ISSUES

- Did Claimant overcome the DIME's determination she was at MMI as of June 1, 2019?

- Did Claimant overcome the DIME's 5% whole person rating by clear and convincing evidence?

- Did Claimant prove by a preponderance of the evidence the spinal cord stimulator trial requested by Dr. David Salek is reasonably needed and related to the January 3, 2017 work injury?

- Did Claimant prove entitlement to TTD benefits from May 9, 2017 to June 1, 2019?

- Did Respondents' prove Claimant is not entitled to TTD benefits after January 10, 2017 because she was responsible for termination of her employment?

- Disfigurement.

FINDINGS OF FACT

1. Claimant worked for Employer as a housekeeper. She suffered an admitted injury to her left elbow on January 3, 2017 when she slipped and fell while cleaning a bathtub.

2. Claimant went to the Penrose St. Francis emergency room after the accident. X-rays were negative but she was diagnosed with an occult fracture of the radial head and placed in a splint.

3. Claimant underwent a urine drug test the next day, which was positive for marijuana. Employer has a strict policy regarding drugs illegal under federal law, including marijuana. Claimant was made aware of the drug policy when she was hired in June 2016. Claimant knew failing a drug test would result in discipline, including potential termination. Employer received Claimant's positive drug screen report on January 9, 2017 and terminated her on January 10, 2017.

4. Claimant saw Dr. Douglas Bradley at Emergicare on January 27, 2017. She complained of left elbow pain radiating to the distal forearm. Dr. Bradley diagnosed a "sprain" and advised Claimant to rest and elevate her arm but stop wearing the splint. Dr. Bradley restricted Claimant to two pounds lifting with the left arm.

5. Claimant returned to Emergicare on February 3, 2017 and saw Dr. Erik Ritch. Her elbow was "a little better" with physical therapy, but still painful. Dr. Ritch continued Claimant's restrictions but indicated "it is okay for you to look for another job.

You just need to let any prospective job know that you have restrictions on your left arm use."

6. On February 16, 2017, Claimant was no better. She described pain in an ulnar nerve distribution. Dr. Ritch referred Claimant to Dr. Timothy Hart, an orthopedic surgeon.

7. Claimant saw Dr. Hart on February 22, 2017. He diagnosed a left elbow contusion with ulnar nerve lesion and recommended a left upper extremity EMG.

8. Dr. Katherine Leppard performed electrodiagnostic testing on March 8, 2017. Claimant described severe pain along the ulnar border and numbness and tingling in the left fourth and fifth fingers. On examination, Claimant had marketed tenderness to palpation over the medial aspect of the elbow. She was hypersensitive to pinprick in the left ulnar area. Dr. Leppard did not perform Tinel's testing because of Claimant's severe pain. The testing was abnormal with evidence of a moderate left ulnar mononeuropathy at the elbow.

9. Claimant followed up with Dr. Hart, who recommended surgery.

10. On March16, 2017, Dr. Ritch noted PT was on hold and Claimant was waiting for surgery to be approved. He released Claimant to work with no use of her left arm.

11. Dr. Hart performed a left ulnar nerve decompression with subcutaneous transposition on May 9, 2017. The surgery necessitated a 3.5-inch incision across the left elbow.

12. Claimant was in a splint for eight days after surgery. The sutures were removed on May 17, 2017. Claimant was unable to drive her truck and had to rely on her mother-in-law to take her to appointments.

13. Claimant's earning capacity was reduced after surgery compared to before surgery. She had a large active incision and her arm was in a splint at all times. Claimant needed assistance for basic ADLs, including driving. The surgery temporarily rendered her unable to work in any capacity.

14. Insurer paid Claimant TTD benefits commencing May 9, 2017, the date of surgery, through June 5, 2017.

15. Claimant followed up with Dr. Ritch on June 1, 2017. Her elbow pain was improved but she was having problems with her left shoulder. Claimant's physical therapist was worried about internal shoulder pathology. Dr. Ritch was "very concerned about the possibility of serious shoulder injury based on your mechanism of injury and the degree of shoulder limitations." He ordered an MRI and asked Claimant to follow-up in a week.

16. Claimant underwent a left shoulder MRI on June 6, 2017. It showed probable mild distal subscapularis tendinosis, mild biceps tendinosis, subacromial and subdeltoid bursitis with fluid accumulation, and strain of the medial glenohumeral ligaments.

17. On June 8, 2017, Claimant's left elbow pain was improving. Her shoulder was still painful, and Dr. Ritch administered a cortisone injection in the shoulder. He increased her restrictions to 15 pounds lifting.

18. Claimant saw Dr. David Walden for an orthopedic evaluation of her left shoulder on June 26, 2017. Dr. Walden's exam indicated left shoulder adhesive capsulitis. He thought Claimant a good chance of improvement with another injection and therapy. If not, she would be a candidate for arthroscopic capsular release and manipulation.

19. On August 17, 2017, Claimant reported aching and throbbing in the elbow and reduced range of motion. The therapist ordered a tension brace to be used at home three times per day.

20. Claimant followed up with Dr. Walden on September 5, 2017. She still had mild to moderate left shoulder adhesive capsulitis. Dr. Walden administered a steroid injection he recommended more PT.

21. On September 14, 2017, Claimant told Dr. Ritch "she feels like the bone in her elbow . . . is trying to protrude out of the skin and is still very bruised."

22. Dr. Ritch placed Claimant at MMI on January 18, 2018. Claimant was looking for work "but having a hard time doing so due to open work-comp case." He referred Claimant for an FCE.

23. Dr. Ritch completed a formal impairment rating on February 16, 2018. He provided a 24% extremity rating, which equates to 14% whole person. Based on the FCE, he assigned permanent work restrictions of 15 pounds lifting from floor to waist, 10 pounds lifting from waist to shoulder, no overhead lifting, 50 pounds pushing and 20 pounds pulling.

24. Claimant had a DIME with Dr. Fredrick Scherr on June 26, 2018. Dr. Scherr determined Claimant was not at MMI. He recommended a second orthopedic opinion regarding ongoing left elbow and shoulder complaints, and a repeat EMG of the left arm, focusing on the ulnar nerve. Dr. Scherr indicated MMI would be contingent on whether further surgery for the shoulder or elbow were recommended.

25. Dr. Michael Sparr performed electrodiagnostic testing on October 5, 2018. He indicated it was normal, showing improvement after the May 9, 2017 surgery.

26. On November 7, 2018, Claimant saw Dr. Scott Primack for evaluation of CRPS. Dr. Primack opined Claimant met three out of four Budapest criteria for CRPS. He recommended a thermogram and autonomic test battery.

27. Dr. Leppard performed repeat electrodiagnostic testing on January 16, 2019. Claimant reported burning pain in her elbow and numbness in the left fingers. Her arm felt weak and she had temperature change in the left hand. She was wearing a glove on the left hand, and it was slightly red compared to the right hand. The testing showed moderate left ulnar mononeuropathy, unchanged since the 2017 study.

28. On January 21, 2019, Claimant underwent CRPS testing with Dr. David Reinhard, including an autonomic testing battery. Dr. Reinhard opined the test results were positive for CRPS Type II of the left upper extremity.

29. On February 8, 2019, Dr. Primack recommended a stellate ganglion block. Claimant subsequently received stellate blocks on two occasions and reported moderate, temporary relief.

30. Dr. Ritch again placed Claimant at MMI on June 1, 2019 with a diagnosis of CRPS Type II. He recommended maintenance care with Lyrica over the next 2-3 years and repeat for CRPS within a year.

31. Dr. Scherr performed a follow-up DIME on August 26, 2019. He opined Claimant had received appropriate care for her confirmed diagnosis of CRPS and mononeuropathy of the left elbow. He agreed with Dr. Ritch's June 1, 2019 MMI date, and assigned a 9% whole person rating. The rating was based on 5% for CRPS under Table 1, page 109 of the AMA Guides, and 4% for elbow range of motion loss. He agreed with the maintenance care recommendations made by Dr. Ritch.

32. On October 1, 2019, Dr. Scherr amended his rating after receiving a request from the DIME Unit. He noted,

> I am told from the Division "ratings from the Spinal Cord Table 1 are considered neurologic ratings and thus should not be utilized in combination with ROM ratings as ROM is accounted for in the neurologic rating. An exception to this would be in cases where the ROM impairment is felt to be resulting from another pathology such as post-surgical/musculoskeletal limitations."
>
> Even though I cannot find on page 109 Table 1 or within the Chapter 4 where this is cited and believing the Impairment Rating tips only meant ROM to not be included if one was using the specific neurological ratings for Table 14/10. After consideration, the impairment rating will be amended to remove the ROM impairment as per the Division statement above.

33. Dr. Scherr amended the rating to 5% whole person.

34. Respondents filed a Final Admission of Liability (FAL) on October 24, 2019, admitting for Dr. Scherr's amended 5% whole person rating. The FAL also admitted for the closed period of TTD previously paid from May 9, 2017 through June 5, 2017. The FAL admitted for medical benefits after MMI.

35. On January 21, 2020, Claimant started seeing Dr. David Salek, a pain management specialist. Claimant was referred to Dr. Salek by Dr. Dallenbach, who took over for Dr. Ritch at Emergicare. Dr. Salek noted Claimant had previously undergone two stellate ganglion blocks and helped briefly but did not provide sustained benefit. Dr. Salek reviewed treatment options, including various medications, infusions, and spinal cord stimulation (SCS). Dr. Salek explained his protocol for a seven-day spinal cord stimulation trial, during which Claimant would try lifting, bending, twisting, and bathing. If Claimant did well with the trial, he would recommend a permanent stimulator implant. Dr. Salek sent Claimant home with literature regarding SCS for her to review. He started Claimant on Cymbalta and advised her to continue the Lyrica.

36. On February 5, 2020, Dr. Salek noted Claimant had reviewed all the SCS literature he provided and was ready to proceed with the trial. Dr. Salek noted Claimant first needed a psychological evaluation and a cervical MRI.

37. The cervical MRI was completed on February 19, 2020. It was unremarkable and showed no contraindication to SCS trial.

38. Claimant underwent a psychological evaluation with Dr. Glenn Kaplan on April 1, 2020. Dr. Kaplan opined Claimant is an appropriate candidate for SCS. She understands the nature of the procedure and has reasonable and rational expectations to produce and manage her pain and include the quality of her life. He appreciated no secondary gain issues. He stated, “she is pursuing this procedure to reduce and manage her pain and to improve her quality of life.” Dr. Kaplan did not think Claimant needed psychological treatment.

39. Dr. Salek requested authorization for an SCS trial on April 8, 2020. Respondents notified Dr. Salek on April 14, 2020 to stimulator was denied and an IME was scheduled with Dr. L. Barton Goldman. Respondents ultimately denied the request based on Dr. Goldman’s opinions.

40. On June 23, 2020, Dr. Salek noted Claimant’s overall condition appeared to be getting worse. Claimant reported “it will scare her when people touch her elbow because it hurts so bad.” Dr. Salek continued to recommend a trial SCS. He also recommended medical massage therapy.

41. Dr. Goldman evaluated Claimant on July 6, 2020. Dr. Goldman noted Claimant’s objective findings were mild and “much less than one would have anticipated based on review of her records and pain drawing.” Claimant described widespread pain affecting multiple areas of her body, many of which are not involved in her injury. Contrary to Dr Kaplan’s assessment, Dr. Goldman opined Claimant was “exceptionally somatically focused even by the standards of my typical chronic pain patient population.” He agreed with the diagnosis of CRPS Type II affecting the left upper extremity, but opined it was relatively mild. He opined she did not meet either the Budapest or Rule 17 clinical criteria for CRPS in the right upper extremity or legs. Dr. Goldman opined there were no objective diagnostic studies to make a CRPS diagnosis probable in Claimant’s other extremities.

Even though Dr. Goldman doubted the CRPS had spread, he recommended repeat testing including thermography and QSART testing for all four limbs.

42. Dr. Goldman opined Claimant is a poor candidate for SCS and predicted the likelihood she would be satisfied with the outcome was “exceedingly low.” Dr. Goldman opined Claimant was at high risk for a false positive response to a trial.

43. Dr. Timothy Hall performed an IME for Claimant on July 28, 2020. Dr. Hall noted considerable ongoing symptoms in the left arm mostly around the elbow, including hypersensitivity, burning pain, and weakness. Claimant had minimal functional use of the left hand. Claimant also reported some burning pain in the right leg and right arm, and was concerned about “spreading” of the CRPS. On examination, Dr. Hall appreciated no excessive pain behaviors. On casual observation, he noted Claimant did not use her left arm spontaneously. He appreciated some trophic changes and mottling distally in the left hand. She had essentially no functional grip on the left side. Temperature seemed symmetrical from right to left hands. Elbow and shoulder ranges of motion were reduced. Dr. Hall disagreed with Dr. Scherr’s rating and found it “unfortunate that Dr. Scherr was misled by the division and he subsequent a change his rating. . . . Her range of motion problems at the shoulder and elbow are not the consequences of the CRPS. They are the consequence of musculoskeletal and postsurgical limitations. I disagree and think Dr. Scherr was wrong when he adjusted his rating based on misinformation from the division.”

44. Dr. Hall opined 20% was a more appropriate rating because of Claimant’s significant limitations using her left arm for ADLs.

45. Dr. Hall opined a trial of spinal cord stimulation “is certainly appropriate in this situation.” Although he had not seen Dr. Kaplan’s report, “based on what I have seen in the record and my interaction with her today, I do not see any red flags from a psychological perspective.” He did not think the symptoms Claimant reported in her other extremities represented any significant spread of the CRPS.

46. On August 24, 2020, Dr. Tashof Bernton performed repeat stress thermography of Claimant’s upper and lower extremities. The lower extremity results were negative bilaterally. Dr. Bernton’s report stated the test was positive “in the upper extremities,” but he later clarified in an email the testing was only positive in the left upper extremity.

47. Claimant testified she wants to try the spinal cord stimulator to see if it helps with her symptoms. Claimant credibly testified the CRPS significantly limits her ability to perform routine activities. Claimant hopes the stimulator will relieve some of the burning pain and allow her to engage in more activities. Claimant credibly testified she will not pursue a permanent stimulator if the trial does not relieve her symptoms.

48. Dr. Hall testified at hearing consistent with his report. He maintained the stimulator trial is reasonably necessary. Dr. Hall opined Claimant is not a “perfect candidate” for spinal cord stimulator but explained not many patients are perfect candidates. Dr. Hall credibly opined Claimant has been cleared from a psychological

perspective and it is reasonable to perform the trial. Dr. Hall credibly explained the trial stimulator is not terribly invasive and in his experience patients report pretty quickly whether they find it helpful. He opined Claimant had "plateaued" in her recovery but would not be at MMI if the stimulator trial were approved. Dr. Hall reiterated his disagreement with Dr. Scherr's rating and opined Claimant should have received a 20% whole person rating based on difficulties with self-care.

49. Dr. Goldman testified Claimant has CRPS in the left upper extremity but the probability of spread to other extremities is low. He agreed Claimant was at MMI on June 1, 2019, and probably remains at MMI notwithstanding the more recent evidence of potential worsening. Dr. Goldman testified the DIME rating of 5% whole person was proper and Dr. Scherr made no error in his application of the *AMA Guides*. Dr. Goldman testified, "you have the choice in terms of the range to pick within a given category" and agreed with Dr. Scherr's selection. He testified that to reach the category of impairment suggested by Dr. Hall would require the patient have no dexterity at all in the nonpreferred extremity, which is not the case with Claimant. Dr. Goldman reiterated his belief the spinal cord stimulator is not reasonably necessary. He believes Claimant has unrealistic expectations regarding the level of pain reduction, and the stimulator will just substitute one distracting stimuli for another. He testified stimulator trials have a "very, very, very high false positive rate." He believes Claimant will probably have a placebo response to the trial and likely have a poor outcome from a permanent implant.

50. The ALJ held the record open for post-hearing evidentiary development, including Dr. Salek's deposition, clarification of Dr. Bernton's findings regarding the thermogram, QSART testing, and rebuttal opinions if necessary.

51. Dr. Berton clarified the thermogram findings in an email to Claimant's counsel on September 9, 2020. He stated there were no specific abnormalities suggesting CRPS in the right arm, with the caveat that "due to CRPS in the left upper extremity, a determination that right upper extremity CRPS is or is not present is difficult based on objective testing alone."

52. Dr. Salek testified in deposition on September 9, 2020. He credibly testified Claimant has failed conservative management. Dr. Salek is not Level II accredited or familiar with the MTGs, but did not believe that impacted the validity of his recommendation. He testified the questions about the MTGs "presuppose that I treat workers' compensation patient's different than I treat other patients, and I think that's incorrect. . . . I don't know the [Medical Treatment] Guidelines, but I've been specifically trained on interventional pain procedures to a wide variety of patients." He explained SCS is part of the CRPS treatment algorithm in patients who have failed conventional medical management. He believes Claimant meets guidelines from the FDA and national neural modulation forms and journals to undergo trial SCS. He answered "certainly not" when asked if he recommends SCS for everyone who is failed conservative therapy. Dr. Salek credibly testified,

> [E]veryone responds a little bit differently. The benefit with the stimulator system is that it's a trial before an implant; and so, of course, in patients

> who didn't feel as though they were able to come down off their opiates or weren't able to participate in physical therapy, we wouldn't really pursue an implant in those individuals. But patients who have had – usually 50 percent pain relief is the typical cut off that we use – it's generally considered tob e recommended to help facilitate participation in those occupational/physical therapy programs, and hopefully reduce symptoms thereafter.

53. Dr. Salek has developed a standardized form that patients use to track pain levels and functional outcomes during the trial. He uses this "to get a holistic picture of how the patient would actually respond to the implant device if it were to proceed." He opined "false positives" or a placebo response "is much less likely during a trial that lasts a week. It's much more likely in trial periods that last much shorter than that." Dr. Salek credibly testified he has had many patients with successful outcomes from SCS. He credibly explained the risks associated with the trial are less than 0.1% chance of nerve injury, bleeding, or an infection. He opined Dr. Goldman's opinions did not change his opinion "in the slightest."

54. The opinions and conclusions expressed in Dr. Salek's deposition are credible and persuasive.

55. On October 1, 2020, Dr. Bernton conducted QSART testing of all four limbs. He opined "this is a very strongly positive test for the presence of complex regional pain syndrome in the lower extremities." He also opined it is "clinically probable" Claimant's right upper extremity symptoms represent "early" CRPS but "there is simply no way to determine with certainty from the objective testing that bilateral upper extremity CRPS is present."

56. Dr. Goldman issued a supplemental report after reviewing the QSART results. Dr. Goldman opined Claimant's medications and/or nicotine and marijuana may have affected the QSART results and made interpretation difficult. He opined the results in the legs are highly atypical and "merit a certain amount of skepticism." Dr. Goldman does not believe the test confirmed multi-limb CRPS to within a reasonable degree of medical probability. Dr. Goldman opined the test results support his conclusion Claimant is a poor candidate for SCS because of the extent of her complaints and multi-regional pain presentation. Dr. Goldman opined Claimant's pain cannot be adequately covered by peripheral or central spinal cord stimulation. He opined Claimant is at risk for developing "full-blown" centralized CRPS if she has an implant.

57. Robin Boddy, Employer's Area Director, testified at hearing. Ms. Boddy did not directly supervise Claimant, but supervised Claimant's supervisor at the time of the work accident. Ms. Boddy explained all new employees are given the Associate Handbook outlining Employer's policies regarding drug use. Ms. Boddy testified it was Employer's policy to administer a drug test after a reported work injury and any positive drug test would result in immediate termination. Ms. Boddy explained Employer follows federal law and a positive test for marijuana is a violation of Employer's policy, even though marijuana is legal in Colorado. Ms. Boddy testified Employer typically accommodates injured workers with modified duty. Ms. Boddy speculated Employer

would have offered Claimant modified duty had she not been fired for failing the drug test. Ms. Boddy testified Employer would not re-hire a terminated employee simply to offer modified employment.

58. Claimant testified in rebuttal regarding a knee injury she suffered in 2016 while working for Employer. She was put on restrictions for approximately one week. She took paid time off that week because Employer could not accommodate her restrictions.

59. Claimant saw her PCP on May 9, 2016 for pain in her left forearm extending from her fingers to her elbow. The pain had been present for five days. She had suffered no injury and assumed the pain was related to repetitive use of her phone while applying for jobs. She was diagnosed with myofascial pain from overuse. She received no further treatment for the condition and there is no persuasive evidence of any permanent sequelae. This transient episode has no bearing on Claimant's injury-related condition, which involves CRPS following a traumatic injury. Claimant's failure to mention the 2016 treatment does not significantly detract from her credibility.

60. Dr. Goldman's opinions regarding MMI and Dr. Scherr's rating are credible and more persuasive than the contrary opinions offered by Dr. Hall.

61. Claimant failed to overcome the DIME regarding MMI or permanent impairment by clear and convincing evidence.

62. Dr. Salek and Dr. Hall's opinions regarding the reasonable necessity of a SCS trial are credible and more persuasive than the contrary opinions offered by Dr. Goldman.

63. Claimant proved by a preponderance of the evidence a trial SCS is reasonably needed to relieve symptoms and prevent deterioration of her condition.

64. Employer proved Claimant was responsible for termination of her employment on January 10, 2017.

65. Claimant proved her condition worsened on May 9, 2017 when she had surgery, which caused a greater impact on her earning capacity than existed before May 9, 2017.

66. Claimant proved she was entitled to TTD benefits commencing May 9, 2017 notwithstanding her previous termination.

67. Respondents failed to prove Claimant was not entitled to TTD benefits after January 10, 2017 because she was responsible for termination of her employment. Respondents failed to prove they properly stopped Claimant's TTD benefits on June 6, 2017.

68. Claimant demonstrated disfigurement at hearing consisting of: (1) an approximately 3.5 inch long by ⅛ inch wide surgical scar on the left elbow, (2) an area of discoloration surrounding the surgical scar, (3) a prominence (possibly tendon) on the

lateral aspect of the left elbow, and (4) noticeable discoloration and swelling of her left pinky finger. These disfigurements are normally exposed to public view. The ALJ finds Claimant shall be awarded $2,500 for disfigurement.

CONCLUSIONS OF LAW

A. Claimant failed to overcome the DIME determination she was at MMI on June 1, 2019.

A DIME's determinations regarding MMI and whole person impairment are binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c), C.R.S. The party challenging a DIME physician's conclusions must demonstrate it is "highly probable" the MMI and impairment findings are incorrect. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). A party meets this burden if the evidence contradicting the DIME physician is "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002).

"Maximum Medical Improvement" (MMI) is defined as the point when any medically determinable physical or mental impairment as a result of the industrial injury has become stable and when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5), C.R.S. A finding of MMI is premature if there is a course of treatment that has "a reasonable prospect of success" and the claimant is willing to submit to the treatment. *Reynolds v. Industrial Claim Appeals Office*, 794 P.2d 1080, 1081-82 (Colo. App. 1990). The determination of MMI inherently includes DIME's opinion regarding the date of MMI.

Claimant failed to overcome the DIME's determination she was at MMI on June 1, 2019. Claimant's condition had plateaued, and no further improvement was reasonably anticipated. Although multiple treating and examining physicians agreed Claimant needed ongoing care after June 1, 2019, that treatment was intended to relieve symptoms and prevent deterioration of her condition. Dr. Goldman is persuasive Claimant was appropriately considered at MMI on June 1, 2019. The evidence suggesting Claimant's condition subsequently worsened with the spread of CRPS is insufficient to overcome the DIME's determination Claimant was at MMI ***on June 1, 2019***. A change of condition after MMI does not show the original MMI date was incorrect. A claimant can pursue reopening for a change of condition under the preponderance of the evidence standard notwithstanding that she may have been put at MMI by a DIME. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). A necessary corollary of that rule is that a claimant cannot overcome the DIME's finding of MMI by showing a change of condition after MMI.

B. Claimant failed to overcome the DIME's 5% whole person rating.

Claimant failed to overcome the DIME's 5% whole person rating by clear and convincing evidence. The DOWC recommends CRPS be rated under Table 1, Section A, p. 109 of the *AMA Guides*. Dr. Scherr appropriately applied the "Use of upper extremities" section of Table 1 to rate Claimant's impairment. Dr. Scherr's reasonably gave gave Claimant the maximum rating under the category "some difficulty with digital dexterity" for a non-dominant extremity. Dr. Hall's opinion Dr. Scherr should have used the category, "Has difficulty with self-care" is not persuasive. As Dr. Goldman explained, the third category applies to a substantially higher degree of impairment than suffered by Claimant. Claimant does not even qualify for the middle category "Has no digital dexterity," so she does not fall into the category advocated by Dr. Hall.

C. Claimant proved a trial SCS is reasonably needed to relieve symptoms or prevent deterioration of her condition

Respondents are liable for authorized medical treatment reasonably needed to cure or relieve an employee from the effects of the injury. Section 8-42-101(1)(a); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Medical benefits may extend beyond MMI if a claimant requires treatment to relieve symptoms or prevent deterioration of their condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Even if the respondents admit liability for medical benefits after MMI, they retain the right to dispute the reasonable necessity or causal relationship of any particular treatment. . *Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003). The claimant must prove entitlement to disputed post-MMI medical benefits by a preponderance of the evidence. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997).

Claimant proved by a preponderance of the evidence the spinal cord stimulator trial recommended by Dr. Salek is reasonably needed to relieve the effects of her injury and prevent further deterioration of her condition. Dr. Salek's opinions regarding the SCS trial are credible and more persuasive than the contrary opinions offered by Dr. Goldman. Neurostimulation is a recognized option for managing chronic pain associated with CRPS. Dr. Goldman's supposition Claimant will not benefit from neurostimulation is speculative and unpersuasive. The SCS trial allows the patient and provider to assess the efficacy of the procedure before pursuing a permanent implant. The ALJ is inclined to give Claimant the benefit of the doubt that she will not pursue a permanent stimulator if the trial is not helpful. Dr. Kaplan opined Claimant appears to have reasonable expectations regarding the procedure and is an appropriate candidate for a psychological perspective. Dr. Salek's protocols are reasonably likely to provide a reliable indication whether Claimant is a good candidate for a permanent implant, and the ALJ sees no reason to believe Dr. Salek would recommend a permanent stimulator if the trail is unsuccessful.

D. Respondents proved Claimant was responsible for termination of her employment on January 10, 2017

Sections 8-42-103(1)(g) and 8-42-105(4)(a) provide:

> In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury.

The respondents must prove that a claimant was terminated for cause or was responsible for the separation from employment by a preponderance of the evidence. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). To establish that a claimant was responsible for termination, the respondents must show the claimant performed a volitional act or otherwise exercised "some degree of control over the circumstances which led to the termination." *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 5 P.3d 1061, 1062 (Colo. App. 2002); *Padilla v. Digital Equipment Corp*., 902 P.2d 414 (Colo. App. 1995); *Velo v. Employment Solutions Personnel*, 988 P.2d 1139 (Colo. App. 1988). The concept of "volitional conduct" is not necessarily related to culpability, but instead requires the exercise of some control or choice in the circumstances leading to the discharge. *Richards v. Winter Park Recreational Association*, 919 P.2d 983 (Colo. App. 1996). The ALJ must consider the totality of the circumstances to determine whether the claimant was responsible for her termination. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004).

As found, Respondents proved Claimant was responsible for termination of her employment. Claimant was terminated for a positive drug test in accordance with Employer's established policy. Even though marijuana is legal in Colorado, nothing precludes Employer from adhering to stricter federal drug laws. Claimant knew of Employer's anti-drug policy and the positive test was the result of the volitional act of ingesting marijuana.

E. Claimant was entitled to TTD benefits commencing May 9, 2017

A termination for cause does not permanently bar to receipt of TTD benefits where the claimant's condition subsequently worsens and the worsened condition causes greater impact on the claimant's earning capacity than existed at the time of termination. *Anderson v. Longmont Toyota, Inc*., 102 P.3d 323 (Colo. 2004). The preponderance of persuasive evidence shows Claimant's condition worsened on May 9, 2017 when she underwent surgery. She had a large active incision and was using an arm splint at all times. Claimant needed assistance for basic ADLs, including driving. The surgery temporarily rendered Claimant unable to work in any capacity. Claimant proved the worsening caused by surgery reduced her earning capacity and rendered her unable to engage in any work. Accordingly, Claimant was entitled to TTD benefits commencing May 9, 2017 notwithstanding her earlier termination. Additionally, Insurer admitted and paid TTD from May 9, 2017 through June 5, 2017, which undermines its current litigation position she was entitled to no TTD after January 10, 2017.

Once commenced, TTD benefits "shall continue" until one of the events enumerated in § 8-42-105(3), none of which occurred before she reached MMI on June 1, 2019. *E.g., Rutledge v. Academy School District 20*, W.C. No. 4-843-161 (December 22, 2011); *Stokes v. Nordstrom, Inc*., W.C. No. 4-782-170 (July 13, 2010); *Smith v. Walmart*, W.C. No. 4-751-887 (May 19, 2009). The mere fact Claimant was released to work with a 15-pound lifting restriction on June 8, 2017 is not dispositive because no modified duty was offered. A temporarily disabled claimant is under no obligation to affirmatively seek employment. *Denny's Restaurant, Inc. v. Husson*, 746 P.2d 63 (Colo. App. 1987); *Schlage Lock v. Lahr*, 870 P.2d 615 (Colo. App. 1993). The onus is on the employer to offer the claimant modified duty within her restrictions to mitigate its liability for TTD benefits. Employer could have, but chose not to, avail itself of that opportunity. Accordingly, Claimant proved she is entitled to TTD benefits from May 9, 2017 through May 31, 2019.

F. Disfigurement

Section 8-42-108(1) provides for additional compensation if a claimant is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." As found, Claimant suffered visible disfigurement to her left arm and pinky finger. The ALJ concludes Claimant should be awarded $2,500 for disfigurement.

ORDER

It is therefore ordered that:

1. Claimant's request for to set aside the June 1, 2019 MMI date determined by the DIME is denied and dismissed.

2. Claimant's request to overcome the DIME regarding permanent impairment is denied and dismissed.

3. Insurer shall pay Claimant PPD benefits based on a 5% whole person rating. Insurer may take credit for any PPD benefits previously paid to Claimant.

4. Insurer shall pay Claimant TTD benefits from May 9, 2017 through May 31, 2019. Insurer may take credit for any TTD benefits previously paid to Claimant.

5. Insurer shall pay Claimant statutory interest of 8% per annum on all compensation not paid when due.

6. Insurer shall cover medical treatment after MMI from authorized providers reasonably needed to relieve the effects of Claimant's injury and prevent deterioration of her condition, including, but not limited to, the neurostimulator trial recommended by Dr. Salek.

7. Insurer shall pay Claimant $2,500 for disfigurement.

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

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

DATED: January 4, 2021

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

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that the spinal cord stimulator ("SCS") recommended by Dr. Kenneth Lewis is reasonable medical treatment necessary to cure and relieve Claimant from the effects of her December 9, 2019 admitted work injury?

- Whether Claimant has proven by a preponderance of the evidence that in-home healthcare services recommended by Dr. Ellen Price is reasonable medical treatment necessary to cure and relieve Claimant from the effects of her December 9, 2019 admitted work injury?

FINDINGS OF FACT

1. Claimant is a 39-year-old female who sustained a work-related injury on December 9, 2019. Claimant worked as a Qualified Medication Administration Personnel ("QMAP") and provided healthcare and quality of life services to residents in an assisted living facility operated by employer.

2. Claimant testified on December 9, 2019 she had sat down to after she finished cooking and serving lunch when she saw a dog belonging to a resident on the back patio. Claimant testified she went to the resident's room to find the resident, but could not find the resident. Claimant testified she then went outside to look for the resident and slipped on a piece of white plastic on the ground. Claimant testified that she rolled her right ankle and foot and fell to the ground. Claimant testified she used her cell phone to call for assistance.

3. Claimant testified she sought medical treatment that day at St. Mary's Hospital's emergency room ("ER") after being referred by the authorized treating medical facility, St. Mary's Occupational Health Center.

4. Claimant consulted with Nurse Practitioner Harkreader at St. Mary's Occupational Heath on December 10, 2019, the day after her injury. Mr. Harkreader recommended x-rays, a CAM boot, ice, and elevation. Mr. Harkreader also provided Claimant with work restrictions that took Claimant off of work.

5. Claimant testified that she continued having significant pain in her right foot in the weeks following the injury. Claimant underwent a magnetic resonance image ("MRI") of her right foot on December 27, 2019. Claimant was referred by Mr. Harkreader to Dr. Thun. Dt. Thun examined Claimant on December 31, 2019 and reviewed her MRI. Dr. Thun noted that the MRI showed edema within the medial cunelform, 1st metatarsal, and along the cubold. Dr. Thun recommended recommended a computed tomography ("CT") scan.

6. Claimant subsequently underwent the CT scan which showed non-displaced fractures at the bases of the first and second metatarsals along the plantar aspect.

7. Claimant was referred for physical therapy in January 2020 by Mr. Harkreader. Claimant testified at hearing that it was her understanding that the therapy was intended to preserve her foot and ankle function, since she had not been able to bear weight.

8. Claimant was evaluated by Dr. Stagg on February 11, 2020. Dr. Stagg noted Claimant had been experiencing significant swelling whenever she stood up. Claimant testified that the swelling continued through the time of hearing. Dr. Stagg referred Claimant to Dr. Price, a physiatrist. Dr. Stagg issued a report dated February 17, 2019 after Claimant called in to the office in which he recommended Claimant undergo a venous Doppler to rule out a deep venous thrombosis.

9. Claimant returned to Dr. Stagg on February 27, 2020. Dr. Stagg noted Claimant was still having significant pain and swelling. Dr. Stagg referred Claimant to Dr. Reinhard to perform testing for potential Complex Regional Pain Syndrome ("CRPS"), including a QSART and thermagram.

10. Claimant was evaluated by Dr. Reinhard on April 20, 2020. Dr. Reinhard noted Claimant had issues with restricted motion in the foot since her date of injury, and she had swelling and a bluish discoloration. Dr. Reinhard noted Claimant had burning, stabbing, and aching pain with tingling in the midcalf distally and dorsal and plantar surface of the right foot. Claimant also described spontaneous pain without weightbearing and abnormal sensation to touch. Dr. Reinhard performed a set of tests to evaluated for a potential CRPS diagnosis. Dr. Reinhard noted that both the stress tomography and autonomic testing battery were positive for CRPS. Dr. Reinhard noted that with two positive tests, the testing meets the Colorado Division of Worker's Compensation criteria for CRPS. Dr. Reinhard recommended additional medical treatment related to the CRPS diagnosis.

11. Claimant was subsequently referred by Dr. Stagg to Dr. Lewis on April 29, 2020. Dr. Lewis initially examined Claimant on May 5, 2020. Dr. Lewis noted Claimant's medical history was consistent with the diagnosis of CRPS. Dr. Lewis recommended sympathetic block injections for treatment of the CRPS, but also noted that a dorsal column stimulator trial might be appropriate. Dr. Lewis subsequently noted that the dorsal column stimulator would be appropriate if they failed to achieve a durable treatment effect with a right L3 lumbar sympathetic block.

12. Dr. Lewis performed the lumbar sympathetic block on May 13, 2020. Dr. Lewis performed a right-sided L3 lumbar sympathetic block on May 21, 2020. Dr. Lewis noted Claimant did not have any relief from the first injection, C.E., p. 89.

13. Claimant returned to Dr. Thun on June 1, 2020. Dr. Thun noted that Claimant continued to have the manifestations of CRPS and recommended Claimant continue with physical therapy and pain management.

14. Claimant underwent a psychological evaluation with Dr. Kaplan on June 12, 2020 to obtain clearance for a SCS trial. Dr. Kaplan opined that Claimant was an appropriate candidate for an SCS trial.

15. Claimant returned to Dr. Lewis on June 23, 2020. Dr. Lewis again recommended Claimant undergo the SCS trial.

16. Respondents denied authorization for the SCS trial on July 2, 2020.

17. Claimant had been receiving psychological counseling with Dr. Carris through the course of her claim. Dr. Carris noted on April 16, 2020 that Claimant's distress was high and she was concerned about the lack of support. Dr. Carris recommended home assistance which she opined would be helpful in reducing the stress in her relationship, which increases personal distress and pain.

18. Claimant returned to Dr. Price on June 25, 2020. Dr. Price noted in her report that because of Claimant's severe pain, she was unable to walk and used a walking boot and bilateral crutches. Dr. Price noted that Claimant reported she has tried to do things at home, but needed help from her husband with cooking, cleaning, and getting around the house. Claimant reported she could dress herself but she has a hard time standing and doing any dishes or any other activities. Dr. Price recommended home healthcare services three times per week, two hours each day, to help with daily activities.

19. Respondents obtained an independent medical examination ("IME") with Dr. D'Angelo on October 19, 2020. Dr. D'Angelo reviewed Claimant's medical records, obtained a medical history and performed a physical examination in connection with her IME. Dr. D'Angelo opined in her report the Claimant did not meet the required criteria on physical examination to establish a diagnosis of CRPS. Dr. D'Angelo opined that Claimant did not have temperature changes between her right and left lower extremity. Dr. D'Angelo opined Claimant did not have tape measurements consistent with right lower extremity atrophy. Dr. D'Angelo opined that Claimant did not swelling or discoloration of her right foot and ankle. Dr. D'Angelo noted that Claimant did not have any help from her two sympathetic blocks performed by two separate physicians. Dr. D'Angelo further noted that the bone scan was negative for findings consistent with CRPS. Dr. D'Angelo diagnosed Claimant with somatic symptom disorder and recommended Claimant undergo a psychological forensic evaluation with Dr. Reilly.

20. Claimant testified at hearing that her foot and ankle was often discolored, and noted that she kept her foot elevated whenever possible to avoid swelling and discoloration. Claimant testified she had not been able to work or drive a car since the injury. Claimant noted she was only able to ambulate using forearm crutches.

21. Claimant testified that due to the difficulties Claimant experienced with her activities of daily living and difficulty ambulating, she was unable to do basic tasks at home, including cooking or cleaning. Claimant testified that her husband and 15 year old child were helping her at home.

22. The ALJ credits the testimony of Claimant at hearing along with the medical records and reports of Dr. Stagg, Dr. Price, Dr. Lewis, Dr. Reinhard, Dr. Carris, and Dr. Kaplan over the contrary opinions of Dr. D'Angelo. The ALJ therefore finds that Claimant has demonstrated that it is more probable than not that SCS trial is reasonable medical treatment necessary to cure and relieve Claimant from the effects of her work injury.

23. The ALJ finds that Claimant has failed to establish that it is more probable than not that the request for home health care services represent a compensable medical expense for which Respondents would be liable under the Colorado Workers' Compensation Act. The ALJ finds that there is insufficient evidence to establish that the home health care services would be necessary to allow Claimant to obtain medical treatment related to Claimant's injury.

24. While Claimant testified as to difficulties ambulating and doing cleaning and cooking, Claimant failed to establish how the home health care services would constitute a medical benefit as contemplated by the Colorado Workers' Compensation Act. Therefore, the request for home health care services must be denied.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A Claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2013. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

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

4. The Colorado Workers’ Compensation Medical Treatment Guidelines are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). The statement of purpose of the Medical Treatment Guidelines is as follows: “In an effort to comply with its legislative charge to assure appropriate medical care at a reasonable cost, the director of the Division has promulgated these ‘Medical Treatment Guidelines.’ This rule provides a system of evaluation and treatment guidelines for high cost or high frequency categories of occupational injury or disease to assure appropriate medical care at a reasonable cost.” W.C.R.P. 17-1(A). W.C.R.P. 17-5(C) provides: “The treatment guidelines set forth care that is generally considered reasonable for most injured workers. However, the Division recognizes that reasonable medical practice may include deviations from these guidelines, as individual cases dictate."

5. While it is appropriate for an ALJ to consider the guidelines while weighing evidence, the Medical Treatment Guidelines are not definitive. *See Jones v. T.T.C. Illinois*, Inc., W.C. No. 4-503-150 (May 5, 2006); *aff'd Jones v. Industrial Claim Appeals Office* No. 06CA1053 (Colo. App. March 1, 2007) (not selected for publication) (it is appropriate for the ALJ to consider the guidelines on questions such as diagnosis, but the guidelines are not definitive); *see also Burchard v. Preferred Machining*, W.C. No. 4-652-824 (July 23, 2008) (declining to require application of medical treatment guidelines for carpal tunnel syndrome in determining issue of PTD); *see also Stamey v. C2 Utility Contractors et al*, W.C. No. 4-503-974 (August 21, 2008) (even if specific indications for a cervical surgery under the medical treatment guidelines were not shown to be present, ICAO was not persuaded that such a determination would be definitive).

6. As found, Claimant has proven by a preponderance of the evidence that the SCS recommended by Dr. Lewis is reasonable and necessary medical treatment related to the industrial injury. As found, Claimant’s testimony and the medical opinions of Claimant’s medical providers establish by a preponderance of the evidence that Claimant’s CRPS diagnosis giving rise to the recommended SCS was the result of the work-related injury.

7. Section 8-42-101(1)(a) requires Respondents to provide such “medical” and “nursing” treatment as may “reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee from the effects of the injury.” To be a compensable medical benefit, the service must be medical in nature or incidental to obtaining such medical or nursing treatment. *Country Squire Kennels v. Tarshis*, 899 P.2d 362 (Colo. App. 1995).

8. A service is medical in nature if it is reasonably needed to cure and relieve the effects of the injury and related to Claimant's physical needs. A medical prescription for attendant care services is not determinative of whether such services are reasonably necessary. Rather, a medical prescription of a physician's supporting testimony is merely some evidence the ALJ may consider in determining whether the requested services are "medical in nature." *See Bellone v. Industrial Claim Appeals Office*, 940 P.2d 1116 (Colo. App. 1997). Services which have been found to be "medical in nature" can include home health care service3s in the nature of "attendant care" if reasonably needed to cure or relieve the effects of the industrial injury. *Atencio v. Quality Care, Inc.*, 791 P.2d 7 (Colo. App. 1990).

9. In this case, Claimant testified that she has not been able to drive and has difficulty performing activities around the house including cooking and cleaning. This difficulty has put added pressure on her family members to perform the required household tasks, such as cooking and cleaning. However, the home health care requested by Dr. Price is not medical in nature, as it does not assist Claimant in helping to cure or relieve the Claimant from the effects of the injury. Therefore, the request for home health services is denied.

10. As found, Claimant has failed to prove by a preponderance of the evidence that the set of in-home healthcare services recommended by Dr. Price is reasonable and necessary medical treatment related to the industrial injury.

ORDER

1. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve Claimant from the effects of the December 9, 2019 work injury, including the SCS recommended by Dr. Lewis pursuant to the Colorado Medical Fee Schedule.

2. Claimant's request for the Respondents to provide attendant care is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

Dated January 5,, 2021

Keith E. Mottram

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

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

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that the C5/C6 and C6/C7 Anterior Cervical Decompression performed on June 17, 2020 by Authorized Treating Physician (ATP) Beth N. Gibbons, M.D. was reasonable, necessary and causally related to her admitted December 13, 2019 cervical injury.

2. Whether Claimant has established by a preponderance of the evidence the she is entitled to receive Temporary Total Disability (TTD) benefits for the 13 day period between June 17, 2020 and June 29, 2020 when she missed time from work following her June 17, 2020 surgery.

3. Whether Respondents have proven by a preponderance of the evidence that they should be permitted to withdraw their General Admissions of Liability (GAL) filed on February 14, 2020.

FINDINGS OF FACT

1. Claimant is a 42 year-old female who works for Employer as a Registered Nurse Case Manager. She worked from home on a computer using two monitors.

2. On December 13, 2019 Claimant suffered an admitted industrial injury to her neck area. Specifically, near the end of her work shift Claimant was turning her head back and forth when she felt the sudden onset of left upper extremity numbness, tingling and pain in her outer arm. The pain radiated down her left forearm into her thumb and index finger.

3. Claimant did not immediately report her injury to Employer but sought chiropractic treatment on December 17, 2019 with Barry Hand, D.C. She noted neck and left shoulder pain that began approximately two weeks earlier that worsened in the prior five days. Claimant remarked that she had a slight loss of strength or coordination in her left hand and the pain disrupted her sleep. She mentioned a history of headaches but the intensity and frequency had increased over the prior six months. Dr. Hand noted that Claimant did not recall a history of trauma.

4. By January 3, 2020 Claimant's left upper extremity symptoms had not resolved. She thus visited John Beneck, PT at High Plains Physical Therapy for an evaluation. PT Beneck recorded the following mechanism of injury and treatment:

> This 41 y.o. female reports a long history of intermittent neck pain, which worsened significantly in November 20th when she was a passenger on bumpy off-road riding. Feels the bumps "jarred" her neck and symptoms worsened, which further worsened over the next several weeks. Current

> symptoms include L neck pain extending into the upper scapular and shoulder regions. Pain radiates to the anterior and lateral shoulder, with paresthesia to the middle fingers. Some improvement in past several days. Has had some improvement with chiropractic and massage.

5. Claimant testified that PT Beneck's history was inaccurate and incomplete. She specified that the January 3, 2020 report failed to reference the events of December 13, 2019 and PT Beneck incorrectly stated that she suffered a worsening on November 20, 2019. Claimant remarked that she had not been "off-roading" but was in her brother's pickup truck when he hit a patch of ice.

6. Claimant explained that over the holidays her symptoms failed to resolve. She spoke with her supervisor about her continuing symptoms. They mutually agreed to initiate a Worker's' Compensation claim.

7. Claimant subsequently visited Concentra Medical Centers for treatment. On January 21, 2020 Claimant underwent an evaluation with Nurse Practitioner Elver Saint. Claimant reported a new injury to her neck and left shoulder. She specified that after a full day of work at home she experiences pain when she turns her head. Claimant noted numbness in her left shoulder down to her fingers. NP Saint noted that Claimant's symptoms worsened about one month earlier after turning her head to look at a second monitor. Claimant specifically felt a pull in her neck. NP Saint diagnosed Claimant with a cervical strain and upper extremity weakness as a result of repetitive motion trauma. She referred Claimant for a worksite evaluation.

8. On January 26, 2020 NP Saint's supervisor Jeffrey T. Backer M.D. noted that Claimant's objective findings were consistent with a work-related mechanism of injury. Claimant continued to work with restrictions and commenced physical therapy. However, Claimant testified that physical therapy did not relieve her symptoms.

9. On February 5, 2020 Claimant commenced treatment with chiropractor Scott Parker, D.C. NP Saint had referred Claimant for a brief trial of manipulative treatment. Claimant reported that on December 13, 2019 she was performing normal data entry work duties. She detailed that, when she was typing on her computer, she moved her head to the right and experienced left-sided neck popping followed by pain. Dr. Parker diagnosed Claimant with a cervicothoracic strain/pain.

10. On February 5, 2020 Howard Fallik of Genex performed the Physical Demands Analysis and Risk Factor Assessment previously requested by NP Saint. On February 6, 2020 Mr. Fallik issued a Report. The Report specified that Claimant worked at home as a Registered Nurse using her primary monitor and a laptop monitor. The laptop monitor was lower and to the right of the laptop monitor. Claimant believed that turning her head to the right to view the laptop monitor caused her to develop a neck strain with symptoms radiating down her left arm.

11. On February 14, 2020 Respondents filed a General Admission of Liability (GAL). Respondents admitted to a cervical spine injury and an Average Weekly Wage (AWW) of $1,446.76.

12. On February 17, 2020 Claimant underwent a cervical spine MRI. The MRI revealed revealed severe spondylosis and stenosis at C5-C6 and moderate spondylosis and stenosis at C6-C7. She was subsequently referred to Authorized Treating Physician (ATP) Beth Gibbons, M.D. for an examination.

13. On April 6, 2020 Respondents filed a new GAL. The new GAL acknowledged that Claimant returned to full-duty work and had been paid Temporary Partial Disability (TPD) benefits from January 21, 2020 to March 29, 2020.

14. On April 15, 2020 Claimant underwent an evaluation with ATP Gibbons at Banner Health Neurosurgery. Claimant reported that she was working at home on her computer. She turned to the right and experienced sudden left upper extremity pain. Claimant then went to sleep and developed numbness into her left index finger. The numbness lasted until the middle of March. Dr. Gibbons noted that Claimant had undergone traction, dry needling, acupuncture, chiropractic care and physical therapy. She remarked that the MRI revealed a disc herniation at C5/6 and C6/7 on the left side that was the likely cause of Claimant's left arm pain and numbness. Dr. Gibbons diagnosed Claimant with neck pain, left arm pain, a herniated nucleus pulposus on the left at C5-6, a herniated nucleus pulposus on the left at C6-7 and cervical radiculopathy. She recommended continued physical therapy exercises, traction and dry needling as tolerated. Dr. Gibbons also referred Claimant for a "left C5/6 and C6/7 TFESI." She discussed possible surgery at C5/6 and C6/7 in the form of an Anterior Cervical Decompression.

15. On May 14, 2020 Dr. Gibbons submitted a request for surgical authorization. She specifically sought "cervical 4 view xrays and surgery request – C5/6, C6/7 anterior cervical decompression." On June 17, 2020 Claimant underwent the requested surgery with ATP Gibbons.

16. On October 5, 2020 Claimant underwent an independent medical examination with B. Andrew Castro, M.D. Dr. Castro reviewed Claimant's medical records and conducted a physical examination. Claimant reported an occupational injury that occurred on December 13, 2019. He characterized Claimant's work injury as pain turning her head during work that caused the sudden onset of left arm and neck symptoms. Dr. Castro also remarked that Claimant had developed pain after a full day of working. He commented that the two histories did not "substantially differ." He explained that Dr. Gibbons' surgical intervention was reasonable because it addressed Claimant's cervical radiculopathy and stenosis. However, Dr. Castro commented that rotating the neck is not an obvious source of a herniated disc or the sudden onset of substantial symptoms. He maintained that individuals periodically rotate their heads as a normal activity of daily living. Specifically, based on Claimant's description of her mechanism of injury, there were no substantial forces to cause an acute disc herniation.

17. Dr. Castro instead remarked that Claimant was involved in an incident on November 20, 2019 as described in the High Plains Physical Therapy initial evaluation. Specifically, Claimant may have been exposed to forces while off-roading that involved substantial jerking and axial loads of the neck that could have produced a disc herniation and cervical radiculopathy. Dr. Castro determined that, because of the different histories regarding the onset of symptoms, Claimant had not shown that the December 13, 2019 work incident caused her symptoms. He summarized:

> If indeed there is no history and no pre-existing conditions, then surgical intervention could be reasonably related, and if there is no other intervening event, then perhaps this is work-related; however, again, because of the substantial, in my opinion, differing histories in this case, certainly it goes directly to the issue of causality in this case. As it is, I do not believe there is substantial forces imparted to the neck with normal activities of daily living of a slight rotation of the neck that would cause a disc herniation in of itself and the history of substantial motions of the neck secondary to off-roading activity is much more likely cause of perhaps a disc herniation and ongoing symptoms.

18. Claimant testified that, if her cervical spine and left upper extremity symptoms had occurred when riding in her brother’s truck, she would have sought treatment. In contrast, she attributed her symptoms to her workplace injury when turning her head between two monitors. Claimant noted that she now works with only one screen and the surgery performed by ATP Gibbons on June 17, 2020 has relieved the symptoms. She noted that, following surgery, she missed work until June 29, 2020 or a period of 13 days. Claimant thus seeks reimbursement for Temporary Total Disability (TTD) benefits for the preceding 13 day period.

19. Dr. Castro also testified at the hearing in this matter. He maintained that the normal activity of daily living of slightly rotating the neck lacks substantial force to cause a disc herniation. Instead, Claimant’s history off-roading was a much more likely cause of her disc herniation and ongoing symptoms.

20. Claimant has failed to demonstrate that it is more probably true than not that the C5/C6 and C6/C7 Anterior Cervical Decompression surgery performed on June 17, 2020 by ATP Dr. Gibbons was reasonable, necessary and causally related to her admitted December 13, 2019 cervical injury. Initially, on December 13, 2019 Claimant suffered an admitted industrial injury to her neck area. Specifically, near the end of her work shift Claimant was turning her head back and forth between two monitors when she felt the sudden onset of left upper extremity numbness, tingling and pain. On January 3, 2020 Claimant visited PT Beneck at High Plains Physical Therapy for an evaluation. PT Beneck recorded that Claimant jarred her neck while off-roading on November 20, 2019. However, Claimant disputed PT Beneck’s account and testified she had not been “off-roading” but was in her brother’s pickup truck when he hit a patch of ice. Claimant subsequently reported her work injury to Employer and visited Concentra for treatment. In a January 21, 2020 evaluation with NP Saint Claimant noted numbness in her left

shoulder down to her fingers after turning to look at her second monitor while working from home about one month earlier. On January 26, 2020 NP Saint's supervisor Dr. Backer noted that Claimant's objective findings were consistent with a work-related mechanism of injury. ATP Dr. Gibbons subsequently noted that Claimant had undergone traction, dry needling, acupuncture, chiropractic care and physical therapy for her symptoms. She remarked that Claimant's MRI revealed a disc herniation at C5/6 and C6/7 on the left side that was the likely cause of her left arm pain and numbness. On June 17, 2020 Dr. Gibbons performed surgery at C5/6 and C6/7 in the form of an Anterior Cervical Decompression. Claimant noted that the surgery relieved her symptoms.

21. Dr. Castro performed an independent medical examination, reviewed Claimant's medical records and conducted a physical examination. He characterized Claimant's work injury as turning her head during work that caused the sudden onset of arm and neck symptoms. Dr. Castro explained that Dr. Gibbons' surgical intervention was reasonable because it addressed Claimant's cervical radiculopathy and stenosis. However, Dr. Castro commented that rotating the neck is not an obvious source of a herniated disc or the sudden onset of substantial symptoms. He maintained that individuals periodically rotate their heads as a normal activity of daily living. Specifically, based on Claimant's description of her mechanism of injury, there were no substantial forces to cause an acute disc herniation. He summarized that "I do not believe there is substantial force imparted to the neck with normal activities of daily living of a slight rotation of the neck that would cause a disc herniation." Instead, he remarked that Claimant's "substantial motions of the neck secondary to off-roading activity is much more likely cause of perhaps a disc herniation and ongoing symptoms."

22. A review of the medical records and persuasive opinion of Dr. Castro reveals that Claimant's activity of rotating her head while performing her work duties on December 13, 2019 did not likely cause a disc herniation and need for surgery. As Dr. Castro explained, the normal activity of daily living of slightly rotating the neck lacks substantial force to cause a disc herniation. Dr. Gibbons' surgery was thus not causally related to Claimant's December 13, 2019 industrial injury. Accordingly, Respondents are not financially liable for Claimant's June 17, 2020 Anterior Cervical Decompression surgery with Dr. Gibbons.

23. Claimant has failed to establish that it is more probably true than not that she is entitled to receive TTD benefits for the 13 day period between June 17, 2020 and June 29, 2020 when she missed time from work following her surgery. Claimant has not demonstrated that her June 17, 2020 surgery was causally related to her admitted December 13, 2019 industrial injury. Although Claimant did not work for the 13 day period between June 17, 2020 and June 29, 2020 because of the surgery, she did not suffer a wage loss that was causally connected to her industrial injury. Accordingly, Claimant's request for TTD benefits is denied and dismissed.

24. Respondents have failed to prove that it is more probably true than not that they should be permitted to withdraw their February 14, 2020 GAL acknowledging that Claimant suffered a cervical spine injury on December 13, 2019. Respondents assert that they are entitled to withdraw their GAL because Claimant supplied materially false

information upon which they relied in filing the GAL. Respondents specifically contend that the January 3, 2020 report of PT Beneck suggests that Claimant developed her symptoms when she jarred her neck while off-roading. However, despite PT Beneck's report, the record reveals that Claimant did not supply materially false information upon which Respondents relied in filing the GAL.

25. Initially, Claimant testified that PT Beneck's history was inaccurate and incomplete. She specified that the January 3, 2020 report failed to reference the events of December 13, 2019 and she had not been "off-roading" but was in her brother's pickup truck when he hit a patch of ice. More importantly, Claimant subsequently reported her work injury to Employer and was referred to Concentra for treatment. In a January 21, 2020 evaluation with NP Saint Claimant reported a new injury to her neck and left shoulder as a result of turning to look at her second monitor. Claimant specifically felt a pull in her neck. Based on a referral from NP Saint, Mr. Fallik of Genex performed a jobsite analysis and issued a Report on February 6, 2020. The Report specified that Claimant developed a neck strain with radiating left upper extremity symptoms when turning her head to the right to view her laptop monitor. Respondents did not file the GAL until February 14, 2020.

26. A review of the preceding chronology reflects that Respondents did not file the GAL until Claimant had repeatedly maintained she developed neck symptoms while turning her head performing work duties. Moreover, Claimant also underwent a job demands analysis in which she explained the cause of her symptoms. Although PT Beneck recorded that Claimant jarred her neck while off-roading, she credibly disputed the characterization. The record thus reveals that Claimant did not concoct a story or otherwise induce Respondents to file a GAL based on materially false representations. In the context of significant evidence to the contrary, the single document from PT Beneck is simply insufficient to suggest that Respondents relied on materially false statements in filing the GAL. Accordingly, Respondents request to withdraw the February 14, 2020 GAL is denied and dismissed.

CONCLUSIONS OF LAW

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

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to

a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

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

C5/C6 and C6/C7 Anterior Cervical Decompression Surgery

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The claimant bears the burden of demonstrating a causal connection between his industrial injuries and the need for additional medical treatment. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

5. As found, Claimant has failed to demonstrate by a preponderance of the evidence that the C5/C6 and C6/C7 Anterior Cervical Decompression surgery performed on June 17, 2020 by ATP Dr. Gibbons was reasonable, necessary and causally related to her admitted December 13, 2019 cervical injury. Initially, on December 13, 2019 Claimant suffered an admitted industrial injury to her neck area. Specifically, near the end of her work shift Claimant was turning her head back and forth between two monitors when she felt the sudden onset of left upper extremity numbness, tingling and pain. On January 3, 2020 Claimant visited PT Beneck at High Plains Physical Therapy for an evaluation. PT Beneck recorded that Claimant jarred her neck while off-roading on November 20, 2019. However, Claimant disputed PT Beneck's account and testified she had not been "off-roading" but was in her brother's pickup truck when he hit a patch of ice. Claimant subsequently reported her work injury to Employer and visited Concentra for treatment. In a January 21, 2020 evaluation with NP Saint Claimant noted numbness in her left shoulder down to her fingers after turning to look at her second monitor while working from home about one month earlier. On January 26, 2020 NP Saint's supervisor Dr. Backer noted that Claimant's objective findings were consistent with a work-related mechanism of injury. ATP Dr. Gibbons subsequently noted that Claimant had undergone traction, dry needling, acupuncture, chiropractic care and physical therapy for her symptoms. She remarked that Claimant's MRI revealed a disc herniation at C5/6 and C6/7 on the left side that was the likely cause of her left arm pain and numbness. On June

17, 2020 Dr. Gibbons performed surgery at C5/6 and C6/7 in the form of an Anterior Cervical Decompression. Claimant noted that the surgery relieved her symptoms.

6. As found, Dr. Castro performed an independent medical examination, reviewed Claimant's medical records and conducted a physical examination. He characterized Claimant's work injury as turning her head during work that caused the sudden onset of arm and neck symptoms. Dr. Castro explained that Dr. Gibbons' surgical intervention was reasonable because it addressed Claimant's cervical radiculopathy and stenosis. However, Dr. Castro commented that rotating the neck is not an obvious source of a herniated disc or the sudden onset of substantial symptoms. He maintained that individuals periodically rotate their heads as a normal activity of daily living. Specifically, based on Claimant's description of her mechanism of injury, there were no substantial forces to cause an acute disc herniation. He summarized that "I do not believe there is substantial force imparted to the neck with normal activities of daily living of a slight rotation of the neck that would cause a disc herniation." Instead, he remarked that Claimant's "substantial motions of the neck secondary to off-roading activity is much more likely cause of perhaps a disc herniation and ongoing symptoms."

7. As found, a review of the medical records and persuasive opinion of Dr. Castro reveals that Claimant's activity of rotating her head while performing her work duties on December 13, 2019 did not likely cause a disc herniation and need for surgery. As Dr. Castro explained, the normal activity of daily living of slightly rotating the neck lacks substantial force to cause a disc herniation. Dr. Gibbons' surgery was thus not causally related to Claimant's December 13, 2019 industrial injury. Accordingly, Respondents are not financially liable for Claimant's June 17, 2020 Anterior Cervical Decompression surgery with Dr. Gibbons.

TTD Benefits

8. To prove entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee

returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

9. As found, Claimant has failed to establish by a preponderance of the evidence that she is entitled to receive TTD benefits for the 13 day period between June 17, 2020 and June 29, 2020 when she missed time from work following her surgery. Claimant has not demonstrated that her June 17, 2020 surgery was causally related to her admitted December 13, 2019 industrial injury. Although Claimant did not work for the 13 day period between June 17, 2020 and June 29, 2020 because of the surgery, she did not suffer a wage loss that was causally connected to her industrial injury. Accordingly, Claimant's request for TTD benefits is denied and dismissed.

Withdrawal of GAL

10. Respondents first filed a GAL in the present matter on February 14, 2020. Because Respondents seek to withdraw their GAL, they bear the burden of proof. Section 8-43-201, C.R.S. provides that "a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification."

11. Respondents specifically seek to withdraw their GAL based on *Vargo v. Industrial Commission*, 626 P.2d 1164 (Colo. App. 1981). In *Vargo*, the claimant made fraudulent representations concerning his condition prior to the industrial injury. The representations induced the respondents to file a general admission of liability for temporary disability and medical benefits. When the respondents discovered the fraudulent representations, they filed a "denial of liability" and ceased payment of medical benefits, but continued temporary disability benefits until the claimant returned to work. The *Vargo* court upheld an order of the Industrial Commission that declared the admission of liability "void from the date of filing." The court observed that no provision of the Act authorizes "retroactive withdrawals of an admission of liability." Nevertheless, the court remarked that the "beneficial intent" of the Act is predicated on claimants providing accurate information. Therefore, the court concluded that, where the claimant supplies "materially false information upon which his employer and its insurer relied in filing an admission of liability, the referee is justified in declaring the admission void *ab initio*." *Id.* at 1166.

12. As found, Respondents have failed to prove by a preponderance of the evidence that they should be permitted to withdraw their February 14, 2020 GAL acknowledging that Claimant suffered a cervical spine injury on December 13, 2019. Respondents assert that they are entitled to withdraw their GAL because Claimant supplied materially false information upon which they relied in filing the GAL. Respondents specifically contend that the January 3, 2020 report of PT Beneck suggests that Claimant developed her symptoms when she jarred her neck while off-roading. However, despite PT Beneck's report, the record reveals that Claimant did not supply materially false information upon which Respondents relied in filing the GAL.

13. As found, initially, Claimant testified that PT Beneck's history was inaccurate and incomplete. She specified that the January 3, 2020 report failed to reference the events of December 13, 2019 and she had not been "off-roading" but was in her brother's pickup truck when he hit a patch of ice. More importantly, Claimant subsequently reported her work injury to Employer and was referred to Concentra for treatment. In a January 21, 2020 evaluation with NP Saint Claimant reported a new injury to her neck and left shoulder as a result of turning to look at her second monitor. Claimant specifically felt a pull in her neck. Based on a referral from NP Saint, Mr. Fallik of Genex performed a jobsite analysis and issued a Report on February 6, 2020. The Report specified that Claimant developed a neck strain with radiating left upper extremity symptoms when turning her head to the right to view her laptop monitor. Respondents did not file the GAL until February 14, 2020.

14. As found, a review of the preceding chronology reflects that Respondents did not file the GAL until Claimant had repeatedly maintained she developed neck symptoms while turning her head performing work duties. Moreover, Claimant also underwent a job demands analysis in which she explained the cause of her symptoms. Although PT Beneck recorded that Claimant jarred her neck while off-roading, she credibly disputed the characterization. The record thus reveals that Claimant did not concoct a story or otherwise induce Respondents to file a GAL based on materially false representations. In the context of significant evidence to the contrary, the single document from PT Beneck is simply insufficient to suggest that Respondents relied on materially false statements in filing the GAL. Accordingly, Respondents request to withdraw the February 14, 2020 GAL is denied and dismissed.

ORDER

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

1. Respondents are not financially liable for Claimant's June 17, 2020 Anterior Cervical Decompression surgery with Dr. Gibbons.

2. Claimant's request for TTD benefits for the 13 day period between June 17, 2020 and June 29, 2020 is denied and dismissed.

3. Respondents' request to withdraw the February 14, 2020 GAL is denied and dismissed.

4. Any issues not resolved in this Order are reserved for future determination.

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

DATED: January 6, 2021.

DIGITAL SIGNATURE:
Peter J. Cannici

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

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that the platelet rich plasma (PRP) injection recommended by Dr. Faulkner is reasonable medical treatment necessary to maintain Claimant at maximum medical improvement ("MMI")?

FINDINGS OF FACT

1. Claimant sustained a compensable workers' compensation injury on September 2, 2015 when he was crawling into an A/C bin and was trying to get into a squatting position when his right knee locked up. Claimant was referred for medical treatment Claimant subsequently underwent surgery on December 14, 2015 under the auspices of Dr. Papillion. The surgery consisted of an arthroscopy, chondroplasty and lateral release of the right knee.

2. Following the surgery, Claimant continued to complain of pain in his right knee. Claimant was referred to Dr. Weinerman for a second opinion. Dr. Weinerman evaluated Claimant and diagnosed Claimant with patellofemoral maltracking, chondromalacia and poor quadriceps function. Dr. Weinerman recommended another surgery which was performed on August 4, 2016. The surgery performed by Dr. Weinerman consisted of a medial patellofemoral ligament reconstruction with allograft. Claimant reported to Dr. Weinerman on January 10, 2017 that the surgery resulted in only somewhat improved symptoms.

3. Claimant was placed at maximum medical improvement by Dr. Lugliani on January 12, 2017. Dr. Lugliani provided Claimant with an 18% lower extremity impairment rating and recommended six months of follow up medical appointments along with ongoing medications. Dr. Lugliani also provided Claimant with permanent work restrictions that consisted of no crawling, kneeling, squatting, or climbing.

4. Claimant subsequently underwent a steroid injection performed by Dr. Weinerman on May 26, 2017. Claimant reported only 25 percent relief for about a month following the steroid injection.

5. Claimant's care was transferred to Dr. Faulkner on August 4, 2017. Dr. Faulkner noted Claimant returned with complaints of persistent right knee pain, weakness and intermittent catching. Dr. Faulkner recommended Claimant start an exercise program. Dr. Faulkner recommended Claimant undergo another magnetic resonance image ("MRI") of his knee. The MRI was performed on August 10, 2017.

6. Claimant returned to Dr. Faulkner on January 8, 2018. Claimant continued to complain of ongoing pain and quadriceps dysfunction and weakness. Dr. Faulkner

diagnosed Claimant with chondromalacia of the patella. Dr. Faulkner discussed the MRI with Claimant and recommended a platelet rich plasma (“PRP”) injection be performed, which was done on that day.

7. Claimant returned to Dr. Faulkner on March 30, 2018. Claimant reported that the PRP injection provided fifty percent (50%) relief. Claimant complained of pain over the anteromedial aspect of his knee. Dr. Faulkner recommended Claimant continue his home exercise program and return for follow up in eight weeks.

8. Claimant returned to Dr. Faulkner on June 11, 2018. Dr. Faulkner noted Claimant had significant atrophy of the quadriceps. Dr. Faulkner provided Claimant with a new knee brace and recommended another PRP injection. Claimant returned to Dr. Faulkner on July 9, 2018 for the PRP injection.

9. Claimant was again evaluated by Dr. Faulkner on October 3, 2018 and reported that the prior PRP injection helped significantly. Cliamant reported his pain was more rare now, but Claimant continued to experience significant quadriceps atrophy.

10. Claimant next returned to Dr. Faulkner on August 21, 2019 and reported that his pain was now a 6 to 7 out of 10. Claimant reported wearing his knee brace at work. Dr. Faulkner noted that Claimant reported that the prior PRP injection provided excellent pain relief until about six (6) weeks ago. Dr. Faulkner recommended another PRP injection and instructed Claimant to return to the office once it was approved.

11. Claimant returned to Dr. Faulkner on October 28, 2019 for the repeat PRP injection. Dr. Faulkner re-evaluated Claimant on July 29, 2020. Dr. Faulkner noted Claimant reported worsening symptoms in his right knee. Claimant reported the previous PRP injections in October provided good relief for about six (6) months. Claimant again reported pain of about 6-7 out of 10 in severity. Dr. Faulkner recommended another PRP injection.

12. Respondents obtained a records review independent medical examination with Dr. O’Brien on April 27, 2020. Dr. O’Brien had previously examined Claimant on December 14, 2017. Dr. O’Brien opined in his April 27. 2020 report that Claimant’s maintenance care should not include the H-wave device, nor should PRP injections be utilized. Dr. O’Brien opined that PRP injections should be considered experimental and until a Level I or multiple Level II studies have been peer-reviewed and published in journals, neither the H-wave device nor PRP injections have any scientific credibility and therefore should not be utilized in this case. Dr. O’Brien opined that Claimant required no further orthopedic treatment and there was no further surgery or modality that Dr. Faulkner can provide that will help Claimant. Dr. O’Brien further opined that until Claimant assumed full responsibility for the complete rehabilitation of his knee, he was not a candidate for further care. Dr. O’Brien opined that the only maintenance care that Claimant should be pursuing was that which Claimant controls through a daily home exercise regimen.

13. Claimant testified at hearing in this matter that he continues to be employed by Employer but has transferred to a new job to comply with his permanent work restrictions. Claimant testified that this work requires Claimant to climb stairs. Claimant testified he had PRP injections performed by Dr. Faulkner. Claimant testified that he has received relief from the injections. Claimant testified that he believes that the relief provided by the injections provides him with relief that allows him to continue to perform his work duties for Employer.

14. Dr. O'Brien testified at hearing in this matter as an expert in orthopedic surgery. Dr. O'Brien testified consistent with his report. Dr. O'Brien testified that the PRP injections were experimental and had not been around very long. Dr. O'Brien testified that the science on PRP injections was very soft. Dr. O'Brien testified that at the present time there was no science that showed that PRP injections were effective treatment. Dr. O'Brien testified that even if Claimant testified he received a benefit from the injections, there was still a lack of documentation of the effectiveness of the injections.

15. The ALJ credits the medical records from Dr. Faulkner along with the testimony of Claimant at hearing and finds that Claimant has demonstrated that it is more probable than not that the PRP injections recommended by Dr. Faulkner are reasonable medical treatment necessary to maintain Claimant at MMI. The ALJ notes that Claimant has consistently reported improvement in his symptoms following the PRP injections that has resulted in less of a need for medical appointments with Dr. Faulkner. The ALJ further credits Claimant's testimony that the PRP injections have continued to allow him to perform his work duties for Employer and finds that testimony to be credible and persuasive. The ALJ notes the contrary opinions of Dr. O'Brien, but finds the medical records from Dr. Faulknerr and testimony of Claimant at hearing to be more credible and persuasive regarding this issue.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A Claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2010. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

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

4. The need for medical treatment may extend beyond the point of maximum medical improvement where claimant requires periodic maintenance care to prevent further deterioration of his physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future maintenance treatment if support by substantial evidence of the need for such treatment. *Grover v. Industrial Commission, supra*.

5. As found, Claimant has proven by a preponderance of the evidence that the PRP injections recommended by Dr. Faulkner are reasonable maintenance medical care pursuant to the Colorado Workers' Compensation Act. As found, the medical records from Dr. Faulkner and testimony of the Claimant at hearing are found to be credible and persuasive evidence with regard to this issue.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the reasonable medical expenses necessary to maintain Claimant at MMI, including the PRP injection recommended by Dr. Faulkner. Respondents shall pay medical benefits pursuant to the Colorado Medical Fee Schedule.

2. All matters not determined herein are reserved for future determination.

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

DATED: January 6, 2021

Keith E. Mottram

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

ISSUES

- Did Claimant prove she suffered a compensable injury on December 7, 2019?

- If Claimant proved a compensable injury, is she entitled to reasonably necessary medical treatment for the injury?

- Did an ATP make a determination of MMI and does the ALJ have jurisdiction to adjudicate the surgery recommended by Dr. Simpson?

FINDINGS OF FACT

1. Claimant works for Employer as a CNA. Her job duties include caring for residents, assisting with feeding, bathing, changing, and ADLs.

2. Claimant alleges a work-related injury to her right ankle on December 7, 2019. Claimant testified she sprained her ankle while walking to her car after her shift. Claimant alleges she heard a pop and felt pain in the ankle.

3. Claimant testified she had the next three days off and did not return to work until December 11, 2019. Claimant testified she sat around the house, elevated her foot, and kept it wrapped, because it was painful and swollen.

4. Claimant attended a physical therapy session for an unrelated low back problem on December 11, 2019. The physical therapist sent Claimant to the emergency room because of concern for right ankle pain.

5. Claimant was seen in the St. Thomas More Hospital emergency department on December 11, 2019. Claimant reported "stepping wrong" on Saturday but denied any trauma or injury. The ER records make no reference to any incident at work. Claimant reported 10/10 pain in the right ankle. Examination showed tenderness to palpation over the lateral malleolus, but no pain elsewhere in the ankle or foot. There was no erythema, edema, or swelling. X-rays were negative for acute injury. The provider was "unsure why your ankle hurts," and no diagnosis was provided other than "ankle pain." Claimant was advised to take Tylenol and ibuprofen as needed and elevate her leg. Claimant declined an off work note and was released without restrictions.

6. Claimant alleges she told her supervisor, Connie A[Redacted], about her ankle pain on December 11, 2019. Claimant admitted she did not report it as a work injury.

7. Despite reporting 10/10 pain at the ER, Claimant worked her regular shift and perform her normal CNA duties on December 11, 2019.

8. Claimant continued working her normal job duties and schedule for the next several weeks.

9. Claimant saw her PCP on January 6, 2020 for a sore throat. Claimant made no mention of any right ankle problems and was noted to have normal gait and station.

10. Claimant saw her PCP again on January 21, 2020. For the first time, she described a work-related injury. The report states, “Rt foot pain x 1 month – rolled.” The report also notes, “Rt ankle: x 12/9/2019. Twisted at work.” The PCP noted swelling in the lateral aspect of the ankle. Claimant was advised to use a tall walking boot for six weeks.

11. Claimant admitted she experienced swelling in both ankles and lower extremities before the alleged December 7, 2019 incident.

12. Claimant testified she told Ms. A[Redacted] about her visit with the PCP on January 21, but again admitted she said nothing about a work injury.

13. Ms. A[Redacted] testified at hearing and disputed many aspects of Claimant’s testimony. Ms. A[Redacted] was the supervisor on-call for December 7, 8, and 9, 2019. She received no report from Claimant or anyone else on any of those dates regarding a work injury. Claimant’s time records show she worked her full 8-hour shift on December 10, 2019, contrary to her testimony she stayed at home resting until December 11. Ms. A[Redacted] worked on December 10, 2019 too, but Claimant never reported any ankle problems to her. Nor she did not observe Claimant having any problems performing her job duties. Ms. A[Redacted] also testified she worked with Claimant on December 11, 2019 but, contrary to Claimant’s testimony, Claimant provided no paperwork from the ER or mentioned any ankle injury on that date. Ms. A[Redacted] testified she had numerous opportunities to observe Claimant working during December 2019 and Claimant had no apparent difficulty performing her regular duties.

14. Ms. A[Redacted] first became aware Claimant had a problem with her right ankle problem January 21, 2020, when Claimant arrived at work with a prescription from her PCP requiring her to wear a boot on her right foot. However, Claimant still did not report a work-related injury at that time. Ms. A[Redacted] checked to see if Claimant could work with a boot and referred her to HR. Subsequently, Ms. A[Redacted] received an email from HR informing her Claimant had reported a work-related injury.

15. Employer referred Claimant to a designated provider, Centura Urgent Care. Claimant saw PA-C Steven Quakenbush at her initial visit on January 23, 2020. Claimant reported on December 7, 2019 she was walking in the parking lot of Employer’s facility and caught her right ankle on uneven asphalt. She stated she twisted her right ankle inward and heard a pop. Mr. Quakenbush noted Claimant walked with a limp. Examination of the right ankle showed swelling about the lateral malleolus and tenderness over the lateral malleolus and medial malleolus. She was also “minimally” tender into the anterior joint space bilaterally. Mr. Quakenbush diagnosed a right ankle sprain and opined the condition was work-related based on the history provided by

Claimant. He released Claimant to primarily sedentary duties wearing the walker boot. Mr. Quakenbush prescribed a Medrol Dosepak and ibuprofen.

16. A right ankle MRI performed on February 19, 2020 showed a partial tear of the distal posterior tibialis tendon at the insertion near the navicular bone, inflammation in the soft tissues with fluid along the tendon sheath, a partial tear of the peroneus brevis tendon, Achilles tendinitis, plantar fasciitis with mixed acute and chronic findings, strain of the anterior and posterior talofibular ligaments, a ganglion cyst near the talonavicular joint space along the dorsum of the foot, and degenerative changes in the subtalar joint and the midfoot.

17. Mr. Quakenbush referred Claimant to Dr. Michael Simpson, an orthopedic surgeon. Claimant was evaluated by Dr. Simpson's PA-C, Kimberly Shenuk, on March 10, 2020. Claimant described the alleged mechanism of injury in similar terms as reported to Mr. Quakenbush. Claimant described constant 8/10 pain in the ankle. On examination, Ms. Shenuk noted a significant pes planus deformity. There was no tenderness along the peroneal or posterior tibial tendon, but she had posterior tibial tendon weakness "as expected with a significant flatfoot deformity." Claimant had "pretty significant" tenderness along the anterior medial joint line, and mild to moderate tenderness laterally. Ms. Shenuk gave Claimant a cortisone injection. After reviewing the MRI, she opined,

> [Claimant] has quite a bit of pain along her anterior medial and anterior lateral joint line. Most of her pain is medial. She has no pain along her peroneal or posterior tibial tendons. She has a flatfoot deformity. I do feel that her peroneal and posterior tibial tendon tears are chronic, given she is not symptomatic. These are not work-related and are chronic conditions. I do feel that she sustained a sprain and is related to her work comp injury.

18. At her April 9, 2020 follow-up appointment with Mr. Quakenbush, Claimant denied any current pain, swelling, popping, clicking, numbness, or weakness of her ankle. Claimant's gait was normal, and she was able to stand on her toes. Claimant was released to full duty.

19. On April 23, 2020, Mr. Quakenbush noted Claimant was working full duty without significant problems. She has some swelling and pain in the right ankle at the end of the workday that resolved by the next morning. Claimant was not participating in any therapy or regularly taking any medication.

20. Claimant saw Dr. Simpson on April 29, 2020. Dr. Simpson's examination showed bilateral pes planus deformities, more severe on the right. She had tenderness at the posterior tibial tendon insertion and the sinus tarsi. Dr. Simpson noted Claimant could continue nonsurgical management "but she does not seem to be getting better." He discussed two surgical options. The first would be a "motion-preserving" operation with a calcaneal osteotomy, spring ligament repair, posterior tibial tendon repair with transfer, and a gastrocnemius rescission. The other surgical option was an arthrodesis. Although Claimant's morbid obesity put her at a greater risk of failure from the motion-preserving procedure, Dr. Simpson did not think arthrodesis was the best choice because Claimant

is relatively young and has no significant arthritis. Claimant wanted to proceed with surgery. Dr. Simpson offered no opinion about whether the proposed surgery is work-related.

21. On May 7, 2020, Dr. Simpson requested authorization surgery, which was denied by Respondent.

22. On June 23, 2020, Mr. Quakenbush noted surgery had been denied. Claimant was working within her restrictions with some increased left ankle swelling at the end of her shift. She was not taking medications regularly or participating in therapy, and no further diagnostics were planned. Mr. Quakenbush indicated further follow-up would be scheduled with his supervising physician, Dr. John Reasoner.

23. Claimant saw Dr. Reasoner on July 13, 2020. He opined Claimant had adequate time for healing and further therapy and surgery were denied. Dr. Reasoner put Claimant at MMI with no impairment and no recommendations for maintenance care. Dr. Reasoner also released Claimant to full duty.

24. Dr. William Ciccone II performed an IME for Respondent on September 30, 2020. Dr. Ciccone authored a report and testified via deposition. Claimant told Dr. Ciccone she was walking to her car at the end of her shift on December 7, 2019 and twisted her ankle and felt a pop. Claimant told Dr. Ciccone she had no pain at that time but first noticed pain two days later. The IME audio recording confirms Claimant stated she had no pain at the time of the accident four times during Dr. Ciccone's interview. Dr. Ciccone opined it is not probable Claimant suffered an ankle sprain on December 7, 2019 because she had no pain, and a sprain would have caused immediate pain. When asked about what she did after the accident, Claimant told Dr. Ciccone she "went about her weekend." She said she first noticed pain on December 11, 2019 as she was getting dressed for PT for her back. This conflicts with Claimant's testimony she spent the weekend after the incident elevating her leg and keeping it wrapped.

25. Dr. Ciccone accepted that Claimant had an "apparent incident" in Employer's parking lot on December 7, but opined it caused no injury that required medical treatment or caused disability. Claimant felt no pain for at least two days after the incident. At the ER, she denied any trauma or injury and merely stated she "stepped wrong." She worked full duties for six weeks after the incident. Dr. Ciccone agreed with Ms. Shenuk the MRI findings were pre-existing and not injury-related, except the possible mild strain of the anterior and posterior talofibular ligaments. He noted the radiologist did not even include the reference to a strain in the "impressions" section of the MRI report. Dr. Ciccone opined Claimant has an flatfoot deformity that commonly affects middle-aged, obese (Claimant's BMI is 50) women. He persuasively explained that on exam Claimant had posterior tibial tendon dysfunction, which appeared chronic in nature. She had loss of the medial longitudinal arch, which accompanies chronic conditions relating to the posterior tibial tendon. He opined the development of symptoms in Claimant's right ankle is related to her chronically progressive posterior tibial tendon dysfunction disease and is not a work-related condition.

26. Dr. Ciccone further testified the December 7, 2019 incident did not aggravate, accelerate, or exacerbate Claimant's underlying pre-existing condition. Dr. Ciccone explained the surgery recommended by Dr. Simpson is consistent with a chronic posterior tibial tendon dysfunction. The surgery involves cutting the bone to try to realign the foot; it is not just a matter of repairing the tendon. He explained there is no question Claimant had pre-existing posterior tibial tendon dysfunction, which leads to deformity of the hindfoot and loss of medial arch. This causes the heel to sit further and further to the outside because the tendon cannot maintain proper alignment. Dr. Ciccone explained the surgery recommended by Dr. Simpson is a common surgery done for late-stage tibial tendon dysfunction where you cut the heel to slide it back to try to take the valgus stress off the ankle to allow for attended to heal and try to repair some of the ligaments to support the medial arch. He explained this is typically done to address a chronic condition, not an acute injury. He opined the surgery is not intended to address any work-related condition.

27. Dr. Ciccone's opinions are credible and persuasive.

28. Ms. A[Redacted]'s testimony was credible and persuasive.

29. Claimant's testimony was not credible or persuasive.

30. Claimant failed to prove she suffered a compensable injury on December 7, 2019.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which she seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). A preponderance of the evidence is that which leads the trier-of-fact, after considering all the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case are not interpreted liberally in favor of either the claimant or the respondents. Section 8-43-201.

A pre-existing condition does not preclude a claim for compensation and an injury is compensable if an industrial injury aggravates, accelerates, or combines with the pre-existing condition to produce disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition, and if the pain triggers the claimant's need for medical treatment, the claimant has suffered a compensable injury. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (September 9, 2016). But the mere fact that a claimant experiences symptoms after an incident at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Industrial Commission*, 437

P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). The ALJ must determine whether the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

The Workers' Compensation Act recognizes a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence," whereas an "injury" is the physical trauma caused by the accident. Section 8-40-201(1). In other words, an "accident" is the cause, and an "injury" is the result. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). Workers' compensation benefits are only payable if an accident results in a compensable "injury." The mere fact that an incident occurred at work and caused symptoms does not establish a compensable injury. Rather, a compensable injury is one that requires medical treatment or causes a disability. *E.g., Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (August 17, 2016).

As found, Claimant failed to prove she suffered a compensable injury on December 7, 2019. Although the incident in the parking lot may have occurred, there is no persuasive evidence it proximately caused a need for medical treatment or disability. Claimant felt no symptoms immediately after the incident and sought no treatment for several days. Claimant testified she rested and elevated her foot for three days but told Dr. Ciccone she went about her weekend and did not feel pain until December 11, 2019. Claimant worked her regular duties as a CNA on December 10 with no difficulty or observable signs of pain or injury. Claimant denied any injury or trauma at the ER. The examination in the ER showed pain but no swelling or ecchymosis, consistent with a chronic condition rather than an acute injury. Claimant did not mention a work-related to ankle injury during multiple conversations with her supervisor. Claimant worked without limitations for approximately six weeks after the alleged injury. The MRI shows extensive pre-existing pathology that could easily account for Claimant's symptoms and limitations independent of any work accident. Dr. Ciccone's causation opinions are credible and not contradicted by any persuasive evidence in the record. The pain and other symptoms in Claimant's right ankle starting in December 2019 reflect the natural progression of her pre-existing condition without contribution from her work activities. Although the treatment Claimant received was reasonably necessary, it was directed her pre-existing condition and not any work-related issue.

Accordingly, even though Claimant may have had an accident on December 7, 2019, she failed to prove it caused any "injury."

ORDER

It is therefore ordered that:

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

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

DATED: January 6, 2021

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

ISSUE

1. Whether Claimant established by a preponderance of the evidence that the following medical treatment is reasonably necessary to relieve the effects of his work-related injury or to prevent further deterioration of his work-related condition:

  a. Bier blocks;
  b. Ketamine infusions; and
  c. Psychiatric evaluation for purposes of a spinal cord stimulator ("SCS") trial.

  d. Medications:
    i. Opioids – Methadone and oxycodone;
    ii. Cymbalta (duloxetine);
    iii. Trazodone;
    iv. Motrin (ibuprofen);
    v. Gabapentin;
    vi. Androgel; and
    vii. Miralax.

2. Whether Claimant is entitled to a "medical care manager" per the terms of his settlement agreement.

3. Whether Claimant is entitled to an award of costs pursuant to § 8-42-101(5), C.R.S.

FINDINGS OF FACT

1. Claimant is a 67-year-old man who sustained an admitted work injury on February 8, 1990. Claimant was originally diagnosed with reflex sympathetic dystrophy, which is now known as "Complex Regional Pain Syndrome" ("CRPS").

2. In 1994, Claimant settled portions of his Workers' Compensation claim with Respondent through a settlement agreement ("Agreement"). Per the terms of the Agreement, Claimant's medical benefits remained open, "with the understanding that the claimant's medical care is to be managed by a medical care manager, to be agreed upon by all the parties." (Ex. 1). The Agreement submitted into evidence is not signed or approved by the Director or an Administrative Law Judge. (Ex. 1).

3. Claimant testified at hearing that he has been unable to work since his 1990 injury. He indicated he has not received treatment or blocks for "the last couple of years" and that he is non-functional in everyday life due to pain in his distal forearms and hands.

4. Claimant relocated to Tennessee in 2014. Prior to that, Claimant received treatment through Scott Hompland, D.O., in Colorado. Claimant testified that when he was under Dr. Hompland's care, he was taking Methadone (four per day), Percocet (six per day), Lyrica (for nerve pain); Motrin (for pain), Lexapro (for depression and nerve pain), Androgel (for testosterone replacement); Miralax (for constipation); and Ambien (for sleep). He testified that when his pain is controlled, he is able to function better, including helping around the house, doing dishes and yardwork.

5. Claimant testified Dr. Hompland also performed Bier blocks and ketamine injections for approximately four years prior to Dr. Hompland's retirement in 2014. Claimant testified that Dr. Hompland performed Bier blocks approximately every six to eight weeks in each arm.

6. When Claimant relocated to Tennessee in 2014, he began treating with Damien Dozier, M.D. Claimant testified Dr. Dozier continued the same treatment Dr. Hompland had prescribed, including Bier blocks, ketamine infusions and medications. At some point, Claimant no longer treated with Dr. Dozier because Dr. Dozier returned to working as an anesthesiologist in a hospital. Claimant then began treatment at Comprehensive Pain Specialists, which Claimant testified shut down after five months. Claimant then transferred his care to Nashville Pain Center. Claimant testified that his provider at Nashville Pain Center, Jason Hendon, M.D., would not do Bier blocks but did perform ketamine infusions in his office. Claimant testified the last ketamine injection he received was in July 2019. Dr. Herndon left the practice, and Dr. Madhu Yelameli because Claimant's authorized treating physician.

7. On August 21, 2018, Claimant was seen at Nashville Pain Center for a new patient evaluation by Jason Herndon, M.D. At that time, Claimant' medications included Methadone HCL and Oxycodone HCL. Claimant reported a history of successful treatment with Bier blocks. Dr. Herndon noted there was a significant safety concern of continuing Bier blocks especially in light of MTD [methadone] use and cardiac concerns, including an abnormal EKG for which his prior physician weaned Claimant's methadone dosage. Dr. Herndon recommended a ketamine infusion in the office with a interscalene block, to be performed 48 hours apart. Dr. Herndon noted there were no concerns regarding misuse of opioids based on a review of Claimant's prescription history (PMP), and an appropriate opioid agreement and treatment consent. Dr. Herndon prescribed Cymbalta, methadone, oxycodone, Ambien, and ibuprofen. (Ex. B)

8. On September 18, 2018, Claimant returned to Dr. Herndon. Dr. Herndon noted he would "strongly recommended that we discontinue prescribing [Androgel, fluticasone and Ambien] before the year was out if possible." He again recommended ketamine infusions. (Ex. B).

9. On October 29, 2018, Claimant saw Madhu Yelameli, M.D., at Nashville Pain Center. Dr. Yelameli continued to prescribe Methadone and Oxycodone. Dr. Yelameli's notes reiterate Dr. Herndon's recommendations with respect to ketamine infusions, discontinuation of certain medications (i.e., Androgel, and Ambien), and keeping Claimant at the lowest possible MEDD. (The ALJ infers that MEDD is the equivalent of morphine

milligram equivalent (MME)). Dr. Yelameli noted (as did Dr. Herndon) that Claimant had a “medium” opioid risk, and his risk of drug abuse was low. (Ex. B).

10. On November 13, 2018, Dr. Herndon performed an interscalene (IS) nerve block on Claimant. On November 20, 2018, Dr. Herndon performed a ketamine infusion on Claimant. At a follow up visit on November 27, 2018, Dr. Herndon noted the IS block and ketamine infusion significantly improved Claimant’s pain, and that Claimant wished to continue to pursue further management of his pain in the same manner. In the same note, Dr. Herndon noted that the 11/20/18 ketamine infusion was “not effective.” (The ALJ infers this was a dictation or transcription error, given the narrative description of the ketamine infusion as providing 50% reduction in pain). Dr. Herndon recommended a repeat ketamine infusion and consider a repeat left IS block. (Ex. B).

11. On December 26, 2018, Claimant saw Dr. Yelameli. Claimant reported the IS block and ketamine infusion worked, but “have already worn off.” Dr. Yelameli noted Claimant was scheduled for a repeat of the procedure again on January 8, 2019. Despite recommendations for discontinuation of Androgel, Dr. Yelameli refilled claimant’s Androgel prescription. (Ex. B).

12. On January 8, 2019, Claimant received a ketamine infusion from Dr. Herndon. (Ex. B). In a follow up appointment on January 22, 2019, Claimant reported the January 8, 2019 ketamine infusion gave better relief than his prior infusion. Claimant reported that Bier blocks worked better and requested to continue (or re-initiate) Bier blocks. Claimant’s medications, including methadone (10 mg 2x per day) and oxycodone (10 mg 3 x per day) remained the same as previously prescribed. (Ex. B).

13. On February 1, 2019, Claimant received another ketamine infusion performed by Dr. Herndon. (Ex. B). At a follow up appointment on February 26, 2019, Claimant reported that the ketamine infusion did not work as well as the previous infusion. Claimant continued to request Bier blocks.

14. On March 28, 2019, Claimant saw Dr. Yelameli. Claimant reported receiving a Bier block two weeks earlier from a different provider and that it helped his left forearm pain. At Claimant’s April 25, 2019 visit with Dr. Yelameli, he reported that he was not able to obtain a second Bier block “due to insurance issues.” Dr. Yelameli’s report from April 25, 2019 contains the same recommendation against Bier blocks that is contained in previous records from Nashville Pain Center. (Ex. B).

15. On May 16, 2019, Claimant received a ketamine infusion at Nashville Pain Center performed by Dr. Yelameli. At a follow up appointment on May 23, 2019, Claimant reported 60-70% improvement with the ketamine infusion. Dr. Yelameli indicated there were no concerns regarding Claimant’s medication use. (Ex. B).

16. On June 25, 2019, Claimant saw Dr. Yelameli. Claimant reported his prior ketamine infusion was more effective on his left than right. Dr. Yelameli noted his plan for Claimant included repeating the ketamine infusion to improve Claimant’s right sided

pain. Claimant continued to take Methadone (2 x per day); Oxycodone (3 x per day), Cymbalta, ibuprofen, Miralax and trazodone. (Ex. B).

17. On July 11, 2019, Claimant received a ketamine infusion performed by Dr. Yelameli. At a follow up appointment on July 25, 2019, Claimant reported the ketamine infusion helped sharp pain and he only had dull pain. Dr. Yelameli advised Claimant against ketamine infusions and recommended Claimant consider a spinal cord stimulator (SCS) for his neck and upper extremity pain. Dr. Yelameli indicated Claimant wanted to proceed with the SCS and referred Claimant for a psychiatric evaluation. (Ex. B).

18. On August 22, 2019, Claimant saw Dr. Yelameli. The medical record from that date of treatment indicates Claimant received another ketamine infusion on July 25, 2019 that provided significant relief. (The ALJ infers that this is a reference to the July 11, 2019 ketamine infusion, as no records for a ketamine infusion on July 25, 2019 based on the Claimant's medical records). Dr. Yelameli's record from August 22, 2019 reiterates that Claimant was advised against ketamine infusions. (Ex. B).

19. On September 24, 2019, Dr. Yelameli noted that Claimant reported his workers' compensation insurance would not pay for a SCS. Claimant returned to Nashville Pain Clinic on October 29, 2019, November 26, 2019, January 2, 2020, January 31, 2020, March 31, 2020, April 28, 2020, May 27, 2020, June 1, 2020, July 9, 2020, August 10, 2020, and October 6, 2020 at which visits his medications were monitored and refilled. None of Claimant's medical records from Nashville Pain Clinic indicate that any provider at Nashville Pain Clinic recommended further ketamine infusions or Bier blocks, or that Claimant was referred to another provider for the performance of either procedure. Each record between July 25, 2019 and April 28, 2020 includes and entry that Claimant was advised against ketamine infusions, and that a psychological evaluation as a precursor to implantation of an SCS was recommended. During this time period, Claimant's medication regimen was essentially unchanged, and included methadone, oxycodone, gabapentin, Cymbalta, ibuprofen, Miralax, and trazodone. Throughout Claimant's treatment at Nashville Pain Center, no concerns were noted about Claimant's abuse or misuse of opioid medication or that Claimant was at a risk for abuse. At Claimant's May 27, 2020 visit with Dr. Yelameli, it was noted that Claimant was "no longer able to do ketamine infusions. (Ex. B).

20. On January 16, 2020, Nashville Pain Clinic submitted a request tot Insurer for a psychological evaluation for a spinal cord stimulator. (Ex. B).

21. At Claimant's office visit with Dr. Yelameli on October 6, 2020, Dr. Yelameli noted that his office no longer performed ketamine infusions, and that Claimant was exploring going to a ketamine clinic. (Ex. B).

22. Claimant testified that Dr. Yelameli refused to perform ketamine injections and recommended that Claimant have a spinal cord stimulator implanted. He testified he is currently being prescribed trazodone, gabapentin, and Miralax, and that he is still getting the other medications he has been prescribed. Claimant testified that he cannot take gabapentin all of the time because it causes vision side effects. Claimant has not been

discharged from Nashville Pain Center, and he has not been referred to any other specific provider by Nashville Pain Center.

23. Tashof Bernton, M.D., was qualified as an expert in internal medicine and occupational medicine. Dr. Berton testified that he has extensive experience treating patients with complex regional pain syndrome. Dr. Bernton conducted a video interview/examination of Claimant and reviewed portions of Claimant's medical records. He relied, in part, on a summary of Claimant's prior medical history prepared by Dr. Cebrian. Dr. Bernton testified that in his opinion, it is reasonable for Claimant to receive ketamine treatments, based on the Claimant's history of receiving ketamine as a treatment for his condition. He also testified that the use of a spinal cord stimulator is reasonable and appropriate if Claimant were to have ketamine treatments and such treatments did not prove efficacious. Dr. Benton believes ketamine is a more reasonable approach for Claimant's condition than a spinal cord stimulator. Dr. Bernton was not aware that treating providers at Nashville Pain Center had advised Claimant against proceeding with ketamine infusions and was not aware of whether Claimant's treating health care providers had prescribed ketamine after January 2020.

24. Dr. Bernton testified that Bier blocks are not an appropriate treatment for Claimant. He testified that while Claimant was receiving ketamine infusions in the past, there was not a corresponding decrease in Claimant's opioid medications. He testified that should be done. Dr. Bernton was not aware of any specific recommendations from Claimant's treating health care providers that he receive ketamine injections or infusions. Dr. Bernton testified that if Claimant is to be considered for a spinal cord stimulator, a psychological evaluation should be performed to determine if he is an appropriate candidate according to the Colorado Medical Treatment Guidelines.

25. With respect to Claimant's medication prescriptions, Dr. Bernton testified that Claimant's opioid medications should be tapered to lower Claimant's morphine milligram equivalent (MME), but that Claimant's medications should not be discontinued. He indicated that treatment for CRPS is difficult and that providers may differ on the appropriate treatment regimen, but that medication management should include central-acting agents, antidepressants, and narcotic agents.

26. In his report, dated October 8, 2020, Dr. Bernton indicated that reasonable and necessary medical care for Claimant's CRPS includes re-implementation of ketamine infusions up to a maximum of six per year, based on past medical records and the Claimant's self-report of reduced symptoms with ketamine. He recommended continuation and tapering opioids to a total of 60 MME over a period of three to four months. He recommended a continuation of medications for constipation caused by opioids, and continuation of Cymbalta and trazodone. He opined that use of trazodone as a sleep aid is appropriate as an alternative to hypnotics such as Ambien. Dr. Bernton testified that use of antidepressants, in conjunction with opioids or narcotics is an appropriate therapy for CRPS and consistent with Colorado Medical Treatment Guidelines. With respect to gabapentin, Dr. Bernton indicated that "if it is helpful," gabapentin is consistent with Colorado Medical Treatment guidelines. He also recommended, continuation of trazodone and duloxetine, a trial of compounded topical

analgesics, and continuation of testosterone with an endocrinology consultation. He recommended discontinuation of ibuprofen.

27. Carlos Cebrian, M.D., was qualified as an expert in occupational and family medicine. Dr. Cebrian performed two record reviews of Claimant's medical records and issued three reports, dated October 28, 2019, April 20, 2020, and September 3, 2020.

28. Dr. Cebrian testified that he originally thought Claimant's diagnosis of CRPS was questionable but made his treatment recommendations based on the assumption that Claimant had a diagnosis of CRPS. Dr. Cebrian testified based on his review of Claimant's medical records, that there was no significant reduction in Claimant's pain medication that corresponded with Claimant's receipt of ketamine injections. He testified that Bier blocks were not appropriate for Claimant due to cardiac concerns. He also testified that Bier blocks were not being recommended by any current treating providers. Dr. Cebrian testified that ketamine injections are not currently being recommended, although such injections are a recognized treatment for CRPS under current treatment guidelines in certain situations for patients who are refractory to other injections. He testified it is unclear whether Claimant currently qualifies for ketamine injections because there have not been other treatments attempted other than those injections. He also indicated that Claimant should not receive ketamine injections while taking methadone.

29. Dr. Cebrian recommended that Claimant wean off opioid medications (i.e., Oxycodone and methadone). He recommended that Claimant wean off oxycodone over a period of twelve weeks, then begin tapering off of methadone over a period of twelve weeks. He also recommended psychological counseling to assist in weaning Claimant off these medications. He recommended Claimant ultimately replace opioid medications with other potential treatments, including topical medications or tramadol, or other over-the-counter medications.

30. Dr. Cebrian testified a psychological evaluation related to an SCS is not reasonable or necessary because Claimant had not completed all conservative therapies, and therefore an SCS is not reasonable or necessary. He testified that Claimant's use of trazodone was not reasonable or necessary because Claimant reported using it as a pain medication to assist him in sleeping. He further testified that that it should attempted to be weaned off of Cymbalta after he is able to wean off of opioid medications because Claimant has been taking it for an extended period of time. Dr. Cebrian recommended Claimant discontinue ibuprofen because of the potential side effect risk of the medication.

31. With respect to gabapentin, Dr. Cebrian testified that the typical dosage for gabapentin for patients with CRPS is approximately 1800 mg per day. However, Claimant was intermittently taking gabapentin at a low dose of 300 mg per day, and that Claimant was not likely receiving any therapeutic benefit from gabapentin. In Dr. Cebrian's opinion, Claimant was taking gabapentin for a sedative effect, rather than its intended use for treatment of nerve pain.

32. With respect to Androgel, Dr. Cebrian testified that he was not able to determine the cause of Claimant's low testosterone and noted that Claimant previously had been

diagnosed with gynecomastia, which was unlikely to be the result of opioid medications. Although, he testified, low testosterone may be linked to opioid usage. He further testified that an endocrinology evaluation was unlikely to reveal the cause of Claimant's low testosterone.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

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

MAINTENANCE MEDICAL BENEFITS

The need for medical treatment may extend beyond the point of MMI where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003); *Hobirk v. Colorado Springs School District #11,* W.C. No. 4-835-556-01 (ICAO, Nov. 15, 2012).

In cases where the respondents file a final admission of liability admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003); *Oldani v. Hartford Financial Services,* W.C. No. 4-614-319-07, (ICAO, Mar. 9, 2015). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School District No.11*, W.C. No. 3-979-487, (ICAO, Jan. 11, 2012); *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO, Feb. 12, 2009. The question of whether the claimant has proven that specific treatment is reasonable and necessary to maintain his condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Claimant seeks specific care in the form of Bier blocks, ketamine infusions, and a psychological evaluation related to the proposed implantation of a spinal cord stimulator. Additionally, Claimant seeks authorization and payment for medications, including methadone, oxycodone, Cymbalta, trazodone, Motrin (ibuprofen), gabapentin, Androgel and Miralax.

Bier Blocks

Claimant has failed to establish by a preponderance of the evidence that Bier blocks are reasonably necessary to relieve the effects of his work-related injury or to prevent further deterioration of his work-related condition. Although Claimant's medical records indicate he previously received benefit from Bier blocks, Claimant's authorized treating physicians have not recommended Bier blocks. Because no authorized treating provider has recommended Claimant receive Bier blocks, the ALJ is without jurisdiction to authorize such treatment. *Potter v. Ground Services Co.*, W.C. No. 4-935-523-04 (ICAO, Aug. 15, 2018); *Torres v. City and County of Denver*, W.C. No. 4-937-329-03 (ICAO, May 15, 2018) *citing Short v. Property Management of Telluride*, W.C. No. 3-100-726 (ICAP May 4, 1995). Claimant's request for authorization of Bier blocks is therefore denied.

Ketamine Infusions

Claimant has failed to establish by a preponderance of the evidence that ketamine infusions are reasonably necessary to relieve the effects of his work-related injury or to prevent further deterioration of his work-related condition. As with Claimant's request for

Bier blocks, the evidence does not demonstrate that Claimant's authorized treating physicians have recommended that Claimant receive ketamine infusions. The only physician currently recommending or endorsing ketamine infusions is Dr. Bernton, who is not an authorized treating physician. The ALJ lacks authority to order an authorized treating physician to provide a particular form of treatment which has been prescribed or recommended by one who is not an authorized treating physician. *Torres v. City and County of Denver*, W.C. No. 4-937-329-03 (ICAO, May 15, 2018) *citing Short v. Property Management of Telluride*, W.C. No. 3-100-726 (ICAP May 4, 1995). Consequently, Claimant's request for authorization of ketamine infusions is denied.

Psychiatric Evaluation For SCS

Claimant has established by a preponderance of the evidence that a psychiatric evaluation for the determination of the appropriateness of the implantation of a spinal cord stimulator is reasonably necessary to relieve the effects of his work-related injury or to prevent further deterioration of his work-related condition. Dr. Yelameli recommended that Claimant be considered for the implantation of a spinal cord stimulator and requested that a psychiatric evaluation be conducted to determine whether Claimant is an appropriate candidate. Dr. Bernton testified that use of an SCS would be appropriate if ketamine infusions were not efficacious. Dr. Cebrian testified that an SCS is appropriate where a claimant has failed conservative treatment. The Colorado Medical Treatment Guidelines, WCRP 17, Ex. 9, (H)(1)(c), provides that the indication for SCS is a patient with established CRPS who has failed conservative therapy including active and/or passive therapy, pre-stimulator trial psychiatric evaluation and treatment, medication management and therapeutic injections.

Given the documentation in Claimant's medical records from Dr. Yelameli advising Claimant against further ketamine infusions, the transient effects of prior infusions, and the fact that Claimant's prior ketamine injections did not result in the reduction of pain medication, the ALJ finds that Claimant has failed conservative therapy and evaluation for an SCS is reasonably necessary to relieve Claimant's symptoms. The ALJ finds that such psychological evaluation is reasonably necessary to relieve the effects of Claimant's work-injury, and Claimant's request for authorization of a psychological evaluation is granted.

Specific Medications

Opioid Medications and Miralax

Claimant has established by a preponderance of the evidence that his continued use of opioid medications (oxycodone and methadone) is reasonably necessary to relieve the effects or prevent deterioration of his work-related injury. Claimant has been on long-term pain management for his work-related condition. The records and testimony demonstrate that Claimant's function is improved through the use of pain medications and that Claimant is not abusing or misusing such medications. While Dr. Bernton and Dr. Cebrian agree that Claimant's dosage of opioid medications should be decreased, the difference is one of degree. Dr. Bernton opined that Claimant's pain medications should be reduced to below 60 MME per day “if that’s possible,” and Dr. Cebrian believes Claimant should ultimately be tapered off the medications completely over a period of approximately six months. The ALJ finds Dr. Bernton’s recommendations to be the more reasonable approach with respect to opioid medications. The Colorado Medical Treatment Guidelines recommend that patients total MME per day remain at 50 or below. However, the ALJ does not find that there is sufficient evidence to permit the ALJ to order a specific tapering schedule or dosage of the medication that is most efficacious for the Claimant, which should be determined by Claimant’s authorized treating physician. Claimant’s request for authorization of oxycodone and methadone is granted.

The Colorado Medical Treatment Guidelines also indicate that “[s]ome level of constipation is likely ubiquitous among chronic opioid users.” A position with which both Dr. Bernton and Dr. Cebrian agree. Given Claimant’s long-term use of opioids, and the continued prescription of Miralax by Claimant’s treating providers, the ALJ finds that Miralax (or some other similar medication) is reasonably necessary to relieve the effects of his work injury.

(Testosterone Supplementation) Androgel

Claimant has not established by a preponderance of the evidence that Androgel is reasonably necessary to relieve the effects of or prevent deterioration of his work-related condition. Claimant’s medical record indicate he has been prescribed Androgel due to low testosterone. Claimant’s authorized treating physicians, Dr. Herndon originally recommended this medication be prescribed by Claimant’s primary care provider. Dr. Cebrian and Dr. Bernton agreed there is insufficient information to determine whether Claimant’s need for Androgel is related to his work injury or to some other condition. Claimant did not offer sufficient evidence to establish that it is more likely than not that Androgel is reasonable and necessary treatment for his work-related condition. Claimant’s request for authorization of Androgel is denied.

Antidepressant Medication (Cymbalta)

Claimant has established by a preponderance of the evidence that antidepressant medication is reasonably necessary to relieve the effects of his work injury or to prevent deterioration. Dr. Bernton credibly testified that antidepressant medication, in conjunction with other medications, is a reasonable treatment for CRPS and consistent with Colorado Medical Treatment Guidelines. Dr. Yelameli’s prescribed Cymbalta at Claimant’s October 6, 2020 office visit, and consistently prescribed it throughout his treatment of Claimant. The ALJ finds that Claimant has established that it is more likely that not that antidepressant medication is reasonably needed to relieve the effects of his work injury. Claimant’s request for authorization of antidepressants (Cymbalta) is granted.

Trazodone

Claimant has established by a preponderance of the evidence that trazodone is reasonably necessary to relieve the effects of his work injury or to prevent deterioration. Dr. Bernton credibly testified that use of trazodone as a sleep aid, as an alternative to hypnotics is reasonable and appropriate. Dr. Yelameli's prescribed trazodone at Claimant's October 6, 2020 office visit. The ALJ finds that Claimant has established that it is more likely that not that trazodone is reasonably needed to relieve the effects of his work injury. Claimant's request for authorization of trazodone is granted.

Ibuprofen (Motrin)

Claimant has not established that ibuprofen is reasonably necessary to relieve the effects of his work injury or to prevent deterioration of his condition. Both Dr. Cebrian and Dr. Bernton recommended that Claimant discontinue ibuprofen. No other persuasive evidence was offered to explain how or why ibuprofen relieves Claimant's work-related condition or prevents further deterioration. Further, in position statements, Claimant concedes that ibuprofen should be discontinued. Claimant's request for authorization of ibuprofen is denied.

Gabapentin

Claimant has not established by a preponderance of the evidence that gabapentin is reasonably needed to relieve the effects or prevent deterioration of his work injury. Claimant testified that he does not take gabapentin all the time and that it causes vision issues. Claimant's prescribed dosage of gabapentin is 300 mg per day. Dr. Cebrian testified that gabapentin is typically taken three times per day and that the recommended dosage is 1800 mg per day. This is consistent with the Colorado Medical Treatment Guidelines for Chronic Pain Disorders. Dr. Cebrian also testified that Claimant use of gabapentin is likely subtherapeutic. Dr. Bernton did not testify concerning gabapentin but indicates in his report that it "if it is helpful, it is clearly consistent with the Colorado Medical Treatment Guidelines." The ALJ finds Dr. Cebrian's testimony on this issue persuasive. Claimant's request for authorization of gabapentin is denied.

REQUEST FOR PAYMENT OF COSTS UNDER § 8-42-101 (5), C.R.S.

Section 8-42-101 (5), C.R.S., provides:

> If any party files an application for hearing on whether the claimant is entitled to medical maintenance benefits recommended by an authorized treating physician that are unpaid and contested, and any requested medical maintenance benefit is admitted fewer than twenty days before the hearing or ordered after application for hearing is filed, the court shall award the claimant all reasonable costs incurred in pursuing the medical benefit. Such costs do not include attorney fees.

Thus, to receive an award of costs, Claimant must establish 1) medical maintenance benefits were recommended by an authorized treating physician; 2) such benefits are unpaid and contested; and 3) the request was admitted less than 20 days before the hearing or benefits are ordered after an application for hearing is filed.

The ALJ finds that Claimant is entitled to costs incurred in pursuing a psychiatric evaluation associated with evaluation of the appropriateness of a spinal cord stimulator. Claimant is not entitled to costs incurred with respect to the other treatments sought.

CLAIMANT'S REQUEST FOR ENFORCEMENT OF SETTLEMENT AGREEMENT

At hearing, Claimant requested that the ALJ interpret and enforce paragraph 6 of the Settlement Agreement which provides that "The parties agree that medical expenses will remain open, with the understanding that the claimant's medical care is to be managed by a medical care manager, to be agreed upon by all the parties."

In position statements, Claimant argued that the ALJ is without jurisdiction to enforce the provision of the settlement agreement because the submitted agreement does not contain written approval of the Division or the ALJ as required by § 8-43-204 (3), C.R.S. The Agreement contemplates approval of the agreement by an Order issued by the Division of Workers' Compensation (Ex. 1, ¶ 5.b.). However, no evidence was presented to indicate that the Agreement was approved. Respondents argue that the Settlement Agreement is not enforceable pursuant to § 8-43-204 (3) because it is not signed by the Director or an ALJ.

Given the lack of evidence indicating that the Settlement Agreement complied with § 8-43-204(3), C.R.S., the ALJ finds that there is insufficient evidence to determine if the ALJ has jurisdiction to enforce or interpret the Agreement. As such, Claimant's request for an order requiring the appointment of a medical care manager is denied without prejudice.

ORDER

It is therefore ordered that:

1. Claimant's request for authorization of Bier blocks is denied and dismissed.

2. Claimant's request for authorization of ketamine infusions is denied and dismissed.

3. Claimant request for authorization of a psychiatric evaluation for purposes of assessing the appropriateness of a spinal cord stimulator is granted.

4. Claimant's request for authorization of opioid medications, including methadone and oxycodone is granted.

5. Claimant's request for authorization of antidepressant medication is granted.

6. Claimant's request for authorization of trazodone is granted.

7. Claimant's request for authorization of gabapentin is denied and dismissed.

8. Claimant's request for authorization of testosterone supplementation is denied and dismissed.

9. Claimant's request for authorization of Miralax is granted.

10. Claimant's request for enforcement of the parties' settlement agreement is denied without prejudice.

11. Pursuant to § 8-42-101 (5), C.R.S., Claimant is entitled to reasonable costs incurred in pursuing a psychiatric evaluation associated with evaluation of the appropriateness of a spinal cord stimulator. Claimant shall submit a bill of costs itemizing the costs incurred in conjunction with pursuing the psychiatric evaluation only within 30 days of the date of this order.

12. All matters not determined herein are reserved for future determination.

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

DATED: January 6, 2021

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

- Did Claimant prove by a preponderance of the evidence treatment for TMJ dysfunction recommended by Dr. Kevin Berry is reasonably needed and causally related to his admitted work injury?

- Did Claimant prove emergency evaluation and extraction of tooth #14 was causally related to the work accident?

FINDINGS OF FACT

1. Claimant worked for Employer as a plumber. He suffered admitted injuries on July 18, 2019 when he hit his head on a low beam while descending a flight of stairs. Claimant recalls "flying in the air," and then "the next thing he knew, he was on the ground." Claimant lost consciousness for an undetermined period of time after the accident.

2. As a result of the accident, Claimant has been diagnosed with a mild traumatic brain injury, cognitive deficits, chronic headaches, cervical myofascial pain, possible cervical radiculopathy, anxiety, and depression. A few days after the accident, Claimant developed speech difficulties including a significant stutter. Imaging of Claimant's head and brain showed no acute findings, and several providers suspect the speech difficulties may represent psychological sequela rather than organic brain damage. Nevertheless, Claimant's speech difficulties appear genuine and not the result of conscious embellishment or malingering. Claimant's neck issues are complicated by a pre-injury diagnosis of cervical radiculopathy for which Claimant was treated before the work injury.

3. Claimant has undergone extensive treatment, including physical therapy, speech therapy, and injections. The specific details of his treatment are beyond the scope of this Order.

4. Claimant was evaluated by Dr. Roberta Anderson-Oeser on December 7, 2019. Examination of Claimant's neck showed significant soft tissue problems, including muscle spasm, postural distortion, range of motion loss, and positive facet loading. Claimant also exhibited problems with his balance and a positive Romberg sign. Dr. Anderson-Oeser referred Claimant for vestibular therapy and recommended he continue with speech therapy. She referred Claimant to Dr. William Boyd, a psychologist, for treatment of post-concussive syndrome.

5. Claimant followed up with Dr. Anderson-Oeser on February 6, 2020.[1] The physical examination findings were similar to the December 7, 2019 examination and

[1] The report from this visit is not in the record but is described in Dr. Ramaswamy's IME report.

again showed soft tissue problems and muscle spasm throughout the neck area. Dr. Anderson-Oeser also noted Claimant "continues to grind his teeth, and he has increased sensitivity in his mouth. He has not been seen by a dentist regarding his TMJ dysfunction." Dr. Anderson-Oeser referred Claimant to Dr. Kevin Berry, DDS to evaluate the "TMJ issues." Dr. Anderson-Oeser has offered no specific opinion regarding causation of the dental or TMJ issues.

6. Claimant returned to Dr. Anderson-Oeser on March 10, 2020. Claimant had not yet been contacted by Dr. Barry's office regarding his TMJ problems and hypersensitivity of his teeth.

7. Dr. Annu Ramaswamy performed an IME for Respondents on April 24, 2020. Dr. Ramaswamy noted Claimant was completely cooperative throughout the evaluation and gave his best effort in responding to all questions. The bulk of Dr. Ramaswamy's examination and analysis related to Claimant's other injuries, but he also evaluated the TMJ. Claimant told Dr. Ramaswamy he clenches his teeth and has done so ever since the injury. He stated he is awakened by pain and finds himself clenching his teeth. He primarily described hypersensitivity of his teeth, which he said began "soon after" the July 2019 work injury. Claimant only noted some "minor right lower jaw pain, but when we discussed TMJ pain during the physical examination today, he indicated that he was nontender in the TMJ joints." Facial examination showed no tenderness over the TM joints when Claimant opened his mouth and moved his mandible from side to side. Claimant noted some very minimal discomfort in the right lower jaw to palpation. Dr. Ramaswamy was unable to elicit any crepitus in the TM joints. Claimant noted generalized dental hypersensitivity, but Dr. Ramaswamy did not directly examine his teeth. Dr. Ramaswamy's diagnosed TMJ syndrome and teeth hypersensitivity, but did not believe these conditions were work-related. He opined stress and anxiety can promote teeth grinding, but he could not relate Claimant's stress and anxiety solely to the work injury. He was also unclear as to the etiology of the dental hypersensitivity but noted local dental conditions could contribute to these issues. He did not see a basis to relate the hypersensitivity to the injury from physiologic standpoint and recommended Claimant see his own dentist.

8. Claimant saw Dr. Berry on August 12, 2020. He complained of mild pain in the bilateral jaw joints. Claimant said he awakens in the morning and the right side of his cheeks and inside of his lips are chewed up. Claimant's teeth ache, and are "supersensitive" to cold air and liquids. The jaw pain was "difficult for him to describe" with specificity. He occasionally has sharp pains in the right TM joint when moving his jaw. Claimant hears popping in the left TM joint and "rice krispies" sounds in the right joint. Examination of Claimant's neck and muscles of mastication showed primarily "mild" tenderness of the bilateral capsules, stylomandibular ligaments, and medial pterygoids. The masseter muscles and temporalis tendons were moderately tender. There was 2 mm of right deviation on opening his mouth, 2 mm left deviation on closing, and 2 mm protrusive movement. Dr. Berry heard no abnormal sounds in the jaw joints. A panoramic x-ray of the TM joints showed bony remodeling of the right and left TM joints. Tooth #14 had a widened periodontal ligament space, and was abscessed and possibly fractured. Dr. Berry diagnosed cervical and masticatory muscle spasms, mandibular deviation on

opening, and bruxism. He opined tooth #14 needed emergent extraction because it was abscessed. The tooth appeared fractured/cracked which Dr. Berry believed was caused by clenching and grinding becase of the accident. Dr. Berry opined, “the result of these diagnostic tests strongly suggest that all of the symptoms are indeed resulting from injuries sustained in the above-mentioned work-related accident.” He recommended a splint to be worn during the day for 12 weeks, and another splint to use during sleep “for lifetime.” He anticipated approximately 8-9 office visits for orthotics therapy over an 8-10 month timeframe. Dr. Berry prescribed amoxicillin for the abscessed tooth and advised Claimant to see his dentist immediately.

9. A September 3, 2020 letter from Claimant’s personal dentist, Dr. Jason Van Wagenen, notes Claimant was seen for an emergency exam relating to tooth #14. Testing confirmed a fracture on the inside back corner of the tooth and a visible infection. The tooth was dead. Dr. Van Wagenen opined, “these can be the result of the fracture but they can be the cause of the fracture. Unable to determine Etiology.”

10. Dr. Michael Dougherty, DDS performed an IME for Respondents on September 28, 2020. In addition to interviewing and examining Claimant, Dr. Dougherty reviewed prior medical records and x-rays from Dr. Van Wagenen dating back to August 2015. He also obtained CT imaging of both TM joints, a full mouth STL scan of Claimant’s teeth to evaluate the degree of tooth wear and articulations, and a digital T-Scan to evaluate A-P mandibular repositioning and vector accommodations of Claimant’s worn occlusion. Dr. Dougherty noted a root canal had been recommended for tooth #14 in August 2015, which was not completed. In June 2016, Dr. Van Wagenen noted “those recommended RCT teeth are bothering him.” An x-ray from May 21, 2020 showed advanced bone loss around the roots of tooth #14, consistent with long-standing infection and non-vitality. In fact, Dr. Van Wagenen’s September 16, 2019 chart note indicates tooth #14 was non-vital “probably > 2-5 yr.” Dr. Dougherty opined it is “100% likely and much more likely than not that this tooth was nonvital before the claimed injury. It was not save-able and removed due to the advanced bone loss due to long-standing non-vitality and non-treatment.” CT images of Claimant’s TMJs were normal and showed no evidence of injury. Claimant had normal range of motion of his mandible and no lateral pole tenderness. Dr. Dougherty noted,

> [Claimant] exhibited a prominent antegonial notch. This morphology of the bone at the angle of the mandible is related to clenching and grinding of the teeth. This ostosis, bone formation, takes many years to form from the insertion of the Masseter and Pterygoid muscles. Palpation of his muscles of mastication shows the most discomfort in: the attachments of both Masseter muscles, slightly in the Digastric area left, and both medial Pterygoids. These muscles are active in clinching and grinding. My oral examination, digital scans, and photos documented an extreme grinding habit with tooth sensitivity. Desensitizing treatments were begun on [Claimant’s] posterior teeth on 6/19/17, 2 years before the accident in question, and again on 6/26/17 when another desensitizing treatment was performed. On 09/16/19, shortly after the accident, Dr. Van Wagenen recorded that the sensitivity of his posterior molars had continued and that

> [Claimant] could not tolerate ultrasonic cleaning of calculus. There is no evidence of a TMJ injury. The grinding habit is long standing and existed before 07/18/19. The amount of tooth loss attributable to a bruxing habit is more than could occur within one year.

11. Dr. Dougherty concluded the emergency treatment for tooth #14 and recommended treatment for TMJ were not causally related to the work accident.

12. Dr. Dougherty's analysis and causation opinions are credible and more persuasive than the opinions offered by Dr. Berry. In addition to a detailed physical examination, Dr. Dougherty obtained extensive imaging data and reviewed Claimant's past dental records. There is no persuasive evidence Dr. Berry had Claimant's prior records and appears to have relied solely on Claimant for the history. But Claimant's reliability as a historian is compromised by the physical and psychological sequelae of the injury. The infection and tooth death that necessitated emergent extraction of tooth #14 was the culmination of long-standing periodontal disease and not caused or aggravated by any injury-related condition. Similarly, Claimant has been bruxing for many years, as evidenced by the extensive tooth damage and bone morphology.

13. Claimant failed to prove the recommended TMJ treatment or treatment of tooth #14 are causally related to the work accident.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Even if the respondents admit liability and pay for some treatment, they retain the right to dispute the reasonable necessity or relatedness of any other treatment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). Where the respondents dispute the claimant's entitlement to medical benefits, the claimant must prove the treatment is reasonably necessary and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must prove entitlement to medical benefits by a preponderance of the evidence. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

The existence of a pre-existing condition does not preclude a claim for medical benefits if an industrial injury aggravates, accelerates, or combines with the pre-existing condition to produce the need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). The ultimate question is whether the need for treatment was proximately caused by an industrial aggravation or merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

As found, Claimant failed to prove the recommended TMJ treatment or treatment for tooth #14 are causally related to the work accident. Dr. Dougherty's analysis and causation opinions are credible and persuasive. Dr. Dougherty performed a thorough examination, obtained extensive imaging data, and reviewed Claimant’s past dental records. There is no persuasive evidence Dr. Berry had Claimant’s prior records and appears to have relied solely on Claimant for the history. But Claimant’s reliability as a historian is compromised by the physical and psychological sequelae of the injury. Dr. Dougherty’s conclusions regarding causation of TMJ are supported by and consistent with Dr. Ramaswamy’s causation opinions. Although Dr. Anderson-Oeser referred Claimant to Dr. Berry, she provided no analysis or specific opinion regarding causation. The infection and tooth death that necessitated emergent extraction of tooth #14 was the culmination of long-standing periodontal disease and not caused or aggravated by any injury-related condition. Similarly, Claimant has been clenching bruxing for many years, as evidenced by the extensive tooth damage and bone morphology. Although tooth #14 clearly needed to be removed, and treatment for TMJ is probably reasonable, the persuasive evidence fails to show those conditions are causally related to the work accident.

ORDER

It is therefore ordered that:

1. Claimant’s request for treatment for TMJ recommended by Dr. Berry and dental treatment related to extraction of tooth #14 is denied and dismissed.

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

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

DATED: January 11, 2021

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-031-884-003

ISSUES

I. Whether the November 9, 2018 Final Admission of Liability properly closed the claim.

II. Whether Claimant established that her compensable injury has worsened and that she is no longer at MMI.

III. Whether Claimant is entitled to reasonable and necessary medical treatment for CRPS.

IV. Whether Claimant is entitled to temporary disability benefits.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. Claimant was injured on November 18, 2016 while employed as a painter. At the time of her injury Claimant had worked with the Employer for about 11 years in many business entities. Claimant's primary language is Spanish. At the time of her injury, Claimant was 44 years old. She is currently 48.
2. As a painter, Claimant prepped, prepared, and painted designated areas. Claimant had to bring ladders, tarps, buckets for paint, brushes, knives, paint handles and extensions to paint. Claimant also worked on various height ladders including extension ladders to reach high areas and paint ceilings.
3. Claimant was coming down a ladder when she reached the bottom, she stepped on the extension that she used to paint walls and twisted her right ankle. In order to keep from falling Claimant extended her right arm to grab onto the ladder and felt a pull in her right elbow.
4. Claimant was referred to Midtown Occupational Clinic and treated with Dr. Noel. He initially provided medical care and treatment for her right ankle and foot. Claimant was released to return to return to work without restrictions on December 20, 2016, but after 4 or 5 hours was having increased pain and swelling in her ankle while climbing ladders. She also had pain reaching with her right arm and hand to paint which caused pain and burning in her elbow. The pain in the elbow was so bad that she went to the emergency room. (Ex. 7, BS 274)
5. Claimant went to Lutheran Emergency Room on December 21, 2016 for pain in her elbow. X-rays were taken of her elbow and forearm and she was prescribed pain medication. Dr. Noel believed that Claimant's case should be reopened for treatment of both the ankle and elbow which resulted from the November 18, 2016 work injury. (Ex. 7, p 275; Ex. 8)
6. Claimant was diagnosed with right medial epicondylitis and received medical care and

treatment for her right elbow. Claimant was eventually referred to Dr. Sears, an orthopedic upper extremity specialist, because her right elbow condition continued to be problematic. Dr. Sears diagnosed traumatic medial epicondylitis and provided a cortisone injection. He later recommended a medial collateral ligament reconstruction with an allograft.

7. Pinnacol Advisor, Dr. Andrew Parker, recommended that the surgery be denied. On May 8, 2017 Dr. Sears responded to the denial stating:

> It should be noted that I strongly disagree with this. On my evaluation and what I documented in my charting have been clinical evaluation and testing consistent with an MCL attenuation that is not improving. These include positive milking maneuver, positive moving valgus stress test, and pain along the medial epicondyle and region of the medial collateral ligament. It is my clinical judgment that this patient would do very well with a medial collateral ligament reconstruction as I have outlined in my documentation and my recommendation stands that this patient should be a candidate for this procedure as I have stated and in contrast to the Independent medical evaluation by Dr. Parker during which he did not have the luxury of evaluating the patient clinically. (Ex. 10, p. 302)

8. Based on Dr. Parker's recommendation, the carrier denied the surgery.

9. Claimant was referred for an IME. The IME was performed by Dr. James Lindberg on August 15, 2017. At that time Claimant was complaining of medial elbow pain that felt like it was burning and pulling when she tried to lift or hold things. Dr. Lindberg noted that Claimant had developed a frozen shoulder secondary to disuse of the right elbow and numbness in the fourth and fifth fingers. He recommended an EMG and believed that significant psychological factors were affecting Claimant's recovery. He also recommended referral to another hand surgeon for a second opinion. (Ex. F, p. 143)

10. On June 6, 2017, Claimant returned to Dr. Noel. During this examination he noted Claimant had "a lot of subjective pain" complaints, but yet also documented myofascial tightness and tenderness on examination of Claimant's right upper arm and shoulder girdle. (Ex. 7, p. 279)

11. On September 7, 2017 Claimant was evaluated by Dr. Lesnak. Dr. Lesnak said that Claimant was complaining of constant right medial elbow pain and burning sensations with frequent diffuse aching and burning sensations through her entire right arm and axillary region along with frequent numbness in her little and ring fingers. (Ex. D, p. 59) Dr. Lesnak, however, had a difficult time performing a physical examination based on Claimant's apprehension of being physically examined. As a result, Dr. Lesnak proceeded directly to performing an EMG of Claimant's right upper extremity including the median, ulnar and radial nerves. The EMG showed mild to moderate diffuse peripheral poly neuropathy involving the right upper extremity. Dr. Lesnak thought the findings were most likely based on her diabetes mellitus. (Ex. D, p. 62) He believed that Claimant was not a surgical candidate for either her elbow or shoulder.

12. On September 26, 2017, Claimant started treating with Dr. Lupe Ledezma, a Spanish speaking psychologist. At this appointment, claimant told Dr. Ledezma, "Since the accident, she isolates in her room and keeps her curtains closed so that she does not

have to look outside. She has lost contact with friends and family members. Often, she avoids taking phone calls so that she does not have to talk to anyone. Her interest in formerly enjoyable activities has decreased." Ex. C, Bates 39. As part of her assessment, Dr. Ledezma performed psychological testing to help assess Claimant's psychiatric condition. Based on the test results, Dr. Ledezma concluded that "there was no evidence of [Claimant] trying to skew her responses in either a favorable or more negative light." Thus, Dr. Ledezma concluded the test results were valid. Based on the valid test results, Dr. Ledezma diagnosed Claimant with major depression, single episode, moderate; generalized anxiety disorder and psychological factors effecting other medical conditions. (Ex. C, p. 45) Dr. Ledezma also stated that Claimant's depression and anxiety were related to her work injury. Dr. Ledezma also stated that Claimant's depressive symptoms may make it difficult for her participate fully in treatment and that she may present as non-compliant. She also indicated that Claimant was noted to have poor pain tolerance. Based on her assessment, Dr. Ledezma provided recommendations for medical treatment modalities that may be effective given Claimant's psychological make up. (Ex. C, pp. 45-46)

13. Dr. Ledezma also stated that before her accident Claimant's self-esteem and identify were highly influenced by her ability to work in physically demanding jobs and that her present physical limitations created a sense of embarrassment, uselessness, hopelessness, anxiety and sadness. (Ex. C, p. 45)

14. On October 18, 2017, Claimant again reported to Dr. Ledezma her fear that she "will be unable to engage in any type of gainful employment because of her physical issues." "It is her assessment that she struggles with even household chores and activities of daily living."

15. On October 30, 2017, Dr. Ledezma also noted Claimant stated that "Based on consultations with her providers, she understands that their recommendation is that she not return to her previous line of work. This information was upsetting to her because she does not want to consider having another line of work [than painting]."

16. Soon after, on November 28, 2017, Claimant also told Dr. Ledezma that "Her main concern is the extent to which her physical issues will interfere with her ability to work in the future." (Ex. C, p. 51.)

17. On December 14, 2017, Claimant returned to Dr. Ledezma. At this appointment, Claimant advised Dr. Ledezma that it was her understanding that she is at MMI. As a result of being told she was at MMI, Claimant said that:

> This news was upsetting to her because she feels that there is still something wrong with her elbow, she is unclear' about her diagnosis and does not feel that she has exhausted all available treatment yet. Since learning about her MMI status, she has been increasingly angry, frustrated, worried, and generally upset. It is her belief that providers have not done everything possible to fix whatever is wrong with her. Moreover, it is her belief that either no one knows what is truly wrong with her or providers have ignored her symptoms. (Ex. C, p. 52.)

18. On December 15, 2017, Claimant returned to Dr. Noel. In his report from that visit, he noted that Claimant was referred to Dr. Lupe Ledezma for psychological care. He also

noted that Claimant was prescribed an antidepressant for her work-related depression. Yet upon increasing the dosage, Claimant developed headaches and stopped taking it. Dr. Noel concluded Claimant was doing quite a bit better psychiatrically. He concluded Claimant no longer needed to be on an antidepressant. As a result, he did not prescribe Claimant any antidepressant medication. (Ex. 7, p. 282) Thus, Dr. Noel recognized that Claimant was improving psychologically, and she was not as depressed as she first reported to Dr. Ledezma and Dr. Noel.

19. On January 22, 2018, Dr. Noel placed Claimant at maximum medical improvement (MMI). Upon placing Claimant at maximum medical improvement (MMI), Dr. Noel provided Claimant a 5% upper extremity impairment rating for loss of range of motion of the elbow, and a psychiatric impairment rating of 2%. He also recommended maintenance medical care. (Ex. 1, p. 8)

20. Upon placing Claimant at MMI, Dr. Ledezma recommended that additional psychological maintenance sessions continue along with continuation of antidepressant medications – even though Dr. Noel did not think Claimant needed to be on an antidepressant - and opined Claimant was likely to have permanent psychological impairment due to chronic pain and physical limitations. (Ex. C, p. 56)

21. On February 23, 2018, Respondents filed a Final Admission of Liability (FAL) based on Dr. Noel's January 22, 2018 MMI finding and rating. (Ex. GG) Claimant objected to the FAL and requested a Division Independent Medical Examination (Division IME).

22. On September 19, 2018, eight months after being placed at MMI by dr. Noel, Dr. William Watson performed the Division IME. At that time Claimant continued to complain of right arm pain located on the inside of the right arm which radiated from the elbow into the forearm and into the axilla of the right arm. She described it as burning and that touching the area was painful. Claimant was also complaining of numbness and tingling in the 4th and 5th digits. (Ex. A, p. 13) On physical examination Dr. Watson noted evidence of allodynia and hyperalgesia 18 cm above the elbow crease on the medial side and 10 cm below the medial epidcondyle on the medial forearm. (Ex. A, p. 14)

23. Dr. Watson diagnosed Claimant with elbow medial epicondylitis post injury, decreased shoulder range of motion secondary to decreased use because of extreme pain in the right elbow and medial upper arm and forearm. (Ex. A, p. 15) He noted that he found it a difficult case because of the extreme pain behaviors that he and other physicians observed. Based on his assessment, he thought that at the time of his evaluation, Claimant met some of the diagnostic components of clinical chronic regional pain syndrome (CRPS) which he identified as:

    a. Continued pain which is disproportionate to any inciting event.

    b. Sensory reports of hyperesthesia which is allodynia.

    c. Pseudomotor edema of the forearm along with decreased range of motion of the elbow.

    Dr. Watson also stated that no other diagnosis - other than CRPS - better explained Claimant's symptoms at that time. (Ex. A, p. 16) He did not, however, formally diagnose Claimant with CRPS at that time based on his clinical examination and findings. He also did not assess Claimant for any psychiatric impairment because he said that was outside his field of expertise. (Ex. A, p. 16)

24. Dr. Watson also addressed maintenance medical treatment. He stated that as part of maintenance care Claimant should have an appointment with a physician who is an expert in the diagnosis of CRPS. He also concluded that if the physician determines Claimant is a candidate for the diagnostic components to confirm CRPS, which would include a trophic test, vasomotor temperature test, pseudomotor test and sensory sympathetic nerve test, that Claimant would not be at maximum medical improvement and should have the tests and treatment. (Ex. A, p. 16)

25. Essentially, Dr. Watson affirmed MMI but concluded that if an expert in CRPS determines testing for CRPS is reasonable and necessary at some point, Claimant would not be at MMI at that time because she would need diagnostic treatment to determine the extent of her work injury and additional medical treatment to cure Claimant from the effects of her work injury.

26. On November 9, 2018, a post-DIME Final Admission of Liability (FAL) was filed which contained a copy of the Division independent medical examiner's report. (Ex. 2) Page 1 of the FAL admitted for permanent disability of 12% of the upper extremity and for a mental impairment of 0.00. In the overpayment area there is a "(see remarks)." Respondents also admitted for reasonable, necessary, and related maintenance medical treatment after MMI. (Ex. 2, p. 14) On page 4 of the FAL in the remarks section (Ex. A, p. 16) there is a statement "Pinnacol Assurance admits for mental impairment rating of 2%. Therefore, mental impairment is calculated as follows: 2% x 400 weeks x 1.3 x 313.47 = $3,260.09. Temporary benefits paid as a result of mental impairment =$0. $3260.09 - $0 = $3260.09." As a result, the FAL is inconsistent regarding the admission for mental impairment benefits.

27. Claimant completed an objection to the November 9, 2019, FAL and an application for hearing. That said, based on the documentation provided by Respondents, the objection and application were not timely. (Ex. AA and BB, pp. 337-341) And Claimant does not contend that her objection and application were timely.

28. On November 16, 2018, Dr. Jeffrey Raschbacher, in his capacity as a Pinnacol Advisor, reviewed the file at the request of Alesia G[Redacted] about the maintenance recommendation of the DIME doctor that recommended a CRPS evaluation. Without obtaining a detailed history from Claimant and physically evaluating her, Dr. Raschbacher summarily concluded that the evaluation should not be authorized because:

- The only physical finding was allodynia.
- Claimant had nonphysiologic behavior and pain behaviors which is not a clear call for a CRPS work up.
- CRPS is exceedingly rare.

29. Despite concluding that the workup for CRPS was not reasonable and necessary, Dr. Raschbacher's report lacked any meaningful analysis in support of his conclusion. (Ex. B, p. 20) Based on Dr. Raschbacher's report, the Insurer did not authorize Claimant to

undergo a CRPS evaluation at that time with a specialist in CRPS to see if Claimant's case should be reopened and CRPS testing performed based on a worsening of condition.

30. On November 26, 2018, William Quinones of the Colorado Division of Workers' Compensation Claims Management Unit sent a letter to Alesia G[Redacted] saying that the November 9, 2018 admission admitted for a 2% mental impairment rating, however the benefit total was left out of the benefit history. He requested correspondence about Pinnacol's position or the filing of an amended admission with new certification of mailing within 15 days of the letter. (Ex. 6, p. 121)

31. On December 11, 2018, Ms. G[Redacted] sent an email to Mr. Quinones which stated, "I received an error letter in regard to the 2% mental impairment. This was admitted upon the attached FA. The DIME did not assign mental impairment, we took credit for previously admitted PPD. Does this resolve this letter?" (Ex. 6, p. 105) Attached to the email was the pre-DIME FAL dated February 23, 2018 admitting for the mental impairment rating. (Ex. 6, pp. 107-118)

32. On January 14, 2019, Bert Sandoval, from the Colorado Division of Workers' Compensation, Claims Management Unit, e-mailed Liana D[Redacted] of Pinnacol Assurance following up on her phone call the previous week and asked Liana if she had a chance to look at the file. (Ex. 6, p. 104) Ms. D[Redacted] responded, "Yes, and per Alesia, William told her she didn't have to refile the admission. Are you saying that she needs to correct the admission." Ms. Sandoval responded to Ms. D[Redacted] stating that "William didn't realize that the copy Alesia sent was a duplicate copy, he thought it was a new filing." (Ex 6, p. 104) Ms. D[Redacted] responded, "Ok. So to clarify we need to send a new admission showing the pay rating?" Ms. Sandoval responded, "The remarks of the 11-9-2018 admission are not consistent with what appears in the benefit history. The remarks admit for the 2% psych of $3,260.00, but the benefit history did not reflect this. The total is 0.00 for mental impairment benefit. Is the adjuster admitting or not admitting to the 2% psych? A new admission clarifying this would be recommended." (Ex 6, p. 105)

33. On January 17, 2019, Mr. William Quinones from the Claims Management Unit sent a letter to Alesia G[Redacted] stating that "This is a follow up to my 11-26-2018 letter regarding the November 9, 2019 admission. I was seeking clarification regarding the mental impairment. The remarks section admits for 2% mental impairment; however, the benefit history showed a zero total." "When I received your email responded on 12-11-2018, I failed to realize the Final Admission included in the email was a copy of the previously admitted FA dated 2-23-2018." "It would be my recommendation that to file a new admission to clarify Pinnacol's position." Copies of the letter were sent to Nicole C[Redacted], Jeffrey Y[Redacted] and Maria P[Redacted]. (Ex 6, p. 103) Despite the recommendations, Pinnacol did not file a new FAL to clarify its position.

34. On January 15, 2019, approximately one year after being placed at MMI, and at Claimant's request, an evaluation was performed by Dr. Tashof Bernton. Dr. Bernton is an expert and specialist in the diagnosis, testing and treatment of CRPS. After physically examining Claimant, Dr. Bernton concluded that Claimant did have findings suggestive of the presence of complex regional syndrome and that further testing as

noted by the Independent Medical Examination by Dr. Watson was indicated at that time. Dr. Bernton recommended the testing to include autonomic testing battery (sometimes referred to as QSART) and stress thermography. (Ex. 15, p. 338) Dr. Bernton found that because Claimant did have the indications for testing at that time, she was no longer at MMI. (Ex. 15, p. 339)

35. On March 20, 2019, Claimant filed a Petition to Reopen her claim based on a change in medical condition and attached the January 15, 2019 report of Dr. Bernton. Then, on August 28, 2019, Claimant filed an Application for Hearing. Claimant endorsed the issue of Petition to Reopen Claim. Claimant did not, however, endorse the issue of medical benefits.

36. On May 10, 2019, approximately 16 months after Claimant was placed at MMI, Respondents had Claimant undergo an independent medical examination with Dr. John Raschbacher. In his report, Dr. Raschbacher noted that Claimant's fingers were getting worse and were "down more" or more contracted and that Claimant's right hand and finger symptoms were getting worse. Dr. Raschbacher allegedly asked Claimant if she reported all of these symptoms to Dr. Noel, which Claimant allegedly said she did. But it is not clear what "all of these symptoms" means in the context of whether her condition and symptoms were getting worse. He also noted that Claimant stated that her second and third digits of her right hand will not stretch or extend, and this occurred since they stopped doing therapy – which she said helped a lot.

37. Dr. Raschbacher then concluded by stating:

> I have little to add to the statement made as a reviewer on 11/16/ 18. True CRPS is exceedingly rare. Medical literature on the incidence or prevalence of CRPS in the population is very suggestive that true CRPS is an extremely rare diagnosis. The medical literature also suggests that malingering is a much more common entity than is CRPS. Therefore, the medical literature appears to suggest that malingering would be much more likely, medically, than CRPS, including and in particular in this case. Again, pain behaviors are not a reason to work up CRPS in the Workers' Compensation system.
>
> Besides the DIME and claimant's IME [with] Dr. Bernton, has any ATP recommended CRPS testing for claimant? (Ex. B, p. 29)

38. On August 13, 2019, Claimant returned to Dr. Bernton for a follow up examination and testing. Since her January 15, 2019, appointment with Dr. Bernton, Claimant's condition worsened even more. Dr. Bernton noted in his report that:

> The patient is concerned because she has noted that her fingers are "curling up," and she is unable to fully strengthen the fingers actively. She has noted progressive loss of strength in the hand also loss of range of motion in the shoulder and wrist and notes that she is "dropping things" with the right hand.

Dr. Bernton noted the following objective findings during his physical examination of Claimant:

- Fixed contractures of the right hand that Claimant can passively straighten but she cannot actively straighten the fingers fully.
- The second PIP has a 27-degree lag.
- The third PIP has an 18-degree lag, and
- The fourth finger PIP has a 15-degree lag.
- Minimal PIP lag in the fifth finger, but an 18-degree lag in the DIP joint.
- Slight, but definite fusiform swelling is present in the digits.
- The right hand was slightly darker than the left,
- Claimant had decreased range of motion of the wrist as well, with maximum flexion of the right wrist at 42 degrees, and maximum extension is 43 degrees
- Examination of the right shoulder demonstrated maximum flexion of 122 degrees and maximum abduction of 112 degrees, which was markedly decreased from the contralateral side.

Based on Dr. Bernton’s physical findings on examination, he assessed Claimant with the progression of findings consistent with complex regional pain syndrome with the development of some contractures at the proximal interphalangeal joints of the fingers and the presence of some fusiform swelling, shininess, and discoloration, consistent with complex regional pain syndrome. As a result, Dr. Bernton concluded Claimant was an appropriate candidate for testing for CRPS.

That same day, Dr. Bernton performed autonomic testing and stress thermography. Dr. Bernton concluded that:

- The autonomic testing battery was positive for the presence of CRPS with a laboratory scale of 4 and a clinical scale of 5.
- The stress thermography was also positive for CRPS.
- Claimant met the Colorado Division of Workers' Compensation diagnostic criteria for CRPS.

In summary, Dr. Bernton stated that he evaluated Claimant on January 15, 2019, and noted the presence of objective findings which could be consistent with complex regional pain syndrome and recommended testing. Then, he concluded:

> She has now returned [on August 13, 2019] with more evident findings on examination and positive testing for complex regional pain syndrome. She is not at Maximum Medical Improvement, and I think it is clear that she has not been. She does require treatment for complex regional pain syndrome to prevent progression of the disease and to improve her functional status and decrease her pain. This would include the use of antineuritic medications, sympathetic blockade, and topical analgesics as well as physical therapy.

> Determination of the time required to reach Maximum Medical Improvement will depend upon the patient's initial response to sympathetic blockade. I would recommend a series of three sympathetic blocks, no more than five to seven days apart to maximize the impact, in conjunction with physical therapy. Treatment is appropriate to prevent further progression of the patient's problems and to improve function and decrease pain levels.

Dr. Bernton's Testimony

39. Dr. Bernton was deposed. During his deposition, he went through his qualifications and expertise in diagnosing and treating patients with CRPS and his additional expertise and experience with thermography. He also discussed his assessment of Claimant and how he concluded Claimant developed CRPS as a result of her work injury and that her condition has worsened.

40. Dr. Bernton's reports and testimony included the following:

- On January 15, 2019, Claimant had physical findings consistent with CRPS, which included decreased range of motion of the right shoulder and wrist. There was some decreased range of motion of the fingers of the right hand with an extensor lag of the fourth finger. Dr. Bernton noted a slight color difference was present with the right side slightly darker than the left. There was some shininess of the skin noted, a finding often seen in complex regional pain syndrome, and a significant diagnostic finding. The elbow showed some diffuse tenderness and decreased range of finding. (Bernton Depo p. 8, ln. 1-9)

- Dr. Bernton was of the opinion that additional testing was necessary to confirm the diagnosis of CRPS because Dr. Lesnak had evaluated Claimant and found polyneuropathy as a potential diagnosis for Claimant's ongoing issues. Dr. Bernton explained that although diabetics can have loss of range of motion issues with injured joints, they generally do not have problems with the non-involved joints, complaints of persistent cold pain and hyperalgesia (increased sensitivity to light touch) (Bernton Depo p. 8, ln.10-25) He stated that based on a totality of Claimant's presentation that polyneuropathy or diabetes did not explain her clinical presentation but CRPS did. Claimant also had subjective complaints of sweating more on one side than the other and feeling one side is colder than the other. (Bernton Depo p. 9) Since Claimant met the clinical criteria for complex regional pain syndrome; he was of the opinion that it would be appropriate to perform objective testing to determine whether or not complex regional pain syndrome was present.

- The Medical Treatment Guidelines (MTG) recommend two objective tests which are tests that Dr. Bernton is qualified to and does perform. The first is an autonomic testing battery known as the QSART which stands for Quantitative Sudomotor Axonal Response Test. The second is stress thermography which is performed in a cold stress environment to evaluate the sympathetic response of the skin vasculature. (Bernton Depo p. 12, ln. 14-18) The advantage of the autonomic testing battery and stress thermography is that they are not subjective tests. There's nothing the patient can tell you that alters the findings. (Bernton Depo p. 12, ln 25 &

p. 13, ln. 1-5) The QSART uses objective measures of sweat function and the stress thermography involves thermographic images of the patient when they're exposed to a cold stress environment. Neither test relies on the representations made by Claimant. (Bernton Depo p. 15, ln. 11-12)

- Claimant returned for testing on August 13, 2019. Claimant had more evident findings of CRPS when she returned for testing of fusiform swelling of the digits of the hand, which is a fairly classic symptom of CRPS, which is a sausage type swelling of the digits of the hand. (Bernton Depo p. 16, ln. 12-16) Claimant met both the clinical and laboratory scales for the diagnosis of CRPS. Dr. Bernton testified that the scales used for QSART testing were researched and developed at the Mayo Clinic and are national standards that have been used for over ten years. (Bernton Depo pp. 17-19) The thermographic results were attached as Depo Exhibit 1 and Dr. Bernton noted the asymmetry between the two extremities present in the pictures. According to the doctor these test results in the presence of loss of range of motion of the effected limb, in particular the digits of the hand which is a classic finding of CRPS as well as the fusiform swelling of the fingers and the shininess of the skin support his findings. (Bernton Depo pp. 25-26) Dr. Bernton also noted a progression of clinical findings between January and August 2019 including the fingers "curling up" which is a frequent finding with CRPS but not diabetes or an injury to a specific nerve. (Bernton Depo pp. 26 & 27, ln. 14-25 & p. 28)

- Dr. Bernton was of the opinion that the work injury of an elbow strain or epicondylar strain from Claimant reaching to grab the ladder to keep herself from falling when she twisted her ankle on a paint roller worsened by the use of crutches which she used as part of the treatment of the ankle led to the development of CRPS of the upper extremity in this claim. (Bernton Depo p. 29, ln. 19-25 & p. 30 ln. 1-9) Dr. Bernton estimated she used crutches somewhere between 10 days and 4 weeks of her injury. (Bernton Depo p. 42, ln. 15-25) Dr. Bernton stated that Dr. Raschbacher's opinion that Claimant did not suffer from CRPS because there were no findings of disuse atrophy was not a basis to rule out CRPS. According to Dr. Bernton disuse atrophy is not a diagnostic criterion in either the MTGs or the Budapest criteria for the diagnosis of CRPS. He did state that it can be an indicator in more severe pathology that assists with the diagnosis of CRPS, but its absence does not mean that CRPS is not present. (Bernton Depo p. 30, ln. 10-25 & p. 31 ln. 1-4) He explained that disuse atrophy develops if you cannot move through a full range of motion, in other words if you still have some motion, you're not necessarily going to develop disuse atrophy if your range of motion is restricted. (Bernton Depo p. 40, ln. 18-24)

- Dr. Bernton was of the opinion that Claimant is not at maximum medical improvement because Claimant has a new diagnosed disorder as a result of her occupational injury that was not formally diagnosed until the tests performed in August 2019 that had not yet to be treated and as a result Claimant was not at maximum medical improvement. (Bernton Depo p. 31, 5-16) Dr. Bernton recommended initial treatment of oral and topical anti neuritic medications and physical therapy. (Bernton Depo p. 31, ln. 17-25) and other care of her neuritic pain along with an initial sympathetic block (Bernton Depo p. 32-33)

- Dr. Bernton disagreed with Dr. Raschbacher’s opinion that because CRPS is so rare and malingering is more common that is more medically probably that Claimant is malingering in this case and does not have CRPS as being illogical because you must look at the appropriate diagnostic criteria when making a diagnosis, and if you used Dr. Raschbacher’s logic then no one with a rare disorder would be diagnosed with the disorder but would rather be determined to be a malinger. (Bernton Depo p. 35) He also dismissed Dr. Raschbacher’s opinion that CRPS was over-diagnosed (statement from MTGs) because the guidelines require objective diagnostic testing which was done in this case and differential diagnoses ruled out. (Bernton Depo p. 36, ln. 9-25 & p. 37, ln. 1-15)
- On cross examination Dr. Bernton was questioned about general statements in the MTGs and selected medical literature articles from annotations of the CRPS MTGs. The first was a statement in the MTGs that the diagnosis of CRPS continues to be controversial. Dr. Bernton explained that he agreed that the statement was in the guidelines, not because the existence of CRPS was controversial, but in terms of how you diagnosis the condition and the specific criteria necessary to make the diagnosis. (Bernton Depo p. 50, ln. 18-25 & p. 51, ln. 1-5)
- Dr. Bernton was read random statements from a 2008 study titled Long Term skin Temperature measurements - A practical diagnostic tool in complex regional pain syndrome, which Dr. Bernton said was done to help establish whether individuals with significant psychological conditions or involved in workers’ compensation or litigation with secondary gain issues would affect the outcome of temperature testing as a variable of the study. (Bernton Depo p. 63, ln. 13-17) Dr. Bernton explained that the medical purpose of the study was to determine whether or not a particular temperature measurement which was less sophisticated than the stress thermography now used and more limited could successfully differentiate between patients with CRPS patients without it. (Bernton Depo p. 64, ln. 1-11) One of the variables they wanted to look at was whether the temperature differences could differentiate whether or not psychological pathology was present. That was the reason they separated that group out. There was no indication that effected the thermographic test results.
- When asked about the statement on page 16 of the MTGs that indicates “patient response testing can be problematic in medical legal settings” Dr. Bernton indicated that he agreed with the statement, but they were referring to subjective responses may be less reliable, but were not saying that objective testing is less reliable in a medical legal setting because that’s why you do it. You attempt to find criteria that is independent of the patient’s subjective response. (Bernton Depo p. 64, ln. 17-25 & p. 65, ln. 1-7)

41. The ALJ credits the opinions of Dr. Dr. Bernton as set forth in his reports and testimony. The ALJ finds his testimony to be credible and highly persuasive based on his expertise in diagnosing and treating CRPS and the fact that he based his opinions on his physical examination of Claimant and the CRPS test results which added an objective component to his assessment of Claimant’s condition.

Claimant's Testimony

42. Claimant testified that over time her condition has continued to deteriorate since being placed at maximum medical improvement. She began to notice color changes, and one hand felt colder than the other, and her pain has continued to intensify. She has more swelling and she has trouble gripping with the hand because her fingers are becoming harder to move.

43. Claimant testified that during her injury she became involved with a marketing company called Zurvita Zeal. Her mother was using the products which are dietary supplements, vitamins and other products made from natural ingredients such as plants.

44. She bought a membership to Zurvita on December 19, 2016. The company requires its members to buy samples for customers and then make sales. The company also required members to attend conventions to learn more about the products and how to sell them. Claimant testified that she was responsible for the payment of costs of travel, hotels, food and other expenses while at the conventions. These were not paid by the company.

45. Claimant testified that she would sign people up under her number to make sales and get credit for their sales as well as her own in the form of commissions. Claimant testified that when she signed her family up to make sales that was when she began making money selling Zurvita.

46. Claimant testified that physically this involved making phone calls and initially going out to potential customers with a trainer and then eventually on her own. Claimant testified it was not a physical job and the products were either directly shipped to the customers or she would deliver the light ones. Her husband would help her with any heavy items.

47. Claimant testified that she won a trip to Disneyland planned for June 2017 as a result of her Zurvita sales, she was unrepresented then and called Alesia G[Redacted] to let her know about the trip and that she needed to reschedule a medical appointment that was scheduled during the trip. Claimant did not, however, state that this trip was for work. Ms. G[Redacted] testified that the last conversation she had with Claimant before representation was on May 25, 2017. (G[Redacted] Depo p. 28)

48. Claimant testified that she travelled for Zurvita conventions in 2017, 2018 and part of 2019. She had to attend 3 conventions a year. The last Zurvita convention Claimant attended was in June 2019. In addition to the convention attendance, Claimant won trips as a result of her success in selling Zurvita and travelled with her family.

49. Claimant provided bank records documenting some of her Zurvita earnings but testified that she also had expenses associated with the trips that were not accounted for. Claimant did not, however, provide any records documenting her expenses. Based on the evidence submitted at hearing, the record relating to Claimant's earnings and expenses with Zurvita is incomplete. Thus, the ALJ cannot determine the net income Claimant earned after accounting for her expenses.

Credibility of Claimant

50. At hearing, Claimant was confronted with her Facebook history. At hearing, Claimant admitted that despite her statements to Dr. Ledezma, she was traveling extensively

throughout this time, in the U.S. and Mexico, to visit family and along with her work in sales selling a product called Zurvita Zeal. Claimant traveled to Las Vegas, Kansas City, Santa Fe, Disney in Orlando Florida, Puerto Vallarta Mexico, and Anaheim California the period of time between the date of injury and that statement made to Dr. Ledezma ("since the accident…isolates..keeps her curtains closed…lost contact...")

51. Following the first appointment with Dr. Ledezma, Claimant was traveling and appeared fairly active at the same time she was asserting that she could not function and could not work. Claimant represented to Dr. Ledezma that she was psychologically impacted by this situation. After making that representation to Dr. Ledezma, Claimant traveled to Memphis, Tennessee, back to Orlando Florida, Hollywood, California, Fort Worth, Texas, Dallas, Texas, Hawaii and Kansas City. She also went hiking, enjoyed the beach and tourist activities, posted live videos, published sales material, welcomed new team members, and joined the 2018 Grand Convention in Denver, Colorado for Zurvita. Comparison of the Facebook activity with representations and assertions to Dr. Ledezma and other providers suggests Claimant was not revealing all of her activities to her doctors. That said, despite all of her traveling and selling Zurvita supplements, Claimant's traveling and work does not appear to have exceeded her physical restrictions issued by Dr. Noel. It does, however, suggest that Claimant was more active than her medical records show. Despite the difference in Claimant's statements in her medical records – and her actual activities – the ALJ does not find Claimant is intentionally misrepresenting her symptoms or that her symptoms do not exist. Claimant's ability to travel and attempt to sell products does not negate from the fact that Claimant's work injury prevented her from performing the physical aspects of her occupation and that she was distressed, depressed, and worried about how she would make an income and support herself. The ALJ also finds that her distress was amplified when the surgery recommended by one of her treating physicians – to help her get back to work - was denied.

52. Moreover, in this case, the ALJ does not view the discrepancies in Claimant's medical records when compared to the documentation of her activities on Facebook to be persuasive evidence that Claimant remains at MMI and that her condition has not worsened. While the ALJ agrees that the reliability of Claimant's subjective complaints can be essential in determining a diagnosis and assessing causation, it would be false dichotomy to conclude that a finding that Claimant is overstating her symptoms and disability to some extent prevents finding that her condition has worsened. In other words, it is not an "A" or "B" analysis. Both can be true. Claimant can be overstating some of her symptoms to some extent and her condition can be worse.

53. The ALJ thus finds that Claimant overstated her psychological symptoms at times, but the ALJ further finds that she is not doing it intentionally to mislead her medical providers or to receive benefits. Instead, the ALJ finds that based on Dr. Ledezma's reports, Claimant's overstatements are more likely related to her underlying psychological makeup and her response to her injury which has prevented her from performing the types of manual labor she used to perform to make a living. The ALJ also finds that Claimant is not overstating her physical symptoms and limitations about her pain and limitations regarding her right upper extremity. As a result, the ALJ finds that Claimant's description of her worsening of her physical condition since being placed

at MMI is credible and persuasive. This finding is based primarily on the testimony and diagnosis of CRPS that was made by Dr. Bernton and supported by his physical findings and test results as well as Claimant's testimony and her statements contained in the medical records.

Dr. Raschbacher's Testimony

54. Dr. Raschbacher evaluated Claimant on May 10, 2019, reviewed the records, reviewed Claimant's Facebook material, watched Claimant's testimony, and testified as an expert. He discussed his examination of claimant. *Rasch. Depo. p. 11 -12.* Dr. Raschbacher noted that there was no disuse atrophy in the right upper extremity. His examination was in May 2019. She reported to him that she could not use her right upper extremity normally and exhibited that she could barely use it. Claimant had been complaining of such pain in her right upper extremity that it could not be examined by Dr. Lesnak in early September 2017. *Ex. D.* Given this situation, Dr. Raschbacher would expect disuse atrophy. *Rasch. Depo. p. 16-17.* Following his examination, he determined that she was not restricting the use of the right upper extremity as she had represented.

55. Dr. Raschbacher concluded that the difference in measurement in the forearms between the left and the right was because of muscle mass, not swelling. *Rasch. Depo. p. 20, l12-13.* His measurement was a .6 cm difference between the forearms. Dr. Raschbacher discussed his observation of Claimant when the parties appeared at the December 2019 hearing. He noted that he saw her shake hands with the interpreter using her right hand and to pick up a piece of paper with the right hand normally off the table in the OAC waiting room. He also noted that Claimant's actual activities do not show loss of function. As a result, it is Dr. Raschbacher's opinion that Claimant has not experienced a worsening of her work-related condition.

56. The ALJ, however, does not find Dr. Raschbacher's opinions to be credible or persuasive for several reasons.

First, through questioning of Dr. Raschbacher, Respondents point out that while the Medical Treatment Guidelines recommend thermography and autonomic testing to help diagnose CRPS, the test results may be affected by other medical conditions such as polyneuropathy - from which Claimant suffers. But absent from Dr. Raschbacher's testimony is whether – in this case – Claimant's polyneuropathy actually affected the test results. Also absent from Dr. Raschbacher's testimony is even if Claimant's polyneuropathy affected the test results, how did it affect the test results. There is nothing in the Guidelines or Dr. Raschbacher's testimony stating that Claimant's underlying polyneuropathy renders the test results ineffective in diagnosing CRPS.

On the other hand, Dr. Bernton did testify about how Claimant's polyneuropathy can affect the thermography results and whether they did in this case. And, according to Dr. Bernton, when polyneuropathy does affect the thermography results, you tend to see findings that are more symmetrical instead of asymmetric as found on Claimants' testing. As stated by Dr. Bernton:

> Well, with the polyneuropathy, you can see changes in the -- the sympathetic nerve runs along with the peripheral nerves. If you have disease of the peripheral nerves, you can have changes as well in the

> sympathetic nerve. However, they are generally symmetric with a peripheral polyneuropathy, and although it does make for a more -- you know, you have to look at it more and you have to take that into account when the interpretation is made.
>
> It was my assessment and remains my assessment that despite the presence of polyneuropathy, there are asymmetries in the temperature and also in the thermography that would not be expected to be seen in polyneuropathy but are more consistent with complex regional pain syndrome.
>
> As in any situation when there is a compounding variable, possible other diagnosis that can affect results to some degree, you need to very carefully look at it and then make an assessment of whether what you are seeing is consistent with polyneuropathy or whether it is most consistent with complex regional pain syndrome.
>
> It is most consistent with complex regional pain syndrome.

57. Second, during his deposition, Dr. Raschbacher was asked whether he agrees that Dr. Bernton is an expert in the "diagnosis, treatment, and evaluation of complex regional pain syndrome based upon his experience and training as a physician." Dr. Raschbacher answered by stating that "I suppose Dr. Bernton is as expert as anyone, particularly given that this is such a rare diagnosis for true CRPS." In essence, Dr. Raschbacher is saying two things. First, that Dr. Bernton is no more of an expert than he is. Second, because CRPS is rare, there can be no experts, there are no experts, and therefore Dr. Bernton is not an expert.

58. Yet earlier in his deposition, Dr. Raschbacher testified that he had reviewed Dr. Bernton's September 5, 2019, deposition on at least two occasions. Moreover, in his deposition, Dr. Bernton goes through his qualifications, expertise, and specialization as it relates to CRPS. For example, Dr. Bernton testified that he is:

    - Board certified in internal medicine.
    - Board certified in occupational medicine.
    - Board certified by the American Academy of Thermography.
    - A Diplomate of the American Academy of Thermography.
    - President of the American Academy of Thermography.
    - A member of the external review committee for the Chronic Regional Pain Syndrome Guidelines.
    - The director of his practice's laboratory which performs autonomic testing, also known as the QSART, and thermography.
    - Has performed hundreds of diagnostic evaluations for CRPS.
    - Receives a large number of referrals from other physicians in Colorado and other states to assess and treat patients for CRPS.

- Assesses 5-10 patients per month for CRPS.
- Although the condition is rare, he usually has 2-3 CRPS patients in his practice at any given time. The severity of which ranges from fairly mild to extreme.
- Level II Accredited.

Moreover, Dr. Bernton was admitted as an expert, without objection by Respondents, in:

- Internal medicine, and
- Occupational medicine, with a specialty in

  i. thermography, and

  ii. complex regional pain syndrome.

Thus, the record is clear that Dr. Bernton is a board-certified expert with additional training and expertise in the area of CRPS. That Dr. Raschbacher is unwilling to acknowledge that Dr. Bernton has more training and experience regarding the diagnosis and treatment of CRPS reveals a lack of objectivity by Dr. Raschbacher.

59. Third, although Dr. Raschbacher was admitted as an expert in occupational medicine based on his training and experience, he lacks any specialized training and experience in diagnosing CRPS and treating patients with CRPS. And he is not board certified in any area.

60. Fourth, during his deposition, Dr. Raschbacher was asked whether he is familiar with the *CRPS Guidelines*. In answering the question, he qualified his answers. For example, he testified that he is “reasonably familiar” with *Guidelines*. He qualified his answer even more by stating that the Guidelines are “extensive and have a lot of technical data.” As a result, the ALJ construes his answers to mean that he is not well versed in the foundation, interpretation, and application of the *CRPS Guidelines*.

61. Fifth, Dr. Raschbacher’s analysis is based on the rarity of the condition. As explained in his latest report, the primary foundation of Dr. Raschbacher’s analysis is based on these premises:

    i. CRPS is really rare.

    ii. Malingering is not as rare.

    iii. Thus, it is more likely Claimant is malingering and does not have CRPS.

The ALJ agrees with Dr. Raschbacher that the *CRPS Guidelines* are extensive and have a lot of technical information. For example, the CRPS Guidelines delineate to the various methods that can be used to help diagnose CRPS. And Dr. Raschbacher did not rely on those methods – as did Dr. Bernton. Moreover, after scouring the *CRPS Guidelines* in detail, the ALJ was unable to find any reference to the causation assessment relied on by Dr. Raschbacher. The *CRPS Guidelines* do not have any analytical framework to diagnose CRPS by comparing the rarity of the condition to the rarity of some other condition such as malingering. Instead, the *Guidelines* set forth concrete physical findings and testing that can be used to help diagnose CRPS. In the end, Dr. Raschbacher failed to adequately analyze the physical findings of other physicians and the test results performed by Dr. Bernton. He merely ignored the facts that did not support finding Claimant has CRPS and that her condition has worsened.

62. Sixth, in his IME, Dr. Raschbacher was asked whether anyone other than Dr. Watson and Dr. Bernton suggested testing for CRPS. After answering the question, he gratuitously added that not only did Dr. Bernton recommend the testing, but that Dr. Bernton "would do this testing in his office and bill for such." (Ex. B, p. 29) The ALJ infers that Dr. Raschbacher is insinuating that Dr. Bernton is only recommending the testing because he has a financial interest in making such a recommendation and not because the testing is medically reasonable and necessary. The ALJ, however, rejects making such an inference based on the evidence submitted in this matter.

63. In the end, the ALJ concludes that Dr. Raschbacher's "analysis" is more akin to name calling than the application of any expertise to the facts of this case. Thus, his observations, findings, and opinions are not found to be credible or persuasive.

64. On the other hand, Dr. Bernton is a qualified and expert in the diagnosis and treatment of CRPS. Moreover, his opinions are based on his physical evaluation of Claimant, his review of her medical records, and the results of his objective testing combined with his analysis of that information based on his expertise.

Ultimate Findings

65. The November 9, 2018 FAL was valid, and Claimant's case closed.

66. Based on the credible testimony of Claimant and the credible and persuasive testimony of Dr. Bernton, Claimant has suffered a change in medical condition. After Claimant was placed at MMI, her condition worsened, and she more fully developed chronic regional pain syndrome because of her work injury.

67. Based on the credible and persuasive testimony of Dr. Bernton, Claimant needs additional medical treatment to cure her from the effects of her work injury which has resulted in Claimant developing CRPS. The date Claimant's condition changed and worsened, and she needed additional medical treatment to cure her from the effects of her work injury, is January 15, 2019, the date Dr. Bernton evaluated Claimant and recommended testing for CRPS.

68. Claimant has also suffered a change in condition as it relates to her disability. Since being placed at MMI, Claimant has become more disabled because of the decreased strength in her right hand, contracture of her fingers, increased swelling, and overall decrease in function of her right upper extremity in general. The date Claimant suffered a change in condition as is relates to her disability is also found to be January 15, 2019.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

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

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether the November 9, 2018 Final Admission of Liability properly closed the claim.

The ALJ finds the case was properly closed. Section 8-43-203(2)(b)(II)(A) provides for the requirements of form and content for a valid FAL. These requirements are part of a statutory scheme designed to promote, encourage, and ensure prompt payment of compensation without the necessity of a formal administrative determination in cases not presenting a legitimate controversy. *Olivas–Soto v. Indus. Claim Appeals Office*, 143 P.3d 1178, 1179 (Colo.App.2006). In light of that intent, one purpose of the requirements is to put the claimant on notice of the exact basis of the admitted or denied liability so that the claimant can make an informed decision whether to accept or contest the final admission. *See Smith v. Myron Stratton Home*, 676 P.2d 1196, 1200 (Colo.1984) (an admission of liability serves to notify an injured worker of the legal ramifications associated with a claim). *Paint Connection Plus v. Indus. Claim Appeals Office*, 240 P.3d 429, 432 (Colo. App. 2010). Whether a FAL is valid is a jurisdictional question, and the inadequacy of a FAL may be raised at any time. *Reed. V. Demetre Painting,* W.C. No. 3-069-138 (January 15, 1993).

On November 9, 2018, a post-DIME Final Admission of Liability (FAL) was filed which contained a copy of the Division independent medical examiner's report. Page 1 of the FAL admits for permanent disability of 12% of the upper extremity and for a mental impairment of 0.00. In the overpayment area there is a "(see remarks)." Respondents also admitted for reasonable, necessary, and related medical treatment after MMI. On page 4 of the FAL in the remarks section there is a statement "Pinnacol Assurance admits for mental impairment rating of 2%. Therefore, mental impairment is calculated as follows: 2% x 400 weeks x 1.3 x 313.47 = $3,260.09. Temporary benefits paid as a result of mental impairment =$0. $3260.09 - $0 = $3260.09." As a result, the FAL is inconsistent regarding the admission for mental impairment benefits. But such inconsistency does not invalidate the FAL. Instead, it created a ripe issue for which Claimant could have objected to the FAL and filed an application for hearing to address the inconsistency. Claimant, however, did not do either in a timely manner. As a result, her case was properly closed pursuant to the FAL.

Even if the "recommendations" of Mr. Quinones were found to create an obligation for Respondents to file an amended FAL, the effect would be limited. Claimant would not be allowed to address MMI or medical benefits following a finding that a portion of the FAL was inaccurate and had to be amended since there was not a timely objection to the November 9, 2018 FAL.

This is like the situation in *Leewaye v. Harrison Sch. Dist. #2,* W.C. 4-649-073 (ICAO October 13, 2006) *remanded regarding other issues*. In that matter, the Division wrote asking for a correction on the final admission, and the respondents complied. Claimant had not filed a timely objection to the FA. Claimant then asserted that her objection to the corrected FA allowed her to pursue questions of PPD and MMI. The ICAO stated, "The Division's correspondence to Respondents noting that there appeared to be an arithmetical, typographical, or clerical error with regard to the calculation of temporary total disability benefits did not invite a *general* reopening of all issues admitted or denied in the…final admission. Rather, the Division sought a correction of the calculation regarding that specific issue and no other. Under these circumstances, the claimant's failure to object in a timely fashion to the first final admission closed all issues except temporary total disability, which was voluntarily reopened pursuant to the corrected final admission." *Id.* In reaching this conclusion, the *Leeway* Panel referred to the case of *Drinkhouse v. Mountain Board of Cooperative Education Services*, W.C. No. 4-368-354 (February 7, 2003) *affirmed Drinkhouse v. Industrial Claim Appeals Office*, (Colo. App. No. 03CA0438, March 4, 2004) (not selected for publication). The finding of *Drinkhouse* was that an amended FA admitting for *Grover* medical benefits did not reopen other issues contained in a prior FA, which was not objected to by the claimant. *See also Friedland v. Oracle America Inc.,* W.C. No. 4-833-682-001 (ICAO December 20, 2019) *(footnote 1); Craig v. Minimart, Inc.* W.C. No. 4-604-109 (ICAO June 14, 2011); *Silva v. Poudre School Dist.,* W.C. No. 4-651-643 (ICAO April 30, 2008). Here, if Respondents had followed Mr. Quinones' "recommendation" to clarify the statements regarding mental impairment, the amended FAL would only reopen the issue of credit for permanent mental impairment and whether Respondents were admitting for permanent mental impairment.

As a result, Claimant's challenge to a new FAL, if filed, would have been limited to mental impairment benefits. It would not serve to reopen the question of any other issue, including the DIME's impairment rating or MMI determination. For that, Claimant would need to carry her burden to prove a worsening of condition – as she did. As a result, the FAL dated November 9, 2018, properly closed Claimant's case and Claimant had to prove a worsening of condition.

II. Whether Claimant established that her compensable injury has worsened and that she is no longer at MMI.

Section 8-43-303(1), C.R.S., provides that an award may be reopened on the ground of, *inter alia*, change in condition. Claimant shoulders the burden of proving her condition has changed and her entitlement to benefits by a preponderance of the evidence. Section 8-43-201; *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). A change in condition refers either to change in the condition of the original compensable injury or to a change in Claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). Reopening is warranted if Claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Construction Co.,* 765 P.2d 1033 (Colo. App. 1988).

The question of whether Claimant met the burden of proof to establish a causal relationship between the industrial injury and the worsened condition is one of fact for determination by the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *City of Durango v. Dunagan, supra.* Similarly, the question of whether the disability and need for treatment were caused by the industrial injury or by an intervening cause is a question of fact. *Owens v. Industrial Claim Appeals Office, 49 P.3d 1187 (Colo. App. 2002).*

As found, Claimant established by a preponderance of the evidence that there has been a change in her work-related condition and that her condition is worse. As found, due to her work-related injury, Claimant developed CRPS and needs additional medical treatment to cure her from the effects of her work injury. The date Claimant's condition worsened, and she became entitled to medical treatment to cure her from the effects of her work-related injury is January 15, 2019, which is the date Dr. Bernton determined Claimant needed additional testing to determine whether Claimant developed CRPS and required additional treatment to cure her from the effects of her work injury.

III. Whether Claimant is entitled to reasonable and necessary medical treatment for CRPS.

On March 20, 2019, Claimant filed a Petition to Reopen her claim based on a change in medical condition. Then, on August 28, 2019, Claimant filed an Application for Hearing. Claimant endorsed the issue of Petition to Reopen Claim. Claimant did not, however, endorse medical benefits.

At hearing, and in her post hearing filing, Claimant made a request for a general award of medical benefits to treat her CRPS. Respondents, however, objected to the issue of medical benefits going forward.

After reviewing the evidence and making detailed findings, the ALJ found that an authorized treating physician has not prescribed any specific treatment – which is currently at issue - to cure Claimant from the effects of her work injury. The only doctor who has commented on additional treatment to cure Claimant from the effects of her work injury is Dr. Bernton.

Dr. Bernton, however, is not an authorized provider. Thus, the ALJ is without jurisdiction to order Respondents to pay for any specific treatment that is not prescribed by an authorized provider. *See Potter v. Grounds Service Company*, W.C. No. 4-935-523-04 (Aug. 15, 2018); *Torres v. City and County of Denver*, W.C. No. 4-917-329-03 (May 15, 2018); and *Short v. Property Management of Telluride*, W.C. No. 3-100-726 (May 4, 1995). Such opinions hold that an ALJ may not order a Respondent to pay for treatment that has not been prescribed by an authorized provider unless it is requested pursuant to a DIME and is an "essential test' as referenced by WCRP 11-5(D).

Thus, because the treatment suggested by Dr. Bernton to treat Claimant for her worsened condition has not been prescribed by an authorized treating physician, the ALJ is without jurisdiction to order Respondents to pay for such. Thus, Claimant's request for a general award of medical benefits to treat her CRPS is denied, without prejudice.

IV. Whether Claimant is entitled to temporary total and temporary partial disability benefits.

Section 8-43-303(1), C.R.S. provides that a worker's compensation award may be reopened based on a change in condition. In seeking to reopen a claim the claimant shoulders the burden of proving his condition has changed and that she is entitled to benefits by a preponderance of the evidence. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Osborne v. Industrial Commission*, 725 P.2d 63, 65 (Colo. App. 1986). A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082, 1084 (Colo. App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* W.C. No. 4-358-465 (ICAO, Oct. 25, 2006). Reopening is warranted if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Construction Co.,* 765 P.2d 1033 (Colo. App. 1988). The determination of whether a claimant has sustained her burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* W.C. No. 4-543-945 (ICAO, July 19, 2004).

As found, Claimant has also suffered a change in condition as it relates to her disability. Since being placed at MMI, Claimant has become more disabled based on the decreased strength in her right hand, contracture of her fingers, increased swelling, and overall decrease in function of her right upper extremity in general. The date Claimant suffered a change in condition as is relates to her disability is also found to be January 15, 2019.

Claimant thus has also established by a preponderance of the evidence that she is entitled to temporary disability benefits as of January 15, 2019. The record, however, is not clear, about the amount of net income Claimant earned from Zurvita since January 15, 2019. As a result, the ALJ is unable to award a specific amount of temporary disability benefits. Therefore, the issue regarding the amount of temporary disability benefits payable to Claimant as of January 15, 2019 and continuing is reserved.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. The November 9, 2018 Final Admission of Liability properly closed the claim. As a result, Claimant had to establish a worsening of her condition to obtain additional medical benefits to cure her from the effects of her work injury and to obtain additional temporary disability benefits.

2. Claimant's petition to reopen is granted as of January 15, 2019.

3. Claimant's work-related injury has resulted in CRPS and Claimant's condition has worsened since being placed at MMI. That said, because an authorized treating physician has not prescribed any specific treatment, the ALJ is without jurisdiction to award specific treatment for Claimant

4. Claimant is entitled to temporary disability benefits as of January 15, 2019. The record, however, is incomplete for the ALJ to award a specific amount of temporary disability benefits. The parties are therefore ordered to attend a settlement conference at the Division of Workers' Compensation in an to attempt to resolve the amount of temporary disability benefits payable to Claimant. If the parties cannot resolve the issue, either party may file an application for hearing to have the amount of temporary disability benefits payable to Claimant resolved by an ALJ.

5. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding

procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: January 11, 2021.

/s/ Glen Goldman
Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-122-992-001

ISSUE

1. Whether Claimant proved by a preponderance of the evidence that he sustained a compensable injury arising out of the course his employment with Employer on April 19, 2018.

2. Whether Claimant proved by a preponderance of the evidence that he is entitled to reasonable and necessary medical benefits arising out of his work-related injury on April 19, 2018.

3. Whether Claimant proved by a preponderance of the evidence that he is entitled to temporary disability benefits arising out of his work-related injury on April 19, 2018.

4. Whether Claimant proved by a preponderance of the evidence that he is entitled to an award for disfigurement.

5. Whether Claimant was entitled to elect his own authorized treating physician.

6. Claimant's average weekly wage.

7. Whether Claimant proved by a preponderance of the evidence an entitlement to penalties for:

    a. Employer's failure to maintain Workers' Compensation Insurance.

    b. Employer's failure to timely admit or deny liability;

    c. Employer's failure to pay temporary disability benefits

    d. Employer's failure to provide and furnish medical treatment; and/or

    e. Employer's failure to provide Claimant with a choice of physicians.

FINDINGS OF FACT

1. Claimant worked for Employer performing demolition, asbestos removal, and abatement. Employer is a staffing company that assigned Claimant to perform work for various other entities. On April 19, 2018, Claimant sustained a fracture of his left ankle while performing abatement work for Employer, subcontracted to [Redacted].

2. At the time of his injury, Claimant earned $22.00 per hour and worked approximately 40 hours per week.

3. Following the injury, Claimant notified Darrick B B[Redacted], owner of Employer, who instructed Claimant to go home and rest. After approximately 5-6 days, Claimant's condition had not improved, and Mr. B[Redacted] advised Claimant to seek treatment at Concentra. Employer did not provide Claimant with a choice of physicians to oversee Claimant's care.

4. Claimant went to Concentra on April 26, 2019 on instructions from Mr. B[Redacted]. (Ex. 11). Concentra performed x-rays, which revealed a Weber type B fracture of the left fibula with posterior and proximal displacement. (Ex. 11 and 13).

5. On May 8, 2018, Michael Zyzda, D.P.M., of Colorado Podiatry, performed an open reduction and internal fixation (ORIF) of Claimant's left fibula fracture at Summit View Surgery Center. (Ex. 14). Following surgery, Claimant was initially placed on crutches with no weight bearing. On May 31, 2018, Dr. Zyzda permitted Claimant to transition into a walking boot with "strict instructions" to remain non-weight bearing for an additional three weeks. (Ex. 14). On August 6, 2020, Dr. Zyzda opined that Claimant could progress to starting work "in the next week or so."

6. Claimant began physical therapy on July 2, 2018 at Concentra and attended approximately 28 physical therapy sessions between July 2, 2018 and October 15, 2018. In addition, Claimant underwent "work hardening" at Concentra. Claimant received care at Concentra through February 28, 2019.

7. On July 18, 2018, Jenelle Tittelfitz, PA-C, (Physician assistant for Amanda Cava, M.D.) authorized Claimant to return to work on modified duty, with restrictions, including remaining seated 90% of the time, no driving a company vehicle, no squatting, no kneeling, no walking on uneven terrain, and lifting/pushing/pulling restrictions of 10 pounds. (Ex. 11). On July 27, 2018, PA Tittelfitz noted that Claimant should elevate and ice his foot periodically, and that he should limit work to "office type work only, no construction sites. (Ex. 11).

8. On September 10, 2018, Claimant's medical restrictions were reduced to sitting 50% of the time, and no lifting over 20 pounds and no climbing ladders. (Ex. 11).

9. On November 3, 2018, an MRI of Claimant's left ankle was performed at Health Images. The MRI was interpreted as showing intermediate/high-grade tearing of the deltoid ligament, scarring of the lateral ankle ligaments, and edema in the sinus tarsi. (Ex. 12). Following the MRI, Ms. Tittelfitz referred Claimant back to Dr. Zyzda.

10. On December 19, 2018, Dr. Zyzda performed a celestone injection into Mr. [Claimant]'s sinus tarsi and switched Mr. [Claimant] from work hardening/physical therapy to pool therapy. (Ex. 11).

11. Claimant's work restrictions of sitting 50% of the time and no lifting more than 20 pounds remained in place until February 7, 2019, at which time Dr. Cava cleared Claimant to return to work full duty. (Ex. 11).

12. On February 28, 2019, Amanda Cava, M.D., placed Mr. [Claimant] at MMI, and recommended follow-up care with Dr. Zyzda 1-2 times over the following six to twelve months if needed. Dr. Cava assigned Claimant a 1% lower extremity impairment rating due to decreased range of motion in the hindfoot. (Ex. 11).

13. At the time of Claimant's injury, Employer did not have Workers' Compensation insurance. Employer paid a portion of Claimant's medical bills but paid no bills for treatment received after August 9, 2018. Claimant received bills from health care providers, including Health Images and Colorado Podiatry Consultants, P.C., including, but not limited to, those from Colorado Podiatry Consultants, PC, and Health Images. (Ex. 15).

14. On October 31, 2018, after receiving his first medical bills for his work-related injury, Claimant filed a Worker's Compensation claim. (Ex. 16). The Division subsequently determined Employer was uninsured. (Ex. 16).

15. As a result of his work-related injury, Claimant incurred medical expenses for reasonable and necessary treatment from Summit View Surgery Center, Concentra, Health Images and Colorado Podiatry totaling $35,939.10. Employer paid a total of $9.759.68, some of the balance was written off by providers, as discussed below.

16. Concentra billed $9,942.60 for Claimant's medical services and physical therapy. Employer or Mr. B[Redacted] paid Concentra $2,849.60 for Claimant's treatment. The remainder of Claimant's balance at Concentra was written off by Concentra as "bad debt." (Ex. 11).

17. Colorado Podiatry Consultants billed $3,004.00 for Claimant's podiatric treatment. Employer or Mr. B[Redacted] paid Concentra $1,984.25 for Claimant's treatment. Colorado Podiatry applied adjustments to payments for Claimant's treatment in the amount of $744.75, leaving an outstanding balance of $275.00. (Ex. 14).

18. Health Images billed $1,742.00 for Claimant's November 3, 2018 MRI of his left ankle. Neither Employer nor Mr. B[Redacted] has paid for Claimant's MRI. Claimant has an outstanding balance of $1,742.00 at Health Images and has received bills from Health Images. (Ex. 12).

19. Summit View Surgery Center billed $20,200.50 for Claimant's May 8, 2018 ankle surgery. Employer or Mr. B[Redacted] paid $4,925.80 to Summit View Surgery Center for Claimant's May 8, 2018 surgery. Summit View Surgery Center wrote off the balance of Claimant's medical expenses. (Ex. 13). (The Summit View Surgery Center invoice indicates "W/O Self Pay" which the ALJ infers was a write-off of Claimant's surgical expenses and not a payment).

20. Claimant testified he worked for various entities owned or controlled by Darrick B[Redacted], owner of Employer for four years, performing demolition, asbestos removal, and abatement. One such entity was named [Redacted]. Claimant testified that at [Redacted] he performed the same work as at Employer and both entities employed the same staff before his injury.

21. Claimant testified that in 2018, prior to his injury, he worked primarily for Employer, but he would also take side jobs at [Redacted], LLC and [Redacted], Inc. doing the same type of heavy labor work. From Employer, Claimant earned an average of $880 a week (40 hours per week at $22.00 per hour). (Ex. 5). Between January 1, 2018 and April 19, 2018, Claimant additionally earned a total of $833.25 for work performed for [Redacted], and $1651.00 from [Redacted]. The ALJ finds that Claimant's average weekly wage for all employment from January 1, 2018 until April 19, 2108 was $1,044.24. (Ex. 3, 4 & 5).

22. Claimant testified Employer periodically permitted Claimant to work and paid Claimant wages after his injury, sometimes for work performed, and other times without performing work, but did not otherwise provide temporary total or partial disability benefits. Claimant testified he requested his wage records from Darrick B[Redacted], but no records were provided. No evidence was offered or admitted that Employer offered Claimant modified employment in writing, although Claimant testified that he did return to work for Employer, doing office work periodically at approximately 8 hours per week at the rate of $15.00 per hour. Claimant also testified he then worked for [Redacted], another entity associated with Mr. B[Redacted], also performing office work at the rate of $15.00 per hour.

23. Employer is a Delaware corporation. On April 6, 2018, Employer filed a Statement Curing Delinquency with the Colorado Secretary of State listing its principal business address as 2851 S. Parker Road, Suite 1-1230, Aurora, CO 80014, and its mailing address as 4942 Altura Street, Denver, CO 80239. Darrick B[Redacted] was identified as the registered agent for Employer. (Ex. 8).

24. Claimant testified that sometime around October 2018, Employer switched its name to "[Redacted]," and after that time he no longer performed work for Employer but performed the same functions for [Redacted]. Claimant testified that [Redacted] and Employer operated out of the same office, had the same employees, and performed the same work. Claimant testified that both Employer and [Redacted] maintained offices at 5707 W. 6th Ave., Suite 211, Lakewood, CO 80214.

25. [Redacted], Inc. is a Colorado Profit Corporation incorporated on April 5, 2018. [Redacted]'s principal business address was 4942 Altura Street, Denver, CO 80239. [Redacted]'s registered agent is Venissa L. B[Redacted], whom Claimant testified is Darrick B[Redacted]'s daughter. Claimant testified that Mr. B[Redacted] was the owner of both Employer and [Redacted]. (Ex. 7).

26. From April 19, 2018 until December 31, 2018, Claimant was paid $12,015.50. by [Redacted] and Employer combined. (Ex. 1, Ex. 2, Ex. 19). In 2019, Claimant worked for [Redacted] until approximately January 25, 2019 and was paid $637.50. (Ex. 6 – YTD Regular Pay).

27. Claimant testified that he has a 3-inch surgical scar from his surgery on his left ankle with some discoloration. The scar visibly distinct from the surrounding skin and is located on the outside of Claimant's left ankle. (Ex. 21). The ALJ finds Claimant should be awarded $600.00 for disfigurement.

28. Correspondence related to Claimant's claim was sent to Employer c/o [Redacted] at 5707 W. 6th Ave, #211, Lakewood, CO 80214, including correspondence from Claimant, the Division, and the Office of Administrative Courts. (Ex. 9, 16, 17 and 18). Additionally, Claimant's counsel sent correspondence to Mr. B[Redacted] at 4942 Altura St., Denver, CO 80239. (Ex. 9). Claimant's counsel mailed copies of the exhibits for hearing by certified mail sent to Mr. B[Redacted] at 4942 Altura St., Denver, CO 80238 on October 1, 2020, was delivered and signed-for but the return receipt contains an incomplete date that appears to be either October 2 or October 22). A copy of the same letter sent to Employer c/o [Redacted] at 5707 W. 6th Ave, #211, Lakewood, CO 80217 was not claimed.

29. The Division sent notice of Claimant's claim to Employer on November 20, 2019 at 5707 W. 6th Ave., Suite 211, Lakewood, CO 80111, Employer has not submitted any documents to the Division of Workers' Compensation. (Ex. 16). On June 24, 2020, Claimant sent his Application for Hearing to Employer c/o [Redacted], 5707 W. 6th Ave., Suite 211, Lakewood, CO 80214 and also to Mr. B[Redacted] at Employer at 4942 Altura Street, Denver, CO 80239. (Ex. 17). On July 23, 2020, the Office of Administrative Courts sent a Notice of Hearing Employer c/o [Redacted], 5707 W. 6th Ave., Suite 211, Lakewood, CO 80214 and also to Mr. B[Redacted] at Employer at 4942 Altura Street, Denver, CO 80239. Employer has not responded to the Application for Hearing, appeared for hearing, or otherwise appeared in this matter.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential*

Insurance Co. v. Cline, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

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

COMPENSABILITY

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, … performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The Claimant must prove his injury arose out of the course and scope of his employment by a preponderance of the evidence. § 8-41-301(1)(b) & (c), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). "Arising out of" and "in the course of" employment comprise two separate requirements. *Triad Painting Co.*, 812 P.2d at 641.

An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d at 641; *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO, Nov. 21, 2014).

The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury "has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014). The mere fact that an injury occurs at work does not establish the requisite causal relationship to demonstrate that the injury arose out of the employment. *Finn v. Industrial Commission,* 437 P.2d 542 (Colo. 1968); *Sanchez v. Honnen Equipment Company,* W.C. No. 4-952-153-01 (ICAO, Aug. 10, 2015).

Claimant has established by a preponderance of the evidence that he sustained a compensable injury arising out of the course of his employment with Employer on April 19, 2018. The evidence establishes that Claimant sustained a left ankle fracture while performing abatement work for Employer on April 19, 2018.

MEDICAL BENEFITS

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). Our courts have held that in order for a service to be considered a "medical benefit" it must be provided as medical or nursing treatment, or incidental to obtaining such treatment. *Country Squires Kennels v. Tarshis,* 899 P.2d 362 (Colo. App. 1995). A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Industrial Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO, May 31, 2006). A service is incidental to the provision of treatment if it enables the claimant to obtain treatment, or if it is a minor concomitant of necessary medical treatment. *Country Squires Kennels v. Tarshis,* 899 P.2d 362 (Colo. App. 1995)*; Karim al Subhi v. King Soopers, Inc.,* W.C. No. 4-597-590, (ICAO. July 11, 2012). The determination of whether services are medically necessary, or incidental to obtaining such service, is a question of fact for the ALJ. *Bellone v. Industrial Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO, May 31, 2006).

Claimant has established by a preponderance of the evidence that the treatment he received from Concentra, Summit View Surgery Center, Health Images and Colorado Podiatry Consultants was work-related, reasonable, and necessary to cure or relieve the effects of the Claimant's work-related injury. The evidence demonstrates that Claimant has outstanding balances at Health Images ($1,742.00) and Colorado Podiatry ($275.00), totaling $2,017.00 , and $7,092.97 was written off by Concentra as "bad debt." Employer is liable for all medical expenses incurred from these providers arising out of his April 19, 2018 work injury.

AUTHORIZED TREATING PHYSICIAN

Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires that respondents must provide injured workers with a list of at least four designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. Section 8-43-404(5)(a)(I)(A), C.R.S. states that, if the employer or insurer fails to provide an injured worker with a list of at least four physicians or corporate medical providers, "the employee shall have the right to select a physician." W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, "the employer shall provide the injured worker with a written list of designated providers." W.C.R.P. Rule 8-2(E) additionally provides that the remedy for failure to comply with the preceding requirement is that "the injured worker may select an authorized treating physician of the worker's choosing." An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. industrial Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006).

If upon notice of the injury the employer timely fails to designate an ATP, the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987). The employer's obligation to appoint an ATP arises when it has some knowledge of the accompanying facts connecting an injury to the employment such that a reasonably conscientious manager would recognize the case might result in a claim for compensation. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006).

Claimant has established by a preponderance of the evidence that Employer did not provide Claimant with a choice of four physicians after receiving notice of Claimant's injury. Consequently, Claimant may select an authorized treating physician of his choosing.

AVERAGE WEEKLY WAGE

Section 8-42-102(2), C.R.S. (2020) requires the ALJ to determine a Claimant's AWW based on his or her earnings at the time of injury. The ALJ must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. Pizza *Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). The objective when calculating the AWW is to arrive at a "fair approximation of the claimant's wage loss and diminished earning capacity." *Campbell v. IBM Corp*., 867 P.2d 77, 82 (Colo. App. 1993).

Claimant has established by a preponderance of the evidence that his average weekly wage was $1,044.24. The ALJ finds that this is a reasonable and fair approximation of Claimant's wage loss and diminished earning capacity.

TEMPORARY DISABILITY BENEFITS

To prove entitlement to Temporary Total or Partial Disability (TTD/TPD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* §§ 8-42-103 (1)(g), 8-42-105(4); *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD/TPD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

Section 8-42-106(1), C.R.S., provides for an award of Temporary Partial Disability (TPD) benefits based on the difference between the claimant's AWW at the time of injury and the earnings during the continuance of the temporary partial disability. In order to receive TPD benefits the claimant must establish that the injury has caused the disability and consequent partial wage loss. Section 8-42-103(1), C.R.S.; *Safeway Stores, Inc. v. Husson,* 732 P.2d 1244 (Colo. App. 1986) (temporary partial compensation benefits are designed as a partial substitute for lost wages or impaired earning capacity arising from a compensable injury).

Claimant has established by a preponderance of the evidence an entitlement to TTD/TPD benefits. The evidence demonstrates Claimant sustained a disability as a result of his work-related left ankle injury that lasted more than three work shifts and resulted in an actual wage loss.

Claimant was placed on significant work restrictions following his injury, including sitting 90% of the time, later reduced to 50% of the time and, for a time office work only. These restrictions prevented Claimant from performing his prior work until February 28, 2019, when restrictions were removed, and he was placed at MMI. §8-42-105(3)(a)-(d), C.R.S. Although Claimant did perform some modified work during this period of time, Claimant did not receive a written offer of modified work from Employer and received some wages from Employer, he was not compensated as required by the Act.

Claimant is entitled to temporary partial and/or total disability benefits from April 19, 2018 until February 28, 2019, a period of 45 weeks and one day. Because Employer refused to produce Claimant's wage records, the ALJ estimates the Claimant's disability benefits as follows: Claimant's AWW of $1,044.24 entitles Claimant to TTD/TPD benefits of $696.16 per week. Claimant is entitled to temporary benefits of $31,426.65 (i.e., $696.16 x 45 1/7 = $31,426.65), less the wages Claimant received from Employer during this time period of $12,653.00. Claimant is entitled to temporary disability benefits of $18,773.65. (i.e., $31,426.65 – $12,653.00 = $18,773.65).

DISFIGUREMENT

Section 8-42-108(1) provides that a claimant is entitled to additional compensation if he is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." As found, Claimant has sustained disfigurement as a direct and proximate result of his work injury, consisting a three -inch scars on his left ankle. Claimant should be awarded $600.00 for disfigurement.

PENALTIES

Claimant seeks penalties for multiple alleged violations of the Workers' Compensation Act. Whether statutory penalties may be imposed under § 8-43-304(1), C.R.S. involves a two-step analysis. The statute provides for the imposition of penalties of up to $1000 per day where the insurer "violates any provision of article 40 to 47 of [title 8], or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or the panel, for which no penalty has been specifically provided, or fails, neglects or refuses to obey any lawful order made by the director or panel…" Thus, the ALJ must first determine whether the insurer's conduct constitutes a violation of the Act, a rule, or an order. Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational argument based in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* W.C. No. 4-187-261 (ICAO, Aug. 2, 2006). There is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

The question of whether the insurer's conduct was objectively reasonable ordinarily presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005); *see also Pant Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). A party makes a *prima facie* showing of unreasonable conduct by proving that an insurer violated a rule of procedure. *Pioneers Hospital v. Industrial Claim Appeals Office, supra*. If the claimant makes such *prima facie* showing the burden of persuasion shifts to the respondents to show their conduct was reasonable under the circumstances. *Pioneers Hospital v. Industrial Claim Appeals Office, supra, Human Resource Co. v. Industrial Claim Appeals Office*, 984 P.2d 1194 (Colo. App. 1999). Here, Employer did not appear or otherwise present evidence demonstrating that its conduct or failure to provide benefits was reasonable.

When penalties are imposed under § 8-43-304(1), C.R.S., such penalties may include" a fine of not more than one thousand dollars per day for each offense, to be apportioned, in whole or part, at the discretion of the director or administrative law judge, between the aggrieved party and the Colorado uninsured employer fund created in section 8-67-105; except that the amount apportioned to the aggrieved party shall be a minimum of twenty-five percent of any penalty assessed."

Failure to Maintain Insurance

Claimant seeks penalties under § 8-43-408(1), C.R.S. Claimant's Position Statement argues for a penalty of fifty percent. Prior to July 1, 2017, Section 8-43-408(1), C.R.S., provided that in cases where the employer is subject to the provisions of the Colorado Workers' Compensation Act and has not complied with the insurance provisions required by the Act, the compensation or benefits payable to the claimant were to be increased fifty percent. Effective July 1, 2017, Section 8-43-408, C.R.S. was amended and the language regarding a fifty percent increase in claimant benefits was removed.

The version of Section 8-43-408 C.R.S. in effect at the time of Claimant's April 19, 2019 work injury states that in cases where the employer is subject to the provisions of the Colorado Workers' Compensation Act and has not complied with the insurance provisions required by the Act, the employer is subject to a penalty and additional twenty-five percent of the benefits ordered, which is payable to the Colorado uninsured employer fund.

Claimant has demonstrated by a preponderance of the evidence that the Employer did not have workers' compensation coverage at the time of Claimant's April 19, 2018 work injury. Employer failed to appear or present evidence to indicate that Employer's failure to maintain insurance was reasonable. For its failure to obtain and maintain workers' compensation insurance, the Employer shall pay penalties of $4,693.41 to the Colorado uninsured employer fund; (which is an amount equal to 25% of the total unpaid temporary disability benefits owed). Employer shall also pay penalties of $504.25 to the Colorado uninsured employer fund (which is an amount equal to 25% of the total unpaid, outstanding medical benefits of $2,107.00).

Failure to File First Report of Injury

The Act and WCRP require an employer to file a First Report of Injury with the Division within ten days after notice or knowledge of a lost-time injury to an employee in excess of three shifts or calendar days. §8-43-101(1), C.R.S. and Rule 5-2(B)(2). Claimant was injured on April 19, 2018, and Employer was obligated to file a First Report of Injury on or about May 2, 2018. To date, Employer has not filed First Report of Injury and the violation is continuing. (Ex. 16); See § 8-43-304(1), C.R.S. Employer failed to appear or present evidence to indicate that Employer's failure file a First Report of Injury was reasonable. The court finds that a penalty of $10 a day is appropriate, which amounts to $9,650.00 (965 days from May 22, 2018 until the date of this order), pursuant to § 8-43-101(1), C.R.S. This penalty is apportioned 50% to the uninsured employer fund and 50% to Claimant. Employer shall pay $4,825 to uninsured employer fund and $4,825.00 to Claimant.

Failure to Admit or Deny

The employer shall state whether liability is admitted or contested within 20 days after the date the employer's First Report of Injury is filed with the Division. § 8-43-203(2)(a), C.R.S. If an Employer's First Report of Injury should have been filed with the Division, but was not, the insurer's statement concerning liability is considered to be due within 20 days from the date the Employer's First Report of Injury should have been filed. W.C. Rules 5-2(c). An employer is liable for a penalty of up to one day's compensation for each day that the employer failed to notify, not to exceed 365 days' compensation. § 8-43-203(2)(a), C.R.S. Section 8-43-203(2)(a) provides that "[f]ifty percent of any penalty paid pursuant to this subsection (2) shall be paid to the subsequent injury fund created in section 8-46-101, and fifty percent to claimant."

Employer was aware of Claimant's work-related injury on April 19, 2018. Therefore, an admission or denial was due to the Division by May 22, 2018, at the latest. Employer has not admitted or denied liability, although Employer received a letter from the Division of Workers' Compensation regarding the claim on December 23, 2019, and

Employer or Mr. B[Redacted] paid a portion of Claimant's medical expenses. Employer is liable for a penalty of up to one day's compensation from May 23, 2018 forward in accordance with § 8-43-203(2)(a), C.R.S. This amounts to a total penalty of $54,300.48 for the maximum 365-day period (AWW x 52 weeks). Employer shall pay $27,150.24 to the subsequent injury fund, and $27,150.24 to Claimant.

Failure to Timely Pay Indemnity Benefits

In accordance with § 8-42-105(2)(a) and § 8-42-106, an employer "shall [pay compensation] at least once every two weeks" during the time of total or partial temporary disability. The ALJ finds and concludes that Employer failed to issue timely TTD or TPD benefits when Claimant was restricted from work from April 19, 2018 until February 7, 2019. Respondent failed to appear or present evidence demonstrating that its failure to timely pay was reasonable and refused to provide Claimant his payroll records. For this failure to pay timely benefits, the ALJ finds that a penalty of $10 a day is appropriate, which amounts to $9,650.00 (965 days from May 22, 2018 until the date of this order), pursuant to § 8-43-304(1), C.R.S. This penalty is apportioned 50% to the uninsured employer fund and 50% to Claimant. Employer shall pay $4,825 to Colorado uninsured employer fund and $4,825.00 to Claimant.

Failure to Furnish Medical Treatment

Section 8-42-101, C.R.S., requires every employer to furnish such medical treatment as may be reasonably needed at the time of the injury and thereafter during the disability to cure and relieve the employee from the effects of the injury. Although Employer or Mr. B[Redacted] paid some of Claimant's medical bills, Employer paid no medical expenses after August 9, 2018, resulting in $9,109.97 in unpaid medical bills which includes $2,017.00 unpaid outstanding amounts billed directly to Claimant, and the balance being written off by the provider as bad debt. For that reason, the Court imposes a penalty of $2,017.00 for Respondent's failure to furnish medical treatment. § 8-43-304(1), C.R.S. This penalty is apportioned 50% to the uninsured employer fund and 50% to Claimant. Employer shall pay $1,008.50 to Colorado uninsured employer fund and $1,008.50 to Claimant.

Statutory Interest

Pursuant to C.R.S. §8-43-410(2), all benefits due, not paid when due, bear interest at the rate of 8% per annum. Under § 8-43-410, interest on an award of compensation is a matter of statutory right and applies automatically on the date payment is due. *Beatrice Foods Co. v. Padilla*, 747 P.2d 685 (Colo.App.1987). The legislative purpose underlying the award of such interest is not to impose a penalty or award an additional benefit, but merely to secure to claimants the full value of the benefits to which they are entitled. See *Travelers Insurance Co. v. Savio*, 706 P.2d 1258 (Colo. 1985).

Requirement for Posting Bond

Pursuant to Section 8-43-408(2), C.R.S.: "In all cases where compensation is awarded under the terms of this section, the director or an administrative law judge of the division shall compute and require the employer to pay to a trustee designated by the director or administrative law judge an amount equal to the present value of all unpaid compensation or benefits computed at the rate of four percent per annum; or, in lieu thereof, such employer, within ten days after the date of such order, shall file a bond with the director or administrative law judge signed by two or more responsible sureties to be approved by the director or by some surety company authorized to do business within the state of Colorado. The bond shall be in such form and amount as prescribed and fixed by the director and shall guarantee the payment of the compensation or benefits as awarded. The filing of any appeal, including a petition for review, shall not relieve the employer of the obligation under this subsection (2) to pay the designated sum to a trustee or to file a bond with the director or administrative law judge." The term "compensation" refers to disability benefits. *In Re of Shier,* W.C. No. 4-573-910 (ICAP, Dec. 15, 2005). In this claim, it has been determined that Respondent was uninsured at the time of Claimant's injury; thus, the provisions of Section 8-43-408(2) are mandatory.

PIERCING THE CORPORATE VEIL

Claimant seeks to impose joint and several liability upon two non-parties – Darrick B[Redacted] and [Redacted], Inc. – for the liabilities of Employer, by piercing the corporate veil of Employer based on the theory that Mr. B[Redacted] and/or [Redacted] are alter egos of Employer. "In workers' compensation proceedings, an ALJ may disregard the corporate form and impose personal liability on corporate shareholders if they used the corporate form as a mere instrumentality for the transaction of their own business, or for the purpose of defeating or evading an important legislative policy, or to perpetrate a fraud or wrong on another." *In re Quick*, W.C. No. 4-365-810 (ICAP June 20, 2000). *Micciche v. Billings*, 727 P.2d 373 (Colo. App. 1986); see also § 8-43-207(1), C.R.S. Colorado also permits "horizonal piercing" which permits the imposition of liability of one entity against a "sister entity" that shares common ownership if the corporate veil is pierced for each corporate entity. *Dill v. Rembrandt Group, Inc.*, 2020 COA 69, 18CA1716 (Colo. App. April 16, 2020). The ALJ does not reach the issue of whether Claimant has established the legal elements of piercing the corporate veil against either Mr. B[Redacted] or [Redacted] because 1) the ALJ does not have personal jurisdiction over Mr. B[Redacted] or [Redacted]; and 2) neither Respondent, Mr. B[Redacted] nor [Redacted] has been provided adequate notice of the claim for piercing the corporate veil.

"A court's jurisdiction consists of two elements: jurisdiction over the parties, or personal jurisdiction, and jurisdiction over the subject matter of the issue to be decided, or subject matter jurisdiction." *In re Madison*, W.C. No. 4-807-513 (ICAP, July 11, 2011), *citing Leewaye v. Industrial Claim Appeals Office*, 178 P.3d 1254 (Colo. App. 2007). "Due process protections provide that the ALJ does not have personal jurisdiction over a party unless the party has been provided fair and adequate notice of proceedings which may result in an order for the payment of benefits." *In re Albert*, 4-368-088 (ICAP, Jun. 3, 1999); *In Re Guzman*, supra; *Romone Ford v. Katzson Bros., Inc.*, 7-790-320 (ICAP, June 16, 2009) (additional citations omitted); *see also In Re Ramos*, WC No. 4-309-179 (ICAP, Jan. 12, 1999) ("The fundamental tenets of due process require the parties be apprised of the evidence to be submitted or considered and afforded a reasonable opportunity in which to confront adverse witnesses and present evidence in support of their position.")

The ALJ does not have personal jurisdiction over Mr. B[Redacted] or [Redacted] because they have not been named as parties to this hearing . A court may not order the piercing of the corporate veil against persons or entities who are not parties to the action before the court. *See e.g.*, *Sheffield Services Co. v. Trowbridge*, 211 P.3d 714, (Colo. App. 2009). As noted above, due process requires that "all parties receive notice of administrative proceedings that could result in the deprivation of a significant property interest." *Romone Ford, supra*. Although documents were sent to Mr. B[Redacted] and [Redacted], neither Mr. B[Redacted] nor [Redacted] are identified as respondents in the pleadings or in the certificates of service associated with those pleadings. Claimant's Application for Hearing names Employer "c/o [Redacted]," but does not identify [Redacted] as a party. Mr. B[Redacted] is not listed in the caption or otherwise identified as a party. Because neither Mr. B[Redacted] nor [Redacted] are named parties in this action the ALJ lacks personal jurisdiction over them.

Further, even if both Mr. B[Redacted] and [Redacted] were named in the Application for Hearing, they would be deprived due process because the Application for Hearing does not provide notice that Claimant seeks to pierce the corporate veil. Neither Employer, Mr. B[Redacted] nor [Redacted] was provided adequate notice that the issue of alter ego liability or "piercing the corporate veil" would be adjudicated at hearing. Claimant's Application for Hearing endorses compensability, medical benefits, authorized treating provider, reasonably necessary, Average Weekly Wage, Disfigurement, TTD, TPD, permanent partial disability benefits and seven categories of penalties. Claimant's Application for Hearing does not include any statement that the ALJ would be asked to determine that Mr. B[Redacted] or [Redacted] would liable under any legal theory. Nor is the issue raised in Claimant's Case Information Sheet. None of the pleadings raise an issue that could reasonably be construed as a claim that Employer's corporate veil should be pierced, and liability imposed upon Mr. B[Redacted] or [Redacted].

Because the ALJ does not have jurisdiction over claims against Based on the foregoing, Claimant's claim for the imposition of liability against Darrick B[Redacted] and [Redacted], Inc., is denied and dismissed without prejudice.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable injury to his left ankle arising out of the course of his employment with Employer on April 19, 2018. Employer is liable for Claimant's injury-related medical treatment.

2. Claimant is entitled to reasonable and necessary medical benefits arising out of his work-related injury of April 19, 2018. Claimant's treatment at Concentra, Colorado Podiatry,

Summit View Surgery Center, and Health Images was reasonable, necessary, and related to his April 19, 2018 work-injury, and Employer shall pay for all associated costs of such treatment, subject to the Division of Workers' Compensation Fee Schedule.

3. Claimant is entitled to select a new authorized treating physician.

4. Claimant's average weekly wage is $1,044.24.

5. Claimant's claim for temporary disability benefits is granted. Employer shall pay to Claimant temporary disability benefits for the period of April 19, 2018 through February 7, 2019 in the amount of $18,773.65, representing 45 1/7 weeks of temporary disability payments, less the amounts previously paid to Claimant.

6. Claimant is awarded $600.00 for disfigurement.

7. Employer shall pay penalties pursuant to section 8-43-408(5), C.R.S. (for Employer's failure to maintain insurance), in the amount of $5,197.66 to the Colorado uninsured employer fund; (which is an amount equal to 25% of the total unpaid temporary disability benefits and 25% of outstanding unpaid medical benefits).

8. Employer shall pay penalties pursuant to section 8-43-203(2)(a), C.R.S., (for Employer's failure to admit or deny liability) in the aggregate amount of amount of $54,300.48. Employer shall pay 50% ($27,150.24) of said penalty to the Colorado Subsequent Injury Fund, and 50% ($27,150.24) to Claimant.

9. Employer shall pay penalties pursuant to section 8-43-304 (1) (a), C.R.S., (for Employer's failure file a First Report of Injury, failure to timely pay indemnity benefits and failure to furnish medical treatment) in the aggregate amount of $11,667.00. Employer shall pay 50% ($5,833.50) of said penalty to the Colorado uninsured employer fund 50% ($5,833.50) to Claimant.

10. Respondent shall pay statutory interest at the rate of 8% per annum on compensation benefits not paid when due.

11. In lieu of payment of the above compensation, penalties and benefits to Claimant, Respondent shall

    a. Deposit the sum of $100,188.54 adding 4% per annum with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation/Trustee. The check shall be mailed to the Division of Workers' Compensation, P.O. Box 300009, Denver, Colorado 80203-0009, Attention: Trustee; or

    b. File a bond in the amount of $100,188.54 with the Division of Workers' Compensation within ten (10) days of the date of this order:

        i. Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation; or

        ii. Issued by a surety company authorized to do business in Colorado. The bond shall guarantee payment of the compensation and benefits awarded.

12. IT IS FURTHER ORDERED, Respondent shall notify the Division of Workers' Compensation of payments made pursuant to this order.

13. IT IS FURTHER ORDERED: That the filing of any appeal, including a petition for review, shall not relieve the employer of the obligation to pay the designated sum to a trustee or to file the bond. § 8-43-408(2), C.R.S.

14. Claimant's request that the ALJ pierce the corporate veil of Employer and impose joint and several liability upon Mr. B[Redacted] and/or [Redacted], Inc., is denied and dismissed without prejudice.

15. All matters not determined herein are reserved for future determination.

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

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

DATED: January 11, 2021

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-103-760-002

ISSUE

1. Whether Claimant has proven by a preponderance of the evidence that the left-hand carpal tunnel release surgery requested by In Sok Yi, M.D., is reasonable, necessary, and related to the January 14, 2019 work injury.

FINDINGS OF FACT

1. On January 14, 2019, Claimant sustained an admitted work injury arising out of the course of his employment with Employer when he slipped and fell on ice onto his left side.

2. Claimant reported his injury to Michael M[Redacted], Employer's safety claims manager. Mr. M[Redacted] testified at hearing that he asked Claimant whether he wanted to go to the clinic, and Claimant declined. Three days later, Claimant requested to see a medical provider due to increasing shoulder pain.

3. On January 23, 2019, Claimant saw Julie Parsons, M.D. Claimant completed a pain diagram indicating symptoms in his left shoulder/trapezius region and the end of his left thumb. Claimant reported that he slipped on ice and landed on his left shoulder. Dr. Parson's noted that Claimant reported muscle aches and joint pain but no swelling, Claimant reported neck pain with left shoulder pain with "NT" (numbness and tingling) in the left arm. On examination, Dr. Parsons noted an essentially normal musculoskeletal examination, excepted for tenderness and limited ROM. Claimant's neck examination was positive for pain with motion. Dr. Parson's diagnosed Claimant with a neck sprain and contusion of the left shoulder. Claimant was referred for MRIs of the neck and left shoulder. In her Physician's Report of Worker's Compensation Injury, Dr. Parsons identified Claimant's work-related medical diagnoses as "Fall: cervical strain; radiculopathy; L shoulder contusion; strain." (Ex. D).

4. Claimant returned to Dr. Parsons on January 30, 2019. Claimant reported muscle aches and joint pain, that his neck was stiff and that his left shoulder had limited range of motion and pain. Claimant did not report any symptoms relating to his hands or wrists. Dr. Parsons reviewed Claimant's cervical MRI which was negative for acute injury but showed degenerative changes. Claimant's left shoulder MRI was interpreted as showing a partial biceps tear and labral tear. Dr. Parsons referred Claimant for orthopedic evaluation of the left shoulder. (Ex. D).

5. On February 12, 2010, Claimant saw Dr. Parsons again. Claimant reported continued pain in his left shoulder and that he was awaiting surgery. The medical record does not indicate that Claimant reported any symptoms in his hand or wrist. Dr. Parsons added "full thickness rotator cuff tear" to Claimant's list of diagnoses. (Ex. D).

6. On April 2, 2019, Claimant underwent arthroscopic repair of his left rotator cuff, degenerative glenoid labrum tear and partial tear of his left biceps tendon performed by Mitchel Robinson, M.D. (Ex. B).

7. On April 9, 2019, Claimant saw Dr. Parsons for a post-surgical follow-up visit. Claimant reported tenderness and limited range of motion in his left shoulder and pain with motion in his neck. The medical record does not indicate that Claimant reported any symptoms in his hand or wrist. (Ex. D).

8. On May 6, 2019, Claimant returned to Dr. Parsons. The medical record does not indicate that Claimant reported any symptoms in his hand or wrist. (Ex. D).

9. On June 12, 2019, Claimant saw Jonathan Salamat, PA-C of Panorama Orthopedics in follow up from his April 2, 2019 shoulder surgery. Claimant complained of aches and pains radiating from his elbow to his thumb. On examination, PA Salamat found Claimant's left elbow was tender to palpation at the lateral epicondyle, pain with resisted wrist extension radiating into the first dorsal compartment of the hand. PA Salamat prescribed a topical NSAID. (Ex. G).

10. On June 17, 2019, Claimant saw Dr. Parsons. Claimant's chief complaints were shoulder and neck pain. In her review of systems, Dr. Parsons noted "L thumb" but no other notations related to Claimant's hand or wrist. (Ex. D).

11. On July 11, 2019, Claimant saw Mitchel Robinson, M.D. for a post-surgical follow up examination. Claimant reported some subjective numbness and tingling from his elbow to thumb. Dr. Robinson recommended Claimant continue physical therapy. (Ex. G).

12. On July 18, 2019, Claimant reported to Dr. Parsons numbness in the left thumb, lateral forearm and lateral hand characterized as "constant since surgery." Dr. Parsons referred Claimant to Roberta Anderson-Oeser, M.D., for evaluation of Claimant's complaints of in his left arm "in light of the degenerative [cervical spine] changes on MRI and the constant [numbness and tingling] and pain in left forearm, hand, and thumb since surgery. Dr. Parsons added "paresthesia of skin" to Claimant's diagnosis list. (Ex. D).

13. On August 22, 2019, Claimant saw Dr. Parsons. Claimant reported "numbness and tingling in arm swelling comes and goes." Claimant also reported "NT [numbness and tingling] getting worse with weaker grip [left] hand." On examination, Dr. Parsons noted that Claimant's left grip was weaker, and he had decreased sensation to light touch of the left hand. (Ex. D).

14. On August 22, 2019, Claimant also saw Dr. Robinson. Claimant continued to complain of aches and pains from his elbow to his thumb and reported small improvements. Dr. Robinson noted that Claimant was doing well following shoulder surgery and discussed the possibility of a cortisone injection (presumably for Claimant's elbow to thumb symptoms). (Ex. D).

15. On October 2, 2019, Claimant saw Dr. Anderson-Oeser, and reported left forearm and hand pain and paresthesias and left leg pain and paresthesias. Claimant reported to Dr. Anderson-Oeser that at the time of his initial evaluation with Dr. Parsons, he had pain in his left shoulder, left hip, and left knee. Claimant also reported to Dr. Anderson-Oeser that prior to his left shoulder surgery, "he was having numbness in his left hand, but the symptoms became more pronounced postoperatively." Claimant also reported weakness in his left hand and dropping objects. Claimant reported pain from the left side of the neck into the left hand, and numbness, tingling and swelling into the left hand. Claimant attributed his symptoms to his work injury. On examination, Dr. Anderson-Oeser found a mildly positive Tinel's over the median nerve and the wrist on the left, and negative over the radial nerves and ulnar nerves. She noted no atrophy of the Claimant left forearm or hand muscles. (Ex. E).

16. Dr. Anderson-Oeser performed and EMG/NCS test which was abnormal. She indicated that Claimant's findings were consistent with a left median neuropathy at the wrist, mild to moderate in severity. She opined that Claimant "may have sustained a [] traumatic injury to the left median nerve when he fell and landed on his left side." She recommended a steroid injection into the left carpal tunnel for therapeutic purposes and advised Claimant to wear a resting hand splint at night. She also provided Claimant a prescription for massage therapy and a prescription for a trial of gabapentin to address neuropathic pain. (Ex. E).

17. On October 3, 2019, Claimant saw Dr. Robinson for a six-month post-operative visit. Claimant complained of continuing aches and pains radiating from his elbow to his thumb. Dr. Robinson did not opine as to the cause of Claimant's elbow to thumb symptoms. (Ex. G).

18. On October 8, 2019, Dr. Parsons saw Claimant and noted abnormal sensation and "+ CTC" in her neurologic examination. The ALJ infers that "CTC" is a reference to "carpal tunnel canal." Dr. Parson's diagnosis remained unchanged from previous diagnoses. (Ex. D).

19. On November 4, 2019, Claimant underwent an IME performed by Gary Zuehlsdorff, M.D. Dr. Zuehlsdorff's report was not offered or admitted into evidence, but portions of the report are described in reports from Dr. Anderson-Oeser and IME physician Dr. Paz. Claimant reported to Dr. Zuehlsdorff that he thought his left arm was extended when he fell on January 14, 2019. Dr. Zuehlsdorff opined that Claimant's left carpal tunnel syndrome was related to his work injury. (Ex. B).

20. On November 5, 2019, Claimant saw Dr. Anderson-Oeser and reported experiencing "aching, stabbing, burning, pins and needle sensation throughout the left upper extremity." In addition, Claimant complained of similar symptoms in his left lower back, buttocks, left foot, and leg. He indicated that his reported left leg symptoms had not been addressed because the focus had been on his left shoulder. He reported being unable to tolerate gabapentin for nerve pain and was given a prescription for trazodone for sleep and neuropathic pain. Dr. Anderson-Oeser recommended a steroid injection, splinting and occupational therapy for Claimant's left arm symptoms. (Ex. E).

21. On November 18, 2019, Claimant reported to Dr. Parsons experiencing numbness (hypesthesia), muscle aches and joint pains, pain on motion of his neck. Dr. Parsons added "delayed physical recovery" "other general symptoms and signs" to Claimant's list of diagnoses. (Ex. D).

22. On December 3, 2019, Claimant saw Dr. Anderson-Oeser and reported similar symptoms as his November 5, 2019 visit. Dr. Anderson-Oeser indicated that Claimant had undergone an IME with Dr. Zuehlsdorff, who recommended referral to a hand surgeon. Dr. Anderson-Oeser referred Claimant to In Sok Yi, M.D., to evaluate whether Claimant is a surgical candidate for decompression of the left median nerve at the wrist. (Ex. E).

23. Claimant attended visits (either in person or via telemedicine) with Dr. Anderson-Oeser on January 2, 2020 and January 30, 2020, March 4, 2020, April 2, 2020, April 30, 2020, May 28, 2020, and June 16, 2020 reporting no change in his symptoms. On January 30, 2020, Dr. Anderson-Oeser indicated that Claimant could return to work without restrictions. On March 4, 2020, Claimant completed a pain diagram with this visit on which he indicated pain from the left side of his neck, through his shoulder arm and hands, left hip, thigh, knee, calf, and foot. (Ex. E).

24. On February 11, 2020, Claimant saw In Sok Yi, M.D., on referral from Dr. Anderson-Oeser for evaluation of carpal tunnel symptoms. Claimant reported that he developed numbness and tingling "almost immediately after the fall" on January 14, 2019. Dr. Yi diagnosed Claimant with carpal tunnel syndrome of the right wrist. (The ALJ infers that Dr. Yi reference to the "right" wrist is an error and intended to refer to Claimant's left wrist). Dr. Yi performed an injection of Claimant's left carpal tunnel. He noted that if Claimant continued to have symptoms after six weeks, Dr. Yi would recommend a surgical release. (Ex. F).

25. On March 25, 2020, Claimant saw Dr. Yi's physician assistant, Timothy Johnson, PA-C. Claimant reported that following the injection performed by Dr. Yi on February 21, 2020, he had almost complete resolution of his symptoms for approximately one week. Claimant reported in the interim, his symptoms had returned to baseline as before the injection. PA Johnson recommended Claimant undergo a left endoscopic carpal tunnel release. A request for authorization of the recommended surgery was sent to Respondents. (Ex. F).

26. On April 8, 2019, Allison Fall, M.D., performed a Rule 16 record review requested by Respondents. Dr. Fall opined that Claimant's medical records do not support that Claimant sustained a traumatic injury to his median nerve. Dr. Fall opined that the Claimant's findings were consistent with a history of diabetes, and that the surgery recommended by Dr. Yi is not medically reasonable, necessary, and related to his work injury. She also opined that Claimant had probable underlying psychological issues, and had not failed conservative treatment, and thus, even if Claimant's condition were caused by his work injury, surgery would not be medically reasonable or necessary. (Ex. C).

27. On April 9, 2020, Respondents notified Claimant that authorization for carpal tunnel release surgery was denied based on Dr. Fall's Rule 16 review. (Ex. C).

28. On April 30, 2020, Dr. Anderson-Oeser conducted a telemedicine visit with Claimant. Dr. Anderson-Oeser reviewed Dr. Fall's IME report in which Dr. Fall opined that Claimant did not sustain a medial nerve injury due to his work-related fall. Dr. Anderson-Oeser stated: "It is my opinion, that [Claimant] could definitely of [sic] sustained trauma to the median nerve when landing on his left upper extremity. He reported pain throughout the left upper extremity with hand numbness and tingling shortly after the fall. A significant contusion of the median nerve is more likely than not to have caused the median neuropathy." Dr. Anderson-Oeser also stated "Within a reasonable degree of medical probability, it is my opinion that [Claimant] sustained an injury to the left median nerve with his fall which led to the median neuropathy." (Ex. E).

29. On October 23, 2020, F. Mark Paz, M.D., performed an Independent Medical Examination (IME) of Claimant requested by Respondents, and issued a report dated November 10, 2020. (Ex. B). Dr. Paz testified at hearing and was offered and accepted as an expert in occupational and internal medicine. Claimant reported to Dr. Paz that he fell at work on January 14, 2019 and immediately after the fall he developed left-sided neck pain and pain in the left arm extending to the left side of his neck. Claimant reported that his immediate pain included discomfort in the entire left hand, forearm, arm, left shoulder, and the base of the neck on the left side, and that his symptoms radiated from the neck to the fingers of his left hand. Claimant indicated that he experienced left arm numbness and tingling prior to his April 2019 surgery, but it was more severe after surgery. On examination, Dr. Paz noted that Claimant's left hand sensory was intact to light touch and pressure, without evidence of atrophy, reflexes and strength of his hands were full and symmetrical.

30. In his report, Dr. Paz opined that it is not medically probable that the diagnosis of left carpal tunnel syndrome is causally related to Claimant's January 14, 2019 work injury. Dr. Paz noted that multiple medical records and Claimant's direct history does not confirm trauma to his left wrist and that the records do not document a contusion of the left arm or wrist. He opined that the mechanism of injury and diagnosis of left carpal tunnel syndrome are incongruent. Dr. Paz also noted that based in part on his examination, that Claimant's left upper extremity symptoms were related to myofascial back pain. He further opined that Claimant was at maximum medical improvement and that his then-current clinical symptoms are clinically stable and not expected to improve with additional treatment.

31. Dr. Paz testified that in a case of traumatic carpal tunnel syndrome, the mechanism of injury is typically the result of blunt force trauma to the volar aspect of the wrist, such as falling forward with an outstretched hand, and that the records did not reflect an injury to Claimant's left hand. Dr. Paz also testified that the arthroscopic rotator cuff repair Claimant underwent would not cause carpal tunnel syndrome. Dr. Paz opined that Claimant's current symptoms are not consistent with carpal tunnel syndrome, because his symptoms are not limited to the median nerve distribution. Dr. Paz testified that if

Claimant does have carpal tunnel syndrome, it is not related to his January 14, 2019 injury, and that surgery for carpal tunnel syndrome is also unrelated.

32. Claimant testified at hearing that on January 14, 2019, he fell on ice and landed on his left side. Claimant testified that he fell on his left shoulder, left arm, left wrist, and left hip. Claimant testified that he noticed pain in his right shoulder down into his hand, left hip, and left knee. Claimant also testified that when he fell, his left arm was extended, and later admitted that he did not recall how he landed .

33. Claimant testified that Employer provided him with a "Case Coordinator" who attended five medical appointments with him – three with Dr. Parsons and two with Dr. Robinson. Claimant identified the Case Coordinator as "Mike," meaning Michael M[Redacted]. Claimant testified that he informed Mr. M[Redacted] that he had pain in his left shoulder into his arm, hip, and knee, but that Mr. M[Redacted] instructed Claimant only to report his shoulder symptoms and not to include other complaints on his pain diagram. Claimant also testified that when he was filling out his pain diagram at his initial visit with Dr. Parsons, Mr. M[Redacted] told Claimant to only include his shoulder pain "and we will deal with the other injuries once the shoulder has been repaired." Claimant testified that Mr. M[Redacted] interjected during visits with physicians and spoke with Claimant's physicians. After Claimant retained counsel, Counsel instructed Employer that Mr. M[Redacted] could not act as a Case Coordinator, and he did not attend any appointments after that time. Mr. M[Redacted] did not attend any appointments after Claimant's April 2, 2019 surgery. Claimant's testimony regarding Mr. M[Redacted]'s level of involvement and instructions not to report certain injuries is not credible.

34. Claimant testified that, at his January 23, 2019 visit with Dr. Parsons, he did not report injuries to his knee, wrists, or hip because he was intimidated by Mr. M[Redacted]. Claimant then testified that he specifically told Dr. Parsons of injuries to his knee, wrists, and hip, but that Dr. Parsons did not document them. He further testified that the pain diagram he completed did not accurately reflect the pain he had a that time. Claimant's testimony in this regard was not credible.

35. Claimant testified that prior to his surgery in April 2019, he had pins and needles sensation from his shoulder to his hands, rating 7/10. Claimant testified that he reported the pins and needles sensation to Dr. Parsons during his visits with her. Claimant indicated that after Mr. M[Redacted] was no longer attending visits, he reported to his health care providers that his wrist symptoms were "part of the slip and fall."

36. Mr. M[Redacted] testified at hearing in rebuttal. Mr. M[Redacted] testified he attended Claimant's first medical appointment with Dr. Parsons but did not direct Claimant on how to fill out his pain diagram, nor did he instruct Claimant on how to answer questions from Dr. Parsons. Mr. M[Redacted] testified Claimant reported only shoulder pain and he did not remember the Claimant reporting anything about his wrist, hip, or knee. He testified he did not try to influence Dr. Parsons regarding her diagnosis of Claimant. The ALJ finds Mr. M[Redacted]'s testimony credible and consistent.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

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

SPECIFIC MEDICAL BENEFITS AT ISSUE

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). Our courts have held that in order for a service to be considered a “medical benefit” it must be provided as medical or nursing treatment, or incidental to obtaining such treatment. *Country Squires Kennels v. Tarshis,* 899 P.2d 362 (Colo. App. 1995). A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant’s physical needs. *Bellone v. Industrial Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO, May 31, 2006). The determination of whether services are medically necessary, or incidental to obtaining such service, is a question of fact for the ALJ. *Bellone v. Industrial Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO, May 31, 2006). The existence of evidence which, if credited, might permit a contrary result affords no basis for relief on appeal. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).” *In the Matter of the Claim of Bud Forbes, Claimant*, No. W.C. No. 4-797-103, 2011 WL 5616888, at *3 (Colo. Ind. Cl. App. Off. Nov. 7, 2011). When the respondents challenge the claimant’s request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School District No.11*, W.C. No. 3-979-487, (ICAO, Jan. 11, 2012); *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO, Feb. 12, 2009).

Claimant has failed to establish by a preponderance of the evidence that the carpal tunnel release surgery requested by Dr. Yi is reasonable, necessary, or related to Claimant’s January 14, 2019 work injury. Claimant was injured when he fell on his left shoulder on January 14, 2019. At Claimant’s initial appointment with Dr. Parsons, other than circling his left thumb on his pain diagram, Claimant reported no symptoms or injuries that could have caused carpal tunnel syndrome. Claimant did not report any hand or wrist symptoms for several months after his injury.

Claimant’s testimony that Mr. M[Redacted] told Claimant only to report his shoulder injury and that his other issues could be addressed after his shoulder was “repaired” is not credible. Claimant testified Mr. M[Redacted] directed him not to report anything other than his shoulder condition while he was filling out his pain diagram before his visit with Dr. Parsons. Dr. Parsons initially diagnosed Claimant with a shoulder contusion and did not refer Claimant for a surgical consultation until one week later. It is not credible that before Claimant was even examined by Dr. Parsons, Mr. M[Redacted] knew that Claimant’s shoulder would need to be “repaired” and instructed Claimant to report only his shoulder injury to the exclusion of his other purported injuries.

Claimant’s testimony was also contradictory in that he testified he did not report his wrist, knee, and hip symptoms to Dr. Parsons because Mr. M[Redacted] intimidated him. But he also testified he did report injuries to his hip, knee, and wrist, but that Dr. Parson did not record them in her medical records. Claimant offered no theory to explain why Dr. Parsons would omit Claimant’s complaints of hip, knee, and wrist pain, if as Claimant testified, he defied Mr. M[Redacted] purported instructions and reported these injuries.

Notwithstanding, Dr. Anderson-Oeser attributed Claimant’s wrist diagnosis to his work injury. However, her records offer no explanation as to the mechanism of injury, other than to state that his call “could” have resulted in trauma to the median nerve when landing on his left arm. Dr. Anderson-Oeser's opinion relies, in part, on the incorrect premise that Claimant complained of pain, numbness and tingling throughout his left arm shortly after his fall. Claimant's contemporaneous medical records do not support Dr. Anderson-Oeser's assertion that Claimant complained of symptoms throughout his left arm shortly after his fall.

Claimant apparently reported to Dr. Zuehlsdorff that his left arm was extended when he fell. This is inconsistent with the mechanism of injury Claimant reported to others and his testimony. Initially, Claimant reported to Dr. Parsons that he fell on his left shoulder, he reported to Dr. Anderson-Oeser that he fell on his left side. Claimant then told Dr. Paz that he did not recall how he landed. At hearing, Claimant testified he landed on his "whole left side," left shoulder, left wrist, and left hip, and that he had the wind knocked out of him. Claimant later testified that his left arm was extended trying to stop his fall. Ultimately, Claimant admitted he could not remember how he fell or how he landed. Because Dr. Zuehlsdorff's report was not offered into evidence, the ALJ cannot determine the extent to which Dr. Zuehlsdorff relied on this information as a basis for his opinion that Claimant's carpal tunnel syndrome was related to his January 14, 2019 injury.

The ALJ does not find the opinions of Dr. Anderson-Oeser and Dr. Zuehlsdorff to be persuasive. These opinions are based, at least in part, on information provided by Claimant that is not corroborated by Claimant's contemporaneous medical records, or information that is inconsistent with Claimant's testimony.

Both Dr. Fall and Dr. Paz opined that Claimant's medical records and reported mechanism of injury do not support the conclusion that Claimant sustained an injury sufficient to cause carpal tunnel syndrome. Dr. Paz credibly testified that an acute carpal tunnel injury would result from a forward fall on the wrist. None of Claimant's medical records or testimony indicates that Claimant fell forward onto his wrist or that the mechanism of injury was consistent with a median nerve injury. The ALJ finds Dr. Paz and Dr. Fall's opinions to be the more credible and persuasive. Claimant has failed to establish by a preponderance of the evidence that the surgery proposed by Dr. Yi is reasonable, necessary, or related to Claimant's January 14, 2019 work injury.

ORDER

It is therefore ordered that:

1. Claimant's request for authorization of carpal tunnel release surgery requested by Dr. Yi is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

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

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

DATED: January 12, 2021

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-091-950-002

ISSUES

I. Whether claimant has proven by a preponderance of evidence that he experienced a left shoulder occupational cumulative trauma injury.

II. Whether Claimant is entitled to reasonable and necessary medical treatment.

III. Whether Respondents are responsible for the left shoulder surgery performed by Dr. Grossnickle.

IV. Whether Claimant is entitled to temporary disability benefits.

a. Whether Claimant's termination from employment on January 18, 2019 prevents Claimant from receiving temporary disability benefits following that.

b. Whether subsequent employment starting July 24, 2020 serves as a return to work and terminates temporary disability benefits.

V. Whether Claimant's compensation should be reduced under 8-43-102(2) because of a late reporting of his occupational disease.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact

1. Claimant was a 42-year-old production operator for employer, working in March 2018, when he claims the onset of a cumulative left shoulder injury. He provided his date of onset as March 15, 2018. *Ex. O, P.* Claimant is now 45 years old.

2. On June 7, 2018, claimant appeared at his primary care physician (PCP), at SCHC Monfort Family Clinic as a walk in "c/o low back, shoulder pain for about a year, but has gotten worse...can't think of a specific time when he had an injury, more so has just been worsening w/ time." *Ex. H, Bates 66.* He was followed for these complaints until an MRI was ordered. *Ex. H, Bates 80.* The MRI showed evidence of a large labral tear, extending superior all the way to the 7 o'clock position, minimally displaced. *Ex. G, Bates 62, 82.* Claimant underwent surgery with Dr. Mark D. Grossnickle on October 18, 2019. The surgery was an arthroscopy left shoulder with repair of type II SLAP lesion and repair of anterior and posterior labral detachments, along with subacromial decompression. *Ex. F, Bates 33.*

3. Claimant had been in a motor vehicle accident (MVA) on February 19, 2018. *CL Test 57:20.* He was driving his car; he lost control and drove into a ditch. He hit his chest hard on the steering wheel, while he was hanging on to the wheel. *CL Test 2, 8:00.* He was taken off work for five days following the incident, from February 20,

2018 to February 25, 2018. He was then provided two more days off work, and a five-pound lifting restriction. *Ex. J, Bates 142, 143*. His declared date of onset for this left shoulder claim is a few weeks later, March 15, 2018.

4. Claimant completed FMLA paperwork with help from his providers. *Ex. J, Bates 154-157.* He had not missed any time because of his shoulder before the date of his surgery. *Ex J. Bates 151; Ex F, Bates 31; Cl Test 53:37.* Claimant's period of incapacity was estimated to be October 18, 2018 to January 18, 2018. Flare ups following surgery were not expected. *Id.* His doctors said that they anticipated restrictions for three months. *Ex. J, Bates 149.* Claimant worked with the employer to complete FMLA paperwork, and claimant was paid 80 hours of FMLA time after he left the job for his surgery. *Ex. J, Bates 151; CL Test 2, 1:30.*

5. Claimant completed and filed both a claim for compensation and a first report of injury November 5, 2018. *Ex. O, P.* Neither of these documents completed by claimant identify a specific incident or event. Instead, the first report of injury says, "Claimant was repetitively lifting and moving 45-pound crates" and "Claimant's work duties required the repetitive lifting and moving 45-pound crates of milk from which he developed pain in his left shoulder." The claim for compensation states the injury occurred because "Claimant's work duties required the repetitive lifting and moving 45-pound crates of milk from which he developed pain in his left shoulder." And "Repetitive lifting and moving crates of milk."

6. Following the claim for compensation, a Job Demands Analysis (JDA) was completed. This JDA, job site photographs and video of the work claimant did for the employer were admitted at hearing. *Ex. A, B, C.* Supervisor Dean C[Redacted] explained the physical requirements of claimant's assignments. These provide the ALJ with an understanding of the job duties concerned. Claimant was working as a Gallon Case Packer when he was first complained of shoulder problems. Because of those complaints and later medical restrictions, he was moved to the position of Leak Detecting and Rework. *Ex. A; Testimony of C[Redacted].* Case Packer was the job he had at the time he now claims that he sustained a cumulative trauma occupational disease of the shoulder.

7. Dr. Mark Failinger testified via deposition as an expert in orthopedic surgery, as Level 2 certified. He initially evaluated claimant on January 16, 2020 and issued a report. *Ex. D.* As set forth in his report, Dr. Failinger asked claimant several different times, and claimant confirmed that he did not have any specific event which caused his injury. "He stated multiple times there was not a specific work event that occurred, not a specific injury that occurred to his left shoulder." *Ex. D, Bates 26.* Claimant explained his work. Dr. Failinger referred to the Colorado Treatment Guidelines for Shoulder Treatment. He explained that these Guidelines do seek to analyze studies regarding the development of cumulative shoulder disorders. He noted that there are three situations, which the guidelines state, "it is reasonable to consider that there is some evidence for the association of the following causative risk factors for the development of shoulder tendon-related pathology." *Ex. D, Bates 27, 28.* After comparing the Guidelines with claimant's work activates, he concluded that claimant's work activities did not cause the development of the shoulder disorder. *Ex. D, Bates 28.*

8. Following his report, Dr. Failinger reviewed claimant's surgical report. He testified that the surgery showed a very extensive torn labrum and not the type of condition where repetitive use or lifting could be the cause. The whole labrum was torn, front all the way to the top to the back. *Failinger Depo. P. 14.* Dr. Failinger testified that this tear would have to be caused by a traumatic event like a fall or a massive traction force. *Failinger Depo. P. 11-13.* Dr. Failinger testified that there is no question that this would be an acute incident. *Id. P. 14, 25.*

9. Dean C[Redacted] testified at hearing. He was claimant's direct supervisor. He testified that claimant never reported a work injury to him. He testified that claimant told him that his shoulder hurt. At the time, he was assigned to work as a Case Packer. *Ex. J Bates 105.* Mr. C[Redacted] was involved in a conversation with Mr. Kevin G[Redacted] when he heard claimant say that he hurt his shoulder at home. *DC Test 49:00; See also Ex. J, Bates 117.* Claimant did not tell him that he injured his shoulder at work.

10. Claimant presented the IME report of Dr. Stephen Gray in support of his claim. If was Dr. Gray's conclusion that claimant had pre-existing left shoulder rotator cuff tendonitis, acromioclavicular osteoarthritis, glenohumeral osteoarthritis and a chronic labral tear, which was aggravated by repetitive lifting at work. This was based upon history provided to him by claimant, which included "Picking up boxes of product weighing between 45 and 50 lbs. from a pallet on the floor and putting the box onto a conveyor belt at about his upper chest height. He would bend and stoop to pick the box up by its bottom and lift it out in front of himself at upper chest height to put it onto the conveyor belt. He would do this many times per hour." Mr. C[Redacted] provided detailed testimony about the physical work required for the Case Packer, Leak Detect, and Rework positions. This testimony, coupled with the Job Demands Analysis (JDA), videos and photographs, show that the history given to Dr. Gray is incorrect and exaggerates the lifting required by claimant in any of his positions. Although Dr. Gray's report also reflects a history that an acute event occurred on or about March 20, 2018, claimant did not testify to this at hearing.

11. Statements made in claimant's IME report by Dr. Gray about claimant's reports to Mr. C[Redacted] were discussed with Mr. C[Redacted]. Although the Gray report says that on March 20, 2018, claimant experienced a popping sensation while at work followed by the onset of pain, and that he stopped work and advised Mr. C[Redacted], Mr. C[Redacted] testified that claimant did not tell him that he had a specific injury at work. He testified that claimant never asked him to send him to a doctor. He did not refuse to send claimant to a doctor. He did not ignore restrictions provided to claimant. He testified claimant did not ask him to complete an injury report. He testified that if someone comes to him to report an injury, he completes the paperwork. If claimant had reported an injury, he would have completed a report. He did not do so. Instead, claimant had indicated he injured his shoulder elsewhere. All of this conflicts with the history provided by claimant to Dr. Gray.

12. Facts in evidence show that the history that is the foundation of Dr. Gray's opinions is inaccurate. As a result, Dr. Gray's opinion is found to be less credible and persuasive than the opinion of Dr. Failinger.

13. Kevin G[Redacted] testified at hearing. He is a production manager for the employer and had supervisory authority over claimant. He testified about his meetings with claimant about his shoulder. Mr. G[Redacted] explained that he had historically communicated effectively with claimant without a translator. Mr. G[Redacted] explained that he spoke to claimant often and in detail, because Mr. G[Redacted] had spent time in Somalia, claimant's home country, during his military service. Mr. G[Redacted] also described incidents of conflict with other employees or complaints about his supervisor that he worked through with claimant, with no translator and no difficulty in claimant speaking or understanding English. Mr. G[Redacted] described his discussions with claimant about his shoulder. In his first discussion with claimant, when claimant asked to move to a new position because his shoulder hurt, Mr. G[Redacted] asked claimant specifically if he hurt it at work. Claimant told him, no, that he had hurt it at home. *KG Test. 15:10.* Mr. G[Redacted] recalls that claimant said this occurred in his garage. *Id; see also Ex. J. 118.* Mr. G[Redacted] testified that he was sure that he was clear with this question and that claimant understood the question, "without a doubt." *KG Test 15:30.*

14. There was a later meeting with claimant about his shoulder. Claimant came to Mr. G[Redacted]'s office and told him about his treatment and his MRI that was pending and told him that he did not have the $900 to pay for the co-pay for the MRI. *KG Test 28:20.* Claimant asked if the company would pay for it. Mr. G[Redacted] explained that no, this is through your private insurance, since you were hurt at home, and the company will not pay for that. Claimant then told him that he was going to claim that he hurt himself at work, so that the company would have to pay for it. Mr. G[Redacted] cautioned claimant at the time about insurance fraud. At that time, Mr. G[Redacted] reminded claimant of what he had told him before about how his shoulder was injured at home. Claimant then told Mr. G[Redacted] that he understood and that he decided not to make that assertion. *KG Test 18:30.* At no time during these two meetings did claimant tell Mr. G[Redacted] that he had actually injured himself at work, only that he thought he would claim that occurred in order to have his medical bills paid. Mr. C[Redacted] testified that he was present at this meeting also and confirmed Mr. G[Redacted]'s testimony and these statements of claimant. *DC Test. 57:40.* At no time during these meetings did Mr. G[Redacted] feel as claimant's supervisor that there was the responsibility to report a work injury. *KG Test 20:00.* Mr. G[Redacted] testified that he had seen the note provided by claimant about payment for the MRI. *KG Test 31:00.* After the MRI was ordered, claimant presented a letter saying that his medical insurance will not cover the whole bill for his MRI, and saying, because his shoulder problem started "while working in this company," "what is the best solution I can do because I can't afford to pay this bill if the company can assist [sic] to pay this bill I will appreciate." *Ex. J, Bates 116.* He testified that he did not interpret the note to indicate that claimant was alleging a work-related injury. Instead, he understood the note to say the shoulder problem started when he as an employee, which was true. *KG Test 32:25; 33:30.* At the time of receiving this note, Mr. G[Redacted] had already been told by claimant that he injured himself at home.

15. Claimant testified that his job as Case Packer required him to lift 50-pound boxes for milk cartons. *CL Test. 46:00, forward.* He testified that he had to do this constantly

for eight hours a day and had to lift the boxes quickly. Mr. G[Redacted] testified that claimant never lifted 50-pound boxes of milk. *KG Test. 16:43.* They do not have any boxes that weigh 50 pounds. The heaviest boxes that they have are boxes that hold four gallons of milk, which weighs 32 pounds. Once the gallons are in the boxes, the Case Packers do not touch the boxes. It is rare that one has to lift one of these 32-pound boxes off of the line. That is when there is a damaged box *KG Test 16:37.* Claimant testified that at some point, his left shoulder started bothering him. He testified that he mentioned that his shoulder was bothering him to Dean [C[Redacted]] in March of 2018. Claimant testified that Mr. C[Redacted] did not do anything.

16. Claimant's leave date began October 18, 2018, which is the date of his surgery. *Ex. J, Bates 156; Ex. F, Bates 33.* He had not missed any time because of his shoulder before that date. *Ex. J, Bates 151; Ex. F, Bates 31; CL Test 53:37.* His leave ended January 18, 2019. *Ex. J, Bates 156.* He was terminated when he did not return to work on January 18, 2019 and did not contact anyone at the plant. This was considered job abandonment. *Ex. J, Bates 127.* Claimant testified that he was angry with his employer because he felt that they had abandoned him and decided not to return to work with them when he was due to return on January 18, 2019 after his surgery. *CL Test 1, 1:02:15; 1:03:20; CL Test 2, 5:45.*

17. Based on the testimony of the employer witnesses, claimant admitted that his left shoulder was injured at home, and not at work. Claimant contacted the employer about paying for the MRI because he said he did not have the funds to pay for it. He did not assert it was a work-related claim. When he notified the employer that he wanted to bring a workers' compensation claim, he said that he needed to do that because he could not pay for the MRI. He was reminded of what he had said before, and informed of the consequences of bringing a false claim in the U.S. After that, claimant went forward with an FMLA application. He did not contact the employer or return to his job after his FMLA expired, and was terminated for abandonment of his job, in January 2019.

18. Claimant testified that he is currently employed with [REDACTED] in the meat packing plant, having started that position on July 24, 2020.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

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

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether claimant has proven by a preponderance of evidence that he experienced a left shoulder occupational cumulative trauma injury.

1. The claimant was required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

2. A claimant seeking benefits for an occupational disease must establish the existence of the disease and that it was directly and proximately caused by the claimant's employment or working conditions. *See, Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by Section 8-40-201(14), C.R.S. as:

> *[A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to*

> *have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.*

This section imposes additional proof requirements beyond that required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). Simply because a claimant's symptoms occurred at work does not mean that his work activities caused his condition. The Guidelines outline specific criteria that must be satisfied to establish a causal connection between work activities and a cumulative trauma or shoulder condition.

3. The Division of Workers' Compensation's Shoulder Injury and Cumulative Trauma Conditions Medical Treatment Guidelines are the current best statement of the state of the medical literature dealing with causation of conditions claimed to have been caused by repetitive work. The Division expressly states that the provisions are, indeed, "guidelines." Nevertheless, the Division adopted the provisions as an enforceable rule, not simply an unofficial policy position of the Division. The Guidelines expressly acknowledge that one can deviate from the Guidelines in particular cases, but the deviation should be explained. The primary purpose is to advise and educate medical professionals and others about the current state of the medical literature. In so doing, the Guidelines provide a paradigm for decisions about causation of particular cumulative trauma diagnoses.

4. The Shoulder Injury Medical Treatment Guidelines were revised, effective February 1, 2015, and include a discussion of cumulative injuries and the shoulder. The Guidelines note that because there are a lack of prospective studies and other reasons, cumulative work-related causation for shoulder disorders is difficult to quantify. "The clinician should use this information judiciously." *Shoulder Guidelines, P. 14*

5. Dr. Failinger credibly opined that review of claimant's work duties shows that they do not support a cumulative trauma shoulder injury. However, more importantly, he testified that the severely torn condition of the labrum revealed in the surgical report shows that claimant experienced an acute injury. Dr. Failinger made clear that the damage in the shoulder would have to be caused by a significant acute force, such as falling or a sudden traction event. Simply lifting at work is not this kind of injury. Claimant repeatedly denied an acute injury at work to Dr. Failinger. Claimant did not testify that there was an acute injury at work. Claimant did not report an acute injury at work to his supervisors. Two witnesses credibly and persuasively testified that claimant did, instead, state that he had injured himself at home. The medical evidence is consistent with the testimony that there was an acute injury elsewhere. The respondents do not have the burden to prove an alternative explanation, but it is recognized that Claimant could have also injured or aggravated his shoulder during the MVA when claimant held the steering wheel and violently hit his chest on the steering wheel. That MVA was weeks from the claimed onset. Claimant has not

proven by a preponderance of the credible evidence that an acute injury occurred at work. Dr. Failinger's testimony establishes that the medical treatment provided to claimant, including surgical repair, was aimed at treating an acute left shoulder injury. Medical treatment and disability associated with the left shoulder are therefore related to an acute injury outside work and are not associated with a compensable work injury or occupational disease.

6. In deciding whether claimant has met his burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions; the motives of a witness; whether the testimony has been contradicted; and bias, prejudice or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936).

7. To the extent that claimant's testimony conflicts with the testimony of other witnesses and the medical evidence, claimant is found less credible. Based on the credible and persuasive testimony of Dr. Failinger, the surgical report established a torn labrum that was consistent with an acute injury and not an occupational disease as claimed by claimant. The findings during surgery were also consistent with the testimony from the two employer witnesses who each credibly testified claimant said he injured his shoulder at home - an acute injury.

8. The ALJ also does not find the ultimate opinions of Dr. Gray to be persuasive since his opinions are based on claimant's contentions – which the ALJ does not find credible. Like a house built on sand, an expert's opinion is no better than the facts and data on which it is based. *See Kennemur v. State of California*, 184 Cal. Rptr. 393, 402–03 (Cal. Ct. App. 1982).

9. As a result, claimant has not carried his burden to prove that he experienced an occupational disease or an acute injury at work. Two credible witnesses testified that claimant told them that he had injured himself outside work. Moreover, claimant was in a traumatic car accident, with his hands on the wheel when his chest was forced into the steering wheel. This was weeks before he claimed the onset of a repetitive use injury at work. Dr. Failinger credibly explained that, from the surgical report, we can see that there had to have been a traumatic injury since there was a complete labral tear. A job demands analysis and a review of the treatment guidelines had been done indicating that there were no risk factors for repetitive use injury in the any of the jobs that claimant did with the employer. This, however, becomes irrelevant given the state of the shoulder, as described in the operative report. There is no work injury. There is no repetitive use exposure at work. Thus, Claimant failed to establish by a preponderance of the evidence that he suffered a compensable work injury in the form of an acute injury or an occupational disease.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim for compensation is denied.

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

DATED: January 13, 2021.

/s/ Glen Goldman___________
Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-071-761-003

ISSUE

The sole issue for determination at hearing was:

- Whether the Claimant's right shoulder injury impairment should be compensated as a whole person?

PROCEDURAL POSTURE

The undersigned issued a Summary Order on June 26, 2020. Claimant filed a timely Request for Specific Findings of Fact and Conclusions of Law on July 8, 2020. Respondent filed amended proposed Findings of Fact and Conclusions of Law on July 20, 2020. An electronic copy of the hearing transcript was subsequently filed with the Court. This Order follows.

FINDINGS OF FACT

1. Claimant was employed by Employer in the warehouse. In this capacity, he would package product and load trucks. This job required Claimant to occasionally lift up to 30 pounds, as well as occasionally lifting floor to waist.[1]

2. There was no evidence in the record that Claimant injured his right shoulder before February 2018 or ever required treatment for the right shoulder.

3. On February 20, 2018, Claimant suffered a compensable injury when he injured his right shoulder while reaching overhead. He testified that he heard a pop and felt pain in his right shoulder.

4. Claimant initially treated in the Emergency Department at Aurora Medical Center.

5. Claimant treated with Annu Ramaswamy, M.D. at Rocky Mountain Medical Group, the designated provider for Employer and was evaluated on February 21, 2018. Dr. Ramaswamy's assessment was sprain of unspecified acromioclavicular joint, strain of unspecified muscle, fascia and tendon at the shoulder and upper arm level, right arm. Claimant was prescribed Norco and put on light duty.

6. On February 27, 2018, Claimant underwent an MRI of the right shoulder. The films were read by Vincent Herilhy, M.D. Dr. Herilhy's Impression was: moderate to marked grade III and IV chondromalacia throughout the glenoid and the posterior aspect of the medial humeral head, with extensive sub chondral cystic change and

[1] Exhibit 11, p. 229.

moderate subchondral bone marrow edema. There was a suspected mild to moderate poorly defined partial thickness articular sided tear of the anterior supraspinatus tendon located at 5 mm proximal to the insertional footprint. Moderate underlying tendinosis and frame without differential muscle atrophy was found. There was mild to moderate infraspinatus tendon gnosis with small interstitial tear of the anterior in social fibers, but no definite retraction or muscle atrophy. Possible scapular tendinosis without tearing was found, along with moderate acromioclavicular osteoarthritis with normal joint alignment and intact coraclavicular ligament.

7. On March 14, 2018, Claimant underwent a subacromial injection, which was performed by Michael Hewitt, M.D.

8. Claimant underwent an intraarticular injection administered by Dr. Hewitt on April 23, 2018.

9. Claimant also received physical therapy ("PT") at PT Select. That treatment was focused on the shoulder. Records from March 30, 2018 to April 24, 2018 were admitted into evidence

10. On June 18, 2018, Claimant was evaluated by Peter Weingarten, M.D., at the request of Respondents. Dr. Weingarten concluded Claimant was not at MMI and that the surgery proposed by Dr. Noonan was reasonable, appropriate and necessary.

11. On July 2, 2018, Claimant underwent arthroscopic surgery on his right shoulder, which was performed by Dr. Noonan. The preoperative diagnosis was right shoulder glenohumeral chondral degeneration, with impingement. Dr. Noonan performed a right shoulder arthroscopy, arthroscopic debridement of labral tearing, chondroplasty of the glenoid and humeral head, arthroscopic biceps release, arthroscopic capsular release and arthroscopic subacromial decompression. The post-operative diagnoses were: right shoulder grade 3 and 4 chondral change, glenohumeral joint; circumferential labral tearing; loss of motion; impingement.

12. After surgery, Claimant received further PT treatments at PT Select, beginning on July 12, 2018. The focus of the treatment Claimant received was to decrease pain, improve function and motor control, increase range of motion ("ROM") and strength. The PT records documented that Claimant problems were focused on the shoulder. Claimant received approximately six weeks of PT through May 5, 2018, at which time he was discharged.

13. Claimant's pain diagrams from DORN Innovative Healthcare Solutions, dated October 17, 2018 to November 21, 2018 primarily idetified a principal complaint of right shoulder pain.

14. On November 26, 2018, Claimant was reevaluated by Dr. Ramaswamy. At that time, Dr. Ramaswamy discerned minimal tenderness in the anterior portion of the biceps region and the rotator cuff. Minimal trigger point activity and tenderness

were present in the right trapezius/levator musculature. Claimant had limitations in his shoulder range of motion, with stiffness in the shoulder joint. Dr. Ramaswamy noted tenderness in the anterior portion of the biceps region, but otherwise stated that Claimant's impingement testing was negative. Finally, Dr. Ramaswamy determined that there was "some crepitus" in the shoulder joint, which he opined was likely related to Claimant's pre-existing, degenerative osteoarthritic changes.

15. Dr. Ramaswamy concluded Claimant was at MMI. A 6% scheduled upper extremity medical impairment was assigned to his right shoulder, which converted to a 4% whole person impairment. No recommendation was made for post-MMI medical treatment, other than Claimant was to keep up his home exercise program. Dr. Ramaswamy assigned a 60 lb. lifting and carrying restriction.

16. On December 20, 2018, a Final Admission of Liability ("FAL") was filed on behalf of Respondents. The FAL admitted for the medical impairment rating (extremity) issued by Dr. Ramaswamy.

17. On June 7, 2019, Dr. Raschbacher evaluated Claimant. At the time, Claimant completed a pain diagram, in which he showed burning, pins/needles and stabbing pain. The pain drawing completed by Claimant was confined to the shoulder, although he indicated he occasionally had pain going to his neck. On examination, Dr. Raschbacher obtained more restricted range of motion than measured by Dr. Ramaswamy.

18. Dr. Raschbacher's diagnosis was osteoarthritis of the right shoulder. Dr. Raschbacher opined that Claimant did not have any neck symptoms and no dysfunction more proximal than the shoulder. Dr. Raschbacher stated the conversion of the impairment rating was pursuant to Division protocol and he did not believe Claimant was entitled to a whole person impairment. Therefore, Claimant would not have impairment more proximal to the shoulder. Dr. Raschbacher concluded Claimant did not need additional medical treatment and had permanent work restrictions.

19. Claimant testified he continues to experience pain in his right shoulder. The pain limits his activities, including his ability to lift. He has to sleep on his right side, due to pain. Claimant was a credibile witness.

20. Ronald Swarsen, M.D. testified as an expert in Occupational Medicine on behalf of Claimant. He is level II accredited pursuant to the WCRP. Dr. Swarsen did not examine the Claimant, but testified based upon a review of the medical records.

21. Dr. Swarsen noted that Claimant's MRI indicated chondromalacia, which was a degeneration of the cartilage portion of the glenoid that was above the glenohumeral joint. He agreed the glenoid was part of the shoulder. Dr. Swarsen said the infraspinatus and supraspinatus were above the glenohumeral joint.

22. Dr. Swarsen noted the body parts which were being evaluated and treated by Dr. Ramaswamy, Dr. Noonan, or other treating physicians concluded that the portions of Claimant's body that were involved including the shoulder, the shoulder girdle itself, the components of the shoulder girdle and the rotator cuff, along with the very head of the humerus of the upper arm.[2] Dr. Swarsen opined that the situs of Claimant's functional impairment was within the shoulder girdle itself. More particularly, he was asked:

> " Q. Do you have an opinion, to a reasonable degree of medical probability, where the situs of functional impairment is here? And if you do, give it to us and tell us why.
>
> A. Yes, I do have an opinion that the primary loss or functional situs -- or situs of functional impairment is within the shoulder girdle itself. This is where the major portion of pathology exists that is -- that results in nonfunctioning or poor functioning of the shoulder girdle itself.[3]

23. Dr. Swarsen's ultimate conclusion was that Claimant's impairment was to the shoulder, including the joint components of the shoulder girdle and the rotator cuff, and the very head of the humerus of the upper arm. The ALJ noted this testimony did not persuade him that the situs of Claimant's impairment was beyond the shoulder.

24. Dr. Raschbacher testified as a medical expert witness on behalf of Respondents. He was board-certified in family medicine. He has practiced in the area of workers' compensation since 1988 and is Level II accredited pursuant to the WCRP. Dr. Raschbacher performed an IME of Claimant at the request of Respondents. On examination, Claimant did not have was disuse atrophy of the right forearm, which is often present when someone has a painful neck or shoulder. He noted Claimant presented in a straight-forward fashion. Dr. Raschbacher agreed with Dr. Swarsen's overall characterization of Claimant's shoulder anatomy, which he noted was also accurately described in the operative report itself.

25. Dr. Raschbacher testified that the various portions of the shoulder anatomy highlighted by Dr. Swarsen all served the primary purpose of moving the arm bone.[4] There were four joints in the shoulder, which included: the acromioclavicular joint, the sternoclavicular joint, the glenohumeral joint and the scapulothoracic articulation. Dr. Raschbacher said these joints were what Dr. Swarsen described when he was testifying about the shoulder girdle. The humeral head was part of the shoulder joint and it articulates with the glenoid fossa. Dr. Raschbacher stated that the shoulder joint was not an independently functioning part of the body. Its purpose was to move

[2] Dr. Swarsen utilized a Netter anatomical drawing to identify and describe the parts of the shoulder- Exhibit 15. Hearing Transcript ("Hr. Tr.") p. 37:7-11.

[3] Hr. Tr., p. 37:16-25.

[4] Transcript of Dr. Raschbacher's Evidentiary Deposition p. 18: 21-25.

and stabilize the arm. Dr. Rascbacher stated the function of the biceps tendon was to flex and supinate the elbow.

26. Dr. Raschbacher also testified that when conducting an impairment rating, the rating physician utilizes the arm as the diagnostic tool to measure resulting range of motion loss, whereby the measuring tool is placed on the arm bone. Dr. Raschbacher testified that conversion was appropriate when there was clear evidence of relation of the neck to the shoulder in terms of symptomatology, which was not present in this case.[5] Dr. Raschbacher opined Claimant's medical impairment was limited to the shoulder. The ALJ credited Dr. Raschbacher's opinions as to the situs of Claimant's impairment.

27. The situs of Claimant's impairment was the arm at the shoulder.

28. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. (2018). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S. (2018).

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. (2018). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). In the case at bench, Claimant's entitlement to benefits turned on the credibility of expert witnesses.

[5] Raschbacher Deposition Transcript p. 7:4-12.

Conversion of Scheduled Impairment Rating

Section 8-42-107(1)(a), C.R.S. limits medical impairment benefits to those provided in §8-42-107(2), C.R.S. when a claimant's injury is one enumerated in the schedule of impairments. The schedule includes the loss of the "arm at the shoulder." *See* §8-42-107(2)(a), C.R.S. However, the "shoulder" is not listed in the schedule of impairments. *See Bolin v. Wacholtz*, W.C. No. 4-240-315 (ICAO, June 11, 1998).

If Claimant sustains an injury not found on the schedule, § 8-42-107(1)(b), C.R.S., provides Claimant shall "be limited to medical impairment benefits as specified in subsection (8)," or whole person medical impairment benefits. As used in these statutes, the term "injury" refers to the part or parts of the body that sustained the ultimate loss, not necessarily the situs of the injury itself. Thus, the term "injury" refers to the part or parts of the body that have been functionally disabled or impaired. *Warthen v. Industrial Claim Appeals Office,* 100 P.3d 581 (Colo. App. 2004); *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo. App. 1996).

Under this test the ALJ is required to determine the situs of the functional impairment, not the situs of the initial harm, in deciding whether the loss is one listed on the schedule of disabilities. *Strauch v. PSL Swedish Healthcare System, supra.* Pain and discomfort that limit Claimant's use of a portion of the body may constitute functional impairment. *Johnson-Wood v. City of Colorado Springs,* W.C. No. 4-536-198 (ICAO June 20, 2005). The ALJ may also consider whether the injury has affected physiological structures beyond the arm at the shoulder. *Brown v. City of Aurora,* W.C. No. 4-452-408 (ICAO October 9, 2002). The ALJ concluded Claimant did not meet his burden of proof to establish he was entitled to a whole person medical impairment rating.

The ALJ's conclusion was based first upon the medical evidence which provided objective evidence that Claimant did not report pain beyond the shoulder, including cervical pain. This was borne out in medical records admitted at hearing, which documented that Claimant's symptoms and treatment were generally confined to the shoulder. This was true in the treatment before shoulder surgery. (Findings of Fact 5, 7-10). This was also true in the medical records which documented Claimant's treatment after shoulder surgery. (Findings of Fact 12-15).

Second, both Dr. Swarsen and Dr. Raschbacher's expert testimony concluded that the anatomical structures at and around Claimant's shoulder girdle were involved. The ALJ was persuaded that Claimant's injury was limited to those structures and did not extend beyond the shoulder. The medical records in evidence documented pain complaints limited (with one exception) to the shoulder. The ALJ credited Dr. Raschbacher's opinion on this point and concluded that Claimant's impairment was limited to the arm at the shoulder. (Finding of Fact 27).

In coming to this conclusion, the ALJ considered Claimant's argument that he was entitled to the whole person medical impairment rating. Claimant argued he suffered functional loss to his right shoulder and the use of that shoulder was impaired.

Claimant testified the impairment of his right shoulder inhibits the Claimant’s ability to reach overhead, sleep on his right side, and to carry objects on his right shoulder. (Finding of Fact 19). Claimant also relied on Dr. Swarsen‘s testimony, specifically that portion in which he discussed what was described as the “shoulder girdle“, as evidence that structures beyond the shoulder joint itself were involved. Because Claimant’s right shoulder impairment is not on the schedule of injuries found at § 8-42-107(2), C.R.S., the situs of the Claimant’s functional impairment is not limited to “the arm at the shoulder”.

The ALJ reviewed both experts’ testimony on the situs of Claimant’s impairment and concluded it was on the schedule found at § 8-42-107(2), C.R.S. Although Claimant was a credible witness, there were not consistent complaints of structures beyond the shoulder in the medical records. The ALJ credited Dr. Raschbacher’s testimony as to the situs of Claimant’s medical impairment. (Finding of Fact 26). Therefore, based upon the totality of evidence presented at hearing, the ALJ determined Claimant failed to prove he sustained functional impairment beyond the shoulder and was not entitled to PPD benefits based upon the whole person rating.

ORDER

1. Claimant’s request for additional PPD benefits based upon conversion of his medical impairment rating for the shoulder is denied and dismissed.

2. Any issues not determined in this decision are reserved for future determination.

DATED: January 15, 2020

STATE OF COLORADO

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that additional psychological treatment with Dr. Dale Bowen is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted March 25, 2020 work injury.

2. Whether the claimant has demonstrated, by a preponderance of the evidence, that her average weekly wage (AWW) should be higher than the previously admitted to base AWW of $557.58, (and $828.27 for the period of July 1, 2020 through July 23, 2020 due to the COBRA adjustment).

3. Whether the claimant has demonstrated, by a preponderance of the evidence, that she is entitled to the COBRA adjusted AWW for the period of June 1, 2020 through July 23, 2020.

FINDINGS OF FACT

1. The claimant has worked for the employer for approximately nine years. On March 25, 2020, she was working in her position as a barista in the employer's Starbucks department. On that date, the claimant was injured when three boxes of frozen sandwiches fell from a shelf and struck the claimant in the back of her head and neck.

2. The claimant's authorized treating physician (ATP) for this claim is Dr. James McLaughlin. The claimant first saw Dr. McLaughlin on March 25, 2020. At that time, the claimant reported a headache and some visual disturbances. Dr. McLaughlin diagnosed post concussive symptoms and tightness of the cervical spine. He took the claimant off of all work at that time.

3. On March 27, 2020, Dr. McLaughlin ordered a head computed tomography (CT) scan.

4. On March 31, 2020, the recommended head CT was performed. The results showed no acute intracranial pathology. In addition to the head CT, x-rays were taken of the claimant's cervical spine on March 31, 2020. The x-rays showed no fracture or bone lesion, and no spondylolisthesis.

5. On April 1, 2020, Dr. McLaughlin noted that the head CT and x-rays of the claimant's cervical spine were normal.

6. On April 20, 2020, Dr. McLaughlin indicated that the claimant could return to full duty work the following day (April 21, 2020).

7. On April 23, 2020, the respondent filed a General Admission of Liability (GAL) admitting for medical benefits and temporary total disability (TTD) benefits. The claimant's average weekly wage (AWW) was listed as $557.98.

8. On May 4, 2020, the claimant was seen by Dr. McLaughlin. At that time, the claimant reported that she felt very fatigued after working a full shift, with a headache and tightness in her neck. At that time, Dr. McLaughlin limited the claimant to working four hour shifts.

9. Due to limitations related to coronavirus (COVID-19), the claimant was not able to begin conservative treatment modalities such as physical therapy and massage. It was not until May 19, 2020, that Dr. McLaughlin was able to refer the claimant to physical therapy.

10. On May 14, 2020, the respondents filed a GAL again listing the claimant's AWW as $557.98. The GAL was issued because the claimant returned to restricted work on May 5, 2020. As a result, the respondent began paying temporary partial disability (TPD) benefits.

11. On June 15, 2020, the claimant continued to report overall improvement in her symptoms. On that date, Dr. McLaughlin recommended additional physical therapy of between six and twelve visits.

12. On June 22, 2020, the respondent notified Dr. McLaughlin that the additional physical therapy was denied.

13. On June 25, 2020, the claimant attended an independent medical examination (IME) with Dr. Tashof Bernton. In connection with the IME, Dr. Bernton reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his IME report, Dr. Bernton opined that the claimant suffered a contusion to the cervical and occipital area with a minor muscle strain. Dr. Bernton further opined that the claimant's continuing symptoms were likely the result of anxiety, and depression (with somatoform complaints). In addition, he opined that the claimant had reached maximum medical improvement (MMI) as of the date of the IME.

14. On June 29, 2020, Dr. McLaughlin referred the claimant to Dr. Dale Bowen for a psychological consultation. The purpose of treatment with Dr. Bowen was listed as "to help with the distress as well as the post concussive symptomatology."

15. The claimant was seen by Dr. Bowen on July 9, 2020. In a medical record of that date, Dr. Bowen listed the claimant's diagnosis as adjustment disorder with mixed anxiety and depressed mood. He opined that the claimant would benefit from approximately eight therapy sessions. A request for authorization for that therapy was sent to the respondent on July 14, 2020.

16. On July 10, 2020, the respondents asked Dr. McLaughlin to review Dr. Bernton's IME report and indicate whether he agreed or not. In a document dated July 22, 2020, Dr. McLaughlin stated that he does not agree with Dr. Bernton's opinions. Specifically, Dr. McLaughlin did not agree that the claimant had reached MMI. For the

claimant to reach MMI, Dr. McLaughlin stated that she would need to continue with physical therapy and treatment with Dr. Bowen.

17. On July 16, 2020, the respondent denied additional treatment with Dr. Bowen. The respondent referred to the opinion expressed by Dr. Bernton in his IME report that the claimant had reached MMI, as the reason for the denial.

18. On July 23, 2020, the respondent filed a GAL that listed the claimant's AWW as $557.98/$828.27. The claimant's AWW was increased to $828.27 because her health insurance was cancelled on July 1, 2020. At that time, the respondent also noted that the claimant's health insurance was to be reinstated on August 1, 2020.

19. On July 31, 2020, Dr. McLaughlin released the claimant to full duty, with no work restrictions.

20. On August 31, 2020, Dr. McLaughlin referred the claimant to Brittany Matsumura for consultation. On September 14, 2020, the claimant was seen by Dr. Matsumura. At that time, the claimant reported occasional visual disturbances, increased migraine headaches, dizziness, and occasional memory issues. Dr. Matsumura noted the claimant's neurologic exam was normal. She recommended the claimant take propranolol to treat her headaches. Dr. Matsumura agreed with the claimant seeing Dr. Bowen for cognitive behavior treatment.

21. On October 15, 2020, the respondents filed a GAL admitting for medical benefits and TTD benefits. The AWW is listed on the GAL as $557.98/$828.73. In addition, the GAL includes language that the claimant's "health insurance was reinstated on 07/23/20. She was released to fully duty on 07/31/20 so TPD[1] was terminated."

22. In a medical record dated October 28, 2020, Dr. McLaughlin opined that four visits of physical therapy and continued treatment with Dr. Bowen would be reasonable and necessary treatment for the claimant. He also opined that such treatment complied with the Colorado Medical Treatment Guidelines.

23. The claimant testified that her current symptoms include horrible headaches that feel like her head "is in a vice", dizziness, as well as neck pain and tightness. The claimant also has memory issues, particularly with remembering numbers and dates. Prior to her March 25, 2020 injury, the claimant did not have any of these symptoms. The claimant also testified that physical therapy helped as did meeting with Dr. Bowen. The claimant testified that she would like to continue to see Dr. Bowen to help with her mental state and mental well being.

24. The claimant's spouse testified at hearing. His testimony was consistent with the claimant's testimony regarding the claimant's current symptoms. In addition, he testified that since her work injury the claimant is anxious, lethargic, and has difficulty concentrating. The claimant's spouse further testified that that since stopping physical therapy, the claimant has declined further.

[1] Temporary partial disability benefits.

25. In January 2020, the claimant's rate of pay was increased from $17.09 per hour to $17.44 per hour. On March 25, 2020, the claimant was paid $17.44 per hour. Based upon payroll records entered into evidence, in 2019 the claimant had total earnings of $28,517.70. When this amount is divided by 52 weeks it is equal to $548.42.

26. The respondent calculated the admitted AWW of $557.58 by reviewing the claimant's total wages of $7,248.16 for the 12 week period of December 22, 2019 through March 31, 2020.

27. In addition to her normal wages, in the pay period ending March 14, 2020, the claimant was paid $1,005.23 in "other earnings". The claimant testified that this might have been a store bonus. She also testified that such a bonus was based on how the store performed in meeting sales goals.

28. The claimant testified that due to the coronavirus (COVID-19) pandemic, the employer paid employees an additional amount per hour as "hero pay". This hero pay was an additional $2.00 per hour. The hero pay program began on April 1, 2020 and ended on May 16, 2020.

29. On June 14, 2020, the claimant was provided written notice that her health insurance was cancelled May 31, 2020. The claimant then received a second notice on July 14, 2020, that her health insurance was cancelled June 30, 2020.

30. The claimant's spouse testified that he and the claimant have medical insurance through the employer. He further testified that he believes that the health insurance was cancelled on May 31, 2020. He explained that in early June 2020 he had a medical appointment and was informed that he could not bill the insurance, as it had been cancelled. The claimant's health insurance was reinstated on July 23, 2020.

31. The claimant asserts that the bonus of $1,005.23 should be considered in calculating her average weekly wage (AWW). In addition, the claimant asserts that an additional $2.00 per hour in hero pay should be included in calculating the claimant's AWW for the period of April 1, 2020 through May 16, 2020.

32. The ALJ credits the medical records, the claimant's testimony, and the opinions of Drs. McLaughlin, Matsumura, and Bowen over the conflicting opinions of Dr. Bernton. The ALJ finds that the claimant has demonstrated that it is more likely than not that continued psychological treatment with Dr. Bowen is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.

33. With regard to the claimant's AWW, the ALJ is not persuaded that her AWW should be recalculated to include the bonus of $1,055.23 and $2.00 per hour in hero pay. First, with regard to the "other earnings" of $1,055.23, the claimant testified that might have been a store bonus that is paid based on the store meeting goals. The ALJ finds that this is not an amount that the claimant had a reasonable expectation to receive. Therefore, it was appropriately excluded from the calculation of the admitted AWW. Second, with regard to the $2.00 per hour in hero pay, that additional pay did not go into effect until April 1, 2020. Therefore, that was not part of the claimant's wages at the time

of the March 25, 2020 injury. For all of the foregoing reasons, the ALJ finds that the admitted AWW of $557.98 accurately reflects the claimant's earnings at the time of her injury.

34. The ALJ credits the testimony of the claimant's spouse and the notices related to the cancellation of the claimant's health insurance and finds that the claimant has demonstrated that it is more likely than not that her health insurance was cancelled on May 31, 2020. Therefore, the claimant has successfully demonstrated that it is more likely than not that she is entitled to the COBRA adjusted AWW for the period of June 1, 2020 through July 23, 2020.

CONCLUSIONS OF LAW

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

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

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

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

5. As found, the claimant has demonstrated, by a preponderance of the evidence, that psychological treatment with Dr. Bowen is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury. As found,

the medical records, the claimant's testimony, and the opinions of Drs. McLaughlin, Matsumura, and Bowen are credible and persuasive.

6. Section 8-42-102(2), C.R.S. requires the ALJ to base claimant's average weekly wage (AWW) on his earnings **at the time of the injury**. In order for a particular payment to be considered "wages" it must have a "reasonable, present-day, cash equivalent value," and the claimant must have access to the benefit on a day-to-day basis, or an immediate expectation interest in receiving the benefit under appropriate, reasonable circumstances. *Meeker v. Provenant Health Partners*, 929 P.2d 26 (Colo. App. 1996). Under some circumstances, the ALJ may determine the claimant's TTD rate based upon his AWW on a date other than the date of the injury. *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). Section 8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO, May 7, 2007).

7. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that her AWW should be recalculated to include the bonus of $1,055.23 and $2.00 per hour in hero pay. The "other earnings" amount that has been identified as a store bonus. Therefore,with regard to that amount, the claimant does not have "a day-to-day basis, or an immediate expectation interest in receiving the benefit". In addition, the increased hero pay was no part of the claimant's wages at the time of her injury. As found, the ALJ is not persuaded by the claimant's assertions. As found, the admitted AWW of $557.98 accurately reflects the claimant's earnings at the time of her injury.

8. As found, the claimant has successfully demonstrated, by a preponderance of the evidence, that she is entitled to the COBRA adjusted AWW for the period of June 1, 2020 through July 23, 2020. As found, the testimony of the claimant's spouse and the notices related to the cancellation of the claimant's health insurance are credible and persuasive.

ORDER

It is therefore ordered:

1. The respondents shall pay for the recommended psychological treatment with Dr. Bowen, pursuant to the Colorado Medical Fee Schedule.

2. The admitted AWW of $557.98 (and $828.27 due to the COBRA adjustment) is appropriate.

3. The claimant is entitled to the COBRA adjusted AWW for the period of June 1, 2020 through July 23, 2020.

4. All matters not determined here are reserved for future determination.

Dated this 6th day of January 2021.

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

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

ISSUE

1. Whether Respondents have overcome by clear and convincing evidence the DIME Physician's assignment of a 20% whole person permanent impairment.

2. Whether Respondents have overcome by clear and convincing evidence the DIME physician's determination that Claimant's date of maximum medical improvement for his January 13, 2009 work injury was July 13, 2020.

FINDINGS OF FACT

1. Claimant is a 47-year-old firefighter who was employed by Employer from approximately October 1998 until December 31, 2018.

2. On August 29, 2008, Claimant sustained an admitted injury to his back arising out of the course and scope of his employment with Employer ("2008 Injury").

3. On August 29, 2008, Claimant saw William Miller, M.D., at Union Medical, P.C., where he was diagnosed with work-related lumbar pain and left leg paresthesia. Dr. Miller recommended physical therapy. (Ex. 8).

4. On referral from Dr. Miller, Claimant received physical therapy at Performax PT starting on September 2, 2008. Claimant attended six physical therapy visits between September 2, 2008 and November 7, 2008. At Claimant's physical therapy visit on November 7, 2008, Claimant reported "feeling great" with minimal back pain. He continued to experience mild left lumbar stiffness localized at L2-4. (Ex. 11).

5. On November 14, 2008, Dr. Miller placed Claimant at maximum medical improvement (MMI) for the 2008 Injury without permanent medical impairment or work restrictions. (Ex. 13).

6. By Stipulation dated February 13, 2020, the parties agreed the 2008 Injury did not cause him to miss more than three regular scheduled shifts or calendar days of work, and therefore was not a lost time claim under § 8-43-101, C.R.S. Claimant also waived all claims for additional benefits, including medical, temporary disability, permanent partial disability, permanent total disability, disfigurement and penalties associated with the 2008 Injury. (Ex. 13).

7. On January 13, 2009, Claimant sustained another work injury to his lower back arising out of the course and scope of his employment with Employer ("2009 Injury"). (Ex. 13).

8. Following the 2009 Injury, Claimant was treated by F. Mark Paz, M.D., of Union Medical. Dr. Paz diagnosed Claimant with lumbar pain and directed Claimant to re-initiate physical therapy. (Ex. 8).

9. Claimant returned to Performax PT for physical therapy on January 15, 2009 and attended 14 physical therapy appointments between January 15, 2009 and July 21, 2009. (Ex. 11).

10. On March 9, 2009, Claimant saw Malcolm Slaton, PA-C (physician assistant for Dr. Paz), and was referred to chiropractor, Keith Graves, D.C., for up to six sessions. Claimant was cleared to return to work without restrictions. Claimant reported that he was working well without limitations but still had occasional back pain across the lower back at the L4-5 area. (Ex. 8).

11. Claimant attended seven chiropractic visits with Dr. Graves between March 23, 2009 and May 29, 2009. During this time, Claimant consistently reported pain in the lower back. (Ex. 10). In his May 8, 2009 report, Dr. Graves diagnosed Claimant with bilateral, right > left, lumbosacral junction sprain/strain. He noted that Claimant was responding to conservative therapy, but "poorly stabilizing." On May 29, 2009, Dr. Graves reported that Claimant was participating in a pool therapy program for core strengthening. (Ex. 10).

12. On April 8, 2009, Dr. Paz referred Claimant to Franklin Shih, M.D., for a physiatry consultation. (Ex. 8).

13. On May 8, 2009, Claimant saw Dr. Shih. At that time, Claimant reported ongoing low back symptomatology with occasional radiation to his buttocks but denied distal ration to the thighs or legs. On examination, Dr. Shih noted mild increase in symptomatology with palpation of the lower lumbar area, and a positive straight leg raise for hamstring tightness. Dr. Shih recommended that Claimant participate in an active exercise program. At this visit and his May 26, 2009 visit, Dr. Shih indicated that he would be hesitant to recommend more aggressive treatment options, such as selective injections or surgery. (Ex. 9).

14. On June 8, 2009, Dr. Shih recommended claimant have a lumbar MRI. (Ex. 9).

15. On June 11, 2009, Claimant had a lumbar MRI at Denver Integrated Imaging South. Radiologist Joseph Morgan, M.D., interpreted the MRI as showing early changes of disc degeneration at L4-5 and L3-4 without a focal abnormality, and an otherwise normal spine. (Ex. 6).

16. On June 18, 2009, Dr. Shih reviewed Claimant's MRI results and indicated that it showed some mild, nonspecific degenerative disc changes, but that he did not see any significant pathology. Dr. Shih stated: "I presented this to him as a good news/bad news situation. The good news is that there is no significant structural pathology. The bad news is that from a treatment standpoint I really have little else to offer to him." He recommended that Claimant complete his stabilization program and deferred to Dr. Paz with respect to Claimant's return to full work activity. (Ex. 9).

17. On July 16, 2009, Dr. Paz examined Claimant and discharged him from care. Claimant reported on July 16, 2009 that he had returned to his usual level of activity and had had a single episode of discomfort that resolved with physical therapy. Dr. Paz's assessment was "lumbar pain, resolved" and "leg paresthesia, resolved." Dr. Paz placed Claimant at MMI with no permanent impairment and no permanent restrictions. He authorized maintenance care for four sessions of physical therapy within the following three months. (Ex. 8).

18. Following placement at MMI, Claimant attended one physical therapy session at Performax on July 21, 2009, where he reported that his back was "feeling good" but he had mild increased stiffness through his spine, which resolved with treatment. (Ex. 11).

19. On August 12, 2016, Claimant was seen at Denver Physical Medicine & Rehab, by Mansi Dua, DPT. At his initial visit, Claimant reported his back pain started approximately three months earlier, and that he believed was "due to the work he does as a firefighter." PT Dua indicated a diagnosis of low back pain, pain in the right and left hips and muscle spasm of the back. The August 12, 2016 physical therapy record indicates that Claimant was referred for a pain management evaluation, and for an MRI. Claimant's "prognosis" was stated as "Fair- The patient can expect to have a reduction of their [sic] symptoms and may require ongoing rehabilitation." (Ex. 7). (The medical records in evidence do not indicate that Claimant underwent a pain management evaluation or MRI or received any medical care until he returned to Denver Physical Medicine and Rehab until October 3, 2017).

20. On October 3, 2017, Claimant returned to Denver Physical Medicine & Rehab and began a course of physical therapy with PT Dua. Between October 3, 2017 and August 23, 2018, Claimant attended approximately 75 physical therapy sessions. Physical therapy records indicate that from October 3, 2017 until December 29, 2017, Claimant's primary complaint was low back, with "Dull, Aching pain" rating between 3/10 and 6/10 during this time. On November 2, 2017, PT Dua noted "Patient reports of having a [sic] insidious flare up in their symptoms. No new injury reported." On November 9, 2017, Claimant reported his back was sore after working his shift. Physical therapy records during this time report no other incidents, and generally describe Claimant's pain at each visit as either "frequent (up to 75% of day) of" either "moderate" or "slight to moderate intensity" and "increased by walking, bending, lifting, sitting an stooping; decreased by stretching and rest." (Ex. 7).

21. Beginning on January 2, 2018, Denver Physical Medicine & Rehab records characterize Claimant's primary complaint at each visit as "Left pelvis, low back, right pelvis," rating between 2/10 and 6/10. On January 9, 2018, March 3, 2018, April 10, 2018, July 14, 2018, PT Dua again noted "Patient reports of having a [sic] insidious flare up in their symptoms. No new injury reported." (The reports of "insidious flare ups" in the Denver Physical Therapy Records correspond with each time Claimant reported a subjective increase in pain of 20%). At each visit, from October 3, 2017 through August 23, 2018, Claimant's prognosis is stated as "Fair- The patient can expect to have a reduction of their [sic] symptoms and may require ongoing rehabilitation." Claimant's

records from Denver Physical Medicine and Rehab do not indicate a referring physician or if Claimant was under the care of any physician during this time. (Ex. 7).

22. In December 2018, Claimant accepted a job offer with [Redacted] as a firefighter, to begin on January 1, 2019. Claimant understood he would be required to complete a job-required fitness test, including VO2 max testing.

23. On December 10, 2018, Claimant began working with Kent B[Redacted], an athletic trainer associated with [Redacted] in preparation for the job-required VO2 max test with [Redacted]. Claimant reported having back issues for approximately ten years, and that he did physical therapy with no resolution of his symptoms. Claimant reported "seeking treatment on and off for this whole time." Mr. B[Redacted] noted that Claimant stated he has been doing core strengthening "but does not understand how to demonstrate basic core strength work." Between December 10, 2018 and December 18, 2019, Claimant attended 55 sessions with Mr. B[Redacted]. In a report dated November 1, 2019, Mr. B[Redacted] reported that Claimant's core strength had improved, and that Claimant reported "having his first pain free day in almost 10 years," although the date of this "pain free" report is not indicated. Mr. B[Redacted] reported Claimant then had a "flare in low back pain" and was referred to Dr. Akuthota for imaging and treatment. Mr. B[Redacted]'s reports indicate that around May 21, 2019, Claimant aggravated his back while working with a window. Claimant also aggravated his back around September 6, 2019 when doing "2.5-inch hose training." (Ex. 4).

24. On January 1, 2019, Claimant began his new position as a firefighter with [Redacted].

25. On April 8, 2019, Claimant was seen at UCHealth CU Sports Medicine by Brian Hill, M.D. Claimant reported a ten-year history of low back pain waxing and waning over time. Dr. Hill's examination was consistent with mechanical low back pain, with no evidence of radicular findings. He was diagnosed with osteoarthritis of the lumbar spine, mechanical low back pain and chronic low back pain without sciatica. Lumbar x-rays were read as showing minimal degenerative changes along the lumbosacral junction. Dr. Hill recommended continuing rehab and home exercise program and self-massage. (Ex. 5).

26. On May 22, 2019, Claimant saw Lindsay Goldstein-Smith, NP at UCHealth AMC Spine Center. Mr. Goldstein-Smith prepared a report addressed to Richard Drexilius, M.D., indicating Claimant had been referred by Dr. Drexilius. (No records from Dr. Drexilius are in the Court's record). Ms. Goldstein-Smith referred Claimant for a lumbar MRI. (Ex. 5).

27. On June 7, 2019, Claimant underwent a lumbar MRI at Health Images. The radiologist, Arash Momeni, M.D., interpreted the MRI as showing "[d]egenerative changes and facet arthropathy at L3-4 to include a left foraminal small disc protrusion and annular fissure. The findings result in mild left foraminal and lateral recess stenosis with mild encroachment on the L3 and L4 nerve roots, respectively." Additionally, the MRI showed "broad-based disc bulge and left foraminal disc protrusion at L4-5. In concert with facet

arthropathy the findings result in left lateral recess stenosis and mild contact on the L5 nerve root." (Ex. 6).

28. On August 13, 2019, Claimant received a transforaminal epidural steroid injection (ESI) at UCHealth at the L4 level. (Ex. 5).

29. On September 25, 2019, Claimant filed a Worker's Claim for Compensation related to the 2008 Injury and the 2009 Injury. Respondents filed a Notice of Contest for each claim on October 17, 2019. (Ex. 13). Subsequently, the parties entered into a Stipulation, (Ex. 13), which is incorporated herein by reference.

30. On November 4, 2019, Claimant saw J. Scott Bainbridge, M.D., apparently referred by Mr. B[Redacted]. Dr. Bainbridge's assessment was intervertebral disc displacement, lumbar region, and spondylosis without myelopathy or radiculopathy, lumbar region. He opined that "lumbar discogenic pain appears to be the primary pain generator. I cannot rule out a mixed picture with some facet component of pain. The most probable symptomatic levels are L3-5." Dr. Bainbridge noted that Claimant had a previous ESI with Dr. Akuthota. (The ALJ infers that the ESI referenced is the August 13 ESI performed at UCHealth). Dr. Bainbridge recommended a L3-4 interlaminar epidural steroid injection, which Dr. Bainbridge performed on December 5, 2019. On January 19, 2020, Claimant returned to Dr. Bainbridge for a follow-up visit and reported that the December 5, 2019 ESI did not provide substantial long-term benefit. Dr. Bainbridge opined that Claimant's then-current problems "are disc and radicular in nature and related to [Claimant's] work comp injury." Dr. Bainbridge's records do not reflect that he reviewed Claimant's prior medical records or his 2009 MRI. Dr. Bainbridge considered several potential treatment and diagnostic options, including medial branch blocks, and lumbar discography. (Ex. 1).

31. On January 20, 2020, Claimant was seen by Allison Fall, M.D., for an independent medical examination (IME) requested by Respondents. Dr. Fall opined that Claimant was appropriately placed at MMI on July 16, 2009, noting Claimant had returned to full duty as a firefighter at that time, and had a normal physical examination with Dr. Paz. Dr. Fall noted that Claimant did not have to perform physical testing at work until 2012, and that he reported that his physical fitness performance testing became more difficult over time, although he passed the fitness test. Dr. Fall found that there was no indication that Claimant sustained an aggravation of his prior work injury, in part because there was no permanency to his prior condition. She opined it was appropriate for Claimant to pursue injection therapy and a strengthening program, but those modalities would be unrelated to the 2008 and 2009 injuries. (Ex. F).

32. On May 14, 2020, Claimant was seen (through video) by Sander Orent, M.D., for an IME requested by Claimant. Dr. Orent noted Claimant reported seeing a chiropractor in 2012, for approximately 5-6 visits, and later saw a different chiropractor. (No documentation of this care appears in the record). Claimant reported to Dr. Orent that his work with Mr. B[Redacted] "broke him," which Dr. Orent attributed to "very aggressive attempts at physical reconditioning in a patient who was not ready for this." Dr. Orent opined that "it is clear and obvious that this patient has had ongoing and continuing low back pain since his injury in 2009." Dr. Orent opined that Claimant' pain was "probably

discogenic and there is a significant concern about instability of the lumbar spine." When discussing a comparison of Claimant's lumbar MRIs, Dr. Orent stated "We note that the patient in 2009 had an MRI which showed only early degenerative changes, but the MRI of June 2019 now shows significant degenerative changes with facet arthropathy at multiple levels and a retrolisthesis 3 to 4 mm. There is also contact in the left lateral recess of the nerve roots at L4-L5. This is a major significant change showing a marked worsening of the condition." (Ex. 2).

33. Dr. Orent's impression was that Claimant "has the occupational disease of degenerative low back spondylosis. This has obviously progressed in the years from 2009 to 2019, now leading to the possibility of spinal instability with the retrolisthesis that is apparent. This may be the source of his discogenic pain." Dr. Orent opined that Claimant "has never been at maximum medical improvement." (Ex. 2).

34. Claimant underwent range of motion testing on May 27, 2020 at Northgate Physical Therapy, apparently at the request of Claimant's counsel. These range of motion measurements were provided to Dr. Orent who opined that they were valid and assigned Claimant a 20% whole person permanent impairment based on those measurements. (Ex. 2, 3).

35. On July 13, 2020, Claimant saw Anjmun Sharma, M.D., for a Division IME (DIME). Dr. Sharma conducted a review of Claimant's medical records and performed a physical examination. On examination, he found that Claimant had a "fairly normal neurological examination," and pain behaviors when performing range of motion. He noted that comparison of Claimant's 2009 and 2019 MRI showed "significant change over time, mainly, facetogenic findings as well as spinal canal stenosis, spondylosis as well." He found the MRIs consistent with "chronic changes over time and no doubt they have a pattern here where the patient has been working as a firefighter and never changed jobs." Dr. Sharma stated that "pathology is present and I do believe that the patient is qualified for a permanent impairment rating." He diagnosed Claimant with lumbar spine strain, lumbar spondylosis, lumbar facet arthropathy, degenerative disc dieses and lumbar spondylosis, degenerative disc and facet arthropathy L3-L4, left foraminal and lateral recess stenosis with mild encroachment L3-L4 nerve roots, broad based bulge, left foraminal disc protrusion L4-L5, and facet arthropathy L5. (Ex. E).

36. Dr. Sharma disagreed with Dr. Paz's placement of Claimant at MMI on July 16, 2009 and assigned a date of MMI as July 13, 2020. Dr. Sharma assigned a whole person permanent impairment rating of 13% for lumbar range of motion, and an 8% rating for disorders of the lumbar spin (for spondylosis) of 8%. The final combined whole person impairment rating assigned is 20%. (Ex. E).

37. In his report, Dr. Sharma explained his rationale for placing Claimant at MMI on July 13, 2020 as follows:

> I have reviewed the medical records. The patient was placed at maximum medical improvement previously on July 16, 2009 per my review of the medical records. However, the patient continues to have medical care and

> it is not clear whether any final admission of liability was ever filed. For my review of the medical record on March 20, 2020, it does appear that the patient was given a final admission of liability for 0% impairment. This appears be based on Dr. Sander Orent.[1] This appears to be done sometime between Dr. Allison Fall's rating for independent medical examination and Dr. Sander Orent's independent medical examination and so as result while we have two reports that contest each other, Dr. Orent is the only one who had provided a numerical rating officially, but nevertheless the patient has really never been placed at MMI aside from Dr. Mark Paz who indicated MMI early. I disagree that the patient was placed at MMI on July 16, 2009. I also disagree with any MMI date that was assigned by Dr. Fall which echoed the same July 16, 2009 rating as well. Dr. Sander Orent had also performed an independent medical examination but in his report, it does [not] appear that he had actually assigned a date of maximum medical improvement either, but he did provide an impairment rating. So, it is still open for interpretation what the official MMI date is. As a result, I will assign the date of MMI date as the date of the division independent medical examination because I am indicating clearly what the date of maximum medical improvement is and I am tying that together with the potential impairment rating that I will assign for the active range of motion measurements that I took during the division independent medical examination. The date of MMI therefore is July 13, 2020.

(Ex. E).

38. With respect the assignment of a whole person impairment rating, Dr. Sharma’s stated rationale was:

> The patient has a [sic] impairment rating that is fairly significant. No doubt, he has been working in the same field of work for the last 20 years. This has resulted in significant wear and tear on Iris back, clearly from the MRI findings of diagnostic tests indicating 10 years apart. There is significant worsening of degenerative changes in the lumbar spine spondylosis and facet arthropathy. I believe that the impairment rating that I have assigned is commensurate with the current level of functioning. This impairment rating is consistent with the previous impairment rating signed by Dr. Sander Orent and I believe with the reasonable degree of medical probability this reflects the accurate current functioning level of status for the patient.

(Ex. E).

39. Dr. Sharma testified by deposition and was qualified as an expert in occupational medicine without objection. Dr. Sharma testified that since Claimant’s 2009 Injury, he has sustained a series of multiple small injuries over time (80% work-related), resulting in cumulative trauma resulting in his current condition. Dr. Sharma testified “I think there’s

[1] The ALJ infers that the reference to “Dr. Sander Orent” should be to Dr. Paz.

lots of minor injuries that have occurred over time. We're talking about a cumulative trauma here, and I really think that's what we're looking at in this claim." He also testified that the pathology in Claimant's back shown in the 2019 MRI was the result of an accumulation of cumulative trauma. When asked why Claimant's back is the way it is today, Dr. Sharma testified: "I think the answer is because of his constant lifting, pushing, pulling the day-to-day activities that he did as a firefighter for the last 27 years, and you know, since 2008 he's been reporting pain." Dr. Sharma also testified that Claimant is not currently suffering from acute trauma, but that Claimant "has cumulative trauma as a result of acute trauma that commenced in 2008, 2009, and continued through that time up until 2020." He testified that his July 13, 2020 MMI date was for the Claimant's "cumulative trauma." Later, Dr. Sharma testified that his July 13, 2020 was for "acute trauma," and testified "You know, I am still sticking with my date of MMI per my DIME report of July 13, 2020. Nobody assigned it. Nobody assigned a date of MMI in this claim, and so I took it upon myself to assign the date." (Ex. I).

40. Dr. Fall was qualified as an expert in occupational medicine and testified at hearing. Dr. Fall testified she had reviewed Claimant's medical records, MRI reports, Dr. Orent's report, the DIME report and Dr. Sharma's testimony. Dr. Fall opined that if Claimant's current findings were causing symptoms, such as radicular irritation, it would indicate that his symptoms were unrelated to his 2008 and 2009 injuries, given the benign MRI findings in 2009. She opined that the Claimant's 2019 MRI showed more significant degenerative changes and protruding discs that were likely caused by multiple factors, including normal changes expected in a person of Claimant's age, changes generally caused by his work as a firefighter and other reasons. She also testified that the Claimant's current complaints are consistent with the pathology shown on Claimant's 2019 MRI, but that they would not be attributable to the events of 2009. Dr. Fall credibly testified that Claimant sustained two acute injuries in 2008 and 2009, and was brought to MMI appropriately for those claims, based on the Claimant's presentation and findings indicated in the contemporaneous medical records. She opined that the acute trauma Claimant experienced as a result of the 2008 and 2009 Injuries were no longer a factor contributing to his current condition. She testified that she believed there is a third issue, which is the cumulative effects of Claimant's work as a firefighter over time. She testified that is not plausible that Claimant's impairment in 2020 was caused by trauma occurring ten years earlier.

41. Claimant testified that he has not been pain free since the 2009 Injury. He testified that following the "window" incident in 2019, the pain resolved within 5 days and he missed four work shifts as a result. Claimant also testified that he has not sustained any new injuries to his back since 2009. He testified that he has experienced "flare ups" in his back over time, with no real prediction of what would cause issues, and that the "flare ups" have always resolved. Claimant testified that he sought additional medical treatment from his employer at some point in time but was told his case was closed.

42. In rebuttal, Respondent called Ragan J[Redacted] a claims specialist who was the designated adjuster for Claimant's worker's compensation claims. Ms. J[Redacted] testified that she has reviewed Claimant's claim records going back to 2009, and the

records do not reflect that Claimant requested any medical treatment since 2009, or that any requests for medical treatment had been denied.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

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

OVERCOMING DIME ON IMPAIRMENT AND MMI

The Act defines MMI as "a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." § 8-40-201(11.5), C.R.S.

Where disputes exist on whether a Claimant has reached MMI, the ALJ must resolve that issue.

Under § 8-42-107 (8)(b)(III), C.R.S., a DIME physician's opinions concerning MMI and whole person impairment carry presumptive weight and may be overcome by clear and convincing evidence. "Clear and convincing evidence means evidence which is stronger than a mere 'preponderance'; it is evidence that is highly probable and free from serious or substantial doubt." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 414 (Colo. App. 1995). Accordingly, a party seeking to overcome a DIME's MMI determination and/or whole person impairment rating must present "evidence demonstrating it is 'highly probable' the DIME physician's MMI determination or impairment rating is incorrect and such evidence must be unmistakable and free from serious and substantial doubt. *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001); *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002). Whether a party has overcome the DIME physician's opinion is a question of fact to be resolved by the ALJ. *Metro Moving & Storage*, 914 P.2d at 414.

The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries,* WC 4-712-812 (ICAO, Nov. 21, 2008); *Licata v. Wholly Cannoli Café*, W.C. No. 4-863-323-04 (ICAP, July 26, 2016).

As a matter of diagnosis, the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003); *Sharpton v. Prospect Airport Services,* W.C. No. 4-941-721-03 (ICAO, Nov. 29, 2016). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998); *Watier-Yerkman v. Da Vita, Inc.*, W.C. No. 4-882-517-02 (ICAO Jan. 12, 2015); *compare In re Yeutter*, 2019 COA 53 ¶ 21 (determining that a DIME physicians opinion carries presumptive weight only with respect to MMI and impairment). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation, and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

Respondent has established by clear and convincing evidence it is highly probable that the date of MMI and impairment rating provided by the DIME physician Dr. Sharma are incorrect. Dr. Sharma's rationale for placing Claimant at MMI on July 13, 2020 is not credible, persuasive, or supported by the evidence. Dr. Sharma asserted Claimant "continued to have medical care" following Dr. Paz's assignment of MMI on July 16, 2009 and testified that Claimant sought treatment “throughout the entire time” between 2009 and 2019. This conclusion, however, ignores that from July 16, 2009 until August 26, 2016, Claimant received no documented medical care except one physical therapy appointment on July 21, 2009, which documents that Claimant’s symptoms resolved after therapy. (There is some indication that Claimant received a limited amount of chiropractic care in 2012, but no chiropractic records were offered or admitted into evidence to determine the nature of that treatment.) Claimant’s next documented medical treatment was seven years later – on August 26, 2016 – when he reported his back pain began three months earlier, after which he received no care again until October 2017. Dr. Sharma failed to offer a cogent explanation how Claimant’s medical care from 2016 (or 2012) through 2020 was related to either the 2008 Injury or the 2009 Injury. Dr. Fall opined that Dr. Paz correctly placed Claimant at MMI on July 16, 2009, because, at the time, Claimant had a normal physical examination, benign MRI findings, and returned to full duty at his job. She further opined that there no indication that Claimant sustained an aggravation of his preexisting condition. The evidence, including the lack of evidence that Claimant sought or received medical care or had complaints of aggravation of his 2008 or 2009 Injuries after being placed at MMI on July 16, 2009, clearly and convincingly establishes it highly probable that Dr. Sharma’s assigned MMI date of July 23, 2020 is incorrect.

With respect to the impairment rating assigned by Dr. Sharma, again, the evidence clearly and convincingly establishes it highly probable that the 20% whole person impairment he attributed to Claimant’s 2009 Injury or 2008 Injury is incorrect. Dr. Sharma, Dr. Fall and Dr. Orent agree Claimant’s impairment is attributable to the pathology demonstrated on his 2019 MRI. These experts also agree that pathology is the result of many small work-related traumas that occurred between the 2009 MRI and the 2019 MRI, and other non-work-related factors. Although it is uncontroverted that Claimant’s back pathology (as demonstrated in the 2019 MRI) is likely related to his occupation as a firefighter to some extent, Dr. Sharma’s reports and testimony offer no explanation to establish how his current condition was caused by either the 2008 or 2009 Injury. Dr. Sharma testified that Claimant’s occupation caused 80% of the pathology in his back, including his work for Employer and [Redacted], but offered no explanation as to how the multiple incidents of “small trauma” he sustained over the years were caused by either the 2009 Injury or the 2008 Injury. His testimony that Claimant has “cumulative trauma now as a result of acute trauma that commenced in 2008, 2009 and continued through that time up until 2020,” is conjecture, not supported by the evidence, and not persuasive.

Dr. Fall credibly opined that Claimant’s 2008 and 2009 Injuries were no longer a factor contributing to Claimant’s current condition. Dr. Fall also credibly testified that Dr. Paz correctly determined Claimant had no permanency when he was evaluated in 2009 and placed at MMI. This opinion supported by the lack of treatment for years after being placed at MMI, Claimant’s ability to continue full duty work, and the uncontroverted evidence that Claimant’s current impairment is the result of other “small” injuries that have occurred since 2009. The ALJ finds that the totality of the evidence clearly and convincingly demonstrates that Dr. Sharma’s assignment of a 20% whole person permanent impairment rating caused by the 2009 Injury or the 2008 Injury is highly probably incorrect.

ORDER

It is therefore ordered that:

1. Respondents have established by clear and convincing evidence that the DIME physician's opinion that Claimant reached MMI for his January 13, 2009 injury on July 13, 2020 is incorrect.

2. Respondents have established by clear and convincing evidence that the DIME physician's assignment of a 20% whole person impairment rating for Claimant's January 13, 2009 work injury is incorrect.

3. All matters not determined herein are reserved for future determination.

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

DATED: January 19, 2021

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-103-649-004

ISSUES

I. Whether Respondents established, by clear and convincing evidence, that the 21% whole person impairment rating provided by the DIME physician was issued in error.

II. Whether Claimant established, by a preponderance of the evidence, an increase to her AWW, thereby impacting PPD benefits owed.

III. Whether Claimant established, by a preponderance of the evidence, entitlement to maintenance medical benefits – including a right hip MRI and orthopedic referral.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. Claimant was injured on January 15, 2018. At the time of her injury, Claimant had worked for employer for about 20 years.
2. Claimant was injured while getting out of her car at work. While getting out of her car, Claimant's left foot slipped on some ice and she fell - while her right foot and leg were still in the car.
3. Right after her accident, Claimant presented to Rocky Mountain Urgent Care. At her first appointment, Claimant reported pain all over. This included her back, legs, shoulders, and neck. They performed x-rays of her neck and shoulders and they did not show any fractures.
4. On January 17, 2018, Claimant came under the are of Dr. Martin Kalevik. Claimant again described slipping while getting out of her car. She also told Dr. Kalevik that she thought she strained her right hip during the fall since her right leg was caught in the car when she fell. After obtaining a detailed history from Claimant, he examined Claimant and concluded that Claimant suffered the following myofascial and soft tissue injuries:
   - Cervical
   - Thoracic
   - Left shoulder
   - Lumbar – with the worst being her right lower back. (Ex. I, p.68-69)
5. Dr. Kalevik also concluded that Claimant did not aggravate any of her preexisting conditions, which included her right shoulder and neck. (Ex. I, p.68-69)

6. On February 19, 2018, Claimant started treating with Dr. Chan. Claimant complained of pain from her cervical spine to her lumbar spine as well as pain radiating into her right lower extremity. She also complained of numbness and tingling involving her entire right lower extremity. She rated her overall pain at 5/10. Dr. Chan physically evaluated Claimant. As part of his evaluation, Dr. Chan performed some additional tests to see if they would increase her pain complaints. Dr. Chan performed axial loading, truncal rotation, and minimal skin folding tests. None of those tests exacerbated Claimant's pain complaints. Based on his assessment, he ordered an MRI.

7. On April 2, 2018, Dr. Chan reviewed the MRI. He concluded that the MRI demonstrated findings consistent with a right L5 radiculitis versus right SI joint dysfunction.

8. On May 1, 2018, Claimant returned to see Dr. Chan. At this appointment, Dr. Chan noted that Claimant's back pain was essentially unchanged. Her pain was localized over the right lumbar spine area. She also complained of pain that radiated into her right lower extremity – laterally – in a L5-S1 distribution. (Ex. J., p. 147) Dr. Chan stated that Claimant's MRI also showed facet arthropathy that was causing foraminal stenosis on the right side. He also noted that her examination demonstrated findings suggestive of SI joint pain as well. He recommended an epidural steroid injection – versus an SI joint injection – for therapeutic and diagnostic purposes.

9. On May 14, 2018, Claimant returned to Dr. Chan. At this appointment, Dr. Chan noted that Claimant did have degenerative findings on her MRI. He also noted Claimant still had symptoms that radiated into her right lower extremity in a L5 distribution. But, at that point, he did not know whether the findings on the MRI were causing some of Claimant's pain complaints. He also noted that on physical examination there were findings that would also suggest sacroiliac joint dysfunction. As a result, he recommended Claimant undergo an epidural steroid injection and then follow up with him one week later. (Ex. J, p. 152.)

10. On May 16, 2018, Claimant underwent an L5 transforaminal epidural steroid injection (ESI). One week after the ESI, Claimant returned to Dr. Chan. At this visit, Dr. Chan noted that Claimant's MRI also demonstrated "a paracentral disc protrusion at the L5-S1 level along with facet hypertrophy causing subarticular stenosis abutting against traversing L5 nerve roots bilaterally." Dr. Chan also commented on her ESI. He noted that:

> Her pre-injection pain level was 7/10, post-injection pain level was 0-1/10. She noted that she is rather pleased with her improvement Even though the pain complaint is slightly returning, she describes that current pain is only about 3/10.' She is able to increase her activity level. (Ex. J, p. 154.)

11. On June 21, 2018, Claimant returned to Dr. Chan. At this visit Dr. Chan noted that Claimant "did have [a] positive diagnostic and therapeutic response to the right L5 transforaminal epidural steroid injection that was performed on May 16, 2018." But he also noted that it felt like her back pain was starting to return and that her pain had increased to a 4/10 to 6/10 and that the pain was reminiscent of the pain that

she had. He also noted that Claimant said her pain was radiating into her right lower extremity posteriorly and laterally. Dr. Chan concluded that because Claimant had a positive diagnostic and therapeutic response to the epidural steroid injection, that another right L5-S1 transforaminal epidural steroid injection should be considered for pain management. (Ex. J, p. 158-159)

12. On July 11, 2018, Claimant underwent a repeat L5-S1 transforaminal epidural steroid injection.

13. On July 18, 2018, Claimant followed up with Dr. Chan to go over her response to the epidural steroid injection that was performed last week. Based on her response, Dr. Chan concluded that Claimant had "a rather profound diagnostic benefit from the epidural steroid injection that was performed one week ago." (Ex. J, p. 174)

14. On August 3, 2018, Claimant was re-evaluated for her low back pain by Dr. Chan. Based on her response to the injections, Dr. Chan stated: "The patient did have rather significant diagnostic benefits from the epidural steroid injections; therefore, I do feel that the MRI findings do correlate well with the patient's current subjective symptoms." (Ex. Q, p. 290)

15. On September 10, 2018, Claimant underwent a surgical evaluation with Dr. Castro. At this appointment, which was about 8 weeks after her repeat L5-S1 transforaminal epidural steroid injection, Dr. Castro noted Claimant had good range of motion, but there is no indication he formally measured her range of motion. Based on his assessment, Claimant was not a surgical candidate at that time. (Ex. L, pp. 246-250)

16. On September 18, 2018, Claimant returned to Dr. Chan. At this appointment, Dr. Chan noted that Claimant's MRI did show a disk protrusion at the L5-S1 level laterally to the left side but affecting the bilateral L5 nerve roots. He again noted that Claimant was "post right L5 transforaminal epidural steroid injections, May 16, 2018, and July 11, 2018, with "profound diagnostic but short-term benefits." (Ex. J, p. 187)

17. On October 8, 2018, Claimant returned to Dr. Chan. At this appointment, he explained that while the EMG he recently performed did not demonstrate a frank neuropathic lesion, the findings could represent Claimant's pain generator. So, although "normal", the EMG findings provided Dr. Chan with some evidence that Claimant's pain was due to the compression or irritation of a nerve root coming from Claimant's lumbar spine. As a result, he thought Claimant's pain could be multifactorial – low back and SI joint. (Ex. J, p. 203)

18. On November 7, 2018, based on Dr. Chan's assessment that Claimant's pain might also be coming from her SI joint, he performed a right SI joint injection.

19. On, November 20, 2018, Claimant followed up with Dr. Chan to go over the results of the injection. Dr. Chan noted that Claimant had a rather significant diagnostic and therapeutic response to the SI joint injection.

20. As of November 20, 2018, Claimant had had significant diagnostic and therapeutic responses to her epidural steroid injections and SI injection.

21. On December 31, 2018, Claimant returned to Dr. Chan. He noted that Claimant had more than 7 weeks of pain relief from her SI injection, but that she felt like her pain was starting to return. As a result, he recommended another SI injection.

22. On January 16, 2019, Claimant underwent a repeat SI joint injection. Claimant returned to Dr. Chan about a month later and noted that her most recent SI injection did not provide as much relief as the first one.

23. On February 15, 2019, Claimant followed up with Dr. Kalevik. At this appointment, Claimant said that while she did get relief from the last SI injection, she did not get as much pain relief as she did from the prior injections. At this time, Claimant was still taking Celebrex to help manage her pain which she currently rated at 3/10. Dr. Kalevik concluded Claimant had predominately right sided discogenic disease with some radiation into her buttocks and tingling down her right leg. At this appointment, he determined Claimant reached MMI. He anticipated that Claimant would have permanent impairment and would require maintenance medical treatment such as injections. However, he deferred to Dr. Chan to provide an impairment rating and address maintenance medical treatment at Claimant's next appointment. (Ex. I, pp. 129-133.)

24. On March 14, 2019, Claimant returned to Dr. Chan. He agreed Claimant was at MMI and provided Claimant an impairment rating. This appointment was held about 8 weeks from her last injection. At this time, Claimant rated her pain at 4/10. Based on the pain relief provided by the prior injections, which provided Claimant over 7 weeks of pain relief before her pain started coming back, the ALJ infers that Claimant was still getting some pain relief from the latest injection. Plus, at this time, Claimant was also taking Celebrex to manage her pain. Thus, the ALJ finds that the temporary pain relief being provided by the injection and the Celebrex allowed Claimant to have greater range of motion at this time. (Ex J, p. 233-234)

25. Dr. Chan assessed Claimant's impairment pursuant to the AMA Guides. Dr. Chan provided Claimant a 5% whole person impairment rating. The rating was based on a 5% rating from Table 53 of the AMA Guides. Dr. Chan also measured Claimant's range of motion. Based on his measurements, he concluded Claimant did not have any additional impairment due to any range of motion deficits. Dr. Chan also addressed maintenance medical treatment. He concluded that Claimant may continue using Celebrex and lidocaine patches on a p.r.n. basis for the next 2-3 months.

26. On July 18, 2019, Respondents filed a Final Admission of Liability. Respondents admitted for the 5% rating provided by Dr. Chan. Since Claimant did not miss any time from work due to her work injury, Respondents did not admit for any temporary disability benefits. Respondents did, however, admit for maintenance medical benefits.

27. On September 5, 2019, Claimant underwent a Division IME (DIME) with Dr. Stanley Ginsburg. At this appointment, Claimant said that the pain in her back was intolerable and getting worse. (Ex. Q, p. 292) At this time, Claimant was no longer taking Celebrex and had not had any injections since January 2019. After reviewing

Claimant's medical records and performing an evaluation, Dr. Ginsburg concluded Claimant suffered a:

> Lumbar strain with radicular symptoms, but without radicular or myelopathic findings, superimposed on pre-existing degenerative disease.

28. Based on his assessment, he rated Claimant's impairment pursuant to the AMA Guides. First, Dr. Ginsburg provided Claimant a 7% rating pursuant to Table 53 II(C) of the AMA Guides. Second, Dr. Ginsburg measured Claimant's range of motion. Based on his measurements, which were valid under the AMA Guides, he provided Claimant an additional 15% impairment rating. The 7% Table 53 II(C) rating combined with the 15% rating for Claimant's range of motion deficits resulted in a 21% whole person impairment rating. After providing Claimant a 21% rating, he then added the following comment:

> I spoke to the patient before and during my obtaining the lumbar spine measurements. I frequently encouraged her to do the best she could and it is very obvious that she moved minimally, even after I had asked her "to cooperate." This is obvious when one compares my findings with Dr. Chan's findings.

29. Dr. Ginsburg also commented on maintenance medical treatment. Dr. Ginsburg concluded that Claimant should be seen by her primary workers' compensation doctor four times during the next year for medication management.

30. Based solely on Dr. Ginsburg's report, it looks like he merely measured Claimant's range of motion measurements and determined her impairment based on the tables in the AMA Guides without determining whether it made anatomical and medical sense based on the injury and Dr. Chan's range of motion measurements which demonstrated zero impairment. In other words, it looks like he accepted his range of motion measurements without using his medical judgement to determine whether the deficits were caused by her work injury.

31. Dr. Ginsburg testified at the hearing and his testimony provided context to his report and demonstrated that he did use his medical judgement is deciding to use his range of motion measurements in calculating Claimant's impairment. During his deposition, Dr. Ginsburg explained how he rated Claimant's impairment and how he determined the range of motion measurements he obtained were valid under the AMA Guides. He also explained why - in his medical judgement – he used the range of motion measurements he obtained in calculating Claimant's impairment.

32. First, Dr. Ginsburg testified about the process he went through in determining the Table 53(II)(C) rating of 7%. He testified that under Table 53(II)(B) of the AMA Guides, a 5% rating is based on non to minimal degenerative changes to the lumbar spine as demonstrated by an MRI. He testified that when rating under the AMA Guides, Claimant's MRI demonstrated more than non to minimal degenerative changes. In his opinion, Claimant's MRI findings demonstrated moderate findings – which supports a 7% impairment under Table 53(II)(C) of the AMA Guides. As a

result, he determined that the next level of impairment – which is 7% - more accurately reflected Claimant's MRI findings and her symptoms from her injury.

33. Dr. Ginsburg also discussed how he measured Claimant's range of motion and how he concluded that the measurements were valid pursuant to the AMA Guides. He also testified that he used his medical judgement to conclude that the range of motion measurements he obtained should be used to determine Claimant's final impairment rating pursuant to the AMA Guides.

34. Dr. Ginsburg also testified that Claimant probably has some behavioral aspects - or conversion aspects – that are impacting her range of motion. Thus, Claimant might think she is a little bit more impaired than she really is. On the other hand, he was adamant that Claimant was not malingering. He further testified based on his clinical judgement, the range of motion deficits he measured are a direct manifestation of her back injury and considered ratable medical impairment under the AMA Guides.

35. He also testified that he found the 0% range of motion deficits noted by Dr. Chan to be suspect based on Claimant's age and her MRI findings. In other words, Dr. Chan's measurements did not make clinical sense to Dr. Ginsburg based on his experience in evaluating and rating impairment. As a result, he provided Claimant a 21% impairment for her work-related back injury.

36. Dr. Ginsburg also testified that although he could have had Claimant come back for repeat range of motion measurements, he concluded that Claimant's ROM measurements would be similar upon repeat testing.[1]

37. On December 6, 2019, at Respondents' request, Claimant underwent an IME with Dr. John Raschbacher. He issued a report and also testified via deposition. (*See* Rs' Ex. E, and his deposition testimony.) This appointment occurred three months after Claimant's DIME with Dr. Ginsburg.

38. The essence of Dr. Raschbacher's opirnion is that Claimant is intentionally limiting her range of motion. More specifically, Dr. Raschbacher believes that Claimant's limited range of motion, which was measured by Dr. Ginsburg and Dr. Raschbacher, is intentional and that Claimant is malingering for secondary gain.

39. According to his report, Dr. Raschbacher noted that Claimant said that she felt that her condition was getting worse. He specifically noted:

> She states that she is currently getting worse at both the back and the leg. At the low back she has more pain. At the lower extremity on the right she states she has worsening of numbness and tingling. (Ex. E, p. 38)

40. Dr. Raschbacher also noted Claimant's medications. That said, it is not clear from his report whether he merely listed medications she had been prescribed in the past or medications she was currently taking. For example, he lists "Celecoxib 200 mg", but does indicate the frequency it was being taken. As a result, the ALJ infers Claimant was not taking it at that time.

[1] This conclusion was substantiated by Dr. Raschbacher's ROM measurements that were performed three months after Dr. Ginsburg's DIME and were remarkably similar.

41. As for Dr. Chan's MMI report and findings, Dr. Raschbacher reiterated that the 5% issued under Table 53(II)(B) was appropriate for six months of medically documented pain and rigidity with none-to-minimal degenerative changes. (DT: 15; 10 – 15) He also noted that her ROM measurements on March 14, 2019 were "good" and that she moved well enough on that date that she appropriately qualified for 0% ROM impairment. *Id.* His report also provided that, per Division guidelines, if someone has pain and it is presumed that the pain is coming from the SI joint, a 5% rating under Table 53 is appropriate and the default rating. (Ex. E, 0044) It was his contention that in this case, there were no clear radicular findings, that she exhibited negative straight leg raising, and the EMG results did not support any radicular symptomatology in the lower extremities whatsoever. *Id.*

42. He also asserted that there was no clear reason why Dr. Ginsburg would elect to impose a 7% specific diagnosis rating rather than 5%. (DT: 28; lines 18 – 25) He also indicated that Claimant's MRI was normal and "benign" for someone her age and that a 7% rating presupposes she had a pain generator from her lumbar spine, which he contended was not medically documented to be the case. (DT: 29; lines 7 – 15)

43. When asked about Dr. Ginsburg's 21% whole person impairment rating from the DIME, Dr. Raschbacher testified that he "heartily disagree[d]." (DT: 17; line 2) In support of this conclusion, Dr. Raschbacher noted that her ROM testing with Dr. Chan on March 14, 2019 yielded the following results: 62 degrees of forward flexion, 30 degrees extension… (*see also* Ex. J, 000236 for a complete review of the range of motion measurements), which qualified Claimant for a 0% range of motion impairment. (DT: 17; 10 – 22) Essentially, he testified that her ROM in March 2019 was normal while her ROM with Dr. Ginsburg during the DIME was "all of a sudden…much, much worse." *Id.* It was also his opinion that there was no medical reason or justification for the considerable discrepancy. *Id.* He stated the same was true of his own IME examination, during which she similarly exhibited very reduced range of motion findings for which Dr. Raschbacher asserted was without a clear explanation or medical justification. *Id.*

44. When asked whether any medical records were reviewed and/or a medical history that would explain such a dramatic increase from March 2019 until September 2019, or a period of approximately six (6) months, Dr. Raschbacher testified that there was no medically documented justification for such a *decrease* in her ROM abilities. (DT: 18; 10 – 18)

45. Dr. Raschbacher also testified that he routinely conducts Division IMEs and that a DIME physician is "never relieved of the requirement that things have to make sense medically." (DT: 19 – 20; lines 20 – 25, 1 – 25) He clarified that a DIME physician has several options when such a considerable inconsistency exists, including (1) utilizing someone else's measurements if they represent a more accurate depiction of a claimant's condition and/or (2) having the claimant return for repeat measurements. (DT: 21; lines 1 – 9) He reiterated that no DIME physician is obligated to accept their own range of motion measurements when they are clearly disproportional to the ATP's findings, as they were here. (DT: 22; lines 1 – 15) Thus, even if the measurements taken are "valid," the DIME physician is not obligated to

accept them if they do not make medical sense and not relieved of his/her duty that the findings must make sense medically. (DT: 23; lines 1 – 8)

46. He further testified that per the AMA Guides, ratings from measurements amongst examiners should be "reasonably consistent" and that here, the rating discrepancy was "grossly inconsistent." (DT: 23; lines 20 – 25) Dr. Raschbacher was of the opinion that Dr. Ginsburg merely ignored the discrepancy and imposed his own rating and that doing so was "clearly improper." (DT: 24; lines 3 – 16) Without having the benefit of Dr. Ginsburg's testimony at hearing, Dr. Raschbacher concluded that Dr. Ginsburg's decision to accept his range of motion measurements rose "to the level of an error so egregious." (DT: 24; lines 17 – 19)

47. In summary, he testified that Dr. Ginsburg's decision to impose a 15% ROM impairment, and 7% specific diagnosis impairment, was clearly erroneous. (DT: 32; 5 – 18) He maintained that the discrepancy and decision was made in error and not simply a difference of opinion. (DT: 32; 19 – 24; *see also* Rs' Ex. E, 0044)

48. Again, Dr. Raschbacher concluded that the range of motion deficits measured by Dr. Ginsburg were based purely on Claimant intentionally limiting her range of motion for secondary gain.

49. Dr. Raschbacher next testified that based on his review of the medical records, Claimant never complained of right hip pain. (DT: 16; 4 – 8) That said, the medical and physical therapy records are replete with complaints by Claimant about her right hip. (*See* Ex., pp. 55-62; 68; 73; 76; 79; 84; 86; 88; and 129.)

50. When asked to directly opine on the right hip MRI and report from Dr. Amador (C's Exh. 3), Dr. Raschbacher noted it was for a right acetabular labrum tear, which would be located right at the hip joint. DT: 30; 16 – 25. He reiterated that not only was there no mention of the right hip ever being involved in this claim but that the report itself also noted a fall from January 2020. DT: 31; lines 4 – 12. However, despite this notation of a January 2020 fall, he did not ask Claimant if that was accurate or not. He merely accepted it as fact. Claimant, however, testified that she did not fall in January 2020, but that the January fall referenced her fall in this case, which was January 2018.

51. Based on the testimony of Dr. Ginsburg, the testimony of Claimant, and the medical record as a whole, the ALJ does not find Dr. Raschbacher's opinions to be credible and persuasive for several reasons.

52. As noted, Dr. Raschbacher concluded that Claimant's decrease in ROM is based on malingering and secondary gain. Dr. Raschbacher, however, arrives at that conclusion without performing any meaningful analysis.

53. For example, Dr. Raschbacher did not consider other factors that could have caused such a difference in the ROM measured by Dr. Chan and the ROM measured by both Dr. Ginsburg and Dr. Raschbacher. For example, Dr. Raschbacher did not appear to consider the following:

    - Claimant said her condition and symptoms had worsened since being placed at MMI. Dr. Raschbacher, however, did not consider the possibility that her symptoms and range of motion actually got worse. As a result, he failed to inquire and assess why Claimant's symptoms – and range of motion – might be getting worse.

- Claimant had also undergone several injections. Pursuant to the Colorado Medical Treatment Guidelines, each injection is only expected to provide short-term relief. The Guidelines specifically indicate that the purpose of each injection is to: "facilitate active therapy by providing short-term relief through reduction of pain and inflammation." [2] As a result, Claimant's decrease in range of motion could have been based on the short-term relief from the injections wearing off.
- Claimant also testified that Dr. Chan actively helped Claimant perform her range of motion. As a result, this active assistance would also explain why the range of motion measurements obtained by Dr. Chan were much better than the range of motion measurements obtained by Dr. Ginsburg and Dr. Raschbacher.
- When Claimant had her range of motion measurements taken by Dr. Chan, she was also taking Celebrex. When Dr. Ginsburg took her ROM measurements, it does not appear she was taking Celebrex – since her treating physicians would not schedule any follow up appointments.

54. By failing to address each of the above factors individually, Dr. Raschbacher also failed to consider them concurrently.

55. In addition, Dr. Raschbacher also concluded that Claimant's pain generator is limited to her SI Joint and not her lumbar spine. He based his opinion on his contention that Claimant's lumbar epidural steroid injections were not diagnostic in diagnosing a lumbar back problem. Lastly, he also stated the EMG did not support a radicular component to Claimant's injury. Such assertions, however, conflict with the findings of Claimant's medical providers. As found above, the findings of Claimant's physicians showed that the injections were diagnostic for a lumbar injury at the L5-S1 level and that the EMG – although normal – still showed some evidence of possible nerve root irritation.

56. In addition, Dr. Raschbacher stated that the medical records do not reference Claimant complaining of hip pain, but a review of Claimant's medical records reflects she did complain of hip pain.

57. In the end, the ALJ finds Dr. Raschbacher's opinion that Claimant's decreased ROM is based on malingering and secondary gain – and not because of her injury - to be nothing more than subjective belief and unsupported speculation. As a result, the ALJ does not find his opinions to be credible or persuasive.

[2] *See* Rule 17, Exhibit 1, Low Back Pain Medical Treatment Guidelines, page 45.

58. Dr. Ginsburg testified at length regarding his analysis in this case. Dr. Ginsburg testified that in the end, it was Claimant's injury, residual pain, and individualized response to her injury that caused her reduced range of motion. In other words, while the same injury might not have reduced another person's range of motion as much as it did Claimant's, it did reduce Claimant's range of motion as measured. He also credibly testified how he applied the AMA Guides and rated Claimant's impairment. Overall, the ALJ finds Dr. Ginsburg's opinions and testimony to be credible and persuasive.

59. Claimant credibly testified that when Dr. Chan performed range of motion measurements for her impairment rating, he physically assisted her achieve the range of motion he measured. (Tr. p. 71, lines 3-23)

60. Claimant credibly testified that she tried to go back to both Dr. Kalevik and Dr. Chan with ongoing complaints after she reached MMI, but they would not see her because they said her case was closed. (Tr., pp. 73-74) As a result, she then went on her own to see Dr. Liberty Amador who has recommended a repeat MRI and a referral to an orthopedic surgeon for her hip. (Tr., p. 75)

61. The ALJ finds that when Claimant was placed at MMI, and afterwards, she needed maintenance medical treatment to relieve her from the effects of her work injury. As a result, the ALJ finds Claimant is still in need of maintenance medical treatment to relieve her from the effects of her work injury.

62. Claimant testified that she worked a significant amount of overtime with her employer and earned $70,917.77 in the year leading up to the accident. (Tr., p. 6 line 5) Respondents' provided these same earnings as exhibit D. Based on Claimant's testimony and Exhibit D, these earnings equal an average weekly wage of $1,363.80, and results in a temporary total disability rate of $909.20.

63. The ALJ finds Claimant's presentation and statements to her medical providers to be consistent and reliable. This finding is supported by Claimant's diagnostic response to her injections (as initially reported by Dr. Chan) and the overall consistency of her statements contained in her medical records. The ALJ also finds Claimant's testimony is consistent with – and tracks – her medical records. As a result, the ALJ finds Claimant's testimony to be credible.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

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

The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Respondents established, by clear and convincing evidence, that the 21% whole person impairment rating provided by the DIME physician was issued in error.

The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995); *Lafont v. WellBridge D/B/A Colorado Athletic Club* W.C. No. 4-914-378-02 (ICAO, June 25, 2015).

As a matter of diagnosis, the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003); *Sharpton v. Prospect Airport Services* W.C. No. 4-941-721-03 (ICAO, Nov. 29, 2016). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998); *Watier-Yerkman v. Da Vita, Inc.* W.C. No. 4-882-517-02 (ICAO Jan. 12, 2015);

Compare *In re Yeutter*, 2019 COA 53 ¶ 21 (determining that a DIME physicians opinion carries presumptive weight only with respect to MMI and impairment). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

The questions of whether the DIME physician properly applied the *AMA Guides*, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000); *Paredes v. ABM Industries* W.C. No. 4-862-312-02 (ICAO, Apr. 14, 2014). A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO, Mar. 22, 2000); *Licata v. Wholly Cannoli Café* W.C. No. 4-863-323-04 (ICAO, July 26, 2016).

As found, Dr. Ginsburg credibly and persuasively set forth how he rated Claimant's impairment pursuant to the AMA Guides. Dr. Ginsburg also credibly and persuasively set forth why he chose to use his range of motion measurements which varied from Dr. Chan's. In the end, the ALJ found his opinion to be well reasoned and supported by the medical record and in accordance with the AMA Guides.

Dr. Raschbacher's opinions, while different, were not found to be credible or persuasive. As a result, Dr. Raschbacher's opinions do not rise to the level of clear and convincing evidence. Moreover, the other arguments raised by Respondents which they contend establish that Dr. Ginsburg's rating is wrong also fails to rise to the level of clear and convincing evidence. While the discrepancy between Dr. Chan's and Dr. Ginsburg's rating is significant, the rating provided by Dr. Ginsburg is still well founded and supported by the medical record and supportable under the AMA Guides. As a result, Respondents failed to overcome the opinion of Dr. Ginsburg by clear and convincing evidence.

II. Whether Claimant established, by a preponderance of the evidence, an increase to her AWW, thereby impacting PPD benefits owed.

Section 8-42-102(2), C.R.S., requires the ALJ to calculate the claimant's AWW based on the earnings at the time of injury as measured by the claimant's monthly, weekly, daily, hourly or other earnings. This section establishes the so-called "default" method for calculating the AWW. However, if for any reason the ALJ determines the default method will not fairly calculate the AWW § 8-42-102(3), C.R.S., affords the ALJ discretion to determine the AWW in such other manner as will fairly determine the wage. Section 8-42-102(3) establishes the so-called "discretionary exception." *Benchmark/Elite, Inc. v. Simpson,* 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.*

Claimant credibly testified about her earnings for the year before the industrial accident. Respondents gave no reason or argument about how they arrived at the AWW of $885.00.

The ALJ finds and concludes that using the Respondents' Average weekly wage would not fairly approximate Claimant's actual earnings at the time of her industrial accident. Based on Claimant's annual earnings of $70,917.77 in the year leading up to the accident, Claimant's average weekly wage is $1,363.80. Thus, her corresponding TTD rate is $909.20. This figure should be applied to all retroactive and future benefits paid and due and owing.

III. Whether Claimant established, by a preponderance of the evidence, entitlement to maintenance medical benefits - including a right hip MRI and orthopedic referral.

a. Whether Claimant established she is entitled to a general award of maintenance medical benefits.

The need for medical treatment may extend beyond the point of maximum medical improvement where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999). The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003).

As found, when Claimant was placed at MMI, Dr. Kalevik concluded that Claimant would require maintenance medical treatment such as injections. Moreover, when Dr. Chan agreed Claimant reached MMI and rated Claimant, he also concluded Claimant would require maintenance medical treatment such as Celebrex and lidocaine patches on a p.r.n. basis for approximately 2-3 months. Moreover, Claimant attempted to obtain maintenance medical treatment for her work injury from Dr. Kalevik and Dr. Chan, but they would not see her. As a result, Claimant established by a preponderance of the evidence that she is entitled to a general award of maintenance medical benefits to relieve her from the effects of her work injury.

b. Whether Claimant established by a preponderance of the evidence that she is entitled to a right hip MRI and a referral to an orthopedic surgeon as recommended by Dr. Amador.

An ALJ is without jurisdiction to order Respondents to pay for any specific treatment that is not prescribed by an authorized provider. *See Potter v. Grounds*

Service Company, W.C. No. 4-935-523-04 (Aug. 15, 2018); *Torres v. City and County of Denver*, W.C. No. 4-917-329-03 (May 15, 2018); and *Short v. Property Management of Telluride*, W.C. No. 3-100-726 (May 4, 1995). Such opinions hold that an ALJ may not order a Respondent to pay for treatment that has not been prescribed by an authorized provider unless it is requested pursuant to a DIME and is an “essential test’ as referenced by WCRP 11-5(D).

As found, after being placed at MMI, Claimant was unable to get maintenance medical treatment through Dr. Chan or Kalevik. However, it is not clear from the record that the issue of whether the right to select an authorized treating physician passed to Claimant based on Dr. Chan and Dr Kalevik refusing to provide maintenance medical treatment for non-medical reasons was endorsed and tried based on the pleadings, statement of the issues made at the beginning of the hearing, the evidence presented, and each party’s post hearing submissions. Therefore, the issue of the MRI and referral to an orthopedic surgeon made by Dr. Amador, and whether Dr. Amador is authorized, is reserved for future determination.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents failed to overcome the opinion of Dr. Ginsburg regarding Claimant’s impairment rating.
2. Respondents shall pay Claimant permanent partial disability (PPD) benefits based on a 21% whole person impairment rating. (Respondents may take a credit for any previously admitted and paid PPD benefits.)
3. Claimant’s average weekly wage is $1,363.80. Respondents shall pay Claimant her PPD benefits based on an average weekly wage of $1,363.80, which results in a temporary total disability rate of $909.20.
4. Claimant is entitled to a general award of maintenance medical benefits to relieve her from the effects of her industrial injury.
5. Claimant’s request for a repeat MRI of her right hip and a referral to an orthopedic surgeon for her right hip based on the referral from Dr. Amador – and whether Dr. Amador is an authorized provider - is reserved.
6. Issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: January 22, 2021

/s/ Glen Goldman___________
Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-118-916-001

ISSUES

I. Whether Claimant suffered a compensable neck injury on September 24, 2019.

II. Whether Claimant is entitled to reasonable and necessary medical treatment.

III. Whether Claimant is entitled to temporary total disability benefits or is Claimant at-fault for her termination and subsequent wage loss.

STIPULATION

The parties stipulated that Claimant's average weekly wage is $673.07.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. Claimant is a 30-year-old former Assistant General Manager for Employer for whom she began working on or after July 30, 2019. She alleges an injury to her cervical spine on September 24, 2019, when she was reaching for a sauce bottle and felt a crack/pop sensation in her upper back, neck, or both.

Past Medical History

2. Claimant has a past medical and claim history. Claimant testified that she sustained a low back injury in 2016 while working for [Redacted]. She testified that the mechanism of injury in that case was "bending forward reaching for something." **Hrg Tr. 43:18-24.**

3. More recently, in February 2019, Claimant reportedly sustained injuries in an assault while she was working for [Redacted]. Claimant denied any complaints and treatment for her neck, which is contradicted by the limited medical records from Concentra.

4. Claimant presented to Concentra on February 11, 2019 asserting back pain, neck pain, and joint swelling after a work-related assault the day before. **Exhibit A**, **p. 2.** She was referred for physical therapy and psychotherapy to treat Post Traumatic Stress Disorder (PTSD).

5. Claimant testified at the September 22, 2020 hearing about the 2019 assault, stating that she was thrown on the ground, hit in the back of the head twice, and kicked several times in the legs. She testified that "the only thing that bothered me from [the assault] was the head pain and my-- he strained my lower back." Claimant testified that "there was no neck pain." **Hrg. Tr. 29.**

6. Medical records from Claimant's February 11, 2019 Concentra evaluation also include complaints of "headache, worsening baseline anxiety, difficulty sleeping, episodic nausea and dizziness." **Exhibit A, p 1.** She reported complaints of palpitations ('with anxiety') and shortness of breath ('with anxiety'). She also reported a headache, dizziness, tremors, anxiety, depression, and insomnia**.** The February 11, 2019 records mention musculoskeletal complaints, including back pain, neck pain, and night pain**. Exhibit A, p 2.**

7. While neck pain was not the most prominent complaint in the 2019 Concentra records, the medical records support that neck complaints were reported and treated in connection with the February 10, 2019 work-related assault. For example, at her February 15, 2019 physical therapy appointment related to the assault, Claimant reported "Pt helping neck tightness—evident second visit." **Exhibit A, p 8.**

8. In connection with the February 2019 assault, Claimant reported attending five physical therapy appointments and a referral for psychological treatment for PTSD with Dr. Boyd. Claimant testified that Dr. Boyd was "actually quite rude" and she did not return for treatment. **Hrg Tr 31:1-8.** Claimant also testified that she was physically able to go back to work following the 5 PT sessions, but testified that "mentally, I wasn't ready" to return to work at Illegal Pete's. **Hrg. Tr. 31: 9-13.** She testified: "I'm still suffering from [PTSD]" related to the February 10, 2019 assault. **Hrg. Tr. 31:14-16.**

9. Claimant presented for her initial psychological interview with Dr. Boyd on February 20, 2019, reporting a history of psychological and behavioral problems. She endorsed sleeping problems (4-6 hours per night), tight muscles, heart palpitations, and panic symptoms. She also reported "difficulty spending time with others." Claimant also reported "problems standing due to bad knees." She was taking no prescribed medications at the time. **Exhibit B, pp 10-11**.

10. Dr. Boyd presumptively diagnosed Claimant with acute stress reaction, bipolar disorder by history, and "rule out borderline personality disorder." **Exhibit B, p 12.** Dr. Boyd recommended 8 sessions of cognitive behavioral therapy to treat work-related PTSD.

11. At her February 22, 2019 Concentra follow-up, Claimant reported resolution of neck and back symptoms and a desire to return to work. Dr. Miller released Claimant to full duty. **Exhibit C, pp 14-15.**

12. Claimant was late to her first cognitive behavioral treatment appointment with Dr. Boyd on February 25, 2019. Since Claimant was late, Dr. Boyd started talking to another provider which resulted in Claimant waiting for about 10 minutes. Claimant refused to engage or listen to anything being said during the session because she was "resentful" for having to wait for Dr. Boyd. Claimant terminated the session and did not return to Dr. Boyd or any other physician for treatment of her PTSD or any other injuries sustained in the assault. **Exhibit D, p 16.**

13. Claimant no showed to her next two scheduled appointments with Dr. Miller at Concentra on March 8, 2019 and April 8, 2019. **Exhibit E.** On April 11, 2019

Claimant signed a Voluntary Abandonment of Claim form, indicating that she was "waiving entitlement to any current and future medical benefits…" along with wage loss and permanency benefits. **Exhibit F**.

14. Claimant testified that she closed the February 2019 assault claim because she "didn't want to think about it anymore." **Hrg. Tr. 31.** Claimant testified that she left her job at Illegal Pete's in June 2019 due to "personal reasons arising from the assault." **Hrg. Tr. 44:14-17.**

15. As a result of Claimant telling Dr. Miller that her neck symptoms had resolved and abandoning her claim, the ALJ finds that when Claimant signed the Voluntary Abandonment of her prior claim, she did not have any ongoing physical complaints or symptoms regarding her neck or upper back based on the assault.

Claimant Hired by Employer

16. Claimant was hired by Employer on or about July 30, 2019. **Exhibit G, pp 20-24.** When Claimant was hired, the day-to-day operations were in "chaos." **Exhibit I, p. 31**. Claimant testified that she quit less than a month after she was hired, when she walked out on her shift on August 27, 2019. **Hrg Tr. 44.**

17. The next day, the new General Manager, David S[Redacted], rehired Claimant as his Assistant General Manager (AGM), as documented in an email exchange and attested to by Claimant. **Exhibit I, p 31; Hrg. Tr. 45.**

18. According to Claimant, her position involved "a little bit of everything" including putting away orders, ordering supplies, working the grill, and making milkshakes. As a result, her job duties required a lot of physical work and she worked 50–plus hours per week. Her job duties included:

    - Putting product away in the basement after it was delivered to the restaurant.
        - This required Claimant to carry heavy boxes of product on one of her shoulders while going down the greasy stairway into the basement.
    - Getting product out of storage from the basement to use in the restaurant.
        - This required Claimant to carry the heavy boxes of product on one of her shoulders while going up the greasy stairway from the basement.
    - Making 300 hamburgers in less than two hours.
        - This required repetitive reaching over the hot grill and gripping the sauce, toppings, and buns.
    - Bagging French fries.
    - Making milkshakes.

    Hrg. Tr. 22-23.

19. Not only was her job physically demanding, but Claimant had to perform her job in an extremely small kitchen. The exceedingly small kitchen caused her to work at very awkward angles when making the hamburgers, fries, and milkshakes. **Hr. Tr. 23**. As a result, Claimant had to perform her job in awkward postural positions.

Claimant's Incident at Work and Medical Treatment

20. Claimant reported arriving for work on September 24, 2019 between 10:00-10:30 AM. **Hrg. Tr. 24:11-15.** She reported performing her opening routine, lighting the grills, bringing the heavy boxes of frozen fries up the stairs and "prepping everything for the day." **Hrg. Tr. 24:20-23**.

21. Claimant testified that she was "reaching forward for the sauce bottle" when she "felt the pop – the tweak, and I just -- I froze." Claimant testified that she was afraid to move because it hurt so much. Claimant testified that Mr. S[Redacted] was present and "saw it when it happened…" Claimant testified that, after she froze, Mr. S[Redacted] asked her if she was okay, to which she responded by shaking her head no and crying. **Hrg. Tr. 25:14-22.**

22. Claimant went to another part of the restaurant, a trailer used for dry storage. She testified that she laid down on the floor of the trailer and then called Mr. S[Redacted] on her cell phone for help and "to get me to the hospital." **Hrg. Tr. 25:10-13**. Claimant refused an ambulance, so Mr. S[Redacted] ordered her an Uber to the hospital. **Hrg. Tr. 26:1-8.**

23. Claimant received emergency treatment at Boulder Community Hospital on September 24, 2019 at almost 1:00 p.m. The medical report from that visit states the incident occurred 30 minutes ago while reaching for something at work while turning and twisting. The emergency room (ER) notes indicate:

> She states that she noticed some mild discomfort 2 days ago however at work today she works at a sandwich shop she ***was reaching for something and turning her upper thoracic spine*** and felt upper thoracic spine pain. She felt a pop and then states she has rather severe pain (emphasis added).
>
> Pain started getting worse **after she twisted at work to reach for something** (emphasis added).
>
> **Exhibit L, p 35**.

24. Claimant underwent a thoracic x-ray at the ER**,** which showed a potential disc herniation in her lower cervical spine. A cervical MRI was performed, which showed a large disc herniation at C6-7 causing "severe central canal stenosis with cord compression and deformity…" along with mild degenerative disk disease with "moderate central canal stenosis secondary to a right paracentral disk herniation" at C5-C6. **Exhibit M, p. 42.** Based on the disc herniation and moderate spinal canal stenosis, Claimant was admitted to Boulder Community Hospital and a neurosurgery consultation was ordered. **Exhibit L.**

25. The next day, Claimant underwent a neurosurgical consultation at Boulder Community Hospital with Adam Levine, DO. Dr. Levine noted that Claimant had a “very large cervical disk herniation that is the cause of her current clinical complaint and she apparently herniated this disk while on the job at [Redacted]’s.” Dr. Levine noted that Claimant could “be given surgical consideration” but “there is a chance that she may do okay with medical management alone.” **Exhibit N, p. 45**. He said the lack of “hard neurological findings of evidence of cord compression” and her young age in recommending conservative treatment as tolerated. **Exhibit N, 45-46.** As a result, Claimant was prescribed steroids and a collar and directed to seek follow up treatment in one week. **Exhibit N, p. 47.**

26. A week later, as directed by Boulder Community Hospital, Claimant followed up at Clinica Family Health. The notes from that visit indicate Claimant was not having any radicular symptoms, but she was having was neck pain. **Exhibit O.**

27. On October 10, 2019, Claimant was first seen at Concentra by Bree Willis, M.D. Dr. Willis wrote a brief description of the work incident. Dr. Willis noted:

> She was reaching for a sauce bottle at work with left hand outstretched when she felt a cracking shift in the vertebrae of her neck. She had immediate severe pain. . . . She reports that earlier in the day when she woke up she felt like she slept wrong. She reports she had soreness in her neck. Worsened when she reached for the sauce bottle.

Dr. Willis also completed a “Physician’s Report of Workers’ Compensation Injury” form on which she answered “Yes” to the question: “Are your objective findings consistent with history and/or work-related mechanism of injury/illness?”

Dr. Willis prescribed medication and physical therapy. She also restricted Claimant to modified duty and imposed work restrictions, which precluded Claimant from performing her regular job duties. These restrictions consisted of:

- May lift up to 10 lbs. Occasionally- up to 3 hrs/day.
- May push/pull up to 10 lbs. Occasionally - up to 3 hrs/day.
- May bend - Occasionally - up to 3 hrs/day.

Ex. P., p. 56-60.

28. Although the providers at Boulder Community Hospital did not provide Claimant with specific work restrictions, the ALJ finds that based on Claimant’s injury, and the restrictions imposed by Dr. Willis, Claimant was unable to perform her regular job duties as of September 24, 2019 when she injured her neck and suffered a disc herniation.

29. Claimant presented to her first physical therapy session on October 11, 2019. The record states:

> Pt woke up really stiff and thought she slept wrong and pt went to reach for a sauce bottle and felt a sharp pop in the

> middle of her neck. Felt instant nerve pain down both arms.
> Shoots primarily down R but sometimes L.

Ex. Q, p. 61.

30. At her second PT appointment on October 15, 2019, the therapist noted that Claimant had radicular symptoms “that worsen with worsening posture.” **Exhibit Q, p. 64**.

31. Claimant testified that, right after the incident, she felt pain “at the top of…my shoulder area in between my shoulders…”, which she testified she reported to Mr. S[Redacted] when he requested the Uber. **Hrg. Tr. 26:12-23.** She also testified that, before September 24, 2019, she never experienced neck problems or sought medical treatment for her neck. **Hrg. Tr. 28:2-8.**

32. On October 20, 2019, Claimant returned to the Boulder Community Hospital ER with complaints of numbness in all extremities and difficulty breathing. According to the ambulance records, Claimant “was found sitting up in her bed hyperventilating and stating her hands and feet felt numb.” Claimant was coached to breathe slower and her numbness improved. She reported “throwing up all day.” The ambulance notes reveal that Claimant denied drugs or alcohol to the EMTs. **Exhibit T.**

33. Despite the ambulance notes revealing Claimant denied using alcohol, Claimant reported “she went out to a party last night and had some drinks with friends. Around 5 AM this morning she awoke feeling nauseous, with multiple episodes of vomiting. **Exhibit U, p 88**. Claimant reported concern that her symptoms were connected to her C6-7 disk herniation. **Exhibit U, p. 80.**

34. On October 20, 2019, while in the hospital, Claimant texted her supervisor, Mr. Mr. S[Redacted], and asked if she was on the schedule the day after since she was probably going to stay in the hospital that night. Mr. S[Redacted] responded and advised Claimant that “You do not work tomorrow.” **Exhibit 16**. Thus, because Claimant was told by her supervisor that she did not have to work the next day, Claimant did not go into work the next day on October 21st.

35. The ER physician concluded: “I think that hyperventilation and nausea and vomiting is much more likely as a source for her numbness and tingling peripherally than her cervical spine.” **Exhibit U, p. 81**. Hospital records noted that Claimant’s arrival complaint was “vomiting all day, anxiety.” **Exhibit U, p 84**. While in the ER, Claimant denied neck pain or related symptoms. **Exhibit U, p 94.** The discharge note from the ER shows that Claimant was offered “supportive management in the outpatient setting; however, she is refusing at the time of disposition.” **Exhibit U, p 94.**

36. Claimant followed up at Concentra on October 21, 2019 and was evaluated by Devin Jacobs, PA-C. Claimant was tearful in recounting her ER visit the day before. PA Jacobs concluded that Claimant's reported symptoms were “**likely multifactorial including anxiety and hyperventilation**.” PA Jacobs noted that further imaging was unnecessary and recommended that Claimant follow up with her primary care provider “for follow up of SOB/post hospital admission.” **Exhibit**

V, p 98. Claimant testified that PA Jacobs never told her that "because he knows I don't have a PCP." **Hrg. Tr. 50.**

37. On October 21, 2019, the day after Claimant's supervisor – Mr. S[Redacted] - advised Claimant by text message that she was not scheduled to work that day, he completed a Disciplinary Action Form. Mr. S[Redacted] specified on the form that Claimant violated their attendance policy by failing to show up for work that day. He wrote: "Theresa missed work due to a text out that she was again in the hospital forcing the GM to come in for this shift" and was terminated. **Exhibit S, p. 75**.

38. Thus, Claimant was told by Mr. S[Redacted], her manager, that she was not scheduled to work on October 21st - but was terminated for not working on October 21st. As a result, Claimant is not at-fault for her termination.

39. On October 23, 2019, Claimant presented to Cornerstone Orthopedics for an orthopedic consultation. Claimant reiterated that she woke up the morning of September 24, 2019 "with stiffness in her back." She reported "leaning forward to pick something up and felt the sudden onset of a popping sensation in her neck with severe neck pain." Claimant told Dr. Castro that her symptoms had "increased significantly**"** at one of her recent physical therapy visits. **Exhibit X, p 102**. She reported "doing reasonably well until physical therapy 2-3 days ago." **Exhibit X, p 105.**

40. Based on Claimant's report to Dr. Castro, he concluded that "she had symptoms as a result of a reaching injury, and I think it would be considered within a degree of medical probability that her symptoms are related to the accident in question without a doubt." He prescribed a Medrol Dosepak. **Exhibit X, p. 105.**

41. Claimant underwent a follow-up MRI of her cervical spine on December 10, 2019. The impressions from that MRI include "disc protrusion with annular tearing and cord contact C6-C7 level. Central canal stenosis. Mild right foraminal compromise. No signal alteration of the cord." Claimant also had findings at the C5-C6 level. **Exhibit EE.**

42. Claimant followed up with Dr. Castro on December 11, 2019. Dr. Castro stated that Claimant's MRI was "markedly improved." Dr. Castro noted: **"**I was hoping this would be the case as free fragment disc herniation's do typically resolve on their own." Claimant reported intermittent arm symptoms was some right tingling in her hand and "numbness and tingling episodes in her feet…" She also reported constipation, fatigue, night sweats, dizziness, and headache. **Exhibit FF, pp. 145-147**. Dr. Castro encouraged Claimant to exercise and continue with physical therapy. **Exhibit FF, p. 148.**

43. Claimant returned to Concentra on December 17, 2019, and was evaluated by Devin Jacobs, PA. **Exhibit GG, p.150.** Claimant reported continued discomfort in her neck and a burning sensation in her right shoulder. Claimant noted improvement in her symptoms but said that they return she reported intermittent numbness and tingling to her right hand and occasionally in her feet. PA Jacobs

noted “mild blunted affect but mood overall improved from prior visits.” **Exhibit GG, p. 154.**

44. On December 29, 2019, Claimant started working at [Redacted]. Claimant continued working with [Redacted] until February 22, 2020.

45. On February 20, 2020, Claimant was evaluated by Dr. Felix Meza at Concentra. At this appointment, Dr. Meza provided Claimant work restrictions, which precluded Claimant from performing her regular job duties. These restrictions included:

    - May lift up to 15 lbs. occasionally.
    - May push/pull up to 15 lbs. occasionally.
    - No lifting overhead.
    - At Least 15 min rest for every two hours worked.

    Exhibit NN, p. 192.

46. On March 5, 2020, Claimant underwent a cervical interlaminar epidural steroid injection at C7-T1 on March 5, 2020. **Exhibit OO, pp.193-194.** The injection, however, did not make things better. Instead, she was worse for a couple of weeks. **Hrg. Tr. 51.**

47. On May 14, 2020, Claimant was seen by Allison Fall for an independent medical examination (IME). Claimant reported “extreme pain following the injection on March 5, 2020” and reported that the injection gave her a headache. She reported 8/10 pain after completing paperwork for the IME. Claimant disclosed the February 2019 assault to Dr. Fall, stating that she “had bruises but no neck pain.” She reported that her injuries under that claim resolved and she was “past it.” **Exhibit PP, p. 195.** This is contradicted by Claimant’s hearing testimony that she is still suffering from PTSD related to the February 2019 assault.

48. Dr. Fall concluded, within a reasonable degree of medical probability, “the large disc extrusion causing severe stenosis was not caused by reaching forward while at work.” Dr. Fall cited Claimant report to the ER that she had neck symptoms two days earlier. Dr. Fall concluded that Claimant’s neck condition is “an evolving process” and while moving her arm may have led to Claimant experiencing symptoms, such action did not “cause the disc abnormality or the need for treatment.” Dr. Fall noted that Claimant did not have any neurological compromise and her second MRI was reassuring. She concluded that “no further treatment is indicated at this time whether work-related or not.” **Exhibit PP, p. 198.**

49. Dr. Fall also testified at hearing as an expert in occupational medicine. **Hrg Tr. 56.** Dr. Fall testified that disc protrusions, annular tears, and bulges are part of the natural aging process, and while there can be traumatic causes, the most common reason for a disc herniation is “age-related degenerative changes because of [a] genetic component, because there is a familial history or certain people are more predisposed.” **Hrg. Tr. 59.** Dr. Fall also stated that many of

these findings are common and found in over 50% of the population who are 50 and older. **Hrg. Tr. 59**.

50. Dr. Fall concluded that Claimant "would be just as likely to feel symptoms whether she were at home or at work" because the alleged mechanism of reaching "did not cause any stress that would cause any damage to her disc…" **Hrg. Tr. 62.** Thus, it was her opinion that Claimant's job activities did not cause the disc herniation. Instead, it was her opinion that the disc herniation is the result of Claimant's natural aging process and that it merely became symptomatic while Claimant was at work and not because of Claimant's work.

51. However, when rendering her opinion, Dr. Fall did not appear to consider the specific circumstances of Claimant and her job duties. For example, although Dr. Fall said disc herniations can be common – and naturally occur in people who are 50 and older, Claimant was only 29 years old at the time of the incident. Moreover, not only was Claimant's job physically demanding, but Claimant had to perform her job in an extremely small kitchen that caused her to work at very awkward angles when making hamburgers, fries, and milkshakes. Moreover, this injury occurred around 12:20 p.m., which is arguably a busy time since it is lunchtime. As a result, at the time of the injury, and while grabbing the bottle of sauce, Claimant was most likely performing her job duties in an awkward postural position and at a production pace.

52. Furthermore, the medical records from the emergency room specifically state Claimant was injured while turning and twisting. Dr. Fall concluded, within a reasonable degree of medical probability that "the large disc extrusion causing severe stenosis was not caused by reaching forward while at work." **Ex. PP, p. 98**. Despite the emergency room records containing the exact mechanism of injury, Dr. Fall fails to address the actual job tasks Claimant was performing at the time of the injury, which included turning and twisting. In the end, Dr. Fall did not even address the actual mechanism of injury - which included reaching, turning, and twisting. As a result, Dr. Fall's failure to address the actual mechanism of injury asserted by Claimant degrades the quality of her opinion.

53. Dr. Fall's opinion is further degraded due to her failure to comprehensively interview and question Claimant about her job duties and document that information in her report. Absent from Dr. Fall's analysis is an assessment of the actual physical requirements of Claimant's job – overall – and at the critical time when Claimant was injured. For example, and as set forth above, the medical records say Claimant was turning and twisting at the time of the incident. Dr. Fall did not ask about how Claimant was turning and twisting and how she reached for the bottle of sauce. Although the sauce might have been in front of Claimant, instead of behind her, there is a range of turning and twisting that is required to grab a bottle of sauce that is two feet to the left and two feet in front from where Claimant was standing compared to a bottle of sauce that is directly in front of Claimant and requires little to no effort to reach and grab. Add to that the added positional stress created if Claimant had to reach around another coworker or reach over a grill or counter, with her hips flush against the front of the grill or counter, to grab the bottle of sauce. Compare that scenario to Claimant having

to reach for a bottle of sauce directly in front of her and in an ergonomically neutral position where Claimant's body is aligned and balanced - placing minimal stress on her upper thoracic and lower cervical spine – thereby minimizing the stress and force exerted through her upper thoracic and lower cervical spine while reaching and grabbing the bottle of sauce.

54. The ALJ is not finding that Claimant had to contort her body in an extreme and unnatural way to reach and grab the bottle of sauce. The ALJ is, however, finding that Dr. Fall's failure to question Claimant and determine exactly how Claimant was reaching for the sauce is fatal to her opinion. In other words, as an expert, Dr. Fall has an obligation to interview Claimant about the mechanism of injury in a manner that provides her a reasonable and complete factual basis from which she can form and provide an expert opinion. Claimant is not an expert, so she does not know which facts matter and Claimant is not in control of the IME. But Dr. Fall is an expert and is in control of the IME and arguably knows which facts matter. Thus, Dr. Fall's failure to inquire about the facts and details regarding what Claimant was doing when she had the immediate onset of pain at work while reaching for a bottle of sauce renders her opinions unreliable and unpersuasive.

55. As a result, the ALJ does not find Dr. Fall's causation opinions in her report and testimony to be credible or persuasive.

56. The ALJ has also considered the expert opinion of Dr. Castro. Dr. Castro concluded Claimant's disc herniation is related to her work activities of reaching for the bottle of sauce. The ALJ finds Dr. Castro's opinion on causation to be credible and persuasive because it aligns with, and supported by, the underlying contemporaneous medical records that describe the mechanism of injury and Claimant's description of the incident and the symptoms she felt at the time of incident and afterward.

57. The ALJ has also considered the testimony of Mr. S[Redacted]. Overall, Mr. S[Redacted] was not a reliable witness. He had a poor memory of events and his documentation of events was also found to not be accurate. As a result, the ALJ does not find his testimony to be credible or persuasive.

58. The Judge does, however, find Claimant's testimony to be credible and persuasive. Although there are some inconsistencies in her testimony, such as her contention that she did not have any neck complaints after her assault in February 2019, the ALJ finds such inconsistencies to be inconsequential. As found, on April 11, 2019, Claimant signed a Voluntary Abandonment of Claim form, stating that she was waiving entitlement to any current and future medical benefits. She had advised Dr. Miller, her treating physician, that her neck symptoms had resolved. As a result, the ALJ finds Claimant was neither claiming nor having ongoing neck pain that required medical treatment as of April 2019. The ALJ also finds her testimony related to her termination to be credible and persuasive as well. Claimant testified she checked with her supervisor to see whether she had to work the next day, October 21, 2019. As documented by Mr. S[Redacted]'s text message to Claimant, Claimant was told she did not have

to work on October 21, 2019. Even so, Claimant was written up and terminated for not working that day. A day she was told by her supervisor, Mr. S[Redacted], that she did not have to work.

59. The ALJ finds that Claimant reaching for a bottle of sauce – while twisting and turning - caused her to suffer a herniated disc in her cervical spine.

60. The ALJ also finds that the herniated disc necessitated the need for medical treatment to cure her from the effects of her work injury. This treatment includes, but is not limited to, the treatment she received at Boulder Community Hospital, Clinica Family Health, Concentra, Spine West, and Cornerstone Orthopedics.

61. The ALJ also finds that Claimant's work injury to her cervical spine precluded her from performing her regular job duties for more than three shifts. The ALJ further finds that Claimant is not at-fault for her termination and subsequent wage loss. Thus, the ALJ finds Claimant's wage loss is caused by her injury.

62. Pursuant to the stipulation between the parties, Claimant's average weekly wage is $673.07.

63. Claimant testified at the September 22, 2020 hearing that she is currently working at Stop-n-Go and had been working there for "a month" prior to the hearing. **Hrg. Tr. 41: 20-25.** Therefore, Claimant returned to work on August 22, 2020.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

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

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant suffered a compensable neck injury on September 24, 2019.

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

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

Although Claimant had some minor neck and/or upper back pain a couple of days before the incident at work and might have had some minor neck pain when she woke up the morning of the incident at work, it was Claimant's actions at work of twisting, turning, and reaching for a bottle of sauce that proximately caused her to suffer a herniated disc in her cervical spine, immediately necessitated the need for medical treatment, and caused her disability. In support of this finding, the ALJ credited Claimant's testimony and the statements she made to her medical providers. The ALJ also found Claimant's testimony to be persuasive. In evaluating Claimant's testimony, the ALJ did consider some of the inconsistencies in Claimant's testimony. The ALJ, however, found such inconsistencies to be inconsequential.

In reaching the findings above, the ALJ also relied upon, and credited, the opinion of Dr. Castro who also determined the incident at work was the cause of Claimant's herniated disc and neck pain. As found, Dr. Castro's opinion was consistent with the underlying medical records and the history provided by Claimant.

As found above, the ALJ did not find Dr. Fall's opinions regarding causation to be credible or persuasive. In essence, Dr. Fall failed to obtain a detailed history regarding Claimant's job duties in general – and specifically - at the time of Claimant's. Moreover, Dr. Fall also failed to consider Claimant's twisting and turning motion while reaching for the bottle of sauce in her causation assessment. Consequently, Dr. Fall's opinion is based on an analysis which failed to consider all relevant facts; accordingly, the ALJ will not credit her conclusion. Like a house built on sand, an expert's opinion is no better than the facts and data on which it is based. *See Kennemur v. State of California*, 184 Cal. Rptr. 393, 402–03 (Cal. Ct. App. 1982).

As a result, the ALJ finds and concludes Claimant established by a preponderance of the evidence that she suffered a compensable injury involving her neck while she was twisting, turning, and reaching for a bottle of sauce while working for Employer.

II. Whether Claimant is entitled to reasonable and necessary medical treatment.

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

As found, Claimant suffered a compensable injury to her cervical spine in the form of a herniated disc. As further found, upon herniating her disc, Claimant was taken to Boulder County Hospital's emergency room and was admitted into the hospital and stayed overnight. After being released from the hospital, Claimant followed up with other providers, which included Clinica Family Health, Concentra, Spine West, and Cornerstone Orthopedics. The ALJ found the medical treatment to be reasonable and necessary to cure Claimant from the effects of her work-related cervical disc herniation.

As a result, the ALJ finds and concludes Claimant established by a preponderance of the evidence that she is in need of reasonable and necessary medical treatment to cure her from the effects of her compensable neck injury.

III. Whether Claimant is entitled to temporary total disability benefits or is Claimant at-fault for her termination and subsequent wage loss.

To prove entitlement to Temporary Total Disability (TTD) benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that Claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

However, under the termination statutes in §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for her termination, Respondents must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over her termination under the totality of the circumstances. *See Padilla v.*

Digital Equipment, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus “responsible” if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep’t of Public Safety,* W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

As found, Claimant suffered a compensable injury on September 24, 2019, in the form of a herniated disc in her neck. As further found, Claimant’s work injury resulted in physical restrictions that prevented her from performing her regular job duties. Although the record is not clear as to the exact date Claimant started missing time from work because of her work injury, Claimant established by a preponderance of the evidence that when she was terminated on October 21, 2019, she was unable to perform her regular job duties due to her work injury.

The ALJ also found that Claimant was not at-fault for her termination. As found, Claimant was told on October 20, 2019, by her supervisor Mr. S[Redacted], that she was not scheduled to work the next day on October 21, 2019. Despite being told by her supervisor that she did not have to work the next day, Claimant was terminated the next day for not working that day. As a result, it was found that Claimant was not at-fault for her termination. Thus, Respondents failed to establish by a preponderance of the evidence that Claimant was at-fault for her termination and subsequent wage loss.

Therefore, the ALJ finds and concludes Claimant established by a preponderance of the evidence that she is entitled to temporary total disability benefits as of October 21, 2019.

As found, Claimant worked at [Redacted] from December 29, 2019, through February 22, 2020. Thus, Claimant is not entitled to temporary total disability benefits during that period.

However, as found, on February 20, 2020, Dr. Meza issued work restrictions which precluded Claimant from performing her regular job duties. Therefore, the ALJ also finds and concludes that Claimant established by a preponderance of the evidence that she is entitled to temporary disability benefits as of February 22, 2020, when she stopped working at [Redacted].

As found, Claimant started working again on August 22, 2020 when she started working at [Redacted]. Therefore, Claimant’s right to temporary total disability benefits ceased on August 22, 2020.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered a compensable injury involving her neck.

2. Claimant is entitled to reasonable and necessary medical treatment to treat her neck injury, which includes a herniated disc.

3. Respondents shall pay Claimant temporary total disability benefits as of October 21, 2019, based on an average weekly wage of $673.07. This shall include the following periods:

   a. Respondents shall pay Claimant TTD from October 21, 2019, through December 29, 2019, when Claimant started working at [Redacted].

   b. Respondents shall also pay Claimant TTD from February 22, 2020, when Claimant ceased working at [Redacted], until August 22, 2020, when she started working at Stop-N-Go.

4. The issue of temporary partial disability benefits was not addressed since that issue was not endorsed. Moreover, the record is not clear as to whether Claimant is entitled to TTD before October 21, 2019. As result, these issues are reserved.

5. Any other issues not expressly decided herein are also reserved to the parties for future determination.

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

DATED: January 24, 2021.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-106-555-003

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

Claimant,

v.

Employer,

and

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on January 5, 2021, in Denver, Colorado. The hearing was recorded by Google Meets (reference: 1/5/21 Google Meets, beginning at 8:30 AM, and ending at 11:00 AM).

Claimant's Exhibits 1 through 4 were admitted into evidence, without objection. Respondents' Exhibits A through MX S and T were admitted into evidence, without objection. The transcripts of the evidentiary depositions of Daniel Possley, D.O., John Raschbacher, M.D. and Brian Reiss, M.D. were admitted into evidence in lieu of their testimony during the hearing

At the conclusion of the hearing, the ALJ ruled from the bench in favor of the Respondents, referring preparation of a proposed decision to counsel for the Respondents, which was submitted on January 8, 2021, and giving the Claimant two working days within which to file objections thereto. No timely objections having been filed, the matter was submitted for decision on January 13, 2021.

ISSUES

The issue to be determined by this decision is whether Respondents can terminate the post maximum medical improvement (MMI) general maintenance medical admission under their December 5, 2017 Final Admission of Liability, (FAL), pursuant to. § 8-43-201, C.R.S.

Respondents bear the burden of proof by a preponderance of the evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. The Claimant is a 37 year old man with a work related back injury of January 24, 2014.

2. As a result of the work-related injury, the Claimant underwent a partial laminecetomy and discectomy at L5-S1 on December 23, 2014. It is undisputed that the Claimant had degenerative changes throughout his spine at the time of the work injury. *Ex. N, Bate 306-308.* The Claimant received treatment under the claim for his L5-S1 until MMI was determined by 24-month DIME Dr. Franklin Shih. *Ex. C.* Dr. Shih found MMI as of July 13, 2016 and provided a 15% whole person impairment rating for the L5-S1 level of the lumbar spine (Respondents' *Exhibit. C, bates 52*).

3. Respondents filed a Final Admission of Liability (FAL), based upon the opinion of Franklin Shih, M.D.. The FAL was dated December 5, 2017, and noted, "We admit for reasonable and necessary and related medical treatment and/or medications after MMI.

4. It is undisputed that the Claimant left work with the Employer and became a self-employed carpenter/handyman after his work injury (Respondents' *Exhibit. D, bates 57*). The evidence establishes that the Claimant has since worked in a full duty capacity as a self-employed carpenter and that job requires heavy labor. The heavy labor done during the self-employment caused symptoms and complaints in the low back. During his treatment, Dr. Keith Graves, D.C., indicated that the Claimant was making poor progress, and stated: "Lasting functional relief from his symptomatology and any change in physical examination have not occurred primarily due to his continued labor intensive workloads as a self employed general contractor (Respondents' *Exhibit D, bates 67*). "He has increased lumbar spine/lumbosacral junction pain/symptomatology with labor-intensive workloads as a general contractor" (Respondents' *Exhibit. D, bates 61*). On November 17, 2015, Chiropractic Dr. Graves's notes reflected a flare of symptoms while loading his residence without much help (Respondents' *Ex. D ,bates 61*). Chiropractor Graves also said, "Most of the patient's continued flare-ups occur with his work as a self-employed general contractor" (Respondents' *Exhibit. D, bates 72*). Dr. Graves repeated this thought throughout his treatment.

5. The Claimant has received maintenance medical treatment under this claim since the FAL was filed. In November of 2018, Daniel Alan Drennan, M.D. became the authorized treating physician (ATP) providing maintenance treatment to the Claimant (Respondents' *Exhibit. F, bates* 83)

6. On March 10, 2020, the Claimant appeared for follow up with Dr. Drennan. The Claimant reported a pain score of 6/10 with medication. He described a constant sharp ache that was not relieved by anything (Respondents' *Exhibit F, bates 141*)*.* Dr. Drennan prescribed morphine 15 mg, Butrans 20 mcg/hour transdermal patch, and Baclofen 10 mg. He recommended a bilateral L4/5 L5/S1 transforaminal epidural steroid injection, a Spinal Q Vest, a surgical evaluation, and noted that the Claimant may benefit from a referral to behavioral medicine for depression, anxiety and coping Respondents' *Exhibit F, bates 142-143*)*.*

7. The Claimant's activities were captured on video on March 10, 2020. He is seen in this video arriving at his March 10, 2020 appointment with Dr. Drennan. The Claimant is in a pick up truck with a construction trailer attached. The truck is parked and another individual waits in the truck while the Claimant attends his appointment. Following the appointment, the two proceed to Home Depot. The video then shows the Claimant repeatedly loading framed doors into the construction trailer. The person with him and the Home Depot employee near him watch the Claimant as he bends, lifts, and carries the doors into the trailer. There is no visible hesitation in his movement while he is doing this. He is not assisted by the others in his lifting.

8. The video was presented to Dr. Drennan, and he was asked whether his recommendations for treatment would change based upon the video. Dr. Drennan replied that it did not, and stated, "He does have a labor intensive job. I have back pain and problems as well, but still work on my farm, lifting heavy items that make me hurt. However, the work still has to be done, regardless of the pain it causes (Respondents' *Exhibit F, bates 147*)*.*

9. In the September 8, 2020 appointment with the Claimant, Dr. Drennan noted continued low back complaints. He also noted that the Claimant's neck popped and clicked and there was occasional pain and tingling in his arms and hands "that has not been addressed" (Respondents' *Exhibit. F, bates 160*). Dr. Drennan prescribed voltaren gel for the knees and requested a right knee MRI (magnetic resonance imaging) and a right lateral genicular knee nerve block. He repeated his recommendations for spinal injections, a Spinal Q Vest and a spinal surgical evaluation. He refilled the Claimant's medication, including morphine, buprenorphine, and baclofen (Respondents' *Ehibitx. F, bates 161-163*)*.*

10. The Claimant took the evidentiary deposition of Dr. Possley, orthopedic surgeon. Dr. Possley last saw the Claimant for treatment on March 6, 2020, a few days prior to the video of March 10, 2020. During that appointment, the Claimant represented

that his condition had gotten worse six weeks prior to that appointment. He reported that he was having trouble working, with activities of daily living and with self care. (*Possley Depo. p. 15, Claimant's Exhibit. 2, bates* 10)7*.* Dr. Possely recommended injections. Dr. Possley felt that the Claimant's current symtoms were from a herniation at L4-5 and bone spurs at L5-S1. He stated that the need for treatment at these levels was a combination of acute and chronic issues (*Possley Depo. p. 16*)*.* He agreed that he had not done a causation analysis and that his opinion was not specific to a work diagnosis. *Id., p. 22.* Dr. Possley's opinion was only based upon what the Claimant had told him about his back feeling worse. Dr. Possely admitted that he had not reviewed all of the Claimant's MRI reports, and could not comment on whether these showed a difference in the spinal condition since MMI. He testified that he had not done a causation analysis, and had not reviewed the Dr. Shih's DIME (Division Independent Medical Examination) report. Dr. Possely's opinion was advanced as his recommendation for treatment of the Claimant's present complaints, without consideration of causation, and without the benefit of the medical records or the March 10, 2020 video. The ALJ finds that Dr. Possley's opinion is not found to include a determination of whether his recommendations are related to the work injury of January 24, 2014.

11. Dr. Reiss testified by deposition. Dr. Reiss is also an orthopedic spinal surgeon. Dr. Reiss had performed a face-to-face evaluation with the Claimant on July 5, 2017. He also performed an updated records review addressing the question of the reasonableness, necessity, and relatedness of continued maintenance treatment under this claim. He provided a summary of all medical records (Respondents' *Exhibit. A*). In comparison with the pre-MMI MRI (Respondents *Exhibit. B, bates 14; Exhibit. N and Reiss Depo p. 14*)*.* Dr. Reiss concluded that it was not reasonable or necessary to repeat epidural injections at this point in time, given the limited benefit from injection therapy in the past (Respondents' *Exhibit. A, Bates 14*)*.* He noted, "It must be remembered that [Claimant] was having significant lower back and left lower extremity pain prior to the minor work incident. [The Claimant's] symptomatology was irritated by his activating including work which is no different than his probable condition right now." *Id.* Dr. Reiss was of the opinion that the Claimant was back to his pre-injury **baseline** and that the need for treatment is related to his pre-existing ongoing condition (Respondents' *Exhibit A, bates 15; Reiss Depo p. 12-16*) *.* Dr. Reiss testified that the bilateral knees are not related to the work injury of January 24, 2014.

12. Dr. Raschbacher testified by deposition. Dr. Raschbacher conducted independent medical examinations (IMEs) of the Claimant on May 1, 2014, March 8, 2016, and July 28, 2017. He provided physician staffing opinions regarding requested medical treatment, and he performed a medical records review and provided a report addressing the reasonableness, necessity, and relatedness of ongoing maintenance medical treatment dated June 22, 2020 (Respondents' *Exhibit.B).* Dr. Raschbacher was of the opinion that continued treatment, including Dr. Drennan's current recommendations, is not reasonable, necessary, or causally elated to the workers'

compensation claim of January 24, 2014 (Respondents' *Exhibit. B, bates 47*). Consistent with Dr. Reiss, he was of the opinion that any aggravation of the Claimant's back symptoms at this time are from his current self-employed work related activities, as illustrated by the March 10, 2020 video (Respondents' *Exhibit. B, bates 47; Raschbacher Depo. P. 29*). According to Dr. Raschbacher continued maintenance treatment is not reasonable, necessary or causally related to the work injury (*Raschbacher Depo p. 30.* Dr. Raschbacher testified that neither the bilateral knees nor the neck are related to the original work injury (*Raschbacher Depo p. 39, 42*).

Ultimate Findings

13. The ALJ finds the opinions of Drs. Reiss and Raschbacher highly credible ,*i.e.,* that Claimant's present back condition is not causally related to the admitted work-related injury of January 24, 2014, nor is there any indication of work-relatedness in their opinions. Further, Dr. Possley was unable to express an opinion concerning work-relatedness. In fact, only ATP Drennan implies work relatedness of the admitted back injury. The ALJ rejects Dr. Drennan's implied opinion as inadequately founded or expressed. Therefor, the ALJ finds his opinion lacking in credibility to support work-relatedness.

14. Between conflicting opinions and testimony, the ALJ makes a rational choice, based on substantial evidence, to accept the opinions of Drs. Reiss and Raschbacher, which do not support work-relatedness of the January 24, 2014 admitted claim and to reject the implied opinion of work-relatedness, expressed by ATP Dr. Drennan.

15. The Respondents have established that the Claimant's current post-MMI medical maintenance treatment is **not** causally related to the admitted injury of January 24, 2014.

16. Respondents have proven, by a preponderance of the evidence that the Claimant's current post-MMI medical maintenance treatment is **not** causally related to the January 24, 2014 back injury.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, 2012 COA 85. The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinions of Drs. Reiss and Raschbacher were highly credible ,*i.e.,* that Claimant's present back condition is not causally related to the admitted work-related injury of January 24, 2014, nor is there any indication of work-relatedness of post-MMI medical maintenance treatment in their opinions. Further, Dr. Possley was unable to express an opinion concerning work-relatedness of post-MMI medical maintenance treatment. In fact, only ATP Drennan implies work relatedness of the post-MMI medical maintenance treatment to the admitted back injury. The ALJ rejects Dr. Drennan's implied opinion as inadequately founded or expressed. Therefore, the ALJ finds his opinion lacking in credibility to support work-relatedness of post-MMI medical maintenance treatment..

Substantial Evidence

b. ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007);

Brownson-Rausin v. Indus. Claim Appeals Office, 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting opinions and testimony, the ALJ made rational choice, based on substantial evidence,

Compensability—Aggravation/Acceleration of Pre-Existing Conditions

c. A compensable injury is one that arises out of and in the course and scope of employment. § 8-41-301 (1) (b), C.R.S. The "arising out of test is one of causation. As found, the Claimant has failed to adequately causally connect his present medical problems to the alleged "tree-falling" incident. The alleged "tree-falling" incident only satisfies the "course and scope" test. If an industrial injury aggravates or accelerates a preexisting condition, the resulting disability and need for treatment isa compensable consequence of the industrial injury. Thus, a claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). If the employment-related activities aggravate, accelerate, or combine with a pre-existing condition to cause disability, a compensable phenomenon has occurred. § 8-41-301 (1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals Office,* 844 P.2d 1259 (Colo. Pp. 1992); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). *Also see* § 8-41-301 (1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998] *Witt v. James J. Kell, Jr.,* W.C. No. 4-225-334 (ICAO, April 7, 1998). As found, the Respondents having the burden of proof to justify a withdrawal of the portion of the operative FAL concerning post-MII medical maintenance treatment have established that the Claimant's current post-MMI medical maintenance treatment is **not** causally related to the admitted injury of January 24, 2014.

Burden of Proof

d. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d

786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Respondents have sustained their burden of prospectively justifying withdrawal of the portion of the operative FAL, admitting for post-MMI medical maintenance benefits.

ORDER

IT IS, THEREFORE, ORDERED THAT:

Any and all claims for workers' compensation benefits are hereby denied and dismissed.

DATED this 25th day of January 2021..

DIGITAL SIGNATURE

EDWIN L. FELTER, JR.
Administrative Law Judge

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

ISSUES

- Did R.G. die of a "heart attack," thereby requiring Claimant to satisfy the requirements of the "heart attack statute," § 8-41-302(2)?

- If R.G. died of a "heart attack," did Claimant prove it was proximately caused by unusual exertion arising out of and within the course of employment?

- If the cause of death was not a "heart attack," did Claimant prove it was proximately caused by an injury arising out of and in the course of employment?

STIPULATIONS

The parties stipulated Claimant is R.G.'s dependent and is entitled to death benefits if the claim is found compensable. The parties also stipulated to an average weekly wage of $622.15 for purposes of this order, which corresponds to a compensation rate of $414.77. Claimant reserved the right to argue for an increase in the stipulated AWW if warranted in the future.

FINDINGS OF FACT

1. Employer operates a farming and ranching operation in northeastern Colorado. The business is owned by Patrick and Mike G[Redacted]. In June 2019, its employees were Mike G[Redacted], Patrick G[Redacted], R.G., Erika G[Redacted], Coy G[Redacted], Cade G[Redacted], and Brooklyn G[Redacted]. R.G. was Mike and Patrick G[Redacted]'s cousin.

2. R.G. worked for Employer as a ranch and farm hand for more than 20 years. He performed a variety of duties depending on the season. In terms of volume, most of his time was spent in sedentary or light activities such as driving farm equipment, driving a pickup truck to observe parts of the farm, and walking. The job also required periods of physical exertion, such as moving hay, setting up pipe fence corrals, and sorting cattle. The physically demanding activities tended to be sporadic and performed at discrete times during the year. For example, R.G. periodically loaded twenty-four (24) 50-pound bales of hay onto a flatbed pickup truck, and then drove the truck around while a co-worker dispersed the hay to the cattle. The evidence showed R.G. last moved hay bales in April 2019, two months before his death. Occasionally R.G. performed other random tasks such as welding or fixing a fence.

3. On June 17, 2019, R.G. collapsed suddenly while at work. Paramedics were summoned and he was taken to the Colorado Plains Medical Center emergency department. The EMTs documented ventricular fibrillation and pulseless electrical activity despite multiple defibrillation attempts. R.G. was in cardiac arrest when he arrived at the ER at 8:02 AM. Additional efforts to resuscitate R.G. were unsuccessful, and he was pronounced dead at 8:40 AM. The final diagnosis was "cardiac arrest."

4. An autopsy was performed on June 18 by pathologist James Wilkerson IV, M.D. The report notes "the deceased was reportedly working with cattle and was observed to have fallen. . . . He has not seen a physician for years, however recently he underwent a blood test with Community Health Profile and reportedly nothing unusual was found." Inspection of the coronary arteries showed "severe, yellow-brown atherosclerosis narrowing the lumen 70 to 100%." There was a possible thrombosis of the right coronary artery. The left ventricular free wall was thickened. Histologic examination showed high-grade coronary artery stenosis with near 90% occlusion and areas of recent hemorrhage into the plaque. Heart sections showed some mild perivascular and perifascicular fibrosis but no acute changes. There was no gross or microscopic evidence of myocardial cell damage or death. Dr. Wilkerson concluded, "Based upon the history and autopsy findings, it is my opinion that [R.G.] a 59-year-old while male, died of sudden cardiac death from his hypertensive atherosclerotic cardiovascular disease. The manner of death is natural." The death certificate listed the cause of death as "sudden cardiac death" and "ASCVHD."

5. R.G. underwent a "Life Line Screening" on May 13, 2019, approximately one month before his death. The report notes cardiovascular risk factors such as BMI of 32, lack of exercise, dietary habits, family history of diabetes, family history of coronary heart disease, family history of stroke or TIA, and age. Testing of the carotid artery was normal and there was no evidence of peripheral arterial disease.

6. Although R.G. had pre-existing atherosclerosis and coronary stenosis, it was asymptomatic before June 17, 2019. There is no persuasive evidence R.G. was aware of his underlying coronary artery disease before his death.

7. Erika G[Redacted], Mike G[Redacted], Brooklyn G[Redacted], Coy G[Redacted], and Cade G[Redacted] testified at hearing regarding R.G.'s activities the morning of June 17, 2019. All witnesses worked directly with R.G. that morning except Mike G[Redacted] who had to get the feed down, change two heads of water, and deal with the brand inspector. The primary task that morning was sorting cattle that were to be loaded onto trucks and transported to Nebraska. R.G. started his shift earlier than usual because the trucks were scheduled to arrive at 7:00 AM. R.G. and Brooklyn used ATVs to bring the cattle from the pasture to the holding pen area. Erika, Coy, and Cade joined them and sorted the cattle. After the sorting was finished, Coy, Cade, and R.G. loaded the ATVs onto a flatbed trailer. One of the ATVs "bottomed out" on the trailer lip and had to be lifted to get it on the trailer. Coy was on the side of the ATV and R.G. was at the back. Cade was sitting in the driver position to apply the gas once the undercarriage was freed from the trailer lip. R.G. and Coy lifted the ATV two or three times before it was able to pull onto the trailer bed. R.G. was noticeably straining and grunting while trying to lift the ATV. After the ATVs were loaded, R.G. chatted and joked with Brooklyn for a few minutes. He then told Brooklyn was going to pass out and abruptly collapsed. The persuasive evidence shows R.G. collapsed within 10-15 minutes after sorting cattle and five minutes or less after lifting the ATV.

8. The persuasive evidence shows R.G. sorted cattle approximately 12-20 times per year. However, the exertion associated with sorting cattle the morning of June 17 was unusual in several respects:

- Usually, they sorted 50-120 cattle but that morning they had 200 cattle and four bulls. Erika testified they sorted 200 head of cattle 2-3 times a year on average, and Mike recalled the last time they sorted that many cattle was in 2018. Erika, Coy, and Brooklyn credibly testified the larger number of cows increased the exertional requirement and stress level associated with sorting.

- They were working at a new property Employer had recently acquired. Neither R.G. nor the witnesses had never sorted cattle at that facility, so they had not learned the most efficient way to do it. This caused extra work. As Erika G[Redacted] testified, “we ran them all in and that didn’t work right. So, then we had to run them back out and figure out how we were going to use that facility to sort the cattle.” Additionally, the cows’ unfamiliarity with the facility made them harder to sort.

- R.G. had to “run off” an uncooperative bull four times. This required additional running to try to “beat” the bull back to the herd.

- The sorting area was wider than their other pens, which required additional lateral movement (described as akin to a “defensive shuffle in basketball”).

- The trucks arrived early, which caused mental pressure to hurry and complete the sorting. Erika G[Redacted] noticed R.G. seemed more stressed by the activity than normal because he was snapping at the boys.

9. The most strenuous activity of the morning was lifting the ATV. Compared to R.G.’s typical duties, the exertion associated with lifting the ATV was unusual in multiple respects. All witnesses agreed the ATV is very heavy. It requires tremendous effort to lift the ATV simply to the limit of the suspension travel. There is no persuasive evidence R.G.’s normal duties required him to lift anything else of similar weight. The ATV had “bottomed out” in similar fashion before, but such an occurrence was rare because they usually parked the trailer in a depression and could simply drive onto the trailer bed. No depression was available at the new property, so the trailer had to be parked on level ground. Although Erika and Mike testified the ATV became stuck “all the time,” when asked to quantify the frequency of its occurrence, Mike estimated once per year, and Erika estimated 1-2 times per year. Cade agreed the ATV gets stuck once per year. The ALJ finds the witnesses’ specific estimates more persuasive than generalities such as “all the time.” Moreover, R.G. did not participate in lifting the ATV every time it had become stuck in the past.

10. Dr. Barry Wolinsky performed a record-review for Claimant. Dr. Wolinsky opined R.G. had extensive coronary artery disease (CAD) and died of sudden cardiac death (SCD). Dr. Wolinsky opined SCD “is different than a heart attack/MI. A heart attack typically results from the sudden cessation of blood supply to the myocardium (heart muscle) resulting in myocardial cell death. While SCD can occur during or after an MI, it is not typically the initial presentation.” He concluded, “there is a high degree of probability that [R.G.]’s death was due to SCD and not a heart attack.” Dr. Wolinsky noted R.G. had no apparent symptoms consistent with ischemia immediately before his sudden loss of consciousness, the ER physician and EMTs documented ventricular fibrillation before his

arrival at the hospital, and the autopsy found no gross or microscopic evidence of myocardial injury to suggest death due to MI. Dr. Wolinsky explained SCD results from sudden cessation of cardiac function, typically due to a fatal arrhythmia (such as ventricular fibrillation). Dr. Wolinsky opined an increased risk of SCD up to 30 minutes after strenuous physical activity by susceptible individuals “is well documented and supported in the scientific literature.” The autopsy confirmed R.G. had extensive CAD and was therefore susceptible to stress induced SCD. Dr. Wolinsky also opined the timing of R.G.’s cardiac arrest—within minutes of engaging in strenuous physical activity—supported a causal connection. Dr. Wolinsky concluded the strenuous physical activity R.G. performed before suddenly losing consciousness increased the oxygen demand of the myocardium and triggered a fatal arrhythmia and caused SCD.

11. Dr. Sander Orent performed a record-review for Claimant and testified at hearing. Dr. Orent agreed with Dr. Wolinsky that R.G. did not have a “heart attack.” He opined “heart attack” is the “colloquial” term for a myocardial infarction. He explained an MI involves death of heart tissue, and there is no evidence of myocardial tissue damage or death in the autopsy. Dr. Orent opined R.G. died of ventricular fibrillation (V-fib) triggered by inadequate oxygen/blood supply to the heart. Although R.G. probably would have had an MI “had he survived,” he died from the V-fib before any heart damage could occur. Dr. Orent agreed many individuals experience MIs and SCD with no precipitating event, but believes exertion was causative in R.G.’s case. He opined the temporal proximity of events—10-15 minutes after sorting cattle and at most 5 minutes after lifting the ATV—was well within the timeframe necessary to support a causal connection. Dr. Orent explained,

> The final common pathway here is the imbalance between oxygen demand of the heart and the ability of the arteries and the body to supply that oxygen. So, because he was exerting himself in an extraordinary way, the blockage in his arteries was such that he could not supply his heart muscle with enough oxygen to prevent it from becoming electrically unstable. And that in my opinion is what happened here, that there was a profound imbalance because of the narrowing—the pre-existing narrowing—and then there was this abrupt hemorrhage in the coronary artery, that obstructed the flow distal to that hemorrhage, and that created an electrical instability of the heart and that went on to cause a cardiac arrest, sudden cardiac death. Or “out-of-hospital ventricular fibrillation.”

Dr. Orent concluded, “there is virtually no question” R.G.’s death was caused by “unusual exertion both in dealing with an unusual number of cows, a recalcitrant bull, and perhaps most importantly the lifting of the four-wheeler.”

12. Dr. Barry Smith, a cardiologist, performed a record-review for Respondents and testified via deposition. Dr. Smith agreed with Dr. Wolinsky and Dr. Orent that “a heart attack and a myocardial infarction are synonymous.” Dr. Smith opined R.G. had an MI, although he provided conflicting opinions regarding the type of MI. In his report, he opined R.G. suffered a non-ST elevation myocardial infarction (NSTEMI), whereas in his deposition he opined it was a ST elevation myocardial infarction (STEMI). Dr. Smith testified R.G. had chronic coronary atherosclerosis and evidence of acute inflammatory

response with ruptured plaque hemorrhage and thrombus in the coronary artery. Dr. Smith agreed hypertensive ASCVD can cause sudden death from V-fib without a heart attack. Dr. Smith thought it was “very clear” from the autopsy findings R.G. died of an MI even though the autopsy report contains no mention of an MI. He testified that 86% of MIs, or “heart attacks,” are caused by plaques that are not bad enough to restrict blood flow and therefore will not cause symptoms even on a stress test. Dr. Smith was unimpressed by literature showing increased relative risk associated with strenuous exertion because the increase in absolute risk was much smaller. He also noted data that shows 4-5 percent of MIs occurred after strenuous activity means 95-96 percent did not. Dr. Smith opined R.G.'s death was caused by an acute inflammatory response in the coronary arteries unrelated to his activities at the time. He opined R.G.'s death could have occurred at any time, in any situation, including outside of work. In Dr. Smith’s opinion, the contribution of pre-existing coronary disease versus exertion at work is 100% coronary artery disease and 0% work activities.

13. Dr. Orent and Dr. Wolinsky’s opinions are credible and more persuasive than the contrary opinions offered by Dr. Smith. Although Dr. Orent is not a cardiologist, he persuasively described his training and experience treating patients with cardiac issues. He cited medical literature to support his opinions, and his reports and testimony demonstrated command of the subject matter. Dr. Orent’s opinions are also consistent with and supported by Dr. Wolinsky’s opinions.

14. Claimant proved R.G. died from ventricular fibrillation which caused SCD. He did not have a “heart attack.”

15. Claimant proved R.G.’s death was proximately caused by an unusual exertion arising out of and in the course of his employment.

CONCLUSIONS OF LAW

As an initial matter, the ALJ agrees with Respondents that Claimant has the burden of proof on all issues in this matter. It is Claimant’s burden to prove the cause of R.G.’s death and establish it was proximately caused by his work. If R.G. died of a “heart attack,” Claimant must prove “unusual exertion.” This case involves no affirmative defenses and Respondents are not required to prove (or disprove) anything.

To receive compensation, a claimant must prove they suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove an injury directly and proximately caused the condition for which they seek benefits. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).). A claimant must prove entitlement to benefits by a preponderance of the evidence. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The facts in a workers’ compensation case are not interpreted liberally in favor of either the claimant or the respondents. Section 8-43-201.

The Act imposes an additional evidentiary requirement when the alleged injury or death results from a "heart attack." Section 8-41-302(2) (the "heart attack statute") provides,

> "Accident," "injury," and "occupational disease" shall not be construed to include disability or death caused by heart attack unless it is shown by competent evidence that such heart attack was proximately caused by an unusual exertion arising out of and within the course of the employment.

Before enactment of the heart attack statute in 1971, the General Assembly had not singled out heart-related injuries for special treatment under the Act. The "overexertion" requirement originated in caselaw in the 1920s as a gloss on the concepts of "accident" and "arising out of" employment. *See Ellerman v. Industrial Commission*, 213 P. 120 (Colo. 1923). The decedent in *Ellerman* died of "acute dilation of the heart preceded by chronic myocarditis." The Industrial Commission had determined "heart disease of any kind causing death in the course of employment could not be held to be an accident." The decedent had been moving heavy wheelbarrows filled with concrete and dropped dead while dumping the third load. The Supreme Court held death from heart disease could be considered an "accident" if it was caused by "overexertion arising out of the employment." Thereafter, courts applied the "overexertion" requirement to "heart cases," most of which involved myocardial infarctions.[1] However, as Respondents' counsel points out, some of those cases involved conditions other than myocardial infarction.[2]

The "overexertion" standard prevailed until a 1965 statutory amendment expanded the definition of "accident" to cover unforeseen or unexpected events unrelated to trauma. The Supreme Court subsequently determined "the legislative intent of the 1965 amendment was to make compensable an injury or death which results from exertion in the performance even of usual duties within an employee's scope of employment. There

[1] *E.g., U.S. Fidelity & Guaranty Co. v. Industrial Commission*, 219 P.2d 315 (Colo. 1950) ("myocardial infarction due to coronary occlusion"); *Peter Kiewit Son' Co. v. Industrial Commission*, 236 P.2d 296 (Colo. 1951) ("occlusion of the coronary artery with early myocardial infarction"); *Bennett v. Durango Furniture Mart*, 319 P.2d 494 (Colo. 1957) ("myocardial infarction"); *Industrial Commission v. Horner*, 325 P.2d 698 (Colo. 1958) ("an anterolateral myocardial infarction which is in lay language a heart attack."); *Baca County school District No. RE-6 v. Brown*, 400 P.2d 663 (Colo. 1965) ("myocardial infarction"); *Evans v. City and County of Denver*, 438 P.2d 698 (Colo. 1968) ("myocardial infarction"); *Industrial Commission v. Bysom*, 444 P.2d 627 (Colo. 1968) ("myocardial infarction.); *Jasinski v. Ginley-Soper Construction Co*., 458 P.2d 754 (Colo. 1969) ("acute myocardial infarction and coronary occlusion").

[2] A handful of cases referred to a diagnosis of "coronary occlusion" or "coronary thrombosis." However, because occlusion and thrombosis are common elements of MI, it is unclear whether those claimants also had MIs. *E.g.*, *T & T Loveland Chinchilla Ranch v. Bourn*, 477 P.2d 457 (Colo. 1970) ("coronary occlusion."); *Curtis v. Industrial Commission*, 447 P.2d 1012 (Colo. 1968) ("coronary occlusion"); *Huff v. Aetna Ins. Co*., 360 P.2d 667 (Colo. 1961) ("coronary thrombosis"); *Industrial Commission v. Hesler*, 370 P.2d 428 (Colo. 1962) ("coronary thrombosis"); *Industrial Commission v. Havens*, 314 P.2d 698 (Colo. 1957) ("coronary occlusion.'). *See also*, *Industrial Commission v. McKenna*, 104 P.2d 458 (Colo. 1940) ("acute heart failure or acute dilatation of the heart."); *City and County of Denver v. Phillips*, 443 P.2d 379 (Colo. 1968) ("congestive heart failure").

must, of course, be the chain of causation necessary in all workmen's compensation cases." *T and T Loveland Chinchilla Ranch v. Bourn*, 477 P.2d 457, 462 (Colo. 1970).

The General Assembly adopted the "heart attack" statute in 1971, presumably in response to the *Chinchilla Ranch* decision. The General Assembly thought causation of many heart attacks was "inherently difficult" to establish, and wanted to limit compensability only to those heart attacks caused by "unusual exertion." *Death of Kohler v. Industrial Commission*, 671 P.2d 1002 (Colo. App. 1983). However, rather than using broad language such as "heart disease" or "heart conditions," the General Assembly only applied the special proof requirement to "heart attacks."

In *Prestige Homes, Inc. v. Legouffe*, 658 P.2d 850 (Colo. 1983)[3], the court held that the heart attack statute was intended to resurrect the "unusual exertion" requirement as relates to "heart attack-related injuries." There was no suggestion the special proof requirements were intended to apply to conditions other than those considered "heart attacks." Consistent with that interpretation, *Eisenberg v. Colorado Industrial Commission*, 624 P.2d 361 (Colo. App. 1981) held that "the statutory provision is applicable only where the claimant has suffered a 'heart attack.' The record discloses the claimant never suffered a 'heart attack.' [Case remanded] to determine whether the Claimant's heart condition is the result of an accident, injury, or occupational disease."

Despite reviewing numerous appellate decisions, the ALJ could not locate a case that squarely defines the term "heart attack" for purposes of the statute. Nor was any such case identified by the parties. However, for multiple reasons, the ALJ concludes the term should be interpreted to refer to a myocardial infarction.

First, the experts involved in this case uniformly agree the term "heart attack" refers to a myocardial infarction. According to Respondents' expert, "a heart attack and a myocardial infarction are synonymous." Claimant's experts agreed with this interpretation. Dr. Orent referred to "a heart attack, or a myocardial infarction, let's call it what it is properly." Dr. Wolinsky used the terminology "heart attack/MI." Although "heart attack" may be a "colloquial" term, it is a term frequently used by medical professional, with a specific, generally accepted meaning in the medical community. Indeed, the term "heart attack" was already understood to refer to a myocardial infarction when the statute was amended. In *Industrial Commission v. Horner*, 325 P.2d 698 (Colo. 1958), the court described the applicable diagnosis as "an anterolateral myocardial infarction *which is in lay language a heart attack*." The first rule of statutory construction is to apply the plain meaning of the statute. It is unlikely the General Assembly intended the term "heart attack" to mean "heart disease" or "heart conditions." It makes the most sense to conclude the General Assembly used the term consistent with its generally accepted meaning as "synonymous" with myocardial infarction.

[3] The decedent's medical condition in *Legouffe* was described as "myocardial infarction (heart attack)."

Second, many cases decided under the heart attack statute simply refer to a "heart attack" without identifying a specific medical diagnosis. But, of the cases that reference a specific diagnosis, none refer to anything other than "myocardial infarction." [4]

Finally, several cases have held the heart attack statute was inapplicable where the cardiac condition was something other than MI. In *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985), the worker died of "cardiac arrhythmia" and "did not have a heart attack." Based on that finding, the heart attack statute did not apply, and compensability was decided on basis of standard rules regarding proximate cause. The same reasoning was applied in *Spurlock v. Atlantic North American*, W.C. No. 3-779-865 (April 12, 1988) and *Cortez v. Colorado Springs Disposal*, W.C. No. 4-544-111 (November 23, 2005). In *Spurlock*, the cause of death was "ventricular fibrillation which caused an arrythmia and cardiac arrest." In *Cortez,* the diagnosis was "cardiac arrhythmia secondary to calcific aortic valve stenosis." The unusual exertion requirement did not apply in either of those cases because the claimants did not suffer a "heart attack."

As found, R.G. died from ventricular fibrillation triggered by his work activities. He did not die from a "heart attack." Accordingly, the heart attack statute does not apply.

Because R.G. did not die of a "heart attack," the question of whether his death resulted from "unusual exertion" could be considered somewhat academic. Nevertheless, although not a strict requirement of compensability in this case, the issue of whether the precipitating exertion was unusual remains a useful touchstone because it increases the likelihood the activity was causative. Moreover, the fact R.G. engaged in unusual exertion was a significant factor in Dr. Orent's persuasive opinions regarding causation.

When determining whether a claimant engaged in unusual exertion, the ALJ must compare the duties at the time of the heart attack to the claimant's job history. *Wackenhut Corp. v. Industrial Claim Appeals Office*, 975 P.2d 1131 (Colo. App. 1997). However, the exertion need not be different in nature from the employee's usual work. *Id*. Moreover, unusual exertion is not limited to physical activities, but can also arise from increased stress. *E.g., In re Carr v. Industrial Commission*, 709 P.2d 52 (Colo. App. 1985) (even though the employee was performing "normal and routine duties" at the time he suffered a heart attack, the amount of work he performed that day required significantly greater physical exertion and involved more emotional stress than did his normal work); *Apache Corp v. Industrial Commission*, 717 P.2d 1000 (Colo. App. 1986) (unusual exertion was found where a petroleum engineer worked unusually long hours under abnormally stressful circumstances).

[4] E.g., Prestige Homes v. *Legouffe*, 658 P.2d 850 (Colo. 1983) ("myocardial infarction (heart attack)"); *Amen's Chevron v. Amen*, 536 P.2d 324 (Colo. App. 1975) ("acute myocardial infarction (heart attack)"); *City and County of Denver v. Industrial Commission*, 579 P.2d 80 (Colo. 1978) ("cardiac arrest due to a myocardial infarction"); *Dravo Corp. v. Industrial Commission*, 569 P.2d 345 (Colo. App. 1977) ("myocardial infarction (heart attack)"); *Townley Hardware Co. v. Industrial Commission*, 636 P.2d 1341 (Colo. App. 1981) ("acute myocardial infarction"); *Matter of Death of Talbert*, 694 P.2d 864 (Colo. App. 1984) ("myocardial infarction"); *Stephen Equip. Co. v. Baca*, 703 P.2d 1332 (Colo. App. 1985) ("fatal myocardial infarction"). *See also Schultz v. Colorado Division of Wildlife*, W.C. No. 3-993-024 (July 9, 1992) ("myocardial infarction"); *Algiene v. City and County of Denver*, W.C. No. 4-134-568 (January 6, 1995) ("myocardial infarction").

The preponderance of persuasive evidence shows R.G. engaged in unusual exertion the morning of his death, and this unusual exertion proximately caused the onset of V-fib and ultimately SCD. The exertion and stress associated with sorting the cattle was unusual in several respects, including the larger herd, the unfamiliar location, the “recalcitrant” bull, and the waiting trucks. The strenuous activity culminated with lifting the ATV several times. Lifting the ATV was more strenuous than any other known activity R.G. performed as part of his job. And even though the ATV occasionally became stuck in that manner, it was not a common or “usual” occurrence. To the contrary, it was something they tried to avoid because it was so strenuous. Because R.G. only rarely lifted the ATV, it cannot reasonably be characterized as part of his “normal” or “usual” duties. Given the degree of pre-existing arterial stenosis, the exertion from sorting cattle probably stressed R.G.’s heart and pushed it to the edge of its tolerance for reduced oxygen supply. Lifting the ATV was probably the proverbial “final straw” that caused the plaque to rupture and ultimately triggered the fatal V-fib.

ORDER

It is therefore ordered that:

1. Insurer shall pay Claimant death benefits of $414.77 per week, based on the stipulated average weekly wage of $622.15, commencing June 18, 2019 and continuing until terminated by law.

2. Insurer shall pay Claimant statutory interest of 8% per annum on all benefits not paid when due.

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

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

DATED: January 25, 2021

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

ISSUE

1. Whether Claimant established by a preponderance of the evidence that the right endoscopic carpal tunnel release with right wrist arthroscopy with debridement of the scapholunate ligament requested by In Sok Yi, M.D. is reasonable, necessary, and related to Claimant's January 16, 2020 work injury.

FINDINGS OF FACT

1. On January 16, 2020, Claimant was driving a truck for Employer when his vehicle was struck from behind at a high rate of speed. As the result of this motor vehicle accident, Claimant sustained an admitted injury to his right arm and wrist.

2. On January 20, 2020, Claimant was seen at NextCare Urgent Care by Stephanie Boisvert, PAC. Claimant reported, among other injuries, pain in his right wrist and elbow. Examination of Claimant's right hand was documented as "normal." Claimant was diagnosed with, among other things, contusions of the right wrist and elbow. (Ex. 3).

3. On January 7, 2020, Claimant was seen by James Fox, M.D. Dr. Fox did not note complaints related to Claimant's wrist or elbow and did not examine Claimant's wrist or arm. On Claimant's next visit with Dr. Fox, on February 3, 2020, Claimant reported pain in his right wrist and elbow. On examination of Claimant's right wrist, Dr. Fox found focal tenderness over the wrist at the distal ulna without any obvious deformity, bruising or swelling. He noted decreased grip strength and moderate pain with grasping and movement. Dr. Fox diagnosed Claimant with a right wrist strain and lateral epicondylitis of the right elbow. Claimant was also diagnosed with strains of the thorax, lower back, and neck, and a contusion of his right knee, all related to the January 16, 2020 accident. Dr. Fox recommended a physical medicine referral. (Ex. 4).

4. On February 10, 2020, Claimant returned to Dr. Fox, reporting worsening pain in his right knee and severe pain in his mid-back. Dr. Fox ordered MRIs of Claimant's knee and back. (Ex. 4).

5. On February 20, 2020, Claimant was seen at Panorama Orthopedics by Shasta Van Sickle for evaluation of his thoracic spine. In addition to complaints related to his neck, upper back and low back, Claimant reported pain in his right knee and arm. Claimant returned to Panorama Orthopedics on March 2, 2020, March 30, 2020, April 21, 2020, and May 4, 2020, and was seen by Mitchel Robinson, M.D., and Michael Horner, D.O. Treatment and assessment during this time addressed Claimant's knee and back and did not address either his wrist or elbow. (Ex. 6) .

6. Dr. Fox noted in his March 6, 2020 treatment notes that Claimant continued to have numerous complaints, including right wrist and elbow pain. Dr. Fox stated: "[Claimant] is still complaining of quite a bit of pain in his right wrist and elbow, particularly the wrist. He states that he has had cramping and difficulty moving the wrist while doing physical therapy. X-rays of the wrist and elbow done previously were unremarkable and [MRIs] will be ordered, pending insurance authorization. His pain level is 5." On examination, Dr. Fox noted Claimant had moderate focal tenderness over the dorsum of the wrist, particularly on the ulnar side and also some tightness and pain over the volar wrist. Decreased grip strength and limited range of motion. He also noted that Claimant had "locking" in his right wrist. (Ex. 4).

7. By letter dated March 3, 2020, Dr. Fox dismissed Claimant from his care for reasons not specified in the discharge letter. (Ex. 4).

8. On June 17, 2020, Claimant saw Roberta Anderson-Oeser, M.D. At that time, Claimant reported his chief complaints were cervical, thoracic, and low back pain, headaches, right elbow and wrist pain, bilateral hand paresthesias, and right knee pain. Claimant reported that he had received physical therapy and other treatment for is lower back, and right knee, but had not yet received therapy for his right arm. He reported frequently dropping objects from his right hand and sharp pain in the right wrist. HE reported losing feeling in the 3rd and 4th digits of his right hand, and numbness in his left hand. Claimant reported burning, stabbing, and aching pains in the right elbow and wrist. Dr. Anderson-Oeser diagnosed Claimant with lateral epicondylitis of the right elbow, and pain in the wrist. She recommended that Claimant see an occupational therapist for his wrist and hand pain and paresthesias. (Ex. 8).

9. On July 7, 2020, Claimant reported to Dr. Robinson that he had bilateral hand numbness, on the right hand approximately three months earlier, and more recently in his left hand. He was diagnosed with bilateral hand numbness. (Ex. 6).

10. At his July 16, 2020 visit with Dr. Anderson-Oeser, Claimant indicated that Dr. Fox had placed an order for an MRI of his elbow and wrist, but that the MRIs were not performed for an unknown reason. Dr. Anderson-Oeser re-ordered these studies, noting that Claimant continued to have ongoing right lateral elbow pain and right wrist pain. (Ex. 6).

11. On July 29, 2020, Claimant underwent an MRI arthrogram of his right wrist. The MRI was interpreted as showing a scapholunate ligament tear, mild arthrosis involving the distal radial ulnar articulation, and first CMC joint spurring. An MRI of Claimant's right elbow performed on the same day shows a small partial-thickness tear of the common extensor origin with underlying tendinosis and mild tendinosis of the common flexor origin (Ex. 5).

12. On August 5, 2020, Claimant returned to Dr. Anderson-Oeser, who reviewed Claimant's elbow and wrist MRI results. Dr. Anderson-Oeser referred Claimant to In Sok Yi, M.D., for a hand surgery consult for treatment of the scapholunate ligamentous tear

and the mild arthrosis involving the distal radial ulnar articulation. He was also referred to Dr. Patel for treatment of his right elbow. (Ex. 6).

13. Between August 10, 2020, and August 25, 2020, Claimant received occupational therapy at Integrated Sports and Spine to address pain ad weakness in his hands, elbows forearms and wrists. (Ex. 10).

14. On August 14, 2020, Claimant was seen by Timothy Johnson, PA-C, a physician assistant for Dr. Yi, for evaluation of his right wrist. PA Johnson noted that Claimant had a partial tear of the scapholunate ligament, and "given the nature of his injury and the diagnosis today that there is a high degree of medical probability it was related to the motor vehicle accident."

15. On August 19, 2020, Dr. Anderson-Oeser performed EMG/NCS studies on Claimant's right wrist and arm. The testing was consistent with a right median neuropathy at the wrist, moderate in severity. She recommended Claimant see Dr. Yi to discuss decompressive surgery to avoid further compromise of the median nerve. (Ex. 6).

16. On August 21, 2020, PA Johnson diagnosed Claimant with strain of the tendons and the wrist and hand level and carpal tunnel syndrome of the right wrist, confirmed by EMG study. On August 21, 2020, PA Johnson performed a therapeutic injection of Claimant's right carpal tunnel. He recommended Claimant undergo a right endoscopic carpal tunnel release with a right wrist arthroscopy with debridement of the scapholunate ligament. On August 27, 2020, Dr. Yi submitted to Insurer a request for authorization to perform a right endoscopic carpal tunnel release, wrist arthroscopy and scapholunate ligament debridement. (Ex. 11).

17. On August 31, 2020, Insurer denied Dr. Yi's request for authorization to perform a right endoscopic carpal tunnel release, wrist arthroscopy and scapholunate ligament debridement as "medically unreasonable, unnecessary and non-work related." (Ex. 14).

18. On September 8, 2020, Claimant underwent an independent medical examination with John Burris, M.D., at respondent's request. Dr. Burris opined that Claimant had no objective findings on examination, and that his current diagnosis was "diffuse myofascial pain complaints involving his low back, right elbow, right wrist and right knee." Dr. Burris opined that no further treatment be approved until Claimant completed a psychology evaluation and treatment. (Ex. 12).

19. On September 25, 2020, Dr. Burris issued a report at Insurer's request regarding Dr. Yi's request for authorization of Claimant's carpal tunnel release. Dr. Burris opined that "based on the nature of [Claimant's' injuries, the diagnosis of carpal tunnel syndrome cannot be causally related to the 1/16/20 MVA." He further opined that the physical findings on examination did not correlate with Claimant's wrist condition and "do not seem to meet the criteria for a surgical condition." Dr. Burris concluded that the request for wrist arthroscopy and debridement is not reasonable, necessary, or related. (Ex. 12).

20. On September 28, 2020, Insurer reiterated its denial of Dr. Yi's request for authorization to perform a right endoscopic carpal tunnel release, wrist arthroscopy and

scapholunate ligament debridement as “medically unreasonable, unnecessary and non-work related.” (Ex. 14).

21. On November 11, 2020, Claimant underwent an IME performed by John Hughes, M.D., at Claimant’s request. Based on his examination and review of records, Dr. Hughes diagnosed Claimant with, as relevant to this hearing, “right wrist sprain/strain with development of electrodiagnostically-confirmed carpal tunnel syndrome and internal derangements as seen on the MR arthrogram of the right wrist, meriting hand surgical evaluation and potentially surgical treatment.” Dr. Hughes opined that Claimant was not at MMI and that stabilization of Claimant’s psychological status before proceeding with additional surgical treatment was appropriate. Dr. Hughes continued “This being said, I do endorse consideration of a carpal tunnel release of the right median nerve as there is electromyographic evidence of denervation as documented by Dr. Anderson-Oeser and this may be progressive.” In an addendum dated November 16, 2020, Dr. Hughes clarified that he recommended performance of the carpal tunnel release surgery due to the potential for progressive motor component radiculopathy and permanent loss of strength in his right thumb musculature. He noted the same consideration was not present with respect to the right wrist internal injuries/derangements seen on MRI, that a hand surgeon may stage the interventions, possibly beginning with a corticosteroid injection, and arthroscopic surgical treatment for Claimant’s internal wrist injuries was a superior treatment option. (Ex. D).

22. Dr. Burris was admitted as an expert in occupational medicine and testified at hearing. Dr. Burris testified that he agreed with Dr. Hughes’ opinion that surgery on Claimant’s torn wrist ligament is not an emergency condition immediately requiring surgery. He also testified that he did not believe Claimant’s carpal tunnel syndrome was related to Claimant’s work injury and that a carpal tunnel release was not reasonable and necessary or work-related. On cross-examination, Dr. Burris agreed that Claimant’s right wrist and elbow complaints have been consistent since his work injury, and that he did not review any records of treatment before Claimant’s work injury. Dr. Burris testified that trauma can be a cause of carpal tunnel syndrome even in the absence of a wrist fracture. Dr. Burris testified that Claimant’s EMG and diagnosis of carpal tunnel syndrome are consistent. He agreed that Claimant’s condition (i.e., carpal tunnel syndrome) if not treated may place him at risk of progressive motor component radiculopathy and permanent loss of strength in his right thumb musculature.

23. Claimant testified at hearing that he did not specifically recall where his hands were placed when the accident occurred, but that he would typically maintain both hands on the steering wheel while operating a vehicle for his employer, and that this was consistent with his training. Claimant also testified that before January 16, 2020, he had no history of problems with his right wrist or elbow. Claimant testified that he continues to experience issues with his right hand and that his symptoms have not improved, and that he would like to undergo the surgery recommended by Dr. Yi.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

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

SPECIFIC MEDICAL BENEFITS AT ISSUE

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). Our courts have held that in order for a service to be considered a “medical benefit” it must be provided as medical or nursing treatment, or incidental to obtaining such treatment. *Country Squires Kennels v. Tarshis,* 899 P.2d 362 (Colo. App. 1995). A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant’s physical needs. *Bellone v. Industrial Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO, May 31, 2006). A service is incidental to the provision of treatment if it enables the claimant to obtain treatment, or if it is a minor concomitant of necessary medical treatment. *Country Squires Kennels v. Tarshis,* 899 P.2d 362 (Colo. App. 1995)*; Karim al Subhi v. King Soopers, Inc.,* W.C. No. 4-597-590, (ICAO. July 11, 2012). The determination of whether services are medically necessary, or incidental to obtaining such service, is a question of fact for the ALJ. *Bellone v. Industrial Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO, May 31, 2006). The existence of evidence which, if credited, might permit a contrary result affords no basis for relief on appeal. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).” *In the Matter of the Claim of Bud Forbes, Claimant*, No. W.C. No. 4-797-103, 2011 WL 5616888, at *3 (Colo. Ind. Cl. App. Off. Nov. 7, 2011). When the respondents challenge the claimant’s request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School District No.11*, W.C. No. 3-979-487, (ICAO, Jan. 11, 2012); *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO, Feb. 12, 2009).

Claimant has established by a preponderance of the evidence that the right endoscopic carpal tunnel release with right wrist arthroscopy with debridement of the scapholunate ligament requested by In Sok Yi, M.D. is reasonable, necessary, and related to Claimant’s January 16, 2020 work injury. Claimant was injured in a significant motor vehicle accident arising out of the course of his employment with Employer. Claimant credibly testified that his hands were likely on the steering wheel when his vehicle was struck from behind and complained of symptoms in his right wrist and elbow at his initial medical appointment. Claimant’s complaints of right wrist and elbow pain where consistently reported throughout his treatment, and an MRI to evaluate these conditions was originally ordered by Dr. Fox on March 6, 2020, within two months of the injury. The MRI was not completed until July 2020, likely due to Dr. Fox’s decision to terminate his physician-patient relationship with Claimant. Once the MRIs were performed, Claimant’s injuries were objectively confirmed. Subsequently, Claimant’s diagnosis of carpal tunnel syndrome was confirmed by EMG/NCS study. Dr. Burris’ opinion that Claimant’s carpal tunnel syndrome was not causally related to his accident is not credible or persuasive, and is contradicted by the opinions of Dr. Hughes, Dr. Anderson-Oeser and Dr. Yi’s physician assistant, PA Johnson. The ALJ finds it more likely than not that Claimant’s carpal tunnel syndrome and scapholunate ligament tear, mild arthrosis involving the distal radial ulnar articulation, and first CMC joint spurring, were the result of the January 16, 2020 work-injury, and that the surgery requested by Dr. Yi is reasonably necessary to cure or relieve the effects of these injuries. Although Dr. Hughes and Dr. Burris are of the opinion that Claimant should wait until completing psychological assessment and treatment until such surgeries are performed, the ALJ does not find the reasons explained by either physician to be compelling evidence for delaying surgical intervention, if Claimant chooses to undergo the procedures, and that the timing of surgery should be directed by Claimant’s treating providers.

ORDER

It is therefore ordered that:

1. Claimant’s request for authorization of the right endoscopic carpal tunnel release with right wrist arthroscopy with debridement of the scapholunate ligament requested by In Sok Yi, M.D. is granted.

2. All matters not determined herein are reserved for future determination.

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

DATED: January 26, 2021

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

- Did Claimant prove treatment for Chiari I malformation is causally related to her admitted May 3, 2018 work accident?

- What is Claimant's average weekly wage (AWW)?

- Did Claimant prove entitlement to TTD and TPD benefits commencing March 13, 2019?

FINDINGS OF FACT

1. Claimant suffered admitted injuries in a rear-end motor vehicle accident on May 3, 2018.

2. Claimant sought treatment at Banner Health emergency department the day of the accident. She reported pain in her left shoulder, back of her scalp, and back. Claimant specifically denied any neck pain, headaches, vision or hearing changes, numbness or tingling. Examination showed no spinous process tenderness throughout her back from the neck to the lumbar spine. There was a seatbelt mark on the anterior aspect of the left shoulder. Claimant was diagnosed with left shoulder pain, left shoulder contusion, posterior scalp contusion, and possible concussion. She was given Flexeril and discharged.

3. On May 14, 2018, Claimant was evaluated at the Monfort Family Clinic for "ER follow up MVA." She reported "some back and shoulder pain." She was taking Tylenol but had not tried the Flexeril because she was breast-feeding. Physical examination revealed low back and shoulder pain. There was no indication of any neck issues, headaches, or neurological problems. An x-ray of the left shoulder was unremarkable.

4. Claimant returned to the Monfort Family Clinic on June 15, 2018. She reported continued left shoulder pain and weakness, causing her to drop boxes at work. Claimant felt the pain radiated down the back of her arm into her wrist but denied paresthesias. Examination showed full strength and normal sensation. There was some tightness and mild tenderness to palpation of the trapezius muscles. The provider recommended an MRI of the left shoulder.

5. On July 13, 2018, Claimant underwent a left shoulder MRI, which showed a small supraspinatus tendon tear.

6. Claimant followed up at the Monfort Family Clinic on August 18, 2018, complaining of ongoing left shoulder pain. She did not report any neck complaints, headaches, or other problems.

7. Claimant saw Dr. Daniel Heaston, an orthopedic surgeon, on August 28, 2018. She described persistent left shoulder pain since the MVA. There was no mention of any neck pain, headaches, or numbness and tingling in her extremities. The physical examination included the neck, which was described as "supple." Dr. Heaston diagnosed rotator cuff inflammation and tightness. He did not believe Claimant was a surgical candidate and recommended conservative treatment for the left shoulder. There was no diagnosis suggesting any neck-related issue.

8. Claimant started physical therapy on September 5, 2018. At the initial appointment, she reported significant left shoulder pain after the MVA. The physical examination revealed left shoulder pain with limitations. Claimant reported no neck issues or headaches. Claimant participated in physical therapy through October 12, 2018, with some improvement noted by the therapist. The therapy notes contain no reference to neck problems or headaches, and the only documented neurological-type symptom was an isolated report of "a little numbness in fingers" on September 21, 2018.

9. On January 3, 2019, Claimant returned to the orthopedic clinic saw Dr. Thomas Pazik regarding her left shoulder and. Dr. Pazik documented, "Since she began physical therapy, she has had some intermittent tingling in all fingers of the left hand. This is worse at night and in the morning. By the time of this evaluation, she is not having any other symptoms." Examination of the neck revealed mild range of motion deficits and pain down the left arm with Spurling's maneuver. This was the first description of any radicular-like symptoms since the MVA. Dr. Pazik diagnosed "whiplash" and opined Claimant appeared to have a chronic cervical myofascial sprain. He also diagnosed possible left-sided radiculopathy and referred Claimant to Dr. David Blatt for a neurosurgical evaluation.

10. Claimant saw Dr. Blatt's PA-C, Sherrie Kay, on January 15, 2019. Claimant reported posterior neck pain and left shoulder pain "since" the MVA. She stated both hands and all her fingers were numb. Palpation of the neck showed no muscle spasms and normal range of motion. She had good strength and sensation throughout the bilateral upper extremities. Phalen's test was positive and Tinel's was positive bilaterally. Ms. Kay prescribed NSAIDs for myofascial pain and ordered cervical imaging.

11. A cervical spine x-ray on January 24, 2019 was normal.

12. On February 8, 2019, Claimant underwent a cervical MRI, which revealed small disc herniations at C4-5 and C5-6 with no canal stenosis or nerve root impingement. The cerebellar tonsils extended 15 mm below the cranial cervical junction, consistent with Chiari Type I malformation. There was severe narrowing of the craniocervical junction.

13. Dr. Blatt evaluated Claimant on February 19, 2019. Claimant complained of increased hand numbness that was causing her to drop things. The numbness and tingling were worse at night. Claimant denied headaches and changes in walking or balance. Dr. Blatt opined, "MRI brain shows a Chiari malformation. No headaches or other symptoms that are typical of that. It is possible that the hand numbness and tingling is related however. The Chiari malformation nevertheless may be asymptomatic." He noted

Claimant's symptoms and clinical findings were consistent with carpal tunnel syndrome. Diagnosed carpal tunnel syndrome and Chiari I malformation. He recommended a brain MRI and electrodiagnostic testing of the upper extremities.

14. The brain MRI was completed on February 24, 2019. The radiologist noted the Chiari I malformation but saw no other intercranial abnormality.

15. Claimant returned to the Monfort Family Clinic on March 5, 2019. She reported bilateral hand tingling, along with tingling on the bottoms of her feet. Review of systems was positive for "numbness, tingling, 'clumsiness' of hands" but negative for "headaches, vision changes, confusion." Claimant had an EMG in the past that showed carpal tunnel syndrome, but Claimant did not think that was the problem and wanted a second opinion. She was referred to Dr. John Oro, a noted Chari malformation specialist, for a second opinion.

16. Claimant resigned from her job with Employer on March 13, 2019. At hearing, Claimant attributed her separation to increased pain from the Chiari I malformation and (primarily) cognitive decline, including memory and "thinking" issues. She described not knowing where she was or who she was. She did not relate her separation to the shoulder injury. At hearing, Claimant conceded that at the time of her resignation, no physician has imposed any work restrictions that prevented her from performing her regular work activities.

17. On March 22, 2019, Claimant completed a lengthy Chiari questionnaire in anticipating of her evaluation with Dr. Oro. She endorsed numerous symptoms not otherwise documented in the post-MVA medical records, including headaches, pain in the back of the neck, general body weakness, blurred vision, problem swallowing, dizziness, face pain/numbness, problems speaking, short-term memory problems, problems with thinking, nausea, leg pain, leg weakness, and leg cramps.

18. On April 4, 2019, Monfort Family Clinic documented Claimant was "getting headaches off and on." This is the first time a medical provider documented headaches since the MVA. Claimant reported numbness in her hands and feet every day and it was waking her up at night.

19. Claimant saw Dr. Oro on May 9, 2019. She reported left shoulder pain since the MVA. She also told Dr. Oro she had pain in the back of her neck at the time of the MVA. Her main complaint was numbness and tingling in her arms and hands causing her to periodically drop things. She also described headaches "off and on." Claimant reported additional symptoms such as blurry vision, difficulty swallowing, dizziness, and short-term memory loss, which she indicated started after the MVA. Dr. Oro recommended a repeat brain MRI.

20. Claimant returned to Dr. Oro on May 16, 2019 to review the MRI. He noted tonsillar herniation of 17 mm compressing and stretching the brainstem. Dr. Oro assessed severe Chiari I malformation with significant crowding at the craniocervical junction. He

recommended a visual evaluation for pseudotumor cerebri, and pending the results, thought Claimant was a candidate for surgical decompression.

21. Claimant returned to the Monfort Family Clinic on June 4, 2019, complaining of headaches. She followed up on June 19, 2019, and reported difficulty walking because of numbness and tingling in her legs. Physical examination showed normal strength in both legs, with a slow but steady gait. The provider completed paperwork for a temporary handicapped parking permit.

22. Dr. Oro performed a posterior craniovertebral decompression for the Chiari I malformation on August 5, 2019. Claimant responded well to the surgery and “felt tons better.” She had to undergo a second procedure in October 2019 to address a cerebrospinal fluid leak but has continued to enjoy significant improvement since recovering from the second surgery.

23. Dr. Oro wrote a letter to Claimant’s counsel on August 24, 2019 addressing causation of the surgery. He opined the MVA aggravated the pre-existing Chiari I malformation and caused the need for treatment. He noted, [Claimant] was rear-ended and ‘smashed’ into the car in front of her. She noted a sudden ‘bad headache’ and developed multiple new neurological symptoms. The headaches were in the ‘back of the neck’ and were described as a pressure and were worsened with bending forward and looking up.” He also opined Claimant developed multiple other symptoms “following the MVC,” including numbness and tingling in her fingers, dysphagia, dizziness, facial numbness, difficulty with speech and short-term memory, and thinking.” Dr. Oro reviewed the emergency room report and thought it was “strongly suggestive” of a whiplash injury. He opined, “whiplash forces can tighten the already crowded area at the base of the skull to the top of the spinal canal and because malfunction of a number of nerve circuits and related centers (nuclei) in the brainstem that because multiple neurological symptoms. These symptoms which were persistent for 10 months following the MVC and, in view of the severe crowding at the base of the skull, would be very unlikely to resolve on their own.”

24. Respondents admitted Claimant suffered a compensable work injury from the May 3, 2018 MVA. But Respondents denied benefits relating to Chiari I malformation as unrelated to the work accident.

25. Claimant testified she developed neck pain, headaches, and dizziness immediately after the MVA. Claimant continued working her regular duties after the MVA, but testified she got help from co-workers with lifting because of her shoulder pain, neck pain, and headaches. Claimant testified she had pain “just about everywhere you can imagine.” She testified she developed dysphagia “a couple of months” after the accident. She testified her pain and other symptoms were getting “worse and worse” around March 2019. On cross-examination, Claimant stated she could not remember when her neck pain started because of her memory issues. Claimant testified she experienced headaches and pain in her neck, shoulder, feet, and legs, and had difficulty walking.

26. Dr. Oro testified at hearing to explain the pathophysiology of Chiari I malformation and elaborate on his opinions regarding the causal relationship to the MVA. Chiari I malformation is a congenital condition in which the skull cavity is too small for the cerebellum and the cerebellar tonsils are pushed out the foramen magnum into the spinal canal. This can compress the brainstem and cause neurologic symptoms. In Claimant's case, the herniated cerebellar tonsils extended up to 17mm into the spinal canal, which Dr. Oro described as significant. He opined the MVA aggravated Claimant's previous asymptomatic Chiari I malformation and caused the need for treatment. He testified Chiari I malformation is frequently undiagnosed or misdiagnosed because "the symptoms don't add up." He opined Claimant began experiencing cognitive decline "right after" the MVA. Dr. Oro described Chiari I generally as a "progressive condition" and many individuals have the anatomical abnormality for many years without symptoms. He conceded most cases of Chiari I become symptomatic without trauma or a specific precipitating event. Dr. Oro explained he drafted the August 24, 2019 letter based on his examination and Claimant's reported history and did not review her post-accident medical records. Dr. Oro testified a whiplash injury can aggravate a previously asymptomatic Chiari I malformation but conceded he would expect the individual to experience neck pain at the time.

27. Dr. Neil Brown, a neurosurgeon, prepared a report and testified at hearing. Dr. Brown reviewed and summarized medical records from the date of accident through Claimant's post-surgical treatment. Dr. Brown opined the Chiari symptoms Claimant had when she saw Dr. Oro did not manifest for many months after the accident. The first documentation of neck pain was not until January 2019, and typical Chiari I symptoms were not documented until Claimant completed Dr. Oro's questionnaire in March 2019. Dr. Brown testified the MVA was unlikely to have aggravated Claimant's Chiari I symptoms because of the delayed presentation. He emphasizes the importance of contemporaneous medical documentation in a causation assessment because patients often provide inaccurate histories because of "telescoping" or the attempt to relate current symptoms to a specific event. He noted the history Claimant provided is not consistent with the medical records. Dr. Brown's causation analysis and opinions are credible and more persuasive than the contrary opinions offered by Dr. Oro.

28. Claimant failed to prove treatment for Chiari I malformation is causally related to the May 3, 2018 work accident.

29. Before April 2018, Claimant was concurrent employed part-time by Employer and also worked for a school district. She left the school district and started working full-time as Employer's general manager on April 16, 2018. Wage records show she earned $1,438.56 in the 18 days before the accident. Claimant's average weekly wage is $559.44 ($1,438.56 ÷ 18 days = $79.92 x 7 = $559.44).

30. Claimant failed to prove she suffered a wage loss because of the work accident. Claimant continued working until March 2019, and left work because of an unrelated medical condition—Chiari I malformation. There is no persuasive evidence she was disabled by the effects of the work accident or suffered any injury -related wage loss.

CONCLUSIONS OF LAW

A. Medical benefits relating to Chiari I malformation

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Even if the respondents admit liability and pay for some treatment, they retain the right to dispute the reasonable necessity or relatedness of any other treatment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). Where the respondents dispute the claimant's entitlement to medical benefits, the claimant must prove the treatment is reasonably necessary and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

The existence of a pre-existing condition does not preclude a claim for medical benefits if an industrial injury aggravates, accelerates, or combines with the pre-existing condition to produce the need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). The ultimate question is whether the need for treatment was proximately caused by an industrial aggravation or merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

As found, Claimant failed to prove treatment for Chiari I malformation is causally related to the May 3, 2018 work accident. Dr. Brown's causation analysis is persuasive. Although temporal proximity does not necessarily prove causation, it is an important indicator of a causal nexus. Claimant's testimony she experienced neck pain and headaches immediately after the MVA is not supported by the medical records or other persuasive evidence. Claimant admitted to memory problems from the Chiari, which makes the medical documentation all the more important in determining the sequence of events.

Dr. Oro is clearly knowledgeable and skilled in diagnosing and treating Chiari I malformation. By the time Claimant got to him, the Chiari was obviously symptomatic and the focus was on treatment. There is no doubt the treatment Dr. Oro provided was reasonably needed and helpful. But his opinions regarding causation are only as good as the information he had regarding the onset and progression of symptoms. Dr. Oro agreed he would expect immediate neck pain if a patient experienced a whiplash sufficient to aggravate Chiari I malformation. He was under the mistaken impression Claimant experienced neck pain and headaches related to whiplash since the MVA. Dr. Oro conceded he relied primarily on the history reported to him by Claimant and did not perform an exhaustive record review. Nor would he be expected to do so, because the specific reason the Chiari became symptomatic was not particularly salient to the treatment she needed. Nevertheless, his reliance on an inaccurate history undercuts the persuasiveness of his opinions. Admittedly, medical records can and do contain errors, and providers are not infallible when it comes to documenting a patient's complaints. But there are simply too many medical records, from too many providers, over too long a time, to conclude Claimant was reporting significant neck pain or Chiari-related symptoms that were not being recorded. Chiari I malformation is a generally progressive condition and most patients develop symptoms without any trauma or other identifiable trigger. Claimant's symptoms associated with Chiari I malformation and need for treatment probably reflect the natural progression of her underlying congenital condition, without contribution from the work accident.

B. Average weekly wage

Section 8-42-102(2), C.R.S. provides compensation shall be based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that seems most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993). As found, Claimant started working full time on April 16, 2018 and earned $1,438.56 in the 18 days before the work accident. That equates to an AWW of $559.44. No persuasive evidence was presented to warrant basing the AWW on a different, post-injury period.

C. Temporary disability benefits

A temporarily disabled claimant is entitled to TTD benefits to compensate for a wage loss that is proximately caused by a work-related injury and lasts longer than three days. Section 8-42-105(1); *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999); *Montoya v. Industrial Claim Appeals Office*, ___ P.3d ___, 17CA 0322 (Colo. App. 2018). TPD benefits are payable when a temporarily disabled claimant earns less than their AWW. Section 8-42-106. As found, Claimant failed to prove the work injury proximately caused a wage loss. Claimant stopped working because of symptoms attributable to the Chiari I malformation, a nonwork-related condition. Accordingly, Claimant failed to establish a causal connection between the work injury and her wage loss.

ORDER

It is therefore ordered that:

1. Claimant's request for medical benefits related to Chiari I malformation is denied and dismissed.

2. Claimant's average weekly wage is $559.44.

3. Claimant's request for TTD and TPD benefits commencing March 13, 2019 is denied and dismissed.

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

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

DATED: January 27, 2021

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

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that his average weekly wage (AWW) should be higher than the previously admitted to AWW of $1,341.64.

FINDINGS OF FACT

1. The claimant worked for the employer at the X[Redacted] (a coal mine) for 20 years. In January 2020 he was working full-time in Y[Redacted] on the overland belts. The claimant earned a different hourly rate depending upon the shift worked. In addition the claimant was eligible for overtime pay. The different hourly rates were negotiated by the union and ratified every five years.

2. The claimant suffered an injury at work on January 17, 2020. The respondents have admitted liability for the injury. In addition, the respondents have admitted an average weekly wage (AWW) of $1,341.64.

3. The ALJ calculates that when the admitted AWW is multiplied by 52 weeks in a year, the total indicates annual earnings of $69,765.28.

4. The respondents began paying the claimant temporary total disability (TTD) benefits based upon the AWW of $1,341.64 beginning on January 18, 2020.

5. The pay records entered into evidence indicate that the claimant's year to date gross earnings for 2019 were $82,541.45. The claimant argues that this is the amount that should be used in calculating the claimant's AWW on the date of his injury in January 2020. When this total is divided by 52 weeks in a year, it results in an AWW of $1,587.33.

6. In December 2019, the claimant was paid $6,939.59 for "Annual Incentive". Danny C[Redacted], Human Resources Manager for the employer testified that this annual incentive fluctuates each year. The amount of the incentive depends upon market conditions, mine production, the quality of the coal produced, whether or not there are MSHA[1] or other safety violations. An employee can be paid a bonus between zero percent to 10 percent of their gross wages. This rate is determined by mine ownership.

7. The pay records indicate that the claimant received a YTD total of $2,049.84 for "Bonus". This was paid to the claimant in three payments. The first was on January 11, 2019 in the amount of $375.00. The second was on January 25, 2019 in the amount

[1] Mine Safety and Health Administration.

of $324.84. The claimant was then paid an additional $1,350.00 on November 15, 2019. The parties agree that the payment of $1,350.00 was the annual Christmas bonus.

8. Mr. C[Redacted] testified that each year all employees are paid a Christmas bonus, which fluctuates between $1,200.00 to $1,500.00 per year. In 2019, the claimant's Christmas bonus was $1,350.00.

9. The pay records indicate that the claimant received a YTD total of $1,817.02 for "Incentive". Mr. C[Redacted] testified that such payments are paid as an "extra bonus".

10. Each year, the claimant is paid a clothing allowance of $650.00 per year. Mr. C[Redacted] testified that in 2019 employees were paid an additional clothing allowance of $1,000.00. This one time payment was paid pursuant to the union contract.

11. The claimant was also paid $600.00 in 2019 for "Safety". Mr. C[Redacted] testified that these payments are made following a monthly drawing. Each month in which there are no safety violations, employees are entered into a drawing to win between $100.00 and $500.00.

12. The claimant testified that the clothing allowance of $650.00 and the Christmas bonus are paid every year. The claimant also testified that all other incentives and bonuses are not paid every year. When these other incentives and bonuses are paid, the payments fluctuate in amount.

13. The respondents agree that the claimant's AWW should be increased. However, the respondents argue that such an increase should only reflect the annual Christmas bonus and annual clothing allowance. The respondents calculate that the AWW should be increased by $62.03 per week, for a total AWW of $1,403.67.

14. The ALJ is persuaded that the annual clothing allowance and a Christmas bonus of between $1,200.00 and $1,500.00 are paid to the claimant every year and the claimant can rely on receiving those payments. As the Christmas payment for 2019 was $1,350.00, the ALJ adopts this amount in calculating the claimant's AWW.

15. In calculating the claimant's AWW, the ALJ declines to include the 2019 "Annual Incentive", "Incentive", "Bonus", and "Safety" amounts as these vary each year, and are not always paid to employees. Therefore, the claimant does not have access to those amounts on a day-to-day basis, or an immediate expectation of receiving the benefit under appropriate, reasonable circumstances.

16. The ALJ calculates that the claimant's AWW for this claim should be $1,393.94. The ALJ reaches this AWW as follows: The claimant's gross earnings for 2019 were $82,541.45. The ALJ deducts from that total $6,939.59 in Annual Incentive; $2,049.84 in Bonus; $1,817.02 in Incentive; and $600.00 in Safety for a total of $71,135.00. Then, the ALJ adds back $1,350.00 for the Christmas bonus for a new total of $72,485.00. When this is then divided by 52 weeks in a year, the average is $1,393.94.

17. The ALJ recognizes that there is an order on appeal regarding the claimant's entitlement to temporary total disability (TTD) benefits beginning on May 26, 2020 and thereafter. The present order is not intended to impact, in any way, any rulings,

decisions, orders, or appeals related to that prior matter. Therefore, this present order applies to the calculation of TTD benefits from January 18, 2020 through May 25, 2020. Any additional TTD benefits which may be found to be due beginning May 26, 2020, would be assessed utilizing the new AWW of $1,393.94, once the current appeals have been exhausted on that prior matter.

CONCLUSIONS OF LAW

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

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

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

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

5. Section 8-42-102(2), C.R.S. requires the ALJ to base claimant's average weekly wage (AWW) on his earnings at the time of the injury. In order for a particular payment to be considered "wages" it must have a "reasonable, present-day, cash equivalent value," and the claimant must have access to the benefit on a day-to-day basis, or an immediate expectation interest in receiving the benefit under appropriate, reasonable circumstances. *Meeker v. Provenant Health Partners*, 929 P.2d 26 (Colo. App. 1996). Under some circumstances, the ALJ may determine the claimant's TTD rate based upon his AWW on a date other than the date of the injury. *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). Section 8-42-102(3), C.R.S. grants the ALJ

discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO, May 7, 2007).

6. Section 8-40-201(19)(a), C.R.S., defines wage as "the money rate at which the services rendered are recompensed under the contract of hire in force at the time of injury." Section 8-40-201(19)(b), C.R.S., provides that "wages" shall include the value of certain fringe benefits including health insurance, and the reasonable value of board, rent, housing, and lodging. However, it also states that wages, "shall not include any similar advantage or fringe benefit not specifically enumerated in this subsection (19)."

7. In *Meeker v. Provenant Health Partners*, 929 P.2d 26, the Colorado Court of Appeals developed a test for whether an employer-paid benefit is a wage or enumerated fringe benefit. *Meeker* held that an employer-paid benefit constitutes wages if it has a "reasonable, present-day, cash equivalent value," and the employee has access to the benefit on a "reasonable day-today basis," or has "an immediate expectation interest in receiving the benefit under appropriate, reasonable circumstances." *Id.*

8. In *Dan Yex v. ABC Supply Company and Ace/ESIS Insurance*, W.C. No. 4-910-373 (May 16, 2014), ICAP relied on the *Meeker* case, and its progeny *Orrell v. Coors Porcelain*, WC No. 4-251-934 (May 22, 2997), and determined that an employee's bonus earned during the employer's busy season was properly excluded from the AWW. The claimant in *Yex* had injured his back in December 2012 and asserted he received a bonus in April 2012. The ALJ found the employees were awarded bonuses if their branch showed a profit in the previous calendar year. Some years resulted in a bonus and others did not. Under *Meeker*, the ALJ reasoned that the bonus did not have a present day cash equivalent value, the claimant did not have access to the proceeds of the bonus on a day to day basis, and did not have an immediate expectation of receiving the bonus. The bonus was appropriately identified as a fringe benefit not included in the calculation of wages.

9. As found, the claimant was paid fringe benefits in the form of "Annual Incentive", "Incentive", "Bonus", and "Safety" as these payments were not paid every year, and when paid would vary in amount. As found, the claimant did not have access to those amounts on a day-to-day basis, or an immediate expectation of receiving the benefit under appropriate, reasonable circumstances. However, with regard to the annual payments for a Christmas bonus and clothing allowance, the claimant did have an immediate expectation of receiving the benefit under appropriate, reasonable circumstances. As found, the AWW for this claim shall be $1,393.94.

ORDER

It is therefore ordered:

1. The claimant's AWW for this claim shall be $1,393.94.

2. As noted above, this order shall be applied to the calculation of TTD benefits from January 18, 2020 through May 25, 2020.

3. Any additional TTD benefits which may be found to be due beginning May 26, 2020, would be assessed utilizing the new AWW of $1,393.94, once the current appeals have been exhausted on that prior matter.

4. The respondents shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined here are reserved for future determination.

Dated this 28th day of January 2021.

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

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You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment recommended by Dr. Raymond Kim (including left total hip replacement) is reasonable medical treatment necessary to maintain the claimant at maximum medical improvement (MMI).

2. Whether the claimant has demonstrated, by a preponderance of the evidence, that her claim should be reopened pursuant to Section 8-43-303, C.R.S. due to a worsening of her condition.

3. If the claimant's claim is reopened, whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment recommended by Dr. Raymond Kim (including left total hip replacement) is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted June 15, 2017 work injury.

FINDINGS OF FACT

1. The claimant works for the employer at the Colorado Regional Center as a psychology technician. On June 15, 2017, she had a one-on-one interaction with one of the behavioral residents. At that time, the resident began to strike her own head on the floor. The claimant attempted to intervene by placing a blocking pad under the resident's head. In response, the resident kicked the claimant in the knees. This caused the claimant to fall to the floor. The claimant testified that while she was on the floor, the resident continued to kick her. Immediately after this incident the claimant had soreness on her left side and in her left hip.

2. The claimant's authorized treating provider (ATP) for this claim is Dr. Robert McLaughlin. During this claim, Dr. McLaughlin has referred the claimant to physical therapy and chiropractic treatment. Dr. McLaughlin has listed the claimant's diagnoses as left hip pain, left sacroiliac (SI) joint pain, left knee pain, and left leg pain.

3. The claimant testified that following the June 15, 2017 incident, she continued to work full time. However, she moved to working during the night shift, which was less physically demanding than the day shift.

4. On February 14, 2018, the claimant was seen by Dr. McLaughlin. At that time, the claimant reported that chiropractic treatment would provide some relief, but the pain would return. In addition, Dr. McLaughlin noted that physical therapy "seemed to flare [the claimant's] muscle strain". On that date, Dr. McLaughlin referred the claimant to orthopedist, Dr. Kennan Vance for a consultation.

5. The claimant was first seen by Dr. Vance on February 26, 2018. On that date, x-rays of the claimant's left hip and pelvis showed osteoarthritis. Dr. Vance recommended a steroid injection to the claimant's left hip.

6. On March 19, 2018, Dr. Bjorn Irion administered the recommended injection. This injection initially provided some relief to the claimant.

7. On April 11, 2018, Dr. McLaughlin referred the claimant to Dr. Mitchell Burnbaum for a neurological consultation to rule out nerve entrapment. On May 16, 2018, Dr. McLaughlin noted that the nerve tests administered by Dr. Burnbaum were normal.

8. On June 1, 2018, Dr. McLaughlin placed the claimant at maximum medical improvement (MMI). In addition, Dr. McLaughlin assessed a permanent impairment rating of four percent for range of motion in the claimant's left knee, and 8 percent for range of motion in the claimant's left hip. This resulted in a total scheduled impairment rating of 12 percent for the claimant's left lower extremity. With regard to maintenance medical treatment, Dr. McLaughlin recommended follow up (as needed) with both himself and the orthopedist, continued use of a TENS unit, and a gym pass. He also listed possible hip injections.

9. On June 25, 2018, the respondent filed a Final Admission of Liability (FAL) admitting for the MMI date of June 1, 2018 and the scheduled impairment of 12 percent for the claimant's left lower extremity.

10. The claimant testified that after she was placed at MMI, she continued working her normal job, but she found that her work demands grew heavier. In addition, the employer was requiring mandatory overtime, which resulted in the claimant working more hours and she was on her feet more. The claimant also testified that it was during this time that she began to have increased hip pain and developed a limp.

11. On November 12, 2018, the claimant returned to Dr. Vance. At that time, Dr. Vance noted that the claimant had significant osteoarthritis in her left hip. He suggested an additional injection to the claimant's left hip. However, he also noted that the claimant would likely need a left total hip replacement. A repeat injection was administered by Dr. Irion on November 27, 2018.

12. On November 18, 2019, the claimant returned to Dr. Vance. On that date, Dr. Vance reviewed updated x-rays of the claimant's left hip. At that time, Dr. Vance noted that the claimant's left hip was arthritic and would eventually require a left hip replacement. Dr. Vance recommended the claimant see a surgeon, either Dr. Stryker or Dr. Copeland.

13. On March 9, 2020, the claimant returned to Dr. McLaughlin and reported that the effects of the injection had worn off, and she had been struggling. At that time, Dr. McLaughlin referred the claimant to an orthopedist to consider surgery. With regard to MMI, Dr. McLaughlin noted: "[I]n my opinion she continues at MMI, but if surgery is recommended to be undertaken that would imply that there is improvement that can be done medically for the underlying condition and she would not be at MMI at that point".

14. On March 31, 2020, the claimant was seen by Dr. Louis Stryker. In the medical record of that date, Dr. Stryker noted that the claimant "has reached an end in regard to her [left] hip". Dr. Stryer recommended a total left hip arthroplasty.

15. On April 4, 2020, Dr. McLaughlin noted that the claimant would proceed with surgery with Dr. Stryker. Dr. McLauglin agreed with the surgical recommendation, and noted that the claimant was no longer at MMI:

> [T]here has been a surgical recommendation that will improve the underlying condition. The hip has worsened enough that it now requires surgery. There has been a worsening of the condition her continued working at [Employer] following the trauma that occurred on [June 15, 2017] and there is new treatment that will improve the underlying condition.

16. On April 27, 2020, the claimant was seen by Dr. McLaughlin. At that time, Dr. McLaughlin noted that Dr. Vance had recommended a left hip arthroplasty, to be done by Dr. Stryker. The claimant communicated to Dr. McLaughlin that she had not heard back from Dr. Stryker regarding scheduling the surgery. Dr. McLaughlin also noted that the claimant had reduced range of motion and increased pain. Terfore, he concluded that the claimant's condition had worsened and she was no longer at MMI.

17. On May 29, 2020, Dr. Stephen Lindenbaum reviewed the authorization request for a total left hip arthroplasty. In his report, Dr. Lindenbaum opined that a total hip arthroplasty was medically necessary. He noted that the claimant had experienced several years of hip pain despite a number of treatment modalities. He also noted the claimant had decreased range of motion. Finally, he noted that both physical examination and imaging showed severe osteoarthritis.

18. The recommended left hip arthroplasty was scheduled with Dr. Stryker for early June 2020. However, the claimant was notified by Dr. Stryker's office staff that the scheduled surgery was cancelled.

19. On June 23, 2020, the claimant attended an independent medical examination (IME) with Dr. Tashof Bernton. In connection with the IME, Dr. Bernton reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his IME report, Dr. Bernton opined that a total left hip replacement is reasonable treatment due to the condition of the claimant's left hip. He further opined that the claimant's need for a hip replacement is not related to the injury she sustained on June 15, 2017. In support of this opinion, Dr. Bernton noted that when the claimant initially received medical treatment following the injury "it was not initially appreciated that her symptoms were from her hip". He also noted that the incident on June 15, 2017 did not cause the osteoarthritis in the claimant's left hip. In addition, it is Dr. Bernton's opinion that the incident on June 15, 2017 did not aggravate the preexisting osteoarthritis in the claimant's left hip to the point of changing the natural progression of the degenerative process.

20. On July 8, 2020, the claimant returned to Dr. McLaughlin. On that date, they discussed that Dr. Stryker was relocating. As a result, Dr. McLaughlin referred the claimant to surgeon Dr. Raymond Kim.

21. On July 23, 2020 the claimant was seen at The Steadman Clinic by Dr. Kim. On that date, Dr. Kim recorded that the claimant was continuing to experience pain that had worsened over time. The claimant described her pain as aching, stabbing, and throbbing. In addition, she reported experiencing giving way/instability, popping, pain, and weakness. Following his exam and additional x-rays, Dr. Kim opined that the best treatment for the claimant would be a left total hip arthroplasty. In support of this opinion, Dr. Kim noted that the claimant had exhausted all conservative treatment.

22. On September 3, 2020, the claimant filed a Petition to Reopen based on a change in medical condition. With the Petition, the claimant included the April 27, 2020 medical record from Dr. McLaughlin and the July 23, 2020 record from Dr. Kim.

23. Dr. Bernton's testimony was consistent with his written report. During his testimony, Dr. Bernton reiterated his opinion that although a left hip replacement would be reasonable treatment for the claimant, that the need for surgery was not work related. He noted that a hip replacement was inevitable, given the significant and chronic osteoarthritis in the claimant's left hip. In addition, Dr. Bernton stated that the osteoarthritis in the claimant's left hip was not aggravated or exacerbated by her injury on June 15, 2017. Dr. Bernton also noted that the Colorado Medical Treatment Guidelines (MTG) would require a structural change (as evidenced by radiographic studies) to warrant consideration of a hip replacement.

24. The ALJ takes administrative notice of WCRP 17 and notes that Section (E)(3)(b) of the Lower Extremity Guidelines states that for aggravation of osteoarthritis of the hip to be work-related, there must be "a change in the patient's baseline condition and a relationship to work activities or specific injury to the hip." WCRP 17, Exhibit. 6.

25. The claimant testified that prior to the June 15, 2017 injury she enjoyed hiking, fishing and four-wheeling. The claimant testified that she is unable to engage in these activities because of her left hip pain. In addition, prior to her injury she would exercise three to four times per week using an elliptical machine. At this time, using the elliptical is painful. The claimant also testified that she is unable to stand long enough to cook a meal. Since being placed at MMI, the claimant has had more pain, uses more over the counter pain medications, (such as Tylenol and ibuprofen). The claimant also testified that she wants to undergo the recommended surgery.

26. The ALJ credits the claimant's testimony, the medical records, and the opinions of Dr. McLaughlin and finds that the claimant has demonstrated that it is more likely than not that, due to a worsening of her condition, the claimant is no longer at MMI. The ALJ notes that the claimant was not a candidate for total hip replacement at the time she was placed at MMI in 2018. However, since that time she has continued to have issues at work and at home, received additional maintenance treatment, and then

became a surgical candidate. The ALJ specifically credits Dr. McLaughlin's March 9, 2020 and April 4, 2020 reports on this issue.

27. The ALJ credits the claimant's testimony, the medical records, and the opinions of Drs. McLaughlin, Lindenbaum, Vance, Stryker, and Kim over the conflicting opinions of Dr. Bernton, and finds that the claimant has demonstrated that it is more likely than not that the left total hip replacement recommended by Dr. Kim is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted work injury.

CONCLUSIONS OF LAW

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

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

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

4. Section 8-43-303(1) provides that "any award" may be reopened within six years after the date of injury "on the ground of fraud, an overpayment, an error, mistake, or a change in condition." Reopening for "mistake" can be based on a mistake of law or fact. *Renz v. Larimer County School District Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996). A claimant may request reopening on the grounds of error or mistake even if the claim was previously denied and dismissed. *E.g., Standard Metals Corporation v. Gallegos*, 781 P.2d 142 (Colo. App. 1989); *see also Amin v. Schneider National Carriers*, W.C. No. 4-81-225-06 (November 9, 2017). The ALJ has wide discretion to determine whether an error or mistake has occurred that justifies reopening the claim. *Berg v.*

Industrial Claim Appeals Office, 128 P.3d 270 (Colo. App. 2005); *Travelers Ins. Co. v. Industrial Commission*, 646 P.2d 399 (Colo. 1981).

5. A change in condition refers to "a change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition which can be causally connected to the original compensable injury." *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 222 (Colo. App. 2008). The ALJ is not required to reopen a claim based upon a worsened condition whenever an authorized treating physician finds increased impairment following MMI. *Id.* The party attempting to reopen an issue or claim shall bear the burden of proof as to any issues sought to be reopened. Section 8-43-303(4), C.R.S.

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

7. The need for medical treatment may extend beyond the point of maximum medical improvement where claimant requires periodic maintenance care to prevent further deterioration of his physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future maintenance treatment if supported by substantial evidence of the need for such treatment. *Grover v. Industrial Commission, supra*.

8. As found, the claimant has successfully demonstrated, by a preponderance of the evidence, that, due to a worsening of her condition, the claimant is no longer at MMI. Therefore, the claimant's claim shall be reopened. As found, the claimant's testimony, the medical records, and the opinions of Dr. McLaughlin are credible and persuasive.

9. As found, the claimant has successfully demonstrated, by a preponderance of the evidence, that the left total hip replacement recommended by Dr. Kim is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted work injury. As found, the claimant's testimony, the medical records, and the opinions of Drs. McLaughlin, Lindenbaum, Vance, Stryker, and Kim are credible and persuasive.

ORDER

It is therefore ordered:

1. The claimant's claim is reopened, due to a worsening of her condition.

2. The respondents shall pay for the recommended left total hip replacement, pursuant to the Colorado Medical Fee Schedule.

3. All matters not determined herein are reserved for future determination.

Dated this 28th day of January 2021.

Cassandra M. Sidanycz
Administrative Law Judge

Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

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ISSUE

1. Whether Claimant established by a preponderance of the evidence that right shoulder surgery requested by Dr. McCarty is reasonably necessary to cure or relieve the effects of his March 26, 2019 work-related injury.

2. Whether Claimant established by a preponderance of the evidence that diagnostics and/or surgery to correct an inguinal hernia is reasonably necessary to cure or relieve the effects of his March 26, 2019 work-related injury.

PROCEDURAL POSTURE

Claimant initially endorsed the issue of the reasonableness and necessity of recommended lumbar transforaminal epidural steroid injections. In his position statements, Claimant stated that the issue was mistakenly endorsed, and that the issue is moot. Consequently, the ALJ considers the issue withdrawn and does not address the issue in this Order.

FINDINGS OF FACT

1. Claimant sustained an admitted work-related injury on March 26, 2019, when he fell approximately 12-15 feet from the top of a wall to the ground. At the time, he was setting floor joists with a coworker.

2. On March 26, 2019, Claimant was initially seen at Concentra. Claimant reported that he fell from a height of approximately 12 feet and reported pain from the top of his right knee to his ankle. Claimant reported that he did not hit his head and that all of his weight went onto his ankle. He denied neck pain, chest pain, back pain, and hip pain. Claimant was diagnosed with right ankle sprain, contusion of right knee, and closed non-displaced fracture of right calcaneus. Claimant's physical examination included evaluation of his head, abdomen, right knee, right ankle, right foot, cervical, thoracic, and lumbar spine. Claimant was given a Toradol injection, prescribed pain medication, a walking boot, and crutches. The records noted Claimant was "not covered under work comp insurance and has no personal insurance," and he was referred to Denver Health for further treatment and evaluation. (Ex. 2).

3. On March 30, 2019, Claimant was seen at Denver Health Medical Center emergency room, reporting shoulder and foot pain, and was evaluated by Paul Leccese, M.D. Claimant reported being seen a few days earlier at urgent care for a right calcaneus fracture. He reported no chest, abdomen, neck, or back pain. He reported bilateral shoulder pain, worse while using crutches without padding in the bilateral axilla (armpits). It was noted that Claimant was tender over the shoulder (AC joint), and a shoulder x-ray

was obtained to rule out a missed injury. Right shoulder x-rays showed no fracture or dislocation, the radiologist noted "high riding humeral head suggests rotator cuff tear." (Ex. C). Left shoulder x-rays were normal. Claimant was diagnosed with a closed, nondisplaced fracture of the right calcaneus, and bilateral shoulder pain, of "unspecified chronicity." (Ex. C).

4. On April 1, 2019, Claimant was seen by David Yamamoto, M.D. Claimant reported he did not remember the details of his fall, but reported he landed on his right heel, and that he did not hit his head. Claimant reported, in addition to his heel, that he injured his shoulders, wrists and right knee. Dr. Yamamoto noted that Claimant "did not hit his head but is complaining of a moderate headache." Claimant reported bilateral shoulder pain and that he was not sure how he injured his shoulder. Claimant also reported moderate pain in the lower abdomen. On examination of Claimant's shoulder, Dr. Yamamoto found anterior and superior tenderness of both shoulders, with 90 degrees flexion and abduction in both shoulders. Dr. Yamamoto examined Claimant's abdomen and found mild tenderness and "no hernias present." Among other things, he diagnosed Claimant with a strain of the right and left shoulder and lower abdominal pain. Dr. Yamamoto noted that he was not yet authorized to treat Claimant and scheduled a follow up appointment in two weeks. (Ex. E).

5. On April 5, 2019, Claimant was seen at Denver Health by Stephen Stacey, M.D. Claimant's chief complaints were documented as a right calcaneus fracture and arthritis of both shoulder regions. Claimant reported that he had aggravated his shoulders at the time of his injury and more with use of crutches. He noted that pain was located deep in the shoulder. On examination, Claimant was found to have a positive Neer test with pain in the anterior and lateral shoulder. X-rays of Claimant's right shoulder were performed which showed moderate inferior glenohumeral joint degenerative changes and mild AC joint degeneration, and no fractures. (Ex. C).

6. On April 16, 2019, Claimant returned to Dr. Yamamoto. At that time, Claimant continued to report bilateral shoulder pain, and lower abdominal pain. He also reported lower back pain, which Claimant indicated he had "from the beginning." Claimant indicated he (apparently mistakenly) marked his lower abdominal area on his initial pain diagram rather than his lower back. Dr. Yamamoto's examination of Claimant's shoulders and abdomen was unchanged from his prior visit. Examination of Claimant's lower back was noted as positive for tenderness over the right lower back. Dr. Yamamoto added "lumbar sprain" to Claimant's diagnosis, and prescribed pain medications. (Ex. E).

7. On May 7, 2019, Claimant was seen at the Denver Health Emergency Department for evaluation of a potential sexually transmitted disease. As part of the evaluation, the emergency room physician performed an examination of Claimant's abdomen and noted "hernia confirmed negative" in both the right and left inguinal area. Similarly, an ultrasound of Claimant's pelvic area was interpreted as showing no evidence of inguinal hernia. (Ex. C).

8. On May 19, 2019, Respondents filed a General Admission of Liability, admitting for medical benefits for "multiple body parts, both wrist[s], both shoulders, head, neck, both legs, back." (Ex. 1). It is undisputed that Claimant sustained fracture of the right calcaneus as a result of the March 26, 2019 work injury.

9. In his May 29, 2019 record, Dr. Yamamoto noted that Claimant "stated that he is not sure how he injured the shoulders. He did have basically a two part fall as he fell from a joist to the edge [of] the roof to the ground and he likely put out his arms." This explanation of Claimant's fall is included in each of Dr. Yamamoto's subsequent records. It is unclear from the record whether Claimant reported a putting his arms out, or whether this description is Dr. Yamamoto's hypothesis of how the injury occurred. Dr. Yamamoto ordered MRIs of the Claimant shoulders, a CT scan of his abdomen and a lumbar MRI. (Ex. E).

10. Between June 18, 2019 and August 9, 2019, Claimant received physical therapy at Atlas Physical Therapy. The therapy provided was directed to Claimant's heel and gait, and did not address Claimant's shoulders. (Ex. F).

11. On June 21, 2019, MRIs of Claimant's shoulders were performed. The right shoulder MRI showed a moderate glenohumeral degenerative joint disease with circumferential labral degeneration and fraying, mild supraspinatus tendinosis with a tiny low-grade tear, mild infraspinatus tendinosis, and moderate acromioclavicular degenerative joint disease. MRI of his left shoulder showed mild tendinosis of the supraspinatus and infraspinatus, small high-grade cartilage erosion of the inferior glenoid with probable inferior labral degeneration but no identifiable tear, and mild acromioclavicular degenerative joint disease. Claimant's lumbar MRI showed lower lumbar degenerative disc disease and facet arthrosis, with no significant spinal canal stenosis, mild bilateral foraminal narrowing at L4-5, and minimal bilateral foraminal stenosis at L3-4. (Ex. D).

12. On June 26, 2019, Dr. Yamamoto referred Claimant to an orthopedist for shoulder pain and to Kristin Mason, M.D., for evaluation of lower back pain. (Ex. E).

13. On July 30, 2019, saw Hector Mejia, M.D., at Panorama Orthopedics for further evaluation of his shoulders. X-rays taken on July 30, 2019 showed glenohumeral and acromioclavicular arthritis of both shoulders. Claimant reported to Dr. Mejia that when he fell on March 26, 2019, "his shoulders popped out," a report not made to previous health care providers. Dr. Mejia reviewed Claimant's right shoulder MRI and described it as follows: "Right shoulder MRI shows some glenohumeral chondral changes and arthritic changes with what looks like chronic inferior humeral changas as well as labral degenerative teras and cystic changes both in the glenoid and the humeral side." Dr. Mejia indicated Claimant would possibly need shoulder replacement in the future due to his preexisting condition. Dr. Mejia acknowledged a "possibly temporary aggravation of preexisting condition," and indicated he would defer to Dr. Yamamoto to determine causation. Dr. Mejia performed two glenohumeral joint injections and recommended physical therapy. Dr. Mejia diagnosed Claimant with primary osteoarthritis of the shoulder. (Ex. G).

14. Claimant returned to Dr. Yamamoto on August 2, 2019, and complained of headaches (migraines), lower back pain and bilateral shoulder pain. Dr. Yamamoto noted that Claimant had “essentially full range of motion of both shoulders.” Dr. Yamamoto referred Claimant to Eric McCarty, M.D., for a second opinion regarding his shoulders, and a MRI of his right elbow.

15. Claimant saw Dr. Mason for initial evaluation on August 9, 2019. At that time, he reported falling approximately 14 feet and landing predominantly on his right leg but also causing pain in the knee and hip and low back. Claimant reported posterolateral right leg pain, with occasional numbness and weakness, as well as intermittent anterior thigh or groin pain. Claimant reported not receiving any treatment for his back. Dr. Mason’s assessment was lumbar disc and facet arthropathy with likely some degree of both at L3-4, L4-5 and L5 intermittent radiculopathy on the right. She also noted “some concern relevant to hip pathology.” Dr. Mason ordered lumbar x-rays and recommended that Claimant initiate physical therapy for his back. (Ex. H).

16. Between August 15, 2019 and October3, 2019, Claimant received physical therapy at Denver Physical Therapy. The therapy he received was directed to Claimant’s lumbar spine, and did not address Claimant’s shoulders. (Ex. I).

17. From September 3, 2019 through July 14, 2020, Claimant continued to see Dr. Yamamoto approximately monthly. At each visit, Dr. Yamamoto noted that Claimant had bilateral shoulder pain. Claimant reported no significant improvement in his shoulder pain throughout this time frame. (Ex. D).

18. On September 4, 2019, Claimant saw Stephen Thon, M.D. and Eric McCarty, M.D. at UC Health.[1] Dr. Thon noted that Claimant had “a significant fall resulting in multiple injuries including to bilateral shoulders.” Claimant reported pain and his shoulder “slipping out of socket.” Claimant reported seeing another orthopedist who “recommended shoulder replacement /reconstruction.” Claimant reported his right shoulder pain was significantly worse than the left. On examination, Dr. Thon found Claimant’s acromioclavicular joint and biceps tendon to be non-tender, pain on “empty can” testing, and positive instability tests. He reviewed Claimant’s shoulder MRIs and indicated “they demonstrate a small Bankart lesion of the anterior inferior labrum bilaterally. He also has degenerative changes of both shoulders, the right is worse than the left.” Dr. Thon characterized Claimant’s shoulders as a “difficult problem.” He stated: “It appears that he has 2 issues going on. He has a significantly torn labrum the anterior inferior aspect of his shoulder, which results in positive apprehension sig, and a positive relocation sign. What is difficult is that he also has evidence of glenohumeral degenerative joint disease.” Dr. Thon stated “I have no doubt that his injury which occurred at work has exacerbated his symptoms and made his shoulders worse.” Dr. Thon discussed two possible treatment options, including a labral reconstruction or total shoulder arthroplasty.

[1] The September 4, 2019 medical record from UCHealth is signed by Dr. Thon, and co-signed by Dr. McCarty on September 15, 2019.

Claimant indicated he would like to pursue labral reconstruction. Dr. Thon advised Claimant to follow up with Dr. McCarty. (Ex. J).

19. On September 10, 2019, Dr. Mason evaluated Claimant and included within her assessment a probable hip labral tear based on her examination. Dr. Mason ordered an MRI arthrogram to evaluate Claimant for labral pathology. (Ex, H).

20. On September 18, 2019, Dr. McCarty submitted a request for authorization of surgery to Insurer. The indicated procedure was right shoulder arthroscopy, debridement, and anterior labral repair. (Ex. J).

21. On September 20, 2019, Andrew Parker, M.D., conducted a review of portions of Claimant's medical records. Dr. Parker opined that Claimant should complete a course of physical therapy and conservative management before proceeding to a surgical intervention. He indicated if Claimant were to have surgery, a labral repair/debridement would likely be preferable to arthroplasty. He opined arthroplasty would be related to chronic degenerative arthritis and not work-related. (Ex. L).

22. On October 8, 2019, Claimant saw Dr. Mason. She noted Claimant had seen Dr. McCarty for his shoulders. Dr. Mason diagnosed Claimant with lumbar disk and facet arthropathy with intermittent right L5 radiculopathy, right hip labral tear (fairly extensive) and right calcaneus fracture. She noted that Claimant's back and hip pain could be the result of two pain generators, in the lumbosacral area and hip, and recommended a diagnostic hip injection. (Ex. H).

23. On October 31, 2019, Claimant was evaluated by Sean Baran, M.D., of Western Orthopedics for right hip pain. Dr. Baran noted that Claimant's September 25, 2019 MRI demonstrated a tear of the anterior superior portion of his right labrum. Dr. Baran recommended conservative management of Claimant's right hip, but did recommend a diagnostic injection of the hip. Dr. Baran further noted that he "would like to have [Claimant] referred to a general surgeon to rule out any abdominal etiology or hernia as a source of his pain. On the same date, Dr. Baran authored a letter to Dr. Yamamoto in which he stated: "I am concerned that a lot of his symptoms today do seem to be coming from his abdomen, potentially a hernia, and I would recommend prior to use thinking about any surgery for the hip that [Claimant] have general surgery evaluation for the abdominal/pelvic portion of the pain." (Ex. L).

24. On November 8, 2019, Dr. Mason saw Claimant. She noted that Dr. Baran had recommended a general surgery evaluation "for ruling out a hernia in the area as a potential contributing." Claimant reported he was reluctant to have a corticosteroid injection because "he had a bad experience with them in a previous shoulder injury." (Ex. H).

25. On December 10, 2019, Claimant saw Dr. Mason. Claimant reported more pain in his lower back and hip. She noted that Claimant's MRI demonstrated nerve root contact from disk disease and facet arthropathy at L4-5 on both sides. Claimant also reported concerns about residual effects from a concussion. She noted that diagnostic injections should be concluded before pursuing interventional pain management for Claimant's back. (Ex. H).

26. On December 20, 2019, Claimant was seen at Denver Health for headaches. Claimant reported that he hit his head on concrete when he fell on March 26, 2019, and that he had chronic daily headaches since that time, but he was "was never evaluated from that fall, never had imaging." (Ex. C).

27. Between December 27, 2019 and January 17, 2019, Claimant attended four physical therapy sessions at Atlas Physical Therapy. The therapy provided was directed to Claimant's right shoulder. On January 17, 2020, the physical therapist noted that "progress throughout the course of therapy has been limited secondary to pain and apprehension. [Claimant] reports R>L shoulder will 'pop out' if he goes further with ROM interventions. Recommend further investigation into shoulder dysfunction/impairment as minimal progress has been made to date." It was noted that Claimant was "more concerned about further diagnostics of shoulder than participating with PT interventions." (Ex. F).

28. On January 21, 2020, Claimant saw Dr. Mason. Dr. Mason noted that Claimant was complaining of groin pain, as well as back pain. (Ex. H).

29. On January 29, 2020, Dr. Erickson performed an Independent medical Examination (IME) of Claimant at Respondents request. Dr. Erickson examined Claimant and reviewed Claimant's medical records. As relevant to the issues presented in this hearing, Dr. Erickson opined that Claimant's right shoulder pathology is significant and substantial, but "clearly not related to an injury that occurred on 3/26/19." With respect to Claimant's right shoulder, Dr. Erickson opined that Claimant suffered a serious dislocation of the shoulder in the past, but not on March 26, 2019. He further opined that an arthroscopic labral repair would be unlikely to benefit the Claimant, and that it would be more appropriate to consider a joint replacement, although that procedure would not be work-related. (Ex. M).

30. In conjunction with his IME, Dr. Erickson asked a radiologist, Elizabeth Carpenter, M.D., to review Claimant's post-accident shoulder MRI. Dr. Carpenter reviewed Claimant's MRI from June 2019 and prior imaging from 2014, and issued a report dated March 10, 2020. Based on her review of imaging studies, Dr. Carpenter opined that the degree of glenohumeral osteoarthritis seen on Claimant's June 21, 2019 right shoulder MRI was consistent with degenerative changes identified in 2014. She noted that the findings were "age indeterminant but most consistent with degenerative change and not suggestive of a recent traumatic event. In fact, there are no imaging findings suggestive of recent traumatic injury." (Ex. N).

31. On February 18, 2020, Claimant reported to Dr. Mason that he appeared for a hernia evaluation with another physician, but the clinic was "backed up" and he could not wait, so he rescheduled the evaluation. Claimant indicated he wanted to proceed with a labral repair in his hip, and Dr. Mason indicated that it would not likely explain Claimant's back pain which she characterized as a separate issue. (Ex. H).

32. On February 21, 2020, Claimant underwent surgery on his right foot, including an Achilles' tendon debridement with repair, flexor hallucis longus deep tendon transfer, partial excision of the right calcaneus, performed by Premjit Deol, D.O., of Panorama Orthopedics. (Ex. G).

33. On March 3, 2020, Dr. McCarty responded to an inquiry from Claimant's counsel regarding Claimant's right shoulder. Dr. McCarty believed the recommended right shoulder surgery was reasonable and necessary and related to Claimant's March 26, 2019 work injury. He opined that Claimant's injury appeared to have exacerbated an ongoing problem with his shoulder. Dr. McCarty stated that Claimant "appears to have a new exacerbation of the shoulder which is now giving him problems based on his exam and his history. The procedure of arthroscopy with labral repair is recommended." Dr. McCarty's records and reports do not indicate that Dr. McCarty reviewed Claimant's medical records pre-dating his involvement. (Ex. J).

34. On March 16, 2020, Dr. Yamamoto prepared a Physician's Report of Worker's Compensation Injury that was submitted to Insurer. Dr. Yamamoto noted that Claimant's work-related medical diagnoses were right calcaneus fracture, right shoulder labral tear, left shoulder labral tear, right hip labral tear, lumbar strain, bilateral wrist pain, right elbow extensor tendon tear, bilateral knee meniscal tears, headaches, and depression. (Ex. E).

35. On March 17, 2020, Claimant was seen by Anthony Canfield, M.D., for evaluation of a potential hernia. Dr. Canfield diagnosed Claimant with a broad based indirect right inguinal hernia and a small left sided hernia, neither of which were incarcerated. Dr. Canfield recommended that Claimant undergo bilateral hernia repair. Dr. Canfield's records do not address the cause of Claimant's hernias, and indicate that Claimant wanted to be seen for a hernia evaluation before hip surgery. Dr. Canfield's records do not indicate whether hernia repair was a necessary prerequisite for Claimant's proposed hip surgery. (Ex. O).

36. On March 20, 2020, Claimant returned to Dr. Mason, and reported he had undergone foot surgery approximately one month earlier. Claimant reported he was found to have two inguinal hernias which may be contributing to Claimant's groin and lower abdominal pain. (Ex. H).

37. On May 5, 2020, Claimant received bilateral transforaminal epidural steroid injections at the L4-5 level, performed by Nicholas Olsen, D.O., a partner of Dr. Mason. (Ex. H).

38. On May 15, 2020, Claimant had a telemedicine visit with Dr. Mason, during which Dr. Erickson's IME report was reviewed. Claimant reported the epidural steroid injection

from May 5, 2020 provided about 30% benefit. Dr. Mason noted "With respect to causation, I think it makes senses with someone who fell 15 feet could potentially sustain injuries up the kinetic chain, and there is a frequent association of lumbar spine injuries with calcaneal fractures. I have also seen this mechanism of injury result in a labral tear. The patient denies a prior history of pain in those areas. I am a little surprised that he had so any many other complaints in the upper quadrants as those have not been issues that he has discussed with me." Dr. Mason also stated: "I feel the height of his fall would indicate that it is certainly more likely than not that his hip and back issues were caused by the fall. I do not have an explanation for why there was a delay in report of his complaints." (Ex. H). Dr. Mason's records do not contain any recommendations for treatment of Claimant's hernia, or any statement that treatment of Claimant's hernia would facilitate her treatment of Claimant's back.

39. On April 15, 2020, Albert Hattem, M.D., provided Insurer with a report related to the causation of Claimant's hernias. Dr. Hattem opined that there was no documentation of a work-related injury that would have involved the increased intra-abdominal necessary to cause an inguinal hernia. He opined that treatment for Claimant's hernias was not work-related. (Ex. Q).

40. On April 30, 2020, Dr. Hattem issued a second report after conducting a review of Claimant's medical records. Dr. Hattem opined that Claimant's work-related diagnoses were limited to a fracture of his right calcaneus, Achilles tendinosis, and aggravation of preexisting degenerative medial meniscus tear, right knee. He opined that Claimant's left knee pain, elbow pain, right hip pain, bilateral shoulder pain, bilateral inguinal hernias, headaches, and low back pain were not related to his work injury of March 26, 2019. (Ex. Q). Dr. Hattem opined that Claimant's bilateral shoulder pain was not work-related because Claimant "first complained of shoulder pain, on March 30, 2019,4 days after the work injury." He further opined that had Claimant suffered a work-related shoulder injury, more likely than not Claimant would have reported the injury oat his initial visit on March 26, 2019, and that when Claimant initially complained of shoulder pain he attributed it to the use of crutches. With respect to Claimant's inguinal hernias, Dr. Hattem opined that Claimant did not complaint of hernia pain until months following the initial injury, and that the mechanism of injury was inconsistent with an inguinal hernia.

41. Claimant testified at hearing that, while working for Employer, he fell from a height of approximately 9-11 feet while framing a wall. He testified that he did not remember the fall, but recalls two impacts and that he landed on his right side. Claimant testified at hearing that fell from a wall and did not recall how the fall occurred. He testified that he recalled two impacts, but did not remember what he hit or how the two impacts occurred. HE testified that his right side hit the ground. He reported feeling pain throughout his entire body, but his primary area of pain was his right leg. Claimant testified that Mr. R[Redacted] indicated he was not insured and that he would take Claimant for medical care. Mr. R[Redacted] took Claimant to Concentra. Claimant testified that on the ride to the Concentra, he did not tell Mr. R[Redacted] what body parts were injured, but that he believed both parties knew his leg was injured. Claimant testified that when he arrived at Concentra, Mr. R[Redacted] told Claimant only to get checked for his leg. When describing the accident and his initial evaluation at Concentra, Claimant did not testify

that he had shoulder, back or abdomen pain when seen at Concentra on March 26, 2019. Claimant testified that he does not have private health insurance or other insurance, such as Medicaid or Medicare.

42. Claimant indicated when he was seen at Denver Health on March 30, 2019, he complained of pain in his ankle, knee and both shoulders. Claimant indicated that there were other body areas that were hurting when he was at Denver Health, but he did not report other body parts as injured. Claimant testified that his shoulder pain began the day of the fall, and that he had pain in his armpits and the upper part of his shoulder.

43. Claimant testified that his former attorney referred him to Dr. Yamamoto. Claimant testified that when he saw Dr. Yamamoto on April 1, 2019, he reported ankle, knee, wrist, abdominal and back pain. He testified that his back had been in pain prior to the visit since March 26, 2019. Claimant testified that he would like to pursue surgery recommended for his right shoulder, and surgery for his hernia.

44. Claimant testified that prior to his fall on March 26, 2019, he did not have any pain in his right shoulder or functional limitations of his right shoulder. He testified that over the previous 8 years he had been employed in construction framing, and that during that time period he had no limitations on his right shoulder. Since March 26, 2019, Claimant testified that he experiences subluxations and pain in his right shoulder. Claimant testified that prior to March 26, 2019, he had no pain or functional limitations in his shoulder back. Claimant testified that he had abdominal pain in December 2017 that may have begun a few years prior to that, and that it had gone away prior to his March 26, 2019 fall.

45. Claimant testified that sometime after his accident, and after beginning treatment with Dr. Yamamoto, he recalled that he struck his head during his fall, but that he did not have any bruises or bumps and that it did not hit hard. Claimant testified that he is now having issues with his memory, migraines, and headaches, but that these conditions were stress-related.

46. Claimant testified that when he saw Dr. Erickson for his IME, that he did not mention certain areas of pain because he was on pain medication. Claimant testified that he did not have any bruising or abrasions on his right shoulder, elbow, hip, knee, hands, or head.

47. Dr. Yamamoto was accepted as an expert in occupational medicine and testified at hearing. Dr. Yamamoto testified that in a fall from the height of Claimant's injury multiple injuries are possible. Dr. Yamamoto testified that he believes, to a reasonable degree of medical probability that Claimant injured his right ankle, right knee, left knee, right shoulder, and lumbar spine (lower back) as a result of his March 26, 2019 fall. He testified that Claimant's fall could have injured or aggravated his right shoulder and back. Dr. Yamamoto testified that all of Claimant's areas of complaint "could have" been related to or caused by his March 26, 2019 fall.

48. Dr. Yamamoto testified that it was reasonable to infer that Claimant intended to report his lower back to him on April 1, 2019, when he circled his abdomen on his pain diagram. Dr. Yamamoto also testified that at his initial appointment he performed a physical examination of Claimant, and that he questions patients on the areas of pain, which would direct his physical examination. He testified that if Claimant reported his lower back was in pain, he would have conducted a physical examination. On cross-examination, Dr. Yamamoto testified that Claimant did not report lower back pain at the April 1, 2019 office visit. Dr. Yamamoto testified that his "review of systems" for Claimant's April 1, 2019 visit, in which "no back pain" is noted, is only in the record for billing purposes, and not because a full review of systems was performed. Dr. Yamamoto also testified that Claimant's purported back injuries may not have been addressed at his initial visit due to time constraints. Dr. Yamamoto testified that Claimant had an acute injury to his lower back, and that the force of his fall "could have" injured Claimant's lower back.

49. Dr. Yamamoto testified he believes Claimant aggravated a pre-existing right shoulder condition, and that his fall on March 26, 2019 accelerated the degeneration of Claimant's right shoulder. He opined that treatment for Claimant's right shoulder is reasonable and necessary, and related to his March 26, 2019 work injury. He also testified that he did not know the mechanism of injury for Claimant's right shoulder, and that he was speculating when stating that Claimant had a "two-part fall." He further testified that Claimant did not sustain a blow to the shoulder when he fell, and that Claimant did not sustain a severe shoulder injury. Dr. Yamamoto testified that he believes Claimant's recommended right shoulder surgery is reasonable, necessary, and related to his work-injury.

50. Dr. Yamamoto testified that it is more likely than not that Claimant aggravated a preexisting hernia which could have been worsened by his fall, and could have aggravated the condition, but he did not know for sure. He testified that Claimant's hernia was an incidental finding but would only be speculating that the fall caused or worsened any hernia. Dr. Yamamoto testified that Claimant needs to address his hernias to address his right hip issues, and that Claimant's surgeon wanted to address the hernia before addressing Claimant's hip.

51. Dr. Hattem was accepted as an expert in occupational medicine and testified at hearing by deposition. Dr. Hattem testified that based on his review of the Claimant's medical records, he did not believe Claimant sustained an injury to his right shoulder or sustained an aggravation of a preexisting shoulder condition as a result of his March 26, 2019 work injury. Similarly, Dr. Hattem testified that he did not believe that Claimant sustained in injury to his lower back as a result of his March 26, 2019 work injury, based on Claimant's delay in reporting symptoms related to his lower back. With respect to Claimant's hernia, Dr. Hattem testified that the Claimant's mechanism of injury (i.e., a fall) was unlikely to cause, aggravate or accelerate a hernia. Dr. Hattem testified that someone who falls on their feet and then onto their right side can sustain injuries to the right side of the body based on landing on their right side.

52. Dr. Ericson was accepted as an expert in occupational medicine and orthopedic surgery and testified at hearing by deposition. Dr. Erickson testified that based on his review of the Claimant's post-injury shoulder MRI, that there was evidence of severe degenerative disease and what he interpreted as evidence of a significant shoulder dislocation in the past (prior to March 26, 2019), although he did not believe that it explained Claimant's reported pain and motion limitations. Dr. Erickson testified that he believed psychosocial factors may be influencing Claimant's injuries. Dr. Ericson testified that the proposed arthroscopic labral repair surgery would not be likely to alleviate Claimant's pain or arthritic condition. Dr. Erickson opined that Claimant did not sustain an injury to his right shoulder as a result of his March 26, 2019 fall.

53. J. Isabel R[Redacted] testified in rebuttal through a post-hearing deposition through a translator. Mr. R[Redacted] testified that he did not witness Claimant's injury but took him for medical treatment at Concentra after being advised of the injury. Mr. R[Redacted] testified that he and Claimant did not discuss Claimant's injuries on the drive to Concentra, although Claimant indicated he had a problem with his foot and that he was having pain in his foot. Mr. R[Redacted] testified that Claimant was on the phone while Mr. R[Redacted] was driving him to Concentra. He testified that he did not tell Claimant that he could only have his leg checked or that he should tell Concentra physicians that he only injured his leg. Mr. R[Redacted] testified on arrival at Concentra, the Claimant spoke to Concentra personnel because Claimant speaks English and Mr. R[Redacted] does not. He further testified that he was not asked if he had insurance while at Concentra, and that he paid for Claimant's medical treatment in cash. Mr. R[Redacted] testified that after taking Claimant to Concentra he called his insurance and initiated the claim.

Claimant's Prior Medical Treatment

54. In July 2004, Claimant sustained an injury to his right shoulder and was evaluated at Denver Health. (Ex. 3). X-rays performed at the time showed no evidence of acute fracture or dislocation.

55. On December 26, 2017, Claimant was seen at Denver Health for complaints of lower abdominal pain and testicular pain that started 2-3 years earlier. Claimant reported he had been seen for that condition before and had an MRI performed, but was unsure of the results. Claimant reported that his pain had worsened over the previous two months, and that he did not follow up due to lack of insurance. (Ex. C).

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the

evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

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

REASONABLENESS, RELATEDNESS AND NECESSITY OF SPECIFIC MEDICAL CARE

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. C.R.S. § 8-41-301(1)(c). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.*, 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the ALJ. Faulkner, 12 P.3d at 846. A compensable injury is an injury which "arises out of" and "in the course of" employment. See C.R.S. § 8-41-301(1)(b); *Price v. Industrial Claim Appeals*, 919 P.2d 207 (Colo. 2012).

"A preexisting condition does not disqualify a claimant from receiving workers' compensation benefits. Rather, where the industrial injury aggravates, accelerates, or combines with a preexisting disease or infirmity to produce the need for treatment, the treatment is a compensable consequence of the industrial injury." *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, (2004); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo.App.1990).

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Industrial Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO, May 31, 2006). A service is incidental to the provision of treatment if it enables the claimant to obtain treatment, or if it is a minor concomitant of necessary medical treatment. *Country Squires Kennels v. Tarshis,* 899 P.2d 362 (Colo. App. 1995)*; Karim al Subhi v. King Soopers, Inc.,* W.C. No. 4-597-590, (ICAO. July 11, 2012). The determination of whether services are medically necessary, or incidental to obtaining such service, is a question of fact for the ALJ. *Bellone v. Industrial Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO, May 31, 2006). The existence of evidence which, if credited, might permit a contrary result affords no basis for relief on appeal. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002)." *In the Matter of the Claim of Bud Forbes, Claimant*, No. W.C. No. 4-797-103, 2011 WL 5616888, at *3 (Colo. Ind. Cl. App. Off. Nov. 7, 2011).

RIGHT SHOULDER

Claimant has failed to establish by a preponderance of the evidence that he sustained an injury to his right shoulder arising out of the course and scope of his employment with Employer

The ALJ finds that the evidence does not establish a mechanism of injury to Claimant's right shoulder. Claimant's medical records indicate that Claimant fell hard on his right heel, with sufficient force to fracture his heel, and possibly injure his knee, hip and back. (The ALJ makes no findings as to the causation of injuries to these body parts). At Claimant's initial visit to Concentra on March 26, 2019, Claimant reported that all of his weight went on to his ankle and falling to the side. Claimant testified that he did not have any bruising or abrasions on his right shoulder, elbow, or hands, which is consistent with his initial report to Concentra. When Claimant first reported shoulder pain, Claimant reported that the pain was the result of his use of crutches, and located in his armpit, although some AC joint tenderness was noted. If, as Claimant reported to Dr. Mejia that his shoulders “popped out” as a result of his fall, one would expect this would have been reported at that time. Notwithstanding, when Claimant initially saw Dr. Yamamoto, he indicated that he was not sure how he injured his shoulder. Approximately two months later, on May 29, 2016, either Claimant or Dr. Yamamoto indicated that Claimant “likely put out his arms.” However, Dr. Yamamoto this explanation of Claimant’s fall appears to have been Dr. Yamamoto’s speculation as to how Claimant could have sustained a right shoulder injury.

Neither Dr. Yamamoto nor Dr. McCarty provided a causation analysis. Dr. Yamamoto testified that Claimant’s shoulder injury “could have” been related to his work fall but offered no cogent explanation as to the mechanism of injury, and he ultimately admitted he did not know the mechanism of injury. Dr. McCarty’s March 3, 2020 statement is similarly not persuasive because Dr. McCarty did not document any mechanism of injury or document any causation analysis and appears to have relied on Claimant’s statement that the March 26, 2019 fall resulted in bilateral shoulder injuries.

Claimant’s testimony that he did not report shoulder symptoms or trauma to his shoulder at Concentra on March 26, 2019 because Mr. R[Redacted] instructed Claimant not to report injuries other than his leg is not credible. Both Claimant and Mr. R[Redacted] testified that on the car ride to Concentra they did not discuss Claimant’s injuries, other than Claimant indicating that his foot hurt. Claimant’s assertion that Mr. R[Redacted] instructed Claimant to only have his leg examined and treated fails to explain why Mr. R[Redacted] would tell Claimant to report exclusively leg injuries if Mr. R[Redacted] was not aware of other areas of purported injury. The ALJ finds Mr. R[Redacted]’ testimony credible on this issue.

The ALJ finds that Claimant failed to establish that it is more likely than not that he sustained an injury to his right shoulder or aggravated or exacerbated any preexisting condition as a result of his May 26, 2019 work injury.

With respect to the requested surgery, because Claimant has failed to establish that it is more likely than not that he sustained an injury to his right shoulder or aggravated or exacerbated a preexisting condition, the request for right shoulder surgery is denied.

HERNIA

Claimant contends that the hernia surgery recommended by Dr. Canfield is “an incidental service necessary to obtain claim-related hip and lumbar care.” Respondents are required to provide ancillary “pre-operative treatment” for non-industrial conditions if the evidence establishes that the ancillary care is a reasonably necessary prerequisite to surgery and must be given to achieve optimum treatment of the compensable injury. *Public Service Co. v. Industrial Claim Appeals Office,* 979 P.2d 584 (Colo. App. 1999); *Walling v. Asa Electric*, Inc., W.C. No. 4-760-050-02, (ICAO, Dec. 10, 2013). The question of whether the claimant has established that the need for ancillary treatment is a reasonably necessary prerequisite to achieve optimal treatment is one of fact for the ALJ. *Public Service Co. v. Industrial Claim Appeals Office, supra*.

In support of this contention, Claimant asserts that "before Dr. Baran can request authorization for the claim-related hip surgery, Claimant needs to have his inguinal hernia's [sic] repaired as indicated by Dr. Baran" in his October 31, 2019 letter to Dr. Yamamoto. Dr. Baran did not testify at hearing and his records do not indicate that repair of Claimant's hernia was a necessary precursor to addressing Claimant's hip condition. Rather, Dr. Baran's records demonstrate that Dr. Baran was concerned that Claimant's hernia may have been a source of Claimant's reported groin and hip pain, and he recommended evaluation by a general surgeon to evaluate that condition.

Neither Dr. Baran, Dr. Canfield nor Dr. Mason made any statements that repair of Claimant's hernias must be done before Claimant's proposed hip surgery or treatment, that hip surgery or treatment could not be performed until Claimant's hernias are repaired, or that surgery on Claimant's hernias would be necessary to cure or relieve the effects of Claimant's work injury. Claimant's contention that Dr. Mason "has also indicated that repairing Claimant's hernias will allow her to better diagnose and treat Claimant's work-related lumbar injury," is not supported by Dr. Mason's medical records. The ALJ finds that Claimant has failed to establish that the recommended hernia surgery is a reasonably necessary prerequisite to treatment of Claimant's hip or that such surgery must be performed to achieve optimum treatment of Claimant's compensable injuries.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that he sustained an injury to his right shoulder arising out of the course and scope of his employment with Employer on March 26, 2019.

2. Claimant's request for authorization of right shoulder arthroscopy, debridement, and anterior labral repair is denied.

3. Claimant's request for authorization of hernia repair surgery is denied.

4. All matters not determined herein are reserved for future determination.

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

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

DATED: January 29. 2021

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that she suffered a compensable right knee injury during the course and scope of her employment with Employer on January 31, 2020.

2. Whether Claimant has established by a preponderance of the evidence that she is entitled to receive reasonable, necessary and causally related medical treatment for her January 31, 2020 industrial incident.

FINDINGS OF FACT

1. Claimant works for Employer as a Merchandizing Specialist. Her job duties involve organizing product orders and returns, performing cycle counts and preparing items for distribution.

2. On November 30, 2015 Claimant obtained treatment for chronic knee pain from Craig Anthony, M.D. at St. Anthony's Family Medicine Center North. Dr. Anthony reported that Claimant presented with chronic right knee pain that began after bending down to pick something off the floor. His physical examination revealed right knee swelling, tenderness to palpation over the proximal lateral patella and upward radiating pain. Dr. Anthony suspected an ACL injury but x-rays only revealed mild tricompartmental osteoarthritis. He provided Claimant with an excused absence note and stated Claimant could return to full duty work.

3. On December 28, 2015 Claimant returned to Dr. Anthony for an examination. Dr. Anthony recounted that Claimant was experiencing worsening right knee symptoms including instability, locking and popping. Claimant specifically reported her knee felt unstable, locks, pops and gives out. A physical examination revealed mild tri-compartmental osteoarthritis and tenderness with a McMurray test. Dr. Anthony discussed a possible arthroscopic debridement and referred Claimant for an orthopedic evaluation. However, Claimant did not follow-up with treatment.

4. Claimant testified that she received an injection into her right knee in late 2015 or early 2016. She did not receive any further right knee treatment until December 2019.

5. On December 9, 2019 Claimant obtained right knee treatment from Tam Minh This Nguyen, PA-C at St. Anthony's Family Medicine North. PA-C Nguyen reported that Claimant injured her right knee on November 21, 2019 when someone fell and struck the inside of her right knee with his or her shoulder. Claimant's knee condition was improving without treatment until she experienced a pop on Thanksgiving Day. Claimant subsequently felt a constant throb in her medial right knee. She disclosed her chronic knee pain and noted she had undergone a cortisone injection in the past. A physical examination revealed right knee swelling and tenderness to palpation. PA-C Nguyen and

her supervising doctor Bruce Williams, M.D., suspected patellar tendonitis. They instructed Claimant to wear a knee brace while at work, continue NSAIDs and undergo x-rays.

6. Claimant testified the November 21, 2019 incident occurred while in a mosh pit at a concert. She explained that her right knee condition improved and returned to baseline for pain and functionality without any further medical treatment. Claimant did not undergo the recommended x-rays but utilized a knee brace while at work and continued to take NSAIDs.

7. Claimant remarked that she stopped wearing a knee brace in early January 2020 but continued to wear a knee compression sleeve. She commented that she was able to walk without any assistive device, climb ladders, kneel down, squat, bend and lift in excess of 60 pounds. Nevertheless, Claimant worked her full duties before and after the mosh pit incident.

8. Claimant explained that on the morning of January 31, 2020 she was reading a cycle count sheet while hastily walking through Employer’s facility. She struck her right foot against a roll of dense carpet-like material that was improperly positioned in the walkway. Claimant specified that she struck the inside of her right big toe. The force pushed her right foot outward and caused intense burning pain in the interior or medial side of her right knee. After a moment, she slowly lowered herself to the ground. Eventually a coworker arrived and helped Claimant into a chair. Claimant then called Employer’s nurse line and was referred for treatment.

9. Later on January 31, 2020 Claimant visited Lisa Grimaldi, PA-C at Concentra Medical Centers. PA-C Grimaldi recorded that she had difficulty understanding the exact mechanism of Claimant’s injury. She noted that Claimant developed right knee pain when she was walking and hit something hard with her right foot. Claimant then went forward and hit her right knee, but did not strike the ground. PA-C Grimaldi noted Claimant’s pain at a level of 10/10. Claimant had difficulty walking, arrived in a wheelchair and was using a cane to ambulate. Claimant noted she had chronic knee pain for years and used a knee brace. Physical examination was difficult because Claimant experienced pain with all movements. Claimant underwent x-rays that were normal. PA-C Grimaldi administered a Toradol injection and prescribed medication, a “hinged” knee brace, pain gel and physical therapy. She also assigned work restrictions.

10. Claimant initially denied any prior right knee injuries during the evaluation with PA-C Grimaldi. However, while at the appointment, a medical assistant overheard Claimant discussing a right knee injury with her husband that occurred at a “mosh pit” in November 2019. Because the medical assistant relayed the information to PA-C Grimaldi, she asked Claimant again about prior injuries. Claimant acknowledged she had suffered a right knee injury a couple of months earlier when she was in a mosh pit. At hearing, Claimant explained that her husband pressured her not to disclose her right knee problems to her medical providers.

11. On February 1, 2020 Claimant visited Marc Passo, M.D. at Arvada Emergency and Urgent Care. Dr. Passo reported that Claimant was experiencing right knee pain from a trip and fall at work one day earlier. Claimant disclosed she injured her

right knee in November 2019, but her condition improved without any acute medical intervention. X-rays were again normal and a physical examination revealed right knee swelling.

12. On February 3, 2020 Misty Merritt filed Employer's First Report of Injury on behalf of Respondents. Ms. Merritt reported that Claimant injured her right knee on January 31, 2020. The document noted that at the time of injury Claimant was walking and looking at a piece of paper. She then tripped over a bag that was sitting on the floor.

13. On February 4, 2020 Claimant returned to Concentra and was evaluated by Janine Kennedy, PA-C under the supervision of Authorized Treating Physician (ATP) Amanda Cava, M.D. PA-C Kennedy reported that Claimant was utilizing crutches and needed adjusted restrictions to allow her to return to work. A physical examination revealed limited flexion and extension. PA-C Kennedy requested Claimant's medical records regarding her prior right knee treatment. She diagnosed Claimant with a sprain or strain of the right knee or lower extremity. PA-C Kennedy instructed Claimant to continue physical therapy and use the brace and crutches. She limited Claimant to sedentary work only,

14. On February 11, 2020 Claimant returned to PA-C Kennedy for an evaluation. During the physical examination Claimant demonstrated limited flexion and extension. PA-C Kennedy referred Claimant for an MRI and instructed her to continue physical therapy and medications.

15. On February 17, 2020 Claimant underwent a right knee MRI. The MRI revealed a large medial meniscus bucket-handle tear with moderately advanced patellofemoral chondromalacia and arthritis.

16. On February 27, 2020 Claimant was evaluated by John Papilion, M.D. Dr. Papilion reported that Claimant injured her right knee while walking in a warehouse at work when she caught her right foot, twisted her right knee and fell to the ground. Claimant developed significant swelling within 24 hours and has been unable to extend the knee since the incident. Although Claimant disclosed a right knee injection approximately five years earlier, she did not mention the November 2019 mosh pit incident. Dr. Papilion diagnosed an incarcerated bucket-handle tear of the right medial meniscus. He determined that Claimant required surgery to address her ongoing right knee issues and noted she could not extend her knee due to the locked meniscus. On February 28, 2020 Dr. Papilion requested authorization to perform surgery on Claimant's right knee.

17. On March 11, 2020 Respondents filed a Notice of Contest.

18. On March 12, 2020 Claimant provided a recorded statement to Sue Massey on behalf of Respondents. Claimant disclosed her chronic knee pain, stated that she had received a cortisone injection in the past and noted she injured her right knee in a mosh pit incident in November 2019. She relayed that on January 31, 2020 she was reading a cycle count sheet while walking through her store when she struck her right foot against a roll of floor dry material. Claimant specified that she did not trip or strike her knee, but instead slowly lowered herself to the ground.

19. On March 16, 2020 Clamant returned for an evaluation with PA-C Kennedy at Concentra. PA-C Kennedy noted that Claimant had suffered a knee sprain with a large bucket handle tear of the medial meniscus. She remarked that the requested medical records for prior right knee injuries "did not supply much information as there was a limited knee exam done at the time and no imaging and therefore do not support a significant prior knee injury." PA-C Kennedy summarized that Claimant had not made any further progress in physical therapy and still could not fully flex or extend her right knee.

20. On March 19, 2020 Respondents sent a denial of the requested right knee surgery to Dr. Papilion.

21. On July 14, 2020 Claimant underwent an independent medical evaluation with Timothy O'Brien, M.D. Dr. O'Brien recorded that on January 31, 2020 she was pushing a cart, struck her right foot and jolted her right knee. She did not fall, but slowly lowered herself to the ground. Dr. O'Brien remarked that Claimant did not twist her knee or slip. Claimant did not describe hitting her knee but only her foot. He reviewed Claimant's medical records and conducted a physical examination. Dr. O'Brien explained that Claimant was not a "creditable, reliable, or trustworthy examinee and therefore her representation that she sustained a work injury on January 31, 2020 by hitting her foot against an object should not be supported." He detailed that Claimant was not forthcoming with Dr. Papilion at her first evaluation, with PA-C Grimaldi on January 31, 2020 or with PA-C Kennedy on February 4, 2020. Dr. O'Brien commented that Claimant should have apprised the three examiners that she sustained an injury requiring treatment weeks earlier. Furthermore, Claimant made historical revisions and exhibited inconsistencies about the mechanism of her January 31, 2020 injury. Moreover, in 2015 Claimant "had significant symptomology following an innocuous daily activity such as leaning forward" that was consistent not only with osteoarthritis but also a meniscus tear. In fact, the examiner in 2015 suggested arthroscopic surgery might be indicated and initiated an orthopedic referral, but Claimant did not follow through. Dr. O'Brien determined that it was medically probable that Claimant had a meniscus tear in 2015.

22. Dr. O'Brien also explained that Claimant's described mechanism of injury on January 31, 2020 would not have caused a meniscus tear. Specifically, kicking something with the foot or hitting the knee after kicking something with the foot is not an injury mechanism that produces a meniscus tear. Dr. O'Brien detailed that meniscus tears occur when the foot remains planted and the body rotates through a knee that is either actively flexing or extending. He noted that many times meniscus tears occur on fields of play such as soccer and football. Dr. O'Brien summarized that the most contemporaneous historical input provided by PA-C Grimaldi on the date of the incident "was not consistent with that type of injury mechanism that would produce a meniscus tear." He determined that Claimant had a pre-existing bucket-handle meniscus tear. Accordingly, Claimant did not suffer a right knee meniscus tear while working for Employer on January 31, 2020.

23. On November 5, 2020 Respondents sent a letter to ATP Dr. Cava asking her to review Dr. O'Brien's independent medical examination and complete a questionnaire. On December 3, 2020 Dr. Cava submitted answers. The first question inquired whether Claimant suffered a work related injury on January 31, 2020. Dr. Cava stated that, after considering Claimant's pre-existing injuries and the "very mild

mechanism" that occurred on January 31, 2020, her "meniscal tear was not work-related." Question number six asked about Claimant's permanent work restrictions. Dr. Cava responded "[a]s the meniscal injury is not work-related, any permanent work restrictions should come from personal physician," Finally, Dr. Cava agreed that Claimant's symptoms constituted a "personal health issue."

24. On December 7, 2020 the parties conducted the pre-hearing evidentiary deposition of Dr. O'Brien. He maintained that Claimant did not suffer an industrial injury to her right knee while working for Employer on January 31, 2020. He remarked that Dr. Papilion over-interpreted the MRI findings and they did not reflect surgical intervention by way of arthroscopy was emergent or necessary. Instead, the bucket handle meniscus tear shown on the MRI was not caused by the January 31, 2020 incident because there was no evidence of an acute injury. Instead, Dr. O'Brien reasoned that Claimant had some type of meniscus tear dating back to 2015 that was substantial enough to result in a wobbly and very unstable knee. He detailed that Claimant's symptoms included right knee locking, popping, instability and giving way. Dr. O'Brien noted that Claimant's complaints in 2015 constituted "classic symptoms" for a medial meniscus. In fact, the treatment provider at the time suggested an orthopedic referral and possible arthroscopic surgery. Moreover, Claimant suffered another substantial injury in a mosh pit in November 2019. Dr. O'Brien remarked that when Claimant visited PA-C Nguyen on December 9, 2019 at St. Anthony's Family Medicine North she stated that she was shouldered in the knee when another person was falling. The mechanism was also described as an aversion injury where the knee was flexed laterally. Dr. O'Brien explained that, although Claimant did not specifically mention the mosh pit, there was an event in which someone fell into Claimant's right knee and forced the knee outward. He characterized the accident as "a tackling type of injury" that would occur on a football or soccer field. He remarked that "this is a classic injury for something that would consistently produce a meniscus tear." Dr. O'Brien summarized that Claimant had a meniscal tear in 2015 and developed similar symptoms as a result of the November 2019 mosh pit incident.

25. Dr. O'Brien also explained that Claimant's January 31, 2020 mechanism of injury would not have caused a meniscus tear. He commented that, because Claimant's foot was in motion, she was in a single-leg stance on the left moving her foot forward on the right at the time her foot impacted the object. Her right foot could not have been planted on the ground. The preceding action could not have produced a tear because the meniscus tears when the foot is planted and there is torsion and sometimes direct loading of the knee. Meniscus tears can only be produced in the lab when the foot is stationary. Dr. O'Brien detailed that the January 31, 2020 incident did not involve any torsion. He remarked that, when any individual kicks an object, there is a straightforward force that loads the patellofemoral joint. In contrast, the mosh pit incident created a load between the femorotibial part of the knee that compressed the meniscus. Dr. O'Brien further reasoned that the right knee MRI revealed arthritis at the patellofemoral joint. When she kicked an immovable object, she loaded the arthritic patellofemoral joint, not the femorotibial joint or meniscus. Claimant's right knee pain was thus consistent with her underlying arthritic condition at the patellofemoral joint that manifested itself when her foot struck an immovable object. Nevertheless, Claimant did not suffer an injury on January 31, 2020 because there was no bruising and the right knee appeared normal. Moreover, the MRI scan did not reflect any evidence of an acute injury. Although Claimant

had pain in her arthritic joint, there was no new tissue breakage or yielding. Accordingly, Claimant did not suffer an injury to her right knee meniscus while working for Employer.

26. Dr. O'Brien concluded that, within a reasonable degree of medical probability, Claimant did not suffer an injury that required medical treatment as a result of the January 31, 2020 work incident. He summarized that Claimant had some type of meniscus tear dating back to 2015 that was substantial enough to result in a wobbly and very unstable knee. Moreover, Claimant suffered another substantial injury in a mosh pit in November 2019. Finally, Dr. O'Brien did not believe Dr. Papilion knew about Claimant's medical history and over-interpreted the MRI scan. Furthermore, the mechanism and forces created by kicking an object would not have caused a meniscus tear. Although Claimant may have been more susceptible to pain as a result of kicking an object due to significant right knee degeneration, she did not suffer a right knee injury. Accordingly, Claimant did not suffer an industrial injury to her right knee while working for Employer on January 31, 2020.

27. Claimant has failed to demonstrate that it is more probably true than not that she suffered a compensable right knee injury during the course and scope of her employment with Employer on January 31, 2020. Initially, Claimant explained that on the morning of January 31, 2020 she was reading a cycle count sheet while hastily walking through Employer's facility. She struck her right foot against a roll of dense carpet-like material and immediately experienced right knee pain. Employer referred Claimant to Concentra for medical treatment. Medical providers diagnosed Claimant with a sprain or strain of the right knee or lower extremity. Claimant subsequently received conservative treatment in the form of physical therapy and medications. A February 17, 2020 right knee MRI revealed a large medial meniscus bucket-handle tear with moderately advanced patellofemoral chondromalacia and arthritis. Dr. Papilion subsequently diagnosed an incarcerated bucket-handle tear of the right medial meniscus. On February 28, 2020 Dr. Papilion sought authorization to perform surgery on Claimant's right knee. Respondents denied the surgical request.

28. The record reveals that Claimant had the following significant pre-existing right knee problems prior to the January 31, 2020 incident:

- Claimant's previous right knee issues dated back to at least 2015 and included a positive McMurray's test with referral to an orthopedic specialist regarding possible surgical intervention;

- Claimant had ongoing popping in her knee where she would feel like she would need to fall down at times;

- Claimant had an injury to her right knee in November of 2019 when it was impacted by another person's shoulder in a mosh pit. Medical records reveal Claimant presented with bruising and swelling of her right knee after the incident;

- On Thanksgiving Day 2019 Claimant again sought treatment for pain in her right knee after it popped while simply walking and she had to sit down due to significant pain.

- Claimant was continuing to treat for pain associated with her right knee issues on January 31, 2020. She had been wearing a knee sleeve or brace and took Ibuprofen for pain shortly before the work incident.

29. In addition to Claimant's pre-existing right knee symptoms, the persuasive opinions of Drs. O'Brien and Cava also reflect that it is unlikely Claimant suffered a right knee injury during the course and scope of her employment with Employer on January 31, 2020. Dr. O'Brien maintained that the bucket handle meniscus tear shown on the MRI was not caused by the January 31, 2020 incident because there was no evidence of an acute injury. Instead, Dr. O'Brien specified that Claimant's significant right knee symptoms in 2015 were consistent with a meniscus tear. He detailed that Claimant's symptoms included right knee locking, popping, instability and giving way. Moreover, Claimant suffered another substantial injury in a mosh pit in November 2019. Dr. O'Brien explained that, although Claimant did not specifically mention the mosh pit, there was an event in which someone fell into her right knee and forced the knee outward. He remarked that "this is a classic injury for something that would consistently produce a meniscus tear." Dr. O'Brien summarized that Claimant had a meniscal tear in 2015 and developed similar symptoms as a result of the November 2019 mosh pit incident. The persuasive opinion of Dr. O'Brien thus reveals that Claimant's right knee meniscus tear likely preceded the January 31, 2020 work incident.

30. Claimant's January 31, 2020 mechanism of injury also likely would not have caused a meniscus tear. Dr. O'Brien commented that the January 31, 2020 event could not have produced a tear because the meniscus tears when the foot is planted and there is torsion and sometimes direct loading of the knee. He remarked that, when an individual kicks an object, there is a straightforward force that loads the patellofemoral joint. In contrast, the mosh pit incident created a load between the femorotibial part of the knee that compressed the meniscus. Dr. O'Brien further reasoned that the right knee MRI revealed arthritis at the patellofemoral joint. Claimant's right knee pain was very consistent with her underlying arthritic condition at the patellofemoral joint that manifested itself when her foot struck an immovable object. Nevertheless, Claimant did not suffer an injury on January 31, 2020 because there was no bruising and the right knee appeared normal. Moreover, the MRI scan did not reflect any evidence of an acute injury. Although Claimant had pain in her arthritic joint, there was no new tissue breakage or yielding. Furthermore, ATP Dr. Cava persuasively agreed with Dr. O'Brien's assessment. On December 3, 2020 Dr. Cava submitted answers to Respondents' questionnaire. The first question inquired whether Claimant suffered a work related injury on January 31, 2020. Dr. Cava stated that, after considering Claimant's pre-existing injuries and the "very mild mechanism" that occurred on January 31, 2020, her "meniscal tear was not work-related." Based on Claimant's pre-existing right knee condition as well as the persuasive opinions of Drs. O'Brien and Cava, Claimant did not likely suffer an injury to her right knee meniscus while working for Employer. Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

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

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.,* W.C. No. 4-650-711 (ICAO, Feb. 15, 2007); *David Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO, Aug. 18,

2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. The provision of medical care based on a claimant's report of symptoms does not establish an injury but only demonstrates that the claimant claimed an injury. *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020). Moreover, a referral for medical care may be made so that the respondent would not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id.* Because a physician provides diagnostic testing, treatment, and work restrictions based on a claimant's reported symptoms does not mandate that the claimant suffered a compensable injury. *Fay v. East Penn manufacturing Co., Inc.*, W.C. No. 5-108-430-001 (ICAO, Apr. 24, 2020); *cf. Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997) ("right to Workers' Compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment"). While scientific evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory supporting compensability when making a determination. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020).

8. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she suffered a compensable right knee injury during the course and scope of her employment with Employer on January 31, 2020. Initially, Claimant explained that on the morning of January 31, 2020 she was reading a cycle count sheet while hastily walking through Employer's facility. She struck her right foot against a roll of dense carpet-like material and immediately experienced right knee pain. Employer referred Claimant to Concentra for medical treatment. Medical providers diagnosed Claimant with a sprain or strain of the right knee or lower extremity. Claimant subsequently received conservative treatment in the form of physical therapy and medications. A February 17, 2020 right knee MRI revealed a large medial meniscus bucket-handle tear with moderately advanced patellofemoral chondromalacia and arthritis. Dr. Papilion subsequently diagnosed an incarcerated bucket-handle tear of the right medial meniscus. On February 28, 2020 Dr. Papilion sought authorization to perform surgery on Claimant's right knee. Respondents denied the surgical request.

9. As found, the record reveals that Claimant had the following significant pre-existing right knee problems prior to the January 31, 2020 incident:

- Claimant's previous right knee issues dated back to at least 2015 and included a positive McMurray's test with referral to an orthopedic specialist regarding possible surgical intervention;

- Claimant had ongoing popping in her knee where she would feel like she would need to fall down at times;

- Claimant had an injury to her right knee in November of 2019 when it was impacted by another person's shoulder in a mosh pit. Medical records reveal Claimant presented with bruising and swelling of her right knee after the incident;

- On Thanksgiving Day 2019 Claimant again sought treatment for pain in her right knee after it popped while simply walking and she had to sit down due to significant pain.

- Claimant was continuing to treat for pain associated with her right knee issues on January 31, 2020. She had been wearing a knee sleeve or brace and took Ibuprofen for pain shortly before the work incident.

10. As found, in addition to Claimant's pre-existing right knee symptoms, the persuasive opinions of Drs. O'Brien and Cava also reflect that it is unlikely Claimant suffered a right knee injury during the course and scope of her employment with Employer on January 31, 2020. Dr. O'Brien maintained that the bucket handle meniscus tear shown on the MRI was not caused by the January 31, 2020 incident because there was no evidence of an acute injury. Instead, Dr. O'Brien specified that Claimant's significant right knee symptoms in 2015 were consistent with a meniscus tear. He detailed that Claimant's symptoms included right knee locking, popping, instability and giving way. Moreover, Claimant suffered another substantial injury in a mosh pit in November 2019. Dr. O'Brien explained that, although Claimant did not specifically mention the mosh pit, there was an event in which someone fell into her right knee and forced the knee outward. He remarked that "this is a classic injury for something that would consistently produce a meniscus tear." Dr. O'Brien summarized that Claimant had a meniscal tear in 2015 and developed similar symptoms as a result of the November 2019 mosh pit incident. The persuasive opinion of Dr. O'Brien thus reveals that Claimant's right knee meniscus tear likely preceded the January 31, 2020 work incident.

11. As found, Claimant's January 31, 2020 mechanism of injury also likely would not have caused a meniscus tear. Dr. O'Brien commented that the January 31, 2020 event could not have produced a tear because the meniscus tears when the foot is planted and there is torsion and sometimes direct loading of the knee. He remarked that, when an individual kicks an object, there is a straightforward force that loads the patellofemoral joint. In contrast, the mosh pit incident created a load between the femorotibial part of the knee that compressed the meniscus. Dr. O'Brien further reasoned that the right knee MRI revealed arthritis at the patellofemoral joint. Claimant's right knee pain was very consistent with her underlying arthritic condition at the patellofemoral joint that manifested itself when her foot struck an immovable object. Nevertheless, Claimant

did not suffer an injury on January 31, 2020 because there was no bruising and the right knee appeared normal. Moreover, the MRI scan did not reflect any evidence of an acute injury. Although Claimant had pain in her arthritic joint, there was no new tissue breakage or yielding. Furthermore, ATP Dr. Cava persuasively agreed with Dr. O'Brien's assessment. On December 3, 2020 Dr. Cava submitted answers to Respondents' questionnaire. The first question inquired whether Claimant suffered a work related injury on January 31, 2020. Dr. Cava stated that, after considering Claimant's pre-existing injuries and the "very mild mechanism" that occurred on January 31, 2020, her "meniscal tear was not work-related." Based on Claimant's pre-existing right knee condition as well as the persuasive opinions of Drs. O'Brien and Cava, Claimant did not likely suffer an injury to her right knee meniscus while working for Employer. Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed.

ORDER

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

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

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

DATED: January 29, 2021.

DIGITAL SIGNATURE:
Peter J. Cannici

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

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that Respondents have waived their right to select an ATP, thus making Dr. Kenneth Danylchuk Claimant's ATP?

II. Have Respondents shown, by a preponderance of the evidence, that Claimant, by refusing several demand appointments, persisted in an injurious practice which tended to imperil or retard his recovery, or refused to submit to medical treatment as reasonably essential to promote recovery?

FINDINGS OF FACT

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

The Work Injury, and Subsequent Treatment

1. Claimant suffered an injury to his low back on December 6, 2019, while attempting to pat down an inmate. Claimant reported the injury to his employer on December 8, 2019. Claimant elected to receive care through Centura Centers for Occupational Medicine ("CCOM").

2. Claimant first saw Brendon Madrid, NP, at CCOM on December 9, 2019. (Ex. E). Claimant subsequently saw Daniel Olson, M.D., at CCOM. Claimant acknowledged at hearing that he might have been referred to a different orthopedist by Dr. Olson, but cannot recall the name, nor did he consult with him. The record is devoid of any formal referral process or documentation.

3. Respondents filed a Notice of Contest for further investigation on January 28, 2020.

4. Claimant presented to Kenneth Danylchuk, M.D., at St. Mary Corwin Hospital in January of 2020 due to issues with incontinence. Dr. Danylchuk was not in the chain of referral from CCOM. After Claimant continued to have issues, Dr. Danylchuk performed emergency surgery (laminectomy) on February 18, 2020. There is no dispute in the record that this surgery was of an *emergent nature*, and the ALJ so finds.

5. Respondents denied this surgery, as the claim was presented under a Notice of Contest at the time. However, at hearing, the Adjuster indicated that Respondents were willing to pay for *nonsurgical* treatment with Dr. Danylchuk since February 2020.

6. Claimant subsequently returned to CCOM and treated through Dr. Olson post-operatively. Claimant likewise maintained follow-up visits through Dr. Danylchuk for post-operative recommendations and treatment.

Denial of Treatment by Dr. Olson

7. On April 9, 2020, Claimant saw Dr. Olson for a follow-up visit. At this visit, Dr. Olson noted:

> He [Claimant] continues to have diffuse back pain. He's got discomfort in his buttocks. He states he has numbness in his feet and continues to have a waddling gait. He continues to notice some urgency but has not had any accidents. His pain level is 4. (Ex. 4, p. 33).

Under Medical Causation, Dr. Olson notes: *"The cause of this problem is related to work activities." Id* at 34. (emphasis added).

8. Dr. Olson noted, apparently for the first time, that the insurance company had denied the case. (Ex. B, p. 7). Dr. Olson stated that "Since the insurance company has denied the claim I will not set up any further follow-ups at this time. If they change their mind I would be happy to see him again." *Id* at 8. Dr. Olson further indicated that Claimant would continue follow-ups with Dr. Danylchuk and possibly Dr. Leggett. There was, however, no indication in the record of a formal transfer of care by Dr. Olson to another provider, or an offer to transfer medical records to another provider.

9. Respondents now allege that Claimant's former attorney withdrew from the claim on April 16, 2020, and that Claimant's present attorney entered his appearance with the DOWC and OAC on April 17, 2020. However, there is neither testimony nor documentation in the record to substantiate those dates. What is clear from the testimony is that Claimant's original [first] attorney withdrew from representation sometime in April, 2020, and a substitution occurred at some point thereafter.

Claimant's Hearing Testimony

10. At hearing, Claimant acknowledged that he did not send notice to Respondents notifying of the discharge or requesting additional treatment through another provider. Claimant testified that he did notify his [first] attorney at the time that he was discharged from care and wanted additional treatment. Claimant testified that he was not aware of whether his first attorney sent notice to Respondents requesting to see another provider. There is no evidence that Claimant or his first attorney submitted notice to Respondents regarding the discharge, or a request to transfer care to another provider.

Hearing Testimony of Adjuster Patricia Richardson

11. Patricia Richardson is the claims adjuster assigned to this claim. At hearing, she testified that the Insurer did not receive notice of discharge within three business days from Dr. Danylchuk, or receive any offer to transfer care or medical records to another provider. She testified that she never received any notification by certified mail, and that no one at the insurer ever signed a return receipt. She testified that treatment through Dr. Olson or CCOM was never denied, and that to her knowledge, no notice was ever sent by Insurer to Dr. Olsen indicating treatment was being denied.

12. Ms. Richardson further testified that the Insurer never received any notice *from Claimant or his attorney* that his treatment was being denied, or a request to transfer care or medical records to a new provider. She stated that she did not send the Notice of Contest directly to Dr. Olson, but "If they [CCOM} asked for it [Notice of Contest], we would've." She did not know *how* Dr. Olson became aware of the Notice of Contest.

13. However, she testified that she did receive the April 9, 2020 medical report from Dr. Olsen on an unspecified date in April, but that *she believed Dr. Olson was still willing to see the Claimant* based on his statement in the report. [The ALJ finds this to be a breathtakingly strained interpretation of Dr. Olson's report; to her credit, Ms. Richardson backed off this interpretation later in the hearing].

14. Ms. Richardson further testified that she did not reach out to Claimant or his [then] attorney and indicate that Insurer would, in fact, continue to pay for treatment with Dr. Olson- or some other physician. Nor did she contact Dr. Olsen to inform him that Insurer would, in fact, pay for Claimant's continued treatment. She stated that no correspondence (nor any other effort) from Insurer tried to get Claimant back to CCOM since Dr. Olson's 4/9/2020 letter until September, 2020.

15. Ms. Richardson testified that because Claimant had retained an attorney, she refrained from communication with either Claimant or Dr. Olson. She was not aware that Dr. Olson had retired until August of 2020, when she made an effort to set up an appointment, since the General Admission of liability had just been filed.

16. Ms. Richardson stated that Insurer has been paying Dr. Danylchuk's bills (at least those bills that he forwarded to Insurer) for services since February of 2020, but not for the surgery itself. She stated that she did not know if Insurer had reimbursed the private health carrier for the surgery, and stated that Insurer has not reimbursed Claimant for his payments towards the surgery, since, "it hasn't been requested."

A GAL is filed, but no ATP is agreed upon

17. Respondents eventually filed a GAL on August 24, 2020. (Ex. A). The record is unclear why, or under what circumstances, Respondents waited until August to admit this claim.

18. Claimant then filed this Application for Hearing on September 24, 2020, with the sole issue for determination being Authorized Medical Provider.

19. Respondents' then contacted CCOM and learned that Dr. Centi was the only presiding physician at the facility after Dr. Olson's retirement. Respondents scheduled Claimant for an appointment at CCOM, and sent a letter to Dr. Centi on September 4, 2020. That letter requested that Dr. Centi resume treatment at CCOM, as Dr. Olson had retired. (Ex. D, p. 27). Claimant's attorney objected to return to CCOM, specifically with Dr. Centi.

20. Respondents scheduled Claimant for a visit with Dr. Centi on October 12, 2020, and notified Claimant (through his attorney of record at that time, [Redacted]) of such in a letter sent on September 29, 2020. (Ex. D, p. 32). Claimant did not attend, as he objected to Dr. Centi on a personal basis.

21. Respondents made a second effort to bring Claimant to treatment at CCOM, and scheduled an appointment on October 26, 2020, with notice to Claimant by letter to Mr. S[Redacted] on October 14, 2020. (Ex. D, p. 33). Claimant did not attend.

22. On November 9, 2020, Dr. Centi indicated, in a reply to correspondence from Respondents, that he was no longer willing to see Claimant, because he had two no-shows at the CCOM office. (Ex. D, p. 36).

23. After an effort to negotiate providers, Respondents designated J.D. Bradley, M.D., at Concentra, due to Dr. Centi's refusal to treat. There were apparently no other Level II accredited physicians remaining at CCOM. In a letter to Mr. S[Redacted] dated December 4, 2020, Respondents scheduled Claimant for an appointment with Dr. J.D. Bradley on December 15, 2020. (Ex. D, p. 38). Claimant did not attend this December 15, 2020 appointment.

24. As of the date of hearing, Claimant has continued to receive bills from service providers (including anesthesia and surgical center) in connection with the emergency surgery by Dr. Danylchuk in February of 2020. (Ex. 1, pp. 1-15). Claimant continues to make partial payments towards these bills, but some have now gone to collections. *Id*.

CONCLUSIONS OF LAW

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

Generally

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability

and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

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

3. Assessing the weight, credibility and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Moreover, the weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of an expert witness. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968).

4. In this instance, each party presented one witness. The ALJ finds Ms. Richardson to have testified sincerely overall, with the conspicuous exception of her initial interpretation of Dr. Olson's 4/9/2020 report re: "if *they* change their mind." To her credit she later appeared to back off that interpretation, but in the process, it was exposed that this file simply got away from her, leaving Claimant to his own devices. Another problematic interpretation is her stated willingness, on behalf of Insurer, to provide conservative care through Dr. Danylchuk all along, but not the surgery itself. Given Claimant's desperate circumstances, this seems akin to offering a gunshot victim pain medication and hrypnotherapy, but not surgery to remove the bullet.

5. As a result, Claimant (who the ALJ finds to be credible throughout) haplessly found himself in a tug-off-war between an Insurer who wished to deny an emergency work-related surgery, and his own attorney, who is reluctant to send him to a different Level II

physician, lest it be deemed a waiver of the right to choose his ATP. The results have been unfortunate.

Right of ATP Selection

6. Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires that respondents must provide injured workers with a list of at least four designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. Section 8-43-404(5)(a)(I)(A), C.R.S. states that, if the employer or insurer fails to provide an injured worker with a list of at least four physicians or corporate medical providers, "the employee shall have the right to select a physician." W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, "the employer shall provide the injured worker with a written list of designated providers." W.C.R.P. Rule 8-2(E) additionally provides that the remedy for failure to comply with the preceding requirement is that "the injured worker may select an authorized treating physician of the worker's choosing." An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. industrial Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006).

7. In this case, there is no dispute that Claimant chose CCOM in the first instance. Further, there is nothing to suggest that his choice was confined to Dr. Olson specifically; rather, CCOM *as a facility* was chosen as Claimant's ATP, including NP Madrid, as well as all physicians on staff. This arrangement worked fine for a while, to everyone's apparent satisfaction.

8. However, §8-43-404(5), C.R.S. implicitly contemplates that the Respondent will designate a physician who is willing to provide treatment. *See Ruybal v. University Health Sciences Center*, 768 P.2d 1259, 1260 (Colo. App. 1988). If the employer fails to timely tender the services of a physician, the right of selection passes to the claimant and the selected physician becomes an ATP. *See Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987); *Garrett v. McNelly Construction Company, Inc.*, W.C. No. 4-734-158 (ICAO, Sept. 3, 2008). Whether the ATP refused to treat the claimant for non-medical reasons, whether the insurer received notice of the refusal to treat and whether the insurer "forthwith" designated a physician who was willing to treat the claimant are questions of fact for resolution by the ALJ*. Garrett v. McNelly Construction Company, Inc.*, W.C. No. 4-734-158 (ICAP, Sept. 3, 2008); *see Ruybal*, 768 P.2d at 1260.

9. The ALJ finds and concludes that Dr. Olson refused treatment for non-medical reasons, effective 4/9/2020. Dr. Olson clearly believed that Claimant's condition was due to work-related reasons. He was aware that Claimant had sought emergency treatment through Dr. Danylchuk, as opposed to through a traditional WC chain of referral. *He was still willing to treat Claimant, knowing all of this.* Through channels which might remain forever a mystery, Dr. Olson became aware that this claim was under a Notice of Contest by Respondents. For that reason alone, Dr. Olson declined further treatment—

unless **Insurer** changed its mind, and reauthorized his involvement. This finally occurred, with the eventual, unexplained filing of the GAL, and subsequent outreach to get CCOM back onboard. In the meantime, Claimant continued to treat with Dr. Danylchuk, which the ALJ finds to have been reasonable and necessary.

10. As a corollary, the ALJ finds that Insurer received *actual notice* of Dr. Olson's 4/9/2020 report sometime later in April of 2020. While the formal procedures were not followed in re-designating an ATP, Insurer knew full well that Dr. Olsen got off the case, and they did…nothing…for over four months. Respondents would now, it appears, place the onus on Claimant to try to clear up any misunderstanding; this, despite that this claim remained under a Notice of Contest until August, 2020. The ALJ cannot accept Respondents' logic that Claimant was responsible to get the case back on track. Respondents' failure to act for over four months after knowing of Dr. Olson's withdrawal does not qualify as "forthwith." As a result, the ALJ concludes that Respondents surrendered any control they might have had over the selection of Claimant's ATP.

Emergency Care by Dr. Danylchuk

11. Section 8-43-404(5)(a), C.R.S. grants employers the initial authority to select the Authorized Treating Physician (ATP). However, in a medical emergency a claimant need not seek authorization from her employer or insurer before seeking medical treatment from an unauthorized medical provider. *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777, 781 (Colo. App. 1990). A medical emergency affords an injured worker the right to obtain immediate treatment without the delay of notifying the employer to obtain a referral or approval. *In Re Gant*, W.C. No. 4-586-030 (ICAP, Sept. 17, 2004). Because there is no precise legal test for determining the existence of a medical emergency, the issue is dependent on the particular facts and circumstances of the claim. *In re Timko,* W.C. No. 3-969-031 (ICAP, June 29, 2005). Once the emergency is over the employer retains the right to designate the first "non-emergency" physician. *Bunch v. Indus. Claim Appeals Office of State of Colorado*, 148 P.3d 381, 384 (Colo. App. 2006); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990).

12. The ALJ finds that the surgery performed by Dr. Danylchuk in February, 2020 was of an emergency basis. There was no time, therefore, to seek the usual chain of Workers Compensation referrals. Therefore Dr. Danylchuk became an ATP by virtue of the emergency. Had Respondents not issued their Notice of Contest and simply overseen Claimant's care through CCOM, they would have maintained control over the ATP. This did not occur. As a result, Dr. Danylchuk remains Claimant's ATP. One of them, at least.

Penalties for Injurious Practice or Refusal to Submit to Care

13. Section 8-43-404(3), C.R.S., states in pertinent part:

> If any employee persists in any unsanitary or injurious practice which tends to imperil or retard recovery or refuses to submit to such medical or surgical treatment or vocational evaluation as is reasonably essential to promote

> recovery, the director shall have the discretion to reduce or suspend the compensation of any such injured employee.

14. As noted by Claimant, there is no *compensation* for the Director – or ALJ – to suspend, even if Claimant's refusal to attend these appointments were deemed to be injurious. However, the ALJ (and without opining on any allegations towards any other CCOM provider) finds that an Application for Hearing on the very issue of ATP was already pending at the time these demand appointments were set up. Even the adjuster acknowledged that there was a need for a Level II accredited provider, primarily to complete this case and provide a rating. There was no *treatment* being refused; Claimant did not want to accept the offered ATPs, once he felt a waiver had occurred by Respondents. By such actions, Claimant did nothing to retard his own recovery; to the contrary, he sought treatment for a dangerous condition where he could find it, and has apparently, faithfully followed up in an attempt to get better. No penalty claim has been stated by Respondents.

Where do we go from here?

15. Respondents raise a valid point in seeking a Level II accredited physician to be assigned. Dr. Danylchuk is apparently not level II accredited. A Level II physician should oversee all aspects of care farmed out to specialists, place Claimant at MMI, and provide an impairment rating. A Level II physician will be needed here, and the sooner the better. While the ALJ has found that the right of selection fell to Claimant, it is anticipated that Dr. Danylchuk will be best positioned to now designate a Level II provider to finish out the case - unless, of course, the parties can simply come to the table and agree on a new Level II provider.

ORDER

It is therefore Ordered that:

1. Claimant has shown that the right to select an ATP passed to him. Dr. Danylchuk is now an Authorized Treatment provider.

2. Respondents' claim for penalties for an Injurious Practice is denied and dismissed.

3. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

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

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

DATED: January 29, 2021

/s/ William G. Edie

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

ISSUE

1. Determination of Claimant's average weekly wage effective July 20, 2018.
2. Whether Claimant is entitled to additional temporary disability benefits.
3. Whether Claimant has established by a preponderance of the evidence that the permanent impairment rating assigned by the DIME physician is incorrect.

FINDINGS OF FACT

1. On July 12, 2018, Claimant sustained an admitted work-related injury to her right Achilles tendon arising out of the course of her employment with Employer.

2. In June 2018, Claimant applied for a position with a new employer, Icon Specialties ("ICON"), and interviewed for the position on July 6, 2018. (Ex. 10).

3. On July 6, 2018, Claimant accepted an offer of employment from ICON, with an planned start date of July 30, 2018. Claimant's starting pay at ICON was $23.00 per hour with an anticipated work week of 40 hours per week. (Ex. 10).

4. On July 9, 2018, Claimant notified Employer that she had accepted new employment and provided Employer with two-weeks' notice.

5. On July 12, 2018, Claimant sustained her admitted work-related injury.

6. On July 26, 2018, Claimant saw Robert Watson, M.D., at Workwell. Dr. Watson imposed a work restriction of "no work capacity" until July 30, 2018. (Ex. 6).

7. Due to her work-related injury and work restrictions, Claimant was unable to begin her position at ICON on July 30, 2018 as anticipated.

8. On July 30, 2018, Claimant underwent an MRI of her right ankle which confirmed a tear of the Achilles tendon. The MRI demonstrated that although a thin strand of the tendon was attached, functionally, the tendon was completely torn. (Ex. D).

9. On July 31, 2018, Dr. Watson changed Claimant's work status to "Restricted Duty," imposing restrictions of sitting work only, using crutches, and no driving until August 14, 2018. (Ex. 6).

10. On August 10, 2018, Claimant underwent surgical repair of her Achilles tendon tear. (Ex. 3).

11. On August 27, 2018, Dr. Watson changed Claimant's work status to "No Work Capacity" until her next visit, two weeks later. (Ex. 6).

12. On September 10, 2018, Dr. Watson revised Claimant's work status to "Restricted Duty," including restrictions for sitting work only, being allowed to elevate her right leg, use of crutches and no driving. The work restriction remained unchanged until November 19, 2018. (Ex. 6).

13. On September 14,2018, Claimant's right ankle range of motion was measured during physical therapy as -25° dorsiflexion, 71° plantar flexion, 40° inversion, and 13° eversion. (Ex. A).

14. On November 16, 2018, Claimant's right ankle range of motion was measured during physical therapy as -25° dorsiflexion, 71° plantar flexion, 40° inversion, and 13° eversion. (Ex. A & 6).

15. On November 19, 2018, Katherine Drapeau, D.O. of WorkWell, modified Claimant's work restrictions to sitting work only and being allowed to elevate her right leg. (Ex. 6).

16. On December 3, 2018, Dr. Drapeau again modified Claimant's work restrictions to four hour shifts per day, with total of two hours walking and two hours sitting per day, alternating as needed, and no lifting more than 5 pounds. This work restriction remained in place until March 12, 2019, when she was placed on regular duty by Dr. Watson.

17. On December 3, 2018, Claimant was able to start her position at ICON, working four hours per day. ICON was able to accommodate Claimant's work restrictions at that time. (Ex. 10).

18. On February 19, 2019, Claimant's ankle range of motion was measured during physical therapy. Claimant's measurements were 3° dorsiflexion, 76° plantar flexion, 38° inversion, and 16° eversion. (Ex. A).

19. On March 7, 2019, Claimant underwent an IME performed by Wallace Larson, M.D., at Respondents' request. Dr. Larson measured the range of motion of Claimant's right ankle as 10° dorsiflexion, 50° plantar flexion, 40° inversion, and 20° eversion. Dr. Larson opined that Claimant reached MMI on March 7, 2019 and assigned a 4% lower extremity impairment rating for Claimant's right ankle. (Ex. D).

20. On March 12, 2019, Dr. Watson modified Claimant's work restrictions and authorized Claimant to return to regular duty. (Ex. 6).

21. In April 2019, Dr. Watson modified Claimant's work restrictions, and recommended that Claimant be limited to only seated work. (Ex. 6, Ex. C).

22. ICON was unable to accommodate Claimant's "sitting only" work restriction and terminated Claimant. Claimant's last week with ICON was the week of April 26, 2019 and her last paycheck was on May 3, 2019. (Ex. 10). Based on Claimant's payroll records,

the ALJ infers that Claimant's last date of employment with ICON was Sunday, April 28, 2019[1].

23. On October 29, 2019, Dr. Watson modified Claimant's work restriction to limiting walking to 15 minutes per hour. (Ex. 6).

24. On December 10, 2019, Dr. Watson opined that Claimant was at maximum medical improvement (MMI) on that date. Dr. Watson measured Claimant's right ankle range of motion as 5° dorsiflexion, 50° plantar flexion, 30° inversion, and 5° eversion. Dr. Watson assigned Claimant a right lower extremity permanent impairment of 5% based on loss of dorsiflexion and 3% based on loss of eversion, for a combined impairment rating of 8%. Dr. Watson indicated that Claimant's work status was "Restricted Duty" effective December 10, 2019, with a permanent restriction to limit walking to 30 minutes per hour. (Ex. 4).

25. On May 14, 2020, Claimant underwent a Division independent medical examination (DIME) with Kathy McCranie, M.D. Dr. McCranie agreed Claimant was at MMI on the date assigned by Dr. Watson Dr. McCranie measured Claimant's right ankle range of motion as 5° dorsiflexion, 65° plantar flexion, 32° inversion, and 22° eversion. Based on her evaluation, Dr. McCranie assigned a 5% permanent impairment rating of the right lower extremity for loss of motion of the right ankle (entirely attributed to loss of range of motion in dorsiflexion). Dr. McCranie noted that Claimant had been given a permanent work restriction limiting walking to 30 minutes per hour, which Dr. McCranie found reasonable. (Ex. A).

26. On June 24, 2020, Respondents filed a Final Admission of Liability admitting permanent partial disability benefits based on Dr. McCranie's impairment rating, and for temporary disability benefits as follows:

a. Temporary Total Disability (TTD) benefits from July 13, 2018 through December 5, 2018 at the rate of $257.57 per week (totaling $5,747.60).

b. Temporary Partial Disability (TPD) benefits from December 6, 2018 through March 11, 2019 in the total amount of $1,593.11.

c. TTD benefits from June 18, 2019 through December 9, 2019 at the rate of $257.57 per week (totaling $6,889.25).

(Ex. A).

27. Respondents admitted to an average weekly wage of $413.35, which resulted in an admitted disability rate of $275.57 per week. (Ex. A).

28. Claimant's Exhibit 10 includes partial wage records for the period of December 3, 2018 through February 3, 2019. Payroll records for the period of December 24, 2018-

[1] Claimant's pay stubs show that the final day of each pay period was a Sunday, and that pay checks were issued five days later.

December 30, 2019, January 28, 3019 – February 3, 2019 and March 4, 2019 – March 11, 2019 are not included in the Court record. (Ex. 10).

29. Claimant credibly testified that she did not earn any wages between April 26, 2019 and December 10, 2019.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

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

AVERAGE WEEKLY WAGE and TEMPORARY DISABILITY BENEFITS

Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's Average Weekly Wage (AWW) on his or her earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993).

"The entire objective of wage calculation [under the Act] is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. Although [AWW] generally is determined from the employee's wage at the time of injury, if for any reason this general method will not render a fair computation of wages, the administrative tribunal has long been vested with discretionary authority to use an alternative method in determining a fair wage." *Avalanche Indus., Inc. v. Indus. Claim Appeals Office,* 166 P.3d 147, 153 (Colo. App. 2007), *aff'd sub nom. Avalanche Indus., Inc. v. Clark*, 198 P.3d 589 (Colo. 2008), as modified on denial of reh'g (Jan. 20, 2009) Citing Campbell v. IBM Corp., supra, 867 P.2d at 82 (citation omitted).

The statute provides an ALJ "with broad discretion to determine whether the circumstances of a particular case requires [the ALJ] to employ an alternative method of computing compensation benefits based upon the employee's average wage." Coates, Reid & Waldron v. Vigil, 856 P.2d 850 (Colo. 1993). An AWW determination may be based on anticipated wages when such wages were foreseeable. For example, in Pizza Hut v. Indus. Claim Appeals Office, 18 P.3d 867, 868 (Colo. App. 2001), a pizza delivery driver who had been attending nursing school and obtained employment at a hospital shortly after the accident was awarded the higher average weekly wage associated with the nursing position. The ALJ found that the wage paid by the employer at the time of the accident "would significantly understate the impact of Claimant's injury on his future loss of earning capacity." *Id.*

The ALJ finds that Claimant has proven by a preponderance of the evidence that her AWW as of July 30, 2018 was $920.00 per hour. Before sustaining her work-related injury, Claimant had accepted a full-time position with ICON, with a reasonable expectation of earning $23.00 per hour for 40 hours per week (i.e., $920.00 per week). The ALJ finds that the wages Claimant anticipated receiving at ICON were not speculative or contingent on anything other than the passage of time. Claimant had been offered and accepted the position to begin less than four weeks later, Claimant had provided Employer with two-weeks' notice, and but for her industrial injury, would have begun earning $920.00 per week effective July 30, 2018. When Claimant began work for ICON in December 2018, she was, in fact, paid $23.00 per hour, but could not work 40 hours per week due to her industrial injury, which limited her earning capacity. Calculating Claimant's AWW as $413.35 per week would significantly understate the impact of Claimant's injury on her earning capacity. The ALJ finds that Claimant's AWW were $413.35 per week from the date of injury until July 29, 2018, and $920.00 per week after July 30, 2019.

Temporary Partial Disability (TPD)

Section 8-42-106(1), C.R.S., provides for an award of Temporary Partial Disability (TPD) benefits based on the difference between the claimant's AWW and the earnings during the continuance of the temporary partial disability. In order to receive TPD benefits the claimant must establish that the injury has *caused* the disability and consequent partial wage loss. Section 8-42-103(1), C.R.S.; *Safeway Stores, Inc. v. Husson,* 732 P.2d 1244 (Colo. App. 1986) (temporary partial compensation benefits are designed as a partial substitute for lost wages or impaired earning capacity arising from a compensable injury).

Claimant has established an entitlement to TPD benefits from December 5, 2019 through March 11, 2019 (a period of 13 5/7 weeks), based on an AWW of $920.00 per month (adjusted to $613.33 per week). The evidence in the record is insufficient for the Court to calculate the TPD benefits due Claimant for this time period. Respondents shall pay Claimant TPD benefits for the period of December 6, 2019 through March 11, 2019 based on an AWW of $920.00. Respondents shall receive credit for TPD benefits previously paid.

Temporary Total Disability (TTD)

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* 8-42-105(1). C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

Claimant has established by a preponderance of the evidence an entitlement to TTD benefits from July 30, 2018 through December 5, 2018 (18 2/7 weeks) and from April 29, 2019 through December 9, 2019 (32 weeks), based on an AWW of $920.00 per week (adjusted to $613.33 per week). Respondents shall receive credit for TTD benefits previously paid.

OVERCOMING DIME ON IMPAIRMENT

Claimant seeks to overcome Dr. McCranie's right lower extremity impairment rating. Impairment of a lower extremity is a scheduled injury under § 8-42-107(2)(w) & (w.5), C.R.S. The increased burden of proof required by the DIME procedures is not applicable to scheduled injuries. Section 8-42-107(8)(a), C.R.S. states that "when an injury results in permanent medical impairment not set forth in the schedule in subsection (2) of this section, the employee shall be limited to medical impairment benefits calculated as provided in this subsection (8)." Therefore, the procedures set forth in §8-42-107(8)(c), C.R.S., which provide that the DIME findings must be overcome by clear and convincing evidence, are applicable only to non-scheduled injuries. The court of appeals has explained that scheduled and non-scheduled impairments are treated differently under the Act for purposes of determining permanent disability benefits. Specifically, the procedures of § 8-42-107(8)(c), C.R.S. only apply to non-scheduled impairments. *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000); *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998); *Gagnon v. Westward Dough Operating CO. D/B/A Krispy Kreme* W.C. No. 4-971-646-03 (ICAO, Feb. 6, 2018). Claimant has the burden of showing the extent of his scheduled impairment by a preponderance of the evidence. *Burciaga v. AMB Janitorial Services, Inc., and Indemnity Care ESIS Inc*., W.C. No. 4-777-882 (ICAO, Nov. 5, 2010); *Maestas v. American Furniture Warehouse and G.E. Young and Company*, W.C. No. 4-662-369 (ICAO, June 5, 2007).

Claimant has failed to establish by a preponderance of the evidence that Dr. McCranie's assigned right lower extremity impairment rating of 5% is incorrect or that she is entitled to the greater impairment rating assigned by Dr. Watson. Both Dr. Watson's and Dr. McCranie's impairment ratings were based on range of motion measurements of Claimant's right foot and ankle. Both physicians measured Claimant's dorsiflexion at 5°, which corresponds to a 5% impairment. Both physicians' measurements of Claimant's plantar flexion and inversion did not support an impairment rating. The only substantive difference between the impairment ratings was Dr. Watson's measurement of Claimant's eversion of the foot at 5° (3% impairment rating), and Dr. McCranie measurement of 22° (0% impairment rating). The eversion measurement accounts for the difference in impairment ratings.

Claimant has offered no evidence to establish that Dr. McCranie's ankle eversion measurement was incorrect or that Dr. Watson's is the more accurate measurement. Claimant's argument that Dr. Watson's measurement is more accurate because it was taken at the date of MMI is not persuasive. The evidence demonstrates that Claimant's right ankle eversion was measured four times prior to Dr. Watson's measurement (three times at WorkWell physical therapy, and once by Dr. Larson) and one time after (by Dr. McCranie). Specifically, the measurements of Claimant's ankle eversion were 13° on September 14, 2018 and November 16, 2018, 16° on February 19, 2019 (each at WorkWell physical therapy), 20° on March 7, 2019 (Dr. Larson), and 22° on May 14, 2020 (Dr. McCranie). With the exception of Dr. Watson's measurement, the measurements taken by others demonstrate a slow but clear improvement in range of motion over time, and each of these measurements showed significantly greater eversion range of motion than Dr. Watson's measurements. The ALJ finds that the measurements taken by Dr. McCranie are consistent with the improvement shown on other eversion measurements and are the more credible and reasonable measurements. Claimant has failed to establish by a preponderance of the evidence an entitlement to a greater impairment rating for her right ankle range of motion.

ORDER

It is therefore ordered that:

1. Claimant's average weekly wage from the date of injury until July 29, 2018 was $413.35.

2. Claimant's average weekly wage from July 30, 2018 to December 10, 2019 was $920.00 per week.

3. Respondents shall pay Claimant TTD benefits from July 30, 2018 to December 5, 2019, and April 29, 2019 to December 9, 2019 based on an AWW of $920.00 (adjusted to $613.33). Respondents are entitled to credit for all TTD benefits previously paid.

4. Respondents shall pay Claimant TPD benefits from July 30, 2018 to December 5, 2018 based pm an AWW of $920.00 (adjusted to $613.33). Respondents are entitled to credit for all TPD benefits previously paid.

5. Claimant is entitled to a right lower extremity impairment rating of 5% as assigned by Dr. McCranie. Claimant's request to increase her right lower extremity impairment rating is denied and dismissed.

6. Insurer shall pay statutory interest at the rate of 8% per annum on compensation benefits not paid when due.

7. All matters not determined herein are reserved for future determination.

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

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

DATED: February 1, 2021

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that she sustained a compensable occupational disease arising out of and in the course and scope of her employment with the employer.

If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that treatment she has received from Dr. Jennifer Copeland is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the occupational disease.

Although other issues were endorsed for hearing, the parties have agreed to resolve those issues via stipulation, should the claim be found compensable.

FINDINGS OF FACT

1. The claimant has worked for the employer since September 17, 2019 as a deli clerk. The claimant's job duties include helping customers with deli orders, making sandwiches, slicing meats and cheeses, making salads, and cleaning.

2. In July 2020, the employer replaced the meat slicers in the deli. The claimant testified that the new slicers were installed lower than the old slicers. As a result, she had to bend over to use the slicer. The claimant testified that she would operate the slicer between four and six hours during an eight hour shift. The claimant also testified that she noticed that using the new slicers caused her to experience pain in her low back. The claimant further testified that this pain began on August 5, 2020. The claimant reported her back pain to supervisors "Brad" and "Steve".

3. Subsequently A[Redacted], Assistant Store Manager completed an Employer's First Report of Injury on August 12, 2020. The claimant testified that it was A[Redacted] who sent her to seek medical treatment.

4. The claimant was first seen by her authorized treating physician (ATP), Dr. Jennifer Copeland with Glenwood Medical Associates, on August 13, 2020. On that date, the claimant reported that she developed low back pain after using the deli slicer. Dr. Copeland identified the claimant's diagnoses as arm/shoulder strain, and neck/whiplash strain. Dr. Copeland took the claimant off of all work and ordered an x-ray of the claimant's lumbar spine. A lumbar spine x-ray was performed on August 13, 2020 and showed mild degenerative changes and arthritis.

5. The claimant returned to Dr. Copeland on August 20, 2020 and reported mild improvement of her symptoms. Dr. Copeland released the claimant to return to work

with restrictions. The specific work restrictions were no lifting, carrying, pushing, or pulling over 10 pounds. Dr. Copeland also referred the claimant to physical therapy.

6. The medical records entered into evidence show that the claimant sought medical treatment for back pain prior to using the new slicers at work. On November 11, 2015, the claimant was seen at Mountain Family Health Centers and reported aching and burning back pain in her middle back. On December 21, 2016, the claimant reported to Nicole Stalter, APN-C that she was experiencing low back pain. More recently on January 15, 2020, the claimant was seen at Mountain Family Health Centers for low back pain. The medical record of that date identifies the claimant's symptoms as "unspecified chronicity", with an onset of "about a week ago". On March 25, 2020, the claimant returned to Mountain Family Health Centers and reported two weeks of acute left-sided low back pain.

7. On October 27, 2020, Torrey Beil, Vocational Consultant, conducted a job analysis of the claimant's position with the employer. In her November 3, 2020 report, Ms. Beil explained that she reviewed the claimant's medical records and job description. In addition, she observed two other employees performing the job of deli clerk. This observation included watching these workers use the specific deli slicer at the claimant's workplace. Based upon her observations, Ms. Beil noted that the slicer was used a total of 17 times in a two hour period. She also recorded that the average time the slicer was used these 17 times was for one minute and 23 seconds. Finally, Ms. Beil reviewed OSHA, industry, and manufacturer recommendations regarding the installation and height placement of the specific slicer equipment. Ms. Beil opined that operation of the slicer would not require bending of the spine, or any awkward or sustained posture. Ms. Beil's testimony was consistent with her written report. Ms. Beil testified that the slicers she saw during her observation were installed in compliance with manufacturer and OSHA recommendations.

8. On November 17, 2020, the claimant attended an independent medical examination (IME) with Dr. Tashof Bernton. In connection with the IME, Dr. Bernton reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In addition, he reviewed the job description for the claimant's position and the job analysis authored by Ms. Beil. In his IME report, Dr. Bernton opined that the use of the slicer did not cause the claimant's back pain. Dr. Bernton also opined that the claimant's back pain symptoms are not work related. In support of this opinion, Dr. Bernton noted that there are no activities listed in the claimant's job description that "would be consistent with an occupational disease resulting in [the claimant's symptoms]". He also noted that the claimant has a history of multiple low back complaints prior to the installation of the new deli slicers. Finally he noted that the job duties described to him by the claimant as well as in the job analysis "do not represent the type and magnitude of force" necessary to cause the claimant's symptoms.

9. The ALJ does not find the claimant's testimony to be credible or persuasive with regard to the nature and onset of her symptoms. The ALJ credits the medical records, the opinions of Ms. Beil, and Dr. Bernton and finds that the claimant has failed to demonstrate that it is more likely than not that she sustained a compensable occupational disease arising out of and in the course and scope of her employment with

the employer. As noted by Dr. Bernton, the claimant has a history of similar complaints prior to the installation of the new slicers. The ALJ is persuaded by Ms. Beil's opinion that operation of the slicer would not require bending of the spine, or any awkward or sustained posture.

CONCLUSIONS OF LAW

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

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

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

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

5. The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by Section 8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as

> a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

6. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that she sustained a compensable occupational disease arising out of and in the course and scope of her employment with the employer. As found, the medical records, and the opinions of Ms. Beil, and Dr. Bernton are credible and persuasive.

ORDER

It is therefore ordered that the claimant's claim is denied and dismissed.

Dated this 1st day of February 2021.

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

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

ISSUES

- Did Claimant prove he suffered a compensable low back injury on August 18, 2019?

- Did Claimant prove entitlement to Temporary Total Disability (TTD) benefits from August 31, 2019 until he was placed at Maximum Medical Improvement (MMI) on August 26, 2019?

- Is Claimant liable to Respondents for charges associated with a missed IME with Dr. John Burris?

STIPULATIONS

The parties stipulated to an Average Weekly Wage (AWW) of $570.21 if the claim is found compensable.

FINDINGS OF FACT

1. Employer is a staffing agency. Claimant was a temporary worker assigned as a machinist at a company named Jabil. Claimant worked overnight on the “third shift.”

2. Claimant typically attended a team meeting at the start of each shift, after which the team dispersed to their respective “cells” to work. Each cell was composed of eight machines controlled by two operators.

3. Claimant was assigned to lathe machines that shave metal parts. The metal shavings fall inside the base of the machine into a “chip bin.” Claimant had to empty the chip bins when they became full, approximately every two days. To do so, Claimant had to “lean down, reach out really far, pull the chips forward . . . then get up and take that bucket to the trash can.” Claimant generally emptied at the chip bins at the beginning of the shift.

4. On August 18, 2019, Claimant began work at his usual time. He had to clean more machines than usual that morning because his “cell mate” was absent. As a result, Claimant had to empty the bins on all eight machines instead of just four.

5. Claimant emptied the bins on his four machines and started working on the other machines in the cell. He stood directly in front of one machine, crouched down, leaned forward and reached to pull out the chip bin. While doing so, Claimant experienced severe shooting pain in his back. The pain was primarily in Claimant’s lower back, but he subsequently developed tingling in his right leg. Claimant retreated to the restroom for a few moments to wait for the pain to subside and regain his composure. The pain continued, so Claimant reported the injury to “Lee,” the ranking Jabil employee on site at

the time. Claimant declined medical treatment that night because he wanted to see how he felt the next day. Lee sent Claimant home, and Jabil personnel walked Claimant out to his car to make sure he was okay. Lee advised Claimant someone from Employer would contact him about the injury.

6. Claimant did not receive communication from Employer for several days. He contacted Lee at Jabil on August 19 to call off work and ask for help getting in touch with his supervisor with Employer. [1] Claimant eventually got ahold of his supervisor with Employer and was directed to UC Health Urgent Care.

7. Claimant saw Dr. Cynthia Schafer at his initial evaluation at UC Health on August 23, 2019. Dr. Shafer's report documents the reason for the appointment as, "lower right side back pain that radiates up spine 8.19.19 at 10:30 p.m. patient leaned over to clean a machine and had a shooting pain in lower right side that made him lightheaded." Dr. Shaffer documented a 2017 motor vehicle accident in which Claimant suffered head and shoulder injuries but there is no indication of any previous back injury. She noted Claimant did no regular exercise or stretching. Jabil had a stretching program but Claimant only participated in that approximately once a week. The physical examination showed normal lumbar range of motion except a slight decrease in left rotation and left lateral flexion. There was diffuse soft tissue tenderness, primarily the right lumbar paraspinal muscles and right gluteus medius. There was also some mild thoracic soft tissue tenderness. Dr. Shafer diagnosed a low back strain with mild facet rotation and compensatory thoracic pain. She opined, "I believe this occurred because his muscles were tight as he does no regular stretching so leaning over 'tweaked' his back. There are no signs of serious injury." Dr. Schafer opined the findings were consistent with the history and/or a work-related mechanism of injury. She prescribed muscle relaxers and recommended up to four sessions of chiropractic treatment with Dr. Brian Polvi. She imposed restrictions of no lifting over 15 pounds and "limited bending/twisting at the waist."

8. Employer provided Claimant a light duty assignment at The Arc. No modified job offer was entered into evidence and no one from Employer testified regarding the details of the modified assignment. The ALJ infers from the evidence presented Claimant was given minimal instructions regarding the modified work process. Claimant worked at The Arc on August 28, 29 and 30, 2019. On the fourth day, he tried to access Employer's timecard application to clock in but could not. Claimant called his supervisor with Employer and had to leave a voicemail. Claimant never received a return call from his supervisor or anyone else with Employer. As a result, Claimant testified, "I assumed I was terminated." Claimant did not work after August 30, 2019 until he was put at MMI on December 26, 2019.

9. For unknown reasons, Dr. Schafer's office did not generate the order for treatment with Dr. Polvi until August 27, 2019. On August 29, 2019, Claimant contacted Dr. Schafer's office and expressed concern about the "lag time" for being approved and scheduled with Dr. Polvi. He made an appointment for September 4, 2019 with a different

[1] Claimant could not recall the name of his supervisor with Employer.

chiropractor at his own expense. After Claimant's call, Dr. Schafer's office submitted an authorization request to Insurer.

10. Claimant saw Dr. Arter at Thrive Chiropractic on September 4, 2019. X-rays were taken and Claimant was told he had or may have a "ruptured disc." At hearing, Claimant acknowledged he was not referred to Thrive Chiropractic and did not expect Respondents to pay for it.

11. Claimant had his initial appointment with Dr. Polvi on September 9, 2019. Dr. Polvi diagnosed a sprain and administered trigger point dry needling to the lumbar muscles.

12. Claimant followed up with Dr. Schafer on September 10, 2019. Physical examination showed soft tissue tenderness in the lumbar area and right SI joint. Dr. Schafer noted Claimant had been seen at Thrive Chiropractic and "they talked him into doing a long-term treatment for which he paid up front." Dr. Schafer noted there were no signs of a herniated disc on either examination she performed, and she was concerned "he is being fed what appears to be false information." The physical examination was largely unchanged from the initial appointment. Dr. Schafer opined, "This is an unfortunate situation where he has basically been sold a bill of goods by a chiropractor group for whom I do not have a great deal of respect. He does not have signs of HNP, but does have SI strain and piriformis syndrome, which will mimic sciatica of course. He feels torn between what he was told by the people he chose to spend his money with versus myself and the chiropractor that I sent him to." Dr. Schafer continued Claimant's work restrictions.

13. At his next appointment with Dr. Schafer on October 4, 2019, Claimant reported low back pain with some radiation into his right leg. Claimant had seen Dr. Polvi four times without significant benefit so he returned to Thrive Chiropractic "whom he prefers." He noted Thrive had "a decompression machine which he says helped him the most." Examination of the low back showed soft tissue tenderness, increased muscle tone, and slight range of motion deficits. Dr. Schafer opined, "this again simply does not fit with being a herniated disc no matter what he is being told by his primary chiropractor. I think he was probably very tight such that the simple leaning tweaked his muscles." She referred Claimant to physical therapy and liberalized Claimant's work restrictions to 20 pounds lifting.

14. Claimant underwent a lumbar MRI on December 1, 2019, which was unremarkable.

15. Dr. Schafer reevaluated Claimant on December 26, 2019. Claimant's low back and SI pain had resolved and he was starting a new job on January 6, 2020. Dr. Schafer placed Claimant at MMI with no impairment and no restrictions.

16. Respondents arranged for an IME with Dr. John Burris in the summer of 2020. Claimant failed to attend the first appointment and it was rescheduled for August 4, 2020. Claimant requested a different date because he was working nights and could not

get up to Denver "early" in the day. Respondents rescheduled the IME to July 20, 2020, but Claimant advised that date did not work either. Respondents then reset the IME for August 4. Respondents also scheduled a Prehearing Conference seeking an order compelling Claimant's attendance at the IME.

17. On July 23, 2020, PALJ Barbo ordered Claimant to attend the August 4, 2020 IME with Dr. Burris, with a check in time of 11:00 AM. Judge Barbo noted discovery and the hearing process regarding this matter had been delayed by "claimant's significant failure to timely comply with the discovery process. These actions include the failure to return the requested authorizations for the release of information, the failure to respond to discovery requests, and the failure to attend a prior appointment for an independent medical examination." Judge Barbo also stated, "The claimant needs to be aware that failure to comply with an order of court may be deemed a willful violation of a court order pursuant to W.C.R.P 9-1 (G). A willful violation of a court order can subject the claimant to sanctions as provided by C.R.C.P 37, and include sanctions up to dismissing his claim." Judge Barbo's order was duly served on Claimant's counsel.

18. Claimant admitted he missed the August 4 IME appointment. He testified 11:00 AM is too early for him because he works nights and typically arises at 1:00 PM. Claimant testified missing the appointment was "my bad," but claimed he "thought it was being rescheduled."

19. Because Claimant failed to attend the second IME on August 4, 2020, Respondents asked Dr. Burris to perform a record review. Dr. Burris authored a report on November 20, 2020. Dr. Burris noted the medical records demonstrate Claimant was leaning over when he "tweaked" his back. Dr. Burris opined the act of bending over is an activity of daily living and not a unique risk factor associated with work. According to Dr. Burris, the Division of Workers' Compensation teaches, "if a worker is performing an activity they would normally be expected to perform in day-to-day tasks at home, the injury would not be work-related." Dr. Burris further opined the forces involved in leaning or bending over are not sufficient to aggravate, accelerate, or contribute to lumbar spine issues. Thus, Dr. Burris opined Claimant sustained no work-related injury.

20. Dr. Burris reiterated and elaborated on his opinions in his deposition testimony. Dr. Burris testified the described mechanism of injury was that Claimant leaned over, which is consistent with an activity of daily living. Dr. Burris testified that as part of the Division's Level I curriculum, when an activity is performed that would be consistent with an activity of daily living, it would not be work-related. Dr. Burris opined that the spine is designed to move and bend, so simply bending over would not cause harm.

21. Claimant's testimony was credible regarding the accident and circumstances relating to his employment. Claimant's testimony regarding the reason he missed the IME appointments was not credible or persuasive.

22. Dr. Schafer's opinions regarding causation in conjunction with Claimant's testimony are more persuasive than the opinions of Dr. Burris.

23. Claimant proved he suffered a compensable injury to his low back on August 18, 2019. Although bending over and reaching for a bin could be considered an activity of daily living in another context, it was done here to accomplish a specific work task. As opined by Dr. Schafer, Claimant's "tight muscles" made him more susceptible to injury from an otherwise potentially innocuous activity. The act of bending over and reaching to pull out the chip bin caused a soft tissue strain for which Claimant appropriately received conservative treatment.

24. Claimant proved he was disabled and suffered a wage loss commencing August 31, 2019.

25. Respondents failed to prove Claimant was responsible for termination of his employment.

26. Respondents proved Claimant should be sanctioned under CRCP 37 for missing the August 4, 2020 IME after being ordered to attend. Claimant failed to provide a legitimate excuse for missing the appointment or otherwise show his failure was substantially justified. Charging the cancellation fee to Claimant is a reasonable sanction for violation of a discovery order.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove they are a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1), C.R.S.; *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, 33 P.3d 1230 (Colo. App. 2001). The claimant must prove an injury directly and proximately caused the condition for which they seek benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

The terms "arising out of" and "in the course of" are not synonymous. The "course of employment" requirement is satisfied if the injury occurred within the time and place limits of the employment relationship and during an activity that had some connection with the employee's job-related functions." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). The term "arising out of" is narrower and requires an injury "has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered a part of the employee's employment contract." *Horodysyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001).

As found, Claimant proved he suffered a compensable injury on August 18, 2019. As an initial matter, notations in medical records that Claimant merely "leaned over" are not entirely accurate. The persuasive evidence shows Claimant crouched down, leaned forward, and reached for the chip bin. Dr. Schafer persuasively opined Claimant had "tight muscles" that made him more susceptible to injury from otherwise potentially innocuous activity. There is no persuasive evidence Claimant had any pre-existing low back symptoms or required treatment for a back problem. According to Dr. Schafer, bending over to retrieve the chip bin "tweaked" Claimant's back and resulted in a minor soft tissue strain. Even a "minor strain" can be a sufficient basis for a compensable claim if it was caused by a claimant's work activities and caused them to seek medical treatment. *Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2004). Here, the activity that caused the strain was directly related to and performed in furtherance of Claimant's work duties.

Claimant's case is similar to *Reinhard v. Pikes Peak Broadcasting Co., Inc*., W.C. No. 4-114-050 (May 20, 1993), in which the claimant suffered a compensable injury merely by turning a corner at the bottom of a staircase. The ALJ found the injury had its origins in the distinctly work-related activity of descending the stairs to obtain his next work assignment. The injury was compensable notwithstanding the opinion of the respondents' expert that the claimant's injury could have occurred from similar activities outside the scope of employment.

B. Temporary total disability benefits

To receive temporary disability benefits, the claimant must prove the injury caused disability and a wage loss. Section 8-42-103(1); *PDM Molding v. Stanberg*, 898 P.2d 542 (Colo. 1995). The persuasive evidence shows Claimant could not perform his regular job after the injury, and he suffered a wage loss commencing August 31, 2019.

Respondents argue Claimant is ineligible for TTD benefits because he was responsible for termination of his modified employment. Sections 8-42-103(1)(g) and 8-42-105(4)(a) provide, "In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." The respondents must prove by a preponderance of the evidence that a claimant was terminated for cause or was responsible for the separation from employment. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). To establish that a claimant was responsible for termination, the respondents must show the claimant performed a volitional act or otherwise exercised "some degree of control over the circumstances which led to the termination." *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 5 P.3d 1061, 1062 (Colo. App. 2002); *Padilla v. Digital Equipment Corp*., 902 P.2d 414 (Colo. App. 1995); *Velo v. Employment Solutions Personnel*, 988 P.2d 1139 (Colo. App. 1988). The concept of "volitional conduct" is not necessarily related to culpability, but instead requires the exercise of some control or choice in the circumstances leading to the discharge. *Richards v. Winter Park Recreational Association*, 919 P.2d 983 (Colo. App. 1996). The ALJ must consider the totality of the circumstances to determine whether the claimant was responsible for his termination. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004).

As found, Respondents failed to prove Claimant was responsible for termination of his employment. Claimant stopped working on August 31 because Employer did not respond to his inquiry regarding the inability to clock in. Claimant was a temporary worker with an injury that prevented him from doing the work he was originally hired to do. There is no persuasive evidence he was given specific instructions regarding the nature or duration of his light duty assignment. Claimant's testimony he could not enter his time and tried unsuccessfully to reach his supervisor is credible and unrebutted by any witness for Respondents. Claimant's inability to access the timecard application coupled with Employer's silence after he asked for help reasonably caused Claimant to question whether he was still their employee. Claimant's assumption about his work status was reinforced when he did not hear back from his supervisor or anyone else with Employer. Under the circumstances, it was reasonable for Claimant to await instructions from Employer before returning to work. Employer's failure to communicate or respond to inquiries cannot be ascribed to Claimant. Claimant's termination did not result from volitional action on his part. Rather, it resulted from Employer's inaction. Respondents failed to prove Claimant was responsible for termination of his employment.

Once commenced, TTD benefits continue until terminated by one of the events in § 8-42-105(3). Claimant was put at MMI by an ATP on December 26, 2019. Accordingly, he is entitled to TTD benefits from August 31, 2019 through December 25, 2019.

C. IME cancellation fee

Section 8-43-207(1)(p) allows the ALJ to impose sanctions provided in the Colorado Rules of Civil Procedure, except civil contempt, for "willful failure to comply with any order of an administrative law judge" regarding discovery. Violation of an order compelling a party to participate in discovery is "presumed willful." WCRP 9-1(G). IMEs are a form of discovery under CRCP 35. If a party fails to obey an order regarding discovery, the court may impose sanctions including requiring the violating party "to pay the reasonable expenses . . . caused by the failure," unless the failure to comply was substantially justified or other circumstances make an award of expenses unjust.

As found, Respondents proved Claimant should be sanctioned under CRCP 37 for missing the August 4, 2020 IME in violation of Judge Barbo's July 23, 2020 order compelling his attendance. Claimant admitted he knew about the IME and provided no substantial justification for missing the appointment. Claimant's argument he could not arise early enough to be in Denver by 11:00 AM is not persuasive. Judge Barbo's order makes clear Respondents tried to accommodate Claimant's schedule and otherwise acted reasonably regarding scheduling the IME. Judge Barbo specifically advised Claimant he could be subject to sanctions if he did not attend the August 4, 2020 IME. Charging Claimant with the cancellation fee is a reasonable sanction for his unjustified violation of the discovery order.

Fahler v. Redbox, W.C. No. 5-111-049 (August 17, 2020), cited by Claimant, is distinguishable because *Fahler* did not involve violation of an order compelling the claimant's attendance at an IME. Here, § 8-43-207(1)(p) and CRCP 37 provide authority to require reimbursement of the cancellation fee.

ORDER

It is therefore ordered that:

1. Claimant's claim for an August 18, 2019 low back injury is compensable.

2. Insurer shall cover medical treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's compensable injury.

3. Claimant's average weekly wage is $570.21, with a corresponding TTD rate of $380.14.

4. Insurer shall pay Claimant TTD benefits at the rate of $380.14 per week from August 31, 2019 through December 25, 2019.

5. Insurer shall pay Claimant statutory interest of 8% per annum on all indemnity benefits not paid when due.

6. Claimant shall reimburse Insurer for the cancellation fee from the August 4, 2020 IME appointment with Dr. Burris.

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

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

DATED: February 3, 2021

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-112-522-002

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that the scheduled impairment rating for his ankle should be converted to a whole-person impairment rating?

II. Has Claimant shown, by a preponderance of the evidence, that the scheduled impairment rating for his wrist should be converted to a whole-person impairment rating?

III. Has Claimant shown, by a preponderance of the evidence, that he is entitled to Medical Maintenance ("Grover") Benefits?

FINDINGS OF FACT

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

The Work Injury, and Subsequent Treatment

1. Claimant is employed as a ski instructor. He sustained an admitted injury on December 24, 2018, when he was struck by another skier. He was treated at CHPG SA Breckenridge – Emergent and Urgent Care Center for mild pain over the lateral aspect of his left ankle. He denied neck or back pain. (Ex. A, pp. 6–16.)

2. MRI's were performed on May 23, 2019 and July 19, 2019, demonstrating an ununited fracture of the anterior colliculus [sic] of the medial malleolus with bone marrow edema patters.

3. Claimant was referred to orthopedist Michael Simpson, M.D., on September 9, 2019, for a second opinion regarding his left ankle pain. Dr. Simpson's assessment was left ankle pain, osteochondral lesion of talar dome, and closed displaced fracture of medial malleolus of right tibia with nonunion. He recommended arthroscopic evaluation and debridement of the medial gutter and removal of the ununited fragment of the medial malleolus. He also planned to assess the posterior lateral talar dome injury and noted repairs that might be needed. (Ex. K, pp. 62–66.)

4. On September 17, 2019, Dr. Simpson performed arthroscopy left ankle with extensive debridement including debridement of nonunion of medial malleolus, debridement of medial gutter, debridement of anterior compartment fibrotic scarring, and debridement of anterolateral ankle joint; arthroscopy left ankle with excision of osteochondral lesion posterolateral talar dome and marrow stimulation using drilling; and stress fluoroscopy left ankle. (Ex. M, pp. 79–80.)

5. On December 16, 2019, Claimant followed up with Dr. Simpson, he noted Claimant's overall prognosis is good:

> JC is doing very well. He has excellent pain relief. He has good range of motion good stability. I will release him from orthopedic care at this point. He is effectively at maximal (sic) medical improvement. I think he can return to full activity activities (sic) including skiing and even snowboarding. No orthopedic follow-up is scheduled. (Ex. R, pp. 96–98.)

6. Claimant was then seen by ATP Dr. Olson on December 16, 2019. Dr. Olson noted Claimant was not taking any medications, and he walked without a limp. Dr. Olson released him for regular duty without restrictions. Claimant was to follow up in one month, at which time he would be considered for MMI. (Ex. Q, pp. 93–94.)

7. On January 14, 2020, Claimant followed up with Dr. Olson. He reported he had been skiing and had not noticed any episodes of instability. Claimant did note, however, that his ankle aches at the end of the day, and he ices and elevates it. As far as his Eustachian tube dysfunction, he had not had any trouble on the ski slopes. He was not taking any medications. (Ex. S, pp. 100–102.)

8. On March 5, 2020, Dr. Olson noted Claimant had been skiing a great deal since he last saw him. He had not had any problems with instability or any difficulties with walking. He did notice a little bit of discomfort when he first gets up in the morning. His gait was normal. Dr. Olson also noted Claimant's left wrist was doing well overall, although he did have some mild discomfort in the scapholunate area. He had no numbness or tingling pain when using it. He had completed a motorcycle ride down to Baja California and back and his wrist was a little sore after that but overall did well. Dr. Olson noted Claimant's Eustachian dysfunction was still taking a little bit longer to equalize but did [eventually] equalize.

9. Dr. Olson placed Claimant at MMI as of March 5, 2020, with no permanent impairment, no restrictions, and no need for maintenance care after MMI. Dr. Olson noted that "Functionally he is doing well with increased activities." (Ex. T, pp. 108–111.)

DIME

10. Claimant then requested a DIME. On July 24, 2020, Anjmun Sharma, M.D., performed his examination. Claimant reported that his biggest problem was the left ankle. Dr. Sharma noted that, overall, he had done very well. If he did extreme activity during the day, he did experience pain, but overall for most part he was able to move his ankle fairly well. He was able to also function with regard to the left wrist. There was a dull nagging pain in each of these two joints, but overall Claimant was capable of working full duty, no restriction.

11. Claimant was ready to do so when the ski season began, and felt that he had had adequate time to rest and rehabilitate his injured body parts. Regarding his ear, Claimant reported that he had not had problems with equilibration. He has gone to the mountain

area and had not suffered any issues or pain. Overall, it was just a ‘nagging sensation’ from time to time. (Ex. U, p. 121.)

12. Dr. Sharma’s clinical diagnoses were: 1. Left wrist sprain; 2. Left wrist contusion; 3. Left ankle osteochondritis dissecans; 4. Left ankle status post arthroscopy; 5. Chronic nonunion left medial malleolus; 6. Osteochondral lesion posterior lateral left talar dome; and 7. Right ear barotrauma, resolved. He agreed Claimant had reached MMI on March 5, 2020.

13. Dr. Sharma rated Claimant’s impairment for his ankle injury at 12% of the lower extremity. He rated Claimant’s impairment for his wrist injury at 6% of the upper extremity. He did not provide a rating for Claimant’s right ear barotrauma, which he noted had resolved. Dr. Sharma opined Claimant could return to work full duty, no restrictions, and he did not need maintenance care. (Ex. U, pp. 122–123.)

14. Respondents filed a Final Admission of Liability on August 10, 2020, admitting for Dr. Sharma’s extremity ratings. Respondents denied liability for maintenance care after MMI. (Ex. 1, p. 1). Claimant timely objected to the FAL and filed an Application for Hearing on the issues of Grover medical benefits and conversion. (Ex. 2, p. 33).

Claimant Testifies at Hearing

15. Claimant testified at hearing. While walking, he was hit by another skier at high speed, and was knocked to the ground, striking his head and left hand. He realized that his left knee and left ankle also hurt. His ear was “uncomfortable.” During his treatment, was told by one of his physicians that he might have TMJ issues.

16. He stated still has pain and swelling in his ankle, and pain in his wrist. He did not testify that either of his rated injuries caused any functional impairment with any other part of his body. When specifically asked about his low back by his attorney, Claimant testified that, if the pain in his ankle has affected his low back, he hasn’t noticed. Claimant also prefers not to use pain medications.

17. Claimant testified that he hasn’t stopped doing anything because of his ankle injury, but he does make compromises, such as wearing a taller hiking boot, so he can continue doing things he likes to do. By the end of a long day, he tends to favor his left ankle. He testified he has not tried scuba diving because of his equilibrium concerns, but not due to his ankle. Claimant did not testify that he needs specific further treatment for this injury.

CONCLUSIONS OF LAW

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

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. §8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. §8-43-201, C.R.S.

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

C. Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). In this instance, the ALJ finds Claimant to be sincere and credible, both in his hearing testimony, and in providing the most accurate information to all healthcare providers he came into contact with. Claimant is the antithesis of a malingerer or whiner. Due to his comparative youth and positive outlook, he is an active participant in his own health and wellbeing, and just wants to maintain that as best he can.

D. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). In this instance, while there was no expert testimony, the ALJ has considered the contents of all medical records and reports submitted.

E. Further, courts are to be "mindful that the Workmen's Compensation Act is to be liberally construed to effectuate its humanitarian purpose of assisting injured workers." *James v. Irrigation Motor and Pump Co.*, 503 P.2d 1025 (Colo. 1972).

Conversion to Whole Person, Generally

F. Whether the Claimant sustained a "loss of an arm at the shoulder" within the meaning of § 8-42-107 (2) (a), C.R.S., or a whole person medical impairment compensable under § 8-42-107 (8), C.R.S. is one of fact for determination by the ALJ. In resolving this question, the ALJ must determine the situs of the Claimant's "functional impairment," and the situs of the functional impairment is not necessarily the location of the injury itself. Langton v. Rocky Mountain Health Care Corp., supra; Strauch v. PSL Swedish HealthcaSystem, supra. Because the issue is factual in nature, we must uphold the ALJ's determination if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; Walker v. Jim Fuoco Motor Co., 942 P.2d 1390 (Colo. App. 1997). This standard of review requires us to defer to the ALJ's resolution of conflicts in the evidence, credibility determinations, and plausible inferences drawn from the record. Metro Moving and Storage Co. v. Gussert, 914 P.2d 411 (Colo. App. 1995).

G. Whether the Claimant has sustained an "injury" which is on or off the schedule of impairment depends on whether the claimant has sustained a "functional impairment" to a part of the body that is not contained on the schedule. *Strauch v. PSL Swedish Health Care System*, 917 P.2d 366 (Colo. App. 1996). Functional impairment need not take any particular impairment. Discomfort which interferes with the claimant's ability to use a portion of his body may be considered "impairment." *Mader v. Popejoy Construction Company, Inc.*, W.C. No. 4-198-489, (ICAO August 9, 1996). Pain and discomfort which limits a claimant's ability to use a portion of his body may be considered a "functional impairment" for determining whether an injury is on or off the schedule. *See, e.g., Beck v. Mile Hi Express Inc.*, W.C. No. 4- 238-483 (ICAO February 11, 1997).

Conversion, as Applied / Ankle and Wrist

H. There is insufficient evidence in the record that Claimant's injuries to either his ankle or his wrist has caused any functional impairment to his whole person. In fact, when asked, Claimant stated he hasn't noticed if his ankle problems have caused any issues with his low back. No *medical records* note any functional impairment beyond the affected extremities. While he has experienced some swelling and discomfort as a result of his injuries, Claimant's own testimony indicates that he is able to 'soldier on', and engage in, for example, skiing at a high level, and long distance motorcycle trips. Without sufficient evidence of a functional impairment not on the schedule of disabilities, Claimant's impairment for his industrial injury remains as a *scheduled impairment* within the meaning of § 8-42-107(2)(a), C.R.S.

Medical Maintenance Benefits, Generally

I. To prove entitlement to medical maintenance benefits, the Claimant must present *substantial evidence* to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710- 13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). Once a claimant establishes the probable need for future medical treatment [s]he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* W.C. No. 4-461-989 (ICAP, Aug. 8, 2003). An award for *Grover*-type medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that a claimant is actually receiving medical treatment. *Holly Nursing Care Center v. ICAO,* 992 P.2d 701 (Colo. App. 1999); *Stollmeyer v. ICAO*, 916 P.2d 609 (Colo. App. 1995). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the ALJ. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 919 P.2d 701, 704 (Colo. App. 1999).

Medical Maintenance Benefits, as Applied

J. While neither of Claimant's ATPs or the DIME physician has seen the need for Grover Maintenance Benefits, the ALJ sees it differently. Claimant has consistently and credibly described certain levels of pain or discomfort in both his wrist and ankle, long after being placed at MMI. His ankle swells on occasion, requiring ice and elevation. He feels it in the morning on occasion, or after a long day, especially given his active lifestyle. There is no evidence that Claimant experienced these discomforts before his work injury. While Claimant (to his credit) prefers not to take medication on a regular basis, the ALJ finds that Claimant has earned the right to change his mind. There are non-narcotic pain relievers and anti-inflammatories, for example, that Claimant might wish to explore further, perhaps on an ad hoc basis. This process could take a while to get him dialed in. So be it. Physical therapy or acupuncture to maintain his current conditioning is but another reasonable alternative. As noted, while Claimant was not assigned an impairment rating for his Eustachian tube issues, he still has difficulty equalizing on occasion. This could get worse without continued intervention, and the ALJ further finds that Claimant may seek any maintenance care for this condition through his ATP that is appropriate. Claimant has presented substantial evidence in support of a general award of medical maintenance benefits.

A Note on Worsening of Condition

K. While this issue is not before the ALJ, nothing in this Order prevents Claimant from seeking additional care and treatment should his work-related conditions worsen with time.

ORDER

It is therefore Ordered that:

1. Claimant's request to convert his scheduled impairment ratings to that of the Whole Person is denied and dismissed.

2. Claimant is entitled to a General Award of Medical Maintenance Benefits.

3. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

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

DATED: February 3, 2021

/s/ William G. Edie

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

ISSUES

- Did Claimant prove she suffered a compensable injury on December 28, 2018?

- Is Claimant's claim barred by claim preclusion?

- If the claim is compensable, did Claimant prove entitlement to medical benefits?

- If the claim is compensable, did Claimant prove entitlement to TTD benefits?

- What is Claimant's average weekly wage (AWW)?

FINDINGS OF FACT

1. Claimant worked for Employer as a housekeeper. She alleges a low back injury on December 28, 2018. On that date, Claimant was vacuuming a day hall used by the residents. She testified the vacuum was "heavy," although she did not know its weight. Claimant had to move some couches and chairs to fully vacuum the area. Claimant testified she developed severe low back pain after approximately 30 minutes of this activity. She did not identify any specific incident that caused her pain. She testified, "I was in the middle of vacuuming the day hall. And then, I just couldn't move anymore. I just felt all that pain coming through me, and the heat in the body, like the burning in my back." Claimant testified the pain became so severe she had to be wheeled out to her car in an office desk chair.

2. Claimant testified sought treatment at the Southern Colorado Clinic urgent care the next morning. She testified she was "turned away" and did not receive treatment. However, the evidentiary record contains a December 28, 2018 report from PA-C James Anderson at the Southern Colorado Clinic urgent care. The report describes Claimant's presenting condition as, "63-year-old female who presents with back pain. The symptoms began 3 days ago. The intensity is described as severe. . . . Pt states she fell at work a few years ago, evaluation and treatment to date includes epidural steroid injection." The report makes no mention of vacuuming or any other recent work associated with the onset of back pain. Mr. Anderson prescribed a Medrol Dosepak.

3. Claimant saw Dr. Dr. Michelle Pennington at Pueblo Community Health Center on January 7. She reported acute back pain and weakness that started "2 weeks ago." The pain was described as persistent and worsening. Dr. Pennington noted, "Xmas spent in bed. Stiff. UC gave Medrol Dosepak. Can't get comfortable. Doesn't have strength. Works as a janitor. Fell at work parking lot 2 years ago. Workmen's Comp. Told couldn't help anymore. Still was having pain. Intermittent flares." Claimant described difficulty arising and walking and had borrowed her sister's walker. She also reported urinary urgency with incontinence. Dr. Pennington was concerned about possible cauda equina syndrome because of "red flag" symptoms of saddle anesthesia, urinary

incontinence, and severe lower extremity weakness. She advised Claimant to go to the Parkview Hospital emergency Department for an MRI. The report contains no indication of any recent accident or incident at work.

4. No records from Parkview Hospital are in evidence.

5. Claimant followed up with Dr. David Krause at Pueblo CHC on January 11, 2019. Dr. Krause documented,

> She said around Christmas her pain became worse and she started having more weakness and numbness in her legs. She was seen here and sent to the emergency room so she could get a stat MRI. The MRI showed severe spinal cord stenosis at L4-L5 and severe foraminal stenosis at the same level. She had lesser degrees of stenosis at L2-L3 and L3-L4.

ALJ Lamphere previously found the MRI also showed segmental instability at L3-4 and L4-5. Although the MRI report is not in evidence, the ALJ infers it showed no acute findings, and the demonstrated pathology existed well before December 28, 2018. Dr. Krause's report makes no mention of any work-related accident or activity that allegedly triggered Claimant's worsened pain.

6. Claimant eventually underwent a four-level lumbar fusion with Dr. Roger Sung on March 5, 2019. The only report in evidence from Dr. Sung is dated September 26, 2019. The report states "overall, she feels good." X-rays showed the hardware was in good position and the fusion was consolidating well. Dr. Sung recommended Claimant continue physical therapy and released her to follow-up "as needed." Dr. Sung provided no opinion attributing the extensive surgery to any work-related cause.

7. Claimant had an extensive history of low back problems before December 28, 2018, including a prior work-related injury from a trip and fall accident on October 31, 2016.

8. Dr. Terrance Lakin was Claimant's primary ATP for the October 31, 2016 injury. X-rays from her initial appointment at Dr. Lakin's office revealed lumbar spondylosis at L4 and L5 that "appear[ed] longstanding" and "not work related." Claimant had fallen multiple times within a few months before the accident. An EMG in February 2017 showed chronic right L5 radiculopathy, indicating past denervation with subsequent reinnervation. The electrodiagnostic abnormalities were probably pre-existing and not related to the work accident. Claimant received conservative care for the October 2016 back injury including trigger point therapy, massage therapy, cognitive behavioral therapy, and injections. The conservative treatment improved Claimant's back pain, and in May 2017, Dr. Lakin noted she had "return[ed] to baseline by her report."

9. On August 15, 2017, Dr. Lakin addressed Claimant's pre-existing lumbar spine issues in detail. He noted Claimant "had long-standing right toe paresthesias and lumbar pain in the past" and "she had been having paresthesias/radicular pain for some time." He noted that a lumbar MRI performed 1-2 months after the accident showed significant degenerative changes with severe facet disease, disk bulging, severe central

canal stenosis, and foraminal narrowing bilaterally. Dr. Lakin considered the October 2016 injury a "minor exacerbation" of Claimant's underlying pre-existing condition. He expected her back problems to worsen with time because of "normal progression of disease." Dr. Lakin opined Claimant's ongoing low back and lower extremity radicular symptoms were "nonoccupational, back to baseline several months ago, now progressing and needs to see [PCP]."

10. Dr. Lakin issued an impairment rating report on November 10, 2017.[1] He opined Claimant had no ratable lumbar spine impairment because her ongoing pain and limitations were not causally related to the October 2016 accident. Dr. Lakin diagnosed "severe lumbar degenerative disc disease/degenerative joint disease (DDD/DJD) with exacerbation and return to baseline." He noted "severe numbness in her right toe for approximately 4 years," which her PCP thought was related to lumbosacral radiculopathy. Dr. Lakin elaborated on his previous opnion Claimant's low back problems were not work-related:

> We have received medical records from her primary care manager. Upon review of those records, it clearly indicated that she had been having ongoing lumbar issues for several years. She had been complaining of paresthesias in a radicular pattern for several years with her primary care provider and they had discussed proceeding with MRI and consideration of epidural injections in the past. Given her mechanism of injury that would not likely result in significant trauma to her lumbar back, along with her significant pre-existing disease on MRI, I believe she had some exacerbation of her lumbar disease that had been returned to baseline level with treatment under this injury. I would not support further treatment . . . . She was urged to continue further lumbar care . . . with her primary care provider.

11. Claimant had a DIME with Dr. Kenneth Finn on March 23, 2018. At that time, her primary complaint was "right-sided lumbosacral pain." Claimant also reported numbness and tingling in her toes and weakness in her legs. Claimant denied any pre-injury low back or radicular symptoms, which Dr. Finn noted was "in contradiction to accompanying records." Dr. Finn opined the October 2016 accident aggravated Claimant's pre-existing condition and was appropriately treated as a work-related. Dr. Finn assigned a spinal impairment rating, but agreed with Dr. Lakin that future care for the low back would be unrelated to the October 2016 accident. Dr. Finn stated, "any ongoing issues with her low back should be taken care of under her regular health insurance."

12. Respondent filed an FAL based on Dr. Finn's DIME report. The FAL admitted for reasonably necessary medical treatment from authorized providers after MMI.

[1] The October 31, 2016 claim also involved a shoulder injury, for which Claimant received a rating.

13. Between June and December 2018, Claimant continued to receive treatment directed to her low back from her PCP at Pueblo CHC. Treatment included physical therapy, additional steroid injections, Toradol injections, and gabapentin. During an examination on October 11, 2018, Claimant lost her balance and fell to the left while getting off the exam table. She could not sense monofilament testing over the majority of the plantar aspect of her feet, and her gait was noted to be unstable on both sides without an assistive device. On December 11, 2018, her PCP documented "absent monofilament sensation bilaterally, absent vibratory sensation on the right and diminished by 50% sign at [the] medial and lateral malleolus on the left." On December 18, 2018 (10 days before the alleged work accident) Claimant received a Toradol injection for "chronic low back pain" related to "fairly severe spinal stenosis at several levels."

14. On May 13, 2019, Claimant applied for a hearing on the issues of "Medical Benefits - Authorization of back treatment and/or surgery and Authorized Provider." This application was filed in relation to the October 31, 2016 injury only, with no reference to any alleged new injury on December 28, 2018.

15. Dr. Michael Rauzzino performed an IME for Respondent on August 26, 2019. Dr. Rauzzino conducted a thorough review of Claimant's medical records, both before and after the October 2016 injury. During the IME, Claimant denied experiencing low back trouble, having x-rays, or receiving treatment for her low back before the October 2016 trip and fall accident. Dr. Rauzzino noted Claimant had suffered "multiple other falls" that were "no less in terms of mechanism" to the fall that caused the work injury. Dr. Rauzzino opined the October 2016 accident caused no structural injury to Claimant's spine. He opined the accident neither accelerated her "chronic degenerative condition" nor caused any permanent neurologic change that required treatment. Dr. Rauzzino agreed with Dr. Finn and Dr. Lakin that any ongoing need for low back treatment was unrelated to the October 31, 2016 work injury. Dr. Rauzzino noted that Claimant's "condition clearly worsened in June and particularly in December 2018 and this was related to the natural course of her chronic degenerative condition and not to the isolated slip and fall that occurred on 10/31/2016." Dr. Rauzzino opined the surgery performed by Dr. Sung was done to treat the underlying severe degenerative pathology and unrelated to the work accident.

16. The parties went to hearing before ALJ Richard Lamphere on October 24, 2019. The primary issue was whether the surgery performed by Dr. Sung was reasonably necessary and related to the October 2016 work accident. Although Claimant testified regarding the same events at work on December 28, 2018 that form the basis for the present claim, she did not seek to prove a new injury at that time. ALJ Lamphere determined the low back treatment Claimant had received, including the multilevel fusion surgery, was reasonably necessary but not related to the work injury. Instead, ALJ Lamphere found that "Claimant's subsequent need for low back surgery was likely caused by the natural progression of her long-standing pre-existing degenerative disc disease."

17. Claimant did not appeal ALJ Lamphere's order. Instead, Claimant filed the current claim alleging a new injury. Whereas Claimant had previously argued to ALJ

Lamphere her worsening back pain in December 2018 was a continuation of the 2016 injury, she now claims it was caused by vacuuming at work on December 28, 2018.

18. In November 4, 2018, Respondent asked Dr. Rauzzino to revisit Claimant's case with an eye toward the new claim. Dr. Rauzzino noted he had taken a detailed history at the prior IME regarding Claimant's condition and potential injuries. Claimant also completed a patient questionnaire on which she attributed her symptoms solely to the October 2016 trip and fall accident, with no mention of any injury in December 2018. Claimant told Dr. Rauzzino her pain worsened in December 2018 "but she did not relate the history of any sort of injury which would have caused a worsening of her pain." Dr. Rauzzino reviewed the transcript of the October 24, 2019 hearing and noted Claimant had testified, "I had been having trouble for days, you know, with my legs and stuff" before December 28, 2018. Dr. Rauzzino thought it "clear that no new occupational injury occurred." He saw "no evidence to indicate that she sustained a new occupational injury on 12/28/18 which caused her to need treatment or surgery." He further opined, from a mechanical standpoint, there is no reason to believe an episode of vacuuming caused Claimant's back condition to worsen. Nothing about her occupational activities on December 28, 2018 because or necessitated any need for treatment. Dr. Rauzzino reiterated Claimant's low back symptoms on and after December 28, 2018 simply reflected the natural progression of her underlying degenerative condition.

19. Claimant is not a reliable historian or credible witness. Respondents' position statement persuasively outlines numerous inconsistencies throughout the record that preclude giving Claimant's testimony any weight.

20. Dr. Lakin and Dr. Rauzzino's causation opinions are credible and persuasive.

21. Claimant failed to prove she suffered a compensable injury on December 28, 2018. Claimant's low back and leg symptoms before, on, and after December 28 were manifestations of her pre-existing condition. Claimant had severe degenerative stenosis and spinal instability that was progressively symptomatic for years. The apparent worsening of Claimant's condition in December 2018 reflects the natural progression of her underlying pre-existing degenerative spinal condition, without contribution from her work.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove that she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The claimant must prove that an injury proximately caused the condition for which benefits are sought. Section 8-41-301(1)(c); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). For an injury to be compensable under the Act, there must be a "sufficient nexus" between the employment and the injury. *In re Question Submitted by* *the U.S. Court of Appeals*, 759 P.2d 17 (Colo. 1988). The claimant must prove entitlement to benefits by a preponderance of the evidence.

The existence of a pre-existing condition does not preclude a claim for compensation if an industrial injury aggravates, accelerates, or combines with the pre-existing condition to produce the need for medical treatment or disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition, and the claimant is entitled to medical benefits for treatment of pain, so long as the pain was proximately caused by the employment-related activities and not the underlying pre-existing condition. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949). But the mere fact that a claimant experiences symptoms at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition or caused a compensable injury. *Madonna v. Walmart*, W.C. No. 4-997-641-02 (August 21, 2017); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). The ultimate question is whether the need for treatment was proximately caused by an industrial aggravation or merely reflects the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

Respondent makes a well-supported and persuasive argument this claim is barred by the doctrine of claim preclusion under the holding in *Holnam, Inc. v. Industrial Claim Appeals Office*, 159 P.2d 795 (Colo. App. 2006). The ALJ is inclined to agree with Respondent's analysis. But it is not necessary to decide that question because, even assuming *arguendo* that claim preclusion does not apply, the preponderance of persuasive evidence shows the worsening of Claimant's low back condition in December 2018 was not causally related to her work. Dr. Lakin and Dr. Rauzzino's causation analysis and opinions are credible and persuasive. Claimant had longstanding, progressive lumbar spine problems before the alleged work accident, including severe canal and foraminal stenosis and multi-level instability. The pre-existing pathology caused chronic and progressive radiculopathy for which Claimant was actively treated by her personal providers. Claimant's condition was bad enough that she requested and received a Toradol injection ten days before the alleged injury. Contemporaneous medical records do not document or support any injury occurring on December 28, 2018. In fact, the December 28, 2018 urgent care clinic report states "the symptoms began 3 days ago." This is consistent with Claimant's sworn testimony at the prior hearing with ALJ Lamphere that she "had been having trouble for days . . . with my legs and stuff" before December 28, 2018. And Claimant told Dr. Pennington she had spent Christmas "in bed" because of back problems. Claimant's work on December 28, 2018 caused no structural change to Claimant's underlying pathology. Nor did it aggravate, accelerate, or combine with the pre-existing condition to proximately cause her need for treatment. While the ALJ does not doubt the surgery performed by Dr. Sung was reasonably needed to address Claimant's severe, progressive neurological deficits, it was in no way related to her work on December 28, 2018. Claimant failed to prove she suffered a compensable injury on December 28, 2018.

ORDER

It is therefore ordered that:

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

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

DATED: February 5, 2021

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

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that she suffered a compensable right shoulder injury during the course and scope of her employment with Employer on April 17, 2020.

2. Whether Respondents have proven by a preponderance of the evidence that Claimant willfully failed to obey a safety rule in violation of §8-42-112(1)(b) C.R.S. on April 17, 2020 and her non-medical benefits should thus be reduced by fifty percent.

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $970.00.

FINDINGS OF FACT

1. Claimant worked for Employer as a Utility Line Locator. Her job duties involved traveling to job sites to locate underground gas and electrical lines.

2. As part of Claimant's employment, she received a primary truck and a spare truck. She stored both of the trucks at her home.

3. In order to pay for minor repairs and routine maintenance on the trucks, Employer provided Claimant with a credit card or "fleet card." Prior to using the fleet card, employees were required to obtain a supervisor's permission for repairs and maintenance.

4. As an added safety measure, Employer provided employees with "Yaktrax" devices for use while working in the field. Yaktrax are safety devices that attach to the bottom of an individual's shoes. They are used in snowy and icy conditions to provide additional grip and traction to the bottom of a shoe or boot. Employer made Yaktrax available to employees through a number of sources, including area managers, operations managers and general managers.

5. On the morning on April 17, 2020 Claimant's primary company truck was stuck in the snow at her house. Because the truck had bald tires and a bad gas fuel injector, she sought to take the truck to a shop for repairs. Claimant's spare truck had a dead battery and required a jump to be operational.

6. Claimant exchanged several text messages and had multiple telephone calls with her supervisor and Employer's Operations Manager Rachel E[Redacted] on April 16, 2020 and the morning of April 17, 2020. Ms. E[Redacted] was responsible for

fleet vehicle maintenance. The parties specifically discussed options to address the problems with each of the trucks at Claimant's house.

7. At about 6:30 a.m. on the April 17, 2020 Ms. E[Redacted] advised Claimant to determine whether she could get her primary truck to an auto repair shop to have the tires replaced. Claimant would drop the truck off at the repair shop and Ms. E[Redacted] would pick her up.

8. Ms. E[Redacted] testified at the hearing in this matter. After considering the snowfall and weather conditions, Ms. E[Redacted] realized that Claimant's primary truck was not safe to drive. She called Claimant and instructed her not to drive anywhere. Ms. E[Redacted] specified that she would direct a technician who lived near Claimant to stop by to jump the battery of the second truck. She specifically instructed Claimant not to travel to the auto repair shop. Instead, Ms. E[Redacted] would arrange to have the primary truck moved to the repair facility for maintenance work. She emphasized that she clearly explained the plan and Claimant verbally agreed.

9. Claimant also testified at the hearing in this matter. She explained that she texted Ms. E[Redacted] on the morning of April 17, 2020 and was advised to take her primary truck to Advanced Auto Body shop located at 505 Orchid Road. The repair facility was located about two miles from Employer's office.

10. In a text message from Claimant to Ms. E[Redacted] time-stamped at 6:31 a.m. on April 17, 2020, she stated "okay we're not going to move this truck in the snow and the other truck the battery is dead." One minute later Claimant noted "[s]o I should get another truck and then my block look like a little [Employer] LOL." Ms. E[Redacted] responded at 6:32 a.m. "call fleet please."

11. Despite her communications with Ms. E[Redacted] Claimant drove her primary truck with bald tires to Advance Auto. When she arrived at the facility at approximately 7:00 a.m. Claimant planned to walk up to the front doors of the building to determine whether it was open. However, before leaving her vehicle, Claimant called Ms. E[Redacted] and told her she needed to be picked up from the facility. Ms. E[Redacted] testified she was confused about why Claimant had gone to Advanced Auto. She had specifically instructed Claimant to remain home so a nearby technician could stop by to jump the battery of the secondary truck.

12. Employer's Regional Operations Manager Nicholas Rizk testified regarding Employer's recommended use of Yaktrax. He explained that Employer frequently discussed the use of Yaktrax at weekly meetings because of the hazards associated with slips, trips and falls when locators are performing their job duties during inclement weather. However, Mr. Rizk acknowledged that Employer did not have a written policy addressing the use of Yaktrax on April 17, 2020. Nevertheless, he remarked that employees could receive a disciplinary write-up for failing to wear the devices.

13. Claimant testified that she never received a written policy regarding the mandatory use of Yaktrax. She remarked that, although she had heard discussions about Yaktrax at meetings, she did not think that wearing them was mandatory. Claimant commented that she never received Yaktrax or money to purchase them. She noted that she never received a write up for failing to wear the devices and noticed other utility locators not wearing Yaktrax.

14. Despite noticing that there was snow and ice on the area where she would be walking on April 17, 2021, Claimant did not wear Yaktrax. As Claimant walked up to Advanced Auto she slipped on ice and fell to the ground. She landed on the right side of her back. Claimant experienced pain in her right arm and shoulder area immediately after the fall.

15. Claimant was able to return to her feet after the fall. A colleague picked Claimant up from Advanced Auto and took her home to retrieve the spare truck. After they jumped the truck's battery, Claimant went to work and completed her scheduled shift.

16. Claimant reported her injuries to Employer's Administrative Assistant Rhonda Stroud. Ms. Stroud testified that Claimant informed her she had slipped on ice and hurt her shoulder. She told Claimant to report the incident and seek treatment. Ms. Stroud advised Ms. E[Redacted] that Claimant had been injured and suggested visiting a doctor because of the pain.

17. On April 23, 2020 Claimant visited Authorized Treating Physician (ATP) Nicole Leitch, M.D. at Concentra Medical Centers for an examination. Dr. Leitch noted that on April 17, 2020 Claimant "was dropping off a truck at auto shop and slipped and fell on ice" and "had pain immediately in her right shoulder." On physical examination Claimant exhibited tenderness in the AC joint, bicipital groove, deltoid, anterior glenohumeral joint and supraspinatus muscle. Dr. Leitch recommended an x-ray, physical therapy and Ibprofen. She assigned work restrictions of occasionally lifting 10 pounds and pushing/pulling not to exceed 20 pounds.

18. On April 27, 2020 Claimant returned to Dr. Leitch for an evaluation. She reported a 5/10 pain level. Claimant exhibited limited right shoulder movement in all planes. Dr. Leitch recommended physical therapy and continued work restrictions.

19. In a May 31, 2020 report ATP Theodore R. Villavicencio, M.D. determined that Claimant reached Maximum Medical Improvement (MMI) on May 26, 2020. Dr. Villavicencio noted that Claimant could work without restrictions and did not require medical maintenance treatment.

20. Claimant has failed to demonstrate that it is more probably true than not that she suffered a compensable right shoulder injury during the course and scope of her employment with Employer on April 17, 2020. Initially, Claimant injured her right shoulder when she slipped on ice while walking up to Advanced Auto for repairs on her primary work truck. Notably, Employer provided Claimant with a fleet card to pay for minor repairs

and routine maintenance on work trucks. However, prior to using the fleet card, employees were required to obtain a supervisor's permission. On April 16-17, 2020 Claimant consulted with her supervisor Ms. E[Redacted] regarding repairs on her truck. Ms. E[Redacted] noted the repair facility was located at 505 Orchid Road or about two miles from Employer's office. At about 6:30 a.m. on the April 17, 2020 Ms. E[Redacted] advised Claimant to determine whether she could take her primary truck to the auto shop to have the tires replaced. Claimant would drop the truck off at the facility and Ms. E[Redacted] would pick her up.

21. After considering the snowfall and weather conditions, Ms. E[Redacted] realized that Claimant's primary truck was not safe to drive. She called Claimant and instructed her not to drive anywhere. Ms. E[Redacted] specified that she would direct another technician who lived near Claimant to stop by and jump the battery of the second truck. She specifically told Claimant not to travel to the auto shop. Ms. E[Redacted] emphasized that she clearly explained the plan and Claimant verbally agreed. In fact, in a text message to Ms. E[Redacted] time-stamped at 6:31 a.m. on April 17, 2020, Claimant stated "okay we're not going to move this truck in the snow and the other truck the battery is dead." One minute later Claimant noted "[s]o I should get another truck and then my block look like a little [Employer] LOL." Ms. E[Redacted] responded at 6:32 a.m. "call fleet please." Ms. E[Redacted]'s credible testimony and Claimant's acknowledgment that she should not move the truck in the snow reflects that Claimant was aware she should not travel to Advanced Auto for repairs. Ms. E[Redacted]'s direct instructions reveal that Claimant lacked approval for any travel with the truck on April 17, 2020.

22. Despite Ms. E[Redacted]'s instructions, Claimant drove her primary truck with bald tires to Advanced Auto. She then slipped and injured her right shoulder. Although Claimant possessed a fleet card for truck maintenance and repairs, Ms. E[Redacted] specifically instructed her not to move the truck because of the weather conditions. In driving the truck to Advance Auto Claimant was not performing mandatory or incidental duties of her employment. Instead, her conduct constituted such a deviation from the circumstances and conditions of her employment that she stepped aside from her job duties. Claimant's decision to drive the truck to Advanced Auto, despite Ms. E[Redacted]'s instructions, thus removed her from the employment relationship. In willfully deciding to drive to Advanced Auto on April 17, 2020, Claimant was no longer engaged in an activity connected with her job-related functions. Claimant's conduct therefore constituted a personal deviation that did not arise within the course and scope of her employment. Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of

the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

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

4. The claimant must prove by a preponderance of the evidence that her injury was proximately caused by an injury arising out of and in the course of his employment with employer. Section 8-41-301(1)(b) & (c), C.R.S*.; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment when the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991); *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO, Nov. 21, 2014).

5. The "arising out of" element is narrower and requires the claimant to show a causal connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014). It is not essential to compensability that an employee's activity at the time of the injury result from a job duty if the activity is sufficiently incidental to the work to be properly considered as arising out of and in the course of the employment. *Panera Bread, LLC v. Industrial Claim Appeals Office,* 141 P.3d 970 (Colo. App. 2006); *Rodriguez v. Pueblo County* W.C. No. 4-911-673-01 (ICAO, Aug. 2, 2016).

6. When the employer asserts a personal deviation from employment "the issue is whether the activity giving rise to the injury constituted a deviation from employment so substantial as to remove it from the employment relationship." *Roache v. Industrial Commission,* 729 P.2d 991 (Colo. App. 1986); *In Re Laroc,* W.C. 4-783-889 (ICAO, Feb. 1, 2010). If an employee substantially deviates from the mandatory or incidental duties of employment so that he is acting for his sole benefit at the time of injury, his claim is not compensable. *Kater v. Industrial Commission,* 729 P.2d 746 (Colo. App. 1986); *Laroc v. Labor Ready, Inc.* W.C. No. 4-783-889 (ICAO, Feb. 1, 2010). The issue is thus whether the "claimant's conduct constitutes such a deviation from the

circumstances and conditions of the employment that the claimant stepped aside from his job and was performing an activity for his sole benefit." *In Re Laroc,* W.C. 4-783-889 (ICAO, Feb. 1, 2010); *see Panera Bread, LLC v. Industrial Claim Appeals Office,* 141 P.3d 970 (Colo. App. 2006). It is thus not essential that the activities of an employee emanate from an obligatory job function or result in a specific benefit to the employer for a claim to be compensable. *City of Boulder v. Streeb,* 706 P.2d 786 (Colo. 1985).

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she suffered a compensable right shoulder injury during the course and scope of her employment with Employer on April 17, 2020. Initially, Claimant injured her right shoulder when she slipped on ice while walking up to Advanced Auto for repairs on her primary work truck. Notably, Employer provided Claimant with a fleet card to pay for minor repairs and routine maintenance on work trucks. However, prior to using the fleet card, employees were required to obtain a supervisor's permission. On April 16-17, 2020 Claimant consulted with her supervisor Ms. E[Redacted] regarding repairs on her truck. Ms. E[Redacted] noted the repair facility was located at 505 Orchid Road or about two miles from Employer's office. At about 6:30 a.m. on the April 17, 2020 Ms. E[Redacted] advised Claimant to determine whether she could take her primary truck to the auto shop to have the tires replaced. Claimant would drop the truck off at the facility and Ms. E[Redacted] would pick her up.

8. As found, after considering the snowfall and weather conditions, Ms. E[Redacted] realized that Claimant's primary truck was not safe to drive. She called Claimant and instructed her not to drive anywhere. Ms. E[Redacted] specified that she would direct another technician who lived near Claimant to stop by and jump the battery of the second truck. She specifically told Claimant not to travel to the auto shop. Ms. E[Redacted] emphasized that she clearly explained the plan and Claimant verbally agreed. In fact, in a text message to Ms. E[Redacted] time-stamped at 6:31 a.m. on April 17, 2020, Claimant stated "okay we're not going to move this truck in the snow and the other truck the battery is dead." One minute later Claimant noted "[s]o I should get another truck and then my block look like a little [Employer] LOL." Ms. E[Redacted] responded at 6:32 a.m. "call fleet please." Ms. E[Redacted]'s credible testimony and Claimant's acknowledgment that she should not move the truck in the snow reflects that Claimant was aware she should not travel to Advanced Auto for repairs. Ms. E[Redacted]'s direct instructions reveal that Claimant lacked approval for any travel with the truck on April 17, 2020.

9. As found, despite Ms. E[Redacted]'s instructions, Claimant drove her primary truck with bald tires to Advanced Auto. She then slipped and injured her right shoulder. Although Claimant possessed a fleet card for truck maintenance and repairs, Ms. E[Redacted] specifically instructed her not to move the truck because of the weather conditions. In driving the truck to Advance Auto Claimant was not performing mandatory or incidental duties of her employment. Instead, her conduct constituted such a deviation from the circumstances and conditions of her employment that she stepped aside from her job duties. Claimant's decision to drive the truck to Advanced Auto, despite Ms. E[Redacted]'s instructions, thus removed her from the employment relationship. In willfully deciding to drive to Advanced Auto on April 17, 2020, Claimant was no longer

engaged in an activity connected with her job-related functions. Claimant's conduct therefore constituted a personal deviation that did not arise within the course and scope of her employment. Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed.

ORDER

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

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

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

DATED: February 3, 2021.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-114-437-002

ISSUE

1. Whether Claimant established by a preponderance of the evidence that the right knee synovectomy, requested by authorized treating physician ("ATP") Aaron T. Baxter, M.D., is reasonable, necessary, and causally related to her admitted industrial injury of July 26, 2019.

FINDINGS OF FACT

1. Claimant is 61-years-old and works for Employer as an ultrasound technician.

2. On July 26, 2019, Claimant sustained an admitted injury to her right knee arising out of the course of her employment with Employer.

3. Claimant was seen at Rehabilitation Associates of Colorado, by Nicholas Olsen, Olsen, M.D., Franklin Shih, M.D., and later by Kristin Mason, M.D., her authorized treating physician (ATP) In September 2019, Dr. Mason referred Claimant to Aaron Baxter, M.D., for an orthopedic evaluation for her left knee. However, Claimant experienced a pulmonary embolus which delayed her ability to see Dr. Baxter at that time. Later, in March 2019, Dr. Mason again referred Claimant to Dr. Baxter and for physical therapy. Claimant's ability to undergo physical therapy was initially delayed due to COVID issues, but she was ultimately able to begin physical therapy for her knee.

4. On August 2, 2019, an MRI of Claimant's right knee was performed. The MRI was interpreted as showing a partial tear of the proximal ACL, no appreciable meniscus tear, and tricompartmental chondromalacia, with Grade 3-4 thinning and fibrillation in the lateral tibial plateau, medial patella, and central and medial trochlea. The MRI also showed "joint effusion, synovitis and joint debris without body evidence." (Ex. 5, 6).

5. On December 20, 2019, Mark Failinger, M.D., performed an independent medical examination (IME) at Respondents' request. Dr. Failinger concluded that Claimant had pre-existing chondromalacia, which was accelerated by her work injury. Dr. Failinger opined that the most reasonable initial treatment modality, that arthroscopy was not a "first line treatment and in fact does not have high probability of helping patients." He also noted that "[m]echanical symptoms can be treated with arthroscopic measures, and would be a reasonable treatment in this case should she fail all of the conservative measures and if she has mechanical symptoms of locking or catching. A loose body is present, along with some of her chondromalacia, and those may case those type of symptoms or may progress to such." (Ex. 6).

6. X-rays performed on May 14, 2020 demonstrated mild osteoarthritis within the knees, and mildly decreased joint space in the medial compartment. Kellgren-Lawrence Grading scale 2. (Ex. 1).

7. Claimant saw Dr. Baxter three times between May 14, 2020 and July 21, 2020. Dr. Baxter discussed with Claimant multiple conservative treatment options, including physical therapy, Visco injections and cortisone injections. Claimant participated in physical therapy, but elected not to undergo injections. Dr. Baxter's records do not reflect that he assigned Claimant any diagnosis. Specifically, the records state "no diagnosis found." At Claimant's July 21, 2020 visit, she reported popping in the lateral aspect of her knee with occasional pain. At the July 21, 2020 visit, Dr. Baxter discussed the possibility of arthroscopic surgery with Claimant, but did not document any explanation as to the reasons for surgery or the specific condition sought to be addressed. (Ex. 5).

8. On July 28, 2020, Dr. Baxter submitted a request for authorization for surgery to Insurer. The authorization identifies the requested surgery as "Right Knee Scope, Synovectomy." The authorization identifies a diagnosis code, without further explanation. (Ex. 5).

9. On August 2, 2020, Dr. Failinger performed a record review to address Dr. Baxter's surgical request, in which he opined that the requested knee surgery was not reasonable, and that a scope with synovectomy would not be reasonably expected to improve Claimant's condition. Dr. Failinger opined that performing a "clean up" of Claimant's cartilaginous debris is not reasonable unless there are mechanical symptoms that appear to be significantly affecting Claimant's life. (Ex. 9).

10. On August 5, 2020, Respondent (through its third-party administrator), advised Claimant that the request for authorization for surgery on her right knee was denied, based on Dr. Failinger's August 2, 2020 report. (Ex. 1).

11. Claimant testified at hearing that she experiences snapping and catching in her right knee that are associated with pain. She also testified that her right knee "gives out" at times, and that this has been consistent since the date of her injury. She testified that she has experienced benefits from physical therapy, Toradol and use of a TENS unit, and that her condition has improved, but not to the point where she is able to function normally. Claimant testified that she would like to undergo the surgery recommended by Dr. Baxter, and does not wish to undergo cortisone injections because she believes the injections to be a temporary fix. Claimant testified she understood the surgery proposed by Dr. Baxter to be one to "clean up" her knee.

12. Dr. Failinger was admitted to testify as an expert in orthopedic surgery and sports medicine. Dr. Failinger testified that Claimant has a compensable knee injury, and that treatment for her knee is reasonable and related to her injury. In Dr. Failinger's opinion, however, a right knee synovectomy is not medically probable to improve or cure Claimant's condition.

13. Dr. Failinger testified that a synovectomy is a procedure used to address pathology of the synovium. The synovium is the tissue that makes up the lining to the joint that provides lubrication. Typically, a synovectomy is indicated for synovial tumors, plica, and rheumatoid arthritis. Dr. Failinger does not believe the Claimant has any of these conditions, and that Dr. Baxter's reports did not explain the rationale for the proposed surgery. He testified that a cortisone injection or visco-supplementation recommended by Dr. Baxter would be reasonable treatment options with a better chance to improve Claimant's condition than surgery. Dr. Failinger believes that Dr. Baxter's request for a synovectomy was a poor choice of words, and that the request was likely for a chondroplasty.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence

contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

SPECIFIC MEDICAL BENEFITS AT ISSUE

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Industrial Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO, May 31, 2006). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). The existence of evidence which, if credited, might permit a contrary result affords no basis for relief on appeal. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002)." *In the Matter of the Claim of Bud Forbes, Claimant*, No. W.C. No. 4-797-103, 2011 WL 5616888, at *3 (Colo. Ind. Cl. App. Off. Nov. 7, 2011). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School District No.11*, W.C. No. 3-979-487, (ICAO, Jan. 11, 2012); *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO, Feb. 12, 2009).

Claimant has failed to establish by a preponderance of the evidence that the right knee arthroscopic synovectomy requested by Dr. Baxter is reasonable, necessary, or related to Claimant's July 26, 2019 work injury. Dr. Failinger credibly testified that the requested synovectomy is not reasonably likely to cure or relieve the effects of Claimant's injury. Neither Dr. Baxter's request for surgery nor his supporting medical records demonstrate that Claimant has a work-related diagnosis that would benefit from a synovectomy. While Dr. Failinger opined that Dr. Baxter's use of the term "synovectomy" may have been a poor choice of words, and that Dr. Baxter may have been referring to a "chondroplasty," the ALJ cannot speculate that Dr. Baxter intended to seek authorization for any procedure other than a synovectomy. Dr. Baxter requested authorization to perform a synovectomy using a scope. Neither the records nor the request for authorization indicate that a debridement or chondroplasty, or other procedure was requested.

Dr. Failinger opined that an arthroscopic "clean-up" of Claimant's knee may be appropriate if her symptoms are mechanical in nature. Claimant similarly understood the procedure Dr. Baxter requested to be a "clean up." However, the ALJ does not find this was the procedure recommended by Dr. Baxter. Consequently, the ALJ makes no findings or conclusions as to the reasonableness or necessity of such a procedure because the ALJ lacks authority to order an ATP to provide a particular form of treatment which has not been prescribed or recommended the ATP. *Torres v. City and County of Denver*, W.C. No. 4-937-329-03 (ICAO, May 15, 2018) *citing Short v. Property Management of Telluride*, W.C. No. 3-100-726 (ICAP May 4, 1995).

ORDER

It is therefore ordered that:

1. Claimant's request for authorization of a right knee synovectomy is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

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

DATED: February 16, 2021

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that the left shoulder surgery, recommended by Dr. Norman Lindsay Harris, is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted June 10, 2019 injury.

Whether the claimant has demonstrated, by a preponderance of the evidence, that magnetic resonance imaging (MRI) of the claimant's brain, as recommended by Dr. Edward Maurin, is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted June 10, 2019 injury.

FINDINGS OF FACT

1. The claimant worked for the employer as a carpenter. On June 10, 2019, the claimant and a coworker were installing a header above a door. The claimant testified that as he was lifting the header over his head, his ladder twisted. This caused the claimant's body to twist. The claimant testified that he immediately felt pain in his neck, left shoulder, left arm, the back of his head, and his face. The claimant testified that his pain was "10 out of 10".

2. Following the incident the employer sent the claimant home. However, the claimant was in such a high degree of pain, that he sought treatment at the emergency department (ED) at Grand River Medical Center. The claimant testified that while he was in the ED, he had burning pain in the top of his left shoulder and into his arm. In addition, he had extreme burning pain between his shoulder blades. The claimant also testified that while in the ED, he was given pain medication and an injection was administered into his neck.

3. The claimant further testified that since June 10, 2019, he has undergone physical therapy, massage therapy, and injections. However, none of these treatment modalities have helped the claimant's symptoms.

4. The June 10, 2019 medical record from Grand River Medical Center ED lists the claimant's complaints as left sided neck pain. On exam, it was noted that the claimant has cervical muscular tenderness into the claimant's left trapezius muscle. Examination of the claimant's extremities was noted to be normal. The claimant was diagnosed with a cervical strain and sprain. The medical record also notes that although trigger point injections were offered to the claimant, he declined those injections. The claimant was prescribed cyclobenzaprine to address muscle spasm.

5. The claimant's authorized treating provider (ATP) for this claim is Grand River Occupational Health. The claimant has been seen in that practice by Cynthia Bjerstedt, PA-C and Dr. Dustin Cole. The claimant was first seen by Ms. Bjerstedt on June 11, 2019. On that date, the claimant reported constant sharp pain and tingling in the left side of his neck. He also reported some burning on the left side of his face. Ms. Bjerstedt diagnosed a strain of the muscle, fascia and tendon of the neck. She recommended use of a muscle relaxer, ice, and heat. She also referred the claimant to physical therapy.

6. On September 5, 2019, a magnetic resonance image (MRI) of the claimant's cervical spine showed a 0.3 cm synovial cyst at the C5-C6 level, likely contacting the left C6 nerve root; cervical spondylosis with mild central canal stenosis and severe left neural foramen stenosis at the C3-C4 level; and cervical spondylosis with moderate left neural foramen stenosis at the C2-C3 level.

7. Following the MRI, Ms. Bjerstedt began to list the claimant's diagnosis as cervical radiculopathy.

8. The claimant was first seen by Dr. Cole on September 12, 2019. Dr. Cole listed the claimant's diagnoses as an acute cervical strain, cervical spondylosis, and radiculopathy. Dr. Cole opined that the claimant's injury triggered pain in the claimant's left C2-C3 and C3-C4 joints due to his advanced facet arthropathy. Dr. Cole recommended the claimant undergo injections. However, the claimant declined injections at that time. Dr. Cole referred the claimant to chiropractic treatment.

9. On October 10, 2019, the claimant returned to the ED at Grand River Medical Center and reported continued left sided neck pain, with shooting pain down his left arm. The claimant requested a "work note" because his pain was aggravated while he was at work that day.

10. On October 17, 2019, the respondents filed a General Admission of Liability (GAL) admitting for the June 10, 2019 injury.

11. On November 4, 2019, the claimant was transported to the Grand River Medical Center ED by ambulance. At that time the claimant reported ongoing left sided neck pain, with numbness in his face, left arm, and left leg. The claimant requested pain medication to address his ongoing left sided neck pain. The diagnosis was listed as chronic neck pain and the treating provider, Dr. Kenneth J. Eckstein, declined to prescribe the claimant anything "stronger than Tylenol/ibuprofen".

12. On November 18, 2019, the claimant was evaluated by Dr. Cole. The medical record of that date indicates that there was "no shoulder pain per se." the claimant described his pain as sharp, burning, dull, stabbing and aching. Concerning the shoulder, the claimant had "fully preserved active range of motion" but there was significant pain at the terminal arc of abduction and flexion. Dr. Cole did not see a need for neurosurgical evaluation but continued to recommend injection therapy.

13. Subsequently, Dr. Cole referred the claimant to Dr. Giora Hahn for epidural steroid injections. On November 26, 2019, the claimant was seen by Dr. Hahn. At that

time, Dr. Hahn recommended the claimant undergo left sided C2-C3 and C3-C4 facet injections.

14. On December 4, 2019, Dr. Mitchell Burnbaum performed nerve conduction studies related to the claimant's reported facial symptoms. Dr. Burnbaum noted that he was unable to determine the cause of these symptoms. He further noted that it was "very hard for me to understand this. He does not appear to have any problem at C2 and for him to have facial numbness from the problem in the neck, he would have to have a problem intrinsic to the spinal cord, so it does not make a lot of sense."

15. Dr. Hahn evaluated the claimant on December 13, 2019. Dr. Hahn noted that the claimant's complaints were primarily in the left axial upper neck. He further noted that the claimant had appropriate motor strength in the bilateral upper extremities. Dr. Hahn's diagnosis was cervical degenerative disc disease with facet arthropathy. Dr. Hahn suggested facet injections.

16. On December 20, 2019, the claimant told Dr. Hahn that the injections provided excellent improvement for a few hours.

17. On January 9, 2020, the claimant was seen by Dr. Cole. On that date, Dr. Cole reviewed the records from Dr. Burnbaum. Like Dr. Burnbaum, Dr. Cole remarked that the results were hard for him to understand, and that they did not "make a lot of sense." Dr. Cole opined that there was likely psychosocial overlay with some somatic symptom amplification. He did not think further facet injections, medial branch blocks, or rhizotomy were indicated. He stated he would make a referral for a surgical evaluation but was not convinced that claimant would be a surgical candidate considering "the scope of pain and ill-defined symptoms."

18. On February 4, 2020, the claimant returned to Dr. Cole. On that date, Dr. Cole administered an occipital nerve block.

19. On February 18, 2020, the claimant returned to Dr. Hahn and reported no significant improvement from the nerve block. At that time, Dr. Hahn opined that the claimant's symptoms were neuropathic and further injections would not be beneficial.

20. On March 5, 2020, Ms. Bjerstedt noted that the claimant began reporting left shoulder issues in October.

21. On April 8, 2020, the claimant was seen by Dr. Norman Lindsay Harris. On that date, Dr. Harris opined that the claimant's left shoulder symptoms were consistent with a rotator cuff tear. He also noted the "chronicity" of the claimant's left shoulder symptoms. Dr. Harris noted that dependent upon imaging findings he would recommend either injections or surgery. Dr. Harris ordered an MRI of the claimant's left shoulder for this purpose.

22. On April 15, 2020, an MRI of the claimant's left shoulder showed a 7 mm articular tear of the distal anterior supraspinatus footplate; a ⅓ cm articular tear of the

distal anterior infraspinatus fibers; mild subscapularis tendinosis; and mild acromioclavicular joint osteoarthritis.

23. On April 22, 2020, the claimant returned to Dr. Harris to address the MRI findings. Based upon the MRI findings, Dr. Harris recommended the claimant undergo arthroscopic left shoulder surgery for a possible biceps tenodesis and possible rotator cuff repair.

24. On May 1, 2020, Dr. Jon Erickson reviewed the request for left shoulder surgery. Dr. Erickson identified the requested procedure as left shoulder arthroscopy with possible rotator cuff repair, and a left biceps tenodesis. Dr. Harris recommended denial of the requested surgery. Dr. Erickson noted that the claimant did not begin to report left shoulder symptoms for "a significant number of months". Dr. Erickson also noted that the MRI of the claimant's left shoulder does not clearly indicate a surgical lesion. Therefore, he also recommended "denial of any claim for a work-related left shoulder problem."

25. The respondents denied authorization for the requested left shoulder surgery.

26. On May 6, 2020, the claimant was seen by neurosurgeon, Dr. Edward Maurin. Dr. Maurin reviewed the cervical spine MRI and noted that the MRI showed congenital central spinal stenosis at the C3-C4 level with severe foraminal stenosis associated with a large facet complex at the C4-C5 on the left. Dr. Maurin recommended the claimant undergo a decompression and fusion at C2-3-4. Dr. Maurin opined that there was no anatomical connection between the claimant's spine and his symptoms of facial numbness. As a result, Dr. Maurin recommended the claimant undergo a brain MRI before pursuing cervical surgery.

27. On June 2, 2020, Dr. Albert Hattem reviewed the request for a brain MRI. Dr. Hattem noted that Dr. Maurin requested the MRI to evaluate the claimant's facial numbness. Dr. Hattem further noted that while a brain MRI is reasonable to evaluate facial numbness, that symptom is not related to the claimant's June 10, 2019 neck strain. Therefore, Dr. Hattem recommended denial of the brain MRI.

28. The respondents denied authorization for the requested brain MRI.

29. On September 22, 2019, the claimant attended an independent medical examination (IME) with Dr. J. Raschbacher. In connection with the IME, Dr. Raschbacher reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. Dr. Raschbacher opined that as a result of the June 10, 2019 incident at work, the claimant suffered a cervical strain injury. That cervical strain has resolved and the claimant reached maximum medical improvement (MMI) on November 18, 2019. Dr. Raschbacher further opined that the claimant's current complaints are not related to the work injury. In addition, it is the opinion of Dr. Rashbacher that the claimant did not injure his left shoulder on June 10, 2019. In support of that opinion, Dr. Raschbacher noted that the claimant had full range of motion in his left shoulder on November 18, 2019 as well as full range of motion at the IME.

30. Dr. Raschbacher’s testimony by deposition was consistent with his written report. Dr. Raschbacher testified that it is his opinion that the claimant’s left shoulder was not injured on June 10, 2019, nor was any preexisting left shoulder condition aggravated on that date. Dr. Raschbacher also testified that at the IME, the claimant’s lack of range of motion in his left shoulder “didn’t make a great deal of sense”. With regard to the claimant’s complaints of face numbness and burning, Dr. Raschbacher testified that there is no indication on the imaging studies to explain those symptoms.

31. The claimant testified that his left shoulder pain has not gone away, and has actually gotten worse. He described it as feeling like his shoulder is tearing, with burning, and throbbing. The claimant testified that he had facial numbness on the date of the injury and that numbness continues.

32. Mr. Henrickon is Director of Operations with the employer. One of his job duties involves investigating work related injuries. In that capacity, Mr. Henrickon spoke with the claimant about the June 10, 2019 injury on either June 11 or June 12, 2019. Mr. Henrickon understood that the claimant injured his neck. He was not made aware that the claimant was claiming an injury to his left shoulder.

33. The ALJ credits the medical records and the opinions of Dr. Raschbacher and finds that the claimant has failed to demonstrate that it is more likely than not that his left shoulder was injured June 10, 2019 and no preexisting left shoulder condition aggravated on that date. Therefore, the ALJ also finds that the claimant has failed to demonstrate that it is more likely than not that left shoulder surgery, (as recommended by Dr. Harris), is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted June 10, 2019 injury.

34. The ALJ credits the medical records and the opinions of Dr. Raschbacher and finds that the claimant has failed to demonstrate that it is more likely than not that a brain MRI, (as recommended by Dr. Maurin), is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted June 10, 2019 injury.

CONCLUSIONS OF LAW

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

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

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

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

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

6. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that left shoulder surgery, (as recommended by Dr. Harris), is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted June 10, 2019 injury. As found, the medical records and the opinions of Dr. Raschbacher are credible and persuasive.

7. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, brain MRI, (as recommended by Dr. Maurin), is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted June 10, 2019 injury. As found, the medical records and the opinions of Dr. Raschbacher are credible and persuasive.

ORDER

It is therefore ordered:

1. The claimant's request for left shoulder surgery, (as recommended by Dr. Harris), is denied and dismissed.

2. The claimant's request for a brain MRI, (as recommended by Dr. Maurin), is denied and dismissed.

3. All matters not determined here are reserved for future determination.

Dated this 17th day of February 2021.

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

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For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-130-933-003

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that penalties should be assessed against the respondents pursuant to Sections 8-43-304 and 8-43-305, C.R.S. for the respondents' alleged failure to comply with ALJ Mottram's June 24, 2020 order.

FINDINGS OF FACT

1. On October 2, 2019, the claimant suffered an injury while working for the employer. The claim was initially denied by the respondents and the parties went to hearing before ALJ Keith Mottram on June 11, 2020. The issues for hearing were: 1) whether the claimant sustained a compensable injury; 2) whether medical treatment the claimant had received was reasonable and necessary to relieve him from the effects of the injury; and 3) whether the claimant was entitled to temporary total disability (TTD) benefits.

2. As of the date of the hearing, no provider had recommended cervical spine surgery.

3. On June 24, 2020, ALJ Mottram issued Findings of Fact, Conclusions of Law and Order. In that order, ALJ Mottram found that the claimant had suffered a compensable injury while employed with the employer. ALJ Mottram also found that the claimant's injury "includes both his left shoulder and cervical spine" and "the medical care **provided** by [the claimant's] treating physicians, including Dr. Spence, Dr. Liotta, Dr. Miller and Dr. Triehaft is reasonable and necessary to cure and relieve Claimant from the effects of his work injury." (*emphasis added*).

4. ALJ Mottram's order also stated that the claimant had proven, by a preponderance of the evidence, that "medical treatment **provided** by his treating physicians in this case including Dr. Spense, Dr. Liotta, Dr. Miller and Dr. Trifehaft was reasonable and necessary to cure and relieve the claimant from the effects of the work injury." (*emphasis added*).

5. Finally, ALJ Mottram ordered, *inter alia*, that "[r]espondents shall pay for the reasonable medical treatment necessary to cure and relieve claimant from the effects of the work injury." The order did not award any specific medical treatment or procedure.

6. As of the date of ALJ Mottram's order, no provider had recommended cervical spine surgery.

7. ALJ Mottram's June 24, 2020 order was not appealed.

8. On October 2, 2020, the claimant was seen by Dr. Ceola. At that time, the claimant reported continued neck pain that radiated into his left arm. Dr. Ceola recommended the claimant undergo an anterior cervical discectomy, pending an updated cervical spine MRI.

9. At the request of the respondents, Dr. Michael Janssen reviewed the requested cervical spine surgery. In his report, Dr. Janssen opined that the cervical spine MRI taken on November 1, 2019 showed a long standing and preexisting C5-C6 osteophyte complex with effacement of the spinal canal that level. Dr. Janseen opined that although the claimant may be a surgical candidate, the need for the recommended surgery was not related to the October 2, 2019 work injury. When compared to an MRI done on October 15, 2020, Dr. Janssen noted that the condition of the claimant's cervical spine was non-traumatic. Dr. Janssen recommended denial of the requested surgery.

10. Based upon the opinions of Dr. Janssen, the respondents denied the requested cervical spine surgery.

11. On October 27, 2020, the claimant filed an Application for Hearing. The issues endorsed for hearing were medical benefits, reasonable and necessary, and penalties alleging a violation of ALJ Mottram's June 24, 2020 order.

12. Subsequently, the recommended cervical spine surgery was authorized by the respondents. The claimant underwent that surgery on January 6, 2021.

13. The claimant asserts that ALJ Mottram's June 24, 2020 order, provides that the respondents are liable for any and all treatment of the claimant's cervical spine. As the ALJ understands the claimant's assertion, because ALJ Mottram found that the claimant suffered an injury to his cervical spine on October 2, 2019, all treatment to that body part shall be paid for by the respondents. The claimant further asserts that the respondents' initial denial of the cervical surgery constitutes a violation of ALJ Mottram's order. The ALJ is not persuaded by the claimant's assertions.

14. The ALJ notes that ALJ Mottram's June 24, 2020 order found that the respondents' were responsible for treatment provided to the claimant by Drs. Spence, Liotta, Miller, and Treihaft. The use of the past tense "provided" clearly indicates that the order addressed treatment provided prior to the date of the order. The ALJ does not interpret the language of ALJ Mottram's order to mean any future treatment of the claimant's cervical spine.

15. As further addressed below, the ALJ finds that the claimant has not demonstrated that it is more likely than not that the respondents violated ALJ Mottram's June 24, 2020 order. Therefore, the claimant has failed to demonstrate that an assessment of penalties against the respondents would be appropriate.

CONCLUSIONS OF LAW

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

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

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

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

4. Before penalties may be assessed, the ALJ must first determine whether a party has violated any provision of the Workers' Compensation Act or an order. If the ALJ finds such a violation, penalties may be imposed if it is also found that the employer's actions were objectively unreasonable. Section 8-43-304, C.R.S*. City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003); *Pioneers Hospital of Rio Blanco County v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005); *Jimenez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003). The "objective standard" is measured by reasonableness of the insurer's action and does not require knowledge that the conduct was unreasonable." *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office*, 907 P.2d 676 (Colo. App. 1995).

5. An order is defined as including "any decision, finding and award, direction, rule, regulation, or other determination arrived at by the director or an administrative law judge." Section 8-40-201(15), C.R.S.

6. In this case, the claimant seeks penalties for an alleged violation of ALJ Mottram's June 24, 2020 order. Specifically, the claimant asserts that the respondents violated the order with the denial of the cervical spine surgery (as recommended by Dr. Ceola on October 2, 2020).

7. The ALJ recognizes that ALJ Mottram's June 24, 2020 order provides for a general award of medical benefits. However, no specific medical treatment was awarded by that order. In addition, at the time of the June 11, 2020 hearing and ALJ Mottram's June 24, 2020 order, there had been no recommendation for a cervical spine

surgery. The ALJ finds that ALJ Mottram's June 24, 2020 order did not contemplate future recommendations for medical treatment.

8. Although a particular body part is considered "covered" under a claim, that does not mean that all future treatment of that body part is the responsibility of the respondents. In a workers' compensation case, any requested medical treatment must be deemed reasonable, necessary, and related to the occupational injury. The respondents do not waive the ability to contest the reasonableness, necessity, or relatedness of a specific treatment simply because a body part is deemed compensable.

9. This issue is addressed in *Hardesty v. FCI Constructors, Inc.*, WC No. 4-611-326 (ICAO July 7, 2005). In that case, the ICAO noted that "regardless of the filing of a [General Admission of Liability] for medical benefits or an order containing a general award for medical benefits, insurers retain the right to dispute whether the need for medical treatment was caused by the compensable injury." The ICAO also found that "the mere admission that an injury occurred and treatment is needed cannot be construed as a concession that all conditions and treatments which occur after the injury were caused by the injury." *Id*.

10. With regard to penalties, the ICAO has rejected the assertion that an insurer violates an order by contesting the reasonableness, necessity, or relatedness of medical treatment when that treatment was not specifically provided for by a prior order, even when that order provides for general medical treatment, or orders other specific medical treatment. *Young v. Bobby Brown Bail Bonds, Inc.*, WC No. 4-632-376 (ICAO April 7, 2020); *Calvert v. Roadway Express, Inc.*, WC 4-355-715 (ICAO February 6, 2003).

11. As found, the claimant has failed to demonstrate by a preponderance of the evidence that the respondents violated ALJ Mottram's June 24, 2020 order. As found, the June 24, 2020 order did not address nor contemplate cervical spine surgery. Therefore, the respondents' initial denial of that surgery was not in violation of ALJ Mottram's order. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that penalties are appropriate in this matter.

ORDER

It is therefore ordered that the claimant's request for penalties related to an alleged violation of ALJ Mottram's June 24, 2020 order is denied and dismissed.

Dated this 17th day of February 2021.

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

Grand Junction, Colorado 81501

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In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

ISSUES

- Whether Claimant has demonstrated by a preponderance of the evidence that she sustained a compensable injury arising out of and in the course of her employment with employer?

- If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that she is entitled to an award of temporary total disability ("TTD") benefits for the period of March 9, 2019 through August 14, 2019?

- The parties stipulated that if the claim is found compensable, Dr. Carrie Burns of Concentra Denver would be the authorized treating physician ("ATP") for Claimant's injury.

FINDINGS OF FACT

1. Claimant is employed as a Warehouse Associate with Employer. Claimant testified at hearing that on March 8, 2019 she was performing her regular job with Employer when she was lifting a tote filled with intravenous ("IV") water and felt pain on her upper back on the right side. Claimant testified that the injury occurred 1-2 hours after she started her shift.

2. Claimant testified that she reported her injury to the Coordinator of the Floor, "J[Redacted]", and then went to the office and reported the injury to her supervisor, Mr. M[Redacted]. Claimant testified she informed Mr. M[Redacted] that she hurt her neck and back and pointed to the right side of her shoulder and back. Claimant was referred to Skyridge Emergency Room ("ER") for medical treatment.

3. According to the medical records from Skyridge Emergency Room, claimant reported to the ER with right upper posterior shoulder pain which started a year ago and has been intermittent and was worse again today. Claimant reported she worked for employer where she lifts a lot of heavy objects and wraps large packages, mostly using her right arm. Claimant reported that whenever she starts to wrap packages, she starts to have pain in that area. Claimant denied any anterior shoulder pain, weakness or numbness. Claimant underwent an x-rays of her thoracic spine, which were negative for any acute abnormality.

4. Claimant has a prior history of a work related injury with employer from December 19, 2017. In relation to this injury, claimant underwent a magnetic resonance image ("MRI") of her cervical spine on May 10, 2018 which demonstrated minimal cervical spondylosis, without evidence of neural impingement. Claimant was placed at

maximum medical improvement ("MMI") for the prior injury on August 1, 2018 with no restrictions or permanent impairment.

5. After being placed at MMI, Claimant sought additional treatment with physicians' assistant ("PA") Bodkin on November 21, 2018. Claimant reported complaints of pain in her right shoulder blade area which she reported developed when she wraps plastic around the orders at work. PA Bodkin recommended a thoracic MRI and follow up with physiatry.

6. Claimant testified at hearing that in August 2018 she still felt pain when she was wrapping pallets at work. Claimant testified that between August 2018 and March 2019 she did not have problems with her upper back and neck, but would follow up with Concentra for any problems she did have.

7. Claimant returned to PA Bodkin on March 12, 2018 for a one-time evaluation related to her prior injury. Claimant reported to PA Bodkin that she was working on March 6, 2019 and had to wrap pallets when she felt a pulling sensation in her right upper thoracic back. Claimant reported she continued to work until Friday when she lifted heavy product and had a sharp stabbing pain in her right upper back. Claimant reported she was having pain from her right upper back in to her trapezoid, shoulder and right neck. Claimant reported she was having trouble moving her neck.

8. Claimant was diagnosed with a sprain of her right shoulder and muscle spasm. PA Bodkin recommended reopening her prior workers compensation case with restrictions that included no lifting greater than 10 pounds and no overhead lifting. Claimant was referred for massage therapy.

9. Claimant was examined by Dr. Burns on March 18, 2019. Dr. Burns noted Claimant was alleging a new injury to her right upper back and shoulder after lifting a tote. Dr. Burns noted that Claimant had been seen two times for "one time evaluations" and her case had not been reopened. Dr. Burns diagnosed Claimant with a sprain of the right shoulder, and trapezius muscle spasm. Dr. Burns referred Claimant for physical therapy.

10. Video surveillance of Claimant at work on March 8, 2019 was entered into evidence at hearing. The video surveillance does not show any obvious injury to Claimant. The surveillance shows Claimant working in a normal manner and does not demonstrate Claimant experiencing an onset of injury during her shift on March 8, 2019.

11. Dr. Burns issued an addendum on March 25, 2019 after reviewing additional records and the surveillance video. Dr. Burns opined in her March 25, 2019 report that there was "no evidence of injury on March 8th video". Dr. Burns further opined that the appeared to be secondary gains from her injury report. Dr. Burns opined that Claimant's current condition was not compensable.

12. D[Redacted], the environmental health and safety supervisor for Employer, testified by deposition in this matter. Mr. D[Redacted] testified that after

Claimant reported an injury on March 8, 2019, he downloaded and reviewed the video surveillance that was entered into evidence in this case.

13. Dr. Burns testified by deposition in this matter on September 25, 2020. Dr. Burns testified in her deposition that she had evaluated Claimant on March 8, 2019. Dr. Burns testified that Claimant reported having suffered an acute injury at work when she was lifting a tote and had hurt her upper right back and shoulder. Dr. Burns testified that Claimant had a prior injury that Dr. Burns described as minor and noted that it took months for Claimant to recover from the injury. Dr. Burns opined that her physical examination of Claimant was very difficult because Claimant did not want to be touched and did not want to move. Dr. Burns opined that Claimant's effort was questionable.

14. Dr. Burns testified that after reviewing the video surveillance from Employer, she did not see any evidence of an injury occurring at the time Claimant reported she was injured in the way Claimant described the injury. Dr. Burns testified that if an injury would have occurred, she would have expected to see Claimant stop what she was doing or change her body mechanics when she experienced the onset of pain.

15. The ALJ credits the surveillance that was entered into evidence along with the opinion expressed by Dr. Burns over Claimant's testimony at hearing and finds that Claimant has failed to demonstrate that it is more probable than not that she sustained a compensable injury arising out of and in the course of her employment with Employer on March 8, 2019.

16. The ALJ notes that Dr. Burns' testimony is consistent with the video surveillance and the medical records entered into evidence in this matter. Based on the the finding that the testimony of Dr. Burns regarding the Claimant's injury is found to be credible, the ALJ finds that Claimant has failed to meet her burden of proof in this matter.

CONCLUSIONS OF LAW

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

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to

a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2017).

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

4. There is no requirement that a claimant present medical evidence to prove the cause of an injury. *See Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997); *Apache Corp. v. Industrial Commission*, 717 P.2d 1000 (Colo. App. 1986). Similarly, the claimant is not required to prove the cause of his injuries by "medical certainty." *Industrial Commission v. Riley*, 165 Colo. 586, 441 P.2d 3 (1968). To the contrary, the claimant's testimony, if credited, may be sufficient to establish the requisite nexus between an industrial injury and the disability for which benefits are sought. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983). However, to the extent expert medical testimony is presented, it is the ALJ's sole prerogative to assess its weight and sufficiency. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990).

5. As found, the surveillance entered into evidence at hearing along with the testimony of Dr. Burns' are credited over the testimony of Claimant at hearing. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she sustained a compensable injury arising out of and in the course of her employment with Employer.

ORDER

It is therefore ordered:

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

Dated February 17, 2021

Keith E. Mottram

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

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ISSUES

I. Whether Claimant is entitled to ongoing temporary total disability payments.

II. Whether Claimant is permitted to designate David Yamamoto, M.D., as the authorized treating physician ("ATP") under C.R.S. 8-43-404(5)(a)(I)(A).

STIPULATIONS

I. Claimant sustained a compensable work injury on September 16, 2019.

II. The medical treatment Claimant received from September 16, 2019 to September 20, 2019, is reasonable, necessary, and related medical treatment.

FINDINGS OF FACT

1. Claimant is a 33-year-old male who worked for Employer as a swim instructor. His job duties included teaching swim lessons.

2. While teaching a swim lesson on September 16, 2019, Claimant passed out and nearly drowned in the swimming pool. Claimant's co-workers pulled him from the pool and performed CPR. Claimant was then intubated by emergency medical technicians and transported to Swedish Medical Center, where he was admitted for suspected seizure and near-drowning.

3. Claimant received treatment at Swedish Medical Center from September 16, 2019 to September 20, 2019. The medical records note a history of alcohol disorder, alcohol pancreatitis, and a seizure two years prior. Claimant underwent a brain MRI and head and neck CT, which were negative for acute abnormalities. Claimant also underwent an abdominal ultrasound which was normal with the exception of liver disease. Claimant was extubated by September 18, 2019. The treating physicians placed Claimant on Keppra, an anti-epileptic medication, and monitored Claimant for seizure activity. Providers noted that the cause of Claimant's suspected seizure was alcohol abuse or polydipsia. Treating physicians noted Claimant's seizure could have occurred from alcohol withdrawal. It was further noted that there was no evidence of significant water aspiration or respiratory failure. Claimant was discharged from Swedish Medical Center on September 20, 2019. Claimant reported feeling well on the day of discharge. No complaints or findings of issues with balance, headaches or memory loss were noted. It was recommended Claimant continue on anti-epileptic medication for at least a few months.

4. Upon his discharge, attending physician, neurologist Emily Lampe, M.D., restricted Claimant from getting into swimming pools. She released Claimant to resume light duty work outside of the pool beginning September 30, 2019. Claimant was to follow-up with neurology in three months.

5. Claimant testified that in the days following his discharge from Swedish Medical Center he had communications with Employer regarding his physical condition and a potential return to modified employment. Claimant testified that Employer verbally offered him work performing cleaning and front desk tasks. Claimant stated he was having concerns returning to work due to balance and memory issues, so he was unable to leave the house and "the offer kind of seemed like it expired." Claimant testified that the topic of him returning to work was never revisited after he expressed his concerns to Employer. A written offer of modified employment was never tendered to Claimant.

6. Claimant testified that, subsequent to the September 16, 2019 work injury, he was able to participate in acting and singing activities three to five days a week at local theater companies. He participated in theater activities until the theaters closed due to COVID-19.

7. Claimant has not returned to work since September 16, 2019.

8. Claimant was not tendered a designated provider list as required by C.R.S. 8-43-404(5)(a)(I)(A). Claimant testified he did not receive further medical treatment within the workers' compensation system because Respondents denied liability for his claim. Claimant testified he has not received any medical treatment to address the effects of the September 16, 2019 work injury since his discharge from Swedish Medical Center. Claimant testified he does not have health insurance and was not able to receive treatment outside the workers' compensation system due to his inability to pay. Claimant testified he was unable to undergo the three-month neurology follow-up recommended by Dr. Lampe for the same reasons. No ATP has placed Claimant at maximum medical improvement ("MMI").

9. On December 4, 2019, Respondents filed a Notice of Contest and formally denied liability for Claimant's September 16, 2019 work injury.

10. On May 26, 2020, Claimant experienced another seizure while at home. When emergency medical services arrived, Claimant was sitting up and conversing, but exhibited some confusion. Claimant again underwent evaluation at Swedish Medical Center. Claimant reported a recent increase in habitual alcohol use due to the COVID-19 pandemic, but denied having any drinks in the past two days. Claimant reported having a seizure in September 2019 when he tried to cut down on his alcohol consumption. Abram Albizo, M.D. opined that Claimant's recent seizure was also likely due to alcohol withdrawal. Dr. Albizo decided to defer anti-epileptic therapy at the time, as the September 2019 and May 2020 seizures occurred in the setting of potential alcohol withdrawal. He recommended Claimant undergo alcohol counseling and alcohol cessation.

11. Claimant met with case worker Isable Hughes on May 27, 2020 to discuss his drinking. Ms. Hughes recommended Claimant seek treatment with a psychiatrist with antidepressants, but noted he was at a high risk for readmission.

12. A May 28, 2020 brain MRI was normal.

13. On July 7 2020, Kathy McCranie, M.D. performed an independent medical examination ("IME") at the request of Respondents. Claimant described his symptoms as occasional unsteadiness, headaches and memory issues. Claimant reported his history of the initial seizure on September 16, 2019 and a subsequent seizure in May 2020, but stated that the May 2020 seizure was due to low electrolytes and potassium. Claimant reported that he is no longer able to sing, act and run due to his work injury. Physical examination, including a neurological exam, was normal. Dr. McCranie assessed Claimant with near-drowning secondary to a non-work related seizure at work. Dr. McCranie diagnosed Claimant with a history of alcoholism and opined that the most likely cause of his seizure was either alcohol withdrawal or electrolyte imbalance. She opined that Claimant's seizure on September 16, 2019 was not causally related to his employment with Employer. She noted, however, that the result of the seizure, near-drowning, was a work-related result of Claimant's non-work-related condition.

14. Dr. McCranie opined that Claimant likely reached MMI by November 1, 2019, with 5% impairment per the AMA Guides, either under page 105, Category 1 for disturbances of complex integrated cerebral function, or for headaches under page 106, Category 1 for episodic neurologic disorders. She reiterated that Claimant's seizures are non-work-related and would not be rated. Dr. McCranie opined that Claimant may require restrictions for his non-work-related seizures, but does not require restrictions or further treatment for the work injury.

15. Respondent filed a General Admission of Liability on September 16, 2020.

16. Dr. McCranie testified at hearing on behalf of Respondents. She testified consistent with her IME report. Dr. McCranie testified that the only restriction Claimant assigned to Claimant was to not get in a pool, and that this restriction was due to Claimant's non-industrial seizure condition and not any effects of the near-drowning work injury Dr. McCranie opined that while Claimant could experience some lingering issues with headaches or memory issues from the near-drowning work injury, he was not unable to work due to memory or balance issues. She testified that Claimant's seizure condition limited him from working. Dr. McCranie further opined that no sequela from his work injury would have affected or inhibited his ability to lift.

17. Claimant testified at hearing that he has lingering effects from his near-drowning work injury consisting of issues with balance, vocal cords, and memory. He testified he is able to do activities of daily living, including chores around his house.

18. The ALJ finds the opinion of Dr. McCranie, as supported by the medical records, more credible and persuasive than Claimant's testimony.

19. Claimant failed to prove by a preponderance of the evidence he is entitled to TTD benefits from September 17, 2019 and ongoing.

20. The right to select the ATP has passed to Claimant. Claimant has selected David Yamamoto, M.D. as his ATP.

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

CONCLUSIONS OF LAW

Generally

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

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

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

Authorized Treating Physician

Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires that respondents must provide injured workers with a list of at least four designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. Section 8-43-404(5)(a)(I)(A), C.R.S. states that, if the employer or insurer fails to provide an injured worker with a list of at least four physicians or corporate medical providers, "the employee shall have the right to select a physician." W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, "the employer shall provide the injured worker with a written list of designated providers." W.C.R.P. Rule 8-2(E) additionally provides that the remedy for failure to comply with the preceding requirement is that "the injured worker may select an authorized treating physician of the worker's choosing." An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. industrial Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006).

In a medical emergency a claimant need not seek authorization from her employer or insurer before seeking medical treatment from an unauthorized medical provider. *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777, 781 (Colo. App. 1990). A medical emergency affords an injured worker the right to obtain immediate treatment without the delay of notifying the employer to obtain a referral or approval. *In Re Gant*, W.C. No. 4-586-030 (ICAP, Sept. 17, 2004). Because there is no precise legal test for determining the existence of a medical emergency, the issue is dependent on the particular facts and circumstances of the claim. *In re Timko,* W.C. No. 3-969-031 (ICAP, June 29, 2005). Once the emergency is over the employer retains the right to designate the first "non-emergency" physician. *Bunch v. Indus. Claim Appeals Office of State of Colorado*, 148 P.3d 381, 384 (Colo. App. 2006); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990).

Claimant underwent emergent medical care at Swedish Medical Center from September 16, 2019 to September 20, 2019. Subsequently, Claimant has not received further evaluation or treatment related to the near-drowning work injury. Respondents, who were aware of the work injury, did not provide Claimant a designated provider list as required by Section 8-43-404(5)(a)(I)(A), C.R.S., and WCRP 8-2 and 8-3. Accordingly, the right to select the ATP has passed to Claimant to select a provider of his choosing, David Yamamoto, M.D.

Temporary Total Disability Benefits

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

Claimant contends that the near-drowning work injury caused a disability resulting in medical incapacity evidenced by Claimant's loss and restriction of neurological body function. Claimant points to the restrictions assigned by Dr. Lampe, restricting Claimant from work for two weeks and releasing Claimant to light duty work as of September 30, 2019.

While Claimant was placed on work restrictions subsequent to the work injury, there is insufficient evidence that the work injury, near-drowning, resulted in a disability causing Claimant to leave work and sustain lost wages. Claimant was hospitalized following the near-drowning incident from September 16, 2019 to September 20, 2019 for monitoring of neurological and seizure activity. Claimant was extubated by September 18, 2019 with no evidence of significant water aspiration or respiratory failure. MRI and CT scans were negative. Claimant reported feeling well at the time of discharge, with no complaints or findings of balance, headache or memory issues. Claimant was to continue on anti-epileptic medication and attend a neurological follow-up. Physicians who evaluated and treated Claimant for the September 16, 2019 incident and the May 28, 2020 incident, along with Dr. McCranie, have all opined that the likely cause of Claimant's seizures is alcohol withdrawal.

Dr. McCranie credibly opined that the restrictions and any inability to resume prior work were due to the non-work-related seizure disorder and not the effects of any disability caused by the near-drowning incident. Dr. McCranie further opined that no sequela from his work injury would have affected or inhibited his ability to lift. Moreover, although Claimant alleges that he unable to work due to headaches, balance and memory issues, Claimant conceded that, subsequent to the work injury, he was participating in acting and singing activities three to five days a week at local theater companies. There is insufficient credible and persuasive evidence that any continuing issues related to the near-drowning incident, such as Claimant's purported headaches, memory issues and balance issues, resulted in Claimant's inability to work and lost wages. The preponderant evidence establishes Claimant was unable to resume his regular work due to the inherent risk Claimant's personal seizure condition presented in working in and around swimming pools. As such, Claimant failed to prove it is more likely than not he is entitled to TTD benefits.

ORDER

1. Claimant suffered a compensable injury on September 16, 2019.

2. The medical treatment Claimant underwent from September 16, 2019 through September 20, 2019 was reasonable and necessary medical treatment to cure and relieve the effects of his compensable work injury.
3. The right to select an ATP passed to Claimant. Claimant has selected David Yamamoto, M.D. as his ATP.

4. Claimant is not entitled to TTD benefits from September 17, 2019 and ongoing.

5. All matters not determined herein are reserved for future determination.

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

DATED: February 19, 2021

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
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ISSUES

- Should Respondents be penalized under § 8-43-304(1) for failure to timely to exchange the complete claim file by November 19, 2019?

FINDINGS OF FACT

1. Claimant suffered severe injuries in a motor vehicle accident on February 13, 2002. Respondents admitted liability for permanent total disability ("PTD") benefits commencing February 14, 2003.

2. Claimant was awarded Social Security Disability Insurance ("SSDI") benefits effective August 2003. In June 2004, Insurer requested Claimant provide information regarding his SSDI award. Claimant never provided the requested SSDI benefit information and Insurer neglected to follow up on the matter. Insurer paid indemnity and medical benefits and there is no persuasive evidence any disputed issues arose for many years.

3. In February 2016, Claimant's claim was assigned to Scott D[Redacted], a senior claims examiner with Insurer. During a routine file review in Fall 2019, Mr. D[Redacted] realized Insurer had no information in its file regarding Claimant's SSDI benefits, and consequently had never taken the statutory offset. Mr. D[Redacted] wrote to Claimant and requested he provide documentation regarding his SSDI award.

4. Claimant was unrepresented during most of his claim but retained counsel in response to Mr. D[Redacted]'s inquiry. On October 21, 2019, Claimant's counsel requested a copy of Insurer's claim file under § 8-43-203(4). Claimant's counsel subsequently agreed to an extension of time to November 19, 2019 for exchange of the claim file.

5. Insurer maintains its files in a computerized case management system that contains claim notes and documents attached in electronic format. After receiving the request for the claim file, Mr. D[Redacted] instructed Insurer's operations personnel to perform a "print all" of the electronic file and send it to Respondents' counsel for review and exchange.

6. On November 15, 2019, Respondents' counsel sent the claim file to Claimant's counsel with a privilege log. The initial exchange contained 1,095 pages. At that time, Mr. D[Redacted] believed the entire file had been exchanged.

7. Respondents filed an Application for Hearing on April 28, 2020 seeking a determination regarding the SSDI offset and recovery of the overpayment. The hearing was set for August 12, 2020.

8. Some time later, Claimant's counsel determined he did not have the complete file and requested a supplemental exchange from Respondents.

9. Mr. D[Redacted] researched the matter and discovered Insurer had other documents regarding the claim archived in paper format at an off-site storage facility. Insurer had transitioned from paper to electronic files in the mid-2000s. At the time of the transition, some documents were scanned and added to the electronic file and the remaining paper documents were sent to storage. Mr. D[Redacted] requested the paper documents be retrieved, copied, and sent to Respondents' counsel to exchange with Claimant's counsel. On an unknown date, Respondents' counsel advised Claimant's counsel Insurer had located additional documents and was preparing them for exchange.

10. Claimant died on July 11, 2020. Claimant had no dependents at the time of his death.

11. Despite the fact he no longer had a client, Claimant's counsel filed an Application for Hearing on August 5, 2020 endorsing PTD benefits, death benefits, and penalties. The basis for the penalty claim was described as:

> Respondent/insurer was asked by letter dated 10/21/19 to produce a complete copy of the claim file pursuant to § 8-43-203(4) and WCRP 9-1(F) and on 11/15/19, Respondents' counsel produced a copy of approximately 1000 pages were produced, however, approximately 10,000 pages of the actual claims file, including the daily activity log, and correspondence between the insurer and the Claimant, were never produced and have not been produced to date.

12. On August 6, 2020, Respondents' counsel exchanged 6,563 pages that had been retrieved from the archived paper file.

13. On August 12, 2020, the undersigned ALJ convened a hearing regarding Respondents' April 28, 2020 application. After learning Claimant had died, the ALJ determined Claimant's estate was a necessary party and had to be joined before the overpayment issue could proceed. Accordingly, the ALJ continued the hearing so the estate could be joined and given proper notice of the proceedings. Claimant's counsel did not know who would be the estate's administrator but agreed to contact Claimant's son, Kennith S[Redacted], to investigate the issue. At that time, Claimant's August 5, 2020 application was pending and had not been set. To conserve judicial resources, the ALJ consolidated the August 5 application with Respondents' April 28 application for hearing.

14. Mr. D[Redacted] attended the August 12, 2020 hearing, although no testimony was taken. After listening to statements of Claimant's counsel regarding the claim file, Mr. D[Redacted] requested his operations team perform a "reprint" of the claim file to make sure nothing had been missed. Mr. D[Redacted] explained occasionally there are "glitches" in the system and attachments are not always copied completely.

15. The requested “reprint” produced tens of thousands of additional documents, the vast majority of which were duplicates. Mr. D[Redacted] forwarded the additional documents to Respondents’ counsel for review and exchange with Claimant.

16. The ALJ convened a telephonic status conference regarding this matter on August 21, 2020. In attendance were Respondents’ counsel, Claimant’s counsel, and Mr. S[Redacted]. Mr. S[Redacted] explained he was seeking appointment as the estate administrator from the Probate Court in Nevada. He was waiting for a copy of the death certificate to submit with the application. Although probate was not formally required due to the small size of Claimant’s estate, Mr. S[Redacted] wanted to “cover all the bases.” Mr. S[Redacted] had not yet decided whether to retain counsel but agreed to participate in the rescheduled hearing.

17. During the status conference, Respondents’ counsel advised she had received over 85,000 additional pages of documents from Insurer, most of which appeared to be duplicates. To avoid conducting a “data dump” on Claimant’s counsel, several associate attorneys from her firm had been assigned to cull the duplicates. The associates started reviewing the documents immediately after receipt, and Respondents’ counsel expected the deduplication process and preparation of the privilege log to be complete within a week. Claimant’s counsel did not object to the ongoing process outlined by Respondents’ counsel or request he be provided with 85,000 pages of mostly duplicate materials.

18. Consistent with the procedure discussed at the status conference, Respondents’ counsel sent Claimant’s counsel an additional 8,923 pages of documents on August 26, 2020. This final exchange included everything that had not already been provided except duplicates.

19. At hearing, Mr. S[Redacted] testified had no formal appointment from any probate court as the administrator of Claimant’s estate. Mr. S[Redacted] testified he retained Mr. Fraley to represent the estate in September 2020.

20. Mr. D[Redacted]’s hearing testimony was credible and persuasive. Each time claim documents were retrieved and forwarded to Respondents’ counsel, Mr. D[Redacted] genuinely believed he had produced all documents in Insurer’s possession. The final document exchange resulted from additional inquiry on Mr. D[Redacted]’s own initiative. Based on Mr. D[Redacted]’s credible testimony, the ALJ finds Insurer acted in good faith and had no intent to withhold documents. Insurer’s inadvertent failure to produce the entire file within the initial production period was purely the result of honest mistakes. And there is no persuasive evidence the delay in producing the complete file caused any harm or prejudice to Claimant.

21. Claimant failed to prove Respondents should be penalized for their handling of the claim file. Insurer’s inadvertent failure to produce all 16,581 pages of the claim file by November 19, 2019 resulted from honest mistakes and objectively reasonable. Furthermore, Respondents produced the entire claim file within the statutory “cure” period as extended by Claimant’s acquiescence at the August 21, 2020 status conference, and

Claimant failed to prove by clear and convincing evidence Respondents knew or reasonably should have known they violated the claim file statute.

CONCLUSIONS OF LAW

Section 8-43-304(1) provides that an insurer "who violates any provision of [the Workers' Compensation Act] . . . shall be punished by penalties of up to $1,000 per day."

The assessment of penalties is governed by an objective standard of negligence and involves a two-step analysis. First, the ALJ must determine whether the insurer or employer violated the Act, a rule, or an order. Second, the ALJ must determine whether the violation was objectively reasonable. *Pioneers Hospital v. Industrial Claim Appeals Office*, 114 P.3d 97 (Colo. App. 2005); *Diversified Veterans Corporate Center v. Hewuse*, 942 P.2d 1312 (Colo. App. 1997); *City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003). A party establishes a *prima facie* showing of unreasonable conduct by proving that an insurer violated the statue or a rule of procedure. If the claimant makes a *prima facie* showing, the burden shifts to the respondents to show their conduct was reasonable under the circumstances. *Pioneers Hospital v. Industrial Claim Appeals Office, supra*; *Human Resource Co. v. Industrial Claim Appeals Office,* 984 P.2d 1194 (Colo. App. 1999). An insurer acts unreasonably if it fails to take action a reasonable insurer would take to comply with a statute, rule or order. *Pioneers Hospital, supra*. To be objectively reasonable, an insurer's actions (or inaction) must be predicated on "a rational argument based in law or fact." *Diversified Veterans Corporate Center v. Hewuse, supra*.

If the alleged violator cures the violation within 20 days of the mailing of an application for hearing seeking penalties, no penalty shall be assessed unless the party seeking the penalty proves by clear and convincing evidence that the alleged violator knew or should reasonably have known they were in violation. Section 8-43-304(4).

Even assuming, *arguendo*, the OAC had jurisdiction to accept the August 5, 2020 Application for Hearing filed on behalf of a claimant who was no longer living, and that any claim for penalties would survive Claimant's death, Claimant failed to prove Respondents should be penalized in this case.

Claimant argues Respondents violated § 8-43-203(4), which requires the insurer to provide "a complete copy of the claim file" within 15 days of a written request. Respondents initially only provided the contents of the electronic file and did not include copies of paper records archived off-site. Although Claimant may have shown a technical violation of the statute, the ALJ credits Mr. D[Redacted]'s credible testimony in determining Insurer's actions were objectively reasonable. Insurer transitioned from paper to electronic files during the course of this claim. It was reasonable for Insurer to archive the paper documents rather than convert them to electronic format, particularly since this was an admitted PTD claim with no disputed issues. When Claimant's counsel requested the claim file, Insurer produced a copy of its electronic file but neglected to retrieve the paper documents from the off-site archive. As Mr. D[Redacted] explained, Insurer works with the electronic file and does not reference the paper archives. Once Mr. D[Redacted] learned Insurer had paper documents that had not been exchanged, he requested the archived documents. A large number of additional documents were exchanged and Mr. D[Redacted] was unaware that more paper documents were in the archives. Mr. D[Redacted] reasonably believed each exchange of documents was complete at the time and worked diligently to remedy the oversight upon learning documents had not been exchanged properly. Insurer's failings with respect to production of the complete file resulted from honest mistakes and objectively reasonable.

Additionally, the final exchange of documents on August 26, 2020 timely "cured" any alleged violation. Admittedly, August 26 was twenty-one days after Claimant's application for hearing, and ordinarily would be considered outside the 20-day statutory cure window. But two unique factors in this case preclude a purely mechanical counting of days. First, Claimant's August 5, 2020 hearing application was improperly filed because Claimant was deceased and Claimant's counsel had not been retained or authorized by the estate to take any action on its behalf. Respondents did not move to strike the application because they did not know the status of Claimant's estate until after the hearing commenced on August 12, 2020, although such a motion would have been well founded. *People in Interest of R.D.S*., 514 P.2d 772 (Colo. 1973). It would be inequitable to hold Respondents strictly to a deadline established by a hearing application that should not have been filed or accepted in the first place. Second, and more important, Claimant's counsel and Mr. S[Redacted] participated in the August 21 status conference at which Respondents' counsel disclosed the existence of the additional documents and explained the process her firm was undertaking to cull duplicates and transmit the documents to Claimant's counsel as quickly as possible. At no time did Claimant's counsel object or insist he be provided with all the documents, including duplicates. Had he done so, Respondents' counsel could have dumped the 85,000-plus pages on Claimant's counsel before the 20-day period expired. A party should not be heard to complain if they sit in silence while the opposing party outlines its anticipated course of action, and thereby induce the opposing party to miss a deadline. Additionally, § 8-43-207(1) permits the ALJ to "grant reasonable extensions of time for the taking of any action contained in this article." The ALJ issued no formal order extending the time to de-duplicate and exchange the documents because it did not appear necessary based on the discussion at the status conference. But Respondents certainly demonstrated good cause to extend the deadline to cure the alleged violation. Under the circumstances here, Respondents' time to "cure" was constructively extended, tolled, and/or Claimant is estopped from asserting the final exchange was untimely. Therefore, Insurer timely cured the violation and Claimant failed to prove by clear and convincing evidence Insurer knew or reasonably should have known it was in violation.

Claimant's argument that Respondents still have not produced the "complete" file because they removed duplicates is unpersuasive. Everything in the claim file was exchanged by August 26, 2020, except duplicates. Section 8-43-203(4) does not require the carrier to bury the claimant with reams of duplicate documents, nor does it preclude the professional courtesy shown by Respondents of culling tens of thousands of duplicate pages at their own expense.

ORDER

It is therefore ordered that:

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

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

DATED: February 19, 2021

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

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that the left shoulder replacement surgery recommended by Dr. Leslie Vidal is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted March 23, 2018 work injury.

FINDINGS OF FACT

1. The claimant has worked for the employer since 2013 as an equipment operator. The claimant's job duties include running heavy equipment, related to road construction. On March 23, 2018, the claimant was fueling equipment when he slipped and fell backwards approximately two to three feet to the ground. The claimant testified that he reached out with his left arm as he fell. He felt like he had "jammed everything" with pain in his low back, left arm, and neck.

Medical Treatment Prior to March 23, 2018

2. Prior to his injury on March 23, 2018, the claimant sought treatment for his low back, neck, and bilateral shoulders.

3. On October 26, 2009, the claimant was seen by Dr. Steven Heil for an orthopedic evaluation of his left shoulder. At that time, the claimant reported left shoulder problems dating back six years, when he was involved in a motor vehicle accident. The claimant also reported increased left shoulder pain, decreased range of motion, and strength in that shoulder over the last year. On exam, Dr. Heil noted decreased range of motion and diagnosed left shoulder rotator cuff dysfunction, with some early degenerative changes and a large os acromialis. Dr. Heil ordered magnetic resonance imaging (MRI) of the claimant's left shoulder.

4. On October 28, 2009, an MRI of the claimant's left shoulder showed an os acromiale; moderately large superior paralabral cyst with labral tear extending into the biceps tendon; tendinopathy infraspinatus tendon and subscapularis tendon with minimal partial thickness tearing of distal infraspinatus tendon; and degenerative joint disease.

5. On October 28, 2009, the claimant returned to Dr. Heil and reported continuing left shoulder symptoms. Upon his review of the MRI results, Dr. Heil noted that the claimant had advanced degenerative disease of the shoulder at the glenohumeral joint. Dr. Heil opined that the claimant's symptoms were coming from his joint and "certainly the degenerative labral tears are more consistent with degenerative arthritis". On that date, Dr. Heil administered a left shoulder injection.

6. The claimant testified that he did not recall seeing Dr. Steven Heil in 2009 with shoulder complaints. He also did not recall undergoing a left shoulder MRI, or injection. The claimant also testified that between 2009 and 2014 he did not seek treatment for his shoulders.

7. On October 29, 2014, the claimant was seen by Dr. Douglas Huene for treatment of right shoulder pain. At that time, the claimant reported having problems with his right shoulder for the past several months to a year, "with a long history of neck problems and left shoulder problems". Dr. Huene administered an injection to the claimant's right shoulder.

8. On February 11, 2015, the claimant returned to Dr. Huene and reported ongoing pain in both shoulders. The medical record of that date indicates that the claimant had experienced "problems with the shoulders for the past several months to years". Dr. Huene performed range of motion measurements and noted limited range of motion in the claimant's left shoulder. Dr. Huene also noted that the claimant's left shoulder pain was due to "[glenohumeral] bone on bone arthritis, acromial clavicular arthritis with biceps tendonitis". On that date, Dr. Huene administered injections to both of the claimant's shoulders.

9. The claimant was again seen by Dr. Huene on May 6, 2015. At that time, the claimant reported increased right shoulder pain and ongoing left shoulder pain. Dr. Huene noted limited range of motion and again attributed the claimant's left shoulder pain to bone on bone arthritis, acromioclavicular arthritis with biceps tendonitis. On that date, Dr. Huene administered injections to both of the claimant's shoulders.

10. On July 10, 2015, the claimant returned to Dr. Huene, reporting increased shoulder pain and that he was "just miserable" with the right shoulder. Dr. Huene noted the claimant had limited range of motion in his left shoulder. On that date, the claimant elected to undergo right shoulder surgery. In addition, he received an injection to the left shoulder.

11. The medical records entered into evidence indicate that the claimant underwent a right rotator cuff repair on July 15, 2015.

12. The claimant testified that after the right shoulder surgery, and the left shoulder injection, his left shoulder symptoms improved.

13. Following surgery, the claimant participated in physical therapy. On July 20, 2015, the claimant was seen by Colleen Walsh, MSPT. In the medical record of that date, Therapist Walsh noted that the claimant had a long history of bilateral shoulder pain. The claimant reported to Therapist Walsh that he needed to have a total shoulder replacement on his left shoulder. Therapist Walsh also noted that the claimant had significant deficits in left shoulder range of motion.

14. On August 12, 2016, the claimant was seen by Dr. Huene. On that date, the claimant reported that his left shoulder "is bad again, it's really killing me". The

claimant also reported that lifting his left arm over his head or a turning motion aggravated his shoulder Dr. Huene noted that although the claimant was experiencing left shoulder pain, the recent steroid injection had “really helped”. On that date, Dr. Huene discussed conservative modalities such as physical therapy and injections, as well as a total shoulder replacement. Dr. Huene noted that the claimant “is thinking about surgery on the left”. On that date, the claimant elected to undergo another injection.

15. On June 9, 2017, the claimant returned to Dr. Huene. The medical record of that date notes that the claimant reported that his left shoulder “is bad again, it’s really killing me”. Dr. Huene again documented that the claimant reported that he felt he “needed to go for surgery”, but that the Claimant elected to undergo another left shoulder injection.

16. On September 8, 2017, the claimant was seen by Dr. Huene and reported that his left shoulder was “miserable”. As with the prior two appointments, Dr. Huene noted that he discussed treatment options (including a total shoulder replacement) and the claimant’s statement that he “needed to go for surgery”. Dr. Huene administered an injection at that time.

17. The claimant testified that he recalled discussing right shoulder surgery with Dr. Huene before he underwent right shoulder surgery. He also testified that he did not recall discussing left shoulder surgery with Dr. Huene in 2015, 2016, and 2017.

18. The claimant also testified that following the September 9, 2017 injection to his left shoulder, he had reduced pain and improved range of motion. He further testified that he was working full time with no restrictions. This included operating equipment and using hand tools. In addition, he did not have issues climbing up into work equipment and was able to reach above his head with his left arm during that time period.

Medical Treatment after March 23, 2018

19. On April 3, 2018, the claimant was first seen by Dan Burnell, PA-C at Surface Creek Family Practice. At that time, the claimant reported that he fell straight back and injured his left shoulder and low back. The claimant also reported a prior history of low back and left shoulder injuries and surgeries. PA Burnell diagnosed a rotator cuff injury to the left shoulder, contusion of the low back, and left cervical strain. On that date, PA Burnell ordered x-rays of the claimant’s lumbar spine[1] and left shoulder.   PA Burnell did not place the claimant under any work restrictions and the claimant was able to return to full duty work.

20. The claimant returned to PA Burnell on April 17, 2018 and reported less neck pain, with no changes to his left shoulder and low back. In the medical record of that date, PA Burnell noted that the left shoulder x-ray showed moderate to severe

[1] Throughout this claim the claimant has undergone low back treatment. As that body part and related medical treatment are not at issue in this order, the ALJ does not enumerate all treatment of the claimant’s low back.

degenerative joint disease of the glenohumeral joint. On that date, PA Burnell ordered magnetic resonance imaging (MRI) of the claimant's left shoulder.

21. On April 26, 2018, an MRI of the claimant's left shoulder showed an os acromiale; downsloping of the acromion with thickening of the coracoacromial ligament; tendinosis of the distal supraspinatus tendon; severe arthritic changes of the glenohumeral joint; possible tear of the posterior glenoid labrum; a possible ganglion cyst; and shoulder joint effusion.

22. On October 23, 2018, PA Burnell noted that the claimant continued to have left shoulder complaints. PA Burnell also noted that an orthopedic surgeon, Dr. John Knutson, recommended the claimant see a shoulder specialist.

23. On October 31, 2018, the claimant was seen by Dr. Mitchell Copeland. At that time, the claimant reported his left shoulder symptoms as pain, grinding, weakness, decreased range of motion, and sleep disturbance. Dr. Copeland noted that the claimant had end state osteoarthritis that was exacerbated by his fall at work. Dr. Copeland also stated that the claimant "will eventually need a total shoulder replacement." Dr. Copeland recommended and administered an injection to the claimant's left glenohumeral joint.

24. The claimant participated in physical therapy for his left shoulder beginning on November 8, 2018. In the medical record of that date, Peter Brown, DPT noted that the claimant had substantial pain and difficulty raising his left arm above chest height.

25. On November 30, 2018, Therapist Brown did not feel further physical therapy was warranted at the time. In support of this opinion, Therapist Brown noted the claimant continued to have left shoulder symptoms and had "no clinically significant improvement in function". Therapist Brown referred the claimant back to Dr. Copeland.

26. The claimant testified that physical therapy helped his left shoulder pain and function. However, his condition "leveled out" and at that "leveling off point" he felt that he was worse than he was before the March 23, 2018 fall.

27. On November 28, 2018, Dr. Copeland noted that the claimant had reported that he felt he improved after the injection and physical therapy, but "is still not back to normal."

28. On January 2, 2019, Dr. Copeland noted that the claimant had been improving, but "he feels he has plateaued and is no longer making progress with physical therapy."

29. On February 27, 2019, the claimant was seen by Dr. Copeland. At that time, the claimant reported constant pain, grinding, weakness, and loss of range of motion in his left shoulder. Dr. Copeland again opined that the claimant had a "work related exacerbation of his end stage glenohumeral arthritis." In addition, Dr. Copeland opined that the claimant was at maximum medical improvement (MMI) for his left shoulder. Dr. Copeland also noted that the claimant would require total shoulder arthroplasty in the future but the "timeframe was unknown". In addition, Dr. Copeland recommended intermittent injections.

30. The claimant testified that in February 2019 he continued to have constant pain and limited range of motion in his left shoulder. He further testified that he understood from Dr. Copeland that the only remaining treatment for his left shoulder was replacement surgery.

31. On March 5, 2019, the claimant returned to PA Burnell. On that date, PA Burnell noted that the claimant had deficits in left shoulder range of motion and described the claimant's shoulder condition as "unchanged".

32. On March 25, 2019, the claimant underwent lumbar spine surgery with Dr. James Gebhard.

33. On April 4, 2019, the respondent filed a General Admission of Liability (GAL) admitting for medical benefits and temporary total disability (TTD) benefits.

34. On June 23, 2020, the claimant returned to Surface Creek Family Practice and was seen by Danny Mingus, PAC. At that time, the claimant reported increased left shoulder pain. PA Mingus noted that the claimant believed "he needs a total shoulder replacement" and requested a referral to Dr. Vidal at the Steadman Clinic.

35. On June 23, 2020, PA Mingus made a referral to Dr. Vidal for an orthopedic consultation to address whether the claimant needed "at total arthroplasty".

36. On July 21, 2020, the claimant was seen by Dr. Leslie Vidal. At that time, an x-ray of the claimant's left shoulder was taken and showed glenohumeral arthritis with decreased joint space and an inferior humeral head osteophyte. Dr. Vidal noted that the claimant had attempted one steroid injection with two to three months of relief, and had attempted physical therapy without any relief. On that date, Dr. Vidal diagnosed primary osteoarthritis of the claimant's left shoulder and recommended a total shoulder arthroplasty.

37. On August 12, 2020, Dr. Vidal's office submitted a request for authorization for the recommended shoulder arthroplasty.

38. On August 17, 2020, Dr. William Ciccone issued a report, following his review of the claimant's medical records. Dr. Ciccone was asked to state an opinion regarding treatment of the claimant's left shoulder. Dr. Ciccone stated that it was his opinion that on March 23, 2018, the claimant suffered a temporary aggravation of his pre existing left shoulder degenerative disease, and symptoms related to that temporary aggravation had improved at the time he was placed at MMI for his shoulder in February 2019. In support of this opinion, Dr. Ciccone noted that the April 2018 left shoulder MRI did not show any acute injury. In addition, the claimant has continued to work full duty, without restrictions. Dr. Ciccone noted that he agrees that the claimant will be in need of a future left shoulder replacement. However, such a replacement would not be related to the claimant's fall at work on March 23, 2018. Dr. Ciccone also opined that the claimant's

current left shoulder symptoms are related to the natural progression of his shoulder arthritis and not a work injury.

39. On December 8, 2020, the claimant attended an independent medical examination (IME) with Dr. James Lindberg. In connection with the IME, Dr. Lindberg reviewed the claimant’s medical records, obtained a history from the claimant, and performed a physical examination. In his December 29, 2020 IME report, Dr. Lindberg opined that the claimant suffers from preexisting degenerative arthritis that he treated for prior to the March 2018 work injury. Dr. Lindberg also noted his agreement with Dr. Ciccone in that the claimant’s preexisting arthritic condition had returned to baseline followed by the natural progression of his underlying severe end stage osteoarthritis.

40. Based upon the opinions of Dr. Lindberg, the respondent has denied authorization for the left shoulder surgery recommended by Dr. Vidal.

41. Dr. Lindberg’s testimony was consistent with his written report. In his testimony, Dr. Lindberg reiterated his opinion that the claimant suffered a temporary aggravation on March 23, 2018, and that aggravation has resolved. Dr. Lindberg further testified that the claimant likely needed a left shoulder replacement while treating with Dr. Huene, and the injections the claimant has received have been “just buying time”.

42. The claimant testified that shortly after his March 2018 fall, he was promoted to a manager’s position that was less physically demanding. However, in the fall of 2020, he was moved to a labor position that was more physically demanding. The claimant also testified that he has continued to work since his injury, despite his left shoulder symptoms. He has been able to do so by using pain medications and Gabapentin. The claimant also testified that because of his inability to raise his left arm over his head, he was unable to do everything asked of him at work.

43. The ALJ credits the medical records, the claimant’s testimony, and the opinions of Dr. Copeland and PA Mingus over the contrary opinions of Drs. Ciccone and Lindberg. The ALJ specifically credits the opinions of Dr. Copeland that the claimant’s preexisting left shoulder condition was exacerbated by the March 23, 2018 work injury, and that exacerbation has resulted in the need for medical treatment, including surgery. The ALJ specifically credits the claimant’s testimony that despite prior treatment for his left shoulder, he was able to perform all of his normal job duties leading up to the March 23, 2018 work injury. In addition, although the claimant’s preexisting shoulder condition was identified and treated prior to March 23, 2018, that condition was not independently disabling. The ALJ finds that if not for the claimant’s work injury, he would not have experienced increased pain and decreased range of motion that necessitated the need for physical therapy and consultations with Drs. Copeland and Vidal.

44. Therefore, the ALJ finds that the claimant has demonstrated that it is more likely than not that his need for the recommended left shoulder replacement is reasonable medical treatment necessary to cure and relieve him from the effects of the admitted work injury.

CONCLUSIONS OF LAW

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

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

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

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

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

6. Pain is a typical symptom from the aggravation of a preexisting condition, and if the pain triggers the claimant’s need for medical treatment, the claimant has suffered a compensable injury. *Maryman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (September 9, 2016). The employee must prove a causal relationship between the injury and the medical treatment for which the worker is seeking benefits. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. Ct. App. 1997). The mere fact that a claimant has suffered a compensable aggravation of a preexisting condition does not oblige the ALJ to conclude

that any subsequent disability or need for treatment is causally connected to such aggravation. *University Park Care Center v. ICAO*, 43 P.3d 637 (Colo. App. 2001). It is for the ALJ, as the fact-finder, to determine whether a need for medical treatment is caused by the industrial injury, or some other cause. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985).

7. The ALJ takes administrative notice of WCRP 17 Medical Treatment Guidelines for shoulder injuries. Specifically, WCRP 17 Exhibit 4 Section G(6) provides that total shoulder arthroplasty can be performed due to post-traumatic arthritis, and that "[t]otal shoulder arthroplasty is usually performed in cases of severe arthritis when all reasonable conservative measures have been exhausted without sufficient return to activities of daily living."

8. As found, the claimant has demonstrated, by a preponderance of the evidence, that the left shoulder replacement surgery recommended by Dr. Vidal is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted March 23, 2018 work injury. As found, the claimant's preexisting left shoulder condition was aggravated and accelerated by the fall on March 28, 2018. As found, if not for the work injury, the claimant would not have needed medical treatment, including the need for surgery. As found, the medical records, the claimant's testimony, and the opinions of Dr. Copeland are credible and persuasive.

ORDER

It is therefore ordered:

1. The respondents shall pay for the left shoulder replacement surgery recommended by Dr. Vidal, pursuant to the Colorado Medical Fee Schedule.

2. All matters not determined here are reserved for future determination.

Dated this 22nd day of February 2021.

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

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after

service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that treatment of her right elbow, including a platelet rich plasma (PRP) injection as recommended by Dr. Matthew Gnirke, is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted January 4, 2020 work injury.

2. What is the claimant's average weekly wage (AWW) for this claim?

3. Whether the claimant has demonstrated, by a preponderance of the evidence, that she is entitled to temporary total disability (TTD) and/or temporary partial disability (TPD) benefits beginning July 17, 2020 and ongoing.

4. If it is determined that the claimant is entitled to TTD and/or TPD benefits, whether the respondents have demonstrated, by a preponderance of the evidence, that the claimant committed a volitional act that led to the termination of her employment.

FINDINGS OF FACT

1. The claimant worked for the employer as a housekeeper and as a housekeeping inspector. As a housekeeper, the claimant was responsible for cleaning various properties for the employer. As a housekeeping inspector, the claimant was responsible for inspecting the cleanliness of a unit in preparation for guest occupancy.

2. On January 4, 2020, the claimant was at work performing her normal job duties. On that date, while carrying a large bag of linens up a staircase, the claimant's foot slipped on some ice. This movement caused the bag of linens to shift. The claimant held the linens tightly with her right arm to avoid dropping them.

3. The claimant testified that she immediately felt pain in her entire arm. Despite this pain, she continued working.

4. On January 5, 2020, the claimant sought medical treatment at Vail Heath Urgent Care in Avon, Colorado. The claimant was seen by Rebecca Novak, NP. At that time, NP Novak recorded that after lifting a bag of linen, the claimant felt pain in her left[1] trapezius and shoulder. The claimant also reported numbness and tingling down into her fingers. Despite this description by NP Novak, an x-ray was taken of the claimant's right shoulder. In addition, NP Novak noted that on examination of the claimant's right upper extremity, there was no tenderness over the SC joint, AC joint, humorous, and elbow. NP Novak did note tenderness over the right acromion. The claimant was diagnosed with a

[1] Based upon the evidence and testimony at hearing, the ALJ notes that the parties agree that the claimant's right upper extremity is the subject of this claim, and not the left.

trapezius muscle strain, and neuropathy of the right upper extremity. NP Novak prescribed a Medrol dose pack and cyclobenzaprine. She recommended that the claimant follow up with occupational health

5. Eventually the claimant began treating with Dr. Guy Kovacevich, as her authorized treating provider (ATP) for this claim. The claimant was first seen by Dr. Kovacevich on February 7, 2020 At that time, the claimant reported that she strained her right shoulder while carrying heavy bags of towels and bedsheets. Dr. Kovacevich diagnosed radiculopathy of the cervicothoracic region and referred the claimant to physical therapy. The claimant did not report any right elbow symptoms.

6. The claimant returned to Dr. Kovacevich on February 26, 2020. Dr. Kovacevich noted that the claimant had experienced “modest improvement” in her symptoms. The claimant reported that she had not yet started the recommended physical therapy, but she had been seeing a chiropractor. On a WC-164 issued on that date, Dr. Kovacevich restricted the claimant to no lifting, carrying, pushing, or pulling over 15 pounds.

7. On March 19, 2020, the claimant was seen by Dr. Kovacevich and reported continued discomfort in the posterior shoulder and lower cervical area. The claimant also reported increasing pain in her right elbow. Dr. Kovacevich added a diagnosis of right elbow lateral epicondylitis and referred the claimant for an orthopedic consultation. Dr. Kovacevich continued to restrict the claimant to no lifting, carrying, pushing, or pulling over 15 pounds.

8. The claimant continued treating with Dr. Kovacevich. Beginning on June 24, 2020, Dr. Kovacevich altered the claimant’s work restrictions to limited use of her right upper extremity and no lifting.

9. On April 14, 2020, the claimant was seen by Dr. Matthew Gnirke with Vail-Summit Orthopaedics & Neurosurgery. On that date, the claimant reported right neck and arm pain, with numbness and tingling. Dr. Gnike opined that the claimant was experiencing cervical radiculopathy in a C-6 distribution. He recommended that the claimant undergo magnetic resonance imaging (MRI) of the cervical spine.

10. On June 9, 2020, the claimant returned to Dr. Gnirke. On that date, the claimant reported continuing pain from her right posterior shoulder into her fingers. Dr. Gnirke recorded that the claimant had severe nerve type pain in a large distribution of her right upper extremity, with severe tenderness over her common extensor tendon. Dr. Gnirke diagnosed lateral epicondylitis of the right elbow and recommended electromyography (EMG) testing of the claimant’s right upper extremity. In addition, he recommended magnetic resonance imaging (MRI) of the claimant’s right elbow.

11. On June 15, 2020, an MRI of the claimant’s right elbow was performed and showed a low grade partial thickness tear of the common extensor tendon; mild enlargement of th the ulnar nerve (which was noted to be suggestive of of ulnar neuritis); and mild ulnar collateral ligament scarring.

12. On June 23, 2020, the claimant was seen by Dr. Gnirke. In the medical record of that date, Dr. Gnirke noted that the MRI showed a partial thickness tear of the claimant's right common extensor tendon. He also noted mild ulnar collateral ligament (UCL) scarring with mild stripping of the UCL from its distal insertion. At that time, Dr. Gnirke recommended a platelet rich plasma (PRP) injection to address the "intrasubstance tear and UCL". Subsequently, a request for authorization for the recommended injection was submitted to the insurer.

13. The respondents asked Dr. Jeffrey Raschbacher to review the claimant's medical records and opine as to whether the claimant's right elbow symptoms are related to the January 4, 2020 injury. In his June 26, 2020 report, Dr. Raschbacher stated that it is his opinion that the diagnosis of epicondylitis and the claimant's right elbow symptoms are not related to the January 4, 2020 injury. In support of this opinion, Dr. Raschbacher noted that the claimant did not report right elbow symptoms when she first received treatment on January 5, 2020. He further notes that the medical record of that date indicates that the claimant had no tenderness at the elbow. Dr. Raschbacher also noted that if the claimant had experienced a right extensor tendon tear on January 4, 2020, the claimant would have mentioned right elbow symptoms earlier than she did. Dr. Raschbacher recommended that the respondents deny any treatment of the claimant's right elbow (including PRP injections).

14. Based upon Dr. Raschbacher's report, on June 29, 2020 the respondents denied the recommended PRP injection.

15. On July 28, 2020, Dr. Gnirke authored a letter to the insurer regarding the denial of the PRP injection. In his letter, Dr. Gnike stated that it is his opinion that the partial thickness tear of the claimant's right common extensor tendon was "likely post-traumatic in nature" and related to the claimant's January 4, 2020 injury. He also noted that the claimant was suffering from myofascial periscapular pain and resolving right ulnar neuritis which was "the underlying etiology of her upper extremity neuropathic symptoms". Dr. Gnirke further opined that this was also related to the claimant's work injury. He requested reconsideration of the denial of the PRP injection.

16. On July 30, 2020, Dr. Raschbacher was asked to again review the recommended PRP injection. In his report of that date, Dr. Raschbacher reiterated his opinion that the claimant's right elbow symptoms are not related to the January 4, 2020 work injury. Dr. Raschbacher again noted that the claimant did not initially have right elbow tenderness. He also opined that if there had been "an acute tear attributable to [the claimant's] injury claim date, she should have had significant, localized, easily identifiable discomfort at the right lateral epicondyle". Dr. Raschbacher recommended that the respondents deny any treatment of the claimant's right elbow (including PRP injections).

17. Based upon Dr. Raschbacher's report, on August 3, 2020 the respondents denied the recommended PRP injection.

18. On August 13, 2020, the respondents filed a General Admission of Liability (GAL) admitting liability for medical treatment of the claimant's right shoulder.

19. The claimant testified that even with the work restrictions assigned by Dr. Kovacevich, the claimant continued working and performing her normal job duties between January 4, 2020 and July 17, 2020.

20. The claimant testified that her employment with the employer was terminated on July 17, 2020. The claimant also testified that the employer ended her employment because of events that occurred on July 4, 2020.

21. On July 4, 2020, the claimant was instructed to inspect a unit for the employer. The claimant testified that day was her daughter's birthday, and she was preparing a meal for her daughter. As a result, the claimant asked her daughter to inspect the unit. The claimant's daughter was not an employee of the employer. The claimant informed the employer that she completed the inspection and the unit was ready for guests, even though she sent her daughter to do so.

22. Athena M[Redacted], was the General Manager for the employer in July 2020. She was the individual that directed the claimant to inspect the unit on July 4, 2020. The claimant did not have permission to ask a non-employee to complete her job duties. Ms. M[Redacted] understood from the claimant that she had completed the inspection and the unit was ready. However, when the guests arrived, they contacted the employer because the unit had not been cleaned.

23. Subsequently, the claimant admitted to the employer that she had asked her daughter to inspect the unit, and her daughter did not do so. The employer reviewed the incident and on July 17, 2020, the claimant's employment was terminated. In the July 17, 2020 termination letter, the employer noted that the claimant "clearly and willfully, provided false, misleading information with regards to the status of a property, ultimately costing our business loss in revenue and guest goodwill".

24. The claimant testified that prior to her termination on July 17, 2020, she was not reprimanded or disciplined by the employer.

25. On October 28, 2020, the claimant attended a psychiatric independent medical examination (IME) with Dr. Robert Kleinman. In connection with the psychiatric IME, Dr. Kleinman reviewed the claimant's medical records, and obtained a history from the claimant. In his IME report, Dr. Kleinman diagnosed adjustment disorder with anxiety. In addition, he opined that the claimant's "physical complaints are expanding and inconsistent with her activities of daily living."

26. Since her employment with the employer ended, the claimant has been self employed cleaning residences. The claimant testified that while working for the employer she earned approximately $1,500.00 per week. Now that she is self employed, she earns approximately $800.00 per week.

27. In the claimant's Worker's Claim for Compensation dated July 27, 2020, the claimant's average weekly wage (AWW) is identified as $1,375.00.

28. A payroll summary for the period of August 2019 through July 2020 was entered into evidence. That document indicates that the claimant earned $49,824.00

during that one year period. When that amount is divided by 52 weeks in a year, it is equal to a weekly average of $958.16.

29. In the termination letter dated July 13, 2020, the employer noted that the claimant's pay structure was changed on May 1, 2020 "during the COVID-19 shutdown" at a "set rate". The letter also states that the claimant was paid a total of $8,750.00 for the period of May 1, 2020 through July 13, 2020. This was a 78 day period. When the claimant's total wages for that period are divided by 78 days, then multiplied by seven days in a week, it equals an average of $785.26.

30. The ALJ has considered all of this information and finds that the claimant's wages from August 1, 2019 through her final day of employment in July 2020 is most reflective of her accurate AWW at the time of her injury on January 5, 2020. Therefore, the claimant's AWW for this claim is $958.16.

31. Checks made issued to the claimant's name were entered into evidence. These checks appear to reflect payments made to the claimant in her capacity as a self employed housekeeper. These checks are dated in July, August, and September 2020. The August checks total $3,055.40. The September checks total $2,510.00. Although the checks do not clearly indicate when the work was performed, the ALJ infers that the August and September checks reflect the claimant's self employment wages earned during those two months. The ALJ calculates that the claimant earned a total of $5565.40 over that 61 day period (August 1, 2020 through September 30, 2020). When divided by 61 days and then multiplied by 7 days in a week, this results in an average of $638.65. Based upon these calculations, the ALJ finds that in self employment the claimant earns an average of $638.65 per week.

32. With regard to the recommended medical treatment, the ALJ credits the medical records and the opinions of Dr. Raschbacher over the contrary opinions of Dr. Gnirke. The ALJ does not find the claimant's testimony to be credible or persuasive with regard to the nature and onset of her right elbow symptoms. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that treatment of the claimant's right elbow (including a PRP injection) is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury. The ALJ specifically credits Dr. Raschbacher's opinion that the claimant's right elbow symptoms are not related to the claimant's January 4, 2020 work injury.

33. With regard to the issue of temporary total disability (TTD) benefits and temporary partial disability (TPD) benefits, the ALJ notes that although Dr. Kovacevich continued to assess work restrictions,the claimant worked for the employer as usual from January 4, 2020 until July 17, 2020 when her employment was terminated. The ALJ further notes that the claimant did suffer a wage loss between her AWW of $958.16 and her average self employment wages of $638.65. Despite this numerical reduction, the ALJ finds that the claimant did not suffer a wage loss as a result of her admitted work injury, as discussed in more detail below.

34. With regard to the termination of the claimant's employment, the ALJ credits the testimony of the claimant and Ms. M[Redacted] regarding the events of July 4, 2020.

The ALJ finds that the respondents have successfully demonstrated that it is more likely than not that the claimant is responsible for the termination of her employment with the employer.

35. The claimant was directed to complete a task that she did not complete and then was not initially honest about her actions. In addition, the claimant directed a non-employee to complete the required task. The ALJ finds that a reasonable person would find that the claimant's actions were not appropriate and could lead to the loss of one's employment. The ALJ further finds that the claimant exercised control over her actions that ultimately led to the termination of her employment.

36. Furthermore, any wage reduction the claimant may have experienced after July 17, 2020 is solely due to the loss of her employment from the employer. The claimant has continued to work as a self employed housekeeper. The ALJ is persuaded that had the claimant not engaged in the volitional acts of July 4 2020 that led to her job loss of July 17, 2020, she would have continued working for the employer in her normal capacity with no wage loss. Therefore, the ALJ finds that the claimant has failed to demonstrate that it is more likely than not that she is entitled to TTD or TPD benefits. The claimant did not suffer a wage loss as a result of her work restrictions.

CONCLUSIONS OF LAW

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

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

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

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

5. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that treatment of the claimant's right elbow (including a PRP injection) is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury. As found, medical records and the opinions of Dr. Raschbacher are credible and persuasive.

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

7. Section 8-42-102(2), C.R.S. requires the ALJ to base claimant's AWW on his earnings at the time of the injury. Under some circumstances, the ALJ may determine the claimant's TTD rate based upon her AWW on a date other than the date of the injury. *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). Section 8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO, May 7, 2007).

8. As found, the claimant's AWW as of the date of her work injury on January 4, 2020 is $958.16. As found, the payroll records are credible and persuasive.

9. To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), C.R.S., requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *Id*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

10. As found, the claimant suffered a reduction in her wages from an AWW with the employer of $958.16 to her self employment wages of $638.65. As found, this reduction in earnings was not the result of the claimant's work injury and her related work restrictions. As found, the claimant has failed to demonstrate, by a preponderance of

evidence that she is entitled to TTD and/or TPD benefits. As found, the payroll records and the medical records are credible and persuasive.

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

12. As found, the respondents have successfully demonstrated, by a preponderance of the evidence, that the claimant is responsible for the termination of her employment with the employer. Therefore, even if it were determined that the claimant was entitled to TTD and/or TPD benefits, such benefits would have ceased upon the termination of the claimant's employment, as the ALJ has found that the claimant was responsible for the termination of that employment. As found, the testimony of the claimant and Ms. M[Redacted] regarding the events of July 4, 2020, are credible and persuasive.

ORDER

It is therefore ordered:

1. The claimant's request for treatment of her right elbow, including PRP injections, is denied and dismissed.

2. The claimant's AWW for this claim is $958.16.

3. The claimant's request for TTD and TPD benefits is denied and dismissed.

4. All matters not determined here are reserved for future determination.

Dated this 22nd day of February 2021.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts

222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. **In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

ISSUE

1. Whether Claimant established by preponderance of the evidence that he sustained a compensable injury arising out of and in the course of employment with Employer on or about May 13, 2020.

2. Whether Claimant established by a preponderance of the evidence an entitlement to a general award of reasonable and necessary medical benefits causally related to his May 13, 2020 injury.

FINDINGS OF FACT

1. Employer is a gutter installation and fabrication company owned by Jose M[Redacted]. In May 2020, Employer employed two workers in addition to Mr. M[Redacted] – Claimant and Mr. M[Redacted]'s son, Juan M[Redacted].[1] Claimant and Juan M[Redacted] were both "installers," and their job duties included installing gutters on buildings. The installers used ladders to access buildings, and given the nature of the work, moved ladders around the building as gutters were installed at different locations. Mr. M[Redacted]'s was primarily a gutter fabricator and did not typically install gutters. Instead, he operated a gutter fabrication machine on Employer's work truck. Typically, the work truck/fabrication machine would be located a short distance from the building where installers were working. Mr. M[Redacted] fabricated gutters, and the installers affixed the gutters to buildings.

2. On Thursday, May 14, 2020, Claimant, Jose M[Redacted], and Juan M[Redacted] were performing a gutter installation at a residence located in Bennett, Colorado (the "Bennett Project"). Claimant and Juan M[Redacted] performed their normal job duties as installers, and Jose M[Redacted] worked fabricating gutters. Jose M[Redacted] testified that Employer has a 32' fiberglass ladder, but that ladder was not used at the Bennett Project. Instead, that day the installers used 28' and 24' aluminum ladders. Claimant worked the full day on May 14, 2020, from approximately 8:00 p.m. until approximately 6:00 p.m.

3. Employer did not have any projects in Bennett, Colorado on May 12 or 13, 2020.

4. Claimant worked a full day on Friday, May 15, 2020, Monday, May 18, 2020, and Tuesday, May 19, 2020, and was paid his full day wages of $250.00 per day for each of these days.

[1] In this Order, Jose M[Redacted] will be referred to "Mr. M[Redacted]" or by his full name.

5. On May 20, 2020, Claimant was ill at work, and had flu-like symptoms. Jose M[Redacted] took Claimant home in the middle of the workday, and Claimant did not complete his shift. Claimant was paid for the hours worked on May 20, 2020.

6. The following day, Jose M[Redacted] called Claimant to check on him. Claimant did not work for Employer on May 21, 2020. That day, Mr. M[Redacted] had a previously-scheduled appointment for himself at Swenson Family Chiropractic and offered to take Claimant to be seen by Dr. Swenson. Mr. M[Redacted] completed a "Personal History" form for Claimant and identified the reason for Claimant's consultation was "low back pain." (Ex. 1). Dr. Swenson's records from this date indicated Clamant had low back pain and right-sided sciatica with severe to moderate muscle spasms. Dr. Swenson's records do not indicate the source or cause of Claimant's low back pain/sciatica, attribute it to a work injury, or indicate a date of injury. Jose M[Redacted] personally paid for Claimant's treatment at Swenson Family Chiropractic. (Ex. 1).

7. Claimant returned to work for Employer on Monday, May 25, 2020 (Memorial Day). On that day, Juan M[Redacted] fell from a ladder while working for Employer. Claimant contacted Jose M[Redacted], who was not at the work-site. At approximately 11:00 a.m., Jose M[Redacted] came to the work-site and drove Juan M[Redacted] for medical treatment. Initially, Mr. M[Redacted] attempted to take Juan M[Redacted] to Concentra, the location Mr. M[Redacted] understood to be the appropriate provider for a workers' compensation claim. However, presumably because it was Memorial Day, Concentra was closed. Consequently, Mr. M[Redacted] drove Juan to another medical facility for evaluation. Mr. M[Redacted] and Juan M[Redacted] returned to the job site, and Claimant had left the job site prior to the end of the workday.

8. The following day, on May 26, 2020, Mr. M[Redacted] contacted Claimant by phone to inquire why Claimant had left early the previous day and if he would be returning to work. Claimant reported to Employer that he (Claimant) had sustained a work-related injury and needed to see a doctor. Claimant did not work for Employer again after May 25, 2020.

9. On May 28, 2020, Employer filed a "First Report of Injury or Illness" (FROI) regarding Claimant's injury. The information on the FROI was provided to Insurer by Jose M[Redacted]. The FROI indicates the date of injury was May 12, 2020, and that Claimant injured his hip while carrying a ladder. The ALJ infers from the testimony that Claimant provided Jose M[Redacted] with the information regarding his injury and the date of injury. (Ex. A).

10. On May 28, 2020, Claimant was evaluated by Jordan Maas, P.A., at Concentra. Claimant reported that he was carrying a ladder, lifted, and hoisted it to one side and felt immediate pain in his right lower back. Claimant reported that he had not been able to work due to discomfort and functional deficits. Ms. Maas testified that no interpreter was present, but that she is sufficiently fluent in Spanish to communicate with Claimant. Ms. Maas diagnosed Claimant with a lumbar strain, and referred Claimant for physical therapy. Ms. Maas testified that Claimant's reported mechanism of injury was consistent with the injuries she diagnosed. (Ex. O).

11. Later, on May 28, 2020, Claimant was seen at Concentra for an initial physical therapy evaluation by Kevin Holmes, DPT. Mr. Holmes' record describes the mechanism of injury as: "Patient went to lift a gutter and felt a strain within his spine." Claimant reported he sustained an injury on May 13, 2020 while carrying a ladder. Claimant indicated he lifted the ladder, hoisted it to one side, and felt immediate pain in the right low back. Claimant reported he had not been able to work due to discomfort and functional deficits. During the examination, Claimant reported that the intensity of his pain resulted in Claimant becoming sick to his stomach and experiencing dizziness. (Ex. P).

12. On June 10, 2020, an MRI of Claimant's lumbar spine was performed that showed degenerative disc and joint changes with a slight dural sac indentation without root sleeve deformity at the L4-5 level. (Ex. 6).

13. On June 11, 2020, Claimant filed a Worker's Claim for Compensation (WC Claim). Claimant indicated the date of injury was May 13, 2020, and that he was injured "while carrying a ladder on even ground. I stood up the ladder, it began to fall sideways and when I tried to prevent the fall I felt a severe pain at the back of my hip and low back." Claimant identified the injury as occurring in Bennett, Colorado. Claimant also indicated he informed Employer of his injury on May 13, 2020. (Ex. B).

14. On July 13, 2020, Insurer filed a Notice of Contest with the Division, citing the need for further investigation. (Ex. C).

15. On August 27, 2020, Claimant filed an Application for Expedited Hearing, requesting a hearing on compensability and medical benefits. (Ex. G).

16. On October 9, 2020, Claimant was seen by John Raschbacher, M.D., for an independent medical examination (IME), at the request of Respondents. In conjunction with the IME, Claimant completed a form describing his injury as occurring while he was trying to hold onto a ladder that was falling, resulting in a pulling/sprain sensation in his lower back. Claimant also reported that he could stand for a maximum of two hours and sit for a maximum of ½ hour with minimal or no pain. (Ex. 7).

WITNESS TESTIMONY

Claimant

17. Claimant testified he was injured on May 13, 2020 while performing work for Employer in Bennett, Colorado. Claimant indicated that he was attempting to place a 32" fiberglass ladder on uneven ground when the latter fell, and he grabbed it. Claimant estimated the ladder's weight as 150 lbs. Claimant testified he felt immediate pain in his back, and that Jose M[Redacted] was directly in front of him when the incident occurred. Claimant testified he informed Mr. M[Redacted] he had been hurt, but Mr. M[Redacted] directed him to continue working. Claimant testified he returned to work, installing a few gutters and brackets, and that he felt immediate pain when he stepped off the ladder. Claimant, however, continued to work the remainder of his shift on May 13, 2020. Claimant testified that he informed Mr. M[Redacted] multiple times on May 13, 2020 that he had injured his back.

18. Claimant testified he did not return to work the following day, and did not return to work until after he was seen by a chiropractor on Friday, May 21, 2020. Claimant also testified that he did return to work and worked light duty, although the dates Claimant asserts he returned to work were not clearly articulated in his testimony. Additionally, Claimant did not articulate what constituted "light duty" and what tasks he performed. Claimant's testimony in this regard conflicts with the testimony of Mr. M[Redacted] and Juan M[Redacted], both of whom testified that Claimant worked on May 15, 2020, May 18, 2020, May 19, 2020 and May 20, 2020, and that Claimant performed his full unrestricted job duties on those days.

19. Claimant testified that Mr. M[Redacted] came to his house and took him to the chiropractic clinic on May 21, 2020. Claimant testified that after going to the chiropractor, he was able to return to work in limited duty, and had to lay down on the job due to his back pain, and he could not sit for more than 30 minutes.

20. Claimant testified that, prior to May 26, 2020, he informed both Jose M[Redacted] and Juan M[Redacted] several times that he had injured his back at work.

Jose M[Redacted]

21. Jose M[Redacted] has owned Employer for approximately 8-10 years. Mr. M[Redacted] testified that the Bennett Project was on May 14, 2020, not May 13, 2020, and that Employer did not have a 32' fiberglass ladder on the project site. Instead, 24' and 28' aluminum ladders weighing approximately 40 pounds were used. At the Bennett Project, Mr. M[Redacted] primarily worked with the gutter fabrication machine that was located 50-80 feet away from the residence where Claimant and Juan M[Redacted] were working. Because he was not working directly with Claimant, Mr. M[Redacted] did not see Claimant catch a falling ladder at the Bennett Project or otherwise witness any injury. Mr. M[Redacted] testified he did not see Claimant injured at the Bennett Project and that Claimant did not tell Mr. M[Redacted] he sustained any injury at the Bennet Project on May 14, 2020. The ALJ finds Mr. M[Redacted]'s testimony in this regard credible.

22. Mr. M[Redacted] testified that Claimant worked on Friday, May 15, 2020; Monday, May 18, 2020; and Tuesday, and May 19, 2020. On each of these days, Claimant performed his normal job duties and did not tell Mr. M[Redacted] that he was injured, or that he was in pain. Mr. M[Redacted] testified that Claimant was paid $250.00 per day for his work, and that he was paid for full days' work on for May 15, May 18, and May 19, 2020. Mr. M[Redacted]'s testimony that Claimant was paid for work on each of these days was credible.

23. On May 20, 2020, Mr. M[Redacted] took Claimant home from work early because Claimant was experiencing flu-like symptoms. On May 21, 2020, Mr. M[Redacted] was preparing to attend a previously-scheduled chiropractic appointment for himself, and spoke to Claimant on the phone. Mr. M[Redacted] offered to take Claimant to the chiropractor, and ultimately drove Claimant to the chiropractic appointment.

24. At the chiropractic visit on May 21, 2020, Mr. M[Redacted] completed Claimant's intake form, and indicated that the reason for Claimant's visit was "low back pain." Mr. M[Redacted] paid for Claimant's chiropractic appointment.

25. Mr. M[Redacted] testified he spoke with Claimant several times in-person and over the phone between May 13, 2020 and May 25, 2020. Mr. M[Redacted] testified that Claimant did not tell him at any time that he had sustained a back injury during the course of his employment with Employer. The ALJ finds credible Mr. M[Redacted]'s testimony that Claimant did not inform him of a work-related injury, although the evidence does indicate Claimant informed Mr. M[Redacted] he was experiencing back pain at least on May 21, 2020.

26. Mr. M[Redacted] testified that May 26, 2020 was the first time Claimant indicated to Mr. M[Redacted] that Claimant had sustained a work-related injury. Mr. M[Redacted] testified Claimant did not indicate how he injured his back, only that he needed to see a doctor. After Claimant informed Mr. M[Redacted] of a work-related injury, Mr. M[Redacted] notified Insurer, indicating that Claimant had injured his hip while working with a ladder.

Juan M[Redacted]

27. Juan M[Redacted] is the son of Jose M[Redacted], and has worked for Employer for approximately four years. Juan M[Redacted] typically worked with Claimant on Employer's gutter installation projects.

28. Juan M[Redacted] worked with Claimant at the Bennett project from approximately 8:00 a.m. until approximately 6:00 p.m. Juan M[Redacted] testified he did not witness the Claimant sustain an injury at the Bennett project, and Claimant did not tell Juan M[Redacted] that he was injured on that date.

29. Juan M[Redacted] testified that Claimant did not tell him on any later dates that Claimant was injured on the job, or that Claimant was experiencing back pain. Mr. M[Redacted] testified that he did not observe Claimant behaving as if he was injured at any subsequent job, and that Claimant was able to perform his job duties without restriction.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

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

COMPENSABILITY

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, … performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The Claimant must prove his injury arose out of the course and scope of his employment by a preponderance of the evidence. § 8-41-301(1)(b) & (c), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). "Arising out of" and "in the course of" employment comprise two separate requirements. *Triad Painting Co.*, 812 P.2d at 641.

An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d at 641; *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO, Nov. 21, 2014).

The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury “has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee’s service to the employer in connection with the contract of employment.” *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014). The mere fact that an injury occurs at work does not establish the requisite causal relationship to demonstrate that the injury arose out of the employment. *Finn v. Industrial Commission,* 437 P.2d 542 (Colo. 1968); *Sanchez v. Honnen Equipment Company,* W.C. No. 4-952-153-01 (ICAO, Aug. 10, 2015).

Claimant has failed to establish by a preponderance of the evidence that he sustained an injury arising out of the course of his employment with Employer associated with the Bennett project. The threshold issue in this case is whether Claimant sustained a work-related injury on or about May 13, 2020. Central to Claimant’s claim is his testimony that he sustained a significant back injury while working on the Bennett Project for Employer. Although the testimony and records conflict as to the actual date of the project, the discrepancies in the date are not determinative. Claimant’s testimony that he sustained an acute back injury at the Bennett Project was not credible in several respects.

First, Claimant described catching a fiberglass ladder that was not used at the Bennett project. Next, Claimant alleges he sustained an injury resulting in immediate pain in front of Mr. M[Redacted]. The ALJ does not find it credible that Mr. M[Redacted] witnessed Claimant sustain a work-related injury at the Bennett Project only to ignore it, and initiate the workers’ compensation process 12 days later based on a verbal report that Claimant needed to see a physician. The evidence demonstrates that Mr. M[Redacted] was not reluctant to submit a workers’ compensation claim on behalf of his employees, or to take employees for treatment at Concentra if a work-related injury occurred. This was demonstrated by Mr. M[Redacted]’s attempt to take Juan M[Redacted] to Concentra on May 25, 2020. Also, when Claimant did inform Mr. M[Redacted] that he needed to see a physician for a work-related injury, Mr. M[Redacted] promptly notified Insurer and initiated the process for Claimant to receive treatment through the workers’ compensation system.

Next, Claimant alleges his injury was significant enough that he did not return to work until after seeing the chiropractor on May 21, 2020, or that he returned to work on light duty prior to that date. Claimant’s testimony regarding this was contradicted by the testimony of Mr. M[Redacted] and Juan M[Redacted], both of whom testified that Claimant worked on at least four days between May 14, 2020 and May 21, 2020, and that Claimant performed his full job duties on those days, without restrictions. Juan M[Redacted] also testified that he worked directly with Claimant and did not observe

Claimant exhibiting any pain behaviors or unable to perform his full work duties. The ALJ finds credible Mr. M[Redacted]'s testimony that Claimant worked full duty on May 15, 18, 19 and 20, 2020, and was paid for work performed on those dates.

While the evidence establishes that Claimant informed Mr. M[Redacted] that Claimant had low back pain on May 21, 2020, nothing in the Claimant's chiropractic records shows that Claimant reported that he sustained an injury while working for Employer. It is not credible that Mr. M[Redacted] would have paid for Claimant's chiropractic treatment, rather than initiate a workers' compensation claim if Claimant had reported to him a work-related injury.

Claimant has failed to meet his burden of establishing by a preponderance of the evidence that he sustained an injury to his lower back arising out of the course of his employment with Employer on or about May 13 or 14, 2020 at the Bennett Project.

MEDICAL BENEFITS

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. § 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012).

Because Claimant has failed to establish that he sustained a compensable work-related injury, his request for medical treatment is denied and dismissed.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable work-related injury on or about May 13, 2020 or May 14, 2020. His claim is denied and dismissed.

2. Claimant has failed to establish by a preponderance of the evidence an entitlement to medical benefits. His claim is denied and dismissed.

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

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

DATED: February 26, 2021

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

I. Whether Claimant provided clear and convincing evidence to overcome the Dr. Gregory Reichhardt's DIME opinion on permanent impairment.

II. Whether Claimant is entitled to ongoing maintenance medical benefits.

STIPULATIONS

The parties stipulated that DIME physician Dr. Reichhardt changed his opinion regarding permanent medical impairment in his November 9, 2020 deposition. The parties agree that Dr. Reichhardt's true opinion is now that there is no permanent medical impairment associated with Claimant's September 27, 2019 work injury.

FINDINGS OF FACT

1. Claimant is a 42-year-old male who worked for Employer as an insulation installer.

2. Claimant sustained an admitted industrial injury on September 27, 2019 when a piece of drywall fell and struck Claimant on his hard hat and nose. Claimant testified that the impact caused a laceration on his nose and broke the inside of his hard hat. Claimant testified that, as a result of the impact, he passed out for approximately five to seven minutes. Claimant testified he immediately felt a fire-like sensation on the top and back of his head and in the back of his neck. Claimant continued to work and indicated to Employer he did not require medical treatment at the time. Claimant did not seek medical treatment until approximately two weeks later.

3. On October 11, 2019, Claimant presented to authorized treating physician ("ATP") John Raschbacher, M.D. at Midtown Occupational Health Services with complaints of nose and neck pain. Claimant reporting being struck by a piece of drywall that knocked off his safety helmet and lacerated his nose. Dr. Raschbacher noted Claimant was not knocked to the ground and did not lose consciousness or have any issues with memory. Claimant reported being a little dizzy and lightheaded the first day or so after the injury. No shoulder or back pain was reported. X-rays of the spine revealed some degenerative changes at the cervical level but no acute findings. Dr. Raschbacher assessed Claimant with blunt facial trauma at the nose and a cervical strain. He referred Claimant for physical therapy and massage therapy and released Claimant to full work.

4. At a follow-up evaluation with Dr. Raschbacher on November 4, 2019, Claimant complained of continued neck pain at 7/10. He also reported a head contusion and low back pain. Dr. Raschbacher prescribed Claimant ibuprofen.

5. Claimant continued to report neck pain, low back pain, headache and dizziness to Dr. Raschbacher on December 5, 2019. Dr. Raschbacher ordered a cervical spine MRI, which was performed on December 12, 2019. The MRI revealed multilevel degenerative changes. Anterior osteophyte formations were shown at C4, C5, and C6 levels, with a straightening of the cervical spine and mild reversal of cervical lordosis.

6. Dr. Raschbacher reviewed the cervical MRI on January 2, 2020 and noted mild to moderate pre-existing degenerative changes with no acute findings. He recommended Claimant continue physical therapy for two weeks.

7. On January 15, 2020, Claimant's physical therapist noted Claimant performed all of his exercises to completion. He noted Claimant presented with "very inconsistent symptoms without clear biomechanical pain generator," and suspected Claimant had no significant limitations and was more so unable to cope with the pain.

8. Claimant returned to Dr. Raschbacher for a follow-up evaluation on January 23, 2020. Claimant continued to report neck pain. Dr. Raschbacher noted that the cervical MRI did not reveal anything correlating with Claimant's subjective complaints. On examination of the cervical spine, Dr. Raschbacher noted mild soft tissue tenderness and "fairly good" neck range of motion with no radiation. He did not document specific range of motion measurements. His final diagnosis remained blunt facial trauma and cervical strain. Dr. Raschbacher placed Claimant at maximum medical improvement ("MMI") and discharged him from care, with no permanent impairment and no work restrictions. He provided a prescription for Ibuprofen as needed and opined that Claimant could complete his remaining physical therapy visits as maintenance.

9. At physical therapy on January 24, 2020, Claimant reported that his cervical spine felt within normal limits.

10. Respondents filed a Final Admission of Liability ("FAL") on February 25, 2020 based upon Dr. Raschbacher's report. Respondents admitted for reasonable and necessary maintenance care. Claimant objected to the FAL and requested a DIME.

11. Prior to the DIME taking place, Claimant sustained a separate work-related injury to his chest on March 9, 2020 after striking his chest on a pipe. Claimant treated for the chest injury with Lawrence Cedillo, D.O. and Lawrence Lesnak, M.D. Dr. Cedillo prescribed Claimant ibuprofen 800 mg and referred Claimant for physical therapy. Claimant reported to Dr. Cedillo and Dr. Lesnak diffuse neck pain related to his September 27, 2019 work injury. Dr. Cedillo's examinations for the March 9, 2020 injury included examination of the cervical spine. On more than one occasion, these examinations showed the neck to be non-tender to palpation and range of motion within normal limits without difficulty. At Dr. Lesnak's July 7, 2020 evaluation, Dr. Lesnak noted full cervical range of motion without reproduction of any symptoms. Cervical root tension maneuvers and cervical facet joint loading activities also reproduced no symptoms. Dr. Lesnak noted self-limited thoracic spine range of motion.

12. Dr. Reichhardt performed the DIME on July 22 and July 23, 2020. Regarding the mechanism of injury, Claimant reported that he was struck in the head by sheet rock that fell from the second floor. Claimant reported that he lost consciousness and fell to the ground for several minutes. He reported neck and low back pain, as well as cognitive symptoms, memory issues, blurred vision, a pins and needles sensation in his hands, and left knee pain. On examination of the cervical spine, Dr. Reichhardt noted tenderness to palpation, pain with flexion and extension, and limited range of motion. He diagnosed Claimant with neck pain and agreed Claimant reached MMI as of January 23, 2020. Dr. Reichhardt provided a 17% whole person permanent impairment, consisting of 12% for range of motion deficits and 6% under Table 53 of the AMA Guides. He did not assign any work restrictions. As maintenance care, Dr. Reichhardt recommended Claimant attend four follow-up evaluations and four physical therapy sessions as needed over the course of the following year.

13. On September 28, 2020, Elizabeth Bisgard, M.D. performed an independent medical examination ("IME") at the request of Respondents. As part of the IME she reviewed the medical records, including the records associated with Claimant's March 9, 2020 work injury. On examination, Dr. Bisgard found Claimant's range of motion invalid, inconsistent and nonphysiologic. She noted that on distraction, Claimant was able to fully extend and rotate his neck bilaterally while demonstrating his work activity. Dr. Bisgard reviewed surveillance video of Claimant dated August 20, 2020, August 22, 2020, August 30, 2020 and September 6, 2020. Dr. Bisgard described the videos, noting that Claimant did not appear to be limited in any movement, and did not show hesitation or pain.

14. Dr. Bisgard opined that Claimant had reached MMI for what she diagnosed as a head contusion and nasal abrasion, resolved, and cervical pain, inconsistent with examination findings. She indicated that no further treatment was warranted, nor was any permanent impairment, for either range of motion deficits or for a Table 53 rating. Dr. Bisgard explained that there was no specific diagnosis or pathology correlating to Claimant's subjective symptoms. She noted that multiple examiners noted inconsistencies and opined that Claimant's reported pain is inconsistent with any physiologic findings. Dr. Bisgard further explained that Claimant did not meet the requirement under Table 53 of the AMA Guides for a minimum of six months of medically documented pain and rigidity, as there were only four months from the date of injury to MMI. She further noted that documentation from the providers did not show rigidity. Dr. Bisgard also explained that, without a Table 53 diagnosis, range of motion measurements cannot be used for a rating.

15. Dr. Reichhardt testified by deposition on November 9, 2020. During the deposition, Dr. Reichhardt was also shown the surveillance video viewed by Dr. Bisgard and, subsequently, by Dr. Hughes. Dr. Reichhardt stated that he did not see "anything that looked unusual or necessarily representative of restricted neck motion." *Dr. R. Depo, P. 39, l. 19-21.* He was also provided and reviewed medical records from Claimant's subsequent work injury of March 9, 2020, which showed cervical evaluations between the date of MMI and the DIME appointment. When Dr. Reichhardt was asked if he was still of the opinion that Claimant had a 17% cervical impairment, he responded that Claimant

did not. He testified, “This is difficult. But I would say after reviewing Dr. Cedillo's notes and after reviewing the surveillance video, along with the other concerns that there have been about inconsistencies, I would say that it is medically probable that he does not have permanent cervical impairment.” *Dr. R Depo. P. 34, l. 16-21.*

16. On November 10, 2020, John Hughes, M.D. performed an IME at Claimant’s request. Dr. Hughes reviewed medical records and surveillance video, and performed a physical examination. Dr. Hughes concluded that Claimant sustained a medically documented injury to the cervical spine with continued pain, and thus qualified for 4% permanent impairment under Table 53(II)(B). He opined that an impairment for range of motion was not appropriate. Dr. Hughes explained that, on his examination, Claimant exhibited highly limited range of motion that was “clearly discrepant” with what he observed on the surveillance video, what was documented by Dr. Raschbacher and Claimant’s physical therapists.

17. Dr. Hughes testified at hearing as a Level II accredited expert in occupational medicine. He testified consistent with his IME report. Dr. Hughes opined that Dr. Reichhardt erred by not providing Claimant an impairment rating for a specific disorder under Table 53(II)(B). He explained that Claimant has a medically documented injury to his cervical spine with more than six months of documented pain. Dr. Hughes testified he was not able to review several records regarding the cervical evaluations done under the subsequent claim between the MMI of Dr. Raschbacher and the DIME evaluation. Dr. Hughes stated that provision of a Table 53 rating is at the discretion of the rater.

18. Claimant testified at hearing he continues to experience ongoing symptoms as a result of the September 27, 2019 work injury, including popping and pain in his neck, tingling in his hands and memory issues. Claimant testified that he cannot bend down or lift greater than 60-70 pounds due to back pain.

19. Surveillance video of Claimant obtained in August and September 2020 shows Claimant lifting and loading a piano into the back of a pickup truck. He is further observed on the surveillance video bending over on multiple occasions.

20. The ALJ finds the opinions of Drs. Reichhardt, Raschbacher, and Bisgard more credible and persuasive than the opinion of Dr. Hughes and Claimant’s testimony.

21. Claimant failed to overcome Dr. Reichhardt’s DIME opinion on permanent impairment by clear and convincing evidence.

22. Respondents proved by a preponderance of the evidence maintenance medical benefits are no longer reasonable, necessary or related to Claimant’s September 27, 2019 work injury.

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

CONCLUSIONS OF LAW

Generally

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

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

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

Overcoming the DIME

The finding of a DIME physician concerning the claimant's non-scheduled medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995); *Lafont v. WellBridge D/B/A Colorado Athletic Club* W.C. No. 4-914-378-02 (ICAO, June 25, 2015).

The questions of whether the DIME physician properly applied the *AMA Guides*, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000); *Paredes v. ABM Industries* W.C. No. 4-862-312-02 (ICAO, Apr. 14, 2014). A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO, Mar. 22, 2000); *Licata v. Wholly Cannoli Café* W.C. No. 4-863-323-04 (ICAO, July 26, 2016).

Claimant failed to prove it is highly probable Dr. Reichhardt's DIME opinion on permanent impairment is incorrect. Although Dr. Reichhardt initially opined that Claimant sustained 12% impairment for range of motion deficits and 6% impairment under Table 53, he subsequently changed his opinion and ultimately opined that Claimant did not sustain any permanent impairment as a result of the September 27, 2019 work injury. Dr. Reichhardt's opinion that Claimant did not sustain any permanent impairment is based on his review of additional medical records and surveillance video, along with concern for inconsistencies in Claimant's reporting and presentation. Dr. Reichhardt's ultimate opinion that Claimant did not sustain any permanent impairment is consistent with the opinions of Claimant's ATP, Dr. Raschbacher, as well as Dr. Bisgard.

Although Claimant consistently complained of neck pain, inconsistencies regarding Claimant's reports of the injury, his symptoms, his presentation, and objective findings call Claimant's credibility into question. Dr. Raschbacher noted the MRI findings did not correlate with Claimant's subjective complaints. Claimant's physical therapist specifically remarked that Claimant presented with inconsistent symptoms without a clear biomechanical pain generator. Subsequent to being placed at MMI, Drs. Cedillo and Lesnak noted normal cervical range of motion without reproduction of symptoms on examination. Dr. Bisgard credibly opined that Claimant's findings on examination were inconsistent and nonphysiologic. Surveillance video of Claimant shows Claimant exhibiting more function and range of motion than he purports. Dr. Reichhardt took all of this into consideration when issuing his ultimate opinion. Dr. Reichhardt's opinion is joined by Dr. Bisgard, who credibly explained Claimant is not entitled to a permanent impairment rating under Table 53 or for range of motion deficits. Dr. Hughes acknowledged that the provision of a Table 53 rating is within the discretion of the examiner. Here, to the extent Dr. Hughes' opinion differs from that of the DIME physician, such disagreement represents a mere difference of opinion and does not rise to the level of clear and convincing evidence that Dr. Reichhardt erred in his opinion.

Maintenance Medical Benefits

Section 8-42-101(1), C.R.S. requires the employer to provide medical benefits to cure or relieve the effects of the industrial injury, subject to the right to contest the reasonableness or necessity of any specific treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). The need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that the claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999); *Hastings v. Excel Electric*, WC 4-471-818 (ICAO, May 16, 2002). There is no bright line test to distinguish treatment designed to cure an injury from treatment designed to relieve the effects of the injury. Surgery may be designed to cure an injury or may be maintenance treatment designed to relieve the effects or symptoms of the injury. Post-MMI treatment may be awarded regardless of its nature. *Corley v. Bridgestone Americas*, WC 4-993-719 (ICAO, Feb. 26, 2020).

To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School District No.11*, WC No. 3-979-487, (ICAO, Jan. 11, 2012). Once a claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* WC 4-461-989 (ICAO, Aug. 8, 2003). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 919 P.2d 701, 704 (Colo. App. 1999).

In contrast, when respondents seek to terminate medical maintenance benefits they have the burden to prove that medical maintenance benefits are no longer reasonable, necessary or related to the industrial injury. *HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990); *see* §8-43-201(1), C.R.S. (specifying that "a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification").

The preponderant evidence establishes Claimant is not entitled to ongoing maintenance medical benefits. Respondents' February 25, 2020 FAL admitted for reasonable, necessary and related post-MMI medical treatment pursuant to Dr. Raschbacher's January 23, 2020 MMI report. As maintenance, Dr. Raschbacher prescribed Claimant ibuprofen as needed and recommended Claimant complete any remaining physical therapy sessions. Claimant attended his final physical therapy appointment as related to the September 27, 2019 work injury on January 24, 2020. At that physical therapy session, Claimant reported that his cervical spine felt within normal limits. Subsequent physical therapy sessions were related to Claimant's March 9, 2020 injury. Claimant was also prescribed ibuprofen as part of his March 9, 2020 work injury. Dr. Bisgard credibly opined Claimant does not require maintenance treatment as a result of the September 27, 2019 work injury. Furthermore, Claimant's testimony regarding ongoing neck issues as a result of the September 27, 2019 work injury are not credible and persuasive. Accordingly, Respondents proved it is more likely than not medical maintenance benefits are no longer reasonable, necessary or related to Claimant's September 27, 2019 work injury.

ORDER

1. Claimant failed to overcome Dr. Reichhardt's DIME opinion on permanent impairment.

2. Ongoing maintenance medical benefits are not reasonable, necessary or related to the September 27, 2019 work injury.

3. All matters not determined herein are reserved for future determination.

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

DATED: February 25, 2021

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-131-091-002

ISSUES

- Did Claimant make a proper showing for a change of physician to Dr. Miguel Castrejon?

FINDINGS OF FACT

1. Claimant works for Employer as a firefighter. He suffered an admitted injury to his right shoulder on December 4, 2019.

2. Claimant has a lengthy history of right shoulder problems, including multiple dislocations. He had bony and labral changes that developed over many years.

3. Claimant saw Dr. Michael Simpson on February 10, 2020 for a surgical consultation. Dr. Simpson noted MRI findings of "marked deformity superior labral aspect of the humeral head consistent with an old Hill-Sachs deformity and corresponding Bankart injuries." Dr. Simpson ordered a shoulder CT, which showed significant glenoid insufficiency. Dr. Simpson opined, "I think he is going to require an anterior shoulder stabilization with a bone block procedure or glenoid augmentation. That is not a surgical procedure I perform. Therefore, we will need to get him referred to another provider. He was asking me about surgeons in town who perform that since I do not. He would like to be referred to Dr. Chris Jones and I will try to facilitate that."

4. Claimant was evaluated by Dr. Jones on February 24, 2020. Dr. Jones recommended a bone reconstruction (Latarjet procedure) and possible allograft. He also recommended arthroscopy to evaluate the Hill-Sachs deformity and a possible rotator cuff repair.

5. Dr. Nicholas Kurz became Claimant's primary ATP on February 25, 2020. Based on the lack of any acute new pathology shown on imaging, Dr. Kurz opined the recommended surgery was related to Claimant's pre-existing condition and was not work-related. Dr. Kurz opined Claimant suffered a work-related strain on December 4, 2019 but had recovered. He put Claimant at MMI on March 31, 2020 and advised Claimant to follow up with his personal physicians for further treatment, including surgery. Dr. Kurz agreed surgery was necessary and encouraged Claimant to pursue treatment under health insurance immediately and not wait for liability issues to be sorted out. He explained if the surgery were later determined to be work-related, Claimant could return to Employer's clinic and would be reimbursed for treatment received in the interim.

6. Dr. William Ciccone II performed an IME for Respondent on May 29, 2020. Dr. Ciccone noted Claimant's extensive pre-existing history and underlying pathology that predated the work injury. However, Dr. Ciccone opined the work injury aggravated Claimant's pre-existing condition and proximately caused the need for surgery.

7. On June 5, 2020, Dr. Christopher Jones performed a right shoulder arthroscopic debridement. Dr. Jones initially planned a Latarjet procedure but he "elected to abort on that procedure" because intraoperative inspection revealed a "massive humeral head defect." Dr. Jones opined, "his only real option is to consider humeral reconstruction and that would be within allograft or an arthroplasty procedure. Certainly, the million-dollar question is what to do with the glenoid. Should we do hemiarthroplasty or does he need a bony procedure." Claimant requested a referral to Dr. Proventure at the Steadman Clinic, and Dr. Jones referred Claimant for what he believed was a second opinion. Dr. Jones advised Claimant to return in four weeks.

8. Claimant saw Dr. Proventure and decided to have him perform surgery.

9. Respondent filed a General Admission of Liability on July 16, 2020 and agreed to authorize surgery with Dr. Provencher.

10. Claimant returned to Dr. Kurz on July 28, 2020 to resume treatment under his workers' compensation claim. Dr. Kurz noted Respondent had accepted the claim and told Claimant, "Awesome. Good for you." Claimant explained he was scheduled for surgery with Dr. Proventure in August. Claimant stated Dr. Jones had referred him out because "the case was too complicated for him." Dr. Kurz informed Claimant he had no notes or other information from Dr. Proventure. Dr. Proventure had ordered a pre-op nerve conduction study and Claimant said he was "trying to find" a doctor to perform it. Dr. Kurz advised Claimant he could see Dr. Leppard or Dr. Bowser, who usually see patients "within a week." Claimant did not pursue the electrodiagnostic testing.

11. On August 18, 2020, Dr. Provencher performed a right shoulder anterior stabilization procedure with an open distal tibial allograft and talus allograft.

12. Claimant testified he no longer wants to see Dr. Kurz because "I don't feel like Dr. Kurz has my best interests at heart. I don't feel like he is taking my injuries seriously. He initially ruled it as a sprain. I've had to undergo one of the most intense shoulder reconstruction surgeries that you can have. I no longer trust his medical opinion. I don't trust that he has anything for me as a patient that he wants to continue to improve me. I feel as though he wants to perpetuate his own initial diagnosis and won't consider any other diagnosis outside of that . . . . Every time I go into that office, I feel as though I'm being treated as a criminal that's being interrogated instead of a patient speaking to a physician . . . . I've never had a relationship with the physician like this. And as a medical professional myself, I would never treat any of my patients the way that I've been treated by Dr. Kurz." Claimant testified Dr. Kurz does not listen to him and "I don't even feel like he is in the room when I am discussing my complaints." Claimant does not believe he has an effective doctor-patient relationship with Dr. Kurz, and "I feel more like there's an interrogator-interrogatee relationship." Claimant testified he "absolutely" feels "threatened" by Dr. Kurz.

13. Claimant secretly recorded his appointments with Dr. Kurz on March 31, July 28, August 11, and September 1, 2020. The recordings were entered into evidence at hearing. After listening to the recordings, the ALJ finds Claimant's descriptions of the

appointments are inaccurate and his perceptions of his interactions with Dr. Kurz are objectively unreasonable.

14. Claimant testified Dr. Kurz told him to perform “pendulum” exercises after surgery. Claimant testified Dr. Provencher’s postop notes made clear that he was not to perform pendulum exercises until approved by Dr. Provencher. Claimant testified he believed Dr. Kurz may have been trying to get him to do something that would cause more damage to his shoulder.

15. Dr. Kurz had no postop notes from Dr. Proventure at the September 1, 2020 appointment. The recording shows Dr. Kurz did not recommend or suggest Claimant perform pendulum exercises but merely asked if Claimant was performing such exercises. Claimant’s suggestion that Dr. Kurz wanted him to cause further injury to the shoulder is irrational and appears paranoid. Claimant’s criticisms of Dr. Kurz regarding pendulum exercises are unpersuasive.

16. Claimant testified he dreaded the visits with Dr. Kurz and his apprehension was evidenced by his vital signs. Claimant testified when he sees Dr. Kurz, his “heart rate is in the 120s, 130s and my blood pressure is in the 140 over like 80, which is a very strong indicator of extreme stress.”

17. Contrary to Claimant’s testimony, his heart rate did not reach the 120s or 130s when his vital signs were taken at appointments with Dr. Kurz. Nor do the records corroborate he repeatedly had higher blood pressure with Dr. Kurz than other providers.

18. Claimant testified he lost feeling in his pinky before surgery. He believes Dr. Kurz should have evaluated the complaint and “it would have warranted a visit to a neurologist.” But Dr. Proventure had already ordered nerve conduction studies when Claimant first mentioned the symptoms to Dr. Kurz on July 28. Dr. Kurz recommended Claimant see Dr. Leppard or Dr. Bowser who could probably do the testing “within a week” but Claimant did not follow through. Claimant’s accusation that Dr. Kurz somehow failed him regarding the ulnar nerve issue is misplaced and unpersuasive.

19. Also at the July 28, 2020 visit, Dr. Kurz asked if Claimant had returned to Dr. Jones. Claimant said Dr. Jones told him the “case was too complicated for him [Dr. Jones]” so he referred Claimant to Dr. Proventure. On August 11, 2020, Claimant again stated Dr. Jones had told him “he wasn’t able to perform the procedure that I needed.”

20. Contrary to Claimant’s statements, Dr. Jones’ June 5, 2020 report did not indicate Claimant’s case was “too complicated” or that he was unwilling or unable to perform surgery. In fact, it was Claimant who requested the referral to Dr. Proventure. Dr. Jones’ report documents, “Patient actually inquired about going to the Steadman clinic to see Dr. Provencher. Apparently, he was referred there by some friends. I am certainly happy to see if I can help facilitate that. I am not sure if those guys have any more experience doing osteochondral graft, but I am certainly happy to help the patient obtain another opinion if he would like.”

21. At hearing, Claimant expressed great concern with the way he felt he was treated by Dr. Kurz at his August 11, 2020 appointment. As reflected on the recording, Dr. Kurz did not request the appointment and did not know why Claimant was there because he previously told Claimant to follow-up after surgery. Claimant appears to blame Dr. Kurz for the appointment, even though he knows Dr. Kurz played no part in scheduling the visit. The clinic staff set the appointment after Claimant called about a WC 164 form he could not find. The appointment probably resulted from miscommunication or misunderstanding by administrative staff and/or PA-C Homberger but had nothing to do with Dr. Kurz. The ALJ finds this complaint to be unpersuasive.

22. Claimant testified Dr. Kurz left the examination room during the August 11 appointment for about "10 to 15 minutes" but the recording shows Dr. Kurz was out of the room for only 4.5 minutes. Claimant testified Dr. Kurz returned with a "massive" file at which point "the appointment became completely unprofessional and something I would never expect a physician to do." As with Claimant's other allegations, this testimony is not supported by the recordings. Dr. Kurz was puzzled because Dr. Jones' June 5, 2020 report contradicted Claimant's story that Dr. Jones "wasn't able to perform the procedure I needed." It was certainly appropriate for Dr. Kurz to inquire about the discrepancy between Claimant's statements and Dr. Jones' report. Claimant later became defensive when Dr. Kurz asked about his lengthy history of narcotic use. Despite Claimant's complaints he felt "threatened" by Dr. Kurz at the August 11, 2020 visit and felt Dr. Kurz's demeanor was accusatory and aggressive, the ALJ did not receive the same impression upon listening to that recording. The ALJ heard nothing "unprofessional" on the recording.

23. Claimant testified every meeting with Dr. Kurz was as if Dr. Kurz just met him for the first time. The recordings do not support this testimony. To the contrary, Dr. Kurz appeared familiar with Claimant's situation, except for some details when he had not been provided reports from other providers. Dr. Kurz congratulated Claimant on enrolling and paramedic school and later inquired how school was going.

24. The audio recordings show Dr. Kurz was cordial and professional at all times. Dr. Kurz never raised his voice to Claimant, including on March 31, 2020 when Claimant asked for an explanation why Dr. Kurz changed his opinion on causation of the shoulder injury.

25. Claimant has received quality treatment through Employer's clinic. Dr. Kurz credibly testified he will "absolutely" provide the medical care Claimant needs. Dr. Kurz testified Claimant's prior inconsistencies are "water under the bridge" and will not hinder his future treatment.

26. Dr. Kurz's hearing testimony was credible and persuasive.

27. Claimant was not a credible witness.

28. Claimant failed to make a proper showing for a change of physician.

CONCLUSIONS OF LAW

A claimant can obtain a change of physician "upon the proper showing to the division." Section 8-43-404(5)(a)(VI)(A); *Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996). Section 8-43-404(5)(a)(VI)(A) does not define a "proper showing," and the ALJ has broad discretion to decide if the circumstances justify a change of physician. *Jones v. T.T.C. Illinois, Inc.*, W.C. No. 4-503-150 (May 5, 2006). The ALJ should exercise this discretion with an eye toward ensuring the claimant receives reasonably necessary treatment while protecting the respondents' legitimate interest in being apprised of treatment for which they may ultimately be held liable. *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999); *Landeros v. CF & I Steel*, W.C. No. 4-395-315 (October 26, 2000). The ALJ may consider many factors including whether the claimant has received adequate treatment, whether the claimant trusts the ATP, the level of communication between the claimant and the ATP, the ATP's expertise and skill at managing a condition, and the ATP's willingness to provide additional treatment. *E.g.*, *Carson v. Wal-Mart*, W.C. No. 3-964-07 (April 12, 1993); *Merrill v. Mulberry Inn, Inc.*, W.C. No. 3-949-781 (November 1995); *Greenwalt-Beltmain v. Department of Regulatory Agencies*, W.C. No. 3-896-932 (December 5, 1995); *Zimmerman v. United Parcel Service*, W.C. No. 4-018-264 (August 23, 1995). An ALJ need not approve a change of physician because of a claimant's personal reasons, including mere dissatisfaction with the ATP. *McCormick v. Exempla Healthcare*, W.C. No. 4-594-683 (November 27, 2007). On the other hand, the ALJ is not precluded from considering the claimant's subjective perception of his relationship with the physician. *Gutierrez v. Denver Public Schools*, W.C. No. 4-688-075 (December 18, 2008).

As found, Claimant failed to establish a basis for a change of physician. Although Claimant appeared credible at first blush, the ALJ developed serious doubts about the reliability of his testimony as additional information was revealed regarding the history and Claimant's perception of events. For instance, Claimant testified Dr. Jones referred him to Dr. Proventure because the proposed surgery was "too complicated." That testimony is contradicted by Dr. Jones' June 5, 2020 report, which makes clear Dr. Jones was willing to perform surgery an only made the referral to Dr. Proventure because Claimant requested it. Claimant's perception of Dr. Kurz as dismissive, hostile, and "threatening" is not supported by the surreptitious recordings of the appointments. To this ALJ's ear, Dr. Kurz sounded professional and courteous at every visit. Although the March 31, 2020 discussion regarding Dr. Kurz's opinion that Claimant's ongoing shoulder problems were not work-related undoubtedly involved some tension, Dr. Kurz was cordial and encouraged Claimant to move forward with treatment under health insurance while the liability issue was being resolved. At the July 28, 2020 appointment, when Claimant informed Dr. Kurz that Respondent accepted the claim and had authorized surgery, Dr. Kurz replied, "awesome. Good for you." The ALJ perceived no resentment or resistance in Dr. Kurz's tone. Claimant's testimony he feels like "a criminal being interrogated, instead of a patient speaking to a physician" is refuted by the recordings. Dr. Kurz credibly testified his prior assessment of causation has no impact on the treatment he will provide going forward. As Dr. Kurz noted, he is not in the "risk" department and the decision whether to cover a claim is distinct from his role as the primary ATP. There is no persuasive evidence Claimant received substandard care, and in fact, the record shows the contrary.

ORDER

It is therefore ordered that:

1. Claimant's request for a change of physician is denied and dismissed.

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

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

DATED: February 25, 2021

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-105-877-002, 5-135-043-002, and 5-177-030-002

ISSUES

I. Whether Claimant established by a preponderance of the evidence that he sustained a compensable injury to his right hand on March 6, 2019.

II. Whether Claimant established by a preponderance of the evidence that he sustained a compensable injury to his right hand on September 5, 2019.

III. Whether Claimant established by a preponderance of the evidence that he sustained a compensable injury to his right elbow on March 6, 2020.

PROCEDURAL BACKGROUND

Claimant alleges he suffered three separate compensable injuries. Claimant alleges he suffered his first injury on March 6, 2019 when he injured his right hand. This first claim has been assigned W.C. Claim No. 5-105-877.

Claimant also alleges he suffered a second injury on September 5, 2019, when he again injured his right hand. This second claim has been assigned W.C. Claim No. 5-135-043.

Claimant further alleges he suffered a third injury on March 6, 2020, when he injured his right elbow. This last claim has been assigned W.C. Claim No. 5-177-030.

Claimant filed a motion and moved to consolidate all three claims for hearing. Claimant's motion was granted on November 13, 2020. As a result, all three claims were heard at the January 14, 2021 hearing.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. Claimant has worked in the grocery industry since approximately 1988. Claimant worked for Employer for about 14 years. Claimant then switched to [Redacted] for about another 14 years, working essentially the same job. Claimant returned to work for Employer in July 2018, again primarily stocking shelves with grocery product. Claimant worked at Employer's Store No. 69 at all relevant times.

2. Claimant testified that he sustained at least two work-related injuries while working for [Redacted], and that when he was working for Employer in December 2018, he knew he had to report work-related injuries to a supervisor. [Hearing Transcript, pp. 41:43 – 42:3].

W. C. No. 5-105-877, March 6, 2019, alleged injury

3. Claimant works the night shift, appearing for work at midnight and working through 8:00 a.m. [Hearing Transcript, pp. 23:23 - 24:1; 46:7-9]. Claimant testified that on March 6, 2019, as he was stocking peanut butter jars on aisle 7, he spread out his right hand to grab two jars of peanut butter when he felt a stabbing pain in his right hand. [Hearing Transcript, p. 30:13-23]. Claimant testified that his hand "changed color and swelled up immediately." [Hearing Transcript, p. 39:4-7]. Claimant testified that after his hand changed color and swelled immediately, he told someone named Chris [Hearing Transcript, p. 31:3-13] and someone named Kayla [Hearing Transcript, p. 31:14-20], to "look at my hand." Both individuals allegedly told Claimant that he needed to talk to Assistant Store Manager Mark P[Redacted].

4. Assistant Store Manager Mark P[Redacted] testified that Employer's Assistant Store Managers rotate morning, evening and night shifts and that at the time of the alleged injury of March 6, 2019, he was working the 10:00 a.m. to 8:00 p.m. shift. Mr. P[Redacted] testified that on March 7, 2019, Employer had scheduled an "inventory crew" to count inventory in the entire store beginning at 6:00 a.m. Thus, because all stocking had to be completed by 6:00 a.m. on March 7, 2019, Claimant started his shift at 10:00 p.m. on March 6, 2019, and Mr. P[Redacted] worked late, leaving the store "somewhere close to midnight." [Hearing Transcript, pp. 47:11 – 48:11]. Thus, while Mr. P[Redacted] and Claimant normally would not be working together, they both were working around midnight on March 6, 2019.

5. Mr. P[Redacted] testified that Claimant approached him either late-night March 6 or early-morning March 7, 2019, stating that Claimant had hurt his hand. When Mr. P[Redacted] asked when the injury occurred, Claimant stated that he was not sure, but probably the week before Christmas in December 2018. [Hearing Transcript, p. 49:17-23]. Mr. P[Redacted] was the head of the store safety team, which included reporting and handling worker-related injury claims. [Hearing Transcript, p. 68:10-25]. Thus, Mr. P[Redacted] asked Claimant to whom Claimant had reported the injury in December. Claimant told Mr. P[Redacted] that he had not reported the alleged injury to anyone. [Hearing Transcript, pp. 50:8 – 51:20]. Mr. P[Redacted] then informed Claimant that he would complete the store incident report packet when he came in the following morning, but that because Claimant had not informed anyone of the alleged injury in December 2018, he was not sure if Sedgwick would accept the claim. [Hearing Transcript, pp. 52:14 – 53:2].

6. Despite Mr. P[Redacted] telling Claimant that Sedgwick might not accept the alleged hand injury claim because of Claimant's delay in reporting the alleged injury from December 2018 until March 2019, Mr. P[Redacted] testified that Claimant never mentioned anything allegedly occurring on March 6 or 7, 2019, and mentioned nothing about his hand swelling or changing color. Furthermore, despite allegedly asking both Chris and Kayla to look at his hand, Claimant never asked Mr.

P[Redacted] to look at his hand. Instead, Claimant testified that he was "not real sure" if he informed Mr. P[Redacted] of the events allegedly occurring on March 6, 2019. [Hearing Transcript, pp. 39:24 – 40:2].

7. The following morning, March 7, 2019, Mr. P[Redacted] spoke to Assistant Store Manager Ed M[Redacted], who informed Mr. P[Redacted] that Claimant had reported a hand injury to Mr. M[Redacted], so Mr. M[Redacted] started the incident report packet. Because Mr. P[Redacted] was head of the store's safety team and he had already spoken to Claimant about the alleged hand injury, Mr. P[Redacted] took over completing the incident packet.

8. On the Associate Incident In-Store Investigation Report, where the form states, "Date of Injury": Mr. P[Redacted] wrote, "December 2018." [Exhibit A, p. 4]. This corroborates and confirms Mr. P[Redacted]'s testimony that Claimant never mentioned anything to Mr. P[Redacted] about an incident on March 6, 2019 when he initially reported his injury. In addition, on the same report, there is a section for information about managers notified of the alleged injury. In that section, under "Mgr Notified of Injury", Claimant wrote, "Alonzo n/c." [Ex. A, p. 4]. Mr. P[Redacted] testified that "Alonzo n/c" referred to a night crew supervisor that normally worked with Claimant on the overnight crew. That said, Alonzo had not worked at Store No. 69 since January 2019. Thus, when Claimant documented that he reported the alleged injury to Alonzo, Claimant necessarily had to have been referring to the alleged injury occurring in December 2018, since Alonzo did not work for Store No. 69 in March 2019. Thus, Claimant's statement in the Associate Incident In-Store Investigation Report on March 7, 2019, that he reported the alleged injury to Alonzo, is consistent with Claimant not mentioning an incident occurring on March 6, 2019.

9. Consistent with the Associate Incident In-Store Investigation Report, Claimant's own written statement on the Associate Work Related Injury / Illness Report dated March 7, 2019, does not mention an incident on March 6, 2019. [Exhibit A, p. 6]. The Associate Work Related Injury / Illness report provides: "In your-own words, describe in detail how the Injury happened: (include the size and weight of objects, the type and condition of any equipment involved, conditions of the area where injury/illness occurred)." Clamant wrote: "in Dec I was reaching for some product and it felt like I got stabbed between the first and second finger. I tryed [sic] to see if would get better but it hasn't it has gotten progressively worse. To the point of my fingers turning blue." [Exhibit A, p. 6]. Thus, Claimant again did not mention an incident occurring on March 6, 2019.

10. Furthermore, in the section of the Associate Work Related Injury / Illness Report which states "Date of Injury" there are scribbled marks across the original date listed by Claimant, but the number 2018 can be seen, which is consistent with Claimant's original report to Mr. P[Redacted] and his written narrative on the Associate Work Related Injury / Illness Report in which he alleged an injury in December 2018. Mr. P[Redacted] testified that a few days after Claimant completed the Work Related Injury / Illness Report, Claimant asked to change the report and wrote the date "3-6-2019." [Hearing Transcript, p: 60:14-22 – 61:2]. This is consistent with the Claimant's statement in the Associate Incident In-Store Investigation Report, in which, by alleging that he reported the alleged injury to "Alonzo", who had not

worked at Store No. 69 since January 2019, Claimant established that he was reporting an alleged injury in December 2018 rather than an incident occurring on March 6, 2019.

11. Claimant's testimony that he sustained an injury on March 6, 2019, is not supported by his own statements to Mr. P[Redacted] on March 6, 2019, or in his own written statement on March 7, 2019. Both times Claimant did not mention an incident on March 6, 2019, instead stating that an injury occurred sometime in December 2018. If Claimant had experienced an injury on March 6, 2019, which caused immediate swelling and discoloration, it is highly unlikely that he would not have told Mr. P[Redacted] about that injury when speaking to Mr. P[Redacted] less than 20 minutes later, especially when Mr. P[Redacted] informed Claimant that Sedgwick may not accept the alleged injury because of the 3-month delay in reporting an injury. Claimant testified that he experienced immediate pain, swelling and discoloration before speaking to Mr. P[Redacted] on March 6, 2019. If this were true, Claimant would not have focused on an alleged incident in December 2018, especially after Mr. P[Redacted] mentioned the delay in reporting the alleged December injury. Rather, Claimant would have told Mr. P[Redacted] that the incident occurred only a few minutes before on March 6, 2019.

12. Claimant's credibility is also undermined by the multiple inconsistencies in Claimant's testimony and the records about the alleged incident in December 2018:

   - Claimant testified that he informed "Michelle" on the day of the alleged incident in December 2018, whom he claims wanted to send Claimant to the hospital [Hearing Transcript, p. 37:6-14];
   - Mr. P[Redacted] testified that during his conversation with Claimant in the late-evening of March 6 or early-morning of March 7, Claimant stated he told no one of the alleged incident in December 2018. [Hearing Transcript, pp. 50:8 – 51:20].
   - The following morning of March 7, 2019, when Claimant provided information for the Associate Incident In-Store Investigation Report, Claimant alleged that he informed "Alonzo" of the alleged December 2018 injury. [Ex. A, p. 4].
   - Claimant told hand surgeon Jonathan Sollender, M.D., on April 4, 2019, that he had not informed anyone of the alleged incident in December 2018. [Ex. C, p. 26].

13. Jonathan Sollender, M.D., a fellowship-trained hand surgeon, performed an Independent Medical Examination of Claimant on April 4, 2019, at the request of Respondent. Claimant's complaints were listed as soreness of the palmar and dorsal side of the index finger and swelling of the long (middle) finger of the right hand. Dr. Sollender diagnosed Claimant with a strain of the right hand and concluded that the strain was not caused by work activities based on his review of job demands analyses of other individuals he has treated in the same position as Claimant. [Ex. C, p. 27].

14. Jill Adams, CRC, CCM, CEAS II performed a Job Demands Analysis and Risk Factor Analysis of Claimant's position for Employer on July 8, 2020. Her report dated July 9, 2020, found that Claimant's job duties did not reach the Primary or Secondary Risk Factors associated with cumulative trauma in the Cumulative Trauma Conditions Medical Treatment Guidelines, W.C.R.P. 17, Exhibit 5. [Ex. N, pp. 132-33]. This Job Demands Analysis supports Dr. Sollender's original opinion on April 4, 2019, that Claimant's hand strain – as an occupational disease - was not caused by Claimant's job duties.

15. Caroline Gellrick, M.D., performed an Independent Medical Examination of Claimant on April 16, 2020, at the request of the Claimant. Dr. Gellrick diagnosed Claimant with a "right hand sprain and strain." [Ex 9, p. 154]. She concluded that "the March 2019, injury appears to be more of an occupational disease." [Ex. 9, p. 155]. Dr. Gellrick then contended that Claimant's right-hand strain was caused by his work activities, referring to W.C.R.P. 17, Exhibit 5, medical causation analysis. But Dr. Gellrick's opinion is flawed because she lacked information which she specifically stated would be dispositive of the causation question. Dr. Gellrick's report says that her opinion on causation rested on assumptions about the ergonomic risk of Claimant's job duties which she could not quantify without a job demands analysis. [Ex. 9, p. 155]. She stated that "[i]f jobsite evaluation and formal Job Demands Analysis does not support the patient's claims of 03/06/19 or 03/06/20, it is understood that the [c]laims may need to be reviewed for pre-existent work at [Redacted]." [Ex. 9, pp. 9-10]. The Job Demands Analysis performed by Jill Adams on July 8, 2020, established that Claimant's job duties did not reach either primary or secondary risk factors for development of a cumulative trauma condition. [Ex. N, pp. 132-33]. Dr. Gellrick did not issue a supplemental report addressing this flaw in her opinion. Since Dr. Gellrick specifically acknowledged that her opinion on causation would change if the Job Demands Analysis established that Claimant's job duties did not meet the primary or secondary risk factors as outlined in W.C.R.P. 17, Exhibit 5, medical causation analysis, her original opinion on causation is not persuasive.

16. While Claimant may have sustained an injury to his right hand in December 2018, that issue is not before the Administrative Law Judge. The sole question in W. C. No. 5-105-877 is whether Claimant sustained an injury to his right hand on March 6, 2019. Claimant has failed to prove it is more likely than not that he sustained an injury to his right hand on March 6, 2019, as Claimant did not initially mention any incident on March 6, 2019, or of any worsening of a pre-existing condition on March 6, 2019. Rather, Claimant's statement to Mr. P[Redacted] on March 6, 2019, and his own initial written statements on March 7, 2019, reference only an alleged incident in December 2018. As a result, Claimant's contention that he suffered an injury on March 6, 2019, is not found to be credible. Claimant has thus failed to sustain his burden of proving an injury or aggravation of a pre-existing condition on March 6, 2019.

W. C. No. 5-117-030, September 6, 2019, alleged injury

17. Claimant testified that by September 2019 "because my hand was bad, they [[Redacted] management] were trying to figure out something else I could do."

[Hearing Transcript, p. 33:2-3]. Thus, Claimant alleges an already "bad" hand for which Claimant had alleged two workers' compensation injuries, both of which Respondent denied.

18. Claimant testified that he was pinching an item with his right hand when he felt a pop in the back of his hand and wrist area. [Hearing Transcript, p. 33:12-19]. However, when Claimant completed the Associate Work Related Injury / Illness Report on September 7, 2019, Claimant did not mention a wrist injury. Rather, he stated, "I felt a pop in my hand and it got really swollen and my hand looked a different color." [Ex. E, p. 50]. Thus, Claimant's description of this "new" injury is identical to his description of his two prior alleged injuries – swelling and discoloration of his hand.

19. Claimant presented to NextCare Urgent Care on September 7, 2019. Claimant's comments on intake were documented as "hurt R hand at work x 6 months ago, since has always been swollen and sore, he was operating a new machine and heard a pop in his R hand x 1 days ago." [Ex. G, p. 63]. Thus, Claimant did not mention any new pain or swelling, instead stating that his hand had been in the same condition as the prior six months.

20. Furthermore, the location of Claimant's alleged "new" injury in September 2019 was the same location as the pain from the alleged incidents in December 2018 and March 2019. Jonathan Sollender, M.D., a fellowship-trained hand surgeon, performed an Independent Medical Examination of Claimant on April 4, 2019, at the request of Respondent. Claimant's complaints were listed as soreness of the palmar and dorsal side of the index finger and swelling of the long (middle) finger of the right hand. Caroline Gellrick, M.D., performed an Independent Medical Examination of Claimant on April 16, 2020, at the request of the Claimant. She documented that Claimant's pain complaints in March 2019 consisted of "gripping pain in his right hand and numbness between his index and middle long fingers." [Ex. 9, p. 152]. Claimant's complaint of pain to NextCare on September 9, 2019, was listed as "dorsum, proximal phalanx, index finger." [Ex. G, p. 65]. Thus, Claimant's complaints in September 2019 were essentially identical to the pain complaints in March 2019, and Claimant specifically stated that his hand had been in the same condition for the prior six months.

21. On September 10, 2019, Claimant presented to Concentra again, where he was examined by Deana Halat, NP. [Ex. F, p. 55-58]. Ms. Halat documented that Claimant was told that he had osteoarthritis and diagnosed Claimant with a right wrist sprain. That said, she stated that additional information was needed to determine causation.

22. Claimant's description of his hand condition to his medical providers after the alleged incident on September 6, 2019, establishes that Claimant continued to complain of the same pain complaints as he did after the alleged December 2018 incident and the alleged March 2019 incident, and that Claimant's hand condition over the prior six months was essentially the same as after the alleged incident on September 6, 2019. Furthermore, the multiple inconsistencies in Claimant's testimony and in the medical records as documented in ¶¶ 4-12, *supra*, make Claimant's credibility highly suspect. As a result, the Administrative Law Judge finds that Claimant has failed to

prove it more likely than not that Claimant sustained an injury or aggravation of his pre-existing hand pain on September 6, 2019.

W. C. No. 5-135-043, March 6, 2020, alleged injury

23. On March 7, 2020, Claimant reported an injury to his right elbow and arm on March 6, 2020. Claimant's explanation of the injury in the Associate Work Related Injury / Illness report dated March 7, 2020, states: "Went home after work and my arm felt really sore, couldn't even use a fork to eat lunch. When I work up to go to work and could not straighten my right arm." [Ex. H, p. 74].

24. Claimant's expert, Caroline Gellrick, M.D., did not issue a diagnosis of Claimant's right elbow because she was not provided with medical records for Claimant's treatment of the March 6, 2020, complaints. [Ex. 9, p. 154. Furthermore, Dr. Gellrick specifically stated that "[i]f jobsite evaluation and formal Job Demands Analysis does not support the patient's claims of 03/06/19 or 03/06/20, it is understood that the [c]laims may need to be reviewed for pre-existent work at [Redacted]." [Ex. 9, pp. 9-10]. The Job Demands Analysis performed by Jill Adams on July 8, 2020, established that Claimant's job duties did not reach either primary or secondary risk factors for development of a cumulative trauma condition as outlined in the medical causation analysis found in W.C.R.P. 17, Exhibit 5. [Ex. N, pp. 132-33]. Since Dr. Gellrick did not have any medical records related to Claimant's elbow condition and could not provide a diagnosis and deferred her opinion on causation to the Job Demands Analysis, Dr. Gellrick essentially offered no opinion on causation of Claimant's elbow condition.

25. Dr. Sollender issued a report dated July 13, 2020, in which he stated that Claimant sustained a strain of the right elbow and that "[b]ased on the supplied job demand analysis, the claimant is not exposed to any degree of repetition, forceful use of his hand, awkward posture, vibration, cold or computer work. These were [sic] all be required to be present in combination to support industrial causation. As there was not a singular incident such as a blow or fall or contusion, this claim must be evaluated as a cumulative trauma disorder. As such, rule 17, exhibit 5 is required which includes industrial causation analysis. Such an analysis requires the presence of a primary or multiple secondary risk factors. In this case, there are none present in the work he does or did. Therefore, I do not find industrial causation ..." [Ex. O, p. 140].

26. Dr. Gellrick did not find Claimant's elbow condition to be caused by his stated work activities. Plus, Dr. Sollender concluded that Claimant's elbow condition was not caused by Claimant's job duties based on the findings in the Job Demands Analysis.

27. The fact that they both found that Claimant had symptoms involving his elbow that might be due to cumulative trauma is not dispositive of the issue of causation. W.C.R.P. 17, Exhibit 5 states that "The mere presence of a diagnosis that may be associated with cumulative trauma does not presume work-relatedness unless the appropriate work exposure is present. Mechanisms of injury for the development of cumulative trauma related conditions have been controversial. However, repetitive

awkward posture, force, vibration, cold exposure, and combinations thereof are generally accepted as occupational risk factors for the development of cumulative trauma related conditions." W.C.R.P. 17, Exhibit 5, p. 6.

28. Claimant's testimony about job duties was limited to a summary of general tasks he would perform daily and the weights of items he would lift, without directly addressing repetitive awkward posture, force, vibration, or cold exposure.

29. Likewise, Dr. Gellrick's report did not address repetitive awkward posture, force, vibration, or cold exposure, other than to state:

- "He constantly shelves food items using the RT hand, picking up 2 items at a time. Now the peanut butter jars can be big, up to 1 lb. or more and in that case, there may be six of them or 12 of them, or sometimes there are 24 jars of jelly." [Exhibit 9, p. 152];
- "On interview with the patient, he has repetitive stocking of 8 oz, 16 oz, to 24 oz jars or cans, up to 200 cases a night, which does require a formal jobsite evaluation to actually quantify the actually ergonomic risk" [Ex. 9, p. 155]

30. Thus, while the Job Demands Analysis prepared by Ms. Adams may not be dispositive of Claimant's job duties, she specifically found that the job duties of someone in Claimant's position did not reach any primary or secondary risk factors associated with the development of cumulative trauma related conditions as identified in W.C.R.P. 17, Exhibit 5, and neither Claimant's testimony nor Dr. Gellrick's report provide sufficient credible and persuasive evidence to establish that Claimant's job duties exposed him to repetitive awkward posture, force, vibration or cold exposure in sufficient degree to cause a cumulative trauma condition. As a result, the Administrative Law Judge finds that Claimant has failed to prove by a preponderance of the evidence that he sustained a discrete injury or occupational disease involving his right elbow that is causally related to his job duties with Employer.

CONCLUSIONS OF LAW

General Provisions

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

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

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

Where the medical evidence is subject to conflicting inferences, it is the ALJ's sole prerogative to resolve the conflict. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998).

Compensability

Whether a compensable injury has been sustained is a question of fact to be determined by the ALJ. *Eller v. Industrial Claim Appeals Office,* 224 P.3d 397 (Colo. App. Div. 5 2009). To recover benefits under the Worker's Compensation Act, the Claimant's injury must both occur "in the course of" employment and "arise out of" employment. See § 8-41-301, C.R.S. (2014). The Claimant must establish that the injury meets this two-pronged requirement by a preponderance of the evidence. See § 8-43-201(1), C.R.S. (2014).

The course of employment requirement is satisfied when it is shown that the injury occurred within the time and place limits of the employment relation and during an activity that had some connection with the employee's job-related functions. *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991); *Triad Painting Co. v. Blair,* 812 P.2d 638 (Colo. 1991). The arising out of requirement is satisfied when it is shown that there is a causal connection or nexus between the conditions and obligations of employment and the employee's injury. *Horodyskyj v. Karanian*, 32 P.3d 470 (Colo. 2001). There is no presumption than an injury which occurs in the course of employment arises out of the employment. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968). An injury "arises out of" employment when it has its "origin in" an employee's work-related functions and is "sufficiently related to" those functions so as to be considered part of employment. *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991); *Horodyskyj v. Karanian*, 32 P.3d 470 (Colo. 2001). The mere fact that a claimant experiences pain at work does not necessarily require a finding of a compensable injury. Pain is a typical symptom caused by the aggravation of a pre-existing condition. However, an incident which merely elicits pain symptoms caused by a pre-existing condition does not compel a finding that the claimant sustained a compensable aggravation. *Miranda v. Best Western Rio Grande Inn*, W.C. No. 4-663-169 (ICAO April 11, 2007).

W. C. No. 5-105-877, March 6, 2019, alleged injury

While Claimant may have sustained an injury to his right hand in December 2018, that issue is not before the Administrative Law Judge in W. C. No. 5-105-877. The sole issue in W. C. No. 5-105-877 is whether Claimant sustained an injury to his right hand on March 6, 2019. The Administrative Law Judge finds and concludes that Claimant has failed to meet his burden of proving by a preponderance of the evidence that his right-hand strain arose out of and occurred within the course of employment on March 6, 2019. When Claimant spoke to Assistant Store Manager Mark Mr. P[Redacted] during the late-evening of March 6 or early-morning of March 7, 2019, he reported that he injured his hand sometime in December 2018 and did not mention an injury on March 6, 2019. Even after Mr. P[Redacted] informed Claimant that Sedgwick might not accept the claim because of a three-month delay in report, when Claimant completed the incident report packet the following morning, Claimant still did not mention anything happening on March 6, 2019, and twice referenced an alleged incident in December 2018. In addition, Claimant's testimony about the alleged incident of December 2018 and the alleged incident of March 6, 2019, were inconsistent and contradictory.

The mere fact that Claimant experienced pain at work on March 6, 2019, does not require a finding of a compensable aggravation of his pre-existing right-hand pain since December 2018. An incident which merely elicits pain symptoms caused by a pre-existing condition does not compel a finding that the claimant sustained a compensable aggravation. *Miranda v. Best Western Rio Grande Inn*, W.C. No. 4-663-169 (ICAO April 11, 2007). Claimant did not report to Mr. P[Redacted] a worsening of his pain as a result of anything on March 6, 2019. Rather, when reporting the pain to Mr. P[Redacted] on March 6, 2019, and completing the injury packet forms, Claimant repeatedly associated his pain with an incident in December 2018. As a result, Claimant has not met his burden of proving a compensable aggravation of his pre-existing hand pain in the form of an accident or occupational disease.

W. C. No. 5-117-030, September 6, 2019, alleged injury

The Administrative Law Judge finds and concludes that Claimant has failed to meet his burden of proving an injury to his right hand or wrist on September 6, 2019. Claimant testified that by September 2019 "because my hand was bad, they [[Redacted] management] were trying to figure out something else I could do." [Hearing Transcript, p. 35:2-3]. Thus, Claimant alleges an already "bad" hand for which Claimant had alleged two workers' compensation injuries, both of which Respondent denied. Claimant's description of his hand condition to his medical providers after the alleged incident on September 6, 2019, establishes that Claimant continued to complain of the same pain and swelling between his first two fingers as he did after the alleged December 2018 incident and the alleged March 2019 incident, and that Claimant's hand condition over the prior six months was essentially the same as after the alleged incident on September 6, 2019.

Furthermore, the multiple inconsistencies in Claimant's testimony and in the medical records as documented in ¶¶ 4-12, supra, make Claimant's credibility highly suspect. While Claimant describes a "pop" on September 6, 2019, this does not establish any difference in Claimant's hand pain before September 6, 2019, and after the alleged "pop." An incident which merely elicits pain symptoms caused by a pre-existing condition does not compel a finding that the claimant sustained a compensable aggravation. *Miranda v. Best Western Rio Grande Inn*, W.C. No. 4-663-169 (ICAO April 11, 2007). As a result, the Administrative Law Judge finds and concludes that Claimant has failed to meet his burden of proving an injury or aggravation of his pre-existing right-hand pain dating back to December 2018.

W. C. No. 5-135-043, March 6, 2020, alleged injury

The claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified, or aggravated the disease for which compensation is sought. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The question of whether the claimant has proven causation is one of fact for the ALJ. *Faulkner v. Industrial Claim Appeals Office, supra*. In this regard the mere occurrence of symptoms in the workplace does not require the conclusion that the conditions of the employment were the cause of the symptoms, or that such symptoms represent an aggravation of a preexisting condition. *See F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Cotts v. Exempla, Inc*., W.C. No. 4-606-563 (I.C.A.O. August 18, 2005). Once claimant makes such a showing, the burden shifts to respondents to establish both the existence of a non-industrial cause and the extent of its contribution to the occupational disease. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

When determining the issue of causation, the ALJ may consider the provisions of the *Medical Treatment Guidelines* because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, the *Medical Treatment Guidelines* are not dispositive of the issue of causation. Rather, the ALJ may decide the weight to be assigned the provisions of the *Guidelines* upon consideration of the totality of the evidence. *See Cahill v. Patty Jewett Golf Course*, WC 4-729-518 (ICAO February 23, 2009); *Siminoe v. Worldwide Flight Services*, WC 4-535-290 (ICAO November 21, 2006).

The Administrative Law Judge finds and concludes that Claimant has failed to prove it more likely than not that his left elbow condition was caused by his job duties with Employer. Both Claimant's expert and Respondent's expert essentially opined that Claimant's elbow condition was not caused by Claimant's job duties based on the findings in the Job Demands Analysis as applied to the medical causation analysis found in W.C.R.P. 17, Exhibit 5.

While the *Medical Treatment Guidelines* provide for specific steps in analyzing whether there is sufficient proof to connect casually Claimant's conditions and need for treatment to his job activities, the Court is not bound by the *Medical Treatment Guidelines* in deciding individual cases on the Guidelines or the principles contained therein alone. Indeed, § 8-43-201(3) specifically provides:

> It is appropriate for the director or an administrative law judge to consider the medical treatment guidelines adopted under section 8-42-101(3) in determining whether certain medical treatment is reasonable, necessary, and related to

> an industrial injury or occupational disease. The director or administrative law judge is not required to utilize the medical treatment guidelines as the sole basis for such determinations.

Notwithstanding this caveat, Claimant still has the burden of proving that his job duties caused his right elbow condition. In addressing Mechanisms of Injury, the Cumulative Trauma Conditions *Medical Treatment Guidelines* provide:

> The mere presence of a diagnosis that may be associated with cumulative trauma does not presume work-relatedness unless the appropriate work exposure is present.
>
> Mechanisms of injury for the development of cumulative trauma related conditions have been controversial. However, repetitive awkward posture, force, vibration, cold exposure, and combinations thereof are generally accepted as occupational risk factors for the development of cumulative trauma related conditions.

W.C.R.P. 17, Exhibit 5, p. 6.

Considering the totality of the evidence, Claimant has failed to provide credible evidence on causation of his elbow condition. Dr. Sollender diagnosed an elbow strain and opined that the injury was not caused by work based on the Job Demands Analysis completed by Ms. Adams. Dr. Gellrick provided no diagnosis and indicated that if the Job Demands Analysis did not establish any primary or secondary risk factors the undiagnosed elbow condition would not be caused by Claimant's employment at Employer. Amanda Cava, M.D., diagnosed a right elbow sprain, but did not obtain any information from Claimant as to his job duties or address causation in any meaningful way. Claimant's testimony about his job duties and Dr. Gellrick's report provided no credible and persuasive evidence about the existence of repetitive awkward posture, force, vibration, cold exposure. Thus, the Administrative Law Judge finds and concludes that Claimant has failed to meet his burden of proving that his right elbow condition was caused or aggravated by a specific incident or in the form of an occupational disease due to his job duties at Employer.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. W. C. No. 5-105-877 alleging a right-hand injury on March 6, 2019, is denied, and dismissed.
2. W. C. No. 5-117-030 alleging a right-hand/wrist injury on September 6, 2019, is denied, and dismissed.
3. W. C. No. 5-135-043 alleging a right elbow injury on March 6, 2020, is denied, and dismissed.

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

DATED: March 1, 2021.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that the right total shoulder arthroplasty recommended by Dr. Mark Luker is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted January 9, 2020 work injury.

FINDINGS OF FACT

1. The claimant has worked for the employer's irrigation business since 1993. In January 2020, the claimant's job duties included driving a truck, spraying chemicals, testing water, operating mowers and backhoes, carrying irrigation pipe, and assisting with system and headgate maintenance.

2. On January 9, 2020, the claimant was working on canal maintenance when he slipped on ice and fell to the ground. The claimant testified that he heard a "pop" and landed on his right shoulder, head, and buttocks. The claimant immediately felt "tremendous" pain in his right arm. The claimant was transported from the job location to undergo medical treatment.

Medical Treatment Prior to January 9, 2020

3. The claimant's primary care provider is the VA Medical Center. Records from the VA demonstrate that the claimant had prior treatment of his back, neck, and bilateral shoulders. A February 26, 2015, medical record indicates that the claimant had experienced bilateral shoulder symptoms for six to seven years. On that same date, it was noted that abduction of either shoulder was painful. Due to complaints of right shoulder pain, on March 26, 2015, a right shoulder x-ray was taken. That x-ray showed mild degenerative change at the ac joint and degenerative change of the glenoid.

4. On April 2, 2015, the claimant was diagnosed with right shoulder and neck muscle spasm. At that time, Dr. John Seevers opined that this was "probably due to [degenerative joint disease]". On April 29, 2015, the claimant returned to Dr. Severs and reported right shoulder and left knee pain. Dr. Severs referred the claimant to orthopedics for possible injections.

5. On July 27, 2015, Dr. Walter Boardwine administered an injection to the claimant's right shoulder. At that time, Dr. Boardwine identified the claimant's osteoarthritis as "moderate". He recommended the claimant participate in physical therapy for his right shoulder. Dr. Boardwine also mentioned the possibility of arthroscopic releases.

6. On March 24, 2019, the claimant was involved in a motor vehicle accident (MVA). Immediately following the MVA, the claimant reported issues with his left shoulder. On that same date, bilateral shoulder x-rays were taken. These x-rays showed severe glenohumeral degenerative joint disease (DJD) in both shoulders.

7. The claimant testified that during this period of time, he was able to perform his normal job duties.

Post-Injury Medical Treatment

8. After his January 9, 2020 fall, the claimant obtained medical treatment in the emergency department (ER) at St. Mary's Hospital that same day. X-rays were taken and showed a non-displaced proximal humerus fracture. The claimant was provided with a sling and advised to use ice, elevation, and pain medications. In addition, the claimant was referred for an orthopedic consultation with Dr. Adam Cota.

9. The claimant's authorized treating provider (ATP) for this claim is Dr. R. James McLaughlin. The claimant was first seen by Dr. McLaughlin on January 13, 2020. At that time, Dr. McLaughlin noted that the claimant had been diagnosed with a closed non-displaced fracture of the surgical neck of the right humerus. Dr. McLaughlin recommended that the claimant see an orthopedist.

10. On January 15, 2020, the claimant was seen at SCL Health Orthopaedics by Dr. Cota. At that time, the claimant reported that he knew he had arthritis in his right shoulder, but was not experiencing shoulder pain prior to the January 9, 2020 fall. Dr. Cota noted that the humerus fracture had "acceptable alignment" and recommended conservative treatment.

11. On January 21, 2020, the respondents filed a General Admission of Liability (GAL).

12. The claimant continued to treat with Dr. McLaughlin. On January 30, 2020, the claimant was seen by Dr. McLaughlin who noted that the humerus fracture was not yet healed. Dr. McLaughlin also noted that Dr. Cota had recommended that the claimant begin physical therapy. On February 21, 2020, Dr. McLaughlin referred the claimant to a physical rehabilitation specialist, Dr. Brittany Matsumura. On February 27, 2020, Dr. McLaughlin recommended a magnetic resonance image (MRI) of the claimant's right shoulder.

13. On March 18, 2020, an MRI of the claimant's right shoulder was performed. The MRI showed that the humerus fracture was "ununited". The MRI also showed severe right glenohumeral DJD.

14. Subsequently, the claimant was referred to surgeon Dr. Mark Luker, who also practices in SCL Health Orthopaedics. The claimant was first seen by Dr. Luker on April 29, 2020. Dr. Luker noted that x-rays taken on that date showed that the humerus fracture was healing. Dr. Luker opined that the claimant would eventually need a right total shoulder arthroplasty. However, Dr. Luker preferred to wait for the humerus fracture to heal before pursuing surgery.

15. On June 2, 2020, the claimant was seen by Dr. Matsumura. Dr. Matsumura recommended physical therapy focused on improving range of motion in the claimant's right shoulder. She also recommended the use of a TENS unit and acupuncture.

16. The claimant was seen by Dr. Luker on June 10, 2020 and July 22, 2020. Dr. Luker continued to recommend that they wait for the humerus fracture to heal before discussing surgery.

17. On July 21, 2020, Dr. Albert Hattem was asked to state an opinion regarding the causation of the claimant's right shoulder, cervical spine[1], and thoracic spine conditions. In his report, Dr. Hattem opined that the non-displaced right humerus surgical neck fracture was related to the claimant's January 9, 2020 work injury. Dr. Hattem recommended that respondents should authorize treatment of that fracture. With regard to the claimant's shoulder complaints, Dr. Hattem noted that the claimant has pre-existing severe glenohumeral arthritis. Dr. Hattem recommended that the claimant undergo an independent medical examination (IME) to ascertain the causation of the claimant's shoulder symptoms.

18. On September 22, 2020, the claimant returned to SCL Health Orthopaedics and was seen by Michaela Lee, MA. At that time, the claimant reported severe and persistent right shoulder pain. MA Lee noted that the humerus fracture had adequately healed and was no longer contributing to the claimant's pain. MA Lee discussed total shoulder arthroplasty. In addition, MA Lee recommended the claimant undergo a right shoulder computed tomography (CT) scan.

19. On September 30, 2020, Dr. Hattem issued a second report. In this report, he reviewed Dr. Luker's recommendation for a right shoulder CT and a right total shoulder arthroplasty. Dr. Hattem opined that it may be medically reasonable and necessary for the claimant to undergo a right total shoulder arthroplasty. However, he does not believe that the condition of the claimant's right shoulder (and the related need for surgery) is related to the work injury. In support of this opinion, Dr. Hattem noted that the claimant suffered a right humerus fracture at the time of the work injury. He further noted that the bilateral glenohumeral arthritis was pre-existing and was not caused or aggravated by the January 9, 2020 fall.

20. On October 1, 2020, the claimant attended an IME with Dr. Carlos Cebrian. In connection with the IME, Dr. Cebrian reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his October 29, 2020 IME report, Dr. Cebrian opined that the claimant's need for right shoulder arthroplasty was not caused by the January 9, 2020 fall at work. Dr. Cebrian future opined that while the January 9, 2020 fall resulted in a humerus fracture, there was no injury to the claimant's right shoulder. Dr. Cebrian also opined that the severe glenohumeral

[1] As the claimant's cervical and thoracic spine conditions and related medical treatment are not at issue at this time, the ALJ does not enumerate all such treatment and/or provider opinions regarding those body parts.

osteoarthritis in the claimant's right shoulder was not aggravated when he fell on January 9, 2020.

21. Dr. Cebrian's deposition testimony was consistent with his written report. Dr. Cebrian testified that the claimant's fall at work did not cause the arthritic condition of his right shoulder. Dr. Cebrian also testified that the claimant did not suffer an acute injury to his right shoulder joint. Dr. Cebrian reiterated his opinion that the January 9, 2020 fall did not aggravate the progression of the arthritis in the claimant's right shoulder. He further testified that if the claimant had not fallen on January 9, 2020, he would still have needed a right total shoulder arthroplasty to address the degenerative condition in his right shoulder.

22. On October 14, 2020, the claimant was seen by Dr. McLaughlin. In the medical record of that date, Dr. McLaughlin stated his opinion that the claimant's work injury and resulting humerus fracture aggravated the pre-existing condition in the claimant's right shoulder. In support of this opinion, Dr. McLaughlin noted that prior to the work injury, the claimant was able to work full duty with severe shoulder osteoarthritis.

23. On November 18, 2020, Dr. McLaughlin reiterated his opinion that when the claimant fell on January 9, 2020, and did so with "significant force to lead to a humerus fracture" the claimant's pre-existing glenohumeral osteoarthritis was aggravated.

24. On December 2, 2020, Dr. Luker authored a letter to the claimant's attorney. In that letter, Dr. Luker opined that the recommended right total shoulder arthroplasty was medically necessary to treat the claimant's right shoulder condition. Dr. Luker also noted that the claimant's pre-existing severe shoulder osteoarthritis was aggravated by the January 9, 2020 fall and related fracture of his right humerus.

25. Dr. Luker testified by deposition in this matter. Dr. Luker testified that although the fall on January 9, 2020 did not cause the arthritis in the claimant's right shoulder, the fall did aggravate that condition to the point of necessitating surgery. Dr. Luker also stated that it is his opinion that because the claimant's fall occurred with enough force that it resulted in a humerus fracture, the fall also aggravated the arthritis in the claimant's right shoulder.

26. The claimant testified that prior to the fall on January 9, 2020, he felt that his right shoulder was functioning normally. In addition, he was able to perform the manual labor aspects of his job duties. He also testified that prior to the injury he coped with occasional aches and discomfort. However, those aches were not as severe as the right shoulder symptoms he has experienced since January 9, 2020.

27. The ALJ credits the opinions of Drs. Luker and McLaughlin over the contrary opinions of Drs. Cebrian and Hattem. The ALJ specifically credits the opinion of Dr. Luker that the fall on January 9, 2020 (which was sufficient to cause a humerus fracture) aggravated and accelerated the arthritic condition of the claimant's right shoulder, necessitating the need for a right total shoulder arthroplasty. The ALJ also credits the medical records and the claimant's testimony. The ALJ finds that the claimant has successfully demonstrated that it is more likely than not the right total shoulder

arthroplasty recommended by Dr. Luker is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted January 9, 2020 work injury.

CONCLUSIONS OF LAW

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

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

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

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

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

6. Pain is a typical symptom from the aggravation of a preexisting condition, and if the pain triggers the claimant’s need for medical treatment, the claimant has suffered a compensable injury. *Maryman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (September 9, 2016). The

employee must prove a causal relationship between the injury and the medical treatment for which the worker is seeking benefits. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. Ct. App. 1997). The mere fact that a claimant has suffered a compensable aggravation of a preexisting condition does not oblige the ALJ to conclude that any subsequent disability or need for treatment is causally connected to such aggravation. *University Park Care Center v. ICAO*, 43 P.3d 637 (Colo. App. 2001). It is for the ALJ, as the fact-finder, to determine whether a need for medical treatment is caused by the industrial injury, or some other cause. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985).

7. As found, the claimant has demonstrated, by a preponderance of the evidence, that the right total shoulder arthroplasty recommended by Dr. Luker is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted January 9, 2020 work injury. As found, the medical records, the claimant's testimony, and the opinions of Drs. Luker and McLaughlin are credible and persuasive.

ORDER

It is therefore ordered:

1. The respondents shall pay for the right total shoulder arthroplasty recommended by Dr. Mark Luker, pursuant to the Colorado Fee Schedule.

2. All matters not determined here are reserved for future determination.

Dated this 1st day of March 2021.

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

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the

Denver Office of Administrative Courts. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-139-355-002

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

[Redacted],
Claimant,

v.

[Redacted]
Employer,

and

[Redacted],
Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on February 10, 2021, in Denver, Colorado. The hearing was digitally recorded (reference: 2/10/21, Google Meets, beginning at 1:30 PM, an ending at 3:30 PM) .

The Claimant was present in person, virtually, and represented by [Redacted], Esq. [Redacted], Esq. Respondents were represented by

Hereinafter [Redacted] shall be referred to as the "Claimant." [Redacted] shall be referred to as the "Employer." All other parties shall be referred to by name.

Claimant's Exhibits 1 through 7 were admitted into evidence, without objection. Respondents' Exhibits A through I were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Respondents, which was filed, electronically, The proposed decision was filed, electronically, on February 17, 2021, mistakenly labeled as "Respondents' Opening Position Statement and which is hereby considered as a proposed decision as ordered.. Claimant filed no timely objections as to form. After a consideration of the proposed decision, the ALJ has modified the proposal and hereby issues the following decision.

ISSUES

The issue herein concerns Respondents' request to overcome the Division Independent Medical Examination (DIME) of Brian Shea, D.O.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. On April 21, 2020, while working for the Employer, Claimant was repairing a street light. **Ex. A:1**. While doing so, a trailer being pulled by a pick-up truck broke loose and collided with the street light pole. **Ex. A:1**. The pole then hit the Claimant in the head, cracked his hard had, and caused a head laceration. **Ex. A:1**. The Claimant lost consciousness and was taken to the emergency room (ER) via ambulance. **Ex. A:1**.

2. The ER physicians evaluated the Claimant and reported that he denied neck pain, back pain, and any other symptoms other than the laceration on his head. **Ex. C:17, 19**.

3. The next day, the Claimant presented to Troy Manchester, M.D., at Concentra, who reported that the Claimant denied neck pain, back pain, and joint pain. **Ex. D:25**.

4. Dr. Manchester placed the Claimant at maximum medical improvement (MMI) on April 28, 2020 once the Claimant's staples were removed. **Ex. D:24**. Dr. Manchester reported that the Claimant had "excellent recovery" and "no ongoing symptoms of concern." **Ex. D:24**. Accordingly, the Claimant was released to full duty with no follow-up and no work restrictions. **Ex. D:25**.

5. On May 5, 2020, the Claimant underwent a left L4-5 laminotomy/decompression by physicians at Cornerstone, for a **non-work** related lumbar disc herniation with radiculopathy. **Ex. 5:35**.

6. On May 21, 2020, Dr. Manchester discharged the Claimant from care without impairment, noting in the narrative report that the Claimant was at MMI on April 28, 2020 (**Ex. D:24; 29**), but reporting the date of MMI on the WC164 form as May 21, 2020. **Ex. D:28**.

7. On June 5, 2020, the Claimant went back to Cornerstone with complaints of peritrapezial and periscapular pain. **Ex. 5:33**. The Claimant was assessed with lumbar disc herniation with radiculopathy, lumbar radiculopathy, lumbar spine pain, cervical spine pain, and thoracic pain. **Ex. 5:36**.

8. The Respondents filed a Final Admission of Liability (FAL) on June 18, 2020, consistent with Dr. Manchester's reports, admitting to an MMI date of May 21,

2020. **Ex. I:48**. Respondents admitted to zero impairment and denied maintenance medical benefits. **Ex. I:48**.

9. The Claimant timely objected to the FAL and requested a DIME.

The Division Independent Medical Examination (DIME) of Brian Shea, D.O.

10. Dr. Shea conducted the DIME on October 1, 2020, and stated the opinion without any explanation that the Claimant's date of MMI was October 1, 2020. **Ex. B:12**. Dr. Shea gave the Claimant a 6% whole person impairment rating, allegedly resulting from a 2% range of motion (ROM) deficit of the cervical spine and 4% from Table 53, Section 2b of the AMA Guides. **Ex. B:12**. Dr. Shea was of the opinion that the Claimant's other back complaints were not related to this work accident. **Ex. B:12**

11. In his report, Dr. Shea wrote:

> Note: the specific disorders table for the spine states 6 months must have gone by before the impairment rating is done. Mr. [Redacted]'s injury happened a little over 5 months ago. I pointes (sic) this out to the Division. Their reply was go ahead with the DIME – the lawyers will work it out. **Ex. B:12**.

12. Dr. Shea's DIME opinion is fatally flawed. The AMA Guides state that Table 53.II.B. applies to injuries of intervertebral disc or other soft-tissue lesions that are "Unoperated, with medically documented injury and a minimum of six months of medically documented pain and rigidity with or without muscle spasm, associated with none-to-minimal degenerative changes on structural tests."

13. Impairment is given at the time of MMI, and thus, the application of the AMA Guides is made at the time of MMI. Claimant had not sustained a minimum of six months of medically documented pain and rigidity by the time he reached MMI regardless of whether one utilized April 29, 2020, May 21, 2020, or October 1, 2020 as the date of MMI. Accordingly, Dr. Shea erred and his opinions are discredited and the ALJ relies on thE of Dr. Manchester, that Claimant was at MMI on April 28, 2020 with no impairment and no recommended maintenance medical care.

Independent Medical Examination (IME) of Allison Fall, M.D.

14. Dr. Fall, M.D., performed a Respondent-sponsored IME of the Claimant. **Ex. A**. She wrote and testified consistent therewith, that the Claimant's onset of neck pain would not merit a permanent impairment because he had sustained a significant cervical spine injury, symptoms would have been noticed in the initial timeframe after the work injury. **Ex. A:8**. Furthermore, according to Dr. Fall, myofascial complaints are not a separate ratable condition pursuant to the AMA Guides Evaluation of Permanent Impairment, 3 Ed, Rev.. **Ex. A:8**. Finally, the Claimant did not have six months of medically documented pain to merit application of Table 53 and the ALJ so finds. **Ex. A:8**.

The ALJ notes that the six-months of medically documented pain is pivotal to the use of Table 53, upon which Dr. Shea based his rating.

Ultimate Findings

15. The ALJ finds that DIME Dr. Shea's MMI date and rating, without adequate explanation, are inadequate and for this reason lack credibility. In fact, it is highly likely, unmistakable and free from serious and substantial doubt that DIME Dr. Shea's MMI date and permanent impairment rating are clearly erroneous.

14. Between conflicting medical opinions, the ALJ makes a rational choice, based on substantial evidence, to reject DIME Dr. Shea's opinions and to accept the opinions of Dr. Manchester and Dr. Fall.

15. For the above reasons, the Respondents have sustained their burden of proof by clear and convincing evidence.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, DIME Dr. Shea's MMI date and rating, without adequate explanation, are inadequate and for this reason lack credibility. In fact, it is highly likely, unmistakable and free from serious and substantial doubt that DIME Dr. Shea's MMI date and permanent impairment rating are clearly erroneous. As further found, the opinions of Dr. Manchester and Dr. Fall are credible.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting medical opinions, the ALJ made a rational choice, based on substantial evidence, to reject DIME Dr. Shea's opinions and to accept the opinions of Dr. Manchester and Dr. Fall.

Elevated Burden of Proof

c. The DIME's determinations regarding MMI and whole person impairment are binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c), C.R.S.; *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998).

d. "Clear and convincing evidence means evidence which is stronger than a mere 'preponderance;' it is evidence that is highly probable and free from serious or substantial doubt." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Therefore, the party challenging a DIME's conclusions must demonstrate it is "highly probable" that the MMI and impairment findings are incorrect. *Qual-Med*, 961 P.2d at 592. A party meets this burden if the evidence contradicting the DIME physician is "unmistakable and free from serious or substantial doubt." *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). As found,the Respondents have sustained their burden of clear and convincing evidence regarding the rating and MMI date of Dr. Shea.

e. A DIME physician must rate impairment in accordance with the provision of the AMA Guides. Section 8-42-101(3.7), C.R.S.; *Wilson v. Indus. Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003). Whether the DIME physician properly applied the AMA Guides is an issue of fact for determination by the ALJ. *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000). Once the ALJ determines that the DIME's rating has been overcome in any respect, the ALJ is free to calculate the claimant's impairment rating based upon the preponderance of the evidence. *Garlets v. Memorial Hospital*, W.C. No. 4-336-566 (Sept. 5, 2001). As found, the rating and MMI date of the authorized treating physician (ATP), Dr. Manchester is the correct rating and MMI date.

f. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to post-MMI medical maintenance benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See Grover v. Indus. Comm'n*,, 759 P.2d 705 (Colo. 1988). The burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, Respondents have sustained their burden with respect to the proposition that Clamant is **not** entitled to post-MMI medical maintenance benefits.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondents having successfully over come the Division Independent Medical Examination (DIME) opinions of Brian Shea, D.O., the Final Admission of Liability, dated June 18, 2020, is hereby affirmed as if fully restated herein.

DATED this______day of March 2021.

DIGITAL SIGNATURE

EDWIN L. FELTER, JR.
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-129-565-002

ISSUES

- Did Claimant prove entitlement to a general award of medical benefits after MMI?

- Did Claimant prove Respondent is liable for a March 12, 2019 office visit with Dr. Gwynn Antonson?

STIPULATIONS

The parties stipulated Dr. Antonson is not an authorized treating physician and will not become authorized even if Respondent is ordered to cover the March 12, 2019 office visit as reasonably needed treatment for the admitted work injury. The parties waived the authorization issue solely with respect to the March 12, 2019 visit to allow a final order.

FINDINGS OF FACT

1. Claimant works for Employer as a Mill Technician Mechanical. He repairs and maintains equipment at Employer's steel mill.

2. Claimant suffered an admitted neck injury on May 17, 2017 when he hit his head on a steel beam. Claimant's hardhat prevented a head injury but suffered a soft tissue injury to his left trapezius muscle.

3. Claimant received conservative treatment from Employer's in-house medical clinic, Onsite Innovations. At his initial visit on May 17, 2018, Claimant reported pain in his for head, lower neck, and low back.

4. Claimant returned to Onsite Innovations on May 18, 2017, with continued complaints of neck pain. He was referred for cervical and lumbar x-rays.

5. Claimant underwent cervical and lumbar x-rays on May 19, 2017. The cervical x-rays showed degenerative changes but no fracture or other acute injury. The lumbar x-rays showed degenerative changes and a probable remote L1 endplate fracture or alternatively physiologic wedging.

6. Claimant continued working without restrictions. He was seen three more times at Onsite Innovations between May 26, 2017 and September 14, 2017. He received conservative treatment, including topical ointments and OTC pain medication.

7. Dr. Charles Hanson took over as Claimant's ATP on December 14, 2017. At the initial appointment, Claimant described persistent pain in his left upper trapezius area extending over the posterior aspect of his left shoulder to the lateral aspect of the proximal upper arm. He also described occasional tingling in his left hand. Examination

of Claimant’s neck showed slight range of motion deficits but no muscle spasm or tenderness. Dr. Hanson diagnosed mild to moderate C5-6 degenerative disc disease, persistent post-traumatic left upper trapezius pain and occasional paresthesias in the left hand due to degenerative disc disease and probable left C6 radiculopathy. Dr. Hanson prescribed a Medrol Dosepak followed by OTC Aleve. He also ordered a cervical MRI and bilateral upper extremity nerve conduction testing.

8. Claimant underwent electrodiagnostic testing with Dr. Sumant Rawat on February 5, 2018. The testing showed severe right carpal tunnel syndrome, moderately severe left carpal tunnel syndrome, and left ulnar neuropathy with possible entrapment at the elbow.

9. Claimant could not tolerate an MRI because of claustrophobia but he underwent a cervical CT scan on March 29, 2018. The CT scan showed asymmetric enthesopathic change at C5-6 and possible neuroforaminal narrowing.

10. Claimant saw Dr. Hanson on June 6, 2018. Dr. Hanson maintained the same diagnoses and added bilateral carpal tunnel syndrome, which he opined was unrelated to Claimant’s work injury. Dr. Hanson placed Claimant at MMI for the May 17, 2017 work injury with no impairment and no need for work restrictions. Dr. Hanson included a generic statement in his narrative report that Claimant could return to the clinic on an “as-needed basis” but made no specific recommendations. Dr. Hanson indicated on the accompanying WC164 form that Claimant required no maintenance care after MMI.

11. Claimant saw his PCP, Dr. Gwynn Antonson on March 12, 2019 for an annual “comprehensive physical examination.” His reported complaints included neck and upper back pain. The musculoskeletal examination was entirely normal. Claimant’s neck was “supple” with full range of motion. Dr. Antonson’s list of diagnoses included “chronic neck pain – August 1986” and “Strain of trapezius muscle – PT, U/S, NSAIDs.” It is unclear whether the reference to “PT, U/S, NSAIDs” was intended as a prescription or merely a description of prior treatment. Even if it was a prescription, there is no discussion of why such treatment would be reasonably needed, and more important, causally related to a soft-tissue injury that occurred in May 2017.

12. Claimant filed a Workers’ Claim for Compensation on January 30, 2020.

13. On February 21, 2020, Respondent filed a Final Admission of Liability (FAL) admitting to medical benefits only but no maintenance medical per Dr. Hanson’s June 6, 2018 MMI report.

14. Claimant objected to the FAL and requested a DIME.

15. Dr. Frank Polanco performed an IME for Respondent on April 20, 2020. Examination of Claimant’s neck showed normal tone with no paracervical tenderness, trigger points, or spasm. Cervical range of motion was “full and fluid” in all planes. Dr. Polanco diagnosed cervical degenerative disk disease, severe right carpal tunnel

syndrome, moderately severe left carpal tunnel syndrome, and left ulnar neuropathy. He opined these conditions were pre-existing and unrelated to the work accident. Dr. Polanco opined Claimant's ongoing complaints of neck pain were probably related to the natural progression of his pre-existing degenerative disc disease. He opined Claimant had been at MMI since December 15, 2017 and required no further diagnostics or treatment.

16. Claimant attended a DIME with Dr. William Watson on June 16, 2020. Dr. Watson noted a normal examination of Claimant's cervical, thoracic, and lumbar spine. Dr. Watson agreed Claimant was at MMI as of his June 8 [sic], 2018 appointment with Dr. Hanson. Even though Claimant continued to have trapezius discomfort, Dr. Watson determined he was not entitled to a Table 53 rating and therefore had no ratable impairment. Dr. Watson also noted full range of motion of Claimant's cervical, thoracic, and lumbar spines. Dr. Watson opined Claimant had no permanent work restrictions and required no maintenance care.

17. Dr. Polanco issued an addendum to his IME report on October 1, 2020. He agreed with Dr. Watson's determination Claimant was at MMI with no permanent impairment. He agreed Claimant requires no further treatment related to the work accident.

18. Claimant does not think he ever returned to baseline and his ongoing neck pain is related to the work accident. Claimant would like to return to the Hanson Clinic when his symptoms flare. Claimant identified no specific treatment he desires or thinks he needs.

19. The opinions of Dr. Hanson, Dr. Watson, and Dr. Polanco that Claimant requires no further treatment related to the work accident are credible and persuasive.

20. Claimant failed to prove he requires additional treatment to relieve symptoms or prevent deterioration of his injury-related condition.

21. The March 12, 2019 appointment with Dr. Antonson was not causally related to the work accident.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment from authorized providers reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101(1)(a); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Medical benefits may extend beyond MMI if the claimant requires maintenance care to relieve symptoms or prevent deterioration of their condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). If the claimant establishes the probability of a need for future treatment, he is entitled to a general award of medical benefits after MMI, subject to the respondents' right to dispute compensability, reasonableness, or necessity of any particular treatment. *Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003). A claimant need not be receiving treatment at the time of MMI nor prove that a particular course of treatment has been prescribed to obtain a general award of *Grover*-

type medical benefits. *Miller v. Saint Thomas Moore Hospital*, W.C. No. 4-218-075 (September 1, 2000). Proof of a current or future need for “any” form of treatment will suffice for an award of post-MMI benefits. *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). The DIME’s opinion regarding medical treatment after MMI is not entitled to any special weight but is simply another medical opinion for the ALJ to consider when evaluating the preponderance of the evidence. *See Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Story v. Industrial Claim Appeals Office*, 910 P.2d 80 (Colo. App. 1995). The claimant must prove entitlement to medical benefits after MMI by a preponderance of the evidence. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997).

As found, Claimant failed to prove any additional medical treatment is reasonably needed or causally related to his May 17, 2017 work accident. Dr. Hanson, Dr. Polanco, and Dr. Watson persuasively opined Claimant requires no further treatment for any injury-related condition. Dr. Antonson provided no discussion or analysis of causation to support the “recommendations” for “PT, U/S, and NSAIDs." There is no persuasive evidence Dr. Antonson reviewed Claimant’s imaging studies or other medical records pertinent to a causation determination. Claimant’s ongoing neck pain is probably related to the natural progression of his underlying preexisting degenerative disc disease, and not a minor soft tissue injury suffered almost four years ago. Even if he needs treatment, the persuasive evidence shows any such treatment is not work-related.

ORDER

It is therefore ordered that:

1. Claimant’s request for a general award of medical benefits after MMI is denied and dismissed.

2. Claimant’s request to have Respondent cover the March 12, 2019 visit with Dr. Antonson is denied and dismissed.

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

DATED: March 3, 2021

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

ISSUE

Whether Claimant has proven by a preponderance of the evidence that he is incapable of earning any wages and is entitled to receive Permanent Total Disability (PTD) benefits as a result of industrial injuries he sustained during the course and scope of his employment with Employer on June 29, 2017.

FINDINGS OF FACT

1. Claimant is a 58 year old former driver/loader for Employer who injured his back on June 29, 2017 while uncoupling a trailer from his truck. Specifically, Claimant was lifting a gear and felt a pop in his back. He initially received conservative treatment that included physical therapy and chiropractic care.

2. During the course of the claim Claimant received treatment from Authorized Treating Physician (ATP) Levi Karl Miller, D.O. Imaging revealed disc damage and Claimant underwent two separate back surgeries. Giancarlo Barolat, M.D. subsequently implanted a spinal cord stimulator.

3. Although Claimant initially reported improvement with the stimulator, he failed to obtain long-term relief. In a July 1, 2019 follow-up visit with Dr. Barolat Claimant expressed a high level of frustration with the lack of relief. Claimant eventually reported some improvement with his lower extremity pain but stated that the stimulator had not improved his lower back symptoms. The lack of improvement ultimately led to a recommendation for a peripheral nerve stimulator trial. The trial was completed on December 9, 2019 followed by implantation of the peripheral lumbar stimulator on February 27, 2020. At his three-month follow up with Dr. Barolat Claimant reported tremendous relief.

4. Claimant subsequently underwent telemedicine evaluations with Dr. Miller on April 8, 2020 and May 6, 2020. On June 17, 2020 Claimant visited Dr. Miller for an impairment evaluation. Claimant had been using opioid medications for pain control but transitioned to gabapentin during the opioid taper. Dr. Miller determined that Claimant reached Maximum Medical Improvement (MMI) on June 17, 2020. He assigned a 15% whole person impairment for a specific disorder of the lumbar spine and a 15% whole person impairment for range of motion deficits. Combining the ratings yields a 28% whole person impairment. Dr. Miller recommended a Functional Capacity Evaluation (FCE) to assign Claimant's permanent work restrictions. He recommended maintenance treatment that included three years of medication management and life-long follow-up for the spinal cord stimulators.

5. On September 3, 2020 Claimant underwent an FCE with Sue Moore, MS, PT, MTC from Brookside Physical Therapy, P.C. During the FCE Claimant demonstrated the ability to work in the light to medium category with the following capacities:

a. Lift carry: He demonstrated the ability rarely to occasionally lift up to 40 pounds, frequently 30 pounds, and constantly 20 pounds.
b. Lifting from floor to waist: 35 pounds occasionally, 25 pounds frequently, and 15 pounds constantly.
c. Waist to shoulder: 35 pounds occasionally, 25 pounds frequently, and 15 pounds constantly.
d. Push-pull: 92 pounds pushing, 99 pounds pulling, occasionally. 45 pounds pushing frequently, 50 pounds pulling frequently. 23 pounds pushing constantly, 25 pounds pulling constantly.
e. Hand grip was 82 pounds on the right and 75 pounds on the left occasionally. Grip was 41 pounds on the right frequently and 37 pounds on the left. 20 pounds on the right and 19 pounds on the left constant. Pinch grip was 12 pounds occasionally on the right and 11 pounds on the left. Frequently, pinch grip was 6 pounds on the right and 5 pounds on the left. Constantly, pinch grip was right hand 3 pounds and left hand 2.5 pounds.
f. With regard to hand coordination, he needed more time for fine objects, but could do it constantly although at his own pace.
g. With regard to sitting, he could sit constantly. With regard to standing and walking, he could stand constantly. With regard to bench reach, he could do that occasionally.

The FCE report did not document that Claimant required breaks between activities.

6. On October 6, 2020 Claimant underwent an independent medical examination with Marc Steinmetz, M.D. Dr. Steinmetz reviewed Claimant’s medical history and performed a physical examination. He noted that Claimant’s lower back was tender but had no spasms. Dr. Steinmetz agreed with Dr. Miller that Claimant had reached MMI on June 17, 2020. He recommended permanent work restrictions consistent with the FCE and concluded Claimant was capable of working in the light to medium work category.

7. On October 27, 2020 Claimant visited Vocational Consultant Sara Nowotny, MA, CCM, CRC of Genex Services, Inc. for a vocational assessment. Ms. Nowotny noted that the FCE and Dr. Steinmetz placed Claimant in the light-medium work category with an occasional lifting capacity of 35-40 pounds. She considered the restrictions specified in the FCE and adopted by Dr. Steinmetz. Ms. Nowotny also conducted labor market research to assess the availability of employment within Claimant’s current skill level and physical capacities. Research revealed that Claimant was capable of returning to work in the light to medium category including jobs such as gate guard, production worker and parking/car wash cashier. Ms. Nowotny summarized that Claimant “is able to work and earn a wage.”

8. On December 7, 2020 Claimant visited Sherry Young, OTR with Starting Point for a second FCE. Claimant demonstrated the ability to lift weights similar to

amounts in the prior FCE, including 30 pounds from floor to waist and 25 pounds from waist to shoulder and overhead. Nevertheless, Ms. Young determined that Claimant was not capable of returning to work due to positional intolerances and other issues that would limit his lifting ability. She specifically remarked that Claimant's lifting abilities partially met the light work category. Ms. Young commented that Claimant was not capable of frequent lifting and his "lifting tolerances will vary greatly and there will be times when symptoms prevent him from lifting at all." She detailed that Claimant spent 1.3 hours or 33% of the 4-hour FCE "resting." Ms. Young summarized that "these types of rest would not be tolerated in typical work settings. [Claimant's] inability to perform even sedentary activities back-to-back in a reliable and dependable manner for more than 30 minutes is the main barrier to return to work."

9. In a December 31, 2020 report Ms. Moore reviewed and responded to the FCE performed by Ms. Young. She first identified the DSI model she had used that included standardized testing methods that provided more objective and reliable results. Ms. Moore noted that Claimant demonstrated similar lifting capacities at both the September and December FCEs. His lifting abilities placed him in the medium to light category. The similar results thus validated the tests. She also identified multiple errors and deficiencies in Ms. Young's testing. Ms. Moore specified that Ms. Young failed to include a physical examination and honor proper body mechanics during the lift test. She explained that a physical examination is important because it helps to confirm or deny the results of the testing. Ms. Moore noted that in the DSI model, physical limitations are correlated with physical abilities rather than self-limitation.

10. Ms. Moore specifically delineated her concerns about Ms. Young's FCE. Notably, Ms. Young failed to follow the DSI model and properly correlate Claimant's reported fatigue with actual physical limitations. Additionally, Ms. Young did not have Claimant use proper body mechanics when performing lifting activities. Ms. Moore detailed that Ms. Young reported Claimant had "bended to lift from the floor" when performing floor to waist lifting. Ms. Moore described the failure to use proper body mechanics as "alarming." She specified that the spine should be in a vertical position and lifting should be performed from the lower extremities instead of the back when starting from the floor. Ms. Moore also reiterated that Claimant had not requested breaks during her evaluation as he had during Ms. Young's FCE.

11. On September 30, 2020 Claimant underwent a vocational evaluation with Bob Van Iderstine, CRC, with Western Slope Rehabilitation, Inc. On December 23, 2020 Mr. Van Iderstine issued a written report. After reviewing the medical records and report from Ms. Nowotny, Mr. Van Iderstine concluded that, if he used the restrictions from the September 3, 2020 FCE with Ms. Moore, Claimant was employable. However, if he used the restrictions from the December 7, 2020 FCE performed by Ms. Young, Claimant was not capable of returning to work. Mr. Van Iderstine ultimately adopted the restrictions assessed by Ms. Young and determined that Claimant was not capable of returning to competitive employment or earning any wages.

12. Claimant testified at the hearing in this matter. He described the circumstances of his June 29, 2017 industrial injury and how it has affected his daily

routine. Claimant remarked that he suffered constant pain and it took him approximately one hour to complete tasks he had previously performed in one-half hour. He noted that, after lifting 35 pounds at the September 3, 2020 FCE, he rested for 15 minutes because his heart rate was too high. Claimant further explained that he needed to change positions from sitting to standing every 15 minutes. He denied telling Ms. Nowotny that he could lift 35 pounds. Although Claimant acknowledged he lifted 30 pounds at the FCE conducted by Ms. Young on December 7, 2020, he stated that he was only "barely" able lift the weight. Finally, Claimant commented that none of the treatment he has received throughout the claim, including the stimulators, improved his symptoms.

13. Mr. Van Iderstine also testified at the hearing in this matter. He maintained that Claimant was unable to return to competitive employment based on his interview and the results of the December 7, 2020 FCE performed by Ms. Young. He reiterated that, if the restrictions identified by Ms. Moore and adopted by Dr. Steinmetz were utilized, then Claimant could obtain competitive employment. However, Mr. Van Iderstine explained that he did not rely upon Ms. Moore's restrictions because they were not consistent with Claimant's description of his "day-in-and-day-out activities." Instead, Claimant's activity levels were better captured by Ms. Young's evaluation.

14. On cross-examination Mr. Van Iderstine maintained that he did not rely upon the restrictions from Ms. Moore and Dr. Steinmetz because they were "completely different from what" Claimant told him. He emphasized that Ms. Young assigned appropriate restrictions based on Claimant's physical capabilities at the December 7, 2020 FCE. Mr. Van Iderstine acknowledged that he had conducted labor market research solely by looking at the Connecting Colorado Workforce Center site. Finally, he also used a subjective 10 pound lifting limit relayed by Claimant but not imposed by any medical provider.

15. Dr. Steinmetz also testified at hearing in this matter. He generally explained that Claimant's physical examination on the date of the Independent medical examination was consistent with his presentation to Dr. Miller on the date of MMI. Dr. Steinmetz did not notice any unsteadiness, altered gait or anything else suggesting Claimant could not stand or walk. He noted that FCEs are useful in identifying an individual's physical capabilities. After reviewing the medical records, examining Claimant and considering the September 3, 2020 FCE, he determined the restrictions identified by Ms. Moore were medically appropriate. Dr. Steinmetz summarized that Claimant was medically and physically capable of returning to work within the identified restrictions.

16. After his evaluation Dr. Steinmetz received the December 7, 2020 FCE completed by Ms. Young. He did not agree with the restrictions and recommendations in the report. Dr. Steinmetz noted several problems with the FCE that rendered the results invalid. Initially, he noted that the shorter length of the FCE performed by Ms. Moore and the lack of documentation that Claimant required breaks during the evaluation supported employability. More importantly, he remarked that Ms. Young's FCE occurred under unsafe conditions. Dr. Steinmetz observed that Claimant's resting heart rate at the start of the FCE of 120 beats per minute was considered tachycardia. Furthermore, Ms. Young began the evaluation with Claimant lifting 30 pounds and gradually decreasing the

weights rather than working up to the heavier weights. There was no documented warm up and Claimant used improper body mechanics as identified by Ms. Moore. Moreover, Dr. Steinmetz emphasized that Ms. Young ignored concerning and potentially dangerous cardiovascular issues. Specifically, Ms. Young's report noted that, after taking a break from lifting heavy weights, Claimant performed grip strength testing and his heart rate increased. Claimant's oxygen level also decreased. Dr. Steinmetz remarked that Claimant's symptoms suggested a serious cardiovascular issue that required cessation of the FCE. However, Ms. Young continued the FCE and attributed Claimant's symptoms to fatigue from lifting. However, based on the medical records, Dr. Steinmetz determined that Claimant had suffered a worsening of his underlying cardiovascular issues after the June 17, 2020 MMI date.

17. Ms. Nowotny also testified at the hearing in this matter. She maintained that Claimant was capable of earning wages based on the FCE completed by Ms. Moore and the restrictions assigned by Dr. Steinmetz. She reviewed the FCE completed by Ms. Young but found it concerning because it had not been reviewed by a physician. Furthermore, Ms. Young made "leaps" and extrapolations with no clear basis. Ms. Nowotny also disagreed with Mr. Van Iderstine's conclusion that Claimant was not capable of employment based on the FCE by Ms. Young. She explained that the 10 pound weight limit used by Mr. Van Iderstine was not supported by the medical records and inconsistent with Claimant's representations at her evaluation. An evaluation based only on Claimant's subjective report did not adequately consider all evidence. Ms. Nowotny also noted that Mr. Van Iderstine's methodology for completing labor market research was incomplete because it only considered open jobs posted with Workforce Center. Mr. Van Iderstine failed to include any "cold calls" to employers in appropriate fields to determine whether there were available jobs within Claimant's restrictions and skill set. She maintained that Claimant was capable of returning to work in the light to medium category in positions such as gate guard, production worker and parking/car wash cashier.

18. Claimant has failed to prove that it is more probably true than not that he is incapable of earning any wages and is entitled to receive PTD benefits as a result of the industrial injuries he sustained during the course and scope of his employment with Employer on June 29, 2017. The record reveals that Claimant has demonstrated physical abilities that enable him to function in the light to medium work category and render him a suitable candidate for a number of employment opportunities. Initially, Claimant injured his back while uncoupling a trailer from his truck at work. He received conservative treatment that included physical therapy and chiropractic care. Claimant subsequently underwent two back surgeries and the implantation of a spinal cord stimulator. He reached MMI on June 17, 2020 with a 28% whole person permanent impairment. Dr. Miller referred Claimant for an FCE to assign permanent work restrictions.

19. In the September 3, 2020 FCE with Ms. Moore Claimant demonstrated the ability to work in the light to medium category. Ms. Moore specifically documented that Claimant could lift 35 pounds occasionally, 25 pounds frequently, and 15 pounds constantly from floor to waist and waist to shoulder. Dr. Steinmetz subsequently reviewed Claimant's medical history and performed a physical examination. He agreed with Dr.

Miller that Claimant had reached MMI on June 17, 2020. Dr. Steinmetz recommended permanent work restrictions consistent with the FCE and concluded Claimant was capable of working in the light to medium work category. Vocational consultant Ms. Nowotny considered the restrictions specified in the FCE and adopted by Dr. Steinmetz. Ms. Nowotny also conducted labor market research to assess the availability of employment opportunities within Claimant's current skill level and physical capacities. Research revealed that Claimant was capable of returning to work in the light to medium category and obtain employment in jobs such as gate guard, production worker and parking/car wash cashier.

20. In contrast, Ms. Young conducted an FCE and determined that Claimant was not capable of returning to work due to positional intolerances and other issues that would limit his lifting ability. She specifically remarked that Claimant's lifting abilities partially met the light work category. Ms. Young commented that Claimant was not capable of frequent lifting and his "lifting tolerances will vary greatly and there will be times when symptoms prevent him from lifting at all." She detailed that Claimant spent 1.3 hours or 33% of the 4-hour FCE "resting" and summarized that "these types of rest would not be tolerated in typical work settings." Ms. Young characterized that Claimant's inability to perform even sedentary activities in a reliable and dependable manner for more than 30 minutes was the main barrier in returning to work. Relying on Ms. Young's FCE, vocational consultant Mr. Van Iderstine determined that Claimant was not capable of returning to competitive employment or earning any wages.

21. Despite the conclusions of Ms. Young and Mr. Van iderstine, the record reveals that Claimant is capable of earning wages. The FCE performed by Ms. Moore on September 3, 2020 and the restrictions adopted by Dr. Steinmetz accurately reflect Claimant's functional abilities. The opinions of Ms. Young are not persuasive based on the errors and mistakes involved with administration of the FCE. The deficiencies include the following: failing to perform a physical examination, failing to have Claimant warm up prior to beginning moderate to heavy lifting, failure to ensure Claimant utilized proper lifting techniques during the evaluation and failing to heed her own instructions regarding cardiovascular compromise. Moreover, Ms. Nowotny persuasively disagreed with Mr. Van Iderstine's conclusion that Claimant was not capable of employment based on the FCE by Ms. Young. She explained that the 10 pound weight limit used by Mr. Van Iderstine was not supported by the medical records and inconsistent with Claimant's representations at her evaluation. Ms. Nowotny also noted that Mr. Van Iderstine's methodology for completing labor market research was incomplete because it only considered open jobs posted with Workforce Center. She explained that Claimant was capable of returning to work in the light to medium category in positions such as gate guard, production worker and parking/car wash cashier. Finally, Dr. Steinmetz observed that Claimant's resting heart rate at the start of his FCE with Ms. Young was elevated at 120 beats per minute. He emphasized that Ms. Young ignored concerning and potentially dangerous cardiovascular issues. Dr. Steinmetz remarked that Claimant's symptoms suggested a serious cardiovascular issue that required cessation of the FCE. Based on the medical records, Dr. Steinmetz determined that Claimant had suffered a worsening of his underlying cardiovascular issues after the June 17, 2020 MMI date.

22. Although there is conflicting evidence regarding the extent of Claimant’s physical capacities, the record reveals that Claimant has demonstrated physical abilities that enable him to function in the light to medium work category and render him a suitable candidate for a number of employment opportunities. Considering Claimant’s vocational attributes and human factors including age, education, work history, transferable skills, communication skills and work restrictions Claimant is capable of earning wages in some capacity. Accordingly, the record reflects that employment exists that is reasonably available to Claimant under his particular circumstances. Accordingly, Claimant’s request for PTD benefits is denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

4. Permanent Total Disability (PTD) is defined as the inability to earn “any wages in the same or other employment.” §8-40-201(16.5)(a), C.R.S.; *Christie v. Coors Transportation Co.,* 933 P.2d 1330, 1333 (Colo. 1997). A claimant is not permanently and totally disabled if he is able to earn some wages in modified, sedentary or part-time employment. *McKinney v. ICAO*, 894 P.2d 42 (Colo. App. 1995). The claimant carries the burden of proof to establish that he is permanently and totally disabled by a preponderance of the evidence. The question of whether the claimant has proven PTD is a question of fact for resolution by the ALJ. *Id.*

5. A claimant must demonstrate that his industrial injuries constituted a “significant causative factor” in order to establish a claim for PTD. *In Re Olinger,* W.C. No. 4-002-881 (ICAO, Mar. 31, 2005). A “significant causative factor” requires a “direct causal relationship” between the industrial injuries and a PTD claim. *In Re Dickerson,* W.C. No. 4-323-980 (ICAO, July 24, 2006); *see Seifried v. Industrial Comm’n,* 736 P.2d 1262, 1263 (Colo. App. 1986). The preceding test requires the ALJ to ascertain the “residual impairment caused by the industrial injury” and whether the impairment was sufficient to result in PTD without regard to subsequent intervening events. *See Joslins Dry Goods Co. v. Indus. Claim Appeals Office*, 21 P.3d 866 (Colo. App. 2001). Resolution of the causation issue is a factual determination for the ALJ. *In Re of Dickerson,* W.C. No. 4-323-980 (ICAO, July 24, 2006).

6. In ascertaining whether a claimant is able to earn any wages, the ALJ may consider various “human factors,” including a claimant's physical condition, mental ability, age, employment history, education, and availability of work that the claimant could perform. *Weld County School District RE-12 v. Bymer*, 955 P.2d 550, 556 (Colo. 1998); *Holly Nursing v. Indus. Claim Appeals Office,* 992 P.2d 701, 703 (Colo. App. 1999). The critical test, which must be conducted on a case-by-case basis, is whether employment exists that is reasonably available to the claimant under his particular circumstances. *Bymer*, 955 P.2d at 557. Ultimately, the determination of whether a Claimant suffers from a permanent and total disability is an issue of fact for resolution by the ALJ. *In Re Selvage,* W.C. No. 4-486-812 (ICAO, Oct. 9, 2007). The ability to earn wages inherently includes consideration of whether claimant is capable of getting hired and sustaining employment. *See Christie*, 933 P.2d at 1335; *Cotton v. Econ. Lub-N-tune*, W.C. No. 4-220-395 (ICAO, Jan. 16, 1997).

7. The test for determining “availability of work” is whether employment exists “that is reasonably available to claimant under his or her particular circumstances.” *Christie*, 933 P.2d at 1335; *Bymer,* 955 P.2d at 554-55. Respondents are not required to prove the existence of a particular job that a specific employer has made available to the claimant. *Labiak v. Bader Burke & Co.,* W.C. No. 4-134-999 (ICAO, Oct. 14, 2009) *citing Beavers v. Indus. Claim Appeals Office*, No. 96CA0275 (Colo. App., Sept. 5, 1996).

8. As found, Claimant has failed to prove by a preponderance of the evidence that he is incapable of earning any wages and is entitled to receive PTD benefits as a result of the industrial injuries he sustained during the course and scope of his employment with Employer on June 29, 2017. The record reveals that Claimant has demonstrated physical abilities that enable him to function in the light to medium work category and render him a suitable candidate for a number of employment opportunities. Initially, Claimant injured his back while uncoupling a trailer from his truck at work. He received conservative treatment that included physical therapy and chiropractic care. Claimant subsequently underwent two back surgeries and the implantation of a spinal cord stimulator. He reached MMI on June 17, 2020 with a 28% whole person permanent impairment. Dr. Miller referred Claimant for an FCE to assign permanent work restrictions.

9. As found, in the September 3, 2020 FCE with Ms. Moore Claimant demonstrated the ability to work in the light to medium category. Ms. Moore specifically

documented that Claimant could lift 35 pounds occasionally, 25 pounds frequently, and 15 pounds constantly from floor to waist and waist to shoulder. Dr. Steinmetz subsequently reviewed Claimant's medical history and performed a physical examination. He agreed with Dr. Miller that Claimant had reached MMI on June 17, 2020. Dr. Steinmetz recommended permanent work restrictions consistent with the FCE and concluded Claimant was capable of working in the light to medium work category. Vocational consultant Ms. Nowotny considered the restrictions specified in the FCE and adopted by Dr. Steinmetz. Ms. Nowotny also conducted labor market research to assess the availability of employment opportunities within Claimant's current skill level and physical capacities. Research revealed that Claimant was capable of returning to work in the light to medium category and obtain employment in jobs such as gate guard, production worker and parking/car wash cashier.

10. As found, in contrast, Ms. Young conducted an FCE and determined that Claimant was not capable of returning to work due to positional intolerances and other issues that would limit his lifting ability. She specifically remarked that Claimant's lifting abilities partially met the light work category. Ms. Young commented that Claimant was not capable of frequent lifting and his "lifting tolerances will vary greatly and there will be times when symptoms prevent him from lifting at all." She detailed that Claimant spent 1.3 hours or 33% of the 4-hour FCE "resting" and summarized that "these types of rest would not be tolerated in typical work settings." Ms. Young characterized that Claimant's inability to perform even sedentary activities in a reliable and dependable manner for more than 30 minutes was the main barrier in returning to work. Relying on Ms. Young's FCE, vocational consultant Mr. Van Iderstine determined that Claimant was not capable of returning to competitive employment or earning any wages.

11. As found, despite the conclusions of Ms. Young and Mr. Van iderstine, the record reveals that Claimant is capable of earning wages. The FCE performed by Ms. Moore on September 3, 2020 and the restrictions adopted by Dr. Steinmetz accurately reflect Claimant's functional abilities. The opinions of Ms. Young are not persuasive based on the errors and mistakes involved with administration of the FCE. The deficiencies include the following: failing to perform a physical examination, failing to have Claimant warm up prior to beginning moderate to heavy lifting, failure to ensure Claimant utilized proper lifting techniques during the evaluation and failing to heed her own instructions regarding cardiovascular compromise. Moreover, Ms. Nowotny persuasively disagreed with Mr. Van Iderstine's conclusion that Claimant was not capable of employment based on the FCE by Ms. Young. She explained that the 10 pound weight limit used by Mr. Van Iderstine was not supported by the medical records and inconsistent with Claimant's representations at her evaluation. Ms. Nowotny also noted that Mr. Van Iderstine's methodology for completing labor market research was incomplete because it only considered open jobs posted with Workforce Center. She explained that Claimant was capable of returning to work in the light to medium category in positions such as gate guard, production worker and parking/car wash cashier. Finally, Dr. Steinmetz observed that Claimant's resting heart rate at the start of his FCE with Ms. Young was elevated at 120 beats per minute. He emphasized that Ms. Young ignored concerning and potentially dangerous cardiovascular issues. Dr. Steinmetz remarked that Claimant's symptoms suggested a serious cardiovascular issue that required cessation of the FCE. Based on

the medical records, Dr. Steinmetz determined that Claimant had suffered a worsening of his underlying cardiovascular issues after the June 17, 2020 MMI date.

12. As found, although there is conflicting evidence regarding the extent of Claimant's physical capacities, the record reveals that Claimant has demonstrated physical abilities that enable him to function in the light to medium work category and render him a suitable candidate for a number of employment opportunities. Considering Claimant's vocational attributes and human factors including age, education, work history, transferable skills, communication skills and work restrictions Claimant is capable of earning wages in some capacity. Accordingly, the record reflects that employment exists that is reasonably available to Claimant under his particular circumstances. Accordingly, Claimant's request for PTD benefits is denied and dismissed.

ORDER

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

Claimant's request for PTD benefits is denied and dismissed.

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

DATED: March 1, 2021.

DIGITAL SIGNATURE:

Peter J. Cannici

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

ISSUES

I. Whether Claimant proved by a preponderance of the evidence he sustained a change of medical condition since being placed at maximum medical improvement ("MMI") on March 26, 2018, for the admitted August 27, 2015, left shoulder/elbow injury.

II. Whether Respondents proved by a preponderance of evidence that no further medical care is reasonable, necessary and related to the August 27, 2015 injury.

FINDINGS OF FACT

Prior History

1. Claimant has a significant pre-existing history of treatment for his left shoulder, left elbow/hand/wrist/arm, back, neck, hip, cognitive issues, complex region pain syndrome/reflex sympathetic dystrophy ("CRPS/RSD") of the left hand and arm, and chronic low back, neck and whole body pain. Claimant has treated for several years with opioids and other medications.

2. In April 2001, Claimant was involved in a motor vehicle accident ("MVA") during which he sustained injuries to his low back, neck, left shoulder and left knee. Claimant underwent a left shoulder open acromioplasty with distal claviculectomy and rotator cuff repair in 2003.

3. Prior to the admitted August 27, 2015 work injury that is the subject of this claim, Claimant had four previous workers' compensation claims, including a June 27, 2006 work injury where Claimant was working for Employer as a maintenance man. Claimant fell six feet from a ladder. He was diagnosed with CRPS/RSD of the left arm and hand, chronic pain syndrome and injuries to his hip, left shoulder, left elbow, left wrist, left arm, chronic neck, low back pain and all over body pain, headaches and severe depression.

4. A June 27, 2007 EMG/Nerve Conduction Study of the left upper extremity conducted by Dr. Sparr was abnormal, indicative of cubital tunnel syndrome and C-7 cervical radiculopathy and Claimant was diagnosed CRPS/RSD of the left upper extremity and partial-thickness rotator cuff tear. Claimant underwent MRIs and imaging of various body parts, as well as multiple medical treatment modalities including back and neck injections, sympathetic blocks to the left upper extremity and left elbow, and numerous therapies, opiates, narcotics, pain medication and anti-depressants. Jose Vega, Ph.D., diagnosed Claimant with major depression and chronic post-traumatic stress disorder and

chronic pain disorder and saw Claimant twenty-two times, documenting episodes of uncontrollable weeping, tearfulness, complaints of forgetfulness, depression and frustration.

5. Claimant's authorized treating physician ("ATP") for the June 2006 work injury, Dr. Sparr, placed Claimant at MMI on March 5, 2008. He assigned a 46% whole person impairment consisting of 30% impairment for CRPS for the left upper extremity, 6% impairment for left rotator cuff tear, 10% cervical spine impairment and 9% lumbar spine impairment. Claimant reported having no use whatsoever of his left hand. Dr. Sparr reviewed surveillance video of Claimant and noted "obvious inconsistences" with Claimant's presentation. According to Dr. Sparr, based on inconsistencies noted in numerous reports and Claimant's attempts to display profound cognitive dysfunction, Claimant's subjective complaints were seen as "inconsistent and volitional." Dr. Sparr noted that psychological impairment was not appropriate as Claimant's psychological dysfunction was "purely subjective" and there were "obvious inconsistencies making determination of a psychological impairment impossible." Dr. Sparr gave permanent work restrictions, stating that Claimant "has significant limitations in the left upper extremity use preventing him from performing greater than sedentary duties."

6. On January 20, 2009, following a hearing, ALJ Stuber awarded Claimant the then-maximum dollar amount of $2,000 for disfigurement because Claimant "has a visible disfigurement to the body consisting of atrophy of the left hand and forearm, scarring of the left forearm and proximal phalanx of the left index finger; and loss of all range of motion of the left hand."

7. On July 8, 2008, Bruce Magnuson, M.A., Claimant's vocational expert, reported that per Claimant, prior to the 2006 work injury, Claimant was "able to speak some English" but he has been unable to do so since the injury. Mr. Magnuson, who evaluated Claimant in person, noted Claimant's "left arm was clearly atrophying. He was wearing a glove on the left hand and showed me that he was unable to extend that arm" and his ex-wife stated that Claimant's "left arm was shattered." Claimant's ex-wife, in Claimant's presence, indicated that Claimant was "very depressed" all the time and "in a lot of pain." Claimant reportedly "yanks out his hair and bite his tongue a lot," while staring at the wall. Magnuson observed Claimant was "a very distraught emotionally" fragile individual. "He appears to be visibly in significant pain. He is unable to sit for any prolonged period of time. He has a visibly atrophied left arm." Mr. Magnuson concluded that Claimant was permanently totally disabled and unable to earn any wages in a part or full time basis and is not a candidate for formal training or able to sustain work in any capacity for the rest of his life.

8. During Claimant's July 3, 2008 vocational evaluation with Katie Montoya, both Claimant and his ex-wife were crying and Claimant presented in a catatonic state. Claimant stated he spoke no English "at all," had ongoing pain in his back, head and body and felt like he was in a "completely differently body" than prior to the June 2006 work injury. Claimant purportedly did not understand what was going on and had difficulty remembering what he did. Claimant removed the glove he had been wearing over his

right hand and arm to show Montoya the appearance of the arm/hand and claimed he was unable to use the left hand at all. According to Claimant, he could not concentrate and forgets things. Claimant could not lift anything more than small things and is up and down all through the day.

9. On August 19, 2009, Claimant entered into a full and final settlement for his 2006 claim for injuries sustained to his left hand, left wrist, left shoulder, head, neck, spine, back, nerves, CPRS/RSD, chronic pain, psychiatric condition, brain, headaches, left elbow, dizziness, cognitive dysfunction, hips, right leg and left leg, for indemnity in the amount of $152,017.60 (consisting of $40,000 in up-front cash and $112,917.60 in a structured settlement. The settlement included a Medicare Set-Aside funded by Respondents with an initial deposit of $1,721 and periodic payments of $957 per year for 30-years.

10. After settling his case, Claimant worked on windows and as a painter in 2011. Clamant also ran his own business for a time as he had a contractor's license. In 2012, Claimant worked for a different employer doing remodels, painting and roofing. Claimant was working in his own business in 2014 when Employer stopped by his home and rehired Claimant. Claimant returned to his pre-2006 work injury employment with Employer as a maintenance worker, doing painting, drywall, roofing, remodeling and climbing ladders. He also put in a sprinkler system, digging for the line.

August 27, 2015 Work Injury

11. Claimant sustained an admitted industrial injury while working for Employer on August 27, 2015. Claimant was installing drywall into a house ceiling and was standing on a ladder approximately three steps up when a 4x8 piece of drywall weighing approximately 30 pounds began to fall. Claimant attempted to catch the piece of drywall and felt left shoulder pain. Claimant was first seen by his primary care physician ("PCP"), Dr. Abool, with complaints of left shoulder, left hip, and back pain. X-rays of the left shoulder, cervical spine, lumbar spine and left hip revealed no acute findings.

12. On October 26, 2015, Scott Primack, D.O., noted Claimant's significant history of chronic pain which affected Claimant's back and other parts of his body. Dr. Primack opined that the only injury Claimant sustained on August 27, 2015 was to the left shoulder.

13. On December 9, 2015, Claimant was seen by shoulder surgeon Dr. Simpson. Dr. Simpson noted a left shoulder MRI revealed a high grade partial thickness tear of the posterior aspect of the supraspinatus tendon. Dr. Simpson opined that left shoulder surgery may be an option, but only after Claimant returned to his family physician to address his chronic pain issues and his relatively high dose opiate pain medications he was taking prior to the August 27, 2015, injury.

14. On December 23, 2015, then ATP Dr. Bradley opined that the only diagnosis related to the August 27, 2015 work injury was to Claimant's left shoulder. In a handwritten note to Insurer, Dr. Bradley stated that the body parts related to the injury included "the

left shoulder only." He also noted that no treatments by Claimant's PCP, Dr. Abool, should be authorized as part of the claim involving the August 27, 2015 work injury.

15. On February 25, 2016, Claimant underwent an Independent Medical Examination ("IME") with Dr. Erickson, who opined that the August 27, 2015 work injury exacerbated Claimant's chronic, non-specific low back pain, and resulted in a left shoulder rotator cuff tear and new lateral left hip pains.

16. On referral by Dr. Bradley, Claimant attended an initial physiatry evaluation with Miguel Castrejon, M.D. on June 10, 2016. Dr. Castrejon diagnosed Claimant with left shoulder rotator cuff tear with clinical evidence of impingement, chronic lumbar musculoligamentous sprain/strain with sacroiliac versus facet mediated pain, chronic pain with opioid dependency, and reactive depression/anxiety. He also noted consideration of left hip acetabular impingement. Dr. Castrejon prescribed Claimant additional medications.

17. Claimant continued to see Drs. Bradley, Castrejon and Dr. Vega. Dr. Castrejon noted that a MRI arthrogram results of left hip revealed findings consistent with femoroacetabular impingement.

18. On October 4, 2016, Lawrence A. Lesnak, D.O. performed an IME at the request of Respondents. Dr. Lesnak performed comprehensive records review and physical examination of Claimant. He noted numerous pain behaviors and nonphysiologic findings on examination. Claimant reported never having any previous shoulder, low back, neck, or hip injuries or similar symptoms in the past. For past medical history, Dr. Lesnak documented the left forearm surgery from the 2006 work injury and chronic depression, but Claimant "could not recall" if he received a prior impairment rating. Dr. Lesnak agreed with Drs. Bradley and Primack that the only work injury Claimant sustained on August 27, 2015 was to the left shoulder, opining that Claimant may have factitious disorder. Dr. Lesnak opined that Claimant reached MMI as of September 7, 2016, and that he was not a candidate for further treatment due to inconsistent pain complaints and psychosocial factors. He assigned 5% permanent impairment of the left shoulder.

19. On November 30, 2016, Dr. Primack issued a letter in response to Respondents' counsel. Dr. Primack noted he reviewed Dr. Lesnak's IME report and agreed Claimant reached MMI as of September 7, 2016 with 5% left shoulder impairment and no recommendations for further treatment.

20. On December 8, 2016, Dr. Bradley issued a response to Respondents' counsel after reviewed Dr. Lesnak's IME report. Dr. Bradley also agreed Claimant reached MMI with no need for maintenance care.

21. On December 15, 2016, Respondents filed a Final Admission of Liability ("FAL") based on the reports of Drs. Bradley, Lesnak and Primack, stating Claimant reached MMI on September 7, 2016, with a 5% scheduled impairment to the left shoulder and no maintenance treatment.

22. Claimant continued to treat with Dr. Castrejon and Dr. Simpson. Dr. Simpson performed a rotator cuff repair on April 18, 2017.

23. On April 25, 2017, Respondents filed a General Admission of Liability ("GAL") reinstating temporary total disability to Claimant as of April 18, 2017 due to the shoulder surgery. Dr. Bradley sent Insurer a letter stating that he did not transfer Claimant's medical care to Dr. Castrejon but Claimant himself transferred his care to Dr. Castrejon. Dr. Castrejon continued to treat Claimant and diagnose injuries to Claimant's back, neck, hip, left arm, left elbow, left hand, left shoulder and depression as related to the August 27, 2015, injury.

24. Dr. Castrejon conducted an EMG in June 2017 and opined there was likely preexisting underlying ulnar neuropathy aggravated by use of splint postoperative for shoulder surgery. Dr. Lesnak opined Claimant's condition was not work-related.

25. On March 5, 2018, Claimant underwent a 24-month Division Independent Medical Examination ("DIME") by John Aschberger, M.D. Dr. Aschberger issued a DIME report dated March 26 2018. Dr. Aschberger reviewed Claimant's medical records beginning September 1, 2015. Claimant reported to Dr. Aschberger that his 2006 injury was not treated under workers' compensation. Dr. Aschberger did not document any reports by Claimant of his prior CRPS/RSD diagnosis to his left arm, hand and elbow, inability to use his hand following the 2006 work injury, or chronic low back, neck and body pain and severe depression. Dr. Aschberger opined assessed, *inter alia*, complications of chronic left should pain, restricted range of motion and left elbow flexion contracture, and muscular atrophy at the left hand and EMG findings most consistent with ulnar neuropathy. Dr. Aschberger recommended that Claimant undergo a repeat EMG to assure that there was no associated abnormality that would affect a C8 T1 distribution. He opined Claimant was an unlikely candidate to proceed with further intervention for the ulnar nerve. He stated that, if the EMG confirmed ulnar neuropathy and Claimant is not a surgical candidate, no further intervention other than medication management would be warranted. arranged. Dr. Aschberger also mentioned the possibility of further psychological and radiological evaluation. Nonetheless, Dr. Aschberger opined that Claimant reached MMI on March 26, 2018. He assigned a 54% scheduled impairment rating for the ulnar nerve and for range of motion deficits of the left shoulder and left elbow. He recommended medication management with Dr. Castrejon as maintenance care.

26. On April 5, 2018, Respondents filed a final admission of liability ("FAL") consistent with Dr. Aschberger's opinion regarding MMI and impairment and admitting to maintenance benefits. The Certificate of Mailing of the FAL includes the addresses of, *inter alia*, Claimant and Claimant's then attorney.

27. No evidence was offered that Claimant applied for hearing to overcome Dr. Aschberger's DIME opinion on MMI and impairment. Consequently, the claim closed 30 days after the date the FAL was filed and remains closed, except as to the issue of

maintenance treatment. No evidence was offered that Claimant previously filed a petition to reopen.

28. Following Dr. Aschberger's DIME, Claimant continued to see Dr. Castrejon. Dr. Castrejon did not opine that Claimant's medical condition worsened but, rather, he continued treating Claimant for left hand/wrist/elbow atrophy, back, neck and hip pain and depression that he deemed were all related to the August 25, 2017, injury. Respondents continued to deny authorization of payment for Dr. Castrejon's treatment recommendations for anything other than left-shoulder and elbow medical maintenance.. Dr. Castrejon opined that Claimant should undergo a repeat EMG to compare it with the 2015 EMG that was done because of profound atrophy at Claimant's elbow, arm and hand. Dr. Aschberger, who reviewed Dr. Castrejon's records for the DIME, repeated Dr. Castrejon's EMG recommendation, still opined Claimant was at MMI.

29. According to both Drs. McCranie and Lesnak, comparison of the 2007 EMG and an EMG performed after the August 27, 2015 work injury showed that Claimant's left ulnar neuropathy improved in 2015 compared to what it was in 2007, and the atrophy was far less profound.

30. On January 8, 2019, Dr. Castrejon declared Claimant "at MMI" and suggested that Respondents send Claimant back for a follow up DIME with Dr. Aschberger. Respondents did not refer Claimant back to Dr. Aschberger as the claim had closed and Claimant was never officially taken off MMI by any physician.

31. On December 17, 2019, Dr. Castrejon opined that Claimant was no longer at MMI from his January 8, 2019 MMI date because of significant decline mentally and on a musculoskeletal basis. Claimant reported being depressed and experiencing an overall worsening of his condition with neck and bilateral arm pain, with the left arm being useless with no movement. Dr. Castrejon noted Claimant's reported significant loss of left upper limb and progressive myofascial symptoms impacting Claimant's function. Dr. Castrejon recommended psychological treatment and additional treatment with Dr. Kelly.

32. On March 4, 2020, Kathy McCranie, M.D. conducted an IME at the request of Respondents. She reviewed Claimant's medical records dating back to 1992, including the 2006 work injury. Dr. McCranie agreed with Drs. Bradley, Lesnak, Primack and Aschberger that the only body part related to the August 27, 2025, injury is the left shoulder and elbow. Dr. McCranie opined Claimant should not be taken off MMI as his physical and psychological condition have not worsened. She noted that Claimant had several pre-existing conditions prior to the August 27, 2015 work injury including, *inter alia*, left ulnar neuropathy, cervical radiculopathy, issues with the left upper extremity, and depression. Dr. McCranie explained that, although Claimant was reporting worsening pain and psychological symptoms, Claimant's current documented pain levels were the same as the pain levels noted by Dr. Aschberger at the time of the DIME. Referring to Claimant's June 2007 EMG, Dr. McCranie noted that subsequent EMGs in 2016 and 2017 actually reflected improvement in Claimant's left ulnar neuropathy. She opined that

Claimant remained at MMI and any further treatment, including medication management and psychological treatment, would be maintenance treatment.

33. Claimant did not undergo any additional treatment recommended by Dr. Castrejon. Noting additional treatment had not been authorized, Dr. Castrejon ultimately opined Claimant reached MMI on September 16, 2020 with 61% whole person impairment rating. He continued to opine Claimant required psychological evaluation and treatment as a result of the work injury.

34. On October 18, 2020, Dr. Kleinman conducted a psychiatric IME at the request of Respondents. Dr. Kleinman and reviewed Claimant's medical records dating back to the 2006 work injury. Dr. Kleinman noted that Claimant's presentation after the August 27, 2015 work injury has presented in the same pattern of mispresenting his complaints to appear as invalid. He noted Claimant reported the same and similar issues after the 2006 work injury but that Claimant attributes the issues to the 2015 work injury. Dr. Kleinman opined that Claimant's pre-existing and recurrent anxiety and depression has not changed, and merely waxed and waned, as is the natural course. Dr. Kleinman opined that Claimant is no worse now from a mental health perspective than he was when placed at MMI in 2018 and that Claimant's claims to be mentally disturbed are unreliable and not convincing. He concluded that Claimant remains at MMI psychologically since being placed at MMI by Dr. Aschberger in March 2018. Dr. Kleinman opined Claimant does not require any additional mental health treatment for the August 27, 2015 work injury.

35. Katie Montoya conducted a second vocational assessment of Claimant on September 14, 2020. Claimant took the glove off of his hand and arm to show Ms. Montoya who opined that the appearance of Claimant's condition has improved. Ms. Montoya noted that, although Claimant presented to her at this assessment the same as he did in 2008 with complaints of pain, cognitive issues and functional limitations, Claimant was more interactive and had better recall in 2020 than in 2008.

36. Surveillance of Claimant from February 20, 2020, shows Claimant driving a vehicle, dropping off children at school, picking up a board that blew from a fence with both arms and placing the board over an opening, using his left arm to hold wood, waling with a normal, fast gait and repeatedly bending at the waist.

37. Dr. McCranie testified at hearing as a Level II accredited expert in physical medicine and rehabilitation and pain medicine. In her IME report, Dr. McCranie initially opined that Claimant could undergo 4-6 sessions of psychological treatment and 3-6 months of medication management as maintenance treatment. Dr. McCranie changed her opinion and testified that no further medical treatment is reasonable, necessary or related to the August 27, 2015 injury. Dr. McCranie pointed to Dr. Kleinman's psychiatric IME report, noting he did not recommend further psychological treatment for Claimant. She explained that her initial recommendation for 3-6 months of medication management no longer applies, as such time period had already transpired.

38. Claimant testified at hearing that his left arm is limp and numb and will not straighten. Claimant testified he lost sensation in left hand after undergoing the left shoulder surgery. Claimant stated that since March 2018 his pain worsens with changes in the weather and he continues to have back, left shoulder, neck and hip pain. Claimant testified that he has suffered from depression since 2006. Claimant testified that he has experienced pain from the 2006 work injury and that Respondents did nothing to help him. Claimant stated that due to his injuries he cannot work or support his family. Claimant testified that he wants to undergo the treatment recommended by Dr. Castrejon, including seeing a psychologist.

39. The ALJ finds the opinions of Drs. Primack, Bradley, Aschberger, Lesnak, McCranie and Kleinman more credible and persuasive than the opinion of Dr. Castrejon and Claimant's testimony.

40. Claimant failed to prove it is more probable than not he sustained a change of medical condition since being placed at MMI by Dr. Aschberger on March 26, 2018 for his August 27, 2015, work injury.

41. Respondents proved it is more probable than not that no further medical care is reasonable, necessary and related to the August 27, 2015, work injury. Evidence and inferences contrary to these findings were not credible and persuasive.

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

CONCLUSIONS OF LAW

Generally

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

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

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

Reopening a Claim

Section 8-43-203(2)(b)(II), C.R.S. provides that a claim will automatically close after the date of the FAL unless the claimant contests the FAL in writing and requests a hearing on any disputed issues that are ripe for hearing including selection of a DIME. *See Stefanski v. Industrial Claim Appeals Office,* 128 P.3d 282 (Colo. App. 2006) (noting that “any pleading that adequately notifies the employer that the claimant does not accept the FAL constitutes substantial, if not actual, compliance with the statutory obligation to provide written objection”).The statutory automatic closure provisions are designed to “promote, encourage, and ensure prompt payment of compensation to an injured worker without the necessity of a formal administrative determination in cases not presenting a legitimate controversy.” *Dyrkopp v. Industrial Claim Appeals Office,* 30 P.3d 821, 822 (Colo. App. 2001).

Once a claim is closed by an FAL, issues resolved by the FAL are not subject to further litigation unless reopened under §8-43-303, C.R.S. *Leewaye v. Industrial Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007). The overall statutory scheme is designed to provide a method to determine the claimant’s medical condition, afford the claimant an opportunity to contest a medical determination, close all undisputed issues and permit reopening on appropriate grounds. *See Peregoy v. Industrial Claim Appeals Office,* 87 P.3d 261 (Colo. App. 2004). Despite the decision in *Harman-Bergstedt v. Loofbourrow,* 320 P.3d 327 (Colo. 2014) a claimant who receives a FAL that only admits for medical benefits and denies temporary disability and permanent impairment benefits is entitled to request a DIME. However, unless he does so within the statutorily-required 30 days, he is jurisdictionally barred from making the request. *Suomie v. Spectrum Retirement Communities*, WC 5-050-347 (ICAO, June 14, 2019).

Section 8-43-303(1), C.R.S. provides that a worker’s compensation award may be reopened based on a change in condition. In seeking to reopen a claim, the claimant shoulders the burden of proving his condition has changed and is entitled to benefits by a preponderance of the evidence. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005). A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082, 1084 (Colo. App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* WC 4-358-465 (ICAO, Oct. 25, 2006). Reopening is appropriate if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000). The determination of whether a claimant has sustained her burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* WC 4-543-945 (ICAO, July 19, 2004).

As found, Claimant failed to prove by a preponderance of the evidence a change in condition occurred warranting the reopening of his claim. It is undisputed Claimant has an extensive and complicated history involving multiple injuries and body parts. At hearing Claimant repeatedly referred to his 2006 work injury, for which he purportedly does not believe he received adequate treatment. Claimant alleges the same for his 2015 work injury, at times conflating the two. The issue before the ALJ concerns Claimant's 2015 work injury, which Drs. Primack, Lesnak, McCranie, Bradley, and Aschberger all credibly and persuasively opined is limited to the left shoulder and elbow. Although Dr. Aschberger referred to Claimant potentially undergoing additional diagnostic treatment, he ultimately opined that Claimant reached MMI for the August 27, 2015 work injury with a 54% impairment rating for the left shoulder and elbow. Respondents filed a FAL consistent with Dr. Aschberger's DIME report and there is no evidence Claimant timely challenged Dr. Aschberger's DIME opinion on MMI and impairment. Accordingly, the claim closed with the exception of maintenance medical benefits.

Claimant continued to see Dr. Castrejon who, at some later point, opined that Claimant was no longer at MMI due to worsening psychological and musculoskeletal issues. As noted by Dr. McCranie, Dr. Castrejon's opinion appears, in large part, to be based on Claimant's subjective reports, which have been credibly called into question by Drs. Lesnak, McCranie and Kleinman. Dr. McCranie credibly explained that there has been no change or worsening of Claimant's condition since being placed at MMI. Dr. Kleinman credibly opined Claimant remains at MMI from a psychological perspective. There is insufficient objective evidence of any worsening of Claimant's condition that is causally connected to the August 27, 2015 work injury. Accordingly, Claimant failed to meet his burden of proof to reopen his claim with for the August 27, 2015 work injury.

Maintenance Medical Benefits

Section 8-42-101(1), C.R.S. requires the employer to provide medical benefits to cure or relieve the effects of the industrial injury, subject to the right to contest the reasonableness or necessity of any specific treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). The need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that the claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999); *Hastings v. Excel Electric*, WC 4-471-818 (ICAO, May 16, 2002). There is no bright line test to distinguish treatment designed to cure an injury from treatment designed to relieve the effects of the injury. Surgery may be designed to cure an injury or may be maintenance treatment designed to relieve the effects or symptoms of the injury. Post-MMI treatment may be awarded regardless of its nature. *Corley v. Bridgestone Americas*, WC 4-993-719 (ICAO, Feb. 26, 2020).

To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995)*.* When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School District No.11*, WC No. 3-979-487, (ICAO, Jan. 11, 2012). Once a claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* WC 4-461-989 (ICAO, Aug. 8, 2003). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 919 P.2d 701, 704 (Colo. App. 1999).

In contrast, when respondents seek to terminate medical maintenance benefits they have the burden to prove that medical maintenance benefits are no longer reasonable, necessary or related to the industrial injury. *HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990); *see* §8-43-201(1), C.R.S. (specifying that "a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification").

As found, the preponderant evidence establishes Claimant is not entitled to ongoing maintenance medical benefits as related to the August 27, 2015 work injury. Respondents' April 5, 2018 FAL admitted for reasonable, necessary and related post-MMI medical treatment pursuant to Dr. Aschberger's DIME report. Claimant continued to see Dr. Castrejon, who recommended additional pre-MMI treatment for Claimant, which Respondents repeatedly denied. Drs. McCranie and Kleinman credibly and persuasively explained that Claimant does not require further treatment for his physical or psychological conditions as related to the August 27, 2015 work injury. To the extent Claimant Accordingly, Respondents proved it is more likely than not medical maintenance benefits are no longer reasonable, necessary or related.

ORDER

1. Claimant failed to prove by a preponderance of the evidence he sustained a change in condition causally related to the August 27, 2015 work injury. Claimant's petition to reopen his claim is denied and dismissed.

2. Respondents proved by a preponderance of the evidence no further medical care is reasonable, necessary or related to the injury in this claim. Claimant's claim for further medical maintenance care is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

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

DATED: March 1, 2021

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Did Claimant prove he suffered a compensable injury to his left shoulder on March 28, 2020?

If the claim is compensable, the ALJ will address the following additional questions:

- Is Claimant entitled to TTD benefits commencing April 22, 2020?
- Was Claimant responsible for termination of his employment?
- Should TTD benefits be reduced under § 8-43-102 based on "late reporting" of the injury?

STIPULATIONS

The parties reached the following stipulations:

1. If the claim is compensable, the date of injury as March 28, 2020.

2. Claimant's average weekly wage is $324.86.

3. Medical benefits provided by and on referral from CCOM were reasonably necessary and authorized.

4. The issue of TPD is withdrawn and reserved for future determination, if necessary.

FINDINGS OF FACT

1. Claimant worked for Employer as a grocery clerk. He was hired in March 2020 and assigned overnight stocking duties. Although Claimant's employment application indicates he was available for "any shift," he verbally explained to Employer he was only willing to work the night shift. Claimant was concerned about contracting COVID-19 and had promised his wife he would only work the night shift to minimize his contact with the public.

2. Employer's workforce is unionized and Employer has procedures regarding work assignments based on specific criteria such as seniority. Claimant had no seniority that allowed him the right to pick his shift, hours, or days. As Employer's witnesses persuasively explained, Claimant could have been assigned to any shift on any day. Employer uses a process called "Select-a-Shift" and promising Claimant a certain shift would violate union rules. Employer was willing to assign Claimant to the night shift in accordance with its established shift selection procedures, but Claimant received no guarantee or contractual commitment he would only be assigned to the night shift.

3. Claimant's first shift started at midnight on March 28, 2020. Claimant stocked grocery items with his brother, a long-time employee of Respondent. The store received an unusually large delivery of goods to be stocked that night. Claimant testified there were approximately 4,500 cases of product, whereas a more typical night would have 1,500 cases. Claimant separated cases of product and put the product on grocery shelves. Claimant testified he "got after it" the first night because he wanted to impress Employer with his work ethic. Claimant's shift ended at 8:30 AM on March 28, 2020. He felt no symptoms while working.

4. Claimant went home after his shift and went to bed. Claimant testified his back, hands, and left shoulder felt "sore" when he awoke. Claimant assumed he was simply unaccustomed to the work and figured the soreness would pass. He continued working as a night stocker for several weeks.

5. Claimant testified the soreness in his back and hands improved but the shoulder pain persisted and worsened over the next few weeks. Claimant testified he worked hard and received praise for stocking quickly despite progressive shoulder pain.

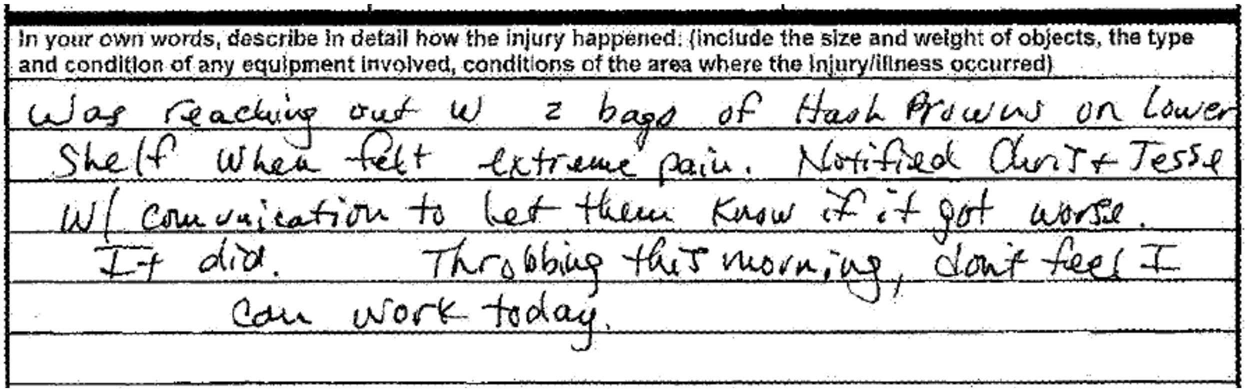
6. Claimant testified he reported left shoulder pain to his immediate supervisor, Jesse O[Redacted], and the Grocery Manager, Chris C[Redacted], on April 13, 2020. Claimant testified he told Mr. O[Redacted] and Mr. C[Redacted] "every detail" about the onset of his symptoms. Claimant testified he has been "very clear with everyone" that the injury started on his first night of work and progressively worsened over the next several weeks. Claimant testified the pain became severe on April 20, 2020 so he reported the injury to upper management. Claimant testified he described an incident while stocking frozen hash browns because "they told me they needed a specific incident" on the accident report.

7. Mr. O[Redacted] corroborated that Claimant verbally reported shoulder pain on or about April 13, 2020, but testified Claimant said he hurt the shoulder "at his day job" in the cannabis industry. Mr. O[Redacted] did not recall Claimant saying the shoulder pain was related to his work for Employer. Mr. O[Redacted] testified he asked if Claimant could continue working and Claimant responded affirmatively. Mr. O[Redacted] put Claimant in the chips aisle because it was lighter and "kept an eye on him" the rest of the night. Mr. O[Redacted] did not observe Claimant having any difficulty performing his work. He did not recall Claimant ever stating he injured his shoulder stocking frozen hash browns. Mr. O[Redacted] testified Claimant was not a "fast" stocker because he was new and inexperienced. Claimant was frequently teamed with his brother, one the store's best stockers, and Claimant's brother typically did a higher percentage of each aisle.

8. Mr. C[Redacted] testified the store was "really crazy" in March and April 2020 and the night crew was stocking more product than usual because of COVID-19. Mr. C[Redacted] recalled one occasion he had asked if Claimant could stay longer and Claimant said his shoulder was bothering him. Mr. C[Redacted] testified he told Claimant, "if you have an injury, you need to speak with someone higher up than me." He testified Claimant did not say the shoulder pain was related to his work for Employer. Mr. C[Redacted] assumed Claimant was simply using the pain as an excuse to avoid having

to work longer. Mr. C[Redacted] could not recall the date of the conversation but agreed it was probably “close to” April 13, 2020. He did not recall Claimant ever mentioning he injured his shoulder stocking frozen hash browns.

9. On April 20, 2020Claimant formally reported a shoulder injury to Andrew N[Redacted], the Assistant Store Manager. Mr. N[Redacted] and Claimant discussed the matter and completed injury reports. Claimant stated the injury occurred on April 13, 2020 at approximately 6:00 AM. He described the accident in the following terms:



In your own words, describe in detail how the injury happened: (include the size and weight of objects, the type and condition of any equipment involved, conditions of the area where the injury/illness occurred)

Was reaching out w 2 bags of Hash Browns on lower
Shelf When felt extreme pain. Notified Chris + Jesse
W/ comunication to let them know if it got worse.
It did. Throbbing this morning, don't feel I
can work today.

Claimant’s accident report does not reference progressive shoulder pain over several weeks.

10. Mr. N[Redacted] completed a manager’s incident report and described the injury in terms similar to Claimant’s description. As with Claimant’s statement, there is no mention of symptoms starting on or shortly after Claimant’s first day of work. Mr. N[Redacted] testified he completed his report based on Claimant’s description of the injury. Mr. N[Redacted] testified Claimant said nothing about developing pain after the first day of work that progressively worsened. Mr. N[Redacted] testified he did not tell Claimant to list a specific incident and merely advised Claimant consistent with the instructions on the form.

11. Employer provided Claimant a list of physicians and he selected CCOM. His initial visit took place on April 22, 2020 with Valerie Joyce, FNP. The report described the history of injury as:

> Pt presents to the clinic with left shoulder pain, says he started working for King Soopers on 3/27/2020, his first night at work he had to stock a huge load of product/cases, 4500 cases – he feels he over did it for his first day on the job, his shoulder was very sore the next day, on 4/13/2020 he had to stock the frozen section – hash browns – his shoulder progressively worsened afterwards.

12. Ms. Joyce diagnosed an “unspecified strain of left shoulder joint.” She gave Claimant work restrictions of no lifting, pushing, pulling, or overhead work with the left arm.

13. Employer offered Claimant modified duty performing light cleaning and sanitizing on a day shift. Claimant resigned his position because he was only willing to work at night to minimize exposure to COVID-19.

14. Dr. Wallace Larson performed an IME for Respondent on October 26, 2020. Dr. Larson opined Claimant's left shoulder symptoms are related to an underlying age-related degenerative condition and were not caused by his work for Employer.

15. On November 6, 2020, Claimant saw Dr. Timothy Hall for an IME at his counsel's request. Crediting Claimant's description of events, Dr. Hall opined Claimant's left shoulder symptoms and need for treatment are causally related to his work for Employer.

16. Claimant's testimony is no more credible or persuasive than the conflicting testimony of Employer's witnesses.

17. Claimant failed to prove he suffered a compensable injury to his left shoulder.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). A pre-existing condition does not disqualify a claim for compensation if a work accident aggravates, accelerates, or combines with the underlying condition to cause disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). The claimant must prove that an injury directly and proximately caused the condition for which he seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The mere fact an employee experiences symptoms at or after work does not automatically establish a compensable injury. *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (October 27, 2008); *Garamella v. Paul's Creekside Grill, Inc.*, W.C. No. 4-519-141 (March 6, 2002). The claimant must prove entitlement to benefits by a preponderance of the evidence. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is evidence that leads the ALJ to find a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). Put another way, the standard is met when the existence of a contested fact is "more probable than its nonexistence." *Industrial Commission v. Jones*, 688 P.2d 1116, 1119 (Colo. 1984). The facts in a workers' compensation case are not interpreted liberally in favor of either the claimant or the respondents. Section 8-43-201.

As found, Claimant failed to prove he suffered a compensable injury to his left shoulder. Although the accident report claims an injury on April 13 stocking hash browns, Claimant testified he did not injure the shoulder on April 13. He believes he injured his shoulder on March 28, 2020 and all subsequent incidents were simply manifestations of the injury. There is no persuasive independent corroborative evidence to show Claimant suffered an injury such as video surveillance, eyewitness testimony, or contemporaneous documentation. As a result, proof of an injury rests entirely on Claimant's statements. The witness testimony was highly conflicting and impossible for this ALJ to reconcile. Claimant's testimony appeared credible and his story is plausible. But Employer's witnesses also appeared credible. Mr. O[Redacted]' testimony that Claimant said he injured his shoulder at his "day job" is particularly challenging for Claimant case, because there is no persuasive evidence of any animosity, bias, or other motivation on Mr. O[Redacted]' part to fabricate testimony. Based on the evidence presented, Respondent's version of events is at least as likely as Claimant's version. Additionally, Dr. Larson persuasively explained shoulder symptoms like those experienced by Claimant are frequently seen in patients over 50 with no precipitating event or identifiable cause other than age-related degeneration. Although a causal nexus between Claimant's work and his shoulder symptoms is possible, Claimant failed to prove such a relationship is more probable than not.

ORDER

It is therefore ordered that:

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

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

DATED: March 2, 2021

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-139-115-001

ISSUES

I. Whether Claimant established by a preponderance of the evidence that he sustained a compensable work injury on May 13, 2020.

II. Whether Claimant established by a preponderance of the evidence that he is entitled to reasonable and necessary medical treatment.

III. Whether Claimant established by a preponderance of the evidence that the surgery recommended by Dr. Beard is reasonable, necessary, and related to his May 13, 2020, work injury.

IV. Whether Claimant established by a preponderance of the evidence that he is entitled to temporary total disability (TTD) benefits from May 13, 2020 and ongoing.

V. Determination of Claimant's average weekly wage (AWW).

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. Claimant is a 33-year-old male who was hired by Employer as a delivery driver on April 8, 2020.
2. Employer is a trucking company that delivers packages for [Redacted].
3. Claimant's duties for Employer included loading a delivery truck with packages, then driving the truck, and delivering those packages. Claimant would make approximately 150 stops per day and deliver about 250-300 packages. The packages could weigh up to 100 pounds. The most common package Claimant delivered was pet food and those packages weighed approximately 60 pounds.
4. Claimant started delivering packages for Employer on April 8, 2020.
5. Shortly after Claimant began working for Employer, he began to develop knee pain. As a result, Claimant began complaining of knee pain to other employees.
6. Lisa R[Redacted], co-owner and manager of Employer, Jeff C[Redacted], route manager for Employer, and Tracy Z[Redacted], manager for Employer, all testified that Claimant complained to them about knee pain within his first two weeks of work.
7. Ms. R[Redacted] testified that Claimant's job was physically demanding and that it is not unusual for new employees to experience pain due to the physical demands of the job.
8. The ALJ finds that Claimant's job was physically demanding and hard on his knees.

9. Both Ms. R[Redacted], and Mr. Z[Redacted] testified that Claimant told them he had been previously diagnosed with knee arthritis. Mr. Z[Redacted] testified that Claimant told him he had received knee treatment in California before moving to Colorado. (Hrng. Audio Part 3, 7:00) Claimant, however, disputed such. Claimant testified he never had any knee issues, or knee treatment, before beginning work for Employer. Consistent with Claimant's testimony, no medical records were submitted showing Claimant treated for knee arthritis or knee pain before working for Employer.

10. After a week or two on the job, Claimant developed pain in his left knee based on the physical demands of his job. Claimant reported this to his supervisor, Lisa R[Redacted], who told him that knee pain was normal for people starting out on the job, and it was likely because of muscular fatigue, much like working out at the gym after a long layoff.

11. On April 20, 2020, Claimant was seen by Kathryn Gibbs, PA-C, at UC Health Urgent Care because of left knee pain. *Exhibit 8, page 82*. Based on her assessment, Ms. Gibbs referred Claimant to physical therapy for left anterior knee pain.

12. On April 23, 2020, Claimant was seen by Derek Haverley at Colorado in Motion for physical therapy. Mr. Haverley noted Claimant complained of 2-3 weeks of insidious left knee pain and pressure behind his kneecap and that his knee would occasionally give out. Claimant said that stepping in and out of the delivery truck would aggravate his pain. Lastly, Claimant denied undergoing any prior treatment for his left knee. *Exhibit 9, page 83*.

13. Claimant also testified that while the medical records for treatment Claimant received after he started working for Employer indicate Claimant's knee was "giving out", Claimant credibly and persuasively defined that phrase as meaning that he had instability and pain within the knee - not that it was making him fall as occurred on May 13, 2020. Claimant's definition is consistent with the medical records submitted into evidence in that they do not indicate Claimant was falling – before May 13, 2020 - because of his knee problems.

14. On May 13, Claimant arrived at a house to deliver a heavy package. The package was a 60-pound box of dog food from Chewy.com. To deliver the package, Claimant had to carry the package from the truck to the house. This required Claimant to pick up the package and get out of the truck. After getting out of the truck, Claimant then had to walk with the heavy package and then walk up a short flight of stairs with the heavy package of dog food. While trying to walk up the stairs to deliver the heavy package Claimant's left knee gave out and he fell to the ground.

15. The ALJ finds that for Claimant to walk up the stairs with the package, he had to exert additional force to propel himself – and the 60-pound package – up the stairs. It was this exertional effort to carry the package up the stairs that proved too much for his knee. As a result, he injured his left knee, his knee "gave out," and Claimant fell on his hands and knees.

16. After Claimant composed himself, he eventually made his way back to his work truck and immediately informed his supervisor that he had been injured on the job. He

also advised his employer that because of his injury, he was unable to keep driving and delivering packages that day. Thus, a co-worker picked Claimant up and drove him to emergency room at UCHealth.

17. On May 13, 2020, Claimant was seen at UCHealth Longs Peak Emergency Room. Claimant presented with left knee pain. It was noted that Claimant had been seen about a month ago for left knee pain, but denied any previous slips, falls, sporting injuries, or trauma to his left knee. Consistent with Claimant's testimony, the report from this visit indicates Claimant said he was going up some steps to deliver a package when his knee gave out and he fell to the ground. Claimant was diagnosed with a left knee strain and derangement involving a ligament of his left knee. At that time, the differential diagnosis included "knee strain, chondromalacia patella, ligament injury, attribution of ligament strain, anterior cruciate ligament tear, PCL strain, PCL tear." Because of the injury that occurred while delivering the heavy package of dog food, Claimant was placed in a knee immobilizer, restricted from work, and referred to the Orthopedic Center of the Rockies for further assessment and treatment. *Ex. 9, pages 85-97, and Ex. 10, page 130*.

18. On May 15, 2020, Claimant was seen at Concentra and evaluated by Dr. Jeffrey Baker. Claimant provided the same history to Dr. Baker – that he started having knee pain at work while delivering packages and that his knee gave out while delivering a package to a house. *Exhibit 7, page 78*. Based on his assessment, Dr. Baker concluded that Claimant's objective findings were consistent with the history and/or work-related mechanism of injury and that there was a greater than 50% probability that Claimant's injury was work related. Dr. Baker ordered an MRI to determine the extent of Claimant's injury and to determine future treatment. He also provided restrictions which precluded Claimant from performing his regular job duties. *Exhibit 7, pages 76-77*.

19. On May 18, Claimant underwent an MRI of his left knee. The MRI showed the following:

    i. Multifocal bone contusions in the left knee predominantly affecting the medial compartment.

    ii. Acute grade 1 MCL sprain with an intermediate grade sprain of the medial retinaculum.

    iii. Small simple effusion with diffuse soft tissue edema and a partially ruptured Baker's cyst.

    iv. Complex tear in the posterior horn of the medial meniscus. *Exhibit 5.*

20. On May 19, 2020, Glenn L[Redacted] filled out a Workers Compensation – First Report of Injury of Illness form. Mr. L[Redacted] listed the date of injury/illness as 5/13/2020, and it noted that "knee gave out while making a delivery." *Exhibit 1, page 1*.

21. On May 19, 2020, Claimant was seen by Dr. Ross at Orthopedic and Spine Center of the Rockies (OCR). Dr. Ross reviewed Claimant's MRI and noted that it looked like Claimant had "a little bit of bone bruising" and a medial meniscus tear, "but no

other acute findings." As a result, he referred Claimant to a surgeon in their practice. *Ex. 6, page 43*.

22. On June 2, 2020, Claimant was seen by Dr. Beard at OCR. Dr. Beard reviewed the history of injury, Claimant's MRI, and determined the findings were:

> Consistent with bone marrow edema along the medial femoral condyle and medial tibial plateau. There is a grade 1 strain of the MCL. The cruciate ligaments are intact. There is a tear of the posterior horn of the medial meniscus, with a small joint effusion present.

Dr. Beard recommended a left knee arthroscopy to address the meniscal pathology caused by the work injury and to cure Claimant from the effects of his work injury. Dr. Beard also sought authorization for the surgery from Insurer. *Exhibit 6, pages 39 and 41*.

23. On June 17, 2020, Claimant was seen by Stephen Toth at Concentra. Mr. Toth noted they were still awaiting approval of the surgery recommended by Dr. Beard. On July 8, 2020, Claimant was again seen by Dr. Toth. At this appointment, it was noted that Claimant was still having swelling and pain in his left knee, with locking daily.

24. On July 29, 2020, Claimant was again seen by Dr. Toth. Claimant was still having problems with his knee to the point Dr. Toth could not perform a complete physical evaluation of Claimant's knee. Dr. Toth concluded that Claimant needed the surgery requested by Dr. Beard to cure Claimant from the effects of his work injury. *Exhibit 7, page 51*.

25. On August 31, 2020, Claimant was seen by Amber Payne, PA-C, at Workwell, Occupational Medicine. Ms. Payne checked "yes," that Claimant's objective findings were consistent with the history and/or work-related mechanism of injury/illness. *Exhibit 3, page 16*. Ms. Payne also noted in her report, "Causality Statement: based on the information given to me at this time, there is a > than 50% medical probability that this is a work-related injury." *Exhibit 3, page 19*.

26. On September 30, 2020, Claimant was seen by Dr. Dupper at Workwell. Dr. Dupper also checked "yes," that his objective findings were consistent with history and/or work-related mechanism of injury/illness. Dr. Duper also concluded that the incident on May 13, 2020 caused a "left knee medial femoral contusion, medial posterior horn meniscus tear and a grade 1 MCL sprain." *Exhibit 3, page 15*. Dr. Dupper also noted "The history and examination are consistent with the mechanism described as a work-related condition." *Claimant's Exhibit 3, page 12*. Since Claimant was still symptomatic, Dr. Dupper prescribed Claimant a cortisone injection for his knee to help reduce Claimant's pain and inflammation caused by the May 13, 2020 injury. *Ex. 3, page 15.*

27. On October 19, 2020, Claimant was seen by Dr. Rizza at Workwell. After evaluating Claimant, Dr. Rizza also checked "yes," that her objective findings were consistent with history and/or work related mechanism of injury/illness. *Exhibit 3, page 10*. At this visit, she gave Claimant a left knee injection.

28. On November 11, 2020, Claimant was seen by Dr. Dupper at Workwell Occupational Medicine. Again, Dr. Dupper checked “yes,” that his objective findings were consistent with history and/or work related mechanism of injury/illness. It was noted at this visit that Claimant had no improvement and was not yet ready to advance to additional activity. Dr. Dupper also noted “The history and examination are consistent with the mechanism described as a work related condition.” *Claimant’s Exhibit 3, page 5*. Dr. Dupper further noted in his report, “Causality Statement: based on the information given to me at this time, there is a > than 50% medical probability that this is a work related injury.” *Exhibit 3, page 6*.

29. On December 17, 2020, Claimant returned to Dr. Dupper at Workwell. Again, Dr. Dupper checked “yes,” that his objective findings were consistent with history and/or work-related mechanism of injury/illness. It was noted that Claimant had no improvement and was not yet ready to advance to additional activity. Dr. Dupper also noted “The history and examination are consistent with the mechanism described as a work-related condition.” *Claimant’s Exhibit 3, page 3*.

30. The ALJ finds the opinions of the medical providers at Concentra and Workwell that determined Claimant’s injury was work related to be credible and persuasive for many reasons. First, each provider obtained a similar history from Claimant. Second, each provider came up with a similar diagnosis. Third, none of the providers documented Claimant had prior left knee problems and was treating for any prior left knee problems before his employment with Employer. Fourth, Claimant could perform his job duties until the incident on May 13, 2020. As a result, their opinions are consistent with – and supported by – the medical records.

31. On January 5, 2021, Claimant underwent an independent medical examination with Carlos Cebrian, M.D., at the request of Respondents. *Ex. N, page 121.* Claimant reported that he started developing knee pain about two weeks before the May 13, 2020, incident. As noted by Claimant, his symptoms first started after he began working for Employer, and his symptoms would include pain, spasms, and the “knee locking or stiffening up.” Claimant also noted that the pain was in the center of his knee, in the region of the patella, and migrated to the medial aspect. Claimant also stated he developed increased generalized swelling and a protuberance at the back of the knee, which he had not noticed until pointed out by the physical therapist. Claimant, however, denied any prior knee issues. *Id. at 121-22*. Claimant described how he injured his knee at work. Claimant reported that on May 13, 2020, he was carrying a large box to a house and there were three stairs. He was going up one of the steps when his knee gave out and he then fell forward onto both palms and both knees. This work accident caused increased pain in the left knee. Claimant reported that before May 13, 2020 his knee had never given out and. *Id. at 122.*

32. Claimant told Dr. Cebrian his job for Employer would require him to deliver packages up to 100lbs. The most common package was pet food weighing 60lbs. He would make about 150 stops per day and deliver 250-300 packages. *Id.* at 123. Dr. Cebrian testified that he evaluated this claim assuming Claimant was carrying a 100lb package at the incident. *Cebrian Depo, pg. 34, ln. 4-10*.

33. Dr. Cebrian assessed Claimant with obesity, hyperlipidemia, left knee patellofemoral syndrome, and he agreed with most of the radiologist's findings in Claimant's May 18 MRI. But Dr. Cebrian stated that none of the findings related to Claimant's work. *Ex. N, page 131*. Dr. Cebrian highlighted the inconsistencies in the medical records with respect to Claimant's mechanism of injury, and he testified that he did not believe Claimant to be a credible historian. Dr. Cebrian found it significant that Claimant was now denying his knee would give out before May 13 despite many contrary statements in the medical records. *Ex. N, page 132; Cebrian Depo, pages 21-22, ln. 20-4.*

34. Dr. Cebrian concluded that it is not medically probable that Claimant's left knee complaints, before May 13, were causally related to Claimant's work for Employer. He cited the Medical Treatment Guidelines and noted Claimant's mechanism of injury, making 150 stops while delivering 250-300 packages per day over a two-week period, is not consistent with the development of patellofemoral syndrome. Further, the symptoms Claimant complained of during this period, such as swelling and the sensation of the knee giving out, are more consistent with a meniscal or ligament pathology. *Ex. N, pages 132-133; Cebrian Depo, pages 15-19*. Additional objective findings, such as the development of a Baker's cyst and quadriceps atrophy, are indicative of a chronic condition in Claimant's left knee before May 13 that cannot be plausibly associated with Claimant's work for Employer. *Cebrian Depo, pg. 15-19*. Dr. Cebrian testified that he would expect Claimant's condition to naturally worsen over time. *Id. at pg. 28, ln. 1-3*.

35. Dr. Cebrian testified that Claimant has never provided a plausible mechanism of injury to cause a complex meniscus tear or a MCL sprain *Id. at page 23-24; 30*. Dr. Cebrian also concluded that Claimant's alleged fall on May 13, 2020, could have caused the bone contusions, but the reason that Claimant fell on that date would have been because of his preexisting knee condition and not his duties for Employer.

In his deposition, Dr. Cebrian stated:

> So in assessing all the information, the reason his knee gave out was due to his preexisting condition that was causing his knee to give out previously, which would likely be secondary to a preexisting meniscal tear because of the Baker's cyst which indicates a chronic finding. *Cebrian Depo, page 26, ln. 17-22.*

36. Dr. Cebrian also stated that Claimant's activities on May 13, 2020, did not contribute to his fall. In other words, Dr. Cebrian stated that Claimant's activities of carrying a 60-pound package, or even a 100-pound package, did not raise the risk of Claimant's knee giving out. It was his opinion that Claimant's fall could have just as easily occurred walking at home or somewhere else and the fact that it happened at work was mere coincidence. (*Id.* at pg. 26-27)

37. The ALJ credits Dr. Cebrian's opinion to the extent that Claimant had a preexisting condition involving his knee. Such opinion is supported by the finding of a Baker's cyst and the atrophy noted by the physical therapist.

38. The ALJ does not, however, credit that portion of Dr. Cebrian's opinion where he states and concludes that Claimant's job duties of delivering a 60-pound package did not cause Claimant's knee injury and necessitate the need for medical treatment on May 13, 2020, and thereafter.

39. Dr. Cebrian's opinion that the activity and force involved in carrying a 60-pound box (or even a 100-pound box) and Claimant placing his left foot on the first step and exerting sufficient force to carry the box up the steps did not increase the risk of Claimant's knee going out seems implausible. As a result, the ALJ does not credit his opinion regarding the cause of Claimant's injury, the cause of Claimant's knee going out, and the cause of Claimant's need for medical treatment.

40. The ALJ does find Claimant's statements to medical providers and testimony at hearing to be credible and persuasive. Claimant's statements and testimony was consistent with the underlying medical records and – for the most part – consistent with the testimony of the employer witnesses. Except for the testimony about whether Claimant told co-workers he had previously been diagnosed or treated for knee arthritis, Claimant's testimony was consistent and supported by the medical record.

41. The ALJ finds that it was the force exerted by Claimant through his left knee that was required to carry the 60-pound box up the stairs on May 13, 2020 that:

    - Caused Claimant's knee injury at that specific time.
    - Caused Claimant's knee to go out at that specific time.
    - Caused Claimant to develop significant pain and swelling in his knee at that specific time and thereafter.
    - Caused Claimant's need for medical treatment at that specific time and thereafter.
    - Caused Claimant's disability at that specific time and thereafter.

42. As a result, the ALJ finds that it was not Claimant's preexisting condition that caused his knee to go out and caused him to fall. Instead, the ALJ finds that it was his work activities of trying to carry a 60-pound package of dog food up a small flight of stairs that caused him to suffer an injury and necessitated the need for medical treatment and caused his disability.

43. The ALJ also finds that before working for Employer Claimant could work and did not have significant left knee symptoms. It was not until after the injury that Claimant's knee began to swell, he developed significant pain, symptoms of his knee catching, and was unable to work. Moreover, an MRI of Claimant's knee showed that Claimant had a complex tear in the posterior horn of his medial meniscus. As a result, the surgery recommended by Dr. Beard is intended to cure Claimant from the effects of his injury – which includes addressing the meniscal pathology. Moreover, no physician has indicated that the surgery recommended by Dr. Beard is not reasonable and necessary to treat Claimant's knee symptoms and torn meniscus. As a result, the ALJ finds that the surgery recommended by Dr. Beard is reasonable,

necessary, and related to treat Claimant from the effects of the May 13, 2020 work injury.

44. Because of his work injury, Claimant was unable to perform the physical requirements of his regular job duties as a delivery truck driver and to deliver packages. As a result, Claimant has been unable to perform his regular job duties since the May 13, 2020 accident. Nor has Claimant performed his regular job duties – or other job duties - since his injury. Thus, Claimant has suffered an actual wage loss as of May 13, 2020.

45. Claimant's first day of work was April 8, 2020. The wage records submitted by Respondents establish Claimant worked between 45 and 60.50 hours per week. The records also establish that between April 8, 2020, and May 2, 2020, (24 days) Claimant earned $3,746.24. *Ex. M*. This results in a daily wage of $156.09 and a weekly wage of $1,092.65. As a result, the ALJ finds Claimant's weekly earnings averaged $1,092.65.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

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

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant established by a preponderance of the evidence that he sustained a compensable work injury on May 13, 2020.

The claimant must prove by a preponderance of the evidence that her injury was proximately caused by an injury arising out of and in the course of her employment with the employer. Section 8-41-301(1)(b) & (c), C.R.S.*; see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991); *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO, Nov. 21, 2014).

The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See Triad Painting Co. v. Blair*, *supra. City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014).

The mere fact that an injury occurs at work does not establish the requisite causal relationship to demonstrate that the injury arose out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); *Sanchez v. Honnen Equipment Company,* W.C. No. 4-952-153-01 (ICAO, Aug. 10, 2015).

If the precipitating cause of an injury is a preexisting health condition that is personal to the claimant, the injury does not arise out of the employment unless a "special hazard" of the employment combines with the preexisting condition to contribute to the accident or the injuries sustained. *National Health Laboratories v. Industrial Claim Appeals Office*, 844 P.2d 1259 (Colo. App. 1992); *Rice v. Dayton Hudson Corp.,* W.C. No. 4-386-678 (ICAO, July 29, 1999); *Alexander v. Emergency Courier Services,* W.C. No. 4-917-156-01 (ICAO, Oct. 14, 2014). This rule is based upon the rationale that, unless a special hazard of the employment increases the risk or extent of injury, an injury due to the claimant's preexisting condition lacks sufficient causal relationship to the employment to meet the arising out of employment test. *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989); *Alexander v. Emergency Courier Services,* W.C. No. 4-917-156-01 (ICAO, Oct. 14, 2014)*.* In order for a condition of employment to qualify as a "special hazard" it must not be a "ubiquitous condition" generally encountered outside the workplace. *Ramsdell v. Horn, supra*; *Briggs v. Safeway,* Inc. W.C. No. 4-950-808-01 (ICAO, July 8, 2015). Conversely, if the precipitating cause of the injury involves conditions or circumstances of the employment, there is no need to prove a “special hazard” for the injury to arise out of the employment. *Cabela v. Industrial Claim Appeals Office,* 198 P.3d 1277 (Colo. App. 2008); *H&H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990).

On May 13, 2020, while at performing his work functions, Claimant was delivering a heavy package of dog food that weighed approximately 60 pounds. To deliver the heavy package of dog food, Claimant had to exert sufficient force through his knees to carry the heavy package up the stairs. It was while exerting the additional force necessary to carry this heavy package up the stairs that Claimant injured his left knee resulting in it going out and causing Claimant to fall to the ground.

Right after the incident Claimant developed pain and swelling and could barely walk. As a result, Claimant called Employer and reported the injury. Because Claimant was unable to keep working, they had a co-worker pick Claimant up and drive him to the emergency room at UC Health.

Claimant was evaluated at the UC Health Emergency Room. He was diagnosed with a left knee strain and derangement of a left knee ligament. The differential diagnosis included “knee strain, chondromalacia patella, ligament injury, attribution of ligament strain, anterior cruciate ligament tear, PCL strain, PCL tear.” Claimant was placed in a knee immobilizer, restricted from work, and referred to the Orthopedic Center of the Rockies for further assessment and treatment.

There was testimony from co-workers indicating Claimant told them he was previously diagnosed with arthritis in his knee(s). Claimant, however, denied stating such to any of his co-workers. Even so, even if Claimant did have preexisting arthritis, the ALJ finds and concludes that it was Claimant’s job duties, delivering a heavy package, that caused Claimant’s injury, his knee to go out, and necessitated the need for medical treatment.

While medical records for treatment Claimant received after he started working for Employer indicate Claimant’s knee was “giving out”, Claimant defined that phrase as meaning that he had instability and pain within the knee and not that it was making him fall. Moreover, such symptoms were brought on by the physical demands of his job with Employer.

Respondents also submitted the opinions of Dr. Cebrian. The ALJ did credit that portion of Dr. Cebrian’s testimony where he concluded that Claimant suffered from a preexisting condition in his knee, which included a Baker’s cyst. That said, because of the physical demands of the job, and the timing of the incident in relation to carrying a 60-pound package up some stairs, the ALJ did not find his opinion that Claimant’s need for medical treatment is due to the natural progression of Claimant’s preexisting condition to be persuasive.

All of Claimant’s treating doctors believed Claimant was injured at work. This includes Dr. Baker, who saw Claimant days after the incident occurred, as well as Dr. Rizza and Dr. Dupper at Workwell Occupational Medicine. And while the specialists did not make an explicit statement about causation one way or another, Dr. Beard did seek to get authorization for the surgery through the Workers’ Compensation process.

The ALJ finds and concludes that the job demands were just too much for Claimant's knee. The requirement to deliver 150-250 packages per day, many of which weighed between 60 and 100 pounds, was too much for Claimant's knee to bare. As a result, the ALJ finds and concludes Claimant established by a preponderance of the evidence that he suffered a compensable injury to his left knee on May 13, 2020 while carrying a 60-pound package of dog food up some stairs.

II. Whether Claimant established by a preponderance of the evidence that he is entitled to reasonable and necessary medical treatment.

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012).

Immediately after the accident, Claimant was taken to the emergency room at UC Health. Claimant was evaluated, provided medical treatment, and directed to seek additional medical treatment due the injury to his knee.

After treating at UC Health, Claimant started treating at Workwell. The providers at Workwell evaluated and assessed Claimant's knee injury. The treatment recommendations included an MRI and referral to an orthopedic surgeon to treat Claimant's knee injury.

As a result, the ALJ finds and concludes that Claimant established by a preponderance of the evidence that he is entitled to reasonable and necessary medical treatment for his left knee.

III. Whether Claimant established by a preponderance of the evidence that the surgery recommended by Dr. Beard is reasonable, necessary, and related to his May 13, 2020, work injury.

As found, Claimant suffered a compensable injury to his knee. Because of his injury, Claimant suffers from pain, swelling, catching, and a torn meniscus. As a result, Dr. Beard recommended - and sought authorization for - arthroscopic surgery to "scope" Claimant's knee and perform a partial meniscectomy. As found, the surgery recommended by Dr. Beard is to cure Claimant from the direct effects — symptoms — caused by his work injury and repair the meniscal pathology which was caused by Claimant's work injury. There was no credible and persuasive evidence submitted by Respondents establishing that the surgery recommended by Dr. Beard is not reasonable and necessary to cure Claimant from the effects of his knee injury.

As a result, the ALJ finds and concludes Claimant established by a preponderance of the evidence that the surgery recommended by Dr. Beard is reasonable, necessary, and related to his work injury.

IV. Whether Claimant established by a preponderance of the evidence that he is entitled to temporary total disability (TTD) benefits from May 13, 2020 and ongoing.

To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

The existence of disability presents a question of fact for the ALJ. There is no requirement that the claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

As found, Claimant has been unable to perform his regular job duties since the May 13, 2020 work accident involving his left knee. Plus, Claimant has not returned to employment since his work accident. As a result, Claimant has suffered an actual wage loss as of May 13, 2020. Therefore, the ALJ finds and concludes Claimant has established by a preponderance of the evidence that he is entitled to temporary total disability benefits as of May 14, 2020.

V. Determination of Claimant's average weekly wage (AWW).

Section 8-42-102(2) requires the ALJ to base the claimant's Average Weekly Wage (AWW) on his or her earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.*

As found, Claimant's first day of work was April 8, 2020. The wage records submitted by Respondents established Claimant worked between 45 and 60.50 hours per week. The records also established that between April 8, 2020, and May 2, 2020, (24 days) Claimant earned $3,746.24. This results in a daily wage of $156.09 and a weekly wage of $1,092.65. As a result, the ALJ finds and concludes that Claimant's average weekly wage is $1,092.65.

ORDER

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

1. Claimant suffered a compensable injury on May 13, 2020.

2. Claimant is entitled to reasonable and necessary medical treatment to cure him from the effects of his left knee injury.

3. Respondents shall pay for the left knee surgery recommended by Dr. Beard.

4. Claimant's average weekly wage is $1,092.65.

5. Respondents shall pay Claimant temporary total disability benefits as of May 14, 2020, based on an average weekly wage of $1,092.65.

Issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: March 8, 2021.

/s/ Glen B. Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUE

1. Whether Respondents proved by a preponderance of the evidence sufficient grounds to withdraw their General Admission of Liability.

2. Did Claimant prove, by a preponderance of the evidence, an EMG study requested by John Sacha, M.D., is reasonable, necessary and related to Claimant's alleged work injury on January 3, 2020.

FINDINGS OF FACT

1. Claimant is a 43-year old man who was employed by Employer on January 3, 2020. Claimant began working for employer in approximately December 2019.

2. Prior to his employment with Employer, Claimant had a history of lower back pain, dating to at least 2016. Between March 2016 and approximately October 2018, Claimant sought treatment for chronic lower back pain and regularly took Percocet for lower back pain. During this time frame, Claimant indicated that his lower back pain was the result of a prior work injury and also the result of a motor vehicle accident. (Ex. C & F).

3. In December 2018, Claimant was seen at Medical Center of Aurora for abdominal and groin pain on the right side. (Ex. F). In March 2018, Claimant reported left sided groin pain radiating into his left thigh and back. Claimant reported to Medical Center of Aurora physicians that he believed the abdominal pain was due to lifting in the course of his employment with a different employer. (Ex F). Over the course of the next six months, through September 25, 2019, Claimant was evaluated multiple times at Medical Center of Aurora and Cornerstone Family Medicine for bilateral groin pain, left treater than right. (Ex. D & F). Claimant's groin pain was variously diagnosed as inguinal hernia and inguinal lymphadenopathy. In June 2019, Claimant noted that that his groin pain had improved with antibiotics. In June and July 2019, Claimant received physical therapy at CACC Physical Therapy for bilateral hip pain, diagnosed as iliopsoas syndrome. (Ex. E and D).

4. On September 23, 2019, Claimant was seen at Cornerstone Family Medicine, and reported that he was experiencing bilateral groin pain that had been progressive since December of 2018. Claimant reported that he had bilateral hip pain radiating to his groin and associated with bilateral back pain. (Ex. D).

5. On January 3, 2020, while Claimant was working in the freezer section for Employer, Claimant was attempting to pull a heavy pallet jack from the freezer. While pulling the pallet jack, Claimant experienced a sudden sharp pain in his lower stomach. (Ex. K).

6. On January 3, 2020, Claimant reported to Employer that he sustained an abdominal injury arising out of the course of his employment with Employer when pulling a frozen pallet onto the salesfloor. (Ex. A). Employer filed an Employer's First Report of Injury (FROI) with the Division on or about January 3, 2020. (Ex. A).

7. On January 3, 2020, Claimant was seen at the Medical Center of Aurora emergency department, and reported he had pulled hard on a pallet at work and felt a sudden pain in his left groin and a small area of swelling in his left groin with a tender node. Claimant indicated his previous left groin symptoms has resolved approximately three months earlier, and that the symptoms returned that day after pulling the pallet while working for Employer. Examination of Claimant's groin revealed a small tender node in the left groin, but no swelling or hernia. A CT of Claimant's abdomen was performed and was negative for hernia. The treating physician, Dr. Alan Como, did not find any sign of an inguinal or abdominal wall hernia. (Ex. F).

8. On January 6, 2020, Claimant was seen at Concentra. Claimant reported left groin pain, swelling and tenderness. Claimant reported pulling a pallet and feeling a sudden and sharp pain in his left groin that made his left leg numb. Deana Halat, NP, diagnosed Claimant with an abdominal wall strain and groin swelling. Ms. Halat was unable to make a determination as to whether Claimant's lymph node groin swelling or abdominal wall strain was causally related to Claimant's work. On January 8, 2020, Ms. Halat opined that Claimant's swollen groin lymph nodes were not work-related. (Ex. G).

9. Over the course of the following months, Claimant returned to Concentra for evaluation of his groin pain and was primarily seen by Sophia Rosebrook, D.O. Claimant attended 17 visits at Concentra between January 6, 2020 and September 3, 2020, and was assessed and treated for an abdominal wall or groin injury, diagnosed as abdominal wall strain and groin swelling. On February 12, 2020, Dr. Rosebrook noted that Claimant's diagnosis was "severe groin tear that does not qualify for surgical repair." With the exception of three dates (February 28, 2020, March 13, 2020, and March 27, 2020), Claimant did not report experiencing back pain. On those dates "leg pain and back pain" were noted in the medical records "review of systems" section, but no other discussion or evaluation was documented. (Ex. E).

10. On May 21, 2020, Dr. Rosebrook noted that Claimant's symptoms had not improved as they should for a classic groin tear/strain. (Ex. G).

11. On September 3, 2020, Claimant was seen by general surgeon John Weaver, M.D., also at Concentra for ongoing pelvic pain.. At that point in time, Claimant reported experiencing back pain that had started over the previous three weeks. Dr. Weaver indicated that he did not believe the Claimant's pain was the result of an inguinal hernia, and noted that multiple imaging studies and physical examinations did not show any evidence of a hernia. (Ex. G).

12. On September 17, 2020, Claimant saw Tanya Manning, P.A., at Concentra. Ms. Manning noted that Claimant had evidence of lymphadenopathy on MRI that would not be work related. Ms. Manning also noted that because Claimant had not presented with

back pain, she did not feel an orthopedic referral was appropriate. Ms. Manning also noted that Claimant had no pathology consistent with his pain presentation. Ms. Manning referred Claimant to John Sacha, M.D., for evaluation and “possible closure of case,” including a possible MMI determination. (Ex. G).

13. On September 23, 2020, Carlos Cebrian, M.D., issued a report regarding a record review he performed regarding Claimant. Dr. Cebrian noted that Claimant had a prior known history of inguinal lymphadenopathy and a history of similar groin pain for approximately one year prior to his accident. Dr. Cebrian opined that Claimant’s groin pain was not causally related to his work for Employer nor was a preexisting condition aggravated. Dr. Cebrian opined that there was no objective evidence to support a work-related condition which would lead to complaints of ongoing and increasing pain over 8 months. He further opined that there was not any claim-related condition to support an acute injury or aggravation of chronic back pain or hip osteoarthritis. (Ex. J).

14. Dr. Cebrian testified at hearing by deposition, which was not attended by Claimant, and testified consistent with the opinions stated in his September 23, 2020 report. Dr. Cebrian testified that in his opinion, Claimant’s groin pain was not related to the January 3, 2020 work incident because the mechanism of injury was very minor and that pulling a pallet was not a “significant mechanism.” Neither Dr. Cebrian’s testimony nor his reports, which total 54 pages, indicate that Dr. Cebrian determined the weight of the pallet or the way in which Claimant pulled the pallet. The ALJ finds Dr. Cebrian’s opinion that Claimant sustained “no injury,” to lack credibility. The ALJ does, however, find Dr. Cebrian’s opinions that Claimant did not sustain a hernia, lymphadenopathy, hip injury or lower back injury credible.

15. Dr. Cebrian also testified that Dr. Sacha’s request for authorization of an EMG was not reasonable, necessary or related to the events of January 3, 2020. This was primarily because, in his opinion, it was not medically probable that Claimant suffered a back injury resulting in radiculopathy on January 2, 2020. The ALJ finds Dr. Cebrian’s testimony credible on this issue.

16. Also on September 23, 2020, Respondents’ counsel wrote to Dr. Rosebrook requesting responses to questions regarding maximum medical improvement (MMI) and impairment rating. In the letter, Respondents’ counsel referenced Dr. Cebrian’s opinions and noted that Claimant had similar groin complaints for approximately one-year prior to January 3, 2020. Ms. Halat responded that Claimant should be at MMI on October 1, 2020 and that he was scheduled for an impairment rating with John Sacha, M.D. for September 29, 2020. (Ex. G).

17. On September 28, 2020, Claimant was seen by John Sacha, M.D., at Concentra. Dr. Sacha. Dr. Sacha found that Claimant had occasional low back pain and occasional anterior thigh numbness and tingling. Dr. Sacha opined that it was unclear whether Claimant’s ongoing symptoms were related to a work injury. To evaluate Claimant’s symptoms, Dr. Sacha recommended that Claimant undergo a course of oral steroids and electrodiagnostic testing to determine whether any further care was indicated. Dr. Sacha declined to place Claimant at MMI until after these tests were performed. (Ex. G).

18. On November 3, 2020, Respondents filed a General Admission of Liability (GAL), admitting for medical benefits an temporary partial disability benefits. (Ex. B).

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

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

WITHDRAWAL OF ADMISSION OF LIABILITY - COMPENSABILITY

When respondents attempt to modify an issue that previously has been determined by an admission, they bear the burden of proof for the modification. §8-43-201(1), C.R.S.; *see also Salisbury v. Prowers County School District*, W.C. No. 4-702-144 (ICAO, June

5, 2012); *Barker v. Poudre School District*, W.C. No. 4-750-735 (ICAO, July 8, 2011). Section 8-43-201(1), C.R.S., provides, in pertinent part, that “a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification.” The amendment to §8-43-201(1), C.R.S. placed the burden on the respondents and made a withdrawal the procedural equivalent of a reopening. *Dunn v. St. Mary Corwin Hospital*, W.C. No. 4-754-838-01 (ICAO, Oct. 1, 2013). Respondents must, therefore, prove by a preponderance of the evidence that the Claimant did not suffer a compensable injury as defined under Colorado law. §8-43-201(1), C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

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

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

Respondents’ request to withdraw their General Admission of Liability is based on the assertion that Claimant did not sustain a compensable injury on January 3, 2020. Respondents have failed to establish by a preponderance of the evidence that Claimant did not sustain a compensable work injury on January 3, 2020, and therefore have not established a basis for withdrawal of its November 3, 2020 General Admission of Liability. Claimant’s reports to Insurer and his various health care providers, were consistent in that Claimant reported experiencing pain in his lower abdomen when pulling a heavy pallet jack from Employer’s freezer which resulted in groin pain and an abdominal wall strain. Respondents have established that Claimant did not sustain a hernia, inguinal lymphadenopathy, back or hip injury as the result of his January 3, 2020 work incident. However, the medical records indicate Claimant did sustain an abdominal wall strain as the result of his January 2, 2020 work incident. Although Claimant had a significant history of groin pain in the year prior to January 3, 2020, nothing in the record demonstrates that Claimant did not sustain an abdominal wall strain and/or aggravate a preexisting condition on January 3, 2020 or that the January 3, 2020 incident did not occur as reported.

In addition, Respondents were aware that Claimant had an approximately one-year history of groin pain by at least September 23, 2020, as demonstrated by Dr. Cebrian’s report and Respondents’ letter to Dr. Rosebrook, in which Claimant’s history of a pre-existing condition was referenced. Nonetheless, Respondents filed their General Admission of Liability on November 3, 2020 with this information available to them. The ALJ concludes that the General Admission of Liability was not improvidently filed.

MEDICAL BENEFITS

A claimant is entitled to medical benefits that are reasonably necessary to cure or relieve the effects of the industrial injury or to maintain his condition at MMI. *See* § 8-42-101(1), C.R.S. 2003; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office, supra*. Similarly, the question of whether medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003).

Claimant has failed to establish by a preponderance of the evidence that the EMG requested by Dr. Sacha is reasonable, necessary or related to his work injury of January 3, 2020. As found, Claimant sustained an injury to his abdominal area which likely aggravated a pre-existing groin condition. However, the EMG requested by Dr. Sacha is intended to evaluate Claimant’s back and hip pain. As found, Claimant did not complain of back pain or hip pain related to the January 3, 2020 work injury until significant time had passed after the initial injury. Aside from three cursory mentions of back pain in February and March 2020, Claimant did not complain of back pain again until seeing Dr. Sacha in September 2020, and then noted that the back pain began three weeks earlier. Similarly, Claimant did not complain of hip pain until June 4, 2020, five months after his initial injury. Because the ALJ finds that Claimant’s back and hip conditions are not caused by a work-related injury nor were they aggravated by his work-injury, evaluation and treatment of these conditions is not reasonable, necessary or related to his January 3, 2020 work injury.

ORDER

It is therefore ordered that:

1. Respondents' request to withdraw their November 3, 2020 General Admission of Liability is denied and dismissed.

2. Claimant's request for authorization of an EMG recommended by Dr. Sacha is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

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

DATED: March 8, 2021

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-130-031-001

ISSUES

I. Whether Claimant established by a preponderance of the evidence that he suffered a compensable injury on October 15, 2019.

II. Whether Claimant established by a preponderance of the evidence that medical treatment, including proposed surgery from Dr. Hatzidakis, is reasonable, necessary, and related.

STIPULATIONS

I. Claimant's Average Weekly Wage is $1,022.56.

II. If compensable, Drs. Ogrodnick, Hatzidakis and Sieber are Claimant's authorized treating providers.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. Claimant, Luis G[Redacted] is a 39-year-old male. His primary language is Spanish.
2. Claimant was employed by Employer, [Redacted] as an oiler. This involves doing field maintenance on vehicles.
3. Claimant has no history of injury, treatment, pain or complaints in and about his left shoulder joint.
4. On October 15, 2019, while working for Employer, Claimant was involved in a motor vehicle collision while traveling from the Employer's shop to the location where the equipment he needed to service was located.
5. The incident occurred at the intersection of East 120th Avenue and Pennsylvania Street. At the time of the accident, Claimant was driving the Employer's 2007 Chevrolet C/K 3500 service truck.
6. The accident occurred when Claimant, who was wearing his seatbelt, was rear-ended by another driver - who was ultimately cited for driving under the influence.
7. The force of the collision caused Claimant's entire body to be thrown forward into the seatbelt. Immediately after the impact, Claimant "almost hit the windshield and struck against the steering wheel." Immediately after the impact, he also felt the force and pressure of the seatbelt around his left shoulder - which the seatbelt went across.
8. The service truck did not appear to be hit in an area that contained any absorption zones that could have absorbed the force from the vehicle that rear-ended Claimant's service truck. Instead, it looks like the force from the impact was directed

directly into the frame of the vehicle. This caused the bumper to curl under the vehicle and also resulted in bending the frame of Claimant's service truck. The amount of force of the accident also broke the seatbelt Claimant was wearing. According to Claimant, after the accident, the portion of the seatbelt where you click the seatbelt was locked and no longer worked. (Claimant's Exhibits, pp. 12-28; Hearing Testimony)

9. On October 15, 2019, the day of the accident, Claimant saw Dr. Ogrodnick. Claimant reported he was rear-ended earlier that morning and that he was wearing his seatbelt. He told Dr. Ogrodnick that he first noticed some mild chest discomfort on the scene which had resolved. He also said that he had some burning over the lower sternum which developed about 45 minutes before the appointment. It was noted in the report from this visit that Claimant felt good, but that his boss insisted he present for medical attention. As for preexisting medical conditions, it was noted that Claimant suffers from psoriatic arthritis for which he takes Humira. At this appointment, Claimant believed he could return to full duty work. On examination, Claimant had no back pain, joint pain, myalgias or neck pain. Claimant had full fluent and pain free shoulder range of motion and could perform multiple push-ups against the exam table. He had no change in chest symptoms with repeated squats. He was tender just lateral to the left sternum costal junction. The sternum was not tender, and he had no abrasions. He was assessed only with a contusion of the chest wall. Dr. Ogrodnick felt Claimant's symptoms were likely muscular in etiology and that Claimant could use NSAIDs for pain. At the end of the appointment, Claimant was released to full duty, and told to return in three days for a follow up evaluation.

10. On October 18, 2019, Claimant returned to Dr. Ogrodnick and had increasing symptoms. At this appointment, Claimant stated that although his chest pain went away after his last visit, he eventually developed right sided neck pain and left sided upper back pain. As further noted by Dr. Ogrodnick, this left sided upper back pain was also accompanied with tenderness between Claimant's left scapula and his thoracic spine. (Ex. B, pp. 68-69.) Despite these findings, Dr. Ogrodnick also noted Claimant had full, fluent pain-free bilateral shoulder abduction and full rotator cuff strength without impingement. His assessment at that time was (i) contusion of chest wall, (ii) muscular neck strain, and (iii) thoracic myofascial strain. As before, Claimant was returned to full duty. Claimant said that he was confident he would make a full recovery but wanted to make one more appointment just in case. As a result, Claimant was scheduled to return on or about November 1, 2019. (Ex. B, pp. 68-69.)

11. Claimant did not attend the November 1, 2019, appointment. However, because of ongoing and progressing symptoms, Claimant called to obtain another follow up appointment. Although it is not clear from the record when he called to make a follow up appointment with Dr. Ogrodnick at SCLH Medical Group – they could not schedule an appointment for Claimant to be seen until December 20, 2019.

12. On December 20, 2019, Claimant returned for a visit with Andrew Hildner, PA-C at SCLH Medical Group. This was only his third medical appointment for his work accident and the first appointment where the medical records note that an interpreter

was used during the appointment. At this appointment, Claimant reported that he "still" had muscular tightness, tense, and aching pain in his neck, upper back, left shoulder, and tender anterior shoulder. Claimant also noted his left shoulder as an area where he experienced pain on the pain diagram. PA Hildner referred the Claimant for six sessions of physical therapy. He also noted, "orders placed are related, reasonable, and necessary to treat/evaluate the worker's comp injury, and within Colorado Div of Worker's Comp guidelines." (Claimant's Exhibit 3, pp. 36-37.)

13. On January 7, 2020, Claimant returned for a follow up appointment. At this appointment, PA Hildner requested "imaging due to concern for permanent damage that may cause problems in the future." PA Hildner referred the Claimant to massage therapy. If the Claimant did not feel improvement, he would refer him for a Magnetic Resonance Imaging (MRI). (Claimant's Exhibit 3, p. 55)

14. On January 28, 2020, Claimant presented to Dr. Ogrodnick. Claimant reported his pain as "it used to be throbbing, now pain…before it hurt to raise my arm now it hurts all the time." He also reported soreness when having to bend over or kneel while at work. Dr. Ogrodnick ordered an MRI of Claimant's left shoulder. (Claimant's Exhibit 3, 75-77)

15. On February 3, 2020, Claimant presented for a follow up appointment with Dr. Ogrodnick. At this appointment, Dr. Ogrodnick placed Claimant on modified duty. (Claimant's Exhibit 3, p. 82)

16. On February 6, 2020, Claimant underwent an MRI of his left shoulder. The MRI report reflects Claimant has an interstitial tear of the distal subscapularis tendon with subacromial impingement. (Claimant's Exhibit 5, pp. 211-212)

17. On February 20, 2020, Claimant presented to PA Hildner. Based on the MRI findings, PA Hildner referred Claimant to Armodios Hatzidakis, M.D. for an orthopedic surgical consultation. (Claimant's Exhibit 3, p. 88)

18. On March 17, 2020, Claimant presented to Dr. Hatzidakis. Dr. Hatzidakis performed a physical examination and reviewed the MRI of Claimant's left shoulder. Dr. Hatzidakis discussed conservative and surgical management. The surgery would include, "an arthroscopic rotator cuff repair, debridement with subacromial decompression, and biceps tenodesis." Furthermore, Dr. Hatzidakis discussed conservative measures, which included, "anti-inflammatories, physical therapy, and cortisone injections." Claimant chose a cortisone injection. Dr. Hatzidakis performed the cortisone injection and instructed the Claimant to return in two months to discuss options of any arthroscopic surgery. (Claimant's Exhibit 4, pp. 199-200).

19. On May 28, 2020, Claimant returned to Dr. Hatzidakis for a follow up appointment. Dr. Hatzidakis noted the corticosteroid injection provided the Claimant relief for three weeks of 20% to 30% relief, but Claimant's pain increased after the injection. Claimant reported his pain five out of ten. Claimant reported conservative therapy was not improving with his regimen. It was also noted that Claimant had, "seven months of conservative care with persistent symptoms and has become a reasonable candidate for arthroscopic surgical management…an arthroscopic evaluation of the glenohumeral joint and subacromial space likely subacromial

decompression, possible rotator cuff repair and long head of biceps tenodesis, if required." (Claimant's Exhibit 4, p. 206)

20. Dr. Hatzidakis reviewed the transcription and images of the Claimant's MRI of his left shoulder. (Deposition Transcription, Armodios Hatzidakis, M.D., p. 16) Dr. Hatzidakis testified Claimant's MRI of his shoulder presented with, "bony structure was good, the joint space was normal, meaning there wasn't severe arthritis in the joint that required a joint replacement. There was nothing really abnormal on the x-rays, no fracture or evidence of dislocation or other problems." (Deposition Transcription, Armodios Hatzidakis, M.D., p. 15)

21. Dr. Hatzidakis agreed with the findings set forth in the MRI report, however, he opined, "there was a little more damage to upper subscapularis, and perhaps even a bit of what's called subluxation or abnormality of the biceps that results from the upper part of the tendon having degeneration or a tear." (*Id*., p. 16)

22. Dr. Hatzidakis performed multiple tests on the Claimant to test his level of pain and assist with his diagnosis. Based on his tests, Dr. Hatzidakis found the Claimant, "had some pain with resisted abduction, or lifting the arm, pain with the hand rotated out or in, keeping the arm up, a positive painful arc lifting the left shoulder." Dr. Hatzidakis also noted Claimant had positive impingement and tenderness over his bicep. (*Id.*, p. 21)

23. Dr. Hatzidakis also opined there is a possibility of tendinosis in the Claimant's left shoulder. (*Id*., p. 13)

24. Dr. Hatzidakis concluded Claimant's left shoulder strain was secondary to the motor vehicle collision the Claimant sustained on October 15, 2019. Dr. Hatzidakis also stated he believes – based on the motor vehicle collision - the Claimant has a partial-thickness rotator cuff tear to the subscapularis, which may involve other parts of the rotator cuff as well. (*Id.*, p. 18)

25. Dr. Hatzidakis surmised surgery is the last option for the Claimant since he has exhausted conservative care. Dr. Hatzidakis concluded:

> [I]f a 38-year-old patient injures their shoulder and they don't get better,… during this long duration of time…so that's 13 months of symptoms, so if he still has the same symptoms now, in most cases, you find something that requires treatment. You find a partial tear, you find -- you find pathology that requires treatment to get better, and in young, active laborer-workers, such as this patient, that's really the only way to get them back to work, typically. Because if they've had this kind of dysfunction this long, they're not going to get back unless you get them back on track with the surgery. (*Id.*, p. 28)

26. The ALJ finds Dr. Hatzidakis' opinions to be credible and persuasive for several reasons. First, Dr. Hatzidakis is an orthopedic surgeon – specializing in shoulders. His education and training include a shoulder and upper extremity fellowship in San Francisco and another year of shoulder fellowship training in Europe. At the

completion of his fellowship in Europe, he started practicing in Denver 17 years ago. Second, he has been board certified in orthopedic surgery for about 17 years and is Level II accredited. Lastly, he spends 3-4 days per week in the operating room performing surgery - and 95% of those surgeries are shoulder surgeries. He was qualified as an expert during his deposition. (Deposition of Dr. Hatzidakis) As a result, the court finds Dr. Hatzidakis to be an expert in the area of orthopedics – with a specialty in the diagnosis and surgical treatment of shoulder conditions.

27. Moreover, Dr. Hatzidakis is Claimant's authorized treating orthopedic surgeon. Most notably, Dr. Hatzidakis testified that a 2-4-week delay in symptoms becoming noticeable is not inconsistent for a shoulder injury involving a subtle or small tear. And Claimant's MRI reveals what is likely a small interstitial tear of the distal subscapularis tendon of his rotator cuff. (Exhibit C.) According to Dr. Hatzidakis, some shoulder injuries just take a while to "declare themselves" and become symptomatic. He also testified that Claimant did have symptoms – peripherally around the shoulder – that were consistent with Claimant suffering a shoulder injury during the accident. For example, Claimant had pain around the scapula. In the end, he ultimately concluded that based on the evidence in front of him, other than the motor vehicle accident, he could not determine any other cause for Claimant's shoulder complaints and need for surgery. As a result, he concluded that the motor vehicle accident is the most likely cause of Claimant's shoulder injury and need for surgery.

28. Again, the ALJ also finds Dr. Hatzidakis' opinions regarding causation to be credible and persuasive for many reasons. First, Dr. Hatzidakis has devoted his entire medical career to diagnosing and repairing shoulder injuries. Second, Dr. Hatzidakis' testimony that some shoulder injuries involving subtle tears take a while to become symptomatic seems plausible because such opinion is supported by Claimant's testimony as well as the MRI report that demonstrated what looks like a small interstitial tear of the distal subscapularis tendon. Third, Claimant did complain of scapular pain shortly after the accident. While not the exact location of pathology found on the MRI, and the ultimate location of his primary symptoms, it is consistent with an injury to Claimant's shoulder girdle. Fourth, the timing (or temporal relationship) between the accident and the development of Claimant's symptoms – within 2-4 weeks of the accident - is medically probable based on the experience of Dr. Hatzidakis and based on Claimant's MRI findings. Fifth, there is no credible and persuasive evidence Claimant had shoulder pain and symptoms before the motor vehicle accident and there is no credible and persuasive evidence that Claimant developed shoulder pain and symptoms based on an accident or incident that occurred after the motor vehicle accident.

29. On April 2, 2020, Claimant presented to Dr. Vanderhorst for a tele-health visit. Claimant reported gradual improvement of his symptoms and reported decreased pain post injection. Claimant reported soreness with flexion and overhead activities and weakness with extended arm or overhead activities. Dr. Vanderhorst placed Claimant on five-to-ten-pound restrictions. (Claimant's Exhibit 3, pp. 110-111)

30. On April 17, 2020, Claimant returned for a follow up appointment with PA Hildner. Claimant reported less pain in his left shoulder. Claimant further reported "doing

better with sleep and less pain turning over." PA Hildner provided Claimant a thirty-pound restriction. (Claimants Exhibit 3, pp. 113-117)

31. On May 8, 2020, Claimant presented to PA Hildner and he also concluded that Claimant, "is not making any progress, may benefit from surgery." (Claimant's Exhibit 3, p. 126)

32. On March 20, 2020, Claimant underwent Respondent's Independent Medical Examination with Michael Striplin, M.D. Dr. Striplin reported Claimant, "suffered a chest wall contusion, most likely related to his use of a seat belt, and possibly suffered a mild cervical strain and thoracic myofascial pain as well." (Claimant's Exhibits, p. 218)

33. Dr. Striplin stated in his report that:

> The mechanism of injury associated with the motor vehicle accident, on 10/15/2019, and the delay in onset of left shoulder pain for at least two weeks after the accident, do not support a contention that the accident caused, or substantively aggravated, the left shoulder pathology noted on the MRI scan or that the accident resulted in an injury to the left shoulder.
>
> In summary, it appears this patient suffered a chest wall contusion, and possibly a cervical strain and thoracic myofascial pain, related to the motor vehicle accident on 10/15/2019, with a full recovery. It cannot be determined that the patients left shoulder pain, and pathology noted on the MRI scan, are causally related to the motor vehicle accident.
>
> (Exhibit 1, p. 6.)

34. Dr. Striplin also testified via deposition. Dr. Striplin is board certified in occupational medicine and Level II accredited. Dr. Striplin has been practicing since 1976 and has treated hundreds of patients with shoulder conditions. He was also qualified as an expert during his deposition and the court also finds him to be qualified as an expert in the area of occupational medicine. In his report and deposition, Dr. Striplin concluded that Claimant's shoulder condition and need for surgery is unrelated to the motor vehicle accident. The basis of his opinion is two-fold. The first basis is that the delayed onset of symptoms is inconsistent with the injury being caused by the motor vehicle accident. The second basis is that rear-end accidents generally do not cause shoulder problems – unless the accident results in a rollover accident in which the occupant is jostled around and possibly supported upside down by a seat belt when the car rolled over. He also concluded that the surgery recommended by Dr. Hatzidakis is to address the pathology noted on the MRI and that the pathology noted on the MRI was not caused by the motor vehicle accident or aggravated by the motor vehicle accident. Again, the primary basis for this conclusion is the timing of the onset of Claimant's shoulder symptoms. Overall, the ALJ does not find Dr. Striplin's opinions to be as persuasive as Dr. Hatzidakis'

opinions on causation since Dr. Striplin is not a surgeon and has not evaluated and surgically repaired shoulder injuries as has Dr. Hatzidakis.

35. On September 1, 2020, Claimant underwent a Claimant's Independent Medical Examination with Mark Winslow, D.O. Dr. Winslow determined Claimant's complaints and injury resulted from the October 15, 2019 motor vehicle collision. Dr. Winslow also reported, "there is evidence in the medical literature supporting the fact that impingement syndrome and shoulder pain are reported to occur in patients following MVA injuries. In fact, according to one study in the Journal of Orthopedic Surgery and Research 2008, 3:25 the diagnosis is, frequently overlooked and shoulder pain is attributed to pain radiating from the neck resulting in long delays before treatment. Direct seatbelt trauma to the shoulder is one possible explanation for this etiology, according to this report. Meantime to diagnosis in some of the cases in this study was 8.8 months with a range of 2-20 months…treatable condition is diagnosed late or not at all due to the lack of awareness of the association between neck injury and subacromial impingement." Dr. Winslow also opined the October 15, 2020 motor vehicle accident was, "the cause of aggravation of this patient's underlying (possible) and previous to this injury asymptomatic shoulder condition." (Claimant's Exhibit 8, pp. 227-228)

36. The ALJ also finds Claimant's testimony to be credible and persuasive.

37. Based on the totality of the evidence, which includes the credible and persuasive testimony of Claimant and Dr. Hatzidakis, the ALJ finds and concludes Claimant suffered a compensable injury on October 15, 2019 due to the motor vehicle accident. The ALJ also finds this includes an injury to Claimant's left shoulder.

38. The ALJ also finds that the work injury caused pain and disability for which Claimant required medical treatment. The ALJ finds that the medical treatment provided to date has been reasonable and necessary to evaluate Claimant's injury, determine the extent of his injury, and to determine the type of treatment that is reasonable and necessary to cure Claimant from the effects of his work injury.

39. The ALJ further finds that Claimant's shoulder injury has caused pain and disability which has failed to improve with conservative treatment. The ALJ also finds that because Claimant has failed to improve with conservative treatment, the surgery recommended by Dr. Hatzidakis is the next reasonable and necessary step to cure Claimant from the effects of his work injury. As a result, the ALJ find that the surgery recommended by Dr. Hatzidakis is reasonable and necessary, to cure Claimant from the effects of his work injury. Thus, the need for surgery also relates to the work accident.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

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

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant established by a preponderance of the evidence that he suffered a compensable injury on October 15, 2019.

A claimant is required to prove by a preponderance of the evidence that at the time of the alleged injury he was performing service arising out of and in the course of employment and the alleged injury or occupational disease was proximately caused by the performance of such service. §8-41-301(1)(b)&(c), C.R.S. The Act creates a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence." §8-40-201(1), C.R.S. In contrast, an "injury" contemplates the physical or emotional trauma caused by an "accident." An "accident" is the cause and an "injury" is the result. No benefits flow to the victim of an industrial accident unless the accident causes a compensable "injury." A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *Mailand v. PSC Industrial Outsourcing LP*, WC 4-898-391-01, (ICAO, Aug. 25, 2014).

As found, Claimant was involved in a work-related motor vehicle accident on October 15, 2019. Although Claimant presented for medical treatment on October 15, 2019, he did not have the immediate onset of left shoulder pain. That said, when Claimant returned for medical treatment on October 18, 2019, the emergence of shoulder pain was staring to develop. As noted by Dr. Ogrodnick, Claimant had left sided upper back pain that was also accompanied with tenderness between Claimant's left scapula and his thoracic spine. Although Claimant cancelled his November 1, 2019, appointment, he rescheduled a medical appointment based on worsening left shoulder symptoms. As found, on December 20, 2019, Claimant returned for medical treatment and was seen by PA Hildner. This was only his third medical appointment for his work accident and the first appointment where the medical records note that an interpreter was used during the appointment. At this appointment, Claimant reported that he "still" had muscular tightness, tense, and aching pain in his neck, upper back, left shoulder, and tender anterior shoulder. Claimant also noted his left shoulder as an area where he experienced pain on the pain diagram.

Claimant underwent an MRI that showed an interstitial tear of the distal subscapularis tendon with subacromial impingement. After that, Claimant was referred to Dr. Hatzidakis, an orthopedic surgeon, for evaluation and treatment. Dr. Hatzidakis evaluated Claimant and discussed conservative treatment options, such as a cortisone injection and surgical options. Claimant first chose conservative treatment and underwent a cortisone injection. When the cortisone injection failed to provide relief, Dr. Hatzidakis recommended surgery.

Dr. Hatzidakis testified via deposition. As explained above, the ALJ found his testimony to be credible and persuasive. Dr. Hatzidakis credibly and persuasively concluded that Claimant suffered a shoulder injury during the accident and that the delay in onset of symptoms of 2-4 weeks is consistent with some shoulder injuries that involve subtle tears like Claimant's.

As a result, the ALJ finds and concludes Claimant established by a preponderance of the evidence that he suffered a compensable injury to his left shoulder.

II. Whether Claimant established by a preponderance of the evidence that medical treatment, including proposed surgery from Dr. Hatzidakis, is reasonable, necessary, and related.

Respondents are liable for medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. §8-42-101(1)(a), C.R.S. Whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* WC 4-835-556-01 (ICAO, Nov. 15, 2012).

As found and concluded, Claimant suffered a compensable injury involving his left shoulder. As also found, the work injury caused pain and disability for which Claimant required medical treatment. The medical treatment provided to date has been reasonable and necessary to evaluate Claimant's injury, determine the extent of his injury, and to determine the type of treatment that is reasonable and necessary to cure Claimant from the effects of his work injury.

Claimant underwent an MRI that showed an interstitial tear of the distal subscapularis tendon with subacromial impingement. After that, Claimant was referred to Dr. Hatzidakis, an orthopedic surgeon, for evaluation and treatment. Dr. Hatzidakis evaluated Claimant and discussed conservative treatment options, such as a cortisone injection, and surgical options. Claimant first chose conservative treatment and underwent a cortisone injection. When the cortisone injection failed to provide relief, Dr. Hatzidakis recommended surgery. As for the need for surgery, Dr. Hatzidakis credibly and persuasively stated and concluded that surgery is the last option for Claimant since he has exhausted conservative care and Claimant still has symptoms - and associated disability. Dr. Hatzidakis concluded that:

> [I]f a 38-year-old patient injures their shoulder and they don't get better,… during this long duration of time…so that's 13 months of symptoms, so if he still has the same symptoms now, in most cases, you find something that requires treatment.· You find a partial tear, you find··- you find pathology that requires treatment to get better, and in young, active laborer-workers, such as this patient, that's really the only way to get them back to work, typically.· Because if they've had this kind of dysfunction this long, they're not going to get back unless you get them back on track with the surgery.

As a result, the ALJ finds and concludes that Claimant has established by a preponderance of the evidence that he is entitled to reasonable and necessary medical treatment to cure him from the effects of his work injury. The ALJ also finds and concludes Claimant has established that the medical treatment provided up through the date of the hearing has been reasonable, necessary, and related to his work injury. Moreover, the ALJ finds and concludes that Claimant established by a preponderance of the evidence that the surgery recommended by Dr. Hatzidakis is reasonable and necessary to cure Claimant from the effects of his work injury.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered a compensable injury on October 15, 2019.
2. Claimant suffered a compensable injury – which includes his left shoulder.

3. Respondents shall pay for reasonable and necessary medical treatment to cure Claimant from the effects of his work injury – which includes his left shoulder.

4. Respondents shall pay for the left shoulder surgery recommended by Dr. Hatzidakis.

5. Issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: March 9, 2021.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-129-652-001

ISSUE

1. Whether Claimant established by a preponderance of the evidence that he sustained a compensable injury to his left knee on December 18, 2019 arising out of the course of his employment with Employer.

2. Whether Claimant established by a preponderance of the evidence that he is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of his industrial injury.

3. Whether Claimant established by a preponderance of the evidence that the medical treatment he received between December 18, 2019 and January 6, 2020 was reasonably necessary to cure or relieve the effects of his industrial injury.

4. If Claimant proves a compensable injury, what is his average weekly wage?

5. Whether Claimant established by a preponderance of the evidence that he is entitled to temporary total disability (TTD) benefits.

PROCEDURAL HISTORY

1. On October 9, 2020, Claimant filed an Application for Hearing in WC 5-129-652-001. The Application for Hearing was mailed to Employer, c/o Marlon M[Redacted] at 1010 980 S. Zeno Way, Aurora, CO 80017.

2. On October 23, 2020, the Office of Administrative Courts (OAC) sent a Notice to Set to Claimant and to Respondent at 980 S. Zeno Way, Aurora, CO 80017 providing notice that this matter would be set for hearing pursuant to OACRP Rule 8.H.

3. On November 16, 2020, the OAC sent a Notice of Hearing to Claimant and to Respondent at 980 S. Zeno Way, Aurora, CO 80017, that this matter was scheduled for hearing on January 26, 2021 at 8:30 a.m.

4. The January 26, 2021 hearing was vacated and rescheduled. On January 26, 2021, the OAC sent a Notice of Hearing to Claimant and to Respondent at 980 S. Zeno Way, Aurora, CO 80017, that this matter was scheduled for hearing on February 25, 2021 at 8:30 a.m.

5. On January 28, 2021, Claimant mailed a copy of his Case Information Sheet for the hearing to Employer addressed to Marlon M[Redacted], [Redacted], 980 S. Zeno Way, Aurora, CO 80017.

6. Respondent did not respond to the Notice to Set or either Notice of Hearing, and has not appeared or otherwise participated in this matter. Respondent did not appear for hearing on February 25, 2021.

FINDINGS OF FACT

7. Claimant was employed by Employer from early December 2019 until December 31, 2019, as a delivery driver. Claimant's job duties included driving a large box-truck and delivering furniture. Respondent earned $150.00 per day and worked six total days prior to his injury. The ALJ finds Claimant's average weekly wage is $750.00 per week.

8. On December 18, 2019, Claimant sustained an injury arising out of the course of his employment with Employer when he stepped out of the cab of a box truck onto ice and his foot slipped causing an injury to his left knee.

9. Claimant reported his injury to Employer on December 18, 2019. Respondent failed and/or refused to provide Claimant with information regarding workers' compensation benefits.

10. On December 18, 2019, Claimant was treated at UCHealth for knee pain. Claimant was seen by Katie Sloter, PA-C, who recommended that Claimant be off work until December 22, 2019. Claimant was directed to follow up with an orthopedic surgeon. Claimant utilized his personal health insurance for this visit. For this visit, Claimant incurred reasonable and necessary medical expenses related to his work injury of that were not paid by insurance in the amount of $1,380.76. (Ex. 1).

11. On December 20, 2019, Claimant was seen at Advanced Orthopedic & Sports Medicine Specialists by James D. Ferrari, M.D. Dr. Ferrari provided Claimant with a work restriction to be off work until he was evaluated after the performance of an MRI. For this visit, Claimant incurred reasonable and necessary medical expenses related to his work injury of $174.29 that were not paid by his insurance. (Ex. 1).

12. On December 28, 2019, Claimant had an MRI of his left knee performed at OCC Imaging. The MRI showed a Grade 2 MCL sprain with tearing of the deep meniscofemoral fibers, and a small bone contusion in the anterior-peripheral medial femoral condyle. For the MRI, Claimant incurred reasonable and necessary medical expenses related to his work injury of $600.26. (Ex. 1).

13. Respondent returned to Dr. Ferrari on January 6, 2020. For this visit, Claimant incurred reasonable and necessary medical expenses related to his work injury of $125.00. Dr. Ferrari prescribed Claimant a hinged knee brace. Claimant incurred reasonable and necessary medical expenses related to his work injury for the knee brace in the amount of $598.00. (Ex. 1).

14. Claimant's left knee injury resulted in a restriction of his ability to use his left leg and resulted in a medical incapacity which rendered Claimant unable to resume his prior work.

15. No physician has been designated as Claimant's authorized treating provider and no physician has placed Claimant at maximum medical improvement.

16. On December 31, 2019, Employer terminated Claimant's employment without fault of Claimant. Claimant did not earn income from December 18, 2019 until approximately August 19, 2020. For approximately ten weeks from late August 2020 until mid-November 2020, Claimant earned $15.00 per hour working 35 hours per week.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

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

COMPENSABILITY

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, … performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The Claimant must prove his injury arose out of the course and scope of his employment by a preponderance of the evidence. § 8-41-301(1)(b) & (c), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). "Arising out of" and "in the course of" employment comprise two separate requirements. *Triad Painting Co.*, 812 P.2d at 641.

An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d at 641; *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO, Nov. 21, 2014).

The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury "has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014). The mere fact that an injury occurs at work does not establish the requisite causal relationship to demonstrate that the injury arose out of the employment. *Finn v. Industrial Commission,* 437 P.2d 542 (Colo. 1968); *Sanchez v. Honnen Equipment Company,* W.C. No. 4-952-153-01 (ICAO, Aug. 10, 2015).

Claimant has established by a preponderance of the evidence that he sustained a compensable injury to his left knee arising out of the course of his employment with Employer. The evidence demonstrates that Claimant sustained an injury to his left knee while exiting a truck he was driving for Employer. The injury occurred during work hours and while Claimant was performing duties for Employer.

MEDICAL BENEFITS

Under section 8-42-101(1)(a), C.R.S., respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *See Owens v. Industrial Claim Appeals Office*, 49 P.3d 1187, 1188 (Colo. App. 2002). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d

1192 (Colo. App. 2002). All results flowing proximately and naturally from an industrial injury are compensable. *Id., citing Standard Metals Corp. v. Ball*, 474 P.2d 622 (Colo. 1970). Claimant is entitled to a general award of medical benefits to treat his left knee as he has established that his claim is compensable.

Claimant has further established by a preponderance of the evidence that the following medical treatment he received was reasonable and necessary to cure or relieve the effects of his injury: December 18, 2019 UC Health emergency department visit; December 20, 2019 and January 6, 2020 evaluations at Advanced Orthopedic & Sports Medicine Specialists by James D. Ferrari, M.D.; December 28, 2019, left knee MRI performed at OCC Imaging; and knee brace prescribed by Dr. Ferrari. Respondent is responsible for payment of these services in the amount of $2,878.31.

AVERAGE WEEKLY WAGE

Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's Average Weekly Wage (AWW) on his or her earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993).

The ALJ finds that Claimant’s average weekly wage at the time of his injury was $750.00 per week, representing $150.00 per day, five days per week.

TEMPORARY TOTAL DISABILITY

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* 8-42-105(4); *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term “disability” connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant’s testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

Claimant has established an entitlement to temporary total disability benefits until terminated by law. The evidence demonstrates that Claimant sustained a disability lasting more than three work shifts, and that he left work as a result of the disability. The ALJ finds that the disability resulted in actual wage loss for the period of December 18, 2019 until August 19, 2020, when Claimant returned to regular employment, a period of 35 weeks. The record is insufficient for the ALJ to determine whether Claimant's wage loss extended beyond this point in time, or the amount of any wage loss after that date. Pursuant to § 8-42-105 (1), C.R.S., Claimant is entitled to payment of sixty-six and two-thirds percent of Claimant's average weekly wage as TTD benefits in the amount of $17,500.00 for the period of December 18, 2019 until August 15, 2020, or $500.00 per week for 35 weeks.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable injury to his left knee arising out of the course of his employment with Employer on December 18, 2019.

2. Respondent shall pay for all medical treatment that is reasonably necessary to cure or relieve the effects of Claimant's December 18, 2019 work injury.

3. Respondent shall pay Claimant $2,878.31 for reasonable and necessary medical expenses previously incurred.

4. Claimant's average weekly wage is $750.00 per week.

5. Claimant is entitled to temporary total disability benefits for the period of December 18, 2019 until August 19, 2020, and Respondent shall pay Claimant $17,500.00 for such benefits.

6. All matters not determined herein are reserved for future determination.

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

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

DATED: April 28, 2021

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that the trial neurostimulator as recommended by Dr. Wolkowitz is reasonable, necessary, and related to his admitted work injury?

FINDINGS OF FACT

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

The Work Injury and Initial Treatment

1. Claimant is a foreman for employer. He sustained an admitted injury to his back on April 18, 2019. An excavator that he was operating came off of its tracks and Claimant felt pain in his back when he tried to shove the excavator back onto its tracks.

2. Claimant began treatment on April 19, 2019 with Dr. Daniel Lombardo at First Street Family Health. Claimant complained of feeling a popping sensation in his back with immediate pain after the incident. He reported left sided pain around the top of his lumbar spine, radiating down to the back of his left knee and some tingling in the left foot. Claimant also complained that his left leg gives out when trying to get in his truck. He was originally diagnosed with a low back strain, and lumbar radiculopathy.

3. Dr. Lombardo referred Claimant to physical therapy and prescribed oxycodone (1-2 tablets up to three times daily), a steroid burst, and gabapentin. (Ex. 1, pp 1-2).

4. Claimant returned to Dr. Lombardo on April 26, 2019 with worsening symptoms to include sudden spasms of pain that shoot down his leg. Dr. Lombardo referred Claimant for an MRI of the Lumbar Spine. (Ex. 1, pp. 6-7).

5. An MRI was taken on May 9, 2019, which was contrasted with an earlier study dated 11/23/2015. It showed degeneration at L4 – L5, which was noted to be more prominent in this more recent study. There was also possible compression at the left L5 nerve root that was not significantly changed from the prior study. (Ex. 2, pp. 62-63).

6. On May 10, 2019, Claimant was seen by Dr. Lombardo, with continuing complaints of radicular pain down the left leg and somewhat down his right leg. Dr. Lombardo recommended continued physical therapy and prescribed oxycodone 1-2 tablets, three times daily as needed. (Ex. 1, pp. 9-10).

7. On May 13, 2019, Claimant went to Heart of the Rockies Regional Medical Center (HRRMC) for physical therapy. Claimant initially participated in numerous sessions of physical therapy through September 9, 2019 but continued to have significant low back pain which still radiated down the left leg. (Ex. 2, pp. 64-80, 85-99,103-111).

8. Translaminar epidural steroid injections at L5 and S1 were performed on August 21, 2019 by Dr. Leek. (Ex. 2, pp. 100-101) On September 10, 2019, Claimant told Dr. Leek that the injections did not help at all and that he still had low back and left leg pain. Dr. Leek referred Claimant to Dr. Ernest Braxton and Vail Summit Orthopedics. (Ex. 2, pp. 112-115).

9. On September 17, 2019, Claimant was seen by Dr. Braxton. Claimant was complaining of a constant 8 out of 10 burning, throbbing, and shooting pain in his left lower back radiating down his left lower back and his left posterior lateral leg into his foot. Claimant was also having associated left lower extremity numbness and paresthesia in the L5 distribution. Claimant told Dr. Braxton at this visit that he feels significantly debilitated and is unable to do his normal work or daily activities due to the pain. After performing a physical examination and reviewing the May 9, 2019 MRI, the diagnosis included lumbar radiculopathy, lumbar disc herniation, lumbar degenerative disc disease and lumbar foraminal stenosis. Dr. Braxton recommended an L5-S1 artificial disc replacement surgery. (Ex. 3, pp 199-202).

10. An anterior lumbar total disc arthroplasty at L5 – S1 was performed by Dr. Braxton and Dr. Jonathan Schoeff on October 25, 2019. (Ex. 3, pp. 205-209).

Lumbar Disc Arthroplasty is Unsuccessful

11. Claimant was seen by Dr. Braxton on November 26, 2019. On that day, Claimant was reporting 6/10 low back pain, 3/10 mid back pain, with 7/10 leg pain. In addition, Claimant continued to have aching and burning down the posterior aspect of his left leg and to the anterior groin and thigh of his left leg. It was noted that Claimant is currently taking oxycodone and tramadol for pain control. X-Rays taken at this visit revealed a "well-seated" arthroplasty device at the L5-SI level with interval increase in foraminal height. Due to his pain complaints, Dr. Braxton performed a caudal epidural steroid injection. (Ex. 3, pp. 210-213).

12. On December 19, 2019, Claimant complained to Dr. Lombardo that he still had pain in his low back and left lower extremity. Claimant told Dr. Lombardo that he had experienced no resolution, and reported a popping sensation that was causing him "unbelievable pain." Claimant stated that he was now worse than he was prior to the procedure.

13. On January 7, 2020 Claimant was seen by Colleen Mintz, N.P. at Vail Summit Orthopedics. On this date Claimant was having constant 7 out of 10 pain in his back which radiates to both legs, left more than right. Claimant described the pain as burning and achy with numbness, tingling, and weakness in both legs, left worse than

right. According to NP Mintz' note, Claimant had failed conservative care and was taking 10 mg of oxycodone 5 times a day, Flexeril at night, and Naprosyn twice daily. Physical examination revealed an antalgic gait, diminished sensation in left posterior lateral calf, big toe, and dorsum of foot, a positive straight leg test bilaterally, and "normal range of motion" with lumbar flexion and extension. NP Mintz prescribed Cymbalta and ordered an MRI. (Ex. 3, pp. 214-216).

14. Claimant was seen again at Vail Orthopedics on January 14, 2020. Claimant reported that since his last visit he felt a pop in his back and had immediate pain, with paralysis in both legs for 20 minutes. Claimant was having more pain and sleep issues. Claimant had new onset of fecal and urinary incontinence, and was reporting 9-10/10 pain. Physical examination was similar to that performed on January 7, 2020. Revision surgery was discussed, pending a new MRI. (Ex. 3, pp. 217-220).

15. An MRI report of the lumbar spine dated January 16, 2020 indicated that there were no acute findings and no evidence of nerve root compression. Other than insertion of the artificial disc, there was no significant change from prior CT and MRI scans. (Ex. 1, pp. 128-129).

16. Dr. Braxton ultimately recommended a hardware removal, arthrodesis and revision surgery. This was performed on February 14, 2020 by Dr. Braxton and Dr. Schoeff. The artificial disc had to be removed in a piecemeal fashion, and was replaced with a biomechanical fusion device. Post-operative diagnoses were hardware failure of L5 – S1 anterior lumbar disc total arthroplasty, resulting in debilitating low back pain and radiculopathy, and severe retroperitoneal fibrosis following prior retroperitoneal lumbar spine exposure.

Revision Surgery and Subsequent Treatment

17. Following the revision procedure, Claimant reported improvement. On March 4, 2020, Claimant told Dr. Lombardo that the pain down his left leg was "completely gone" and that pain was now limited to the buttock and lower back. Claimant reported sleeping longer at night. Dr. Lombardo noted that Claimant could return to work soon. Claimant was prescribed amitriptyline, cyclobenzaprine, Naprosyn, and oxycodone 1 10mg tablet up to 6 per day. (Ex. 1, p. 33). He further noted that Claimant was taking six oxycodone tablets per day, but that he could start cutting down on that medication soon.

18. Claimant began physical therapy following the revision procedure on March 12, 2020. He was evaluated by Kristi Spanier, DPT at Heart of the Rockies Regional Medical Center. Claimant told Dr. Spanier that he was in tremendous pain for ten months preceding the surgery with pain all of the way down his left leg to his toes. Claimant reported that he felt that his pain was "already better than prior." His pain (6/10) was now extending down to the mid-thigh on the left leg and that he was walking better and more than he had in nearly a year. (Ex. 2, p. 132).

19. On March 17, 2020, Claimant consulted with Dr. Braxton. Claimant told Dr. Braxton that his leg pain was now minimal, with a level of one or two out of ten. Claimant did endorse continued back pain, but stated that he was “100 times better than he was after his index operation.” Dr. Braxton wrote that Claimant’s “lower extremity pain has all but resolved following revision of total disc arthroplasty device….” He recommended that Claimant continue goal directed exercise-based physical therapy. He noted that Claimant would follow up in eight to twelve weeks, or sooner if problems arose.

20. On March 19, 2020, Claimant returned to Heart of the Rockies for physical therapy. The PT note reflects that Claimant was getting slowly better. Physical examination revealed antalgic/guarded gait, weakness in left extension hallicus, dorsiflexors, and left plantarflexors. Pain was noted to be 6/10. (Ex. 2, p. 133). He told PT Spanier that he had no pain down his right leg. He was tolerating more than he had previously been able to. PT Spanier added strength work to Claimant’s home exercise program and walking as well.

21. On March 25, 2020, Claimant returned to Heart of the Rockies for more physical therapy. He was evaluated by Alice Smyth, PT. In her note it was recorded that Claimant’s back got “really mad” after his last visit, but he is unsure what aggravated it. Claimant was unable to do any exercises for two days and then resumed them. He did not perform as many reps Sunday, and then even fewer reps Monday, but it was still aggravated. This same note indicates Claimant was better today but on Friday morning was having pain down both legs to the back of the knee and now just down the left. Physical examination revealed weakness in left extensor hallicus and dorsiflexors as well as left plantarflexors. Pain was noted to be 6/10 (Ex. 2, p. 134).

22. On March 31, 2020, Claimant told his physical therapist that he walked two miles yesterday and is flared up today down the thigh and into the calf which he has not had since his second surgery. Claimant told the physical therapist that the flare up may be related to working the clutch on his car which was “tight”. No physical exam was performed. (Ex. 2, p. 137).

23. Claimant returned for physical therapy on April 3, 2020, stating that he was frustrated as his pain level was not changing, although the location was changing between the back and the leg. He reported back pain on that date. That same date, Claimant told Dr. Lombardo that he was doing “alright” but that he still had some popping in his back when he stepped over something. Claimant was participating in physical therapy and continued to report improved sleep. He further advised the therapist it doesn’t seem to make a difference whether or not he does his exercises. Claimant remarked that his pain was being controlled, but with five tablets of oxycodone per day. Dr. Lombardo cleared Claimant to return to light duty office work of up to four hours per day. He wrote that he planned to continue to taper Claimant’s pain medications. Dr. Lombardo noted that Claimant was very slowly improving and prescribed Trazadone. (Ex. 1, pp. 35-36).

24. On April 7, 2020, Claimant continued his physical therapy. Claimant remarked that he was walking more and had cut back on some exercises. He reported

feeling better. Claimant stated that he had done a five mile walk the day prior. He also had been able to do a lap around Wal-Mart, an activity that usually would have bothered him. He felt like he would have been able to do it again. Claimant began pool therapy on this date.

25. On April 10, 2020, Claimant returned for more physical therapy. He said that he had been sore for about 18 hours after the pool therapy, but then was back to normal. He stated that he planned to continue tapering his pain medications. PT Smyth wrote that Claimant "seems to be tolerating exercise better and having quicker recovery time." Claimant was able to increase time on an exercise bike and was less tender with manual therapy.

26. Claimant returned for more physical therapy on April 14, 2020. He stated that "today is rough," noting that he had overdid it at work the day prior and had a ride in a truck on a rough road. Claimant participated in pool therapy, and was able to add reps and more exercises.

27. PT Smyth treated Claimant again on April 17, 2020. Claimant noted that he was still getting pain "that moves back and forth from back to left leg." Pain was averaging a six out of ten but could still get up to a ten out of ten. Claimant noted that he had felt good after pool therapy during the last session. PT Smyth wrote that Claimant's pain was down to five out of ten with treatment, and that his gait was improved with less limp. Claimant was tolerating exercises without a back brace, and that he seemed to be tolerating four hours of work per day without significant increase in pain.

28. On April 21, 2020, Claimant returned for more physical therapy. He reported that he still had pain, which had been intense the prior Monday, but doesn't know why, since he took it easy on Sunday. (Ex. 2, p.152). He stated that he had still been able to tolerate exercises, walking and therapy.

Claimant Slips and Falls in Late April

29. On April 28, 2020, Claimant returned to PT Smyth. He told her that he had fallen the last Thursday [April 23, 2020], while walking down an icy ramp at his home. He stated that he now had more pain. He was still able to do his walking, but the pain on his left side was now worse than it was before this fall, though still not as bad as it was pre-surgery. This same note indicates that it felt good to do pool therapy and Claimant felt better post treatment than prior to coming in. (Ex. 2, pp. 154-155).

30. On May 1, 2020, Claimant told Dr. Lombardo that he had fallen the prior Friday [April 24, 2020] walking down the ramp at his home, and had not been doing well. He landed on his left side. Claimant reported repeated popping/cracking in his back with certain movements. Dr. Lombardo remarked that Claimant's "pain has been much worse with the fall, though he was having *more* issues even *leading up* to this fall in the last couple weeks." Dr. Lombardo noted that Claimant's extremity pain had worsened though was still stopping at the left knee. He recorded that Claimant had "been taking 5 per day

of his pain medication since the fall, was not able to reduce down to 4 tablets as discussed previously."

31. Claimant met with Dr. Braxton via telemedicine again on May 8, 2020. Dr. Braxton recorded:

> Patient reports that following surgery he was doing well and making gradual improvements in his low back and left leg symptoms. However unfortunately patient notes that last week he had a fall from standing [position] and landed on his side. Patient states that he slipped on some ice and felt a pop in his back when he hit the ground. Since that time the patient has had a significant exacerbation of his axial back pain symptoms as well as his left lower extremity radiating pain symptoms which go down the back of his leg to his mid-calf. Patient denies any new numbness or weakness. He reports that his pain symptoms are as severe as a 7 or 8 out of 10. The patient is concerned that he has damaged his instrumentation in the fall. (Ex. 3, p. 236).

32. Dr. Braxton wrote that Claimant "has had a new exacerbation of symptoms following a recent fall from standing." X-rays taken that date showed that Claimant's surgical instrumentation was still intact and Dr. Braxton reassured Claimant that additional neurosurgical treatment was not necessary at that time. Dr. Braxton believed that Claimant would continue to improve with time. He referred Claimant back to Dr. Leek for consideration of injection therapy to help with his acute pain symptoms due to the fall. *Id.*

33. Claimant was evaluated by Mark Lynch, NP at Dr. Leek's office on May 12, 2020. Claimant complained of low back pain and radicular symptoms radiating laterally and into the knee. Pain was reported 8/10. Dr. Leek recommended a L5-S1 transforaminal steroid injection. There was also a discussion concerning the possibility of a spinal cord stimulator. (Ex. 2, pp. 158-160).

34. The request for injections was reviewed by Dr. Albert Hattem on behalf of Insurer. He issued a review opinion on May 19, 2020. When asked his opinion whether the injection proposed by Dr. Leek was secondary to Claimant's April 18, 2019 injury, Dr. Hattem wrote:

> No, it is clear from the medical records reviewed that Dr. Braxton referred [Claimant] for injection therapy related to the exacerbation that occurred in early May [sic] 2020 when [Claimant] slipped and fell on the ramp at his home. But for this slip and fall, the injection treatment by Dr. Leek would not be necessary. I therefore advise that if [Claimant] would like to proceed with this injection, then it should be provided outside of workers' compensation. Ex. D, pp. 45-47).

However, Dr. Hattem further opined that Claimant was not at MMI and that he was in need of further physical therapy and an opioid tapering regimen. *Id.*

35. Claimant returned to Heart of the Rockies for therapy on May 12, 2020 and told PT Spanier that he was very sore and was not walking as much. She recommended brain training exercises. On May 15, 2020, Dr. Lombardo noted that Claimant was still unable to further taper his medications. On May 26, 2020, Claimant told PT Spanier that he was walking better with the assistance of a cane.

Conservative Treatment to no Avail

36. Claimant did undergo a L4-L5 transforaminal epidural steroid injection performed by Dr. Richard Wolkowitz on May 28, 2020. (Ex. 2, pp. 165-166). The injection offered only hours of relief per Claimant's report. *Id at 170.*

37. Claimant was seen again by Dr. Leek on June 19, 2020 with continued complaints radiating to the left leg. The pain was in the left low back with posterior thigh discomfort of burning pain, occasional short stabbing sensation and pins-and-needles with occasional muscle spasm. Claimant's pain was noted to be 7/10. According to this note, Claimant's symptoms are exacerbated when standing or sitting, as well as in the supine position. Physical exam revealed mild diffuse tenderness to lower lumbar spine midline. There was worsened tenderness at the facet joints left great than right. Straight leg raise was positive but improved. Dr. Leek ordered an EMG to rule out a left S1 radiculopathy and noted that a spinal cord stimulator could be a possibility. (Ex. 2, pp. 171-174).

38. On June 23, 2020 at physical therapy, Claimant was overall more comfortable but continues to have terrible nerve pain. (Claimant's Submissions – Bates # 00175). On July 14, 2020 Claimant told his physical therapist that he had been very busy at work and because of that he is sore. *Id at 177.*

39. An EMG taken on July 22, 2020 showed left leg findings of "*mild subacute to chronic* S1 radiculopathy." (Ex. 2, p. 178).

Neurostimulator Trial is Recommended

40. Claimant was seen by Dr. Wolkowitz on July 27, 2020. At this visit Claimant had complaints of some pain in the low back, left buttock, and left leg. Pain was noted to be 6/10. Physical exam reflected negative straight leg raise but there was noted dermatomal weakness or numbness in the lower extremities. Dr. Wolkowitz diagnosed lumbar radiculopathy and post laminectomy syndrome. Dr. Wolkowitz recommended a trial of neuromodulation due to Claimant's ongoing radiculopathy, pain complaints from the prior back surgery, and interference with Claimant's activities of daily living, all of which have not been responsive to conservative care. (Ex. 2 pp. 179-181).

41. The request for the spinal cord stimulator trial was reviewed by Dr. Hattem on August 5, 2020. Dr. Hattem remarked that he had previously recommended denial of the post-fall injections on the basis that this fall was an intervening event. He

recommended denial of the spinal cord stimulator trial. He further wrote that it was not clear that the extremity pain was at least 50% or greater of Claimant's overall pain. At that time, Dr. Hattem remarked that it was unclear whether a psychological evaluation required by the Medical Treatment Guidelines had been performed.

42. On August 11, 2020, Claimant underwent a psychological evaluation and was found to be a viable candidate for a neuro spinal stimulator. (Ex. 2, pp. 182-188).

43. On September 9, 2020, Claimant was seen by Dr. Braxton. He wrote that Claimant was approximately 7 months post-surgery, yet is still experiencing low back and left buttock pain. Pain was noted to be 7/10. Dr. Braxton felt that Claimant had failed conservative care and has been suffering from a chronic pain syndrome for greater than 6 months. In addition, X-Rays were taken and Dr. Braxton opined that there were no structural abnormalities that can be corrected. Furthermore, the risk/benefit analysis outweighs any further surgical correction. Therefore, Dr. Wolkowitz recommended a trial implantation of a spinal cord stimulator. (Ex. 3, pp. 239-241).

44. A September 10, 2020 office note from Dr. Lombardo revealed that Claimant was experiencing 9/10 pain but was still working. The pain was noted to be throbbing, stabbing, a little burning and radiating down the left leg. (Ex. 2, pp. 51-52).

45. On a follow up visit with Dr. Lombardo on September 17, 2020, it was noted that Claimant's pain was 7.5/10 with pain in the lower back and left leg. *Id at 55-56.*

46. On September 23, 2020, Claimant was seen by N.P. Elizabeth Curie, with continued complaints of low back pain and left lower extremity radicular pain which he reported was interfering with his vocational and avocational activities. Claimant reported pain of 7/10. Ms. Curie changed Claimant's medication regimen to start OxyContin up to 4 times daily if needed. (Ex. 2, pp.191-192).

47. In a follow up with NP Curie on October 19, 2020, Claimant was experiencing back pain, leg pain, and thigh pain. Claimant told Ms. Curie that his pain had been best controlled in a long time after a recent medication change. It was noted, however,

> He notes if he does anything that takes physical effort, such as pushing a grocery cart for 5 minutes, he has severe acute pain exacerbation in his lower back and leg. He has to go home and be 'done for the day.' He sits on the couch or lays down after a short walk or trip to grocery store. (Ex. 2, pp. 195-196).

48. A November 9, 2020 office note from Dr. Lombardo revealed Claimant had an episode a week ago when he was squatting down and had an onset of sharp stabbing pain in his lower back and left leg. Claimant needed help in getting up. Claimant's pain at this visit was a 7/10. (Ex. 1, pp. 58-59).

Record Review Opinion of Dr. Ramaswamy

49. Dr. Annu Ramaswamy performed a records review and issued a report on November 30, 2020. He recounted the history of Claimant's symptoms, noting his improvement following the revision surgery and worsening pain after the intervening fall. Dr. Ramaswamy opined that a spinal cord stimulator trial would not be reasonable, necessary and related to the industrial injury. He wrote that after review of the medical records that it was fairly clear that while Claimant "did not improve after the lumbar arthroplasty procedure, he did finally improve after the lumbar fusion procedure." He remarked that the April 2020 fall caused an aggravation in the lower back and left lower extremity conditions, pointing out that the post-surgical steroid injection and spinal cord stimulator were not recommended by his ATPs until after the intervening fall.

50. Dr. Ramaswamy stated that the spinal cord stimulator would be treating the aggravated symptoms related to the April of 2020 fall, and not the April of 2019 injury. He indicated that he also agreed with Dr. Hattem that Claimant's providers did not document the extent of extremity symptomatology. He further indicated that Dr. Wolkowitz' physical examination from July of 2020 did not demonstrate an active radiculopathy. This led Dr. Ramaswamy to question whether the spinal cord stimulator trial was clinically indicated based upon examination. Dr. Ramaswamy noted that Claimant would have reached MMI for his work related condition, but recommended continued medications for at least one year as maintenance, along with home exercise. (Ex. C, p. 43).

Deposition Testimony of Dr. Wolkowitz

51. Dr. Wolkowitz testified by pre-hearing deposition on December 21, 2020. He was tendered as an expert witness in the fields of anesthesiology, pain management and spinal cord stimulators without objection. He estimates he has implanted over 1000 spinal cord stimulators. However, he is not level I or II accredited by the Colorado Division of Workers Compensation. Dr. Wolkowitz testified that Claimant meets the criteria under the MTG for implantation of a spinal cord stimulator. Specifically, Dr. Wolkowitz felt Claimant has a L5 radiculitis as evidenced by pain in the hip, lateral thigh, lateral calf, into the dorsal foot as recreated with a straight leg raise or dorsiflexion of the foot and great toes. This, coupled with Claimant's history of increased pain with weight bearing, and increased pain over the course of the day fits the criteria for an L5 radiculitis.

52. In addition, Dr. Wolkowitz felt that medical records reflect Claimant has a burning pain in a distribution of amenable stimulation coverage along with pain at night not relieved by position. Furthermore, Claimant's pain is at least 50% or greater of his pain complex. Finally, Dr. Wolkowitz stated that he reviewed the psychological evaluation performed, and feels that, emotionally and mentally, Claimant is a good candidate for a neurostimulator.

53. Regarding causation, Dr. Wolkowitz testified that the need for a spinal stimulator is due to the April 18, 2019 work injury. Dr. Wolkowitz explained that Claimant's initial injury was to the L5 nerve root, which once injured or impinged, gets better and gets

worse based on activity levels as one goes through life. Dr. Wolkowitz further explained that one doesn't have continuously recurring problems *unless there is an initial injury.* Dr. Wolkowitz clarified that symptoms of an injured nerve can wax and wane. Even after a surgery the symptoms can chronically recur. Dr. Wolkowitz stated that in absence of his fall in late April 2020, Claimant would likely have needed the neurostimulator, due to the waxing and waning of symptoms that often occur when a nerve root is injured.

Hearing Testimony of Claimant

54. Claimant testified at hearing. He testified that his initial surgery in October of 2019 was a "complete disaster." He testified that he had significantly increased pain in his low back and left leg to the point that he was in the emergency room, as well some issues with incontinence. His pain was getting up to a ten out of ten. Claimant testified that after the revision surgery, he still had some pain, but that it was different than before. He testified that after the revision surgery his pain still did get to a ten out of ten level, but not as often or long as it had after the initial procedure. Claimant stated that he was able to walk better after the revision procedure, because the radicular pain no longer extended down to the toes.

55. Claimant testified that he slipped and fell on April 23, 2020 coming down an icy ramp at his house. According to Claimant, he landed on his left side but was able to catch the majority of his weight and momentum with his arm. He felt his back "pop" when he fell. Right after he fell, Claimant testified that he felt terrible and was having increased pain which radiated down his left leg into his lower calf. The pain was a strong 9 to low 10. Claimant testified that after the fall he went back into his house and took some pain medication. Claimant further testified that he saw his physical therapist on April 28 and was still having increased pain, but by May 1 he was noticing his pain was decreasing down to "semi-normal" level.

56. According to Claimant, in the two weeks leading up to the April 23 fall he was noticing increased pain and numbness, as well as a painful popping in his lower back. Claimant went on to testify that since the fall, his symptoms have returned to where they were prior to the fall. These symptoms include pain that averages around a 6 but can go up to an 8 or to a 10 when he is having a really bad day. According to Claimant his left leg pain is significantly more problematic than his back pain.

57. Claimant testified that insofar as his symptoms are concerned, he has good days and bad days, but is unable to pinpoint any specific activities that exacerbate his symptoms. Claimant stated that after his second surgery, he returned back to part-time work until March 30, 2020 and then returned back to full-time work on May 8, 2020 which was after the fall. Claimant continues to work full-time in a supervisory capacity.

58. When asked about Dr. Braxton's March 17, 2020 office note wherein it indicates Claimant's leg pain was down to a 1 out of 10, Claimant testified that he told Dr. Braxton he was better than before but nowhere near a 1 or 2. Claimant did not dispute he told Dr. Braxton that he was a hundred times better than before the revision surgery, since

prior to the revision surgery he was feeling miserable and experiencing extreme pain, incontinence, and significant issues walking.

Deposition Testimony of Dr. Ramaswamy

59. Dr. Ramaswamy testified by post-hearing deposition on January 4, 2021. He was received as an expert witness in medicine, specifically internal medicine, with level II accreditation per the Colorado Division of Workers' Compensation. He testified consistent with his report that the intervening fall did cause Claimant's need for the spinal cord stimulator trial. He stated that Claimant had demonstrated improvement following the revision procedure, and that no physician had recommended additional interventional care until after the intervening fall.

60. Dr. Ramaswamy testified that he treats patients who undergo the type of surgery that Claimant underwent in February of 2020. He testified that in a case such as Claimant's, "the nerve has been irritated for quite a long time. And so when you go ahead and start doing surgical procedures, we have to remember that the nerve takes time to heal." Dr. Ramaswamy stated that patients who have undergone a fusion would notice stiffness and postoperative pain. He also noted that as patients rehabilitate and start moving around, they can deal with inflammation. He testified that there was no indication from the records of Dr. Lombardo or Dr. Braxton suggesting that the revision procedure had failed. He testified that the records overall supported the conclusion that Claimant showed clinical improvement following the revision surgery. He testified that there was no indication from the materials of Dr. Braxton or Dr. Lombardo prior to the intervening fall that Claimant's recovery from the fusion procedure was abnormal in terms of pain level, symptomatology, functional gains or recovery time. He testified that there was nothing in any of Claimant's medical records to suggest that the revision surgery had failed or that Claimant's pre-fall recovery was outside of what was generally expected for patients recovering from that type of procedure.

61. Dr. Ramaswamy remarked that he would have expected Claimant to continue improving in his recovery had the fall from April of 2020 never occurred. He stated that "the improvement we saw after the procedure, typically we wouldn't expect that improvement not to continue."

62. Dr. Ramaswamy opined that he had not reviewed all of Claimant's physical therapy notes. He did note that there were times that Claimant's pain levels after the intervening fall were similar to those prior to the intervening fall, typically with activity. With regard to physical therapy records that were referenced to him by Claimant's counsel, Dr. Ramaswamy remarked that the notes of pain were common "because he was only a couple months out from the fusion."

63. Dr. Ramaswamy acknowledged that the more information one has, the better the causation analysis. He never spoke to or examined Claimant. Dr. Ramaswamy also conceded that the medical records both pre and post slip and fall are similar in terms of Claimant's pain levels and location of said pain.

CONCLUSIONS OF LAW

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

Generally

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

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion).

C. In this instance, the ALJ finds Claimant to be credible in recounting the work incident, and in describing her ongoing symptoms to his medical providers and IMEs to the best of his abilities. Claimant has been sincerely dismayed at his condition, and has made every reasonable effort to rehabilitate from his injury and become as fully productive as possible. The ALJ sees no evidence of seeking secondary gain; to the contrary, Claimant wants to get as well as he can, even if that means a lower impairment rating at the end of this process.

D. The ALJ further finds that the medical experts in this case have all rendered sincere medical opinions, but as is not infrequent, such opinions differ. In final analysis, the ALJ must decide who is more *persuasive* (as opposed to *credible*, per se), in light of their respective expertise and access to all pertinent information.

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

Medical Benefits, Generally

F. Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). Our courts have held that in order for a service to be considered a "medical benefit" it must be provided as medical or nursing treatment, or incidental to obtaining such treatment. *Country Squires Kennels v. Tarshis,* 899 P.2d 362 (Colo. App. 1995). *A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the Claimant's physical needs. Bellone v. Industrial Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO, May 31, 2006). A service is incidental to the provision of treatment if it enables the claimant to obtain treatment, or if it is a minor concomitant of necessary medical treatment. *Country Squires Kennels v. Tarshis,* 899 P.2d 362 (Colo. App. 1995)*; Karim al Subhi v. King Soopers, Inc.,* W.C. No. 4-597-590, (ICAO. July 11, 2012). The determination of whether services are medically necessary, or incidental to obtaining such service, is a question of fact for the ALJ. *Bellone v. Industrial Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO, May 31, 2006).

Reasonable and Medically Necessary

G. Indicators for the use of a neurostimulator pursuant to Rule 17, Exhibit 9 (H)(I)(C)(i) of the MTG include the following:

1.) Clear neuropathic radicular pain (Radiculitis);

2.) The extremity pain should be greater than 50% of the overall back and leg pain experienced by the patient.

3.) A comprehensive psychiatric or psychological evaluation should be performed with favorable findings.

H. Dr. Wolkowitz is a specialist in pain management, and the implantation of spinal cord stimulators. He has considerable practical experience in this field as well. Unlike Respondents' record-reviewing physicians, he has met Claimant, and laid hands on him-as have Claimant's numerous medical providers. This is an integral part of the art of medicine. The ALJ is satisfied with his opinion that Claimant meets the criteria for a trial stimulator. He has adequately identified Claimant's neuropathic pain, based upon Claimant's lengthy history and the objective data available. Such extremity pain is greater than 50% of the overall leg and back pain Claimant has experienced. Conservative treatment has been sincerely attempted, and exhausted, to no avail. Claimant has met the psychological criteria for implantation, and has realistic expectations of what his results might be. In summary, while the result is far from guaranteed, Claimant has earned the right to give it a try. If this trial does not yield the anticipated results, perhaps at that point Respondents can say 'I told you so'. But not until then. The ALJ finds and concludes, by a preponderance of the evidence, that the trial implantation is *reasonable and medically necessary* to cure Claimant of his current condition.

Related to Work Injury, Generally

I. All results flowing proximately and naturally from an industrial injury are compensable. *See, Standard Metals Corp. v. Ball, 172 Colo. 510, 474 P.2d 622 (1970)*. However, no compensability exists when a later accident or injury occurs as the direct result of an independent intervening cause. *Post Printing & Publishing Co. v. Erickson, 94 Colo. 382, 30 P.2d 327 (1934)*. "If the need for treatment results from an intervening injury or disease unrelated to the industrial injury, then treatment of the subsequent condition is not compensable. This…is a question of fact for resolution by the ALJ." *See, e.g., Merrill v. Pulte Mortgage Corp.*¸ W.C. No. 4-635-705-02 (ICAO May 10, 2013) (citing *Owens v. Industrial Claim Appeals Office*, 49 P.3d 1187 (Colo. App. 2002)).

Related to Work Injury, as Applied

J. Taken as whole, the medical records, and Claimant's testimony, support the conclusion that while Claimant began an upward trajectory after his fusion, things were already deteriorating prior to his fall in April. These signs began in late March, 2020. His back got "really mad" at him for no apparent reason. Claimant could experience a setback simply by riding over a rough road, or working the clutch on his own car. Prescribed exercises seemed to make his radiculopathy worse. There were other bouts of intense pain earlier in April for which no real correlation could be made to what he had done.

K. Then Clamant took a hard fall onto his side at his own home in late April, 2020. Clearly, his symptoms were exacerbated, including his axial back pain and radiculopathy. He was even concerned that he might have damaged his fusion hardware from the fall. *X-rays showed, however, that he had not damaged this hardware.* Instead, Claimant began to improve once again, but then levelled off once again, with symptoms as a whole consistent with what Claimant was experiencing in April, prior to his fall. The EMG taken in July showed "*mild subacute to chronic*" S1 radiculopathy. While clearly hard to pinpoint a timeline from this, this EMG does not demonstrate to the ALJ that Claimant's radicular symptoms occurred in April. In fact, the records demonstrate that Claimant took a hard spill at home; unsurprisingly, this really hurt for a while. It made him temporarily worse. Then he got over the fall, and continued to deal with his underlying radiculopathy, which remains to this day. The ALJ therefore concludes that the exacerbation of Claimant's symptoms from this fall was temporary in nature. Claimant's continuing need for treatment was not due to the fall in April; instead, it is due to his original work injury, and the ALJ so finds by a preponderance of the evidence.

ORDER

It is therefore Ordered that:

1. Respondents shall pay for the trial neurostimulator as recommended by Dr. Wolkowitz

2. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein are reserved for future determination.

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

DATED: March 9, 2021

/s/ William G. Edie

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-978-703-004

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

[Redacted]

Claimant,

v.

[Redacted], Employer,
and HUGH MACAULAY, M.D.,Individually,,

Employer,

and

[Redacted],

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on December 21, 2020, January 8, 2020 and February 19, 2020 (reference: Google Meets: 12/21/20, 1/8/21, and 2/19/21).

The Claimant was present in person, virtually, and represented by Chris Forsyth, Esq. Representing Denver Water and its insurance carrier were Eric J. Pollart, Esq. and Kristi Robarge, Esq. Representing Dr. Macauley, individually, was David J. Dworkin, Esq.

Hereinafter [Redacted] shall be referred to as the “Claimant."   [Redacted] shall be referred to as the “Employer.” All other parties, including Dr. Macauley, shall be referred to by name.

Claimant’s Exhibits 1 to 3, 5 to 13, 15 to 19, 22, and 25 to 35 and 36 (page 82 of a transcript were admitted into evidence, without objection. Respondents’ Exhibits A through I were admitted into evidence, without objection. Employer’s Exhibit JJ was admitted into evidence without objection Dr. Macaulay’s exhibits were reserved.

On February 19, 2021, the last of the three-day hearing, the Claimant and Respondent Employer informed the ALJ that they agreed to a full and final settlement contingent on approval of a Medicare set aside. The proceedings between Claimant and Respondent Employer were held in abeyance and will be dismissed upon finalization of a full and final settlement or resume if the Medicare set aside is not approved.. The hearing between Claimant and Dr. Macaulay proceeded.

At the conclusion of the Claimant's case in chief, Respondent Dr. Macaulay moved for a judgment in the nature of a directed verdict on the ground that the Claimant, at that juncture, had not sustained his burden of proof on penalties, by preponderant evidence. At the conclusion of the Claimant's case-in-chief, the ALJ ruled from the bench, granting Dr. Macaulay's motion and denying and dismissing Claimant's penalty claims against Dr. Macaulay, and referred preparation of a proposed decision to Dr. Macaulay's counsel, which was submitted on February 24, 2021. On or about March 8, 2021, Claimant filed a 25-page "Amended Objection to Macaulay's Proposed Order." The ALJ infers that Claimant does **not** understand why he was given an opportunity to object as to form. Claimant's Objection goes to great length to present Claimant's version of alternative facts, to which the ALJ disagrees. Perhaps, Claimant can use his Objection as an opening brief in an appeal. Nonetheless, the ALJ has modified Respondents' Proposed Order and an appeal is not ripe until the ALJ has affixed his signature to , and mailed, the actual Full Findings to the parties. The ALJ hereby determines that the penalty matter was submitted for decision on March 8, 2021.

ISSUES

The issues concerning Dr. Macaulay include: (1) whether Claimant established that Dr. Macaulay violated § 8-43-203 (3)(b)(IV), C.R.S., by allowing alleged nurse case managers to attend Claimant's medical appointments without Claimant's consent, and whether penalties should be awarded pursuant to § 8-43-304, C.R.S; (2) whether Claimant established that Dr. Macaulay violated § 8-47-203 (1), C.R.S., by allowing access to Claimant's medical file and records to an alleged nurse case manager employed on Claimant's claim; (3) whether penalties should be awarded pursuant to § 8-43-304, C.R.S; (4) whether Claimant's penalty claims are barred by the one-year statute of limitation, pursuant to § 8-43-304(5), C.R.S; and, (5) whether Claimant's penalty claims are barred for failure to file a certificate of review pursuant to § 13-20-602, C.R.S.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Findings

1. The Claimant worked for Denver Water from 1996 to 2016. He reported that a work-related injury occurred on March 25, 2015.

2. At all times relevant to this matter, the Employer maintained an employee health clinic on its premises (hereinafter the "Employer's Clinic"). The Employer's Clinic provided medical care to its employees, including physicals, vision and hearing testing, commercial driver's license (CDL) certifications, and other medical issues.

3. At all times relevant to this matter, the Employer employed nurses and a physician assistant who served as the full-time staff of the Clinic. These employees included the health services manager/nursing supervisor, Angela "Dawn" Cogan, R.N.; Jessica Thompson, R.N., Patricia Holschuh, R.N, Sue Baker, R.N., and Erin Lay, P.A. (collectively " Clinic Staff"). The Clinic Staff are salaried employees of the Employer and their compensation was not affected by seeing workers' compensation patients vs. non-workers' compensation patients. None of the Clinic Staff was hired by, paid by, or received compensation from the Employer's insurance carrier..

4. In addition, the Employert contracted with a physician, Dr. Macaulay, who served as the authorized treating physician (ATP) for workers' compensation claimants and who provided other services to the Employer's employees. Typically, Dr. Macaulay worked Clinic hours Mondays and Wednesdays. Otherwise, Dr. Macaulay was reasonably available by phone or email.

5. Dawn Cogan managed the Employer's Clinic, and was the day-to-day supervisor of nurse Thompson, nurse Holschuh, Physician's Assistant (PA) Lay and nurse Baker. Dr. Macaulay did not have a supervisory role over the Clinic Staff for employment purposes. Instead, the Clinic Staff worked under Dr. Macaulay's direction with respect to implementing his plan of medical care, recommendations, referrals, prescriptions, and restrictions for injured workers. Dr. Macaulay exercised his independent medical judgment and decision making with respect to his assessment, diagnoses, treatment, recommendations, orders, and work restrictions for injured workers. The Clinic Staff had no authority to approve, reject or countermand Dr. Macaulay's decision making and judgment.

6. The Clinic Staff provided reasonable, necessary, and appropriate assistance to Dr. Macaulay in his role as the ATP for injured workers. The Clinic staff brought the patient to the examination room, took the patient's vital signs and/or performed other examinations, as necessary. When Dr. Macaulay examined a patient at the Clinic. Clinic Staff was present in the examination room to assist Dr. Macaulay and to facilitate patient care. The Clinic Staff member documented Dr. Macaulay's orders, recommendations, referrals, and work restrictions. The Clinic Staff's presence helped ensure that Dr. Macaulay's referrals, prescriptions, and restrictions were correctly understood and implemented. The Clinic Staff scheduled injured workers' appointments

with Dr. Macaulay and with outside providers such as physical therapy, imaging, and specialists; they ordered prescriptions; communicated with pharmacies; and informed injured workers of the status of their appointments. The Clinic Staff communicated work restrictions to injured workers' supervisors to help assure the Employer's compliance with the restrictions. Also, Clinic Staff fielded calls from injured workers and addressed injured workers' questions in person and over the phone. Clinic Staff's duties included contact with the insurance carrier to inform the Insurer of the injured workers' work restrictions, missed time, referrals, and recommended treatment, so the insurer could process claims and authorize benefits. In some instances, Clinic Staff contacted the Insurer to verify authorization of benefits for prescriptions, referrals, or treatment. Clinic staff did not attend medical appointments with injured workers away from the Clinic.

7. In general, one Clinic Staff member served as the "assigned nurse" for each workers' compensation claim, and was primarily the individual involved in attending appointments and performing the functions described above. The "assigned nurse," however, was not an official designation and other Clinic Staff members were involved in the injured workers' case. At times, Clinic Staff used the terms "case management" or "nurse case manager" in reference to functions performed with respect to a given case. Based on the totality of the evidence, the ALJ finds that Clinic nurses did **not** understand the meaning of "nurse case manager," as a word of art within the meaning of the Workers' Compensation Act (hereinafter "the Act').

Clinic Staff Activities

8. The Clinic Staff documented their attendance at appointments and the functions performed in an electronic progress note format maintained by the Clinic ("Progress Notes"). Within the Progress Notes, the Clinic Staff created individual notes labeled, among other things, "Case Management," "Dr. Exam," "Phone Consult" and "Medication." When a Clinic Staff member attended an appointment with Dr. Macaulay, the Progress Note entry was typically labeled as "Dr. Exam." The ALJ infers and finds that when "Case Management" was documented, the meaning was "case management" by a treating nurse.

9. Dr. Macaulay documented his examination, assessment, treatment, recommendations, and decision making for each appointment with an injured worker in a written medical record. Upon the completion of documentation, Dr. Macaulay provided a copy of his documentation to the Clinic Staff for inclusion in the injured workers' medical record file.

Dr. Macaulay

10. Dr. Macaulay testified that he understood the term "case manager" or "nurse case manager" to mean a nurse employed by an insurance company or some other third party to observe and to relay to the insurance carrier the nature of the care

and the problems experienced by the injured worker. Dr. Macaulay understood that "nurse case managers" hired by the insurance company are passive observers who do not take an active role in a patient's medical treatment. For example, a "nurse case manager" does not take a patient's vital signs, help implement the physician's recommendations for prescriptions or referrals, or perform other nursing duties. Dr. Macaulay understood that the Employer's Clinic Staff were present at the clinic and in the examinations in their capacity as Clinic medical staff who assisted Dr. Macaulay in providing medical care to patients who worked for the Employer, and that the Clinic Staff were not "nurse case managers" hired by an insurance company. Dr. Macaulay was not aware that Clinic Staff referred to themselves as case managers on occasion. The ALJ infers and finds that the Clinic nurses were mistaken in their generic reference to themselves as "case managers," and they did not understand that "case manager" within the meaning of the Act is a phrase of art and it did not include the nurse treaters at the Clinic.

Nurses at the Clinic

11. Nurse Dawn Cogan testified that she was confused about the meaning of "nurse case manager." She did not know the Act's definition of "nurse case manager" or "case management." She used the term "case management" at the Clinic to refer to providing services, taking vital signs, making referrals, calling in medications, applying warm compresses; those things to help facilitate care for the patient. Ms. Cogan understands a different workers' compensation definition may exist such as expressed by Dr. Macaulay.

12. Nurse Jessica Thompson testified that she worked at the Clinic as an occupational health nurse. Nurse Thompson never worked for Travelers Insurance Company and was never paid by Travelers Insurance Company. Thompson testified that to the extent she identified as a nurse case manager, she used the term as it related to her job as a registered nurse (RN) assigned to a workers' compensation patient. Her job duties included patient assessment to determine if urgent care was necessary, schedule appointments, implement Dr. Macaulay's orders and referrals, communicate with the supervisors about the patient's restrictions, assist Dr. Macaulay during medical examinations, take a patient's vitals, gather supplies, provide nursing treatment requested by the doctor, take notes, and follow up on doctor's orders.

13. The nurses at the Employer's clinic were **not** "nurse case managers" as inferentially defined by the statutory provision defining "nurse case management." Quite simply, "nurse case management" requires "nurse case managers" to implement "nurse case management." The insurer did not deploy "nurse case managers" in this case.

The Claimant's Involvement with the Employer's Clinic

14. The Claimant treated at the Employer's Clinic and with other medical providers including Gary Gutterman, M.D. and Robert Kawasaki., M.D. The Claimant testified that he considered the Clinic Staff treating nurses. The Clinic Staff offered treatment, brought him into the examination room, took vital signs, helped schedule appointments, and helped him arrange for prescriptions. Also, the Claimant testified that the Clinic Staff did not advise Claimant they were "nurse case managers," and did not request the Claimant's permission or consent to be present in the examination room with Claimant and Dr. Macaulay. Claimant did not request of any of the Clinic Staff to not remain present in the examination room. Similarly, Dr. Macaulay did not advise the Claimant the Clinic Staff were "nurse case managers," or request the Claimant's consent for Clinic Staff members to be present in the examination room. The ALJ infers and finds that this lack of disclosure as "nurse case managers" is the gravamen of the Claimant's request for penalties. The ALJ, however, rejects the theory that the Clinic nurses were, in fact, "nurse case managers" within the meaning of the Workers' Compensation Act. For this reason, disclosure of the Clinic nurses as "nurse case managers," which they were **not**. Compliance with § 8-43-203 (3) (b) (iv), C.R.S. , was factually necessary because the Clinic nurses were not "nurse case managers" within the meaning of the Workers' Compensation Act.

Teresa Manshardt

15. Teresa Manshardt testified that she adjusted the Claimant's workers' compensation claim for Travelers. On April 9, 2015, Travelers filed a General Admission of Liability (GAL). The GAL indicated that Travelers mailed the GAL to the Claimant with a "WC brochure enclosed for injured worker." Manshardt testified that the Insurer's standard procedure in April 2015 was for an administrative assistant to assemble admissions of liability, including attachments, and then deliver the documents to the adjusters. Manshardt's habit and practice was to review the draft for typographical errors and to confirm any referenced attachments were included with the GAL. Once Manshardt reviewed the documents, she would sign them and return them for mailing. Manshardt testified that she would not sign a GAL until she verified that a WC brochure was attached for an injured worker. When a WC brochure was included with a GAL mailed to a claimant, the WC brochure itself would not be maintained in the claims file. Instead, the Insurer relied on the notation on the GAL of the WC brochure's inclusion as evidence it was attached and sent. In the course of handling Claimant's claim, Manshardt sent other documents to the Claimant at his home address. Manshard was not aware of any correspondence or other documents sent to the Claimant that were returned to the Insurer as undeliverable or for an incorrect address. The ALJ finds Manshardt's testimony credible --that she followed her standard practice and that the WC brochure was attached to the April 9, 2015 GAL and mailed to Claimant on April 9, 2015, and the ALJ finds that the brochure was attached to the GAL. In the face of a convincing showing that the brochure was attached to the GAL, the Claimant's denial of receipt thereof is not credible.

16. The April 9, 2015 GAL states under “Remarks” – “WC brochure enclosed for injured worker” indicating that the WC brochure was enclosed with the copy of the GAL sent to Claimant.

The Claimant

17. Claimant’s attorney, also represented the Claimant in 2015. On October 8, 2015, he authored and sent an email to Respondents’ then attorney, Jon Robbins. Claimant’s attorney referenced “an email missing where Dawn Cogan says she’s the nurse case manager.” (Employer-Respondents’ Exhibit JJ).

18. On December 14, 2015, Claimant’ represented Claimant at a hearing before ALJ Peter Cannici. In anticipation of that hearing, on October 14, 2015, Claimant’s attorney deposed Employer Clinic Physician Assistant (PA) Lay. The Claimant was present at PA Lay’s deposition. PA Lay testified that she functioned as a case manager for work comp. Claimant’s attorney asked what PA Lay meant. PA Lay responded that she assisted Dr. Macaulay in making appointments for employees, making certain that prescriptions for physical therapy (PT) were sent correctly, that the patient was scheduled for what they needed, and that she scheduled Claimant’s follow-up examinations with Dr. Macaulay. Then, at the December 14, 2015 hearing, at which Claimant was present, Clinic nurse Jessica Bedwell Thompson testified in response to a question from Claimant’s attorney about Bedwell Thompson’s job at the Clinic, and Bedwell Thompson said: We do workers’ comp case management. Again, Bedwell Thompson said thios without regard to the meaning of “case manager” as defined by the Workers’ Compensation Act.

19. In the current case, Claimant admitted he received the April 9, 2015 GAL, but he did not recall receiving the WC brochure. Claimant admitted that he provided his attorney a copy of the April 9, 2015 GAL and that they submitted a copy of the April 9, 2015 GAL at the hearing in 2015. Claimant admitted that he did not allege failure to receive the WC brochure at the hearing in 2015. In light of the established business practices of the Clinic, Claimant’s lack of recall is **not** sufficient to rebut the presumption of receipt of the brochure.

20. On April 4, 2019, Claimant filed an Application for Hearing and alleged penalties against Dr. Macaulay-- that related to Claimant’s allegations that a “nurse case manager” attended medical appointments without proper disclosure and that “nurse case managers” improperly accessed medical records in violation of §§ 8-43-203(3)(b)(iv) and 8-47-203(1)., C.R.S. Specifically, the Claimant listed penalty claims:

- for March 25, 2015, April 1, 2015, April 20, 2015, May 13, 2015, May 27, 2015, July 29, 2015, and August 5, 2015, alleging that Nurse Jessica Bedwell Thompson, attended Claimant’s medical appointments with Dr.

Hugh Macaulay without proper disclosure to Claimant in violation of § 8-43-203(3)(b)(iv), C.R.S.

- On March 25, 2015, April 1, 2015, April 20, 2015, May 13, 2015, May 27, 2015, July 29, 2015, and August 5, 2015, Dr. Macaulay allegedly allowed Nurse Bedwell Thompson, access to Claimant's medical file in violation of § 8-47-203(1), C.R.S.

- On April ,13, 201515 and July 13, 2015, nurse case manager, Dawn Cogan, attended Claimant's medical appointments with Dr. Hugh Macaulay without proper disclosure to Claimant in violation of C.R.S. 8-43-203(3)(b)(iv);

- On April 13, 2015 and July 13, 2015, Dr. Macaulay allegedly allowed Nurse Dawn Cogan access to Claimant's medical file in violation of § 8-47-203(1).

- On June 3, 2015 and June 22, 2015, Nurse Bedwell Thompson or Dawn Cogan, attended Claimant's medical appointments with Dr.Macaulay without proper disclosure to Claimant in violation of § 8-43-203(3)(b)(iv), C.R.S.

- On June 3, 2015 and June 22, 2015, Dr. Macaulay allowed Nurse Jessica Bedwell Thompson or Dawn Cogan, access to Claimant's medical file in violation of § 8-47-203(1), C.R.S.
- On April 29, 2015 nurse case manager, Erin Lay, attended Claimant's medical appointment with Dr. Hugh Macaulay without proper disclosure to Claimant in violation of C.R.S. 8-43-203(3)(b)(iv);

- On April 29, 2015, Dr. Macaulay allowed Erin Lay access to Claimant's medical file in violation of § 8-47-203(1)., C.R.S.

21. Dr. Macaulay treated the Claimant after his March 25, 2015 work injury. Dr. Macaulay last treated the Claimant in 2015 and last worked at the Employer's Clinic in 2015. Dr. Macaulay first learned of the Claimant's penalty allegations in this case when Dr. Macaulay received the Claimant's Application for Hearing dated April 4, 2019. At that time, Dr. Macaulay had not worked at the Clinic for 3 ½ years and Dr. Macaulay was in no position to investigate or cure the Claimant's penalty allegations at the Clinic.

Ultimate Findings

22. Insofar as the Employer Clinic's nurses did not properly comprehend the legal meaning of "nurse case manager," as found hereinabove, the ALJ infers and finds that their self-description as "nurse case manager" is **not** credible. By their own description of their duties, which is credible, they were nurse treaters, as found

hereinabove. Dr. Macaulay's testimony, however, was credible and persuasive. The Claimant's testimony that he does not remember receiving the brochure with the GAL, although there is no reason to doubt his credibility, fails to disprove that the brochure was included with the GAL In fact, Teresa Manshardt's testimony concerning the official procedure of including the brochure with the GAL, as found, was credible and established that the brochure was included with the GAL Claimant's lack of recall is insufficient to overcome Manshardt's establishment of the fact that the brochure was included with the GAL. in 2015 Claimant never raised Respondents' alleged failure to include the brochure at a hearing in 2015. The fact that Claimant raised this proposition almost five years later, although he has been continuously represented by counsel since 2015, causes the ALJ to question the Claimant's credibility.

23. Between conflicting sets of fact, the ALJ makes a rational choice, based on substantial evidence, to accept Dr. Macaulay's description of the situation and the Clinic nurses' description of their jobs, *sans* their legal conclusions that they were "nurse case managers," and to reject the Claimant's legal conclusion that they were "nurse case managers," allegedly as contemplated by the Workers' Compensation Act.

24. The ALJ hereby finds that the Clinic nurses were not "nurse case managers" as contemplated by §8-43-203 (3) (b) (IV), C.R.S. As found, the Clinic nurses were there to assist Dr. Macaulay with treatment of the Claimant and **not** to manage the case for the insurance carrier. The ALJ rejects the Claimant's theory that the Clinic nurses were "nurse case managers" in the accepted meaning thereof, thus triggering the Claimant's right to refuse their presence when Dr. Macaulay was treating the Claimant, allegedly contrary to §8-43-203 (3) (b) (IV). "Nurse case management" is defined in the Act. As found hereinabove, "nurse case management" requires "nurse case managers" to implement it. The Clinic nurses, as found hereinabove, were not engaged in "nurse case management as defined by the Act.

25. The Claimant failed to prove, by preponderant evidence at the conclusion of the Claimant's case-in-chief that Dr. Macaulay, the Clinic nurses and the Employer knowingly or negligently violated provisions of the Workers' Compensation Act ("the Act'), thus triggering the penalty provisions of the Act. Consequently, a judgment in the nature of a directed verdict is appropriate.

CLAIMANT'S STATED POSITION IN OBJECTION TO PROPOSED ORDER

The Claimant argues for an outcome contrary to the decision announced from the bench at the conclusion of his case. Specifically, the Claimant argues that Dr. Macaulay violated § 8-43-203 (3)(b)(IV), C.R.S., beginning on March 25, 2015 and ongoing from March 9, 2015, pleading other violation dates including: April 1, 2015; April 13, 2015; April 20, 2015; April 29, 2015; May 13, 2015; May 27, 2015; June 3, 2015; June 22, 2015; July 13, 2015; July 29, 2015; and August 5, 2015. Claimant alleges that the penalty violations were ongoing from each date, based on Dr.

Macaulay's failure to identify staff as nurse case managers. Claimant argues that It was Dr. Macaulay's ongoing business practice to allow nurses (who, according to Claimant were "nurse case managers") into Claimant's medical appointments without Claimant's consent. , C.R.S., from March 25, 2015, to the date of this order. The ALJ rejects this argument and prayer for relief because the Clinic nurses were not "nurse case managers," as contemplated by the Act.

Claimant further argues that Dr. Macaulay violated § 8-47-203 (1), C.R.S., beginning on March 25, 2015 and ongoing from March 9, 2015; and, other violation dates including: April 1, 2015; April 13, 2015; April 20, 2015; April 29, 2015; May 13, 2015; May 27, 2015; June 3, 2015; June 22, 2015; July 13, 2015; July 29, 2015; and August 5, 2015. Claimant alleges that the penalty violations were ongoing from each date, based on Dr. Macaulay's providing Clinic nursing staff access to his medical records which they had access to continually. Claimant further argues that it was Dr. Macaulay's ongoing business practice to allow Clinic nurses at the Employer's clinic access to Claimant's medical records. The ALJ rejects this argument because the Clinic nurses were nurse treaters and required access to Claimant's medical records to effectively augment Dr. Macaulay's treatment. The Claimant requested additional penalties in the amount of $325.00 per day, pursuant to § 8-43-304, C.R.S., from March 25, 2015, to the date of this order. The ALJ rejects this argument and all requests for penalties, *in toto*, because the Clinic nurses were nurse treaters and **not** "nurse case managers" as commonly defined.

CONCLUSIONS OF LAW

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

Judgment in the Nature of a Directed Verdict

a. Colo. Rules of Civil Procedure, Rule 41(b) (1), provides that, after a plaintiff in a civil action *tried without a jury* has completed the presentation of his evidence, the defendant may move for a dismissal on the grounds that the plaintiff has failed to present a prima facie case for relief. In determining whether to grant a motion to dismiss or in the nature of a directed verdict, the court is not required to view the evidence in the light most favorable to the plaintiff, as argued by a claimant. *Rowe v. Bowers*, 160 Colo. 379, 417 P.2d 503 (Colo. 1966)*; Blea v. Deluxe/Current, Inc.*, W.C. No. 3-940-062 [Indus. Claim Appeals Office (ICAO), June 18, 1997] (applying these principles to workers' compensation proceedings). Neither is the court required to "indulge in every reasonable inference that can be legitimately drawn from the evidence" in favor of the Claimant. Rather, the test is whether judgment for the respondents is justified on the claimant's evidence. *Amer. National Bank v. First National Bank*, 28 Colo. App. 486, 476 P.2d 304 (Colo. App. 1970); *Bruce v. Moffat County Youth Care Center*, W. C. No. 4-311-203 (ICAO, March 23, 1998). The question of whether the Claimant carried this burden was one of fact for resolution by the ALJ. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). As found, the Claimant's case for penalties against Dr. Macaulay could not have gotten any better as of the time the Claimant rested his case-in-chief. At that point, the Claimant had not carried his burden by a preponderance of the evidence. Therefore, dismissal of the penalty claims was warranted.

Credibility

b. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, insofar as the Employer Clinic's nurses did not properly comprehend the legal meaning of "nurse case manager," as found hereinabove, the ALJ infers and finds that their self-description as "nurse case manager" is **not** credible. By their own description of their duties, which is credible, they were nurse treaters. Dr. Macaulay's testimony, as found, was credible and persuasive. The Claimant's testimony that he does not remember receiving the brochure with the GAL, although there is no reason to doubt his credibility, fails to disprove that the brochure was included with the GAL The ALJ infers that the Claimant was not paying careful attention when he received the GAL in 2015. The fact that he did not raise this proposition at a 2015 hearing corroborates this inference. In fact, Teresa Manshardt's testimony concerning the official procedure of including the brochure with the GAL, as found, was credible and established that the brochure was included with the GAL Claimant's lack of recall is insufficient to overcome. The fact that Claimant raised this proposition almost five years later, although he has been continuously represented by counsel since 2015, causes the ALJ to question the Claimant's credibility.

Substantial Evidence

c. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985).   It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting sets of fact, the ALJ made a rational choice, based on substantial evidence, to accept Dr. Macaulay's description of the situation and the Clinic nurses' description of their jobs --that they were **not** "nurse case managers," and the ALJ rejects reject the Claimant's conclusion that they were "nurse case managers."

Penalties

d. The Claimant failed to meet his burden and prove that Dr. Macaulay violated a provision of the Workers' Compensation Act, did any act prohibited by the Act, failed or refused to perform any duty lawfully enjoined, or failed or neglected or refused to obey any lawful order that could subject Dr. Macaulay to a penalty. Claimant alleged penalties against Dr. Macaulay based on Claimant's allegations that a nurse case manager attended medical appointments without proper disclosure in violation of § 8-43-203(3)(b)(iv) C.R.S. and that nurse case managers improperly accessed medical records in violation of § 8-47-203(1) C.R.S. As found, the Clinic nurses were nurse treaters and **not** "nurse case managers,' and they necessarily attended Dr. Macaulay's treatment sessions in order to medically assist Dr. Macaulay.

e. § 8-43-203(3)(b)(iv), C.R.S. does not create a duty for treating physicians. The primary task in construing a statute is to ascertain and give effect to the Legislature's intent. *East Lakewood Sanitation Dist. v. District Court,* 842 P.2d 233, 235

(Colo. 1992); *In Interest of* R.C., 775 P.2d 27, 29 (Colo. 1989). To determine that intent, the ALJ looks first to the plain language employed by the General Assembly (*e.g., Farmers Group, Inc. v. Williams,* 805 P.2d 419, 422 (Colo. 1991)). "Words and phrases [are] given effect according to their plain and ordinary meaning, and [the ALJ must choose a construction that serves the purpose of the legislative scheme, and must not strain to give language other than its plain meaning, unless the result is absurd."' *Id.* (quoting *Colorado Dep't of Social Servs. v. Board of Comm'rs,* 697 P.2d 1, 18 (Colo. 1985)). If a statute is unambiguous, there is no need to resort to interpretive rules of statutory construction or the legislative history, e.g., *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542, 545 (Colo. 1995). The ALJ should not read nonexistent provisions into the Colorado Workers' Compensation Act. *See Kraus v. Artcraft Sign Co*., 710 P.2d 480, 482

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f. The plain language of § 8-43-203(3)(b)(iv), C.R.S. provides that at the time that the employer or, if insured, the employer's insurance carrier provides notice whether liability is admitted or contested, the **employer** or **insurance carrier** shall provide to the claimant a brochure written in easily understood language, in a form developed by the director after consultation with employers, insurance carriers, and representatives of injured workers, describing the claims process and informing the claimant of his or her rights…The brochure shall…contain (b) The claimant's right to receive medical care for work-related injuries or occupational diseases paid for by the employer or the employer's insurance carrier including (iv) The claimant's right to discuss with his or her doctor who should be present during a claimant's medical appointment, and the right to refuse to have a "nurse case manager" employed on the claimant's claim present at the claimant's medical appointment (Emphasis supplied) .

g. The the plain language of § 8-43-203(3)(b)(iv), C.R.S. does not create or place a duty on treating physicians, such as Dr. Macaulay, to provide the Claimant a brochure. The statute does not create or place a duty on treating physicians, such as Dr. Macaulay, to advise a Claimant about the brochure in the event the employer or insurance carrier does not provide the Claimant with a copy of the brochure. The plain language of the statute does not, as Claimant suggests, create or place a duty on Dr. Macaulay to disclose to Claimant if a "nurse case manager" attends Claimant's medical appointment. The Claimant reads into the statute a duty which is not present in the plain language of the statute and the ALJ may not read nonexistent provisions into the Act. Nonetheless, as found, the Claimant was furnished a brochure with the GAL and simply does not remember receiving it.

h. The Employer's Clinic staff are not "nurse case managers" identified in § 8-43-203(3)(b)(iv), C.R.S. "Nurse case manager" is not defined in § 8-43-203(3)(b)(iv), C.R.S. That section provides that the brochure must include a statement that the claimant has the right to refuse to have a "nurse case manager" present during a medical appointment. The may look to other statutory provisions for guidance. The primary task in construing a statute is to ascertain and give effect to the Legislature's intent. *East Lakewood Sanitation Dist. v. District Court, supra*; *In Interest of* R.C., 775 P.2d 27, 29 (Colo. 1989). To determine that intent, the ALJ looks first to the plain language employed by the General Assembly (e.g., *Farmers Group, Inc. v. Williams,* 805 P.2d 419, 422 (Colo. 1991)). "Words and phrases [are] given effect according to their plain and ordinary meaning, and [the court] 'must choose a construction that serves the purpose of the legislative scheme, and must not strain to give language other than its plain meaning, unless the result is absurd.'" Id. (quoting *Colorado Dep't of Social Servs. v. Board of Comm'rs, supra.* "Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." § 2-4-101, C.R.S. An ALJ may consider dictionary definitions, but also the context in which the words are used to harmonize the meaning with the remainder of the statutory provisions. *People v. Berry, 459 P.3d 578, 581 (Colo. App. 2017).*

i. Statutes should be construed in the context of the other provisions of the statutory scheme, so as to give consistent, harmonious, and sensible effect to all parts of the act); See *Henderson v. RSI, Inc.*, 824 P.2d 91 (Colo. App. 1991); *See also Climax Molybdenum v. Walter,* 812 P.2d 1168 (Colo. 1991) (specific statutory provisions should prevail over general statutory provisions). The ALJ should not read nonexistent provisions into the Colorado Workers' Compensation Act. *See Kraus v. Artcraft Sign Co*., 710 P.2d 480, 482 (Colo. 1985).

j. As noted, § 8-43-203(3)(b)(iv), C.R.S. does not define "nurse case manager", however, § 8-42-101(3.6)(p)(I)(A), C.R.S. defines "case management" as a system developed by the insurance carrier in which the carrier shall assign a person knowledgeable in workers' compensation health care to communicate with the employer, employee, and the treating physician to assure that appropriate and timely medical care is being provided. § 8-42-101(3.6)(p)(I)(A), C.R.S. helps make sense of the term "nurse case manager." The logical construction is that the language of §8-42-101(3.6)(p), C.R.S is linked to the language of §8-43-203(3)(b)(IV), C.R.S. As found, the Clinic nurses were **not** engaged in "nurse case management," and were, therefore, not "nurse case managers," the trigger to activate the Claimant's right to disclosure of their role and Claimant's statutory right to refuse their presence. It is illogical for a claimant to refuse the presence of a nurse treater, who is present to augment a physician's medical treatment.

k. As found, Dr. Macaulay's testimony provides evidence as to the understanding of the term "nurse case manager" as it relates to workers' compensation matters. Dr. Macaulay understood the term "case manager" or "nurse case manager" to mean a nurse employed by an insurance company or some other third party to observe and to relay to the insurance carrier the nature of the care and the problems experienced by the injured worker. Dr. Macaulay understood that "Nurse Case

Managers," hired by the insurance company are passive observers who do not take an active role in a patient's medical treatment. A "nurse case manager" does not take a patient's vital signs, help implement the physician's recommendations for prescriptions or referrals, or perform other nursing duties. Dr. Macaulay's understanding is consistent with the statutory definition of "nurse case management."

l. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, should be construed accordingly." The more reasonable construction of § 8-43-203(3)(b)(IV), C.R.S., is that the term "nurse case manager" allegedly employed on the Claimant's claim" has a technical, or particular meaning, and refers to a person who represents the interest of a third-party and who is not directly involved in implementing the ATP's plan of care.

m. As found, the Employer's Clinic nurses were nurse treaters and the fact that the Clinic nurses called themselves case managers is not controlling. There is no reasonable dispute that the Clinic Staff provided treatment and rendered services normally obtained in a doctor's office. As found, they weighed patients and took vitals. They assisted Dr. Macaulay to implement referrals, prescriptions, and restrictions. As further found, they were employed by the Employer to work at the Clinic and they were not "employed" by an insurance carrier "or third-party. As further found, the insurer did not deploy "nurse case managers" in this case.

n. The Claimant cites to *Nanez v. Indus.l Claim Appeals Office*, 444 P.3d 820 (Colo App. 2018) as defining the role of a "nurse case manager," in a conservator related case. In *Nanez*, a claimant sought benefits for conservator or guardian services under the Act. In denying the claimant's request, the Court of Appeals compared some of the proposed functions of a conservator to a nurse case manager who had already been employed on claimant's case. The court did not define the role of a "nurse case manager," but noted the existing nurse case manager had scheduled, and reminded the claimant of upcoming medical appointments, maintained contact with medical providers to keep updated on his progress, facilitated treatment recommendations and compliance with those recommendations, monitored medications and complaints for possible medical needs, and attended medical appointments. The Court did not, however, make any legal determination that a person who performs these functions is a "nurse case manager employed on the claimant's claim" under §8-43-203(3)(b)(IV), C.R.S. The holding in *Nanez* is inapposite to the facts in the present case.

o. Taking all the above into consideration, the ALJ concludes that the term "nurse case manager employed on claimant's claim," as used in § 8-43-203(3)(b)(IV), C.R.S., does not mean treating nurses or staff of a clinic where a claimant receives treatment and who assist the physician in implementing his plan of care or who assist a claimant in scheduling appointments. Instead, the ALJ concludes that "nurse case manager employed on a claimant's claim" means a person representing the interest of a third-party and who is not directly involved in implementing the ATP's plan of care.

Therefore, the Clinic Staff were not “nurse case managers employed on Claimant’s claim” as the term is extrapolated from the Act.

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p. the Claimant received the Workers’ Compensation brochure, and thus knew or should have known of his right to discuss who may be present during his appointment and his right to refuse the presence of a nurse case manager employed on his claim. Because the Clinic nurses were **not** “nurse case managers” receipt or lack thereof is not relevant to the question of disclosure of the nurses’ role and whether the Claimant had a right to refuse their presence when Dr. Macaulay was treating the Claimant.

q. As found, Teresa Manshardt adjusted the Claimant’s workers’ compensation claim for Travelers. Manshardt credibly testified that she sent the April 9, 2015 GAL and the WC brochure to Claimant in compliance with § 8-43-203(3)(b)(IV), C.R.S. The business practice of Insurer was to review all GAL’s before mailing to assure the referenced attachments were included in the documents to be mailed, including assuring the WC brochure was attached to the version sent to Claimant. Although Insurer does not maintain in its claims file a copy of each WC brochure sent to a claimant, the Insurer documents the inclusion on the GAL. The April 9, 2015 GAL states under “Remarks” – “WC brochure enclosed for injured worker” indicating that the WC brochure was enclosed with the copy of the GAL sent to Claimant. Ms. M[Redacted] also testified that she only signed off on a GAL after assuring that the WC brochure was attached. Ms. M[Redacted]’s testimony is corroborated because she sent Claimant other documents to the same address to which she sent the GAL and the WC brochure and Ms. M[Redacted] did not recall that any mail sent to Claimant was returned as undelivered or returned due to an incorrect address. Also, neither Claimant nor his attorney raised the issue of a missing WC brochure in 2015.

r. In addition, “There is a rebuttable presumption that a letter which was properly addressed, stamped, and mailed was duly delivered to the addressee.” *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). “[T]he existence of a business custom or practice is sufficient to warrant a presumption that a particular letter was duly posted.” *National Motors, Inc. v. Newman*, 484 P.2d 125, 126 (Colo. App. 1971), *see also EZ Bldg. Components Mfg., LLC v. Industrial Claim Appeals Office of State*, 74 P.3d 516 (Colo. App. 2003) (“The existence of a business custom is sufficient to warrant a presumption that notice was sent, and it is the province of the trier of fact to decide whether that presumption is overcome by other evidence”) . As further found, Claimant’s lack of recall concerning receipt of the brochure is **insufficient** to rebut the presumption of receipt.

Clinic Nurses’ Access to Claimant’s Medical Records

s. The Claimant asserts that alleged "nurse case managers" access to Claimant's medical file was a violation of § 8-47-203(1), C.R.S. The plain language of §8-47-203(1), C.R.S. provides that the filing of a claim for compensation is deemed to be a limited waiver of the doctor-patient privilege to persons who are necessary to resolve the claim. Access to claim files maintained by the Division of Workers' Compensation (DOWC) will be permitted for limited purposes including availability for inspection upon request by the parties to the claim, including the claimant, the employer, and the insurer or their attorneys or other designated representatives.

t. The Claimant failed to meet his burden by proving that Dr. Macaulay violated § 8-47-203(1), C.R.S. As found, Dr. Macaulay created treatment notes for his appointments with Claimant and provided those notes to the Clinic Staff for inclusion in the Claimant's medical file. The Clinic Staff were not "nurse case managers" under the Act. Also, § 8-47-203(1), C.R.S. does not prevent Dr. Macaulay from providing his medical records to Clinic staff, nurses, Physician Assistants (PAs), or Nurse Practitioners (NPs). This is a normal use of medical records within a medical facility for which no waiver of the doctor-patient privilege is required.

u. Even if the Clinic staff were "nurse case managers" hired by an insurance company to act on behalf of the insurance company, § 8-47-203(1), C.R.S. specifically considers the insurance company a necessary party to whom a physician may provide medical records. The ALJ concludes that Dr. Macaulay did not violate § 8-47-203(1), C.R.S., or do any act prohibited by § 8-47-203(1), C.R.S., or fail or refuse to perform any duty lawfully enjoined, or fail or neglect or refuse to obey any lawful order that could subject him to a penalty.

Borden of Proof

v. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to penalties. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has failed to sustain his burden with respect to all penalty claims against Dr. Macaulay.

ORDER

IT IS, THEREFORE, ORDERED THAT:

Any and all penalty claims against Hugh Macaulay are hereby denied and dismissed.

DATED this 11th day of March 2021.

DIGITAL SIGNATURE

EDWIN L. FELTER, JR.
Administrative Law Judge

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

ISSUES

1. Whether Respondents have produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Thomas G. Fry, M.D. that Claimant suffered a 31% whole person impairment rating as a result of his October 10, 2017 admitted left upper extremity injury.

2. Whether Claimant has demonstrated by a preponderance of the evidence that the reverse shoulder arthroplasty recommended by Nathan D. Faulkner, M.D. is reasonable, necessary and causally related to his October 10, 2017 admitted industrial injury.

FINDINGS OF FACT

1. This is an admitted claim for an October 10, 2017 left hand crush and shoulder injury. Specifically, Claimant was operating a pneumatic industrial forklift while working for Employer when he lost control of the machine and pinned his left hand between the forklift and a metal wall. He suffered fractures of his left thumb proximal phalanx and second metacarpal.

2. Claimant was transported to the emergency department at the University of Colorado where he underwent x-rays of the left shoulder, left wrist and left hand. In addition to Claimant's finger fractures, x-rays of the left shoulder revealed mild degenerative changes in the acromioclavicular joint and a full-thickness rotator cuff tear.

3. Claimant underwent left hand surgery to address the fractures and conservative treatment for the left shoulder. After Claimant's hand symptoms resolved he was discharged from care. However, Claimant had ongoing left shoulder symptoms and ultimately underwent an MRI. The October 27, 2017 left shoulder MRI revealed a large full-thickness rotator cuff tear of the supraspinatus and infraspinatus tendons as well as an anterior-superior labral tear.

4. On December 12, 2017 Claimant underwent left shoulder surgery with Nathan D. Faulkner, M.D. The surgery specifically addressed Claimant's left massive full-thickness, acute rotator cuff tear involving the supraspinatus and infraspinatus, a longitudinal biceps tear, adhesive capsulitis with extensive glenohumeral synovitis, and subacromial bursitis and impingement.

5. On January 19, 2018 Claimant visited Dr. Faulkner for a follow-up examination. Claimant noted his pain has improved since his last visit. He had been attending physical therapy and reported improved range of motion.

6. On April 23, 2018 Claimant underwent a repeat left shoulder MRI. The imaging revealed that the rotator cuff repair appeared to be intact. The MRI also reflected evidence of atrophy that was unchanged from his preoperative MRI.

7. On December 5, 2018 Claimant returned to Dr. Faulkner for an examination. He noted Claimant was about one year removed from left shoulder surgery. The repeat MRI showed an intact rotator cuff repair. Claimant exhibited functional range of motion and minimal pain. Dr. Faulkner determined that Claimant had reached Maximum Medical Improvement (MMI). He assigned permanent restrictions of no lifting more than 20 pounds overhead.

8. Claimant's shoulder symptoms and range of motion initially continued to improve. At physical therapy sessions he noted that he had shoveled snow and engaged in yard work. When Claimant returned for therapy on April 16, 2019 he stated "my shoulder hurts from doing so much yard work." The physical therapy report specifically documented that "Pt using LUE for yard work this weekend."

9. Claimant subsequently reported an increase in left shoulder symptoms that included ongoing weakness. Due to positive impingement signs on examination, Authorized Treating Physician (ATP) Matthew Lugliani, M.D. recommended a repeat left shoulder MRI to rule out the possibility of a re-tear.

10. On May 6, 2019 Claimant underwent a left shoulder MRI. The imaging revealed the following: little to no intact supraspinatus tissue; suggestion of proximal full-thickness disruption and distal tendon retraction; and mild to moderate acromioclavicular and mild glenohumeral osteoarthritis. Notably, based on the reading by Frank Crnkovich, M.D. the imaging reflected an "intact rotator cuff repair, I believe, but the tendons are thinned and of increased signal intensity."

11. On June 19, 2019 Claimant returned to Dr. Faulkner for an orthopedic surgery consultation. Claimant reported little to no pain and was not taking any pain medications, but merely had pain while performing overhead activities involving his left shoulder. Dr. Faulkner noted that the May 6, 2019 left shoulder MRI showed "a recurrent tear of the supraspinatus and infraspinatus with grade 3/4 atrophy. The MRI was compared to the previous MRI from last April that showed the rotator cuff to be intact with edema in the tendon and minimal rotator cuff atrophy." Dr. Faulkner remarked that Claimant did not obtain any significant relief from a superior medial steroid injection. He commented that Claimant had experienced "pain/persistent dysfunction and failure of more conservative treatment" and recommended a reverse left total shoulder arthroplasty. Dr. Faulkner did not address causality regarding the recommended surgery.

12. Claimant subsequently developed symptoms consistent with left ulnar entrapment neuropathy at the left elbow. On January 20, 2020 Scott Primack, M.D. confirmed the condition with EMG testing.

13. On May 12, 2020 Claimant visited Dr. Lugliani for an impairment evaluation. Dr. Lugliani noted that Claimant had suffered a work-related left hand crush injury and

undergone failed rotator cuff labral repairs. He concluded that Claimant reached MMI on May 12, 2020. Relying on the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides*), Dr. Lugliani assigned Claimant a 16% permanent impairment rating for the left hand. He noted that Claimant also had a 3% permanent impairment for the left wrist based on flexion/extension range of motion deficits. Dr. Lugliani also assigned a 10% rating for the left shoulder based on range of motion deficits. Combining the 16% left hand impairment with the 3% left wrist rating yields a 19% scheduled impairment. Combining the 19% rating with the 10% left shoulder impairment yields a 27% left upper extremity impairment. Finally, Dr. Lugliani converted the 27% left upper extremity rating to a 17% whole person impairment. He did not diagnose Claimant with a left elbow injury.

14. Based on the results of a Functional Capacity Examination (FCE), Dr. Lugliani assigned Claimant permanent restrictions of left hand and upper extremity lifting not to exceed 5 pounds, pushing and pulling of no more than 20 pounds and no reaching above shoulder height or away from the body with the left arm. He recommended maintenance medical treatment of two years for follow-up with orthopedics for reverse shoulder surgery, "if indicated."

15. Respondents filed a Notice and Proposal with an Application for a Division Independent Medical Examination (DIME) on June 19, 2020. Thomas G. Fry, M.D. was selected with a scheduled appointment on September 15, 2020. Dr. Fry issued a report on September 20, 2020. However, on October 8, 2020 the Division of Workers' Compensation issued an Incomplete Notice – DIME report, outlining six distinct issues that needed to be addressed by the DIME physician. Dr. Fry issued a supplemental report on November 18, 2020. However, on December 2, 2020 the Division issued a second Incomplete Notice – DIME Report, outlining two additional issues that needed to be addressed. Dr. Fry eventually clarified his report and the Division issued a Notice of DIME Process Complete.

16. Dr. Fry diagnosed Claimant with "arthritis left shoulder; complete rotator cuff tear left shoulder, failed repair, labral tear left shoulder, impingement syndrome left shoulder, adhesive capsulitis left shoulder, post biceps tenodesis with residual pain; loss of elbow motion; loss of wrist motion; multiple digit loss of motion; loss of grip strength; loss of superficial radial nerve function." He agreed that Claimant had reached MMI on May 12, 2020. Dr. Fry recommended a re-examination of Claimant's left shoulder in six months. He also noted that it was appropriate for Claimant to have a reverse shoulder arthroplasty if he elected. However, Dr. Fry did not comment on causality regarding the need for surgery.

17. In his final corrected report, Dr. Fry assigned Claimant a 24% permanent impairment of the left hand. He also assigned Claimant a 10% impairment of the wrist that included 2% for loss of superficial radial nerve function. Moreover, Dr. Fry assigned a 2% impairment for the left elbow based on range of motion deficits. Finally, Dr. Fry assigned a 26% impairment of the left shoulder that included a 12% upper extremity rating for crepitus. Combining the ratings yields an overall 52% left upper extremity scheduled rating that converts to a 31% whole person impairment.

18. On July 9, 2020 Claimant underwent an independent medical examination with Lawrence A. Lesnak, D.O. He interviewed Claimant, completed a medical record review and performed a physical examination. Ultimately, Dr. Lesnak determined that Claimant's injuries on October 10, 2017 injuries were limited to his left shoulder, left hand, left thumb and left index finger.

19. Dr. Lesnak testified that Claimant likely suffered a shoulder strain/sprain injury and noted significant pathology involving the left shoulder on MRI. However, the pathology probably predated Claimant's October 10, 2017 work incident. Dr. Lesnak remarked that, because Claimant possibly aggravated pre-existing pathology at the time of his work injury, he was entitled to a left shoulder impairment rating.

20. Dr. Lesnak determined that the recommended left shoulder surgery is not related to Claimant's work injury. He commented that Claimant's post-operative left shoulder MRI showed an intact rotator cuff repair. Dr. Lesnak remarked that, when surgeon Dr. Faulkner placed Claimant at MMI on December 5, 2018, he was still improving. Claimant had no specific pain in the shoulder other than some intermittent popping sensations. Dr. Lesnak concluded that Claimant's rotator cuff re-tear was unrelated to the occupational incident. Notably, Claimant's repair was intact 4½ months after surgery. Finally, Dr. Lesnak noted that, while surgery has been recommended, neither ATP Dr. Lugliani, surgeon Dr. Faulkner nor DIME Dr. Fry have specified that the need for surgery is causally related to Claimant's October 10, 2017 work injury.

21. Dr. Lesnak thoroughly addressed **Claimant's** permanent impairment rating. He assigned Claimant an 8% permanent impairment for the left shoulder based on range of motion deficits. Range of motion impairment specifically consisted of 4% for abnormal flexion, 2% for abnormal abduction and 2% for abnormal internal rotation. Dr. Lesnak explained that Claimant also qualified for a 9% total left hand impairment rating for residual abnormalities involving his left thumb, left index and left middle fingers. The 9% hand impairment rating converted to an 8% upper extremity impairment rating pursuant to Table 2 of the *AMA Guides*. Dr. Lesnak explained that the 8% upper extremity impairment for Claimant's left hand, thumb and fingers combined with the 8% upper extremity impairment for his left shoulder for an overall 15% upper extremity permanent impairment rating.

22. Dr. Lesnak detailed that Claimant did not warrant a permanent rating for the left wrist. He reasoned that there was no evidence of any type of injury to Claimant's left wrist and he never had any specific documented ongoing complaints of left wrist symptoms that qualified for a formal diagnosis as a result of the October 10, 2017 occupational incident. Furthermore, Dr. Lesnak agreed with Dr. Lugliani that Claimant did not qualify for any left elbow impairment. Although Dr. Primack identified an electrodiagnostic abnormality on his EMG testing, there was no evidence to suggest that the nerve entrapment was related to Claimant's work activities. Dr. Lesnak commented that the mechanism of injury that involved the crushing of the left hand "would be completely inconsistent with development of a left ulnar neuropathy at the elbow." Similarly, Dr. Lesnak did not assign impairment ratings for Claimant's left ring finger or left little finger for the industrial incident.

23. Claimant testified at the hearing in this matter. He remarked that he did not have any problems with his left wrist, arm, elbow or shoulder prior to the work incident. He further explained that he suffered inflammation, soreness and pain in his left elbow beginning on the date of his industrial injury. Specifically, when he attempted to rotate his hand and wrist in physical therapy, he developed pain in his left elbow. Claimant remarked that "when I pulled my arm away and tore the rotator cuff, it also caused that injury to the elbow." Finally, Claimant denied that he was able to shovel snow. He testified that his neighbors had shoveled for him until he bought a power snow "thrower" to push.

24. Respondents have produced clear and convincing evidence to overcome the DIME opinion of Dr. Fry that Claimant suffered a 31% whole person impairment rating as a result of his admitted left upper extremity injury. Initially, on October 10, 2017 Claimant was operating a pneumatic industrial forklift while working for Employer when he lost control of the machine and pinned his left hand between the forklift and a metal wall. He suffered fractures of his left thumb proximal phalanx and second metacarpal. Claimant subsequently underwent left hand and left shoulder surgeries. The shoulder surgery addressed Claimant's left, massive, full-thickness, acute rotator cuff tear. After an MRI revealed an intact rotator cuff, Claimant subsequently reported an increase in left shoulder symptoms that included ongoing weakness. After a subsequent left shoulder MRI revealed a recurrent rotator cuff tear, Dr. Faulkner recommended a reverse left total shoulder arthroplasty. By May 12, 2020 ATP Dr. Lugliani determined that Claimant had reached MMI. He assigned Claimant a 16% permanent impairment rating for the left hand, 3% for the left wrist and 10% for the left shoulder for a total 27% left upper extremity impairment as a result of his October 10, 2017 industrial injuries.

25. DIME Dr. Fry agreed that Claimant had reached MMI on May 12, 2020. He noted that it was appropriate for Claimant to have a reverse shoulder arthroplasty if he elected. However, Dr. Fry did not address causation regarding the proposed surgery. Dr. Fry assigned Claimant a 24% permanent impairment of the left hand. He also assigned Claimant a 10% impairment of the wrist that included 2% for loss of superficial radial nerve function. Moreover, Dr. Fry assigned a 2% impairment for the left elbow based on range of motion deficits. Finally, Dr. Fry assigned a 26% impairment of the left shoulder that included a 12% upper extremity rating for crepitus. Combining the ratings yields an overall 52% left upper extremity scheduled rating that converts to a 31% whole person impairment.

26. The record reveals that Respondents have produced clear and convincing evidence that Dr. Fry's impairment determination is incorrect. Initially, neither ATP Dr. Lugliani nor Dr. Lesnak assigned Claimant an impairment rating for his left elbow ulnar neuropathy. The record reflects that Claimant's elbow symptoms and diagnoses are unrelated to the occupational injury of October 10, 2017. The complaints warranting the diagnostic testing for the left elbow occurred more than two and one-half years after the original work injury. Moreover, the work injury was limited to the hand, fingers and left shoulder. Although Claimant testified that he developed left elbow symptoms as a result of his October 10, 2017 industrial injury, his comments are inconsistent with the medical records. Importantly, Dr. Fry failed to note a causal connection between the October 10, 2017 industrial injury and the subsequent emergence of left elbow symptoms. As Dr.

Lesnak noted, the mechanism of injury that involved the crushing of the left hand "would be completely inconsistent with development of a left ulnar neuropathy at the elbow." Based on the medical records and persuasive opinion of Dr. Lesnak, Respondents have produced unmistakable evidence free from serious or substantial doubt that Dr. Fry's assignment of a 2% left elbow impairment rating as a result of Claimant's October 10, 2017 industrial injury is incorrect.

27. Because Respondents' have carried the initial burden of overcoming Dr. Fry's impairment rating by clear and convincing evidence, the Claimant's correct rating is a matter of fact based upon the lesser burden of a preponderance of the evidence. The record reveals that Dr. Fry also erred in assigning a 12% upper extremity rating for crepitus of Claimant's left shoulder. Neither ATP Dr. Lugliani nor Dr. Lesnak assigned Claimant an impairment rating for left shoulder crepitus. Dr. Lesnak testified that his shoulder rating and the rating of Dr. Lugliani are "pretty similar." Dr. Lugliani and Dr. Lesnak appropriately limited the impairment for the left shoulder solely to range of motion deficits. Accordingly, as Dr. Lugliani determined, Claimant suffered a 10% impairment for his left shoulder based on range of motion deficits. Furthermore, despite Dr. Lesnak's testimony, the record reveals that Claimant suffered a 3% left wrist impairment as a result of his work injury. Dr. Lugliani noted that Claimant warranted a 3% permanent impairment for the left wrist based on flexion/extension range of motion deficits. Dr. Fry also assigned a left wrist impairment rating based on range of motion deficits.

28. Reviewing the record and considering the impairment ratings assigned by Drs. Lugliani, Fry and Lesnak, Claimant suffered a total 25% left upper extremity rating as a result of his October 10, 2017 work injury. Specifically, Claimant suffered a 16% left hand impairment, a 3% left wrist rating and a 10% left shoulder impairment. Although Dr. Lugliani calculated a 27% total left upper extremity rating for the preceding impairments, Table 2 of the *AMA Guides* reveals that the 19% rating for the left hand and wrist converts to 17% of the upper extremity. The 17% upper extremity rating for Claimant's left hand and wrist, combined with the 10% shoulder rating yields a total 25% left upper extremity impairment rating.

29. Claimant has failed to demonstrate that it is more probably true than not that the reverse shoulder arthroplasty recommended by Dr. Faulkner is reasonable, necessary and causally related to his October 10, 2017 admitted industrial injury. The record reveals Claimant initially underwent left shoulder surgery on December 12, 2017 to address his left massive, full-thickness, acute rotator cuff tear caused by his industrial accident. On April 23, 2018 Claimant underwent a repeat left shoulder MRI. The imaging revealed that the rotator cuff repair appeared to be intact. Although Claimant's left shoulder symptoms initially improved, his condition subsequently began to worsen. On May 6, 2019 Claimant underwent another left shoulder MRI that revealed a recurrent rotator cuff tear and Dr. Faulkner recommended a reverse left total shoulder arthroplasty. However, Dr. Faulkner did not address causality regarding the recommended surgery.

30. Dr. Lesnak persuasively explained that the requested left shoulder surgery is not related to the October 10, 2017 work injury. Claimant achieved MMI following his initial surgery, never returned to work and continued to use his left upper extremity for

activities of daily living. Notably, Claimant's rotator cuff repair was intact 4½ months after surgery. The record reflects that the new pathology relating to the new rotator cuff tear is not a result of the October 10, 2017 work injury. Dr. Lesnak's opinion is consistent with the medical records from Claimant's treating physicians and surgeons who noted he does not really have any significant pain or require the use of pain medication despite the re-tear. Moreover, while surgery has been recommended, neither Claimant's ATP, surgeon nor Dr. Fry have specified that the need for surgery is causally related to the initial work injury. Although the medical records document a rotator cuff re-tear, there is a lack of persuasive medical evidence to support a causal connection between the new tear and the original work injury. Accordingly, Claimant's request for a left reverse shoulder arthroplasty is denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

Overcoming the DIME

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any

subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAO, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAO, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAO, Apr. 16, 2008).

6. A DIME physician's opinions concerning MMI and impairment carry presumptive weight pursuant to §8-42-107(8)(b)(III), C.R.S.; *see Yeutter v. Industrial Claim Appeals Office*, No. 18CA0498 (Apr. 11, 2019) 2019 COA 53. The statute provides that "[t]he finding regarding [MMI] and permanent medical impairment of an independent medical examiner in a dispute arising under subparagraph (II) of this paragraph (b) may be overcome only by clear and convincing evidence." *Id.* Subparagraph (II) is limited to parties' disputes over "a determination by an authorized treating physician on the question of whether the injured worker has or has not reached [MMI]." §8-42-107(8)(b)(II). "Nowhere in the statute is a DIME's opinion as to the cause of a claimant's injury similarly imbued with presumptive weight." *See Yeutter*, 2019 COA 53 ¶ 18. Accordingly*,* a DIME physician's opinion carries presumptive weight only with respect to MMI and impairment. *Id.* at ¶ 21.

7. "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAO, Nov. 17, 2000).

8. If a party has carried the initial burden of overcoming the DIME physician's impairment rating by clear and convincing evidence, the ALJ's determination of the correct rating is then a matter of fact based upon the lesser burden of a preponderance of the evidence. *See Deleon v. Whole Foods Market, Inc*., WC 4-600-47 (ICAO, Nov. 16, 2006). When applying the preponderance of the evidence standard the ALJ is "not required to dissect the overall impairment rating into its numerous component parts and determine whether each part or sub-part has been overcome by clear and convincing evidence." *Deleon v. Whole Foods Market, Inc*., WC 4-600-47 (ICAO, Nov. 16, 2006). When the ALJ determines that the DIME physician's rating has been overcome, the ALJ may independently determine the correct rating. *Lungu v. North Residence Inn*, WC 4-

561-848 (ICAO, Mar. 19, 2004). An ALJ's statutory power to render evidentiary decisions does not disappear merely because the ATP and the DIME doctor agree that a claimant has not reached MMI. An ALJ may thus determine whether a claimant has reached MMI and assign an impairment rating as a question of fact. *Destination Maternity and Liberty Mutual Insurance Company v. Burren*, 19SC298 (Colo. May 18, 2020); *see Niedzielski v. Target Corporation*, WC 5-036-773-001 (ICAO, Mar. 9, 2020) (when an ALJ determines that a DIME opinion has been overcome, the issue of the claimant's correct impairment rating becomes a question of fact and the ALJ may calculate the impairment based upon a preponderance of the evidence).

9. As found, Respondents have produced clear and convincing evidence to overcome the DIME opinion of Dr. Fry that Claimant suffered a 31% whole person impairment rating as a result of his admitted left upper extremity injury. Initially, on October 10, 2017 Claimant was operating a pneumatic industrial forklift while working for Employer when he lost control of the machine and pinned his left hand between the forklift and a metal wall. He suffered fractures of his left thumb proximal phalanx and second metacarpal. Claimant subsequently underwent left hand and left shoulder surgeries. The shoulder surgery addressed Claimant's left, massive, full-thickness, acute rotator cuff tear. After an MRI revealed an intact rotator cuff, Claimant subsequently reported an increase in left shoulder symptoms that included ongoing weakness. After a subsequent left shoulder MRI revealed a recurrent rotator cuff tear, Dr. Faulkner recommended a reverse left total shoulder arthroplasty. By May 12, 2020 ATP Dr. Lugliani determined that Claimant had reached MMI. He assigned Claimant a 16% permanent impairment rating for the left hand, 3% for the left wrist and 10% for the left shoulder for a total 27% left upper extremity impairment as a result of his October 10, 2017 industrial injuries.

10. As found, DIME Dr. Fry agreed that Claimant had reached MMI on May 12, 2020. He noted that it was appropriate for Claimant to have a reverse shoulder arthroplasty if he elected. However, Dr. Fry did not address causation regarding the proposed surgery. Dr. Fry assigned Claimant a 24% permanent impairment of the left hand. He also assigned Claimant a 10% impairment of the wrist that included 2% for loss of superficial radial nerve function. Moreover, Dr. Fry assigned a 2% impairment for the left elbow based on range of motion deficits. Finally, Dr. Fry assigned a 26% impairment of the left shoulder that included a 12% upper extremity rating for crepitus. Combining the ratings yields an overall 52% left upper extremity scheduled rating that converts to a 31% whole person impairment.

11. As found, the record reveals that Respondents have produced clear and convincing evidence that Dr. Fry's impairment determination is incorrect. Initially, neither ATP Dr. Lugliani nor Dr. Lesnak assigned Claimant an impairment rating for his left elbow ulnar neuropathy. The record reflects that Claimant's elbow symptoms and diagnoses are unrelated to the occupational injury of October 10, 2017. The complaints warranting the diagnostic testing for the left elbow occurred more than two and one-half years after the original work injury. Moreover, the work injury was limited to the hand, fingers and left shoulder. Although Claimant testified that he developed left elbow symptoms as a result of his October 10, 2017 industrial injury, his comments are inconsistent with the medical records. Importantly, Dr. Fry failed to note a causal connection between the October 10,

2017 industrial injury and the subsequent emergence of left elbow symptoms. As Dr. Lesnak noted, the mechanism of injury that involved the crushing of the left hand “would be completely inconsistent with development of a left ulnar neuropathy at the elbow.” Based on the medical records and persuasive opinion of Dr. Lesnak, Respondents have produced unmistakable evidence free from serious or substantial doubt that Dr. Fry’s assignment of a 2% left elbow impairment rating as a result of Claimant’s October 10, 2017 industrial injury is incorrect.

12. As found, because Respondents’ have carried the initial burden of overcoming Dr. Fry’s impairment rating by clear and convincing evidence, the Claimant’s correct rating is a matter of fact based upon the lesser burden of a preponderance of the evidence. The record reveals that Dr. Fry also erred in assigning a 12% upper extremity rating for crepitus of Claimant’s left shoulder. Neither ATP Dr. Lugliani nor Dr. Lesnak assigned Claimant an impairment rating for left shoulder crepitus. Dr. Lesnak testified that his shoulder rating and the rating of Dr. Lugliani are “pretty similar.” Dr. Lugliani and Dr. Lesnak appropriately limited the impairment for the left shoulder solely to range of motion deficits. Accordingly, as Dr. Lugliani determined, Claimant suffered a 10% impairment for his left shoulder based on range of motion deficits. Furthermore, despite Dr. Lesnak’s testimony, the record reveals that Claimant suffered a 3% left wrist impairment as a result of his work injury. Dr. Lugliani noted that Claimant warranted a 3% permanent impairment for the left wrist based on flexion/extension range of motion deficits. Dr. Fry also assigned a left wrist impairment rating based on range of motion deficits.

13. As found, reviewing the record and considering the impairment ratings assigned by Drs. Lugliani, Fry and Lesnak, Claimant suffered a total 25% left upper extremity rating as a result of his October 10, 2017 work injury. Specifically, Claimant suffered a 16% left hand impairment, a 3% left wrist rating and a 10% left shoulder impairment. Although Dr. Lugliani calculated a 27% total left upper extremity rating for the preceding impairments, Table 2 of the *AMA Guides* reveals that the 19% rating for the left hand and wrist converts to 17% of the upper extremity. The 17% upper extremity rating for Claimant’s left hand and wrist, combined with the 10% shoulder rating yields a total 25% left upper extremity impairment rating.

Medical Benefits

14. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

15. As found, Claimant has failed to demonstrate by a preponderance of the evidence that the reverse shoulder arthroplasty recommended by Dr. Faulkner is reasonable, necessary and causally related to his October 10, 2017 admitted industrial injury. The record reveals Claimant initially underwent left shoulder surgery on December 12, 2017 to address his left massive, full-thickness, acute rotator cuff tear caused by his industrial accident. On April 23, 2018 Claimant underwent a repeat left shoulder MRI. The imaging revealed that the rotator cuff repair appeared to be intact. Although Claimant's left shoulder symptoms initially improved, his condition subsequently began to worsen. On May 6, 2019 Claimant underwent another left shoulder MRI that revealed a recurrent rotator cuff tear and Dr. Faulkner recommended a reverse left total shoulder arthroplasty. However, Dr. Faulkner did not address causality regarding the recommended surgery.

16. As found, Dr. Lesnak persuasively explained that the requested left shoulder surgery is not related to the October 10, 2017 work injury. Claimant achieved MMI following his initial surgery, never returned to work and continued to use his left upper extremity for activities of daily living. Notably, Claimant's rotator cuff repair was intact 4½ months after surgery. The record reflects that the new pathology relating to the new rotator cuff tear is not a result of the October 10, 2017 work injury. Dr. Lesnak's opinion is consistent with the medical records from Claimant's treating physicians and surgeons who noted he does not really have any significant pain or require the use of pain medication despite the re-tear. Moreover, while surgery has been recommended, neither Claimant's ATP, surgeon nor Dr. Fry have specified that the need for surgery is causally related to the initial work injury. Although the medical records document a rotator cuff re-tear, there is a lack of persuasive medical evidence to support a causal connection between the new tear and the original work injury. Accordingly, Claimant's request for a left reverse shoulder arthroplasty is denied and dismissed.

ORDER

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

1. Respondents have overcome Dr. Fry's DIME opinion regarding Claimant's permanent impairment. Claimant suffered a 25% left upper extremity impairment rating as a result of his October 10, 2017 industrial injury.

2. Claimant's request for a left reverse shoulder arthroplasty is denied and dismissed.

3. Any issues not resolved in this order are reserved for future determination.

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

DATED: March 11, 2021.

DIGITAL SIGNATURE:

Peter J. Cannici

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

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that the medical treatment recommended by David L. Reinhard, M.D. is reasonable, necessary, and causally related to her admitted industrial injury.

FINDINGS OF FACT

Prior History

1. In March 2016 Claimant sought treatment at Norris Chiropractic with 5/10 cervical spine pain and 4/10 headaches related to a motor vehicle accident ("MVA") that occurred on March 11, 2016. Claimant treated at Norris Chiropractic until September 7, 2016, when she was released from care with no further treatment recommended.

2. Claimant subsequently began treating at Complete Chiropractic in September 2017, reporting her history of a MVA one year prior, with current complaints of 7/10 neck pain with tingling and numbness, dizziness, ear and sinus problems, right shoulder pain, upper back pain, 3/10 low back pain that stopped her from walking, right TMJ pain, and poor circulation in her feet. Claimant treated for these conditions up to March 5, 2018.

3. On March 9, 2018, Claimant was involved in a second MVA where she was rear-ended by another vehicle. She reported experiencing immediate upper back pain with dizziness, light headedness, blurry vision, confusion, and numbness/tingling. Claimant sought treatment at Complete Chiropractic, where the chiropractor noted Claimant's symptoms from the 2016 MVA had resolved prior to this visit. Claimant attended 85 chiropractic visits from September 14, 2017 until January 28, 2019.

4. On January 17, 2019, Claimant saw her primary care physician ("PCP") at Clinix Health Services for a lump on her collarbone. She also requested refills of Sertraline and Breo Ellipta inhaler medication. Claimant reported neck pain and frequent severe headaches, as well as depression. She requested physical therapy for her neck pain.

5. As of January 28, 2019, Claimant continued to report neck, upper back and shoulder pain with nausea and general malaise discomfort. She rated her neck pain at 4/10 on both sides of her neck with limited range of motion. Claimant's chiropractor opined that it was reasonable to believe that Claimant's recovery may take longer than an average patient with an uncomplicated case. Trigger point injections and alternative treatment were recommended to resolve Claimant's ongoing issues.

January 31, 2019 Work Injury

6. On January 31, 2019, Claimant sustained an admitted industrial injury when she struck the left side of her forehead on a steel beam. Video footage of the incident shows Claimant turning around and running into a metal beam. Claimant did not fall to the ground or lose consciousness. Claimant is observed placing her hand on the left side of her head and walking off camera.

7. Claimant presented to her PCP on February 1, 2019 reporting hitting her head on a beam and not feeling like herself. The physician noted a contusion and bruise on the frontal region of Claimant's head. Claimant indicated she did not lose consciousness but felt dizzy. She reported neck pain and pain on the left side of her head associated with a headache. Claimant described feeling "out of it," dazed, slow, and off-balance. She described her head injury as aggravated by movement or bending over. Claimant's PCP diagnosed Claimant with a concussion without loss of consciousness. The PCP advised Claimant not to drive and to stay home from work for the remainder of the week and beginning of the following week.

8. Claimant was also seen on February 1, 2019 by her chiropractor who Claimant had a regular treatment schedule. The chiropractic notes reflect that Claimant hit her head on a metal beam at work. Claimant advised that she had been to the doctor and diagnosed with a concussion. She noted that she had a headache and was having trouble focusing and speaking coherently. Claimant complained of increased pain in her neck and mid back tingling head returned worse than it had been in months.

9. Claimant returned to her PCP on February 6, 2019 reporting some improvement but continued symptoms. Claimant complained of visual difficulties with her left eye, slurring and stuttering, numbness, and a tingling sensation in the left parietal region radiating down to her neck. Claimant's PCP kept her off of work.

10. Claimant subsequently underwent evaluation and treatment at authorized provider Concentra. Claimant presented to Kathryn Bird, D.O. on February 7, 2019 with complaints of neck and left shoulder pain, pain in the left side of her face, intermittent nausea, blurred vision in the left eye, dizziness worsened by bending and movement, photophobia, headache, speech disturbance, impaired balance, and poor coordination. Dr. Bird diagnosed Claimant with a head contusion and neck strain and referred her for physical therapy.

11. On February 12, 2019, Dr. Bird released Claimant to return to modified work of seated duty only.

12. On February 21, 2019, Claimant continued to complain of blurred vision, headaches, dizziness, tingling and numbness. Dr. Bird prescribed medication and ordered physical therapy for benign paroxysmal positional vertigo and bilateral strain of the neck muscle. Dr. Bird provided work restrictions requiring Claimant to be seated for

half of her shift and no squatting, kneeling, bending or climbing ladders the other half of the shift.

13. Dr. Bird reexamined Claimant on March 7, 2019. Claimant had ongoing complaints of constant headache, dizziness, confusion, balance issues, confusion, problems with conversing, forgetfulness, and light sensitivity. Claimant informed Dr. Bird that she had a history of two prior rear-end MVAs with chiropractic care, the most recent in March of 2018, and had been receiving medical care for her neck prior to the current work injury. Dr. Bird referred Claimant to John Sacha, M.D. for evaluation and treatment of a whiplash injury to her neck. She continued Claimant on work restrictions.

14. Dr. Sacha first evaluated Claimant on March 20, 2019. Claimant reported left-sided neck pain, headaches, blurry vision, dizziness and photophobia. Dr. Sacha found Claimant exhibited good concentration, memory and attention to task, and was able to answer all questions without difficulty. He opined that there was a concern of a concussion, but that Claimant's symptoms were not consistent with a concussion, and instead were consistent with mild upper cervical facet syndrome or whiplash disorder. Dr. Sacha noted Claimant had a recent car accident with similar symptoms and opined that Claimant was likely experiencing an exacerbation of a pre-existing problem. Dr. Sacha diagnosed Claimant with cervical facet syndrome, posttraumatic in nature, whiplash associated disorder, and occipital neuralgia. He provided medications and ordered a cervical MRI.

15. On March 21, 2019, Dr. Bird referred Claimant for vestibular therapy.

16. At her initial vestibular therapy appointment on March 29, 2019, Claimant complained of constant cloudy vision in the left eye; intermittent double vision; left sided head face numbness, difficulty swallowing; intermittent stuttering, word finding difficulty; decreased memory; dizziness and confusion; and decreased sensitivity to light. She reported having difficulty with driving, reading, balance, household chores since she hit her head. The therapist assessed that Claimant presented with symptoms consistent with vestibular dysfunction, post concussive syndrome and cervicalgia.

17. Claimant returned to Dr. Sacha on May 1, 2019 with continued complaints of neck pain, headaches, lightheadedness and dizziness. Dr. Sacha noted that an April 27, 2019 cervical MRI showed evidence of straightening of Claimant's cervical lordosis consistent with a whiplash disorder and modest degenerative disc disease and facet spondylosis. Dr. Sacha recommended that Claimant undergo medial branch block injections bilaterally from C2-C5 and possibly radiofrequency ablation.

18. On June 3, 2019 Dr. Bird performed a neurologic exam and noted equivocal Romberg and tandem gait, cranial nerves grossly intact, normal gait and normal mental status. Dr. Bird referred Claimant for a head MRI and massage therapy.

19. On June 5, 2019, the parties agreed to a change of physician to Barton Goldman, M.D.

20. On June 24, 2019, Claimant reported continuing symptoms to Dr. Bird. She reported having fallen several times. Dr. Bird noted a normal neurologic exam.

21. Prior to examining Claimant, Dr. Goldman performed a comprehensive medical records review of records dating back to September 12, 2017. He prepared a report dated August 1, 2019. Dr. Goldman noted that prior to the work injury Claimant had ongoing chronic neck, thoracic and upper back pain with bilateral shoulder paresthesias for more than a year in the range of 4/10 and was in the process of a physical therapy referral for these conditions. He further noted prior complaints of numbness, tingling, dizziness, lightheadedness, blurry vision and confusion. Dr. Goldman remarked that the medical notes established "a pattern of passive modality and chiropractic overutilization with lack of clearly documented functional and symptomatic progress, as well as a possible proclivity on the part of the patient to overly emphasize a more proximate trauma within the context of prior musculoskeletal injuries and accidents." (Ex. A, p. 225).

22. Dr. Goldman opined that, as a result of the work injury, Claimant had (1) a concussion without loss of consciousness with a mild traumatic brain injury ("TBI") and complaints of residual short term memory, processing, left facial paresthesias, vestibular and visual deficits; (2) exacerbation of pre-existing chronic cervical strain and facet dysfunction that had returned to her pre-work injury baseline; (3) deconditioning; and (4) occupational situation. Dr. Goldman commented that he may not be the ideal authorized treating physician ("ATP") for Claimant, as his goal was aggressive and active physical rehabilitation, and he sensed Claimant wanted a physician with nurturing skills.

23. Dr. Goldman evaluated Claimant on August 8, 2019 and September 6, 2019. He noted that, based on Claimant's pain drawings and history, her physical examination was considered physiological with evidence of slowly improving mild residual balance and slower processing speed that may be post concussive or medication/anxiety/depression/somatization-related. He concluded that Claimant's neck issues probably pre-existed the work-related injury. Dr. Goldman opined that, until Claimant's post concussive complaints have been objectively clarified, Dr. Bird's placement of Claimant at MMI is premature. He opined that objective quantification of Claimant's post concussive symptoms would require neuropsychological and neuropsychometric testing, neuroontological workup, and neurological evaluation. Dr. Goldman agreed to supervise and evaluate the testing evaluations as an ATP if all parties were supportive of his treatment plan.

24. On August 20, 2019, Claimant returned to Dr. Bird with complaints of frequent headaches with nausea, balance issues, headaches on the left side and near each temple, memory issues, and confusion. On neurologic examination Claimant demonstrated normal gait, normal heel-toe test, normal balance, normal mental status, intact cranial nerves, and normal sensation to light touch. Dr. Bird released Claimant at

maximum medical improvement (“MMI”) on August 20, 2019 with a return to full duty work. She recommended six sessions of vestibular therapy as maintenance treatment.

25. On September 17, 2019, Dr. Goldman requested authorization for Dr. Hammerberg to conduct a neurological evaluation of post concussive headaches and “fullness” increase of intracerebral pressure; for Dr. Alan Lipkin to evaluate Claimant for dizziness/balance issues; for Dr. Jennifer Geigo or Dr. Thwaites to conduct a complete neuropsychological and neuropsychometric evaluation for post concussive symptoms; and for Dr. Drucker, Dr. Chester Roe or Dr. Ronald Wise to conduct ophthalmology or optometry evaluations.

26. On September 26, 2019, Respondents contested and denied the medical treatment referrals recommended by Dr. Goldman pursuant to WCRP Rule 16.

27. On October 7, 2019, Dr. Goldman formally discharged Claimant from his practice, noting that Respondents had denied his requests for evaluation and it was not an agreed upon situation in which all parties could work in harmony towards the best possible outcome as soon as possible. Dr. Goldman noted that he found sufficient and consistent presentation of symptoms that supported his recommendations and possible treatment prior to declaration of MMI. Dr. Goldman provided referrals to one of three physicians to serve as Claimant’s ATP: Dr. Reinhard, Dr. Gellrick or Dr. Macaulay.

28. Claimant requested a change of physician to Dr. Reinhard on October 16, 2019, which was granted by Respondents on October 29, 2019.

29. Claimant first presented to Dr. Reinhard on November 8, 2019. Dr. Reinhard noted Claimant had pre-existing neck issuing for which she was undergoing chiropractic care leading up to the work injury, and that by Claimant’s report, her pre-existing neck symptoms did not change after to the work injury. Dr. Reinhard opined that Claimant experienced head trauma on January 31, 2019 which resulted in a Grade 2 concussion with resulting post concussive syndrome. Claimant had neurocognitive complaints, vertigo and imbalance, mood changes with emotional flatness, photophobia, and cephalgia. Dr. Reinhard wanted to rule out cerebral dysfunction. He also diagnosed posttraumatic headaches as a result of head trauma. Dr. Reinhard recommended an MRI of the head, formal neuropsychological testing, the continuation of vestibular therapy, and an ENT evaluation with Dr. Lipkin. He provided work restrictions of no ladders, no waiting on customers, and no activities requiring significant new learning, speed of task completion or multitasking.

30. On November 17, 2019, Allison Fall, M.D. performed an Independent Medical Examination (“IME”) at the request of Respondents. Dr. Fall reviewed Claimant’s medical records dating back to February 2, 2014. Claimant described her symptoms as a headache, unbalanced, memory issues, with 3-6/10 pain. Dr. Fall reviewed the medical records and noted a prior history of depression, chronic neck pain, dizziness, numbness and tingling, malaise, and muscle tension headaches. She diagnosed Claimant with a mild concussion and temporary exacerbation of cervicothoracic

myofascial pain, resolved. Dr. Fall remarked that psychosocial issues may be playing a role in Claimant's complaints, and that Claimant has a reliance on passive modalities with no medical explanation for her neurologic deficits. Dr. Fall opined that the requests for neurological, neuroontological, and neuropsychological or neuropsychometric evaluations or any other recommended care was not reasonable, necessary or related. She concluded Claimant reached MMI on August 5, 2019 without impairment.

31. On November 27, 2019, Respondents denied testing and referrals requested by Dr. Reinhard based on the opinions of Dr. Fall.

32. On December 19, 2019, Claimant attended a follow-up evaluation with Dr. Reinhard who limited Claimant's work hours to 4 hours/day, 4 days/week with no ladders, no waiting on customers, and no significant cognitive demands in the area of new learning, multitasking and speed of task completion. Dr. Reinhard noted Claimant continued to experience numerous post concussive symptoms. He continued to recommend an ENT consultation for a vestibular workup, neuropsychological testing, a head MRI, and vestibular therapy.

33. Claimant returned to Dr. Reinhard on March 6, 2020. He reviewed a brain MRI Claimant paid for personally and noted that the MRI was normal aside from chronic microvascular changes. Dr. Reinhard also responded to questions from Claimant's counsel after reviewing Claimant's pre-existing chiropractic records as well as the reports of Dr. Goldman and Dr. Fall. Dr. Reinhard continued to opine that Claimant's work-related diagnosis is a Grade 2 concussion with resultant post-concussion syndrome including neurocognitive complaints, vertigo and imbalance, changes in mood, photophobia, and post traumatic headaches. Dr. Reinhard disagreed with Dr. Fall that Claimant reached MMI and he continued to recommend formal neuropsychological testing, ENT consultation with vestibular testing, a head MRI, and additional vestibular therapy. Dr. Reinhard noted that, although Claimant had been involved in two prior rear-end MVAs, she did not sustain a concussion in either of those accidents. He further noted that Claimant's concussion was a direct result of the work-related head trauma sustained on January 31, 2019. Dr. Reinhard opined that additional workup and treatment should be performed to further evaluate Claimant's complaints as opposed to assuming Claimant's complaints are non-physiologic and inconsequential. Dr. Reinhard stated that the recommendations made by himself and Dr. Goldman were consistent with the Colorado Division of Workers Compensation Medical Treatment Guidelines and should be pursued prior to placing Claimant at MMI. Dr. Reinhard maintained Claimant's work restrictions.

34. On July 13, 2020, Dr. Fall issued an addendum to her IME report after reviewing additional medical records, video footage of the work incident, and surveillance video of Claimant. Dr. Fall continued to opine that Claimant's work-related injury consisted of a left forehead contusion with possible mild temporary exacerbation of pre-existing cervical myofascial pain. She opined that Claimant's continued reported symptoms were not related to the work injury and were inconsistent with Claimant's presentation on surveillance footage.

35. On August 19, 2020, Dr. Fall issued a second addendum report after reviewing the February 11, 2020 MRI report. Dr. Fall opined that the MRI indicated a chronic microangiopathic ischemic, otherwise known as microvascular disease, which are changes in the walls of the blood vessels of the brain and can be asymptomatic and can also cause complaints consistent with Claimant's current complaints of cognitive impairment, balance problems, and dementia-like symptoms. She concluded that those changes could be responsible for Claimant's current complaints. She opined that the chronic microangiopathic ischemic changes do not have any relation to Claimant's January 31, 2019 injury, explaining that they are not caused by hitting one's head. She noted that the cause of microangiopathic ischemic changes is often multifactorial, and risk factors include age, hypertension, diabetes and smoking.

36. On August 21, 2020, Dr. Reinhard issued an addendum after reviewing Dr. Fall's August 19, 2020 report. While he agreed with Dr. Fall in her explanation of micro ischemic changes, he opined that micro ischemic changes are not the cause of Claimant's cognitive impairment, balance difficulties and mood changes. He indicated these findings on MRI are common in people over 60 years old, and Dr. Fall acknowledged they can be asymptomatic. Dr. Reinhard indicated that since Claimant was not experiencing these problems prior to the work injury, it is most probable that the ischemic changes were asymptomatic. He also noted that ischemic changes present slowly and over time, not suddenly. He indicated that the timing and nature of Claimant's symptoms are more consistent with work injury rather than the incidental finding of microangiographic ischemic changes found on the February 11, 2020 MRI.

37. Dr. Fall testified by post-hearing deposition as an expert in physical medicine and rehabilitation. Dr. Fall stated she reviewed the video footage of how the incident occurred and opined that Claimant did not suffer whiplash. She testified that the findings on her physical and neurologic examination of Claimant were normal. Dr. Fall noted that, although Claimant reported memory issues and provided some vague responses, she did not detect verbal word forming issues or comprehension issues. Claimant's balance and coordination were both good. Dr. Fall further noted that Dr. Goldman discussed somatoform disorder as a potential cause of Claimant's symptoms, and that she agreed with Dr. Goldman.

38. Dr. Fall testified that if Claimant did suffer a concussion as a result of the work injury, it was a mild concussion with an excellent prognosis given the lack of initial neurologic symptoms, the fact that she did not lose consciousness, and the lack of retrograde amnesia. Dr. Fall explained that symptoms from a mild concussion are expected to resolve within days or a few weeks with no permanency, barring some other pre-existing or stress/anxiety issues. Dr. Fall noted that anxiety, pain or whiplash from a MVA can resemble symptoms of a concussion, such as a headache, nausea and dizziness. She testified that a concussion does not require specific treatment beyond rest and time, and thus there is no indication for any further treatment for Claimant, including but not limited to the recommendations of Dr. Reinhard.

39. Dr. Fall reviewed Claimant's brain MRI and noted no acute findings, but did note chronic microvascular changes, which she explained is an issue present when blood and oxygen do not get to tips of vessels in the brain, common in older individuals. Dr. Fall further explained that, if this condition is symptomatic, it can cause memory and cognitive issues, mood changes, balance issues, and depression. Dr. Fall opined that the chronic microvascular changes seen on Claimant's MRI are idiopathic and were not caused or otherwise related to the work injury.

40. Claimant testified at hearing that, at the time of the work injury, she was finishing chiropractic treatment for her right side, directed at her neck, shoulders, and spine. Claimant testified that the character of her headaches changed after the work injury. She described her pre-injury headaches as general tension and her post-injury headaches as severe pain from temple to temple, resulting in imbalance and confusion. Claimant testified that, over time, everything has slowly improved, although she continues to have time limits on what she can do before she has to sit down. She stated that she currently does not have any neck issues because she is not performing heavy work and that her balance has improved. She explained that her imbalance issues comes with workload and stress. She testified that she has issues multitasking, confusion, and forgetfulness and comprehension. Claimant testified she experiences sharp pains through her temples, especially on the left side when there are loud noises. She explained that her pre-existing headaches stemmed from the right side. Claimant testified that her symptoms wax and wane depending on sleep and stress. She stated that prior to the work injury was able to perform her job duties.

41. Surveillance footage from March 11, 2020 documents Claimant working at a thrift store. She is observed standing and walking with no altered gait, removing small items from a shopping cart to a shelf and organizing clothing on clothing racks. Claimant also is observed walking to and getting into a vehicle, walking in a parking lot with a slightly altered gait, and carrying a wooden chair and putting the chair into the backseat of her vehicle. Surveillance footage from June 16, 2020 shows Claimant performing yardwork without assistance.

42. The ALJ finds the opinions of Drs. Reinhard and Goldman, as supported by the medical records and testimony, more credible and persuasive than the opinion of Dr. Fall.

43. Claimant proved it is more probable than not the treatment recommended by Dr. Reinhard is reasonable, necessary and related to the January 31, 2019 work injury.

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

CONCLUSIONS OF LAW

Generally

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

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

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

Medical Treatment

Respondents are liable to provide medical treatment that is causally related and reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012).

Claimant proved it is more probable than not the treatment recommended by Dr. Reinhard is reasonable, necessary and related to her January 31, 2019 work injury. Claimant's mechanism of injury is consistent with a head injury. Both Drs. Goldman and

Reinhard diagnosed Claimant with a concussion as a result of the work injury and post concussive symptoms. Dr. Goldman opined that objective quantification of Claimant's post concussive symptoms would require neuropsychological and neuropsychometric testing, neuroontological workup, and neurological evaluation. He continued to recommend evaluation and treatment when he discharged Claimant from his care. Dr. Goldman made his determinations and recommendations after having examined Claimant and performing a comprehensive review of Claimant's records pre-dating the work injury. Dr. Goldman noted, and was thus aware of, Claimant's prior complaints of numbness, tingling, dizziness, lightheadedness, blurry vision, confusion and headaches, yet continued to recommended additional evaluation and treatment as a result of the work injury. He credibly explained that he found sufficient and consistent presentation of symptoms supporting his recommendations.

Dr. Goldman's credible opinion provides support for the opinion and recommendations of Claimant's current ATP, Dr. Reinhard. Dr. Reinhard reviewed Claimant's records, including those of Dr. Goldman and the IME reports of Dr. Fall, which document Claimant's pre-existing conditions and complaints prior to the work injury. Subsequent to reviewing those records, Dr. Reinhard repeatedly continued to opine that Claimant required additional evaluation and treatment as a result of the work injury. Dr. Reinhard explained that, unlike the January 31, 2019 work injury, Claimant's prior MVAs did not result in concussions. While Dr. Reinhard agrees with Dr. Fall that Claimant's brain MRI revealed micro ischemic changes, he credibly opined that the timing and nature of Claimant's symptoms are more consistent with the work injury rather than the incidental finding of microangiographic ischemic changes found on the February 11, 2020 MRI. Dr. Fall opined that the findings evidenced on MRI *could* cause some of Claimant's complaints. She did not opine that such findings were the more likely cause of Claimant's complaints.

Dr. Reinhard's recommendations appear in line with the Medical Treatment Guidelines for Traumatic Brain Injuries, Rule 17, Exhibit 2, which discuss imaging, neurological, neuropsychological, and neuroontological evaluation and treatment as accepted methods used in the diagnosis and management of traumatic brain injuries. Based on the credible and persuasive opinions of Drs. Reinhard and Goldman, such treatment is related to the work injury and is reasonably necessary to further define, cure and relieve Claimant's condition.

ORDER

1. The medical treatment recommended by Dr. Reinhard is reasonable, necessary and related to Claimant's January 31, 2019 work injury. Respondents shall authorize and pay for the neuropsychological testing, ENT consultation with vestibular testing, head MRI, and additional vestibular therapy, as ordered by Dr. Reinhard.

2. All matters not determined herein are reserved for future determination.

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

DATED: March 12, 2021

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Does the ALJ have jurisdiction to consider Claimant's request for medical benefits even though Dr. Thomas Centi stated Claimant was at MMI on August 4, 2020 and no DIME has taken place?

FINDINGS OF FACT

1. Claimant suffered an admitted injury to his left arm on February 17, 2020. He fell and struck his left hand on some metal shelving.

2. Dr. Thomas Centi at CCOM has been Claimant's primary ATP. Dr. Centi diagnosed contusions of the left hand and wrist.

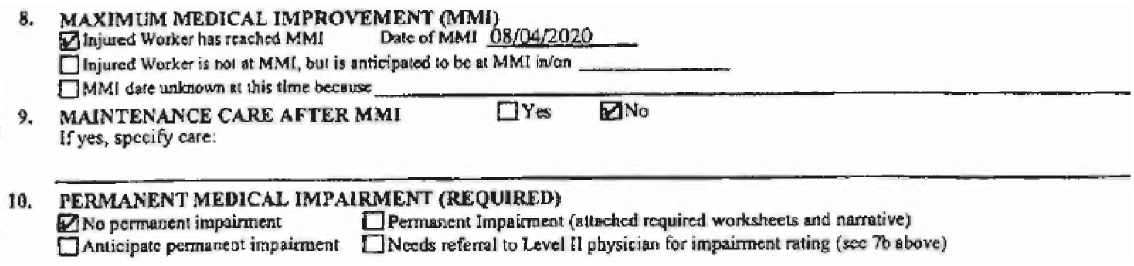
3. Claimant was referred to Dr. Karl Larsen, an orthopedic surgeon, who diagnosed a symptomatic carpal boss and tendon subluxation. On May 26, 2020, Dr. Larsen performed carpal boss excisions of the left index and left middle fingers.

4. On July 14, 2020, Dr. Larsen requested authorization for a second surgery, to include a left carpal tunnel release, revision ulnar neurolysis at the elbow with flexor/pronator lengthening, and possible nerve wrap. Dr. Larsen opined the surgery "appears directly related" to the work accident.

5. Dr. Centi's July 16, 2020 report states the surgery "does not appear to be related" to Claimant's industrial injury. Dr. Centi anticipated Claimant would reach MMI on August 18, 2020.

6. Dr. Jonathan Sollender performed a Rule 16 review for Respondent on July 19, 2020. Dr. Sollender opined the proposed surgery was not related to the work accident.

7. Claimant followed up with Dr. Centi on August 4, 2020. Claimant described ongoing pain and numbness in his left hand and wrist. Dr. Centi noted, "IME does not find CTS and cubital tunnel surgery related to contusion, now hand surgery is talking about a fusion, this does not seem related either." Dr. Centi released Claimant to regular duty with no need for further treatment. Dr. Centi completed a WC164 form on which he checked the following boxes related to MMI:



8. MAXIMUM MEDICAL IMPROVEMENT (MMI)
☑ Injured Worker has reached MMI Date of MMI 08/04/2020
□ Injured Worker is not at MMI, but is anticipated to be at MMI in/on ______________
□ MMI date unknown at this time because ______________

9. MAINTENANCE CARE AFTER MMI □ Yes ☑ No
If yes, specify care:

10. PERMANENT MEDICAL IMPAIRMENT (REQUIRED)
☑ No permanent impairment □ Permanent Impairment (attached required worksheets and narrative)
□ Anticipate permanent impairment □ Needs referral to Level II physician for impairment rating (see 7b above)

8. Respondent filed a Final Admission of Liability on August 28, 2020 based on Dr. Centi's August 4, 2020 report.

9. Claimant timely objected to the FAL and initiated the DIME process. Claimant also applied for a hearing on September 24, 2020, seeking approval of the surgery recommended by Dr. Larsen.

10. PALJ Tenreiro convened a Prehearing Conference on October 16, 2020 to address Respondent's motion to strike Claimant's Application for Hearing without prejudice and Claimant's motion to hold the DIME process in abeyance pending the outcome of the hearing. PALJ Tenreiro denied Respondent's motion because the issues required factual determinations by a "merits" ALJ. PALJ Tenreiro granted Claimant's motion and held the DIME process in abeyance "until the ALJ issues a final order."

11. The record contains conflicting opinions from multiple ATPs regarding whether Claimant is at MMI. Dr. Larsen does not think Claimant is at MMI and believes further treatment is reasonably needed to cure and relieve the effects of the industrial injury. Dr. Centi determined Claimant reached MMI on August 4, 2020 because he does not believe the recommended surgery is related to the work accident.

12. The ALJ lacks jurisdiction to adjudicate Claimant's entitlement to further medical treatment before the DIME process has been completed.

CONCLUSIONS OF LAW

Sections 8-42-107(8)(b)(I)-(III) provide:

> An authorized treating physician shall make a determination as to when the injured employee reaches maximum medical improvement . . . . If either party disputes a determination by an authorized treating physician on the question of whether the injured worker has or has not reached maximum medical improvement, an independent medical examiner may be selected . . . . A hearing on this matter shall not take place until the finding of the independent medical examiner has been filed with the division.

Taken together, these provisions establish that once an ATP places a claimant at MMI, a DIME is a "mandatory, jurisdictional prerequisite" to a hearing regarding additional medical treatment. *Whiteside v. Smith*, 67 P.3d 1240, 1246 (Colo. 2003).

Absent a completed DIME, the ALJ may not hear or decide any issue that constitutes an actual or constructive challenge to MMI. *Story v. Industrial Claim Appeals Office*, 910 P.2d 80 (Colo. App. 1995). "[A]fter MMI [is] declared, the ALJ lack[s] jurisdiction to award or deny medical benefits to cure and relieve the claimant's condition." *McCormick v. Exempla Healthcare*, W.C. No. 4-594-683 (January 27, 2006); *see also Eby v. Wal-Mart Stores Inc*., W.C. No. 4-350-176 (February 14, 2001) ("once an authorized treating physician places the claimant at MMI, an ALJ lacks jurisdiction to award additional medical benefits for the purposes of curing the industrial injury and assisting a claimant to reach MMI unless the claimant undergoes a DIME."); *Anderson-Capranelli v. Republic Industries, Inc*., W.C. No. 4-416-649 (November 25, 2002); *Cass v. Mesa County Valley School District*, W.C. No. 4-69-69 (August 26, 2005).

Claimant cites *Blue Mesa Forest v. Lopez*, 928 P.2d 831 (Colo. App. 1996) for the proposition the ALJ can resolve the competing MMI opinions of Dr. Centi and Dr. Larsen. But the situation in Claimant's case is governed by *Town of Ignacio v. Industrial Claim Appeals Office*, 70 P.3d 513 (Colo. App. 2002), which held that any ATP can put a claimant at MMI and trigger the DIME requirement. ALJs have jurisdiction to resolve conflicting or ambiguous opinions from *one* ATP but cannot resolve conflicts among *multiple* ATPs.

As found, Dr. Centi determined Claimant is at MMI because he does not think the recommended surgery is related to the work injury. Determining MMI "inherently" includes an assessment of what condition(s) or treatments are causally related to the work accident. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998). Dr. Centi is "an authorized treating physician" within the meaning of § 8-42-107(8)(b)(I)-(III). Accordingly, Claimant must go through the DIME process notwithstanding Dr. Larsen's contrary opinions regarding MMI and causation.

ORDER

It is therefore ordered that:

1. Claimant's September 24, 2020 Application for Hearing is dismissed without prejudice pending the DIME process.

2. The stay of the DIME is LIFTED and the DIME process hereby is REINSTATED.

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

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

DATED: March 12, 2021

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-979-139-002

I. ISSUES

1. Whether Claimant established by a preponderance of the evidence that the DW Respondents committed fraud thereby permitting Claimant to reopen his claim.

2. Whether Claimant established by a preponderance of the evidence that the DW Respondents violated § 8-43-203 (3)(b)(IV), C.R.S., by having nurse case managers attend Claimant's medical appointments without Claimant's consent, and whether penalties should be awarded pursuant to § 8-43-304, C.R.S.

3. Whether Claimant established by a preponderance of the evidence that the DW Respondents violated § 8-42-101 (3.6)(p)(II), C.R.S., by forcing Claimant into case management without Claimant's consent, and whether penalties should be awarded pursuant to § 8-43-304, C.R.S.

4. Whether Claimant established by a preponderance of the evidence that Dr. Macaulay violated § 8-43-203 (3)(b)(IV), C.R.S., by allowing nurse case managers to attend Claimant's medical appointments without Claimant's consent, and whether penalties should be awarded pursuant to § 8-43-304, C.R.S.

5. Whether Claimant established by a preponderance of the evidence that Dr. Macaulay violated § 8-47-203 (1), C.R.S., by allowing access to Claimant's medical file and records to a nurse case manager employed on Claimant's claim, and whether penalties should be awarded pursuant to § 8-43-304, C.R.S.

II. FINDINGS OF FACT

Claimant's March 4, 2015 Workers' Compensation Claim

1. Claimant is a 59-year-old man who began working for [Redacted] in approximately 1996 as a driver. Claimant sustained multiple admitted injuries when he slipped and fell on ice in the performance of his duties as an employee of [Redacted] on March 4, 2015.

2. Claimant has lived at the same address in Lakewood, Colorado for approximately 15 years without interruption ("Home Address"). Claimant resided at his Home Address at the time of his March 4, 2015 injury, receives his mail at that address and maintains no other address.

[Redacted]'s Employee Health Clinic

3. At all times relevant to this matter, [Redacted] maintained an employee health clinic on its premises (hereinafter the "DW Clinic"). The DW Clinic provided medical care to [Redacted] employees for work-related injuries and other medical services associated with [Redacted], including physicals, vision and hearing testing, commercial driver's license (CDL) certifications, and other medical issues.

4. During the relevant time frame from 2015 through 2017, [Redacted] employed nurses and a physician assistant who serves as the full-time staff of the DW Clinic. These employees included the health services manager/nursing supervisor, Dawn Cogan, R.N.; nurses Jessica Thompson, R.N., Patricia Holschuh, R.N, and Sue Baker, R.N.; and physician assistant Erin Lay, P.A. (collectively "DW Clinic Staff"). In addition, [Redacted] contracted with a physician who served as the authorized treating physician (ATP) for workers' compensation claimants, and provided other services to [Redacted] employees. For approximately 22 years, Dr. Macaulay filled this role, until sometime in late 2016 or early 2017, at which time Dr. Danahey assumed Dr. Macaulay's role at the DW Clinic. From at least March 2015 through the end of his tenure, Dr. Macaulay was typically physically present at the DW Clinic two days per week, (typically Mondays and Wednesdays) approximately five hours per day.

5. During the relevant time frame, when [Redacted] employees with work-related injuries ("Injured Workers") were seen in the DW Clinic, the standard practice was for a DW Clinic Staff member to be present in the examination room with Dr. Macaulay and the Injured Worker during the appointment. During these visits, the DW Clinic Staff member would observe the appointment and document Dr. Macaulay's orders, recommendations, referrals, and work restrictions.

6. DW Clinic Staff members attended appointments to facilitate certain functions they performed with respect to workers' compensation claims and to assist implementing Dr. Macaulay's orders, recommendations, and work restrictions.

7. These functions were fairly broad in scope and included scheduling Injured Workers' appointments with Dr. Macaulay; scheduling appointments with outside providers (such as physical therapy, imaging, and specialists); ordering prescriptions; communicating with pharmacies; and informing Injured Workers of the status of their appointments. The DW Clinic Staff communicated work restrictions to Injured Workers' supervisors to help assure [Redacted]'s compliance with the restrictions. DW Clinic Staff also notified supervisors of the dates of Injured Workers' appointments and referrals so the supervisors would be aware of the reasons for any absences due to work-related injuries. In addition, DW Clinic Staff fielded calls from Injured Workers and addressed Injured Workers' questions in person and over the phone.

8. DW Clinic Staff's duties also included contact with Insurer. These contacts included informing Insurer of Injured Workers' work restrictions, missed time, referrals, and recommended treatment, so Insurer could process claims and authorize benefits. In

some instances, DW Clinic Staff contacted Insurer to verify authorization of benefits for prescriptions, referrals, or treatment.

9. In general, one DW Clinic Staff member served as the “assigned nurse” for each workers’ compensation claim, and was primarily the individual involved in attending appointments and performing the functions described above. However, the “assigned nurse,” was not an official designation and other DW Clinic Staff members also were involved in the implementation of Injured Workers’ cases. Insurer had no input or involvement in the assignment of “assigned nurses” or the tasks performed by the “assigned nurses.” At times, DW Clinic Staff used the terms “case management” or “nurse case manager” in reference to functions performed with respect to a given case.

10. During the relevant time frame, the DW Clinic Staff documented their attendance at appointments and the functions performed in an electronic progress note format maintained by the DW Clinic (“Progress Notes”). (*See, e.g.*, Ex. 3, G, T, U). Within the Progress Notes, the DW Clinic Staff created individual notes labeled as, among other things, “Case Management,” “Dr. Exam,” “Phone Consult” and “Medication.” When a DW Clinic Staff member attended an appointment with Dr. Macaulay, the Progress Note entry was typically labeled as “Dr. Exam.”

11. The DW Clinic Staff are salaried employees of [Redacted] and their compensation was not affected by the type of patients they treated. That is, DW Clinic Staff compensation was unaffected by seeing workers’ compensation patients vs. non-workers’ compensation patients. None of the DW Clinic Staff was hired by, paid by, or received compensation from Insurer.

12. Dawn Cogan manages the DW Clinic, and was the day-to-day supervisor of Ms. Thompson, Ms. Holschuh, Ms. Lay and Ms. Baker. Dr. Macaulay did not have a supervisory role over the DW Clinic Staff nurses for employment purposes. Instead, the DW Clinic Staff worked under his direction with respect to implementing his plan of care, recommendations, referrals, prescriptions, and restrictions for Injured Workers. The DW Clinic Staff provided reasonable, necessary, and appropriate assistance to Dr. Macaulay in his role as the ATP for Injured Workers.

13. In his role at the DW Clinic, Dr. Macaulay exercised his independent medical judgment and decision making with respect to his assessment, diagnoses, treatment, recommendations, orders, and work restrictions for Injured Workers. The DW Clinic Staff had no authority to approve, reject or countermand Dr. Macaulay’s decision making and judgment. Dr. Macaulay documented his examination, assessment, treatment, recommendations, and decision making for each appointment with an Injured Worker in a written medical record on his own letterhead. Upon the completion of documentation, Dr. Macaulay provided a copy of his documentation to the DW Clinic Staff for inclusion in the Injured Workers’ medical record file.

Claimant's injury and course of treatment

14. On Wednesday, March 4, 2015, Claimant sustained an admitted injury to his lower back when he slipped and fell on ice in the course and scope of his employment. As a result of this injury, Claimant sustained injuries to his head, hip, neck, and back. Ms. Cogan went to the site of Claimant's injury and stayed with him until an ambulance arrived and took Claimant to Denver Health.

15. On March 4, 2015, Claimant was taken to Denver Health to evaluated and was discharged. Ms. Baker met with Claimant and advised him to follow up at the DW Clinic the following day. (Ex. 3).

16. On March 4, 2015, Claimant's injury was reported to Insurer. (Ex. 10).

17. Claimant was referred to Joel Cooperman, D.O., whom he saw on March 5, 2015. (Ex. 6). (The ALJ infers that Claimant was referred to Dr. Cooperman because March 5, 2015 was a Thursday, and Dr. Macaulay was not scheduled to be in the DW Clinic on that day). Dr. Cooperman evaluated Claimant and prescribed hydrocodone-acetaminophen (Vicodin). (Ex. 6).

18. On the morning of March 5, 2015, Ms. Baker spoke with an adjuster at Insurer, advised Insurer of Claimant's injury, that he would follow with a "DO" (presumably Dr. Cooperman), and would see Dr. Macaulay on Monday. Ms. Baker also advised Claimant was expected to be released to return to work on Monday, but would know more after the visit with Dr. Macaulay. (Ex. 10).

19. The following morning, March 6, 2015, Claimant began feeling sick, contacted the DW Clinic and spoke to Ms. Baker. Ms. Baker contacted Dr. Macaulay who ordered Claimant to go to Guardian Urgent Care for evaluation. Claimant was seen at Guardian Urgent Care, where he was advised his nausea and vomiting was likely a side effect of a mild concussion. Claimant called Ms. Baker at the DW Clinic to report the results of his visit at Guardian Urgent Care. (Ex. 4).

20. On Monday, March 9, 2015, Claimant reported to the DW Clinic, where he met with Dr. Macaulay. Dr. Macaulay documented his appointment with Claimant in a medical record. (Ex. 2). Ms. Baker was present in the examination room with Claimant and Dr. Macaulay, and created a note in the DW Clinic's electronic "progress notes." Ms. Baker's record is labeled "Dr. Exam on 3/9/2015 @ 06:64." Ms. Baker's note states: "Went to 3/6, told he has mild concussion. Felt better able to move around yesterday, today back and hip more painful again today. Injury leave 3/5, 6, 9 WC 3/10 Recheck 3/11." (Ex. 3)

21. On March 10, 2015, Claimant called the DW Clinic and spoke to Ms. Thompson. Claimant reported, among other things, he had seen Dr. Cooperman that morning, and Dr. Cooperman recommended Claimant stay off work the rest of the week. Ms. Thompson advised Claimant Dr. Macaulay would make the determination of Claimant's return to work date, and noted Claimant had an appointment with Dr. Macaulay the following day. (Ex. 3).

22. On March 11, 2015, Claimant saw Dr. Macaulay at the DW Clinic.[1] Again, Dr. Macaulay documented his appointment in a medical record. (Ex. 2). Ms. Baker was present in the examination room and created a note in the DW Clinic's electronic progress notes. Ms. Baker's note is labeled "Dr. Exam on 3/11/2015 @ 9:30." Ms. Baker's note states: "F/U appt with Dr Macaulay, less nausea, no vomitting [sic] for 2 days. Saw Dr Cooperman yesterday, he did not manip SIJ due to muscle tightness, next appt. 3/17/15. To remain off work until 3/16/15. Recheck with Dr Macaulay 3/18/15. To call if any concerns in the meantime. T. Manshardt and supervisor, Jeff Chavez notified of time off." (Ex. 3).

23. On March 16, 2015, Claimant saw Dr. Macaulay. Again, Dr. Macaulay documented his appointment in a medical record. (Ex. 2). Ms. Baker was present in the examination room and prepared a Progress Notes labeled "Dr. Exam on 3/16/2015 @ 8:30." Ms. Baker's note states: "F/U appt with Dr Macaulay. Continue massage and OMT. Activity for comfort, avoid stressful activities. Recheck in 1 wk." (Ex. 3).

24. On March 23, 2015, Claimant saw Dr. Macaulay, and Dr. Macaulay documented his appointment in a medical record. (Ex. 2). Ms. Baker was present in the examination room with Claimant and Dr. Macaulay, and created a Progress Note labeled "Dr. Exam on 3/23/2015 @ 7:15." Ms. Baker's note states: "F/U appt with Dr Macaulay. Continue OMT with Dr Cooperman and MFR with Terry Winter. Restricted duty, no lifting > 30lbs, 20lbs repetitively, avoid stressful activities. Recheck in 1 wk." (Ex. 3).

25. Claimant attended a follow up appointment with Dr. Macaulay on April 1, 2015. (Ex. 2). As with the previous appointments, Ms. Baker was present in the examination room, and created a Progress Note. (Ex. 3).

26. On April 15, 2015, Claimant saw Dr. Macaulay, and Dr. Macaulay documented his appointment in a medical record. (Ex. 2). Ms. Baker was present in the examination room with Claimant and Dr. Macaulay, and created Progress Note labeled "Dr. Exam on 4/15/2015 @ 9:36" Ms. Baker's note states: "Employee to clinic for visit with Dr. Macaulay. Recheck with Cooperman 4/21/15. Saw massage therapist yesterday. Feels much better after visit. He will continue to stretch. He has some difficulties with memory at this time. Rarely. He is improving daily. Ibuprofen prn. Difficulty with climbing in trucks that are to [sic] tall. Recheck in 2 weeks. Continue restrictions. Massage x 2 more times." (Ex. 3).

27. Claimant attended a follow up appointment with Dr. Macaulay on April 29, 2015. Dr. Macaulay referred Claimant to Gary Gutterman, M.D., for postconcussive stress-related issues. (Ex. 2). Erin Lay, PA, was present in the examination room, and created a Progress Note labeled "Dr. Exam on 4/29/2015 @7:32." Ms. Lay's note states: "F/U with Macaulay. Seeing OMT. Stopped massage/MFT and buttock/hip sx increased; has had to use narcotics. Headaches improving but notes feeling uneasy or "startled" at times. Continue OMT; restart Massage/MFR twice weekly. HEP. Message left for Terry winter

[1] All of Claimant's appointments with Dr. Macaulay took place at the DW Clinic.

for Dr. Macaulay. Refer to Dr. Gutterman, Psychiatry; message left. Continue current restrictions. Recheck 2 weeks with Dr. Macaulay." (Ex. 3).

28. Claimant saw Dr. Macaulay on May 6, 2015. (Ex. 2). Ms. Lay was present in the examination room, and created Progress Note. Ms. Lay's note, labeled "Dr. Exam on 5/6/2015 @9:30" states: "F/u with Dr. Macaulay. D/C OMT. Scheduled with Dr. Gutterman 5/18/15 @ 9:00 am. Continue MFR. Continue same restrictions. Recheck 1 week." (Ex. 3).

29. Claimant saw Dr. Macaulay on May 6, 2015. (Ex. 2). Ms. Lay was present in the examination room, and created a Progress Note. Ms. Lay's note, labeled "Dr. Exam on 5/6/2015 @7:32" states: "F/U with Macaulay. Seeing OMT. Stopped massage/MFT and buttock/hip sx increased; has had to use narcotics. Headaches improving but notes feeling uneasy or "startled" at times. Continue OMT; restart Massage/MFR twice weekly. HEP. Message left for Terry winter for Dr. Macaulay. Refer to Dr. Gutterman, Psychiatry; message left. Continue current restrictions. Recheck 2 weeks with Dr. Macaulay." (Ex. 3).

30. Claimant attended follow up appointments with Dr. Macaulay on May 11, 2015, May 15, 2015, May 27, 2015, June 15, 2015, and June 29, 2015. (Ex. 2). Ms. Baker was present at visits on May 27, 2015, June 15, 2015, and June 29, 2015. Ms. Baker's notes from these visits generally document Dr. Macaulay's orders, prescriptions, referrals, and work restrictions. (Ex. 3).

31. Claimant saw Dr. Macaulay on May 6, 2015. (Ex. 2). Ms. Lay, was present in the examination room, and created a Progress Note labeled "Dr. Exam on 5/6/2015 @7:32." Ms. Lay's note states: "F/U with Macaulay. Seeing OMT. Stopped massage/MFT and buttock/hip sx increased; has had to use narcotics. Headaches improving but notes feeling uneasy or "startled" at times. Continue OMT; restart Massage/MFR twice weekly. HEP. Message left for Terry winter for Dr. Macaulay. Refer to Dr. Gutterman, Psychiatry; message left. Continue current restrictions. Recheck 2 weeks with Dr. Macaulay." (Ex. 3).

32. On July 13, 2015, Claimant had a follow up visit with Dr. Macaulay. (Ex. 2). Ms. Baker was present in the examination room, and created a Progress Note. Ms. Baker's note, labeled "Dr. Exam on 7/13/2015 @7:00" states: "F/U apt with Dr Macaulay. Schedule return visit to Dr Gutterman. Biofeedback with Terry Teis when [Claimant] s ready. Restricted duty, ok to try driving large trucks, no lifting > 40lbs, 20lbs repetitively MFR 1x/wk. Recheck in 2 wks." (Ex. 3).

33. On July 27, 2015, Claimant had a follow up visit with Dr. Macaulay. (Ex. 2). Ms. Thompson was present in the examination room, and created a Progress Note. Ms. Thompson's note, labeled "Dr. Exam on 7/27/2015 @7:31" states: "F/u with Dr. Macaulay. [Claimant] states last week he was in excavator when machine jerked and he hit his head against back window while head turned to left. Now c/o pain to left neck/shoulder areas. [Claimant is now driving large trucks on the highway with no

difficulty. Dean states he is off Xanax. Count MFR. F/u with Gutterman in about six weeks. No restrictions. Recheck 3 weeks." (Ex. 3)

34. On August 17, 2015, Claimant had a follow up visit with Dr. Macaulay. (Ex. 2). Ms. Thompson was present in the examination room, and created a Progress Note. Ms. Thompson's note, labeled "Dr. Exam on 8/17/2015 @7:18" states: "Recheck with Dr. Macaulay; Cont MFR with Terry Winter once a week. F/u with Gutterman next month. Increase Lexapro to 20mg daily. No restrictions. Recheck 2 weeks." (Ex. 3)

35. Claimant attended follow up appointments with Dr. Macaulay on August 31, 2015, September 16, 2015, September 21, 2015, September 30,2015, October 7, 2015, and October 14, 2015. (Ex. 2). Ms. Thompson was present at each visit. Ms. Thompson's Progress Notes from these visits generally document Dr. Macaulay's orders, prescriptions, referrals, and work restrictions. In addition, Ms. Thompson documented her calls to outside providers regarding scheduling appointments and referrals. (Ex. 3).

36. On October 21, 2015, Claimant had a follow up visit with Dr. Macaulay. (Ex. 2). Ms. Thompson was present in the examination room, and created a Progress Note labeled "Dr. Exam on 10/21/2015 @7:10." The note states: "F/u with Dr. Macaulay. Refer to Dr. Goldman, left VM. Refer MRI thoracic and lumbar spine, scheduled at Health Images at Cherry Hills 10/26/15. Refer EMG/NCVS, left VM with Dr. Treihaft's office. No restrictions." (Ex. 3).

37. On November 16, 2015, Claimant had a follow up visit with Dr. Macaulay. (Ex. 2). Ms. Thompson was present in the examination room, and created a Progress Note labeled "Dr. Exam on 11/16/2015 @7:03," which states: "F/u with Dr. Macaulay. Will see Dr. Goldman 11/20. EMG/NCVS 11/23/. F/u with Dr. Gutterman. No restrictions. Recheck 11/25/15." (Ex. 3).

38. On December 7, 2015, Claimant saw Dr. Macaulay for a follow up visit. (Ex. 2). Ms. Thompson was present in the examination room, and created a Progress Note. Ms. Thompson's note, labeled "Dr. Exam on 12/7/2015 @7:05" states: "F/u with Dr. Macaulay. Cont PT and MFR. Restrictions of sitting for 1 hour max at a time, limit to one major load per day, Recheck 2-3 weeks." (Ex. 3).

39. Claimant attended follow up appointments with Dr. Macaulay on January 4, 2016, January 20, 2016, and February 3, 2016. (Ex. 2). Ms. Thompson was present the January 4, 2016 and January 20, 2016 visits, and Ms. Holschuh was present at the February 3, 2016 visit. The Progress Notes from these visits generally document Dr. Macaulay's orders, prescriptions, referrals, and work restrictions. In addition, calls to outside providers regarding scheduling appointments and referrals are documented. (Ex. 3).

40. On February 17, 2016, Claimant saw Dr. Macaulay for a follow up visit. (Ex. 2). Ms. Holschuh was present in the examination room, and created a Progress Note. Ms. Holschuh's note, labeled "Dr. Exam on 2/17/2016 @6:54" states: "Appointment with Dr. Macaulay; missed appointment with Dr. Gutterman 02/16/16; patient to contact office to

reschedule; return to full duty 02/17/16 with no restrictions; anticipate IR next appointment; recheck with Dr. Macaulay 03/02/2016 0700." (Ex. 3).

41. March 2, 2016, March 23, 2016, April 11, 2016, May 2, 2016, June 1, 2016, and June 22, 2016. Ms. Thompson was present the March 2, 2016, March 23, 2016, May 2, 2016, June 1, 2016, and June 22, 2016 visits, and Ms. Lay was present at the April 11, 2016 visit. The progress notes from these visits generally document Dr. Macaulay's orders, prescriptions, referrals, and work restrictions. In addition, calls to outside providers regarding scheduling appointments and referrals are documented. (Ex. 3).

42. On July 6, 2016, Claimant saw Dr. Macaulay. (Ex. 2). Dr. Macaulay found Claimant was at maximum medical improvement and noted Claimant could return to work at his regular duties. Dr. Macaulay assigned Claimant a 17% whole person impairment. Ms. Holschuh was present in the examination room, and created a Progress Note. Ms. Holschuh's note, labeled "Dr. Exam on 7/6/2016 @8:03" states: "Appointment with Dr. Macaulay; impairment rating conducted; D/C from care at MMI to full duty without restrictions; patient to continue HEP; to return to ECH [employee health clinic] for appointment with Dr. Macaulay 10/3/2016 0700." (Ex. 3).

43. On September 7, 2016, Claimant saw Dr. Macaulay for a follow up visit. (Ex. 2). Claimant reported had indicated to his supervisors he had pain with certain activities, and beyond what Claimant found he could reasonably handle. Dr. Macaulay noted if Claimant had restrictions, his CDL would be in jeopardy, and if he lost his CDL he would probably be removed from his job. Dr. Macaulay ordered a functional capacity evaluation. Dr. Macaulay also indicated Sandra Miller reviewed his job with his supervisors and wrote a work/task job description. Ms. Thompson was present in the examination room, and created a Progress Note labeled "Dr. Exam on 9/7/2016 @10:30." The note states: "F/u with Dr. Macaulay. No restrictions. [Claimant] is scheduled for FCE on 9/19. Next at with Dr Macaulay 9/26. Per Dr. [M]acaulay, volataren refill for 30-day supply called into King Soopers at 303-936-7403 " (Ex. 3).

44. On September 26, 2016, Claimant saw Dr. Macaulay for a follow up visit. (Ex. 2). Ms. Holschuh was present in the examination room, and created a Progress Note. Ms. Holschuh's note, labeled "Dr. Exam on 2/17/2016 @6:54" states: "Appointment with Dr. Macaulay; missed appointment with Dr. Gutterman 02/16/16; patient to contact office to reschedule; return to full duty 02/17/16 with no restrictions; anticipate IR next appointment; recheck with Dr. Macaulay 03/02/2016 0700." (Ex. 3).

45. On September 26, 2016, Claimant saw Dr. Macaulay for a follow up visit. (Ex. 2). Dr. Macaulay noted Claimant had undergone a functional capacity evaluation, and "With his job description [in] hand, the occupational therapist indicated that [Claimant] was capable of performing his job within the parameters outlined in his job description." Dr. Macaulay noted Claimant was "concerned that, with restrictions, he will be released from [duty] at [Redacted]. If, on the other hand, he has no restrictions then he believes that his pain would be preclusive of performing his job duties. He indicated that he would discuss these issues with his attorney." Ms. Lay was present in the examination room, and created a Progress Note labeled "Dr. Exam on 9/26/2016 @7:24." The note states:

"Reeval with Dr. Macaulay today. Reviewed Biometric results. No restrictions. Reeval on 9/28/16 at 8am." (Ex. 3).

46. On September 28, 2016, Claimant returned to Dr. Macaulay. Claimant and Dr. Macaulay discussed Claimant's work restrictions and the impact of restrictions on Claimant's CDL, and job requirements. Claimant discussed the possibility of moving to a different position at [Redacted], although he did not want to take the job due to a reduction in pay. Dr. Macaulay told Claimant "that if he had work restrictions, he would not have a CDL and his job would probably be vacated." Dr. Macaulay documented he "thought the best alternative for [Claimant] was to continue his job without restrictions and try to work out some of the other issues." Dr. Macaulay noted Ms. Cogan "spoke with [Claimant] and recommended FMLA. This would cover him on the days that he felt unable to work and would protect his job." Ms. Lay was present in the examination room, and created a Progress Note. Ms. Lay's note, labeled "Dr. Exam on 9/28/2016 @9:15" states: "Reeval with Dr. Macaulay. Patient remains at MMI without permanent restriction. No further appointments scheduled in clinic. Pt's questions directed to Georgeann Chapman, HR." (Ex. 3).

47. Over the course of his claim, Dr. Macaulay referred Claimant to various providers, including Gary Gutterman, M.D., for psychiatric evaluation and care; Dr. Cooperman, Barton Goldman, M.D., physical therapy and to Select Physical Therapy for a functional capacity evaluation. (Exs. 2, 3, 6, 7 O & P). None of the DW Clinic Staff attended these appointments with Claimant.

48. During the course of Claimant's treatment at the DW Clinic, the DW Clinic Staff did not advise Claimant they were "nurse case managers," and did not request Claimant's permission or consent to be present in the examination room with Claimant and Dr. Macaulay. Claimant did not request any of the DW Clinic Staff not be present in the examination room. Similarly, Dr. Macaulay did not advise Claimant the DW Clinic Staff were "nurse case managers," or request Claimant's consent for DW Clinic Staff members to be present in the examination room.

49. On October 31, 2016, Claimant filed an application for Division Independent Medical Examination ("DIME") with the Division. (Ex. D).

50. On January 18, 2017, Claimant underwent a DIME performed by Stephen Gray, M.D. Dr. Gray agreed with Dr. Macaulay's MMI date of July 6, 2016, and assigned Claimant a whole person impairment of 18%. (Ex. S).

51. On March 1, 2017, Insurer filed an FAL. The FAL admitted for reasonable and necessary medical care, temporary total disability benefits, and permanent partial disability benefits. The FAL also states: "Any benefits and penalties not specifically admitted herein are denied. (Ex. E).

52. Claimant did not file an objection to the March 1, 2017 FAL or file an application for hearing challenging any aspect of the March 1, 2017 FAL.

53. On April 5, 2018, Ms. Cogan testified in a hearing in W.C. Case No. 5-056-432-001 between Claimant and [Redacted]. At this hearing, Ms. Cogan testified the DW Clinic Staff served as "case managers" for Claimant's workers' compensation claim, overseeing referrals, making sure Claimant received his medications, and communicating with Claimant. She further testified that in this role, DW Clinic Staff were not present in appointments in a treatment capacity. (Ex. 34).

54. In the present hearing, Ms. Cogan testified she does not know the Act's definition of "nurse case manager" or "case management." In the context of the DW Clinic, she used the term "case management" to refer to monitoring an Injured Worker's case to make sure nothing was missed or "'[fell] through the cracks," to make it easier on the patient.

55. On April 4, 2019, Claimant filed the Application for Hearing in this matter, seeking to reopen Claimant's claim on the basis of fraud, and seeking penalties for alleged violations of the Act. (Ex. 15).

DW CLINIC NURSES ROLES

56. Between March 4, 2015 and October 23, 2017, Claimant regularly communicated with the DW Clinic Staff regarding various aspects of his care, treatment, and workers' compensation claim. The DW Clinic Staff documented the interactions in Progress Notes. In multiple telephone calls, DW Clinic Staff advised Claimant of his scheduled appointments with outside providers to whom he was referred by Dr. Macaulay. In other calls or in--person, Claimant discussed with DW Clinic Staff issues with obtaining prescriptions, his symptoms, his treatment preferences, and his work restrictions. After appointments with outside providers, Claimant on several occasions called DW Clinic Staff to advise them of the appointments and what occurred during those appointments, including the recommendations of those treating providers. The Progress Notes are maintained by the DW Clinic, and were not sent to Insurer. (Ex. 3).

57. In March 2015, Ms. Baker sent emails to Ms. Manshardt advising Insurer of the status of Claimant's claim, and his work restrictions. On April 2, 2015, Claimant spoke to Ms. Baker and indicated he had not received a check for his lost workdays. Ms. Baker contacted Ms. Manshardt by email to advise Ms. Manshardt of the days Claimant was on injury leave, that Claimant had lost workdays, and when he returned to work. (Ex. 11).

58. On June 22, 2017, Ms. Thompson received a call from one of Claimant's physical therapy providers regarding the status of payment of outstanding bills. Ms. Thompson emailed Ms. Manshardt to ask for the status of the bills. (Ex. 3).

59. On November 12, 2015, Ms. Thompson received notice from a pharmacy that Claimant's prescription for Lexapro had been denied. Ms. Thompson contacted Ms. Manshardt who called the pharmacy to approve the prescription. (Ex. 3).

60. On May 18, 2016, Ms. Thompson called Ms. Manshardt regarding Insurer's authorization of trigger point injections with Dr. Goldman and medical massage with another provider. Ms. Manshardt communicated that these services would be covered.

Ms. Thompson relayed Insurer's approval to Dr. Goldman's office. Ms. Thompson credibly testified when she contacted Ms. Manshardt regarding the approval of trigger point injections, she did not express any opinion as to whether the treatment should or should not be approved. (Ex. 3).

61. On June 3, 2016, Claimant called Ms. Thompson and expressed concern that payment for a prescription for Lexapro was denied and that he had never received mileage reimbursement from Insurer. Ms. Thompson called Ms. Manshardt regarding these issues. Ms. Thompson submitted Claimant's mileage sheet to Ms. Manshardt on Claimant's behalf, and was informed Ms. Manshardt would call the pharmacy to approve Claimant's prescription. (Ex. 3)

62. On several other occasions, DW Clinic Staff faxed information regarding Claimant's treatment or referrals to Insurer. (Ex. 13).

WC BROCHURE

63. On April 9, 2015, Insurer filed a General Admission of Liability (GAL) with respect to Claimant's claim, admitting for medical benefits and temporary total disability. (Ex. A). The GAL's indicates it was mailed to the Claimant on April 9, 2015 at Claimant's Home Address in Lakewood, Colorado.[2] The GAL states under "Remarks": "WC brochure enc'd for IW." Insurer's adjuster assigned to Claimant's claim, Teresa Manshardt, testified that the brochure referenced in the Remarks section was the document entitled "Information Regarding Workers' Compensation and A Claimant's Rights" included in Exhibit A, pages 0004-0006 (hereinafter "WC Brochure").

64. Insurer's standard procedure in April 2015, was for an administrative assistant to assemble admissions of liability, including attachments, and then deliver the documents to the adjusters the day prior to the admission being issued. Ms. Manshardt's habit and practice was to review the draft for typographical errors and to confirm any referenced attachments were included in the documents. Once Ms. Manshardt reviewed the documents, she would sign then and return them for mailing. Ms. Manshardt testified that she would not sign a GAL until she verified that a WC Brochure was attached for an injured worker. When a WC Brochure was included with a GAL mailed to a claimant, the WC Brochure itself would not be maintained in the claims file. Instead, Insurer relied on the notation on the GAL of the WC Brochure's inclusion as evidence it was attached and sent. Ms. Manshardt testified the WC Brochure is always sent with Insurer's first "position statement" (i.e., a General Admission of Liability or Notice of Contest). In the course of her handling of Claimant's claim, Ms. Manshardt sent other documents to Claimant at his Home Address, and was not aware of any correspondence or other documents being returned to Insurer as undeliverable or for an incorrect address.

65. The ALJ finds credible Ms. Manshardt's testimony that she followed her standard practice and assured that the WC Brochure was attached to the GAL and that the GAL was mailed to Claimant on April 9, 2019.

[2] The address listed on the GAL as Claimant's address is Claimant's Home Address.

66. Claimant testified that he did not receive the April 9, 2015 General Admission of Liability (Ex. A, p. 1-2), around the time it was mailed and that he never received the document in the mail at his home. At some point in time, Claimant hired an attorney (Mr. H[Redacted]) to assist him in contesting Dr. Macaulay's MMI determination. Claimant testified he received pages 1 and 2 of the GAL (Ex. A) (i.e., the GAL form, but not the WC Brochure) in a box of documents he received from Mr. H[Redacted] and provided to his new attorney (Mr. F[Redacted]). No evidence was offered to explain how Mr. Holley came into possession of the GAL. (Ex. A, p. 1-2).

67. Claimant testified he first became aware of the WC Brochure on the first day of hearing, January 27, 2020. He testified that he did not receive the WC Brochure and that it was not included in the box of documents he received from Mr. H[Redacted].

68. The WC Brochure (Ex. A, p. 4-6) contains the information required to be provided to Claimant's pursuant to § 8-43-203 (3)(b), C.R.S. (Ex. A).

69. In an email exchange on September 26, 2018, Ms. Cogan emailed Ms. Manshardt asking if Ms. Manshardt had documentation Claimant was provided the WC Brochure. Ms. Manshardt replied:

> "On the enclosed 04/09/15 General Admission of Liability, you'll see a reference under the Remarks section that the WC brochure was enclosed for the Injured Worker. That is really the only documentation we have. However, my signature (or where I hand-printed my name) essentially serves as my certification to all the included parties that the document was in fact sent. Typically, the brochure is always sent at the time the initial filing is made with the Division of Workers' Compensation regardless of whether it is a General Admission of Liability, a Notice of Contest or a Final Admission of Liability."

(Ex. 10).

70. Claimant could not recall if he received Ex. B, Ex. C, Ex. D, or Ex. E in the mail at his Home Address. Exhibits B, C and E each indicate Claimant was sent these documents at his Home Address on either a certificate of mailing or certificate of service.

WITNESS TESTIMONY

Claimant

71. Claimant was employed by [Redacted] for twenty-one years. During that time, Claimant had multiple workers' compensation claims for which he received treatment at the DW Clinic. With respect to the present claim, a DW Clinic Staff member was present at each of his appointments with Dr. Macaulay. He was not asked for his permission to have a nurse in the room, or to do "case management" on his case.

72. The DW Clinic Staff member would sit in the room, observe, and take notes, and sometimes speak with him or Dr. Macaulay. The DW Clinic Staff who were present at his

appointments would explain to him Dr. Macaulay's orders, the next steps with respect to referrals. The DW Clinic Staff set up referral and follow up appointments with him, and he found this to be helpful to him.

73. During the first few visits after his injury, Ms. Baker was present during his appointments with Dr. Macaulay. Claimant could not remember precisely what Ms. Baker did or whether she interacted with Claimant or the doctor. He did recall Ms. Baker took his vital signs and sat in the examination room during the appointments. He could not recall if Ms. Baker took notes during the appointments.

74. Later, Ms. Thompson began attending appointments, and she would type on a computer while Claimant and Dr. Macaulay were talking and occasionally speak to Dr. Macaulay. Claimant's testimony regarding Ms. Thompson's discussions with Dr. Macaulay was vague, but Claimant believed Ms. Thompson informed Dr. Macaulay that certain referral providers were not used anymore. In one instance, Claimant complained about being referred to a chiropractor whom Claimant asserted hurt him. Claimant testified that Ms. Thompson told Claimant "You need to go back. The doctor wants you to see him. You need to go back." Claimant testified he returned to the chiropractor because "I didn't have a choice." In another instance, Dr. Macaulay mentioned sending Claimant to a specific physical therapy provider, and Ms. Thompson and Dr. Macaulay engaged in a discussion about the physical therapy provider to which Claimant would be referred. Claimant testified Ms. Thompson engaged in discussions with Dr. Macaulay. At or around the time of these visits, Claimant perceived Ms. Thompson to be directing his care.

75. Claimant could not recall specifically how Ms. Lay participated in appointments at which she was present, but he did not "think she really participated." Claimant recalled Ms. Lay advised him if he had work restrictions, he would not be able to maintain a commercial driver's license (CDL). This conversation occurred outside of a medical appointment.

76. Claimant testified Ms. Holschuh took notes at one appointment, but most of the time she "just sat in the back."

77. Claimant recalled Ms. Cogan attended one of his appointments with Dr. Macaulay and took notes on a computer. He testified Ms. Cogan was "just kind of helping Macaulay," and "doing nurses' things."

78. Claimant testified he requested treatment for his head at visits with Dr. Macaulay, and was not adequately treated for a head injury. Claimant believes if the DW Clinic Staff had not been in the appointments, he "could have maybe talked [Dr. Macaulay] into sending me to a neurologist or something else besides just [Dr.] Gutterman because the Gutterman thing made me just think they are trying to think I was crazy and not really healing my head." Claimant believes the presence of the DW Clinic Staff in his medical appointments affected the amount of treatment he received for his head injury, back, hip, shoulder, and neck.

79. Claimant agreed he was able to discuss with Dr. Macaulay the nature of his injuries and symptoms, and report whether his symptoms had improved, worsened, or stayed the same at his appointments. He also discussed with Dr. Macaulay how he was doing at work and whether he was able to work within restrictions or needed more assistance.

80. Claimant was present at the April 5, 2018 hearing and heard Ms. Cogan's testimony in that hearing. Claimant testified that is when he first became aware the DW Clinic Staff were putative "nurse case managers." Claimant testified he has come to believe the DW Clinic Staff were present in his appointments to "spy" on him, take notes and give the notes to Insurer or others.

81. Claimant believes by having the DW Clinic nurses in his appointments his treatment was curtailed and he "could have gotten different treatment done with a one-on-one with the doctor. And being able to put out [his] frustration to him and him being able to look at it in more of a caring way…."

Dustin E[Redacted] and Ronald D[Redacted]

82. The ALJ considered the testimony of Dustin E[Redacted] and Ronald D[Redacted], witnesses called by Claimant regarding their experiences with the DW Clinic. Neither witness had direct knowledge of Claimant's care or treatment, or the role of DW Clinic Staff in Claimant's claim. Accordingly, the ALJ found the testimony of Mr. E[Redacted] and Mr. D[Redacted] to be of no persuasive effect and of little evidentiary value.

Jessica Thompson, R.N

83. Ms. Thompson is a registered nurse and has been employed as an occupational nurse at [Redacted] since December 2012. Until approximately 2015, Ms. Thompson's last name was "Bedwell," and her notes prior to changing her name were signed "JB". Ms. Thompson has never been hired or paid by Insurer, and she has not represented herself to anyone as an insurance representative.

84. The appointments she scheduled for Claimant were done at the direction of Dr. Macaulay, and she did not take any direction from Insurer with respect to Claimant's treatment.

85. Ms. Thompson was never told to "spy" on Claimant and report what she observed. She did not attend any of Claimant's appointments with outside providers and was only present at Claimant's appointments in the DW Clinic. Ms. Thompson credibly testified she attended appointments so she could be kept up to date on everything happening in the claim, including referrals, restrictions and when the Claimant would need to follow up with Dr. Macaulay.

86. Ms. Thompson credibly testified she never told Dr. Macaulay what to do medically and never approved or rejected any of Dr. Macaulay's medical recommendations. Ms. Thompson did not make any determinations related to times Claimant would be out of work, and those decisions were made by the physician. Similarly, Ms. Thompson made no determination of whether Claimant was at maximum medical improvement.

87. At times, Ms. Thompson would receive or make calls to outside providers regarding the status of authorizations, and Ms. Thompson would contact Ms. Manshardt to verify the status of an authorization. Ms. Thompson credibly testified this was done merely to expedite the process and help assure Claimant could receive timely treatment.

Patricia Holschuh, R.N.

88. Ms. Holschuh is a registered nurse who has been employed by [Redacted] since 2015. At the appointments Ms. Holschuh attended with Claimant, she created a Progress Note either during the visit or after the visit to document the "highlights" of the visit.

89. Ms. Holschuh's role in workers' compensation appointments was to attend and document the visit, and based on the determination of the physician, assist in coordinating care, including referrals to other providers and orders issue by the physician. Ms. Holschuh testified that being present in the examination assisted in allowing the DW Clinic Staff to respond to questions from injured employees.

90. In her role at the DW Clinic, Ms. Holschuh had limited contact with insurance claims adjusters, that typically involved receiving questions from the claims representatives regarding the timing of patient evaluations and requests for information. She also notified Injured Workers' supervisors when an Injured Worker was being discharged, any applicable restrictions, and of Injured Workers' appointments. This was done so supervisors would be aware an Injured Worker may be missing from their regular work site while attending appointments.

91. Ms. Holschuh credibly testified that she does not participate in directing patient care, and Dr. Macaulay made the treatment decisions with respect to Claimant. Ms. Holschuh was not pressured by Employer to attempt to countermand any of Dr. Macaulay's treatment recommendations. She was not asked by Insurer to send "secret documents" or to ask Dr. Macaulay to deny treatment.

92. Ms. Holschuh characterized the Progress Notes (Ex. 3) as an efficient way to document, at a high level, what occurred during appointments, and to have that information available for other nurses in her absence. She considers the Progress Notes to be a quick reference to see what the care had been, and the plan of care proposed. The Progress Notes were not sent to anyone, absent a request with an authorization. Specifically, Claimant's Progress Notes were not sent to Insurer.

Dawn Cogan, R.N.

93. Ms. Cogan is a registered nurse who has been employed by [Redacted] since 2008. Ms. Cogan's job title is currently "health services manager" and she was previously the "nursing supervisor," although her job duties have remained the same. Ms. Cogan's job responsibilities are primarily managerial.

94. Although Ms. Cogan's managerial duties include "cost containment," during the relevant time frame, she did not have directions to reduce medical treatment of injured workers, and medical decisions for treatment of Injured Workers were made by Dr.

Macaulay. Ms. Cogan did not have the ability to challenge or question Dr. Macaulay's medical decisions, and did not instruct Ms. Thompson, Ms. Holschuh or Ms. Lay to attempt to limit Claimant's medical care.

95. With respect to workers' compensation claims, part of Ms. Cogan's duties was supervision of the [Redacted] workers' compensation program, including reporting, recordkeeping, review of payment of claims and the modified duty program. Ms. Cogan did not have any role in adjusting Claimant's claim and did not have any direct involvement in decisions regarding payment of Claimant's workers' compensation benefits.

Hugh Macaulay, M.D.

96. Hugh Macaulay, M.D., is a board-certified family medicine physician, Level II accredited, and has practiced in occupational medicine since 1992. At one time, Dr. Macaulay served as the cochair for the development of the Medical Treatment Guidelines for traumatic brain injury. Dr. Macaulay was offered and admitted to testify as an expert in occupational medicine.

97. Dr. Macaulay worked as an independent contractor for the DW Clinic for approximately 22 years. In addition, Dr. Macaulay maintains a separate private practice at a different office. At the DW Clinic, Dr. Macaulay's job duties included serving as the medical review officer, performing CDL certifications, surveillance for exposure to materials, and provided primary care for injured workers. Dr. Macaulay had no contracts with Insurer.

98. Dr. Macaulay worked with various nurses, PAs, and nurse practitioners at the DW Clinic, and testified these providers were necessary to help him provide treatment to Injured Workers at the DW Clinic. Dr. Macaulay was typically present at the DW Clinic two days per week (Mondays and Wednesdays) approximately five hours per day. If he was not physically present at the DW Clinic, the DW Clinic staff would contact him by telephone with issues requiring his attention. In situations where a patient needed attention and Dr. Macaulay was unable to come to the DW Clinic on non-scheduled workdays, the patient may be referred to urgent care or an emergency department.

99. A DW Clinic Staff member was always present in the examination room when Dr. Macaulay examined a workers' compensation patient. Dr. Macaulay testified this was to facilitate patient care, to make sure information was being appropriately heard and interpreted, to facilitate nursing care for patients and to implement orders that might be necessary following the visit. Dr. Macaulay follows this procedure in his private practice as well.

100. Dr. Macaulay's understanding is that a "nurse case manager" is an individual hired by a third-party (typically an insurance company) to represent the third-party in the scope of the evaluation. In his private practice Dr. Macaulay has had experience with nurse case managers hired by third-parties.

101. In this context, "nurse case managers" do not take patient's vital signs, assist in following up with the physician's recommendations for prescriptions or referrals. Third-party nurse case managers are not incorporated into the management of patient care. Instead, the nurses or medical assistants employed by Dr. Macaulay would implement the orders he generated. To his knowledge, no nurse case manager hired by a third-party or insurance company attended any of his medical appointments with Claimant.

102. Neither the DW Clinic Staff, nor anyone at [Redacted] instructed Dr. Macaulay on how to make referrals, prescribe medicine or practice medicine in general. He testified that [Redacted] did not influence his treatment of patients. He does not believe his medical treatment of Claimant was impeded by the presence of DW Clinic staff in appointments with Claimant.

103. Dr. Macaulay did not prevent Claimant from speaking about anything during his appointments, and he did not have the impression that Claimant was intimidated during his appointments. Dr. Macaulay did not knowingly conceal anything from Claimant.

104. Dr. Macaulay did not refer Claimant to a neurologist for evaluation of a head injury because most mild concussions resolve within 90 days, and he did not believe a referral was necessary.

105. Dr. Macaulay ordered an FCE for Claimant, and that the initial FCE report recommended certain restrictions on Claimant. Dr. Macaulay testified that the FCE indicated that Claimant could perform most of the essential functions of his job. Dr. Macaulay testified he discussed the limitations with Claimant and Claimant was concerned about possible termination from his job if work restrictions were imposed Dr. Macaulay testified, he did not want the Claimant to lose his job if he might be able to have accommodations that would let Claimant perform his job. Out of concern expressed by Claimant, Dr. Macaulay "tailored the work restrictions" to permit Claimant to continue in his job, and asked Claimant to return and let him know if the restrictions needed to be altered.

RETAINED EXPERT WITNESSES

Nathaniel Moore, M.D.

106. Nathaniel Moore, M.D. was admitted as an expert in family medicine and clinic management. Dr. Moore was previously Level II accredited, but is not currently Level I or Level II accredited. Currently, Dr. Moore sees approximately 1-2 workers' compensation patients per month.

107. Dr. Moore testified that in his career, he has never seen an outside third-party nurse case manager present in a clinic. Dr. Moore understood a "nurse case manager" is a person involved in the patient's care and who "has a role in helping decide what kind of care the patient might receive." Dr. Moore testified that his understanding of the functions performed by DW Clinic Staff included both treating patients in a nursing capacity, and "they would enter the room with the treating physician and help determine the treatment of the patient on an ongoing basis."

108. Dr. Moore's current clinic does use nurses in the role of a "nurse case manager." In this capacity, the "nurse case manager's" role is "to help coordinate care, obtain prior authorizations, send in prescriptions, coordinate imaging studies and referrals to outside specialists." In this role, staff plays an important role in assisting patients with prior authorizations, referrals to specialists, transportation issues and medication questions. He testified that in his clinic "nurse case managers" do not go into the examination room with the physician. He agreed that different doctors may choose different ways of utilizing a nurse's services.

109. Dr. Moore opined that DW Clinic Staff's roles changed for workers' compensation cases, and that nurses would act as a "case manager." He opined there should have been a notification to the patient of the "change in roles." Dr. Moore also testified that in his experience treating injured workers, he has "never once had a nurse case manager come in the room," because he made his own treatment decisions, and did not need a nurse case manager to help make treatment decisions.

110. Dr. Moore opined that nurses acting in two separate roles (i.e., treating provider and "nurse case manager") creates a conflict of interest at [Redacted] because the nurses became friendly with workers over time, and that in their role as "nurse case managers" they might not have the best interest of the patient in mind. Dr. Moore testified he has not worked with "nurse case managers" in his practice, and that the role of a nurse case manager is to help facilitate ongoing care, treatment, and evaluation of the injured worker, and who assists the medical provider, employer, and insurance company. He also opined that a nurse case manager can be hired by "any of those" (i.e., the provider, employer, or insurance company). Dr. Moore testified that it was unreasonable and inappropriate for [Redacted] to permit "nurse case managers" into patient appointments without the patient's consent. He further testified that such consent should be in writing.

111. Dr. Moore testified that physician-patient interactions and medical records are confidential, and may be accessed by the medical provider, the patient, and (certain parts) the insurance carrier.

Henry Roth, M.D.

112. Henry Roth, M.D., is a physician who practices physical and occupational medicine. Dr. Roth was offered and admitted to testify as an expert in physical occupational medicine.

113. Dr. Roth testified that it is optional, but common for physicians to have a third-person present during a patient examination. In some contexts, the third-person is present for the administration and management of the claim, including executing the physician's orders and plan. He testified that it is easier to have the person who is responsible for coordinating and communicating appointments, procedures, and follow-up in the examination room. Generally, Dr. Roth testified, the third-person in the room is a nurse or a medical assistant.

114. Dr. Roth testified that his understanding of a nurse case manager in the workers' compensation context is a person who is an employee or agent of the insurance carrier to help coordinate and manage the claim. He testified that nurse case managers employed by an insurance company never take an active role during the examination and treatment of a patient, and they are not a participant in the clinical practice.

III. CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

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

A. CLAIMANT’S PETITION TO REOPEN FOR FRAUD

1. NECESSITY TO REOPEN TO ASSERT PENALTY CLAIMS

a) DW RESPONDENTS

Once a case has been closed, the issues resolved by a Final Admission of Liability are not subject to litigation unless they are reopened pursuant to § 8-43-303, C.R.S. § 8-43-203 (2)(d), C.R.S.; *see also Berg v. Industrial Claim Appeals Office*, 128 P.3d 270, 272 (Colo. App. 2005); *Webster v. Czarnowski Display Service Inc*., W.C. No. 5-009-761-03 (ICAO, Feb. 4, 2019). This requirement is equally applicable to claims for penalties. *Villegas v. Denver Water,* W.C. 4-889-298-002 (ICAO Feb. 5, 2021). Thus, if the issue of penalties has been closed by a Final Admission of Liability, a claimant may not assert a penalty claim against the party or parties who filed the FAL unless the claim is properly reopened.

The DW Respondents filed a Final Admission of Liability on March 1, 2017. The GAL did not admit for any penalties and included the following language: “Any benefits and penalties not specifically admitted herein are denied.” (Ex. E). Claimant did not object to the March 1, 2017 FAL or request a hearing within 30 days, as required by § 8-43-203 (2)(b)(II), C.R.S. Accordingly, and the issue of penalties with respect to the DW Respondents closed effective April 1, 2017 by operation of law. Consequently, Claimant may only litigate the issue of penalties against the DW Respondents if Claimant establishes a basis for reopening under § 8-43-303.

b) DR. MACAULAY

Claimant is not required to reopen his claim to assert a penalty claim against Dr. Macaulay. Section 8-43-304 (1), C.R.S., authorizes penalty claims against any person, and is not limited to only employers or insurers. Because only an employer and its insurance carrier may file a Final Admission of Liability under § 8-43-203(b)(I), C.R.S., the closure of issues through the March 1, 2017 Final Admission applies only to the DW Respondents. As found in *Villegas v. Denver Water*, W.C. 4-889-298-002 (ICAO Feb. 5, 2021), the Claimant is not required to reopen his claim under § 8-43-203(2)(d) as a prerequisite to asserting penalties against Dr. Macaulay.

2. REOPENING AGAINST DW RESPONDENTS

Claimant seeks to reopen his claim on the ground of fraud. Fraud may justify reopening an otherwise final award of benefits, under § 8-43-303, C.R.S., which provides, in relevant part:

> At any time within six years after the date of injury, the director or an administrative law judge may, after notice to all parties, review and reopen any award on the ground of fraud, an overpayment, an error, a mistake, or a change in condition ….

The elements of fraud or material misrepresentation are well-established in Colorado law. The elements are: (1) A false representation of a material existing fact, or a representation as to a material fact with reckless disregard of its truth; or concealment of a material existing fact; (2) Knowledge on the part of one making the representation that it is false; (3) Ignorance on the part of the one to whom the representation is made, or the fact concealed, of the falsity of the representation or the existence of the fact; (4) Making of the representation or concealment of the fact with the intent that it be acted upon; (5) Action based on the representation or concealment resulting in damage. *Arczynski v. Club Mediterranee of Colorado, Inc.*, W.C. No. 4-156-147 (ICAO, Dec. 15, 2005), *citing Morrison v. Goodspeed*, 68 P.2d 458, 462 (Colo. 1937). "Where the evidence is subject to more than one interpretation, the existence of fraud is a factual issue for resolution by the ALJ." *Arczynski, supra*

The power to reopen is permissive, and is therefore committed to the ALJ's sound discretion. Further, the party seeking to reopen bears the burden of proof to establish grounds for reopening. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Barker v. Poudre School Dist.*, W.C. No. 4-750-735 (ICAO, Mar. 7, 2012).

To prevail on his fraud claim, Claimant must establish that the DW Respondents made a material misrepresentation or knowingly concealed a material existing fact. Although not well-articulated, the ALJ discerns that Claimant believes the DW Respondents committed fraud by allegedly failing to send Claimant the WC Brochure and/or failing to affirmatively disclose the DW Clinic Staff roles as putative "nurse case managers," and thereby knowingly concealed a material existing fact that should have been disclosed. In his position statement, Claimant argues his "penalty allegations support his fraud claim because he thought the staff at [Redacted]'s facility were there to treat him. He did not know that the staff members were nurse case managers and that he had the right to refuse their presence."

a) MATERIAL EXISTING FACT - "NURSE CASE MANAGER[S] EMPLOYED ON CLAIMANT'S CLAIM".

The alleged material existing fact upon which Claimant's fraud claim is based is the assertion that the DW Clinic Staff were "nurse case mangers employed on claimant's claim" as that term is used in § 8-43-203 (3)(b)(IV), C.R.S. That section requires that the employer or insurer provide claimants with the WC Brochure "informing the claimant of his or her rights," and which advises a claimant, among other things, of:

> (IV) The claimant's right to discuss with his or her doctor who should be present during a claimant's medical appointment, and the right to refuse to have a nurse case manager employed on the claimant's claim present at the claimant's medical appointment…

§ 8-43-203 (3)(b)(IV), C.R.S.

The parties assign different meaning to the term “nurse case manager.” Claimant asserts the term includes individuals who, like the DW Clinic Staff, in a non-treating capacity, schedule medical appointments for claimants, reminded claimants of upcoming appointments, and facilitating treatment. Respondents, on the other hand, contend that a “nurse case manager” is a person assigned or hired by the insurer on a specific claim.

Because the term “nurse case manager” is not defined in § 8-43-203 (3), C.R.S. or elsewhere in the Act (or in any Colorado statute), the ALJ must begin by attempting to discern the plain and ordinary meaning of the term. When construing a statute, the ALJ must give effect to the General Assembly’s purpose and intent as reflected in the plain language of the statute. *State Dept. of Labor and Employment v. Esser*, 30 P.3d 189, 195 (Colo. 2001). “To that end, the words in a statute should be given their plain and ordinary meanings, and the statute should be construed so as to give consistent, harmonious, and sensible effect to all its parts.” *In Re Spencer*, WC. 4-580-221 (ICAO June 15, 2004) (citations omitted). “Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.” § 2-4-101, C.R.S. A court may consider dictionary definitions, but also the context in which the words are used to harmonize the meaning with the remainder of the statutory provisions. *People v. Berry*, 459 P.3d 578, 581 (Colo. App. 2017). “[I]t is an axiom of statutory construction that statutes must be construed as a whole, and the several parts of a statute reflect light upon each other.” *People ex rel. Dunbar v. Gym of America, Inc.*, 493 P.2d 660, 665 (Colo. 1972). The ALJ should not depart from the plain meaning unless it leads to an absurd result. *Colo. Dep't of Soc. Servs. v. Bd. of County Comm'rs*, 697 P.2d 1 (Colo.1985).

If, after applying these principles, the statute remains ambiguous, the court may resort to other rules of statutory construction. *Francen v. Colo. Dept. of Revenue*, 411 P.3d 693, 698 (Colo. App. 2012); *Midboe v. Industrial Claim Appeals Office*, 88 P.3d 643 (Colo. App. 2003). Colorado’s Construction of Statutes law, § 2-4-203, C.R.S., provides “[i]f a statute is ambiguous, the court, in determining the intention of the general assembly, may consider among other matters: (a) the object sought to be attained; [and] … (e) the consequences of a particular construction.”

The ALJ has found no Colorado case, dictionary or other secondary legal source which provides a cogent, accepted definition of the term. The term “case management” is defined in the Act, and provides guidance on the intended meaning of the term. Section 8-42-101 (3.6)(p)(I)(A), provides that “case management” means “a system developed by the insurance carrier in which the carrier shall assign a person knowledgeable in workers’ compensation health care to communicate with the employer, employee, and treating physician to assure that appropriate and timely medical care is being provided.”

The expert testimony of Drs. Moore, Roth and Macaulay also provides evidence as to the understood meaning of the term as it relates to workers’ compensation claims. Dr. Roth understands a “nurse case manager” to be a person employed by the insurance carrier to help coordinate and manage a claim, and in this context, a “nurse case manager” does not participate in the physician’s clinical practice. Similarly, Dr. Macaulay testified that a “nurse case manager” is a person hired by a third-party to represent the third-party in the scope of the evaluation. Dr. Moore testified that "nurse case managers" in his office to help coordinate care, obtain prior authorizations, send in prescriptions, coordinate imaging studies and referrals to outside specialists. However, he also testified that in the context of workers' compensation, a conflict exists because a "nurse case manager" may direct and make decisions about the care a patient may need, and may have the best interest of the employer or insurer rather than the patient, in mind. Implicit in Dr. Moore's testimony is that the conflict he addresses would only exist if the "nurse case manager" was employed by a third-party for the purpose representing that party's interest.

The testifying experts' opinions are consistent in their understanding that, in the context of workers' compensation, a "nurse case manager" is a person whose role is to represent the interest of a third-party (typically the insurer), rather than the interest of the claimant. The definitions provided by Dr. Roth, Dr. Macaulay and Dr. Moore are consistent with the statutes' reference to "nurse case managers employed on claimant's claim."

The expert testimony is consistent with Colorado cases in which referenced "nurse case managers" were engaged by a party other than the treating provider and played a role in directing patient care, such as directly referring the claimant to health care providers. *See e.g., Vargas v. Tetra Technologies*, W.C. No. 4-771-845 (ICAO, Dec. 18, 2009) (insurer's nurse case manager referred claimant to provider); *Rokvic v. U.S. Home*, W.C. No. 4-513-682 (ICAO, Dec. 7, 2007) (nurse case manager referred claimant to provider); *Ries v. Subway of Cherry Creek, Inc.*, W.C. No. 4-674-408 (ICAO, Aug. 4, 2011) (nurse case manager employed by respondents to assist in locating out-of-state physician for claimant); *Watson v. Grey Wolf Drilling*, W.C. No. 4-372-314 (ICAO, Nov. 29, 2006) (nurse case manager employed by employer's medical management firm recommended treatment and investigated claim prior to claimant receiving treatment from a physician).

As noted above, Colorado's rules of statutory construction provide that the object sought to be obtained and the consequences of a particular construction may be considered when construing an ambiguous statute. The object of the Act is "to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers…" § 8-40-102 (1), C.R.S. That objective is not furthered by requiring the insurer to notify a claimant of a right to preclude a member of the treating physician's staff from an appointment regardless of that person's role in a claimant's case. Instead, the more reasonable construction of § 8-43-203 (3)(b)(IV), is that the term "nurse case manager employed on the claimant's claim" refers to a person representing the interest of a third-party and who is not directly involved in implementing the ATP's plan of care.

Claimant cites to *Nanez v. Industrial Claim Appeals Office*, 444 P.3d 820 (Colo App. 2018) as defining the role of a "nurse case manager." In *Nanez*, a claimant sought benefits for conservator or guardian services under the Act. In denying the claimant's request, the Court of Appeals compared some of the proposed functions of a conservator to a nurse case manager who had already been employed on claimant's case. The court did not define the role of a "nurse case manager," but noted the existing nurse case manager had scheduled, and reminded the claimant of upcoming medical appointments, maintained contact with medical providers to keep updated on his progress, facilitated treatment recommendations and compliance with those recommendations, monitored medications and complaints for possible medical needs, and attended medical appointments. The Court did not, however, make any legal determination that a person who performs these functions is a "nurse case manager employed on the claimant's claim" under §8-43-203 (3)(b)(IV), C.R.S.

Taking into consideration the statutory definition of "case management," expert testimony, relevant case law, and the rules of statutory construction, the ALJ concludes that the term "nurse case manager employed on claimant's claim," as used in § 8-43-203 (3)(b)(IV), C.R.S., does not mean nurses or staff of a clinic where a claimant receives treatment and who assist the physician in implementing his plan of care or who assist a claimant in scheduling appointments. Instead, the ALJ concludes that "nurse case manager employed on a claimant's claim" means a person representing the interest of a third-party and who is not directly involved in implementing the ATP's plan of care.

The evidence demonstrates that DW Clinic Staff were not employed or assigned by Insurer and did not represent the Insurer's or Employer's interests with respect to Claimant's claim. The functions performed by the DW Clinic Staff were done to implement the Claimant's care recommended by Dr. Macaulay. As such, the ALJ finds and concludes that the DW Clinic Staff were not "nurse case managers employed on claimant's claim" as the term is used in the Act.

b) KNOWING MISREPRESENTATION OR CONCEALMENT

Notwithstanding the conclusion that the DW Clinic Staff were not "nurse case mangers employed on claimant's claim," the ALJ concludes that Claimant has failed to establish that the DW Respondents made knowing or reckless misrepresentations or knowingly concealed any material existing fact from Claimant, or that Claimant was ignorant of a concealed fact or false representation.

Even assuming, *arguendo*, the DW Clinic Staff were "nurse case managers" because they scheduled and reminded Claimant of medical appointments, facilitated treatment, and functioned in a non-treating role, as Claimant argues, the evidence does not demonstrate that either [Redacted] or Insurer made any false representation to the Claimant or concealed any material existing fact from Claimant. Claimant presented no competent evidence that the DW Respondents made any affirmative misrepresentations about the roles performed by DW Clinic Staff. Similarly, neither the DW Respondents, DW Clinic Staff nor Dr. Macaulay made any effort to conceal from the Claimant the functions being performed by the DW Clinic Staff, or their role in his claim.

To the extent Claimant's fraud allegation relies upon the assertion that Claimant did not receive the WC Brochure from Insurer, the Claimant has failed to establish that the alleged failure to provide the WC Brochure was done knowingly, or an active concealment. To the contrary, the March 1, 2017 GAL sent to Claimant indicates the WC Brochure was enclosed and sent to the Claimant, and Ms. Manshardt's testimony confirms that it was Insurer's standard business practice to send the WC Brochure to workers' compensation claimants with its initial GAL or notice of denial. The ALJ finds that, even assuming Claimant did not receive the WC Brochure, Claimant has failed to establish by a preponderance of the evidence that the DW Respondents knowingly concealed any information from Claimant.

The ALJ concludes that Claimant has failed to establish that the DW Respondents made any knowing misrepresentation or concealment of a material existing fact.

c) IGNORANCE OF MISREPRESENTATION OR CONCEALMENT.

To establish fraud, the Claimant must also establish his ignorance of the fact allegedly concealed, of the falsity of the representation or the existence of the fact. Again, Claimant has failed to meet this burden.

The evidence establishes Claimant knew DW Clinic Staff were present in his appointments on the date of each appointment. The Progress Notes document numerous communications between Claimant and DW Clinic Staff regarding the conduct he asserts constitute "nurse case management." Claimant solicited and accepted assistance from DW Clinic Staff in scheduling appointments for him with Dr. Macaulay, scheduling appointments with outside referrals and reminding him of those appointments. Claimant was also aware and involved in discussions with DW Clinic Staff regarding his compliance with recommendations. Claimant was also aware that he was not receiving treatment directly from DW Clinic Staff. Whether Claimant was aware that DW Clinic Staff occasionally used the term "case manager" or "nurse case manager" to describe their role is irrelevant. The mere use of the phrases "nurse case manager," "case manager" or "case management" does not convert the DW Clinic Nurses to "nurse case managers" as that phrase is used in the Act. Claimant was aware that the DW Clinic Staff were performing the functions he now characterizes as fraud.

Claimant has failed to establish by a preponderance of the evidence that the DW Respondents committed fraud or that he is otherwise entitled to reopen his claim pursuant to § 8-43-303, C.R.S.

3. FRAUD BASED OF FAILURE TO DISCLOSE DR. MACAUALY'S POSITION AT THE DW CLINIC.

In his Position Statement, Claimant argues that "[t]he misrepresentation to the DIME physician that Claimant did not treat in an on-site clinic constitutes fraud." Claimant contends that Dr. Macaualy did not treat Claimant at an on-site because Dr. Macaulay's medical reports were created under Dr. Macaualy's letterhead, rather than [Redacted] letterhead and that Dr. Macaualy was a contractor, rather than an employee of the DW Clinic. A fact is material if a reasonable person under the circumstances would attach importance to it in determining his or her course of action. *See Rosenthal v. Dean Witter Reynolds, Inc.*, 908 P.2d 1095, 1102 (Colo. 1995) *citing* CJI-Civ.3d 19:4. As found, Claimant treated at the DW Clinic which is an on-site clinic. Notwithstanding, even assuming *arguendo* that Claimant's interpretation of the facts was correct, Claimant did not establish by a preponderance of the evidence that a reasonable DIME physician would attach importance to Claimant not being treated at the DW Clinic, to Dr. Macaualy's employment status or the to letterhead on which his medical reports were issued. Similarly, Claimant has failed to establish that the DIME physician, Dr. Gray, was ignorant of any fact allegedly concealed or misrepresented, or that Dr. Gray took action based on the alleged concealment or misrepresentation. Accordingly, the ALJ concludes that Claimant has failed to satisfy the elements of fraud with respect to this allegation.

B. CLAIMANT'S PENALTY CLAIMS

Claimant seeks penalties against the DW Respondents and Dr. Macaulay for multiple alleged violation of the Workers' Compensation Act pursuant to § 8-43-304, C.R.S. Whether statutory penalties may be imposed under § 8-43-304(1), C.R.S. involves a two-step analysis. The statute provides for the imposition of penalties where the any party "violates any provision of article 40 to 47 of [title 8], or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or the panel, for which no penalty has been specifically provided, or fails, neglects or refuses to obey any lawful order made by the director or panel…" Thus, the ALJ must first determine whether a party's conduct constitutes a violation of the Act, a rule, or an order. Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the action depends on whether it was based on a rational argument based in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* W.C. No. 4-187-261 (ICAO, Aug. 2, 2006). There is no requirement that the offending party know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

The question of whether a party's conduct was objectively reasonable ordinarily presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005); *see also Pant Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). A party makes a *prima facie* showing of unreasonable conduct by proving that a party violated a rule of procedure . *Pioneers Hospital v. Industrial Claim Appeals Office, supra*. If the claimant makes such *prima facie* showing the burden of persuasion shifts to the respondents to show their conduct was reasonable under the circumstances. *Pioneers Hospital v. Industrial Claim Appeals Office, supra, Human Resource Co. v. Industrial Claim Appeals Office*, 984 P.2d 1194 (Colo. App. 1999).

When penalties are imposed under § 8-43-304(1), C.R.S., such penalties may include "a fine of not more than one thousand dollars per day for each offense, to be apportioned, in whole or part, at the discretion of the director or administrative law judge, between the aggrieved party and the Colorado uninsured employer fund created in section 8-67-105; except that the amount apportioned to the aggrieved party shall be a minimum of twenty-five percent of any penalty assessed."

1. PENALTIES AGAINST [REDACTED] RESPONDENTS

a) VIOLATION OF § 8-43-203 (3), C.R.S.

In his position statement, Claimant seeks penalties against the DW Respondents for allegedly violating § 8-43-203 (3), C.R.S., by failing to provide Claimant with the statutorily-mandated brochure advising Claimant of his rights under the Act. Section 8-43-304 (4) requires that "[i]n any application for hearing any penalty pursuant to subsection (1) of this section, the applicant shall state with specificity the grounds on which the penalty is being asserted." Claimant's Application for Hearing does not assert a claim for penalties for violation of § 8-43-203 (3), C.R.S., based on the alleged failure to provide Claimant with the WC Brochure. As such, this issue is not properly before the ALJ.

Notwithstanding the fact that this penalty was not alleged in Claimant's Application for Hearing, Claimant has failed to establish grounds for reopening his claim, and may not assert this penalty claim against the DW Respondents.

b) VIOLATION OF § 8-42-101 (3.6)(p)(II), C.R.S.

Claimant's Application for Hearing (paragraph 49) asserts the DW Respondents violated § 8-42-101 (3.6)(p)(II), C.R.S., by forcing Claimant into "case management" without Claimant's consent, and seeks penalties for an alleged violation of this section. As found, Claimant has failed to establish grounds for reopening his claim, and therefore may not assert this penalty claim against the DW Respondents.

c) VIOLATION OF 8-43-203 (3)(b)(IV), C.R.S.

Claimant's Application for Hearing (paragraphs 1, 4, 7, 10, 13, 16, 19, 22, 25, 28, 31, 34, 37, 40, 43, and 46) asserts the DW Respondents violated § 8-43-203 (3)(b)(IV), C.R.S., by utilizing DW Clinic Staff as "nurse case managers" in connection with Claimant's claim without informing Claimant of his right to refuse nurse case management or the presence of nurse case managers in his appointments. As found, Claimant has failed to establish grounds for reopening his claim, and therefore may not assert this penalty claim against the DW Respondents.

2. PENALTIES AGAINST DR. MACAULAY

a) VIOLATION OF § 8-43-203 (3)(b)(IV), C.R.S.

Claimant's Application for Hearing (paragraphs 2, 5, 8, 11, 14, 17, 20, 23, 26, 29, 32, 35, 38, 41, 44 and 47) asserts Dr. Macaulay violated § 8-43-203 (3)(b)(IV), C.R.S., by allegedly failing to identify "nurse case managers" present in 16 appointments. Specifically, Claimant asserts "Penalties pursuant to C.R.S. § 8-43-304 for a violation of § 8-43-203 (3)(b)(IV)", and for each penalty asserts:

> "[Dr. Macaulay] allowed a nurse case manager to attend Claimant's appointments with Macaulay at [Redacted]'s Clinic without identifying the

> nurse case manager as a nurse case manager. Claimant was under the impression that the [Redacted] Clinic employee was there to treat him. He did not know to exercise his right to have the nurse case manager leave the room because he did not know she was a nurse case manager. [Dr. Macaulay][violated Claimant's right to refuse to have a nurse case manager employed on Claimant's claim present at Claimant's medical appointment."

Section 8-43-304 (1), C.R.S., permits the imposition of penalties against "Any employer or insurer, or any officer of agent of either, or any employee, or any other person who violates articles 40 to 47 of this title 8, or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or panel, for which no penalty has been specifically provided …." Thus, to prevail on his claim for penalties against Dr. Macaulay, Claimant must establish that Dr. Macaulay performed an act prohibited by the Act, of failed or refused to perform a duty required by the Act.

Claimant has failed to establish that the Act imposed a duty upon Dr. Macaulay, to identify the DW Clinic Staff as "nurse case managers." Section 8-43-203 (3)(b)(IV), imposes a duty on "the employer, or if insured, the employer's insurance carrier" to provide the Claimant with the WC Brochure advising the Claimant of his rights. As found, Dr. Macaulay served as Claimant's ATP, he is neither the Claimant's employer nor Employer's insurer. The Act imposes no duty on physicians to advise Claimant of his rights, or to identify individuals present within an appointment. Requiring a treating physician to advise a claimant of his rights, or to identify putative "nurse case managers" would improperly read a nonexistent provision into the Workers' Compensation Act, which is not allowed. *See Kraus v. Artcraft Sign Co.*, 710 P.2d 480, 482 (Colo. 1985) (The appellate courts of this state have "uniformly held that a court should not read nonexistent provisions into the . . . Act."). The ALJ declines to read into the Workers' Compensation Act provisions that do not exist.

Claimant's claim for penalties against Dr. Macaulay fails for a second reason. As found above, the DW Clinic Staff engaged in administrative functions to implement the care and treatment recommended by Dr. Macaulay. As found, the DW Clinic Staff were not "nurse case managers employed on claimant's claim" within the meaning of § 8-43-203 (3)(b)(IV), C.R.S. As such, even if a duty existed under the Act for Dr. Macaulay to identify to Claimant nurse case managers in his appointment, the duty would not apply in this case because the DW Clinic Staff were not "nurse case manager[s] employed on [Claimant's] claim."

Claimant's claim fails for a third reason as well. The ALJ finds it more probable than not that Claimant received the WC Brochure, and thus knew or should have known of his right to discuss with Dr. Macaulay who should be present during his appointment and to refuse the presence of a nurse case manager employed on his claim. Among the rights about which a claimant is to be informed through the WC Brochure is "[t]he claimant's right to discuss with his or her doctor who should be present during a claimant's medical appointment, and the right to refuse to have a nurse case manager employed on the claimant's claim present at the claimant's medical appointment." § 8-43-203 (3)(b)(IV).

As found, Insurer sent Claimant a General Admission of Liability on April 9, 2015. The GAL indicates that the WC Brochure was attached to the copy of the GAL sent to Claimant at Claimant's Home Address, and the WC Brochure advised Claimant of his rights in compliance with § 8-43-203 (3)(b)(IV). Ms. Manshardt credibly testified that the business practice of Insurer was to review all GAL's before mailing to assure the referenced attachments were included in the documents to be mailed, including assuring the WC Brochure was attached to the version sent to Claimant. Although Insurer does not maintain in its claims file a copy of each WC Brochure sent to a claimant, Insurer documents the inclusion on the GAL. The April 9, 2015 GAL states under "Remarks" – "WC brochure enc'd for IW," indicating that the WC Brochure was enclosed with the copy of the GAL sent to Claimant. Ms. Manshardt also testified that she would only sign off on a GAL after assuring that the WC Brochure was attached. Ms. Manshardt's testimony is corroborated by her email to Dawn Cogan dated September 26, 2018.

"There is a rebuttable presumption that a letter which was properly addressed, stamped, and mailed was duly delivered to the addressee." *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). "[T]he existence of a business custom or practice is sufficient to warrant a presumption that a particular letter was duly posted." *National Motors, Inc. v. Newman*, 484 P.2d 125, 126 (Colo. App. 1971), *see also EZ Bldg. Components Mfg., LLC v. Industrial Claim Appeals Office of State*, 74 P.3d 516 (Colo. App. 2003) ("The existence of a business custom is sufficient to warrant a presumption that notice was sent, and it is the province of the trier of fact to decide whether that presumption is overcome by other evidence.")

The ALJ does not find Claimant's testimony that he never received the GAL or WC Brochure in the mail to be sufficient evidence to establish that Insurer failed to follow its business custom of attaching the WC Brochure to the GAL sent to him on April 9, 2015. Accordingly, the ALJ finds and concludes it more likely than not that Claimant received the WC Brochure.

Claimant has failed to establish by a preponderance of the evidence that Dr. Macaulay performed any prohibited act, or failed or refused to perform a required duty required by the Act under § 8-43-203 (3)(b)(IV), and that no basis for imposing penalties against Dr. Macaulay exists.

b) VIOLATION OF § 8-47-203 (1), C.R.S.

Claimant's Application for Hearing (paragraphs 3, 6, 9, 12, 15, 18, 21, 24, 27, 30, 33, 36, 39, 42, 45 and 48) asserts Dr. Macaulay violated § 8-47-203 (1), allowing DW Clinic Staff to access to Claimant's medical records on 16 dates. Specifically, Claimant asserts "Penalties pursuant to C.R.S. § 8-43-304 for a violation of § 8-47-203 (1)", and for each penalty asserts:

> "Dr. Macaulay allowed access to Claimant's medical file and records to a nurse case manager who was hired by Respondents and who was not necessary to resolve Claimant's claim. In doing so, Macaulay violated the limited waiver of the doctor-patient privilege provided by C.R.S. § 8-47-203 (1). Macaulay violated the doctor-patient privilege."

Section 8-47-203 (1) provides "Notwithstanding the provisions of section 8-47-202, the filing of a claim for compensation is deemed to be a limited waiver of the doctor-patient privilege to person who are necessary to resolve the claim."

Claimant asserts that Dr. Macaulay violated § 8-47-203 (1), "because Macaulay left his records for [Redacted] staff members." As found, the DW Clinic Staff were not functioning a "nurse case managers" under the Act. Dr. Macaulay created treatment notes for his appointments with Claimant and provided those notes to the DW Clinic Staff for inclusion in Claimant's medical file. The evidence does not reflect that DW Clinic Staff distributed or disseminated Dr. Macaulay's treatment notes, or did anything with the notes other than include them in Claimant's medical file maintained by the DW Clinic, and possibly use the records to implement Dr. Macaulay's recommendations and orders. These are normal uses of medical records within a medical facility for which no waiver of the doctor-patient privilege is required. The ALJ need not determine whether the DW Clinic Staff were "necessary to resolve the claim," because the Claimant has cited no authority supporting the proposition any waiver of doctor-patient privilege was required for Dr. Macaulay to provide his records to the DW Clinic for inclusion in the medical file or to implement his treatment recommendations.

Claimant has failed to establish that, by providing treatment notes to the DW Clinic Staff to include in Claimant's medical file, or to utilize in implementing his treatment recommendations, Dr. Macaulay violated § 8-47-203 (1), C.R.S. Accordingly, the ALJ finds no basis for imposing penalties against Dr. Macaulay.

3. RESPONDENTS' AFFIRMATIVE DEFENSE OF § 8-43-304 (4)

In their respective Responses to Claimant's Application for Hearing, the DW Respondents and Dr. Macaulay assert that Claimant's penalty claims are barred by the one-year statute of limitations for penalty claims contained in § 8-43-304 (4), C.R.S. Because the ALJ finds that Claimant has failed to meet his burden of proof on each of his claims, the ALJ does not address the Respondents' affirmative defense under § 8-43-304(4), C.R.S.

ORDER

It is therefore ordered that:

1. Claimant's petition to reopen his claim is denied and dismissed.

2. Claimants request for penalties against [Redacted] and Travelers for violation of § 8-43-203 (3)(b)(IV), C.R.S., is denied and dismissed.

3. Claimant request for penalties against [Redacted] and Travelers for violation of § 8-42-101 (3.6)(p)(III), C.R.S., is denied and dismissed.

4. Claimants request for penalties against Dr. Macaulay for violation of § 8-43-203 (3)(b)(IV), C.R.S., is denied and dismissed.

5. Claimants request for penalties against Dr. Macaulay for violation of § 8-47-203 (1), C.R.S., is denied and dismissed.

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

DATED: May 11, 2022

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

1. Whether Claimant provided clear and convincing evidence to overcome Dr. Regan's DIME opinion that Claimant reached maximum medical improvement ("MMI") for his December 9, 2017 right knee injury.

2. Whether Pinnacol proved by clear and convincing evidence that Dr. Sacha erred in failing to apportion Claimant's right knee impairment rating.

FINDINGS OF FACT

1. This claim involves two separate claims and dates of injury: November 18, 2016 (WC# 5-037-178) and December 9, 2017 (WC# 5-064-719).

2. Claimant has a prior history of right knee injury and treatment. Claimant suffered an admitted industrial injury to his right knee on April 26, 2007. A July 2, 2007 right knee MRI revealed focal advanced degenerative changes along the medial half of the medial facet of the distal femoral trochlear sulcus with an apparent osteochondral insult to the superior third of the patellar ridge and a full-thickness chondral fissure.

3. On October 23, 2007, Claimant underwent right knee surgery with Michael Hewitt, M.D. Dr. Hewitt diagnosed Claimant with a right knee medial meniscus tear, grade II medial chondromalacia, and grade III and IV patellofemoral chondromalacia. A 50% excision of the posterior horn was required during the surgery. Dr. Hewitt released Claimant from his care on January 7, 2008. Dr. Hewitt opined that most of Claimant's continued pain was likely due to arthritis and recommended Claimant undergo viscosupplementation injections. The request for viscosupplementation injections was denied.

4. Claimant's authorized treating physician ("ATP"), Robert Watson, M.D., placed Claimant at maximum medical improvement ("MMI") on January 23, 2008 with a 10% right knee permanent impairment rating. The impairment rating consisted of 5% under Table 40-II of the AMA Guides for the partial meniscectomy and 5% for range of motion loss. For maintenance medical benefits, Dr. Watson recommended a trial of viscosupplementation injections. Claimant was given permanent work restrictions of no kneeling or crawling.

5. On February 27, 2008, Respondents in the WC# 5-037-178 claim filed a Final Admission of Liability ("FAL") consistent with Dr. Watson's MMI report.

6. On November 18, 2016, Claimant slipped and fell on ice and snow while exiting his work truck. Claimant presented to ATP Lori Rossi, M.D. on November 18, 2016 with complaints of back and left elbow pain. At a follow-up evaluation with Dr. Rossi on November 21, 2016, Claimant reported right knee pain. Claimant reported increased right knee symptoms with prolonged standing, walking kneeling, squatting, and bending. Dr. Rossi noted increased right knee pain with range of motion. Dr. Rossi assessed a low back contusion, left elbow contusion, right knee strain and neck strain. She recommended physical therapy, and prescribed ibuprofen.

7. Dr. Rossi subsequently placed Claimant at MMI on December 20, 2016 with 0% permanent impairment. At this evaluation, Claimant reported that he had returned to working regularly and that he was feeling back to baseline. Dr. Rossi observed Claimant to have an antalgic gait secondary to his chronic right knee issues.

8. On July 18, 2017, Claimant underwent a DIME with John Sacha, M.D. Claimant complained of ongoing lower back and right knee issues, including pain localized to the right lateral and posterior knee, worse with kneeling and walking up/down hills. Claimant reported having a prior knee injury and surgery and some residual pain. Dr. Sacha diagnosed Claimant with work-related lumbosacral facet syndrome and a right knee strain, which he noted was a flare-up of Claimant's pre-existing right knee condition. He opined that Claimant was not at MMI and recommended additional treatment for the low back and right knee, including six physical therapy visits for the right knee, and a trial of Synvisc injections of the right knee for symptom control. Dr. Sacha provided an advisory 7% whole person impairment rating, consisting of 5% whole person low back impairment under Table 53 of the AMA Guides, and 5% lower extremity impairment under Table 40 for chondromalacia (2% whole person impairment). He noted apportionment was not appropriate as Claimant did not have medical care for two years prior to this injury.

9. On August 31, 2017, Pinnacol filed a General Admission of Liability ("GAL") reopening the claim.

10. Claimant returned to Dr. Rossi on November 22, 2017. Dr. Rossi noted that Claimant complained of right knee pain after his initial visit, and that the knee pain had been longstanding. Claimant informed Dr. Rossi that his lawyer asked the insurance company for him to be seen. Dr. Rossi stated that Claimant was wanting his case reopened. He complained that his knee instability had caused the 11/18/2016 injury, which Dr. Rossi noted was not previously mentioned or documented. Claimant complained that he has difficulty moving or bearing weight, and that he had two additional falls in March and two months prior to this visit. During this visit, Dr. Rossi noted that it was the first time Claimant had mentioned the prior treatment for the work related injury to his right knee back in 2008, and understood that he needed a right total knee replacement. Dr. Rossi again reported that his gait was "quite antalgic." Dr. Rossi observed some diffuse swelling of his right knee. A McMurray test, abduction/adduction stress testing and ballottement all caused significant discomfort for the Claimant. Dr. Rossi noted Claimant had limited extension and flexion, as well as significant pain. Claimant's left knee was unremarkable. Dr. Rossi explained to Claimant that the case

documentation did not support the instability of his right knee as being the cause of his November 2016 fall, as he did not document or disclose his 2008 knee injury. Dr. Rossi opined that, while Claimant does have a significant knee problem, treatment should be covered under his private insurance and not the workers' compensation system.

11. Prior to returning to Dr. Sacha for a follow-up DIME regarding the November 18, 2016 work injury, Claimant sustained another work injury on December 9, 2017.

12. Claimant sought treatment for his December 9, 2017 right knee injury on December 10, 2017 at the Saint Joseph Hospital Emergency Department. Claimant reported slipping and hitting his right knee on the corner of a dishwasher. He complained of difficulty straightening and bending his knee due to pain. The physician noted Claimant's right knee had a large effusion, ecchymosis distal to his patella, tenderness, and significantly decreased range of motion due to pain. X-rays revealed a small joint effusion and tricompartmental degenerative joint disease most pronounced in the medial aspect of Claimant's knee. The physician diagnosed Claimant with right knee hemarthrosis and aspirated Claimant's right knee. Claimant was provided crutches and prescribed medication.

13. On January 15, 2018, Claimant treated at Concentra with Elizabeth Palmer, PA-C under the supervision of ATP Stephen Danahey, M.D. Claimant stated that he tripped on a rug and landed on his right knee. Claimant reported that he had a right knee meniscectomy in 2008 and has had intermittent knee pain since then. PA Palmer diagnosed Claimant with a knee sprain, prescribed him medication and a knee brace, and referred Claimant for three weeks of physical therapy. Claimant was released to work full duty.

14. On January 25, 2018, Claimant returned to PA Palmer reporting that he had been to five physical therapy sessions with no improvement. He reported right knee locking, stiffness, and instability. PA Palmer referred Claimant for a MRI and prescribed new medications.

15. Liberty filed a General Admission of Liability ("GAL") on January 25, 2018 admitting liability for medical treatment.

16. Claimant underwent a right knee MRI on February 6, 2018 which revealed a medial meniscus bucket-handle type cleavage tear without a focally localized fragment, effusion and debris in the posterior joint recess, advanced arthrosis in the medial compartment, mild arthritic change at the patellofemoral interval, and a grade II PCL sprain.

17. On February 8, 2018, Claimant returned to PA Palmer and complained of on-and-off right knee pain. PA Palmer reviewed the MRI findings and referred Claimant to orthopedic specialist John Schwappach, M.D.

18. From January 16, 2018, through February 19, 2018, Claimant had six physical therapy sessions. At his first physical therapy appointment, Claimant reported right knee pain popping, clicking, and occasional instability. Claimant reported walking, standing, and getting up out of a chair are difficult. Claimant reported on and off again pain since his prior 2007 right knee injury.

19. Claimant presented to Dr. Schwappach on February 16, 2018. Dr. Schwappach reviewed Claimant's medical history, mechanism of injury, and treatment to date. Dr. Schwappach reviewed Claimant's MRI and noted a history of an old medial meniscus bucket-handle cleave tear. On examination, Dr. Schwappach noted knee effusion and a noticeable limp. He opined that Claimant had advanced osteoarthritis in the right knee. Dr. Schwappach's impression was post-traumatic osteoarthritis of the right knee. He administered a cortisone injection and recommended Claimant undergo a right total knee arthroplasty.

20. On March 16, 2018, John Papillion, M.D., performed an Independent Medical Examination ("IME") at the request of the respondents in the WC# 5-064-719 claim. Dr. Papillion noted Claimant's 2007 and 2016 right knee injuries and treatment. He diagnosed Claimant with tricompartmental degenerative osteoarthritis with varus deformity and grade I post-traumatic posterior cruciate ligament laxity. Dr. Papillion opined that Claimant's December 9, 2017 industrial injury mildly exacerbated, but was not the proximate cause of, Claimant's underlying degenerative arthritis. He opined Claimant reached MMI. Dr. Papillion agreed that Claimant has significant arthritis and has likely failed conservative treatment. Dr. Papillion noted Claimant could consider viscosupplementation injections and opined that he is likely a candidate for a right total knee arthroplasty, but that such treatment is not work-related and should be pursued under Claimant's private insurance.

21. In an addendum dated March 23, 2018, Dr. Papillion opined Claimant sustained 15% lower extremity impairment (6% whole person), consisting of 10% under Table 40 #5 of the AMA Guides for underlying arthritis, and 5% under Table 40 #7 of the AMA Guides for a partial posterior cruciate ligament tear. He apportioned Claimant's 2008 4% whole person impairment from his calculated 6% whole person impairment, resulting in a whole person impairment of 2%.

22. Claimant returned to Dr. Danahey for a follow-up evaluation on April 12, 2018, at which time Dr. Danahey placed Claimant at MMI for his December 9, 2017 work injury with no permanent impairment. Dr. Danahey opined that a right total knee replacement is necessary, but that the indication for the surgery pre-dated the work injury.

23. On May 8, 2018, Claimant attended a follow-up DIME with Dr. Sacha for his November 18, 2016 work injury. Dr. Sacha opined that Claimant sustained an intervening new injury on December 9, 2017 that resulted in a permanent exacerbation of Claimant's preexisting right knee and lower back issues. Dr. Sacha placed Claimant at MMI for the November 18, 2016 work injury as of December 9, 2017. He assigned the impairment rating he referenced in his July 18, 2017 DIME report, 5% whole person for the low back

and 5% lower extremity for the right knee, with no apportionment. Dr. Sacha opined that, with the significant worsening due to the December 9, 2017 injury, no maintenance treatment for the right knee was related to the November 18, 2016 work injury. As related to the November 18, 2016 work injury, Dr. Sacha recommended maintenance for the low back in the form of 6-8 chiropractic and acupuncture sessions, a low back MRI, and bilateral L4-S1 facet injections.

24. On May 29, 2018, Respondents in WC# 5-064-719 filed a FAL based on Dr. Danahey's April 28, 2018 MMI report.

25. On June 20, 2018, Pinnacol filed a FAL based on Dr. Sacha's May 8, 2018 DIME report.

26. On October 21, 2018, Claimant underwent a DIME with James Regan, M.D. for the December 9, 2017 work injury. Dr. Regan issued a DIME report dated November 5, 2018. Dr. Regan reviewed Claimant's medical records including, *inter alia*, Dr. Watson's January 23, 2008 impairment report and Dr. Sacha's DIME reports. He noted that the medical records showed significant arthritis dating back to 2008 with subsequent imaging and evaluations demonstrating the same. Dr. Regan noted that the February 2018 right knee MRI evidenced advanced arthritis and an old meniscal tear without any new internal derangement. He opined that Claimant's advanced right knee arthritis engendered the total knee arthroplasty discussion. He noted range of motion measurements for both knees were identical.

27. Dr. Regan opined that Claimant's December 9, 2017 knee strain had resolved and placed Claimant at MMI for the December 9, 2017 work injury as of November 5, 2018. Dr. Regan provided 5% right knee impairment (2% whole person) under Table 40 for his meniscal tear. He noted no additional Table 40 rating for the December 9, 2017 work injury. Dr. Regan explained,

> Dr. Sacha uses chondromalacia for 5%. This is fine. Either the meniscal tear, or the chondromalacia, the value remains 5%. This is not a new meniscal tear from 12/09/17, but would likely date back to 2008. The Table 40 diagnosis is no different regarding the 12/09/17 than it was regarding the 11/2016 event.

28. Dr. Regan apportioned the rating by subtracting Dr. Sacha's 5% lower extremity impairment from his 5% lower extremity impairment, resulting in 0% apportioned impairment for the right knee. Dr. Regan opined that Claimant's continued right knee pain and need for treatment was the result of advanced degenerative arthritis and not a consequence of the 2007 meniscal tear, November 2016 knee strain, or December 2017 knee strain.

29. On November 28, 2018, Liberty filed an Amended Final Admission based on Dr. Regan's November 5, 2018 Division IME report.

30. On November 9, 2019, orthopedic surgeon Philip Stull, M.D. performed an IME at the request of Claimant. Dr. Stull reviewed Claimant's medical records and performed a physical examination. Dr. Stull noted Claimant's persistent symptoms since his December 2017 knee injury. Dr. Stull took x-rays of both knees. He noted the right knee x-rays showed advanced medial compartmental arthritis with mild to moderate patellofemoral compartment arthritis, while the left knee x-rays revealed only minimal arthritic changes and reasonably well-preserved joint space throughout the joint. Dr. Stull noted that Claimant's right knee arthritis is multifactorial, but opined that the predominant factor is work-related activity and injury. Dr. Stull noted that at the time of Claimant's 2008 right knee surgery, the surgeon removed 50% of his medial meniscus and found only grade II chondromalacia. Now, Claimant is bone-on-bone. Dr. Stull concluded,

> The arthritic changes that are present in his knee joint at this time are the result of the work related injury in 2008 and the partial meniscectomy. He is continuing to do physically demanding work, and the aggravating injuries he sustained to his knee in 2016 and 2017 provoke exacerbation of his symptomatology.

31. Dr. Stull opined that Claimant is a candidate for a right knee replacement. He concluded that if it were not for the repeated work-related insults to the right knee, Claimant would not have advanced arthritis in his right knee and would not require a knee replacement at this time.

32. Dr. Stull testified by deposition as an expert in orthopedic surgery. Dr. Stull testified consistently with his IME report. Dr. Stull testified that Claimant's need for knee replacement and ongoing treatment is multifactorial and related to his multiple work injuries including the 2007, 2016 and 2017 injuries. Dr. Stull opined that Claimant's 2007 injury and surgery predisposed Claimant to the gradual progression of arthritis and subsequent injuries likely made him more symptomatic. Dr. Stull did not differentiate between the 2016 and 2017 work injuries. He indicated that his opinion was based upon Claimant's representation that he did "reasonably well" after the 2007 surgery and had not had functional or gait issues before the recent claims.

33. Dr. Regan testified by deposition as an expert in internal medicine. He testified consistent with his DIME report and explained Claimant suffered a right knee sprain as a result of the December 9, 2017 work injury. Dr. Regan explained that Claimant's arthritis is degenerative and pre-existing. He stated that although it was "conceivable" Claimant's pre-existing arthritis was worsened, aggravated and accelerated by the workers' compensation injuries, such conclusion would be conjecture and could not be proven. Dr. Regan testified that the bucket handle tear evidenced on MRI was an old tear, and that there was no MRI evidence of any partial tear, contrary to Dr. Papillion's finding. Dr. Regan continued to opine Claimant is at MMI for the December 9, 2017 work injury and that further treatment, including a total knee arthroscopy, would be related to Claimant's unrelated pre-existing degenerative arthritis. Regarding permanent impairment, Dr. Regan explained that he apportioned Dr. Sacha's 5% rating for chondromalacia from his

5% rating for the meniscus, resulting in no additional impairment for the December 2017 work injury.

34. Dr. Sacha testified by deposition. Dr. Sacha continued to opine Claimant remains at MMI for the November 18, 2016 work injury. He testified that Claimant continued to have symptomatic pain in his knee from arthritis when he was put at MMI for the 2007 work injury and given impairment on January 9, 2008. He testified Clamant likely was not symptom-free after the 2007 work injury. After reviewing records from the 2007 work injury, Dr. Sacha continued to opine that apportioning the 5% rating for the 2007 work injury from his rating for the 2016 work injury was inappropriate. He testified that Dr. Watson's prior rating did not use the correct terms and explained the difference between arthritis and chondromalacia. Dr. Sacha determined that the 2008 impairment rating was not for the same "injury", as he rated for chondromalacia and Dr. Watson rated the meniscus. Dr. Sacha testified that, on his examination, Claimant had no meniscal findings or complaints consistent with a meniscal injury. He explained that he rated Claimant on complaints of anterior knee pain. Dr. Sacha stated,

> And with no evidence of other chondral ratings with no rating given to a meniscus, which had been done before, you don't apportion. It's fairly straightforward. Level II accreditation course and Colorado statute are all straightforward when it comes to that. It's not a prior diagnosis. It's not a prior injury that was rated. It was not a prior injury that was even treated. And finally, he had no care for the prior two years. So the state of Colorado is straightforward on this. So, no, you can't apportion that.

Dr. Sacha Depo. Tr. 20:21-25; 21:1-7.

35. Dr. Sacha further testified that the December 9, 2017 work injury caused a permanent aggravation of a pre-existing problem. He opined that Dr. Regan prematurely placed Claimant at MMI for the December 9, 2017 work injury, and that additional treatment, including a trial of Synvisc injections, pool/physical therapy, and strength/conditioning, would be needed to attempt to get Claimant back to baseline. He acknowledged that pool therapy can be prescribed as maintenance treatment. Dr. Sacha opined Claimant's need for a total knee arthroplasty dates back several years and is not a result of the December 9, 2017 work injury. Dr. Sacha disagreed with Dr. Stull that Claimant currently requires knee surgery, noting some nonphysiologic presentation.

36. On the issue of apportionment of the November 18, 2016 work injury, the ALJ finds the opinion of Dr. Sacha more credible and persuasive than the opinion of Drs. Stull and Regan.

37. On the issue of MMI for the December 6, 2017 work injury, the ALJ finds the opinion of Dr. Regan more credible and persuasive than the opinions of Drs. Stull and Sacha.

38. Claimant failed to overcome Dr. Regan’s DIME opinion on MMI by clear and convincing evidence.

39. Respondents in WC# 5-037-178 claim failed to overcome Dr. Sacha’s DIME opinion on apportionment by clear and convincing evidence.

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

CONCLUSIONS OF LAW

Generally

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

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

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

Overcoming Dr. Regan's DIME Opinion on MMI for the December 9, 2017 Work Injury

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Powell v. Aurora Public Schools* W.C. No. 4-974-718-03 (ICAO, Mar. 15, 2017). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (ICAO, Mar. 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management,* W.C. No. 4-356-512 (ICAO, May 20, 2004).

The party seeking to overcome the DIME physician's finding regarding MMI and impairment bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge D/B/A Colorado Athletic Club* W.C. No. 4-914-378-02 (ICAO, June 25, 2015). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries,* WC 4-712-812 (ICAO, Nov. 21, 2008); *Licata v. Wholly Cannoli Café* W.C. No. 4-863-323-04 (ICAP, July 26, 2016).

Claimant contends Dr. Regan erred by placing him at MMI for his December 9, 2017 work injury. Claimant argues that the December 9, 2017 work injury resulted in a permanent aggravation of his prior condition and that Claimant requires additional treatment to return to baseline. The evidence does not establish it is highly probable Dr. Regan erred in finding Claimant reached MMI.

As part of his evaluation, Dr. Regan performed a records review and was aware of Claimant’s 2007 and 2016 work injuries when making his determinations. Dr. Regan noted that the February 2018 MRI showed advanced arthritis with an old meniscus tear and no new pathology. He thoroughly assessed Claimant’s condition and determined that the component related to the December 2017 work injury, a knee strain, had resolved and required no further treatment.

It is undisputed Claimant has significant, pre-existing osteoarthritis dating back to at least 2008 and that surgery has been recommended. Dr. Regan credibly opined that, while a total knee arthroplasty may be reasonable and necessary, it is not related to Claimant’s December 9, 2017 work injury. Dr. Regan’s opinion that Claimant has reached MMI and the need for surgery is related to Claimant’s pre-existing, chronic and degenerative arthritis is corroborated by Drs. Papillon and Danahey. Although Dr. Sacha disagrees Claimant has reached MMI for the December 2017 work injury, with respect to the need for surgery, he also opined that such need was due to Claimant’s pre-existing arthritic condition. While Dr. Stull opines that the 2016 and 2017 work injuries aggravated and exacerbated Claimant’s symptomatology and caused the need for a total knee arthroplasty, Dr. Stull does not differentiate between the 2016 and 2017 work injuries.

Claimant argues that, while the pathology requiring surgery may date back to 2008, Claimant did not develop symptoms until after the 2016 and 2017 work injuries, and there is no record of a recommendation of surgery being made until February 2018. The ALJ notes that three weeks prior to the December 9, 2017 work injury, Claimant presented to Dr. Rossi with complaints of longstanding knee pain and instability, reporting that he had fallen on multiple occasions in the past nine months. Claimant wanted to reopen his claim. In reference to the 2008 injury, Dr. Rossi noted Claimant understood he needed a total knee replacement. Considering the totality of the credible and persuasive evidence, the absence of an actual recommendation for knee surgery prior to February 2018 is not dispositive of whether the December 2017 work injury caused the need for such treatment, or that Dr. Regan erred in his opinion on MMI. To the extent Dr. Stull and Dr. Sacha disagree Claimant has reached MMI for the December 9, 2017 work injury, their opinions represent mere differences of opinion and do not rise to the level of clear and convincing evidence.

Overcoming Dr. Sacha’s DIME Opinion on Permanent Impairment for the November 18, 2016 Work Injury

Section 8-42-104(5)(a)&(b), C.R.S. and WCRP 12-3(B) provide that apportionment is required only after the DIME physician initially determines that the industrial injury has caused ratable impairment under the AMA Guides. Hernandez v. Dairy Farmers of America, WC 5-028-658 (ICAO, Feb. 4, 2020). Apportionment is made by subtracting from the injured worker's impairment the preexisting impairment as it existed at the time of the subsequent injury. Section 8-42-104(5)(a)&(b), C.R.S. explicitly provides that a permanent medical impairment rating applicable to a body part shall be deducted from the permanent medical impairment rating for a subsequent injury to the same body part. Similarly, WCRP 12-3(B) specifies that "apportionment shall be made by subtracting from the injured worker's impairment the preexisting impairment as it existed at the time of the subsequent injury or occupational disease." Consequently, both the statute and Rule presume that apportionment applies as long as there is a subsequent permanent impairment causally related to the industrial injury. See Hernandez v. Dairy Farmers of America, WC 5-028-658 (ICAO, Feb. 4, 2020); In re Marquez, WC 4-896-504-04 (ICAO, Aug. 7, 2014). The purpose of this statute is to preclude a claimant from recovering twice for the same impairment. See In re Kellebrew, WC 964-409-01 (ICAO, Feb. 6, 2017).

Respondents in the WC# 5-037-178 claim argue Dr. Sacha erred in failing to apportion Claimant's prior Table 40 impairment from the Table 40 impairment for the 2017 work injury. Respondents argue that the term "body part" referenced in the statute and WCRP should effectively be interpreted to mean a ratable unit under the AMA Guides, and the AMA Guides consider the knee joint as one unit of the lower extremity. As found, Respondents failed to prove Dr. Sacha clearly erred in his opinion on apportionment.

Table 40 of the AMA Guides provides for impairment ratings for the lower extremity for other disorders of the knee. Table 40 outlines the impairment values for different disorders including, *inter alia*, pallectotomy, anterior cruciate ligament loss, posterior cruciate ligament loss, patella replacement, and knee replacement arthroplasty. Section 5 of Table 40 provides for a 0-20% impairment rating for arthritis due to any cause including trauma; chondromalacia. Section 2 of Table 40 of the AMA Guides provides for a 0-10% impairment for one meniscus. As noted in the footnotes to Table 40, impairment values in the table can be combined with other impairment values in the table, as well as with loss of motion impairments using the Combined Values Chart.

Dr. Sacha's 5% impairment rating for chondromalacia falls within the impairment range noted in the AMA Guides. There is objective evidence of chondromalacia in the record. Dr. Sacha explained that he did not apportion Claimant's 2008 rating as the prior rating was for impairment resulting from Claimant's meniscus, not chondromalacia. He further explained that, on his examination of Claimant, there were no meniscal findings or complaints consistent with a meniscal injury. Dr. Sacha credibly opined Claimant's underlying chondromalacia was his primary pain complaint/generator, not his meniscus. Accordingly, Dr. Sacha's impairment rating would not result in Claimant recovering twice for the same impairment. Dr. Sacha's rating was based on the AMA Guides and he provided an analysis of the nature of the impairment and the medical basis for his conclusions and opinions. There is insufficient evidence establishing it is highly probable Dr. Sacha erred in his DIME opinion regarding apportionment.

ORDER

1. Claimant failed to overcome Dr. Regan's DIME opinion on MMI. Claimant is at MMI for the December 6, 2017 work injury.

2. Respondents failed to overcome Dr. Sacha’s DIME opinion on apportionment. Claimant’s impairment for the November 18, 2016 work injury is 5% whole person for the low back and 5% lower extremity under Table 40 of the AMA Guides.

3. All matters not determined herein are reserved for future determination.

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

DATED: March 15, 2021

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that on December 6, 2018, he sustained an injury arising out of and in the course and scope of his employment with the employer.

2. If the claimant proves a compensable injury, whether the claimant has demonstrated, by a preponderance of the evidence, that treatment he has received for his right elbow, (including right elbow surgery performed by Dr. Frank Kopich on June 1, 2020), breathing issues, and his right hip, was reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.

3. If the claimant proves a compensable injury, what is the claimant's average weekly wage (AWW)?

4. If the claimant proves a compensable injury, whether the claimant has demonstrated, by a preponderance of the evidence, that he is entitled to temporary total disability (TTD) and/or temporary partial disability (TPD) benefits beginning December 6, 2018 through and including February 7, 2020.

5. If the claimant is found to be entitled to TTD and/or TPD benefits, whether the respondents have demonstrated, by a preponderance of the evidence, that the claimant was responsible for the termination of his employment with the employer.

6. The issue of whether the claimant is entitled to indemnity benefits beginning February 8, 2020 is reserved for future determination, if necessary.

FINDINGS OF FACT

1. At hearing the parties provided a great deal of information regarding a number of events and issues related to this matter. In an effort to clearly communicate her findings of fact, the ALJ has organized these findings in chronological order.

2. In 2017, the claimant attended training to become a farrier (horseshoer). The claimant testified that he wanted to become a horseshoer so he could save money by shoeing his own horses and his father's horses. However, not long after the claimant completed his farrier training, his father sold his horses. The claimant currently owns two horses and he maintains the condition of their hooves. The claimant testified that since completing his farrier training, he has not worked on any other horses.

3. Some time thereafter, the claimant established a Facebook page for "Eric's Farrier Service", which includes photos of the claimant shoeing horses. The claimant testified that these photos were taken while he was attending farrier training.

4. Prior to December 6, 2018, the claimant has sought treatment for back pain. On April 10, 2017, the claimant was seen at Grand River Primary Care (Grand River) with complaints of back pain. On that date, he reported that in March 2017 he had been seen at the emergency department (ED) in Fort Collins, Colorado for right sided radiculopathy.

5. On September 20, 2017, the claimant returned to Grand River. At that time, the claimant reported an increase in his back symptoms after shoeing a mule.

6. The medical records indicate that the claimant's left upper extremity issues began in early 2018. On April 27, 2018, the claimant was seen at Grand River regarding complaints of numbness in his left fourth and fifth fingers. At that time, Lydia Steinbach, CFNP noted that the numbness was reproducible by tapping on the medial side of the claimant's elbow. NP Steinbach recommended the claimant use splints and padding.

7. On May 17, 2018, the claimant returned to Grand River and was seen by NP Steinbach. On that date, the claimant reported finger numbness with left elbow pain. NP Steinbach diagnosed lateral epicondylitis of the left elbow and referred the claimant for an orthopedic consultation.

8. On May 23, 2018, the claimant was seen by surgeon, Dr. Frank Kopich. At that time, the claimant reported six weeks of left elbow pain. He also reported that the pain began while he was shoeing a horse. Dr. Kopich diagnosed left lateral epicondylitis and administered an injection to the claimant's left elbow. The medical record of that date indicates that the claimant intended to begin work as a welder rather than continue as a horseshoer.

9. When the claimant completed the employment application for the employer, he stated that he had worked as a farrier for Parachute Horse Shoeing Service from 2012 to 2018. The claimant testified that he made up Parachute Horseshoeing Service because he did not want the employer to think that he had gaps in his employment history. The claimant also testified that although he had several jobs in 2018 that predated his work for employer, he did not list any of those jobs on his application for the employer.

10. The claimant began working for the employer in September 2018 as a fabricator and shop foreman. He was paid $22.00 per hour. The claimant's job duties included working the "CNC" table and plasma torch to cut out pieces of steel for welding. The claimant testified that the CNC table was approximately 10 feet by 18 feet in size. The working surface of the table was approximately three to three and one half feet above the ground.

11. The steel that is cut on the CNC table comes in flat sheets that measure four by eight feet, and sometimes 5 by 10 feet. The steel sheets vary in thickness from one-sixteenth of an inch to one-half inch. The claimant testified that the thickness of these sheets will impact the weight. The claimant further testified that depending upon the weight of the steel he would load the sheet onto the table himself. However, two or three people would be needed to lift the heavier sheets.

12. On September 24, 2018, the claimant was seen at Grand River. At that time, he reported experiencing shortness of breath. However, that symptom was noted as “not changed from usual.”

13. The claimant testified that in November 2018, the exhaust fan on the CNC table broke. This resulted in smoke from the plasma torch filling the work area. The claimant also testified that this smoke continued for two weeks before the fan was repaired. The claimant did not use a mask while working in this smoke. He attributes his breathing issues to this smoke exposure.

14. The claimant testified that while he was working for the employer, he began to have issues with his left elbow. However, on December 6, 2018, his right elbow also began to bother him.

15. The claimant testified that on December 7, 2020 he informed Mr. A[Redacted] that he was having issues with his elbows and would not be able to work. The claimant also testified that the employer did not offer him medical treatment on that date.

16. Office Manager Mr. B[Redacted]. and Owner/Supervisor Mr. A[Redacted] testified. Both testified that the claimant complained of pain and medical issues while employed with them. These complaints included issues related to the claimant’s elbows. However, the claimant did not complain of any workplace injury, nor did he attribute his symptoms to his job duties. Mr. B[Redacted] testified that the claimant relayed to him that these elbow issues were related to shoeing horses and riding motorbikes.

17. With regard to the broken CNC exhaust fan, Mr. A[Redacted] testified that he and the claimant replaced the broken fan the same date that it became broken.

18. On December 7, 2018, the employer presented the claimant with a letter addressing the claimant’s job performance. The letter stated that the claimant's work ethic had decreased; other employees did not feel comfortable working with him; contractors and clients had complained; and that his fabrication abilities were not “100%”. Given these job performance issues, the employer offered the claimant the opportunity to work at the reduced rate of $18.00 per hour. The letter also provided that if the claimant found this offer unacceptable, he could resign.

19. Mr. B[Redacted] and Mr. A[Redacted] testified regarding the December 7, 2018 letter. Both witnesses testified that they did not believe the claimant would continue his employment after the modified employment offer. However, they planned to allow the claimant to continue working if he had accepted the reduction in pay.

20. The claimant did not accept the reduced pay, and quit his employment on December 7, 2020. The claimant testified that he had recently purchased a new vehicle and could not afford to work for $18.00 per hour.

21. After separating from his employment on December 7, 2018, the claimant sought treatment in the emergency department (ED) at Valley View Hospital. On that date, the claimant was seen by Dr. Brandy Drake. The claimant reported bilateral elbow pain and a sore throat. The claimant also reported a longstanding left elbow injury that had worsened as a result of heavy lifting at work and the onset of right elbow symptoms the day prior. The claimant also asserted a belief that smoke and fumes at work contributed to his sore throat symptoms. On exam, Dr. Drake noted slight effusion of the left elbow and pain with range of motion. The claimant's right elbow was "tender throughout". X-rays were taken of both of the claimant's elbows. Dr. Drake noted that no fracture was evident on the x-rays. In addition, a chest x-ray taken that day and was read as normal. Dr. Drake recommended the use of wrist braces, rest, and ice.

22. On December 11, 2018, the claimant sought treatment at Grand River and was seen by Tami Griffith, CFNP. On that date, the claimant reported bilateral elbow pain and requested referral to an orthopedist.

23. On December 18, 2018, the claimant was seen by Dr. Kopich. In the medical record of that date, Dr. Kopich referenced the May 2018 injection he administered to the claimant's left elbow. On December 18, 2018, the claimant reported to Dr. Kopich that he began having left elbow pain in October and right elbow pain in December 2018. On exam, Dr. Kopich noted that the claimant had no erythema, warmth, or swelling in either elbow. In addition, the claimant had full range of motion in both elbows. Dr. Kopich diagnosed lateral epicondylitis in both elbows. He administered an injection to the claimant's left elbow and referred him to physical therapy.

24. On December 24, 2018, the claimant began working for H&K Trucking as a water truck driver in the oil and gas industry.

25. On January 15, 2019, the claimant returned to Dr. Kopich and reported that his left elbow symptoms had improved after the injection. However, he continued to have right elbow issues. The claimant also reported worsening symptoms when pulling hoses at his new job. On that date, Dr. Kopich administered an injection to the claimant's right elbow.

26. The claimant testified that while working for H&K Trucking the fumes from the oil tankers bothered him and he separated from that job on January 20, 2019.

27. Thereafter, the claimant continued to seek medical treatment at Grand River for various issues. However, he did not seek treatment for elbow, back, or lung symptoms. On January 29, 2019, Dr. Edward Wright diagnosed the claimant with osteopenia. On February 1, 2019, the claimant reported medication related rashes, sluggishness, and vertigo. On February 13, 2019, Dr. Alan Saliman evaluated ongoing issues with blood pressure medication and noted that the claimant had osteopenia (bordering on osteoporosis) in his back and hip.

28. On April 8, 2019, the claimant was seen by NP Griffith for ongoing lumbar pain. NP Griffith noted that the claimant had returned to working as a farrier. In addition

to his lumbar symptoms, the claimant also reported an elevated pulse when working on horses.

29. The claimant returned to Grand River on May 9, 2019 and was seen by Andrew Sever, PA-C. On that date, PA Sever noted that the claimant's low back and elbow pain had worsened, and he was requesting an injection. The claimant reported that he had difficulty squeezing and gripping while performing farrier work.

30. On June 29, 2019, the claimant began working for Screamin' Eagle Trucking & Excavating. The claimant testified that he worked only as a truck driver and did not perform any work outside of his work vehicle.

31. The claimant testified that he did not sustain any new injuries while working for H&K Trucking and Screamin' Eagle. However, while working for those employers, he experienced elbow pain with activity, especially when the relief from the injections wore off. The claimant further testified that he continued to engage in activities that aggravated his symptoms because it was required by his job. When the symptoms became worse, he would seek additional injections.

32. On November 4, 2019, the claimant was seen by PA Sever and reported relief from the prior injection. However, the claimant also reported that he performed heavy lifting at work and now had symptoms in both elbows. At that time, the claimant requested bilateral elbow injections, which PA Sever administered. In addition, PA Sever noted that "[l]ateral epicondylitis is notoriously difficult to treat, especially if you do lots of strenuous work with your hands."

33. On January 2, 2020, the claimant was seen by Dr. Saliman for energy and mood issues. At that time, the claimant told Dr. Saliman that he was extremely short of breath. The claimant also reported "that in his usual work environment he is shoeing as many as 5 – 8 horses per day. Off season he does little activity and pretty much sits around the house." Dr. Saliman opined that the claimant's shortness of breath was exertional in nature and related to claimant's sedentary lifestyle and deconditioning.

34. On January 14, 2020, the claimant established care with Dr. Heath Cotter at Grand River. Dr. Cotter reviewed the claimant's history, and noted mild airflow obstruction. He also noted that the claimant reported that he was exposed to fires while shoeing horses. Dr. Cotter recommended an albuterol inhaler for the claimant's symptoms.

35. On January 14, 2020, the claimant was also seen by Dr. Kopich. At that time, the claimant reported improvement of his right elbow symptoms. However, he had increased left elbow symptoms after driving a truck that did not have power steering. Dr. Kopich administered an injection to the claimant's left elbow. On January 30, 2020, Dr. Kopich administered an injection to the claimant's right elbow.

36. Claimant testified that he did not work for Screamin' Eagle after February 8, 2020 because of a lack of work due to the COVID-19 pandemic and related restrictions.

37. On March 12, 2020, the claimant was seen by NP Griffith. At that time the claimant reported that he was feeling winded when shoeing horses. NP Griffith diagnosed mild reactive airway disease and recommended continued use of the inhaler.

38. On May 5, 2020, the claimant was seen by Dr. Kopich. On that date, the claimant reported worsening right elbow pain. The claimant also informed Dr. Kopich that he was ready to consider surgery. Dr. Kopich noted that the claimant had exhausted conservative treatment, and recommended surgery to treat right elbow lateral epicondylitis.

39. On May 27, 2020, the claimant was seen by PA Sever and Dr. Kopich. In the medical record of that date, the "inciting event" for claimant's right elbow symptoms was identified as "shoeing horses." The recommended right sided epicondylar release surgery was performed on June 1, 2020

40. The claimant testified that he returned to work for Screamin' Eagle in October 2020 following his right elbow surgery.

41. The ALJ does not find the claimant's testimony regarding the nature and onset of his symptoms to be credible or persuasive. The ALJ credits the medical records and finds that the claimant's elbow symptoms existed prior to his employment with the employer. The ALJ also finds as credible the claimant's resorts to Mr. B[Redacted] that his pain symptoms were due to horseshoeing and riding motorbikes. The ALJ credits the opinion of Dr. Kopich that the claimant's need for right elbow surgery was caused by horseshoeing. In addition, the ALJ credits the medical records that speak of the claimant's ongoing work as a horseshoer/farrier over the contrary testimony of the claimant regarding when he performed horseshoeing.

42. The ALJ credits the testimony of Mr. A[Redacted] over the conflicting testimony of the claimant and finds that the issue with the CNC exhaust fan was remedied the same day that it malfunctioned. The ALJ is not persuaded that the claimant's lung/breathing issues are related to that broken exhaust fan. For all of the foregoing reasons, the ALJ finds that the claimant has failed to establish that it is more likely than not that he suffered an injury to his bilateral elbows, lungs, low back, or right hip while employed with the employer. The ALJ also finds that the claimant has failed to demonstrate that it is more likely than not that his job duties with the employer aggravated, accelerated, or combined with his preexisting elbow condition to necessitate the need for medical treatment.

43. With regard to the ending of the claimant's employment with the employer, the ALJ credits the testimony of Mr. B[Redacted] and Mr. A[Redacted] over the claimant's contrary testimony. The ALJ finds that continuing work was available to the claimant, albeit at a lower rate of pay. The ALJ finds that the employer's decision to reduce the claimant's rate of pay was reasonable in addressing the claimant's unsatisfactory job performance. The ALJ also finds that the claimant's decision to leave continuing employment was a circumstance within his control. Therefore, the ALJ finds that the claimant's wage loss was not related to his elbow condition or the need for medical treatment. The claimant's wage loss occurred because the claimant quit this employment.

CONCLUSIONS OF LAW

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

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

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

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

5. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that on December 6, 2018, he sustained an injury arising out of and in the course and scope of his employment with the employer. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that his job duties with the employer aggravated, accelerated, or combined with a preexisting condition to necessitate treatment. As found, the medical records and the opinions of Dr. Kopich are credible and persuasive.

6. As the ALJ has found that the claim is not compensable, all remaining endorsed issues are dismissed as moot.

ORDER

It is therefore ordered that the claimant's claim for workers' compensation benefits related to an alleged injury occurring on December 6, 2018 is denied and dismissed. All remaining endorsed issues are dismissed as moot.

Dated this 15th day of March 2021.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

ISSUES

- Whether claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with employer?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that the medical treatment he received was reasonable and necessary to cure and relieve the claimant from the effects of the industrial injury?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that employer failed to properly designate a physician to treat claimant's injuries, allowing claimant to choose his own authorized treating physician?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary total disability ("TTD") benefits for the period of June 26, 2019 and continuing?

- If claimant has proven a compensable injury, whether claimant has proven by a preponderance of the evidence that respondents are subject to penalties for failure to timely report the injury pursuant to Section 8-43-103(1), C.R.S.?

- If claimant has proven that respondents are subject to penalties for failing to report the injury timely, whether respondents have proven by a preponderance of the evidence that the cured the penalty?

- If claimant has proven a compensable injury, what is claimant's average weekly wage ("AWW")?

- If claimant has proven by a preponderance of the evidence that he sustained a compensable injury, whether respondents have proven by a preponderance of the evidence that claimant failed to timely report the injury to employer?

STATEMENT OF FACTS

1. Claimant testified at hearing that he was employed by employer as an engineering supervisor. Claimant's job duties included performing the corrective and preventative maintenance on the units in the buildings that were owned by employer. The units were condominiums owned by individuals contained within the building that was owned by employer. Claimant also worked at Wal-Mart where he earned an hourly wage of $19.44.

2. Claimant testified that on June 25, 2019, claimant met with his supervisor in the morning to discuss work, claimant then went to the third floor to check the pool temperature, and then went to his office to eat his lunch. Claimant testified that after lunch, he was doing reports in his office when he heard a strange noise that sounded like water running. Claimant testified he went to investigate the sound and checked the bathroom of a privately owned condominium unit where he suspected the noise was coming from, but did not find any water. Claimant testified he set down his dishes from lunch, and then does not remember what happened after he set down his dishes. Claimant testified the next thing he remembers is when he was seated at his desk and was bleeding from the back left side of his head.

3. Claimant was eventually found by his sons after they had received a strange phone call from claimant. Claimant was taken by his family to Vail Valley Medical Center. Claimant was diagnosed with a fractured skull and underwent a computed tomography ("CT") scan of the head. Claimant also underwent various other tests. The CT scan of the head showed left occipital and temporal bone skull fractures with bifrontal and left cerebellar contusions, subarachnoid hemorrhage and subdural hemorrhage.

4. Claimant was subsequently flown by Flight-For-Life to Denver Health where he remained until July 16, 2019. Claimant then participated in rehabilitation at Denver Health until July 26, 2019. Claimant's diagnosis include a non-traumatic subarachnoid hemorrhage, unspecified, and a fractured skull. Claimant's medical records from Denver Health note that claimant presented with a syncopal episode with head trauma resulting in multifocal intracranial hemorrhages. During claimant's stay at Denver Health, he underwent an MRI of the lumbar spine that revealed moderate subarachnoid hemorrhage in thecal sac below the L3-L4 level with nerve root irritation and small subdural hematoma at L4-L5.

5. Following claimant's treatment with Denver Health, claimant returned to Vail and began rehabilitation with Howards Head Sports Medicine and treatment with Dr. Lipton. Claimant then suffered a second fall when he was at home in the shower on September 24, 2019. Claimant was diagnosed with an acute on chronic subdural hematoma. Claimant underwent surgery for this condition on September 28, 2019.

6. Claimant's medical records document a prior history of diabetes, cardiomyopathy and pulmonary hypertension. Prior to claimant's date of injury, claimant was seen by Dr. Lipton on June 10, 2019. During this visit, Dr. Lipton noted claimant was still on the prescription drug Bydureon for treatment of his diabetes mellitus. Dr. Lipton noted claimant would like to go back on Victoza, but his insurance company wanted him to try Trulicity first. It was noted that Trulicity had been ordered, but had not been delivered to claimant yet.

7. Claimant subsequently took time off from work and traveled to Mexico. Claimant testified he did not change his diabetes medication prior to his work injury. Conflicting evidence was presented at hearing as to whether claimant had started taking the Trulicity prior to his work injury.

8. Mr. A[Redacted], the property manager for employer, testified on behalf of employer. Mr. A[Redacted] testified that he had discussions with claimant on the day of the incident and then later saw claimant changing locks in the ski room. Mr. A[Redacted] testified that he later learned claimant had fallen after speaking to claimant's son. Mr. A[Redacted] testified he proceeded to claimant's office where claimant's wife was holding a towel on the back of his head. Mr. A[Redacted] testified claimant also had a very swollen black eye.

9. Mr. A[Redacted] testified claimant's family proceeded to take claimant to the hospital and asked Mr. A[Redacted] if he could look for claimant's glasses. Mr. A[Redacted] testified he later found claimant's glasses in unit B-11 on the kitchen floor along with a four inch puddle of blood. Mr. A[Redacted] testified that he noticed that the light was on in the bathroom/laundry area of the condominium, and when he went into the bathroom he found more blood on the bathroom floor. Mr. A[Redacted] testified he found claimant's dirty dishes next to the sink. Mr. A[Redacted] testified he did not find any of claimant's tools in the condominium unit. Mr. A[Redacted] testified he did not hear or see anything in the unit that would indicate a leak or a noise was coming from the unit.

10. Claimant underwent an independent medical examination ("IME") with Dr. Orent on October 22, 2019. Dr. Orent reviewed claimant's medical records, obtained a medical history and performed a physical examination in connection with the IME. Dr. Orent noted that in his opinion, claimant took a fall for unknown reasons. Dr. Orent opined that claimant was having no cardiac symptoms, no chest pain, no palpitations, no shortness of breath, nothing to suggest a cardiac etiology and no evidence of a stroke. Dr. Orent opined that there was no evidence of any ischemic change in the brain on the imaging and a stroke almost never causes abrupt loss of consciousness as occurred in this case. Dr. Orent opined that the pericardial effusion was not related and had been present since 2007 and unchanged since that time. Dr. Orent further opined that the pericardial effusion would not cause a sudden loss of consciousness.

11. Dr. Orent opined in his report that claimant either fell forward, hit the front part of his head on the shelf of the bathroom causing the black eye, then fell backwards and hit his head either on the toilet or the floor, or the reverse occurred and claimant fell backward hitting his occiput on the shelf and his eye on the toilet.

12. Dr. Orent concluded that he had no idea as to why claimant fell on June 25, 2019 and caused serious injury to his brain.

13. Respondents obtained their own records review IME of claimant with Dr. Lesnak on November 15, 2019. Dr. Lesnak reviewed claimant's medical records and issued a report in connection with his review of the records. Dr. Lesnak opined that claimant suffered an acute change in his mental status between 12:30 p.m. on June 25, 2019 and 5:00 p.m. on that same day. Dr. Lesnak noted that prior to this probably "syncopal episode" on June 25, 2019, claimant's personal physician, Dr. Lipton, had recommended claimant change his blood sugar medication because of claimant's documented chronically elevated blood sugars.

14. Dr. Lesnak opined that claimant suffered a syncopal episode during his work hours on June 25, 2019. Dr. Lesnak opined that the syncopal episode was unrelated to any work activities. Dr. Lesnak opined that it was possible that the syncopal episode may have been related to abnormally high or low blood sugars. Dr. Lesnak also considered the possibility that the syncopal episode was caused by vasovagal episode versus an arrhythmia potentially related to claimant's longstanding cardiomyopathy and pericardial effusion, but did not place any degree of medical probability on the cause of the syncopal episode. Dr. Lesnak did opine that the syncopal episode was not related to claimant's work activities.

15. Dr. Orent testified at hearing consistent with his IME report. Dr. Orent opined that the syncopal episode was not caused by claimant's diabetes or his pericardial effusion, as there was no evidence these would have caused the syncopal episode. Dr. Orent opined that claimant's glucose levels and noted in claimant's glucose monitor were noted the be pretty good, and hypoglycemia does not cause a "drop attack".

16. Dr. Orent testified that claimant's second fall at his home was related to the brain injury suffered in the first fall. Dr. Orent noted that claimant could have developed increasing swelling in the areas of the brain bleed for unknown reasons or he still had a neurologic deficit when he left the hospital.

17. Dr. Orent testified that on June 25, 2019, claimant hit his head on two occasions. Dr. Orent testified claimant hit his head first posteriorly, and second on the two occipitals. Dr. Orent testified that both blows were severe enough to cause brain bleeding and a skull fracture. Dr. Orent testified that the medical records documented several reasons why claimant may have lost consciousness, including intracranial hemorrhage leading to seizure and trauma, but no reason for the fall was definitively diagnosed.

18. Dr. Orent testified that neither he nor Dr. Lesnak could definitively tell why claimant lost consciousness. Dr. Orent testified that claimant's injury occurred when claimant lost consciousness and then fell while at work. Dr. Orent testified that he did not believe that claimant would have hit his head on a shelf in the bathroom after standing up from checking behind the toilet, and then fallen and struck his head, as standing up fast and hitting his head on a shelf was not an adequate mechanism of injury. Dr. Orent testified claimant was unconscious and unprotected when he fell.

19. Dr. Orent further testified that claimant's syncopal episode was not caused by diabetes of her pericardial effusion. Dr. Orent noted that the glucose levels that were tracked through claimant's phone were pretty good. Dr. Orent further testified that hypoglycemia would not cause a drop attack. The ALJ finds the testimony of Dr. Orent to be credible and persuasive regarding the fact that the claimant's blood sugar level was not the cause of the syncopal episode.

20. Dr. Lesnak testified consistent with his report at hearing. Dr. Lesnak testified that claimant sustained a syncopal episode or drop attach while at work. Dr.

Lesnak opined that the syncopal episode could be caused by several pre-existing conditions including chronic cardiomyopathy and pericardial effusion, claimant's hypertension and pulmonary hypertension, cardiac arrhythmia or claimant's diabetes.

21. Dr. Lesnak noted that the medical records showed that there were no other injuries to claimant's body other than the head injury. Dr. Lesnak testified that it was his opinion that that evidence confirmed that claimant was unconscious and then fell. Dr. Lesnak testified that if claimant was conscious prior to falling, he would have had injuries to his hands or arms.

22. Insofar as there is a conflict in the testimony between Dr. Orent and Dr. Lesnak, the ALJ credits the testimony of Dr. Orent over the testimony of Dr. Lesnak. The ALJ notes that both doctors testified that claimant sustained a syncopal episode while at work, but the ALJ credits the testimony of Dr. Orent that the cause of the syncopal evidence is unknown over the testimony of Dr. Lesnak that the syncopal episode was caused by claimant's pre-existing conditions, including chronic cardiomyopathy and pericardial effusion, claimant's hypertension and pulmonary hypertension, cardiac arrhythmia or claimant's diabetes.

23. Respondents argue in their position statement that claimant's fall is not compensable because he had deviated from his employment when he entered the condominium unit. Respondents argue that the presence of the dirty dishes and the lack of any evidence of a leak in the condominium unit establish that claimant was using the unit for personal reasons. The ALJ is not persuaded.

24. Claimant denied using the condominium for personal reasons during his testimony. While claimant's dishes were found in the condominium unit by Mr. A[Redacted] when he went to look for claimant's glasses and found the blood, there is insufficient evidence presented at hearing that claimant was using the condominium unit to perform personal chores at the time he lost consciousness and struck his head.

25. Claimant argues in his position statement that this claim is compensable based on the theory the unexplained falls are compensable under Colorado Workers' Compensation law. Claimant argues that if the cause of a fall at work is unknown, then as a matter of law, the fall arose out of employment. The ALJ finds that in this case, the cause of claimant's fall is not unknown. Based on the testimony of both Dr. Lesnak and Dr. Orent, claimant sustained a syncopal episode that led to his fall at work. Dr. Lesnak and Dr. Orent disagreed on what may have caused the syncopal episode, but agreed that claimant sustained a syncopal episode that led to his fall at work, unconscious and unprotected, resulting in the fractured skull.

26. Because the fall in this case is explained as being the result of a syncopal episode by the medical doctors' testimony at hearing, the fall is not unexplained. Instead, the question becomes whether a fall that results from a syncopal episode occurring at work is compensable in this case.

27. Claimant also appears to argue that because the syncopal episode is unexplained, the injuries from the resulting fall is compensable. The ALJ disagrees. A syncopal episode is a loss of consciousness. See, e.g., Tabers' Cyclopedic Medical Dictionary. A syncopal episode, or fainting spell, is an inherently private risk to the injured worker in that there is a dysfunction within the claimant's body which causes claimant to lose consciousness. Workers' compensation law is well established that injuries arising out of risks or conditions personal to the claimant do not arise out of the employment unless the employment contributes to the risk or aggravates the injury.

28. Despite the syncopal episode being an inherently private risk to claimant, the injury in this case may still be compensable if there is a special hazard of employment that leads to an injury in this case.

29. In this case, Dr. Orent's IME report opines that claimant fell and struck his head two times, and hypothesized that claimant may have fallen forward and hit his head on the shelf, then fallen backward and hit the toilet or the floor, or fell backwards into the shelf, then forward and stuck his face on the toilet. Dr. Orent testified that both falls were severe enough to cause a brain bleed and a skull fracture. Dr. Orent testified on rebuttal testimony that he believed the more likely scenario was that claimant fell forward, hit the front part of his head, which is why he had the black eye and the bleed in the front of the brain, and then fell backwards and hit his head either on the toilet or on the floor.

30. The ALJ notes that the black and white photographs that were entered into evidence at hearing demonstrate blood on the floor of the condo and on the floor of the bathroom in the condo. Additionally, blood is located on the toilet in the bathroom. As indicated by the Panel in their remand order, from the existing evidence, it is impossible to definitively know if the blood spatters on the toilet, wall, toilet paper and shelf were left from an impact with them or were projected onto them when claimant picked himself up, moved around, and left the bathroom, or both.

31. Dr. Lesnak testified at hearing that claimant's black eye would not have resulted in the need for medical care. Dr. Orent disagreed with this opinion and noted that the black eye would be indicative of an underlying condition that would need medical treatment, including a diagnostic sign of a basilar skull fracture. The ALJ credits the testimony of Dr. Orent over the testimony of Dr. Lesnak with regard to this issue and finds that claimant has demonstrated that it is more likely true than not that claimant striking his face on the shelf resulted in an injury that required medical treatment.

32. The evidence establishes that there was blood on the floor and the toilet in the bathroom. Additionally, in addition to claimant's fractured skull, claimant also had a black eye as testified to by Mr. A[Redacted]. The presence of a black eye is persuasive evidence that claimant struck something in the condo after losing consciousness and before striking the floor, which resulted in claimant suffering a black eye.

33. The testimony of Mr. A[Redacted] establishes that there were two pools of blood. One on the kitchen floor and one on the bathroom floor. The ALJ credits the opinion of Dr. Orent and concludes that the evidence establishes that it is more likely true than not claimant suffered a fainting spell while at work, fell and struck his face on the shelf in the bathroom causing the black eye, then fell to the floor, and fractured his skull. The evidence of a blood pool in the kitchen and in the bathroom supports two separate falls, one in each room.

34. The ALJ further finds that the shelf in the bathroom represents a special hazard of employment that caused claimant's black eye and resulted in claimant then falling backwards and fracturing his skull, as opined to by Dr. Orent.

35. The ALJ relies on the medical records entered into evidence in this case and finds that claimant has established that it is more likely true than not that the medical treatment he received following the work in jury on June 25, 2019 was related to the falls he had at work on June 25, 2019. The ALJ credits the opinions expressed by Dr. Orent in this regard in support of this finding. The ALJ further credits the opinion of Dr. Orent and finds that claimant has established that the fall at his home on September 24, 2019 was related to the original skull fracture and claimant's subsequent weakness of his left leg. The medical records establish that the fall at his home on September 24, 2019 was not a syncopal episode, as claimant had a recollection of that event occurring as documented in the medical records and testified to by Dr. Orent. The ALJ therefore finds that the medical treatment related to the September 24, 2019 fall are related to the original injury in this case.

36. Claimant testified at hearing that following his injury, he was never provided with a list of physicians to select an authorized treating provider. Claimant testified that he sought treatment following his injury with his regular doctor, Dr. Lipton.

37. The ALJ credits claimant's testimony and finds that employer did not properly refer claimant to a physician following his injury. The ALJ finds that the choice of authorizing treating provider has therefore transferred to claimant and claimant has selected Dr. Lipton as his treating physician.

38. The ALJ credits claimant's testimony at hearing that since June 25, 2019, he has not been released to return to work and finds that claimant has proven that it is more probable than not that he is entitled to an award of temporary total disability ("TTD") benefits beginning June 26, 2019 and continuing until terminated by law.

39. The parties stipulated at hearing that claimant's average weekly wage ("AWW") for the employer was $1,047.60 per week. Claimant also had concurrent employment with a separate employer. Claimant argued at hearing that his concurrent employment paid him $19.44 per hour and he worked 20 hours per week. Claimant argued that this should result in an increase in the AWW of $388.80. Respondents argued in their position statement that the wage records demonstrated that in the two weeks prior to claimant's vacation, claimant earned $761.65. Respondents argue that claimant's AWW should only be increased by $380.82. The ALJ agrees with

respondents and notes that the wage records do not document consistently working 20 hours per week prior to his work injury for the concurrent employer.

40. Respondents filed a first report of injury on July 20, 2019. A notice of contest was filed on August 8, 2019 Claimant filed a workers' claim for compensation on August 19, 2019, along with an application for hearing alleging penalties against respondents for failing to timely report the injury.

41. Respondents argue that claimant failed to provide notice of his injury in writing. However, the ALJ relies on the medical records entered into evidence at hearing and finds that due to the nature of this injuries, claimant was incapable of providing written notice to employer based on his injury. The ALJ finds that claimant was taken by Flight for Life to Denver for medical treatment and did not have a recollection of his injury. Furthermore, the ALJ finds that claimant's supervisor, Mr. A[Redacted], was present on the day claimant was discovered and was provided with notice of the incident at that time. Therefore, the ALJ finds that respondents have failed to prove that it is more likely than not that claimant should be subject to penalties of one days compensation for failing to provide written notice of his injury to employer.

42. Claimant argues that respondents were required to provide notice of the injury to the Division of Workers' Compensation within ten (10) days of the injury pursuant to Section 8-43-103. The ALJ is not persuaded that respondents are subject to penalties in this matter.

43. While claimant had suffered an injury on June 25, 2019, employer was not specifically aware of the circumstances surrounding the injury and whether those circumstances would constitute a compensable workers' compensation claim. Insofar as the employer reasonably should have known of the need to file a report of injury to the Division of Workers' Compensation, the ALJ finds that the proper paperwork was filed on July 20, 2019, along with a notice of contest on August 8, 2019. The ALJ finds that under the facts of this case, with the questionable nature of the compensability of the injury in question, the acts of the employer and insurance carrier were reasonable under the circumstances.

44. Claimant's application for hearing alleging penalties was filed on August 19, 2019. Therefore, any claim for penalties against respondent was cured by respondents pursuant to Section 8-43-304(4), C.R.S. within 20 days of the filing of the application for hearing. The is no credible evidence that was presented at hearing that would establish that respondents knew or reasonably should have known of the penalty violation prior to the filing of the application for hearing alleging penalties.

CONCLUSIONS OF LAW

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

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

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

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

4. Claimant must show that the injury was sustained in the course and scope of his employment and that the injury arose out of his employment. The "arising out of" and "in the course of" employment criteria present distinct elements of compensability. *Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo. 1999). For an injury to occur "in the course of" employment, the claimant must demonstrate that the injury occurred in the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Id.* For an injury to "arise out of" employment, the claimant must show a causal connection between the employment and the injury such that the injury has its origins in the employee's work related functions and is sufficiently related to those functions to be considered a part of the employment contract. *Id.* Whether there is a sufficient "nexus" or relationship between the Claimant's employment and his injury is one of fact for resolution by the ALJ based on the totality of the circumstances. *In re Question Submitted by the United States Court of Appeals*, 759 P.2d 17 (Colo. 1988).

5. All risks that cause injury to employees can be placed within three well-established, overarching categories: (1) *employment risks,* which are directly tied to the work itself; (2) *personal risks*, which are inherently personal or private to the employee

him – or herself; and (3) *neutral risks*, which are neither employment related nor personal. *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014); 2014 CO 7 (emphasis in the original); citing 1 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* §§ 4.01-4.03, at 4-1 to -3 (2013) (hereinafter *Larson's*).

6. The first category, employment risks, encompasses risks inherent to the work environment itself. *City of Brighton*, supra. Employment risks include, for example, a gas explosion at work that burns an employee's body, or the breakdown of an industrial machine that partially amputated an employee's finger. *Id.* (citations omitted). The causal connection between such prototypical industrial risks and employment is intuitive and obvious, and the resulting injuries are universally considered to "arise out of" employment under the Act. *Id.*

7. Claimant's injury does not fit into this first risk because the condominium was free from any obstruction that would cause claimant's fall.

8. The second category contains risks that are entirely personal or private to the employee him or herself. *Id*. at 503. These risks include, for example, an employee's preexisting idiopathic illness or medical condition that is unrelated to his or her employments, such as *fainting spells*, heart disease or epilepsy. *Id*. (emphasis added). These types of purely idiopathic or personal injuries are generally not compensable under the Act, unless an exception applies. *Id.* (emphasis added). The Colorado Supreme Court in *City of Brighton*, then goes on to discuss what constitutes an "idiopathic injury" in a footnote that represents dicta in the Order. The Supreme Court notes that they have used the term "idiopathic" consistently with the leading treatise in the field:

> Generally understood within the workers' compensation framework to mean "self-originated," [idiopathic] injuries usually spring from a personal risk to the claimant, e.g., heart disease, epilepsy and the like. *Such injuries are to be contrasted with those that are truly "unexplained."* The latter generally are considered [to have arisen] from a neutral risk…. Idiopathic injuries are said to have arisen from a personal risk. Idiopathic injuries, therefore, often are not compensable. *Id*. (emphasis in the original).

9. The exception to idiopathic injuries being non-compensable is when the "special hazard" doctrine applies. Under this doctrine, an injury is compensable even if the most direct cause of that injury is a pre-existing idiopathic disease or condition so long as a special employment hazard also contributed to the injury. *Id.* footnote 3, citing *Ramsdell v. Horn,* 781 P.2d 150, 152 (Colo. App. 1989).

10. Injuries arising out of risks or conditions personal to the claimant do not arise out of the employment unless the employment contributes to the risk or aggravates the injury. *Larson's* Ch. 9. Larson's notes specifically in Chapter 9 that in a fact scenario where an employee, solely because of a non-occupational fainting spell, falls and sustains a skull fracture or other injury, the question arises as to whether the

skull fracture is that an injury arising out of the employment. *Larson's* Ch. 9.1. Larson's notes that the basic rule, on which there is now general agreement, is that the effects of such a fall are compensable if the employment places the employee in a position increasing the dangerous effects of such a fall, such as on a height, near machinery or sharp corners. *Id.*

11. Larson's further notes that this specific question, although often discussed in the same breath with unexplained falls, is basically different, since unexplained fall cases begin with a completely neutral origin of the mishap, while idiopathic fall cases begin with an origin which is admittedly personal and which therefore requires some affirmative employment contribution to offset the prima facie showing of personal origin. *Id.*

12. In this case, claimant has satisfied the burden of proof to establish that his injury occurred "in the course of" employment, as the injury occurred in the time and place limits of his employment. Respondents argue that claimant may have been using the condominium for personal reasons, such as eating lunch or doing dishes, at the time he suffered the syncopal episode. However, the evidence does not establish that claimant was not in the place limits of his employment during his scheduled work day and the ALJ has rejected this argument.

13. The question becomes whether claimant has established that the injury "arose out of" his employment. The ALJ, in crediting the opinions of Dr. Orent, finds that claimant has established by a preponderance of the evidence that when he fell, he struck the shelf in the bathroom which resulted in claimant sustaining the black eye, then fell to the ground striking the toilet. The ALJ therefore finds that claimant has established by a preponderance of the evidence that the injury resulted from a special hazard of employment in that he struck the shelf and the toilet resulting in the injury he sustained in this case.

14. The ALJ rejects the argument from respondents that claimant's cause of the fall was a result of a pre-existing medical condition. The ALJ credits the opinion of Dr. Orent and finds that it is more likely true than not that claimant's fall was the result of a syncopal episode, and that the underlying cause of the syncopal episode is unknown.

15. The ALJ finds that the evidence establishes that the claimant had lost consciousness prior to his fall. This was the consistent testimony of Dr. Lesnak and Dr. Orent. Claimant fell when he was unconscious and unprotected.

16. Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires that respondents must provide injured workers with a list of at least four designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. Specifically, if the employer or insurer fails to provide an injured worker with a list of at least four physicians or corporate medical providers, "the employee shall have the right to select a physician." §8-43-404(5)(a)(I)(A), C.R.S. W.C.R.P. Rule 8-2 further clarifies that once

an employer is on notice that an on-the-job injury has occurred, “the employer shall provide the injured worker with a written list of designated providers.” W.C.R.P. Rule 8-2(E) additionally provides that the remedy for failure to comply with the preceding requirement is that “the injured worker may select an authorized treating physician of the worker’s choosing.”

17. As found, respondents failed to provide claimant with a list of physicians in the first instance. As such, the right to select the authorized treating physician in this case transferred to the claimant. As found, claimant selected Dr. Lipton to serve as his authorized treating physician.

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

19. As found, claimant has proven by a preponderance of the evidence that the medical treatment he received in this case following his work injury was reasonable and necessary to cure and relieve the claimant from the effects of the work injury. As found, respondents are liable for the medical treatment provided in this case, including but not limited to the treatment provided by Vail Valley Health, Flight for Life, Denver Health and Dr. Lipton.

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

21. As found, claimant has proven by a preponderance of the evidence that he is entitled to an award of TTD benefits commencing June 26, 2019 and continuing until terminated by law. As found, claimant’s testimony regarding his being taken off of work is found to be credible and supported by the medical records entered into evidence in this case.

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

23. As found, the claimant has proven by a preponderance of the evidence that his AWW for the injury is $1,428.42 ($1,047.60 + $380.82 = $1,428.42).

24. Section 8-43-102(1)(a), C.R.S., states in pertinent part

> Every employee who sustains an injury resulting from an accident shall notify said employee’s employer in writing of the injury within four days of the occurrence of the injury. If the employee is physically or mentally unable to provide said notice, the employee’s foreman, super-intendant, manager or any other person in charge who has notice of said injury shall submit such written notice to the employer…. Otherwise, if said employee fails to report said injury in writing, said employee may lose up to one day’s compensation for each day’s failure to so report.

25. As found, the ALJ relies on the medical records in this case and finds that claimant was unable to report the injury to his employer in writing due to his physical and mental condition. Moreover, claimant’s supervisor was made aware that claimant had an injury while at work, although the compensable nature of the injury was not known the claimant’s supervisor at the time of the injury.

26. As found, respondents have failed to prove by a preponderance of the evidence that claimant violated Section 8-43-102(1)(a) by failing to report his injury in writing due to the fact that claimant’s condition left him unable to report the injury to employer in writing.

27. Section 8-43-103(1), C.R.S., provides in pertinent part:

> Notice of an injury, for which compensation and benefits are payable, shall be given by the employer and insurance carrier … within ten days after the injury…. If no such notice is given by the employer, as required by articles 40 to 47 of this title, such notice may be given by any person.

28. Claimant argues that respondents are subject to penalties of up to $1,000 per day for failing to provide written notice to the Division of Workers’ Compensation pursuant to Section 8-43-304(1), C.R.S. which allows for penalties for any violation of the Colorado Workers’ Compensation Act. The ALJ is not persuaded.

29. Section 8-43-304(1), C.R.S. provides that a daily monetary penalty may be imposed on any employer who violates articles 40 to 47 of title 8 if "no penalty has been specifically provided" for the violation. Section 8-43-304(1), C.R.S. is thus a residual penalty clause that subjects a party to penalties when it violates a specific statutory duty and the General Assembly has not otherwise specified a penalty for the

violation. *See Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005).

30. Whether statutory penalties may be imposed under §8-43-304(1) C.R.S. involves a two-step analysis. The ALJ must first determine whether the insurer's conduct constitutes a violation of the Act, a rule or an order. Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational argument in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* WC 4-187-261 (ICAO, Aug. 2, 2006). There is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

31. The question of whether the insurer's conduct was objectively unreasonable presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005); *see Pant Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). A party establishes a prima facie showing of unreasonable conduct by proving that an insurer violated a rule of procedure. *See Pioneers Hospital* 114 P.2d at 99. If the claimant makes a prima facie showing the burden of persuasion shifts to the respondents to prove their conduct was reasonable under the circumstances. *Id.*

32. As found, considering the facts of this case and the questionable compensable nature of claimant's injury, the ALJ finds that the acts of respondents in not filing an employer's first report of injury until July 20, 2019 was reasonable. As noted above, claimant had not yet filed notice with employer alleging that his claim was compensable, and employer could reasonable question whether the injury was a compensable claim during this time in question.

33. Section 8-43-304(4), C.R.S. permits an alleged violator 20 days to cure the violation. If the violator cures the violation within the 20 day period "and the party seeking such penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation, no penalty shall be assessed." The cure statute adds an element of proof to a claim for penalties in cases where a cure is proven. Typically, it is not necessary for the party seeking penalties to prove that the violator knew or reasonably should have known they were in violation. The party seeking penalties must only prove the putative violator acted unreasonably under an objective standard. *See Jiminez v. Indus. Claim Appeals Office*, 107 P.3d 965 (Colo.App.2003). Section 8-43-304(4), C.R.S. modifies the rule and adds an extra element of proof when a cure has been effected. Specifically, the party seeking penalties must prove the violator had actual or constructive knowledge that its conduct was unreasonable. *Diversified Veterans Corporate Center v. Hewuse*, 942 P.2d 1312 (Colo. App. 1997); *see In re Tadlock*, WC 4-200-716 (ICAO, May 16, 2007).

34. As found, even assuming respondents violated Section 8-43-103(1), C.R.S., claimant has failed to prove by clear and convincing evidence that respondents knew or reasonably should have known that they were in violation of the statute.

ORDER

It is therefore ordered:

1. Respondents shall pay for the medical treatment reasonably necessary to cure and relieve claimant from the effects of the work injury, including, but not limited to the treatment provided by Dr. Lipton, Denver Health, Vail Valley Medical Center, and Flight for Life.

2. Dr. Lipton is claimant's authorized treating physician for the compensable injury.

3. Respondents shall pay for temporary total disability benefits for Claimant beginning June 26, 2019 and continuing until terminated by law based on an AWW of $1,428.42.

4. Respondents request for penalties against claimant pursuant to Section 8-43-102(1)(a), C.R.S., is denied.

5. Claimant's claim for penalties against respondents for failure to timely provide notice of the injury to the Division of Workers' Compensation is denied.

Dated: March 17, 2021

Keith E. Mottram

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

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

ISSUE

Whether Claimant has proven by preponderance of the evidence that she is entitled to be reimbursed for mileage expenses for visits to medical appointments that were not submitted until more than 120 days after she incurred the mileage and failed to provide supporting documentation for visits to her providers.

FINDINGS OF FACT

1. Claimant is a 31 year old employee for Employer who injured her left ankle on February 25, 2020 when she slipped on snow. Claimant received medical treatment from Advanced Urgent Care in the form of x-rays, an MRI and physical therapy.

2. On June 23, 2020 Claimant's care was transferred at her request to Injury Care Associates. She began receiving treatment with Margaret A. Irish, D.O.

3. Dr. Irish referred Claimant to Panorama Orthopedics for treatment. On August 6, 2020 Claimant underwent left ankle surgery. Claimant continued to follow-up with Dr. Irish and Panorama Orthopedics. She also underwent physical therapy after surgery. Claimant incurred mileage expenses while attending her medical appointments.

4. On February 28, 2020 Respondents, through Third-Party Administrator Sedgwick Claims Management Services, Inc., filed a General Admission of Liability (GAL) acknowledging medical benefits and Temporary Partial Disability (TPD) benefits. The GAL included the mandatory brochure required by §8-43-203(3) C.R.S. The third page of the attachments to the February 28, 2020 GAL included the language "you are entitled to be reimbursed mileage expenses for travel to and from authorized medical visits and to go to the pharmacy. You will need to request reimbursement in writing and should discuss this process with your adjuster."

5. The attachment to the GAL also included the following statement:

> If you have questions on your claim, the first step is to contact the insurer and speak with the claims adjuster handling your claim. If you have more general questions or don't understand something you can call the Division of Worker's Compensation at 303-318-8700, or toll-free at 1-888-390-7936. You can also check the Division's website at www.colorado.gov/cdle/dwc. Pay special attention to the information contained in the *Employee's Guide,* which is available to you on the website or by calling the Division. You are also free to hire an attorney at your own expense, who can provide you with information and legal advice.

6. On July 21, 2020 Respondents filed a second GAL acknowledging medical benefits and TPD benefits. The new GAL also included the mandatory brochure and the same advisements as the initial GAL.

7. On June 20, 2020 Claimant completed two separate mileage reimbursement request forms. The first form sought reimbursement for 151.4 total miles traveled from February 15, 2020 through April 13, 2020. Claimant signed and dated the form June 20, 2020. The second form requested reimbursement for 134.2 total miles traveled between April 15, 2020 and June 23, 2020. Claimant also signed and dated the form June 20, 2020. Both forms are on Sedgwick Claims Management Service, Inc. letterhead and include the mailing address, phone number and fax number for Sedgwick. Claimant did not return either form to Respondents on or about June 20, 2020.

8. Claimant subsequently retained counsel in July 2020. On August 31, 2020 Claimant submitted both of the preceding June 20, 2020 mileage reimbursement request forms and a third request dated August 31, 2020. The third form sought reimbursement for 416 total miles traveled between June 23, 2020 and July 27, 2020.

9. Respondents determined that Claimant had requested reimbursement for 709.1 total miles. After considering Claimant's requests, Respondents denied reimbursement for 179.7 miles traveled between February 25, 2020 and April 28, 2020 or more the 120 days prior to the date of her request. Respondents also denied an additional 155.2 miles based on the absence of supporting documentation to confirm the travel was related to reasonable and necessary medical care. Accordingly, Respondents only reimbursed Claimant for 374.2 miles traveled at a rate of $.53 per mile for a total of $198.33 for miles traveled between May 6, 2020 and August 24, 2020.

10. Workers' Compensation Rule of Procedure, Rule 16-8(2) (formerly 16-9) effective January 1, 2020, provides in relevant part:

> B. Injured workers shall submit requests for mileage reimbursement within 120 days of the date of service or reimbursement may be denied unless good cause exists.
>
> C. Extenuating circumstances/good cause may include, but are not limited to, delays in compensability being decided or the party has not been informed of this benefit or where to send the bill.

11. Claimant responded to Respondents' determination through counsel. Claimant first asserted Respondents inappropriately applied Rule 16-8(2) retroactively to her claim for reimbursement and asked Respondents to reconsider the request. She contended that she had "good cause" for her untimely request because she was not aware of the 120 day limitation until after retaining counsel. Respondents responded that Rule 16-8(2) became effective on January 1, 2020 and was properly applied to Claimant's February 15, 2020 claim. Respondents also reiterated that supporting documentation for some of the mileage reimbursement requests was lacking.

12. Claimant also presented a handwritten explanation for mileage traveled that was unsupported by other documentation. Claimant's handwritten document noted several dates on which she traveled to a provider's location but had to reschedule the appointment. However, Claimant did not present any WC164 forms or other documentation from any providers confirming that the appointment dates had been rescheduled.

13. Claimant testified at the hearing in this matter. She asserted that Respondents failed to inform her prior to the September 11, 2020 denial of her request that mileage reimbursement requests had to be submitted within 120 days of travel. Claimant remarked that she did not become aware of the time limitation until she retained counsel in July 2020. Within two months of retaining counsel she forwarded her mileage requests to her attorney. Claimant also explained that she traveled to medical facilities on the dates listed on her requests but on several occasions her appointments were rescheduled. Claimant noted that the rescheduling of appointments explained the lack of documentation to support her mileage requests.

14. Claimant only offered limited details regarding the lack of documentation from providers confirming the appointment dates on which she was not seen. For example, Claimant's logs document that she traveled a total of 9.2 miles round trip to see Dr. Chiccoine on April 21, 2020 and April 28, 2020 but had to be rescheduled on both dates. She further explained that she traveled to see Dr. Chan on August 24, 2020 and claimed 44 roundtrip miles for the appointment. Therefore, even assuming Claimant's representations are correct, they only provide a limited explanation.

15. Claimant has failed to demonstrate that it is more probably true than not that she is entitled to receive reimbursement for mileage expenses for visits to medical appointments that were not submitted until more than 120 days after she incurred the mileage and failed to provide supporting documentation for visits to her providers. Initially, Claimant suffered an admitted left ankle injury on February 5, 2020. After undergoing left ankle surgery Claimant incurred mileage expenses while attending follow-up medical appointments and physical therapy.

16. Respondents subsequently filed a GAL that included the mandatory brochure required by §8-43-203(3) C.R.S. The third page of the attachments to the February 28, 2020 GAL advised Claimant that "you are entitled to be reimbursed mileage expenses for travel to and from authorized medical visits and to go to the pharmacy." The brochure additionally directed Claimant to the *Employee's Guide* published by the Division of Workers Compensation and contained on the Division's website. *The Employee's Guide* provides additional information concerning the mileage reimbursement process and specifically states that the claimant must submit reimbursement requests within 120 days. The information was readily available to Claimant from the Division of Workers' Compensation. Respondents further advised Claimant of her right to mileage reimbursement by providing her with a reimbursement form on or before June 20, 2020. Finally, the attachment to the GAL specifically told Claimant that she should hire an attorney at her own expense to obtain legal advice. Respondents thus provided Claimant with the mandatory information statutorily required pursuant to §8-43-203(3) C.R.S.

17. The record reveals that Claimant submitted mileage reimbursement requests more than 120 days after the date of medical service. Specifically, Respondents denied reimbursement for 179.7 miles traveled between February 25, 2020 and April 28, 2020 or more the 120 days prior to the date of her request. There was no evidence establishing that this untimely request was due to a delay in determining compensability, Claimant's failure to be informed about the mileage benefit or where to send the request. Instead, Claimant asserted at hearing that the mileage was untimely because she was unaware of the time limit set forth in Rule 16-8(2) that became effective on January 1, 2020. However, Claimant's ignorance of the 120 time limitation does not afford grounds for relief. Because the record is replete with evidence that Claimant had been apprised of the deadline for submitting mileage reimbursement requests, Respondents properly denied 179.7 miles traveled between February 25, 2020 and April 28, 2020 as untimely.

18. Claimant is only entitled to reimbursement for reasonable and necessary mileage incidental to obtaining medical treatment. However, several of Claimant's timely mileage requests were not supported by documentation establishing that travel was incurred incidental to obtaining medical care. Although Claimant submitted a written explanation regarding disputed mileage dates, she failed to provide documentation to support the majority of the mileage. Specifically, Respondents denied an additional 155.2 miles based on the absence of supporting documentation to confirm the travel was related to reasonable and necessary medical care. Claimant did not present corresponding medical records from her providers or any other documentation to confirm she had appointments on the denied dates. In the absence of supporting documentation, Respondents reasonably denied Claimant's mileage reimbursement requests. Claimant has thus failed to prove that she should be reimbursed for the disputed visit dates totaling 155.2 miles.

19. The record reflects that Respondents denied Claimant's reimbursement request for 179.7 miles traveled between February 25, 2020 and April 28, 2020 as untimely. Respondents also denied an additional 155.2 miles based on the absence of supporting documentation to confirm the travel was related to reasonable and necessary medical care. Claimant has failed to establish good cause that the 120 day time limitation in Rule 16-8(2) should not be applied. Furthermore, Claimant has failed to present documentation to support her timely mileage reimbursement for visit dates that have been denied. Accordingly, Claimant's request for additional mileage reimbursement is denied and dismissed.

CONCLUSIONS OF LAW

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

facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

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

4. Section 8-42-101(1)(a), C.R.S. requires the respondents to pay for expenses that are incidental to obtaining reasonable and necessary medical treatment. Specifically, mileage expenses are compensable if "incident" to obtaining medical treatment. *Country Squire Kennels v. Tarshsis*, 899 P.2d 362 (Colo. App. 1995); *Sigman Meat Co. v. Industrial Claim Appeals Office*, 761 P.2d 265 (Colo. App. 1988). Thus, mileage expenses are treated in the nature of a medical benefit.

5. Workers' Compensation Rule of Procedure, Rule 16-8(2) (formerly 16-9) effective January 1, 2020, provides in relevant part:

> B. Injured workers shall submit requests for mileage reimbursement within 120 days of the date of service or reimbursement may be denied unless good cause exists.
>
> C. Extenuating circumstances/good cause may include, but are not limited to, delays in compensability being decided or the party has not been informed of this benefit or where to send the bill.

6. Rule 16-10(G) states "payers shall reimburse injured workers for mileage expenses as required by statute or provide written notice of the reason(s) for denying reimbursement within 30 days of receipt." Rule 16 thus imposes both a time limit on requesting reimbursement for mileage and paying reimbursement for mileage. Prior to the amendment to the Rule effective January 1, 2020, no time limits applied to either the submission of mileage reimbursement requests or payment of the requests. *See Safeway, Inc. v. Industrial Claim Appeals Office*, 186 P.3d 103 (Colo. App. 2008); *Higuera v. Bethesda Foundation*, W.C. No. 4-683-101 (ICAO, Sept. 22, 2009).

7. A claimant in a Workers' Compensation claim is presumed to know applicable statutes and is required to act accordingly. *Paul v. Industrial Commission,* 632 P.2d 638 (Colo. App. 1981). A claimant's ignorance of the applicable procedural rules

thus does not afford grounds for relief. *In the Matter of Swanson,* W.C. 4-589-465 (ICAO, Sept. 13, 2006). It is not the duty or responsibility of the opposing party to advise claimant of any statutory or rule requirements.

8. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she is entitled to receive reimbursement for mileage expenses for visits to medical appointments that were not submitted until more than 120 days after she incurred the mileage and failed to provide supporting documentation for visits to her providers. Initially, Claimant suffered an admitted left ankle injury on February 5, 2020. After undergoing left ankle surgery Claimant incurred mileage expenses while attending follow-up medical appointments and physical therapy.

9. As found, Respondents subsequently filed a GAL that included the mandatory brochure required by §8-43-203(3) C.R.S. The third page of the attachments to the February 28, 2020 GAL advised Claimant that “you are entitled to be reimbursed mileage expenses for travel to and from authorized medical visits and to go to the pharmacy.” The brochure additionally directed Claimant to the *Employee’s Guide* published by the Division of Workers Compensation and contained on the Division’s website. *The Employee’s Guide* provides additional information concerning the mileage reimbursement process and specifically states that the claimant must submit reimbursement requests within 120 days. The information was readily available to Claimant from the Division of Workers’ Compensation. Respondents further advised Claimant of her right to mileage reimbursement by providing her with a reimbursement form on or before June 20, 2020. Finally, the attachment to the GAL specifically told Claimant that she should hire an attorney at her own expense to obtain legal advice. Respondents thus provided Claimant with the mandatory information statutorily required pursuant to §8-43-203(3) C.R.S.

10. As found, the record reveals that Claimant submitted mileage reimbursement requests more than 120 days after the date of medical service. Specifically, Respondents denied reimbursement for 179.7 miles traveled between February 25, 2020 and April 28, 2020 or more the 120 days prior to the date of her request. There was no evidence establishing that this untimely request was due to a delay in determining compensability, Claimant’s failure to be informed about the mileage benefit or where to send the request. Instead, Claimant asserted at hearing that the mileage was untimely because she was unaware of the time limit set forth in Rule 16-8(2) that became effective on January 1, 2020. However, Claimant’s ignorance of the 120 time limitation does not afford grounds for relief. Because the record is replete with evidence that Claimant had been apprised of the deadline for submitting mileage reimbursement requests, Respondents properly denied 179.7 miles traveled between February 25, 2020 and April 28, 2020 as untimely.

11. As found, Claimant is only entitled to reimbursement for reasonable and necessary mileage incidental to obtaining medical treatment. However, several of Claimant’s timely mileage requests were not supported by documentation establishing that travel was incurred incidental to obtaining medical care. Although Claimant submitted a written explanation regarding disputed mileage dates, she failed to provide

documentation to support the majority of the mileage. Specifically, Respondents denied an additional 155.2 miles based on the absence of supporting documentation to confirm the travel was related to reasonable and necessary medical care. Claimant did not present corresponding medical records from her providers or any other documentation to confirm she had appointments on the denied dates. In the absence of supporting documentation, Respondents reasonably denied Claimant's mileage reimbursement requests. Claimant has thus failed to prove that she should be reimbursed for the disputed visit dates totaling 155.2 miles.

12. As found, the record reflects that Respondents denied Claimant's reimbursement request for 179.7 miles traveled between February 25, 2020 and April 28, 2020 as untimely. Respondents also denied an additional 155.2 miles based on the absence of supporting documentation to confirm the travel was related to reasonable and necessary medical care. Claimant has failed to establish good cause that the 120 day time limitation in Rule 16-8(2) should not be applied. Furthermore, Claimant has failed to present documentation to support her timely mileage reimbursement for visit dates that have been denied. Accordingly, Claimant's request for additional mileage reimbursement is denied and dismissed.

[Intentionally left blank.]

ORDER

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

1. Claimant's request for additional mileage reimbursement is denied and dismissed.

2. Any issues not resolved in this order are reserved for future determination.

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

DATED: March 17, 2021.

DIGITAL SIGNATURE:
Peter J. Cannici

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

ISSUES

I. Have Respondents shown, by a preponderance of the evidence, that Claimant is responsible for his own termination from employment, pursuant to CRS 8-42-103(1)(g), and 8-42-105(4)(a)?

II. What is Claimant's Average Weekly Wage?

FINDINGS OF FACT

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

Background / Summary

1. Claimant began work on June 17, 2019, as a new employee in the Rail Finishing department as a "Crane Chaser" (Ex. O, p. 68). Claimant is left-hand dominant. Prior to his work injury of 7/3/2019, the Employer's records do not indicate that there were performance issues with Claimant.

2. Respondent requires new employees to complete a 720-hour probationary period. Respondent reviews new employees at certain points in their probation, defined by the number of hours completed, to determine the employee's progress in learning the position. New employees are informed that they should not miss work during the probationary period, except in the case of emergencies or medical appointments with prior notice to their supervisor or general supervisor.

3. Claimant was terminated by Respondent on August 9, 2019. The official reason was for repeated violations of Respondent's attendance policy (Ex. O, pp. 78-79). In Claimant's probationary period with Respondent, Claimant accumulated seven unexcused absences. On one of these occasions, Claimant was a no-call/no-show at a medical appointment that he stated he took time off to attend. On three other occasions, there was no medical appointment scheduled on the date that Claimant informed his supervisor he had a medical appointment. One of Claimant's unexcused absences was a no-call/no-show.

The Work Injury, and Immediate Aftermath

4. Claimant suffered an admitted injury to his left hand on July 3, 2019, when his hand was pulled into the reel for an air hose as the hose was retracting into the reel. Claimant was transported to Respondent's on-site clinic, Onsite Innovations, shortly after the injury. Claimant's left hand was wrapped; he was provided pain medication;

and he was instructed to ice the hand every two hours (Ex. J, p. 38).

5. Claimant completed his shift on July 3, 2019. He was then scheduled off for five days from July 5, 2019, through July 9, 2019, following a company-wide holiday on July 4, 2019 (Ex. O pp. 152-153). At hearing, Claimant testified that Onsite Innovations informed him that he was not allowed to seek treatment during the five-day period that Claimant was off work, following the July 4 holiday. [*Note: Claimant's medical records indicate that Claimant underwent an x-ray of his left finger at Respondent's worksite on July 8, 2019 - two days before he was scheduled to return to work (Ex. K, p. 39).]

Medical Treatment Continues / Work Restrictions

6. Onsite Innovations scheduled an appointment with Dr. Charles Hanson on July 10, 2019, to evaluate Claimant's left hand (Ex. L, p.41). Dr. Hanson diagnosed Claimant with a left fifth finger boutonniere deformity, probably due to a tear of the central slip of the EDL and posterior subluxation of the lateral bands *Id* at 43. Dr. Hanson referred Claimant for a surgical consultation with Dr. Patrick Devanny. *Id.* Dr. Hanson also provided Claimant work restrictions of "may work on a light duty desk type basis with only very slight use of his left hand (less than 5 pounds)." *Id*.

7. Claimant was working a 7:00 pm to 7:00 am shift while he was still under work restrictions by Dr. Hanson (2/1/21 TR at 48; RHE O at 153). According to Claimant, he was initially placed on modified duty (no use of his left hand by Dr. Charles Hanson) that required him to sit in a non-heated room by himself, with no cellphone access, and with nothing to do during his entire shift. Claimant testified that he felt this was done to demoralize him.

8. Claimant was assigned to this duty for five days, one of which was an unexcused absence. It was subsequently determined that there was office work Claimant could perform on the 7:00 am to 3:00 pm shift, and Claimant was transitioned to office work on this shift beginning Monday, July 15, 2019 (Ex. O, p. 153).

9. Claimant was assigned new modified duty based on a July 25, 2019, clarification by Onsite Innovations of Dr. Hanson's work restrictions, stating that Claimant could work in the mill and outside, but he was allowed 'no use of his left hand' (Ex. 3, p. 11).

10. Claimant's new modified duty entailed painting yellow safety rails inside and outside the mill where the paint was degrading. Claimant was instructed that he could not use his left hand to paint or to carry any of the painting supplies, which included a one-gallon bucket of paint and a paintbrush.

Testimony of Chris E[Redacted]

11. Chris E[Redacted] testified at hearing. He was employed by Respondent as a general supervisor in rail mill finishing, which eventually was expanded to general supervisor of rail mill finishing and quality, from October 18, 2017, to October 18, 2019. Mr. E[Redacted] testified that as a general supervisor he was responsible for supervising shifts in rail mill finishing, including supervising the other supervisors.

12. During the period from approximately July 25, 2019, to August 9, 2019, during which Claimant was working light duty painting safety rails, Mr. E[Redacted] talked to Claimant at least three times to ask Claimant how his hand was doing, and he walked by at least twice each day to observe Claimant and confirm that Claimant performing his modified duty within his restrictions. He testified that if an employee expressed concern about their modified work, he would have sent the employee back to Onsite Innovations to work out the issue with the restrictions. The employee would then have been assigned work within any amended restrictions. Mr. E[Redacted] testified that at no time, including in the conversations with Claimant initiated by Mr. E[Redacted], did Claimant inform Mr. E[Redacted] that he was uncomfortable with the job he was performing or that he was having trouble doing his modified duty.

13. Mr. E[Redacted] testified that if an employee for Respondent needs to call off due to an emergency, the proper procedure is to call in to a supervisor on the call-off line. If a supervisor was not available, Mr. E[Redacted] testified that an employee could have attempted to contact him directly. An emergency absence is generally excused if documentation of the emergency is provided to Respondent once the employee returns to work. Mr. E[Redacted] testified that his work cell phone number was given to anyone in the mill who needed or wanted it, and that his work cell phone number was "published out there."

14. Mr. E[Redacted] also testified that if an employee for Respondent needs time off for a doctor's appointment, the proper procedure is to inform a supervisor of the need for time off, which can be granted in good faith. The employee then brings documentation of the appointment back to Respondent, and it is eventually submitted to Respondent's HR department. Employees are required to leave in a timely fashion for appointments and to return to work after doctor's appointments if there is time remaining in their shift after the appointment.

Testimony of Claimant re: Company Procedures

15. Claimant testified that he has no recollection of an orientation with Respondent when he was hired (10/22/20 at 59). Claimant also testified that his appointments with treating providers were made for him by Onsite Innovations, and that his upcoming appointments were revealed to him one at a time, usually a day before the scheduled appointment. When asked directly if he was ever made aware that he was not to miss work during his probationary period, unless it was excused or an emergency, Claimant

simply replied, “I don’t recall.”

Testimony of Regina R[Redacted]

16. Regina R[Redacted] also testified at the hearing. She has worked for Respondent in her current position as a labor relations supervisor for five years. Prior to her position as a labor relations supervisor, Ms. R[Redacted] worked for Respondent in the rod and bar mill. She testified that her duties as a labor relations supervisor include administering the grievance policy, interpreting contracts, and maintaining relations with the union. Ms. R[Redacted] stated that part of her position entails reviewing all discipline to ensure that Respondent is applying discipline in a consistent manner. She testified that she has been involved firsthand in the full-day HR training that occurs on the first day of new hire orientation.

17. A “New Hire Orientation & Training Time Card” signed by Claimant indicates that Claimant attended a five-day orientation conducted by Respondent from June 17, 2019, through June 21, 2019 (Ex. P. p. 201). The training consisted of different topics each day involving Respondent’s employment policies, safety practices, and regulations, taught in sessions lasting approximately seven hours each including a lunch.

18. On June 17, 2019, Claimant attended a training covering the following topics: handbook and policies, boots and uniform sizing, union meeting, and LOP and benefits (Ex. P. p. 201). Respondent’s attendance policy falls under the “handbook and policies” training. Ms. R[Redacted] testified that the HR representative in this training would have gone page-by-page through the employee handbook, including prohibitive conduct and Respondent’s attendance policy. [*Note. Claimant signed a form dated June 17, 2019, confirming that he received a Rocky Mountain Steel Mills Employee Handbook (Ex. O, p. 188).] Ms. R[Redacted] testified that she knows attendance policy during an employee’s probationary period is covered in orientation, as she has personally handled this part of the orientation. This policy is also outlined in the employee handbook that Claimant acknowledged receipt of in writing on June 17, 2019. *Id* at 199.

19. Respondent’s Attendance and Punctuality policy, as outlined in Respondent’s employee handbook, states that employees must notify Respondent of any absence at least twenty-four hours prior to the start of the shift, or as soon as reasonably practicable. *Id* at 189. Respondent’s attendance policy dictates that if an employee’s supervisor is not available, an employee should refer to the “Call Off procedure.” *Id*. Ms. R[Redacted] stated that supervisors must know in advance if an employee intends to miss a scheduled shift so that they can determine how to get coverage for the employee. She testified that a single no-call/no-show during probation is grounds for termination.

20. If an emergency occurs, the proper procedure for an employee to call off is to call in to a "call-off line" established by Respondents. The call-off line is a line that goes directly to a supervisor's office. Whoever is available in the supervisor's office answers the call-off line, and if no one is available, the call goes directly to voicemail and is documented when the voicemail is cleared.

21. Mr. R[Redacted] testified that Respondent provides company cell phones to all of its supervisors to use for employment related matters. Employees are directed to call the call-off line when they must miss a shift, but they are also instructed that they may call supervisors on their work cell phones if the employee needs to reach the supervisor immediately.

22. Ms. R[Redacted] testified that she has been dealing with Onsite Innovations for 13 years, and she has never encountered a situation in which Onsite Innovations makes all the medical appointments for an injured employee. Ms. R[Redacted] testified that in the meeting after which Claimant was terminated, Claimant acknowledged that he knew he needed to make appointments around his schedule and that he was informed that he should contact Onsite Innovations if he needed assistance with his appointments.

23. Mr. R[Redacted] testified that Respondent uses a timekeeping system called "Kronos." Employees for Respondent use a thumb print and an employee ID to clock in and out on a machine and these actions are automatically saved into a timekeeping system. Supervisors can enter notes into the system, including notes as to why an employee was absent on a certain day. Ms. R[Redacted] confirmed that Claimant's Kronos records were entered into evidence as Respondent's Hearing Exhibit O, pages 179 through 182.

July 12, 2019

24. Claimant was scheduled to work from 7:00 pm to 7:00 am on Friday, July 12, 2019 (Ex. O, p. 180). Kronos records for Claimant reflect that Claimant clocked in at 7:00 pm on July 12, 2019; however, there is no indication that Claimant clocked out. Mr. E[Redacted] testified that Claimant came into the plant and spoke with him in the hallway to Mr. E[Redacted]'s office on July 12, 2019, regarding the need to take the day off, due to a death in his family. Mr. E[Redacted] instructed Claimant to take the day off, but instructed him to bring in the required documentation of the family emergency, in order to have the absence excused. Mr. E[Redacted] testified that if he had been provided documentation, he would have approved the absence in Kronos, and sent a pay request to HR for the day.

25. Claimant never provided any documentation to his supervisors regarding the July 12, 2019, absence when he returned to work on July 13, 2019 (Ex. O. p. 180). The July 12, 2019, absence was therefore not approved, and was considered an unexcused

absence.

July 26, 2019

26. On Friday, July 26, 2019, Claimant was scheduled to work from 7:00 am to 3:00 pm (Ex. O, p. 181). Claimant's Kronos records indicate that Claimant clocked in at 6:53 am, then clocked out at 8:00 am, for a total of one hour worked for the day. Claimant informed Mr. E[Redacted] that he had to leave for a doctor's appointment, but did not inform him the time of said appointment. Mr. E[Redacted] instructed Claimant to return after his appointment, as required by Respondent's attendance policy.

27. Claimant testified that he does not remember why he left early on July 26, 2019. He testified that he does not remember why he told Mr. E[Redacted] he needed to leave early, but that he "most likely" told Mr. E[Redacted] he needed to leave for a doctor's appointment. Claimant does not remember which doctor he had an appointment with on July 26, 2019. He did not provide documentation to his supervisors or to Onsite Innovations of a medical appointment on July 26, 2019, as required by Respondent's attendance policy.

28. Claimant testified that he could not produce a medical record verifying that he attended a medical appointment on July 26, 2019. Respondent's subsequent investigation did not locate a medical appointment scheduled for Claimant on July 26, 2019, nor do Claimant's medical records include a medical report from this date (Ex. S, p. 205). In accordance with Respondent's attendance policy, and in the absence of documentation, the July 26, 2019, absence was not approved and was considered an unexcused absence.

August 2, 2019

29. On Friday, August 2, 2019, Claimant was scheduled to work from 7:00 am to 3:00 pm (Ex. O, p. 181). Claimant clocked in at 6:53 am and clocked out at 9:20 am, a total of 2.25 hours. Claimant informed Mr. E[Redacted] that he had a doctor's appointment. Mr. E[Redacted] communicated to Claimant that he must return after the appointment, as he had done each time Claimant informed him of a doctor's appointment. Mr. E[Redacted] stated that Claimant did not provide documentation to his supervisors of a doctor's appointment on August 2, 2019, as required by Respondent's attendance policy.

30. Claimant testified that he left early for a doctor's appointment on August 2, 2019. He could not recall what doctor he saw on August 2, 2019. Claimant acknowledged that he could not produce a medical record verifying that he attended a medical appointment on that date. Ms. R[Redacted] conducted an investigation and found that Claimant had no appointment scheduled with a doctor on August 2, 2019. The August 2, 2019, absence was not approved and was considered an unexcused

absence.

August 5, 2019

31. On Monday, August 5, 2019, Claimant was scheduled to work 7:00 am to 3:00 pm. Claimant's Kronos records document an "unpaid absence" on August 5, 2019 (Ex. O, p.185). This absence is a no-call/no-show, which is considered an unexcused absence. Claimant did not show up for work on the morning of August 5, 2019, and he did not call anyone with Respondent to inform them of his absence, as required by Respondent's attendance policy.

32. Mr. E[Redacted] spoke with Claimant after Claimant's shift would have ended on August 5, 2019, and Claimant informed him that he had a doctor's appointment that day. Mr. E[Redacted] again explained to Claimant Respondent's attendance policy as it relates to missing work for doctor's appointments. On the August 5, 2019, phone call with Mr. E[Redacted], Claimant informed Mr. E[Redacted] that he had a doctor's appointment on August 6, 2019. Respondent's subsequent investigation uncovered that Claimant had an appointment with Dr. Kessler at 8:00 am on August 5, 2019 (Ex. S. p. 205).

33. Mr. E[Redacted] composed email correspondence to Ms. R[Redacted] on August 6, 2019, confirming that Claimant informed him the previous week of a doctor's appointment on August 5, 2019, but that Claimant did not show up for work on August 5, 2019, and did not call until the afternoon of August 5, 2019 (Ex. O, p. 141).

August 6, 2019

34. On August 6, 2019, Claimant was scheduled to work from 7:00 am to 3:00 pm. Claimant's Kronos records indicate that Claimant clocked in at 6:53 am and clocked out at 9:00 am, for a total of two hours worked (Ex. O, p. 154). Claimant had an appointment for an initial evaluation with Hands Plus on August 6, 2019, at 2:00 pm, according to documentation of the appointment that Claimant submitted to Mr. E[Redacted] (Ex. N, p. 59). At hearing, Claimant confirmed that Hands Plus is a facility on Thatcher Avenue in Pueblo, Colorado. He further opined that the Hanson Clinic is located in Pueblo West, approximately 14 miles from EVRAZ, and the drive could take 30 minutes each way. Respondent's place of business is also located in Pueblo, Colorado. Claimant, therefore, clocked out five hours before this appointment was scheduled. In accordance with Respondent's attendance policy, Claimant did not leave for his appointment in a timely manner, and the August 6, 2019, absence was considered an unexcused absence.

August 7, 2019

35. On August 7, 2019, Claimant was scheduled to work from 7:00 am to 3:00 pm.

Claimant's Kronos records reflect that he clocked in at 6:54 am and clocked out at 7:26 am, with a total of .5 hours worked (Ex. O. p. 154). At hearing, Claimant testified that he left that day for a doctor's appointment. Mr. E[Redacted] clarified that Claimant told him that he was leaving for a doctor's appointment, and that he once again reviewed with Claimant Respondent's attendance policies relating to doctor's appointments. This included that an employee must return after an appointment if time remaining in a shift allows. A Daily Billing Slip/Progress Note from Hands Plus dated August 7, 2019, stated that Claimant was a no-show at his August 7, 2019, medical appointment (Ex. N, p. 61). Claimant, therefore, did not attend this appointment he left work to attend, and he also did not return to work. In accordance with Respondent's attendance policy, the August 7, 2019, absence was not approved and was considered an unexcused absence.

August 8, 2019

36. On August 8, 2019, Claimant was scheduled to work from 7:00 am to 3:00 pm. Claimant's Kronos records indicate that he clocked in at 6:54 am and clocked out at 7:08 am, with a total of .25 hours worked (Ex. O, p. 154). Mr. E[Redacted] confirmed that Claimant again told him that he was leaving early for a doctor's appointment. Claimant's medical records do not include a record from an appointment on August 8, 2019. Respondent's investigation into Claimant's medical appointments did not show a medical appointment on August 8, 2019 (Ex. S, p. 205).

37. Claimant testified that he provided Mr. E[Redacted] with doctor's notes from every appointment he attended. Mr. E[Redacted] testified that the only documentation he received from Claimant for a doctor's appointment was from an appointment on August 6, 2019, at 2:00 pm. In accordance with Respondent's attendance policy, and in the absence of documentation, the August 8, 2019, absence was not approved and was considered by Respondents to be an unexcused absence.

Claimant is Terminated by Respondent

38. On August 9, 2019, a meeting was scheduled with Claimant. Present at the meeting were Claimant; George Garcia, the mill superintendent; Chuck Chaffin, Respondent's business partner at the time; a union representative; Chris E[Redacted]; and Regina R[Redacted]. Ms. R[Redacted] questioned Claimant whether he understood the processes around scheduling and attending medical appointments, and he stated that he did. Ms. R[Redacted] and Mr. E[Redacted] each testified that Claimant was provided an opportunity to explain the situation surrounding his absences and provide documentation.

39. Ms. R[Redacted] testified that had Claimant provided any explanation for his absences, the meeting would have been stopped and Claimant's explanations investigated before convening another meeting. Claimant did not provide

documentation to explain of his unexcused absences in July and August 2019. Ms. R[Redacted] testified that neither Claimant, nor the union representative, raised any question that Claimant did not understand the process, or that Claimant did not know what was happening.

40. Claimant testified that he does not recall a meeting on August 9, 2019, involving Regina R[Redacted], but he does remember a meeting with Eric L[Redacted], the union president, Chris E[Redacted], and "all the supervisors."

41. Ms. R[Redacted] testified that after the August 9, 2019, meeting with Claimant, the circumstances surrounding Claimant's probation were discussed and it was decided that Claimant had failed his probationary period due to multiple violations of Respondent's attendance policy. Mr. E[Redacted] testified that the termination had no relationship to the work injury.

42. At hearing, Claimant provided no evidence that the termination related to the work injury, modified duty, or any other aspect of the work injury.

Excerpts from the Medical Records

43. Following his failed probationary period and termination from Respondent, Claimant has continued to treat for his work injury, with no observable change in condition.

44. Dr. Hanson referred Claimant to Dr. Patrick Devanny, a hand surgeon, for evaluation of Claimant's condition. In the note from a July 16, 2020, appointment with Claimant, Dr. Devanny noted that he had seen Claimant more than once, and it appeared to Dr. Devanny that Claimant's "symptoms have been slightly inflated" and that it was difficult for him to assess Claimant's actual pathology (Ex. 9, p. 75). Dr. Devanny concluded that the "organic nature" of Claimant's disorder is in question. *Id*.

45. At Claimant's most recent appointment with Dr. Hanson on October 5, 2020, Dr. Hanson noted x-rays, an MRI, and a nerve test of Claimant's left hand, all ordered by Dr. Devanny, each came back "normal" (Ex. 10, p. 78). Dr. Hanson also noted that he performed routine grab and pinch tests with "no change." *Id*.

Average Weekly Wage

46. Respondents allege Claimant was paid $16.55 hourly. This is supported by Respondents' Exhibit O, pp. 100 and 101. Claimant alleges he was paid $17.02 per hour. No document in support of this hourly wage can be identified from the records supplied. The ALJ finds and concludes that Claimant's hourly wage at the time of injury was $16.55. The contract of employment merely *guaranteed* 32 hours of work per week. *Id.*

47. According to the testimony of Ms. R[Redacted], in the Kronos reporting system, an "*Exception*" is generated any time an employee does not work the hours they were

originally scheduled to. The *Exception* is denoted by the “little bar that has stripes on it that almost looks like a barber pole” (10/22/2020 transcript, p. 148). The existence of an *Exception* in Kronos could mean anything from a no-show, or simply that there was no work to perform, and the employee was thereby allowed to leave his shift early, with no adverse action being inferred (aside, from forfeiting the pay by leaving early). *Id.* [Throughout Claimant’s Kronos report, there are numerous *Exceptions* noted, - even during his initial training week. Except for the disciplinary *Exceptions* discussed, supra, there is no testimony or documentation in the record defining why any of the other *Exceptions* were noted, other than it shows a corresponding reduction in hours worked vs. hours scheduled.

48. By all credible accounts, Claimant was in training his first week, from 6/17/2019 through 6/21/2019. He was scheduled to work 38 hours, 15 minutes, but due to the unexplained *Exceptions*, worked only 36 hours.

49. The following week, from 6/24/2019 through 6/28/2019, Claimant began his regular shift, which was scheduled from 7:00 pm to 7:00 am, Monday through Friday of that week, for a total of 60 hours to be worked. An unexplained *Exception* was noted for 6/28/2019, resulting in only 3.5 hours being worked that day, for a weekly total of 51.5 hours.

50. The week following (during which the injury occurred), from 6/30/2019 through 7/4/2019, Claimant was to continued his regular schedule, but this time from 7:00 am to 7:00 pm, but with 8 hours (apparently paid, however) noted as a Holiday for July 4. Claimant was able to complete his shift on 7/3/2019, and was credited for 12 hours. The running tally of hours worked indicates 48 hours actually *worked.* [*Note: actual *payroll* records were not supplied by either party-nor was any testimony- so it is not entirely clear if Claimant was in fact paid 8 hours for July 4, 2019].

51. The plant shut down for 5 days, beginning July 4, 2019. Claimant was then *scheduled* to work from 7:00 am to 7:00 pm from 7/10/2019 through 7/13/2019, for a total of 48 hours to be worked. [During this period, on 7/12/2019, Claimant incurred his first unexcused, and unpaid absence]. He also incurred another unexplained *Exception* on 7/11/2019, by clocking out early, resulting in 9.75 hours for that day. Claimant, therefore, was only credited for working 33.75 hours that entire week. It is noted that once Claimant’s work restrictions were placed into effect, he was placed on a regular day shift, at 40 hours per week.

52. Respondents’ Exhibit O, page 74, contains unintelligible, unexplained codes, apparently describing differentials for overtime, graveyard shift, swing shift, and Sunday premiums. In the absence of an explanation from the parties, the ALJ is unable to speculate how this might have meaningfully impacted Claimant’s AWW.

53. Claimant applied for Unemployment benefits after his termination. (Ex. O, pp. 127-

132). While the results of that unemployment claim are not pertinent to this ALJ's decision, the written responses (limited herein to the first 4 weeks of employment, in order to attempt to ascertain a pattern) from Respondents (and suppled in their own Exhibits) are germane. In question #4 (*Id* at 127, 128), Respondents were asked:

Q: Prior to being switched to modified duty, what was the claimant's work schedule? Provide the days of the week and the start/end times of the shift.

A: I have listed both the time sheet schedules and the schedules that where (sic) posted in the mills. *There were no differences.*

Time Sheet

1. 6/17-6/21 Monday through Friday 8-4, 730-245, 8-315, 8-4, 8-4
2. 6/24-6/27 Monday through *Friday* 7 pm-7 am *[4 days, or 5?]*
3. 6/30-7/4 Sunday through *Thursday* 7 am-7 pm
4. 7/10-7/13 Wednesday through Saturday (Modified duty 7/10/19) 7pm-7 am

………………………………………………..

Schedule

9. 6/17-6-21 Monday through Friday (orientation not on mill schedule)
10. 6/24-6/27 Monday through Friday 7 pm-7 am *[4 days, or 5?]*
11. 6/30-7/4 Sunday through *Wednesday* 7 am-7 pm
12. 7/10-7/13 Wednesday through Saturday (Modified Duty 7/10/19) 7 pm-7 am

CONCLUSIONS OF LAW

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

Generally

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

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion).

C. In this case, the ALJ finds the testimony of Chris E[Redacted] and Regina R[Redacted] to be credible, without ulterior motive, and consistent with the documents in evidence. The ALJ accepts Mr. E[Redacted]'s explanation that it was Claimant's unexcused absences, and not his work injury, that led to his termination. By contrast, Claimant's explanations for his actions are unsupportable, inconsistent with records that he himself was a party to (such as his orientation paperwork), and would often strain credulity. His professed lack of recall that he was made aware of his need to avoid unexcused absences sums it all up. Further, the ALJ does not accept his explanation that Onsite Innovations actually made his medical appointments for him, then only told him a day or two in advance that they had been made. It simply makes no sense.

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

Was Claimant Responsible for his own Termination?

E. The termination statutes, § 8-42-103(g) and § 8-42-105(4)(a) C.R.S., provide: In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury. The employer must prove by a preponderance of the evidence that a Claimant was terminated for cause or was responsible for the separation from employment. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). To establish that a Claimant was responsible for termination, the Respondents must show the Claimant performed a volitional act or otherwise exercised "some degree of control over the circumstances which led to the termination." *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 5 P.3d 1061, 1062 (Colo. App. 2002); *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1995); *Velo v. Employment*

Solutions Personnel, 988 P.2d 1139 (Colo. App. 1988). Whether the Claimant acted volitionally or exercised control over the circumstances of the termination is a question of fact, which must be evaluated based on the totality of circumstances. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004).

F. A Claimant who voluntarily resigns her job is "responsible for termination" unless the resignation was prompted by the injury. *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2008); W.C. No. 4-492-753 (ICAO, May 11, 2004). The term "responsible," as used in the termination statutes, may not be construed in a fashion which undermines the "overall scheme of the Act." *Colorado Springs Disposal v. Industrial Claim Appeals Office*, supra, In *Colorado Springs Disposal* the court held the "word 'responsible' does not refer to an employee's injury or injury-producing activity." The court reasoned that treating a Claimant as "responsible" for the loss of employment caused by physical limitations resulting from the compensable injury itself would significantly alter fundamental principles of the Act. Hence, a Claimant does not act "volitionally" or exercise control over the circumstances leading to the termination if the effects of the injury ultimately lead to her termination. E.g., *Kauffman v. Noffsinger*, W. C. No. 4-608- 836 (ICAO, April 18, 2005); *Blair v. Art C. Klein Construction, Inc.*, W.C. No. 4-556-576 (ICAO, November 3, 2003); *Bonney v. Pueblo Youth Service Bureau*, W.C. No. 4-485- 720 (ICAO, April 24, 2002).

G. Claimant was a probationary employee, and early in his tenure at that. For good reason, Employer keeps a close eye on new hires, to make certain they will have the stamina, aptitude, and work ethic to be a long-term and productive employee. Employer went to great lengths to train and orient Claimant for an entire week to explain his obligations to the company. Claimant also had a supportive network of supervisors to assist him in becoming successful. Absences or tardies were always duly noted, but could be excused for good cause, such as illness, injury, or family emergencies. The ALJ finds that Employer's system treated Claimant fairly, and with adequate due process safeguards in effect. Nonetheless, even one unexcused absence could result in termination as a probationary employee. Employer did not "owe" Claimant any verbal warnings, corrective actions, or 'do-overs'. At Employer's discretion, it can be "one and done".

H. Here, however, Claimant made it "seven and done" and in fairly short order. Not only was Claimant gaming the hours he took off for medical appointments; on occasion he would clock out of work and not even attend appointments that were scheduled. Other times, he would claim time off for appointments that never had been set. Claimant's conduct was downright egregious, and he rightfully earned his termination. The ALJ finds that Respondents have shown, by a preponderance of the evidence, that Claimant was responsible for his own termination and that therefore, his income loss from the date of his termination was not due to his original work injury.

Average Weekly Wage

I. Where the Claimant is earning an hourly wage at the time of the injury, the AWW is to be determined by multiplying the hourly rate by the number of hours in a day the claimant would have worked but for the injury, then multiplying that sum by the number of days in a week the Claimant would have worked. Colo. Rev. Stat. § 8-42-102(2)(d) (2003). However, 8-42-102(3) provides that an ALJ may diverge from the statutorily-prescribed methods of calculating the AWW if, for any reason, they will not fairly compute the AWW. The ALJ has wide discretion to decide whether the statutorily-prescribed methods will fairly calculate the AWW, and if not, to devise a method which will fairly determine the AWW. Because the ALJ's authority is discretionary, appellate courts may not interfere with the AWW determination unless there is an abuse of discretion. An abuse occurs if the order is beyond the bounds of reason, as where it is contrary to the law or not supported by substantial evidence. *Pizza Hut v. Indus. Claim Appeals Office*, 18 P.3d 867 (Colo. Ct. App. 2001). *Vance v. The Brown Schs/Cedar Springs Behavioral Health*, W.C. No. 4-558-130 (I.C.A.O. Aug. 17, 2004).

J. There is a relative dearth of information in the record, and it is particularly challenging to ascertain an Average Weekly Wage when one's tenure is so short, and an injury occurs before a pattern can be ascertained. However, the ALJ makes some observations. The first week on the job was for orientation only. There was no productive work to be performed in the mill at all; that would begin the following week, and on-the-job. Orientation was, by design, done on the day shift, and was never intended to serve as a preview of Claimant's hours in the mill. Even then, Claimant managed to accumulate some *Exceptions*, which reduced his actual hours to 36, from the originally scheduled 38.25. In any event, the ALJ will not factor in the entire first week on the job, as that was clearly was not contemplated by the parties to represent Claimant's work schedule, and therefore, his earnings.

K. In the absence of testimony, or documents in support, it now falls to the ALJ to ascertain a *pattern* of work hours from the remaining three weeks after the conclusion of orientation, and before Claimant was taken off his 12 hour shifts and placed onto the regular day shift, in accommodation of his work restrictions. Such pattern must be viewed both from what Employer would be *offering,* and what the Claimant would realistically *accept.* It is duly noted that Claimant only went one week during his entire tenure without accumulating some sort of *Exception* (it being duly noted that many could be no-fault, voluntary hour reductions) but in each case, his work hours were thereby reduced. He even clocked in two minutes late on the date he was injured (*see* Ex. O, p. 179).

L. Leaving aside all of Claimant's disciplinary *Exceptions*, it appears that he was willing to take off time when offered, even with the commensurate reduction in hours worked. Such pattern was established pre-injury on 6/28/2019 (8.5 hours). *At no point in Claimant's tenure did he ever show he could, and would, actually work a 60-hour week.* The ALJ will not infer that Claimant, even pre-injury, would *accept* all hours *offered* by Employer. Eight hours of voluntary *Exception* time off (instead of more) is being generous to Claimant, but the ALJ will infer that Claimant's actual *accepted* hours are reduced by 8 hours per week, compared with what Employer would actually *offer.* Claimant likes his time off, even when it's legit and unpaid.

M. In the absence of better evidence from the parties, the ALJ finds that Employer would *offer* Claimant work weeks of four,12-hour days (48 hours a week), *alternating* with five, 12-hour days (60 hours per week).

N. Applying Claimant's duly imputed *Exception* hours' reduction of 8 hours per work week, yields alternating actual weeks *offered* and *worked* to 40 hours the first week, and 52 hours the following week. However, those two may not simply be averaged, as overtime earnings must be assigned for the longer week.

O. Claimant's hourly wage is $16.55. In a 40-hour week, he earns $662.00. In a 52-hour week, Claimant earns $959.90 ($662.00 plus 12 hours at $24.83 = $297.90. The average between the two is therefore $662.0 + $959.90 = 1621.90 ÷ 2 = $810.95. The ALJ concludes that Claimant's Average Weekly Wage on the date of injury is $810.95.

ORDER

It is therefore Ordered that:

1. Claimant is responsible for his own termination from employment; therefore his wage loss from August 9, 2019 and ongoing is not attributable to his July 3, 2019 work injury.

2. Claimant's Average Weekly Wage is $810.95.

3. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

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

DATED: March 17, 2021

/s/ William G. Edie

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

ISSUES

I. Whether Respondents proved by a preponderance of the evidence Claimant did not sustain a compensable injury on December 19, 2019 and thus are permitted to withdraw their general admissions of liability.

FINDINGS OF FACT

1. Claimant is a 32-year-old male who works for Employer as an Operations Agent. Claimant's job involves, among other things, assisting and transferring passengers at the airport.

Prior History

2. On May 29, 2019, Claimant underwent a non-work related right inguinal hernia repair as a result of persistent pain and the presence of an indirect right-sided inguinal hernia which had been present since mid-May 2019.

3. Claimant subsequently developed a postoperative testicular infarct and associated hydrocele, as confirmed on a June 4, 2019 ultrasound. Claimant continued to report pain and discomfort, including scrotal swelling. Claimant's urologist, Christopher M. Dru, M.D. at the Urology Center of Colorado, monitored Claimant's condition by physical examination and imaging.

4. On September 6, 2019, Claimant presented to his primary care physician, Johanna Freedman, M.D., for an unrelated respiratory issue. Dr. Freedman noted Claimant was having significant complications after his hernia surgery, including testicular infarct, and continued pain/bleeding/bruising in the scrotum. She noted Claimant recently saw a pain management physician.

5. On October 10, 2019, Claimant underwent another ultrasound which showed the continued presence of a hydrocele and infarct. Dr. Dru noted Claimant was clinically improving and he would continue to monitor Claimant. He planned to have Claimant undergo a repeat ultrasound in approximately six months.

December 3, 2019 Work Incident

6. On December 3, 2019, a passenger elbowed Claimant in the testicular region while lowering himself into a wheelchair held by Claimant.

7. Claimant presented to the emergency department at Platte Valley Medical Center on the evening of December 3, 2019 with complaints of severe pain to his right testicle.

The record notes a history of right inguinal surgery and right testicular infarct. Claimant reported that, prior to the work incident, he experienced minimal intermittent testicular pain several times a week and a follow-up with his urologist had already been scheduled. On examination, the physician noted minimal swelling to the right hemiscrotum without erythema or ecchymosis; and exquisite tenderness of the superior pole of the right testicle with moderate diffuse right scrotal tenderness. A testicular ultrasound was obtained. The radiologist's impression was: "1. Moderate to large right-sided hydrocele containing a septation and internal debris. This could be chronic. 2. Otherwise unremarkable." (Ex. D, p. 215). Claimant was diagnosed with a scrotal injury and hydrocele and discharged with instructions to follow-up with his primary care physician and urologist.

8. On December 4, 2019, Claimant presented to Amanda Cava, M.D. at Concentra. Dr. Cava noted Claimant's prior history of hernia surgery, hydrocele, and testicular necrosis. Claimant reported that his current pain was above his baseline pain. On examination, Dr. Cava noted edema, tenderness and right hydrocele of the scrotum, and swelling of the testes. She assessed Claimant with pain in the right testicle and a right hydrocele. Dr. Cava released Claimant to modified duty with restrictions on lifting/pushing/pulling and walking/standing.

9. Claimant saw Dr. Dru on December 5, 2019. Claimant reported that his chronic right testicular pain had been doing better prior to the reported December 3, 2019 work incident. On examination of the right testicle, Dr. Dru noted tenderness to palpation, + hydrocele, and small scrotal bruising at dependent portion. He noted that an ultrasound showed increased size in the right hydrocele with a few septations and internal debris. Dr. Dru opined that Claimant suffered an acute exacerbation of his pain, but continued to have chronic right orchialgia. He administered a right spermatic cord nerve block to Claimant noting, "The nerve block will show improved concept if a [neurolysis] is possible. If he has some dramatic improvement over the next few hours with the nerve block, he will be a good candidate for a [neurolysis]." (Ex. C, p. 157). Dr. Dru referred Claimant to John Tillett, M.D. and noted Claimant was to follow-up in 7-10 days for a neurolysis evaluation. Dr. Dru released Claimant to return to work with restrictions of no lifting more than five pounds for six weeks.

10. On December 12, 2019, Claimant presented to Dr. Tillett. He reported having right testicular pain since his May/June 2019 surgery, but experiencing an acute worsening after the December 3, 2019 work incident. Dr. Tillett noted the December 3, 2019 ultrasound showed an unchanged large right hydrocele. He noted that a prior scrotal ultrasound on October 10, 2019 also showed the right testicular infarct and a large right hydrocele, and a June 19, 2019 scrotal ultrasound showed a 25% segmental infarction of the right testis, as well as a large right hydrocele. Claimant reported experiencing approximately three days of relief from the nerve cord block administered by Dr. Dru on December 5, 2019. Dr. Tillett discussed treatment options for Claimant's symptomatic hydrocele and chronic testicular pain, including surgery.

11. On December 27, 2019, Claimant underwent a right hydrolectomy and excision of right epididymal neoplasm by Dr. Tillett.

12. Respondents filed an initial General Admission of Liability ("GAL") on January 9, 2020. Respondents allege they filed the GAL prior to discovering Claimant's pre-existing pain and complications from a previous inguinal hernia repair.

13. Claimant continued to treat with his urologists and Concentra and continued to report testicular symptoms.

14. On July 23, 2020, F. Mark Paz, M.D. performed an independent medical examination ("IME") at the request of Respondents. Dr. Paz issued an IME report dated August 10, 2020. As part of his evaluation, Dr. Paz took a history from Claimant, physically examined Claimant, and reviewed records dated May 20, 2019 through May 27, 2020. Regarding the mechanism of injury, Claimant reported that a passenger inadvertently elbowed him in the right testicular region when going to sit down in a wheelchair. Claimant provided Dr. Paz a history of prior right inguinal hernia repair and subsequent 6-7/10 pain. Claimant reported that his right testicle symptoms resolved over time and were not present in the weeks prior to the December 3, 2019, incident. Based on Claimant's history, exam findings, and records, Dr. Paz concluded that Claimant sustained a right testicular contusion as a result of the December 3, 2019 work incident. He opined that the work incident aggravated Claimant's right testicular infarct pain.

15. Dr. Paz explained that, based on the limited records available, Claimant continued to experience pain in the right testicle until July 30, 2019, but had returned to light duty work. There was an increased level of pain in and about the right testicle, with swelling and increased symptoms subsequent to the December 3, 2019, incident. He opined that the treatment provided to Claimant on and subsequent to the work incident was reasonable, necessary and related. He further opined that Claimant was not at maximum medical improvement ("MMI") and may require additional treatment.

16. On August 18, 2020, Dr. Paz issued a supplemental IME report after reviewing additional records from May - July 2019 and September - October 2019. Based on his review of the additional records, Dr. Paz changed his opinion and concluded it was not medically probable the December 3, 2019 work incident caused Claimant's right testicular pain. Dr. Paz explained that, although Claimant reported that his right testicular symptoms had resolved over time and were not present in the many weeks prior to December 3, 2019, a September 6, 2019 medical record documented Claimant continued to experience pain, bleeding, and bruising in the scrotum and was being treated by a pain management physician. He further noted Claimant had a repeat testicular ultrasound on October 10, 2019, which showed persistence of right testicular infarction and identified a large right hydrocele. The findings of Claimant's December 3, 2019 testicular ultrasound were consistent with right testicular infarction, with septation and internal debris, without acute findings. Dr. Paz noted that Dr. Dru reviewed the results of the December 3, 2019 ultrasound, and that Dr. Dru documented the testicle appeared more normal.

17. Dr. Paz opined that Claimant's right testicular contusion and chronic right inguinal/testicular pain and need for treatment are not causally related to the December

3, 2019 work incident. Dr. Paz stated it was not apparent that Claimant's treatment course changed as a result of the December 3, 2019 work incident. He noted that Claimant may have undergone right hydrocele resection on December 27, 2019 with or without the December 3, 2019 incident, and that Claimant's right testicular symptoms have continued to persist despite the right hydrocele resection on December 27, 2019. Dr. Paz explained that, with or without the December 3, 2019 work incident, the medical and surgical treatment proposed and/or completed following the December 3, 2019 work incident were consistent with the treatment considerations for complex chronic pain following herniorrhaphy repair which Claimant underwent in May 2019.

18. Dr. Cava reviewed Dr. Paz's IME reports and responded to a letter from Respondents' counsel on October 12, 2020. In response to the question "Do you agree with Dr. Paz's opinion that Claimant's right testicular symptoms are not causally related to the December 3, 2019 occupational incident?" Dr. Cava circled "Yes." She opined Claimant reached maximum medical improvement ("MMI.") In response to the question "If you think Claimant has reached MMI, please state the date Claimant reached MMI and the basis for such opinion" Dr. Cava wrote: "12/09/19 – post nerve block treatment on 12/5/19 for acute exacerbation of chronic testicular pain. 12/9/19 was Concentra follow-up visit. Subsequent surgery 12/27/19 would be related to the chronic underlying condition." (Ex. B, p. 103).

19. On January 21, 2021, Dr. Paz testified by pre-hearing deposition as a Level II accredited expert in occupational medicine. Dr. Paz testified consistent with his supplemental IME report and continued to opine that the December 3, 2019 work incident did not cause Claimant's symptoms or otherwise aggravate, accelerate or combine with Claimant's pre-existing condition. Dr. Paz testified that Claimant reported to him only experiencing pain in the right groin, not the right testicle, leading up to the work incident. He explained that, contrary to Claimant's history, the September 6, 2019 medical record documented pain and bruising in the scrotum and ecchymosis in the right testicle. Dr. Paz further explained that, per Claimant's provided history, the hydrocele developed on December 3, 2019 and was larger and more painful; but the supplemental records documented a progressive increase in size/dimension of the hydrocele prior to December 3, 2019. Dr. Paz testified that the October 10, 2019 ultrasound did not document dimensions of the hydrocele; however, he did compare the dimensions of the June 19, 2019 ultrasound to those documented on the June 27, 2019 ultrasound, as well as those documented in the pathology report subsequent to the December 2019 hydrocelectomy, and noted progressive increase in the size of the hydrocele. Dr. Paz explained that progressive increase of the hydrocele is consistent with the natural history of a hydrocele. Dr. Paz testified that, if the hydrocele was the cause of Claimant's pain, resection would have been expected to relieve Claimant's symptoms, but it did not.

20. Dr. Paz stated that there is no objective evidence to support any change of anatomical structure subsequent to December 3, 2019. Claimant's diagnoses did not change on or subsequent to the work incident. He concluded that it is more medically probable Claimant's symptomatology is consistent with the natural history of a

progressive condition and the need for treatment was based on Claimant's pre-existing condition.

21. Clamant testified that in the weeks before the work incident he did not have any issues. He testified he scheduled a follow-up appointment with Dr. Dru for December 5, 2019 on the way to see the provider at Concentra on December 4, 2019. Claimant testified that prior to December 3, 2019 he did not have restrictions from his urologist and he was taking 800mg Ibuprofen or 500mg Aleve 1-2 per day as needed.

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

CONCLUSIONS OF LAW

Generally

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

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

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

Withdrawing an Admission of Liability

When the respondents attempt to modify an issue that previously has been determined by an admission, they bear the burden of proof for the modification. §8-43-201(1), C.R.S.; *see also Salisbury v. Prowers County School District*, WC 4-702-144 (ICAO, June 5, 2012). Section 8-43-201(1), C.R.S. provides, in pertinent part, that "a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification." The amendment to §8-43-201(1), C.R.S. placed the burden on the respondents and made a withdrawal the procedural equivalent of a reopening. *Dunn v. St. Mary Corwin Hospital*, WC 4-754-838-01 (ICAO, Oct. 1, 2013).

Respondents note the distinction between the term "accident" and "injury," and contend that, while Claimant may have had an "accident" at work on December 3, 2019, such incident did not cause disability or the need for treatment. The preponderant evidence does not establish Claimant did not sustain a compensable industrial injury.

Although it is clear Claimant had pre-existing testicular conditions and symptoms at the time of the work injury, Drs. Cava, Dru and Tillet all credibly opined Claimant sustained an acute exacerbation of his testicular pain as a result of the work incident. That Claimant's testicular symptoms had not fully resolved by the time of the work injury does not preclude a finding that the work injury exacerbated Claimant's symptoms, even if temporarily. The reported mechanism of injury, being struck in the testicles, is a mechanism of injury that could likely result in aggravation of an already symptomatic, pre-existing testicular condition. While Claimant was actively undergoing follow-up evaluations and experiencing intermittent testicular pain leading up to the work injury, the records note the work injury caused an increase in pain above his baseline, causing Claimant to seek evaluation and treatment at the emergency department.

While Dr. Cava noted she agreed with Dr. Paz that Claimant's symptoms are not work-related, she also opined Claimant reached MMI as of December 9, 2019 after receiving a post nerve block for "acute exacerbation of chronic testicular pain." She specifically noted that the 12/27/19 surgery was related to Claimant's chronic underlying condition. In light of the other medical records, a reasonable interpretation of Dr. Cava's somewhat contradictory October 12, 2020 response is that she agreed Claimant's current and ongoing symptoms are unrelated to the work injury, not that no work injury occurred.

Dr. Paz opines that Claimant did not sustain any work injury, as Claimant had a long-standing history of symptomatic testicular conditions, there were no changes to any anatomical structures, and the work incident did not alter the course of Claimant's treatment, specifically referring to the December 27, 2019 surgery. The record is unclear as to when the December 5, 2019 appointment with Dr. Dru was actually scheduled. Claimant testified he scheduled the appointment on his way to the December 4, 2019

Concentra appointment; however, the ALJ notes the December 3, 2019 emergency room record indicates Claimant already had a follow-up appointment scheduled.

Even assuming, arguendo, the appointment with Dr. Dru had been scheduled prior to the work incident, there remains insufficient evidence establishing the treatment was not due, at least in part, to the work incident, which caused an acute exacerbation of Claimant's chronic pain. As of Claimant's October 10, 2019 examination with Dr. Dru, Dr. Dru noted Claimant was clinically improving and a follow-up ultrasound was to take place in six months. The record does not establish any care received between October 10, 2019 and the date of the work injury, or that the post-nerve block administered on December 5, 2019 was previously recommended or scheduled to take place on December 5, 2019 absent the work injury. While the evidence indicates subsequent treatment, including the December 2019 surgery, may be unrelated to the work injury, the issue of whether such treatment was reasonable, necessary and related, or whether Claimant has reached MMI, is not before the ALJ.

A "temporary" aggravation of a pre-existing condition is compensable, as long as the industrial exposure is the proximate cause of the claimant's need for treatment. *See Merriman v. Industrial Commission, 120 Colo. 400, 210 P.2d 448 (1949); Subsequent Injury Fund v. State Compensation Insurance Authority, 768 P.2d 751 (Colo.App. 1988).* Here, the preponderant evidence establishes Claimant sustained a right testicular contusion that temporarily aggravated his chronic underlying condition, resulting in the need for treatment. As Respondents failed to prove Claimant did not sustain a compensable injury, their request to withdraw admissions of liability shall be denied.

ORDER

1. Respondents failed to prove Claimant did not suffer a compensable injury on December 19, 2019. Respondents' claim to withdraw their admissions of liability is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

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

when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 19, 2021

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that he is entitled to an award of temporary total disability ("TTD") benefits for the period of August 10, 2020 through September 18, 2020?

- If Claimant has proven that he is entitled to an award of TTD benefits, whether Respondents have proven that Claimant committed a volitional act that led to his termination of employment?

- Whether Claimant has proven by a preponderance of the evidence that his average weekly wage ("AWW") should be increased to $1,029.28? With regard to this issue, the parties stipulated that Claimant's AWW would be include $18.23 per week for the cost of health care benefits provided to Claimant by Employer.

- Whether Claimant has proven by a preponderance of the evidence that he is entitled to an award for disfigurement pursuant to Section 8-42-108, C.R.S.?

FINDINGS OF FACT

1. Claimant was employed with Employer as a remove and reinstall technician. Claimant sustained an admitted injury on July 31, 2020 when smashed his left index finger against the bumper of a vehicle while attempting to remove the vehicle.

2. Claimant testified he reported the injury to his supervisor, Mr. W[Redacted]. Claimant testified he later reported the injury to Mr. D[Redacted], Employer's owner when Mr. D[Redacted] returned to the shop. Claimant testified that when he reported the injury to Mr. W[Redacted], he informed Mr. W[Redacted] that he believed his finger was broken. Claimant testified Mr. W[Redacted] advised him that there was nothing a physician could do for him. Claimant testified that Mr. W[Redacted] and Mr. D[Redacted] advised Claimant to take it easy for the rest of the day.

3. Claimant testified he returned to work on Monday, August 3, 2020, and informed Mr. D[Redacted] that he wanted to see a physician for his injury. Claimant testified Mr. D[Redacted] referred him to fill out paperwork, including a First Report of Injury. Claimant was ultimately referred to Workpartners for medical treatment.

4. Claimant was examined at Workpartners on August 3, 2020 by Dr. Fay. Claimant was diagnosed with a contusion of the left index finger with damage to nail

and a fracture of unspecified phalanx of left index finger. Claimant was referred for x-rays which demonstrated an acute tuft fracture of the left index finger. Dr. Fay prescribed Keflex and recommended light duty and splinting to promote healing. Claimant was provided with a 15 pound lifting restriction of the left upper extremity and instructed Claimant to limit pinching.

5. Claimant testified he returned to work with his restrictions and informed Mr. W[Redacted] of his diagnosis. Claimant testified regarding insulting and offensive language Mr. W[Redacted] used in addressing his work injury. Claimant testified that this offensive language was used on the Friday he was injured as well as on Monday when he returned from Workpartners with his work restrictions and diagnosis.

6. Claimant testified he continued to work for employer by doing his regular job with one hand. Claimant testified he was unable to perform his job with one hand and he was provided with work restrictions by Employer.

7. Claimant underwent a performance review on August 6, 2020. Claimant's performance review showed good or excellent marks in all areas except communication skills, safety and attitude, which received fair marks. The review noted Claimant had two injuries under safety and noted Claimant needed to work on consistency on write ups on his communication skills. The performance review did not include a comment under attitude. Claimant testified he felt the performance review went well.

8. Claimant testified that on August 10, 2020, Mr. D[Redacted] held a meeting in the morning where Mr. D[Redacted] presented all employees with a new Drug and Alcohol Policy. Mr. D[Redacted] read the policy to all employees and requested that they sign a copy of the policy. Claimant testified that he did not sign the policy and contacted a law office to make an appointment to discuss the Drug and Alcohol Policy.

9. Claimant testified that he was approached by Mr. D[Redacted] regarding his not signing the policy. Claimant testified that he asked for a third party to be in on the meeting and then informed Mr. D[Redacted] that he was concerned about some of his prescription medications and told Mr. D[Redacted] he wasn't comfortable signing a document that he did not understand. Claimant testified Mr. D[Redacted] told Claimant he could talk to someone about the policy before signing the document.

10. Mr. D[Redacted] testified that he presented the Drug and Alcohol Policy to all employees on August 10, 2020. Mr. D[Redacted] testified that Claimant left the meeting without signing the document and Mr. D[Redacted] later found Claimant outside on his phone. Mr. D[Redacted] testified he approached Claimant between phone calls and asked Claimant if he had questions with regard to the policy. Mr. D[Redacted] testified Claimant informed him that he felt Employer was violating his 4th

Amendment rights. Mr. D[Redacted] testified he did not recall Claimant saying he wanted to speak to an attorney, but did recall Claimant saying he did not understand the document Employer was asking him to sign.

11. Mr. D[Redacted] testified the later approached Claimant at lunch to discuss Claimant signing the policy. Mr. D[Redacted] testified Claimant told him that Claimant was not comfortable revealing his prescription medications. Mr. D[Redacted] testified he told Claimant that they already had his prescription medications on file. Mr. D[Redacted] testified that Claimant then yelled at him that he didn't want to speak with Mr. D[Redacted] on his lunch break.

12. Mr. D[Redacted] testified he then went back to his office, typed up a termination letter and Claimant's last paychecks and provided Claimant with his paychecks and the termination letter. According to the termination letter, Claimant was fired for "personality conflicts".

13. Mr. D[Redacted] testified Claimant was fired because Claimant had become rude and insubordinate and Claimant seemed unwilling to sign the Drug and Alcohol Policy.

14. Mr. D[Redacted] testified Claimant had spoken to him about the language used by Mr. W[Redacted]. Mr. D[Redacted] testified that he told Claimant he would speak to Mr. W[Redacted] with regard to his language.

15. Claimant denied in his testimony yelling at Mr. D[Redacted], but instead testified that he informed Mr. D[Redacted] that he would feel more comfortable speaking to Mr. D[Redacted] after his lunch break.

16. Respondents presented the testimony of Ms. K[Redacted]. Ms. K[Redacted] testified she is the owner of Matco Tool Truck. Ms. K[Redacted] testified she knew Claimant through her work. Ms. K[Redacted] testified that she was aware that Claimant had a couple of injuries with Employer. Ms. K[Redacted] testified that Claimant had informed her that he wanted to quit working for Employer, but his circumstances changed when his parents asked him to move out, and he needed to keep his job. Ms. K[Redacted] testified that Claimant told her he thought his Employer would let him go at any time, and asked if she would help him move his tool box if he was fired.

17. Claimant testified on rebuttal that he had told Ms. K[Redacted] that he felt Employer was trying to get him to quit because of how badly they treated him. The ALJ finds this testimony consistent with Claimant's prior testimony regarding the offensive nature of the language used by Mr. W[Redacted].

18. Claimant returned to Dr. Fay on September 18, 2020. Dr. Fay noted that Claimant's pain and swelling was resolved. Dr. Fay released Claimant to return to work without restrictions and instructed Claimant to return to her office in 2 weeks, at which time he should be at maximum medical improvement.

19. The ALJ credits the testimony of the Claimant with regard to his inability to perform his regular work following the injury as credible and persuasive. The ALJ further credits the work restrictions set forth by Dr. Fay and finds that Claimant has established that it is more likely true than not that his work injury resulted in a medical incapacity evidenced by restriction of bodily function and an impairment of wage earning capacity as demonstrated by Claimant's inability to resume his prior work.

20. The ALJ credits the testimony of Claimant over the testimony of Mr. D[Redacted] and finds that Respondents have failed to establish that it is more likely than not that Claimant committed a volitional act that led to his termination of employment. According to the employment records, Claimant was terminated for a "personality conflicts" The evidence does not establish that Claimant was advised that he had a set time that he needed to sign the Drug and Alcohol Policy, and the conflict with Employer over the signing of the policy that led to the confrontation with Mr. D[Redacted] would be an understandable workplace conflict. The evidence does not establish that Claimant would reasonably believe that his conduct in this case would lead to his termination of employment.

21. While Claimant had received only a "Fair" grade regarding his attitude on the performance evaluation, the evidence does not establish that Claimant would reasonably expect that he would be terminated over his dispute with Employer over the signing of the Drug and Alcohol Policy. Additionally, while Mr. D[Redacted] testified Claimant had yelled at him during their discussion over lunch, this fact was disputed by Claimant in his testimony at hearing. Moreover, the termination papers in this case do not establish that Claimant was terminated for insubordination in his conduct with Mr. D[Redacted]. Therefore, the ALJ finds that Respondents have failed to establish that Claimant committed a volitional act that led to his termination of employment with Employer.

22. Claimant was paid $19 per hour by Employer. Claimant testified he would also be paid "flag hours" in which he would get paid at a higher rate for jobs he completed in a more timely manner. In the seven (7) weeks prior to his work injury, Claimant was paid by Employer $7,077.35. This time period includes two (2) bonuses, one for $250 and one for $750. The ALJ finds that the appropriate average weekly wage ("AWW") should be based on the wages Claimant was paid in the 7 weeks prior to his injury, plus the stipulated amount for Claimant's health care coverage. The ALJ therefore finds that the AWW should be $1,029.28 ($7,077.35 divided by 7 = $1,011.05 + $18.23 = $1,029.28).

23. Claimant has sustained a disfigurement to his left index finger that includes a small scar measuring approximately 8 millimeters according the medical records and photographs. Claimant also has a small bump on his nail.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

3. To prove entitlement to temporary total disability ("TTD") benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S. requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy &*

Co., 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

4. As found, Claimant has proven by a preponderance of the evidence that he is entitled to an award of TTD benefits commencing August 10, 2020 through September 18, 2020. As found, the restrictions set forth by Dr. Fay establish that Claimant had a medical incapacity to perform his regular work. As found, Claimant's testimony regarding his inability to perform his usual work after the injury is found to be credible and persuasive with regard to this issue.

5. Under the termination statutes in §§8-42-105(4) & 8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, WC 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge,* WC 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for her termination, respondents must demonstrate by a preponderance of the evidence that the claimant committed a volitional act or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if he or she precipitated the employment termination by a volitional act that he or she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* WC 4-432-301 (ICAO, Sept. 27, 2001).

6. As found, Respondents have failed to prove by a preponderance of the evidence that Claimant committed a volitional act that led to his termination of employment. As found, Claimant was not fired for failing to sign the Drug and Alcohol Policy, or for insubordination, but was fired for a personality conflict with the owner. As found, Respondents have failed to establish that Claimant's conduct in this case in handling his dispute with employer over signing the Drug and Alcohol Policy was a volitional act that Claimant could reasonably expect would lead to his loss of employment.

7. The ALJ must determine an employee's AWW by calculating the money rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the

Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

8. As found, the AWW for claimant in this case is based on Claimant's earnings in the 7 weeks prior to his work injury, and is determined to be $1,029.28.

9. Section 8-42-108(1), C.R.S. provides that Claimant is entitled to additional compensation in the event that the injury results in a serious permanent disfigurement to areas of the body normally exposed to public view.

10. As found, Claimant has proven by a preponderance of the evidence that he is entitled to an award for disfigurement pursuant to Section 8-42-108(1). The ALJ awards $250 for that disfigurement.

ORDER

It is therefore ordered that:

1. Respondents shall pay Claimant TTD benefits for the period of August 10, 2020 through September 17, 2020 based on an AWW of $1,029.28.

2. Respondents shall pay Claimant disfigurement benefits in the amount of $250.00.

3. All matters not determined herein are reserved for future determination.

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

DATED: March 19, 2021

Keith E. Mottram

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-937-396-001

ISSUES

I. Whether Claimant established by a preponderance of the evidence that she suffered a compensable injury.

II. Whether Claimant established by a preponderance of the evidence that she is entitled to medical benefits.

PROCEDURAL ISSUES

Respondents reserved the right to appeal Judge Edwin Felter's December 16, 2019 Order on Remand finding that claimant's claim for benefits is not barred by the statute of limitations.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. Claimant started working for the employer as a technical designer in 2005. In this job, she worked with venders designing clothing patterns, fit, and quality control. *Ex. K.* Outerwear was her specialty.

2. In March 2012, the company moved to a new building. Claimant contends that once she started working in the new building, she started developing respiratory and skin disorders. As a result, Claimant contends that her respiratory and skin disorders are caused by the environmental conditions of her job in the new building.

3. Claimant developed a cough, wheezing, and shortness of breath, for which she sought treatment on June 26, 2012. *Ex. J, Bates 550.* Her symptoms, however, started in December 2000, when she developed chest tightness and throbbing in the left arm, loss of coordination, flu-like symptoms, and fatigue. *Ex. I Bates 527.* In her 2012 evaluation, Claimant indicated to her providers that her respiratory symptoms may have been due to smoke in the air from nearby forest fires. She went to an urgent care clinic and was treated with a nebulized bronchodilator and given prescriptions for Advair and albuterol inhalers. She returned to the clinic 4 days later with continued chest complaints. A chest x-ray was "abnormal" and claimant was given additional prescriptions. *Id.* Claimant has a history of "chronic bronchitis" for 2 years beginning in 1970 with symptoms of deep, dry cough. Claimant underwent testing in 1972 and was found to be positive for grass, trees, dust, and mold. *Ex. J; Ex. I, Bates 551, 527.* Claimant's respiratory problems waxed and waned over 2012 and 2013 when she was evaluated by an allergist in June 2013 and was told she was allergic to weeds. *Ex. I, Bates 529; Ex. J, Bates 552.*

4. Claimant's son, daughter, and grandchildren have asthma and allergies. *Ex. E, Bates 522.*

5. In a visit at Banner Health on April 19, 2013, she reported that her symptoms were aggravated by "airborne chemicals, animals, change in weather, dust/dust mites, environmental allergens, molds, respiratory infection, smoke and stress." *Ex. H, Bates 496.*

6. Claimant reported having 1 dog and three cats in her home as of March 2014. *Ex. I, Bates 522.*

7. Around April 2013, claimant became concerned that her respiratory problems and dermatitis may be due to her workplace, and asserted work as the cause of ongoing symptoms to her providers and her employer. Her PCP stated, "[Claimant] is still convinced that her workplace is the etiology of both the dermatitis and her breathing problem. The extensive workup that was done at the workplace did not reveal exposure to large quantities of mold." *Ex. E, Bates 420.*

8. Claimant was evaluated by physicians at National Jewish Health. On September 23, 2013, she brought building inspection results to Dr. Annyce Mayer, M.D. of the Occupational/Environmental medicine department, who said, "We discussed in detail that the environmental report does appear to have been a thorough assessment with air sampling that clearly demonstrates no suggestions of indoor amplification of mold. Therefore, although she smells an odd and musty smell, mold was not identified in the workplace. It is difficult to link all of her symptomatology to a specific diagnosis.**"** *Ex. I, Bates 535.* In the absence of evidence of mold, Dr. Mayer suggested that there should be testing for fiberglass as a possible etiology for her symptoms, but noted, "the erythema of the neck sparing the face and hands and eyes that persists now 2 weeks after going through clothes would be atypical." *Ex. I, Bates 540.*

9. Air monitoring of claimant's office space was conducted on December 11, 2013 by Stuart Bailey MS, CIH, Industrial Hygienist. No workplace hazard was identified. This testing addressed Dr. Mayer's concerns about fiberglass. This testing showed that both fiberglass and organic contaminants in the area were below OSHA, American Conference of Governmental Industrial Hygienists, and NIOSH thresholds. *Ex. B, Bates 13.*

10. The series of microbial evaluations discussed by Dr. Mayer were conducted by Strategic Environmental Management LLC. at claimant's jobsite, the industrial/office warehouse office property located at 14100 East 35th Place, Aurora, CO. No workplace hazard was identified. Their report, dated September 4, 2013, summarized the findings, "the total spores per cubic meter of air for all indoor fungal air sampling locations were significantly lower than those found in the outside control sample. Furthermore, while the first test in the Subject's office tested only at 15% of the outdoor concentration, the third test detected only 7% of the outdoor concentration. Based upon this information, the indoor air at the Site is not in need of remediation." *Ex. A, Bates 3.*

11. OSHA preformed three investigations based on claimant's complaints. *CL Testimony, Tape 4 1:06:10.* OSHA took material from claimant's workplace for testing. *CL Testimony Tape 4 1:07:05.* No workplace hazard was identified. *Id.* The certified OSHA file, with OSHA's redactions, was admitted into evidence. *Ex. C*.

12. On February 25, 2014, OSHA conducted their first investigation. The Compliance Officer was unable to find any air contaminant in the office environment that would induce an adverse respiratory effect. *Ex. C, Bates 25.* The Compliance Officer was unable to find signs that would indicate the presence of mold or fungi. *Id.* The Compliance Officer also investigated the office work environment for the presence of chemicals or other substances that may induce adverse health effects. The Compliance Officer was unable to find a chemical in the office environment that would induce an adverse skin irritation or rash effect. *Id.*[1] A new complaint was filed with OSHA, alleging that employees were potentially exposed to a respiratory hazard causing asthma and to skin contact hazard causing asthma or rash. *Ex. C, Bates 144.* OSHA returned for inspection on September 29, 2014. *Ex. C, Bates 189.*

13. Again, there were no workplace hazards identified. The Compliance Officer concluded that employees were not exposed to formaldehyde in excess of Permissible Exposure Limits and that indoor levels were not in excess of outdoor levels for most fungi. *Ex. C, Bates 144.*

14. Claimant retained Mold Inspection Sciences, Inc. to conduct two separate tests for yet another inspection. This was done on August 14, 2014. *Ex. D.* No workplace hazards were identified in either test. *Cl Testimony Tape 4 1:05:47*. The "testing did not detect a mold problem." *Ex. D, Bates 364,384, 387-388.*

15. Dr. Jeffry Schwartz conducted an evaluation of claimant on May 19, 2014. Dr. Schwartz is a pulmonary and critical care physician, board certified in internal medicine, pulmonary medicine, and critical care medicine. He has been evaluating patients with occupational pulmonary disease for approximately 30 years. He was admitted as an expert. *Schwartz Testimony Tape 4 starting 1:08:30.*

16. After review of the records and his evaluation, Dr. Schwartz concluded that claimant does not have occupational asthma or work-related exacerbation of underlying asthma. *Ex J Bates 554; Ex. I Bates 535; Schwartz Testimony, Tape 4 starting 1:14:00.* Dr. Schwartz concluded in his written report:

> Ms. M[Redacted] has asthma of unknown cause, as is true for the majority of asthmatics. She has many triggers of her asthma. While she expressed concern regarding the air quality in her workplace, an extensive evaluation of the claimant and her workplace has not shown any exposure at work that would account for her increased asthma symptoms over the past two years. Additionally, the claimant's peak flow monitoring has not

[1] Although there were no contaminants found upon OSHA inspection, the employer was cited for deficiencies in their Hazard Communications and complied with OSHA remediation requirements by compiling a hazardous chemicals list, using MSDS's, ensuring containers were labeled, and undergoing training. The employer explained that they did not have a program in place at the time of inspections because they did not feel they were storing or working with hazardous chemicals in their work place. *Ex. C, Bates 165, 286..*

shown values that would suggest work-related exacerbation of her asthma. She, therefore, does not have occupational asthma or work-related worsening of her underlying asthma. *Ex. J, Bates 554.*

17. Dr. Schwartz explained that peak flow measurements are one of the objective means to identify the existence of occupational pulmonary disease. *Schwartz Testimony, Tape 4 1:25:00.* Here, those objective tests did not identify a work-related occupational disease. Dr. Schwartz also noted that claimant's unrelated GERD and Barrett's esophagus could be causing airway inflammation and worsening of her asthma. *Id.*

18. Claimant disputed that she had GERD. Dr. Schwartz explained the claimant does have GERD, managed with medication that reduces the acidity and therefore the noticeability of her reflux, but which does not prevent reflux and its effect on the lungs. He explained that long term GERD can cause the chronic cough claimant experiences.

19. Dr. Schwartz also explained that claimant's diagnostic tests show emphysema. Claimant disputed this, and Dr. Schwartz explained that emphysema is seen in the August 31, 2012 CT of her Thorax. *Ex. G, Bates 472.* He explained that claimant's heavy smoking history placed her well above the threshold for expected damage to the lungs (2 packs a day for approximately 25 years = 50 pack/year history). *Ex. I, Bates 522; Ex. J, Bates 551.* He explained that emphysema is commonly related to smoking. He testified that airway hyper reactivity, interpreted as asthma for claimant, can also be caused by smoking. He explained that claimant has objective evidence of smoking related lung disease and may have asthma as a result of her smoking or may have developed that asthma independent of her smoking. *Schwartz Testimony Tape 4 starting 1:26:00.*

20. Dr. Schwartz testified that the fact that claimant's doctors advised against her working in the employer's building did not change his opinion that there was no occupational disease in this case. He explained that claimant's doctors were not doing a causation analysis. Instead, they were responding to claimant's belief that her workplace was causing her problems with the practical solution of avoiding the workplace. *Id. 1:29:00*. Dr. Schwartz testified that the fact that claimant continues to complain of symptoms but has not been in the employer's building since June 2014 makes work related causation much less likely, because of the lack of temporal exposure to any workplace hazard. *Id. 1:30:45.*

21. Dr. Schwartz' opinions are consistent with - and supported by - Claimant's underlying medical records and the extensive environmental testing that has been performed. Moreover, Dr. Schwartz' opinions are consistent with other providers who have evaluated Claimant and have been unable to provide a causal link between Claimant's work environment, her symptoms, and her underlying medical conditions. As a result, the ALJ finds Dr. Schwartz' opinions and testimony to be credible and persuasive.

22. Claimant testified at hearing. *Tape 3, beginning Tape 4.* Included in her testimony was the following:

a. She discussed her current complaints which she relates to work exposure in 2013. Her coughing and wheezing is ongoing daily. She has very sensitive airways. She gets bronchial spasms from scents. When she goes to the store, she starts coughing and has to use her inhaler. She is irritated by wood burned by her neighbor and the forest fires. She sweats. She has a fever. She cannot travel because she has to know the environment she is going into. She is short of breath if she walks over 50 feet. She is on 4 liters of oxygen at night and probably needs oxygen under exertion. She has a rash from her CPAP machine around her nose. She believes that she has a fungal infection in her eyes.

b. She started working for the employer as a technical designer August 1, 2005. In this job, she worked with venders on clothing patterns, fit, and quality control. Outwear was her specialty. She began working for the employer in a building in Aurora. In March 2012, the company moved to a new building.

c. She sought treatment in June 2012 for coughing a wheezing and not feeling well. In December 2012, she was diagnosed with asthma. After the diagnosis, she went to the internet and researched occupational asthma and triggers. She began to try to identify what she thought were triggers. She noticed that she was feeling worse when she got to the Denver area from her home in Greeley. She noticed that after her commute, she was short of breath by the time she got to her desk at work. She testified that she was feeling a crawling sensation up her legs. She felt she could notice a difference in her breathing in different parts of the building. She testified that she had what she felt was an asthma attack at work in April 2013. She was afraid and used her inhaler. After that, she was afraid to come to work.

d. She ordered a mycotoxin test after researching for herself on the internet. She ordered this herself through the internet. This was not ordered by a doctor. She understands her results were positive for two mycotoxins. After these results were received, she shared them with her providers and National Jewish. *Ex. I; Paragraph 7, above.*

e. She felt that cardboard boxes containing clothing moved from the prior employer building to the new building in 2012 caused a reaction for her in the form of a rash on her chest and her arms and her legs, a spot on her hand, and a fungal infection on her feet. These boxes were kept in her work area and contained clothing that was used as examples during her pattern making. She noted that the same boxes with the same clothing did not bother her when they were located at the old building. She stated that clothing stored in plastic boxes did not bother her. *CL Testimony Tape 4, starting 46:35* She testified that it was her understanding that OSHA took those boxes of clothing for testing.

f. In January 2014 she was admitted to the hospital with influenza and asthma complications. She was in the ICU from 1/14/14 to 1/18/14 for her influenza. Upon release, she was provided an excuse from work. After her release from the hospital, but before her return to work, she developed a rash on her back.

She did not return to the employer until February 24, 2014. Upon her return to work, claimant felt her symptoms increased, including fungal infection in her toes, rash, burning eyes, headaches, sore throat, sweating, and asthma symptoms. Claimant was last in the building June 20, 2014.

g. After leaving work in June 2014, she was weak, had a limited amount of time that she could stand and was too weak to cook. She developed an incisional hernia in the area where she had had a portion of her stomach removed in 2001. She had surgery for that hernia on December 30, 2014. At the time of that surgery, they found "Swiss cheese-like hernias" all over her stomach, and it ended up being a very major surgery. She was then in ICU for 3 days on oxygen. Following this, she had an acute kidney injury, "they don't know why." She was discharged from the hospital 20 days later and was on 8 liters of oxygen. She thinks her muscles went into atrophy because she had leg cramps, foot cramps, pain, burning skin and difficulty breathing. She was also hospitalized with pancreatitis. She believes that the employer's building caused her symptoms and conditions since 2013 and continues to cause her symptoms now.

23. Although the ALJ finds Claimant's reporting of her numerous symptoms to be credible and reliable, the ALJ does not find her association of her symptoms and conditions with her work environment to be persuasive evidence regarding causation.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

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

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant established by a preponderance of the evidence that she suffered a compensable injury.

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

A claimant seeking benefits for an occupational disease must establish the existence of the disease and that it was directly and proximately caused by the claimant's employment or working conditions. *See Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992). The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by Section 8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

This section of the Act imposes additional proof requirements beyond that required for an accidental injury by adding the “peculiar risk” test. The “peculiar risk” test requires that the hazards associated with the vocation must be more prevalent in the workplace than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the condition for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

Claimant has consistently and persistently asserted that work exposure after her company moved buildings is the cause of many medical problems. This resulted in multiple testing for various possible hazards by several sources. None revealed workplace hazards. After review of the testing, her PCP and National Jewish doctors did not join her in her belief that her conditions were related to an exposure at work. Dr. Schwartz credibly testified that her condition is not an occupational disease. There are other explanations within claimant’s medical history for her complaints.

There is simply no persuasive evidence of either exposure or persuasive medical evidence that exposure caused claimant’s multiple symptoms, complaints, and conditions. As noted by the Panel in the matter of *Washburn v. City Market*, “From a legal standpoint, claimant may be confusing causation for correlation. The claimant would have us blindly follow the common informal fallacy of “after this therefore because of this” (*post hoc ergo propter hoc*). We decline to do so.” *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO June 3, 2020).

As a result, Claimant has not met her burden to prove that there was exposure at work that caused her multiple symptoms and conditions. It is found and concluded that Claimant did not meet her burden to prove by a preponderance of the evidence that she suffered a compensable occupational disease or an acute injury.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant’s claim is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding

procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 22, 2021.

/s/ Glen Goldman
Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-957-582-01

ISSUES

➢ Whether claimant has proven by a preponderance of the evidence that he sustained an injury arising out of and in the course and scope of his employment with employer on September 18, 2020?

STIPULATIONS

➢ If the claim is compensable, Claimant's average weekly wage ("AWW") is $949.44.

➢ If the claim is compensable, Claimant is entitled to an award of temporary total disability ("TTD") benefits for the period of September 19, 2020 through November 30, 2020.

➢ If the claim is compensable, Claimant's medical treatment is deemed to be reasonable and necessary to cure and relieve Claimant from the effects of the work injury.

FINDINGS OF FACT

1. Claimant is employed by Employer as a General Manager. Employer is a fine dining restaurant in Carbondale, Colorado. On September 18, 2020, Employer was hosting a private buy out for a wedding rehearsal dinner. The private buyout was set to host a party of 40-50 guests.

2. Claimant testified he arrived at work at approximately 4:45 p.m. and began to set up for the party. Claimant had two other employees, Ms. Kopman and Mr. Beatty, working the event as servers. Ms. Kopman and Mr. Beatty also helped Claimant set up for the event. Claimant was set to work as the bartender during the wedding rehearsal party. Ms. Conti and Mr. Sweeney, co-owners of Employer were also present on September 18, 2020.

3. Employer's restaurant has a bar area that is on an elevated floor and separated from the restaurant area by a half wall. On the top of the half wall is a flat metal railing that runs the entire length of the half wall. Claimant testified at hearing that the railing is approximately 25 feet long. The evidence indicates that the brass railing weighed between 200-300 pounds.

4. Claimant testified that after finishing setting up, at approximately just before 5:45 p.m., Claimant ran up to the half wall, grabbed the railing and put both feet on the wall underneath the railing. Claimant testified he did this in an attempt to rally Ms. Kopman and Mr. Beatty and hype up the staff before the event. Ms. Kopman

testified that when Claimant put his feet up on the half wall, he said something to the effect of “Look, I’m Spiderman”. Claimant testified he did not recall saying this, but acknowledged that he is a superhero/comic book fan.

5. The railing in this case was not fastened to the half wall. The railing came off the half wall, and landed on Claimant on the ground. Claimant sustained fractures to his left distal tibia shaft, medial malleolus and distal fibula. Claimant was helped to a booth by Ms. Kopman and Mr. Beatty. Ms. Conti and Mr. Sweeney also checked on Claimant having heard the commotion of the railing fall. Ms. Conti contacted Claimant’s girlfriend who came to the restaurant and took Claimant to the Emergency Room. Claimant had surgery on his left leg the next morning.

6. Employer has an employee handbook that was drafted in large part by Claimant. Claimant testified at hearing that the actions he took on September 18, 2020 would not have been acceptable pursuant to the terms of the employee handbook.

7. Claimant filed a Workers’ Claim for Compensation. Respondents filed a Notice of Contest and argued at hearing that the injury in this case was a result of horseplay.

8. By all accounts there are very few disputed facts in this case, other than whether Claimant grabbed the rail and put his feet on the half wall in an attempt to hype up the staff before the event.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers’ Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers’ Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2006. A Workers’ Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ’s factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness’s testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the

testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

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

4. Where the alleged deviation from employment involves "horseplay," our courts apply a four-part test to determine whether the resulting injury is compensable. In *Lori's Family Dining v. Industrial Claim Appeals Office,* 907 P.2d 715, 718 (Colo. App. 1995), the Court of Appeals enumerated the following four factors:

> (1) the extent and seriousness of the deviation; (2) the completeness of the deviation, *i.e.,* whether it was commingled with the performance of a duty or involved and abandonment of duty; (3) the extent to which the practice of horseplay had become an accepted part of the employment; and (4) the extent to which the nature of the employment may be expected to include some horseplay.

5. No single factor is determinative, and the claimant need not prove the existence of every factor in order to establish compensability. *Panera Bread, LLC v. Industrial Claim Appeals Office,* 141 P.3d 970 (Colo. App. 2006).

9. In *Panera Bread, supra*, the Court of Appeals affirmed a finding of compensability for an injury that occurred when the employee in that case, with a smirk on his face, lifted his right leg as if he were going to kick a coworker, who was ten feet from the cooler and far enough away that he could not have been stuck, and had his left leg slip out from under him, causing him to fall. The court found in that case that the employee's actions did not constitute an extensive or serious deviation from his employment duties.

10. In *Lori's Family Dining, Inc.*, the court held that injuries that occurred when teasing between co-workers escalated to a physical level and when the injured worker attempted to kick his co-worker, the co-worker caught his leg. The employee who attempted to kick his co-worker was injured when he attempted to extract his leg from his co-workers' grip.

11. These two cases have established that horseplay is analyzed under general principles that govern whether a claimant has deviated from employment so substantially as to remove him or her from the course of employment. This case

involves a particular act of horseplay, and not the employment environment in general. Therefore, the act, according to *Panera Bread*, *supra,* is to be judged according to the same standards of extent and duration of deviation that are accepted in other fields, such as resting, seeking personal comfort , or indulging personal errands.

12. In this case, Claimant was not injured when he fell from the railing to the floor. Claimant sustained the fractures to his leg from the brass railing falling on Claimant's legs. The brass railing is a component of Employer's restaurant, and ultimately caused Claimant's injuries. Therefore, the ALJ finds that the ALJ finds that the injury in this case arose out of and in the course of his employment with Employer. (See *Panera Bread*, where the combination of a slippery floor, the employee's shoes and his actions of attempting to kick toward his co-worker combined to cause the injury).

13. The deviation in this case was a brief act by the Claimant in an attempt to be goofy. Claimant had completed setting up for the private party, and was in the area of the restaurant where he was scheduled to be working, so any horseplay did not involve an abandonment of Claimant's duties. The ultimate cause of the injury in this case was Claimant's actions combined with an unsecured brass railing that weighed between 200-300 pounds. Because Claimant was in an area of the restaurant where he was scheduled to work, the horseplay incident was brief in nature, and the cause of the injury involved an unsecured brass rail that was part of Employer's restaurant, the deviation in this case is not so extensive or serious from Claimant's employment duties as to render the injury non-compensable.

14. Respondents shall pay Claimant workers compensation benefits as set forth in the stipulation of the parties at hearing, including reasonable and necessary medical benefits necessary to cure and relieve Claimant from the effects of the injury pursuant to the Colorado Medical Fee schedule and temporary total disability ("TTD") benefits for the period of September 19, 2020 through November 30, 2020 based on an average weekly wage ("AWW") of $949.44

ORDER

It is therefore ordered that:

1. Respondents shall pay claimant TTD benefits beginning August 5, 2014 and continuing until terminated by law based on an AWW of $425.61.

2. Respondents shall pay for the reasonable medical treatment necessary to cure and relieve claimant from the effects of the August 1, 2014 industrial injury provided by Dr. McLaughlin and Dr. Copeland.

3. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

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

DATED: March 22, 2021

Keith E. Mottram

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

ISSUES

- Did Respondents overcome the DIME's determination Claimant is not at MMI by clear and convincing evidence?

- If Claimant has reached MMI, should the PPD award for Claimant's left shoulder be based on the schedule or as a whole person impairment?

- If Claimant is not yet at MMI, did Respondents prove Claimant's TTD benefits should be reduced to zero on or after March 14, 2019 for persisting in an "injurious practice" under § 8-43-404(3)?

- Did Respondents prove Claimant received an overpayment of TTD benefits based on his receipt of Social Security Disability Insurance (SSDI) benefits, payment of TTD benefits beyond the date of MMI, and/or payment of TTD benefits after benefits were suspended for persisting in an injurious practice?

PRELIMINARY MATTERS

The hearing in this matter was initiated by Respondents' application challenging the DIME's determination Claimant was not at MMI. Pursuant to Division policy, the DIME also assigned advisory impairment ratings of: 10% whole person for left hemidiaphragm paralysis, and 21% scheduled/13% whole person for Claimant's left shoulder. Respondents do not contest the impairment ratings calculated by the DIME, except Respondents assert Claimant suffered only scheduled impairment to the left shoulder rather than whole person impairment.

Claimant has not contested Respondents' right to terminate TTD benefits to recover an overpayment caused by his concurrent award of SSDI benefits.

FINDINGS OF FACT

1. Claimant was born in September 1956 and is currently 64 years of age.

2. Claimant worked for Employer as a delivery driver. He suffered admitted injuries on August 25, 2016 when he fell from his truck. Claimant injured multiple parts of his body, including his left shoulder, low back, neck, left shoulder, pelvis, right knee. He also developed situational depression and anxiety. Most of the injuries healed relatively quickly, but the left shoulder symptoms and anxiety persisted.

3. Claimant was eventually referred to Dr. Michael Simpson, an orthopedic surgeon, for evaluation of his left shoulder.

4. An MR arthrogram on March 13, 2017 showed a SLAP II tear, moderate AC joint osteoarthritis, and probable bursitis.

5. On June 29, 2017, Dr. Simpson performed an arthroscopic subacromial decompression, distal clavicle excision, and open biceps tenodesis.

6. The surgery was a negative experience for Claimant in many ways. First, he had an adverse reaction to post-operative pain medication, which caused hallucinations. He also developed breathing difficulties shortly after surgery, and his shoulder remained significantly symptomatic.

7. On July 20, 2017, Claimant reported to Dr. Simpson he sometimes had difficulty breathing or catching his breath. In August 2017, Claimant reported increasing dyspnea and difficulty breathing with exertion. A CT scan suggested hemidiaphragm paralysis. Dr. Simpson opined the hemidiaphragm problem was probably related to the nerve block Claimant received for the shoulder surgery.

8. Claimant participated in several months of physical therapy and home exercises attempting to rehabilitate his shoulder.

9. On February 12, 2018, Dr. Simpson noted Claimant was “still struggling” with range of motion and pain. Active shoulder range of motion was “quite restricted”, and Claimant was frustrated with his slow progress. Dr. Simpson opined,

> [Claimant] has pretty significant adhesive capsulitis which is really not improving over time. We had a lengthy discussion about treatment options. At this point, I see there are 2 options available to him. The first option would be to consider an arthroscopic lysis of adhesions and manipulation under anesthesia. . . . The other option, if either he prefers to avoid surgery, or if it is felt that surgery is contraindicated, would be to place him at maximum medical improvement at this time with 2-3 years of maintenance care to monitor resolution of his adhesive capsulitis. Prior to making any determination about the advisability of surgery, I would recommend a repeat CT scan of his chest to evaluate his hemidiaphragm position and evaluation from an internal medicine physician or pulmonologist to make sure that elective surgery would be appropriate at this time.

10. Claimant was evaluated by Dr. Majd Kobitary, a pulmonologist, on March 6, 2018. Dr. Kobitary opined the diaphragmatic paralysis could be related to phrenic nerve injury or could be idiopathic. He recommended no specific treatment and saw no contraindication to additional surgery from a pulmonary perspective.

11. Claimant followed up with Dr. Simpson on March 12, 2018. Claimant was “making some progress” even though his range of motion was still significantly limited. Dr. Simpson indicated Claimant “would like to avoid surgery if at all possible” and “I think it is appropriate to . . . continue to treat him to nonoperatively.” Dr. Simpson believed Claimant was approaching MMI but recommended maintenance care “in the event he decides he wants to proceed with surgery at some point.”

12. Dr. Terrence Lakin has been Claimant's primary ATP for this injury. Dr. Lakin put Claimant at MMI on April 18, 2018 with a 20% scheduled/12% whole person rating for the left shoulder. Dr. Lakin recommended two years of follow-up with Dr. Simpson "including additional imaging and arthroscopic surgery if warranted."

13. Claimant returned to Dr. Simpson on April 22, 2018. Dr. Simpson opined shoulder surgery would be "risky" because of the diaphragmatic issue and recommended Claimant have pulmonary surgery before considering any additional shoulder surgery.

14. On June 11, 2018, Dr. Simpson noted Claimant's range of motion appeared to be improving and "[it appears] he will be placed at maximal medical improvement with recommendation for maintenance care. I think that's very appropriate. With the recent improvement of his range of motion I would be optimistic that he will continue to make slow steady gains . . . and allow him to avoid additional surgical intervention."

15. At his September 10, 2018 appointment, Dr. Simpson noted Claimant's range of motion continued to improve and the best course was nonoperative management.

16. Dr. Gary Zuehlsdorff evaluated Claimant for a DIME on October 16, 2018. Claimant said his left shoulder was approximately 50% better after surgery and he was "frustrated with his level of recovery." Claimant indicated Dr. Simpson "highly recommended going to another procedure, but he is scared of going through another procedure." Claimant was "aggressively" performing home exercises to improve his range of motion. Dr. Zuehlsdorff noted Claimant appeared "very anxious and very wound up." Dr. Zuehlsdorff had received no records regarding the pulmonary condition but spoke with Claimant's pulmonologist by telephone the day after the DIME. Dr. Zuehlsdorff determined Claimant was not at MMI because "he needs a second surgical procedure regarding his left shoulder" and "he also needs to have his left hemidiaphragm evaluated."

17. Respondents accepted the results of the DIME and authorized treatment of Claimant's left shoulder and pulmonary problems.

18. Claimant followed up with Dr. Simpson a few times after the DIME. Dr. Simpson administered two cortisone injections that provided some benefit. On June 10, 2019, Dr. Simpson noted, "As I have told him all along, his symptoms are improving nonoperatively, that I would try very hard to avoid additional surgical treatment." Claimant's last documented appointment with Dr. Simpson took place on September 9, 2019. Dr. Simpson did not recommend surgery at that time.

19. On January 23, 2019, Claimant saw Dr. Michael Weyant, a cardiothoracic surgeon with National Jewish Hospital. Dr. Weyant opined Claimant suffered diaphragmatic paralysis because of the shoulder surgery. Dr. Weyant recommended a diaphragm plication procedure. Claimant wanted to proceed with surgery.

20. Respondents authorized the plication surgery, and it was scheduled for March 14, 2019. Claimant cancelled the surgery shortly before the appointed date.

21. Claimant had a consultation with Dr. Evan Stepp at National Jewish regarding the surgery on May 15, 2019. Dr. Stepp agreed Claimant was an appropriate candidate for the plication procedure but noted, “the patient wishes to defer this for the time being until his shoulder function further improves as he fears recovering from chest surgery may cause him to lose ground in his shoulder recovery.” Dr. Stepp ordered additional workup including “a full pulmonary function test, upright and supine spirometry, and diaphragmatic sniff test. We will also check overnight oximetry to assess for any evidence of nocturnal hypoventilation. . . . I will review these results with him in person at the next visit.”

22. Claimant’s decision to postpone the March 2019 surgery was also partially motivated by the complications he suffered from shoulder surgery and “my fear was I go into surgery and wouldn’t come out. I didn’t understand. I was fearful and scared about what would happen to me in the surgery.”

23. Claimant followed up with Dr. Weyant on June 26, 2019, who the procedure and associated risks explained in detail. Claimant was reassured by the discussion and ready to proceed with surgery. Surgery was scheduled for July 18, 2019.

24. On July 8, 2019, Claimant’s wife of 31 years was diagnosed with advanced cancer. Claimant served as his wife’s primary caregiver and support system while she underwent cancer treatment.

25. The plication surgery was rescheduled for September 26, 2019 but Claimant cancelled the procedure because he was prioritizing his wife’s cancer treatment. Claimant did not reschedule surgery because he did not know how long his wife’s cancer treatment would last.

26. Claimant’s wife passed away on January 21, 2020, which naturally caused Claimant severe emotional distress. He did not attempt to schedule the plication procedure between January and March 2020 because he was struggling to come to terms with his wife’s death.

27. On February 26, 2020, Dr. Lakin opined Claimant remained at MMI. Dr. Lakin did not think additional shoulder surgery was warranted and believed he had “been given an adequate window to pursue surgical intervention” for the diaphragmatic condition. He stated it was reasonable for Dr. Zuehlsdorff to find Claimant not at MMI, but the lack of any significant treatment since the DIME confirmed his original determination of MMI on April 18, 2018. Dr. Lakin opined Claimant should return to Dr. Zuehlsdorff for a pulmonary rating.

28. Dr. Zuehlsdorff conducted a follow-up DIME on March 16, 2020. He maintained his determination Claimant was not at MMI. Dr. Zuehlsdorff noted “everything was put on hold” when Claimant wife was diagnosed with cancer and “the patient simply did not have the moral fortitude to attempt to treat himself during this time when he was actively involved in his wife’s treatment and care.” It had been two since his wife’s death “and he is simply trying to get his life back together.” Claimant told Dr. Zuehlsdorff he

wanted to move forward with the surgeries, first to address the hemidiaphragm abnormality and then to address the left shoulder. Dr. Zuehlsdorff opined both surgeries were reasonably necessary and should be completed before placing Claimant at MMI.

29. On March 19, 2020, Governor Polis issued Executive Order 2020 009 suspending all voluntary or elective surgeries or procedures because of the COVID-19 pandemic until April 14, 2020 at the earliest. The primary reason for suspending elective procedures was to conserve healthcare resources and scarce personal protective equipment.

30. National Jewish resumed elective procedures in mid to late May 2020. Claimant was made aware of this during a telehealth consultation with Dr. Weyant on May 27, 2020. Dr. Weyant explained the technical aspects and risks associated with the procedure. The ALJ infers the "risks" discussed included COVID-19 risks and protocols. Despite multiple contacts from National Jewish staff, Claimant still has not scheduled or undergone the plication surgery due to fears of contracting COVID-19. Claimant testified, "after COVID, I would definitely have the surgery" but does not intend to proceed before COVID-19 is controlled or the vaccine is widely available.

31. Dr. Jeffrey Schwartz, a pulmonologist, performed a record review for Respondents and testified at hearing. Dr. Schwartz agreed Claimant's hemidiaphragmatic paralysis is probably a complication of the shoulder surgery. The plication procedure is relatively simple and has been around for decades. It is the only treatment likely to improve Claimant's lung capacity. The risks of a significant complication from the plication procedure are low, and the likelihood of improvement is high. Dr. Schwartz "absolutely" recommended Claimant undergo the plication procedure, with the caveat he needs a repeat a chest x-ray and spirometry in case Claimant had improved with time (in which case the procedure might no longer be necessary). Dr. Schwartz though Claimant "certainly . . . should benefit" from the procedure, with an 80% chance the procedure would help. Dr. Schwartz has not heard of any patient getting worse from the procedure. Dr. Schwartz opined if Claimant does not have the plication, he was at MMI by June of 2018, not long after the shoulder surgery.

32. Dr. Schwartz persuasively described measures hospitals and surgical centers have undertaken to protect patients from COVID-19 since restarting elective procedures in May 2020. Claimant's risk of contracting COVID-19 while undergoing plication surgery is "exceedingly low" because of rigorous screening, enhanced operative sterility and respiratory precautions, and limited contact only with personnel who are protecting themselves and patients from exposure to COVID-19. To Dr. Schwartz's knowledge, the few surgical patients who acquired COVID-19 were exposed to the virus by their own visitors. Dr. Schwartz acknowledged fear of COVID is common but most of his patients have gone ahead with surgical procedures after being educated about the safety protocols and low actual risk. Dr. Schwartz's testimony was credible and persuasive.

33. Respondents failed to overcome Dr. Zuehlsdorff's MMI determination by clear and convincing evidence. There is no substantial question the plication procedure

is reasonably expected to improve Claimant's condition, and Respondents' argument is based on the premise Claimant has "refused" the procedure. Claimant is willing to undergo the procedure once COVID-19 is controlled or a vaccine becomes widely available. Claimant has not refused the surgery and therefore is not at MMI.

34. The delay of surgery was not an "injurious practice" before May 27, 2020. Claimant's decision to postpone the surgery in March 2019 was reasonable because he needed additional information and reassurance given the bad result from the prior shoulder surgery. Claimant was also reasonably concerned the surgery could cause him to "lose ground in his shoulder recovery." The ALJ also notes Dr. Stepp ordered additional workup on May 15, 2019, to be reviewed before making the final decision. After further consultation with Dr. Stepp and Dr. Weyant, Claimant was scheduled for surgery on July 18, 2019. Claimant probably would have undergone the surgery in July 2019 but for his wife's cancer diagnosis. Claimant's decision to put his treatment on hold and focus on his wife's needs was reasonable. It was also reasonable for Claimant to take a couple of months after his wife's death to "put his life back together." With the advent of COVID-19, Claimant had no opportunity to undergo surgery from March 19, 2020 until mid to late May 2020 because elective procedures were suspended.

35. Claimant's decision to decline plication surgery was no longer reasonable when he was advised about the technical aspects of surgery and risks involved during a telehealth consultation with Dr. Weyant on May 27, 2020. Claimant's subjective fear of contracting COVID-19 from surgery is not objectively reasonable given the heightened COVID-19 precautions and the "exceedingly low" actual risk. Claimant's failure to schedule the surgery after May 27, 2020 was an injurious practice that unreasonably delayed his recovery and attainment of MMI.

36. Claimant's compensation should be suspended and reduced to zero effective May 28, 2020. Such suspension shall continue until he undergoes the plication procedure.

CONCLUSIONS OF LAW

A. MMI

A DIME's determination regarding MMI are binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c), C.R.S. The party challenging a DIME physician's conclusions must demonstrate it is "highly probable" the determination is incorrect. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). A party meets this burden if the evidence contradicting the DIME physician is "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002).

"Maximum Medical Improvement" (MMI) is defined as the point when any medically determinable physical or mental impairment as a result of the industrial injury has become stable and when no further treatment is reasonably expected to improve the condition.

Section 8-40-201(11.5), C.R.S. A finding of MMI is premature if there is a course of treatment that has “a reasonable prospect of success” and the claimant is willing to submit to the treatment. *Reynolds v. Industrial Claim Appeals Office*, 794 P.2d 1080, 1081-82 (Colo. App. 1990).

As found, Respondents failed to overcome Dr. Zuehlsdorff’s MMI determination by clear and convincing evidence. There is no dispute the plication procedure is reasonably needed to cure and relive the effects of Claimant’s injuries. Respondents long ago authorized the procedure and remain willing to cover it should Claimant decide to move forward. Claimant is clearly not at MMI from a *purely medical standpoint*. Admittedly, a claimant is at MMI as a matter of law if they refuse the only remaining treatment proposed to improve their condition. *MGM Supply Co. v. Industrial Claim Appeals Office*, 62 P.3d 1001 (Colo. App. 2002). Here, Claimant has not “refused” the procedure, and appears willing to have surgery “after COVID.” Claimant was a generally credible witness, and the ALJ is inclined to give him the benefit of the doubt he will pursue surgery once the threat of COVID-19 recedes. Claimant’s age gives him a reasonable opportunity to receive the vaccine within the next few months (if he has not already done so). If he does not pursue the surgery, Respondents retain the option to petition to close the claim or take any other appropriate measures to conclude the case.

Because MMI is not “divisible,” there is no need to analyze whether Respondents overcame Dr. Zuehlsdorff’s MMI determination with respect to additional shoulder surgery. Although Dr. Zuehlsdorff was under the impression Dr. Simpson is still considering another shoulder surgery, no surgical recommendation has been made by any ATP. Dr. Simpson’s reports indicate he prefers to avoid surgery if Claimant continues to improve and plans to reevaluate Claimant after the plication procedure. If Dr. Simpson recommends shoulder surgery in the future, the parties can adjudicate reasonable necessity and relatedness at that time. If Dr. Simpson does not recommend additional surgery, the issue is moot and Claimant will return to Dr. Zuehlsdorff for another follow-up DIME.

B. Injurious Practice

Section 8-43-404(3) gives ALJs discretionary authority to “reduce or suspend” the compensation of a claimant who “persists in an unsanitary or injurious practice which tends to imperil or retard recovery or refuses to submit to such medical or surgical treatment . . . as is reasonably essential to promote recovery.” Respondents must prove the treatment is reasonably needed to assist the claimant in reaching MMI. *MGM Supply Co. v. Industrial Claim Appeals Office*, 62 P.3d 1001 (Colo. App. 2002); *Parks v. Ft. Collins Ready Mix, Inc.*, W.C. No. 4-251-955 (March 31, 1999). Benefits should not be reduced or suspended if the claimant’s refusal of treatment is reasonable. *Id.* In making this determination, the ALJ should consider what a reasonable person would do given the circumstances facing the claimant. Relevant factors include the history of treatment, the information reasonably available to the claimant, the existence of contrary medical opinions, the importance of the proposed treatment, and other circumstances bearing on the patient’s ability to comply with medical recommendations. *Romero v. Alstom, Inc*., W.C. No. 4-767-1057-06 (April 9, 2015).

As found, Claimant's delay of surgery was not an "injurious practice" before May 27, 2020. The decision to postpone plication surgery in March 2019 was reasonable because Claimant was seeking additional information and reassurance considering the bad result from the prior shoulder surgery. Moreover, Claimant was reasonably concerned the surgery could cause him to "lose ground in his shoulder recovery." Ultimately, Dr. Stepp ordered additional workup on May 15, 2019 to confirm details relating to the plication. After consulting with Dr. Stepp and Dr. Weyant, Claimant scheduled surgery for July 18, 2019, and probably would have undergone the procedure but for his wife's cancer diagnosis. Claimant's decision to put his treatment on hold and focus on his wife's needs was reasonable. It was also reasonable for Claimant to take a couple of months after his wife's death to mourn and "put his life back together." Claimant subsequently had no opportunity to undergo surgery from March 19, 2020 until mid to late May 2020 because elective procedures were suspended.

But Claimant's decision to postpone plication surgery was no longer reasonable after May 27, 2020 when he was advised about the technical aspects of surgery and risks involved during a telehealth consultation with Dr. Weyant. Claimant's subjective fear of contracting COVID-19 from surgery is not objectively reasonable given the heightened precautions implemented when elective procedures resumed and the "exceedingly low" actual risk. Claimant's failure to schedule the surgery after May 27, 2020 was an injurious practice that unreasonably delayed his recovery and attainment of MMI.

Claimant's compensation shall be suspended effective May 28, 2020, and the suspension shall remain in effect until Claimant undergoes the plication procedure. The statute permits the resumption of benefits when "the disqualifying condition has been removed." *Dziewior v. Michigan General Corp*., 672 P.2d 1026, 1030 (Colo. App. 1983). Given the number of times the plication surgery has been scheduled and cancelled, the suspension of TTD should continue until Claimant has the procedure. This provides a verifiable time for cessation of the injurious practice. *See Ganser v. Blue Mountain Energy*, W.C. No. 5-128-084-001 (December 16, 2020).

ORDER

It is therefore ordered that:

1. Respondents' request to set aside the DIME's determination regarding MMI is denied and dismissed.

2. Respondents' request that Claimant's TTD benefits be suspended commencing March 14, 2019 is denied and dismissed.

3. Claimant's TTD benefits shall be suspended effective May 28, 2020. The suspension shall remain in effect until Claimant undergoes the plication procedure.

4. If Claimant does not undergo the plication surgery within six months of this Order, Respondents may petition to close the claim for failure to prosecute or take any other appropriate action(s) to conclude this matter.

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

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

DATED: March 22, 2021

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-122-625-002

ISSUES

I. Whether Claimant suffered a compensable injury.

II. Whether Claimant is entitled to reasonable and necessary medical treatment.

III. Whether Claimant is entitled to temporary disability benefits.

IV. Whether Claimant is at-fault for his wage loss and not entitled to temporary disability benefits.

STIPULATIONS

The parties stipulated to an average weekly wage of $1,411.00. Respondents also agreed that if the claim is found compensable, they are not asserting any of the medical treatment received by Claimant is not authorized.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. The Claimant was 31 as of October 11, 2019. He resides in Medford, Oregon.
2. Before working for Employer, Claimant injured his low back in 2011 in a rollover automobile accident. After receiving conservative treatment, which included physical therapy and injections, Claimant made a full recovery. Claimant again injured his lower back in December 2018. He pulled a muscle lifting a heavy chest but made a full recovery with no treatment beyond one visit to the emergency room.
3. Before working for Employer, Claimant worked full duty for his prior employer, Diamond Fire. Claimant worked for Diamond fire as a wildland firefighter throughout the 2019 fire season, up to approximately September 18, 2019.
4. The duties of a wildland firefighter are laborious. They include, but are not limited to, walking long distances in full firefighting gear, using chain saws and other heavy equipment, raking ground, and staging. Staging involves observing the fire to assess how it is spreading to best assess how to control its damage.
5. Employer is a private wildland firefighting company that resides in Midwest City, Oklahoma. In October 2019, Employer assembled a crew of wildland firefighters to combat the Decker Fire raging near Salida, Colorado ("The Crew"). The Crew was around 20 members, including Claimant, Arthur "A.J." B[Redacted], Benjamin "Cade" B[Redacted], Harold "Lee" S[Redacted], James "Jim" H[Redacted], Brandon

W[Redacted], and Cody S[Redacted]. The Crew was led by . S[Redacted].

6. Claimant's tenure with Employer lasted 11 days, from October 2, 2019 to October 12, 2019.

7. The Crew used five fire engines or trucks. The trucks were three-quarter ton Dodge Ram pickup trucks, specially fitted to travel over mountainous terrain. Each member of the Crew was assigned a specific spot in a specific truck. Assignments were based on seniority and Claimant was the lowest ranking member.

8. Claimant was originally assigned to the middle seat of the fourth truck. He asked to move trucks because he objected to one member in his truck sleeping all the time.

9. On October 11, 2019, the keys to one of the trucks went missing while the Crew was eating. Claimant and Mr. B[Redacted] were accused of taking the keys. Claimant was searched as well as his belongings. The keys were not located. Thus, one of the trucks could not be used. As a result, the Crew downsized to four trucks for the evening and headed into the mountains to fight the Decker Fire. In order to fight the fire, the Crew staged on a mountainous hillside near Salida, Colorado on Rainbow Road Trail.

10. Claimant testified that on the night of October 11, 2019, he, Mr. B[Redacted], Mr. H[Redacted], as well as two others (i.e., Dunn and G2), were staging in their fire engine at Rainbow Road Trail. The Crew was waiting for scouts to return and instruct them regarding their next move. Claimant was watching Netflix on a phone while sitting in the back seat of the truck directly behind the passenger seat. Claimant was also vaping. Mr. H[Redacted] was sitting in the front passenger seat when, unprovoked and unannounced, he exited the truck and abruptly opened Claimant's door.

11. It is not clear from the evidence whether Mr. H[Redacted] pulled Claimant out of the truck or whether Claimant was leaning up against the door while watching Netflix and fell out of the truck upon the door being opened abruptly. Regardless, Claimant was either pulled out of the truck or fell out of the truck and landed on the left side of his lower back and on the hard ground. He was also sitting about three feet off the ground while in the truck and had no time to react to brace for the impact with the ground. Once he hit the ground, he laid there in shock and in pain. Mr. H[Redacted] then went around the truck to address Mr. B[Redacted], but Mr. B[Redacted] informed Mr. H[Redacted] that if he were touched a fight would ensue. Mr. H[Redacted] did not engage with Mr. B[Redacted], and instead returned to his seat in the truck. Claimant testified he felt immediate pain in his lower back. Claimant informed Mr. S[Redacted] of the incident and that his lower back was in pain. Mr. S[Redacted] informed Claimant that if he and Mr. H[Redacted] had a problem with each other – they should basically take their problem into the woods and fight it out.

12. Shortly after the incident, Mr. W[Redacted]s, who is an EMT but not for the Crew, checked Claimant for a concussion and instructed him to perform stretches for his lower back pain. Claimant also testified that there was a professional EMT crew nearby that he was instructed not to see because Claimant thought that due to the cause of the injury - which Claimant classified as an assault - the incident could result in the Crew being pulled off the fire.

13. Mr. B[Redacted] testified that the night of October 11, 2019, he, Claimant, and Mr. H[Redacted], along with others, were staging together in the same truck. He and Claimant were in the back of the truck watching Netflix on a phone while awaiting orders on where the Crew would go next. Mr. B[Redacted] was located behind the driver seat and Claimant was located behind the passenger seat. Mr. H[Redacted] was in the front passenger seat when, unprovoked and unannounced, he exited the truck, opened Claimant's door and ripped him out of the truck throwing him to the ground. Mr. H[Redacted] then went around the truck to address Mr. B[Redacted]. But Mr. B[Redacted] locked his door and informed Mr. H[Redacted] that a fight would ensue if Mr. H[Redacted] touched him. Mr. B[Redacted] stated that Mr. H[Redacted] thought Claimant was using cannabis, but Claimant was simply vaping tobacco. Mr. B[Redacted] also testified that Claimant appeared to be in shock after the incident occurred and was in noticeable back pain. The two went to speak with Mr. S[Redacted] about what occurred. Mr. B[Redacted] testified that Claimant informed Mr. S[Redacted] that his back was hurting, but Mr. S[Redacted] instructed Claimant to "rub some dirt on it" and if he took issue with Mr. H[Redacted] to go "fight him in the woods." Mr. B[Redacted] testified that Claimant had no issues with his back and performed all his job duties without the appearance of pain before the incident with Mr. H[Redacted]. Lastly, Mr. B[Redacted] testified that he decided to leave the Crew, along with Claimant and Mr. B[Redacted], the morning of October 12, 2019, due to how this situation was handled by Mr. S[Redacted].

14. Mr. B[Redacted] testified that the night of October 11, 2019, Mr. H[Redacted] "yanked" Claimant out of the backseat of the pickup because Mr. H[Redacted] thought Claimant was using cannabis. After the incident, Claimant was laying on the ground in shock, and appeared to be in pain when he stood up. Mr. B[Redacted] testified that he was staging in the same pickup as Mr. S[Redacted] when the incident occurred and was nearby when Claimant reported the incident to Mr. S[Redacted]. Mr. B[Redacted] testified that he heard Claimant report back pain to Mr. S[Redacted] that was "really bad." Then, he said that Claimant was relocated to the truck Mr. S[Redacted] and Mr. B[Redacted] were in. Mr. B[Redacted] again heard Claimant report back pain to Mr. S[Redacted], to which Mr. S[Redacted] replied, "suck it up, stop being a pussy, and if you have a problem go out to the woods and fight him." In addition, Mr. S[Redacted] did not offer to send Claimant for medical care. Mr. B[Redacted] also testified that Claimant had no issues with his back and could perform all his job duties without the appearance of pain before the incident with Mr. H[Redacted]. Mr. B[Redacted] testified that he decided to leave the Crew, along with Claimant and Mr. B[Redacted], the morning of October 12, 2019, based on how this situation was handled by Mr. S[Redacted]. Mr. B[Redacted] testified the three drove to Idaho where he and Mr. B[Redacted] lived. Mr. B[Redacted] also stated that while on the way to Idaho, Claimant was complaining of back pain, was in noticeable back pain, and they had to pull over multiple times to allow Claimant to stretch and address his back pain.

15. Claimant, Mr. B[Redacted], and Mr. B[Redacted] all testified they do not have special relationships with one another. The first and only time Mr. B[Redacted] and Mr. B[Redacted] met Claimant was while working the Decker Fire. They are not friends and are unrelated.

16. The crew finished its staging shift and returned to camp the morning of October 12, 2019. Claimant, Mr. B[Redacted], and Mr. B[Redacted] decided to quit and leave the Crew. Claimant testified he left because he feared for his safety and needed to seek medical care. Mr. B[Redacted] and Mr. B[Redacted] left the crew because of how Mr. S[Redacted] handled the incident involving Claimant and Mr. H[Redacted]. Both testified they feared they would be involved in fights and be injured or arrested. The three took Mr. B[Redacted]'s truck and drove to Idaho where Mr. B[Redacted] and Mr. B[Redacted] reside. Based on the totality of the evidence, the ALJ finds Claimant's decision to leave and get medical treatment for his back to be reasonable. The ALJ also finds that employees were constantly told work out their problems by basically fighting it out in the woods. Such statements created a difficult environment for employees such as Claimant to work and resolve problems that would arise. Claimant was also unable to keep performing his regular job duties after the incident and injury to his back. As a result, his wage loss is solely attributable to his injury and not his decision to leave and obtain medical treatment.

17. Claimant experienced back pain the entire trip from Colorado to Idaho and had to stop multiple times due to the pain. Claimant arrived in Idaho the evening of October 12, 2019. He stayed with Mr. B[Redacted] that night and booked a flight to Oregon. He arrived in Oregon the evening of October 13, 2019.

18. Mr. S[Redacted] testified that although he did not see the incident involving Claimant and Mr. H[Redacted], he was aware of what happened. He alluded to knowing that Mr. H[Redacted] pulled Claimant out of the truck. He testified that everyone on the Crew was aware of what happened to Claimant. That everyone on the Crew knew Clamant "hit his back" and "did something else to it."

19. Mr. H[Redacted] testified that he did not pull Claimant out of the truck on October 11, 2019. That said, he did acknowledge that after he opened Claimant's door, Claimant fell out of the truck and landed on the hard ground below. He testified that he thought he smelled cannabis in the truck despite everyone in the truck denying using cannabis. Mr. H[Redacted] testified that Claimant laid on the ground for at least a minute after falling, and that Claimant fell from two-and-a-half to three feet. Mr. H[Redacted] testified that it was dark inside the truck, and instead of simply turning on the light to see if anyone was using cannabis, he felt it best to exit the truck and quickly open Claimant's door.

20. Mr. W[Redacted] testified that he examined Claimant after the incident and that Claimant was not injured. He also testified that Claimant declined to be evaluated by the nearby EMT. He also testified that Claimant secretly disclosed to him during the Crew's "Death March" that he was experiencing back pain. Mr. W[Redacted] still works for Employer and his testimony conflicts with Claimant's testimony and the testimony of Claimant's co-workers. Based on the totality of the evidence, the ALJ does not find Mr. W[Redacted]'s testimony to be credible regarding Claimant declining to be evaluated by an EMT and that Claimant complained of back pain during the "Death March."

21. On October 14, 2019, Claimant sought medical care at the Providence Medford Medical Center Emergency Department ("ER"). He reported low back pain that began three days prior (i.e., October 11, 2019). He reported the mechanism of injury as being pulled

out of a truck and slammed to the ground by a coworker while working as a wildland firefighter in Colorado. He disclosed his prior lumbar injuries, but that he was not suffering from chronic lumbar pain at the time of injury. Claimant underwent lumbar x-ray. He was prescribed lidocaine patches, anti-inflammatories, and pain medication. He was scheduled for a one week follow up evaluation. Cl. Ex. 7: 31-37.

22. Claimant was evaluated by Cynthia Lewis-younger, M.D., on October 21, 2019. He reported lower back and upper gluteal pain that radiated into his legs. Claimant again reported the cause of his symptoms as being assaulted by Mr. H[Redacted] on October 11, 2019. Claimant underwent x-ray of his sacrum and coccyx. He was prescribed NSAIDs and schedule for a follow up to occur in one week. Cl. Ex. 7:38-41.

23. Claimant returned to Dr. Lewis-Younger on November 5, 2019. He reported lumbar pain. Dr. Lewis noted a "discrete mass in the soft tissue about his sacrum." Claimant was given a lumbar injection. He was instructed to continue taking medication, and to return for evaluation in one week. Cl. Ex. 7:42-45.

24. On November 7, 2019, Murri E[Redacted], an Employer representative, emailed Patricia O[Redacted]. (Resp. Ex. M, p. 318.) The subject of the email reflects it relates to Claimant's October 11, 2019, injury. In the email, Ms. E[Redacted] provided the exact description of the incident provided by Claimant. Based on Claimant's testimony, and this email, the employer was again provided notice that Claimant was alleging that he suffered a work injury. Despite being provided notice that Claimant was alleging a work injury, there is no indication the employer provided Claimant a list of designated providers with whom he could treat.

25. On November 12, 2019, Claimant missed his scheduled appointment with Dr. Lewis-Younger, and instead presented to the ER because his lumbar pain was radiating into his left leg with numbness. They discussed Claimant getting an MRI, but at this time Claimant was prescribed medication and informed to follow up with Dr. Lewis-Younger. Cl. Ex. 7:46-51.

26. Claimant returned to Dr. Lewis-Younger on November 18, 2019. He reported lumbar pain with worsening left leg pain. Claimant requested another injection and a walking assistive-device because of his worsening symptoms, but Dr. Lewis-Younger recommended against both until he underwent a lumbar MRI. Cl. Ex. 7: 52-54.

27. On December 3, 2019, Claimant returned for evaluation with Dr. Lewis-Younger. Claimant again reported lumbar pain that radiated into his left leg. He was referred for lumbar MRI and placed on no work status. Cl. Ex. 7:55-57.

28. Claimant underwent an MRI on December 9, 2019. When compared to prior lumbar imaging, there is noted an interval progression of the multilevel discogenic and facet degenerative spondylosis primarily involving the L3-4, L4-5, and L5-S1 levels. There was also a large left paracentral disc extrusion at the L4-5 level that encroached upon the left L5 nerve root and a new annular disc tear involving the posterior L3-4 disc. Cl. Ex. 4: 16.

29. Claimant returned to Dr. Lewis-Younger on December 11, 2019 and received an injection of Toradol. Cl. Ex. 7: 58.

30. On December 28, 2019, Claimant returned to the ER. He again reported low back pain that began in October 2019 after being pulled and thrown off a fire truck. Claimant reported his symptoms were worsening with numbness, tingling, and weakness in his left leg. He also complained of numbness and tingling into his right leg, and bowel and bladder incontinence. As a result of his symptoms, he was referred to orthopedics for a surgical evaluation. Cl. Ex. 59-60.

31. On January 1, 2020, Claimant started working for Liberty Tax. Claimant continued working for Liberty Tax through April 15, 2020. Ex. O: 339-350.

32. Claimant was evaluated by orthopedist Timothy Uschold, M.D., at Southern Oregon Neurosurgical & Spine Associates, P.C., on January 14, 2020. Claimant reported lumbar and left leg pain that began on October 11, 2019 when he was "ripped out of his fire engine" while working as a wildland fire fighter. Claimant also reported numbness and tingling into his left foot, otherwise known as "foot drop." Claimant was referred for lumbar surgery. Cl. Ex. 8: 61-66.

33. On January 24, 2020, Claimant underwent left-sided L4-5 microdiscectomy surgery performed by Dr. Uschold. It is noted that Claimant had a large disc herniation at L4-5, and pars defect at the L5 level. There was also an incidental durotomy, which was repaired. Cl. Ex. 5.

34. Claimant returned to his orthopedist on February 11, 2020, where he was evaluated by Anna Uschold, PA-C. He reported "feeling great" for the first four days post-surgery. Yet the symptoms he experienced pre-operatively had returned. It is noted that Claimant was working light duty as an interpreter for Liberty Tax. Claimant was diagnosed with reactive L5 radiculitis. He was prescribed a Medrol Dosepak and referred for lumbar MRI. Cl. Ex. 8: 67-70.

35. Claimant underwent lumbar MRI on February 13, 2020. Interval left L5 laminotomy changes were noted, with small peripherally enhancing fluid collection at the laminotomy site which probably represented postoperative seroma, abscess, or contained CSF leak. There was also a mild residual or recurrent left paracentral disc extrusion at the L4-5 level that contributed to mild stenosis of the left lateral recess. Cl. Ex. 4: 18.

36. Claimant returned to Dr. Uschold February 17, 2020. Claimant moved a bench at home and reported he "felt like he was electrocuted." The event caused an increase in lower back pain, but Claimant was still experiencing left leg pain post-operatively. Cl. Ex. 8: 71-73.

37. On March 9, 2020, Claimant retuned to Dr. Uschold. He reported that his left leg pain had mostly resolved post-surgery, but suddenly returned earlier in the week. The pain was severe and had no specific cause. Claimant reported the pain was the same as the pain he had before surgery. He was referred for an MRI. Cl. Ex. 8: 83-87.

38. Claimant underwent another post-operative MRI on March 12, 2020. The MRI showed a residual and recurrent medium-sized central/left paracentral disc extrusion with minimal caudal migration at L4-5 that was enlarged slightly and resulted in increased, now moderate, narrowing of the left lateral recess. The disc extrusion appeared to contact the traversing left L5 nerve root. Cl. Ex. 4: 20-21.

39. Claimant returned to Dr. Uschold for evaluation on March 17, 2020. Dr. Uschold reviewed the MRI and opined "his MRI scan shows clear evidence of a progressive left L4-5 disc re-herniation/extrusion." Claimant was referred for a revision microdiscectomy. Cl. Ex. 8: 88-95.

40. Claimant underwent an independent medical exam with Gary Zuehlsdorff, D.O., on April 29, 2020. Dr. Zuehlsdorff opined that Claimant suffered a compensable work injury on October 11, 2019. He also concluded that all medical treatment to Claimant's lumbar spine, and associated radiculopathy since that date was reasonable and necessary medical treatment that was related to the October 11, 2019 work injury.

41. On April 30, 2020, Claimant underwent a second lumbar surgery on April 30, 2020. The procedure consisted of a left revision lumbar decompression microdiscectomy. C. Ex. 6.

42. Because of ongoing pain complaints, Claimant underwent a third lumbar surgery consisting of a fusion.

43. Claimant's lumbar injury was caused by Mr. H[Redacted] either abruptly opening the door of the truck and Claimant falling out and onto the ground or Mr. H[Redacted] abruptly opening the door and pulling Claimant from the truck and Claimant falling out and onto the ground. Either way, the injury arose out of and occurred within the course and scope of Claimant's employment.

44. The injury occurred while Claimant was on the clock and within the course and scope of his employment.

45. The injury occurred while Claimant was performing a work duty that arose out of his employment contract with Employer.

46. The incident or altercation did not result from a personal dispute. The incident occurred because of Mr. H[Redacted]'s actions and his belief that Claimant was vaping cannabis.

47. Claimant's testimony is found to be internally consistent and consistent with the medical records. As a result, the ALJ finds Claimant's statements contained in his medical records and his testimony to be credible.

48. The ALJ also finds the testimony of Mr. B[Redacted] and Mr. B[Redacted] to be credible regarding the fact that Claimant fell out of the truck and landed on the ground and suffered an injury. The ALJ does not, however, credit their testimony to the extent that they say they witnessed Mr. H[Redacted] pull Claimant out of the truck and throw Claimant to the ground. The ALJ does not find their testimony about that aspect to be reliable since it was dark when the incident occurred and there was insufficient evidence submitted to demonstrate that they were looking at Claimant when the incident occurred. That said, the exact details of the incident or altercation are irrelevant because it is undisputed that Mr. H[Redacted] opened the truck door and Claimant was either pulled out of the truck or fell out of the truck and landed on the hard ground.

49. Dr. Zuehlsdorff credibly concluded that Claimant's treatment, including the surgeries, were reasonable and necessary medical care that resulted from the incident at work that occurred on October 11, 2019. In addition, Dr. Zuehlsdorff credibly concluded that Claimant did not suffer an intervening injury when he felt a sharp pain in his back moving a bench roughly three weeks after the first surgery.

50. The ALJ finds that the incident caused an injury that necessitated the need for medical treatment. The ALJ finds that the treatment received by Claimant has been reasonable and necessary to cure Claimant from the effects of his back injury that occurred when he was either pulled from the truck or fell out of the truck and landed on the ground. This finding is also supported by the opinion of Dr. Zuehlsdorff – whose opinion was not contradicted by any other physician.

51. Claimant is entitled to all reasonable and necessary medical care that stems from his compensable work injury, including the three lumbar surgeries he has undergone since the injury occurred on October 11, 2019. Again, no credible and evidence was submitted that indicated the treatment Claimant has received was not reasonable, necessary, and related to his work injury.

52. As admitted by Respondents, all medical care Claimant has received to his lumbar spine since October 11, 2019 has been provided by authorized providers.

53. As of October 12, 2019, Claimant's work injury precluded Claimant from performing his regular job duties as a fire fighter. Claimant's wage loss is not attributable to his decision to leave the jobsite and seek medical treatment after the accident. As a result, Claimant is entitled to temporary disability benefits as of October 12, 2019.

54. Based on the evidence submitted at hearing, Claimant is entitled to temporary total disability benefits from October 12, 2019, through December 31, 2019. Claimant worked for Liberty Tax from January 1, 2020 through April 15, 2020. As result, Claimant is entitled to temporary partial disability benefits during that time. As of April 16, 2020, Claimant's right to temporary total disability benefits resumed and he is entitled to such benefits until the one of the termination events listed in C.R.S. 8-42-105 occurs. These benefits are subject to apportionment or offset for unemployment benefits Claimant has received since October 11, 2019.

55. Under the stipulation between the parties, Claimant's average weekly wage is $1,411.00.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence

is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant suffered a compensable injury.

Claimant was required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

An injury that results from a risk of employment that is directly tied to the work itself is compensable. *See City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). Moreover, actions such as eating, sleeping, resting, washing, toileting, seeking fresh air, getting a drink of water, and keeping warm have been held to be incidental to employment under the "personal comfort" doctrine. *In re Question Submitted by U.S. Court of Appeals*, 759 P.2d 17, 22-23 (Colo. 1988); *Industrial Commission v. Golden Cycle Corp.*, 246 P.2d 902 (1952). Colorado appellate courts consistently have held that under the personal comfort doctrine, a resulting injury arises out of and in the course of the employment while the employee is on the employer's premises ministering to personal necessities. *Industrial Commission v. Golden Cycle Corp., supra*; *Stribling v. Home Depot USA, Inc.*, W.C. No. 4-597-408 (October 13, 2004). Underlying the personal comfort doctrine is the assumption that "personal comfort" is necessary to maintain an employee's health and is indirectly conducive to the employer's purposes. *See Ocean Accident & Guaranty Corp. v. Pallaro*, 66 Colo. 190, 180 P. 95 (1919). Further, it is sufficient if the injury arises out of a risk which is reasonably incidental to the conditions and circumstances of employment. *Cf. Phillips Contracting, Inc. v. Hirst*, 905 P.2d 9 (Colo. App. 1995). This includes discretionary activities on the part of the employee which do not have any duty component and are unrelated to any specific benefit to the employer. *Cf. City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985).

The law has identified three categories of causation for willful work-place assaults or altercations. The first category are incidents that have an inherent connection to the employment. In *Re Questions Submitted by U.S. Court of Appeals, supra*; *Moorhead Machinery & Boiler Co. v. Del Valle*, 934 P.2d 861 (Colo. App. 1996). Under this category injuries suffered during these incidents are compensable if the altercation grew out of an argument over performance of work, possession of work tools or equipment, delivery of a paycheck, quitting or being terminated.

The second category are incidents that result from a “neutral force”. *See Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991); *In Re Questions Submitted by U.S. Court of Appeals, supra*. A “neutral force” is one that is neither particular to the claimant nor the employment. Instead, the only relationship to the employment is that the conditions and obligations of the employment placed the claimant in the position where he was attacked or where the incident occurred.

This type of altercation has been analyzed under the “positional risk” doctrine. The “positional risk” doctrine is applied to injuries which result from stray bullets, roving lunatics, drunks, assaults by mistake and completely unexplained attacks. *In Re Questions Submitted by the U.S. Court of Appeals, supra*. In such circumstances, the force is neutral because any person then and there present would have been assaulted or subject to the altercation. *Id.*

The third category of assaults or altercations result from a private dispute which the parties import to the workplace. A workplace assault or altercation is compensable unless it arises from a private or personal dispute. *In Re Questions Submitted by U.S. Court of Appeals, supra*. Thus, the critical issue is whether the altercation was motivated by a private dispute imported to the workplace.

As found, Claimant began working for Employer on October 2, 2019, when he flew into Colorado from Oregon. He was contracted to work 14 straight days fighting the Decker Fire. On October 11, 2019, Claimant was staging with the Crew, awaiting scouts to return with instructions on how to best combat the fire that night. Claimant and others were in their respective trucks, keeping warm and occupying their time by watching Netflix on a phone. The Crew was observing the Decker Fire in the distance, ready to roll out at a moment’s notice.

As found, Claimant was “clocked in” at the time of the incident because he was staging with the Crew at Rainbow Road Trail. At the time of the incident, Claimant was where the Employer instructed him to be, performing the job duty his Employer instructed him to do, because the Employer required him to ride and stage in the same truck as Mr. H[Redacted]. The evidence establishes Claimant was staying warm inside the truck on a cold Colorado night and staging - placing his activity at the time the injury occurred squarely under the personal comfort doctrine as well as performing work activities.

Claimant is also permitted to use tobacco, and the evidence establishes multiple members of the Crew were doing so on the night of October 11, 2019. Claimant being targeted by Mr. H[Redacted] does not remove him from the course and scope of his employment. *See In re Question Submitted by U.S. Court of Appeals, supra*. There is no evidence Mr. H[Redacted]'s conduct stemmed from a personal dispute. To the contrary, Mr. H[Redacted] denies intentionally assaulting Claimant, instead testifying Claimant simply fell out of the truck when he quickly opened the door. Thus, the incident that injured Claimant is a neutral force because any person sitting where Claimant was when Mr. H[Redacted] opened the rear passenger door would have been subject to Mr. H[Redacted]'s conduct. *See In Re Questions Submitted by U.S. Court of Appeals, supra*. The ALJ concludes that staging inside his assigned fire truck and being involved in an altercation with a coworker who mistakenly assumed Claimant was vaping cannabis is a risk of employment that is directly tied to Claimant's job of staging in preparation of fighting the Decker Fire.

The ALJ finds Claimant's hearing testimony to be credible and persuasive for many reasons. First, Claimant alleges he injured his lower back when he was pulled from the truck by Mr. H[Redacted] and thrown to ground. Claimant's testimony of either being pulled from the truck or falling out of the truck and landing on the ground was corroborated by co-employee's Mr. B[Redacted], Mr. B[Redacted], and Mr. S[Redacted]. Although it was dark, Mr. B[Redacted] did testify that he witnessed the incident. Mr. B[Redacted] also testified to seeing the altercation from two trucks over. And while the ALJ did not find that Mr. B[Redacted] and Mr. B[Redacted] saw the initial actions which caused Claimant to land on the ground, they did see Claimant on the ground after either being pulled from the truck or falling from the truck.

Second, Claimant's testimony that he felt immediate pain in his lower back was corroborated by Mr. B[Redacted], Mr. B[Redacted], and Mr. S[Redacted]. Both Mr. B[Redacted] and Mr. B[Redacted] corroborated Claimant's testimony that after he hit the ground, he laid there in shock. Further, that once Claimant got to his feet he was in noticeable back pain. Mr. S[Redacted] corroborated this testimony by stating that everyone on the Crew knew Claimant injured his back as a result of the incident involving he and Mr. H[Redacted].

Third, Claimant suddenly falling out of the truck and landing on his back was corroborated by Mr. H[Redacted], the alleged perpetrator of the incident. Mr. H[Redacted] corroborated that Claimant was roughly three feet high, sitting in the truck when he fell to the ground. He also corroborated that Claimant laid on the ground for at least a minute after he hit the ground.

Fourth, Mr. B[Redacted] and Mr. B[Redacted] corroborated Claimant's testimony that he informed Mr. S[Redacted] that his back was hurting shortly after the incident occurred. Further, that Mr. S[Redacted] did nothing to address the situation beyond telling Claimant to suck it and up and go fight Mr. H[Redacted] if he has a problem with what happened.

Fifth, Mr. B[Redacted] corroborated Claimant's testimony that he experienced back pain throughout the trip from Colorado to Idaho, which required pulling over multiple times to allow Claimant to address his back pain by stretching or walking around.

The ALJ finds the majority of Mr. B[Redacted] and Mr. B[Redacted]'s testimony to be credible and persuasive because neither still works for Employer, and there is no credible evidence submitted that Mr. B[Redacted] and Mr. B[Redacted] were friends with Claimant outside of work. Nor is there any evidence Mr. B[Redacted] and Mr. B[Redacted] knew Claimant outside the 11 days they all worked together on the Decker Fire. Claimant lives in Oregon. Mr. B[Redacted] and Mr. B[Redacted] live in Idaho. There is no evidence the three have any other personal or work relationship beyond their time working the Decker Fire. Thus, the ALJ finds Mr. B[Redacted] and Mr. B[Redacted] to be, for the most part, impartial witnesses because neither is beholden to Employer for ongoing employment and were not friends of Claimant.

As a result, the ALJ concludes Claimant established by a preponderance of the evidence that he suffered a compensable injury and injured his lumbar spine during the course and scope of his employment while performing a work activity on October 11, 2019 when he was either pulled out of his fire truck and thrown to the ground or fell out of the fire truck when the door was opened abruptly by Mr. H[Redacted].

II. Whether Claimant is entitled to reasonable and necessary medical treatment.

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a),

C.R.S. The question of whether Claimant proved treatment is reasonable and necessary is one of fact for the ALJ*. Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

As found, Claimant suffered a compensable injury when he was pulled from his fire truck and struck the ground. As found, the injury led to a herniated L4-5 disc that has required multiple surgeries to repair.

Claimant suffered two previous lumbar injuries. The first in 2011. The second in December 2018. X-ray from December 13, 2018 indicates Claimant did have degeneration in his lower lumbar spine. Claimant testified he pulled a back muscle lifting a heavy chest, and the only treatment he received was one visit to the ER where he received the x-ray. There is no medical evidence that indicates Claimant received any lumbar treatment in the five years before 2018, or the months between December 2018 and October 14, 2019. The overwhelming evidence supports Claimant's lumbar spine was not an ongoing issue when the industrial injury occurred on October 11, 2019.

As found, Claimant worked for Diamond Fire in Oregon for the entire 2019 fire season, working up to September 18, 219. Claimant worked his full job duties. Claimant was able to perform the full job duties required of him by Employer leading up to the incident on October 11, 2019. Most notably, he was able to complete the "death march" in full gear.

As found, Claimant was unable to seek medical care until October 14, 2019 because he was tasked with getting back to Oregon to seek medical care. The injury happened the night of October 11, 2019. He spent the day of October 12, 2019 traveling to Idaho where he stayed with Mr. B[Redacted] for a night. He was unable to fly from Idaho to Oregon until the night of October 13, 2019. He sought medical care the first day he was back in Oregon on October 14, 2019.

As found, when Claimant sought medical care, he disclosed his prior lumbar injuries, but denied any ongoing pain from those injuries. Claimant reported that his lumbar pain was caused by being thrown to the ground by Mr. H[Redacted] on October 11, 2019. Claimant has consistently reported to every provider he has seen since October 11, 2019 that his lumbar pain and radiculopathy were caused by being thrown to the ground on October 11, 2019. Further, Dr. Zuehlsdorff is the only level II accredited doctor who has evaluated Claimant for his work injury and treatment. Dr. Zuehlsdorff credibly reported that Claimant's treatment, including the surgeries, were reasonable and necessary medical care that resulted from the incident that occurred on October 11, 2019. In addition, Dr. Zuehlsdorff credibly concluded that Claimant did not suffer an intervening injury when he felt a sharp pain in his back moving a bench roughly three weeks after the first surgery.

As a result, the ALJ concludes Claimant has established by a preponderance of the evidence that the Respondents are liable for all reasonable and necessary medical treatment to treat Claimant's lumbar spine, including the three lumbar surgeries he has undergone since the incident on October 11, 2019.

III. Whether Claimant is entitled to temporary disability benefits.

IV. Whether Claimant is at-fault for his wage loss and not entitled to temporary disability benefits.

To prove entitlement to temporary total disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *Se*e Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits.

The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co*., 964 P.2d 595, 597 (Colo. App. 1998) (citing Ricks v. Industrial Claim Appeals Office, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic*, 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. § 8-42-105(3)(a)-(d), C.R.S.

As found, Claimant left the Decker Fire on October 12, 2019, to seek medical care and because he feared for his safety. When he reported the injury to Mr. S[Redacted] he was not offered medical care. Instead, he was told to suck it up and take matters into his own hands in the form of fighting if he had an issue with Mr. H[Redacted]. Claimant testimony is corroborated by both Mr. B[Redacted] and Mr. B[Redacted].

Claimant leaving the Decker Fire under these circumstances cannot be equated with him being responsible for his termination. No reasonable person would believe he or she is responsible for his or her termination when that person is injured in an altercation at work, nothing is done to the perpetrator, and no medical care is tendered.

As found, Claimant has proven by the preponderance of the evidence that the industrial injury on October 11, 2019, caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. Claimant was unable to work after October 11, 2019 and perform his regular job duties as a wildlands firefighter as a result of his work injury. His treating physician placed him completely off work on December 3, 2019. He has had three lumbar surgeries since that date, all of which have led to disability and impairment to his wage-earning capacity. Claimant has not been placed at MMI. Claimant has not returned to full duty. Claimant is not responsible for any termination or subsequent wage loss.

Claimant credibly testified that he worked modified duty during the 2020 tax season, and that he has received unemployment benefits since November 2020. Claimant is entitled to temporary partial disability benefits for the dates he returned to modified duty. Respondent is entitled to an offset equal to the amount of unemployment benefits Claimant has received since November 2020.

As found, Claimant is entitled to temporary total disability benefits from October 12, 2019, through December 31, 2019. Claimant worked for Liberty Tax from January 1, 2020 through April 15, 2020. As result, Claimant is entitled to temporary partial disability benefits during that time. As of April 16, 2020, Claimant's right to temporary total disability benefits resumed and he is entitled to such benefits until one of the termination events listed in C.R.S. 8-42-105 occurs. These benefits are subject to apportionment or offset for unemployment benefits Claimant has received since October 11, 2019.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered a compensable injury on October 11, 2019.
2. Respondents shall pay Claimant's reasonable and necessary medical treatment which includes the three lumbar surgeries Claimant has undergone. Respondents shall pay for this medical treatment in accordance with the Colorado Medical Fee Schedule of the Division of Workers' Compensation.
3. Respondents shall pay Claimant temporary total disability benefits from October 12, 2019 through December 31, 2019.
4. Respondents shall pay Claimant temporary partial disability benefits from January 1, 2020, through April 15, 2020.
5. Respondents shall pay Claimant temporary total disability benefits from April 16, 2020 and continuing until terminated by law.
6. Claimant's average weekly wage is $1,411.00. As a result, temporary disability benefits shall be paid based on an average weekly wage of $1,411.00.
7. Respondents are entitled to take the appropriate offset against Claimant's disability benefits based on his receipt of unemployment benefits.
8. Insurer shall pay Claimant interest at the rate of 8% per annum on compensation benefits not paid when due.
9. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding

procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: March 23, 2021.

/s/ Glen Goldman
Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that she sustained a compensable occupational disease in the course and scope and arising out of her employment with Employer.

II. If Claimant proved she sustained a compensable occupational disease, whether she is entitled to a left wrist carpal tunnel release surgery recommended by Dr. Timothy Pater.

FINDINGS OF FACT

1. Claimant is a 53-year-old, right hand dominant female who worked for Employer as a quality inspector. Claimant began working for Employer on July 29, 2004. Claimant's primary job was to either visually inspect, or visually inspect and physically test, finished cable/harness assemblies. Claimant's secondary job tasks included file management, paperwork, administrative duties, and at times, production.

2. On May 4, 2020, Claimant reported to Employer suffering from left wrist issues as a result of repetitive movement.

3. On May 12, 2020, Claimant presented to Keith Meier, NP at Concentra with left wrist complaints. Claimant reported that her wrist complaints were the result of repetitive activity and in the past six months she had been having pain with numbness and tingling in her left hand and wrist, which had worsened over the past three months. NP Meier noted Claimant worked 40 hours a week, used a lot of tools and that she may do 100 cables an hour. Claimant complained of pain in the left wrist with constant dull, aching and stinging pain radiating to the left hand. Claimant further reported grip weakness, numbness and weakness of the hand, stiffness and tenderness. She reported experiencing the same feelings in her right hand to a much lesser extent. On physical examination of the left hand/wrist, NP Meier noted tenderness in the ulnar and palmar aspects, decreased sensation to light touch of the median nerve distribution on palpation, full range of motion with pain, and sensation to light touch diminished in left hand. Phalen's and Tinel's carpel tests were positive. NP Meier gave an assessment of right (*sic*)[1] wrist strain and paresthesia of the thumb of the left hand. He referred Claimant for an EMG of the bilateral upper extremities and physical therapy. NP Meier opined that Claimant's condition is work-related with greater than 50% medical probability, noting that it appeared to meet the Colorado Medical Treatment Guidelines ("MTG") for cumulative

[1] Based on the findings and context of the May 12, 2020 medical record, the ALJ infers that NP Meier's assessment of a wrist strain of the right wrist a typographical error and that the diagnosis is in reference to Claimant's left wrist.

trauma. He requested a job description from Employer and released Claimant to modified duty.

4. On May 27, 2020, Claimant saw Michael B. Tracy, D.O. and underwent an EMG/NCS. Claimant reported that she worked for Employer for the past 15 years testing up to 100 cables per hour. She reported that, in November 2019, she began developing pain in her left wrist and numbness, paresthesia and weakness in her left hand. Dr. Tracy concluded that EMG/NCS showed electrophysiological evidence of severe left median nerve compromise at or near the wrist/carpal tunnel affecting the sensory and motor components. He noted that the findings showed active signs of denervation with immature reinnervation potentials, suggesting subacute etiology consistent with patient history. Dr. Tracy recommended that Claimant undergo surgical decompression.

5. Claimant presented to Lori Long Miller, M.D. at Concentra on June 1, 2020. Dr. Miller noted that the EMG/NCS showed severe medial neuropathy. She gave an assessment of carpal tunnel syndrome of the left wrist and referred Claimant to hand specialist Dr. Pater.

6. Claimant presented to Dr. Pater on June 8, 2020. Claimant reported finger and hand pain that began at work and had been persistent for months. Dr. Pater opined that Claimant demonstrates symptoms and clinical exam findings consistent with carpal tunnel syndrome. He requested authorization for left carpal tunnel release surgery on June 10, 2020.

7. On June 9, 2020, Jill Adams, CRC, CCM, CEAS II, performed a job demand analysis ("JDA") of Claimant's position with Employer. Ms. Adams interviewed Claimant as part of her analysis, but observed another employee performing Claimant's usual duties because Claimant was on modified duty. Ms. Adams described Claimant's quality inspector job generally as "inspects and tests completed cables/harness assemblies, inject mold assemblies, and mechanical sub-assemblies related to computer, medical, telecommunications, and automotive cables." (Ex. F, p. 034) The position was further described as sedentary.

8. Under the Essential Functions and Physical Demands section of her June 9, 2020 report, Ms. Adams indicated that the quality inspector job had three essential functions: visual inspections, testing inspections, and production. The essential functions for each of those three job tasks were more specifically described as follows:

a. Visual Inspections: The visual inspection essential functions were 50-60% of Claimant's job tasks, and the visual inspection process involved Claimant obtaining a box of cables from the intake area/cart, removing the box and walking to her work area, removing the cable assemblies from the box, and performing a visual inspection of the cable to ensure that each assembly was correctly performed and that each cable was in working order. Claimant then would replace the cable into the box and obtain forms to complete the order. Claimant would then return the box to the cart when the order was completed. The boxes typically weighed less than ten pounds.

b. Testing Inspections: Testing inspections involved obtaining boxes of cables from the intake area/cart then, at her designated work area, removing the cable to be tested from the box, and then, using outlets at her desk, plugging and unplugging each cable to perform the testing. Claimant would adjust her machine as needed, and she may access other cables from nearby shelves to attach to the one at her desk for proper testing technique. This process required Claimant to grip one end of the cable with her left hand, and plug and unplug the cable with her right hand.

c. Production: The production essential functions involved Claimant assisting with production tasks if needed when her inspection work was low.

9. Ms. Adams' June 9, 2020 JDA report specifically describes the quality inspector demands for lifting/carrying forces, total body pushing/pulling forces, upper extremity pushing/pulling forces, gripping and coupling forces, and reaching and work environment conditions. It also summarizes the quality inspector position's physical demands, and then applies a Risk Factor Assessment analysis. The Risk Factor Assessment was based upon information gained through direct interview of Claimant and observation of her job tasks and working environment, as per the MTG. Ms. Adams concluded that Claimant's position did not meet any of the primary or secondary risk factors for development of carpal tunnel syndrome per the MTG for (1) force and repetition/duration, (2) awkward posture and repetition/duration, (3) computer work, (4) use of handheld vibratory power tools and duration, or (5) cold work environment.

10. Claimant saw Dr. Miller on June 15, 2020 and reported that her right hand was beginning to have numbness. Dr. Miller continued Claimant's restrictions.

11. On June 16, 2020, Davis Hurley, M.D. performed a physician advisor review. He reviewed Claimant's medical records and the June 9, 2020 JDA Dr. Hurley noted that, although Claimant's medical records are consistent with the diagnosis of carpal tunnel syndrome, no primary or secondary risk factors were identified in the JDA to suggest Claimant suffered a work-related repetitive motion injury. Accordingly, Dr. Hurley opined that, while the treatment recommendations are medically reasonable, appropriate and indicated, the treatment is not work-related.

12. Respondents filed a Notice of Contest on June 24, 2020.

13. On September 14, 2020, Ms. Adams performed a follow-up JDA. Ms. Adams issued a second JDA report on September 15, 2020. Ms. Adams indicated that the second JDA was conducted partly in response to Claimant's interrogatory answers, and partly to ensure a complete and thorough observation of as many inspections as possible using two different observation dates. Ms. Adams addressed several issues Claimant raised in her answers to interrogatories, and she provided more detail as to the process followed

in assessing Claimant’s job functions and risk factors. Ms. Adams noted that, in her answers to interrogatories, Claimant alleged, *inter alia,* that Ms. Adams only stayed for less than a half-hour at the first analysis and that certain parts required more force than found by Ms. Adams. Ms. Adams noted that she used a force gauge and an electronic hand dynamometer to measure hand/pinch force; that Claimant used both hands to perform the visual and testing inspections; that she spent more than a half hour of job observation on her first evaluation, and 2.5 hours on her second; that per an employer representative 60% of Claimant’s inspections were visual, and 40% were a combination of visual inspections and testing; that Claimant’s pinch force was not constant; that visual inspections required nothing more than a simple grasp; that order sizes varied; that each order required different fine motor skills; and that in addition to inspections, Claimant regularly performed file management tasks.

14. Ms. Adams updated her risk factor analysis based on the additional information and detailed exactly how the risk factor analysis was conducted for each risk factor. She again concluded that Claimant’s position did not meet any of the MTG primary or secondary risk factors for the development of carpal tunnel syndrome for force and repetition/duration, awkward posture and repetition/duration, computer work, use of handheld vibratory power tools and duration, or cold work environment.

15. Claimant quit her employment with Employer as of September 21, 2020.

16. On September 25, 2020, Jonathan L. Sollender, M.D. performed an Independent Medical Examination (“IME”) at the request of Respondents. As part of his evaluation, Dr. Sollender took a history from Clamant, performed a physical examination, and reviewed Claimant’s records dated May 12, 2020 through September 21, 2020, including both JDA reports prepared by Ms. Adams. Dr. Sollender noted Claimant has two previous wrist-related claims, one in 1998 for bilateral wrist and one in 1999 for the right wrist. Claimant complained of bilateral wrist issues. Dr. Sollender documented Claimant’s description of her job duties. Dr. Sollender agreed that Claimant has left carpal tunnel syndrome, and requires surgery; however, he opined that Claimant’s condition is non-industrial in nature. Dr. Sollender noted that both JDAs reflect insufficient exposure to force, repetition, awkward posture, computer work, vibration or cold exposure to support any allegation that Claimant’s work is responsible for her left or right upper extremity complaints. In reaching this opinion, Dr. Sollender noted that he was aware of Claimant’s concerns with the first JDA, stating the second JDA addressed Claimant’s concerns while confirming that there were no primary or secondary risk factors. He noted that the second JDA showed even less exposure than originally documented.

17. Dr. Sollender detailed a six-step causation analysis from the MTG for Cumulative Trauma Conditions (WCRP Rule 17, Exhibit 5). He explained that the first step is to determine the diagnosis, which he noted is carpal tunnel syndrome, in Claimant’s case. Dr. Sollender explained the next step is to clearly define Claimant’s job duties, which he sated he did by interviewing Claimant, and reviewing the JDAs. The third step was to complete the required comparison/match between the risk factors identified by the Risk Factor Definition Table and the established diagnosis. Dr. Sollender noted that each of

the four sub-categories of work Claimant performed were carefully evaluated and her exposure times carefully documented, and her job was observed for sufficient time to gather objective evidence as to hand and upper extremity usage. Dr. Sollender indicated that "in doing this match there was no exposure to repetition, awkward posture or application of force (as defined in CO DOWC Rule 17, Exhibit 5). This goes for both defined Primary and Secondary Risk Factors." (Ex L. p., 70). Dr. Sollender then went through Step 4 (causal analysis of Claimant's risk factors identified in Step 2 to Secondary Risk Factor definitions). He noted that since no Secondary Risk Factors were present, the Risk Factor definition Table was not utilized. In applying Step 5, Dr. Sollender indicated that because an evidence-based medical causation relationship had not been established through Steps 1-4, and no Secondary Risk Factors had been identified, the analysis ended, as the claim lacked validity as a work-related claim.

18. On July 6, 2020, Dr. Miller discharged Claimant from her care as Claimant's claim had been denied.

19. Claimant testified at hearing that she always had a good work ethic, she worked in an efficient manner, that she had been in the same position for years, and in her opinion her condition was work related because her non-dominant hand is the hand that is injured. Claimant indicated that in order for her to perform her job properly, she must flex her left wrist all the time. She stated she continues to have many of the same wrist symptoms, she has not worked her usual position for more than five months, and there has not really been improvement. Claimant believes the only thing preventing her from getting surgery is the work analysis that was done in June, and lasted only 30 to 45 minutes. Claimant alleges the JDAs are not accurate representations of her position.

20. Claimant further testified that her left wrist problem started in November 2019. She stated her job duties as a quality inspector included visual inspections and testing completely assembled cables and harnesses, and she admitted that visual inspections involved simply holding the cables in her hands, and inspecting the cables with a magnifying glass, without constant flexion, repetitive motion, or hand force. Claimant testified that for the physical testing, she would take a cable, plug it into an outlet on her desk, wait a few moments, and then unplug that cable. She admitted her job also involved completing paperwork, filling orders, and managing files. She believes her job required more testing inspections than visual inspections. She testified that her inspections varied day-to-day. Claimant indicated that Mr. J[Redacted] was the head of quality assurance for Employer for more than 15 years, and she agreed that Mr. J[Redacted] is in a position to properly estimate the number visual inspections versus testing inspections she performed by looking at the order forms she completed. Claimant was asked if she would have reason to disagree with Mr. J[Redacted] if he testified that he pulled Claimant's orders for the first three months of 2020, and those orders reflect that Claimant visually inspected 65% of the orders, and physically tested 35% of those orders. Claimant indicated that she would agree with that testimony, but her work varied, and some days she probably completed more physical testing than visual inspections.

21. J[Redacted] testified at hearing on behalf of Respondents. Mr. J[Redacted] is in charge of quality assurance at Employer, and is responsible for new incoming materials, auditing, and document control. Mr. J[Redacted] has access to the company inspection logs and is familiar with the quality inspector position Claimant performed. He worked with and around Claimant, and is familiar with the functional requirements and physical demands of Claimant's position. He testified that the visual inspections are not hand intensive, and he described the physical testing as being slightly more hand intensive, as it requires the inspector to plug and unplug connectors. Mr. J[Redacted] confirmed that he was the employer representative who notified Ms. Adams that the quality inspector position was 60% visual inspections, and 40% testing and visual inspections. Since that time, he pulled the inspection log sheets for January through March 2020, and determined that during that period 65% of the inspections were visual, and 35% were testing. He indicated that percentage breakdown has been the norm over the years based upon customer order history patterns. Mr. J[Redacted] explained that he did not pull inspection log sheets from 2019 because some of Employer's documents were purged during a relocation. He maintained that based upon his personal knowledge of customer order patterns over the years, Claimant historically performed 60-65% visual inspections, and the remainder was physical testing.

22. B[Redacted] testified at hearing on behalf of Respondents. Ms. B[Redacted] has worked for Employer for 19 years as a floor supervisor, primarily supervising assemblers. She testified that because the quality inspectors are self-sufficient, her involvement with the inspectors primarily involves ensuring they have work and providing direction on what needs to be done and when. Ms. B[Redacted is familiar with the job duties of the quality inspector job, and she reviewed Ms. Adams' JDAs. Ms. B[Redacted] agreed with Mr. J[Redacted] that quality inspectors perform 60-65% visual inspections, and the remainder are testing inspections. She testified that Ms. Adams' September 15, 2020 JDA accurately reflects the demands of the quality inspector position in terms of force, repetitive nature, and positioning. Ms. B[Redacted] testified that Claimant was a good and honest employee, who liked to work quickly and efficiently. She testified that aspects of Claimant's job involved her holding the cable with her left hand, and plugging in the cable with her right.

23. The ALJ finds the testimony of Mr. J[Redacted] and Ms. B[Redacted], as supported by the JDAs, more credible and persuasive than the testimony of Claimant.

24. Claimant failed to prove it is more probable than not she sustained a compensable occupational disease.

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

CONCLUSIONS OF LAW

Generally

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

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

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

Compensability

The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S., as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard

> to which the worker would have been equally exposed outside of the employment.

This section imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test. The test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). A claimant is entitled to recovery if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* The onset of a disability occurs when the occupational disease impairs the claimant's ability to perform his regular employment effectively and properly or when it renders the claimant incapable of returning to work except in a restricted capacity. *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App.2002); *In re Leverenz*, WC 4-726-429 (ICAO, July 7, 2010).

The claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified or aggravated the disease for which compensation is sought. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). The "rights and liabilities for occupational diseases are governed by the law in effect at the onset of disability." *Henderson v. RSI, Inc.*, 824 P.2d 91, 96 (Colo.App. 1991). The standard for determining the onset of disability is when "the occupational disease impairs the claimant's ability to perform his or her regular employment effectively and properly or when it renders the claimant incapable of returning to work except in a restricted capacity." *City of Colorado Springs v. Industrial Claim Appeals Office*, 89 P.3d 504,506 (Colo. App. 2004). The question of whether the claimant has proven causation is one of fact for the ALJ. *Faulkner,* 12 P.3d at 846. The mere occurrence of symptoms in the workplace does not mandate that the conditions of the employment caused the symptoms or the symptoms represent an aggravation of a preexisting condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO Aug. 18, 2005).

When evaluating this issue of causation the ALJ may consider the provisions of the MTG because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, the MTG are not dispositive of the issue of causation and the ALJ need not give them any more weight than he determines they are entitled to in light of the totality of the evidence. *See Cahill v. Patty Jewett Golf Course,* WC 4-729-518 (ICAO February 23, 2009); *Siminoe v. Worldwide Flight Services,* WC 4-535-290 (ICAO November 21, 2006).

As found, Claimant failed to prove it is more probable than not she sustained a work-related occupational disease. While it is undisputed Claimant suffers from left carpal tunnel syndrome, the preponderant evidence does not establish Claimant's condition was caused by Claimant's employment. Two JDAs were performed in this case, the second of which was performed specifically in part to address issues Claimant had with the first JDA. In performing two JDAs, Ms. Adams had adequate opportunity to assess Claimant's position, and ultimately determined there were no primary or secondary risk factors present for carpal tunnel syndrome. Dr. Sollender performed a detailed causation analysis pursuant to the MTG for Cumulative Trauma Conditions and concluded no work-related casual relationship had been established. While the MTG are not dispositive of the issue of causation, they are instructive and persuasive in light of the totality of the evidence in this case.

The ALJ acknowledges Claimant asserts she performed more testing then visual inspections, that she flexed her wrist all the time, and that her job was extremely repetitive; however, such assertions without further detail and proof were insufficient to establish the requisite causal relationship in light of the credible and persuasive findings of the JDAs, and the testimony of Mr. J[Redacted] and Ms. B[Redacted].

ORDER

1. Claimant failed to establish by a preponderance of the evidence that she sustained a work-related occupational disease. Claimant's claim for benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

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

DATED: March 23, 2021

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Did Claimant prove entitlement to TTD benefits commencing October 2, 2020?

- Did Respondents prove Claimant was responsible for termination of his employment?

- Should the admitted AWW be increased to reflect higher wages Claimant earned from subsequent employment?

FINDINGS OF FACT

1. Claimant worked as a part-time stocker and checker at Employer's grocery store in Walsenburg, Colorado. He was hired in mid-December 2019.

2. Claimant suffered an admitted injury to his left clavicle on March 25, 2020 while helping lift an overweight customer who fainted in the store.

3. Claimant continued working after the incident but later noticed pain in his left clavicle. He reported the symptoms to his manager and was directed to the Spanish Peaks Regional Hospital Emergency Department.

4. Claimant was evaluated by Dr. Dunham-Smith at Spanish Peaks Hospital. He reported left-sided neck and clavicle pain from the work accident. Physical examination showed painful range of motion, paraspinous muscle tenderness, and muscle spasm. Dr. Dunham-Smith diagnosed a neck strain and prescribed ibuprofen and a muscle relaxer. She imposed no work restrictions.

5. Claimant was not scheduled to work another shift until the following Monday, March 30, 2020. It was subsequently learned the customer who fainted was diagnosed with COVID-19, so Claimant and several co-workers were instructed to quarantine for fourteen days.

6. Employer voluntarily paid partial wages to the employees who were under quarantine.

7. After completing his quarantine, Claimant returned to work and performed his regular duties for approximately two weeks. Employer was juggling staff and schedules because of COVID-19 and Claimant received fewer hours than he hoped.

8. Claimant failed to report to work as scheduled on April 22, 2020. An unexcused employee absence report dated April 22, 2020 states, "no call no show. Was intoxicated didn't make it home the night before. Called around 5PM that evening. Was scheduled at 6:45 AM. Apologized." Claimant initially testified he did not come to work

because an unexpected schedule change caused a conflict with a side job he had previously lined up. However, Claimant later admitted he did not report to work on April 22 because he had been out drinking the night before. Claimant never returned to work after April 22, 2020. Employer's records document Claimant was a "no call no show" on April 22, 24, and 25, 2020. An entry in Employer's records on April 25, 2020 states, "Quit w/o notice no call no show has not communicated with anyone."

9. Claimant agrees he left his job with Employer and looked for other work because he could not support himself and his son on the low part-time wages he was earning.

10. Claimant quickly found a new job through People Ready at the Vestas manufacturing plant south of Pueblo. He worked as "rigger," assembling and installing rigging for cranes. The job was strenuous and required lifting heavy objects such as slings and shackles weighing up to 50 pounds. Claimant typically worked 50 hours per week. Claimant successfully performed this work from the end of April 2020 until October 2, 2020.

11. After Claimant started working at Vestas he noticed, "There were still significant problems in my chest." Claimant contacted "a couple of doctors" seeking treatment for his ongoing symptoms but was unable to obtain an appointment because he did not have insurance or approval from "workers' comp." Claimant contacted Employer on an undetermined date and requested medical treatment. Employer advised Claimant to return to the Spanish Peak Hospital but Claimant chose not to do so.

12. Claimant has repeatedly denied that his condition worsened between April and October 2020. He testified, "Did my injury get worse? I would not say it got worse, but I did notice that I was still having problems with it." Claimant also affirmed his previous discovery responses wherein he stated, "My condition didn't worsen with the new employer but it also didn't get any better."

13. Insurer filed a General Admission of Liability on August 12, 2020 admitting liability for medical benefits.

14. Given the limited options for providers in Walsenburg, Respondents authorized Claimant to receive treatment from Southern Colorado Clinic. Claimant saw PA-C Emily Rogers at his initial visit on September 8, 2020. Claimant described the accident and his ongoing symptoms. There was no indication of any worsening. Ms. Rogers noted Claimant was "currently working at Vestas Towers without restrictions without issues." Examination showed tenderness to palpation around the medial aspect of the clavicle/sternum with no ecchymosis or swelling. His left shoulder had full range of motion with pain at 160 degrees of flexion and abduction. X-rays showed no acute findings or anything consistent with a seed dissociation. Ms. Rogers diagnosed clavicle pain and a sternoclavicular sprain. She prescribed Voltaren gel and referred Claimant to physical therapy. Even though Claimant had been working without difficulty, Ms. Rogers imposed work restrictions of no lifting over 10 pounds.

15. Claimant saw Dr. Terrence Lakin on September 29, 2020. Claimant told Dr. Lakin his symptoms began on March 25, 2020 and gave no indication of any recent worsening. In fact, Claimant had “improved somewhat” since the first appointment with Ms. Rogers. Dr. Lakin noted mild “fullness” of the paracervical soft tissue and tenderness at the left sternoclavicular joint. Claimant’s left shoulder had essentially full range of motion. Dr. Lakin noted, “Examination today is consistent with left sternoclavicular joint subluxation, perhaps this is getting better but it has been 6 months.” He recommended MRIs of the left shoulder and sternoclavicular joint. He continued Claimant’s 10-pound lifting restriction and added a restriction of no over shoulder work with the left arm.

16. Vestas initially accommodated Claimant’s restrictions but terminated his employment on October 2, 2020 because of “liability” concerns.

17. The MRIs were completed on October 9, 2020. The left shoulder MRI showed some mild tendinopathy, bursitis, and AC joint osteoarthritis. The sternoclavicular MRI was normal except for a small amount of edema and intermuscular fluid adjacent to the medial clavicle.

18. Dr. Lawrence Lesnak performed an IME for Respondents on December 16, 2020. Dr. Lesnak’s examination showed no specific tenderness to palpation over the left sternoclavicular joint and no evidence of any soft tissue or bony abnormality. He noted x-rays and MRIs showed no objective evidence of any trauma related pathology. Dr. Lesnak opined Claimant might have suffered a left sternoclavicular joint sprain or soft tissue strain because of the work accident. He found no current clinical evidence of symptomatic left sternoclavicular joint pathology and thought Claimant’s current symptoms most likely represented some mild myalgias involving the soft tissue surrounding his left medial clavicle. Dr. Lesnak saw no justification for imposing work restrictions in September 2020 because Claimant had been working at Vestas for five months without difficulty and there was no discernible change in his condition. Dr. Lesnak reiterated during his deposition that, “to impose temporary work restrictions after five months of performing what the patient told me was very heavy, strenuous work does not seem to be medically reasonable at all.” Consistent with Claimant’s testimony and discovery responses, Dr. Lesnak opined there was no evidence Claimant’s condition worsened after his termination in April 2020.

19. Respondents proved Claimant was responsible for termination of his employment. Claimant’s termination resulted from volitional actions unrelated to the work injury.

20. Claimant failed to prove his condition worsened after the termination of his employment in April 2020. The clinical findings documented in September 2020 would probably have been noted earlier had Claimant pursued treatment between April and September 2020. The ALJ credits Claimant’s testimony and discovery responses that his condition did not worsen during his work at Vestas. This finding is supported by Dr. Lesnak’s persuasive opinions regarding Claimant’s work capacity and restrictions.

21. Respondents admitted for an average weekly wage (AWW) of $416.27 based on the 14 weeks of work before the injury. The admitted AWW accurately reflects Claimant's earnings at the time of his injury. Claimant's higher earnings at Vestas are not an appropriate touchstone because he is being awarded no indemnity benefits relating to the loss of that employment. Claimant failed to prove a basis to depart from the admitted AWW.

CONCLUSIONS OF LAW

A. Claimant was responsible for termination

Sections 8-42-103(1)(g) and 8-42-105(4)(a) provide, "In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." A claimant's responsibility for termination not only provides a basis to terminate temporary disability benefits, but also limits the initial eligibility for TTD. Section 8-42-103(1)(g); *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002); *Valle v. Precision Drilling*, W.C. No. 5-050-714-01 (July 23, 2018). The respondents must prove the claimant was terminated for cause or was responsible for the separation from employment by a preponderance of the evidence. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). To establish that a claimant was responsible for termination, the respondents must show the claimant performed a volitional act or otherwise exercised "some degree of control over the circumstances which led to the termination." *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 5 P.3d 1061, 1062 (Colo. App. 2002); *Padilla v. Digital Equipment Corp*., 902 P.2d 414 (Colo. App. 1995); *Velo v. Employment Solutions Personnel*, 988 P.2d 1139 (Colo. App. 1988). The concept of "volitional conduct" is not necessarily related to moral turpitude or culpability but merely requires the exercise of some control or choice in the circumstances leading to the discharge. *Richards v. Winter Park Recreational Association*, 919 P.2d 983 (Colo. App. 1996). The ALJ must consider the totality of the circumstances to determine whether the claimant was responsible for his termination. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004).

As found, Respondents proved Claimant was responsible for termination of his employment. Claimant's repeated "no call no shows" were ample justification for his termination on April 25, 2020. Moreover, Claimant agreed he left the job with his Employer to pursue a higher paying job. Although no one would begrudge Claimant's desire to improve his financial standing, his termination was based on his volitional acts unrelated to the work accident.

B. Claimant is not entitled to TTD commencing October 2, 2020

Termination for cause is not a permanent bar to the receipt of temporary disability benefits, and a claimant can reestablish eligibility for TTD by showing a worsened condition that caused a subsequent wage loss. *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004). A post-termination wage loss is "caused by a worsened condition" if the worsening results in limitations which did not exist at the time of the termination, and those limitations cause a limitation on the claimant's temporary earning capacity that did not exist at the time of the termination. *Martinez v. Denver Health*, W.C. No. 4-527-415 (August 8, 2005). The imposition of new work restrictions does not automatically establish a worsening, but is simply one factor to consider when evaluating the preponderance of evidence. *Apex Transportation, Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630 (Colo. App. 2014). The burden of proof to establish a subsequent worsening of condition and consequent wage loss is on the claimant who has been found responsible for a termination. *Green v. Job Site, Inc.*, W.C. No. 4-587-025 (July 19, 2005).

As found, Claimant failed to prove his condition worsened after the termination of his employment in April 2020. The ALJ credits Claimant's testimony and discovery responses that his condition did not worsen during his work at Vestas. This finding is supported by Dr. Lesnak's persuasive opinions regarding Claimant's work capacity and restrictions. Ms. Rogers and Dr. Lakin provided no persuasive explanation for why Claimant suddenly required work restrictions in September 2020 after successfully working a heavy job at Vestas for months. Claimant failed to prove the wage loss commencing October 2, 2020 was caused by a worsening of his condition as opposed to the volitional termination of his employment.

B. Claimant's AWW is $416.27

Section 8-42-102(2), C.R.S. provides compensation shall be based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that seems most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993).

As found, the admitted AWW of $416.27 accurately reflects Claimant's earnings at the time of his injury. Claimant's higher earnings at Vestas are not an appropriate touchstone because he is being awarded no indemnity benefits relating to the loss of that employment.

ORDER

It is therefore ordered that:

1. Claimant's request for TTD benefits commencing October 2, 2020 is denied and dismissed.

2. Claimant's average weekly wage if $416.27.

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

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

DATED: March 24, 2021

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

ISSUES

1. Whether Claimant overcame Dr. Counts' DIME opinion on MMI by clear and convincing evidence?

2. Whether Claimant overcame Dr. Counts' DIME opinion on permanent impairment by clear and convincing evidence?

FINDINGS OF FACT

1. On November 29, 2016 Claimant sustained an admitted industrial injury when 600 pounds of sheet metal fell onto Claimant. He was taken to Colorado Mountain Medical with complaints of headache and pain in the right knee, neck, left rib cage, and left shoulder. Jona S. Nykreim, PA-C assessed: mild traumatic brain injury without loss of consciousness, neck pain, right knee pain, laceration of the head, left anterior shoulder pain, and left sided rib pain. Claimant was discharged and instructed to follow up with Edward Dent, M.D.

2. Claimant continued to treat at Colorado Mountain Medical with Dr. Dent on a weekly basis reporting ongoing pain in the neck, shoulder and knee, as well as low back pain. Claimant also reported difficulties with sleep, headaches and concentration.

3. On December 27, 2016 Claimant treated with Dr. Dent and reported improved symptoms with respect to his head injury, but ongoing knee, neck, and left arm symptoms and worsening lumbar pain. Dr. Dent ordered MRIs of Claimant's right knee, left shoulder, cervical spine, and lumbar spine. He subsequently referred Claimant to orthopedic surgeon Richard B. Cunningham, M.D.

4. Claimant first presented to Dr. Cunningham on January 16, 2017. Dr. Cunningham opined Claimant sustained a complete rotator cuff tear/rupture of the left shoulder and strain of the long head of biceps left arm. He recommended Claimant undergo a left shoulder arthroscopic rotator cuff repair and open biceps tenodesis, which was performed by Dr. Cunningham on February 10, 2017.

5. Claimant continued to treat with Dr. Dent. By March 1, 2017 Claimant was reporting resolution of his head injury symptoms, but continued neck, lumbar, and right knee pain.

6. On March 27, 2017 Dr. Cunningham recommended surgery for Claimant's right knee. On May 5, 2017 Claimant underwent a right knee arthroscopy with partial medial and partial lateral meniscectomies, loose body removal, lysis of adhesions, and chondroplasty, performed by Dr. Cunningham.

7. On May 26, 2017 Dr. Dent referred Claimant for chiropractic evaluation and treatment by Scott Raub, D.O. for ongoing lumbar and neck complaints.

8. Claimant presented to Dr. Raub on August 3, 2017 with complaints of neck and lumbar pain, the latter worsened by sitting, bending and lifting. Dr. Raub reviewed Claimant's cervical and lumbar MRIs and noted that the lumbar MRI was "basically unremarkable" with no herniated disc and no significant central or foraminal narrowing. He further noted that there were no facet-type issues on physical exam. Dr. Raub assessment was chronic mechanical low back pain with probable left sacroiliac joint sprain/strain. He opined Claimant's condition would improve over time. Dr. Raub noted that the most aggressive treatment option would be a left sacroiliac joint injection, which Claimant did not want at the time. He recommended Claimant proceed with physical therapy and chiropractic treatment.

9. On October 16, 2017 Claimant resumed physical therapy sessions and reported pain in the left shoulder, lumbar, right knee, and neck. Claimant continued to report low back, neck and left shoulder pain.

10. On December 18, 2017 Dr. Raub requested authorization for a left sacroiliac joint injection, which was denied by Respondents.

11. On February 13, 2018 Dr. Dent noted Claimant's complaints of continued back and left shoulder pain. He referred Claimant back to Dr. Cunningham for evaluation of the shoulder.

12. On April 12, 2018 David Reinhard, M.D., performed an Independent Medical Examination ("IME") at the request of Claimant. Claimant continued to report pain in the left shoulder, right knee, low back, and neck. Dr. Reinhard diagnosed Claimant with, *inter alia*, a lumbar strain and sprain injury with left-sided myofascial pain and dysfunction and left sacroiliac dysfunction. Dr. Reinhard opined that the left sacroiliac injection recommended by Dr. Raub should be authorized as reasonable and necessary. Dr. Reinhard recommended that Claimant receive 1-3 left sacroiliac joint injections and, if the response included a reduction in low back pain, then 12-16 physical therapy sessions to maximize Claimant's low back function. He anticipated that Claimant would have permanent residual impairment for the cervical and lumbar spine injuries, as well as for the left shoulder and right knee.

13. On August 10, 2018 Carlos Cebrian, M.D. performed an IME at the request of Respondents. Dr. Cebrian diagnosed Claimant with, *inter alia,* lumbar spine strain with left SI joint dysfunction. He opined that Claimant was not at MMI and required additional treatment for the lumbar spine in the form of sacroiliac joint injections. Dr. Cebrian opined that if the injections resulted in at least three months of increased, documented functional benefit and at least an 80% initial improvement in pain scales, Claimant could continue with injections and receive a short course of physical therapy. If Claimant did not show

improvement from the injections, he would be at MMI. Dr. Cebrian anticipated Claimant having impairments of the left shoulder, right knee, and lumbar spine.

14. On September 28, 2018 Claimant began treating with Scott Primack, D.O. Dr. Primack performed a computerized outcome analysis to assess Claimant's psychological stressors and physical functioning and opined that the results demonstrated profound psychological stressors. He was unclear if this was a component of the concussion Claimant sustained or perhaps somatization. Regarding the thoracolumbar spine, Dr. Primack noted the MRI demonstrated mild disc bulges at L3-4 and L4-5 with bilateral foraminal narrowing but no significant degenerative changes. He noted that on examination he did not get a sense of any type of sacroiliac dysfunction. Dr. Primack noted that he was "not convinced" interventional spine injections for the lumbar spine would significantly alter Claimant's overall pain symptom complex or function. He recommended Claimant undergo a left shoulder sonographic analysis and EMG/NCS and neuropsychological testing.

15. Claimant underwent sonographic analysis of the shoulders/thoracic outlet on October 15, 2018. Dr. Primack concluded there was no clinical or sonographic evidence of left partial or full-thickness rotator cuff tear, nor any type of left thoracic outlet syndrome. He opined that, at best, there may be a myofascial component at the level of the left shoulder, although there was no evidence of significant shoulder pathology.

16. On October 29, 2018, Claimant presented to neuropsychologist Timothy Shea, Psy.D. Dr. Shea opined Claimant was suffering from depression and anxiety and recommended Clamant undergo counseling and further neuropsychological assessment to evaluate Claimant's cognitive problems.

17. At an October 31, 2018 follow-up evaluation with Dr. Primack, Claimant continued to complain of ongoing pain in the left upper extremity and problems at the sacroiliac joint. Dr. Primack noted that the ultrasound did reveal problems with slight compression of the ulnar nerve at the cubital tunnel on the left side as compared to the right. He opined that Claimant's treatment options for the left upper extremity included wearing a sleeve, further rehabilitation, injections, or a surgical consultation. Dr. Primack noted Claimant was not a candidate for a sacroiliac injection at the time.

18. Dr. Shea conducted a neuropsychological assessment on November 13, 2018, which revealed no clinically significant deficits. Dr. Shea recommended 8-10 sessions of behavioral and cognitive behavioral therapy for Claimant. He noted that if Claimant could adequately engage and manage his mood, he should be able to perform adequately in regard to cognitive functioning. Claimant attended subsequent appointments with Dr. Shea on December 5, 2018, December 12, 2018, December 19, 2018, January 3, 2019, and January 10, 2019. At the January 10, 2019 session, Claimant reported back pain, shoulder pain, frustration and memory issues. Dr. Shea recommended an additional six sessions of behavioral therapy.

19. Claimant returned to Dr. Primack on January 16, 2019, with continued complaints regarding his left elbow, right knee, back, as well as issues with cognition. Dr. Primack opined Claimant was at MMI for his elbow, knee and cognition. He planned to perform a sonographic analysis of Claimant's low back. Using the AMA Guides, Dr. Primack assigned 10% scheduled impairment of the left knee for the chondromalacia patellae (4% whole person), 6% scheduled impairment of the left elbow for sensory loss and deficits (4% whole person), and 5% whole person impairment for disturbances of complex integrated cerebral function. This resulted in a combined 13% whole person impairment.

20. On January 17, 2019, Dr. Primack performed a sonographic analysis of Claimant's thoracolumbar muscles, which revealed two non-work-related lipomas. Dr. Primack opined that there was no specific lumbar spine diagnosis that would necessitate an impairment rating. Based on Claimant's history, clinical examination and functional capacity evaluation, Dr. Primack again opined that Claimant had reached MMI as of January 16, 2019. As maintenance, Dr. Primack recommended Claimant undergo up to four chiropractic sessions for his lumbar spine. He recommended lifting restrictions of 50 pounds occasionally and 25 pounds frequently.

21. Claimant saw Dr. Shea on January 24, 2019, February 28, 2019 and March 7, 2019. At the March 7, 2019 session, Claimant continued to report issues with memory, focus and sleep. He reported some back pain and intermittent flaring of shoulder pain. Dr. Shea noted Claimant had successfully completed treatment, but may require additional therapy sessions upon returning to work for readjustment purposes.

22. Claimant returned to Dr. Primack on March 25, 2019 requesting some form of psychotherapeutic medication. Dr. Primack checked Claimant's computerized outcome analysis scores and compared them to Claimant's October 29, 2018 scores, noting there was "absolutely no change whatsoever." Dr. Primack declined to put Claimant on psychotherapeutics and opined that Claimant remained at MMI.

23. Bryan Counts, M.D. performed a DIME on July 15, 2019. As part of his evaluation, Dr. Counts reviewed Claimant's medical records from the date of injury through Dr. Primack's March 25, 2019 evaluation. Claimant reported to Dr. Counts feeling anxious and depressed, ongoing pain at the left shoulder and low back (rated at 7-10/10 pain levels), ongoing right knee pain that did not prevent mile-long walks, and ongoing memory issues with difficulty finding words. Claimant also reported experiencing headaches 3-4 times per week and mild and intermittent neck symptoms. Claimant estimated that he experienced about 20-30% improvement in symptoms since the date of injury.

24. Dr. Counts diagnosed Claimant with: a traumatic brain injury with brief loss of consciousness; adjustment disorder with major depressive disorder and generalized anxiety disorder; cervical strain; left shoulder rotator cuff and inferior labral tears with tendinosis; status-post bicipital tenodesis; mild left ulnar nerve entrapment at elbow; left sacroiliac strain; right knee meniscal tear and chondromalacia; and chronic pain syndrome. Regarding MMI and treatment, Dr. Counts stated,

> I agree with Dr. Primack, that [Claimant] has been at MMI since 1/16/2019. At this time it is my medical opinion that his psychiatric issues need more treatment I specifically recommend a trial of Zoloft 50 mg in the morning. His ulnar neuropathy and radiating back pain interrupt his sleep, so I would recommend gabapentin at bedtime, beginning with 100 mg nightly and increasing to 600 mg nightly if tolerated and needed.

25. Dr. Counts calculated a 22% whole person impairment using the AMA Guides. The 22% impairment is comprised of 9% scheduled impairment for the left shoulder due to range of motion deficits, 3% scheduled impairment for pain interfering with activity at the peripheral ulnar nerve (under Table 10 and Table 14 of the AMA Guides), 18% scheduled impairment for the left knee for range of motion loss and meniscal surgery (under Table 39 and Table 40 of the AMA Guides), and 10% whole person impairment for emotional disturbances or language difficulties (under Table 1, p. 109 of the AMA Guides). Dr. Counts opined that Claimant did not qualify for a cervical or lumbar impairment rating. Regarding the lumbar spine, Dr. Counts noted Claimant's MRI showed bulging discs with mild bilateral foraminal stenosis at L3-4 and L4-5 with no significant facet arthropathy. He concluded that Claimant's persistent low back pain appeared to be from a left sacroiliac joint strain, which would be unusual to last 2.5 years.

26. Under "Rationale for Decision" Dr. Counts included the following explanation of his impairment rating:

> Today's rating differs from that of Dr. Primack in January of this year in several respects. He did not rate the shoulder, even though there was a surgery as part of this case with residual motion deficits. His knee rating was lower than mine, primarily because he gave no rating for the meniscal surgery. His brain rating was lower than mine, giving only a five percent rating. The language difficulties and emotional disturbances are both high enough to merit a ten percent brain rating.
>
> Regarding the lumbar spine, the persistent low back pain appears to be from a left SI joint strain. It is unusual for this to last 2.5 years. Lumbar spine MRI show bulging discs with mild bilateral foraminal stenosis at L3-4 and L4-5. There was no significant facet arthropathy. Neither Dr. Primack or I chose to rate it. There is very significant depression and some indications of a possible somatoform disorder, so rating the lumbar spine without further psych treatment does not seem prudent. His lumbar spine measurements did not meet validity criteria today, even though his effort seemed fair/good. Sacral motion in flexion and extension were much lower than one would expect with his straight leg raise measurements.

27. As maintenance care, Dr. Counts recommended Claimant be allowed to follow up with Dr. Primack and/or Dr. Shea for the next 12 months. He noted Claimant is a good candidate for psychotropic medications that are non-sedating, recommending Zoloft and Gabapentin.

28. Claimant returned to Dr. Primack on August 26, 2019. Dr. Primack performed a computerized outcome analysis and opined that Claimant remained at his most stable level of functioning. Regarding Claimant's continued left shoulder complaints, Dr. Primack noted Claimant had been working full duty, riding his motorcycle and going to the gym. He recommended Claimant undergo a sonographic analysis to rule out anything further with regards to the work injury. Dr. Primack opined Claimant remained at MMI.

29. On September 3, 2019, Dr. Primack again performed a computerized outcome analysis and a left shoulder sonogram. He noted that the sonogram did not evidence any impingement syndrome, rotator cuff tear or instability. Dr. Primack concluded that Claimant's left shoulder pain was, at best, myofascial in nature. He opined that Claimant was at a stable and stationary level psychologically and physically. Dr. Primack opined that Claimant did not require further treatment and remained at MMI.

30. At a follow-up evaluation with Dr. Primack on October 29, 2019, Claimant reported feeling great and being able to work full duty. Dr. Primack noted Claimant continued to improve on his own and opined that Claimant remained at MMI and could work full duty without restrictions. No further treatment was recommended.

31. On November 29, 2019, L. Barton Goldman, M.D. performed an IME at the request of Claimant. Dr. Goldman reviewed medical records from November 29, 2016 through August 26, 2019. Dr. Goldman opined that Dr. Counts' DIME opinions on MMI and impairment were substantially in error and not in compliance with the AMA Guides. Dr. Goldman opined that Claimant likely was experiencing significant ongoing psychological distress affecting Claimant's function and physical presentation, and that he could be better treated with additional counseling and medication. Claimant reported to him that he was currently not working and had not worked full duty since November 29, 2016. Based on Claimant's reports to him about his symptoms and function, Dr. Goldman noted Dr. Primack was incorrect in indicating Claimant had returned to work full time, and that Dr. Primack was likely overestimating Claimant's functional status. Dr. Goldman opined that it was illogical and contradictory for Dr. Counts' to find Claimant at MMI yet make additional recommendations to improve or address a possible worsening of Claimant's biopsychosocial function. Dr. Goldman stated that the psychosocial care Claimant received was efficient but likely suboptimal based on Dr. Goldman's own experience and the recommendations in the Medical Treatment Guidelines, which document that treatment of a significant adjustment disorder and/or major depressive disorder can often take at minimum two months but often up to six months.

32. Dr. Goldman agreed that Claimant did not sustain any cervical impairment. He opined that Dr. Counts' and Dr. Primack's rating of the left ulnar nerve did not make sense, as the EMG/NCS of the left upper extremity was deemed non-diagnostic. Dr. Goldman further opined that Claimant's brain impairment should instead be calculated as a mental/emotional impairment.

33. Regarding the lumbar spine, Dr. Goldman opined that Dr. Counts should have provided a provisional impairment rating for a Table 53 diagnosis and range of motion deficits based on lumbosacral extension and bilateral lateral flexion range of motion, while requesting that Claimant return for another visit to recheck his range of motion. He noted that, on his examination, Claimant gave good effort and the low back, shoulder and knee measurements were as good or better than those noted by Dr. Counts. He further noted that Claimant's straight leg raising measurements on his exam did not meet validity criteria. Dr. Goldman assessed a provisional lumbar impairment of 10% whole person, comprised of 5% under Table 53 II B, and 5% for range of motion deficits.

34. Dr. Goldman opined that Claimant is not at MMI and requires additional psychological and physical care, including psychiatric evaluation, medication, 6-10 biofeedback sessions, cognitive behavioral therapy, a course of intramuscular stimulation and/or trigger point injections, physical therapy, and possibly additional imaging and testing.

35. Claimant testified at hearing that he continues to experience ongoing symptoms in his left shoulder, right knee, and low back. Claimant stated he experiences left shoulder tingling, numbness, cracking, popping, decreased range of motion and function in the left extremity as compared to the right. He testified that his right knee is painful with weather changes and will crack, pop and give out with bending, walking and weightbearing. He stated he experiences daily low back pain that radiates down left leg and reduced range of motion. Claimant testified he has issues with sleeping, memory, fumbling words, and depression. Claimant is currently working, which he testified increases his symptoms. Regarding his reports to Dr. Primack, Claimant stated that at the August 26, 2019, he told Dr. Primack he was going to start trying to go to the gym. Claimant wants to undergo the treatment recommended by Dr. Goldman to get as close as possible to 100%.

36. Dr. Primack testified by post-hearing deposition as a Level II accredited expert in physical medicine and rehabilitation and neuromuscular skeletal medicine. He testified the placed Claimant at MMI on January 16, 2019 because it was clear Claimant had reached a stable, stationary and highest level of function and would not get that much better. Dr. Primack explained that he did not assign an impairment rating for Claimant's lumbar spine as there was no specific diagnosis and no specific deficits. Dr. Primack testified that, although Claimant reported lumbar symptoms in excess of six months and received treatment for the lumbar spine, there was no rigidity or spasms and no clinical correlation of a defined area of pathology. Dr. Primack explained that pain is not rateable under the AMA Guides.

37. Dr. Primack testified that, after the DIME, he continued to opine Claimant maintained MMI because it was clear, based on physical examination and Claimant's perceptions of his overall functioning, that there were not any appreciable changes. Dr. Counts' maintenance recommendations do not change Claimant's MMI status.

38. Dr. Primack opined that Claimant does not require sacroiliac joint injections. He testified he disagreed with the opinion of Dr. Goldman that Claimant required additional

psychological treatment as Claimant has been through a psychometric assessment and neuropsychological consultation with treatment and had improved to a stable and stationary level of functioning given the computerized outcome analysis data. Dr. Primack stated that Dr. Goldman's determination that the psychological treatment Claimant received was suboptimal was based on opinion.

39. Dr. Primack also expressed concern with the vastly different presentation of Claimant at his evaluation on October 29, 2019 and at Dr. Goldman's November 8, 2019 evaluation. He testified that Claimant had reported to him that he was participating in recreational activities, had attempted to ride his motorcycle, and was begging to be returned to full duty with no restrictions, and had been hitting the gym regularly. Based on this, Dr. Primack questioned Dr. Goldman's recommendations for trigger point injections and myofascial release. Dr. Primack disagreed with Dr. Goldman's recommendations for further care, reiterating that Claimant was active and already at a high level of overall functioning.

40. Dr. Primack reviewed Dr. Goldman's IME report and opined the subjective complaints documented therein, as well as Claimant's continued complaints testified to at hearing, do not change his opinion that Claimant continues to be at MMI.

41. Dr. Primack testified there are no errors with Dr. Counts' impairment rating. He explained that Dr. Counts did not err in failing to rate the lumbar spine, as there was no specific diagnosis and thus no Table 53 rating or rating for range of motion deficits. With regard to the difference in his psychological impairment and the impairment assessed by Dr. Counts, Dr. Primack testified that he did not see any error in the application of impairment for cognitive impairment.

42. The ALJ finds the opinions of Drs. Counts and Primack, as supported by the medical records, more credible and persuasive than the opinion of Dr. Goldman and Claimant's testimony.

43. Claimant failed to prove it is highly probable Dr. Counts' DIME opinion on MMI and impairment in incorrect.

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

CONCLUSIONS OF LAW

Generally

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

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

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

Overcoming the DIME Opinion on MMI

MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." §8-40-201(11.5), C.R.S. A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Powell v. Aurora Public Schools* WC 4-974-718-03 (ICAO, Mar. 15, 2017). A finding that the claimant needs additional medical treatment including surgery to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management,* WC 4-356-512 (ICAO, May 20, 2004).

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge D/B/A Colorado Athletic Club* WC 4-914-378-02 (ICAO, June 25, 2015). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., WC 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., WC's 4-532-166 & 4-523-097 (ICAO, July 19, 2004). Rather, it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Licata v. Wholly Cannoli Café* WC 4-863-323-04 (ICAO, July 26, 2016). When a DIME physician issues conflicting or ambiguous opinions concerning MMI, the ALJ may resolve the inconsistency as a matter of fact to determine the DIME physician's true opinion. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Licata v. Wholly Cannoli Café* WC 4-863-323-04 (ICAO, July 26, 2016).

Claimant contends that Dr. Counts' own recommendation that Claimant undergo psychological treatment, which he believes will improve Claimant's symptoms, contradicts a determination of MMI. The evidence does not establish it is highly probable Dr. Counts' DIME opinion on MMI is incorrect. Dr. Counts' discussion of additional psychiatric treatment, specifically medication, could be done as maintenance care. Dr. Counts' statement that Claimant's symptoms may improve as his anxiety is treated was made in the context of discussing his decision to not assign a lumbar spine rating in the presence of significant depression and indications of a possible somatoform disorder, as related to Claimant's subjective reporting of symptoms. Dr. Counts proceeded to assign an impairment rating for Claimant's brain injury and explained the difference in his reasoning from that of Dr. Primack. Dr. Counts did not indicate the rating he assigned for brain/cognitive impairment was meant to be provisional.

Dr. Counts' finding of MMI is supported by the opinion of Dr. Primack, who is familiar with Claimant's presentation, conditions and course of treatment as Claimant's ATP. Dr. Primack credibly and persuasively opined that Dr. Counts' recommendations for maintenance care do not change Claimant's MMI status, and that Claimant remains at MMI with respect to both his physical and psychological condition. While Dr. Goldman opined that Dr. Primack overstated Claimant's ability and functional status, Dr. Goldman did not review Dr. Primack's September 3 or October 29, 2019 reports, at which Claimant's reported functioning was at an overall high level. Although Dr. Goldman recommends Claimant undergo significantly more treatment before being placed at MMI, his opinion represents a mere difference of opinion with the DIME physician that does not rise to the level of clear and convincing evidence.

Overcoming the DIME Opinion on Impairment

The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury*.* *Mosley v. Industrial Claim Appeals Office*, 78 P.3d 1150 (Colo. App. 2003); *Sharpton v. Prospect Airport Services* W.C. No. 4-941-721-03 (ICAO, Nov. 29, 2016). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office*, 17 P.3d 202 (Colo. App. 2000).

A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAO, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. Rather, deviation from the AMA Guides constitutes evidence that the ALJ may consider in determining whether the DIME physician's rating has been overcome. *See Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117 (Colo. App. 2003); *Logan v. Durango Mountain Resort,* W.C. No. 4-679-289 (ICAO, April 3, 2009); *Linda Vuksic v. Lockheed Martin Corporation* W.C. No. 4-956-741-02 (ICAO, Aug. 4, 2016). Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In re Goffinett,* W.C. No. 4-677-750 (ICAO, Apr. 16, 2008).

The questions of whether the DIME physician properly applied the AMA Guides, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. Wackenhut Corp. v. Industrial Claim Appeals Office, 17 P.3d 202 (Colo. App. 2000); Paredes v. ABM Industries W.C. No. 4-862-312-02 (ICAO, Apr. 14, 2014). A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. See Gonzales v. Browning Ferris Industries of Colorado, W.C. No. 4-350-36 (ICAO, Mar. 22, 2000); Licata v. Wholly Cannoli Café W.C. No. 4-863-323-04 (ICAO, July 26, 2016).

Claimant argues Dr. Counts erred in failing to assign a lumbar impairment rating pursuant to the AMA Guides and the Impairment Rating Tips. Dr. Goldman opined that Dr. Counts should have provided a provisional Table 53 rating and performed additional range of motion measurements at a second visit before invalidating the measurements.

Section 3.3 of the AMA Guides discusses impairment of the spine. Section 3.3a provides that impairment of the spine begins with using either Table 53 or Table 50 to obtain a diagnosis-based percentage of impairment. Next, regional range of motion should be tested. The AMA Guides state that if consistency requirements are not met after six measurements, the physician should consider the test invalid and reexamine at a later date or disqualify that part of the examination.

Paragraph 1 of the Spinal Rating Section of the Impairment Rating Tips provides:

> Table 53 and Application of Spinal Range of Motion: In order to be assigned a spinal rating, the patient must have objective pathology and impairment that qualifies for a numerical impairment rating of greater than zero under Table 53. Spinal range of motion impairment must be completed and applied to the impairment rating only when a corresponding Table 53 diagnosis has been established. (References: *Spine section of the AMA Guides, 3rd Edition (rev.)*; Level II Accreditation Curriculum, Spine and Pelvis Impairment).
>
> In unusual cases with established severe shoulder pathology accompanied by treatment of the cervical musculature, an isolated cervical range of motion impairment is allowed if it is well justified by the clinician. Otherwise, there are no exceptions to the requirement for a corresponding Table 53 rating.

Paragraph 2 of the Spinal Rating Section provides:

> Table 53 and 0% Impairment Rating with Six Months or More Treatment: Whenever 6 months of treatment of the spine has occurred and a Table 53 zero percent rating is assigned, the physician must provide justification for the zero percent rating, based on the lack of physiologic findings. The rating physician shall be aware that a zero percent rating in this circumstance implies that treatment was performed in the absence of medically documented pain and rigidity.

Paragraph 12 of the Spinal Rating Section of Impairment Rating Tips provides:

> Invalidation of Spinal Range of Motion (cervical, thoracic, lumbar): To invalidate spinal range of motion impairment, due to internal or straight leg raise validity, or for physiologic reasons, claimants must have two visits. Two sets of three measurements must be taken on each visit (12 measurements total).

In his DIME report, Dr. Counts specifically addressed why he did not assign a lumbar spine impairment rating. While he noted Claimant’s lumbar spine MRI revealed bulging discs with mild bilateral foraminal stenosis at L3-4 and L4-5 and no significant facet arthropathy, Dr. Counts attributed Claimant’s persistent low back pain to a left SI joint strain. He opined that it would be unusual for such a strain to last 2.5 years. Dr.

Counts' opinion on lumbar impairment is supported by Dr. Primack, who also did not assign a lumbar impairment rating. Dr. Primack credibly explained that in Claimant's case, there is no specific Table 53 diagnosis or specific deficits. He further credibly explained that, although Claimant reported lumbar symptoms in excess of six months and received treatment for the lumbar spine, there was no rigidity or spasms and no clinical correlation of a defined area of pathology to rate. Although Dr. Counts did not conduct a second visit to invalidate Claimant's range of motion measurements, without a corresponding Table 53 diagnosis, such measurements alone could not be the basis for an impairment rating. Accordingly, based on the totality of the credible and persuasive evidence, Dr. Counts' failure to perform additional measurements in this case does not mandate a conclusion that his impairment rating was incorrect. Again, Dr. Goldman's opinion represents a mere difference of opinion, which does not rise to the level of clear and convincing evidence to overcome the DIME opinion.

ORDER

1. Claimant failed to overcome Dr. Counts' DIME opinion on MMI and impairment by clear and convincing evidence. Claimant reached MMI on January 16, 2019 with a 22% whole person impairment, as determined by Dr. Counts.

2. All matters not determined herein are reserved for future determination.

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

DATED: March 26, 2021

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Did Claimant prove his right shoulder injury caused functional impairment beyond the arm and distinct from the admitted cervical impairment?

- Did Claimant prove his AWW should be increased to $1,072 effective July 1, 2018?

STIPULATIONS

Respondent filed a Final Admission of Liability (FAL) on August 4, 2020 admitting for the 11% whole person cervical rating and 13% scheduled shoulder rating assigned by the DIME. The admitted AWW is $1,010.48. Claimant reached MMI on March 25, 2019. The FAL includes a general award of reasonably necessary and related medical treatment after MMI from authorized providers. Claimant accepts the general award and there are no disputed issues regarding specific treatment at present. Respondent retains the right to contest any specific treatment in the future. The parties agreed to reserve the issue of disfigurement until OAC resumes in-person hearings.

FINDINGS OF FACT

1. Claimant works for Employer as a Labor and Employment Specialist. He suffered admitted injuries to his right shoulder and neck on March 30, 2018 while moving flats of water at a job fair. One of the flats fell, which jerked his right arm. Claimant felt immediate pain in his neck and right shoulder.

2. An MRI of the right shoulder showed acute rotator cuff tendonitis, moderate to advanced AC joint osteoarthritis, a Type II SLAP tear, and probable biceps anchor pathology.

3. Claimant was referred to Dr. David Walden, an orthopedic surgeon. Dr. Walden initially recommended conservative treatment. Dr. Walden ultimately recommended surgery because therapy and multiple cortisone injections failed to resolve Claimant's symptoms. On October 10, 2018, Dr. Walden performed a right shoulder arthroscopic biceps tenodesis, a subacromial decompression with coracoacromial ligament resection and acromioplasty, and debridement of rotator cuff fraying.

4. Claimant's shoulder improved after surgery but remained symptomatic. Post-surgery pain diagrams show continued pain in the right upper pectoralis region, superior and lateral shoulder, trapezius, upper back, and neck. Claimant also noted pain and paresthesias in the right forearm and hand.

5. Claimant's ATP, Dr. John Reasoner, put Claimant at MMI on March 25, 2019 with a 12% extremity / 7% whole person impairment for the right shoulder. Dr.

Reasoner assigned permanent work restrictions including no lifting over 20 pounds and no overhead reaching with the right arm.

6. Dr. Tashof Bernton performed an IME for Respondent on May 7, 2019. Claimant reported ongoing right shoulder and neck pain with associated headaches. Dr. Bernton opined Claimant's symptoms were consistent with his history of shoulder surgery. Dr. Bernton saw no evidence of a separate injury to the cervical spine. He recommended electrodiagnostic testing for the right upper extremity symptoms "on a nonwork-related basis." Dr. Bernton calculated a 13% extremity / 8% whole person rating for right shoulder ROM deficits. Dr. Bernton indicated the ROM measurements may have been inflated by "submaximal" effort on Claimant's part, but his supposition is unpersuasive given the highly consistent measurements obtained by Dr. Reasoner, Dr. Bernton, and the DIME.

7. In August 2019, Claimant sought treatment at the St. Thomas More emergency department for severe neck and shoulder pain. A cervical MRI was recommended but apparently not performed. The emergency department records are not in evidence but the ALJ infers this visit occurred in mid- to late-August 2019.

8. On August 28, 2019, Claimant's PCP, Dr. Robert McCurry, documented persistent symptoms related to Claimant injury including right shoulder pain, bilateral trapezius pain and spasm, neck pain, sleep disturbance, headaches, right arm weakness, and paresthesias in the fourth and fifth fingers of the right hand. Claimant was also experiencing depression and anxiety from a combination of ongoing symptoms and workplace conflicts.

9. Claimant saw Dr. John Tyler for a DIME on October 1, 2019. Dr. Tyler opined Claimant suffered a specific injury to his cervical spine that warranted a rating in addition to the shoulder rating. Examination of the cervical spine showed markedly increased myofascial tone with active trigger points in the bilateral scalenes, right posterior scalenes, right clavicular portion of the sternocleidomastoid, right splenius capitis, and bilateral suboccipitals. Dr. Tyler appreciated segmental dysfunction at C3 and C5 markedly restricting the mobility of the C3-4 and C5-6 facet joints, which Dr. Tyler believed were the "primary generators" of Claimant's posterolateral cervical spinal pain on the right side. Dr. Tyler diagnosed cervical facet syndrome with overlying areas of myofascial pain, which provided the basis for a Table 53 cervical rating.

10. Examination of Claimant's right shoulder showed upslope of the shoulder girdle complex due to increased myofascial tone and active trigger points within the superior trapezius on the right side, forward of the right shoulder due to structural tightness and active trigger points in the right pectoralis minor, and multiple "easily" palpable trigger points within the infraspinatus and superior medial parascapular musculature. The ALJ infers from the structure of Dr. Tyler's report he associated Claimant's trapezius symptoms more with the shoulder injury than the neck injury.

11. Dr. Tyler assigned an 11% whole person rating for the cervical spine and a 13% extremity / 8% whole person rating for the right shoulder. The overall combined

whole person rating was 18%. Dr. Tyler opined the myogenic TOS symptomatology caused no ratable impairment.

12. Respondent filed a FAL admitting for Dr. Tyler's whole cervical rating and the scheduled shoulder rating.

13. Dr. Carlos Cebrian performed an IME for Respondent on December 16, 2020. In contrast to Dr. Tyler's examination, Dr. Cebrian found no spasms or trigger points around the right shoulder or cervical spine. Nevertheless, he noted cervical tenderness to palpation and reduced range of motion and included "cervical spine myofascial pain" in his list of injury-related diagnoses. Dr. Cebrian opined Claimant's shoulder rating "should remain a scheduled impairment" because he saw no functional impairment beyond the arm. Dr. Cebrian opined the muscle "tightness" around Claimant's shoulder girdle does not give rise to functional impairment beyond the glenohumeral joint, and the cervical spine impairment accounts for any complaints extending beyond the glenohumeral joint. He opined the subacromial decompression does not cause functional impairment beyond the arm because "a subacromial decompression does not have any negative effect on a person's function."

14. Dr. Cebrian's examination findings are less credible than those of Dr. Tyler. Dr. Cebrian's opinions Claimant's shoulder impairment is limited to his right arm and any proximal limitations are fully captured by the cervical rating are not credible or persuasive.

15. Claimant's testimony regarding his ongoing injury-related symptoms and associated functional limitations was credible and persuasive.

16. Claimant proved his right shoulder injury caused functional impairment beyond the arm that is not captured by the admitted cervical spine rating.

17. The admitted AWW of $1,010.48 is based on Claimant's earnings at the time of his injury.

18. Claimant received a pay raise on July 1, 2018, which corresponds to an AWW of $1,072. Respondent produced no contradict or refute Claimant's credible testimony regarding the wage increase.

19. The admitted AWW does not accurately reflect the reduced earning capacity caused by Claimant's injury when he reached MMI on March 1, 2019. Claimant proved his average weekly wage should be increased to $1,072 effective July 1, 2018.

CONCLUSIONS OF LAW

A. Claimant proved his shoulder injury caused whole person impairment

Whether a claimant has sustained scheduled or whole person impairment is a question of fact for determination by the ALJ. *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366, 368 (Colo. App. 1996). In resolving this question, the ALJ must determine "the situs of the functional impairment," which is not necessarily the site of the injury itself.

Id. The schedule of disabilities refers to the loss of "an arm." Section 8-42-107(2)(a). In other words, if the claimant has a functional impairment to part(s) of his body other than the "arm," he has sustained a whole person impairment and must be compensated under § 8-42-107(8).

Although the opinions of physicians can be considered when determining this issue, the ALJ can also consider lay evidence such as the claimant's testimony regarding pain and reduced function. *Olson v. Foley's*, W.C. No. 4-326-898 (ICAO, September 12, 2000). There is no requirement that functional impairment take any particular form, and "pain and discomfort which interferes with the claimant's ability to use a portion of the body may be considered 'impairment' for purposes of assigning a whole person impairment rating." *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (ICAO, June 30, 2008). Referred pain from the primary situs of the initial injury may establish proof of functional impairment to the whole person. *E.g., Latshaw v. Baker Hughes, Inc*., W.C. No. 4-842-705 (ICAO, December 17, 2013); *Mader v. Popejoy Construction Co., Inc*., W.C. No. 4-198-489 (ICAO, August 9, 1996).

Pain and limitation in the trapezius and scapular area can functionally impair an individual beyond the arm. *E.g. Steinhauser v. Azco, Inc.*, W.C. No. 4-808-991 (January 11, 2012) (pain and muscle spasm in scapular and trapezial musculature warranted whole person impairment); *Franks v. Gordon Sign Co.*, W.C. No. 4-180-076 (March 27, 1996) (supraspinatus attaches to the scapula, and is therefore properly considered part of the "torso," rather than the "arm"); *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (ICAO, June 30, 2008) (pain affecting the trapezius and difficulty sleeping on injured side supported ALJ's finding of whole person impairment). Limitations on overhead reaching can also consitute functional impairment beyond the arm in appropriate cases. *E.g*., *Brown v. City of Auror*a, W.C. No. 4-452-408 (October 9, 2002); *Heredia v. Marriott*, W.C. No. 4-508-205 (September 17, 2004).

If a claimant has ratable impairment of the cervical spine and also seeks a whole person rating for the shoulder, the functional impairment used to "convert" the shoulder rating must be distinct from the cervical impairment. *Warthen v. Industrial Claim Appeals Office*, 100 P.3d 581 (Colo. App. 2004); *Steinhauser v. Azco, Inc*., W.C. No. 4-808-991-02 (January 11, 2012).

As found, his right shoulder injury caused functional impairment beyond the arm that is not captured by the admitted cervical spine rating. First, the injury and resulting surgery permanently altered anatomical structures that are not part of his arm. Claimant underwent a subacromial decompression and acromioplasty. These procedures are performed proximal to the glenohumeral joint and therefore above the "arm." Although the anatomical situs of the injury or treatment is not dispositive, it is a valid factor to consider when determining whether a claimant has a scheduled or whole person impairment. *See, e.g., Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (June 30, 2008) ("The [claimant's] subacromial decompression was done at the acromion and the coracoacromial ligament in order to relieve the impingement, which is all related to the scapular structures above the level of the glenohumeral joint").

Second, and more important, Dr. Tyler's examination showed objective evidence of functional impairment in the chest and scapular area, including forward positioning of the shoulder due to structural tightness and active trigger points in the right pectoralis minor, and diffuse myofascial trigger points within the infraspinatus and superomedial parascapular musculature. The structural tightness in Claimant right anterior chest wall is compressing and irritating the brachial plexus, causing symptoms consistent with myogenic TOS. These findings are distinct from the cervical spine impairment. The right-sided trapezius pain may overlap to some degree with the cervical injury but is probably primarily related to the shoulder injury. Claimant's headaches are probably at least partially related to the right shoulder symptoms. The clinical findings documented by Dr. Tyler are consistent with and supported by the medical records and pain diagrams and Claimant's credible testimony.

B. Claimant's AWW is $1,072 effective July 1, 2018

Section 8-42-102(2), C.R.S. provides that compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993).

PPD benefits are intended to compensate a claimant for a permanent loss of future earning capacity. *Broadmoor Hotel v. Industrial Claim Appeals Office*, 939 P.2d 460 (Colo. App. 1996). Accordingly, the discretionary authority to deviate from the "default" AWW formula extends to PPD benefits. *Pizza Hut v. Industrial Claim Appeals Office*, 18 P.3d 867 (Colo. App. 2001).

As found, Claimant proved his AWW should be increased to $1,072 effective July 1, 2018. Because of the pay raise, Claimant's rate of pay at time of the injury no longer provided an accurate measure of his future earning capacity when he reached MMI on March 1, 2019.

ORDER

It is therefore ordered that:

1. Claimant's average weekly wage is $1,072 effective July 1, 2018.

2. Respondent shall pay Claimant PPD benefits based on the DIME's combined whole person rating of 18%. Respondent may take credit for any PPD benefits previously paid in connection with this claim.

3. Respondent shall pay Claimant statutory interest of 8% per annum on all benefits not paid when due.

4. Respondent shall cover all reasonably necessary and related medical treatment after MMI from authorized providers, consistent with the parties' stipulation.

5. The issue of disfigurement is reserved for future determination.

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

DATED: March 26, 2021

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-137-551-002

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that that he sustained a compensable injury in the course and scope of his employment.

II. Whether Claimant has proven by a preponderance of the evidence that the medical care and treatment he received was reasonable and necessary and related to his employment and that he is entitled to a general award of medical benefits.

III. Whether Claimant has proven by a preponderance of the evidence that he is entitled to temporary disability benefits.

STIPULATIONS

- The parties agreed that if the claim is found to be compensable and temporary disability benefits are awarded, they will attempt to work out and resolve Claimant's average weekly wage and the amount of temporary total and temporary partial disability benefits payable to Claimant.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. Claimant, who was born on May 14, 1958, alleges he suffered a compensable back injury on April 22, 2020.
2. Claimant has been continuously employed by Employer as a delivery driver since September 2019. His job duties include loading, driving, and unloading heavy materials.
3. On April 22, 2020, his job duties included picking up, delivering, and unloading landscaping "baffles," which are large rolls of webbing that are woven with straw and seed. The baffles are approximately 12 feet long, weighed approximately 200 pounds each, and all three bundles totaled between 2,000 and 2,100 pounds.
4. Claimant picked up the baffles in Denver, Colorado. When the baffles were loaded, they were sorted into three separate bundles and wrapped with nylon banding. Claimant delivered them to Fountain, Colorado. During transit, two of the three bundles split open and resulted in the baffles being strewn throughout the bed of his semi-truck.
5. When Claimant arrived in Fountain, Colorado, he was responsible for unloading the baffles. He did so with the help of an individual from the delivery site.

6. To unload the baffles, Claimant had to get onto the bed of the truck and maneuver around the loose baffles. He then had to untangle the loose baffles one-by-one. As he would untangle a baffle, he would then bend over, lift it up the end, and push the baffle off the bed of the truck onto a nearby forklift. The forklift then drove the baffles to where they were to be stored.

7. Claimant testified that he does not recall tweaking, popping, pulling, or injuring his back while unloading the baffles. He testified he did not recall experiencing pain at that point in time. Claimant drove back to the Employer's yard to return his truck and finish his day. The road in Fountain, Colorado Claimant had to drive over was extremely bumpy. This caused Claimant to twice strike his head on the top-interior of the cabin of his truck. Claimant testified he did not feel back pain after hitting his head while driving on the bumpy road.

8. Claimant returned to the Employer's yard located in Denver, Colorado, safely. He then performed his closing duties, clocked out, and drove home to Aurora, Colorado. Claimant did not suffer any accidents on the way home. Once home, he parked, spoke to his wife, got ready for bed in the bathroom, and then went to bed.

9. After going to bed, Claimant woke up between 1:30 a.m. and 2:00 a.m. to use the restroom. He rolled over to get out of bed and felt extreme stiffness in his lower back. The pain caused him to have to use the wall to get out of bed. He had to move cautiously to the bathroom due to the pain. After using the restroom, Claimant returned to bed.

10. Claimant went back to sleep and then woke up at 5:30 a.m. and his back pain had worsened. He called Employer to inform his boss he would not be at work that day because his back was in a lot of pain. Claimant testified that he informed Employer he was not sure exactly how he injured his back, but he believed he did it the day prior at work while either driving on the bumpy road or unloading the baffles.

11. Claimant was provided a designated provider list from Employer. He chose to treat at Denver Aviation and Occupational Medicine.

12. Claimant presented to Denver Aviation Occupational Medicine on April 27, 2020. He was evaluated by Nazia Javed, M.D. Claimant reported lumbar pain that began on April 22, 2020. It was noted by Dr. Javed that Claimant stated that "he was driving on dirt roads and his truck was bouncing up and down and he felt low back pain." It was also noted that Claimant stated that while unloading heavy landscaping stuff he felt a sharp pain in his low back. Dr. Javed concluded that Claimant's mechanism of injury was possibly hitting his head on the interior of his truck cabin due to the rough road or unloading heavy landscaping materials. Dr. Javed diagnosed Claimant with a lumbar strain and sprain. Dr. Javed recommended physical therapy and placed work restrictions on Claimant's activity which precluded Claimant from performing his regular job duties. Cl. Ex. 3.

13. Claimant missed approximately three months of work due to his injury. Hearing Transcript, p. 31.

14. Claimant remained on restricted duty throughout his treatment. As time went on, Claimant's restrictions were modified, and he was able to return work and perform in a limited capacity. Cl. Ex. 3 and 9.

15. Claimant underwent a course of treatment from April 27, 2020 to August 28, 2020, inclusive of evaluations, x-rays, physical therapy, home exercise program, MRI, and medications. Cl. Ex. 3.

16. Claimant was placed at maximum medical improvement ("MMI") and released to full duty work on August 28, 2020. Cl. Ex. 3.

17. Claimant underwent a medical evaluation with Allison Fall, M.D., at the request of Respondent on October 28, 2020. Dr. Fall opined that Claimant did not suffer a compensable work injury because he did not notice pain while performing his work activities on April 22, 2020. Dr. Fall further opined that is it impossible for her to know what led to Claimant's lumbar symptoms.

18. Dr. Fall testified at hearing in accordance with her report. She also testified that a lumbar sprain or strain is an acute injury that would not appear on an x-ray or MRI. She further acknowledged that Claimant's medical diagnosis is a lumbar sprain and strain. She testified that the activities Claimant performed on April 22, 2020 could result in a lumbar strain or sprain. She also testified that a lumbar strain or sprain could result in the complaints that Claimant had, including pain and stiffness.

19. Prior to April 22, 2020, Claimant never had issues with his back. He did not have back pain. He did not have functional loss in his back. He had never injured his back prior to April 22, 2020 or sought medical treatment for his low back.

20. Claimant's statements contained in his medical records and his hearing testimony is found to be credible. Claimant's testimony regarding his work activities on April 22, 2020 aligns with his reporting to Dr. Javed and Dr. Fall. Moreover, the Respondents did not offer any testimony to contradict Claimant's statements and testimony regarding his work activities on April 22, 2020.

21. It is more probable than not that Claimant's lumbar injury was caused by his work activities on April 22, 2020.

22. The injury occurred while Claimant was on the clock and within the course and scope of his employment.

23. The injury occurred while Claimant was performing a work duty that arose out of his employment contract with Employer.

24. Claimant is entitled to reasonable and necessary medical treatment to cure and relieve him from the effects of his work injury.

25. The medical treatment provided up through the date of the hearing and documented in the hearing exhibits is found to be reasonable and necessary to determine the extent of Claimant's work injury and to cure Claimant from the effects of his work injury.

26. Claimant's work injury and restrictions precluded him from performing his regular job duties and he missed more than three shifts of work, starting April 23, 2020. As a result, Claimant is entitled to temporary disability benefits.

27. The extent, however, of Claimant's wage loss is not clear from the record as the parties agreed to resolve such dispute should the claim be found compensable.

CONCLUSIONS OF LAW

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

General Provisions

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

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant has proven by a preponderance of the evidence that that he sustained a compensable injury in the course and scope of his employment.

Claimant was required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). An injury that results from a risk of employment that is directly tied to the work itself is compensable. *See City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). A finding of causation need not be proven or supported by expert medical evidence. Rather, the claimant's testimony alone may support a finding of causation despite conflicting medical evidence or testimony. *See Lymburn v. Symbios* Logic, 952 P.2d 831 (Colo. App. 1997).

As found, Claimant was clocked-in, at a location he was supposed to be at in Fountain, Colorado, when he injured his lower back.

As found, Claimant's work activities on April 22, 2020 involved moving heavy, awkwardly shaped baffles, and driving on a rough road. Claimant moved roughly 2,000 pounds of baffles within 30 minutes. Moving the baffles required Claimant to bend, lift, and push. As testified to by Dr. Fall, all of these activities can result in a muscle strain or sprain to the low back.

The ALJ finds Claimant's hearing testimony to be credible and persuasive for a number of reasons. First, Claimant testified he has never suffered a low back injury or sought medical treatment to his lower back prior to April 22, 2020. This is supported by the medical records.

Second, Claimant's testimony establishes he works a labor-intensive job that requires loading and unloading heavy materials, as well as driving long distances. Claimant's testimony establishes he was able to work his full work duties, free from back pain or functional issue, up until 1:30 a.m. the morning of April 23, 2020.

Third, Claimant's testimony regarding the mechanism of injury is reasonably consistent throughout the claim. The first time Claimant sought medical treatment from Dr. Javed she noted that he felt some pain while driving on the bumpy road and while unloading the truck. Claimant did, however, testify that he did not notice pain in his back until, approximately, 1:30 a.m. on April 23, 2020. The ALJ does not find this discrepancy to be fatal to Claimant's claim or credibility. It must be borne in mind that inconsistencies are not uncommon to the adversary process which, of necessity, must rely upon the sometimes contradictory and often incomplete testimony of human observers in attempting to reconstruct the historical facts underlying an event. *See People v. Brassfield*, 652 P.2d 588 (Colo. 1982).

Claimant described the only activities that could have injured his back, which was striking his head against the interior of the cab of his truck and moving the heavy landscaping baffles.

Fourth, there is no other reasonable explanation as to how Claimant began experiencing back pain in the early morning on April 23, 2020, other than his work activities on April 22, 2020. Claimant credibly testified he did not suffer any accidents or injuries on his way home from work on April 22, 2020, or once he got home. Claimant credibly testified that he drove home after clocking out, walked in his house, got ready for bed, and then went to bed. The only reasonable explanation is that Claimant suffered lower back injury at work on April 22, 2020.

Therefore, the ALJ concludes Claimant established by a preponderance of the evidence that he injured his lumbar spine during the course and scope of his employment while performing a work activity on April 22, 2020.

II. Whether Claimant has proven by a preponderance of the evidence that the medical care and treatment he received was reasonable and necessarily related to his employment and that he is entitled to a general award of medical benefits.

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

As found, Claimant suffered a compensable injury on April 22, 2020. In order to determine the nature and extent of his injury, Claimant selected to treat with one of the designated providers on the list provided by Employer - Denver Aviation Occupational Medicine. Claimant went to Denver Aviation and Occupational Medicine and was evaluated by Dr. Javed. Claimant complained of pain in his lumbar spine. As a result, Dr. Javed evaluated Claimant and ultimately diagnosed Claimant with a lumbar strain and sprain. Dr. Javed recommended physical therapy and placed work restrictions on Claimant's activity. Claimant underwent a course of treatment from April 27, 2020 to August 28, 2020, which included evaluations, x-rays, physical therapy, home exercise program, an MRI, and medications to cure Claimant from the effects of his work injury.

As a result, the ALJ finds and concludes that Claimant established by a preponderance of the evidence that the medical treatment provided up through the date of the hearing and substantiated by the medical records submitted at the hearing was reasonable and necessary to cure Claimant from the effects of his injury.

The ALJ further finds and concludes that Claimant established by a preponderance of the evidence that he is entitled to a general award of medical benefits to cure Claimant from the effects of his work injury.

III. Whether Claimant has proven by a preponderance of the evidence that he is entitled to temporary disability benefits.

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *Se*e Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont*

Toyota, 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits.

The term “disability” connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co*., 964 P.2d 595, 597 (Colo. App. 1998) (citing Ricks v. Industrial Claim Appeals Office, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant’s testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic*, 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. § 8-42-105(3)(a)-(d), C.R.S.

As found, Claimant’s compensable lumbar injury resulted in an actual wage loss as of April 23, 2020. The records submitted at hearing demonstrated Claimant was provided work restrictions that precluded Claimant from performing his regular job duties. Moreover, Claimant’s testimony and wage records demonstrate Claimant missed more than three days of work due to his work injury.

Therefore, the ALJ finds and concludes Claimant established by a preponderance of the evidence that the industrial injury caused a disability lasting more than three days or work shifts, that Claimant left work as a result of the disability, and that the disability resulted in an actual wage loss. As a result, the ALJ finds and concludes Claimant established by a preponderance of the evidence that he is entitled to temporary disability benefits as of April 23, 2020.

ORDER

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

1. Claimant suffered a compensable injury to his back on April 22, 2020.
2. Respondents shall pay for Claimant’s reasonable and necessary medical treatment that is related to his industrial injury to cure Claimant from the effects of his work injury.
3. Claimant is entitled to temporary disability benefits as of April 23, 2020. The exact amount of temporary disability benefits, however, is reserved. As indicated at the beginning of the hearing, the parties agreed to attempt to

resolve such issue if the Claim was found compensable and the Claimant awarded temporary disability benefits. If the parties are unable to reach an agreement regarding Claimant's average weekly wage and the amount of temporary disability benefits payable to Claimant, either party may file an application for hearing and set the matter for a hearing to have the issues resolved by an ALJ.

4. Issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: March 29, 2021.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-126-258-001

ISSUE

1. Whether Claimant proved by a preponderance of the evidence that he sustained an injury to his right hand arising out of the course of his employment with Employer on November 25, 2019.

2. Whether Claimant proved by a preponderance of the evidence an entitlement to a general award of reasonable and necessary medical benefits causally related to his November 25, 2019 injury.

3. Whether Claimant established by a preponderance of the evidence that the treatment he received from UC Health, Denver Health and Lutheran Medical Center was reasonably necessary to cure or relieve the effects of an industrial injury.

4. Whether Claimant established an entitlement to temporary total disability benefits (TTD).

5. Claimant's average weekly wage.

6. Whether Respondents established by a preponderance of the evidence that Claimant was responsible for termination of his employment and the resulting wage loss from his termination.

7. Whether Respondents established by a preponderance of the evidence that they are not liable for treatment Claimant received because such treatment was not prescribed by an authorized treating provider, pursuant to §8-43-404 (7), C.R.S.

FINDINGS OF FACT

1. Claimant is a 40-year-old male who was employed by Employer as a roofer from September 2019 until November 2019. Claimant was paid $22.00 per hour and worked approximately 30-35 hours per week.

2. On November 25, 2019, Claimant sustained an injury to his right hand as the result of an altercation Claimant initiated with two fellow employees, Isaac A[Redacted], and Michael R[Redacted]. Claimant was initially involved in an argument or physical altercation with Mr. A[Redacted]. Mr. R[Redacted], who was the job foreman, approached Claimant and directed him to leave the job site for the day, with the intent of addressing the situation at a later time. Claimant then falsely accused Mr. R[Redacted] of having a relationship with Claimant's wife and began punching Mr. R[Redacted] in the head and face. As a result, Mr. R[Redacted] sustained injuries to his eye and face and was left

briefly unconscious. Claimant then left the job site in his car and never returned to work for Employer.

3. Mr. R[Redacted] reported the matter to the Parker, Colorado police department, and Claimant was later arrested and charged regarding the altercation. The record does not reflect the crime or crimes with which Claimant was charged or the date of his arrest.

4. On November 27, 2019, Claimant was seen at the UC Health emergency room where he reported that he injured his thumb "trying to protect myself" and reported to the ER physician that his right thumb got caught in a second person's hoodie bending his thumb back and causing a "pop." Claimant was diagnosed with closed displaced fracture of the right thumb. (Ex. 3).

5. On December 11, 2020, Claimant filed a Worker's Claim for Compensation with the Division, and described his injury as occurring "while attempting to get into the back house while going through the door fell [sic]." (Ex. 2). Prior to December 11, 2020, Claimant did not notify Employer or Insurer that he sustained any injury arising out of the course of his employment with Employer.

6. On December 12, 2020, Claimant was seen at in the Denver Health Hand Clinic and reported that his injury occurred "when he was going through a door and fell, and his thumb hyperextended." (Ex. 4).

7. At hearing, Claimant's testimony regarding the way his injury occurred was vague, inconsistent, and confusing. Claimant testified he fell backward on ice resulting in an injury to his hand. Claimant also testified that he injured (or further injured) his hand when he removed his sweatshirt to examine the area. Claimant denied any altercation with Mr. A[Redacted] or Mr. R[Redacted] occurred, but also testified he "had words" with either Mr. R[Redacted] or Mr. A[Redacted], but did not clarify the nature of the interaction. Claimant's testimony was not credible or persuasive.

8. At hearing, Mr. R[Redacted] testified that Claimant was involved in an altercation with another employee, and Mr. R[Redacted], as the foreman, directed Claimant to go home from the job site and return the following day. Claimant then initiated an altercation with Mr. R[Redacted], and struck him numerous times with both hands, knocking Mr. R[Redacted] to the ground and leaving him briefly unconscious. As a result of the altercation, Mr. R[Redacted] sustained injuries to his face. Mr. R[Redacted] testified that Claimant never indicated to him that Claimant had injured his hand at any time on November 25, 2019. The ALJ finds Mr. R[Redacted]'s testimony credible.

9. As a result of the altercation, Employer terminated Claimant's employment shortly after November 25, 2018.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

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

COMPENSABILITY

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, … performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The Claimant must prove his injury arose out of the course and scope of his employment by a preponderance of the evidence. § 8-41-301(1)(b) & (c), C.R.S.; *see*

City of Boulder v. Streeb, 706 P.2d 786 (Colo. 1985). “Arising out of” and “in the course of” employment comprise two separate requirements. *Triad Painting Co.*, 812 P.2d at 641.

An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d at 641; *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO, Nov. 21, 2014).

The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury “has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee’s service to the employer in connection with the contract of employment.” *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014). The mere fact that an injury occurs at work does not establish the requisite causal relationship to demonstrate that the injury arose out of the employment. *Finn v. Industrial Commission,* 437 P.2d 542 (Colo. 1968); *Sanchez v. Honnen Equipment Company,* W.C. No. 4-952-153-01 (ICAO, Aug. 10, 2015).

Claimant has failed to establish that the injury to his right hand arose out of the course of his employment with Employer. Claimant asserts he injured his hand when he fell on a deck outside of a house while starting work on the morning of November 25, 2019. Claimant’s description of the events of November 25, 2019 was not credible and conflicts with his contemporaneous report to UC Health on November 27, 2019. As found, it is more likely than not that Claimant injured his hand while striking Mr. R[Redacted]. If, as Claimant asserted, he injured his hand falling, given the nature of the injuries, Claimant would not likely have been able to strike Mr. R[Redacted] with his right hand. The physical altercation, initiated by Claimant, did not arise from his employment with Employer because the injury had no connection to Claimant’s work-related functions, and was not sufficiently related to his work functions to be considered part of his service to Employer. The injury also did not occur “in the course” of Claimant’ employment, because Claimant assaulting his supervisor was not an activity that had any connection with his work-related functions.

MEDICAL BENEFITS

Under section 8-42-101(1)(a), C.R.S., respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *See Owens v. Industrial Claim Appeals Office*, 49 P.3d 1187, 1188 (Colo. App. 2002). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). All results flowing proximately and naturally from an industrial injury are compensable. *Id., citing Standard Metals Corp. v. Ball*, 474 P.2d 622 (Colo. 1970).

Because Claimant has failed to establish a compensable injury, Claimant is not entitled to an award of general or specific medical benefits.

TEMPORARY TOTAL DISABILITY BENEFITS & AVERAGE WEEKLY WAGE

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* 8-42-105(4); *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

Because Claimant has failed to establish a compensable injury, Claimant is not entitled to an award of temporary disability benefits. Consequently, the ALJ makes no determination of Claimant's average weekly wage.

RESPONSIBILITY FOR TERMINATION AND AUTHORIZED TREATMENT

Because Claimant has failed to establish a compensable injury, the issues Claimant's responsibility for his termination and Claimant's treatment was prescribed by an authorized treating provider are moot.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits relating to his November 25, 2019 right-hand injury is denied and dismissed.

2. Claimant's claims for medical benefits are denied and dismissed.

3. Claimant’s claim for temporary disability benefits is denied and dismissed.

4. All remaining matters are moot.

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

DATED: March 29, 2021

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-142-821-001

ISSUE

1. Whether Claimant proved by a preponderance of the evidence that on or about June 8, 2020 she sustained a compensable injury to her right upper extremity arising out of the course of her employment with Employer.

2. Whether Claimant proved by a preponderance of the evidence an entitlement to reasonable and necessary medical benefits causally related to a work-related injury.

3. Whether Claimant proved by a preponderance of the evidence an entitlement to temporary total disability benefits.

4. Whether Claimant proved by a preponderance of the evidence an entitlement to temporary partial disability benefits.

FINDINGS OF FACT

1. Claimant is a 41-year-old right-hand-dominant female who was employed by Employer as a sales associate at Employer's convenience store. Claimant's job duties include customer service, cashier, and stocking product. The parties stipulated that Claimant's average weekly wage as of June 8, 2020 was $425.14 per week. The parties stipulated that Claimant's employment with Employer voluntarily terminated on September 5, 2020.

2. On June 8, 2020, Claimant was working for Employer and retrieving product from the walk-in refrigerator at Employer's store. In the course of doing so, a partially-full box containing plastic bottles of iced tea fell from a shelf, with the corner of the box striking Claimant in the right elbow.

3. Claimant mentioned the incident to her supervisor, but did not believe she had sustained any significant injury, and did not complete an incident report. Over the following week, Claimant's pain did not diminish as she expected. After approximately two weeks, when Claimant's elbow pain had not resolved, Claimant reported the injury to Employer and was advised to go to the emergency room for evaluation. Muhammad C[Redacted], owner of Employer, testified he had heard from another employee that Claimant had sustained an injury approximately 4-6 days after the initial incident, but Claimant did not report the incident to him until approximately June 21 or June 22, 2020.

4. On June 23, 2020, Claimant was seen at UCHealth by Danielle Mianzo, M.D., for a right elbow injury. Claimant reported a box full of ice fell on her right forearm striking her right elbow. (The ALJ infers that Dr. Mianzo's reference to "a box full of ice" is an error, and that it is meant to reference "a box full of iced tea."). Claimant reported having elbow pain and difficulty lifting things since that time. On exam, Dr. Mianzo found

tenderness in the proximal forearm distal to the antecubital fossa, and discomfort moving the right elbow. X-rays of Claimant's right elbow were normal. (Ex. 5).

5. On June 29, 2020, Claimant saw Sarah Curzon, PA-C, at SCHC Monfort Family Clinic, where she reported continuing pain with bending and twisting of her shoulder to elbow and elbow to forearm. Ms. Curzon found mild swelling, tenderness over the medial aspect of the elbow and pain with extension. Ms. Curzon noted that although Claimant's x-rays were negative, she would refer Claimant for an orthopedic evaluation due to limited mobility and pain reports being out of proportion to the injury. (Ex. 4).

6. On July 2, 2020, Claimant had an x-ray of her right elbow performed at Advanced Medical Imaging Consultants, for evaluation of her right elbow. The x-ray was ordered by Ms. Curzon. (Ex. 7).

7. Claimant returned to the SCHC Monfort Family Clinic on July 9, 2020, where she continued to report right elbow pain. (Ex. 4).

8. On July 16, 2020, Claimant was seen at UCHealth by Michael Deitz, PA-C. Claimant reported difficulty using her right hand and denied any numbness, tingling or dysesthesias. Claimant's description of her injury was consistent with the mechanism initially reported to Dr. Mianzo. Claimant was diagnosed with work-related contusion of the right forearm with lateral epicondylitis, noting that Claimant had swelling, tenderness and decreased range of motion. Mr. Dietz provided Claimant with work restrictions, including limiting her lifting, carrying, pushing, and pulling to three pounds for her right hand. (Ex. 5).

9. On July 17, 2020, Respondents filed a Notice of Contest, noting that Claimant's claim was contested for further investigation to determine compensability. (Ex. A).

10. Claimant received physical therapy at ProActive Physical Therapy and Sports Medicine on July 22, 2020 and July 27, 2020. (Ex. 7).

11. On July 30, 2020, Claimant returned to work subject to work restrictions, including no lifting more than 7 pounds. (Ex. 3).

12. Claimant returned to UCHealth on August 21, 2020, where she was seen by Oscar Sanders, M.D. At that time, Claimant reported that her symptoms had improved with near complete resolution with only minimal stiffness and pain to the lateral aspect of the right elbow with gripping and grasping activities. Claimant had completed physical therapy and was engaged in a home exercise program. Dr. Sanders opined that Claimant may have sustained a temporary exacerbation of underlying lateral epicondylalgia secondary to her injury, which would likely slowly spontaneously abate, and advised Claimant to advance her activity as tolerated. (Ex. 5).

13. On September 22, 2020, Claimant returned to Dr. Sanders, and reported persistent minor aching with increased activities. Additionally, Claimant noted she did not feel her then-current work was exacerbating her symptoms. Dr. Sanders recommended Claimant consult with an orthopedic surgeon. (Ex. 5).

14. On September 22, 2020, Claimant saw Jeffrey Wunder, M.D., for an independent medical examination requested by Respondents. Based on the provided history and his examination, Dr. Wunder opined that within a reasonable degree of medical probability, Claimant's right lateral epicondylitis is work-related. Dr. Wunder noted that Claimant had objective findings and subjective complaints consistent with her injury, including localized swelling and tenderness of the lateral epicondyle and proximal extensor musculature and tendons in the forearm.

15. The parties stipulated that if Claimant sustained a compensable injury, she would be entitled to temporary total disability (TTD) benefits for the period of June 29, 2020 to July 30, 2020, and temporary partial disability (TPD) benefits for the period of July 31, 2020 to September 5, 2020.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

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

COMPENSABILITY

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, … performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The Claimant must prove his injury arose out of the course and scope of his employment by a preponderance of the evidence. § 8-41-301(1)(b) & (c), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). "Arising out of" and "in the course of" employment comprise two separate requirements. *Triad Painting Co.*, 812 P.2d at 641.

An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d at 641; *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO, Nov. 21, 2014).

The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury "has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014). The mere fact that an injury occurs at work does not establish the requisite causal relationship to demonstrate that the injury arose out of the employment. *Finn v. Industrial Commission,* 437 P.2d 542 (Colo. 1968); *Sanchez v. Honnen Equipment Company,* W.C. No. 4-952-153-01 (ICAO, Aug. 10, 2015).

Claimant has established by a preponderance of the evidence that she sustained an injury to her right elbow arising out of the course of her employment with Employer on June 8, 2020. The evidence demonstrates that Claimant sustained an injury to her right elbow when a box fell from a shelf in Employer's store while Claimant was in the course and scope of her employment. Claimant's testimony regarding the mechanism of injury was credible and was not contradicted by other credible evidence. Similarly, Claimant's explanation that she did not immediately report the incident as a work injury was credible, given that Claimant did not immediately appreciate that she sustained a significant injury that would require medical treatment. Mr. C[Redacted]'s testimony that he heard from another employee that Claimant had sustained an injury approximately 4-6 days after June 8, 2020, but that Claimant did not report it to him until later is congruent with Claimant's explanation of the delay in reporting the injury. In addition, Dr. Wunder concluded that Claimant's symptoms were consistent with her description of her injury and opined that she sustained a work-related injury. The ALJ concludes that Claimant sustained a compensable injury to her right elbow on or about June 8, 2020.

MEDICAL BENEFITS

Under section 8-42-101(1)(a), C.R.S., respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *See Owens v. Industrial Claim Appeals Office*, 49 P.3d 1187, 1188 (Colo. App. 2002). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). All results flowing proximately and naturally from an industrial injury are compensable. *Id., citing Standard Metals Corp. v. Ball*, 474 P.2d 622 (Colo. 1970).

Because Claimant has established a compensable injury, Claimant has established by a preponderance of the evidence that she is entitled to a general award of medical benefits. In addition, Claimant received medical services from UC Health, the SCH Monfort Family Clinic, Advanced Medical Imaging Consultants and ProActive Physical Therapy limited to evaluation and treatment of Claimant's right elbow. No credible evidence was presented to demonstrate that the medical services Claimant received were not related to her work injury. The ALJ concludes that the medical services Claimant received from these providers was reasonable and necessary to cure or relieve the effects of Claimant's work injury. \

TEMPORARY DISABILITY BENEFITS (TOTAL AND PARTIAL)

To prove entitlement to Temporary Total Disability (TTD) benefits, Claimant must prove her industrial injury caused a disability lasting more than three work shifts, she left work as a result of the disability, and the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by Claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999).

The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) TTD benefits ordinarily continue until terminated by the occurrence of one of the criteria listed in § 8-42-105 (3), C.R.S. The existence of disability is a question of fact for the ALJ. No requirement exists that a claimant produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

Because Claimant established a compensable injury, pursuant to the parties' stipulation, Claimant has established an entitlement to TTD Benefits for the period of June 29, 2020 to July 30, 2020, and TPD benefits for the period of July 31, 2020 to September 5, 2020.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable injury to her right elbow arising out of the course of her employment with Employer on June 8, 2020.

2. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of Claimant's right elbow injury, including medical expenses incurred from UC Health, SCH Monfort Family Clinic, Advanced Medical Imaging Consultants, and ProActive Physical Therapy.

3. Claimant is entitled to TTD benefits for the period of June 29, 2020 to July 30, 2020, based on Claimant's average weekly wage of $425.14.

4. Claimant is entitled to TPD benefits for the period of July 31, 2020 to September 5, 2020, based on Claimant's average weekly wage of $425.14.

5. All matters not determined herein are reserved for future determination.

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

(20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: February 10, 2021

____
Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that the spinal fusion surgery recommended by Dr. Wade Ceola is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted November 30, 2018 work injury.

FINDINGS OF FACT

1. On November 30, 2018, the claimant was performing his normal job duties as a trash collector and driving a roll off truck. While working to set down a trash can, the claimant twisted while reaching for a hook and felt a pop and pain in his back. The claimant testified that the pain was immediate, sharp, and stabbing. The claimant reported this incident to the employer and was referred for medical treatment.

2. The claimant's authorized treating provider (ATP) for this claim is Dr. Daniel Smith. The claimant was first seen by Dr. Smith on November 30, 2018. On that date, the claimant reported left lower thoracic pain. Dr. Smith opined that the claimant's pain was muscular in nature. He placed the claimant under work restrictions that included only driving.

3. The claimant returned to Dr. Smith on December 7, 2018, and reported continuing thoracic back pain. Dr. Smith listed the claimant's diagnosis as thoracic back sprain. He referred the claimant to physical therapy and prescribed Tramadol.

4. On December 21, 2018, the claimant was seen by Dr. Smith. On that date, Dr. Smith determined that the claimant could return to full duty at work.

5. The claimant returned to Dr. Smith on January 31, 2019. On that date, Dr. Smith noted that the claimant had "mostly thoracic pain", but was also reporting "some more low back discomfort with some radicular symptoms down legs". The claimant reported that physical therapy was helping and he was able to perform his work duties.

6. On February 27, 2019, the claimant was again seen by Dr. Smith. On that date, the claimant reported persistent pain that traveled down both legs, with numbness and cramping into his buttocks. Dr. Smith added the diagnosis of "low back pain with radicular component" and ordered a magnetic resonance image (MRI) of the claimant's lumbar spine.

7. On March 11, 2019, a lumbar spine MRI was performed. The MRI showed, *inter alia*, multilevel spondylosis and stenosis; a mild broad disc bulge and mild thecal sac

narrowing at the L1-L2 level; moderate disc space narrowing with a moderate asymmetric disc bulge at the L2-L3 level; and a mild disc bulge at the L4-L5 level.

8. On March 28, 2019, the claimant was seen by Dr. David Miller for consultation. Dr. Miller noted that the claimant had low back pain with bilateral radicular symptoms into his legs. Dr. Miller also noted that the lumbar spine MRI showed degenerative changes at all lumbar levels. Dr. Miller opined that surgery would not be beneficial to treat the claimant's condition. He also recommended that further physical therapy and injections would likewise not be beneficial. Subsequently, Dr. Smith referred the claimant to Dr. Wade Ceola for a surgical consultation.

9. On July 26, 2019, the claimant was seen by Dr. Ceola. At that time, the claimant reported persistent and significant back and leg pain. Dr. Ceola noted that the claimant had been through physical therapy without relief. Dr. Ceola noted the MRI results and opined that it was possible that the L4-L5 level was the pain generator. As a result, he recommended the claimant undergo injections to at that level. Dr. Ceola did not believe the claimant was a surgical candidate at that time.

10. In August and September 2019, Dr. Michael Campion administered bilateral L4-5 and L5-S1 facet injections. On September 4, 2019, the claimant was seen by Dr. Campion and reported that he did not experience any relief from the facet joint injections. Dr. Campion opined that it was possible that the claimant had bilateral L5 radiculopathy.

11. On October 24, 2019, the claimant as seen in Dr. Smith's practice by Andrew Henrichs, PA-C. At that time, the claimant reported that he could not continue working. As a result, PA Henrichs restricted the claimant from all work.

12. On November 8, 2019, the claimant returned to Dr. Ceola and reported that he had undergone injections, but the injections did not provide any relief. Dr. Ceola noted that the injections were not helpful from a diagnostic standpoint. On that date, Dr. Ceola referred the claimant to Dr. Kenneth Lewis for consideration of a spinal cord stimulator (SCS). Dr. Ceola also referenced the possibility of a future spinal fusion surgery.

13. On November 15, 2019, the respondents filed a General Admission of Liability (GAL).

14. On January 8, 2020, the claimant was evaluated by Dr. Kenneth Lewis for consideration for a SCS. Dr. Lewis opined that the claimant was not a candidate for SCS as he had symptoms of mechanical back pain.

15. On January 9, 2020, the claimant was seen by Dr. Smith. At that time, Dr. Smith noted that the claimant was not a candidate for a SCS. He opined that the claimant should obtain a second opinion from a surgeon.

16. On February 4, 2020, claimant was seen by Thomas Scruton, PA-C at Atlas Arch Neurosurgery. On that date, the claimant reported low back and extremity pain; right greater than left. PA Scruton opined that the claimant's pain was "multifactorial" and recommended diagnostic injections at the sacroiliac (SI) joint.

17. On March 2, 2020, Dr. Lewis performed the recommended SI joint injections. Subsequently, the claimant reported no improvement in his symptoms following the SI joint injections.

18. At the request of the respondents, Dr. Brian Castro performed a review of the claimant’s medical records. In his March 29, 2020 report, Dr. Castro opined that on November 30, 2018, the claimant suffered a lifting sprain/strain injury. He also noted that the claimant’s initial presentation was of lower thoracic/upper lumbar spine symptoms. It was not until later that the claimant began to report lower lumbar and hip symptoms. Dr. Castro further opined that the claimant’s hip symptoms were not related to the November 30, 2018 work injury.

19. On May 7, 2020, the claimant returned to Dr. Ceola. At that time, Dr. Ceola noted that the claimant’s pain generator had not been determined. Dr. Ceola recommended the claimant undergo a computed tomography (CT) scan and a psychological evaluation.

20. On May 19, 2020, a lumbar spine CT scan was performed. The CT scan showed mild to moderate loss of disc height and broad disc bulges at L1-L2; L2-L3; L3-L4; L4-L5; and L5-S1; and mild multilevel neural foraminal narrowing.

21. On June 11, 2020, the claimant was seen by Dr. Ceola and the results of the CT scan were discussed. In the medical record of that date, Dr. Ceola noted that the CT scan did not identify “surgically significant pathology”. At that time, Dr. Ceola recommended the claimant undergo a discogram to determine if a surgical fusion would be appropriate.

22. On June 23, 2020, Dr. Giora Hahn performed a five level lumbar discogram. In the medical report, Dr. Hahn identified concordant discs at the L3-L4 and L5-S1 levels.

23. Following the discogram, Dr. Ceola recommended the claimant undergo surgery consisting of MIS TLIF[1] at both the L5-S1 and L3-L4 levels.

24. On July 8, 2020, Dr. Castro issued a second report related to his further review of the claimant’s medical records. Dr. Castro was specifically asked to state an opinion with regard to whether the recommended spinal fusion is reasonable, necessary and related to the claimant’s November 30, 2018 work injury. In his report, Dr. Castro noted that the claimant has demonstrated “somewhat of a nonphysiologic presentation”. In addition, Dr. Castro stated his opinion that a discogram is not an accurate assessment of pain, and “is known to be a very subjective test”. Dr. Castro opined that the claimant suffered a thoracic sprain/strain injury, for which the claimant had reached maximum medical improvement (MMI). He also noted that all of the claimant’s imaging studies show chronic degenerative changes. With regard to the recommended fusion surgery, Dr. Castro opined that the surgery is not related to the November 20, 2018 work injury. Based upon Dr. Castro’s opinions, the respondents denied the requested lumbar fusion surgery.

25. Dr. Castro’s testimony by deposition was consistent with his written reports. Dr. Castro testified that the claimant suffered a “mostly thoracic” sprain/strain injury. Dr.

[1] Minimally invasive transforaminal lumbar interbody fusion.

Castro also reiterated his opinion that the recommended spinal fusion surgery is not causally related to the claimant's November 30, 2018 work injury. In support of this opinion, Dr. Castro also testified that the claimant's initial complaints related to his thoracic spine. Dr. Castro also testified that the imaging studies show chronic degenerative changes, but that the claimant's radicular leg symptoms were not dermatomal in nature. Dr. Castro noted that the diagnostic injections the claimant received provided no relief at the same levels to be addressed by the surgery. Dr. Castro opined that the lack of relief from the injections go "directly against the discogram".

26. The claimant testified that he wants to proceed with the recommended surgery.

27. The ALJ credits the medical records and the opinions of Dr. Castro over the contrary opinions of Dr. Ceola. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that the spinal fusion surgery recommended by Dr. Ceola is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted November 30, 2018 work injury. The ALJ specifically credits Dr. Castro's opinion that the claimant's initial injury was to his thoracic spine, and he has reached MMI related to that injury. The ALJ also notes that the various injections that were intended to be diagnostic support Dr. Castro's opinion that the claimant's pain generator has not been ascertained.

CONCLUSIONS OF LAW

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

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

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

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

5. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that the spinal fusion surgery recommended by Dr. Wade Ceola is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted November 30, 2018 work injury. As found, the medical records and the opinions of Dr. Castro are credible and persuasive.

ORDER

It is therefore ordered:

1. The claimant's request for a spinal fusion surgery, as recommended by Dr. Wade Ceola, is denied and dismissed.

2. All matters not determined here are reserved for future determination.

Dated this 30th day of March 2021.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

ISSUES

- Whether Claimant has proven by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment?

- If Claimant has proven a compensable injury, whether Claimant has proven by a preponderance of the evidence that the medical treatment from Aspen Family Medical Care and physical therapy are reasonable medical treatment necessary to cure and relieve the Claimant from the effects of the industrial injury?

FINDINGS OF FACT

1. Claimant was employed with Employer in their snowmaking operation on December 30, 2018. Claimant testified that he would begin snowmaking at A[Redacted] Mountain at the beginning of the year, and then shift his work to snowmaking on B[Redacted] Mountain later in the year. Claimant testified that on December 30, 2018, he was working at B[Redacted] Mountain during the night shift making snow. The ALJ finds the testimony of Claimant in this regard to be credible.

2. Claimant testified that snowmaking is a rough job as it is often cold and dark and he is exposed to difficult elements, including avalanches, water pressure issues and air pressure issues. Claimant testified that the employees making the snow during the night are often the only employees on the mountain. The ALJ finds the testimony of Claimant in this regard to be credible. However, the rough nature of Claimant's job is immaterial with regard to the alleged work injury in this case, as Claimant's alleged injury was not caused by an avalanche, water pressure issues or air pressure issues.

3. Claimant testified that snowmaking involves a lot of physical work and minor injuries are common. Claimant testified that snowmaking employees are trained as to snowmobile operations and use the snowmobiles to access different parts of the mountain where the snowmaking operations take place. Claimant testified that in operating the snowmobiles at night, the employees must deal with varying terrain and often times maneuver around chunks of snow that are commonly found on the paths used by the snowmobiles. The ALJ finds the testimony of Claimant in this regard to be credible. However, Claimant did not testify as to any particular mechanism of injury that involved maneuvering the snowmobile.

4. Claimant testified that on December 30, 2018, he was working for Employer making snow. Claimant testified he was in the control room and then needed to go out and check the snowmaking guns. Claimant testified that the snowmaking guns draw water from a creek and it becomes necessary to check the filters on the guns. Claimant testified that he came upon a snowmaking gun that was buried in the

snow and blowing the snow back on itself. Claimant testified that when this happens, you need to dig out the snowmaking gun with a shovel. Claimant provided pictures of the type of snowmaking gun that was buried to demonstrate the size of the snowmaking gun. Claimant testified that in digging out the snowmaking gun, he had to pick up a lever to rotate the upper portion of the gun to aim the gun in the proper direction. Claimant testified that after doing these tasks he got back on the snowmobile and felt "something" in his shoulder. The ALJ finds the testimony of Claimant in this regard to be credible. However, Claimant did not testify as to any action he performed in digging out the gun that led to Claimant developing symptoms in his shoulder.

5. Claimant testified he drove the snowmobile to the next snowmaking gun that was located on a tower. Claimant testified he climbed the ladder on the tower, reached out on to the gun to pull the lever to maneuver where the gun was aimed, and felt an acute pain in his right arm when he reached out to pull the lever. Claimant testified he then changed to use his left arm to adjust the lever. The ALJ finds the testimony of Claimant in this regard to be credible.

6. Claimant testified he reported his injury to his supervisor, Mr. D[Redacted]. The Employer's First Report of Accident filled out by Mr. D[Redacted] indicates that Claimant was "feeling slight pain in his right shoulder diving snowmobiles and while performing other like tasks". The First Report of Accident also indicated that Claimant was unsure of what caused the injury and he had not seen a doctor, as Claimant was waiting to see if the pain subsides.

7. Claimant was eventually evaluated by Physicians' Assistant ("PA") Kiehnbaum on January 11, 2019. PA Kiehnbaum noted an accident history of Claimant noticing symptoms while performing his snowmaking job on December 30, 2018. PA Kiehnbaum reported no specific activity or trigger that caused his pain, but noted that Claimant's job is very active. Claimant reported his pain was aggravated with turning snow guns or pushing/pulling levers. Claimant was diagnosed with a right rotator cuff strain with possible labral pathology. PA Kiehnbaum recommended six sessions of physical therapy ("PT") and non-steroidal anti-inflammatories (NSAID's) or ice as needed. Claimant was provided with work restrictions of no pushing or pulling greater than 25, pounds. The ALJ credits the report of an onset of pain while at work in the medical records to be credible. The ALJ further finds that the description in the medical records that there was no specific activity or triggering cause for Claimant's pain to be credible and persuasive.

8. Claimant returned to PA Kiehnbaum on January 24, 2019 and reported he had started PT and that his physical therapist believed that Claimant's symptoms were related to the biceps head. PA Kiehnbaum noted that there was not a clear work trigger to the pain, although the pain began while Claimant was at work riding a snowmobile downhill. The ALJ finds that this report of an onset of symptoms is consistent with Claimant's testimony at hearing that he felt "something" in his shoulder when Claimant got back on the snowmobile. The ALJ further finds that this is consistent with PA Kiehnbaum's finding that there was no clear work trigger to the pain. PA Kiehnbaum

further noted that Claimant is very active at work and performs frequent pushing and pulling movements.

9. PA Kiehnbaum noted in her January 24, 2019 report that shoulder injuries are often multifactorial given the anatomy and complexity of the joint. PA Kiehnbaum also noted that there was no clear triggering event for the right shoulder pain and opined that it cannot be assumed that the work incident on December 30, 2018 was the sole cause of Claimant's shoulder condition. PA Kiehnbaum noted that Claimant had a history of a prior right shoulder SLAP tear repair in 2002, and that while this is not directly known to cause glenohumeral osteoarthritis, it could contribute to other symptoms in the shoulder such as a biceps tendinopathy, which Claimant appeared to have. PA Kiehnbaum further noted that Claimant performed a lot of repetitive movements and heavy lifting at work which over time could cause shoulder pathology.

10. Claimant was again examined by PA Kiehnbaum on February 12, 2019. Claimant reported his shoulder felt about the same and he still had pain along the biceps tendon head. PA Kiehnbaum recommended Claimant continue with PT and noted she would consider a referral to an orthopedic specialist if there was no improvement.

11. Claimant was examined by Dr. Scheuer on March 1, 2019. Dr. Scheuer noted that while this visit and prior visits were covered by workers' compensation, future visits would not be covered, nor would future PT appointments. Dr. Scheuer released Claimant to return to work without restrictions.

12. Respondents presented the testimony of Mr. J[Redacted], the workers' compensation manager for Employer. Mr. J[Redacted] testified that following Claimant's injury, Claimant returned to work for one day on January 17, 2019 driving a snow cat. Mr. J[Redacted] testified that Claimant returned to work later in March at one of the restaurants and in a ski shop, before returning to work in the snowmaking department on May 13, 2019. Claimant disputed Mr. J[Redacted]'s testimony regarding the work he performed for Employer in March of 2019 and the date of his return to the snowmaking department. The ALJ credits the testimony of Mr. J[Redacted] over the testimony of Claimant regarding the work performed by Claimant after he returned to work with Employer.

13. With regard to the issue of compensability, Claimant was at work when he first noticed pain in his shoulder. Claimant testified he noticed the pain while operating the snowmobile. Claimant testified he felt pain in his shoulder while at work in an area he had not felt pain before.

14. Unfortunately, the development of pain while on the job does not necessarily lead to a compensable workers' compensation injury. Claimant must establish that an injury occurred arising out of and in the course of his employment with employer. While the onset of pain while at work may establish that an injury occurred "in the course of" his employment with employer, Claimant must also establish that the injury "arose out of" his employment with employer.

15. In this case, Claimant has failed to establish how his work activities resulted in an injury to his right shoulder. Claimant testified he first noticed “something” in his shoulder while operating a snowmobile, but failed to establish how operating the snowmobile would lead to the injury identified by PA Kiehnbaum in this case. As noted by PA Kiehnbaum, Claimant has a prior history of a right shoulder injury resulting in a SLAP tear repair. PA Kiehnbaum further noted that this prior history could contribute to a biceps tendinopathy, which Claimant appeared to have. The ALJ credits the medical records and finds that Claimant has failed to establish that it is more likely than not that Claimant’s work activities aggravated, accelerated or combined with Claimant’s pre-existing condition to cause the need for medical treatment. The ALJ finds that Claimant’s need for medical treatment is more likely related to his prior SLAP tear repair.

16. The ALJ notes that if Claimant’s work injury aggravates a pre-existing condition, the workers’ compensation claim is compensable. However, in this case, there is a lack of credible evidence as to the development of any pain being related to work activities associated with Claimant’s employment. Claimant testified at hearing that he noticed the pain while operating a snowmobile, but did not establish that the use of the snowmobile resulted in an injury to the Claimant’s shoulder. Nor did Claimant explain how operating the snowmobile and maneuvering the snowmobile would result in an injury to his right shoulder. Claimant’s testimony that he later felt pain while attempting to reach out and move the lever on the snowmaking gun likewise does not establish that Claimant sustained an injury to his right shoulder arising out of his employment. Pursuant to Claimant’s testimony, he had already noticed the pain in his right shoulder while operating the snowmobile, and again noticed the pain while reaching out to pull the lever on the snowmaking gun. While Claimant began experiencing pain in his right shoulder while at work on December 30, 2018, the facts in this case fail to establish that the cause of that pain was related to Claimant’s work for employer.

17. Due to the fact that Claimant has failed to establish that his right shoulder injury arose out of and in the course of his employment with employer, his claim for compensation must be dismissed.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A Claimant in a Workers’ Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers’ Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2018.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

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

4. A compensable injury is one which arises out of and in the course of employment. Section 8-41-301(1)(b), C.R.S. (2017). The "arising out of" test is one of causation. It requires that the injury have its origin in an employee's work-related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. In this regard, there is no presumption that injuries which occur in the course of a worker's employment arise out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968); Rather, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. Section 8-43-201, C.R.S. 2002; *Ramsdell v, Horn*, 781 P.2d 150 (Colo. App. 1989).

5. As found, Claimant has failed to establish by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment with employer. As found, the mere fact that Claimant began to experience pain in his right shoulder while operating a snowmobile is insufficient under the facts of this case to establish that he sustained an injury arising out of and in the course of his employment with employer. As found, Claimant has failed to establish that his injury had it's origin in Claimant's work related functions. Instead, the facts establish only that Claimant began experiencing pain in his right shoulder while at work on December 30, 2018, but fail to establish that the cause of that pain was related to Claimant's work for employer. As found, Claimant has failed to establish that his work activities aggravated, accelerated, or combined with his pre-existing condition to cause the need for medical treatment.

6. The ALJ recognizes that Claimant argued at hearing that the purpose of the Workers' Compensation Act indicates that facts should be construed liberally in favor of the injured workers to ensure that they receive the benefits they are entitled to

under the Act. However, this recitation of the law is incorrect. Facts involving the compensability of a claim cannot be interpreted liberally in favor of an injured worker or the employer.

7. Due to the fact that Claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with employer, Claimant's claim for benefits must be denied.

ORDER

It is therefore ordered that:

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

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

DATED: March 31, 2021

Keith E. Mottram

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

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that she suffered compensable injuries during the course and scope of her employment with Employer on January 26, 2018.

2. Whether Claimant has established by a preponderance of the evidence that she received reasonable, necessary and causally related medical treatment for her January 26, 2018 injuries.

3. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive Temporary Partial Disability (TPD) benefits for the period January 26, 2018 through February 13, 2018.

4. A determination of Claimant's Average Weekly Wage (AWW).

FINDINGS OF FACT

1. Claimant worked for Employer as a Trimmer. Claimant's jobs duties involved trimming the tails from cows who reached her position on Employer's production line. She also placed a shackle on the cow's leg before the cow continued down the line. Before the cow reaches a trimmer, air has been injected into its head to render the cow senseless. Moreover, an employee has cut the cow's jugular vein to cause the cow to bleed to death. The time between when a cow is rendered senseless and reaching Claimant's position on the production line is approximately five minutes.

2. Claimant worked full time or 40 hours per week for Employer and earned $15.45 per hour. Her wages in the 12 weeks prior to January 26, 2018 totaled $11,251.86 for an Average Weekly Wage (AWW) of $937.66.

3. Claimant explained that on January 26, 2018 she was using scissors to cut off a cow's tail using scissors at work. She detailed that, while the cow was hanging upside down by one leg, it began moving and kicking. Claimant moved backwards away from the cow and struck a sink with her left upper buttock area. She did not fall to the ground and continued to perform her job duties. During her break she reported the incident to her supervisor and went to Employer's nursing station. Claimant received Ibuprofen and an ice pack then completed her work shift.

4. Claimant continued to follow-up at Employer's clinic but did not receive additional treatment. She noted that her hip and lower back symptoms failed to improve. Claimant commented that she was unable to perform her regular job duties because of her symptoms.

5. On February 13, 2018 Claimant visited Carlos Cebrian, M.D. at Employer's clinic. Claimant reported that she suffered injuries at work about two weeks earlier when she was cutting cow tails. She specifically noted that the cow's movements caused her to move backwards and strike her left buttock area against a sink. She did not fall to the ground. Claimant remarked that she was still experiencing pain in the area and bending caused pain into her hamstring. Dr. Cebrian noted that Claimant had full lumbar range of motion and was tender to palpation over the left gluteal muscle. He assessed Claimant with a left buttocks contusion. Dr. Cebrian determined that Claimant had reached Maximum Medical Improvement (MMI) without permanent impairment and released her to regular duty employment.

6. On March 20, 2018 Claimant returned to Dr. Cebrian for an examination. She reported worsening pain in her left hip and buttocks area. Claimant felt that repeated bending at work worsened her symptoms. Dr. Cebrian reiterated that Claimant had left hip/buttock pain and requested x-rays of the "left hip buttocks/coccyx and lumbar spine. He directed Claimant to continue working and recommended reassessment after x-rays.

7. On March 27, 2018 Claimant visited Kathy D'Angelo, M.D. at Employer's clinic. Claimant reported that on January 26, 2018 she struck her buttocks on the corner of a table at work. Dr. D'Angelo noted reports of tenderness to Claimant's left buttock region since the injury. On physical examination Claimant did not exhibit any pain to the area and had minimal complaints. A physical examination of Claimant's lumbar spine did not reveal any pain or tenderness to the sacrum or coccyx.

8. On April 17, 2018 Claimant returned to Dr. D'Angelo for an "evaluation of her lumbar spine issues." Dr. D'Angelo ordered a lumbar MRI due to Claimant's subjective complaints of pain. An April 23, 2018 MRI of her lumbar spine showed degenerative disc disease and facet arthropathy, worst at L4, and grade 1 degenerative anterolisthesis at L4-5 measuring 3 mm. The study also revealed an irregular posterior margin of the distal sacrum that could have been related an old chronic fracture or a subacute, nearly healed fracture.

9. On June 19, 2018 Claimant returned to Dr. D'Angelo for an evaluation. Claimant reported slight pain when she twisted at the waist, but no other difficulties. Dr. D'Angelo released Claimant at MMI to regular duty because she had completed physical therapy for her lumbar spine.

10. Dr. D'Angelo next evaluated Claimant on February 12, 2019 for a January 9, 2019 date of injury. Claimant complained of radiculopathy in the left leg down to the calf. She provided Dr. D'Angelo with several histories of injury. One was that her pain stemmed from a prior injury in 2018 when she hit her left buttock on a sink. Claimant reported her pain improved following the 2018 incident, but worsened in approximately November 2018 when she switched to a different job. The next history Claimant provided was that her pain never improved, but simply worsened. Finally, Claimant reported her pain began three months earlier when she was working in a specific job that required lifting. Dr. D'Angelo remarked that, "[e]very time [Claimant] was asked a question, the history seemingly changed." She commented that there was simply no mechanism of

injury. Dr. D’Angelo could not explain Claimant’s current complaints of radiculopathy in her left leg and down her calf based on a contusion to the left buttock. Claimant’s symptoms also could not be explained based on the lumbar MRI. Although Claimant requested massage therapy, Dr. D’Angelo concluded there was no work-related claim and thus could not refer her for treatment.

11. On April 16, 2019 Claimant returned to Dr. Cebrian for an evaluation. He noted that Claimant had visited Dr. D’Angelo in Employer’s clinic on February 12, 2019. She reported continued left buttock pain and attributed her symptoms to the January 26, 2018 incident when she struck a sink. Dr. Cebrian noted that diagnostic testing had revealed “some irregular findings in the sacrum that were possibly related to a subacute/acute fracture/chronic fracture of the sacrum.” Claimant remarked that walking worsened her condition but working did not cause too much of a problem. After conducting a physical examination Dr. Cebrian diagnosed Claimant with lumbar spine pain. Dr. Cebrian could not state whether Claimant’s symptoms were related to work activities and recommended x-rays of the lumbar spine and sacrum.

12. On April 30, 2019 Claimant again visited Dr. Cebrian. He noted that x-rays had revealed “stable diffuse multilevel degenerative disc space disease with an L4-5 spondylolisthesis which showed mild hypermobility with flexion.” Dr. Cebrian concluded that Claimant’s lumbar radiculopathy in her left leg and x-ray findings with spondylolisthesis were not related to, or aggravated by, her work activities for Employer. He noted that her prior Workers’ Compensation injury had resolved and “she has had no injury or exposure that would explain” her symptoms. Dr. Cebrian discharged Claimant from care for her “non-work-related condition.”

13. Claimant subsequently visited personal physician Elias Hernandez, M.D. for an evaluation. Dr. Hernandez recommended a spinal surgical evaluation with Anant Kumar, M.D. On September 20, 2019 Dr. Kumar performed a surgical evaluation. He noted a two year history of back pain and lower left leg radiculopathy in the five distribution with associated weakness. Claimant completed paperwork at the evaluation. One question asked, “[w]hen did and what caused your symptoms to improve or worsen?” Claimant responded “[a]t work when asked to walk up/down stairs more often approximately a year ago-worsened.”

14. Dr. Kumar ordered a comparison MRI for diagnostic purposes. On September 27, 2019 Claimant underwent a repeat MRI of her lumbar spine. The study revealed moderate central canal stenosis and mild bilateral neural foraminal stenosis at L4-L5, secondary to grade 1/2 anterolisthesis, a mild to moderate circumferential disc bulge, and severe facet arthropathy with ligamentum flavum hypertrophy. Compared with the prior MRI, Claimant had developed a 2 mm anterolisthesis with severe facet arthrosis at the L5-S1 level. The MRI also reflected additional mild diffuse degenerative disc disease and facet arthropathy with mild bilateral neural foraminal stenosis at L3-L4. Dr. Kumar planned a L4-S1 posterior fusion, a L4-S1 decompression, and a L4-5, L5-S1, T1 interbody fusion with posterior instrumentation.

15. On November 13, 2019 Dr. Kumar performed a posterior interbody lumbar fusion on L4-L5 and L5-S1. Postoperative x-rays reflected stability of the L4 through S1 posterior fusion. A July 1, 2020 MRI showed decreased stenosis at L4-L5 and L5-S1.

16. On February 12, 2021 the parties conducted the post-hearing evidentiary deposition of Dr. Kumar. He explained that it was not medically probable that Claimant's condition was caused by backing into a counter and striking her left hip and gluteal region on January 26, 2018. Dr. Kumar acknowledged that it was medically probable that Claimant's description of backing into a sink possibly caused a bruise to her back. However, her condition had returned to baseline. He remarked that most bruises heal uneventfully with Tylenol, Advil and ice to help discomfort. Dr. Kumar agreed with the assessments of Drs. Cebrian and D'Angelo that there was no causal relationship between Claimant's spondylolisthesis and the January 26, 2018 work incident.

17. On December 3, 2020 Claimant underwent an independent medical examination with Allison M. Fall, M.D. She also testified at the hearing in this matter. Based on her review of the records and evaluation of Claimant, Dr. Fall concurred with Drs. Kumar, Cebrian, and D'Angelo that Claimant's current condition is the result of degenerative disc disease in her lumbar spine and the surgery to address her condition. She emphasized that Claimant did not require any medical treatment for the January 26, 2018 work incident. Dr. Fall concluded that Claimant's current symptoms are unrelated to the January 26, 2018, work incident.

18. During the examination Dr. Fall asked Claimant to point to the area where she was injured. Claimant pointed to the upper, outer corner of her buttock on the left side. She did not report striking her lumbar spine on January 26, 2018. Dr. Fall determined that, when Claimant backed up and hit her upper buttock area on a sink on January 26, 2018, she would have suffered a contusion of the soft tissue that would not have changed any underlying pathology in her lumbar spine and hip joints. Claimant's contusion constituted a self-limited condition and resolved over time without treatment.

19. On December 14, 2020 Claimant underwent an independent medical examination with John S. Hughes, M.D. He determined that Claimant sustained a "high energy crush mechanism injury" to her lumbosacral spine on January 26, 2018 that caused her spondylolisthesis to become symptomatic. Dr. Hughes concluded that all of the treatment Claimant has received for her lumbar spine, including her fusion surgery, was related to the January 26, 2018 work incident.

20. Claimant has failed to demonstrate that it is more probably true than not that she suffered compensable injuries during the course and scope of her employment with Employer on January 26, 2018. Initially, Claimant explained that on January 26, 2018 she was using scissors to cut off a cow's tail at work. She detailed that, while the cow was hanging upside down by one leg, it began moving and kicking. Claimant moved backwards away from the cow and struck a sink with her left upper buttock area. She did not fall to the ground and continued to perform her job duties. Although Claimant presented to Employer's on-site clinic on the date of the incident and reported striking her buttock and hip on the edge of a sink, she received only conservative treatment including

ice and over-the-counter anti-inflammatory medications. Claimant returned to work and completed her shift.

21. On February 13, 2018 Claimant visited Dr. Cebrian at Employer's clinic. Claimant reported that she suffered injuries at work about two weeks earlier when she was cutting tails from cows. She remarked that she was still experiencing pain in the area and bending caused pain into her hamstring. Dr. Cebrian diagnosed Claimant with a left buttock contusion. Claimant treated her contusion with non-medical modalities, including ice, heat and over-the-counter painkillers. After performing a physical examination, Dr. Cebrian determined that Claimant had reached MMI without permanent impairment and released her to regular duty employment. His only recommendation was to use ice in the area as needed. He did not mention pain in Claimant's lumbar spine. When Claimant returned to Dr. Cebrian on March 20, 2018 her symptoms involved the lumbar spine. Claimant's treatment from that point forward, including a lumbar MRI, focused on her lumbar spine and not on a contusion to her left hip and buttock that resolved without medical treatment.

22. On April 17, 2018 Claimant visited Dr. D'Angelo at Employer's clinic for an evaluation of her lumbar spine issues. On June 19, 2018 Dr. D'Angelo released Claimant at MMI to regular duty because she had completed physical therapy for her lumbar spine. Claimant returned to Dr. D'Angelo on February 12, 2019 for a January 9, 2019 date of injury. She complained of radiculopathy in the left leg down to the calf and provided several histories of her injury. However, Dr. D'Angelo reasoned that there was simply no mechanism of injury and could not explain Claimant's symptoms of radiculopathy in her left leg down her calf based on a contusion to the left buttock. Claimant's symptoms also could not be explained based on the lumbar MRI. Although Claimant requested massage therapy, Dr. D'Angelo concluded there was no work-related claim and thus could not refer her for treatment. On April 30, 2019 Dr. Cebrian noted that x-rays had revealed "stable diffuse multilevel degenerative disc space disease with an L4-5 spondylolisthesis which showed mild hypermobility with flexion." Dr. Cebrian concluded that Claimant's lumbar radiculopathy in her left leg and x-ray findings with spondylolisthesis were not related to, or aggravated by, her work activities for Employer. He noted that her prior Workers' Compensation injury had resolved and "she has had no injury or exposure that would explain" her symptoms. Dr. Cebrian discharged Claimant from care for her "non-work-related condition."

23. Claimant was subsequently diagnosed with significant degenerative lumbar pathology. Dr. Kumar noted that Claimant had developed a 2 mm anterolisthesis with severe facet arthrosis at the L5-S1 level. The MRI also reflected additional mild diffuse degenerative disc disease and facet arthropathy with mild bilateral neural foraminal stenosis at L3-L4. On November 13, 2019 Dr. Kumar performed a posterior interbody lumbar fusion on L4-L5 and L5-S1.

24. Dr. Kumar explained that it was not medically probable that Claimant's lumbar spine condition was caused by backing into a counter and striking her left hip and gluteal region on January 26, 2018. Although he acknowledged that it was medically probable that Claimant's description of backing into a sink possibly caused a bruise to her

back, Claimant’s condition had returned o baseline. He remarked that most bruises heal uneventfully with Tylenol, Advil and ice to help with discomfort. Dr. Kumar agreed with the assessments of Drs. Cebrian and D’Angelo that there was no causal relationship between Claimant’s spondylolisthesis and the January 26, 2018 work incident. Moreover, Dr. Fall concurred with Drs. Kumar, Cebrian, and D’Angelo that Claimant’s current condition was the result of degenerative disc disease in her lumbar spine and the surgery to address her condition. She emphasized that Claimant did not require any medical treatment for the January 26, 2018 work incident. Notably, Drs. Kumar and Fall persuasively explained that Claimant’s buttock contusion at work was self-limiting and resolved with the passage of time. In fact, Claimant continued to work her regular shift without restrictions after the incident until undergoing surgery to address her degenerative disc disease.

25. In contrast, Dr. Hughes determined that Claimant sustained a “high energy crush mechanism injury” to her lumbosacral spine on January 26, 2018 that caused her spondylolisthesis to become symptomatic. Dr. Hughes concluded that all of the treatment Claimant has received for her lumbar spine, including her fusion surgery, was related to the January 26, 2018 work incident. However, Dr. Hughes failed to explain how striking her buttock and hip on the edge of a sink caused Claimant to suffer a “high energy crush injury.” Based on a review of the medical records and persuasive medical opinions of Drs. Cebrian, D’Angelo, Kumar and Fall, Claimant did not likely suffer an injury requiring medical treatment, resulting in lost time or permanent physical impairment on January 26, 2018. Moreover, Claimant has failed to demonstrate that she aggravated a pre-existing condition when she bumped into a sink while backing away from a cow carcass. Accordingly, Claimant’s claim for Workers’ Compensation benefits is denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

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

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.,* W.C. No. 4-650-711 (ICAO, Feb. 15, 2007); *David Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

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

7. The provision of medical care based on a claimant's report of symptoms does not establish an injury but only demonstrates that the claimant claimed an injury. *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020). Moreover, a referral for medical care may be made so that the respondent would not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id.* Because a physician provides diagnostic testing, treatment, and work restrictions based on a claimant's reported symptoms does not mandate that the claimant suffered a compensable injury. *Fay v. East Penn manufacturing Co., Inc.*, W.C. No. 5-108-430-001 (ICAO, Apr. 24,

2020); *see Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997) ("right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment"). While scientific evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory supporting compensability when making a determination. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020).

8. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she suffered compensable injuries during the course and scope of her employment with Employer on January 26, 2018. Initially, Claimant explained that on January 26, 2018 she was using scissors to cut off a cow's tail at work. She detailed that, while the cow was hanging upside down by one leg, it began moving and kicking. Claimant moved backwards away from the cow and struck a sink with her left upper buttock area. She did not fall to the ground and continued to perform her job duties. Although Claimant presented to Employer's on-site clinic on the date of the incident and reported striking her buttock and hip on the edge of a sink, she received only conservative treatment including ice and over-the-counter anti-inflammatory medications. Claimant returned to work and completed her shift.

9. As found, on February 13, 2018 Claimant visited Dr. Cebrian at Employer's clinic. Claimant reported that she suffered injuries at work about two weeks earlier when she was cutting tails from cows. She remarked that she was still experiencing pain in the area and bending caused pain into her hamstring. Dr. Cebrian diagnosed Claimant with a left buttock contusion. Claimant treated her contusion with non-medical modalities, including ice, heat and over-the-counter painkillers. After performing a physical examination, Dr. Cebrian determined that Claimant had reached MMI without permanent impairment and released her to regular duty employment. His only recommendation was to use ice in the area as needed. He did not mention pain in Claimant's lumbar spine. When Claimant returned to Dr. Cebrian on March 20, 2018 her symptoms involved the lumbar spine. Claimant's treatment from that point forward, including a lumbar MRI, focused on her lumbar spine and not on a contusion to her left hip and buttock that resolved without medical treatment.

10. As found, on April 17, 2018 Claimant visited Dr. D'Angelo at Employer's clinic for an evaluation of her lumbar spine issues. On June 19, 2018 Dr. D'Angelo released Claimant at MMI to regular duty because she had completed physical therapy for her lumbar spine. Claimant returned to Dr. D'Angelo on February 12, 2019 for a January 9, 2019 date of injury. She complained of radiculopathy in the left leg down to the calf and provided several histories of her injury. However, Dr. D'Angelo reasoned that there was simply no mechanism of injury and could not explain Claimant's symptoms of radiculopathy in her left leg down her calf based on a contusion to the left buttock. Claimant's symptoms also could not be explained based on the lumbar MRI. Although Claimant requested massage therapy, Dr. D'Angelo concluded there was no work-related claim and thus could not refer her for treatment. On April 30, 2019 Dr. Cebrian noted that

x-rays had revealed "stable diffuse multilevel degenerative disc space disease with an L4-5 spondylolisthesis which showed mild hypermobility with flexion." Dr. Cebrian concluded that Claimant's lumbar radiculopathy in her left leg and x-ray findings with spondylolisthesis were not related to, or aggravated by, her work activities for Employer. He noted that her prior Workers' Compensation injury had resolved and "she has had no injury or exposure that would explain" her symptoms. Dr. Cebrian discharged Claimant from care for her "non-work-related condition."

11. As found, Claimant was subsequently diagnosed with significant degenerative lumbar pathology. Dr. Kumar noted that Claimant had developed a 2 mm anterolisthesis with severe facet arthrosis at the L5-S1 level. The MRI also reflected additional mild diffuse degenerative disc disease and facet arthropathy with mild bilateral neural foraminal stenosis at L3-L4. On November 13, 2019 Dr. Kumar performed a posterior interbody lumbar fusion on L4-L5 and L5-S1.

12. As found, Dr. Kumar explained that it was not medically probable that Claimant's lumbar spine condition was caused by backing into a counter and striking her left hip and gluteal region on January 26, 2018. Although he acknowledged that it was medically probable that Claimant's description of backing into a sink possibly caused a bruise to her back, Claimant's condition had returned o baseline. He remarked that most bruises heal uneventfully with Tylenol, Advil and ice to help with discomfort. Dr. Kumar agreed with the assessments of Drs. Cebrian and D'Angelo that there was no causal relationship between Claimant's spondylolisthesis and the January 26, 2018 work incident. Moreover, Dr. Fall concurred with Drs. Kumar, Cebrian, and D'Angelo that Claimant's current condition was the result of degenerative disc disease in her lumbar spine and the surgery to address her condition. She emphasized that Claimant did not require any medical treatment for the January 26, 2018 work incident. Notably, Drs. Kumar and Fall persuasively explained that Claimant's buttock contusion at work was self-limiting and resolved with the passage of time. In fact, Claimant continued to work her regular shift without restrictions after the incident until undergoing surgery to address her degenerative disc disease.

13. As found, in contrast, Dr. Hughes determined that Claimant sustained a "high energy crush mechanism injury" to her lumbosacral spine on January 26, 2018 that caused her spondylolisthesis to become symptomatic. Dr. Hughes concluded that all of the treatment Claimant has received for her lumbar spine, including her fusion surgery, was related to the January 26, 2018 work incident. However, Dr. Hughes failed to explain how striking her buttock and hip on the edge of a sink caused Claimant to suffer a "high energy crush injury." Based on a review of the medical records and persuasive medical opinions of Drs. Cebrian, D'Angelo, Kumar and Fall, Claimant did not likely suffer an injury requiring medical treatment, resulting in lost time or permanent physical impairment on January 26, 2018. Moreover, Claimant has failed to demonstrate that she aggravated a pre-existing condition when she bumped into a sink while backing away from a cow carcass. Accordingly, Claimant's claim for Workers' Compensation benefits is denied and dismissed.

ORDER

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

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

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

DATED: March 31, 2021.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-115-274-001

ISSUES

I. Whether Landow Performance invoices for services dated October 28, 29, 30, 31, 2019 and November 1, 2019 were for reasonable, necessary, and related medical benefits to Claimant's work injury and thus are the responsibility of Respondents for payment?

II. Whether maintenance medical benefits are reasonable, necessary, and related to Claimant's work injury?

III. Whether maintenance medical treatment from Sports Rehab LA is reasonable, necessary, and related to Claimant's admitted industrial injury?

IV. Whether Claimant sustained permanent disfigurement because of his work injury.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. On May 13, 2019, Claimant sustained an admitted work-related injury while working for Employer as a professional football player. **Ex. K:25**. He was participating in drills that involved a change of direction. **Ex. C:10**. He went from back pedaling to rapidly accelerating forward and felt a pop in the back of his left heel and calf, which was an Achilles tendon tear. **Exs. A:1, A:5, C:10**.
2. On the date of his injury, Claimant saw the team physician, Martin Boublik, M.D. **Ex. C:10**.
3. Dr. Boublik referred Claimant to Joshua A. Metzl, M.D., for surgical treatment of his injury.
4. On May 15, 2019, Dr. Metzl performed a left Achilles tendon repair. **Ex. D:11**.
5. On June 19, 2019, Claimant began working with a team trainer and started a rehabilitation program for his Achilles injury at the [Redacted]' - Employer's - strength training facility.
6. On September 12, 2019, Dr. Boublik documented Claimant was doing well. He noted Claimant was building strength and increasing his activity level. Lastly, he indicated Claimant was going to begin a more aggressive physical therapy program.
7. On October 24, 2019, Claimant was advised by Employer's head trainer, Steve Antonopulos, that he could no longer perform his rehabilitation at Employer's facility. Therefore, Claimant went to Landow Performance to complete his rehabilitation.

8. Claimant continued his rehabilitation program for his work injury at Landow Performance and attended 5 rehabilitation sessions on October 28, 2019, October 29, 2019, October 30, 2019, October 31, 2019, and November 1, 2019 at a cost of $75.00 per session. **Ex. 6:12.** However, because Claimant was required to obtain and continue his rehabilitation treatment on his own, there is no indication Claimant or Landow Performance was informed by Respondents where to send the bills for his ongoing rehabilitation treatment that was reasonable and necessary for Claimant to reach MMI.

9. On October 31, 2019, Dr. Metzl recommended that Claimant participate in "performance strength training with a strength coach in order to continue rehab in conjunction with physical therapy."

10. On January 9, 2020, Claimant returned to Dr. Metzl. At this appointment, Dr. Metzl concluded Claimant was doing quite will. He noted Claimant had been increasing his activity level and had been diligent with his therapy. Dr. Metzl further noted that Claimant was 8 months post-surgery and cleared to play football. He concluded that:

    > At this point he has made tremendous progress. He is fit to play professional football. I have cleared him from an Achilles perspective to resume any activity as tolerated. ***He will see me back on as as-needed basis***. (Emphasis added.) **Ex. 4:6.**

11. Based on Dr. Metzl's January 9, 2020 report, it was concluded that Claimant reached MMI as of January 9, 2020. As a result, on January 9, 2020, Dr. Metzl concluded Claimant should be allowed the opportunity to return for future medical treatment on an as needed basis should Claimant need additional medical treatment to relieve Claimant from the effects of his work injury, to maintain maximum medical improvement, or to assess a possible increase in symptoms. Thus, although a specific course of treatment was not recommended, Dr. Metzl did state that Claimant should be allowed to return for additional medical treatment if needed. As a result, Dr. Metzl's statements equate to a recommendation that Claimant be provided a general award of maintenance medical treatment as of January 9, 2020, which is the date Claimant was placed at MMI.

12. Once Claimant was no longer allowed to train in Employer's facility, he returned to his home in California. Claimant was initially unable to continue training due to closing of facilities following the start of the COVID pandemic.

13. Claimant, however, re-started his rehabilitation and strengthening for his Achilles injury in approximately June 2020. At that time, Claimant still had pain in the region of his left Achilles, loss of motion/tightness and weakness with swelling after activity. Moreover, Claimant had not regained full muscle mass in his left calf following his post-surgery atrophy.

14. Claimant started rehabilitation and strengthening at the Sports Rehab LA facility in California. Claimant described strengthening and mobility exercises, as well as medical treatment including electrical stimulation, ultrasound, manual stretching and

massage following his exercises to address pain, tightness and swelling of his left Achilles region. Claimant testified this treatment allowed him to recover from his work-out and allowed him to perform his rehabilitation exercises 4-5 days per week and maximize the benefits from strengthening and agility exercises.

15. Claimant, however, also engaged in overall strengthening and conditioning at the Sports Rehab LA facility in order to be fit to play professional football. Moreover, the treatment records from Sports Rehab LA were not admitted into evidence. As a result, the record was not fully developed regarding the amount of treatment directed specifically towards Claimant's Achilles injury. Based on Claimant's testimony, it appears that the treatment directed towards Claimant's Achilles was a small portion of Claimant's overall strengthening and conditioning program at Sports Rehab LA that was required to maintain his ability to play professional football. Plus, Claimant failed to provide any prescription outlining specific maintenance treatment for his Achilles injury and the provision of such treatment at Sports Rehab LA. Therefore, based on the record, the ALJ is unable to determine whether any of the treatment Claimant received at Sports Rehab LA is reasonable, necessary, and related maintenance treatment to relieve Claimant from the effects of his work injury.

16. On July 16, 2020, Dr. Boublik completed a WC164 form, stating that Claimant reached maximum medical improvement ("MMI") on January 9, 2020, the date he was last seen by Dr. Metzl, with no permanent impairment. **Exs. F:15; 3:5**.

17. Shortly thereafter, on July 27, 2020, Dr. Boublik examined Claimant for a 2020 preseason physical examination. **Ex. G:17**. He authored a narrative report stating that Claimant's left Achilles repair was fully recovered and that Claimant was fit to play professional football. **Ex. G:16**.

18. On July 28, 2020, the day after Dr. Boublik stated Claimant had fully recovered and was fit to play profession football, Claimant was terminated by the [Redacted]. **Ex. J:24**. Since then, as Claimant testified, he has attended multiple try-outs to be signed to another professional football team. He continues to maintain his body in professional-ready football shape in hopes of playing professional football.

19. On August 7, 2020, and despite Dr. Metzl stating that Claimant should be allowed to return on an as needed basis, Respondents filed a Final Admission of Liability denying maintenance medical benefits and admitting to no impairment. **Ex. K:27**.

20. On October 21, 2020, Claimant filed an Application for Hearing and endorsed the issue of "Medical Benefits, Authorized provider, Reasonably necessary, and Maintenance Medical Treatment."

21. Respondents filed a Response to Application for Hearing.[1] Respondents did not, however, endorse any affirmative defenses.

22. On December 23, 2020, Claimant attended a Respondent-sponsored independent medical examination ("IME") by video with Barry A. Ogin, M.D. **Exs. A-B**. Dr. Ogin

[1] Although Respondents' Response indicates it is in response to Claimant's October 21, 2020, Application for Hearing, the Response is dated as being mailed/served on October 20, 2020 – the day before Claimant filed his Application. Therefore, the exact date the Response was filed cannot be discerned from the record. Regardless, the date it was filed is irrelevant to any issue before the court.

reported that Claimant made various different statements regarding the focus of his workouts, but admitted, “that most of the training course is whole body training,” (**Ex. A:7**) and “even if he had never had the ankle injury, *he would still be doing the strength training and conditioning at the same rate on an independent basis* regardless.” (**Ex:A:8**, emphasis in original). Dr. Ogin agreed with Dr. Boublik, that Claimant is at MMI and does not require formal maintenance care. **Ex. A:9**.

23. At hearing, Claimant testified that he continues to work out 5-days a week and admitted that he never called Dr. Boublik and expressed his opinion that he required additional medical care or treatment. His workouts include speed and powers drills designed to enhance position specific movements, positional workouts to help dial in technique to allow for better on the field transfer, metabolic conditioning specific per position, recovery, and regeneration strategies to help aid in recovery, and corrective exercises, myofascial maintenance strategies, active isolated mobility and muscle activation techniques. He also testified that he has had tendinitis since he was in high school, which required orthotics and shoes consistently.

24. Claimant’s testimony was consistent and supported by the records submitted at hearing. As a result, the ALJ finds Claimant’s testimony to be credible and persuasive.

25. Drs. Boublik and Ogin testified at hearing that the 1-on-1 personal training at Landow Performance on October 28, 2019, October 29, 2019, October 30, 2019, October 31, 2019, and November 1, 2019 that occurred prior to MMI was reasonable, necessary, and related to the work injury, but that Claimant does not require ongoing maintenance medical care related to this claim. They agreed that Claimant should continue to physically exercise to maintain his body in professional level football shape, but that the training is not related to his Achilles injury despite that there may be a portion of that training that includes the Achilles. Dr. Ogin testified that Claimant may be, in fact, overtraining, causing whatever discomfort he may physically have. Further, they agreed that at the time of MMI, Claimant did not have an examination that revealed a tendinitis issue that would result in the need for orthotics, shoes, or ongoing care and treatment.

26. The ALJ credits that portion of Dr. Ogin’s testimony that concluded the treatment Claimant received at Landow Performance was reasonable, necessary, and related to treat Claimant from the effects of his work injury. The ALJ also credits that portion of Dr. Ogin’s testimony that Claimant may be overtraining and developing a tendinitis. The fact that Claimant might be overtraining supports a finding that Claimant needs maintenance medical treatment to relieve him from the effects of his work injury and maintain MMI. In essence, it is the lack of medical guidance that is resulting in Claimant overtraining and possibly developing tendonitis. As indicated by Dr. Metzl on January 9, 2020, when Claimant was placed at MMI, Claimant should be able to see him “on as as-needed basis.” The ALJ finds that Claimant needs to see Dr. Metzl, or another physician, so that a physician can guide Claimant’s conditioning in a manner that allows Claimant to maintain MMI and relieve him from the effects of his work injury.

27. In addition, Dr. Boublik testified that Claimant may never regain the bulk he lost in his calf. Claimant, however, testified that he is trying to rebuild his muscle and bulk in his calf. This type of medical "advice" provided at the hearing is the type of maintenance medical treatment Claimant requires to maintain MMI and relieve him from the effects of his injury. In other words, Claimant needs maintenance medical treatment provided by a physician to guide his ongoing workouts in a manner that prevents overtraining, reinjury, and allows him to maintain his MMI status.

28. Due to his surgery, Claimant sustained a scar that is disfiguring on his left foot/ankle. Based on the photographs submitted by Claimant, the scar is in the shape of the letter J. The skin color of the scar is darker than the surrounding skin. The scar is approximately 3 inches long with the hook of the J being approximately 1 ½ inches long. The width of the scar is approximately ½ of an inch. Therefore, the total scar is approximately 4 ½ inches long by ½ inch wide.

CONCLUSIONS OF LAW

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

General Provisions

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

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Landow Performance invoices for services dated October 28, 29, 30, 31, 2019 and November 1, 2019 were for reasonable, necessary, and related medical benefits to Claimant's work injury and thus are the responsibility of Respondents for payment?

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Industrial Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997). The determination of whether services are medically necessary, or incidental to obtaining such service, is a question of fact for the ALJ. *Bellone v. Industrial Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997).

As found, On May 15, 2019, Dr. Metzl performed a left Achilles tendon repair. On June 19, 2019, Claimant began working with a team trainer and started a rehabilitation program at the Employer's strength training facility. On September 12, 2019, Dr. Boublik documented Claimant was doing well. He noted Claimant was building strength and increasing his activity level. Lastly, he indicated Claimant was going to begin a more aggressive physical therapy program. On October 24, 2019, Claimant was advised by Employer's head trainer, Steve Antonopulos, that he could no longer perform his rehabilitation at Employer's facility. Therefore, Claimant went to Landow Performance to complete his rehabilitation.

As found, Claimant continued his rehabilitation program at Landow Peformance and attended 5 rehabilitation sessions on October 28, 2019, October 29, 2019, October 30, 2019, October 31, 2019, and November 1, 2019 at a cost of $75.00 per session. Ex. 6:12. Moreover, on October 31, 2019, Dr. Metzl recommended that Claimant participate in "performance strength training with a strength coach in order to continue rehab in conjunction with physical therapy."

Drs. Boublik and Ogin testified at hearing that the 1-on-1 personal training at Landow Performance on October 28, 2019, October 29, 2019, October 30, 2019, October 31, 2019, and November 1, 2019 that occurred prior to MMI was reasonable, necessary, and related to the work injury - and the ALJ credits that portion of their testimony.

Respondents contend, in their post-hearing proposed order, that even though the treatment is reasonable, necessary, and related, they are not responsible for the treatment because the services were not properly or timely billed pursuant to W.C.R.P. 16-8-1 and 16-8-2(A).

W.C.R.P. 16-8-1 governs what a provider is required to do when seeking reimbursement – without a hearing. As a result, Claimant is not required to submit billing records consistent with W.C.R.P. 16-8-1 for an ALJ to find a Respondent liable for the underlying treatment.

Moreover, the billing requirements of W.C.R.P. 16-8-2(A), which requires a provider to submit bills within 120 days, is also inapplicable for several reasons. First, the provider is not seeking reimbursement – Claimant is. Second, even if W.C.R.P. 16-8-2(A) is applicable, such Rule is an affirmative defense and it was not raised by Respondents prior to the hearing. Rules of this type are analogous to statutes of limitation which create affirmative defenses to a claim for benefits. Affirmative defenses are waived unless raised prior to the hearing. *Kersting v. Industrial Commission*, 39 Colo.App. 297, 567 P.2d 394 (1977). Only with advance notice can the party against whom a defense is raised prepare to meet the asserted bar. *Kersting v. Industrial Commission*, 567 P.2d at 396; *Reese v. Cripple Creek Mountain Estates Country Club*, Colo.App. No. 91CA0291, November 29, 1991 (not selected for publication). *Grubbs v. Simmons Elec*., W.C. 3-859-532, 3-905-277, 3-979-946, (Dec. 5, 1991). Third, there is no indication Respondents complied with Rule 16-8-2(C) and advised Claimant or Landow Performance that they were covering the expense and where to send the bills. Fourth, Respondents' interpretation appears inconsistent with C.R.S. 8-42-101(6) which would appear to allow Claimant to merely pay the Landow Performance bills and then seek reimbursement from Respondents - without any limitation of the billing limitations set forth in W.C.R.P. 16-8-1 and 16-8-2(A).

As a result, the ALJ finds and concludes that Claimant established by a preponderance of the evidence that Respondents are liable for the Landow Performance bills.

II. Whether maintenance medical benefits are reasonable, necessary, and related to Claimant's work injury?

The need for medical treatment may extend beyond the point of maximum medical improvement where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999). The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003).

As found, on January 9, 2020, Dr. Wetzl evaluated Claimant. It was concluded that as of this appointment, Claimant reached MMI. Dr. Wetzl also indicated Claimant should be able to see him on "an as-needed basis." The only way Claimant can see Dr. Wetzl on an "as-needed" basis after being placed at MMI is if Claimant is provided a general award of maintenance medical benefits.

Plus, the ALJ credited that portion of Dr. Ogin's testimony that concluded Claimant may be overtraining and developing a tendinitis. The fact that Claimant might be overtraining supports a finding that Claimant needs maintenance medical treatment to relieve him from the effects of his work injury and maintain MMI. In essence, it is the lack of medical guidance that is resulting in Claimant overtraining and possibly developing tendonitis. As indicated by Dr. Metzl on January 9, 2020, when Claimant was placed at MMI, Claimant should be able to see him "on as as-needed basis." The ALJ finds that Claimant needs to see Dr. Metzl, or another physician, so that a physician can guide Claimant's conditioning in a manner that allows Claimant to maintain MMI and relieve him from the effects of his work injury.

Moreover, as found, according to Dr. Boublik, Claimant may never regain the bulk he lost in his calf. Claimant, however, testified that he is trying to rebuild his muscle and bulk in his calf. This type of medical "advice" provided at the hearing by Dr. Boublik is the type of maintenance medical treatment Claimant requires to maintain MMI and relieve him from the effects of his injury. In other words, and Claimant needs maintenance medical treatment from a physician to guide his ongoing workouts in a manner that prevents overtraining, reinjury, and allows him to maintain his MMI status.

Therefore, the ALJ finds and concludes that Claimant established by a preponderance of the evidence that he is entitled to a general award of maintenance medical treatment.

III. Whether maintenance medical treatment from Sports Rehab LA is reasonable, necessary, and related to Claimant's admitted industrial injury?

Respondents are liable to provide maintenance medical treatment that is reasonable and necessary relieve the effects of the industrial injury or maintain MMI. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant has proven that specific treatment is reasonable and necessary to maintain her condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

As found, the majority of the treatment Claimant received at Sports Rehab LA is related to his general and overall conditioning to enable Claimant to play professional football. There is, however, a component of his treatment at Sports Rehab LA that is directed towards relieving him from the effects of his work injury and maintaining MMI. The record, however, was not fully developed regarding this issue so that only a portion of that treatment can be ordered. Therefore, this issue is reserved for future determination.

IV. Whether Claimant sustained permanent disfigurement as a result of his work injury.

The ALJ finds and concludes that because of his work injury, Claimant sustained a surgical scar that is disfiguring on his left foot/ankle. Based on the photographs submitted by Claimant, the scar is in the shape of the letter J. The skin color of the scar is darker than the surrounding skin. The scar is approximately 3 inches long with the hook of the scar – the J portion - being approximately 1 ½ inches long. The width of the scar is approximately ½ of an inch. Therefore, the total scar is approximately 4 ½ inches long by ½ inch wide.

As a result, Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation. Section 8-42-108 (1), C.R.S. The ALJ concludes that Claimant shall be awarded $2,000 for disfigurement benefits.

ORDER

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

1. Respondents shall pay the Landow Performance invoices for the following dates of service:
   a. October 28, 2019.
   b. October 29, 2019.
   c. October 30, 2019.
   d. October 31, 2019.
   e. November 1, 2019.
2. Claimant is awarded a general award of maintenance medical benefits.
3. Whether maintenance medical treatment from Sports Rehab LA is reasonable, necessary, and related to Claimant’s admitted industrial injury is reserved for future determination.
4. Respondents shall pay Claimant $2,000.00 in disfigurement benefits. The Respondents shall, however, be given credit for any amount previously paid for disfigurement in connection with this claim.
5. Any other issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: March 18, 2021.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant proved by a preponderance of the evidence she sustained a compensable industrial injury on January 29, 2019.

II. If Claimant has proven a compensable injury, whether Claimant proved by a preponderance of the evidence that the medical treatment she received from Concentra was reasonable and necessary to cure and relieve Claimant from the effects of the industrial injury.

III. If Claimant has proven a compensable injury, determination of authorized provider.

FINDINGS OF FACT

1. Claimant is a 40-year-old female who worked for Employer as a teaching instructor. Claimant was also in a doctorate program.

2. Claimant has a long-standing history of adjustment disorder with mixed anxiety and depressed mood, bipolar II disorder, ADHD and borderline personality disorder. Claimant's primary care records with Kaiser Permanente document headache and light sensitivity issues, left hip, left shoulder, and neck complaints in 2012; left shoulder complaints in 2014; and blurry vision in 2016-2018. As of January 21, 2019, Claimant was continuing to treat for anxiety and depression. Her primary care physician at Kaiser, Brownie K. Flesche, M.D., noted Claimant's reports of stress, difficulty focusing and concentrating. Dr. Flesche noted Claimant was suffering from caregiver stress, as Claimant was caring for her husband, who is a double amputee.

3. On January 29, 2019, Claimant slipped and fell on ice while crossing the street from the employee parking lot to her work location on campus. The incident occurred at approximately 8:30 a.m. Claimant testified she landed on her back and left side, and does not recall hitting her head. Claimant got up and proceed to her work location, where she notified Employer of the incident.

4. Claimant subsequently presented to Valerie Skvarca, PA-C at Concentra at 10:53 a.m. that morning. Claimant reported slipping and falling straight back, hitting the back of her head, left elbow and low back. Claimant denied loss of consciousness but stated she was unable to get up right away due to dizziness. She complained of pain in her left shoulder, left elbow, left lower back radiating into her left hip, headaches, dizziness, and confusion. On examination, Claimant's head/face was noted to be normocephalic and atraumatic with no external swelling and no evidence of trauma. Examination of the left shoulder, left upper extremity, left hip and lumbosacral spine

were normal. PA-C Skvarca noted impaired attention, impaired concentration, impaired judgment and impaired thought initiation, decreased responsiveness, and slow speech. PA-C Skvarca gave an assessment of closed head injury and contusions of the left elbow, left shoulder, and lumbar spine. She referred Claimant to the emergency department for an emergent neurology evaluation and head CT.

5. Claimant was transported to Porter Adventist Hospital by the paramedics who noted a Glasgow Coma score of 15.

6. Claimant arrived at Porter Adventist Hospital at 12:22 p.m. Her Glasgow Coma score was again noted to be 15. The medical record documents Claimant reported slipping and falling on her left side and back and hitting her head but denied loss of consciousness; however, the triage notes state Claimant denied striking her head. Claimant complained of headache, nausea, fatigue, resolved confusion, neck and lower back pain. On examination, diffuse tenderness in the midline and left lateral paraspinal soft tissue of the neck was noted, as well as midline discomfort in the lumbar region and lateral soft tissue tenderness. Neurologic and psychologic examination was normal with "no appreciable traumatic amnestic properties or other altered cognition." Claimant's eyes were normal and her head was atraumatic. There was no evidence of scalp hematoma, contusion, or depression. A CT scan of the head and x-rays of the cervical and lumbar spine demonstrated no acute findings. Claimant was diagnosed with a concussion without loss of consciousness and muscle strain, prescribed medication for nausea, pain and muscle relaxation, and advised to rest for 48 hours and avoid exertion, computer and screen time.

7. Claimant continued to treat with Concentra. On January 31, 2019, Claimant saw Michael Roberts, PA and reported some improvement, but occasional photophobia and dizziness, resolved headaches, and continued lower back pain. Physical examination was normal with the exception of tenderness at the coccygeal area. No findings were noted regarding the cervical spine. PA Roberts noted slow speech and slowness in serial subtraction, but normal judgment, insight and memory. Claimant was referred to physical therapy for a neck strain. At physical therapy on February 4, 2019, Claimant reported increased pain and discomfort into the left shoulder, left neck and head pain, as well as difficulty engaging in mentally taxing activities and dizziness with increased head movements due to medication use. The physical therapist noted Claimant's signs and symptoms were consistent with acute to subacute post cervical/shoulder injury after fall. She noted Claimant's shoulder range of motion was normal but painful, and cervical range of motion was increased but limited into right side bending with discomfort. She further noted negative symptoms associated with any severe ligamentous injury to the cervical spine, but hypersensitivity into left lateral cervical musculature with palpation.

8. On February 6, 2019, Claimant reported to PA-C Skvarca having difficulties focusing at work, but believed her cognitive deficits may be due to an increase in her pre-existing anxiety. PA-C Skvarca noted that Claimant's psychosocial factors may contribute to her lack of progress. She encouraged Claimant to contact her psychiatrist.

9. On February 12, 2019, Claimant attended vestibular therapy with complaints of issues with concentration, feeling woozy, difficulty reading music, a throbbing sensation in the left eye, ear popping, light and sound sensitivity, eye pressure when reading, and vertigo. The therapist noted Claimant reported previous impairment to affected area with functional deficits. Claimant reported that her psychological medications made her slightly dizzy when she first started taking it. Visual convergence was noted.

10. On February 13, 2019, Claimant saw Stephen Danahey, M.D. at Concentra with reports of increased pain. Claimant reported that she did not feel she hit her head during the January 29, 2019 fall. She reported feeling “awful”, and complaining of a sensation of a "twisting knife in her right ear" and like there is "something sticking in her left eye". Claimant further reported that her posterior neck felt very tense and that she felt like her spine was bruised. She stated she was having a very difficult time trying to teach, with issues focusing and making decisions. Physical examination was normal. Dr. Danahey specifically noted no spasms, normal sensation, normal grip and negative spurling regarding the cervical spine.

11. Dr. Danahey wrote, “There are certainly some red flags here, but having said that her presentation and demeanor appear genuine. It sounds like she is having a very difficult time at work. I will see if being away from teaching for a bit results in any functional gain on her part.” (Ex. 4, p. 53-54).

12. On February 25, 2019, Claimant reported to Dr. Danahey experiencing anxiety over grading deadlines. Examination of the cervical and lumbar spine revealed tenderness with full range of motion. No spasms were noted. He referred added adjustment reaction to Claimant’s diagnoses and referred her for psychological evaluation with Ron Carbaugh, Psy.D.

13. On February 28, 2019, Claimant reported to Dr. Danahey that her left arm had been “wobbly” and moving spontaneously on its own, for which Dr. Danahey noted he knew no etiology. She reported no other major complaints besides constant fatigue, and noted she was going to speak to her psychiatrist to adjust her medications.

14. Claimant first presented to Dr. Carbaugh on February 26, 2019. Dr. Carbaugh tested Claimant and found Claimant’s depression score significantly above the score for the average pain patient, suggesting serious depression. Claimant’s anxiety score was more than the average pain patient’s, while somatization scores were close to the scores of the average pain patient. Dr. Carbaugh opined it is very likely Claimant’s depression is involved in her symptomatology, and noted that efforts for long-term rehabilitation may be hampered by Claimant’s emotional symptoms. He noted Claimant’s reports of other significant stressors in her life, and concluded that Claimant’s emotional distress is not solely attributable to the January 29, 2019 slip and fall. Dr. Carbaugh recommended Claimant undergo biofeedback therapy, follow-up with her personal psychiatrist, and a brief course of pain and adjustment counseling. He cautioned that Claimant’s providers

> [s]hould be aware of the role of psychological and other none-injury related factors impacting her overall presentation, her pain and symptom perception, and response to appropriate medical care. She is the type of patient who will request additional intervention, and have a poor response to treatment, specifically interventional strategies. In sum, in [Claimant's] case more so than generally is the case, treatment should focus on signs and not symptoms. (Ex. G, p.272).

15. At a follow-up evaluation with Dr. Danahey on March 8, 2019, Claimant reported word-finding difficulty, an increase in dizziness, and left arm twitching, which Claimant felt might be a "pain/anxiety feedback loop." Claimant reported experiencing explosive moods. She had uncertainty about whether she was taking her medications too frequently.

16. On March 8, 2019, Claimant sought treatment at St. Joseph's hospital with complaints of paresthesia, headache, persistent dizziness and increased anxiety. Examination was negative for any focal neuro deficits. Claimant was given pain medication and discharged.

17. At the request of Claimant, on March 22, 2019, Dr. Danahey drafted a handwritten letter. Dr. Danahey stated Claimant sustained a slip and fall injury on ice and was diagnosed with a closed head injury, multiple musculoskeletal contusions, and an adjustment reaction to her injury with some aggravation of pre-existing emotional and psychological symptoms. He noted Claimant had experienced some difficulty with short-term memory and concentration. He stated that Claimant has been progressing well with treatment, but that her injury had an effect on her ability to teach, attend classes, and complete her coursework. Dr. Danahey concluded, "I think it is reasonable that she has been functionally impaired with respect to her school work, both as an instructor and as a student given her injury. I expect resolution of her injury and resumption of all regular activity within the next several weeks." (Ex 4, p. 78).

18. Claimant began biofeedback therapy with William Beaver, M.A, L.P.C., on March 25, 2019.

19. At a follow-up appointment with Dr. Danahey on April 5, 2019, Dr. Danahey noted Claimant had multiple complaints but acknowledged doing very well overall. She reported that her optometrist had diagnosed her with a convergence disorder. Claimant reported issues with bright lights and screen time. Dr. Danahey referred Claimant for vision/convergence therapy.

20. On May 17, 2019, Dr. Danahey noted Claimant was doing better with therapy but was waiting for her vision therapy to be approved. Claimant reported 4/10 neck pain in posterior neck but only when her eyes are open and she is turning her neck. With her eyes closed there is no discomfort and she has full neck motion. She reported improvement with her headaches, but issues with words. She was exhausted with

teaching and felt overwhelmed. Dr. Danahey added convergence insufficiency and binocular vision disorder with convergence insufficiency to Claimant's diagnoses.

21. On June 10, 2019, Claimant was discharged from biofeedback therapy. Mr. Beaver noted Claimant had made some gains in therapy.

22. On June 12, 2019, Claimant saw Dr. Danahey and reported worsening vision complaints. Dr. Danahey referred Claimant for a neuropsychology evaluation with Kevin Reilly, Psy.D., an ophthalmology evaluation, and a physical medicine and rehabilitation evaluation with John Sacha, M.D.

23. Claimant presented to Dr. Sacha on June 25, 2019. Regarding the mechanism of injury, Dr. Sacha noted Claimant slipped and landed flat on her back. Claimant denied losing consciousness and was unclear if she hit her head. She reported experiencing an acute onset of neck pain, headaches, dizziness, blurry vision, and ringing in the ears as well as some mental fogginess. Claimant reported experiencing pain that was fairly constant in nature and localized to bilateral neck with headaches starting in the occipital area, pain at the periorbital area bilaterally. She further reported intermittent dizziness, intermittent blurry vision, some photophobia, and some problems with concentration and memory. On examination, Dr. Sacha noted Claimant appeared anxious with pressured speech, but good concentration, memory, attention to task, and ability to follow complex commands without difficulty. Examination of the neck showed cervical paraspinal spasm and segmental dysfunction in the mid to upper cervical spine. Deep palpation reproduced Claimant's headaches and dizziness. There was pain with extension and limitations in range of motion. Dr. Sacha's impression was: cervical facet syndrome, posttraumatic in nature; whiplash-associated disorder with symptoms of blurry vision, photophobia, occipital neuralgia, and dizziness; occipital neuralgia; secondary adjustment disorder; no evidence of closed head injury.

24. Dr. Sacha opined that there was no evidence of closed head injury in Claimant's case but that Claimant did sustain a "very simple" whiplash-associated disorder with all the symptoms consistent with an upper cervical whiplash, including the dizziness, blurry vision, ringing in ears, and photophobia. He noted that patients who are bipolar frequently have an increase in anxiety, and difficulty handling the increased stimulation. Dr. Sacha explained that, in patients with bipolar disorder, when cervical spine symptoms improve and are treated, all of the other whiplash symptoms tend to go away, cognition stabilizes, and bipolar symptoms also get back to their baseline levels. Accordingly, Dr. Sacha strongly recommended obtaining a cervical spine MRI and then beginning some chiropractic and acupuncture treatment for symptom control. He strongly recommended against any type of vestibular treatment or optometry treatment, and recommended holding off on neuropsychological testing until Claimant's cervical condition resolved.

25. On July 8, 2019, Dr. Reilly sent a letter to Dr. Danahey stating Claimant had cancelled multiple appointments with him and appeared to be avoiding evaluation.

26. During physical therapy on July 10, 2019, Claimant fell off of a treadmill onto her behind. She experienced some bruising to her right elbow and right knee.

27. On July 16, 2019, Claimant saw Ronald Wise, M.D. at UC Health. Dr. Wise noted Claimant's optometry records revealed problems dating back to January 29, 2016. His assessment was convergence and insufficiency, accommodative insufficiency, and irregular astigmatism of the left eye. He opined that causation as related to the slip and fall accident on January 29, 2019 was uncertain, particularly given Claimant's near vision complaint starting 3.5 years prior.

28. On July 18, 2019, Claimant sought treatment at the emergency department at Sky Ridge Medical Center with complaints of headaches, dizziness, visual changes, blurry vision and left lateral neck pain. Claimant reported falling on ice in January 2019 and falling in physical therapy a week prior. Claimant stated she was unsure if she struck her head. Claimant further reported experiencing worsening head and neck pain after a chiropractic adjustment the day before, and worsening headaches and neck pain after sexual intercourse the night prior. Physical examination was normal. CT scans of the head and neck were negative for acute abnormalities.

29. Claimant returned to Dr. Sacha on July 23, 2019. Dr. Sacha noted that Claimant fell during physical therapy on July 10, 2019 and that the incident, “markedly increased this patient's anxiety, irritability and even felt-lightheaded.” Claimant reported a marked increase in anxiety and confusion, but no specific areas of worsening pain. Dr. Sacha wrote,

> In reviewing this patient's case, the patient's anxiety and mania from her bipolar seems to be very much out of control at this point. This can occur with Whiplash injuries, but more importantly because of the intervening event, the patient's anxiety has gone so high that at this point, she needs med adjustments and an eval with her psychiatrist. All care needs to be on hold because any care would be counterproductive at this point because of this patient being so far so unstable from a psychological standpoint. (Ex. 4, p. 11).

30. On July 24, 2019, Claimant saw her primary care physician, Dr. Flesche, reporting that she had fallen again about a week prior, this time actually hitting her head. Claimant reported needing to ice her neck after the recent fall. Claimant did not report this fall to her workers' compensation providers. Claimant told Dr. Flesche that the recent fall was making her anxiety worse. She indicated that she had an appointment with her psychiatrist to discuss her medication. It was following this event that her medication was increased and she was provided restrictions.

31. On July 31, 2019, Dr. Sacha noted that Claimant's psychiatrist had adjusted her medications and that Claimant was getting back to her baseline of symptoms with far less mania and anxiety. An MRI of the cervical spine showed straightening of her cervical lordosis and minimal degenerative disc disease and facet spondylosis with no

other abnormalities. On examination, Dr. Sacha noted cervical paraspinal spasm, segmental dysfunction in the mid to upper cervical spine, pain with extension and external rotation. Deep palpation reproduced Claimant's occipital neuralgia. He recommended proceeding with a trial of bilateral C2-C5 facet injections, as well as a neuropsychological evaluation.

32. On August 6, 2019 Dr. Sacha sent a request to Insurer for prior authorization of cervical facet injections.

33. On August 14, 2019, Respondents filed a Notice of Contest indicating no injury arose from the work incident.

34. On August 15, 2019, Insurer notified Concentra that liability for the claim was denied and treatment was not authorized.

35. On December 9, 2019, Kathleen D'Angelo, M.D. performed an independent medical examination ("IME") at the request of Respondents. Dr. D'Angelo interviewed and examined Claimant and reviewed Claimant's records dated June 5, 2009 through November 14, 2019. Claimant complained of neck pain and tightness; increased dizziness; headaches; memory loss; depression; anxiety; adjustment disorder; vision issues/double/blurred vision/difficulty tracking; right knee and shoulder pain; fatigue; mood swings; intermittent numbness in left arm; balance issues; vertigo; right elbow and shoulder pain. Dr. D'Angelo noted that the initial records after Claimant's alleged injury disputes the occurrence of any traumatic brain injury ("TBI"). She noted that symptoms of a TBI/concussion are at their worst immediately following a head injury and gradually reduce over time. She noted Claimant reported not striking her head and that Claimant early records documented Claimant was oriented to time, person, event and place, the absence of any, head contusion, a normal Glasgow score of 15/15, and a normal cervical spine exam.

36. Dr. D'Angelo recommended that Claimant undergo evaluation with Kevin Reilly, Psy.D. to allow for better classification of Claimant's claims, in light of the complications of Claimant's bipolar 2 diagnosis and metastasizing complaints. She wrote,

> Ultimately, if the patient's psychometric testing is negative; it is difficult for me to isolate a specific physiological injury. The patient's post fall treatment course was significant for copious subjective complaints but no true objective findings. Her radiological studies were negative and she had normal neurological evaluations; particularly in her post fall course. (Ex. A, p. 61).

37. Claimant presented to Dr. Reilly on December 12, 2019. Dr. Reilly interviewed Claimant, administered multiple neuropsychometric tests, and reviewed records dated April 5, 2019 through December 2, 2019. Claimant reported ongoing symptoms of headaches, neck tightness, vision problems, intermittent dizziness, light and sound sensitivity, fatigue, word finding difficulties, decreased attention and concentration and

short-term memory problems. Dr. Reilly noted Claimant's pre-existing conditions included bipolar II disorder and anxiety. Following his testing, Dr. Reilly concluded,

> The results of this evaluation are strongly indicative of non-organic factors influencing symptom production and/or maintenance. Performance validity testing indicated negative response bias and probable coaching. Symptom validity testing indicates exaggeration and non-credible responding. The patient's description of her slip and fall injury would not predict any long-term neuropsychological sequela. There is no objective data to support the patient's continuing symptoms. There is strong objective data for intentional symptoms magnification. (Ex. B, p. 162).

38. Dr. Reilly noted that Claimant's description [emphasis not added] of her injury is "potentially" consistent with a mild traumatic brain injury, as Claimant reported a head injury in the form of a concussion with no loss of consciousness and some confusion/disorientation. He noted there was no significant identified anterograde or retrograde amnesia, a Glasgow Coma score of 15 at the scene of the injury, and negative brain neuroimaging studies. Dr. Reilly explained that the natural history of a mild TBI/post concussive syndrome is neurocognitive symptoms are worst immediately after, with rapid improvement without any formal treatment interventions. He noted Claimant's clinical course was notable for persistent symptoms in the form of chronic pain, somatic and cognitive symptoms.

39. Dr. Reilly emphasized that "symptom validity measure indicate that self-report (symptoms) are exaggerated. The patient's reported history and symptoms (somatic/cognitive/emotional) must be evaluated considering this exaggeration. Diagnosis and treatment responses need to be based on objective indicators rather than self-report." (Ex. B, p. 162). Dr. Reilly indicated that his testing showed "robust" indication of non-organic factors mediating symptoms production and maintenance. He noted, "Medical documentation indicates a significant history for psychiatric conditions in addition or psychosocial and financial stressors." He indicated that secondary gain plays a significant role in claimant's reported symptoms and that there is no valid objective data to support her chronic mild traumatic brain injury claims. Dr. Reilly diagnosed malingering [as evidenced by medicolegal context of presentation, symptom exaggeration, performance/symptoms invalidity and external incentives]. He opined that Claimant's visual disturbances were a part of Claimant's symptom exaggeration and recommended Claimant's reported visual symptoms be objectively evaluated by an ophthalmologist.

40. On January 4, 2020, Dr. Reilly reviewed additional medical records dated January 29, 2019 through June 12, 2019. He opined that the additional records documented a clinical course of increasing symptoms and disability, which he noted is a strong indication for secondary gain factors. He further noted that Claimant's providers extensively relied on Claimant's self-report. Dr. Reilly again opined that Claimant's clinical course is consistent with the diagnosis of malingering.

41. On January 7, 2020, Dr. Reilly testified at a pre-hearing deposition as an expert in neuropsychology and clinical psychology. Dr. Reilly explained that he used standard protocols and guidelines for the administration of Claimant's tests and the interpretation of Claimant's test results. He testified that redundant measures are built into the tests which reveal if there is a pattern of performance that is consistent or inconsistent with a condition. He explained that Claimant did very well on one of the performance validity tests while failing some of the other performance validity tests. Dr. Reilly stated that Claimant's

> [c]linical presentation, as well as the symptom validity testing, indicates symptom exaggeration. What that means is that the symptoms are being exaggerated across the board, so the patient self-report is exaggerated. And so when you look at medical records and the person's history over time, you need to do so with the understanding that a lot of these records are documented based solely on the patient's self-report, which the test indicates is unreliable and invalid. (Reilly Depo. P. 13, l. 2-11; P. 18, l. 2-4).

42. Dr. Reilly testified it was "potentially possible" Claimant suffered a concussion, but if so, the concussion would be very mild. He explained that the medical records did not document any objective indicators of a concussion of any significance, again noting the Glasgow score of 15 and lack of complaints of memory issues or physical signs of a traumatic injury in the initial medical records. Dr. Reilly explained that Claimant's pattern of increasing symptoms over time strongly indicate secondary gain factors. Dr. Reilly noted the principle of "worse first" with respect to mild traumatic brain injuries. Dr. Reilly testified that Claimant's visual complaints were slowly but surely increasing in terms of severity and impairment, which he opined was more a sign that there is secondary-gain factors. Regarding Claimant's visual complaints, he testified that, in his experience, if a person who has had a concussion presents with photophobia or posttraumatic vision syndrome or convergence, there is a very high probability they are going to fail all validity testing, as he does not see this as an established or recognized diagnosis.

43. During his testimony, Dr. Reilly explained the context of his diagnosis of malingering. He explained that malingering is the intentional production or exaggeration of symptoms for external gain. He indicated that he only finds that diagnosis about one percent of the time in patients he evaluates. He explained that in Claimant's case, there are numerous preexisting conditions that influence her complaints, including prior diagnoses of bipolar disorder II, adjustment disorder with depressed mood, borderline personality disorder, prior hospitalization for depression, psychosocial stressors, caregiver stress, and that the psychological records reflect that she has been consistently unable to achieve her dissertation and complete her degree requirements.

44. In reference to Dr. Danahey's March 22, 2019 letter in which Dr. Danahey indicated Claimant had functional impairment from the January 29, 2019 incident, Dr. Reilly testified that Dr. Danahey was reporting what Claimant was reporting to him, and did not have the opportunity to objectively evaluate these statements. Dr. Reilly opined

that, based upon the objective testing, there is not any functional impairment with respect to Claimant's school work or as an instructor caused by the January 29, 2019 incident.

45. On January 8, 2020, Dr. D'Angelo testified by pre-hearing deposition as a Level II accredited expert in internal medicine and occupational medicine. Dr. D'Angelo opined that Claimant did not sustain an injury as a result of the January 29, 2019 slip and fall incident. Dr. D'Angelo explained that there was no objective evidence of any acute injury, noting CT scans and x-rays were negative for acute traumatic injuries. She testified that there was no evidence of whiplash or TBI. Dr. D'Angelo testified there was no evidence of acute injury at the Concentra visit, with the EMTs, or in the emergency department on the date of the incident. She explained that Claimant's Glasgow score of 15 meant that Claimant showed no physical, verbal, or orientation deficits. Dr. D'Angelo stated that Claimant's complaints are not physiologically consistent. She opined that the slip and fall accident did not cause disability or the need for medical treatment.

46. At the request of Claimant, Mark H. Zacharewicz, Ph.D. performed an independent review of Dr. Reilly's report and evaluation notes, including Dr. Reilly's raw data and audio of Dr. Reilly's interview of Claimant. Dr. Zacharewicz did not review Claimant's records or conduct any tests on Claimant. Dr. Zacharewicz issued a report dated June 17, 2020. Dr. Zacharewicz noted several perceived issues with Dr. Reilly's report and conclusions. He opined that Dr. Reilly's report omits clinically relevant complaints reported by Claimant in her interview, including reports of experiencing various acute concussion-related symptoms, such as dizziness, wooziness, confusion, feeling goofy, and visual issues. Dr. Zacharewicz noted that many of the post-injury related symptoms reported by Claimant are symptoms often observed with a mild TBI and postconcussion syndrome. He noted Dr. Reilly also omitted other reported issues, such as convergence insufficiency. Dr. Zacharewicz opined that Dr. Reilly's omission of clinically important information was potentially misleading, interfered with the ability to clarify diagnostic and prognostic issues, and was inconsistent with the standard of care and assessment and guidelines for the practice of neuropsychology.

47. Regarding Dr. Reilly's raw data, Dr. Zacharewicz opined there was incomplete documentation regarding the administration of certain tests. He disagreed with Dr. Reilly's diagnosis of malingering. Dr. Zacharewicz felt Dr. Reilly over-interpreted the significance of Claimant's performance on the performance validity tests, and noted issues with one of the tests in particular, the DAT, which he noted was an experimental/preliminary performance validity measure. He noted that the only performance validity test on which Claimant performed in a potentially abnormal range was the DAT.

48. Dr. Zacharewicz wrote,

> While her demonstrated neurocognitive findings are consistent with residual symptoms that may be observed with a MTBI/concussion history, it is noted that based upon available information her presentation and

> pattern of test performances may also be confounded by suspected psychological/psychiatric issues, medical issues, somatic issues (e.g. visual symptoms, pain, fatigue), poor psychological coping abilities and/or combination of some or all of these potential influences. (Ex. 8, p. 154).

49. Dr. Zacharewicz concluded that the January 29, 2019 incident resulted in a MTBI/concussion. He opined that Dr. Reilly's neurocognitive testing revealed objective cognitive difficulties and functional impairments which are "further intertwined with [Claimant's] ongoing somatic and psychological/psychiatric symptoms" and super-imposed on Claimant's pre-existing vulnerabilities and stressors. (Id.)

50. Claimant testified at hearing that when she fell on January 29, 2019, she hit her left side, shoulder and hip and does not recall hitting her head. Claimant testified she has a history of bipolar II disorder and anxiety. She stated that in 2019, she had several stressors including financial stressors, caretaking for her husband, and participating in a degree program. Claimant testified that, prior to the January 29, 2019 incident, she had previous experience of neck pain that was not chronic, occasional shoulder pain related to an injury several years prior, and low back pain that felt more like tightness as opposed to achiness after the work incident. She stated she also had prior experiences with headaches, confusion and dizziness, but those symptoms only happened one time together. She stated that her dizziness now feels like the room spinning. Claimant explained that prior to the work incident she suffered from occasional impaired concentration, and after the incident she suffered from issues with judgment and speech, light sensitivity, issues focusing on words, and tracking.

51. Dr. Zacharewicz testified at hearing as an expert in neuropsychology and clinical psychology. Dr. Zacharewicz testified consistent with his report and identified several issues he found with Dr. Reilly's report. Dr. Zacharewicz testified that Dr. Reilly's performance validity testing absolutely does not support a diagnosis of malingering. He explained that the DAT test used by Dr. Reilly is in preliminary stages and not ready to be used. He opined that one failed performance validity test does not invalidate the test or mean an individual is malingering. Dr. Zacharewicz explained that two or more tests are required to invalidate test results, and there must also be a pattern, which does not exist in Claimant's case. Dr. Zacharewicz testified that Dr. Reilly did not follow strict guidelines of standardized administration. He did agree that it was reasonable for Dr. Reilly to use clinical judgment. Dr. Zacharewicz acknowledged that Claimant's pattern of symptom endorsements on other portions of the MMPI-2 reflect likely over-reporting and/or exaggeration of her somatic and cognitive symptoms. Dr. Zacharewicz testified that he could not say what is causing Claimant's continued complaints without his own evaluation, and agreed that there could be a variety of reasons, including stress and other emotional issues. He agreed that the side effects of medications being taken by a patient should be considered when trying to understand what the etiology is for claimant's continued complaints, which he did not consider.

52. Dr. Zacharewicz asserted that, based upon the initial diagnosis provided in this case on the date of injury, Claimant had a mild traumatic brain injury. Dr. Zacharewicz

agreed that Claimant now states she did not hit her head on January 29, 2019. Nonetheless, his opinion remained the same as he determined that Claimant's condition could be due to a whiplash-type injury. During his testimony, Dr. Zacharewicz confirmed the conclusions of the World Health Organization ("WHO") are:

> The evidence shows that mild cognitive complaints do occur after whiplash, but are not specific to MTBI and are not likely due to a brain injury *per se*. There same cognitive complaints are also reported in patients with chronic pain, depression, anxiety, post-traumatic stress disorder, chronic fatigue syndrome, malingering and in patients involved in personal injury litigation. (Ex.9, Bates 208).

53. Dr. Reilly offered rebuttal testimony at a post-hearing deposition on August 13, 2020. He disagreed with Dr. Zacharewicz's contention that his testing and report did not meet the standard of care for psychological and neuropsychological assessments. He testified he included information he considered clinically relevant in his notes and report. He explained that he administered the full subtests of the NAB screening module battery and used his professional judgment to not perform additional testing. Dr. Reilly explained that the DAT is the Denver Attention Test, which is a new performance validity test he created. Dr. Reilly noted the DAT is not widely used but has been examined using multiple performance validity measures. He testified that Dr. Zacharewicz is dismissing and undervaluing the implications of the test results, and continued to opine there is no evidence of a head injury. Dr. Reilly acknowledged He testified that he did not base the diagnosis of malingering on Claimant's test results.

54. Dr. Zacharewicz provided surrebuttal testimony at a post-hearing deposition on August 13, 2020. Dr. Zacharewicz reiterated that Claimant's report of some acute accident-related symptoms were important to document because they have diagnostic and prognostic utility. He explained that the diagnostic criteria for determining a mild TBI or concussion includes those exact symptoms and omitting those means you are potentially missing that information that can help clear up diagnostic questions.

55. The ALJ credits the opinions of Drs. D'Angelo and Reilly, as supported by the medical records, over the opinion of Drs. Zacharewicz, Danahey and Sacha.

56. Claimant failed to prove it is more probable than not she sustained a compensable industrial injury on January 29, 2019.

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

CONCLUSIONS OF LAW

Generally

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

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

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

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991)*.* The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998).

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

As found, Claimant failed to prove she sustained a compensable injury as a result of the slip and fall incident on January 29, 2019. The existence of Claimant's longstanding bipolar II disorder, anxiety, and other psychosocial factors do not negate the possibility Claimant sustained a compensable injury. However, as Drs. Carbaugh and Reilly credibly opined, such factors underscore the necessity of focusing on signs and objective findings as opposed to subjective reports of symptoms in Claimant's case. The preponderant evidence establishes that, while Claimant was involved in an accident on January 29, 2019, the accident did not cause disability or the need for medical treatment.

There is insufficient credible and persuasive evidence of an acute injury or aggravation. As noted by Drs. D'Angelo and Reilly, the medical records reflect that much of the evaluation, treatment and restrictions recommended for Claimant appear to be based on Claimant's extensive subjective complaints and self-reported restrictions. Shortly after the accident, the Concentra records note Claimant's physical examination was normal. Although PA-C Skvarca noted impaired attention/concentration/judgment and decreased responsiveness, when Claimant was transported to Porter Adventist and upon her arrival at the hospital, Claimant's Glasgow Coma Score was 15, which Drs. D'Angelo and Reilly both explained indicated no verbal or orientation deficits. Upon examination at Porter Adventist Hospital, there was no appreciable traumatic amnestic properties or other altered cognition. Tenderness of the cervical and lumbar spine was noted, which would be based on Claimant's reports. Imaging demonstrated no acute findings. On January 31, 2019, physical examination was normal with the exception of reported tenderness at the coccygeal area. No findings were noted regarding the cervical spine. On February 13, 2019, Dr. Danahey specifically noted there were no cervical spine spasms. Objective evidence of any physical findings are limited to spasms and segmental dysfunction noted by Dr. Sacha on two of his evaluations which, in light of the totality of the evidence, is insufficient to establish the fall caused disability or the need for medical treatment.

Dr. Danahey's opinion that Claimant sustained functional impairment with respect to her schoolwork as a result of the work accident is, again, based on Claimant's self-reports. There is insufficient evidence the accident caused functional impairment or restrictions, particularly considering that approximately one week before the accident, Claimant was complaining of significant stressors and difficulty focusing and concentrating. The record reflects Claimant has previously experienced issues with headaches, vision and dizziness. To the extent the results of Dr. Reilly's neurocognitive testing indicates neurocognitive issues, the preponderant evidence does not establish that such issues were caused or aggravated by the accident.

Drs. D’Angelo and Reilly credibly and persuasively opined that Claimant did not sustain an injury as a result of the January 29, 2019 slip and fall. Dr. D’Angelo’s opinion is based on a comprehensive review of medical records, examination of Claimant, and interview with Claimant. Dr. Reilly’s opinion is based on his interview of Claimant, review of records and neuropsychological testing. Although Dr. Zacharewicz identified several perceived issues with Dr. Reilly’s testing, Dr. Reilly addressed such issues and, in light of other evidence, the ALJ does not find Dr. Reilly’s opinion wholly unpersuasive. Based on the totality of the evidence, Claimant failed to prove it is more probable than not the January 29, 2019 accident resulted in disability or the need for treatment.

ORDER

1. Claimant failed to prove she sustained a compensable industrial injury on January 29, 2019. Claimant’s claim for benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

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

DATED: March 26, 2021

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that treatment of his cervical spine (including cervical facet injections, as recommended by Dr. Giora Hahn) is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted October 23, 2017 work injury.

2. Whether the claimant has demonstrated, by a preponderance of the evidence, that treatment of his right knee (including arthroscopic surgery as recommended by Dr. Christopher George) is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted October 23, 2017 work injury.

3. At hearing, the respondents confirmed that this is an admitted claim. The admitted body parts are: rib fractures, a sternum fracture, right hip, and right knee.

FINDINGS OF FACTS

1. The claimant worked for the employer as a roofer. On October 23, 2017, the claimant was performing his normal job duties when he fell through rotted boards on a roof. The claimant estimates that he fell 13 to 15 feet to the ground.

Medical Treatment Prior to October 23, 2017

2. Prior to this work injury, the claimant underwent medical treatment for his **left** knee, including arthroscopic left knee surgery on January 13, 2015. The claimant has been treated by his primary care provider, Dr. Michael Vargas, since February 2015. The claimant has seen Dr. Vargas for various chronic pain symptoms, including treatment for his left knee and low back. Dr. Vargas has noted that the claimant has osteoarthritis in his bilateral knees. Claimant's history of chronic osteoarthritis is also documented in medical records from Mountain Family Health Centers.

Medical Treatment Beginning October 23, 2017

3. On October 23, 2017, the claimant was immediately transported to Valley View Hospital for medical treatment. At that time, the claimant was seen by Dr. Brad Nichol. The claimant reported that when he fell he landed on his left side, shoulder, and head. The claimant's symptoms were recorded to be left sided chest pain. Dr. Nichol ordered computed tomography (CT) scans of the claimant's cervical spine, head, chest, abdomen, and pelvis. The results of those scans showed left sided rib fractures (1 through 8). There were no fractures or dislocation found in the cervical spine. In addition, there was no cranial fracture, facial fractures, or intracranial hemorrhage. Dr. Nichol noted

that the claimant was a “chronic narcotic user for his lower back pain”. Dr. Nichol recommended the claimant’s admission to the hospital for observation.

4. After he was released from Valley View Hospital the claimant was seen by Dr. Vargas on October 30, 2017. On that date, the claimant reported falling through a roof on October 23, 2017. The claimant also reported multiple rib fractures and a sternal fracture. Dr. Vargas renewed the claimant’s standing prescription for oxycodone. In addition, he prescribed the muscle relaxant, baclofen.

5. On November 7, 2017, the respondents filed a General Admission of Liability (GAL). In that document the respondents admitted for the claimant’s fractured ribs. In addition, temporary total disability (TTD) benefits were noted to have begun on October 24, 2017.

6. Dr. David Lorah is the claimant’s authorized treating provider (ATP) for this claim. The claimant was first seen by Dr. Lorah on November 8, 2017. At that time, the claimant reported continuing chest wall pain on the left side.

7. The claimant returned to Dr. Lorah on December 8, 2017. The claimant reported that he was experiencing pain in his right shoulder and left hip. Based upon this report, Dr. Lorah referred the claimant to physical therapy to address these right shoulder and left hip symptoms.

8. On December 20, 2017, the claimant returned to Dr. Nichol. At that time, Dr. Nichol noted that the claimant’s rib fractures were healing and he could resume activity,as tolerated.

9. On April 4, 2018, Dr. Lorah ordered magnetic resonance imaging (MRI) of the claimant’s right shoulder and right hip. The MRI of the claimant’s right shoulder showed a rotator cuff tear. The right hip MRI showed a labral tear. Based upon the MRI results, on April 20, 2018, Dr. Lorah referred the claimant to Dr. Christopher George for an orthopedic evaluation.

10. On May 8, 2018, the claimant was seen by Dr. George and Dr. Ferdinand Liotta. At that time, the claimant described his October 23, 2017 fall. The MRI results of the claimant’s right shoulder and right hip were addressed. In the medical record of that date, it was noted that the claimant wanted to proceed with shoulder surgery, as he felt that his shoulder was more limiting than his hip.

11. On July 28, 2018, Dr. Liotta performed arthroscopic surgery on the claimant’s right shoulder. The surgery included debridement of hypertrophic synovitis; subacromial decompression; distal clavicle excision; and coracoid decompression and subscapularis tendon repair. Following the right shoulder surgery, the claimant attended physical therapy.

12. Thereafter, it was determined that the claimant would also undergo right hip surgery. On April 4, 2019, Dr. George performed a right hip arthroscopy and labral debridement. The claimant attended physical therapy following that surgery.

13. On May 10, 2019, the claimant reported to his physical therapist, Codi Fruhmann, PT/DPT, that he had fallen up the stairs at home. The medical record of that date specifically provides that the claimant "did try to catch himself with bilateral upper extremities. He reports increased soreness anteriorly in pectorals and long head of biceps tendon." In a similar physical therapy record also dated May 10, 2019, PT Fruhmann noted that the claimant "feels he refractured a rib on the left side… He heard a pop when landing right on this rib on the stairs…"

14. On May 16, 2019, the claimant was seen by Dr. Liotta. At that time, the claimant reported "falling down some stairs" on approximately May 9, 2019. Since that fall, the claimant was experiencing increased pain and tightness in his right shoulder. Thereafter, Dr. Liotta determined that the claimant had reinjured his prior repair, requiring surgery. On June 25, 2019, Dr. Liotta performed a revision subscapularis tendon repair on the claimant's right shoulder.

15. With regard to all of the above medical appointments, the ALJ finds no mention of right knee or neck related complaints.

16. Following a referral from Dr. Vargas, on June 21, 2019, claimant began treatment with Colorado Injury & Pain Specialists[1] to address various chronic pain conditions. The medical record of that date states that the claimant was seeking treatment for his right shoulder, right knee, and back pain. Specifically, the pain in the claimant's "right shoulder and hip began in 2013 after falling through a roof while working construction…The back and right knee pain began in 2008 after he was run over by a truck… He reports sustaining a L2 [fracture] of his low back. He also had to have the meniscus removed from his right knee. He states that he could not get a right knee replacement because of his age…"

17. The claimant testified that the June 21, 2019 medical record is incorrect. He testified that he injured his left knee in 2008.

18. The claimant first reported right knee symptoms to Dr. Lorah on July 21, 2019. On that date, the claimant reported that his right knee was bothering him while doing his hip exercises. Dr. Lorah opined that the claimant had sprained his right knee and that it was "unlikely he would have sustained a major injury and if he has a meniscal tear or something else is probably not related to his workers comp injury".

19. The claimant first reported cervical symptoms to Dr. Lorah on September 9, 2019. In the medical record of that date, Dr. Lorah noted "[T]oday he is complaining of cervical [crepitus] and pain with left-sided rotation. I don't recall that he has ever mentioned this nor do I see this in our previous encounters although he assures me this has been happening since the time of the injury… He tells me that he has been complaining of this ever since the time of the initial injury. I reviewed basically all of our

[1] At hearing, the claimant confirmed that this treatment is paid for by Medicaid and is not part of this workers' compensation claim.

notes since that time and don't see mention of it. I don't see mention of it in his physical therapy notes either."

20. On September 27, 2019, the claimant reported right knee complaints to Dr. George. Specifically. the claimant reported right knee pain, clicking, and popping over "the last several months". Dr. George opined that it was a possible lateral meniscus tear.

21. Subsequently, Dr. Lorah ordered a cervical spine x-ray. The x-ray was performed on October 9, 2019 and showed no acute bony findings; multilevel mild to moderate degenerative changes (most severe at the C4-C5 level); and moderate to marked foraminal narrowing at the right C4-C5 level (with moderate at the left C4-C5 level).

22. In addition, Dr. Lorah ordered a right knee MRI. That MRI was performed on October 19, 2019 and showed tears of the posterior horn and posterior root of the medial meniscus; partial tear versus ganglion of the anterior cruciate ligament (ACL); minimal lateral subluxation of the patella; and mild osteoarthritis of the medial compartment and proximal tibiofibular joint.

23. On December 3, 2019, the claimant was seen by Dr. George. At that time, Dr. George opined that the claimant's right knee was injured when he fell on October 23, 2017. Dr. George recommended arthroscopic surgery. On December 5, 2019, Dr. George submitted a request for authorization of a right knee arthroscopy and medial meniscectomy.

24. At the request of the respondents, Dr. David Orgel reviewed the surgical request. In a report dated December 17, 2019, Dr. Orgel recommended denial of the surgery. Based upon Dr. Orgel's report, the respondents denied the right knee surgery.

25. On January 31, 2020, Dr. George authored a letter of appeal related to the requested right knee surgery. Dr. George stated that the claimant had experienced right knee pain since his October 23, 2017 work injury. Dr. George opined that primary focus of treatment was on the claimant's hip and shoulder because those symptoms were more severe than those in his right knee. Dr. George also opined that the claimant's mechanism of injury was consistent with a medial meniscus tear.

26. Following Dr. George's appeal, the respondents asked Dr. Jon Erickson to review the surgical request. In his February 14, 2020 report, Dr. Erickson agreed with Dr. Orgel's recommendation to deny the surgery. In support of this opinion, Dr. Erickson noted that the claimant had not reported right knee symptoms between October 23, 2017 and July 5, 2019. Dr. Erikson also referenced the claimant's May 2019 fall on stairs "and yet at that time there was no complaint of any knee pain." Based upon Dr. Erickson's report the respondents denied the right knee surgery.

27. During this same period of time, the claimant continued to report right shoulder symptoms. On May 26, 2020, Dr. Liotta performed "manipulation under anesthesia" to address adhesive capsulitis of the right shoulder.

28. On February 12, 2020, a cervical spine MRI was performed. The MRI showed straightening of the cervical lordosis; minimal posterior spondylolisthesis at C4; degenerative changes of the cervical spine resulting in mild canal stenosis and slight impingement of the spinal cord at the C4-C5 level; and foraminal compression of the right C5 nerve root.

29. On February 25, 2020, the claimant was seen by Dr. George regarding his right hip. On that date, Dr. George opined that the claimant would not benefit from further arthroscopic surgeries. Instead he recommended a right hip replacement. With regard to the claimant's cervical spine, Dr. George noted that the claimant "[d]id mention some disc issues in his neck".

30. On March 4, 2020, the claimant was seen by Dr. Vargas regarding chronic pain. In the medical record of that date, Dr. Vargas noted, *inter alia*, that the claimant suffered from chronic degenerative cervical spinal stenosis and lumbar radiculopathy.

31. Following a referral by Dr. Lorah, on March 6, 2020, the claimant was seen by Dr. Giora Hahn for consultation. On that date, Dr. Hahn noted that the claimant had experienced right neck pain "for 2 years since he fell off a roof". Dr Hahn noted the cervical spine MRI results and diagnosed cervical degenerative disc disease with facet arthropathy. Dr. Hahn recommended the claimant undergo cervical facet injections. Dr. Hahn also opined that radiofrequency ablation could be a potential future treatment for the claimant. Dr. Hahn submitted a request for authorization of the recommended injections.

32. At the request of respondents, Dr. Joseph Fillmore reviewed the request for cervical facet injections. In a report dated March 18, 2020, Dr. Fillmore opined that the claimant did not suffer an injury to his cervical spine as a result of his fall on October 23, 2017. Dr. Fillmore also noted that the first reference of neck symptoms was made by Dr. Lorah on September 9, 2019. Dr. Filmore recommended denial of the injections. Based upon Dr. Fillmore's report, the respondents denied authorization.

33. On July 23, 2020, the claimant attended an independent medical examination (IME) with Dr. Robert Messenbaugh. In connection with the IME, Dr. Messenbaugh reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his IME report, Dr. Messenbaugh opined that the claimant did not injure his cervical spine or his right knee on October 23, 2017. In support of these opinions Dr. Messenbaugh noted that the claimant did not report any neck or right knee related complaints "for an extremely lengthy period of time" after his October 23, 2017 fall. Dr. Messenbaugh also opined that the degenerative changes in the claimant's cervical spine predated his work injury. Dr. Messenbaugh's testimony was consistent with this written report. During his testimony, Dr. Messenbaugh reiterated his opinion that the claimant did not injure his right knee or cervical spine when he fell on October 23, 2017.

34. On October 29, 2020, Dr. George performed a right total hip arthroplasty.

35. On November 17, 2020, Dr. Vargas authored a letter regarding his review of his treatment of the claimant. In the letter, Dr. Vargas stated that he "found there to be no mention of treatment for right knee or cervical neck pain prior to the accidental fall in October of 2017." Dr. Vargas also noted that these symptoms were first reported to him in March 2020.

36. The claimant testified that when he was seen by Dr. Vargas on October 30, 2017, he had pain in his right knee and neck. The claimant further testified that he has experienced pain in his right knee and neck throughout this claim. The claimant testified that he wishes to undergo the recommended knee surgery and neck treatment so that he can return to work.

37. The ALJ does not find the claimant's testimony regarding the onset of his right knee and cervical spine symptoms to be credible or persuasive. The ALJ credits the medical records and the opinions of Drs. Orgel, Erickson, Fillmore, and Messenbaugh over the contrary opinions of Drs. George and Hahn. In crediting these opinions, the ALJ finds that the claimant has failed to demonstrate that it is more likely than not that his need for right knee and cervical spine treatment is reasonable, necessary, and related to the admitted October 23, 2017 work injury. The ALJ specifically credits the medical records that demonstrate that the claimant did not report right knee or cervical spine symptoms until long after his work injury. The ALJ is not persuaded that the claimant injured either of these body parts on October 23, 2017. The ALJ finds that there is no persuasive evidence on the record to support a finding that the fall on October 23, 2017 aggravated, accelerated, or combined with any preexisting condition in the claimant's right knee or cervical spine to warrant the need for medical treatment.

CONCLUSIONS OF LAW

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

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

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

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

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

6. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that treatment of his cervical spine (including cervical facet injections, as recommended by Dr. Hahn) is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the October 23, 2017 work injury. As found, the medical records and the opinions of Drs. Fillmore, and Messenbaugh are credible and persuasive.

7. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that treatment of his right knee (including arthroscopic surgery as recommended by Dr. George) is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the October 223, 2017 work injury. As found, the medical records and the opinions of Drs. Orgel, Erickson, and Messenbaugh are credible and persuasive.

ORDER

It is therefore ordered:

1. The claimant's request for treatment of his cervical spine (including cervical facet injections, as recommended by Dr. Hahn) is denied and dismissed.

2. The claimant's request for treatment of his right knee (including arthroscopic surgery as recommended by Dr. George) is denied and dismissed.

3. All matters not determined here are reserved for future determination.

Dated this 1st day of April 2021.

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

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

ISSUES

- Did Claimant overcome the DIME's 15% whole person lumbar spine impairment rating by clear and convincing evidence?

- Did Claimant prove by a preponderance of the evidence his right shoulder impairment should be converted to whole person?

- If Claimant has whole person impairment to his shoulder, did he overcome the DIME's shoulder rating by clear and convincing evidence?

- Did Claimant prove by a preponderance of the evidence he suffered scheduled impairment greater than the ratings assigned by the DIME and admitted by Respondent?

- Did Claimant prove he is eligible for indemnity benefits greater than $87,470.18 because his combined whole person impairment rating is greater than 25%?

- Disfigurement.

- Claimant withdrew the endorsed issue of "Grover Medical Benefits" because the FAL admits for a general award of medical benefits after MMI and there is no current dispute regarding any specific treatment.

STIPULATIONS

1. Claimant is entitled to TPD benefits from August 31, 2019 through March 12, 2020, and from March 20, 2020 to June 2, 2020. The parties will calculate the specific amount of TPD benefits owed to Claimant, if necessary based on the outcome of this hearing. Additional TPD benefits are subject to the statutory cap on indemnity benefits pursuant to § 8-42-107.5.

2. Respondent has paid Claimant temporary disability and permanent partial disability benefits totaling $87,470.18, which is the maximum amount of indemnity benefits payable under § 8-42-107.5 when the final rating is 25% or less. Respondent will not owe any additional indemnity benefits unless Claimant's final whole person rating is determined to be 26% or greater.

3. Respondent may take a credit equal to the amount of PPD benefits previously paid to Claimant against any additional PPD benefits the ALJ may award. Respondent may assert the overpayment reserved in the August 4, 2020 Final Admission of Liability against any additional TPD benefits that owed to Claimant.

FINDINGS OF FACT

1. Claimant works as a grocery clerk at one of Employer's stores in Pueblo.

2. On August 20, 2017, Claimant suffered admitted injuries when he fell down a staircase at work. He injured multiple parts of his body, including his right arm, right shoulder, low back, right knee, and face.

3. Claimant's most severe injuries were a displaced and comminuted right proximal humeral fracture and mid shaft fractures of the right radius and ulna. Claimant was hospitalized at Memorial Hospital in Colorado Springs and underwent ORIF surgery for the humerus, radius, and ulnar fractures by Dr. Augusta Kluk. Claimant was discharged from the hospital on August 25, 2017.

4. Claimant was referred to Dr. Phillip Marin in October 2017 for evaluation of scarring on his right cheek from the injury. Dr. Marin noted hypertrophic scarring and step off which probably would not improve with time. Dr. Marin performed a revision with surgical excision and closure of Claimant's right cheek scar.

5. In March 2018 Dr. Kluk determined Claimant had a nonunion of the ulna and probable bone infection.

6. Dr. Wallace Larson performed an IME for Respondent on March 29, 2018. Dr. Larson agreed Claimant was not at MMI and required additional treatment for the nonunion and infection. Dr. Larson also noted some "non-physiologic findings" related to superficial palpation of the neck and back.

7. On April 3, 2018, Dr. Kluk removed the hardware and debrided the nonunion.

8. Dr. J. Douglas Bradley has been Claimant's primary ATP throughout this claim. On August 3, 2018 Dr. Bradley opined Claimant was approaching MMI and ordered an FCE.

9. Dr. Bradley placed Claimant at MMI on August 30, 2018. He used ROM measurements obtained during the FCE to calculate the following impairment ratings:

Right shoulder:	13% upper extremity after normalization
Right elbow:	5% upper extremity
Right wrist:	3% upper extremity
Right knee:	5% lower extremity after normalization
Lumbar spine:	19% whole person (excluding invalid flexion)
Total combined rating:	29% whole person

10. Dr. Bradley assigned no rating for lumbar flexion because Claimant did not meet the straight leg raise validity criteria.

11. Respondent disagreed with Dr. Bradley's rating and initiated the DIME process.

12. On September 3, 2018, Dr. Kluk opined Claimant was still suffering from a hypertrophic nonunion. This was later confirmed by a CT scan on October 4, 2018. Dr. Kluk performed an ORIF with bone graft on December 4, 2018. The parties agreed Claimant was not at MMI and Respondent abandoned the DIME.

13. The surgery was successful with eventual resolution of the infection and steady bone callus formation, although Claimant continued to have pain in the right forearm and restricted motion.

14. Dr. Bradley again placed Claimant at MMI on June 18, 2019. Dr. Bradley calculated new ratings for Claimant's right elbow and right wrist based on measurements taken at an FCE on April 5, 2019.[1] He otherwise reused the August 2018 data and assigned the same ratings for Claimant's other injuries. Dr. Bradley's revised final ratings were:

Right shoulder:	13% upper extremity after normalization
Right elbow:	8% upper extremity after normalization
Right wrist:	9% upper extremity
Right knee:	5% lower extremity after normalization
Lumbar spine:	19% whole person (excluding invalid flexion)
Total combined rating:	33% whole person

15. Respondent requested a DIME to contest Dr. Bradley's impairment rating.

16. On September 11, 2019, Dr. Kluk indicated Claimant's symptoms appeared to have stabilized compared to previous visits. Claimant was working full time but still had "vague achy pain" in his right arm and limited pronation and supination. X rays showed continued bone healing and no evidence of any hardware issues. Dr. Kluk released Claimant to follow up as needed.

17. Claimant saw Dr. Dwight Caughfield for a DIME on September 13, 2019. Dr. Caughfield determined Claimant was not at MMI and recommended additional workup. Specifically, he recommended a right shoulder MRI to evaluate possible rotator cuff pathology, upper extremity electrodiagnostic testing for possible radial sensory neuropathy, and a lumbar MRI. Although Claimant was not at MMI, Dr. Caughfield performed an "advisory" impairment rating consistent with Division policy. Dr. Caughfield noted multiple inconsistencies and "non-physiological" findings including "variable and nondermatomal sensory changes, variable and giveway weakness in both his right hand/arm as well as his right leg, large observed discrepancies in range of motion observed versus measured, and wide variability in range of motion noted on repeat testing

[1] The FCE report is not in evidence but was described in Dr. Burris' IME report. The reliability of the FCE appears questionable because Claimant only passed 14 of 20 reliability and consistency measures.

and between those done in his record. His non-physiological factors appear to be impacting the examination findings and potentially functional tolerances."

18. Dr. Caughfield noted other specific issues pertinent to the disputed ratings, including:

- When measuring right pronation with the elbow at 90 degrees he has less than 10 degrees of motion but with neurological testing of rapid alternating hand motion (transition from palm up to palm down) he has much greater motion which is measured at over 65 degrees.

- With initial range of motion evaluation, he only flexes the knee to 72° but once I discussed with him how in seated posture he has 90° or more of range we repeat the measurements [and] he does demonstrate slightly over 90° of flexion . . . but that does not correlate with the ROM findings 2018 FCE done per AMA guidelines nor the ROM reported in Dr. Larson's IME of 2019.

- Self-limited range of motion in all lumbar planes without accompanying spasm or muscle guarding.

- Low back motion is ratcheting was shaking and sudden 5 to 10° changes in flexion/extension.

19. Claimant failed the straight leg raise validity criteria for a lumbar flexion rating and Dr. Caughfield had him return for a second set of measurements on a different day. Claimant again failed to demonstrate valid flexion measurements.

20. Dr. Caughfield assigned a 25% whole person advisory rating, calculated as follows:

Right shoulder:	13% upper extremity after normalization
Right elbow:	9% upper extremity
Right wrist:	3% upper extremity
Right knee:	0% lower extremity after normalization
Lumbar spine:	13% whole person (excluding invalid flexion)
Total combined rating:	25% whole person

21. Respondent accepted the determination Claimant was not at MMI and authorized additional treatment.

22. A lumbar MRI on December 27, 2019 was unremarkable with no significant structural pathology and only mild disc degeneration. A right shoulder MRI that same date showed subdeltoid bursitis and supraspinatus tendinopathy but no rotator cuff tear.

23. Upper extremity electrodiagnostic testing on January 15, 2020 showed radial neuropathy in the mid forearm.

24. Claimant was evaluated by Dr. Gregg Martyak, a hand surgeon, on January 16, 2020. Claimant reported numbness in his right thumb, index, and middle fingers that started after his fall. Dr. Martyak noted supination to 60° and pronation -10°. Dr. Martyak's clinical examination was consistent with mild radial tunnel but also carpal tunnel syndrome. He administered a carpal tunnel injection, which provided "definite improvement" in Claimant's numbness and tingling for a few weeks. Dr. Martyak recommended surgery.

25. Dr. Martyak performed a right radial nerve neuroplasty and right carpal tunnel release on March 13, 2020. The numbness in Claimant's fingers resolved after surgery and his pain decreased.

26. Claimant's final visit with Dr. Martyak was June 1, 2020. Dr. Martyak noted Claimant's preoperative symptoms had improved but he still had problems rotating his right hand. Claimant demonstrated 135 degrees of elbow flexion, 80 degrees of supination, and only 5 degrees of pronation. Dr. Martyak did not think the pronation would improve but did not recommend another procedure because that might make Claimant worse. He released Claimant at MMI with no specific follow-up.

27. Dr. Bradley put Claimant at MMI on June 2, 2020. Confusingly, Dr. Bradley's report states Claimant was released from care with no impairment. The ALJ infers this notation was a mistake because Dr. Bradley testified he believes Claimant has permanent impairment and requires maintenance care. Nevertheless, Dr. Bradley provided no contemporaneous analysis of impairment when Claimant reached MMI.

28. Dr. Caughfield performed a follow-up DIME on July 7, 2020. He determined Claimant was at MMI and provided an impairment rating. As he had at the first DIME, Dr. Caufield again found significant inconsistencies in Claimant's presentation then examination findings. Dr. Caughfield wrote,

> He demonstrates severe non-physiological findings on examination such as sudden, large amplitude oscillations in joint and spine position that he attributes to joint and spine pain (such sudden and large movement should exacerbate pain and be avoided in physiological based pain behaviors), significant passive range of motion variation on examination versus active measured range without findings of neurological deficits, weakness to less than antigravity that does not resolve with gravity eliminated or gravity assist postures on direct examination but is not noted was observed spontaneous movement, and no loss of muscle bulk that is expected with non-antigravity muscle strength. . . . Wrist extension strength is variable and non-antigravity and active range but then resists wrist flexion strongly. . . . His lumbar flexion is once again invalidated by straight leg measurements (this is his 5th set of measurements with me) and non-physiological examination with jerking oscillating motion that is atypical for someone with back pain.

29. Regarding the right elbow, Dr. Caughfield stated, "His active elbow flexion and forearm pronation range is very inconsistent with observed spontaneous motion and

passive range even after discussion of my concerns with him and I therefore did not find them are liable for the purpose of providing impairment due to loss of range. His supination was reasonably consistent and for 70° I assigned 0% UE impairment." With respect to the right knee, Dr. Caughfield stated, "His knee range of motion is symmetric with the left while his strength testing is non-physiological. No impairment is assigned." Dr. Caughfield also noted:

> [Claimant] has multiple inconsistencies in the record and on repeated examinations that indicate non-physiological aspects to his presentation. This significantly complicates the assignment of impairment as maximal volitional effort is required for both neurological and range of motion impairment assessment. That being said, he has objective evidence of significant trauma that would be expected to impact upper limb motion (radial and ulnar fracture with a nonunion, greater trochanter humorous fracture that can produce shoulder range loss) as well as EDX findings of a radial neuropathy with axonal loss which can lead to neurological functional loss. I have assigned values for his impairment based upon the most consistent range of motion in his loss of motor axons on his EMG. For his low back pain, he has had consistent pain complaints and repeated treatment that merits impairment due to specific disorders. His range of motion is non-physiological inflection but does have some consistency between repeated measurements for extension and lateral flexion and therefore impairment is assigned for range of motion loss as well as specific disorder.

30. Dr. Caughfield's final ratings were:

Right shoulder:	13% upper extremity after normalization
Right elbow:	0% ROM
Radial nerve impairment:	3% upper extremity
Right wrist:	2% upper extremity
Right knee:	0% after normalization
Lumbar spine:	15% whole person (excluding invalid flexion)
Total combined rating:	24% whole person

31. Dr. Caughfield's documented clinical findings and rationale for his rating are credible and persuasive.

32. Respondent filed a Final Admission of Liability on August 4, 2020 based on Dr. Caughfield's ratings.

33. Dr. John Burris performed an IME for Respondent on January 5, 2020 and was impressed by similar inconsistencies as Dr. Caughfield. He noted, "the examination today exhibits similar findings in measurements documented by Dr. Caughfield. Specifically, there are multiple non-physiologic findings present, the lumbar range of motion is invalid based on straight leg raise criteria, and there is no impairment of the right knee after normalization." He pointed out Dr. Caughfield took a total of 15 lumbar

spine range of motion measurements over three separate visits. Dr. Burris opined Dr. Caughfield's rating was accurate and consistent with the AMA Guides and Level II training. Dr. Burris' opinions are credible and persuasive.

34. Dr. Bradley testified at hearing regarding Claimant's impairment. He stood by his rating but agreed Dr. Caughfield's rating was reasonable based on the findings at the DIME. Dr. Bradley admitted he had no specific basis to contest or disagree with Dr. Caughfield's ratings. He found Claimant's presentation generally straightforward and consistent with his exam findings but acknowledged Dr. Caughfield's different impression. He agreed Dr. Caughfield had discretion to not rate Claimant's elbow because he believed the measurements were inconsistent. He also agreed it was within Dr. Caughfield's discretion whether to have Claimant return for another set of lumbar ROM measurements given the repeated inconsistencies and invalidity.

35. Claimant failed to overcome Dr. Caughfield's lumbar spine rating by clear and convincing evidence.

36. Claimant failed to prove by a preponderance of the evidence he is entitled to any scheduled ratings above those assigned by Dr. Caughfield.

37. Claimant's overall combined whole person rating is 24%, as determined by Dr. Caughfield.

38. The issue of right shoulder "conversion" is moot because Claimant's overall rating is less than 26% and he has already received the maximum indemnity benefits payable for his date of injury.

39. Claimant's injuries caused significant scarring in multiple areas normally exposure to public view. He has: (1) a 5-inch long by ¼ inch wide, curved, partially indented, partially raised, discolored scar extending from nose across the right cheek; (2) a 6-inch long by ½ to ¾ inch wide, curved, irregularly shaped, partially indented, partially raised, discolored surgical scar on the proximal right biceps extending onto the right pectoralis muscle; (3) a 2-inch long by ½ inch wide partially indented, partially raised, discolored surgical scar on the on distal dorsal forearm; (4) a 6-inch long by ½ wide, irregularly shaped, partially indented, partially raised, discolored surgical scar on the outer right forearm; (5) an 8-inch long by ½ to ¾ inch wide, irregularly shaped, partially indented, partially raised, discolored surgical scar on the inner right forearm; and (6) a 4-inch long by ¼ to ½ inch wide surgical scar on the lateral right elbow with a "puncture" in the center. The skin in the center of scar #6 is thin and opens periodically (it appeared somewhat open during the hearing). Claimant's scars are quite irregularly shaped, significantly discolored, and generally more noticeable than the "typical" scars this ALJ has observed during many disfigurement evaluations. Claimant suffered "extensive" scarring that entitles him to an enhanced award. The ALJ finds Claimant should be awarded $7,500 for his disfigurement.

CONCLUSIONS OF LAW

A. Claimant failed to overcome the DIME's lumbar spine rating

A DIME's determination regarding whole person impairment is binding unless overcome by "clear and convincing evidence." Section 8-42-107(8)(C). Clear and convincing evidence is "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). The party challenging a DIME's conclusions must demonstrate it is "highly probable" the impairment rating is incorrect. *Qual-Med v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Deviations from rating protocols outlined in the *AMA Guides* are relevant but not dispositive in determining whether the DIME rating has been overcome. *Corley v. Bridgestone Americas, Inc*., W.C. No. 4-993-719-004 (February 26, 2020). Similarly, the ALJ may consider but is not bound by the Division's Impairment Rating Tips or the Level II accreditation curriculum. *Vuksic v. Lockheed Martin Corporation*, W.C. No. 4-956-74 one-02 (August 4, 2016) (rating "Tips" are not "merely guidance" and "not binding rules").

As found, Claimant failed to overcome the DIME's 15% whole person rating for the lumbar spine. The only specific error Claimant alleged regarding the lumbar rating is Dr. Caughfield's "failure" to have Claimant return for a second set of measurements. Although the Rating Tips unequivocally state "claimants must have two visits" before spinal ROM measurements can be invalidated, the *AMA Guides* give the examiner discretion on this issue.[2] Notwithstanding the dogmatic language of the Rating Tips, a DIME is not invariably required to obtain a second set of measurements in all cases. *Corley, supra*. Dr. Caughfield believed having Claimant return for another set of measurements would be fruitless because he had already failed to the SLR validity testing on multiple occasions, including five sets of measurements performed by Dr. Caughfield personally. There was no reason to think another set of measurements would produce valid results, and it was reasonable for Dr. Caufield to conclude the DIME without doint so.[3] Dr. Burris and Dr. Bradley agreed Dr. Caughfield was within his discretion to forego another set of measurements under the circumstances.

B. Claimant failed to prove a scheduled other than those assigned by the DIME

The DIME procedure does not apply to scheduled impairment ratings. Section 8-42-107(8)(a); *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000). The claimant is not required to overcome a DIME's scheduled rating by clear and convincing evidence but must only prove a rating under the preponderance standard.

[2] The instructions in the AMA Guides (p.79) are: "If consistency requirements are not met, perform additional tests up to a maximum of six until reproducibility criteria are satisfied. If testing remains inconsistent after six measurements, consider the test invalid and **reexamine at a later date or disqualify that part of the examination**." (Emphasis added).

[3] This assumption was subsequently borne out by Claimant's inability to provide valid measurements at the IME with Dr. Burris.

Wagoner v. City of Colorado Springs, W.C. No. 4-817-985-03 (Oct. 21, 2013), *aff'd Wagoner v. Industrial Claim Appeals Office*, Colo. App. No. 13CA1983 (Oct. 23, 2014)(NSOP). The DIME's determination regarding scheduled impairment is not entitled to special weight and is merely another opinion to consider when evaluating the preponderance of the evidence. If a claimant has multiple impairments, the clear and convincing standard applies to the whole person components and the preponderance standard governs any scheduled ratings. *Alaya v. Reinerth Enterprises, Inc*., W.C. No. 4-999-925-003 (December 3, 2020).

As found, Claimant failed to prove he suffered any ratable scheduled impairment beyond that found by Dr. Caughfield. Dr. Caughfield's thoughtful and detailed explanations are highly persuasive. His conclusions are buttressed by Dr. Burris' persuasive opinions and Dr. Bradley's testimony. Dr. Bradley could point to no specific errors in the DIME report and conceded Dr. Caughfield "followed the protocol of the AMA Guides to the letter." Dr. Bradley agreed it was permissible and appropriate for Dr. Caughfield to reject range of motion measurements he considered non-physiologic and inconsistent with observed behaviors and movements during the examination. Indeed, Dr. Bradley has done that himself when warranted. Dr. Bradley's June 18, 2019 impairment rating advocated by Claimant is not persuasive because it was based on measurements obtained long before MMI and before Claimant underwent additional surgery. Although such an outdated rating might be useful in certain cases, it is not helpful here because Claimant's measurements have varied so widely over time. Additionally, because Dr. Bradley did not personally perform the range of motion measurements use used for his rating, he cannot persuasively speak to their reliability.

There is no doubt Claimant suffered serious injuries that caused ongoing symptoms and permanent impairment. But translating symptoms and limitations into a numeric rating requires reliable data, which Dr. Caughfield was unable to obtain despite multiple good faith attempts. Claimant's argument that Dr. Caughfield "intended" to keep the rating under 26% is not persuasive. Instead, Dr. Caughfield appears to have given Claimant the benefit of the doubt and provided the highest rating he could reasonably justify in light of the numerous inconsistencies and non-physiologic findings. Although Claimant may have some permanent impairment related to elbow and forearm motion, his inconsistent effort and lack of reliable measurements prevents establishing any specific rating to the level of "more likely than not." Additionally, Dr. Caughfield's determination Claimant has no knee impairment after normalization is consistent with measurements obtained at both DIME appointments and Dr. Burris' evaluation.

C. Shoulder conversion is moot

Section 8-42-107.5 limits the combined total of temporary disability and permanent partial disability benefits a claimant may receive based on their final impairment rating. The applicable cap for a whole person rating under 26% for Claimant's date of injury is $87,470.18. As found, Claimant's overall final whole person rating is 24% and Respondent has already admitted and paid Claimant $87,470.18 in temporary and permanent partial disability benefits. Because Claimant failed to prove he has impairment greater than 25% whole person, a determination of whether his shoulder rating represents a scheduled or whole person impairment will have no impact on his compensation. Accordingly, Claimant’s request to convert the shoulder is moot and will not be addressed.

D. Disfigurement

Section 8-42-108(1) provides for a disfigurement award if a claimant is “seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view.” Subsection 108(2) permits an additional award if the disfigurement includes extensive facial scars or facial burn scars, extensive body scars or burn scars, or stumps due to loss or partial loss of limbs. Disfigurement awards are subject to maximum limits tied to the date of injury. The maximum limits in effect on Claimant’s date of injury are $5,019.83 and $10,037.89. There is no set formula for disfigurement awards within the applicable range and the appropriate amount is left to the ALJ’s discretion. *Garcia v. Colorado Department of Corrections*, W.C. No. 4-827-794-01 (May 17, 2012).

As found, Claimant’s disfigurement includes extensive body and facial scars, which entitles him to an enhanced award under § 8-42-108(2). *The American Heritage College Dictionary, 3d. Edition* (1993) defines extensive as “large in extent, range or amount.” *Merriam-Webster* defines extensive as “having wide or considerable extent.” The word “extent” means “the amount of space or service that something occupies.” Those definitions accurately describe the scarring affecting large portions of Claimant’s right arm, chest, and face. The multiple large, irregularly shaped, and highly discolored surgical scars were easily noticeable on video and probably much more obvious in person. Additionally, the facial scar crosses most of Claimant’s cheek and is located on the front of his face where people commonly train their gaze during interpersonal interactions. Claimant shall be awarded $7,500 for disfigurement.

ORDER

It is therefore ordered that:

1. Claimant’s request for additional PPD benefits beyond those already admitted by Respondent is denied and dismissed.

2. Claimant’s request to convert his shoulder impairment to the whole person equivalent is denied and dismissed as moot.

3. Respondent shall pay Claimant $7,500 for disfigurement.

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

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DATED: April 1, 2021

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

ISSUES

I. Whether Claimant proved by a preponderance of the evidence he is entitled to a change in his average weekly wage ("AWW").

STIPULATIONS

Claimant stipulated that the wage records contained in Respondents' Exhibit A (Bates 8-9) are a fair and accurate representation of his pre-injury income with Employer.

FINDINGS OF FACT

1. Claimant sustained an admitted industrial injury on September 10, 2020.

2. On December 10, 2020, Respondents filed a General Admission of Liability ("GAL") admitting for an AWW of $1,143.42, based on Claimant's earnings of $16,007.81 over the 14 week period of 5/31/2020 - 9/5/2020.

3. Respondents' Exhibit A includes an Average Weekly Wage Report documenting the total hours and gross wages, including all overtime, Claimant worked for weeks ending 6/8/2019 - 9/12/2020. Claimant earned $31.00/hour and $46.50/hour for hours worked more than 40 hours per week. Claimant's hours varied, from 70 hours a week to 20.75 hours a week. Claimant's hours and wages as documented in the wage records are detailed below:

Week Ending	Total Hours	Gross Wages Including All Overtime
6/8/2019	51.75	$1,826.98
6/15/2019	50.50	$1,803.65
6/22/2019	50.05	$1,832.13
6/29/2019	47.75	$1,751.76
7/6/2019	45.00	$1,583.28
7/13/2019	51.00	$1,751.50
7/20/2019	51.00	$2,876.84
7/27/2019	44.00	$1,426.00
8/3/2019	45.25	$1,956.25
8/10/2019	50.50	$1,786.83
8/17/2019	68.00	$2,566.07
8/24/2019	70.00	$3,065.13
8/31/2019	41.25	$1,732.05

9/7/2019	54.75	$2,128.88
9/14/2019	50.50	$1,972.43
9/21/2019	53.25	$2,017.95
9/28/2019	51.00	$1,809.50
10/5/2019	50.25	$1,886.73
10/12/2019	51.25	$1,821.25
10/19/2019	54.50	$2,351.23
10/26/2019	55.75	$2,162.04
11/2/2019	43.25	$1,451.13
11/16/2019	54.50	$2,067.47
11/23/2019	53.00	$2,190.30
11/30/2019	45.25	$1,568.81
12/14/2019	51.00	$1,751.50
12/21/2019	51.75	$1,786.38
12/28/2019	51.75	$1,541.85
1/4/2020	45.50	$1,622.31
1/11/2020	54.50	$2,058.00
1/18/2020	65.75	$2,516.73
1/25/2020	55.25	$2,060.68
2/1/2020	53.50	$1,902.83
2/8/2020	55.00	$1,987.50
2/15/2020	60.75	$2,304.93
2/22/2020	44.00	$1,589.85
2/29/2020	40.00	$1,498.75
3/7/2020	44.00	$1,426.00
3/14/2020	44.00	$1,301.53
3/21/2020	40.00	$1,469.40
3/28/2020	40.00	$1,301.53
4/4/2020	44.00	$1,539.28
4/11/2020	43.00	$1,397.33
4/18/2020	40.00	$1,240.00
4/25/2020	40.00	$1,360.15
5/2/2020	40.00	$1,533.83
5/9/2020	40.00	$1,240.00
5/16/2020	43.75	$1,834.71
5/23/2020	34.25	$1,349.80
5/30/2020	27.75	$1,005.73
6/6/2020	33.75	$1,046.25
6/13/2020	33.75	$879.85
6/20/2020	32.00	$992.00
6/27/2020	39.75	$1,282.25
7/4/2020	34.25	$1,061.75
7/11/2020	34.21	$1,275.66
7/18/2020	37.75	$1,185.75
7/25/2020	20.75	$894.50

8/1/2020	42.00	$1,758.51
8/15/2020	42.50	$1,510.93
8/22/2020	45.00	$1,522.50
8/29/2020	45.75	$1,507.38
9/5/2020	45.75	$1,091.48
TOTAL	2972.01	$107,866.96

4. Due to the variability of Claimant's hours and weekly wages, the preponderant evidence establishes that a fair and accurate approximation of Claimant's wage loss and diminished earning capacity is based on a period of 52 weeks (weeks ending 9/7/2019 – 9/5/2019). Claimant earned a total of $81,908.49 during this time period, resulting in an AWW of $1,575.16.

CONCLUSIONS OF LAW

Generally

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

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

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

AWW

Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell*, 867 P.2d at 82. Where the claimant's earnings increase periodically after the date of injury the ALJ may elect to apply §8-42-102(3), C.R.S. and determine that fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability, not the earnings on the date of the injury. *Id.; see e.g. Burd v. Builder Services Group Inc*., WC 5-085-572 (ICAO, July 9, 2019) (determining that signing bonus claimant received when he began employment is not a "similar advantage or fringe benefit" specifically enumerated under §8-40-201(19)(b) and therefore cannot be added into claimant's AWW calculation); *Varela v. Umbrella Roofing, Inc.*, WC 5-090-272-001 (ICAO, May 8, 2020) (noting that a claimant is not entitled to have the cost or value of the employer's payment of health insurance included in the AWW until after the employment terminates and the employer's contributions end).

Claimant's wage records reflect that Claimant's total hours and gross wages per week varied. The AWW of $1,143.42 admitted to by Respondents in the December 10, 2020 GAL reflects Claimant's earnings during a period of time in which Claimant worked significantly fewer hours as compared to prior weeks. Based on the wage records, an AWW calculated using the 52-week period prior to Claimant's injury results in a fair approximation of Claimant's wage loss and diminished earning capacity. Dividing Claimant's gross wages of $81,908.49 by 52 weeks (weeks ending 9/7/2019 – 9/5/2020) results in an AWW of $1,575.16.

ORDER

1. Claimant's AWW is $1,575.16.

2. All matters not determined herein are reserved for future determination.

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

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

DATED: April 2, 2021

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Whether Claimant proved by a preponderance of the evidence the trigger point injection recommended by John Sacha, M.D. is reasonable, necessary, and causally related maintenance medical treatment.

FINDINGS OF FACT

1. Claimant is a 58-year-old male who works for Employer as a package handler.

2. Claimant sustained an admitted industrial injury on September 12, 2012 when he picked up a box and felt a pop in his low back.

3. Claimant underwent medical treatment for the work injury. On January 30, 2014, authorized treating physician ("ATP") Dr. Sacha noted, "There is nothing further to do other than just maintenance, medicines, and a home exercise program for the next year."

4. Claimant was placed at maximum medical improvement ("MMI") by DIME physician Scott Hompland, D.O. on January 30, 2014.

5. Respondent filed a Final Admission of Liability admitting for "reasonable and necessary related care from an authorized treating doctor."

6. Claimant continued to see Dr. Sacha for maintenance treatment.

7. Claimant was involved in a motor vehicle accident ("MVA") on April 1, 2014, when he was rear-ended by another vehicle.

8. Claimant saw Dr. Sacha on April 2, 2014. Dr. Sacha noted Claimant reported increased low back pain plus leg pain after the MVA. Claimant was scheduled to see Dr. Blau for evaluation and treatment related to the MVA. Dr. Sacha discharged Claimant from the workers' compensation claim, and stated, "Whenever there is a permanent exacerbation of a pre-existing problem, care will transfer over to the work-related motor vehicle accident."

9. On April 23, 2014, Claimant saw Dr. Blau for the MVA. Dr. Blau noted Claimant had sharp and throbbing pain in both his neck and his lower back. Claimant saw Dr. Blau again on May 28, 2014. Dr. Blau noted that Claimant reported his back pain worsened after the MVA.

10. Claimant testified at hearing that he did not experience any increase in low back pain after the MVA.

11. Despite Dr. Sacha's previous statement regarding discharging Claimant from his care for the September 12, 2012, he resumed providing maintenance care to Claimant for the work injury. On August 21, 2014, Dr. Sacha noted Claimant had lumbosacral radiculopathy and "multiple other injured body parts not related to this work comp claim but related to a separate motor vehicle accident." He further noted, "Once the motor vehicle accident has been completed and all the care has been rendered, as maintenance care under the work comp claim he should be allowed a gym pool pass and medications for a 12-month period as maintenance care under the work comp claim."

12. Dr. Sacha continued to provide maintenance care to Claimant, including numerous epidural steroid injections, medications, facet injections, and chiropractic care.

13. On December 30, 2014, Dr. Sacha recommended a lumbar transforaminal epidural steroid injection which was authorized by Respondent and which provided Claimant with relief.

14. On July 2, 2015, Dr. Sacha administered trigger point injections to Claimant. At a follow-up evaluation on July 23, 2015, Claimant reported experiencing good relief for approximately one week, with his symptoms subsequently returning.

15. Claimant testified that the trigger point injections he receive in July 2015 provided three to four months of relief.

16. On November 2, 2015, Dr. Sacha was deposed on the issue of maintenance care. Dr. Sacha testified that Claimant had a diagnostic and therapeutic response to previous transforaminal epidurals and "excellent lasting relief," along with physical exam findings that corroborate radicular pain and radiculopathy. Dr. Sacha testified that the July 2015 trigger point injections provided Claimant only temporary relief. Dr. Sacha opined Claimant continued to need maintenance medical treatment as such treatment allowed Claimant to work and better function.

17. On January 7, 2016, Dr. Sacha performed an L5 transforaminal epidural steroid injection/spinal nerve block as well as a left S1 transforaminal steroid injection which provided relief.

18. On January 28, 2016, Claimant underwent a "left greater trochanteric bursa corticosteroid injection with ultrasound guidance" which provided relief.

19. On September 15, 2016, Claimant underwent an L5 transforaminal steroid injection and left S1 transforaminal steroid injection with Dr. Sacha which provided relief.

20. By April 14, 2017, Claimant was reporting to Dr. Sacha a flare in low back pain with radiation to the left leg and increased numbness and tingling. Dr. Sacha prescribed Claimant an oral steroid, which only provided minimal relief to Claimant.

21. On April 26, 2017, Dr. Sacha performed a L5-S1 transforaminal epidural steroid injection/spinal block, which Dr. Sacha noted was maintenance care. Dr. Sacha noted the injection was diagnostic and therapeutic.

22. Claimant returned to Dr. Sacha on October 19, 2017. Dr. Sacha noted that Claimant's care had been interrupted due to having a myocardial infarction a few months prior. He noted Claimant had undergone a lumbar MRI that showed minimal changes from a prior MRI. Dr. Sacha's plan was to check with Claimant's cardiologist to confirm if Claimant was clear to undergo left L5 and S1 transforaminal epidural injections/spinal nerve root blocks.

23. On December 21, 2017, Dr. Sacha noted that the lumbar epidural was not performed because Claimant's cardiologist recommended Claimant not undergo any interventional, surgical or procedural treatment for a year, and also refrain from the use of any corticosteroids in that time frame.

24. Claimant was subsequently cleared by his cardiologist and, on May 3, 2018 returned to Dr. Sacha. Dr. Sacha noted that Claimant was returning under maintenance medical care for the "same distribution as his current pain" and performed an L5 transforaminal epidural steroid injection/nerve block as well as an S1 transforaminal epidural steroid injection/nerve block. At a follow-up evaluation on May 11, 2018, Claimant reported no significant improvement.

25. On September 20, 2018, Dr. Sacha performed another L5 transforaminal epidural steroid injection/nerve block as well as an S1 transforaminal epidural steroid injection/nerve block.

26. On October 4, 2018, Claimant returned to Dr. Sacha who indicated that Claimant had a diagnostic response to the injection at the L5 level, consistent with L5 radiculopathy, and placed a request for a repeat left L5 transforaminal injection. Dr. Sacha also recommended chiropractic and acupuncture treatment.

27. On February 7, 2019, Claimant underwent a left L5 transforaminal epidural steroid injection/spinal nerve block performed by Dr. Sacha which provided relief.

28. On July 11, 2019, with Kathleen D'Angelo, M.D. performed an independent medical examination ("IME") at the request of Respondent. Dr. D'Angelo concluded that the Claimant has had two significant intervening events prior to any objective evidence of true lumbar radiculopathy, which included the automobile accident of 2014 and the passage of time. Dr. D'Angelo opined that Claimant's maintenance and active treatment should have stopped immediately after Dr. Hompland's second DIME report. She opined that the need for treatment within the prior two years, and any need for futher treatment, was not casually related to the work injury, but rather to intervening degenerative changes or Claimant's 2014 MVA. Dr. D'Angelo further opined that Dr. Sacha's recommendations for treatment at the time were not causally related to the 2012 work injury.

29. On August 28, 2019, Claimant again underwent a left L5 transforaminal epidural steroid injection/spinal block which provided relief.

30. On October 31, 2019, Dr. Sacha noted that a surgeon recommended against surgery due to multiple medical issues. Claimant was to continue treating for symptom control with chiropractic and acupuncture treatment and medication.

31. On July 16, 2020, Dr. Sacha performed bilateral lumbar trigger point injections. Claimant returned to Dr. Sacha for repeat trigger point injections on August 6, 2020. When Claimant attempted to follow-up for his third trigger point injections on September 1, 2020, Dr. Sacha noted that the insurance carrier had denied the trigger point injections.

32. Claimant testified that the trigger point injections permit him to work and perform the activities of daily living. He stated that, without the injections, he has problems reaching, grabbing, and bending over.

33. The ALJ finds Claimant's testimony and the opinion of Dr. Sacha, as supported by the medical records, more credible and persuasive than the opinion of Dr. D'Angelo.

34. Claimant proved it is more probable than not the lumbar trigger point injection recommended by Dr. Sacha are reasonably necessary to relieve the effects of Claimant's September 12, 2012 work injury.

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

CONCLUSIONS OF LAW

Generally

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

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

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

Maintenance Medical Treatment

Section 8-42-101(1), C.R.S. requires the employer to provide medical benefits to cure or relieve the effects of the industrial injury, subject to the right to contest the reasonableness or necessity of any specific treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). The need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003).

In cases where the respondents file a final admission of liability admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003); *Oldani v. Hartford Financial Services,* W.C. No. 4-614-319-07, (ICAO, Mar. 9, 2015). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School District No.11*, W.C. No. 3-979-487, (ICAO, Jan. 11, 2012); *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO, Feb. 12, 2009. The question of whether the claimant has proven that specific treatment is reasonable and necessary to maintain her condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Respondents are not liable if the need for treatment was caused as the direct result of an independent intervening cause. *Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187 (Colo. App. 2002). The question of whether disability and need for treatment was caused by the industrial injury or an intervening cause is a question of fact. *Id*.

Respondents argue that the need for the recommended trigger point injection, as well as any further medical care, is no longer related to the September 12, 2012 work injury due to the intervening 2014 MVA and ongoing natural degenerative changes. Respondents further argue that the trigger point injection is not reasonable and necessary based on Dr. Sacha's deposition testimony that prior trigger point injection did not provide lasting relief.

The ALJ is not persuaded the 2014 MVA was an intervening injury that severed the causal relationship between the work injury and Claimant's need for treatment. Despite Dr. Sacha's earlier statements regarding limited maintenance treatment around the time Claimant was placed at MMI, and his statements regarding discharging Claimant from his care around the time of the 2014 MVA, subsequent to the 2014 MVA, Dr. Sacha has continued to provide several years of maintenance care to Claimant related to the 2012 work injury. This maintenance care has included multiple injections, including trigger point injections and transforaminal epidural steroid injections. Dr. Sacha has been Claimant's ATP for several years and is familiar with Claimant's condition. He administered additional trigger point injections in July 2020 and August 2020, and recommended additional trigger point injections to relieve Claimant's symptoms. Dr. Sacha's 2015 testimony that trigger point injections administered in July 2015 only provided temporary relief is insufficient, in light of the totality of the evidence, to persuade the ALJ that the injections currently recommended are not reasonable, necessary and related to the 2012 work injury. Claimant credibly testified that the trigger point injections provided relief and increased his ability to function. Claimant proved by a preponderance of the evidence the trigger point injections recommended by Dr. Sacha are reasonable and necessary maintenance treatment.

ORDER

1. Respondents shall authorize and pay for the trigger point injection recommended by ATP Sacha.

2. All matters not determined herein are reserved for future determination.

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

when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 2, 2021

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Did Claimant prove by a preponderance of the evidence she suffered a compensable occupational disease caused by her work for Employer?

- If Claimant proved a compensable occupational disease, is she entitled to reasonably necessary treatment to cure and relieve the effects of the injury?

FINDINGS OF FACT

1. Claimant works for Employer as a seamstress processing uniforms for commercial customers. She has worked at this job for approximately three and one-half years. Her normal duties include adjusting the length of pant legs, detaching and attaching bar codes, sewing emblems onto garments, assigning and sewing RFID chips into garments, scanning orders, covering garments with plastic bags, and entering completed orders into a computer system. Claimant typically worked four nine-hour shifts per week.

2. On January 17, 2019, Claimant suffered an admitted work injury to her left index finger. She primarily treated with Dr. Jessica Leitl and PA Anna Printy at HealthOne. Claimant was put on work restrictions of no use of her left hand and use a splint. Employer accommodated Claimant's restrictions with modified duty.

3. Claimant's initial modified duty assignment was trimming emblems, which involves cutting threads from the backside of embroidered emblems. Claimant provided conflicting testimony regarding this task. She initially testified she removed emblems with pliers for her entire nine-hour shifts for three months. She testified she removed emblems using only her right hand and worked with her arms at shoulder height. She later agreed she was actually removing threads from emblems rather than removing emblems. She also conceded she performed other tasks but continued to assert she typically spent her entire day trimming emblems while on modified duty.

4. Claimant's supervisor, Mr. O[Redacted}, credibly testified Claimant performed a variety of tasks on modified duty because Employer did not have sufficient emblem production to keep Claimant busy her entire shift for three months. Mr. O[Redacted} assigned Claimant to assist other employees with tasks within her restrictions rather than re-assigning other employees from their regular duties to provide Claimant with modified work. The tasks included trimming threads from emblems, making and stacking emblems, trimming paper from embroidered garments, and removing RFID chips from old garments before they were discarded. Claimant generally performed at least three different duties each day for no more than three hours per duty.

5. HealthOne records document hand and arm symptoms after Claimant started modified duty, primarily on the left side, although the right arm was mentioned briefly. A January 24, 2019 report documented “her right hand is getting overused now and with some use of the fingers of her left hand, by the end of the workday her finger hurts worse.” By the next visit on January 31, 2019, Claimant reported “her right hand is much less painful now with breaks during work. Work is going well. Abiding by restrictions.”

6. A February 14, 2019 report states, “was doing much better, but yesterday was taking off letters and using [ ] her left forearm to hold down fabric as she tore the names from fabric. After a few hours her 2nd and 3rd digits and wrist became very inflamed. She said the pain was intolerable and went to boss who put her on different work. Took 600 mg Ibuprofen yesterday and put heat on forearm and wrist and did the exercises Rx’d by OT. Feeling much better now.” The corresponding physical examination documented pain extending from the second digit to the dorsum of the left hand, wrist, and forearm, but there was no mention of any issues with the right hand. Mr. O[Redacted} corroborated that Claimant told him her hands were “tired” from trimming emblems, so he re-assigned her to make supplemental emblems and remove RFID chips from old garments. He continued to assign rotating modified duties thereafter while Claimant remained on restrictions. Mr. O[Redacted} credibly testified Claimant never made any subsequent comments or complaints about pain or difficulty performing modified or regular duties.

7. On February 26, 2019, Claimant complained to Dr. Leitl about pain and paresthesias in her left hand, wrist, and fingers on February 26, 2019 Dr. Leitl advised Claimant to wear a brace and indicated she would consider electrodiagnostic testing for possible carpal tunnel syndrome (CTS) if the symptoms persisted. There was no mention of any problems with the right arm.

8. The next day Claimant told the occupational therapist her pain was improving.

9. At a follow-up appointment on March 20, 2019, Dr. Leitl again documented left arm symptoms consistent with CTS, but opined “I would not expect the original injury to have caused this condition, however there is question of a secondary injury 2/13 (as documented per 2/14 encounter). There is no documented injury to the right hand.” She ordered an EMG “to evaluate for CTS vs distal medial nerve injury.”

10. On April 11, 2019, Claimant told Dr. Leitl her left wrist, thumb, and index finger symptoms were no better and she was starting to have pain in her upper arm. Dr. Leitl noted “she attributes this to ‘lifting’ more frequently, however her restrictions have not changed . . . . Since her last visit, she has been tasked to remove a chip from a piece of clothing, remove the clothing from a hanger and place the clothing into the garbage, but otherwise adhering to her 2lb lifting restriction.” Dr. Leitl opined the wrist and arm symptoms were consistent with CTS and possibly mild medial epicondylitis and biceps tendonitis. She did not believe the symptoms were related to the original injury and advised Claimant to pursue treatment under health insurance or consider filing a separate claim if Claimant believed the symptoms were work-related.

11. Claimant was put at MMI for the left finger injury on May 10, 2019. She was released with no restrictions and no need for maintenance care.

12. Claimant returned to her regular work on May 10, 2019 and has continued in that position to present.

13. Dr. David Yamamoto performed an IME for Claimant on January 14, 2020. Her primary complaints were bilateral hand pain and numbness in a median nerve distribution. Phalen's and Tinel's tests were positive at the left wrist but negative on the right. Dr. Yamamoto diagnosed bilateral CTS from "overuse . . . caused by changes in her work activity after she injured her left index finger." Dr. Yamamoto was under the impression Claimant's modified duties "involved cutting fabric, often with the wrists in frequent positions of flexion." Dr. Yamamoto opined "this change in her job duties was . . . the cause of her current bilateral [CTS]." The report gives no indication Dr. Yamamoto thought Claimant's regular pre-injury duties were causative. He recommended lab work to investigate possible metabolic or other underlying conditions, a jobsite analysis "including analysis of her work when she was cutting fabric," an EMG study to verify the diagnosis of CTS, and evaluation with a hand specialist.

14. The conclusions in Dr. Yamamoto's report were based on bad information that led to several inaccurate assumptions about Claimant's modified duty work tasks. Claimant told Dr. Yamamoto she was cutting fabric for seven months until August 2019, even though she returned to regular work on May 10, 2019. Claimant was merely trimming small threads on the edges of emblems rather than "cutting fabric." Claimant gave Dr. Yamamoto the impression she was performing a singular task all day, but she only trimmed emblems a few hours each day. Dr. Yamamoto's report indicates Claimant was holding clothing with the third and fourth fingers of her left hand. Claimant testified at hearing that she was using her thumb and pinky finger because she work a brace that prevented use of her other fingers. Dr. Yamamoto admitted he did not obtain a clear history regarding what and how Claimant was doing, he simply understood that she was cutting in an awkward position for several months.

15. Joseph Blythe performed a job demands analysis (JDA) at Insurer's request on August 25, 2020. Claimant had already returned to regular duties and was alleging the modified duty tasks caused her bilateral CTS, so Mr. Blythe observed other employees performing the tasks Claimant had done while on modified duty. Mr. Blythe evaluated Claimant's work under the risk factor framework outline in the CTD MTGs. The observed tasks potentially implicated two of the five categories of risk factors: (1) force and repetition/duration, and (2) awkward posture and repetition/duration. None of the tasks satisfied the thresholds for any primary risk factors or secondary risk factors to be considered causative under the MTGs.

16. Dr. Jonathan Sollender performed an IME for Respondents on September 8, 2020. Claimant told Dr. Sollender the modified duty assignment required her to trim emblems "the whole day." She later acknowledged she trimmed paper from emblems at times. On examination, Tinel's test was equivocal and Phalen's was negative bilaterally. Median nerve compression test was positive bilaterally. Claimant was diffusely tender

about both wrists. The lateral left elbow was mildly tender to palpation and resisted left wrist flexion caused minor lateral elbow pain. Dr. Sollender diagnosed left lateral epicondylitis, bilateral CTS, and diffuse wrist pain with no focused diagnosis. He noted the diagnoses were based entirely on subjective data (reported symptoms and response to examination) with no objective support (such as electrodiagnostic testing). Dr. Sollender saw no work-related explanation for any of Claimant's reported upper extremity issues. Based on his review of the JDA, his discussion with Claimant, and analysis of the CTD MTGs, Dr. Sollender concluded Claimant's job exposed her to no occupational risk factor sufficient to cause, contribute to, or aggravate her condition.

17. Based on Dr. Yamamoto's report and Claimant's discovery responses, Respondents were initially under the impression Claimant was only alleging an injury from modified duties. But Claimant expanded her theory of causation to encompass her regular work for Employer. As a result, Mr. Blythe conducted another JDA in January 2021 to evaluate Claimant performing her regular work.

18. Claimant's regular work implicates three potential risk factors under the MTGs: (1) force and repetition/duration, (2) awkward posture and repetition/duration, and (3) computer use. Based on Mr. Blythe's objective analysis, none of the tasks exposed Claimant to any primary or secondary risk factors considered causative of CTDs.

19. Dr. Sollender reviewed the JDA and opined,

> [None of the work tasks] exposed her to anywhere near a significant amount of time to any risk factor known to cause/contribute to upper extremity pathology. In short, these positions would not lead to the development of any upper extremity cumulative trauma conditions such as carpal tunnel syndrome or lateral epicondylitis. These other jobs, in addition to the original positions evaluated previously, did not cause, contribute, aggravate, or accelerate her left lateral epicondylitis, bilateral carpal tunnel syndrome, or diffuse bilateral wrist pain without focused diagnosis.

20. Dr. Sollender's analysis and opinions are credible and more persuasive than the contrary opinions offered by Dr. Yamamoto.

21. Mr. O[Redacted}'s description of Claimant's modified and regular work duties is credible and more persuasive than any contrary descriptions offered by Claimant.

22. Claimant failed to prove she suffered a compensable occupational disease proximately caused by her work for Employer.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove they are a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove entitlement to benefits by a preponderance of the evidence. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201.

The Act imposes additional requirements for compensability of a claim based on an occupational disease. A compensable occupational disease must meet each element of the four-part test mandated by § 8-40-201(14), which defines an occupational disease as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

The "equal exposure" element effectuates the "peculiar risk" test for occupational diseases and requires that the injurious hazards associated with the employment be more prevalent in the workplace than in everyday life or other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The employment must expose the claimant to the risk causing the disease "in a measurably greater degree and in a substantially different manner than are persons in employment generally." *Id.* at 824. The conditions of employment need not be the sole cause of the disease, but must cause, intensify, or aggravate the condition "to some reasonable degree." *Id*. *Id*. at 824. If the condition resulted from multiple or concurrent causes, the respondents may mitigate their liability by proving an apportionment of benefits. *Id*. If the claimant proves that the hazards of employment caused, intensified, or aggravated the disease process "to some reasonable degree," the burden shifts to the respondents to prove the existence of nonindustrial causes and the extent to which they contribute to the disability or need for treatment. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992); *Vigil v. Holnam, Inc*., W.C. No. 4-435-795 & 4-530-490 (August 31, 2005).

The Division has adopted Medical Treatment Guidelines (MTGs) to advance the statutory mandate to assure quick and efficient delivery of medical benefits to injured workers at a reasonable cost to employers. WCRP 17, Exhibit 5 addresses Cumulative Trauma Conditions (CTD MTGs), and was most recently updated in December 2016. Under § 8-42-101(3)(b) and WCRP 17-2(A), medical providers must use the MTGs when furnishing medical treatment. The ALJ may consider the MTGs as an evidentiary tool but is not bound by the MTGs when determining if requested medical treatment is reasonably necessary or work-related. Section 8-43-201(3); *Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (January 25, 2011).

As found, Claimant failed to prove she suffered a compensable occupational disease involving her upper extremities. The argument Claimant was injured by her modified duty work is unpersuasive for multiple reasons. Claimant initially reported right hand pain within a week of starting modified duty. It is not plausible Claimant developed CTS or any other CTD in her right arm after only one week of light duty. In any event, the symptoms improved a week later and there is no further mention of any right upper extremity symptoms in HealthOne records thereafter. Nor is it plausible Claimant injured the left arm by working primarily with her right arm. Claimant was performing a variety of light duty tasks each day, which further reduces the likelihood the work caused any upper extremity issues. The JDAs objectively show that neither the modified work nor Claimant's regular duties exposed her to any risk factors set forth in the MTGs. Even though Mr. Blythe evaluated workers other than Claimant for the first JDA, the persuasive evidence shows the tasks he observed were fairly representative of the work Claimant was performing. Moreover, Claimant was the subject for the second JDA regarding her regular job. The JDAs provide the most accurate assessment of Claimant work tasks. Claimant's variable and imprecise descriptions do not provide a reliable basis to quantify her duties in the context of a causation analysis. Dr. Sollender's thorough analysis and conclusions are persuasive. Dr. Yamamoto's opinions are not persuasive because they are based on erroneous information and unsupported assumptions about Claimant's work activities.

ORDER

It is therefore ordered that:

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

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

DATED: April 3, 2021

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

ISSUES

- Did Claimant overcome the DIME's 15% whole person lumbar spine impairment rating by clear and convincing evidence?

- Did Claimant prove by a preponderance of the evidence his right shoulder impairment should be converted to whole person?

- If Claimant has whole person impairment to his shoulder, did he overcome the DIME's shoulder rating by clear and convincing evidence?

- Did Claimant prove by a preponderance of the evidence he suffered scheduled impairment greater than the ratings assigned by the DIME and admitted by Respondent?

- Did Claimant prove he is eligible for indemnity benefits greater than $87,470.18 because his combined whole person impairment rating is greater than 25%?

- Disfigurement.

- Claimant withdrew the endorsed issue of "Grover Medical Benefits" because the FAL admits for a general award of medical benefits after MMI and there is no current dispute regarding any specific treatment.

STIPULATIONS

1. Claimant is entitled to TPD benefits from August 31, 2019 through March 12, 2020, and from March 20, 2020 to June 2, 2020. The parties will calculate the specific amount of TPD benefits owed to Claimant, if necessary based on the outcome of this hearing. Additional TPD benefits are subject to the statutory cap on indemnity benefits pursuant to § 8-42-107.5.

2. Respondent has paid Claimant temporary disability and permanent partial disability benefits totaling $87,470.18, which is the maximum amount of indemnity benefits payable under § 8-42-107.5 when the final rating is 25% or less. Respondent will not owe any additional indemnity benefits unless Claimant's final whole person rating is determined to be 26% or greater.

3. Respondent may take a credit equal to the amount of PPD benefits previously paid to Claimant against any additional PPD benefits the ALJ may award. Respondent may assert the overpayment reserved in the August 4, 2020 Final Admission of Liability against any additional TPD benefits that owed to Claimant.

FINDINGS OF FACT

1. Claimant works as a grocery clerk at one of Employer's stores in Pueblo.

2. On August 20, 2017, Claimant suffered admitted injuries when he fell down a staircase at work. He injured multiple parts of his body, including his right arm, right shoulder, low back, right knee, and face.

3. Claimant's most severe injuries were a displaced and comminuted right proximal humeral fracture and mid shaft fractures of the right radius and ulna. Claimant was hospitalized at Memorial Hospital in Colorado Springs and underwent ORIF surgery for the humerus, radius, and ulnar fractures by Dr. Augusta Kluk. Claimant was discharged from the hospital on August 25, 2017.

4. Claimant was referred to Dr. Phillip Marin in October 2017 for evaluation of scarring on his right cheek from the injury. Dr. Marin noted hypertrophic scarring and step off which probably would not improve with time. Dr. Marin performed a revision with surgical excision and closure of Claimant's right cheek scar.

5. In March 2018 Dr. Kluk determined Claimant had a nonunion of the ulna and probable bone infection.

6. Dr. Wallace Larson performed an IME for Respondent on March 29, 2018. Dr. Larson agreed Claimant was not at MMI and required additional treatment for the nonunion and infection. Dr. Larson also noted some "non-physiologic findings" related to superficial palpation of the neck and back.

7. On April 3, 2018, Dr. Kluk removed the hardware and debrided the nonunion.

8. Dr. J. Douglas Bradley has been Claimant's primary ATP throughout this claim. On August 3, 2018 Dr. Bradley opined Claimant was approaching MMI and ordered an FCE.

9. Dr. Bradley placed Claimant at MMI on August 30, 2018. He used ROM measurements obtained during the FCE to calculate the following impairment ratings:

Right shoulder:	13% upper extremity after normalization
Right elbow:	5% upper extremity
Right wrist:	3% upper extremity
Right knee:	5% lower extremity after normalization
Lumbar spine:	19% whole person (excluding invalid flexion)
Total combined rating:	29% whole person

10. Dr. Bradley assigned no rating for lumbar flexion because Claimant did not meet the straight leg raise validity criteria.

11. Respondent disagreed with Dr. Bradley's rating and initiated the DIME process.

12. On September 3, 2018, Dr. Kluk opined Claimant was still suffering from a hypertrophic nonunion. This was later confirmed by a CT scan on October 4, 2018. Dr. Kluk performed an ORIF with bone graft on December 4, 2018. The parties agreed Claimant was not at MMI and Respondent abandoned the DIME.

13. The surgery was successful with eventual resolution of the infection and steady bone callus formation, although Claimant continued to have pain in the right forearm and restricted motion.

14. Dr. Bradley again placed Claimant at MMI on June 18, 2019. Dr. Bradley calculated new ratings for Claimant's right elbow and right wrist based on measurements taken at an FCE on April 5, 2019.[1] He otherwise reused the August 2018 data and assigned the same ratings for Claimant's other injuries. Dr. Bradley's revised final ratings were:

Right shoulder:	13% upper extremity after normalization
Right elbow:	8% upper extremity after normalization
Right wrist:	9% upper extremity
Right knee:	5% lower extremity after normalization
Lumbar spine:	19% whole person (excluding invalid flexion)
Total combined rating:	33% whole person

15. Respondent requested a DIME to contest Dr. Bradley's impairment rating.

16. On September 11, 2019, Dr. Kluk indicated Claimant's symptoms appeared to have stabilized compared to previous visits. Claimant was working full time but still had "vague achy pain" in his right arm and limited pronation and supination. X rays showed continued bone healing and no evidence of any hardware issues. Dr. Kluk released Claimant to follow up as needed.

17. Claimant saw Dr. Dwight Caughfield for a DIME on September 13, 2019. Dr. Caughfield determined Claimant was not at MMI and recommended additional workup. Specifically, he recommended a right shoulder MRI to evaluate possible rotator cuff pathology, upper extremity electrodiagnostic testing for possible radial sensory neuropathy, and a lumbar MRI. Although Claimant was not at MMI, Dr. Caughfield performed an "advisory" impairment rating consistent with Division policy. Dr. Caughfield noted multiple inconsistencies and "non-physiological" findings including "variable and nondermatomal sensory changes, variable and giveway weakness in both his right hand/arm as well as his right leg, large observed discrepancies in range of motion observed versus measured, and wide variability in range of motion noted on repeat testing

[1] The FCE report is not in evidence but was described in Dr. Burris' IME report. The reliability of the FCE appears questionable because Claimant only passed 14 of 20 reliability and consistency measures.

and between those done in his record. His non-physiological factors appear to be impacting the examination findings and potentially functional tolerances."

18. Dr. Caughfield noted other specific issues pertinent to the disputed ratings, including:

- When measuring right pronation with the elbow at 90 degrees he has less than 10 degrees of motion but with neurological testing of rapid alternating hand motion (transition from palm up to palm down) he has much greater motion which is measured at over 65 degrees.

- With initial range of motion evaluation, he only flexes the knee to 72° but once I discussed with him how in seated posture he has 90° or more of range we repeat the measurements [and] he does demonstrate slightly over 90° of flexion . . . but that does not correlate with the ROM findings 2018 FCE done per AMA guidelines nor the ROM reported in Dr. Larson's IME of 2019.

- Self-limited range of motion in all lumbar planes without accompanying spasm or muscle guarding.

- Low back motion is ratcheting was shaking and sudden 5 to 10° changes in flexion/extension.

19. Claimant failed the straight leg raise validity criteria for a lumbar flexion rating and Dr. Caughfield had him return for a second set of measurements on a different day. Claimant again failed to demonstrate valid flexion measurements.

20. Dr. Caughfield assigned a 25% whole person advisory rating, calculated as follows:

Right shoulder:	13% upper extremity after normalization
Right elbow:	9% upper extremity
Right wrist:	3% upper extremity
Right knee:	0% lower extremity after normalization
Lumbar spine:	13% whole person (excluding invalid flexion)
Total combined rating:	25% whole person

21. Respondent accepted the determination Claimant was not at MMI and authorized additional treatment.

22. A lumbar MRI on December 27, 2019 was unremarkable with no significant structural pathology and only mild disc degeneration. A right shoulder MRI that same date showed subdeltoid bursitis and supraspinatus tendinopathy but no rotator cuff tear.

23. Upper extremity electrodiagnostic testing on January 15, 2020 showed radial neuropathy in the mid forearm.

24. Claimant was evaluated by Dr. Gregg Martyak, a hand surgeon, on January 16, 2020. Claimant reported numbness in his right thumb, index, and middle fingers that started after his fall. Dr. Martyak noted supination to 60° and pronation -10°. Dr. Martyak's clinical examination was consistent with mild radial tunnel but also carpal tunnel syndrome. He administered a carpal tunnel injection, which provided "definite improvement" in Claimant's numbness and tingling for a few weeks. Dr. Martyak recommended surgery.

25. Dr. Martyak performed a right radial nerve neuroplasty and right carpal tunnel release on March 13, 2020. The numbness in Claimant's fingers resolved after surgery and his pain decreased.

26. Claimant's final visit with Dr. Martyak was June 1, 2020. Dr. Martyak noted Claimant's preoperative symptoms had improved but he still had problems rotating his right hand. Claimant demonstrated 135 degrees of elbow flexion, 80 degrees of supination, and only 5 degrees of pronation. Dr. Martyak did not think the pronation would improve but did not recommend another procedure because that might make Claimant worse. He released Claimant at MMI with no specific follow-up.

27. Dr. Bradley put Claimant at MMI on June 2, 2020. Confusingly, Dr. Bradley's report states Claimant was released from care with no impairment. The ALJ infers this notation was a mistake because Dr. Bradley testified he believes Claimant has permanent impairment and requires maintenance care. Nevertheless, Dr. Bradley provided no contemporaneous analysis of impairment when Claimant reached MMI.

28. Dr. Caughfield performed a follow-up DIME on July 7, 2020. He determined Claimant was at MMI and provided an impairment rating. As he had at the first DIME, Dr. Caufield again found significant inconsistencies in Claimant's presentation then examination findings. Dr. Caughfield wrote,

> He demonstrates severe non-physiological findings on examination such as sudden, large amplitude oscillations in joint and spine position that he attributes to joint and spine pain (such sudden and large movement should exacerbate pain and be avoided in physiological based pain behaviors), significant passive range of motion variation on examination versus active measured range without findings of neurological deficits, weakness to less than antigravity that does not resolve with gravity eliminated or gravity assist postures on direct examination but is not noted was observed spontaneous movement, and no loss of muscle bulk that is expected with non-antigravity muscle strength. . . . Wrist extension strength is variable and non-antigravity and active range but then resists wrist flexion strongly. . . . His lumbar flexion is once again invalidated by straight leg measurements (this is his 5th set of measurements with me) and non-physiological examination with jerking oscillating motion that is atypical for someone with back pain.

29. Regarding the right elbow, Dr. Caughfield stated, "His active elbow flexion and forearm pronation range is very inconsistent with observed spontaneous motion and

passive range even after discussion of my concerns with him and I therefore did not find them are liable for the purpose of providing impairment due to loss of range. His supination was reasonably consistent and for 70° I assigned 0% UE impairment." With respect to the right knee, Dr. Caughfield stated, "His knee range of motion is symmetric with the left while his strength testing is non-physiological. No impairment is assigned." Dr. Caughfield also noted:

> [Claimant] has multiple inconsistencies in the record and on repeated examinations that indicate non-physiological aspects to his presentation. This significantly complicates the assignment of impairment as maximal volitional effort is required for both neurological and range of motion impairment assessment. That being said, he has objective evidence of significant trauma that would be expected to impact upper limb motion (radial and ulnar fracture with a nonunion, greater trochanter humorous fracture that can produce shoulder range loss) as well as EDX findings of a radial neuropathy with axonal loss which can lead to neurological functional loss. I have assigned values for his impairment based upon the most consistent range of motion in his loss of motor axons on his EMG. For his low back pain, he has had consistent pain complaints and repeated treatment that merits impairment due to specific disorders. His range of motion is non-physiological inflection but does have some consistency between repeated measurements for extension and lateral flexion and therefore impairment is assigned for range of motion loss as well as specific disorder.

30. Dr. Caughfield's final ratings were:

Right shoulder:	13% upper extremity after normalization
Right elbow:	0% ROM
Radial nerve impairment:	3% upper extremity
Right wrist:	2% upper extremity
Right knee:	0% after normalization
Lumbar spine:	15% whole person (excluding invalid flexion)
Total combined rating:	24% whole person

31. Dr. Caughfield's documented clinical findings and rationale for his rating are credible and persuasive.

32. Respondent filed a Final Admission of Liability on August 4, 2020 based on Dr. Caughfield's ratings.

33. Dr. John Burris performed an IME for Respondent on January 5, 2020 and was impressed by similar inconsistencies as Dr. Caughfield. He noted, "the examination today exhibits similar findings in measurements documented by Dr. Caughfield. Specifically, there are multiple non-physiologic findings present, the lumbar range of motion is invalid based on straight leg raise criteria, and there is no impairment of the right knee after normalization." He pointed out Dr. Caughfield took a total of 15 lumbar

spine range of motion measurements over three separate visits. Dr. Burris opined Dr. Caughfield's rating was accurate and consistent with the AMA Guides and Level II training. Dr. Burris' opinions are credible and persuasive.

34. Dr. Bradley testified at hearing regarding Claimant's impairment. He stood by his rating but agreed Dr. Caughfield's rating was reasonable based on the findings at the DIME. Dr. Bradley admitted he had no specific basis to contest or disagree with Dr. Caughfield's ratings. He found Claimant's presentation generally straightforward and consistent with his exam findings but acknowledged Dr. Caughfield's different impression. He agreed Dr. Caughfield had discretion to not rate Claimant's elbow because he believed the measurements were inconsistent. He also agreed it was within Dr. Caughfield's discretion whether to have Claimant return for another set of lumbar ROM measurements given the repeated inconsistencies and invalidity.

35. Claimant failed to overcome Dr. Caughfield's lumbar spine rating by clear and convincing evidence.

36. Claimant failed to prove by a preponderance of the evidence he is entitled to any scheduled ratings above those assigned by Dr. Caughfield.

37. Claimant's overall combined whole person rating is 24%, as determined by Dr. Caughfield.

38. The issue of right shoulder "conversion" is moot because Claimant's overall rating is less than 26% and he has already received the maximum indemnity benefits payable for his date of injury.

39. Claimant's injuries caused significant scarring in multiple areas normally exposure to public view. He has: (1) a 5-inch long by ¼ inch wide, curved, partially indented, partially raised, discolored scar extending from nose across the right cheek; (2) a 6-inch long by ½ to ¾ inch wide, curved, irregularly shaped, partially indented, partially raised, discolored surgical scar on the proximal right biceps extending onto the right pectoralis muscle; (3) a 2-inch long by ½ inch wide partially indented, partially raised, discolored surgical scar on the on distal dorsal forearm; (4) a 6-inch long by ½ wide, irregularly shaped, partially indented, partially raised, discolored surgical scar on the outer right forearm; (5) an 8-inch long by ½ to ¾ inch wide, irregularly shaped, partially indented, partially raised, discolored surgical scar on the inner right forearm; and (6) a 4-inch long by ¼ to ½ inch wide surgical scar on the lateral right elbow with a "puncture" in the center. The skin in the center of scar #6 is thin and opens periodically (it appeared somewhat open during the hearing). Claimant's scars are quite irregularly shaped, significantly discolored, and generally more noticeable than the "typical" scars this ALJ has observed during many disfigurement evaluations. Claimant suffered "extensive" scarring that entitles him to an enhanced award. The ALJ finds Claimant should be awarded $7,500 for his disfigurement.

CONCLUSIONS OF LAW

A. Claimant failed to overcome the DIME's lumbar spine rating

A DIME's determination regarding whole person impairment is binding unless overcome by "clear and convincing evidence." Section 8-42-107(8)(C). Clear and convincing evidence is "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). The party challenging a DIME's conclusions must demonstrate it is "highly probable" the impairment rating is incorrect. *Qual-Med v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998); *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Deviations from rating protocols outlined in the *AMA Guides* are relevant but not dispositive in determining whether the DIME rating has been overcome. *Corley v. Bridgestone Americas, Inc*., W.C. No. 4-993-719-004 (February 26, 2020). Similarly, the ALJ may consider but is not bound by the Division's Impairment Rating Tips or the Level II accreditation curriculum. *Vuksic v. Lockheed Martin Corporation*, W.C. No. 4-956-74 one-02 (August 4, 2016) (rating "Tips" are not "merely guidance" and "not binding rules").

As found, Claimant failed to overcome the DIME's 15% whole person rating for the lumbar spine. The only specific error Claimant alleged regarding the lumbar rating is Dr. Caughfield's "failure" to have Claimant return for a second set of measurements. Although the Rating Tips unequivocally state "claimants must have two visits" before spinal ROM measurements can be invalidated, the *AMA Guides* give the examiner discretion on this issue.[2] Notwithstanding the dogmatic language of the Rating Tips, a DIME is not invariably required to obtain a second set of measurements in all cases. *Corley, supra*. Dr. Caughfield believed having Claimant return for another set of measurements would be fruitless because he had already failed to the SLR validity testing on multiple occasions, including five sets of measurements performed by Dr. Caughfield personally. There was no reason to think another set of measurements would produce valid results, and it was reasonable for Dr. Caufield to conclude the DIME without doint so.[3] Dr. Burris and Dr. Bradley agreed Dr. Caughfield was within his discretion to forego another set of measurements under the circumstances.

B. Claimant failed to prove a scheduled other than those assigned by the DIME

The DIME procedure does not apply to scheduled impairment ratings. Section 8-42-107(8)(a); *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000). The claimant is not required to overcome a DIME's scheduled rating by clear and convincing evidence but must only prove a rating under the preponderance standard.

[2] The instructions in the AMA Guides (p.79) are: "If consistency requirements are not met, perform additional tests up to a maximum of six until reproducibility criteria are satisfied. If testing remains inconsistent after six measurements, consider the test invalid and **reexamine at a later date or disqualify that part of the examination**." (Emphasis added).

[3] This assumption was subsequently borne out by Claimant's inability to provide valid measurements at the IME with Dr. Burris.

Wagoner v. City of Colorado Springs, W.C. No. 4-817-985-03 (Oct. 21, 2013), *aff'd Wagoner v. Industrial Claim Appeals Office*, Colo. App. No. 13CA1983 (Oct. 23, 2014)(NSOP). The DIME's determination regarding scheduled impairment is not entitled to special weight and is merely another opinion to consider when evaluating the preponderance of the evidence. If a claimant has multiple impairments, the clear and convincing standard applies to the whole person components and the preponderance standard governs any scheduled ratings. *Alaya v. Reinerth Enterprises, Inc*., W.C. No. 4-999-925-003 (December 3, 2020).

As found, Claimant failed to prove he suffered any ratable scheduled impairment beyond that found by Dr. Caughfield. Dr. Caughfield's thoughtful and detailed explanations are highly persuasive. His conclusions are buttressed by Dr. Burris' persuasive opinions and Dr. Bradley's testimony. Dr. Bradley could point to no specific errors in the DIME report and conceded Dr. Caughfield "followed the protocol of the AMA Guides to the letter." Dr. Bradley agreed it was permissible and appropriate for Dr. Caughfield to reject range of motion measurements he considered non-physiologic and inconsistent with observed behaviors and movements during the examination. Indeed, Dr. Bradley has done that himself when warranted. Dr. Bradley's June 18, 2019 impairment rating advocated by Claimant is not persuasive because it was based on measurements obtained long before MMI and before Claimant underwent additional surgery. Although such an outdated rating might be useful in certain cases, it is not helpful here because Claimant's measurements have varied so widely over time. Additionally, because Dr. Bradley did not personally perform the range of motion measurements use used for his rating, he cannot persuasively speak to their reliability.

There is no doubt Claimant suffered serious injuries that caused ongoing symptoms and permanent impairment. But translating symptoms and limitations into a numeric rating requires reliable data, which Dr. Caughfield was unable to obtain despite multiple good faith attempts. Claimant's argument that Dr. Caughfield "intended" to keep the rating under 26% is not persuasive. Instead, Dr. Caughfield appears to have given Claimant the benefit of the doubt and provided the highest rating he could reasonably justify in light of the numerous inconsistencies and non-physiologic findings. Although Claimant may have some permanent impairment related to elbow and forearm motion, his inconsistent effort and lack of reliable measurements prevents establishing any specific rating to the level of "more likely than not." Additionally, Dr. Caughfield's determination Claimant has no knee impairment after normalization is consistent with measurements obtained at both DIME appointments and Dr. Burris' evaluation.

C. Shoulder conversion is moot

Section 8-42-107.5 limits the combined total of temporary disability and permanent partial disability benefits a claimant may receive based on their final impairment rating. The applicable cap for a whole person rating under 26% for Claimant's date of injury is $87,470.18. As found, Claimant's overall final whole person rating is 24% and Respondent has already admitted and paid Claimant $87,470.18 in temporary and permanent partial disability benefits. Because Claimant failed to prove he has impairment greater than 25% whole person, a determination of whether his shoulder rating represents a scheduled or whole person impairment will have no impact on his compensation. Accordingly, Claimant's request to convert the shoulder is moot and will not be addressed.

D. Disfigurement

Section 8-42-108(1) provides for a disfigurement award if a claimant is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." Subsection 108(2) permits an additional award if the disfigurement includes extensive facial scars or facial burn scars, extensive body scars or burn scars, or stumps due to loss or partial loss of limbs. Disfigurement awards are subject to maximum limits tied to the date of injury. The maximum limits in effect on Claimant's date of injury are $5,019.83 and $10,037.89. There is no set formula for disfigurement awards within the applicable range and the appropriate amount is left to the ALJ's discretion. *Garcia v. Colorado Department of Corrections*, W.C. No. 4-827-794-01 (May 17, 2012).

As found, Claimant's disfigurement includes extensive body and facial scars, which entitles him to an enhanced award under § 8-42-108(2). *The American Heritage College Dictionary, 3d. Edition* (1993) defines extensive as "large in extent, range or amount." *Merriam-Webster* defines extensive as "having wide or considerable extent." The word "extent" means "the amount of space or service that something occupies." Those definitions accurately describe the scarring affecting large portions of Claimant's right arm, chest, and face. The multiple large, irregularly shaped, and highly discolored surgical scars were easily noticeable on video and probably much more obvious in person. Additionally, the facial scar crosses most of Claimant's cheek and is located on the front of his face where people commonly train their gaze during interpersonal interactions. Claimant shall be awarded $7,500 for disfigurement.

ORDER

It is therefore ordered that:

1. Claimant's request for additional PPD benefits beyond those already admitted by Respondent is denied and dismissed.

2. Claimant's request to convert his shoulder impairment to the whole person equivalent is denied and dismissed as moot.

3. Respondent shall pay Claimant $7,500 for disfigurement.

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

oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: April 1, 2021

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

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that continuing medical maintenance benefits in the form of chronic opioid medications are reasonable, necessary and causally related to her August 28, 2005 industrial injuries.

2. Whether Claimant has established by a preponderance of the evidence that medical maintenance benefits in the form of Ketamine infusions are reasonable, necessary and causally related to her August 28, 2005 industrial injuries.

3. Whether Claimant is entitled to recover attorney's fees and costs because Respondents' offer of a detoxification facility for opioid reduction is not ripe for adjudication.

FINDINGS OF FACT

1. Claimant worked for Employer as a hairstylist and manager. On August 28, 2005 Claimant sustained a compensable injury to her left elbow when she slipped and fell at work. On February 10, 2010 ALJ Cannici issued an Order concluding that Claimant was permanently and totally disabled. Respondents began paying benefits pursuant to the Order and filed a Final Admission of Liability (FAL) on May 5. 2010. Claimant continued to receive maintenance care from her treating physicians. She had a spinal cord implant prior to reaching Maximum Medical Improvement (MMI).

2. On August 25, 2020 Respondents filed an application for hearing challenging the reasonableness and necessity of medical maintenance care. Respondents' specifically disputed the reasonableness and necessity of opioid medications and Ketamine infusions that have been prescribed by Claimant's current treating physician Paul S. Leo, M.D.

3. Respondents retained Nicholas K. Olsen as their medical expert in the present matter. On February 23, 2021 the parties conducted the post-hearing evidentiary deposition of Dr. Olsen. He explained that Claimant has been chronically using opioid medications since the date of her injury. In a report dated April 3, 2017 Dr. Olsen noted that Claimant had been on high opioids for over eight years. He also commented that there was no evidence that her function had improved or the opioids had decreased her pain levels.

4. The medical records frequently reference MME levels. Dr. Olsen testified that MME stands for Morphine Milligram Equivalent. Each opioid has a conversion to MME. The MME thus serves as a standard to compare the strength of different opioids. Dr. Olsen remarked that it is generally accepted that the MME levels should be no higher than 60-90.

5. In 2017 Claimant received care from Authorized Treating Physician (ATP) Peter N. Reusswig, M.D. By April 11, 2017 Claimant was taking several medications that included 20 MG tablets of Oxycodone every six hours and a Fentanyl patch of 62.5 MCG/HR. Dr. Reusswig noted that Claimant's Spinal Cord Stimulator (SCS) had been effective prior to her pregnancy and she was interested in getting the system working again. He remarked that Claimant expressed the desire to decrease opioid use.

6. On July 25, 2017 ATP Amar Patel, M.D. replaced Claimant's SCS. By August 31, 2017 Dr. Reusswig noted that Claimant had been able to cut down 25% on oral opiates with return of stimulation to the left upper extremity.

7. On November 27, 2017 Claimant saw Physician's Assistant Brittany L. D'Orio at Dr. Reusswig's office. P.A. D'Orio remarked that Claimant was waiting for approval of a second SCS.

8. On July 11, 2018 Claimant visited Dr. Patel for an examination. Dr. Patel commented that Claimant had been on high dose opioid therapy for quite some time and was going to need to be weaned from her opioids because the dose was simply too high. When Claimant returned to Dr. Patel on September 4, 2018 he again stated that Claimant's opioids were too high and it was necessary to start the weaning process.

9. On October 2, 2018 Claimant saw Physician's Assistant Joseph Shankland at Dr. Patel's office. PA-C Shankland reported that Claimant had the second SCS implant about three weeks before the appointment. Claimant had noticed about a 50% improvement in her pain. She was taking Hydromorphone 2 MG tablets and using five different fentanyl patches. PA-C Shankland remarked that: "Pt has already started a self taper at this time. Coming into today MME= 190, after today it is MME= 182. Will need to continue downward trend to get the pt below MME= 120 or lower, overall goal is MME= 90."

10. On December 4, 2018 Claimant returned to Dr. Patel for an evaluation. He explained that the second SCS device was helping with Claimant's back pain. In addressing weaning from opioids Dr. Patel remarked, "she has been on high dose opiates pending placement of this device (done by Dr. Beasley at BNA). Accordingly, we are going to continue weaning her. Today, Fentanyl TD reduced by 12 mcg. We will CONTINUE TO WEAN MONTHLY TO AN OME < 90. Continue Hydromorphone by mouth for now. Follow-up in 1 month. The patient appears to be using opiates appropriately, without evidence of misuse or diversion."

11. Claimant returned to Dr. Patel's office on January 9, 2019 and visited Nurse Practitioner Susan Miget. NP Miget had a discussion with Claimant regarding slowly weaning from opioids. The goal was to discontinue opioids or reach a very low dose.

12. On February 5, 2019 Claimant saw Dr. Patel for an evaluation. Dr. Patel noted that "after turning on the SCS implant for her legs from the last visit that [Claimant]

has seen about 40-50% reduction in pain." He also explained that he had a long discussion with Claimant and her husband about the goal of weaning and engaging in a minimum 4-6 week opiate free period. Dr. Patel remarked that Claimant could consider a Ketamine infusion that "would be excellent to assist with continuing to reduce opiates. We will see if this can get approved w/her insurance carrier."

13. Claimant returned to Dr. Patel's office on May 14, 2019 and visited NP-C Miget. Claimant remarked that the newly placed SCS was not helping with her pain and the current level of medications was not working. NP-C Miget started Claimant on Buprenorphine (generic for Suboxone). Dr. Patel testified that Suboxone does not have an abuse potential like other opioids because it does not create a "high" sensation.

14. On May 21, 2019 Claimant returned to NP-C Miget for an examination. Claimant reported body pain and repeated that her SCSs were not helping with pain. She reported pain levels of 8 out of 10. Claimant commented that Suboxone was making her feel sick and drunk. NP-C Miget switched Claimant off of Suboxone and started her on Nucynta.

15. Claimant returned to Dr. Patel on July 2, 2019 for an examination. Dr. Patel noted that he and Claimant discussed the goal of weaning her completely off opioids within the next three months. Moreover, he also had an extensive discussion with Claimant and her husband about the reasonable option of Ketamine infusions based on her positive response to Nucynta. He also remarked that they had tried many other medications, including Gabapentin, Lyrica and Cymbalta, that were all discontinued due to side effects. Dr. Patel reduced Claimant's Nucynta from 100 mg to 50 mg per day and Oxycodone from four to three per day.

16. On July 16, 2019 Claimant again visited NP-C Miget for an evaluation. Claimant reported that her pain levels were 8 out of 10. NP-C Miget recounted that Claimant's husband specified Claimant had suffered severe pain since Dr. Patel had reduced her opioid medications. She detailed that

> Every attempt that we have made to even slightly lower her opioids has resulted in immediate clinic follow-up visit to adjust her medications back. I have asked [Claimant] several times to give any changes we make a few weeks to determine how the new plan will address her needs.
>
> . . .
>
> Over the past several months, I do not see a significant benefit from her medication regime, her activity remains limited, and [Claimant's] husband reports that she spends most of her days "laying in bed."

> I have offered her a multitude of medication options, all of which she has either failed or has reactions to.

At the end of the visit, NP-C Miget adjusted Claimant's long-acting Nucynta back to 100 mg.

17. On July 17, 2019 Dr. Patel issued a letter notifying Claimant she was fired from his practice. In a report dated August 20, 2019 Dr. Patel provided the following explanation for his decision.

> [Claimant] and her husband wanted to dictate the care of [Claimant]. Our intention was to continue her opioids to off as we felt that medically, she no longer required them. This was not an acceptable treatment plan for the patient, nor the husband. Our practice cannot condone patients attempting to dictate care, and particularly when other alternatives are being offered and being denied.

18. Dr. Patel testified that it was apparent Claimant was fixated on staying on opioids. He remarked that during a July 2, 2019 clinical visit Claimant was displeased with his attempts to wean her off her opioids. Furthermore, Claimant and her husband had resisted all attempts to reduce opioids. Dr. Patel summarized that Claimant needs to be completely weaned from opioid medications.

19. Claimant subsequently began treatment with ATP Paul S. Leo, M.D. On October 30, 2019 Dr. Leo reported that Claimant was getting relief from her SCSs and stated that "[i]f we can assure that she will have a Ketamine infusion we can then continue to decrease medications if that infusion is successful."

20. By January 17, 2020 Claimant saw Dr. Leo. He noted that Claimant's MME dose was 110. Dr. Leo remarked that the SCS's were doing reasonably well. He was still trying to get information about the Ketamine infusion center.

21. On May 26, 2020 Claimant again saw Dr. Leo. He recounted she was taking Nucynta extended release 100 mg twice a day and oxycodone 5 mg four times per day when necessary. He summarized that Claimant's MME dose was 110.

22. On June 3, 2020 Dr. Leo responded to a letter from Respondents' counsel. He remarked that Claimant's Oxycodone had been decreased to 5 mg or a 30 MME equivalent. Dr. Leo also mentioned that Nucynta Extended Release 100 mg twice a day equals 80 MME. He also explained that, based on Claimant's good, short term response to Ketamine, a trial of IV Ketamine was warranted. On June 23, 2020 Dr. Leo issued a formal referral order for Ketamine infusions.

23. On November 17, 2020 Claimant returned to Dr. Leo for an examination. He recounted that Claimant suffered from Chronic Regional Pain Syndrome (CRPS) and chronic pain syndrome. Dr. Leo encouraged Claimant to follow-up with Boston Scientific

for stimulator reprogramming. He recorded that Claimant was taking Nucynta ER 100 mg tablets twice a day and oxycodone 5 mg tablets with a maximum of four tablets per day.

24. On October 28, 2020 Richard Larson with the Ketamine Wellness Centers sent Insurer a request for authorization of Ketamine infusions. On November 6, 2020 Respondents' counsel sent a letter to Mr. Larson stating that the prior authorization request for Ketamine treatment was denied.

25. On January 13, 2021 the parties conducted the pre-hearing evidentiary deposition of Dr. Leo. He noted that he is Claimant's current treating physician. Dr. Leo testified that Claimant has "severe three limb CRPS of the left upper extremity and bilateral lower extremities." He explained that Claimant's current medication regimen is reasonable and necessary to treat her work injuries. Dr. Leo commented that Ketamine infusions would hopefully help relieve Claimant's pain and reduce her dependence on opioids.

26. Dr. Patel testified at the hearing in this matter. He recounted Claimant's treatment history. He maintained that Claimant needed to be completely weaned of opioid medications. Dr. Patel emphasized that the goal of opioid reduction is to reach the lowest possible dose that achieves pain relief and maintains function. Nevertheless, Dr. Patel acknowledged that Claimant had consistently appropriately used opioid medications. He explained that Ketamine infusions constituted a reasonable treatment option to reduce Claimant's opioid reliance.

27. Claimant testified at the hearing in this matter. She remarked that she still suffers from pain as a result of her work injuries. Claimant explained she is no longer using Fentanyl patches and has reduced her opioid use. She emphasized that she has consistently followed the recommendations of her physicians in reducing her opioid medications. After receiving care from Dr. Patel, Claimant began treating with Dr. Leo and is happy with his care. She would like to proceed with Ketamine infusions hoping that the treatment will reduce her medications and alleviate her pain.

28. On February 23, 2021 the parties conducted the post-hearing evidentiary deposition of Dr. Olsen. Based on his evaluations of Claimant over the years, as well as a review of the extensive medical records, Dr. Olsen agreed with Dr. Patel that Claimant needs to be weaned from her opioid medications. He explained that, given Dr. Patel's experience with Claimant and her husband during Dr. Patel's attempt to wean her from opioids, the weaning process could not be performed on an outpatient basis. Instead, weaning had to be done at an in-patient detoxification center. Dr. Olsen reasoned that, if Claimant did not accept the offer to attend an in-patient detoxification program, it would be unreasonable to allow Claimant to continue taking opioids.

29. Dr. Olsen explained that Claimant suffers from a Substance Use Disorder (SUD). He specifically noted concerns about Claimant's reports of side effects for all prescribed non-narcotic medications including Gabapentin, Lyrica and Cymbalta. Claimant also had reported side effects to Suboxone or the opioid medication that would

not cause a “high.” Dr. Olsen reasoned that, although Claimant may have an intolerance to one of the preceding medications, it is extremely unlikely that she would be intolerant to all of the medications. He concluded that Claimant’s intolerance to all of the preceding medications suggest that she seeks to remain on opioid medications.

30. Dr. Olsen testified that Ketamine treatment is experimental under the Medical Treatment Guidelines (MTG). He explained that an experimental treatment means “there are not enough scientific studies to verify its efficacy as treatment for pain.” Dr. Olsen detailed that there is a lack of evidence, based on medical literature, that Ketamine can do what the providers in the present matter suggest it can do. He reasoned that, even if Ketamine treatment was considered an appropriate form of medical treatment under the MTG, it still would not be appropriate and reasonable for Claimant. Claimant needs to be weaned from opioids through an in-patient detoxification program before determining whether Ketamine is reasonable and necessary.

31. Respondents do not seek to terminate all of Claimant’s medical maintenance benefits, but only her opioid medications. Claimant thus has the burden to prove the challenged treatment is reasonable, necessary and related to the industrial injury. However, Claimant has failed to prove that it is more probably true than not that continuing medical maintenance benefits in the form of chronic opioid medications are reasonable, necessary and causally related to her August 28, 2005 industrial injuries. The record reflects that a weaning process to reduce Claimant’s opioid medications is reasonable and necessary to treat her symptoms as a result of her industrial injuries.

32. Initially, on August 28, 2005 Claimant sustained a compensable injury to her left elbow when she slipped and fell at work. Dr. Olsen persuasively explained that Claimant has used opioids dating back to her industrial injury. In a report from April 3, 2017 Dr. Olsen specified that Claimant had been on high doses of opioids for over eight years. He remarked that it is generally accepted that MME levels should be no higher than 60-90. Dr. Olsen also commented that there is no evidence that her function has improved or her pain levels have decreased. By July 11, 2018 ATP Dr. Patel also remarked that Claimant had been on high dose opioid therapy for quite some time and was going to need to be weaned. The medical records reveal that he continued to discuss the opioid weaning process with Claimant and her husband. Dr. Patel testified that it was apparent Claimant was fixated on staying on opioids. He remarked that Claimant and her husband had resisted all attempts to reduce opioids. Dr. Patel summarized that Claimant needs to be completely weaned from opioid medications. He emphasized that the goal of opioid reduction is to reach the lowest possible dose that achieves pain relief and maintains function. Finally, based on his evaluations of Claimant over the years, as well as a review of the extensive medical records, Dr. Olsen agreed with Dr. Patel that Claimant needs to be weaned from opioid medications.

33. In contrast, Claimant’s current ATP Dr. Leo testified that Claimant suffers from severe three limb CRPS. He explained that Claimant’s current medication regimen is reasonable and necessary to treat her work injuries. However, the medical records, in conjunction with the persuasive opinions of Drs. Patel and Olsen, reflect that Claimant

requires opioid weaning to the lowest possible dose to achieve pain relief and maximize function. Accordingly, Claimant has failed to establish that her current opioid use is reasonable and necessary to treat her August 28, 2005 industrial injuries. Therefore, Claimant shall be weaned from opioids as directed by her current ATP Dr. Leo.

34. Claimant has established that it is more probably true than not that medical maintenance benefits in the form of Ketamine infusions are reasonable, necessary and causally related to her August 28, 2005 industrial injuries. The bulk of the evidence demonstrates that Ketamine infusions will reduce Claimant's reliance on opioid medications and thus aid in the weaning process.

35. In a February 5, 2019 examination, Dr. Patel had a long discussion with Claimant and her husband about the goal of weaning and engaging in a minimum 4-6 week opiate free period. He remarked that Claimant could consider a Ketamine infusion that "would be excellent to assist with continuing to reduce opiates." Dr. Patel also testified that Claimant has consistently appropriately used opioid medications. He explained that Ketamine infusions constituted a reasonable treatment option to reduce Claimant's opioid reliance. On October 30, 2019 Dr. Leo reported that Claimant was getting relief from her SCSs and stated that "[i]f we can assure that she will have a Ketamine infusion we can then continue to decrease medications if that infusion is successful." Furthermore, Dr. Leo testified that Ketamine infusions would hopefully help relieve Claimant's pain and reduce her dependence on opioids. Finally, Claimant noted she would like to proceed with Ketamine infusions with the hope that the treatment will reduce her medications and alleviate her pain.

36. In contrast, Dr. Olsen testified that Ketamine treatment is experimental under the MTG. He explained that there is a lack of evidence suggesting that Ketamine can do what the providers in the present matter suggest it can do. He reasoned that, even if Ketamine treatment was appropriate under the MTG, it still would not be reasonable for Claimant because she needs to be weaned from opioids through an in-patient detoxification program before determining whether Ketamine is reasonable and necessary. Despite Dr. Olsen's opinion, the medical records in conjunction with the persuasive opinions of ATPs Drs. Patel and Leo, reveal that Ketamine treatment is a reasonable and necessary modality to reduce Claimant's reliance on opioids and facilitate the weaning process. Accordingly, medical maintenance benefits in the form of Ketamine infusions are reasonable, necessary and causally related to Claimant's August 28, 2005 industrial injuries. Respondents shall be financially responsible for Ketamine infusions as part of Claimant's opioid weaning process.

37. Claimant has failed to demonstrate that she is entitled to recover attorney's fees and costs because Respondents' offer of a detoxification facility for opioid reduction is not ripe for adjudication. Claimant asserts that, because none of her ATPs have recommended a detoxification program for opioid mediations, the issue is unripe for hearing. In contrast, Respondents assert that Dr. Olsen has suggested Claimant needs a detoxification program to wean from opioids. Respondents thus seek to make the detoxification program available in the event Claimant's opioid medications are

terminated. Because the record reflects that the issue of a detoxification facility for weaning is ripe for adjudication, Claimant's request for attorney's fees and costs is denied and dismissed.

38. The record reflects that the issue of whether Claimant should attend an in-patient detoxification facility is real, immediate, and fit for adjudication. The central issue in the present case is whether Claimant should be weaned from opioid medications. Relying on the opinion of Dr. Olsen, Respondents have offered an in-patient detoxification facility as an option to aid in the weaning process. Dr. Olsen explained that, based on Dr. Patel's experience in attempting to wean Claimant from opioids, the weaning process could not be performed on an out-patient basis. Dr. Olsen reasoned that, if Claimant did not accept the offer to attend an in-patient detoxification program, it would be unreasonable to allow her to continue taking opioids. Because in-patient treatment is an option for weaning Claimant from opioids, the issue is sufficiently immediate and real to warrant adjudication. There is no legal impediment to immediate adjudication. Accordingly, Claimant's request for attorney's fees and costs is denied and dismissed.

39. Although Respondents have offered an in-patient detoxification program to help wean Claimant from opioids, Claimant is not required to attend the program. Instead, as noted earlier in this opinion, Claimant shall be weaned from opioids as directed by her current ATP Dr. Leo. If Claimant and Dr. Leo believe that an in-patient detoxification program is the best method for weaning, Claimant shall have the option to attend the program at Respondents' expense.

CONCLUSIONS OF LAW

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

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

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and

actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Medical Maintenance Benefits

4. Generally, to prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988). However, when respondents file a final admission of liability acknowledging medical maintenance benefits pursuant to *Grover* they can seek to terminate their liability for ongoing maintenance medical treatment. *See* §8-43-201(1), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). When the respondents contest the liability for a particular benefit, the claimant must prove that the challenged treatment is reasonable, necessary and related to the industrial injury. *Id.* However, when respondents seek to terminate all post-MMI benefits, they shoulder the burden of proof to terminate liability for maintenance medical treatment. *In Re Claim of Arguello*, W.C. No. 4-762-736-04 (ICAO, May 3, 2016); *In Re Claim of Dunn*, W.C. No. 4-754-838 (ICAO, Oct. 1, 2013). Specifically, respondents are not liable for future maintenance benefits when they no longer relate back to the industrial injury. *See In Re Claim of Salisbury*, W.C. No. 4-702-144 (ICAO, June 5, 2012).

Opioid Medications

5. As found, Respondents do not seek to terminate all of Claimant's medical maintenance benefits, but only her opioid medications. Claimant thus has the burden to prove the challenged treatment is reasonable, necessary and related to the industrial injury. However, Claimant has failed to prove by a preponderance of the evidence that continuing medical maintenance benefits in the form of chronic opioid medications are reasonable, necessary and causally related to her August 28, 2005 industrial injuries. The record reflects that a weaning process to reduce Claimant's opioid medications is reasonable and necessary to treat her symptoms as a result of her industrial injuries.

6. As found, initially, on August 28, 2005 Claimant sustained a compensable injury to her left elbow when she slipped and fell at work. Dr. Olsen persuasively explained that Claimant has used opioids dating back to her industrial injury. In a report from April 3, 2017 Dr. Olsen specified that Claimant had been on high doses of opioids for over eight years. He remarked that it is generally accepted that MME levels should be no higher than 60-90. Dr. Olsen also commented that there is no evidence that her function has improved or her pain levels have decreased. By July 11, 2018 ATP Dr. Patel also remarked that Claimant had been on high dose opioid therapy for quite some time and was going to need to be weaned. The medical records reveal that he continued to discuss the opioid weaning process with Claimant and her husband. Dr. Patel testified that it was apparent Claimant was fixated on staying on opioids. He remarked that Claimant and her husband had resisted all attempts to reduce opioids. Dr. Patel summarized that Claimant needs to be completely weaned from opioid medications. He emphasized that the goal of

opioid reduction is to reach the lowest possible dose that achieves pain relief and maintains function. Finally, based on his evaluations of Claimant over the years, as well as a review of the extensive medical records, Dr. Olsen agreed with Dr. Patel that Claimant needs to be weaned from opioid medications.

7. As found, in contrast, Claimant's current ATP Dr. Leo testified that Claimant suffers from severe three limb CRPS. He explained that Claimant's current medication regimen is reasonable and necessary to treat her work injuries. However, the medical records, in conjunction with the persuasive opinions of Drs. Patel and Olsen, reflect that Claimant requires opioid weaning to the lowest possible dose to achieve pain relief and maximize function. Accordingly, Claimant has failed to establish that her current opioid use is reasonable and necessary to treat her August 28, 2005 industrial injuries. Therefore, Claimant shall be weaned from opioids as directed by her current ATP Dr. Leo.

Ketamine Infusions

8. As found, Claimant has established by a preponderance of the evidence that medical maintenance benefits in the form of Ketamine infusions are reasonable, necessary and causally related to her August 28, 2005 industrial injuries. The bulk of the evidence demonstrates that Ketamine infusions will reduce Claimant's reliance on opioid medications and thus aid in the weaning process.

9. As found, In a February 5, 2019 examination, Dr. Patel had a long discussion with Claimant and her husband about the goal of weaning and engaging in a minimum 4-6 week opiate free period. He remarked that Claimant could consider a Ketamine infusion that "would be excellent to assist with continuing to reduce opiates." Dr. Patel also testified that Claimant has consistently appropriately used opioid medications. He explained that Ketamine infusions constituted a reasonable treatment option to reduce Claimant's opioid reliance. On October 30, 2019 Dr. Leo reported that Claimant was getting relief from her SCSs and stated that "[i]f we can assure that she will have a Ketamine infusion we can then continue to decrease medications if that infusion is successful." Furthermore, Dr. Leo testified that Ketamine infusions would hopefully help relieve Claimant's pain and reduce her dependence on opioids. Finally, Claimant noted she would like to proceed with Ketamine infusions with the hope that the treatment will reduce her medications and alleviate her pain.

10. As found, in contrast, Dr. Olsen testified that Ketamine treatment is experimental under the MTG. He explained that there is a lack of evidence suggesting that Ketamine can do what the providers in the present matter suggest it can do. He reasoned that, even if Ketamine treatment was appropriate under the MTG, it still would not be reasonable for Claimant because she needs to be weaned from opioids through an in-patient detoxification program before determining whether Ketamine is reasonable and necessary. Despite Dr. Olsen's opinion, the medical records in conjunction with the persuasive opinions of ATPs Drs. Patel and Leo, reveal that Ketamine treatment is a reasonable and necessary modality to reduce Claimant's reliance on opioids and facilitate the weaning process. Accordingly, medical maintenance benefits in the form of Ketamine infusions are reasonable, necessary and causally related to Claimant's August 28, 2005

industrial injuries. Respondents shall be financially responsible for Ketamine infusions as part of Claimant's opioid weaning process.

Ripeness

11. In *Olivas-Soto v. Industrial Claim Appeals Office*, 143 P.3d 1178 (Colo. App. 2006) the court noted that generally the test to assess whether an issue is ripe for adjudication is when an issue is real, immediate, and fit for adjudication. Under that doctrine, adjudication should be withheld for uncertain or contingent future matters that suppose a speculative injury that may never occur. The Panel discussed the meaning of the term "ripe for hearing" and noted that the term refers to a disputed issue concerning which there is no legal impediment to immediate adjudication. Ripeness requires an actual case or controversy between the parties that is sufficiently immediate and real to warrant adjudication. *Jessee v. Farmers Ins. Exch*., 147 P.3d 56 (Colo. 2006); *Beauprez v. Avalos*, 42 P.3d 642 (Colo. 2002). In general, under the doctrine of ripeness, courts will not consider uncertain or contingent future matters because the injury is speculative and may never occur. *Stell v. Boulder County Dep't of Social Svcs.,* 92 P.3d 910, (Colo.2004).

12. As found, Claimant has failed to demonstrate that she is entitled to recover attorney's fees and costs because Respondents' offer of a detoxification facility for opioid reduction is not ripe for adjudication. Claimant asserts that, because none of her ATPs have recommended a detoxification program for opioid mediations, the issue is unripe for hearing. In contrast, Respondents assert that Dr. Olsen has suggested Claimant needs a detoxification program to wean from opioids. Respondents thus seek to make the detoxification program available in the event Claimant's opioid medications are terminated. Because the record reflects that the issue of a detoxification facility for weaning is ripe for adjudication, Claimant's request for attorney's fees and costs is denied and dismissed.

13. As found, the record reflects that the issue of whether Claimant should attend an in-patient detoxification facility is real, immediate, and fit for adjudication. The central issue in the present case is whether Claimant should be weaned from opioid medications. Relying on the opinion of Dr. Olsen, Respondents have offered an in-patient detoxification facility as an option to aid in the weaning process. Dr. Olsen explained that, based on Dr. Patel's experience in attempting to wean Claimant from opioids, the weaning process could not be performed on an out-patient basis. Dr. Olsen reasoned that, if Claimant did not accept the offer to attend an in-patient detoxification program, it would be unreasonable to allow her to continue taking opioids. Because in-patient treatment is an option for weaning Claimant from opioids, the issue is sufficiently immediate and real to warrant adjudication. There is no legal impediment to immediate adjudication. Accordingly, Claimant's request for attorney's fees and costs is denied and dismissed.

14. As found, although Respondents have offered an in-patient detoxification program to help wean Claimant from opioids, Claimant is not required to attend the program. Instead, as noted earlier in this opinion, Claimant shall be weaned from opioids as directed by her current ATP Dr. Leo. If Claimant and Dr. Leo believe that an in-patient

detoxification program is the best method for weaning, Claimant shall have the option to attend the program at Respondents' expense.

ORDER

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

1. Claimant shall be weaned from opioids as directed by her current ATP Dr. Leo.

2. Respondents shall be financially responsible for Ketamine infusions as part of Claimant's opioid weaning process.

3. The issue of whether Claimant should attend an in-patient detoxification facility is ripe for adjudication. Claimant's request for attorney's fees and costs is thus denied and dismissed. Claimant shall have the option of attending an in-patient detoxification program at Respondents' expense.

4. Any issues not resolved in this order are reserved for future determination.

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

DATED: April 6, 2021.

DIGITAL SIGNATURE:
Peter J. Cannici

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

ISSUES

1. Whether Claimant has proven by a preponderance of the evidence that continuing medical maintenance benefits in the form of chronic opioid medications are reasonable, necessary and causally related to her August 28, 2005 industrial injuries.

2. Whether Claimant has established by a preponderance of the evidence that medical maintenance benefits in the form of Ketamine infusions are reasonable, necessary and causally related to her August 28, 2005 industrial injuries.

3. Whether Claimant is entitled to recover attorney's fees and costs because Respondents' offer of a detoxification facility for opioid reduction is not ripe for adjudication.

FINDINGS OF FACT

1. Claimant worked for Employer as a hairstylist and manager. On August 28, 2005 Claimant sustained a compensable injury to her left elbow when she slipped and fell at work. On February 10, 2010 ALJ Cannici issued an Order concluding that Claimant was permanently and totally disabled. Respondents began paying benefits pursuant to the Order and filed a Final Admission of Liability (FAL) on May 5. 2010. Claimant continued to receive maintenance care from her treating physicians. She had a spinal cord implant prior to reaching Maximum Medical Improvement (MMI).

2. On August 25, 2020 Respondents filed an application for hearing challenging the reasonableness and necessity of medical maintenance care. Respondents' specifically disputed the reasonableness and necessity of opioid medications and Ketamine infusions that have been prescribed by Claimant's current treating physician Paul S. Leo, M.D.

3. Respondents retained Nicholas K. Olsen as their medical expert in the present matter. On February 23, 2021 the parties conducted the post-hearing evidentiary deposition of Dr. Olsen. He explained that Claimant has been chronically using opioid medications since the date of her injury. In a report dated April 3, 2017 Dr. Olsen noted that Claimant had been on high opioids for over eight years. He also commented that there was no evidence that her function had improved or the opioids had decreased her pain levels.

4. The medical records frequently reference MME levels. Dr. Olsen testified that MME stands for Morphine Milligram Equivalent. Each opioid has a conversion to MME. The MME thus serves as a standard to compare the strength of different opioids. Dr. Olsen remarked that it is generally accepted that the MME levels should be no higher than 60-90.

5. In 2017 Claimant received care from Authorized Treating Physician (ATP) Peter N. Reusswig, M.D. By April 11, 2017 Claimant was taking several medications that included 20 MG tablets of Oxycodone every six hours and a Fentanyl patch of 62.5 MCG/HR. Dr. Reusswig noted that Claimant's Spinal Cord Stimulator (SCS) had been effective prior to her pregnancy and she was interested in getting the system working again. He remarked that Claimant expressed the desire to decrease opioid use.

6. On July 25, 2017 ATP Amar Patel, M.D. replaced Claimant's SCS. By August 31, 2017 Dr. Reusswig noted that Claimant had been able to cut down 25% on oral opiates with return of stimulation to the left upper extremity.

7. On November 27, 2017 Claimant saw Physician's Assistant Brittany L. D'Orio at Dr. Reusswig's office. P.A. D'Orio remarked that Claimant was waiting for approval of a second SCS.

8. On July 11, 2018 Claimant visited Dr. Patel for an examination. Dr. Patel commented that Claimant had been on high dose opioid therapy for quite some time and was going to need to be weaned from her opioids because the dose was simply too high. When Claimant returned to Dr. Patel on September 4, 2018 he again stated that Claimant's opioids were too high and it was necessary to start the weaning process.

9. On October 2, 2018 Claimant saw Physician's Assistant Joseph Shankland at Dr. Patel's office. PA-C Shankland reported that Claimant had the second SCS implant about three weeks before the appointment. Claimant had noticed about a 50% improvement in her pain. She was taking Hydromorphone 2 MG tablets and using five different fentanyl patches. PA-C Shankland remarked that: "Pt has already started a self taper at this time. Coming into today MME= 190, after today it is MME= 182. Will need to continue downward trend to get the pt below MME= 120 or lower, overall goal is MME= 90."

10. On December 4, 2018 Claimant returned to Dr. Patel for an evaluation. He explained that the second SCS device was helping with Claimant's back pain. In addressing weaning from opioids Dr. Patel remarked, "she has been on high dose opiates pending placement of this device (done by Dr. Beasley at BNA). Accordingly, we are going to continue weaning her. Today, Fentanyl TD reduced by 12 mcg. We will CONTINUE TO WEAN MONTHLY TO AN OME < 90. Continue Hydromorphone by mouth for now. Follow-up in 1 month. The patient appears to be using opiates appropriately, without evidence of misuse or diversion."

11. Claimant returned to Dr. Patel's office on January 9, 2019 and visited Nurse Practitioner Susan Miget. NP Miget had a discussion with Claimant regarding slowly weaning from opioids. The goal was to discontinue opioids or reach a very low dose.

12. On February 5, 2019 Claimant saw Dr. Patel for an evaluation. Dr. Patel noted that "after turning on the SCS implant for her legs from the last visit that [Claimant]

has seen about 40-50% reduction in pain." He also explained that he had a long discussion with Claimant and her husband about the goal of weaning and engaging in a minimum 4-6 week opiate free period. Dr. Patel remarked that Claimant could consider a Ketamine infusion that "would be excellent to assist with continuing to reduce opiates. We will see if this can get approved w/her insurance carrier."

13. Claimant returned to Dr. Patel's office on May 14, 2019 and visited NP-C Miget. Claimant remarked that the newly placed SCS was not helping with her pain and the current level of medications was not working. NP-C Miget started Claimant on Buprenorphine (generic for Suboxone). Dr. Patel testified that Suboxone does not have an abuse potential like other opioids because it does not create a "high" sensation.

14. On May 21, 2019 Claimant returned to NP-C Miget for an examination. Claimant reported body pain and repeated that her SCSs were not helping with pain. She reported pain levels of 8 out of 10. Claimant commented that Suboxone was making her feel sick and drunk. NP-C Miget switched Claimant off of Suboxone and started her on Nucynta.

15. Claimant returned to Dr. Patel on July 2, 2019 for an examination. Dr. Patel noted that he and Claimant discussed the goal of weaning her completely off opioids within the next three months. Moreover, he also had an extensive discussion with Claimant and her husband about the reasonable option of Ketamine infusions based on her positive response to Nucynta. He also remarked that they had tried many other medications, including Gabapentin, Lyrica and Cymbalta, that were all discontinued due to side effects. Dr. Patel reduced Claimant's Nucynta from 100 mg to 50 mg per day and Oxycodone from four to three per day.

16. On July 16, 2019 Claimant again visited NP-C Miget for an evaluation. Claimant reported that her pain levels were 8 out of 10. NP-C Miget recounted that Claimant's husband specified Claimant had suffered severe pain since Dr. Patel had reduced her opioid medications. She detailed that

> Every attempt that we have made to even slightly lower her opioids has resulted in immediate clinic follow-up visit to adjust her medications back. I have asked [Claimant] several times to give any changes we make a few weeks to determine how the new plan will address her needs.
>
> . . .
>
> Over the past several months, I do not see a significant benefit from her medication regime, her activity remains limited, and [Claimant's] husband reports that she spends most of her days "laying in bed."

> I have offered her a multitude of medication options, all of which she has either failed or has reactions to.

At the end of the visit, NP-C Miget adjusted Claimant's long-acting Nucynta back to 100 mg.

17. On July 17, 2019 Dr. Patel issued a letter notifying Claimant she was fired from his practice. In a report dated August 20, 2019 Dr. Patel provided the following explanation for his decision.

> [Claimant] and her husband wanted to dictate the care of [Claimant]. Our intention was to continue her opioids to off as we felt that medically, she no longer required them. This was not an acceptable treatment plan for the patient, nor the husband. Our practice cannot condone patients attempting to dictate care, and particularly when other alternatives are being offered and being denied.

18. Dr. Patel testified that it was apparent Claimant was fixated on staying on opioids. He remarked that during a July 2, 2019 clinical visit Claimant was displeased with his attempts to wean her off her opioids. Furthermore, Claimant and her husband had resisted all attempts to reduce opioids. Dr. Patel summarized that Claimant needs to be completely weaned from opioid medications.

19. Claimant subsequently began treatment with ATP Paul S. Leo, M.D. On October 30, 2019 Dr. Leo reported that Claimant was getting relief from her SCSs and stated that "[i]f we can assure that she will have a Ketamine infusion we can then continue to decrease medications if that infusion is successful."

20. By January 17, 2020 Claimant saw Dr. Leo. He noted that Claimant's MME dose was 110. Dr. Leo remarked that the SCS's were doing reasonably well. He was still trying to get information about the Ketamine infusion center.

21. On May 26, 2020 Claimant again saw Dr. Leo. He recounted she was taking Nucynta extended release 100 mg twice a day and oxycodone 5 mg four times per day when necessary. He summarized that Claimant's MME dose was 110.

22. On June 3, 2020 Dr. Leo responded to a letter from Respondents' counsel. He remarked that Claimant's Oxycodone had been decreased to 5 mg or a 30 MME equivalent. Dr. Leo also mentioned that Nucynta Extended Release 100 mg twice a day equals 80 MME. He also explained that, based on Claimant's good, short term response to Ketamine, a trial of IV Ketamine was warranted. On June 23, 2020 Dr. Leo issued a formal referral order for Ketamine infusions.

23. On November 17, 2020 Claimant returned to Dr. Leo for an examination. He recounted that Claimant suffered from Chronic Regional Pain Syndrome (CRPS) and chronic pain syndrome. Dr. Leo encouraged Claimant to follow-up with Boston Scientific

for stimulator reprogramming. He recorded that Claimant was taking Nucynta ER 100 mg tablets twice a day and oxycodone 5 mg tablets with a maximum of four tablets per day.

24. On October 28, 2020 Richard Larson with the Ketamine Wellness Centers sent Insurer a request for authorization of Ketamine infusions. On November 6, 2020 Respondents' counsel sent a letter to Mr. Larson stating that the prior authorization request for Ketamine treatment was denied.

25. On January 13, 2021 the parties conducted the pre-hearing evidentiary deposition of Dr. Leo. He noted that he is Claimant's current treating physician. Dr. Leo testified that Claimant has "severe three limb CRPS of the left upper extremity and bilateral lower extremities." He explained that Claimant's current medication regimen is reasonable and necessary to treat her work injuries. Dr. Leo commented that Ketamine infusions would hopefully help relieve Claimant's pain and reduce her dependence on opioids.

26. Dr. Patel testified at the hearing in this matter. He recounted Claimant's treatment history. He maintained that Claimant needed to be completely weaned of opioid medications. Dr. Patel emphasized that the goal of opioid reduction is to reach the lowest possible dose that achieves pain relief and maintains function. Nevertheless, Dr. Patel acknowledged that Claimant had consistently appropriately used opioid medications. He explained that Ketamine infusions constituted a reasonable treatment option to reduce Claimant's opioid reliance.

27. Claimant testified at the hearing in this matter. She remarked that she still suffers from pain as a result of her work injuries. Claimant explained she is no longer using Fentanyl patches and has reduced her opioid use. She emphasized that she has consistently followed the recommendations of her physicians in reducing her opioid medications. After receiving care from Dr. Patel, Claimant began treating with Dr. Leo and is happy with his care. She would like to proceed with Ketamine infusions hoping that the treatment will reduce her medications and alleviate her pain.

28. On February 23, 2021 the parties conducted the post-hearing evidentiary deposition of Dr. Olsen. Based on his evaluations of Claimant over the years, as well as a review of the extensive medical records, Dr. Olsen agreed with Dr. Patel that Claimant needs to be weaned from her opioid medications. He explained that, given Dr. Patel's experience with Claimant and her husband during Dr. Patel's attempt to wean her from opioids, the weaning process could not be performed on an outpatient basis. Instead, weaning had to be done at an in-patient detoxification center. Dr. Olsen reasoned that, if Claimant did not accept the offer to attend an in-patient detoxification program, it would be unreasonable to allow Claimant to continue taking opioids.

29. Dr. Olsen explained that Claimant suffers from a Substance Use Disorder (SUD). He specifically noted concerns about Claimant's reports of side effects for all prescribed non-narcotic medications including Gabapentin, Lyrica and Cymbalta. Claimant also had reported side effects to Suboxone or the opioid medication that would

not cause a “high.” Dr. Olsen reasoned that, although Claimant may have an intolerance to one of the preceding medications, it is extremely unlikely that she would be intolerant to all of the medications. He concluded that Claimant’s intolerance to all of the preceding medications suggest that she seeks to remain on opioid medications.

30. Dr. Olsen testified that Ketamine treatment is experimental under the Medical Treatment Guidelines (MTG). He explained that an experimental treatment means “there are not enough scientific studies to verify its efficacy as treatment for pain.” Dr. Olsen detailed that there is a lack of evidence, based on medical literature, that Ketamine can do what the providers in the present matter suggest it can do. He reasoned that, even if Ketamine treatment was considered an appropriate form of medical treatment under the MTG, it still would not be appropriate and reasonable for Claimant. Claimant needs to be weaned from opioids through an in-patient detoxification program before determining whether Ketamine is reasonable and necessary.

31. Respondents do not seek to terminate all of Claimant’s medical maintenance benefits, but only her opioid medications. Claimant thus has the burden to prove the challenged treatment is reasonable, necessary and related to the industrial injury. However, Claimant has failed to prove that it is more probably true than not that continuing medical maintenance benefits in the form of chronic opioid medications are reasonable, necessary and causally related to her August 28, 2005 industrial injuries. The record reflects that a weaning process to reduce Claimant’s opioid medications is reasonable and necessary to treat her symptoms as a result of her industrial injuries.

32. Initially, on August 28, 2005 Claimant sustained a compensable injury to her left elbow when she slipped and fell at work. Dr. Olsen persuasively explained that Claimant has used opioids dating back to her industrial injury. In a report from April 3, 2017 Dr. Olsen specified that Claimant had been on high doses of opioids for over eight years. He remarked that it is generally accepted that MME levels should be no higher than 60-90. Dr. Olsen also commented that there is no evidence that her function has improved or her pain levels have decreased. By July 11, 2018 ATP Dr. Patel also remarked that Claimant had been on high dose opioid therapy for quite some time and was going to need to be weaned. The medical records reveal that he continued to discuss the opioid weaning process with Claimant and her husband. Dr. Patel testified that it was apparent Claimant was fixated on staying on opioids. He remarked that Claimant and her husband had resisted all attempts to reduce opioids. Dr. Patel summarized that Claimant needs to be completely weaned from opioid medications. He emphasized that the goal of opioid reduction is to reach the lowest possible dose that achieves pain relief and maintains function. Finally, based on his evaluations of Claimant over the years, as well as a review of the extensive medical records, Dr. Olsen agreed with Dr. Patel that Claimant needs to be weaned from opioid medications.

33. In contrast, Claimant’s current ATP Dr. Leo testified that Claimant suffers from severe three limb CRPS. He explained that Claimant’s current medication regimen is reasonable and necessary to treat her work injuries. However, the medical records, in conjunction with the persuasive opinions of Drs. Patel and Olsen, reflect that Claimant

requires opioid weaning to the lowest possible dose to achieve pain relief and maximize function. Accordingly, Claimant has failed to establish that her current opioid use is reasonable and necessary to treat her August 28, 2005 industrial injuries. Therefore, Claimant shall be weaned from opioids as directed by her current ATP Dr. Leo.

34. Claimant has established that it is more probably true than not that medical maintenance benefits in the form of Ketamine infusions are reasonable, necessary and causally related to her August 28, 2005 industrial injuries. The bulk of the evidence demonstrates that Ketamine infusions will reduce Claimant's reliance on opioid medications and thus aid in the weaning process.

35. In a February 5, 2019 examination, Dr. Patel had a long discussion with Claimant and her husband about the goal of weaning and engaging in a minimum 4-6 week opiate free period. He remarked that Claimant could consider a Ketamine infusion that "would be excellent to assist with continuing to reduce opiates." Dr. Patel also testified that Claimant has consistently appropriately used opioid medications. He explained that Ketamine infusions constituted a reasonable treatment option to reduce Claimant's opioid reliance. On October 30, 2019 Dr. Leo reported that Claimant was getting relief from her SCSs and stated that "[i]f we can assure that she will have a Ketamine infusion we can then continue to decrease medications if that infusion is successful." Furthermore, Dr. Leo testified that Ketamine infusions would hopefully help relieve Claimant's pain and reduce her dependence on opioids. Finally, Claimant noted she would like to proceed with Ketamine infusions with the hope that the treatment will reduce her medications and alleviate her pain.

36. In contrast, Dr. Olsen testified that Ketamine treatment is experimental under the MTG. He explained that there is a lack of evidence suggesting that Ketamine can do what the providers in the present matter suggest it can do. He reasoned that, even if Ketamine treatment was appropriate under the MTG, it still would not be reasonable for Claimant because she needs to be weaned from opioids through an in-patient detoxification program before determining whether Ketamine is reasonable and necessary. Despite Dr. Olsen's opinion, the medical records in conjunction with the persuasive opinions of ATPs Drs. Patel and Leo, reveal that Ketamine treatment is a reasonable and necessary modality to reduce Claimant's reliance on opioids and facilitate the weaning process. Accordingly, medical maintenance benefits in the form of Ketamine infusions are reasonable, necessary and causally related to Claimant's August 28, 2005 industrial injuries. Respondents shall be financially responsible for Ketamine infusions as part of Claimant's opioid weaning process.

37. Claimant has failed to demonstrate that she is entitled to recover attorney's fees and costs because Respondents' offer of a detoxification facility for opioid reduction is not ripe for adjudication. Claimant asserts that, because none of her ATPs have recommended a detoxification program for opioid mediations, the issue is unripe for hearing. In contrast, Respondents assert that Dr. Olsen has suggested Claimant needs a detoxification program to wean from opioids. Respondents thus seek to make the detoxification program available in the event Claimant's opioid medications are

terminated. Because the record reflects that the issue of a detoxification facility for weaning is ripe for adjudication, Claimant's request for attorney's fees and costs is denied and dismissed.

38. The record reflects that the issue of whether Claimant should attend an in-patient detoxification facility is real, immediate, and fit for adjudication. The central issue in the present case is whether Claimant should be weaned from opioid medications. Relying on the opinion of Dr. Olsen, Respondents have offered an in-patient detoxification facility as an option to aid in the weaning process. Dr. Olsen explained that, based on Dr. Patel's experience in attempting to wean Claimant from opioids, the weaning process could not be performed on an out-patient basis. Dr. Olsen reasoned that, if Claimant did not accept the offer to attend an in-patient detoxification program, it would be unreasonable to allow her to continue taking opioids. Because in-patient treatment is an option for weaning Claimant from opioids, the issue is sufficiently immediate and real to warrant adjudication. There is no legal impediment to immediate adjudication. Accordingly, Claimant's request for attorney's fees and costs is denied and dismissed.

39. Although Respondents have offered an in-patient detoxification program to help wean Claimant from opioids, Claimant is not required to attend the program. Instead, as noted earlier in this opinion, Claimant shall be weaned from opioids as directed by her current ATP Dr. Leo. If Claimant and Dr. Leo believe that an in-patient detoxification program is the best method for weaning, Claimant shall have the option to attend the program at Respondents' expense.

CONCLUSIONS OF LAW

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

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

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and

actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Medical Maintenance Benefits

4. Generally, to prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988). However, when respondents file a final admission of liability acknowledging medical maintenance benefits pursuant to *Grover* they can seek to terminate their liability for ongoing maintenance medical treatment. *See* §8-43-201(1), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). When the respondents contest the liability for a particular benefit, the claimant must prove that the challenged treatment is reasonable, necessary and related to the industrial injury. *Id.* However, when respondents seek to terminate all post-MMI benefits, they shoulder the burden of proof to terminate liability for maintenance medical treatment. *In Re Claim of Arguello*, W.C. No. 4-762-736-04 (ICAO, May 3, 2016); *In Re Claim of Dunn*, W.C. No. 4-754-838 (ICAO, Oct. 1, 2013). Specifically, respondents are not liable for future maintenance benefits when they no longer relate back to the industrial injury. *See In Re Claim of Salisbury*, W.C. No. 4-702-144 (ICAO, June 5, 2012).

Opioid Medications

5. As found, Respondents do not seek to terminate all of Claimant's medical maintenance benefits, but only her opioid medications. Claimant thus has the burden to prove the challenged treatment is reasonable, necessary and related to the industrial injury. However, Claimant has failed to prove by a preponderance of the evidence that continuing medical maintenance benefits in the form of chronic opioid medications are reasonable, necessary and causally related to her August 28, 2005 industrial injuries. The record reflects that a weaning process to reduce Claimant's opioid medications is reasonable and necessary to treat her symptoms as a result of her industrial injuries.

6. As found, initially, on August 28, 2005 Claimant sustained a compensable injury to her left elbow when she slipped and fell at work. Dr. Olsen persuasively explained that Claimant has used opioids dating back to her industrial injury. In a report from April 3, 2017 Dr. Olsen specified that Claimant had been on high doses of opioids for over eight years. He remarked that it is generally accepted that MME levels should be no higher than 60-90. Dr. Olsen also commented that there is no evidence that her function has improved or her pain levels have decreased. By July 11, 2018 ATP Dr. Patel also remarked that Claimant had been on high dose opioid therapy for quite some time and was going to need to be weaned. The medical records reveal that he continued to discuss the opioid weaning process with Claimant and her husband. Dr. Patel testified that it was apparent Claimant was fixated on staying on opioids. He remarked that Claimant and her husband had resisted all attempts to reduce opioids. Dr. Patel summarized that Claimant needs to be completely weaned from opioid medications. He emphasized that the goal of

opioid reduction is to reach the lowest possible dose that achieves pain relief and maintains function. Finally, based on his evaluations of Claimant over the years, as well as a review of the extensive medical records, Dr. Olsen agreed with Dr. Patel that Claimant needs to be weaned from opioid medications.

7. As found, in contrast, Claimant's current ATP Dr. Leo testified that Claimant suffers from severe three limb CRPS. He explained that Claimant's current medication regimen is reasonable and necessary to treat her work injuries. However, the medical records, in conjunction with the persuasive opinions of Drs. Patel and Olsen, reflect that Claimant requires opioid weaning to the lowest possible dose to achieve pain relief and maximize function. Accordingly, Claimant has failed to establish that her current opioid use is reasonable and necessary to treat her August 28, 2005 industrial injuries. Therefore, Claimant shall be weaned from opioids as directed by her current ATP Dr. Leo.

Ketamine Infusions

8. As found, Claimant has established by a preponderance of the evidence that medical maintenance benefits in the form of Ketamine infusions are reasonable, necessary and causally related to her August 28, 2005 industrial injuries. The bulk of the evidence demonstrates that Ketamine infusions will reduce Claimant's reliance on opioid medications and thus aid in the weaning process.

9. As found, In a February 5, 2019 examination, Dr. Patel had a long discussion with Claimant and her husband about the goal of weaning and engaging in a minimum 4-6 week opiate free period. He remarked that Claimant could consider a Ketamine infusion that "would be excellent to assist with continuing to reduce opiates." Dr. Patel also testified that Claimant has consistently appropriately used opioid medications. He explained that Ketamine infusions constituted a reasonable treatment option to reduce Claimant's opioid reliance. On October 30, 2019 Dr. Leo reported that Claimant was getting relief from her SCSs and stated that "[i]f we can assure that she will have a Ketamine infusion we can then continue to decrease medications if that infusion is successful." Furthermore, Dr. Leo testified that Ketamine infusions would hopefully help relieve Claimant's pain and reduce her dependence on opioids. Finally, Claimant noted she would like to proceed with Ketamine infusions with the hope that the treatment will reduce her medications and alleviate her pain.

10. As found, in contrast, Dr. Olsen testified that Ketamine treatment is experimental under the MTG. He explained that there is a lack of evidence suggesting that Ketamine can do what the providers in the present matter suggest it can do. He reasoned that, even if Ketamine treatment was appropriate under the MTG, it still would not be reasonable for Claimant because she needs to be weaned from opioids through an in-patient detoxification program before determining whether Ketamine is reasonable and necessary. Despite Dr. Olsen's opinion, the medical records in conjunction with the persuasive opinions of ATPs Drs. Patel and Leo, reveal that Ketamine treatment is a reasonable and necessary modality to reduce Claimant's reliance on opioids and facilitate the weaning process. Accordingly, medical maintenance benefits in the form of Ketamine infusions are reasonable, necessary and causally related to Claimant's August 28, 2005

industrial injuries. Respondents shall be financially responsible for Ketamine infusions as part of Claimant's opioid weaning process.

Ripeness

11. In *Olivas-Soto v. Industrial Claim Appeals Office*, 143 P.3d 1178 (Colo. App. 2006) the court noted that generally the test to assess whether an issue is ripe for adjudication is when an issue is real, immediate, and fit for adjudication. Under that doctrine, adjudication should be withheld for uncertain or contingent future matters that suppose a speculative injury that may never occur. The Panel discussed the meaning of the term "ripe for hearing" and noted that the term refers to a disputed issue concerning which there is no legal impediment to immediate adjudication. Ripeness requires an actual case or controversy between the parties that is sufficiently immediate and real to warrant adjudication. *Jessee v. Farmers Ins. Exch*., 147 P.3d 56 (Colo. 2006); *Beauprez v. Avalos*, 42 P.3d 642 (Colo. 2002). In general, under the doctrine of ripeness, courts will not consider uncertain or contingent future matters because the injury is speculative and may never occur. *Stell v. Boulder County Dep't of Social Svcs.,* 92 P.3d 910, (Colo.2004).

12. As found, Claimant has failed to demonstrate that she is entitled to recover attorney's fees and costs because Respondents' offer of a detoxification facility for opioid reduction is not ripe for adjudication. Claimant asserts that, because none of her ATPs have recommended a detoxification program for opioid mediations, the issue is unripe for hearing. In contrast, Respondents assert that Dr. Olsen has suggested Claimant needs a detoxification program to wean from opioids. Respondents thus seek to make the detoxification program available in the event Claimant's opioid medications are terminated. Because the record reflects that the issue of a detoxification facility for weaning is ripe for adjudication, Claimant's request for attorney's fees and costs is denied and dismissed.

13. As found, the record reflects that the issue of whether Claimant should attend an in-patient detoxification facility is real, immediate, and fit for adjudication. The central issue in the present case is whether Claimant should be weaned from opioid medications. Relying on the opinion of Dr. Olsen, Respondents have offered an in-patient detoxification facility as an option to aid in the weaning process. Dr. Olsen explained that, based on Dr. Patel's experience in attempting to wean Claimant from opioids, the weaning process could not be performed on an out-patient basis. Dr. Olsen reasoned that, if Claimant did not accept the offer to attend an in-patient detoxification program, it would be unreasonable to allow her to continue taking opioids. Because in-patient treatment is an option for weaning Claimant from opioids, the issue is sufficiently immediate and real to warrant adjudication. There is no legal impediment to immediate adjudication. Accordingly, Claimant's request for attorney's fees and costs is denied and dismissed.

14. As found, although Respondents have offered an in-patient detoxification program to help wean Claimant from opioids, Claimant is not required to attend the program. Instead, as noted earlier in this opinion, Claimant shall be weaned from opioids as directed by her current ATP Dr. Leo. If Claimant and Dr. Leo believe that an in-patient

detoxification program is the best method for weaning, Claimant shall have the option to attend the program at Respondents' expense.

ORDER

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

1. Claimant shall be weaned from opioids as directed by her current ATP Dr. Leo.

2. Respondents shall be financially responsible for Ketamine infusions as part of Claimant's opioid weaning process.

3. The issue of whether Claimant should attend an in-patient detoxification facility is ripe for adjudication. Claimant's request for attorney's fees and costs is thus denied and dismissed. Claimant shall have the option of attending an in-patient detoxification program at Respondents' expense.

4. Any issues not resolved in this order are reserved for future determination.

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

DATED: April 6, 2021.

DIGITAL SIGNATURE:

Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-975-067-002

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that his claim should be reopened due to a worsening of condition?

II. Whether Claimant has proven by a preponderance of the evidence that a total knee replacement surgery is reasonable, necessary, and related to the industrial accident?

III. Whether Claimant has proven by a preponderance of the evidence that medical treatment for his low back and hip complaints are reasonable, necessary, and related to the industrial accident?

IV. Whether Claimant has proven by a preponderance of the evidence entitlement to temporary total disability ("TTD") benefits from May 4, 2020 ongoing.

V. Whether Respondent has proven by a preponderance of the evidence that Claimant was responsible for his separation from employment.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

Claimant's preexisting back condition before January 2015 compensable right knee injury.

1. Before Claimant sustained a compensable injury to his right knee on January 21, 2015, Claimant suffered from chronic back pain.

2. On May 28, 2010, Claimant called his personal physician at Kaiser Permanente ("Kaiser") and requested a refill of Percocet. He stated, "I know my body, I know what is wrong with my back, I've had this pain for years, and just tweaked it this week, and need pain medication to get me through it." **Ex. D:48**. He said, "I don't want to come in just to hear that I have a herniation in my L5, and that I have arthritis in fascia." **Ex. D:48**.

3. Claimant's back pain continued. On January 3, 2012, he emailed Dr. Rears at Kaiser and stated, "My back is acting up again, can you prescribe me some pain meds please? As soon as you can?" **Ex. D:51**.

4. Claimant went to Kaiser on July 14, 2012 and received a referral to neurosurgery for thoracic and lumbar spine pain. **Ex. D:55**.

5. By October 21, 2013, he had been diagnosed with chronic nonmalignant pain, chronic opioid use, abuse potential low, chronic low back pain, and severe obesity. **Ex. D:61**.

It was reported that he was told he had arthritis in his back and a history of back injury since age 13 due to wrestling. **Ex. D:60**.

6. Claimant consistently treated with pain medications prescribed by treaters at Kaiser, since 2012 and after the date of injury of this workers' compensation claim.

Date	Medication	Reason
1/4/2012	Percocet (20 tablets)	Low Back Pain
8/23/2013	Tramadol (30 tablets)	Low Back Pain
9/16/2013	Tramadol (30 tablets)	Low Back Pain
9/27/2013	Baclofen (90 tablets)	Low Back Pain
9/27/2013	Tramadol (30 tablets)	Low Back Pain
10/21/2013	Naproxen (120 tablets)	Pain and Inflammation
10/21/2013	Nortriptyline (60 tablets)	Pain
10/21/2013	Tramadol (112 tablets)	Severe Pain
1/13/2014	Tramadol (112 tablets)	Chronic Pain Syndrome
2/6/2014	Tramadol (112 tablets)	Chronic Pain Syndrome
3/7/2014	Tramadol (112 tablets)	Chronic Pain Syndrome
4/4/2014	Tramadol (112 tablets)	Chronic Pain Syndrome
8/21/2014	Tramadol (112 tablets)	Chronic Pain Syndrome
WC INJURY: 1/21/2015		
2/6/2015	Tramadol (112 tablets)	Chronic Pain Syndrome
6/25/2015	Tramadol (112 tablets)	Chronic Pain Syndrome
10/16/2015	Tramadol (112 tablets)	Chronic Pain Syndrome
1/7/2016	Tramadol (112 tablets)	Chronic Pain Syndrome
1/7/2016	Tramadol (112 tablets, duplicate fill)	Chronic Pain Syndrome
3/10/2016	Tramadol (112 tablets)	Chronic Pain Syndrome; Chronic Low Back Pain > 3 Months
4/8/2016	Tramadol (112 tablets)	Chronic Pain Syndrome; Chronic Low Back Pain > 3 Months
5/6/2016	Tramadol (56 tablets)	Chronic Pain Syndrome; Chronic Low Back Pain > 3 Months

Ex. D.

Claimant suffered a compensable injury
involving his right knee on January 21, 2015.

7. On January 21, 2015, Claimant sustained a compensable injury to his right knee. Claimant was running down a ramp to respond to a call for deputy assistance when he heard a pop and felt pain in his right knee at that time. (Tr. 18:2-16). He explained that it is critical to respond to these calls timely, as there may be inmates fighting, a deputy being assaulted, and so forth. (Tr. 18:17-25). If Claimant does not respond timely, a deputy could be seriously injured or even killed, stressing the importance of how quickly he needed to run and respond to calls such as these. (Tr. 19:19-24).

8. Claimant did not have any issue performing the duties of his job, particularly being able to run at full speed to respond to an emergency, prior to the work injury. He would have been a liability. Claimant testified that he had responded to "hundreds" of these types of calls while working for the employer, and again, he never had any issue with either of his knees and no credible evidence was presented to the contrary. (Tr. 19:24 – 20:4). He elaborated that in late 2014, shortly before this injury occurred in January 2015, he was working 13-hour shifts, requiring him to be on his feet for 80% of the shift. He was also doing Sunday traffic work, which means he would stand for another five hours on his feet in the street on top of his normal daily duties. Claimant could perform all of these activities with no limitations due to pain or functional loss of either knee. (Tr. 20:2 – 20:11). Claimant did admittedly have a previous right knee meniscal tear at around the age of 20 years old, but that was fixed, and Claimant had no functional loss afterwards, and there are no records to dispute Claimant's testimony. (Tr. 20:12 – 21:8). Claimant began working for the Employer in July 2004 after he had recovered from this injury during his youth and remained employed without issue until the work incident in January 2015. (Tr. 21:9-16). Claimant's physical from July 20, 2004 confirms the veracity of his testimony. (Clmt. Ex. 4, p. 11). There is another physical from June 2005 indicating Claimant can perform all of his job tasks without restriction. *Id.* at 12.

9. Claimant began treating with his ATP, Dr. Brian Beatty, for his right knee injury on January 23, 2015, 2 days after the incident. (Clmt. Ex. 10, p. 47). It was documented that Claimant injured his right knee while "running full speed down a ramp" to another when the knee pain occurred. *Id.* Claimant disclosed to Dr. Beatty his prior knee surgery at the first appointment. *Id.* Claimant was diagnosed with only a right knee sprain at this time and was instructed to rest and ICE his knee. *Id.* at 48. However, by January 30, 2015, the knee pain had worsened and also began feeling "unstable," noting that it was worse by the end of his workday and work week. *Id.* at 51. The right knee was tender laterally with effusion and a questionably positive McMurray's test. Dr. Beatty noted Claimant's antalgic gait and also ordered a right knee MRI given Claimant's symptoms. *Id.* at 52.

10. Claimant underwent the MRI on February 6, 2015. (Clmt. Ex. 9, pp. 34-35). The MRI revealed "a diffuse degenerative tear of the posterior horn and body of the lateral meniscus and also a tear of the anterior horn of the lateral meniscus." *Id.* at 34. It also identified arthritis, and joint effusion and synovitis. *Id.* The MRI was performed because of a "Running injury January 21, 2015. Popping sensation. Swelling and sensation of instability." *Id.* Dr. Beatty referred Claimant to surgeon Dr. Phillip Stull. (Clmt. Ex. 10, p. 57).

11. Claimant presented to Dr. Stull for his first visit on February 17, 2015. (Clmt. Ex. 11, p. 269). Claimant reported the same mechanism of injury along with ongoing pain, swelling, stiffness, and a catching sensation, all causing functional loss, especially ability to climb stairs. *Id.* He diagnosed Claimant with a torn lateral meniscus and "mild patellofemoral arthritis" of the right knee. *Id.* It was recommended that they proceed with a right knee arthroscopy with partial meniscectomy. *Id.* Claimant underwent surgery on March 12, 2015. (Resp. Ex. F). The operative report documented grade II and III arthritic changes of the patellofemoral joint, which was extensively debrided as

part of the surgery and the partial lateral meniscectomy. *Id.* at 85. There was in fact a complex tear of the posterior horn that was unstable and displaceable. A partial meniscectomy of this piece, along with resecting the torn portion of the lateral meniscus. *Id.*

12. Claimant followed up with Dr. Stull on March 20, 2015. (Clmt. Ex. 11, p. 282). He was reporting slow progress. *Id.* Claimant was referred to begin outpatient physical therapy at this time. *Id.* Claimant called Dr. Stull's office on March 22, letting them know that he was having drainage at his portal sites, for which he was prescribed Keflex. *Id.* at 288.

13. Claimant's next appointment with Dr. Stull was on April 24, 2015, when Claimant reported persistent aching pain in his right knee, including popping and grinding. (Clmt. Ex. 11, p. 295). On May 25, 2015, Claimant unfortunately reported ongoing activity related pain and grinding and popping in the right knee. *Id.* at 291. Dr. Stull stated that his residual symptoms were likely the result of moderate arthritic change of the right knee, for which a cortisone injection was recommended. *Id.* Claimant had no documented right knee arthritic pain before the January 2015 work injury. Claimant testified at hearing that his knee was "never the same after that first surgery. It just always hurts and always ached. In fact… Dr. Stull came and told my wife that I would need a knee replacement because there was too much debridement or too much to take out. (Tr. 22:2-9). There is a clear line drawn on January 21, 2015 between the lack of pain and functional loss before January 21, 2015, and the significant level of pain and functional loss that began on January 21, 2015 and has persisted to this date with no intervening events.

14. Dr. Beatty continued following up with Claimant for ongoing management of the claim. (Clmt. Ex. 10, p. 78). Dr. Beatty documented on May 1, 2015 that Claimant continued to have intermittent swelling of the knee, that he has felt a click in his knee, and that they had been working harder in physical therapy. *Id.* Claimant still noted functional loss, particularly with stairs. Claimant's symptoms persisted through his June 1, 2015 visit with Dr. Beatty. *Id.* at 86. Dr. Beatty referred Claimant to Dr. Thomas Noonan at the Steadman-Hawkins Clinic at this time. *Id.* at 87.

15. Dr. Noonan and his physician's assistant, Gary Sakryd, evaluated Claimant on June 18, 2015. (Clmt. Ex. 12, p. 298). Claimant stated that he never recovered, despite the surgery and 9 weeks of post-operative therapy, and the cortisone injection that did not help. *Id.* Claimant was wondering about further treatment options given his continued pain. Of note, on physical exam that where mild to moderate patellofemoral crepitus and some pain with "trapping." *Id.* Dr. Noonan indicated he spoke at length with Claimant about his condition and treatment options moving forward. *Id.* at 299. Dr. Noonan specifically stated, "We have counseled him that most likely his arthritis has been longstanding and that likely his injury was an exacerbation of his arthritis." *Id.* They discussed conservative treatment options, such as rest, ice, anti-inflammatories, physical therapy, cortisone injections, hyaluronic acid injections, and unloader bracing of the knee. *Id.* That said, it was already anticipated at this time, as early as June 2015, that Claimant would need a total knee replacement, and that the replacement would be due to the arthritis aggravated at work. *Id.* The plan was to try conservative care first. *Id.*

16. Claimant was referred to the particular specialist within the Steadman-Hawkins Clinic, Dr. Braden Mayer, by Dr. Noonan. (Clmt. Ex. 12, p. 304). Dr. Mayer examined Claimant on August 17, 2015. *Id.* Dr. Mayer documented the history of the running incident at work, the subsequent surgery, and the "continued significant pain following his surgeries." Despite these treatments, along with the cortisone injections, viscosupplementation injections, and unloader brace, there was no noted significant improvement. *Id.* "He has had difficulty returning to work and he is here today to discuss further treatment options." *Id.* Examination documented patellar grind and compression with mild retro patellar crepitus. Dr. Mayer diagnosed Claimant with right knee pain and swelling, mild-to-moderate right degenerative joint disease, worse in the patellofemoral and lateral compartments, and IT band syndrome. *Id.*

17. Claimant and Dr. Mayer discussed the option of a total knee replacement at the visit on August 17, 2015. (Clmt. Ex. 12, pp. 304-05). They discussed ongoing conservative care, but also noted that the ongoing conservative care was not helping, as Claimant "continues to have significant pain despite conservative treatment." *Id.* at 304. Dr. Mayer stated that the definitive treatment for Claimant's condition, at that time, as early as August 2015, was a total knee replacement; however, it was not recommended for Claimant at that time solely due to his young age and prior activity level as a police officer. *Id.* at 304.

18. On October 5, 2015, Dr. Mayer reiterated, "Ultimately, the patient may require replacement-type surgery. However, due to his young age, I would try to put this off for as long as possible. He agrees with this plan." (Clmt. Ex. 12, p. 306). Dr. Mayer made it clear in his notes from 2015 that Claimant had ongoing symptoms that began with the work injury, and that the definitive treatment for said ongoing symptoms is a total knee replacement. Claimant testified consistently with this note: "[A]ccording to Dr. Mayer, he wanted to make sure that I didn't need a knee revision in my fifties. He said I could go as long as I could. He wanted me to wait until closer to fifty, but this last past year I – I have a hard time even going to the grocery store." (Tr. 24:2-9).

19. There have been no subsequent intervening events regarding the right knee since Dr. Mayer concluded that a total knee replacement was the only treatment option left to improve Claimant's condition, but that Claimant would need to wait as long as possible to have it done, given his age.

20. Claimant's left knee became symptomatic over the course of his treatment as a direct result of overcompensating for his injured right knee. Respondents disputed the relatedness of the left knee and Dr. Mayer's request for left knee surgery. Nevertheless, ALJ Kara Cayce's March 9, 2017 Order found that Claimant's left knee condition and need for surgery was reasonable, necessary, and related to the work incident. (Resp. Ex. I, pp. 121-30).

21. Claimant was placed at MMI on September 21, 2017 by Dr. Beatty with a 22% scheduled rating for each knee. Respondents filed a final admission of liability accordingly. (Resp. Ex. I, p. 167). Dr. Beatty stated in his closing report, "At this point he is still not a candidate for knee replacement surgery and is now felt to be at maximum medical improvement." *Id.* at 181. Dr. Beatty states that Claimant was truly only at MMI because he was too young for the knee replacement at that time. Dr.

Beatty also provided permanent restrictions of 1-2 hours of walking per day with no crawling, kneeling, squatting, or climbing, and he may work up to 5 hours per day. Orthotics were recommended for maintenance care, along with a pool pass for one year; however, Claimant testified at hearing that he never received a pool pass. *Id.* at 183.

22. When Claimant was placed at MMI on September 21, 2017, Claimant's restrictions prevented him from performing his regular job duties as a deputy sheriff. As a result, Respondent offered to Claimant three different employment positions approved by Dr. Beatty: Communications Technician I, Records Clerk, and Communications Technician II. **Ex. K:240**.

23. Claimant declined the offered opportunities for a civil job, and despite Respondent wanting to retain Claimant as an employee, he was separated from employment effective January 2, 2018. **Ex. L; TR. 74:12-20.** Claimant had a chance to appeal the separation to the Sheriff, which he did not do. **TR. 68:18-24**. He applied for and received long term disability benefits and social security disability benefits. **TR. 41:21-25; 42:1-2**.

24. On January 23, 2018, claimant returned to Dr. Beatty for a maintenance visit. At this appointment, Claimant said that his symptoms were about the same but possibly a little worse with regard to his right knee. Claimant did, however, indicate that he felt more unstable and had trouble going down any type of hill. Despite Claimant's complaints, there is no indication Dr. Beatty changed Claimant's. At this time, Claimant was limited to part-time work for 5 hours per day. **Ex. B:27. Ex. 10:246-248.**

25. On October 10, 2018, Dr. Reichhardt performed an IME on behalf of Respondent and addressed Claimant's low back and hip complaints. He assessed whether Claimant's back and hip pain relates to his work injury. Dr. Reichhardt concluded that Claimant's low back pain does not result from the January 21, 2015 work injury. **Ex. B:30**. Despite the Kaiser records showing otherwise, Claimant told Dr. Reichardt that his back pain developed between April and October 2017. **Ex. B:30**. Dr. Reichardt also contended that Claimant's hip pain, right thigh, and bilateral lower leg symptoms and sensory loss did not relate to the January 21, 2015 injury. **Ex. B:30**.

26. During his IME with Dr. Reichhardt, Claimant also described his ability to engage in certain activities, including grocery shopping. As of October 18, 2018, Claimant said that his underlying work conditions prevented him from completing all of his grocery shopping in one visit. Instead, Claimant alleged he was only able to just "pick up a few items." **Ex. B: 29.**

27. On April 9, 2019, Claimant returned to Dr. Beatty. At this appointment, Claimant complained of worsening right knee pain. At this appointment, Dr. Beatty noted abnormal range of motion wit swelling. At this appointment it was also noted Claimant was not working. In the end, Dr. Beatty did not modify Claimant's work restrictions. He did, however, write a prescription for orthotics and a pool pass. **Ex. 10: 247-252**.

28. On May 9, 2019, Claimant returned to Dr. Beatty. At this appointment, Claimant said his knee pain was the same, but that he was developing some low back pain over the last several months. At this appointment, Dr. Beatty did not provide Claimant any additional work restrictions. Claimant was still limited to working part time – 5 hours per day. **Ex. 10: 253-254.**

29. On March 11, 2020, Claimant saw Dr. Beatty and said at this appointment that "on occasion, his right knee will become severely painful and he is unable to walk on it." At this appointment, Dr. Bain still maintained Claimant's work restrictions and did not provide additional restrictions. **Ex. 10: 265-266**.

30. On May 4, 2020, Claimant was evaluated by Dr. Braden Mayer. At this visit, it was concluded that conservative treatment – the hyaluronic acid injections – were no longer providing any relief and Claimant's pain was worse. As a result, Claimant's condition had worsened to the point where the next option was a knee replacement. **Ex. 12: 356-358**.

31. Claimant filed a petition to reopen his claim on August 3, 2020, asserting a "Change in medical condition" per the required form. (Clmt. Ex. 1, p. 1). Claimant asserted the claim should be reopened as his condition had changed or worsened to require a knee replacement per his surgeon. *Id.* Dr. Braden Mayer's May 4, 2020 note was attached to the petition to reopen. *Id.* at 3-5. Under history of present illness, Claimant stated that he has continued to have the ongoing right knee pain that has not subsided since the date of the injury. *Id.* at 3. He has been treating conservatively for years, but Claimant began noticing a diminishing effect with his recent hyaluronic acid injections. *Id.* "At this point in time [Claimant] has failed to respond to conservative treatments and wishes to discuss definitive treatment with total knee arthroplasty." Dr. Mayer and Claimant agreed that the knee replacement was the best way to proceed forward medically. *Id.* at 5. Respondents denied the surgery. (**Clmt. Ex. 2**). Claimant testified that, since being placed at MMI, the pain in his right knee has become worse. (**Tr. 25:1-6**).

32. Claimant underwent an IME with Dr. James Lindberg at the request of Respondents on June 30, 2020. (Clmt. Ex. 8). Dr. Lindberg stated that Claimant has significant osteoarthritis of the right knee, and to a lesser extent his left knee. Dr. Lindberg goes so far as to say that Claimant's initial surgery for the torn meniscus was "clearly" not claim related and that it was degenerative, despite Respondent's approval of this surgery. *Id.* at 32. However, this is moot as Respondents accepted liability for the knee and the surgery performed. *Id.* Dr. Lindberg further opined that Claimant's back and bilateral hip symptoms were not related to Claimant's work injury or a consequence thereof. *Id.* at 33. Dr. Lindberg was asked if the surgery for the knee was "necessary," to which he replied, possibly, but that it was unrelated in his opinion. He felt the only evidence of a causal relationship was the timing. *Id.* Dr. Lindberg also opined on October 15, 2020 that the orthovisc injections that Claimant had been receiving for years were not work related. *Id.* at 15.

33. On August 18, 2020, Claimant returned to Dr. Beatty. At this appointment, Claimant complained of worsening knee pain which worsened with any significant walking or standing. It was also noted that due to Claimant's pain complaints, Dr. Mayer had recommended a right knee replacement. **Ex. 10: 267.**

34. Although Dr. Beatty did not comment on Claimant's restrictions at this appointment, Claimant's ability to walk and stand decreased based on the pain in his knee. This evidence combined with the recommendation for a knee replacement by Dr. Mayer further supports a finding that Claimant's condition has worsened and that additional medical treatment is necessary to cure Claimant from the effects of his work injury.

35. Claimant has undergone multiple IMEs with Dr. Timothy Hall at the request of Claimant's counsel. Of record, there is an August 31, 2018 IME, a January 30, 2020 IME, and a November 3, 2020 records review. (Clmt. Exs. 6-8). Claimant has been reporting ongoing back and bilateral hip pain related to his work condition for years. At the examination with Dr. Hall on August 31, 2018, Claimant informed Dr. Hall that he had been complaining of his hips to his providers, but they would not listen to him. (Clmt. Ex. 5, p. 14). Claimant felt that his symptoms began about a year and a half ago because of his ongoing pain in both knees. Claimant had lower back pain, more right sided than left in the thoracolumbar area. Claimant reported pain of the posterior/superior iliac spine/SI joint. *Id.*

36. Dr. Hall stated that Claimant's hip and lower back symptoms were directly caused by the injury to his knees and his gait disturbance since. (Clmt. Ex. 5, p. 15). "Having a lack of push-off in stance phase necessitates pulling one's leg through, which one does with hip flexors/psoas, which is where his pain is. I doubt it is the hip joints, although they do need looking into, but there are obvious abnormalities on exam consistent with psoas spasm." Claimant's back and hips remained untreated. (Clmt. Ex. 6, p. 16). Claimant went to an IME with Dr. Hall again on January 30, 2020 to address this issue and the knee replacement. (Clmt. Ex. 6). Claimant told Dr. Hall that he has been continuing to treat for his knees but that his back and hip pain had been increasing. Dr. Hall maintained that these problems were caused by Claimant's abnormal gait and postural dysfunction caused by the knees. *Id.* at 16. He explained that in the notes that do not mention abnormal gait, it is because it is often not observed or tested. In the tests that were observed, such as the FCE and then the evaluation with Dr. McCeney both documented abnormal gait[1]. *Id.*

37. As for the right total knee replacement, Dr. Hall opined "It is clear he needs the joint replacement." (Clmt. Ex. 6, p. 18). He felt that one would not ideally want to do it at a young age, but "sometimes there are not options. He may require revision in the future but better that than to have him continue now in such pain and with such devastating consequences from a functional perspective." *Id.* Dr. Hall stated that Claimant's back and hip issues were likely musculature in nature, not discogenic or anything more severe. *Id.* Dr. Hall felt manual therapies would be appropriate, such as physical therapy and massage therapy *Id.*

38. Dr. Hall testified at hearing consistently with his authored report. He explained that Dr. Lindberg was wrong regarding the initial meniscal tear resulting from Claimant's obesity and his previous surgery 20 years ago. Dr. Hall agreed neither of those factors is "helpful" for Claimant, but it remains evident that the precipitating factor that caused Claimant's need for treatment was him running down the hall in response to a call and

[1] *See* Clmt. Ex. 15, p. 522, noting altered gait, and Claimant reporting pain in his lower back and hip from same.

injuring his knee while doing so. It was this event that likely caused the tear and exacerbated the arthritis. (Tr. 43:8-24). Claimant's previous surgery from approximately 20 years ago could have left his knee in a weakened state, but that only increases the probability that Claimant would have severely injured his knee while running and increased the probability of him needing a total knee replacement. (Tr. 44:3-16).

39. There is much discussion and argument from Respondent regarding the amount of pre-existing arthritis that was in Claimant's knee; however, this largely remains irrelevant since there is no evidence to suggest his knee was symptomatic prior to January 21, 2015. As Dr. Hall explained, many people have severe arthritis but do not have severe pain or functional loss, and you should not perform a knee replacement on somebody simply because of "arthritis." The surgery is performed to alleviate pain and increase function due to the arthritis. Claimant did not have pain or functional loss before this incident. Claimant has had pain and functional loss since the incident. (Tr. 45:1-17). Dr. Hall testified that Claimant sustained a "permanent" aggravation to his underlying arthritis in his knee on January 21, 2015 and that the surgery was reasonable, necessary, and appropriate. (Tr. 46:1-19). Dr. Hall also commented on the opinions of Dr. Lindberg and his reliance on information indicating "overcompensation" injuries were not actually a thing. Dr. Hall pointed out that the article cited by Dr. Lindberg was in reference to contralateral extremities, not altered gait from an extremity causing hip or lower back issues. (Tr. 48:1-13).

40. Dr. Lindberg testified at hearing on behalf of Respondents. It was his opinion that Claimant's previous meniscectomy from decades ago and his weight where the "causative factors" in Claimant's injury. (Tr. 77:1-13). When asked by Respondents counsel his opinion on whether running down the ramp exacerbated an underlying, non-symptomatic degenerative knee condition, he responded, "More than likely it was a manifestation of his underlying osteoarthritis." (Tr. 76:2-7). It is unclear what this means, but at a minimum, Dr. Lindberg opined that Claimant's osteoarthritis "manifested," or became symptomatic, while running down the ramp; however, the "cause" of the need for treatment for the arthritis in Dr. Lindberg's eyes are Claimant's obesity and a surgical history two decades old.

41. Dr. Lindberg himself at least twice testified that Claimant's underlying arthritic condition was aggravated by the work injury or treatment. On direct examination, Dr. Lindberg testified that "doing a scope for a meniscectomy for degenerative arthritis is almost always unsuccessful in solving the problem." (Tr. 78:7-11). He elaborated that after the surgery, you still have the underlying arthritis. "You take out more of the cushion so there's more articular cartilage rubbing against articular cartilage. It's already damaged. So, it accelerates the issue." (Tr. 78:12-17). As a result, Dr. Lindberg admitted that the first surgery Claimant underwent for his work condition "accelerates" the arthritis.

42. Dr. Lindberg admitted on cross-examination that there is no record of Claimant treating for his knee between roughly 2001 and 2015. (Tr. 86:15-25). Of critical importance is Dr. Lindberg's second statement that Claimant sustained a permanent aggravation of his underlying osteoarthritis as a result of the work injury. Dr. Lindberg was asked whether he agreed with Dr. Hall that Claimant sustained a permanent

aggravation or a temporary aggravation. "Well, he's still complaining of pain. The underlying disease was already there. The fact that he's still painful, it's reasonable to think that he has a permanent aggravation." (Tr. 87:17-25).

43. Ms. Jhanadu Gaza testified on behalf of Respondents in her capacity as the risk manager for the Employer that handles their workers' compensation Claims. (Tr. 66:8-21). Ms. Gaza testified that, after Claimant had reached MMI with permanent restrictions, he was offered three different job assignments that were approved by Dr. Beatty. She testified that Dr. Beatty said Claimant could do all the jobs, but that Claimant declined, and because he declined, they had to separate employment. (Tr. 67:9 – 68:5). There is no documentation that a formal modified job offer was made to Claimant. Exhibit L, Bates 240, of Respondents' exhibits documents that Dr. Beatty indicated Claimant could work any of the three jobs presented, but there was nothing in the letter indicating what the job duties were. There was also no formal modified job offer mailed to Claimant. The record reflects that Dr. Beatty responded on December 21, 2017. The next letter is from Respondents' - Exhibit L - dated January 2, 2018, documenting that Claimant supposedly declined the modified job offer that does not exist in the record.

44. Ms. Gaza testified that Claimant never responded to the letter. Claimant testified that he was contacted by Chief Etheridge about work, but only to notify him that they could not accommodate his restrictions and the employment would be ending. (Tr. 38:1-7). Claimant testified that it was December 2017 when he was formally terminated from his employment by Chief Etheridge because they could no longer continue to accommodate his restrictions. Claimant believed his last day of work was either December 21 or December 23 of 2017. (Tr. 26:22 – 27:18).

45. Claimant's testimony was internally consistent and consistent with the underlying medical records. As a result, the ALJ finds Claimant to be credible.

46. Claimant did not have any significant functional limitation related to his right knee before the work injury on January 21, 2015. Claimant did not have any ongoing significant pain in his right knee before the work injury on January 21, 2015. Claimant could perform the full duties of his job prior to the work injury; a job that requires near constant use of the knee to stand, walk, or run. The opposite has been true since January 21, 2015. Claimant's function has not returned. Claimant's rather severe pain continues. Claimant remains unable to perform his job duties. According to Dr. Lindberg's own words, the incident caused a permanent aggravation of Claimant's underlying arthritis that now requires a knee replacement.

47. The evidence supports that Claimant has proven by a preponderance of the evidence that his medical condition has worsened and that his claim should be reopened pursuant to the Act.

48. The evidence supports that Claimant has proven by a preponderance of the evidence that the request for the right total knee replacement by Dr. Mayer is reasonable, necessary, and related to the January 21, 2015 work injury.

49. The ALJ finds that Claimant has failed to establish that the increase in his knee pain has caused additional disability. While Claimant has complained of more pain since

being placed at MMI, the ALJ finds Claimant has failed to establish that the increase in pain has caused additional restrictions or additional disability that further diminishes his ability to work. The ALJ finds that Claimant's chronic knee pain severely restricted Claimant from working when he was placed at MMI and the added knee pain has not caused additional wage loss. As a result, the ALJ finds Claimant has not established a change in his disability since being placed at MMI and up through the date of the hearing.

50. While the ALJ finds Dr. Hall's opinions regarding the cause of Claimant's need for medical treatment for his knee to be persuasive, the ALJ does not credit his opinion about Claimant's need for medical treatment for his low back and hip. Instead, the ALJ credits the opinion of Dr. Reichhardt regarding Claimant's low back and hip. Claimant had chronic low back pain before and after his work injury. Moreover, since being placed at MMI, Claimant has remained fairly inactive and has not worked. As a result, the ALJ finds that Claimant's back condition and hip condition was not caused or aggravated by his work injury and antalgic gait.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

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

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant has proven by a preponderance of the evidence that his claim should be reopened due to a worsening of condition?

Section 8-43-303(1), C.R.S. provides that a worker's compensation award may be reopened based on a change in condition. In seeking to reopen a claim, the claimant shoulders the burden of proving his condition has changed and is entitled to benefits by a preponderance of the evidence. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005). A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082, 1084 (Colo. App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* WC 4-358-465 (ICAO, Oct. 25, 2006). Reopening is appropriate if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000). The determination of whether a claimant has sustained her burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* WC 4-543-945 (ICAO, July 19, 2004).

The ALJ finds and concludes that the evidence presented has established by a preponderance of the evidence that Claimant had a change in his condition under the meaning of § 8-43-303, C.R.S. The evidence reflects that Claimant was placed at MMI at the end of 2017, not because there were no treatment options left available, but because neither Claimant nor his surgeon, Dr. Mayer, wanted to perform a knee replacement at that time. They both wanted to wait as long as possible to have the knee replacement. The evidence reflects that Claimant received consistent, ongoing maintenance care, including ongoing viscosupplementation injections. Claimant eventually informed his surgeon, Dr. Mayer, that he was no longer receiving the same relief from these conservative measures. Given his increased pain – worsened condition - Claimant and Dr. Mayer made the decision together that it was finally time to move forward with the knee replacement since other modalities were no longer providing significant relief and Claimant was now simply suffering. The ALJ finds and concludes Claimant requires additional medical treatment in the form of a total knee replacement, and the claim shall be reopened effective May 4, 2020, the date Dr. Mayer recommended the total knee replacement based on Claimant's changed medical condition.

II. Whether Claimant has proven by a preponderance of the evidence that a total knee replacement surgery is reasonable, necessary, and related to the industrial accident?

Respondents are liable for medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. §8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* WC 4-835-556-01 (ICAO, Nov. 15, 2012).

The ALJ finds and concludes that there is no reliable and credible evidence to suggest Claimant had any significant pain or functional limitation of his right knee before the admitted work injury. Although Claimant almost assuredly had arthritis in his knee before January 21, 2015, it was the incident at work that directly caused his knee to become symptomatic, and Claimant's knee remained symptomatic after the initial surgery. There is no suggestion if or when Claimant would have required a total knee replacement but for the work incident. As stated by Dr. Hall, and by Dr. Lindberg, Claimant sustained a permanent aggravation of his underlying arthritis. The pain and functional loss now being caused by the permanent aggravation of the underlying arthritis has worsened to the point of requiring a total knee replacement. If the need for the knee replacement is unrelated to the work injury, the only other explanation based on the evidence presented is that Claimant's knee would have come to this point, as fast as it did, without the work injury. The weight of the evidence does not support this alternative theory. As a result, the ALJ finds and concludes Claimant has established by a preponderance of the evidence that the knee replacement recommended by Dr. Mayer is reasonable, necessary, and related.

III. Whether Claimant has proven by a preponderance of the evidence that medical treatment for his low back and hip complaints are reasonable, necessary, and related to the industrial accident?

Respondents are liable for medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. §8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* WC 4-835-556-01 (ICAO, Nov. 15, 2012).

While the ALJ found Dr. Hall's opinions about the cause of Claimant's need for medical treatment for his knee to be persuasive, the ALJ does not credit his opinion about Claimant's need for medical treatment for his low back and hip. Instead, the ALJ credits the opinion of Dr. Reichhardt regarding Claimant's low back and hip. Claimant had chronic low back pain before and after his work injury. Moreover, since being placed at MMI, Claimant has remained fairly inactive and has not worked. As a result, the ALJ finds that Claimant's back condition and hip condition was not caused or aggravated by his work injury and antalgic gait. Thus, the ALJ finds and concludes Claimant has failed to establish by a preponderance of the evidence that he is entitled to medical treatment under this claim for his back and hip.

IV. Whether Claimant has proven by a preponderance of the evidence entitlement to temporary total disability ("TTD") benefits from May 4, 2020 on.

Section 8-42-105(4), C.R.S. does not bar TTD wage loss claims after a termination for which the employee was responsible when the worsening of a work-related injury causes a subsequent wage loss. *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323, 326 (Colo. 2004). This is limited to cases in which the "claimant's condition worsens after the termination of employment and prevents or diminishes the claimant's ability to work" rather than where the wage loss is the result of the voluntary or for-cause termination of the regular or modified employment. *Gilmore v. Industrial Claim Appeals Office,* 187 P.3d 1129 (Colo. App. 2008); *Grisbaum v. Indus. Claim Appeals Office*, 109 P.3d 1054, 1056 (Colo. App. 2005). A subsequent increase in work restrictions is not per se evidence of a worsening of condition and whether a worsened condition caused the claimant's wage loss is a factual question for the ALJ. *See Apex Transportation, Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630, 632 (Colo.App.2014). An ALJ may consider several factors in determining that a worsened condition, and not an intervening termination of employment, caused the claimant's wage loss. *Id.* at 633.

The ALJ finds and concludes that Claimant has failed to establish that the increase in his knee pain has caused additional disability and wage loss since being placed at MMI. While Claimant has complained of more pain since being placed at MMI, the ALJ finds Claimant has failed to establish by a preponderance of the evidence that the increase in pain has caused additional restrictions or additional disability that further diminishes his ability to work. The ALJ finds and concludes that Claimant's chronic knee pain severely restricted Claimant from working when he was placed at MMI and the additional knee pain has not caused any additional wage loss. As result, the ALJ finds Claimant has not established a change in his disability since being placed at MMI and up through the date of the hearing. Claimant has therefore failed to establish by a preponderance of the evidence that he is entitled to temporary total disability benefits at this time.

V. Whether Respondent has proven by a preponderance of the evidence that Claimant was responsible for his separation from employment.

The ALJ does not find this issue to be relevant given the above findings and conclusions.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request to reopen his claim is GRANTED.
2. Respondents shall authorize and pay for the right total knee replacement recommended by Dr. Braden Mayer to cure Claimant from the effects of his work injury.

3. Claimant's claim for medical benefits for his back and hip is denied and dismissed.

4. Claimant's claim for TTD benefits from May 14, 2020, through the date of the hearing is denied and dismissed.

5. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

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

DATED: April 5, 2021.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that treatment of his cervical spine (including cervical facet injections, as recommended by Dr. Giora Hahn) is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted October 23, 2017 work injury.

2. Whether the claimant has demonstrated, by a preponderance of the evidence, that treatment of his right knee (including arthroscopic surgery as recommended by Dr. Christopher George) is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted October 23, 2017 work injury.

3. At hearing, the respondents confirmed that this is an admitted claim. The admitted body parts are: rib fractures, a sternum fracture, right hip, and right **shoulder**.

FINDINGS OF FACTS

1. The claimant worked for the employer as a roofer. On October 23, 2017, the claimant was performing his normal job duties when he fell through rotted boards on a roof. The claimant estimates that he fell 13 to 15 feet to the ground.

Medical Treatment Prior to October 23, 2017

2. Prior to this work injury, the claimant underwent medical treatment for his left knee, including arthroscopic left knee surgery on January 13, 2015. The claimant has been treated by his primary care provider, Dr. Michael Vargas, since February 2015. The claimant has seen Dr. Vargas for various chronic pain symptoms, including treatment for his left knee and low back. Dr. Vargas has noted that the claimant has osteoarthritis in his bilateral knees. Claimant's history of chronic osteoarthritis is also documented in medical records from Mountain Family Health Centers.

Medical Treatment Beginning October 23, 2017

3. On October 23, 2017, the claimant was immediately transported to Valley View Hospital for medical treatment. At that time, the claimant was seen by Dr. Brad Nichol. The claimant reported that when he fell he landed on his left side, shoulder, and head. The claimant's symptoms were recorded to be left sided chest pain. Dr. Nichol ordered computed tomography (CT) scans of the claimant's cervical spine, head, chest, abdomen, and pelvis. The results of those scans showed left sided rib fractures (1 through 8). There were no fractures or dislocation found in the cervical spine. In addition, there was no cranial fracture, facial fractures, or intracranial hemorrhage. Dr. Nichol noted

that the claimant was a “chronic narcotic user for his lower back pain”. Dr. Nichol recommended the claimant’s admission to the hospital for observation.

4. After he was released from Valley View Hospital the claimant was seen by Dr. Vargas on October 30, 2017. On that date, the claimant reported falling through a roof on October 23, 2017. The claimant also reported multiple rib fractures and a sternal fracture. Dr. Vargas renewed the claimant’s standing prescription for oxycodone. In addition, he prescribed the muscle relaxant, baclofen.

5. On November 7, 2017, the respondents filed a General Admission of Liability (GAL). In that document the respondents admitted for the claimant’s fractured ribs. In addition, temporary total disability (TTD) benefits were noted to have begun on October 24, 2017.

6. Dr. David Lorah is the claimant’s authorized treating provider (ATP) for this claim. The claimant was first seen by Dr. Lorah on November 8, 2017. At that time, the claimant reported continuing chest wall pain on the left side.

7. The claimant returned to Dr. Lorah on December 8, 2017. The claimant reported that he was experiencing pain in his right shoulder and left hip. Based upon this report, Dr. Lorah referred the claimant to physical therapy to address these right shoulder and left hip symptoms.

8. On December 20, 2017, the claimant returned to Dr. Nichol. At that time, Dr. Nichol noted that the claimant’s rib fractures were healing and he could resume activity,as tolerated.

9. On April 4, 2018, Dr. Lorah ordered magnetic resonance imaging (MRI) of the claimant’s right shoulder and right hip. The MRI of the claimant’s right shoulder showed a rotator cuff tear. The right hip MRI showed a labral tear. Based upon the MRI results, on April 20, 2018, Dr. Lorah referred the claimant to Dr. Christopher George for an orthopedic evaluation.

10. On May 8, 2018, the claimant was seen by Dr. George and Dr. Ferdinand Liotta. At that time, the claimant described his October 23, 2017 fall. The MRI results of the claimant’s right shoulder and right hip were addressed. In the medical record of that date, it was noted that the claimant wanted to proceed with shoulder surgery, as he felt that his shoulder was more limiting than his hip.

11. On July 28, 2018, Dr. Liotta performed arthroscopic surgery on the claimant’s right shoulder. The surgery included debridement of hypertrophic synovitis; subacromial decompression; distal clavicle excision; and coracoid decompression and subscapularis tendon repair. Following the right shoulder surgery, the claimant attended physical therapy.

12. Thereafter, it was determined that the claimant would also undergo right hip surgery. On April 4, 2019, Dr. George performed a right hip arthroscopy and labral debridement. The claimant attended physical therapy following that surgery.

13. On May 10, 2019, the claimant reported to his physical therapist, Codi Fruhmann, PT/DPT, that he had fallen up the stairs at home. The medical record of that date specifically provides that the claimant "did try to catch himself with bilateral upper extremities. He reports increased soreness anteriorly in pectorals and long head of biceps tendon." In a similar physical therapy record also dated May 10, 2019, PT Fruhmann noted that the claimant "feels he refractured a rib on the left side… He heard a pop when landing right on this rib on the stairs…"

14. On May 16, 2019, the claimant was seen by Dr. Liotta. At that time, the claimant reported "falling down some stairs" on approximately May 9, 2019. Since that fall, the claimant was experiencing increased pain and tightness in his right shoulder. Thereafter, Dr. Liotta determined that the claimant had reinjured his prior repair, requiring surgery. On June 25, 2019, Dr. Liotta performed a revision subscapularis tendon repair on the claimant's right shoulder.

15. With regard to all of the above medical appointments, the ALJ finds no mention of right knee or neck related complaints.

16. Following a referral from Dr. Vargas, on June 21, 2019, claimant began treatment with Colorado Injury & Pain Specialists[1] to address various chronic pain conditions. The medical record of that date states that the claimant was seeking treatment for his right shoulder, right knee, and back pain. Specifically, the pain in the claimant's "right shoulder and hip began in 2013 after falling through a roof while working construction…The back and right knee pain began in 2008 after he was run over by a truck… He reports sustaining a L2 [fracture] of his low back. He also had to have the meniscus removed from his right knee. He states that he could not get a right knee replacement because of his age…"

17. The claimant testified that the June 21, 2019 medical record is incorrect. He testified that he injured his left knee in 2008.

18. The claimant first reported right knee symptoms to Dr. Lorah on July 21, 2019. On that date, the claimant reported that his right knee was bothering him while doing his hip exercises. Dr. Lorah opined that the claimant had sprained his right knee and that it was "unlikely he would have sustained a major injury and if he has a meniscal tear or something else is probably not related to his workers comp injury".

19. The claimant first reported cervical symptoms to Dr. Lorah on September 9, 2019. In the medical record of that date, Dr. Lorah noted "[T]oday he is complaining of cervical [crepitus] and pain with left-sided rotation. I don't recall that he has ever mentioned this nor do I see this in our previous encounters although he assures me this has been happening since the time of the injury… He tells me that he has been complaining of this ever since the time of the initial injury. I reviewed basically all of our

[1] At hearing, the claimant confirmed that this treatment is paid for by Medicaid and is not part of this workers' compensation claim.

notes since that time and don’t see mention of it. I don’t see mention of it in his physical therapy notes either.”

20. On September 27, 2019, the claimant reported right knee complaints to Dr. George. Specifically. the claimant reported right knee pain, clicking, and popping over “the last several months”. Dr. George opined that it was a possible lateral meniscus tear.

21. Subsequently, Dr. Lorah ordered a cervical spine x-ray. The x-ray was performed on October 9, 2019 and showed no acute bony findings; multilevel mild to moderate degenerative changes (most severe at the C4-C5 level); and moderate to marked foraminal narrowing at the right C4-C5 level (with moderate at the left C4-C5 level).

22. In addition, Dr. Lorah ordered a right knee MRI. That MRI was performed on October 19, 2019 and showed tears of the posterior horn and posterior root of the medial meniscus; partial tear versus ganglion of the anterior cruciate ligament (ACL); minimal lateral subluxation of the patella; and mild osteoarthritis of the medial compartment and proximal tibiofibular joint.

23. On December 3, 2019, the claimant was seen by Dr. George. At that time, Dr. George opined that the claimant’s right knee was injured when he fell on October 23, 2017. Dr. George recommended arthroscopic surgery. On December 5, 2019, Dr. George submitted a request for authorization of a right knee arthroscopy and medial meniscectomy.

24. At the request of the respondents, Dr. David Orgel reviewed the surgical request. In a report dated December 17, 2019, Dr. Orgel recommended denial of the surgery. Based upon Dr. Orgel’s report, the respondents denied the right knee surgery.

25. On January 31, 2020, Dr. George authored a letter of appeal related to the requested right knee surgery. Dr. George stated that the claimant had experienced right knee pain since his October 23, 2017 work injury. Dr. George opined that primary focus of treatment was on the claimant’s hip and shoulder because those symptoms were more severe than those in his right knee. Dr. George also opined that the claimant’s mechanism of injury was consistent with a medial meniscus tear.

26. Following Dr. George’s appeal, the respondents asked Dr. Jon Erickson to review the surgical request. In his February 14, 2020 report, Dr. Erickson agreed with Dr. Orgel’s recommendation to deny the surgery. In support of this opinion, Dr. Erickson noted that the claimant had not reported right knee symptoms between October 23, 2017 and July 5, 2019. Dr. Erikson also referenced the claimant’s May 2019 fall on stairs “and yet at that time there was no complaint of any knee pain.” Based upon Dr. Erickson’s report the respondents denied the right knee surgery.

27. During this same period of time, the claimant continued to report right shoulder symptoms. On May 26, 2020, Dr. Liotta performed “manipulation under anesthesia” to address adhesive capsulitis of the right shoulder.

28. On February 12, 2020, a cervical spine MRI was performed. The MRI showed straightening of the cervical lordosis; minimal posterior spondylolisthesis at C4; degenerative changes of the cervical spine resulting in mild canal stenosis and slight impingement of the spinal cord at the C4-C5 level; and foraminal compression of the right C5 nerve root.

29. On February 25, 2020, the claimant was seen by Dr. George regarding his right hip. On that date, Dr. George opined that the claimant would not benefit from further arthroscopic surgeries. Instead he recommended a right hip replacement. With regard to the claimant's cervical spine, Dr. George noted that the claimant "[d]id mention some disc issues in his neck".

30. On March 4, 2020, the claimant was seen by Dr. Vargas regarding chronic pain. In the medical record of that date, Dr. Vargas noted, *inter alia*, that the claimant suffered from chronic degenerative cervical spinal stenosis and lumbar radiculopathy.

31. Following a referral by Dr. Lorah, on March 6, 2020, the claimant was seen by Dr. Giora Hahn for consultation. On that date, Dr. Hahn noted that the claimant had experienced right neck pain "for 2 years since he fell off a roof". Dr Hahn noted the cervical spine MRI results and diagnosed cervical degenerative disc disease with facet arthropathy. Dr. Hahn recommended the claimant undergo cervical facet injections. Dr. Hahn also opined that radiofrequency ablation could be a potential future treatment for the claimant. Dr. Hahn submitted a request for authorization of the recommended injections.

32. At the request of respondents, Dr. Joseph Fillmore reviewed the request for cervical facet injections. In a report dated March 18, 2020, Dr. Fillmore opined that the claimant did not suffer an injury to his cervical spine as a result of his fall on October 23, 2017. Dr. Fillmore also noted that the first reference of neck symptoms was made by Dr. Lorah on September 9, 2019. Dr. Filmore recommended denial of the injections. Based upon Dr. Fillmore's report, the respondents denied authorization.

33. On July 23, 2020, the claimant attended an independent medical examination (IME) with Dr. Robert Messenbaugh. In connection with the IME, Dr. Messenbaugh reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his IME report, Dr. Messenbaugh opined that the claimant did not injure his cervical spine or his right knee on October 23, 2017. In support of these opinions Dr. Messenbaugh noted that the claimant did not report any neck or right knee related complaints "for an extremely lengthy period of time" after his October 23, 2017 fall. Dr. Messenbaugh also opined that the degenerative changes in the claimant's cervical spine predated his work injury. Dr. Messenbaugh's testimony was consistent with this written report. During his testimony, Dr. Messenbaugh reiterated his opinion that the claimant did not injure his right knee or cervical spine when he fell on October 23, 2017.

34. On October 29, 2020, Dr. George performed a right total hip arthroplasty.

35. On November 17, 2020, Dr. Vargas authored a letter regarding his review of his treatment of the claimant. In the letter, Dr. Vargas stated that he "found there to be no mention of treatment for right knee or cervical neck pain prior to the accidental fall in October of 2017." Dr. Vargas also noted that these symptoms were first reported to him in March 2020.

36. The claimant testified that when he was seen by Dr. Vargas on October 30, 2017, he had pain in his right knee and neck. The claimant further testified that he has experienced pain in his right knee and neck throughout this claim. The claimant testified that he wishes to undergo the recommended knee surgery and neck treatment so that he can return to work.

37. The ALJ does not find the claimant's testimony regarding the onset of his right knee and cervical spine symptoms to be credible or persuasive. The ALJ credits the medical records and the opinions of Drs. Orgel, Erickson, Fillmore, and Messenbaugh over the contrary opinions of Drs. George and Hahn. In crediting these opinions, the ALJ finds that the claimant has failed to demonstrate that it is more likely than not that his need for right knee and cervical spine treatment is reasonable, necessary, and related to the admitted October 23, 2017 work injury. The ALJ specifically credits the medical records that demonstrate that the claimant did not report right knee or cervical spine symptoms until long after his work injury. The ALJ is not persuaded that the claimant injured either of these body parts on October 23, 2017. The ALJ finds that there is no persuasive evidence on the record to support a finding that the fall on October 23, 2017 aggravated, accelerated, or combined with any preexisting condition in the claimant's right knee or cervical spine to warrant the need for medical treatment.

CONCLUSIONS OF LAW

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

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

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

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

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

6. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that treatment of his cervical spine (including cervical facet injections, as recommended by Dr. Hahn) is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the October 23, 2017 work injury. As found, the medical records and the opinions of Drs. Fillmore, and Messenbaugh are credible and persuasive.

7. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that treatment of his right knee (including arthroscopic surgery as recommended by Dr. George) is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the October 23, 2017 work injury. As found, the medical records and the opinions of Drs. Orgel, Erickson, and Messenbaugh are credible and persuasive.

ORDER

It is therefore ordered:

1. The claimant's request for treatment of his cervical spine (including cervical facet injections, as recommended by Dr. Hahn) is denied and dismissed.

2. The claimant's request for treatment of his right knee (including arthroscopic surgery as recommended by Dr. George) is denied and dismissed.

3. All matters not determined here are reserved for future determination.

Dated this 5th day of April 2021.

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

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

ISSUES

- Did Claimant prove the average weekly wage (AWW) should be increased from the admitted AWW of $1,141.77?

- If so, what is the appropriate AWW?

- Temporary partial disability benefits.

FINDINGS OF FACT

1. Claimant works for Employer as a carpenter. He suffered an admitted injury to his left arm on May 18, 2020.

2. Claimant missed work after the accident from May 19, 2020 through June 30, 2020. Insurer admitted for TTD benefits.

3. Claimant returned to modified duty on June 30, 2020. He suffered a partial wage loss because of reduced hours.

4. Claimant missed 6 days of work from October 16 through October 21, 2020. Insurer admitted for TTD benefits.

5. Claimant returned to modified duty on October 22, 2020. He suffered a partial wage loss because of reduced hours.

6. Claimant was again off work starting November 19, 2020 because of surgery. He returned to modified duty on February 10, 2021 at reduced hours.

7. Insurer has admitted and paid TTD for all periods Claimant was off work. Insurer has paid no TPD benefits.

8. Claimant proved he is entitled to TPD benefits from June 30, 2020 through November 18, 2020, and from February 10, 2021 until terminated by law.

9. The admitted AWW is $1,141.77. Insurer's claim notes state the AWW is based on 13 weeks of earnings in the total amount of $14,843.06. This appears to be a computational error because the ALJ could not find any combination of 13 weeks that totals $14,843.06. In any event, in their post-hearing brief, Respondents advocate using the 12 weeks immediately before Claimant's injury.

10. Claimant worked overtime when available. Based on Employer's work rules, he earned overtime wages in some weeks even though he worked less 40 hours.

11. Claimant's overtime hours fluctuated widely, from a low of zero some weeks to a high of 30 in one week. In the 12 weeks before the injury, Claimant's hours were:

Pay date	**Reg Hrs**	**OT Hrs**
3/6/2020	38.5	12.5
3/13/2020	40	30
3/20/2020	40	14.5
3/27/2020	34	10
4/3/2020	8	1
4/10/2020	37.5	16
4/17/2020	40	6
4/24/2020	22	5
5/1/2020	36.5	0
5/8/2020	40	5
5/15/2020	40	21.5
5/22/2020	40	20
AVERAGE	34.71	11.79

12. There is no persuasive evidence the general pattern of hours and overtime availability shown above would have changed significantly after Claimant's injury.

13. Claimant received a pay raise to $24.76 per hour effective May 4, 2020, with a corresponding overtime rate of $37.14. All wages Claimant has lost since the date of injury would otherwise have been earned at the hourly rates of $24.76 and $37.14.

14. Respondents' proposal to compute the AWW using the 12 weeks of earnings before Claimant's accident is reasonable and appropriate. Claimant's proposal to use only two weeks before the injury is not persuasive.

15. Claimant's AWW is $1,297.30, calculated as follows:

$24.76 x 34.71 avg reg hours:	$859.42
$37.14 x 11.79 avg OT hours:	$437.88
Total:	**$1,297.30**

16. The corresponding TTD rate is $864.87.

17. Based on the AWW of $1,297.30, Claimant is owed TPD benefits as follows:

Pay period end	Gross wages	Diff from AWW	TPD Owed
7/5/2020	$940.88	$356.42	$237.61
7/12/2020	$1,213.24	$84.06	$56.04
7/19/2020	$1,213.24	$84.06	$56.04
7/26/2020	$1,250.38	$46.92	$31.28
8/2/2020	$1,176.10	$121.20	$80.80
8/9/2020	$1,176.10	$121.20	$80.80
8/16/2020	$1,176.10	$121.20	$80.80
8/23/2020	$792.32	$504.98	$336.65
8/30/2020	$990.40	$306.90	$204.60
9/6/2020	$1,008.97	$288.33	$192.22
9/13/2020	$792.32	$504.98	$336.65
9/20/2020	$990.40	$306.90	$204.60
9/27/2020	$990.40	$306.90	$204.60
10/4/2020	$990.40	$306.90	$204.60
10/11/2020	$990.40	$306.90	$204.60
10/18/2020	$792.32	$504.98	$336.65
10/25/2020	$445.68	$851.62	$567.75
11/1/2020	$990.40	$306.90	$204.60
11/8/2020	$990.40	$306.90	$204.60
11/15/2020	$594.24	$703.06	$468.71
11/22/2020	$396.16	$901.14	$600.76
TOTAL:		**$7,342.45**	**$4,894.97**

18. Insurer admitted for TTD from October 16, 2020 through October 21, 2020. But that period spans less than one full week and straddles two pay periods. Because the parties only submitted weekly pay records, the ALJ finds it more efficient to incorporate the October 16 through October 21 wage loss into the longer period of TPD. The net result is the same. Insurer can simply take a credit for $652.87 in TTD previously paid when determining the past-due TPD.

CONCLUSIONS OF LAW

A. Average weekly wage

The term "wages" is defined as "the money rate at which the services rendered are recompensed under the contract of higher in force at the time of the injury." Section 8-40-201(19)(a). "Wages" includes per diem payments that are included in the claimant's federal taxable wages. Section 8-40-201(19)(c). Section 8-42-102(2) provides that compensation shall be based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that seems most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993).

As found, Claimant's AWW is $1,297.30. Claimant was an hourly worker whose schedule varied based on the available work. Therefore, his earnings must be averaged over a reasonable period to account for the typical fluctuations in his hours, including overtime. The 12-week period immediately preceding the injury give a representative sample and fairly approximates Claimant's average hours "at the time of the injury." Claimant's proposal to use only the two weeks before the injury would artificially inflate the AWW and overstate the injury's impact on his earning capacity. Although Claimant coincidentally worked more overtime those weeks than average, the general pattern of available work going forward would probably been more consistent with the 12-week average.

B. Temporary partial disability benefits

A temporarily partially disabled claimant is entitled to two-thirds of the difference between their AWW and their reduced earnings during the period of disability. Section 8-42-106. As found, Claimant suffered a partial wage loss while working modified duty Claimant is owed $4,894.97 from June 30, 2020 through November 18, 2020 (reduced by $652.87 in TTD already paid). Claimant is also entitled to TPD benefits commencing February 10, 2021 and continuing until terminated by law.

ORDER

It is therefore ordered that:

1. Claimant's average weekly wage is $1,297.30.

2. Insurer shall pay Claimant TTD benefits at the rate of $864.87 per week from May 19, 2020 through June 29, 2020, and November 19, 2020 through February 9, 2021. Insurer may take credit for any TTD benefits already paid for those periods.

3. Insurer shall pay Claimant $4,894.97 in TPD benefits from June 30, 2020 through November 18, 2020. Insurer may take credit for any temporary disability benefits already paid for that period.

4. Insurer shall calculate and pay Claimant TPD benefits commencing February 10, 2021 and continuing until terminated by law.

5. Insurer shall pay Claimant statutory interest of 8% per annum on all benefits not paid when due.

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

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

DATED: April 6, 2021

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-144-892-001

ISSUES

I. Whether Claimant established he suffered a compensable injury on July 29, 2020.

II. Whether Claimant established that he is entitled to a general award of medical benefits.

III. Whether Claimant is entitled to temporary total disability benefits as of July 29, 2020.

IV. Whether Claimant is at-fault for his wage loss and not entitled to temporary total disability benefits.

V. Whether Claimant violated a safety rule.

VI. Offset for unemployment benefits.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. Clamant testified at hearing. *Hrg. Audio 1, 30:45.* He is a CDL driver and was driving for Employer on July 29, 2020.
2. On the night of July 28, 2020, Claimant's foreman Julian C[Redacted] informed Claimant that he wanted Claimant to pick up a truck and meet him at a jobsite the next morning. The morning of July 29, 2020, Claimant picked up the truck, VT-5. This is a manual shift HydroVac truck, with a tank on the back and a boom and hoses mounted on the top. *Ex. J, Bates 333-337.* Claimant had driven that truck multiple times. Claimant knew that it required a 13-foot clearance. Claimant used the Google pin drop to obtain directions to the worksite, as he had done before. Claimant described his route. He started in Greeley and drove about 45 minutes. He testified that he was driving West on what he thought was Highway 32 and approached the two bridges of Highway I-25 that go over that road. The bridges were marked as providing 12 feet, 10 inches of clearance. *Ex. J, Bates 328.* There were other routes that Claimant could take to get to the jobsite. *Ex. J. Bates 314, 315; Exhibit R.* Claimant testified that he thought he could make it under the bridges. This testimony contradicts what he has said before. "He wondered whether he could clear the bridges, but he proceeded on." *Ex. A, Bates 2.* He testified he went under the first bridge but hit the top of his truck on the second bridge. He testified that he was going 25-30 mph, and that he knew this because he

was in 3rd or 4th gear. He testified that his truck came almost to a complete stop, and his head jerked forward really hard and back, while he held on to the steering wheel. He specifically denied the truck stopping. He testified that he shifted down into second gear and he drove the truck through the bridge and heard scraping. *Hrg. Audio 1 1:01.11.* He testified that he never stopped the truck and never pulled over. *Hrg. Audio 1 1:02:40.* This testimony contradicts what he told his providers. "Patient notes he then exited his vehicle and noted extensive damage to the bridge." *Ex. F, Bates 62.* Instead, he testified that he did not stop and drove up to the jobsite and saw his supervisor Julian C[Redacted]. He testified that Mr. C[Redacted] came about 5 minutes after he did to the jobsite and called him to tell him he was at the jobsite. This testimony is contrary to what Claimant told his providers. "Patient notes he then existed his vehicle and noted extensive damage to the bridge. He subsequently notified his supervisor, who came to the accident scene and instructed him to drive back to the work site." *Ex. F, Bates 62.*

3. Claimant testified that he told Mr. C[Redacted] right away when Mr. C[Redacted] met him at the jobsite. He said that he pulled his truck up behind Mr. C[Redacted], he got out, met Mr. C[Redacted] between the vehicles, and he told Mr. C[Redacted] immediately. Claimant testified that he told Mr. C[Redacted]. "I hit the bridge." He testified that is all he said. He did not say what bridge or anything else. *Hrg. Audio 1 1:03:00-1:04:20.* He testified that Mr. C[Redacted] went on top of the truck and told him that he did $10,000 in damage to the truck. Claimant testified that no one tried to operate the truck when it was on site. *Hrg. Audio 1 1:15:05.* He testified Mr. C[Redacted] told him to stand right there, while Claimant was standing at the front of the truck, and Mr. C[Redacted] walked over into the field and made a phone call Claimant could not hear. *Hrg. Audio 1 38:50-40:00.* He was on the phone for about 5 minutes. Mr. C[Redacted] came back and told him to go back to the office. When he got to the office, Claimant said he was told to help another employee clean. He did this all day. *Hrg. Audio 1 40:30.* When asked how he felt, he said he just felt "shocked" all day. He left the shop and drove in his car for lunch and returned. *Hrg. Audio 1 1:23:35.*

4. At about 2:00 p.m. he took a urinalysis test and then returned to working in the shop. At about 3:30 p.m. he was told by Cat U[Redacted] that he had to go to the office. He went to the office and met with Cat U[Redacted] and Nichole T[Redacted] and was terminated. *Hrg. Audio 1 40:30-41:50.* Claimant testified that no one talked to him all day about the incident, and no one inquired how he felt. According to Claimant in his direct examination, no one said anything to him all day. He was adamant this was the case. He said no one asked him what happened or asked him to explain. *Hrg. Audio 1 1:08:30.* When confronted during cross-examination, he corrected this, and he stated that Cat U[Redacted] told him to get the scissor lift and help a co-worker. He then added that Mr. U[Redacted] then told him to go to the office. He testified that, although these exchanges occurred, Mr. U[Redacted] did not ask him anything about what happened or whether he was hurt. *Hrg. Audio 1 1:10:36.*

5. Claimant testified that when he was terminated, he was only told he was being let go and to turn in his stuff. He testified was given no reason. No one talked to him all day and no one got his side of the story. *Hrg. Audio 1 43:00-45:00.* He agreed that he told no one that he was injured while he was at the shop on July 29, 2020. *Hrg. Audio 1*

1:15:25-50; 1:20:15.

6. Claimant testified that he went home and talked to his roommate on the night of July 29, 2020. He testified that he was "OK" the next day, and then later on at about 4 or 5 p.m. of January 30 he felt a headache like he had never had before. He felt dizzy and then he "caught a migraine." This was a Friday. This headache lasted 5-10 minutes. *Hrg. Audio 1 45:00-46:18.* During cross-examination, Claimant's interrogatory responses were reviewed, in which Claimant provided a different history, stating, "the following day I woke up feeling dizzy and had a migraine headache." Claimant testified that he went back to the employer before noon on July 30, 2020, the next day. He testified that he did not tell them that he had woken up feeling dizzy with a migraine. He testified that he did not speak to anyone at the employer on July 30, 2020 and they did not speak to him. *Hrg. Audio 1, 1:21.*

7. Claimant said his symptoms over the next couple of days were just brief headaches and the accompanying dizziness. *Hrg. Audio 1 47:00.* He went to Monfort Family Clinic Monday to make sure he was OK. When asked why he did not seek treatment through workers' compensation at that time, he said, "Because I didn't experience it until later on. I didn't know." *Hrg. Audio 1 48:10.* The history given to the Monfort Family Clinic, however, is that he "was in car accident in work truck." *Ex. H, Bates 210.* This is contrary to his testimony and shows he clearly was making the connection at the time of this visit. Claimant treated through the Monfort Clinic for almost a month. *Ex. H.* Although he was treated for other things, Claimant testified that the work-related treatment he sought from the Monfort Family Clinic was for his headaches. *Ex. H; Hrg. Audio 1 1:26:00.* The "thunderclap" headaches are what he continues to relate to the work incident. *Hrg. Audio 1, 1:26:50.*

8. Claimant testified that he still gets migraines, but at the time of the hearing, he was feeling OK. Claimant testified that he had experienced 2 migraines the week prior to the hearing. He said he gets dizzy, the headache hits him, and it lasts for 5-10 minutes and then spontaneously resolves. After it goes away, he sits for a few minutes and feels normal again, but tensed up. *Hrg. Audio 1, 50:00.*

9. Claimant testified that he did not hit his head on July 29, 2020. He did not immediately feel any dizziness. He did not vomit. He did not have any memory problems. He remembers everything that happened before and everything that happened after. He is not having any attention or concentration problems day to day. *Hrg Audio 1, 55:40.*

10. Claimant testified that he had driven this truck before and knew that it was 13 feet tall. *Hrg. Audio 1 1:12:00.* The bridge was marked with a sign that said it was 12 feet, 10 inches. *Ex. J, Bates 328.* He testified that he had received the employee handbook. *Ex. J, Bates 247-285.* This includes the directive, "It is the responsibility of every employee to drive safely and obey all traffic, vehicle safety, and parking laws or regulations. Drivers must demonstrate safe driving habits at all times." *Ex. J. Bates 277.* Claimant is a DOT driver and agreed that he needed to know the DOT rules, and the precautions for driving under bridges. Claimant agreed that he was supposed to know the height of the bridge. If the height is posted, he agreed he is supposed to pay attention to the posting. He agreed according to the DOT rules, he was not supposed to go under a bridge that is too short for the height of his vehicle if he was not sure. *Ex. J.*

Bates 329. Based on Claimant's testimony, it is found that he was aware of the employer safety rule, that he knew that the bridge only had clearance of 12 feet 10 inches, and that he knew that he should not drive the VT-5 truck, requiring 13 feet of clearance, under that bridge. The evidence supports that "He wondered whether he could clear the bridges, but he proceeded on." It is found that Claimant intentionally chose to drive under the bridge when he did not know if his truck could clear it. Based on the evidence of record, this was an intentional violation of the employer's safety rule.

11. Claimant agreed that there was a stop sign immediately before the bridge. *Hrg. Audio 1 1:22:30; Ex. R.* According to aerial photographs admitted into evidence, and using the vehicles pictured in those photographs as reference, one can see the approximate distance Claimant traveled before encountering the bridges. After crossing the street from the stop sign, the first bridge is encountered after a little over one car length in distance and the second bridge is approximately 5-7 car lengths from the same place. *Ex. R.* As discussed below, witnesses Julian C[Redacted] and Catarino U[Redacted] credibly testified that Claimant could not reach his claimed speed of 25-30 mph driving the VT-5 truck over that distance.

12. Julian C[Redacted] testified at hearing. *Hrg. Audio 3, starting 2:15.* He is Claimant's foreman and was present with Claimant on the jobsite on July 29, 2020. Based on his credible testimony, the ALJ finds:

    a. Mr. C[Redacted] sent Claimant the drop pin for the location of the jobsite on July 28, 2020. He told Claimant to be at the shop in Greeley at 6:30 a.m. to pick up the VT-5 truck so he could be at the jobsite at 8 a.m. He did not see Claimant at the shop the morning of July 29, 2020. He spoke to Claimant around 7:30 a.m. when he called to ask where Claimant was. Claimant said he was on Highway 66 and was about 5 to 10 minutes away.

    b. Claimant was at the jobsite when Mr. C[Redacted] arrived there. When Mr. C[Redacted] drove to the jobsite, Claimant was on 32nd facing west, about a block from the job location. He thought the direction that Claimant was facing was a little odd, because he would have expected Claimant to take another route. He signaled Claimant to move his truck to where Mr. C[Redacted] was. Claimant moved his truck. Mr. C[Redacted] got out of his own truck and met with the customer. He then went to Claimant's truck, climbed up on the driver's side step to Claimant in the truck to tell him where they needed to go on the jobsite. He then signaled Claimant and directed Claimant to the position the truck to the area on the jobsite where the truck would be used. At this time, about 30 minutes had passed since Mr. C[Redacted] first saw Claimant that morning. Mr. C[Redacted] again went up to Claimant's truck, stepped on the step of the rig and spoke to Claimant through the window. He told him to raise the boom on the top of the truck. Claimant tried to raise the boom and told Mr. C[Redacted] that the boom was not working. Claimant handed the remote to the boom to Mr. C[Redacted]. Mr. C[Redacted] went into the cab of the truck and noticed that the settings for the boom operation were incorrect. He changed the settings and got out of the truck with the boom remote. When he hit the remote, hydraulic fluid shot into the air from the truck and splashed on him and Claimant. Claimant was standing next to him. Mr. C[Redacted] then climbed to the top of the truck and found concrete on the truck and the top of the boom had been skimmed along the top. Up to this point in the morning, Claimant had not mentioned any incident with the truck, and did not indicate he had any idea why there would be problems with the truck.

c. Because of what Mr. C[Redacted] saw when he got on top of the truck, his first assumption was that Claimant had gone under a bridge or hit something. He asked Claimant if he had gone under a bridge, and Claimant said no. Mr. C[Redacted] showed Claimant the piece of concrete and Claimant said he was not sure what happened. Mr. C[Redacted] further questioned Claimant, saying that he must have gone under a bridge. He asked Claimant if he had felt anything, and Claimant said no. Mr. C[Redacted] did not believe Claimant did not go under a bridge and did not feel anything and felt that Claimant was being dishonest. Mr. C[Redacted] then took pictures and sent them to supervisors and H.R. Mr. C[Redacted] had listened to Claimant's testimony that Claimant had told him that he hit a bridge and that Mr. C[Redacted] did not ask him any other questions. Mr. C[Redacted] testified that neither of these things were true.

d. Mr. C[Redacted] sent a text to his supervisor and the office manager at 8:19 a.m. which stated, "He needs to be let go. Most definitely written up there is no excuse for this especially sense [sic] he lied saying he didn't feel anything and I have to cancel my job for GLJ a customer who has been good to us." *Ex. J, Bates 326.* Based on the credible testimony of Mr. C[Redacted], along with the documentation at the time of the event, it is found that Claimant was dishonest with Mr. C[Redacted] at the time of the event of July 29, 2020, by first withholding information about the damage to the truck and then representing that he did not know what had happened to the truck. Claimant's testimony to the contrary is rejected as incredible.

e. After informing the customer, Mr. C[Redacted] told Claimant to go back to the shop. They drove back to Greeley to the shop. Claimant did not appear injured. He did not appear dizzy. Claimant drove without difficulty. When they arrived at the shop, Claimant came to Mr. C[Redacted] and asked him if he was going to be fired. Mr. C[Redacted] said he did not know and advised Claimant that the important thing was to be busy and not stand around.

f. Mr. C[Redacted] confirmed the truck involved in the incident was a Unit VT-5, a HydroX Unit. He is familiar with the truck and its performance. He had driven that particular truck. He explained that, based on his experience, Claimant could not have been going 25-30 MPH when he was going under the second bridge. It takes 5th gear to get to 30 miles an hour. In looking at the distance between the stop signs and the bridges, the truck could not have been going that fast. This unit is not built for speed, it is built for "hauling heavy."

g. Mr. C[Redacted] was familiar with the safety rules of the company. In his work with Claimant, Claimant knew that the Unit VT-5 truck required 13 feet of clearance. After the employer had figured out what bridge Claimant had gone under, Mr. C[Redacted] learned that the bridge was marked with a sign showing it was 12 feet, 10 inches. *Ex. J, Bates 329.* Mr. C[Redacted] believed that driving the 13-foot truck under a 12-foot 10-inch bridge was a safety rule violation.

13. Catarino U[Redacted] testified at hearing. *Hrg. Audio 3, starting 28:15.* He is the field

supervisor. Based on his credible testimony, the ALJ finds:

a. He first heard about the damage to the truck when he received Mr. C[Redacted]'s text. He was on another job site in Golden, Colorado. When he learned of the incident, he drove from Golden to the location where he suspected Claimant had gone under a bridge. Mr. U[Redacted] used to live nearby the jobsite and the bridge and was familiar with the area. Claimant had not identified where an incident occurred. When Mr. U[Redacted] arrived at the bridge, he parked his truck. He found the boom lid and a small piece of the electric coil from on top of the VT-5 HydroX truck on the road laying on County Road 32 on the west side of I-25. *Ex. J, Bates 328, 330, 331, 332.*

b. Mr. U[Redacted] took pictures then drove to the shop in Greeley. He saw Claimant sweeping the floor in the shop. He went up to Claimant and asked him if he was OK. Claimant assured him that he was OK. Mr. U[Redacted] asked Claimant if he was sure, and asked Claimant what happened. Claimant said, "I guess I went underneath a bridge. I didn't feel nothing." Mr. U[Redacted] asked Claimant again if he was OK, and if he needed to see a doctor. Claimant said, no, he was good. Mr. U[Redacted] then said, OK, if you are good, then we need you to move the unit into the bay and clean it. Claimant did not identify the location of the bridge and did not indicate at any time that he had felt the impact of the truck under the bridge. Based on the credible testimony of Mr. U[Redacted], along with other evidence of record, it is found that Claimant was dishonest with Mr. U[Redacted] about the events of July 29, 2020 in declaring that he did not know what happened.

c. Mr. U[Redacted] encountered Claimant a little bit before Claimant went for his drug test. He told Claimant that he needed to go to the office.

d. The next time Mr. U[Redacted] spoke with Claimant, it was right before Claimant was going to clock out. He went up to Claimant and asked him again if he was doing OK. Claimant said he was. Mr. U[Redacted] told Claimant that he needed him to come to the office with him. When waiting to go upstairs to the office, Claimant approached him and tried to give him the keys to the shop and the credit card, saying that he knew he was going to be fired. Mr. U[Redacted] told him to wait for the meeting.

e. Mr. U[Redacted] was present during the termination meeting. At no time during the meeting did Claimant explain what happened or indicate that he felt the impact of the truck. He did not say he was injured and did not appear injured.

f. Based on his Mr. U[Redacted]'s familiarity with the VT-5 Unit and the road by the bridge, he credibly testified that it was not possible for Claimant to be driving 25-30 MPH when he got to the bridges.

g. In Mr. U[Redacted]'s opinion, driving the VT-5 truck under the short bridges was a violation of a safety rule.

14. Based on the credible testimony of Mr. U[Redacted] and Mr. C[Redacted], the ALJ finds Claimant was not going 25-30 miles per hour when he struck the bridge. Instead, the ALJ finds Claimant was going much slower.

15. Nichole T[Redacted] testified at hearing. *Hrg Audio 2, staring 1:00.* She is the office

manager and handles workers' compensation and human resources issues for the employer. Based on her credible testimony, the ALJ finds:

a. She learned of the incident about 8:30 a.m. on July 29, 2020 through a text message. *Ex. J, Bates 325-327.* After learning of the incident, she investigated the possible location of the incident. She had to do this because Claimant said he did not know what had happened or what he had hit. *Ex. J, Bates 312-315; Ex. R.* By doing this, she identified a bridge off Highway 1-25 that is built over Adams Avenue and County Road 32. *Id.* Ms. T[Redacted] indicated that Claimant was terminated for dishonestly - Claimant did not disclose what had occurred or where it had occurred.

b. She credibly testified that Claimant's testimony that no one asked him what had occurred was not true. She credibly testified that they did give Claimant the opportunity during his exit interview to explain what happened. She also credibly testified that they had asked him if he was injured at that time, and he denied that – and Claimant did not appear to have any physical problems.

c. She saw Claimant again on July 30, 2020 when he brought his safety harness in before noon. She spoke to him at that time. Claimant again did not say anything about being injured, did not explain the incident, and did not appear to be injured. He did not tell her that he had woken up in pain. *Ex. J. Bates 338.*

d. After his termination, Claimant sent Ms. T[Redacted] a text asking for the name of the doctor "that you guys require." She did not understand what this was for and asked him "Doctor that we require? For what?" She did not get a response and assumed that Claimant had sent her a text by mistake and this was associated with a new job screening. *Ex. J, Bates 340.*

e. According to Ms. T[Redacted], on the employer's termination form, there is no box to check for lying, so she did not include that in that form. She did, however, include that in the unemployment "request for facts" response, completed on August 17, 2020. She indicated that Claimant had done damage to a truck before and was not fired. The difference was, that time there was no problem about him being honest about what had occurred.

16. Based on the credible testimony of Ms. T[Redacted], it is found that Claimant was terminated for the dishonesty he displayed after he drove the VT-5 truck under the 12-foot, 10-inch bridge. It is found that he was not terminated because of the accident or any injury occurring as a result of the accident.

17. Claimant did not report for medical treatment until August 3, 2020. At that time, he went to his PCP SCHC Monfort Family Clinic. He reported that he had neck pain and whiplash symptoms for three days. He described being in a "car accident in work truck" and that his head was whipped "violently forward and then back." He reported that he was not sure if he lost consciousness or not, and that he does not remember much. He reported a severe thunderclap headache, described as frontal lasting five minutes, along with dizziness for the past 4 days. *Ex. H, Bates 210.* Because of the history of memory loss and abnormal eye tracking that was interpreted as neurologic symptoms, a CT scan of the head was performed on August 3, 2020. This showed no acute processes. *Ex. I.*

18. Claimant filed a workers' claim for compensation and a first report of injury on August 10, 2020. *Ex. P, Q.*

19. After filling with the Division, Claimant was sent to UCHelath and seen by Dr. Oscar Sanders. In his initial visit of August 28, 2020, he reported headaches of 5 to 6 minutes with spontaneous resolution. Claimant estimated to Dr. Sanders that he had experienced approximately 4 of these since the accident of July 29, 2020. He was not having one at the time of the examination. *Ex. F, Bates 63.* Claimant reported dizziness at the time of the headaches, but not otherwise. He also complained of neck pain. Claimant described the events of July 29, 2020 to Dr. Sanders. He said he was driving 20 to 30 miles per hour on the interstate when he misjudged the height of the bridge in relation to his truck. He described a sudden stopping/jerking force that caused him to snap forward and backwards in his seat. He denied a head strike or loss of consciousness. Claimant told Dr. Sanders that he exited his vehicle and noted extensive damage to the bridge. He said he notified his supervisor, who came to the accident scene and instructed him to drive back to the work site. Dr. Sanders diagnosed a "likely" cervical WAD, cervical/thoracic myofascial strains, and "potentially" strain of the left shoulder. He also stated, "Patient may also have sustained an mTBI, although this was somewhat unclear given his lack of head strike/LOC/PTA or altered consciousness (i.e., day/confused) [sic] at the time of the injury." *Ex. F, Bates 74.* Dr. Sanders recommended physical therapy and massage, Tylenol for headaches, and muscle relaxant. He noted for Claimant's work status "employment terminated." *Ex. F, Bates 62.* Dr. Sanders was sent the statements of Mr. C[Redacted] and Mr. U[Redacted] which described a different history than Claimant provided, with Claimant denying feeling anything on the date of the incident. Dr. Sanders indicated in response to questions that he relied primarily on Claimant's self-report, and based on that self-report, he felt Claimant had a whiplash-type injury. *Ex. F, Bates 123-126.*

20. Dr. Sanders referred Claimant to Dr. Gregory Reichhardt, who saw Claimant first on November 30, 2020. To Dr. Reichhardt, Claimant described driving his truck on I-25 when the top of his truck hit the bottom of the bridge. He said he was going 25 to 30 miles per hour. *Ex. B, Bates 21.* Unlike the description given on August 3, 2020 to the Monfort Clinic PA, he had good memory of the events before, during and after the accident. He said that his head was jerked, but that he had no symptoms immediately after the accident. Dr. Reichhardt diagnosed "Possible cervicogenic headaches." *Ex. B, Bates 21-24.* Dr. Reichhardt provided trigger point injections.

21. Dr. Elizabeth Bisgard evaluated Claimant for respondents on January 11, 2021 and provided a written report. *Ex. A.* She testified as an expert in occupational medicine and as a Level II accredited physician via deposition. Her conclusion is that there was no injury requiring medical treatment or causing disability that occurred on July 29, 2020. *Ex. A, Bates 9; Bisgard Depo., P. 26, l. 3-14.* Dr. Bisgard testified that at the time of Claimant's examination with her, he was feeling well. There were no objective findings and no subjective complaints. *Bisgard Depo. P. 13, l. 1-11; Ex. A, Bates 8.* There were no trigger points in his cervical area at the time of her examination. *Id. P. 23, l. 9-13.* Claimant told Dr. Bisgard that, although he has been prescribed Imitrex, nortriptyline and Flexeril, he has not taken them, because he is "scared" of pills and prefers not to. *Ex. A, Bates 8.* Dr. Bisgard explained that Claimant's reported

"thunderclap" headaches, resolving after 5 minutes, are not migraines. *Ex. H, Bates 210 (Monfort Clinic 8/2/20 "severe thunderclap headache (frontal x 5 min)"); Bisgard Depo, P. 20.* As noted, in his first evaluation at the Monfort Clinic, Claimant described these headaches occurring in the frontal region. Dr. Bisgard explained that this would not be a cervicogenic headache being caused by neck injury. *Bisgard Depo. P. 20-22.* She explained that none of the mechanisms discussed could medically explain Claimant's thunderclap headache complaints. This is true for the whole spectrum of reported mechanism: from feeling nothing to violently being thrust back in forth in the seat after a "sudden stopping/jerking". Dr. Bisgard explained that there was no concussion or traumatic head injury, based on the mechanism and the history. Effects of a concussion or a traumatic brain injury manifest immediately. Claimant gave no history of any relevant symptoms and was able to work the entire day with no reported symptoms. Claimant had indicated that he was in "shock" from the incident, implying that prevented him from noticing any symptoms. Dr. Bisgard explained that symptoms of concussion or traumatic brain injury would manifest regardless of shock. *Bisgard Depo. P. 15, l. 12 – P. 18, l. 9.*

22. Dr. Bisgard discussed the conclusions of Monfort Clinic's Lauren Stewert, PA, that indicated that Claimant had headaches and associated neurologic symptoms. She explained that this was inaccurate. Dr. Bisgard explained that there were no injury-related neurologic symptoms. Claimant has a congenital "lazy eye." PA Stewert noticed this upon her first visit and interpreted this as "abnormal eye tracking caused by the reported incident. She was not corrected by Claimant, even as Claimant submitted to a CT scan. PA Stewert said, "pt reporting thunderclap headache since Friday on and off, worst headache of his life after work truck accident where he may or may not have lost consciousness, eyes not tracking appropriately today." *Ex. H, Bates 212.* It was because of the report of lost consciousness and the "neurological" symptom of abnormal eye tracking that Ms. Stewert referred Claimant for a CT scan. *Id, Bates 212, 214 (Problems include: "concussion with loss of consciousness of unspecified duration.")* Claimant denied loss of consciousness to all other providers and under oath. Dr. Bisgard explained that the lazy eye has nothing to do with the injury. "It may be an abnormal neurological finding, but it was present before this incident." *Bisgard Depo. P. 19, 7-24.* Dr. Bisgard is found to be credible and her testimony is found persuasive.

23. On August 12, 2020, Claimant was evaluated at the Monfort Family Clinic. Claimant requested a letter stating he was on driving restrictions. *Ex. H, Bates 224.* On August 14, 2020, PA Stewert wrote that Claimant was seen for a concussion/head injury secondary to a motor vehicle accident and that he was "experiencing significant symptoms with even minor activities, and as a result, is unable to work." *Ex. H. Bates 227.* Dr. Bisgard explained that nothing in the medical records justified this statement. *Bisgard Depo. 24, l. 9- P. 26, l. 2.* She testified that it does not make medical sense for Claimant to be taken entirely off work. There is nothing in the medical records that justifies a conclusion that he was disabled because of the events of July 29, 2020. *Bisgard Depo. P. 24, l. 24-P. 26, l. 14.* He requested a release and was accommodated by the PA. There is no indication that the PA did a causation analysis or carefully considered whether restrictions were medically appropriate. *Bisgard Depo. Id.*

24. Dr. Bisgard's report was sent to both Dr. Sanders and Dr. Reichhardt. They were asked

if Claimant was at MMI work his work injury, and if not, what further treatment was necessary. Dr. Reichhardt replied that he felt that Claimant should be offered additional trigger point injections. If Claimant does not want to pursue facet injections, that would be reasonable, and he would be approaching MMI. Dr. Reichhardt deferred MMI and impairment to Dr. Sanders. He did not comment on causation. *Ex. B, Bates 37.*

25. Mr. U[Redacted], Mr. C[Redacted], and Ms. T[Redacted] are determined to be credible. Based on the conflicts with the credible testimony of others, the conflicts with his prior statements, and logical problems raised by Claimant's assertions, Claimant's testimony which conflicts with Mr. U[Redacted], Mr. C[Redacted], and Ms. T[Redacted] is found to be not credible. As a result, the ALJ does not find Claimant's assertions, statements to medical providers, and testimony to be credible.

26. Dr. Bisgard's opinions are internally consistent and consistent with the credible and persuasive testimony of the Employer witnesses about the low-speed nature of the accident and Claimant's lack of complaints after the accident. Moreover, her opinions are found to be a plausible interpretation of the information she reviewed and used in rendering her opinions. As a result, the ALJ finds her opinions to be credible and persuasive.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

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

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant established he suffered a compensable injury on July 29, 2020.

For a claim a claim to be compensable under the Act, a Claimant has the burden of proving that he or she suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. Section 8-41-301(1) (c), C.R.S.; *Snyder v. ICAO,* 942 P.2d 1337 (Colo. App. 1997); *In re Swanson,* W.C. No. 4-589-645 (ICAO, September 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp*., 961 P.2d 571, 574 (Colo. App. 1998); *Tiner v. PeopleCare LLC, W.C. No. 5-115-369 (* ICAO August 7, 2020).

The Act distinguishes between the terms "accident" and "injury." The term "accident" refers to an unexpected, unusual, or undesigned occurrence. Section 8-40-201(1), *supra*. By contrast, an "injury" refers to the physical trauma caused by the accident. Thus, an "accident" is the cause and an "injury" the result. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). The mere fact that an accident occurs does not rise to the level of compensability unless the accident resulted in an injury. *Leary v. Vail Resorts, Inc.* W.C. 5-075-399-002 (ICAO, April 24, 2020)[1.] No benefits flow to the victim of an industrial accident unless the accident results in a compensable injury. A compensable industrial accident is one which results in an injury requiring medical treatment or causing disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). The fact that medical treatment occurred, does not require a finding that medical treatment was required because of a work incident. *Washburn v. City Market,* W.C. 5-109-470 (ICAO June 3, 2020); *Reynolds v. U.S. Airways, Inc.* WC Nos. 4-352-256 and 4-391-859 (ICAO May 20, 2003); *Dugan v. Mondelez Internation Inc.* W.C. No. 5-092-091 (ICAO May 6, 2020). The need for that medical treatment must be proven by a preponderance to be proximately caused by an injury arising out of and in the course of employment. *Salazar v. 3ATS,* W.C. No. 5-128-144-001 (ICAO March 3, 2021).

A condition is not compensable merely because a Claimant sought treatment after a work incident. *Leary v. Vail Resorts, Inc.* W.C. 5-075-399-002 (ICAO, April 24, 2020); *Dugan v. Mondelez Internation Inc* W.C. 5-092-091 (ICAO May 6, 2020). The

[1] There were two *Leary v. Vail Resorts* decisions issued by the ICAO on April 24, 2020.

development of an increase in complaints after a work incident does not necessarily support a finding that a compensable injury occurred. *Leary, supra.* The fact that an employer tenders treatment is not dispositive of whether an injury is compensable, and does not serve as a waiver of the right to contest liability. *Grapham v. Anderwood Court Carecener*, W.C. No 4-624-138 (ICAO June 29, 2005); *Yeck v. ICAO,* 996 P.2d 228 (Colo. App. 1999). Restrictions from work do not mandate a finding of compensability. If, as is the case here, the inability to perform work is due to circumstances other than a work incident, then it is not a work related disability. *Lopez Pando v. Martin Marietta Materials, Inc.* W.C. No. 5-081-406 (ICAO, May 15, 2020). Claimant did not have work restrictions until he requested them from the physician's assistant at his PCP. They were provided by a PA Stewert at his request, without scrutiny as to their necessity and gave reasoning that is not supported by the medical record. Based on Dr. Bisgard's credible opinion, it is found that the restrictions provided to Claimant by any of the treating providers were not because of a work-related disability.

There have been several recent ICAO decisions that provide guidance in disputes over whether a work "accident" resulted in a compensable "injury." In *Leary v. Vail Resorts,* Claimant fell from a gondola. She appeared to her provider with "fairly extensive bruising" and proceeded on a long course of treatment with several body parts. *Supra.* Nonetheless, the ALJ denied the claim for benefits related to that fall. Claimant argued that it was undisputed that a fall occurred, and that treatment following that fall proved compensability as a matter of law. The ICAO rejected the argument, stating, "Claimant appears to advance a temporal narrative suggesting that merely because the Claimant sought treatment after a fall, and because the treatment was provided by a designated physician, it renders such treatment compensable." In *Washburn*, Claimant fell at work. *Supra.* She complained of upper back pain, said she was not sure if she hit her head, and complained of aches in her shoulder, arms and right hip. She reported intermittent numbness in both hands and legs, and contracture of both hands. CT scans of the head and spine showed no traumatic injury, only degenerative conditions. The ALJ found that an incident occurred at work, but that the incident did not result in the need for the medical treatment Claimant had received. The Claimant appealed, arguing that the undisputed incident and subsequent treatment supported the conclusion that she sustained an injury while subject to an employment risk, and therefore suffered a compensable injury. The ICAO rejected this *post hoc ergo proper hoc* causation reasoning and affirmed the ALJ. In *Lopez,* the ICAO rejected the argument that restriction from work established a compensable claim. *Lopez, supra, p. 4.* Treatment ordered by providers reasonably based on a Claimant's subjective complaints does not necessarily prove that there was a compensable work injury. This is because, "In the situation where a medical provider is initially engaged in a patient's physical complaints of distress, the provider has little information other than the patient's subjective statement to guide a response. Accordingly, the provider's' reaction is conservative..." *McCarty v. Target Corporation,* W.C. No. 5-131-093 (ICAO, March 11, 2021)

Much like these cases, although Claimant sought and received treatment, and requested and received work restrictions, he did not experience a compensable injury. According to his testimony, Claimant alleges that his "thunderclap" headaches, or "migraines" as he labels them, are his work injury.

Based on the conflicting evidence, the ALJ found that Claimant could not have been going 25-30 miles per hour when the top of his truck scraped the bottom of the bridge. Claimant's statements about whether the impact stopped the truck or did not stop the truck are in conflict. Claimant's assertion that he was "violently" thrown inside the cab of the truck is found not credible.

Claimant's characterization of the mechanism is the basis for his doctor's diagnosis, treatment, and restriction recommendations. The initial recommendation for a CT scan and the diagnosis of whiplash and concussion stemmed from Claimant's initial assertions of a sudden and violent impact in a "car accident", that he did not know if he had been knocked unconscious and he did not remember anything, along with a misunderstanding of the origin of Claimant's "lazy eye." Claimant now verifies that he was not unconscious, has memory of all events, and the true nature of his "abnormal eye tracking." Dr. Sanders explains that his conclusions and recommendations depend on the history given to him by Claimant, which is found incredible. Like a house built on sand, an expert's opinion is no better than the facts and data on which it is based. *See Kennemur v. State of California*, 184 Cal. Rptr. 393, 402–03 (Cal. Ct. App. 1982).

Based on the credible opinions set forth by Dr. Bisgard, the ALJ finds and concludes that there is no credible medical basis for an injury causing the need for medical treatment or disability.

The ALJ is mindful that causation may be established entirely through circumstantial evidence. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). The ALJ is also mindful that medical evidence is neither required nor determinative of causation. A claimant's testimony, if credited, may alone constitute substantial evidence to support the ALJ's determination concerning the cause of the claimant's condition. *See Apache Corp. v. Industrial Commission*, 717 P.2d 1000 (Colo. App. 1986) (claimant's testimony was substantial evidence that his employment caused his heart attack); *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); see also *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997) (lay testimony sufficient to establish disability).

In this case, however, Claimant's statements to medical providers and testimony are not credited. As a result, the ALJ finds and concludes Claimant has not proven by a preponderance of the credible evidence that the incident that occurred on July 29, 2020 caused the need for medical treatment or caused any disability. As a result, the ALJ finds and concludes Claimant failed to establish by a preponderance of the credible evidence that he suffered a compensable work injury.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant has failed to establish by a preponderance of the evidence that he sustained a work-related injury during the course and scope of his employment with Employer.

2. As Claimant failed to meet his burden to establish a compensable injury, the remaining issues are not addressed.

3. Claimant's claim is denied and dismissed.

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

DATED: April 7, 2021.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that on September 22, 2020, he suffered an injury arising out of and in the course and scope of his employment with the employer.

2. If the claimant proves a compensable injury, whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment he has received, including bilateral carpal tunnel release surgeries performed by Dr. James Rose, constitutes reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.

3. If the claimant proves a compensable injury, whether the claimant has demonstrated, by a preponderance of the evidence, that he is entitled to temporary total disability (TTD) benefits from September 23, 2020 through December 21, 2020.

4. If the claimant proves a compensable injury, what is the claimant's average weekly wage (AWW)?

FINDINGS OF FACT

1. The claimant began his employment with the employer on June 7, 2020. The employer operates in the oil and gas industry. During his employment with the employer, the claimant worked in North Dakota performing maintenance on gas wells.

2. On September 22, 2020, the claimant was working in North Dakota. His job duties on that date involved pulling rods out of a well. This activity included separating lines of pipe at the coupling mechanism. If the couplers are too tight to open with the wrench, it is necessary to hit the couplers with hammers. These couplers are placed every 30 feet of the pipe and are commonly referred to as "rod boxes".

3. The claimant testified that on September 22, 2020, he was tasked with repeatedly striking the rod boxes with hammers weighing four pounds each. The claimant demonstrated how he would hold a hammer in each hand, swing his arms outward in a wing-like motion, then simultaneously bring the hammers together to strike the rod box in front of his person. The claimant also testified that he engaged in this activity for 10 to 12 hours on September 22, 2020.

4. After completing his shift on September 22, 2020, the claimant noticed that both of his hands were swollen and painful. The claimant testified that the swelling made his hands appear "inflated". The claimant further testified that he has experienced symptoms related to a carpal tunnel diagnosis. However, the condition of his hands on September 22, 2020 were unlike any symptoms he had previously experienced.

Symptoms and Medical Treatment Prior to September 22, 2020

5. The claimant worked for many years as a mechanic. That work involved a great deal of twisting and turning of wrenches.

6. In 2018, the claimant was experiencing numbness and tingling in his fingers and sought medical treatment for those symptoms. On December 20, 2018, the claimant was seen by his primary care provider (PCP) Christopher Weaver. On that date, the claimant reported pain, tingling, numbness, and clumsiness in both hands. The claimant also reported that the onset of these symptoms was "year(s) ago". Dr. Weaver opined that the claimant had bilateral carpal tunnel syndrome and referred the claimant for electromyography (EMG) testing.

7. On January 21, 2019, Dr. Mitchell Burnbaum performed EMG testing and nerve conduction studies (NCS) of the claimant's bilateral upper extremities. In his report of that same date, Dr. Burnbaum noted that the claimant had "very significant right carpal tunnel syndrome and mild to moderate left carpal tunnel syndrome".

8. On January 23, 2019, the claimant returned to Dr. Weaver to discuss the results of the EMG/NCS testing. On that date, Dr. Weaver recommended surgical intervention to address the claimant's carpal tunnel syndrome and referred the claimant for a surgical consultation.

9. On February 22, 2019, the claimant was seen by Dr. James Rose for a surgical consultation. On that date, Dr. Rose opined that the claimant had bilateral carpal tunnel, (right greater than left), based upon the claimant's symptoms on exam and the EMG testing results. Dr. Rose recommended that the claimant undergo a right carpal tunnel release. However, that procedure was not scheduled at that time.

10. At the time that he was diagnosed with carpal tunnel in 2019, the claimant was employed with Helmrich and Payne (H&P), another oil and gas company. The claimant testified that he did not undergo the surgery recommended by Dr. Rose in 2019 because needed to keep his employment with H&P.

11. The claimant also testified that he was able to continue to work both in his position at H&P and during his employment with the employer. The claimant further testified that he was able to do so because of the ability to switch duties with members of his crew. In addition, the claimant testified that he had no other treatment for carpal tunnel symptoms until his work activities on September 22, 2020.

Medical Treatment After September 22, 2020

12. Due to his hand symptoms, the claimant sought medical treatment on September 23, 2020 at McKenzie County Urgent Care in Watford City, North Dakota. At that time, the claimant reported bilateral hand pain and swelling. The medical record of that date also states that the claimant reported that he was returning to Colorado and

would see his surgeon at that time The claimant was prescribed prednisone and instructed to follow up with his surgeon in Colorado.

13. The claimant testified that while he was en route to the urgent care facility, he contacted Dr. Rose's office in Colorado to report his symptoms.

14. On September 30, 2020, the claimant was seen by Dr. Rose. On that date, Dr. Rose recommended bilateral carpal tunnel release surgeries. In addition, he noted that the claimant could return to work without restrictions, pending the surgeries.

15. Although Dr. Rose indicated that the claimant could return to work without restrictions, the respondents scheduled a "fit for duty" evaluation with Erica Herrera, PA-C. The claimant was seen by PA Herrera for this evaluation on October 12, 2020. At that time, the claimant reported constant bilateral hand pain that was "now resolved". Following a physical exam and a functional capacity evaluation (FCE), PA Herrera opined that the claimant should undergo surgery to address his carpal tunnel symptoms before returning to full duty. PA Herrera also noted that the claimant's "recent significant flare in his condition" posed a risk to his workplace.

16. Following the evaluation by PA Herrera, the employer ended the claimant's employment. In a document dated, October 15, 2020, Rhonda Cejka, Office Manager, indicated that the claimant's employment was terminated due to a "[f]ailure to return from leave or unable to perform duties due to illness or injury"; and "Violation of Company Policy or Procedure".

17. Mr. Keith Duke Lord, Safety Manager with the employer, testified that he was in North Dakota at the time that the claimant was engaged in the duties involving the rod boxes. Mr. Lord's testimony with regard to the need to hammer the rod boxes was consistent with the claimant's testimony on that issue. Mr. Lord also testified that the claimant and his crew worked approximately 10 hours on September 22, 2020 hammering the rod boxes. Mr. Lord saw the claimant at the urgent care facility in North Dakota and observed that the claimant's hands appeared to be swollen. Mr. Lord testified that he believed that the claimant suffered a "first aide" type injury and he did not prepare an incident report.

18. Ms. Cejka testified that the claimant's medical treatment after September 22, 2020 was handled through the employer's medical insurance. In addition, Ms. Cejka assisted the claimant with obtaining short term disability benefits through the employer.

19. On November 4, 2020, physician advisor for the insurer, Dr. Gary Zuehlsdorff reviewed the requested release surgeries. In his report, Dr. Zuehlsdorff recommended that the insurer deny authorization for the requested surgeries. In support of this opinion Dr. Zuehlsdorff noted that the claimant was diagnosed with bilateral carpal tunnel syndrome on January 21, 2019 following the EMG studies performed by Dr. Burnbaum.

20. Based upon the opinions of Dr. Zuehlsdorff, the respondents denied authorization for recommended bilateral carpal tunnel release surgeries.

21. On November 10, 2020, Dr. Rose performed bilateral carpal tunnel release surgeries. The claimant testified that the surgery was paid for by his personal medical insurance. In addition, the claimant paid out of pocket for his deductible. The claimant further testified that since the surgeries he has not had a return of his symptoms of numbness and tingling.

22. The claimant testified that he obtained employment as a mechanic with RCR Performance on December 23, 2020. In this new employment the claimant uses hand tools such as wrenches and cordless drills. The claimant testified that he has not had any carpal tunnel symptoms in this position.

23. On January 25, 2021, Dr. Jonathan Sollender reviewed the claimant's medical records and issued a report regarding the reasonableness, necessity, and relatedness of the carpal tunnel releases to the claimant's work activities on September 22, 2020. In his report, Dr. Sollender opined that the claimant's bilateral carpal tunnel syndrome is not related to the claimant's job duties. He further opined that the claimant's carpal tunnel syndrome is pre-existing and was not caused by his work activities on September 22, 2020.

24. With regard to his wages, the claimant testified that while employed with the employer, he was paid $22.00 per hour, with an increase to $33.00 per hour for overtime. The claimant testified that the employer did not pay him any wages after September 22, 2020.

25. Wage records entered into evidence demonstrate that the claimant had total earnings of $22,378.96 during his employment with the employer. Based upon the claimant's start date of June 7, 2020, and his last day earning wages of September 22, 2020, the ALJ calculates this to be a period of 108 days. The ALJ calculates that when the claimant's total wages are divided by 108 days and then multiplied by seven days in a week, it results in an average weekly wage (AWW) of $1,450.47.

26. Records entered into evidence demonstrate that the claimant received short term disability benefits. He received these benefits as follows: on November 25, 2020 a payment in the amount of $1,179.02; and on December 10, 2020, a payment in the amount of $4,042.36. This is a total of $5,221.38.

27. The claimant also received unemployment insurance benefits (UIB) from the Colorado Department of Labor and Employment (CDLE). Documents entered into evidence at hearing demonstrate that the claimant received UIB benefits in the amount of $618.00 each week he was eligible for UIB.

28. In a decision dated January 6, 2021, a hearing officer with the CDLE determined that the claimant was not eligible to receive UIB for the dates of November 8, 2020 through January 2, 2021. In that same order, the hearing officer found that the claimant was eligible to receive UIB beginning January 3, 2021.

29. The ALJ credits the claimant's testimony regarding his carpal tunnel symptoms and is persuaded that although the claimant has a long history of carpal tunnel symptoms, he was able to continue to perform his normal job duties for his prior employer

H&P and the employer. The ALJ further credits the claimant's testimony regarding his job duties on September 22, 2020 and the condition of his hands following that work. Specifically, the ALJ is persuaded that the symptoms the claimant experienced after his shift of September 22, 2020 were worse than any of his prior symptoms. The ALJ finds that the nature of the claimant's job duties on September 22, 2020 resulted in this increased symptomatology. The ALJ also credits the testimony of Mr. Lord regarding his observation of the claimant's swollen hands at the urgent care facility in North Dakota.

30. The ALJ also credits the medical records, and specifically the records of Dr. Rose and PA Herrera and finds that the claimant suffered an aggravation of his carpal tunnel related symptoms on September 22, 2020. The ALJ also finds that this aggravation necessitated medical treatment. The ALJ is not persuaded by the opinions of Drs. Zuehlsdorff and Sollender that the events of September 22, 2020 did not aggravate, accelerate, or combine with the claimant's pre-existing carpal tunnel syndrome. The ALJ finds that the claimant has successfully demonstrated that it is more likely than not that on September 22, 2020, he suffered an injury arising out of and in the course and scope of his employment with the employer. Specifically, the ALJ finds that if not for the act of repeatedly striking rod boxes with hammers on September 22, 2020, the claimant's carpal tunnel related symptoms would not have become so aggravated so as to necessitate medical treatment.

31. The ALJ finds that, despite his pre-existing carpal tunnel syndrome, the claimant was able to perform all of his normal job duties until the September 22, 2020 aggravation of his pre-existing condition. The ALJ credits the opinion of PA Herrera that the claimant was not to return to full duty until undergoing carpal tunnel surgery. The ALJ also finds that the claimant has successfully demonstrated that it is more likely than not that the bilateral carpal tunnel release surgeries constitute reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.

32. The ALJ credits the opinion of PA Herrera that the claimant was not to return to full duty until undergoing carpal tunnel surgery. The ALJ also credits the employer records that demonstrate that the claimant's employment with the employer ended because the claimant was "unable to perform duties due to illness or injury". Therefore, the ALJ finds that the claimant has successfully demonstrated that it is more likely than not that he suffered a wage loss due to his injury. This wage loss began on September 23, 2020 and continued until December 23, 2020 when he began new employment.

33. The ALJ also finds that the respondents are entitled to statutory offsets for the claimant's receipt of short term disability benefits and UIB.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of

the evidence, to find that a fact is more probable than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

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

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

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

5. As found, the claimant has demonstrated, by a preponderance of the evidence, that on September 22, 2020, he suffered an injury arising out of and in the course and scope of his employment with the employer. As found, the claimant's testimony, the testimony of Mr. Lord, the medical records, and the opinions of Dr. Rose and PA Herrera are credible and persuasive on this issue.

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

7. As found, the claimant has demonstrated, by a preponderance of the evidence, that medical treatment he has received, including bilateral carpal tunnel release surgeries performed by Dr. Rose, constitutes reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury. As found, the medical records, and specifically the records of Dr. Rose and PA Herrera, are credible and persuasive on this issue.

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

9. As found, the claimant has demonstrated, by a preponderance of the evidence, that as a result of his work injury, he suffered a wage loss beginning September 23, 2020 through and including December 22, 2020. As found, the opinion of PA Herrera and the records of the employer are credible and persuasive.

10. Section 8-42-102(2), C.R.S. requires the ALJ to base claimant's average weekly wage (AWW) on his earnings at the time of the injury. Under some circumstances, the ALJ may determine the claimant's TTD rate based upon his AWW on a date other than the date of the injury. *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). Section 8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO, May 7, 2007).

11. As found, the claimant's average weekly wage (AWW) is calculated to be $1,450.47. As found, the wage records are credible and persuasive.

ORDER

It is therefore ordered:

1. The claimant suffered a compensable injury on September 22, 2020.

2. The respondents shall pay for reasonable and necessary treatment of the claimant's bilateral carpal tunnel syndrome, including the bilateral carpal tunnel release surgeries performed by Dr. Rose.

3. The claimant is entitled to TTD benefits for the period of September 22, 2020 through and including December 22, 2020.

4. The respondents are entitled to statutory offsets for the claimant’s receipt of short term disability benefits and UIB.

5. The claimant’s AWW is $1,450.47.

6. All matters not determined here are reserved for future determination.

Dated this 8th day of April 2021.

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

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-925-175-001

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that she is entitled to an award of the specific post-MMI medical benefits - bilateral viscosupplementation injections in both knees - as requested by authorized treating physician (ATP) Michael Hewitt, M.D.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. In 2013 Claimant worked for Employer as a small package handler working in the warehouse when on July 17, 2013, she suffered an admitted workplace injury when her foot got caught in a load net and she fell down hitting both knees on the cement. Claimant's authorized treating physician (ATP) Michael Hewitt, M.D., eventually performed surgery on the left knee, but did not operate on the right knee.
2. On December 19, 2014 Claimant was placed at maximum medical improvement (MMI) by her treating physicians with a recommendation for ongoing maintenance medical care. *See* Claimant's Exhibit Tab 3, Bate Stamp (BS) 6-19.
3. Claimant subsequently underwent a Division-sponsored independent medical evaluation (DIME) and, thereafter, was again released at MMI, this time on August 17, 2015, again with a recommendation for ongoing maintenance medical care. *See* Claimant's Exhibit Tab 4, BS 20-31.
4. At both of the times that the Claimant was released at MMI, the Final Admission of Liabilities left her claim open for maintenance medical care and the admission to maintenance medical care placed no time limit on when that care would end.
5. The maintenance medical care Claimant was receiving after original placement at MMI and up through November 3, 2017 included oral medications provided through her authorized treating physician (ATP) Allison Fall, M.D. *See* Claimant's Exhibit Tab 5, BS 32-54.
6. Claimant credibly testified that around November 2017 she stopped treating with ATP Fall as the medications she was taking were not providing relief.
7. ATP Fall's last record of November 3, 2017 sets forth:

   > I do recommend proceeding with the viscosupplementation. She has already had this through the workers' compensation system.

   See Claimant's Exhibit Tab 4, BS 53.

8. Claimant has been receiving bilateral viscosupplementation injections as maintenance medical care since her original placement at MMI on December 19, 2014, after the amended placement at MMI on August 17, 2015, and after she ceased taking oral medication with ATP Fall in November 2017.

9. On August 14, 2016 ATP Hewitt put in a request for repeat Synvisc injections. *See* Claimant's Exhibit Tab 3, BS 69.

10. On October 3, 2016 Claimant presented and received her second bilateral knee viscosupplementation injections from ATP Hewitt. "She tolerated the initial injections well." *See* Claimant's Submission Tab 6, BS 71.

11. On November 28, 2016 ATP Hewitt noted that the bilateral viscosupplementation injections provided "70% to 80% improvement in knee pain." *See* Claimant's Exhibit Tab 6, BS 70.

12. On August 28, 2017 Claimant returned to ATP Hewitt who noted:

> HISTORY: [Claimant] is a 30-year-old female well-known to this office presenting for follow up of bilateral knee pain with bilateral knee chondromalacia. She was last evaluated in the office approximately 10 months prior. She underwent viscosupplementation injection last October with significant improvement in the knee symptoms. She has had a gradual return of pain over the past six to eight weeks without acute trauma. She has been attempting to exercise. The knees have been limited her activities.
>
> * * *
>
> PLAN: Treatment options were rediscussed with the patient in detail today. She has been attempting to maintain a healthy body weight, but notes difficulty as the viscosupplementation injection affect wears off. After much discussion, the patient states she would like to proceed with repeat injections**. Given her excellent response in the past, I do feel repeat bilateral injections are medically reasonable and appropriate.** We rediscussed the risks and benefits as well as expected results. We will await authorization.

See Claimant's Exhibit Tab 6, BS 72 (Emphasis added).

13. On September 7, 2017 ATP Hewitt put in a request for "ORTHOVISC 30mg #6 – to be injected into bilateral knees weekly for 3 weeks by MD in office. Requesting auth for injections and visits." *See* Claimant's Exhibit Tab 6, BS 74.

14. On January 8, 2018 Claimant returned to ATP Hewitt who noted:

> HISTORY: [Claimant] follows up for her bilateral knee pain. She was last evaluated in August 2017. She has been followed for bilateral knee chondromalacia. She has had good responses to viscosupplementation injections, her

> most recent was October 2016. She has decided to proceed with repeat viscosupplementation injections.
>
> * * *
>
> PLAN: Under sterile conditions, Orthovisc was injected from the anterolateral approach bilaterally. She tolerated the procedure well. She will ice tonight and tomorrow, monitoring for signs of infection. She will follow-up next week for her second injection, all questions were answered.

See Claimant's Exhibit Tab 6, BS 75.

15. On January 15, 2018 Claimant returned to ATP Hewitt for her second injection which she tolerated well. *See* Claimant's Exhibit Tab 6, BS 76.

16. On January 22, 2018 Claimant returned to ATP Hewitt for bilateral viscosupplementation which she tolerated well. *See* Claimant's Exhibit Tab 6, BS 77.

17. On March 5, 2018 ATP Hewitt noted:

> HISTORY: [Claimant] presents for follow up approximately 6 weeks status post bilateral viscosupplementation injection for her knees. She tolerated the injections well and has noted greater than 50% improvement in pain and swelling with activities of daily living.
>
> * * *
>
> PLAN: The patient is progressing well. She continues to note a positive response from viscosupplementation injections. She understands the importance of maintaining a healthy body weight and good lower extremity strength. She will follow up with this clinic as needed all questions were answered.

See Claimant's Exhibit Tab 6, BS 78.

18. On September 25, 2019 Respondent authorized Claimant to be evaluated by ATP Hewitt and provided him with the report of Kathleen D'Angelo, M.D., in which Dr. D'Angelo concludes that the viscosupplementation injections are no longer related to Claimant's admitted July 17, 2013 claim. *See* Claimant's Exhibit Tab 6, BS 80.

19. On August 17, 2020 ATP Hewitt issued a report setting forth in pertinent part:

> HISTORY: [Claimant] is a 33-year-old female, presenting for evaluation of bilateral knee pain. The patient has been followed for bilateral patellofemoral chondromalacia and underwent viscosupplementation injections in November 2019. She noted 60-70% improvement in knee pain, with a gradual return over the last month. She denies fevers, chills, respirator complaints or further knee injury.

* * *

> PLAN: The patient has been focusing on home exercises and has lost over 50 pounds since her last visit. She noted significant improvement from the viscosupplementation injections, but her symptoms are returning. **She is nine months from injections and wishes to proceed with repeat injections. With her previous improvement, I do feel this is medically reasonable and appropriate.** We re-discussed risks, benefits, and expected results, and we will await authorization.

See Claimant's Exhibit Tab 6, BS 81 (Emphasis added).

20. Claimant credibly testified that the viscosupplementation injections permit her to perform the activities of daily living, including her current position as a truck driver, driving both single and tandem semis for her new employer Cecil Elkins. Claimant credibly testified that she has had no intervening events since her original injury and subsequent surgery on the left knee from the injury which occurred on July 17, 2013.

21. Respondent had Claimant evaluated by Kathleen D'Angelo, M.D., who concluded that the need for the injections is no longer causally related to Claimant's original industrial injury. Dr. D'Angelo relies in part on the workers' compensation lower extremity treatment guidelines, from the Colorado Medical Treatment Guideline, to conclude that Claimant's maintenance treatment for the duration for viscosupplementation has been exceeded.

22. Claimant challenges Dr. D'Angelo's most recent report of November 4, 2020, stating that her knee was swollen although Dr. D'Angelo said, "it was not swollen" when Dr. D'Angelo examined Claimant. Claimant also stated she had pain with movement during her examination which she says Dr. D'Angelo did not acknowledge and that Dr. D'Angelo said that Claimant was morbidly obese, although Claimant credibly testified that she has lost 61 pounds since her last visit with Dr. D'Angelo and even with the weight loss, her knee pain remains.

23. Claimant's testimony was internally consistent and consistent with the underlying medical records. As a result, the ALJ finds Claimant's testimony to be credible and persuasive.

24. Claimant's treating providers, including the DIME physician, to the extent his report is readable, never restricted the number of viscosupplementation injections Claimant could undergo.

25. The injections provide Claimant relief and make it possible for her to complete her activities of daily living - making her more functional.

26. The ALJ credits and finds persuasive Dr. Hewitt's findings and conclusions that the prior injections provided Claimant relief from the effects of her work injury and that additional injections are reasonable and necessary to treat and relieve Claimant from the effects of her work injury. The ALJ finds his conclusions to be credible and persuasive because his findings are consistent with the Claimant's medical records

and are consistent with Claimant's prior ATP – Dr. Fall – who found prior injections to be reasonable and necessary to treat Claimant from the effects of her work injury.

27. The viscosupplementation injections are found to be reasonable and necessary to relieve Claimant from the effects of her work injury and maintain MMI. As a result, the viscosupplementation injections are also related to Claimant's work injury.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

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

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

C. In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant proved by a preponderance of the evidence that she is entitled to an award of the specific

post-MMI medical benefits - bilateral viscosupplementation injections in both knees - as requested by authorized treating physician (ATP) Michael Hewitt, M.D.

D. Colorado recognizes the "chain of causation" analysis holding that results flowing proximately and naturally from an industrial injury are considered to be compensable consequences of the injury. Thus, if the industrial injury leaves the body in a weakened condition and the weakened condition plays a causative role in producing additional disability or the need for additional treatment such disability and need for treatment represent compensable consequences of the industrial injury. *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970); *Jarosinski v. Industrial Claim Appeals Office*, 62 P.3d 1082 (Colo. App. 2002); *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). However, no compensability exists if the disability or need for treatment was caused as a direct result of an independent intervening cause. *Owens v. Industrial Claim Appeals Office*, 49 P.3d 1187 (Colo. App. 2002). The question of whether the need for medical treatment was caused by the industrial injury or by an intervening cause is a question of fact. *Owens v. Industrial Claim Appeals Office, supra*.

E. When the Respondents file a FAL admitting for ongoing medical benefits after MMI, it retains the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.*, 77 P.3d 863 (Colo. App. 2003). When Respondent challenges Claimant's request for specific medical treatment, Claimant bears the burden of proof to establish entitlement to the benefits. *Ford v. Regional Transportation District*, W.C. No. 4-309-217 (ICAO February 12, 2009). The question of whether Claimant proved that specific treatment is reasonable and necessary to maintain her condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

F. Respondent argues that Claimant's need for viscosupplementation has exceeded the medical treatment guidelines and that her need is no longer causally related to the original industrial injury, relying on the report of Dr. D'Angelo.

G. As it relates to the medical treatment guidelines, the Judge considered the broader question of whether the Medical Treatment Guidelines ("*Guidelines*") applied to the requested bilateral viscosupplementation injection in both knees. The *Guidelines* are contained in W.C. Rule of Procedure 17-2(A), 7 Code Colo. Regs. 1101-3, and provide that health care providers shall use the *Guidelines* adopted by the Division of Workers' Compensation (Division). The Division's *Guidelines* were established by the Director pursuant to an express grant of statutory authority. See § 8-42-101(3.5)(a)(II), C.R.S. 2008. In *Hall v. Industrial Claim Appeals Office*, 74 P.3d 459 (Colo. App. 2003) the Court noted that the Guidelines are to be used by health care practitioners when furnishing medical aid under the Workers' Compensation Act. *See* Section 8-42-101(3)(b), C.R.S. 2008.

H. The *Guidelines* are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). It is appropriate for an ALJ to consider the *Guidelines* in deciding whether a certain medical treatment is reasonable and necessary for the claimant's condition. *Deets v. Multimedia Audio Visual*, W.C. No. 4-327-591 (March 18, 2005); see *Eldi v. Montgomery Ward*, W.C. No. 3-757-021 (October 30, 1998) (medical treatment guidelines are a reasonable source for identifying the diagnostic criteria). However, an ALJ is not required to award or deny medical benefits based on the *Guidelines*. In fact, there is generally a lack of authority on whether the *Guidelines* require an ALJ to award or deny benefits in some cases. Thus, the ALJ has discretion to approve medical treatment even if it deviates from the *Guidelines*. *Madrid v.Trinet Group, Inc*., W.C. 4-851-315 (April 1, 2014)

W.C.R.P. 17-5(C) provides in relevant part:

> The treatment guidelines set forth care that is generally considered reasonable for most injured workers. However, the Division recognizes that reasonable medical practice may include deviations from these guidelines, as individual cases dictate. For cases in which the provider requests care outside the guidelines the provider should follow the procedure for prior authorization in Rule 16-9.

I. It is quite clear from the medical records of Claimant's treating providers, including the DIME physician, to the extent his report is readable, that there was never a limitation placed upon viscosupplementation injections.

J. As found, the injections are providing Claimant relief from the effects of her work injury. Moreover, the viscosupplementation injections provided Dr. Hewitt makes it possible for Claimant to complete her activities of daily living - making her more functional.

K. Moreover, the medical records of Claimant's treating physicians, including to the extent readable the DIME report issued by Yusuke Wakeshima, M.D. make no time limitation on the viscosupplementation injections which Claimant has been receiving since being placed at MMI.

L. The ALJ finds and concludes that Claimant's need for the bilateral visco-supplementation is reasonable and necessary maintenance medical care related to the July 17, 2013 injury. This ALJ was highly persuaded by the fact that the July 17, 2013 injury was caused by a direct blow on hard cement to both of Claimant's knees – and caused an osteochondral defect of the left knee - which ATP Hewitt has been treating with viscosupplementation. The ALJ has considered the Respondent's requested medical evaluation written by Dr. D'Angelo and for the reasons set forth above dismisses her conclusion that Claimant's maintenance medical care should be limited based on the Colorado Medical Treatment Guidelines and that Claimant's viscosupplementation should be "pursued through private health insurance." Claimant's need for the viscosupplementation is a direct result of the admitted industrial injury. Those injections have been providing relief. The Medical Treatment Guidelines are guidelines only. Claimant has credibly testified that she has worked on losing weight and continues to work on losing weight. Despite that fact, she continues to have severe debilitating knee pain. For these reasons and other as set forth above, the ALJ rejects the opinions of Dr. D'Angelo as it relates to the relatedness of the need for viscosupplementation.

M. Thus, the ALJ finds and concludes that Claimant has established by a preponderance of the evidence that the viscosupplementation injections are reasonable and necessary maintenance medical treatment to relieve Claimant from the effects of her work injury and maintain MMI.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant remains entitled to maintenance medical treatment.
2. Respondent shall pay for the viscosupplementation injections recommended by ATP Michael Hewitt, pursuant to the Colorado Workers' Compensation medical fee schedule.
3. The injections shall be provided as maintenance medical treatment.
4. Issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: April 9, 2021.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant proved by a preponderance of the evidence her claim should be reopened due to a change in condition.

II. Whether Claimant proved by a preponderance of the evidence additional medical treatment of the left knee, including the left osteotomy and lateral retinacular reconstruction with fresh frozen allograft recommended by James Genaurio, M.D., is reasonable, necessary and causally related to her July 25, 2016 industrial injury.

III. Whether Claimant proved by a preponderance of the evidence she is entitled to temporary disability benefits.

IV. Determination of Claimant's average weekly wage ("AWW").

FINDINGS OF FACT

1. Claimant is a 38-year-old female who has worked for Employer for the past 20 years as a customer service agent. Claimant's job duties require, *inter alia*, lifting, tagging, and moving luggage. Claimant estimates the average piece of luggage weighs approximately 50 pounds, and that she squats and lifts luggage several times in any given work day. Claimant spends the majority of her shift standing.

2. Claimant testified she works 35 to 45 hours per week for Employer and is paid on an hourly basis. Since her date of hire, Claimant has received raises in her hourly rate of pay at least once a year. Claimant's current hourly rate is $30.94.

3. Claimant has a history of a prior left knee work injury on September 28, 2010, for which she underwent a left knee arthroscopic chondroplasty of the patella and lateral release on August 20, 2012.

4. The subject of this claim is a July 25, 2016 industrial injury to Claimant's left knee.[1] Claimant sustained the industrial injury when she was standing and pivoting with baggage and experienced pain and swelling. Respondents initially denied liability for the injury. ALJ Peter J. Cannici determined the injury was compensable in a Findings of Fact, Conclusions of Law and Order issued on April 7, 2017. ALJ Cannici further determined Claimant's AWW was $1,222.41, based on Claimant's pay rate of $29.88 per hour.

5. Claimant was diagnosed with a left knee chondral defect of the patella with associated patella-femoral pain. She underwent physical therapy and injections with no

[1] ALJ Cannici's April 7, 2017 refers to a July 25, 2016 date of injury, while the medical records refer to a July 26, 2016 date of injury.

significant relief. Claimant ultimately underwent a left knee arthroscopic debridement with chondral grafting on December 16, 2016, performed by James Genuario, M.D.

6. Claimant reported improvement in her left knee symptoms after the surgery with some persistent pain. March 2 and April 11, 2017 evaluations with Dr. Genuario document reports of 4/10 and 3/10 achy pain with prolonged standing or walking, with no locking, popping or instability.

7. Authorized treating physician ("ATP") Matthew Lugliani. M.D. placed Claimant at maximum medical improvement ("MMI") on May 15, 2017. Claimant reported persistent minimal aching left knee pain, localized to the lateral side of her knee, worse with prolonged standing or walking. On examination, Dr. Lugliani noted that Claimant ambulated with a normal gait. Knee flexion measured at 120 degrees, and extension at 0 degrees. Dr. Lugliani assigned 11% impairment for range of motion deficits and 5% impairment for arthritis under Table 4 of the AMA Guides for specific disorders, resulting in a total left lower extremity impairment of 15%. Dr. Lugliani recommended Claimant follow-up with orthopedics for six months for flare-ups and undergo five additional sessions of physical therapy for strengthening. He released Claimant to work full duty with no restrictions.

8. Claimant underwent a left knee MRI on November 3, 2017. The MRI revealed: full-thickness cartilage erosion involving the inferior aspect of the lateral patellar facet without healing fibrocartilage; exposed subchondral bone on the inferior aspect lateral patellar facet without chondral fill with no subchondral edema; thinning and attrition of the lateral retinaculum without complete dehiscence; and attrition of the medial patellofemoral ligament adjacent to the femoral attachment site.

9. On June 2, 2020, Claimant underwent another left knee MRI. The MRI report notes a clinical history of persistent patellar pain and swelling. The radiologist's impression included: severe chondral thinning to bone grade 4 along the patella lateral facet inferiorly with subchondral bone sclerosis and flattening and edema; undermining and a possible small chondral flap along the peripheral margins of that region toward the median ridge; chondral thinning grade 3 along the superior lateral peripheral margin of the trochlea; scarring of the lateral retinaculum with scattered susceptibly artifact which may be from stated history of previous reconstruction postoperative change; thinning and fluid signal outpouching of the lateral retinaculus anterior to the iliotibial band; mild patella alta; and a large effusion.

10. On July 24, 2020, Claimant saw Dr. Genuario, who remarked that Claimant initially did well after her surgery but that her symptoms had returned. The medical record notes that physical examination was unchanged from the June 12, 2020 examination.[2] Dr. Genuario noted the recent MRI showed progression with loss of the retinacular graft and articular cartilage with a new cartilage defect. He gave an assessment of left knee pain with grade 4 lateral patellar changes and loss of lateral retinacular graft with relative lateral patellar offset. Dr. Genuario opined that Claimant's condition "is a sequela from her

[2] The record does not include notes from the June 12, 2020 evaluation referenced by Dr. Genuario.

previous injury," noting the graft did not take. (Ex. C, p. 58). Dr. Genuario recommended Claimant undergo a medialization tibial tubercle osteotomy with de novo grafting and a lateral retinacular reconstruction. Dr. Genuario's July 24, 2020 medical note does not address a release to work or any work restrictions.

11. On November 10, 2020, Timothy S. O'Brien, M.D. performed an Independent Medical Examination ("IME") at the request of Respondents. Dr. O'Brien previously conducted an IME of Claimant on November 11, 2016, at which time he opined that Claimant did not sustain an injury as a result of the July 25, 2016 work incident. Claimant reported to Dr. O'Brien doing well after her 2016 knee surgery and then experiencing a return of knee pain and swelling in the last eight months. Claimant reported 6/10 pain, swelling, instability, soreness, tightness, throbbing, catching, stiffness, achiness, weakness and locking. She further reported having difficulties working and performing activities of daily living. Dr. O'Brien continued to opine that Claimant did not sustain a work injury. Dr. O'Brien explained that Claimant has pre-existing underlying arthritis and patellofemoral malalignment. He opined that the 2016 left knee surgery was unrelated to the July 2016 work incident, and that the proposed revision surgery is also not work-related. Dr. O'Brien further opined that the proposed revision surgery is experimental, will not work, and is not a viable treatment option for Claimant. Dr. O'Brien explained that the vast majority of revision cases do "less well" than the primary surgery, and performing additional surgeries will make a subsequent undertaking of a total knee arthroplasty much more complex and the outcome much less predictable.

12. In a letter dated December 11, 2020, Dr. Genuario responded to Dr. O'Brien's IME report. Dr. Genuario explained that he diagnosed Claimant diagnosed with a recurrent chondral injury on the patella and a lateral retinacular failure. He noted Claimant had persistent pain and swelling and weakness with activities of daily living, which had prevented her from returning to work. Dr. Genuario explained his basis for recommending surgery for Claimant, stating:

> I referred [Claimant's case to] knee surgeon experts across the country as she has a very difficult problem with a chondral defect patella maltracking and a lateral retinacular defect from the previous lateral release done by the outside physician. The consensus of the expert panel of knee surgeons across the country was to realign the patellar tracking with a tibial tubercle osteotomy, chondral procedure patella, and a lateral retinacular reconstruction with a fresh frozen allograft.
>
> With all due respect to Dr. Timothy O'Brien's level of expertise in these areas as a foot and ankle surgeon is not nearly the breadth and depth of the panel of expert knee surgeons across the country who we have been at Lee (*sic*) disagree with his opinion. [Claimant] is a 38-year-old active female with a focal cartilage defect. This is not an indication for a total knee arthroplasty and in fact [Claimant] would do very poorly with this procedure and have a lifelong limitation of activity. As such it is both my opinion, and the opinion of an expert panel of multiple expert surgeons from across the

> country that this is not the appropriate treatment for [Claimant] and in fact they would recommend a realignment procedure cartilage procedure and retinacular reconstruction. (Ex. 24, p. 10).

Dr. Genuario opined Claimant was unable to return to work, noting Claimant tried to do so at some point in the fall, but continued to have pain and swelling with activity.

13. Claimant testified at hearing that, at and being placed at MMI, she felt good, that she was able to perform her job duties, and that she was not seeking continuing treatment for her left knee. She testified that around April 2020 she began experiencing increased pain and significant swelling of her left knee, for which she subsequently sought evaluation and treatment. Claimant testified that Dr. Genuario placed her on restrictions on July 24, 2020 removing her from work due to her knee. Claimant stated has been off of work since July 24, 2020 as a result of her symptoms and restrictions and that she has not received any wages since that time. Claimant testified that she went on a voluntary COVID leave from approximately May 2020 to late July 2020, during which time Employer paid her 22 hours every two weeks to cover medical insurance. Claimant testified she is unable to work due to her left knee condition.

14. Dr. O'Brien testified by post-hearing deposition as an expert in orthopedic surgery. Dr. O'Brien testified consistent with his November 11, 2020 IME report and continued to opine that the surgery proposed by Dr. Genuario is not reasonable, necessary or work-related. Dr. O'Brien clarified that his experience was not only limited to performing foot and ankle surgeries, but also hip and knee surgies. Dr. O'Brien explained that Claimant's pain and instability is likely being caused by her pre-existing patellofemoral arthritis and patellofemoral malalignment. Dr. O'Brien testified that there were no great surgical solutions for patellofemoral malalignment, and that there was no science published which would prove that the surgery proposed by Dr. Genuario would be effective in treating Claimant's current condition. Dr. O'Brien opined that the proposed surgery would be ineffective because the best chance at curing pain due to patellofemoral arthritis is the first surgical option and revision surgeries are never as successful as the original surgery. Because Claimant has had multiple surgeries on the left knee, Dr. O'Brien opines that the proposed surgery would be ineffective. In addition, the arthritis in Claimant's knee is more advanced and extensive.

15. Dr. O'Brien also testified that Claimant's previous chondral grafting and lateral retinaculum reconstruction from December of 2016 was a failure, as Claimant experienced barely two years of pain relief following the surgery. Dr. O'Brien noted that Claimant was not released from the surgery until 2017, and she had presented back in June of 2020 reporting eight months of pain. Dr. O'Brien explained that the surgery proposed by Dr. Genuario would reduce the good outcome of a total knee replacement Dr. O'Brien testified that Claimant's condition has worsened since being place at MMI in May 2017, but that he attributes Claimant's condition to a personal health issue. He further explained that, with Claimant's knee condition, pain and intermittent swelling is unavoidable, and opined that Claimant is able to work her regular job duties with no restrictions.

16. Claimant's wage records indicate that Claimant received the benefits she described as COVID leave from May 1, 2020 through August 31, 2020.

17. Records from the Colorado Department of Labor and Employment indicate that Claimant received benefits through the standard unemployment insurance program from May 10, 2020 through August 15, 2020.

18. The ALJ finds the opinion of Dr. Genaurio, as supported by the medical records and Claimant's testimony, more credible and persuasive than the opinion of Dr. O'Brien.

19. Claimant proved it is more probable than not she sustained a worsening of her left knee condition causally related to her July 2016 work injury, and is thus entitled to reopen her claim.

20. Claimant proved it is more probable than not additional medical treatment, including the left knee surgery proposed by Dr. Genuario, is reasonable, necessary and causally related to the July 2016 work injury.

21. Claimant proved it is more probable than not her worsened left knee condition resulted in a disability causing Claimant to leave work for more than three shifts and lose wages. As Claimant received COVID leave and unemployment insurance benefits, Respondents are entitled to applicable offsets.

22. As Claimant's wages have increased since the date of injury, a fair approximation of Claimant's current wage loss and diminished earning capacity is an AWW of $1,237.60 (40 hours x $30.94).

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

CONCLUSIONS OF LAW

Generally

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

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

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

Reopening Due to Change in Condition

Section 8-43-303(1), C.R.S. provides that a worker's compensation award may be reopened based on a change in condition. In seeking to reopen a claim, the claimant shoulders the burden of proving his condition has changed and is entitled to benefits by a preponderance of the evidence. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005). A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082, 1084 (Colo. App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* WC 4-358-465 (ICAO, Oct. 25, 2006). Reopening is appropriate if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000). The determination of whether a claimant has sustained her burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* WC 4-543-945 (ICAO, July 19, 2004).

As found, Claimant proved it is more probable than not she sustained a worsening of her July 25, 2016 knee condition after being placed at MMI on May 15, 2017. Dr. Lugliani's medical note documents Claimant's reports of persistent left knee pain at the time of MMI; however, such pain was noted to be minimal. Moreover, Claimant credibly testified that, up until April 2020, she was doing well, she was able to perform her job duties, and she was not seeking medical treatment for her left knee. There is no evidence refuting Claimant's testimony. The November 2017 left knee MRI is the only evidence of any additional evaluation of the left knee that occurred between MMI and June 2020. Claimant credibly testified that in April 2020 she began experiencing significant pain and swelling which affected her ability to function. The June 20, 2020 MRI revealed progressive findings and postoperative changes. Dr. Genuario credibly opined that Claimant's current condition and need for additional treatment, including surgery, is sequela of the July 2016 work injury.

Dr. O'Brien agrees Claimant's condition has worsened since being placed at MMI, although he attributes Claimant's original condition and any subsequent worsening to a personal health condition and not any work-related event. The ALJ is not persuaded Claimant's worsening condition is solely the result of a personal health condition and unrelated to the work injury. As found, ALJ Cannici determined the July 2016 work injury was compensable, and Claimant underwent treatment approved by Respondents, including the December 2016 surgery performed by Dr. Genaurio. Dr. Genaurio credibly opined that the graft from the 2016 failed and that Claimant requires additional treatment. The preponderant evidence establishes Claimant's claim should be reopened, as she has suffered a change in condition that related to the work injury, requiring additional medical treatment and disability benefits.

Medical Treatment

Respondents are liable for medical treatment that is causally related and reasonable and necessary to cure and relieve the effects of the industrial injury. §8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* WC 4-835-556-01 (ICAO, Nov. 15, 2012).

Claimant proved it is more probable than not that additional treatment, including the left knee surgery proposed by Dr. Genaurio, is reasonable, necessary and related to the July 2016 work injury. As one of Claimant's authorized providers, Dr. Genaurio is familiar with Claimant's condition and course of treatment. Based on evaluation of Claimant and review of the June 2020 left knee MRI, Dr. Genaurio assessed Claimant with left knee pain with grade 4 lateral patellar changes and loss of lateral retinacular graft with relative lateral patellar offset. He credibly opined that Claimant's condition is sequela from the work injury, noting the graft did not take. Claimant is currently experiencing a worsening of her knee condition for which she underwent surgery in July 2016 and the graft subsequently failed. Dr. Genaurio acknowledges that Claimant's condition is complicated. He addressed Dr. O'Brien's IME opinion and continues to opine that the proposed surgery is reasonable and necessary to address Claimant's condition at this time. Based on the totality of the evidence, the ALJ is more persuaded by Dr. Genaurio's opinion, as he has treated Claimant for several years and is familiar with her condition and course of treatment.

Temporary Total Disability

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S. requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S. Notably, an insurer is legally required to continue paying claimant temporary disability past the MMI date when the respondents initiate a DIME, However, where the DIME physician found no impairment and the MMI date was several months before the MMI determination, all of the temporary disability benefits paid after the DIME's MMI date constituted a recoverable overpayment. *Wheeler v. The Evangelical Lutheran Good Samaritan Society*, WC 4-995-488 (ICAO, Apr. 23, 2019).

The ALJ notes that Dr. Genuario's July 24, 2020 medical note is devoid of any discussion of a restrictions or a release to work. Respondents are correct in their contention that a recommendation for surgery, alone, is insufficient to establish entitlement to TTD benefits. Nonetheless, Claimant credibly testified that, since July 24, 2020, she has been unable to perform her job duties due to her worsening left knee condition. Claimant's job requires standing for several hours and lifting/moving luggage. Claimant suffers from significant pain, tightness and swelling in the left knee. In his December 2020 letter, Dr. Genuario opined that Claimant's current condition rendered her unable to perform her work duties. Claimant was initially on COVID leave and remained on COVID leave until August 31, 2020. She has suffered wage loss as a result of the disability due to the worsening left knee condition. Accordingly, Claimant has proven by a preponderance of the evidence she is entitled to TTD benefits July 24, 2020 and ongoing. Respondents are entitled to an offset of COVID leave pay and unemployment insurance benefits received by Claimant during this applicable period of time.

Average Weekly Wage

Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell*, 867 P.2d at 82. Where the claimant's earnings increase periodically after the date of injury the ALJ may elect to apply §8-42-102(3), C.R.S. and determine that fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability, not the earnings on the date of the injury. *Id.; see e.g. Burd v. Builder Services Group Inc*., WC 5-085-572 (ICAO, July 9, 2019) (determining that signing bonus claimant received when he began employment is not a "similar advantage or fringe benefit" specifically enumerated under §8-40-201(19)(b) and therefore cannot be added into claimant's AWW calculation); *Varela v. Umbrella Roofing, Inc.*, WC 5-090-272-001 (ICAO, May 8, 2020) (noting that a claimant is not entitled to have the cost or value of the employer's payment of health insurance included in the AWW until after the employment terminates and the employer's contributions end).

As found, Claimant proved it is more probable than not she is entitled to an increase in her AWW. ALJ Cannici found an AWW of $1,222.41, which was based on Claimant's then-pay rate of $29.88 per hour. Claimant credibly testified that her earnings have increased since the date of injury due to raises for cost of living, and that her current pay rate is $30.94. Claimant works between 35 and 45 hours per week. Based on an average 40-hour work week, a fair approximation of Claimant's current wage loss and diminished earning capacity is an AWW of $1,237.60.

ORDER

1. Claimant's petition to reopen her claim due to a worsening of her left knee condition is granted.

2. Respondents are liable for reasonable and necessary medical treatment related to Claimant's July 2016 work injury, including the left knee surgery recommended by Dr. Genuario.

3. Respondents shall pay Claimant TTD benefits beginning July 24, 2020 and ongoing, subject to offsets for COVID leave and unemployment insurance benefits.

4. Claimant's AWW is $1,237.60.

5. All matters not determined herein are reserved for future determination.

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

DATED: April 9, 2021

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that the right hip arthroplasty and gluteus medius tendon repair requested by Clifford Clark, M.D. is reasonable, necessary and causally related to her August 4, 2018 admitted industrial injuries.

FINDINGS OF FACT

1. Claimant worked for Employer as a Certified Nursing Assistant and Activity Assistant. On August 4, 2018 Claimant suffered admitted industrial injuries during the course and scope of her employment. Specifically, Claimant slipped on a wet floor while walking sideways between two tables. She fell and took a "hard jolt" on her left side. Claimant landed on the left corner of her hip and left shoulder. Claimant remained on the ground for a few minutes and the director of nursing came over because she heard the fall. Claimant stood up without assistance then walked down to the emergency room because Employer's facility was connected to a hospital.

2. At the emergency room Claimant reported left lateral neck, shoulder and hip pain. She had decreased neck range of motion, back pain, shortness of breath and the inability to walk or use her arms. An examination revealed full range of motion of the spine with no spinal tenderness. Imaging did not reflect any fractures. The treating provider did not list a specific diagnosis, but noted that Claimant had fallen on her left side with left or right-sided pain in the hip, knee, elbow and left shoulder. Claimant subsequently underwent a course of physical therapy.

3. On August 7, 2018 Claimant received medical treatment from Authorized Treating Physician (ATP) Robyn A. Zehr, D.O. Dr. Zehr recounted the slip and fall as well as Claimant's emergency room visit. She noted ongoing pain in the left neck, shoulder, hip and back. When detailing Claimant's symptoms, Dr. Zehr noted pain in the lower left hip/back, but emphasized that the left shoulder pain was the worst. Dr. Zehr's report did not mention right hip symptoms.

4. On September 6, 2018 Claimant underwent a left shoulder MRI. The imaging reflected a full-thickness tear of the supraspinatus tendon with infraspinatus tendinosis, subscapularis tendinitis and mild AC joint degenerative changes with subacromial bursitis.

5. Because of continued symptoms, Claimant underwent an MRI of the lumbar spine on November 1, 2019. The MRI revealed d mild-to-moderate disc height loss at L1-2 and L2-3 with circumferential disc bulging and mild neuroforaminal stenosis at all levels.

6. On November 12, 2018 Claimant underwent a left shoulder arthroscopic rotator cuff repair and a subacromial decompression. After the procedure, Claimant received physical therapy, chiropractic care and massage therapy.

7. On December 19, 2018 Frederick P. Scherr, M.D. performed an independent medical examination of Claimant. Dr. Scherr specified that Claimant suffered left shoulder and lower back injuries on August 4, 2018. Claimant also mentioned that injures to her left thumb and left hip had resolved. She believed the only remaining injuries involved her left shoulder and lower back. Dr. Scherr did not mention any injuries to Claimant's right hip.

8. On January 10, 2019 Claimant returned to Dr. Zehr for an evaluation. Dr. Zehr noted that Claimant's back symptoms were put on hold with the shoulder surgery and she continued to have concerns with her lower back pain. Claimant also had aching in her lower back/buttock that was worse with pronged positioning. Her sciatica symptoms had resolved.

9. Claimant mentioned recurrent sciatica-type symptoms when she started attending chiropractic treatments in January 2019. Claimant's first mention of anterior right hip pain occurred on January 24, 2019 and in some subsequent chiropractic treatment notes. Claimant continued intermittent complaints of pain in the right hip and left hip throughout the spring of 2019.

10. On April 30, 2020 Claimant underwent a repeat MRI of the lumbar spine. There were no changes from November 1, 2019 with multilevel degenerative disc disease, minimal disc bulging and evidence of a right hemilaminectomy at L5-S1.

11. On June 25, 2020 Claimant underwent an impairment rating evaluation with Gregory Reichhardt, M.D. However, because Claimant had not reached Maximum Medical Improvement (MMI), Dr. Reichhardt did not assign an impairment rating.

12. On July 17, 2020 Claimant followed-up with Dr. Reichhardt for lower back pain. Claimant specified a 4-5/10 level for right groin pain and a 5-6/10 level for right posterior thigh pain. Dr. Reichhardt noted that Claimant stated she had experienced groin pain since the original injury. The right groin pain appeared to be coming from the right hip. Dr. Reichhardt ordered an MRI/arthrogram of the right hip.

13 On August 12, 2020 Claimant underwent a right hip MRI. The MRI showed a non-displaced tear in the lateral superior labrum of the right hip with advanced degenerative changes at the L5-S1 level and mild right trochanteric bursitis with mild tendinitis of the left gluteus medius insertion.

14. In an August 13, 2020 follow-up visit Dr. Reichhardt noted Claimant suffered sporadic right leg pain with back pain. The right leg pain was "a zinger" that extended from the buttocks down to the posterior thigh into the foot. An EMG/nerve conduction study showed no significant abnormalities.

15. On September 24, 2020 Claimant visited Joshua Snyder, M.D. to evaluate her right hip pain. She told Dr. Snyder that her right hip pain began immediately after the August 4, 2018 work injury. Dr. Snyder noted that most of Claimant's pain was in the buttocks and groin. In reviewing radiological studies, Dr. Snyder determined that Claimant was suffering right hip pain secondary to a combination of hip arthritis and a gluteus medius tear. Dr. Snyder referred Claimant to Clifford Dana Clark, M.D. for a right hip evaluation.

16. Dr. Clark reviewed the radiographs and determined that Claimant had severe gluteal medius with minimus tearing and tendinopathy in the setting of moderate hip arthrosis. He agreed with Dr. Snyder's statement that Claimant would not improve without surgery. On November 3, 2020 Dr. Clark submitted a prior authorization request for a right anterior total hip arthroplasty and gluteus medius tendon repair. Respondents denied the right hip replacement surgery on November 10, 2020 pending the results of a Rule 16 independent medical examination with Mark S. Failinger, M.D.

17. On December 3, 2020 Claimant underwent an independent medical examination with Dr. Failinger, He recounted that Claimant had a history of "bilateral hip pain including right leg pain that was 'incapacitating' along with right-sided buttock pain on 03-12-2014 with recurrent complaints of bilateral hip pain when the patient was seen by Dr. Guy Vanderwerf on 10-27-2015." Dr. Failinger detailed that x-rays of the pelvis from May 24, 2016 showed minimal degenerative changes of the hips with some mild joint space narrowing and subchondral sclerosis. He reasoned that Claimant's recurrence of right hip symptoms in late 2018 was consistent with the natural course of hip osteoarthritis. Notably, an increase in symptoms followed by the lessening or resolution of symptoms is the most common presentation for ongoing osteoarthritis. Therefore, based on Claimant's prior complaints of right hip pain and the imaging showing degenerative changes in 2016, Dr. Failinger determined that Claimant's right hip symptoms were consistent with the natural progression of osteoarthritis.

18. Based on his physical examination and review of the medical records, Dr. Failinger concluded that Dr. Clark's request for a right hip arthroplasty and a gluteus medius tendon repair might be reasonable and necessary, but was not related to Claimant's August 4, 2018 slip and fall at work. He remarked that Claimant's need for the gluteus medius tendon repair is, with very high medical probability, due to ongoing degeneration. The need for surgery was not caused by a tear that occurred during the work accident. In fact, if an acute tear had occurred, Claimant would have complained of significant right hip pain shortly after the incident. Dr. Failinger noted that generally gluteus medius tears are degenerative in nature, and the hip abductor musculature is often referred to as "the rotator cuff" of the hip. He thus summarized that there is no reasonable connection between Claimant's August 4, 2018 work accident and the request for a right hip arthroplasty.

19. Based on Dr. Failinger's independent medical examination, Respondents' submitted a final denial of the requested surgery to Dr. Clark and Claimant on December 23, 2020.

20. Respondents sent Dr. Failinger's independent medical examination report to authorized medical provider Dr. Reichhardt. In a January 11, 2021 report Dr. Reichhardt noted that Dr. Failinger had concluded that the proposed hip surgery was not related to Claimant's work injury. Dr. Reichhardt remarked that Dr. Failinger conducted a comprehensive records review and "clearly has more records available than I do." He concluded that, if the record review performed by Dr. Failinger was correct, there were questions about the causality of Claimant's hip complaints,

21. Claimant testified at the hearing in this matter. She noted that two years prior to the work accident she had pain in her hips that she attributed to a change in the weather. Hip x-rays revealed mild degenerative arthritis. Claimant remarked that she was not having any difficulties performing her job duties prior to the August 4, 2018 slip and fall. She wishes to have the surgery recommended by Dr. Clark because it will improve her symptoms.

22. Claimant has failed to demonstrate that it is more probably true than not that the right hip arthroplasty and gluteus medius tendon repair requested by Dr. Clark is reasonable, necessary and causally related to her August 4, 2018 admitted industrial injuries. Initially, Claimant slipped and fell on her left side at work. She reported pain in her left neck, shoulder, hip and back to ATP Dr. Zehr. Claimant subsequently underwent a left shoulder arthroscopic rotator cuff repair and subacromial decompression. In a December 19, 2018 examination with Dr. Scherr Claimant believed that her only remaining injuries involved her left shoulder and lower back. Dr. Scherr's report did not mention an injury to Claimant's right hip. On April 30, 2020 Claimant underwent a repeat MRI of her lumbar spine that was unchanged from a November 1, 2019 MRI. There was multilevel degenerative disc disease, minimal disc bulging and evidence of a right hemilaminectomy at L5-S1.

23. Claimant maintains that she began suffering right lower extremity symptoms after the August 4, 2018 accident. However, the medical records reveal that Claimant's first mention of anterior right hip pain occurred on January 24, 2019 and continued through subsequent chiropractic treatment. Claimant also mentioned intermittent complaints of pain in the right hip and left hip throughout the spring of 2019. Dr. Clark reviewed radiographic studies and determined that Claimant had severe gluteal medius with minimus tearing and tendinopathy in the setting of moderate hip arthrosis. He determined that Claimant would not improve without surgery. On November 3, 2020 Dr. Clark thus submitted a prior authorization request for a right anterior total hip arthroplasty and gluteus medius tendon repair.

24. Based on his physical examination and review of the medical records, Dr. Failinger concluded that Dr. Clark's request for a right hip arthroplasty and a gluteus medius tendon repair was not related to Claimant's August 4, 2018 slip and fall at work. Dr. Failinger detailed that x-rays of the pelvis from May 24, 2016 showed minimal degenerative changes of the hips with some mild joint space narrowing and subchondral

sclerosis. He reasoned that Claimant’s recurrence of right hip symptoms in late 2018 was consistent with the natural course of hip osteoarthritis. Dr. Failinger thus determined that Claimant’s need for surgery is not due to a tear that occurred during the work accident. In fact, if an acute tear had occurred, Claimant would have complained of significant right hip pain shortly after the incident. He summarized that, after carefully reviewing the medical records, there is no reasonable connection between Claimant’s August 4, 2018 work accident and the request for a right hip arthroplasty.

25. The medical records, in conjunction with the persuasive opinion of Dr. Failinger, reveal that Claimant’s need for right hip surgery is not causally related to her August 4, 2018 work accident. Notably, Claimant slipped and fell on her left side and did not complain of right hip pain until approximately five months after the date of injury. Claimant’s testimony regarding prior right hip pain and communication of right hip pain to medical providers is inconsistent with the medical records. In fact, medical records reveal that Claimant had degenerative changes in her right hip in 2016 and the current pain complaints constitute a natural progression of her pre-existing right hip arthritis. Therefore, Claimant’s need for right hip treatment cannot be considered a direct and natural consequence of the August 4, 2018 work injury. Claimant has thus failed to demonstrate that the requested right anterior total hip arthroplasty and gluteus medius tendon repair is related to the admitted work injuries of August 4, 2018.

CONCLUSIONS OF LAW

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

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

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The question of whether a particular disability is the result of the natural progression of a preexisting condition, or the subsequent aggravation or acceleration of that condition, is itself a question of fact. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Finally, the determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

5. As found, Claimant has failed to demonstrate by a preponderance of the evidence that the right hip arthroplasty and gluteus medius tendon repair requested by Dr. Clark is reasonable, necessary and causally related to her August 4, 2018 admitted industrial injuries. Initially, Claimant slipped and fell on her left side at work. She reported pain in her left neck, shoulder, hip and back to ATP Dr. Zehr. Claimant subsequently underwent a left shoulder arthroscopic rotator cuff repair and subacromial decompression. In a December 19, 2018 examination with Dr. Scherr Claimant believed that her only remaining injuries involved her left shoulder and lower back. Dr. Scherr's report did not mention an injury to Claimant's right hip. On April 30, 2020 Claimant underwent a repeat MRI of her lumbar spine that was unchanged from a November 1, 2019 MRI. There was multilevel degenerative disc disease, minimal disc bulging and evidence of a right hemilaminectomy at L5-S1.

6. As found, Claimant maintains that she began suffering right lower extremity symptoms after the August 4, 2018 accident. However, the medical records reveal that Claimant's first mention of anterior right hip pain occurred on January 24, 2019 and continued through subsequent chiropractic treatment. Claimant also mentioned intermittent complaints of pain in the right hip and left hip throughout the spring of 2019. Dr. Clark reviewed radiographic studies and determined that Claimant had severe gluteal medius with minimus tearing and tendinopathy in the setting of moderate hip arthrosis. He determined that Claimant would not improve without surgery. On November 3, 2020 Dr. Clark thus submitted a prior authorization request for a right anterior total hip arthroplasty and gluteus medius tendon repair.

7. As found, based on his physical examination and review of the medical records, Dr. Failinger concluded that Dr. Clark's request for a right hip arthroplasty and a

gluteus medius tendon repair was not related to Claimant's August 4, 2018 slip and fall at work. Dr. Failinger detailed that x-rays of the pelvis from May 24, 2016 showed minimal degenerative changes of the hips with some mild joint space narrowing and subchondral sclerosis. He reasoned that Claimant's recurrence of right hip symptoms in late 2018 was consistent with the natural course of hip osteoarthritis. Dr. Failinger thus determined that Claimant's need for surgery is not due to a tear that occurred during the work accident. In fact, if an acute tear had occurred, Claimant would have complained of significant right hip pain shortly after the incident. He summarized that, after carefully reviewing the medical records, there is no reasonable connection between Claimant's August 4, 2018 work accident and the request for a right hip arthroplasty.

8. As found, the medical records, in conjunction with the persuasive opinion of Dr. Failinger, reveal that Claimant's need for right hip surgery is not causally related to her August 4, 2018 work accident. Notably, Claimant slipped and fell on her left side and did not complain of right hip pain until approximately five months after the date of injury. Claimant's testimony regarding prior right hip pain and communication of right hip pain to medical providers is inconsistent with the medical records. In fact, medical records reveal that Claimant had degenerative changes in her right hip in 2016 and the current pain complaints constitute a natural progression of her pre-existing right hip arthritis. Therefore, Claimant's need for right hip treatment cannot be considered a direct and natural consequence of the August 4, 2018 work injury. Claimant has thus failed to demonstrate that the requested right anterior total hip arthroplasty and gluteus medius tendon repair is related to the admitted work injuries of August 4, 2018.

ORDER

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

1. Claimant's request for a right hip arthroplasty and gluteus medius tendon repair is denied and dismissed.

2. Any issues not resolved in this order are reserved for future determination.

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

Rule 26, OACRP. You may access a form for a petition to review at https://oac.colorado.gov/resources/oac-forms.

DATED: April 9, 2021.

DIGITAL SIGNATURE:
Peter J. Cannici

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

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that the right rotator cuff surgery recommended by Dr. Mitchell Copeland is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted April 19, 2020 work injury.

FINDINGS OF FACT

1. The claimant worked for the employer as a truck driver. His job duties entailed driving a semi truck full of US Mail between Grand Junction, Colorado and Denver, Colorado. The claimant would also load and unload this mail.

2. On April 19, 2020, the claimant was unloading his work semi truck when one of the cargo nets fell, causing the claimant to fall onto his right shoulder. The outside of the claimant's right shoulder struck the ground.

Prior Treatment

3. The claimant testified regarding prior surgeries to his bilateral shoulders. He estimates that his first right shoulder surgery was done 15 years ago. That surgery was performed by Dr. Mitchell Copeland and involved a rotator cuff repair. The claimant also recalls that following that surgery he developed an infection that necessitated revision surgery. Those records were not included in the hearing exhibits. There is some indication in the record that due to the age of these records, they were not easily obtained. However, the ALJ notes that both the claimant and Dr. Copeland provided testimony regarding a prior right shoulder procedure.

4. The ALJ notes that there are several instances in the claimant's more recent medical records that reference prior bilateral shoulder surgeries. It is unclear to the ALJ if that information was obtained by the providers' review of prior records or directly from the claimant's own report.

5. On November 14, 2011, the claimant sought treatment in the emergency department (ED) at Community Hospital for chest pain. The claimant's diagnoses were listed as, *inter alia*, chronic right shoulder pain, uncontrolled hypertension, tobacco abuse, and obesity. In addition, it was noted that the claimant "most likely has diabetes mellitus".

6. In a medical record dated April 1, 2014, Nermin Imsirovic, PA-C noted that the claimant had Type 2 diabetes and a history of "multiple surgeries involving both shoulders".

7. On May 14, 2014, Dr. Brian Witwer performed a cervical spine fusion at the C4-C5 level.

8. On December 3, 2014, the claimant reported a “ripping sensation in the right bicep in August of 2014.” The claimant also reported he had had “multiple surgeries” and was requesting a referral to orthopedics.

9. On May 28, 2019, Dr. Witwer performed a posterior cervical fusion and laminectomy at the C3, C4, and C5 levels.

10. The claimant testified that that following his prior right shoulder procedures he fully recovered and did not seek right shoulder treatment until the April 19, 2020 incident.

Post-Injury Treatment

11. Following the April 19, 2020 fall, the claimant began treatment with Dr. James McLaughlin. Dr. Mclaughlin is the claimant’s authorized treating provider (ATP) for this claim. The claimant was first seen by Dr. McLaughlin on April 20, 2020. At that time, the claimant reported that a net fell down and tripped him, causing him to fall onto his right shoulder. The claimant also reported to Dr. McLaughlin that he had undergone “right shoulder surgery multiple times” with the most recent occurring approximately 14 years prior. X-rays were taken of the claimant’s right shoulder and showed no shoulder dislocation. Dr. McLaughlin opined that the claimant might have injured his labrum, or suffered a rotator cuff tear, or strain. He ordered a right shoulder magnetic resonance image (MRI). Dr. McLaughlin also referred the claimant to Dr. Copeland for consultation.

12. The recommended right shoulder MRI was but not performed for some time because of claimant’s claustrophobia.

13. On May 13, 2020, the claimant was seen in the ED at Community Hospital because of left foot swelling. At that time, the claimant reported that his left foot became stuck in a car door, resulting in the swelling. The claimant also reported that he was a daily tobacco user and drank between 12 and 18 beers per day. It was noted that the claimant had uncontrolled diabetes. The claimant’s diagnosis was identified as sepsis secondary to left foot cellulitis. The claimant was admitted to the hospital for observation. Thereafter, it was necessary for the claimant’s left foot to be incised and drained by Dr. Joshua Thun. The claimant was diagnosed with a MRSA infection and given a wound vac.

14. On May 28, 2020, the claimant was seen at Primary Care Partners to establish care. In the medical record of that date, the claimant’s “active problems” were listed as: alcoholism, benign essential hypertension, diabetic infection of the left foot, hypertension associated with diabetes, and uncontrolled Type 2 diabetes mellitus. Jessica Harrington, FNP recommended the claimant obtain treatment at a behavioral health clinic (BHC) to address his alcoholism. The claimant declined to pursue that recommendation.

15. The claimant had follow up appointments with Dr. Thun regarding his left foot on June 16, 2020; June 23, 2020; and June 30, 2020. In each of those medical reports, Dr. Thun noted that the claimant was noncompliant with his directive of no weight bearing on the left foot.

16. On June 26, 2020, the claimant returned to Dr. McLaughlin. With regard to his left foot wound, the claimant reported being bitten by a brown recluse spider, that resulted in the need for hospitalization and surgery. With regard to his right shoulder, the claimant reported some improvement. Dr. McLaughlin again recommended an MRI and consultation with Dr. Copeland. In addition, he recommended the claimant begin physical therapy.

17. On July 28, 2020, the claimant was seen by Dr. McLaughlin. On that date, the claimant reported that physical therapy was helpful and he was ready to return to work. It was also discussed that the claimant's left foot had healed to the point that he could see Dr. Copeland. Dr. McLaughlin noted that if the claimant was doing well at their next appointment he would consider placing him at maximum medical improvement (MMI).

18. On August 19, 2020, the claimant again returned to Dr. McLaughlin . At that time, the claimant reported that he had returned to full duty work and was "generally okay". However, he noted an increase in his pain when doing more with his right arm. Dr. McLaughlin opined that the claimant had not reached MMI due to this worsening. In addition, Dr. McLaughlin opined that the claimant could continue working full duty as a driver.

19. On September 8, 2020, the respondents filed a General Admission of Liability (GAL).

20. On September 2, 2020, the claimant was seen by Dr. Copeland. On that date, the claimant reported right shoulder symptoms that included pain, popping, grinding, weakness, and sleep disturbance. Dr. Copeland was concerned that the claimant had re-torn his rotator cuff. Dr. Copeland recommended a right shoulder MRI.

21. A right shoulder MRI was performed on October 12, 2020. The MRI report identified the following:

> 1. Complete full-thickness tear of the supraspinatus tendon which appears chronic, as there is muscle bundle atrophy. 2. Tear involving the superior fibers of the subscapularis tendon. 3. Atrophy of the infraspinatus and teres minor muscle. The tendons remain intact. 4. Diffuse degenerative changes of the superior glenoid labrum. 5. Postop changes rotator cuff repair and subacromial decompression.

22. Following the MRI, Dr. Copeland recommended surgical repair of the claimant's right rotator cuff tendons.

23. Dr. Copeland testified via deposition. In his testimony, Dr. Copeland stated that the claimant had recurrent tearing of his rotator cuff and the supraspinatus, with some tearing of the subscapularis and infraspinatus. Dr. Copeland opined that the claimant had an "acute on chronic event" when he fell at work on April 19, 2020. In support of this opinion, Dr. Copeland testified that prior to April 19, 2020, the claimant's right shoulder was functioning. Then following April 19, 2020, the claimant had a "dramatic decline in function". In his testimony, Dr. Copeland reiterated that his recommendation is a repair to

the right rotator cuff tendons. Dr. Copeland further opined that there is a 50 percent chance that the recommended surgery will be successful. It is the opinion of Dr. Copeland that the right shoulder surgery he has recommended is related to the claimant's work injury.

24. At the request of the respondents, Dr. Timothy O'Brien reviewed the claimant's medical records. In a report dated October 21, 2020, Dr. O'Brien opined that the claimant suffered a minor right shoulder sprain/strain on April 19, 2020. Dr. O'Brien further opined that this sprain/strain temporarily aggravated the claimant's pre-existing rotator cuff arthropathy, but there was "no substantial aggravation and no acceleration" of the claimant's pre-existing shoulder condition. In addition, Dr. O'Brien opined that the claimant reached MMI as of July 19, 2020. With regard to the surgery recommended by Dr. Copeland, Dr. O'Brien opined that the claimant is not a candidate for surgery. In support of this opinion, Dr. O'Brien noted his understanding that the claimant had failed "numerous prior surgeries". Dr. O'Brien also noted that the claimant is a diabetic and a smoker. Finally, Dr. O'Brien opined that if the claimant were to undergo a shoulder surgery (unrelated to the work injury) he would recommend a reverse total shoulder and not the surgery recommended by Dr. Copeland.

25. Dr. O'Brien's testimony by deposition was consistent with his written report. Dr. O'Brien reiterated his opinion that the surgery recommended by Dr. Copland is not reasonable, necessary, or work related. In support of his opinions, Dr. O'Brien testified that the MRI results show atrophy, retraction, and fatty infiltration in the claimant's right shoulder. Dr. O'Brien explained that these phenomena take years to occur. Dr. O'Brien also testified that there was no acute injury to the claimant's right shoulder evident in the MRI results. Dr. O'Brien further noted that the claimant was able to return to full duty in August 2020, which is indicative of the claimant's recovery from the April 19, 2020 incident. Dr. O'Brien also testified regarding the claimant's mechanism of injury. The claimant did not fall onto an outstretched hand. Rather he fell onto the outside of his right shoulder. Dr. O'Brien noted that this mechanism of injury would not result in any new tissue breakage in the shoulder.

26. The claimant testified that he has pre-diabetes. He also testified that he has never been referred for treatment of alcoholism. The claimant testified that the injury to his left foot in May 2020 was the result of a spider bite. The ALJ does not find the claimant's testimony to be credible or persuasive.

27. The ALJ credits the medical records and the opinions of Dr. O'Brien over the contrary opinions of Dr. Copeland. The ALJ specifically credits the opinion of Dr. O'Brien that the claimant suffered a minor injury to his right shoulder, and he has recovered from that minor injury. The ALJ finds that the claimant's need for a right shoulder surgery is not related to his April 19, 2020 work injury, but rather related to his pre-existing and chronic condition of his right shoulder. The ALJ is not persuaded that the claimant's fall on April 19, 2020 aggravated, accelerated, or combined with the claimant's pre-existing right shoulder condition to necessitate surgery. Therefore, the ALJ finds that the claimant has failed to demonstrate that it is more likely than not that the right shoulder surgery recommended by Dr. Copeland is reasonable medical treatment

necessary to cure and relieve the claimant from the effects of the April 19, 2020 work injury.

CONCLUSIONS OF LAW

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

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

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

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

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

6. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that the right rotator cuff surgery recommended by Dr. Copeland is reasonable medical treatment necessary to cure and relieve the claimant from the effects

of the admitted April 19, 2020 work injury. As found, the medical records and the opinions of Dr. O'Brien are credible and persuasive.

ORDER

It is therefore ordered that the claimant's request for a right shoulder surgery, as recommended by Dr. Copeland, is denied and dismissed.

Dated this 12th day of April 2021.

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

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-145-996-001

ISSUE

1. Whether Claimant established by a preponderance of the evidence that he sustained a compensable injury arising out of course of his employment with Employer on or about June 23, 2020.

2. Whether Claimant established by a preponderance of the evidence that he is entitled to an award of general medical benefits for a work-related injury arising out of the course of his employment with Employer on or about June 23, 2020.

FINDINGS OF FACT

1. Claimant is a 41-year-old man who worked as mason and bricklayer for approximately six years. He was employed in that role with Employer beginning on approximately March 24, 2020. Claimant had worked in a similar position for a different company for approximately 14 months prior to working for Employer. Claimant is a native Spanish-speaker, and does not speak, read, or write English. As part of Claimant's hiring process, Employer provided Claimant with an employment manual, written in Spanish, which included instructions that employees report all injuries immediately to the employee's supervisor. On March 24, 2020, Claimant signed an acknowledgement indicating he had received and reviewed the manual. Additionally, Claimant viewed a video (also in Spanish) in which workers' compensation was explained. (Ex. P).

2. On Tuesday, June 23, 2020, Claimant was working for Employer a project known as the "Marion Project." Claimant asserts that on June 23, 2020 at approximately 12:30 p.m., he was working on the Marion Project laying concrete block. Claimant testified he was crouching down with is knees on the floor or a scaffold and lifting a block weighing approximately 30-40 pounds when he felt a "pop" in his lower back. There were no witnesses to Claimant's injury, other than Claimant. Claimant did not report his purported injury to Employer on June 23, 2020.

3. Claimant left the Marion Project on June 23, 2020 at approximately 2:30 p.m., to attend a chiropractic appointment he had scheduled several days earlier with Alvin Padua, D.C., at Aim High Chiropractic. Claimant reported pain in his right hip and lumbar area, which he described as beginning approximately one month earlier without a known origin. Claimant also indicated he had similar symptoms 8-10 years earlier. On pain diagrams Claimant completed, he indicated pain and tenderness in his anterior and posterior right leg extending from his right buttock to calf. Claimant reported his pain was worst in the morning, with more stiffness, and aggravated by "almost any movement." Dr. Padua noted that Claimant had difficulty putting on his shows and socks. Claimant also reported his symptoms were relieved with over-the-counter medication and stretching. Dr. Padua diagnosed Claimant with low back pain, lumbar radiculopathy, muscle spasms

and segmental and somatic dysfunctions of the lumbar, sacral, and thoracic regions. (Ex. A).

4. Claimant did not work for Employer on Wednesday, June 24, 2020, but did work for Employer on June 25, 2020 and June 26, 2020. Claimant did not return to work for Employer after June 26, 2020.

5. Claimant returned to Dr. Padua for additional follow up visits on June 26, 2020, June 29, 2020, and July 14, 2020, and reported similar complaints as his initial visit. (Ex. A). On July 14, 2020, Claimant reported to Dr. Padua that he had injections performed in his right gluteal area while in Mexico. (Ex. A).

6. On July 20, 2020, Claimant was seen at Swenson Family Chiropractors for low back and right-sided leg pain. Claimant reported receiving an injection for pain on July 19, 2020. Claimant reported the onset of his symptoms was the "first part of June 2020." Claimant attended two additional chiropractic appointments at Swenson Family Chiropractors on July 20, 2020 and July 31, 2020. On July 31, 2020, Claimant was referred for a lumbar MRI. (Ex. B).

7. On August 6, 2020, Claimant had a lumbar MRI performed at Simon Med. Radiologist Munib Sana, M.D. interpreted the MRI as showing a large right paracentral disc extrusion at L5-S1 compressing the right SI nerve root. (Ex. C).

8. On August 7, 2020, Claimant contacted one of Employer's supervisors and notified him that he had sustained an injury on the job. Claimant testified he had not previously reported an injury to Employer because he believed his condition would improve with chiropractic treatment, and he did not appreciate the significance of his injury until he received the results of his MRI report.

9. On August 24, 2020, Claimant filed a Worker's Claim for Compensation (WCC) with the Division of Workers' Compensation (Division). Therein, Claimant indicated he sustained a disc injury to his lower back while laying brick for Employer on June 24, 2020 at 1:00 p.m. In the WCC, Claimant indicated Employer was notified of his injury on August 5, 2020. (Ex. D).

10. On August 26, 2020, Employer filed a First Report of Injury or Illness with the Division consistent with Claimant's WCC. (Ex. E).

11. On September 2, 2020, Respondents filed a Notice of Contest with the Division contesting compensability of Claimant's injury as not work-related. (Ex. 1).

12. On September 2, 2020, Claimant saw Marc Steinmetz, M.D. at Midtown Occupational Health Services. Claimant reported back and right leg pain and indicated that he hurt his back while lifting a heavy box at work. (The records do not indicate whether an interpreter was present). Claimant reported that he had no previous similar problems or any other injuries. Dr. Steinmetz diagnosed Claimant with a back strain with a herniated disc and right S1 sciatica, causation undetermined. Claimant was referred

for a surgical consult and for an EMG. Insurer denied authorization for both procedures. (Ex. G).

13. When Claimant returned to Dr. Steinmetz on September 9, 2020, Dr. Steinmetz recommended Claimant go to the emergency room with his MRI report and seek a referral to a back specialist due to the denial. Claimant saw Dr. Steinmetz five additional times between October 5, 2020 and December 14, 2020. Dr. Steinmetz made no determination regarding whether Claimant's condition was work-related, indicating that the claim was under investigation by insurer. (Ex. G).

14. Claimant reported to the emergency room at UC Health on October 9, 2020, seeking a referral for a surgical consult. The ER physician provided Claimant with a referral to a spine center and for interventional pain and rehabilitation medicine. (Ex. 6).

15. On October 14, 2020, Claimant filed an Application for Expedited Hearing with the Office of Administrative Courts. (Ex. I). Respondents filed their Response to the Application for Hearing on October 23, 2020. (Ex. K).

16. On December 4, 2020, Claimant underwent an independent medical examination (IME) performed by John Raschbacher, M.D., at Respondents' request. Claimant described the mechanism of injury consistent with his testimony (i.e., occurring while working with concrete blocks around pipes). Claimant reported low back and right leg symptoms which were constant, but temporarily improved with physical therapy and massage. Claimant also was using lidocaine patches for pain. Dr. Raschbacher opined that Claimant's diagnosis and symptomatology were consistent with his described mechanism of injury. Claimant reported no previous similar injuries or symptoms. (Ex. M).

17. On December 8, 2020, Claimant underwent an IME performed by Mark Winslow, D.O., at Claimant's request. Dr. Winslow opined that Claimant's disc herniation is a work-related injury. Dr. Winslow noted that Claimant has no documented history of lower back pain, had worked in the heavy labor position as a mason/bricklayer for approximately six years, and was working without restrictions as of June 2020. He opined that Claimant's clinical examination, objective evidence and imaging were consistent with lifting a cinder block in an awkward position. (Ex. N).

18. On December 22, 2020, Dr. Raschbacher issued a follow-up report following his review of additional records from Aim High Chiropractic. (Ex. O). In his testimony, Dr. Raschbacher opined that Claimant's symptoms were consistent with the mechanism of injury described by Claimant. He also indicated that his opinions were subject to revision if the Claimant's description of the mechanism of injury was not accurate, and that after review of testimony and additional records, Dr. Raschbacher indicated that he did not trust the Claimant's testimony. Dr. Raschbacher also correctly observed that the determination of the Claimant's credibility is the purview of the administrative law judge. Ultimately, Dr. Raschbacher opined that Claimant's back condition is likely a chronic problem, and not the result of an acute injury.

19. Prior to his employment with Employer, Claimant sought treatment at Aim High Chiropractic on December 10, 2019 and December 13, 2019. At that time, Claimant reported his primary problem was in his right shoulder and right wrist, which he attributed to holding onto falling bricks six months earlier. Claimant's pain diagram identified pain and tenderness in his right shoulder and trapezius area. No other areas of pain were reported. (Ex. 2). Claimant testified that prior to his alleged injury on June 23, 2020, he had experienced pain in his right leg, but he was able to work by taking "pills." He testified that the pain he experienced after June 23, 2020 was different than the pain he previously experienced. Claimant testified that he made the appointment with Dr. Padua to address issues with his leg.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence

contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

COMPENSABILITY

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, … performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The Claimant must prove his injury arose out of the course and scope of his employment by a preponderance of the evidence. § 8-41-301(1)(b) & (c), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). "Arising out of" and "in the course of" employment comprise two separate requirements. *Triad Painting Co.*, 812 P.2d at 641.

An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d at 641; *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO, Nov. 21, 2014).

The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury "has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014). The mere fact that an injury occurs at work does not establish the requisite causal relationship to demonstrate that the injury arose out of the employment. *Finn v. Industrial Commission,* 437 P.2d 542 (Colo. 1968); *Sanchez v. Honnen Equipment Company,* W.C. No. 4-952-153-01 (ICAO, Aug. 10, 2015).

Claimant has failed to establish by a preponderance of the evidence that he sustained an injury to his lower back arising out of the course of his employment with Employer on June 23, 2020. The retained experts for both Claimant and Respondent (Drs. Winslow and Dr. Raschbacher, respectively), agree that Claimant's lower back injury is consistent with the mechanism of injury described by Claimant. However, there is a significant dispute over whether Claimant sustained an injury in the course and scope of his employment with Employer on June 23, 2020. The evidence does not establish it more likely than not that Claimant sustained an injury on June 23, 2020 while working for Employer as claimed.

Claimant alleges he was injured at approximately 12:30 p.m. on June 23, 2020, and was seen by Dr. Padua within a matter of hours. While Claimant reported hip and lumbar pain on that day, multiple entries in Dr. Padua's June 23, 2020 chiropractic record demonstrate the injury did not occur on June 23, 2020. Specifically, Claimant indicated that the pain started approximately one month earlier. Had Claimant experienced a "pop" in his back resulting in immediate pain, it stands to reason that Claimant would have indicated an onset only hours earlier. Dr. Padua's notation that the origin of the injury was "unknown" contradicts Claimant's assertion that the injury occurred while lifting blocks that day. Claimant's report that he noticed the pain in the morning, when he experienced more stiffness and that the condition made it "very hard to work," indicates that the Claimant's condition began sometime before that day, rather than on June 23, 2020 as alleged. Additionally, Claimant's report that his pain was relieved by over-the-counter medication and stretching is inconsistent with an acute injury with an onset only hours earlier. At Swenson Chiropractic, on July 20, 2020, Claimant reported his onset of symptoms was the first part of June 2020, consistent with his report to Dr. Padua that his symptoms had an onset approximately one month prior to his June 23, 2020 visit.

Notwithstanding the expert opinions that Claimant's injury is consistent with the described mechanism of injury, the ALJ finds that Claimant has failed to establish that an injury occurred as claimed. The ALJ finds that Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury to his lower back on June 23, 2020.

MEDICAL BENEFITS

Under section 8-42-101(1)(a), C.R.S., respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *See Owens v. Industrial Claim Appeals Office*, 49 P.3d 1187, 1188 (Colo. App. 2002). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). All results flowing proximately and naturally from an industrial injury are compensable. *Id., citing Standard Metals Corp. v. Ball*, 474 P.2d 622 (Colo. 1970).

Because Claimant has failed to establish a compensable injury, Claimant is not entitled to an award of medical benefits.

ORDER

It is therefore ordered that:

1. Claimant's claim for worker's compensation benefits for an alleged injury to his lower back on June 23, 2020 is denied and dismissed.

2. Claimant's claim for medical benefits is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

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

Steve R. Kabler

DATED: April 14, 2021

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that the right total hip replacement performed by Dr. Louis Stryker was reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.

2. Whether the claimant has demonstrated, by a preponderance of the evidence, that bilateral L5-S1 transforaminal epidural steroid injections (TFESIs) recommended by Dr. Kirk Clifford constitute reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.

3. At hearing, the parties agreed that the ALJ would adopt Findings of Fact paragraph 30 contained in the ALJ's June 1, 2020 Findings of Fact, Conclusions of Law, and Order regarding testimony of the claimant's martial arts instructor, Toni Miller.

FINDINGS OF FACT

1. The claimant works as an attorney. On December 12, 2018, the claimant was in his office taking a banker's box of paper to be recycled when he tripped, falling head first with his body horizontal to the floor. His left thigh fell on the banker's box impacting his left testicle and left hip. The claimant's right hip impacted the ground. The claimant testified that when he fell, he slightly crushed the banker's box. The claimant also testified that the door was open about one and one-half feet and his head hit the edge of the door. In addition, his right hand struck the drywall with enough force to create a hole in the wall.

2. The claimant further testified that he briefly lost consciousness due to the incident. When he "came to his senses" he asked his secretary to find information regarding how to make a workers' compensation claim. In addition, the claimant scheduled an appointment with Western Valley Family Practice.

3. The claimant testified that immediately after his fall, his symptoms included a headache; aching in his right wrist and right shoulder; an electrical shock type pain down both legs into his feet; and left thigh, left groin, and left testificle pain. The claimant clarified that when he identified left groin pain, he described pain from his pelvis area out toward his hip.

4. On December 12, 2018, the claimant was seen by Dr. Thomas Motz at Western Valley Family Practice. At that time, the claimant reported his symptoms as dizzy, tired, pain in his neck, right arm, and lower back. In addition, the claimant reported pain in the right side of his groin that radiated down the outside of this right leg. Dr. Motz diagnosed acute thoracic back pain and rib pain. Dr. Motz also noted the claimant's fall

resulted in a loss of consciousness. Dr. Motz ordered a head computed tomography (CT) scan and imagining of the claimant's thoracic spine.

5. The claimant underwent the recommended head CT after seeking treatment at the emergency department (ED) at Community Hospital. At the ED, the claimant was seen by Dr. Julie McCallen. At that time, the claimant described the tripping incident and reported his symptoms as significant soreness on the left side of his neck, right side of this low back, and groin. The head CT showed no acute intracranial process.

6. On December 21, 2018, the claimant returned to Western Valley Family Practice and was seen by Dr. Kurtis Holmes. On that date, the claimant reported pain in his low back with pain radiating down the outside of his left leg. In addition, the claimant reported numbness and tingling in his left lower extremity. On the right side, the claimant described some pain in his right buttock and down the inside of his right leg. Dr. Holmes diagnosed a lumbar strain with radiculopathy. In addition, Dr. Holmes ordered a magnetic resonance image (MRI) of the claimant's lumbar spine and referred the claimant to physical therapy.

7. On December 31, 2018, a lumbar spine MRI was performed and showed multilevel degenerative disc and facet disease.

8. Thereafter, the claimant continued to treat with Dr. Holmes. On March 28, 2019, the claimant was seen by Dr. Holmes and reported ongoing pain and numbness in both legs. On that date, Dr. Holmes listed the claimant's diagnoses as strain of the lumbar region, obesity, concussion with loss of consciousness, bilateral leg paresthesia and left testicular pain. Dr. Holmes referred the claimant to Dr. Kirk Clifford, an orthopedic spine specialist, for evaluation.

9. On April 19, 2019, the claimant was seen by Dr. Clifford and reported a combination of low back and radiating leg pain. On that date, an x-ray of the claimant's lumbar spine showed moderate to severe bilateral hip degenerative joint disease with osteophyte formation and joint space narrowing. Dr. Clifford diagnosed bilateral hip degenerative joint disease and L5-S1 foraminal stenosis with bilateral radiculopathy. Dr. Clifford recommended that the claimant undergo bilateral L5-S1 transforaminal epidural steroid injections (TFESIs). In addition, Dr. Clifford referred the claimant to Dr. Louis Stryker for consultation of the claimant's hip arthritis. Dr. Clifford opined that the claimant's hip condition could be the result of osteoarthritis and radiation treatment the claimant underwent to treat a sarcoma.

10. The medical records indicate that the claimant underwent radiation treatment due to a sarcoma in his left groin area. On December 11, 2013, an MRI of the claimant's pelvis was performed, which showed a small amount of fluid in the left hip joint. On December 18, 2014, a CT scan of the claimant's abdomen and pelvis showed degenerative joint disease in both hips.

11. A request for authorization of bilateral L5-S1 TFESIs was submitted to the insurer on May 5, 2019.

12. On May 16, 2019, the claimant was seen by Dr. Stryker. On that date, the claimant reported bilateral groin pain radiating down the lateral aspect of both of his hips and into his feet. The claimant also described experiencing limited range of motion that resulted in difficulty putting on socks. Dr. Stryker ordered hip x-rays which were done on that same date. These x-rays showed "complete obliteration" of joint space in both hips with subchondral sclerosis and osteophyte formation, and CAM lesions of both femoral heads. Dr. Strker opined that the claimant had long standing arthritic changes in his hips, that are likely due to femoral acetabular impingement. Dr. Styker also opined that the claimant's hip condition was exacerbated by his fall at work on December 12, 2018. Dr. Stryer discussed treatment opinions with the claimant. Those treatment modalities included gait aids, the use of antiinflammatories, physical therapy, intra articular joint injections, and total hip replacement.

13. On May 22, 2019, the claimant reported to Dr. Holmes that Dr. Stryker had recommended bilateral hip replacements.

14. On May 29, 2019, Dr. Clifford administered bilateral L5-S1 TFESIs.

15. On June 20, 2019, the claimant was seen by Dr. Holmes. At that time, the claimant reported that the injections reduced his low back and upper leg pain. Despite this improvement, the claimant continued to report numbness and burning in his lower legs.

16. On July 15, 2019, the claimant returned to Dr. Clifford and reported that the injections provided 60 percent overall relief of his symptoms. The claimant further reported that he had 85 percent improvement of his thigh pain and 45 percent relief of his calf and toe pain. Dr. Clifford suggested possible repeat injections if the claimant's pain symptoms returned.

17. On July 24, 2019, the claimant returned to Dr. Stryker and reported excellent relief from the TFESIs. On that date, Dr. Styker recommended proceeding with a total hip replacement. On July 26, 2019, a request for authorization was submitted to the insurer for a left total hip arthroplasty.

18. On August 2, 2019, Dr. Jon Erickson reviewed the surgical request. Dr. Erickson recommended that the surgery be denied, pending an MRI of the claimant's left hip. In support of this recommendation, Dr. Erickson noted that there was some indication in the medical records that the claimant has "radiation-induced" hip arthritis, but without an MRI he could not opine regarding whether the claimant's left hip condition was related to the December 12, 2018 fall at work.

19. On August 19, 2019, the claimant was seen by Dr. Clifford. At that time, the claimant reported 95 percent relief of his back pain. The claimant requested another injection before undergoing a left hip replacement. On August 20, 2019, Dr. Clifford's office submitted a request for authorization of repeat bilateral L5-S1 TFESIs.

20. On September 16, 2019, an MRI of the claimant's left hip showed advanced osteoarthritis, with no evidence of avascular necrosis.

21. On September 18, 2019, Dr. Clifford administered the recommended repeat bilateral L5-S1 TFESIs.

22. Claimant testified that the injections only provided one to two weeks of relief from his back pain. He also testified that by the end of summer 2019, his radiating leg pain had returned.

23. On September 27, 2019, Dr. Erickson again reviewed the request for a left hip replacement. Dr. Erickson noted that the left hip MRI showed evidence of degenerative tearing of the acetabular labrum and advanced degenerative osteoarthritis. Dr. Erickson recommended continued denial of the surgery, to allow him the opportunity to review the MRI with a musculoskeletal (MSK) expert radiologist.

24. Dr. Erickson did review the claimant's MRI with an MSK expert and on October 29, 2019 he issued his third report related to the requested left hip replacement. Dr. Erickson recommended denial of the recommended surgery. Dr. Erickson noted that the MRI showed advanced bone on bone arthrosis and "huge" periarticular osteophytes in both of the claimant's hips. Dr. Erickson opined that no fall or trauma would worsen the degenerative condition of the claimant's left hip.

25. On November 7, 2019, the claimant was seen by Dr. Holmes. On that date, Dr. Holmes noted that Dr. Erickson's opinion was that "the degenerative arthritis of [the claimant's] hips is so profound that no accident could have made either of them worse". Dr. Holmes noted that the claimant would seek a second opinion from a surgeon in Vail.

26. On February 21, 2020, Dr Elizabeth Carpenter authored a letter regarding the claimant's September 16, 2019 left hip MRI. Dr. Carpenter noted that the MRI showed advanced bilateral hip osteoarthritis, with bone on bone contact (left greater than right). Dr. Carpenter noted that she had also reviewed a pelvic MRI taken on December 24, 2013 and an abdominal and pelvic CT scan performed on December 18, 2014. Dr. Carpenter noted that left hip osteoarthritis with bone on bone contact was present at the time of those prior imaging studies. Dr. Carpenter opined that there is no evidence of an acute injury indicated by the September 16, 2019 left hip MRI.

27. On January 21, 2020, Dr. James Lindberg performed a review of the claimant's medical records. On February 25, 2020, Dr. Lindberg issued a report in which he noted that the claimant has severe osteoarthritis in both hips, including bilateral and symmetrical osteophytes on the acetabulum and femur. Dr. Lindberg opined that the claimant's December 12, 2018 slip and fall did not cause this osteoarthritis. In his report, Dr. Lindberg opined that the claimant should have bilateral hip replacements. However, the claimant's need for hip replacement was not related to the December 12, 2018 work injury.

28. On March 27, 2020, Dr. Stryker authored a letter in which he disputed the opinions of Dr. Lindberg. Dr. Stryker argued that while the claimant has degenerative changes in his hips, he was asymptomatic prior to the December 12, 2018 fall. Therefore, it is Dr. Stryker's opinion that the claimant's symptoms were exacerbated by his fall at work.

29. The claimant testified that prior to his fall on December 12, 2018, he was able to perform midline kicks in his martial arts training. In addition, he could ride a bicycle and take hikes on rocky terrain. The claimant further testified that since his fall, he is unable to engage in these activities.

30. The parties went to hearing on May 6, 2020 before the undersigned ALJ regarding a left total hip replacement. The ALJ issued an order on that matter on June 1, 2020. At the May 6, 2020 hearing, the claimant's martial arts instructor provided testimony. As agreed by the parties in the present matter, the ALJ adopts the following paragraph 30 from her June 1, 2020 order. Those findings are restated herein as follows:

> Ms. Miller was the claimant's martial arts instructor from approximately 2003 through October 2018. Ms. Miller testified that the claimant progressed in his martial arts training. In October 2018, the claimant was able to complete "midline" kicks. Ms. Miller also testified that the claimant was able to perform warm up exercises involving "opening" his hips. Ms. Miller testified that she recalls last seeing the claimant in class in approximately October 2018. She further testified that the claimant has not returned to martial arts training since that time.

31. On June 3, 2020, Dr. Stryker performed a left total hip arthroplasty. This surgery was paid for by the claimant's personal medical insurance.

32. On July 1, 2020, Dr. Stryker submitted an authorization request for a right total hip arthroplasty. The request was reviewed by Dr. Erickson on July 13, 2020. Dr. Erickson opined that the right total hip arthroplasty should be denied as there was no evidence in the medical records that the right hip was damaged in the claimant's fall at work.

33. On July 13, 2020, Dr. Stryker performed a right hip total arthroplasty. This surgery was paid for by the claimant's personal medical insurance.

34. On August 17, 2020, the claimant returned to Dr. Clifford and reported that after the left hip arthroplasty, he started using a cane due to left sided symptoms secondary to lumbar radiculopathy. The claimant also reported that he did not have these symptoms prior to the work injury. Dr. Clifford opined that the claimant's pain was related to the injury he sustained at work in December 2018. In support of this opinion, Dr. Clifford noted that the claimant did not have any symptoms prior to the fall. Dr. Clifford recommended left sided L4-5 and L5-S1 TFESIs. Dr. Clifford submitted an authorization request for these injections on August 19, 2020.

35. On August 26, 2020, Dr. Stryker performed a revision of the left hip arthroplasty because of the stem "subsiding". This surgery was paid for by the claimant's personal medical insurance.

36. On August 27, 2020, Dr. Erickson reviewed the request for additional TFESIs. In that report, Dr. Erickson noted that he had previously addressed the claimant's low back pain complaints in his July 13, 2020 review. Dr. Erickson reiterated his opinion that the claimant's low back pain was exacerbated by his total hip

arthroplasties. As it is his opinion that neither hip arthroplasty related to the claimant's December 12, 2018 fall, the injections should be denied as unrelated to his work injuries.

37. The claimant was seen by Dr. Clifford on November 2, 2020, reporting his lumbar spine symptoms were "the same" with pain across the lumbar area, left buttock, left hip, and left groin. He also reported radiating pain into the lateral aspect of his bilateral thighs, calves, and feet. Dr. Clifford counseled the claimant on the importance of weight loss and the effects it can have in regards to his back. He recommended that the claimant continue conservative treatment including core strengthening, stretching, anti-inflammatories, and ice. Dr. Clifford opined that the claimant would benefit from bilateral L5-S1 TFESIs.

38. On November 12, 2020, Dr. Erickson reviewed the request for additional TFESIs. In his report, Dr. Erickson opined that the claimant's back pain was likely due to progressive degenerative changes. As the MRI failed to show evidence of any acute trauma relating to the work injury, Dr. Erickson recommended that the claimant pursue treatment under his private health insurance.

39. On February 1, 2021, the claimant attended an independent medical examination with Dr. Jack Rook. In connection with the IME, Dr. Rook reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his IME report, Dr. Rook opined that the claimant sustained injuries to his low back, both legs, and both hips due to his fall of December 12, 2018. His opinion was based upon the claimant's statement that he was unrestricted in his performance of all activities prior to his work injury. Dr. Rook further opined that the claimant's history was consistent with a permanent aggravation of osteoarthritis of both hips and that his need for bilateral hip replacements was a reflection of that permanent aggravation. Dr. Rook also opined that the claimant's back condition was caused by the fall due to the acute rotation of his trunk to the right after his left hip/groin struck the box. Therefore, the claimant's symptoms of bilateral lower extremity lumbar radiculopathy were related to his fall at work.

40. A second record review was done by Dr. Lindberg on February 8, 2021. Dr. Lindberg agreed with Dr. Erickson's assessment that the claimant's most recent low back pain was likely related to a gait disturbance that the claimant developed after his left total hip arthroplasty (and subsequent revision). Therefore, since the left hip was unrelated to the claimant's work injury, the claimant's current radicular complaints are likewise unrelated to the work injury. Regarding the claimant's right hip condition and resulting arthroplasty, Dr. Lindberg noted that the claimant was a candidate for bilateral hip replacements based upon the x-rays taken shortly after the accident. Dr. Lindberg further opined that the claimant's fall did not cause any permanent damage to the claimant's hip or back.

41. The claimant testified that he always had back pain after his December 12, 2018 fall. He also testified that his back pain worsened after his left hip replacement and the need for the revision left hip surgery. However, that back pain is now back to the level it was right after the December 12, 2018 fall. The claimant testified that the reason he

did not go back to Dr. Clifford for further back treatment was that he did not intend to do anything more with his back until his hip surgeries were completed.

42. Dr. Erickson testified at the hearing. During his testimony, Dr. Erickson noted that he had reviewed the x-rays of the claimant's right and left hips. He opined that this is some of the worst arthritis he has ever seen. Dr. Erickson also noted that the imaging of the right hip identified arthritis that was "end stage, bone on bone." Regarding claimant's reported level of functioning prior to the injury, Dr. Erickson noted that although he usually defers to the patient in these situations, it would be "extremely unusual for a person with this level of arthritis to be completely asymptomatic."

43. Dr. Erickson also noted that there was evidence of the claimant's pre-existing bilateral hip arthritis in the imaging done in follow up for his cancer treatment that showed bilateral degenerative arthritis of both hips. Therefore, it was known he had the condition before the fall. Dr. Erickson also testified that there must be objective evidence of some aggravation, worsening, or acceleration of the claimant's pre-existing condition. Dr. Erickson further explained that this analysis has nothing to do with the claimant's subjective pain complaints. It is Dr. Erickson's opinion that it is more likely that the increased symptoms in the claimant's right hip came about because of the natural progression of the advanced arthritis in his right hip and not because of his fall at work. In addition, Dr. Erickson found no evidence of an aggravation or acceleration of the claimant's right hip arthritis as a result of the claimant's fall at work.

44. Dr. Erickson also provided testimony with regard to the claimant's low back pain and the request for additional TFESIs Dr. Erickson noted that the claimant underwent two TFESIs to address bilateral leg tingling. Dr. Erickson noted that Dr. Clifford's medical reports indicate that these injections were extremely successful. Dr. Erickson opined that the claimant likely suffered a low back sprain/strain when he fell on December 12, 2018. That sprain/strain caused some symptoms of radiculopathy, but following the successful injections, that problem was resolved. Dr. Erickson further opined that when the claimant began having ambulation difficulties (as a result of his joint replacements), his back pain returned. As it is Dr. Erickson's opinion that neither hip is related to the work injury, the claimant's development of back pain after the bilateral hip replacements is not work related.

45. Dr. Lindberg testified at the hearing. Dr. Lindberg stated that due to the severe degenerative end stage osteoarthritis present in the claimant's right hip, the right total hip arthroplasty was medically reasonable and necessary. Dr. Lindberg also testified that it is his opinion that the claimant's work injury did not cause, aggravate, or accelerate the claimant's right hip arthritis. In support of this opinion, Dr. Lindberg noted that in the medical records immediately following the claimant's fall, the claimant's right groin pain went from the groin down the outside of the claimant's leg to his ankle. Dr. Lindberg explained that this is not hip pain. On the contrary, osteoarthritis hip pain is felt from the groin and down the inside of the leg and the thigh. Pain that goes down the leg into the ankle is not consistent with hip joint pain. It is Dr. Lindberg's opinion that the first indication that there was an issue in the claimant's right hip was when Dr. Clifford noted anterior groin and lateral thigh pain on April 19, 2019. Dr. Lindberg also testified that

lateral thigh pain is not indicative of hip joint pain. Dr. Lindberg testified that if the claimant had experienced an acute injury to his hips on December 12, 2018, it would have been obvious. Dr. Lindberg further opined that it is more likely that the claimant's arthritis has worsened with time, which is the progressive nature of arthritis.

46. The ALJ credits the medical records and the opinions of Drs. Erickson and Lindberg over the contrary opinions of Drs. Stryker and Rook. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that the right total hip replacement performed by Dr. Stryker was necessary to cure and relieve the claimant from the effects of the work injury. While a right total hip replacement was medically necessary to treat the claimant's pre-existing right hip arthritis, the need for surgery was unrelated to the claimant's fall at work on December 12, 2018. The ALJ also finds that the claimant has failed to demonstrate that it is more likely than not that the claimant's fall on December 12, 2018 aggravated or accelerated the claimant's pre-existing right hip condition.

47. The ALJ credits the medical records and the opinions of Drs. Erickson and Lindberg over the contrary opinions of Drs. Stryker, Clifford, and Rook. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that bilateral L5-S1 TFESIs (as recommended by Dr. Clifford) constitute reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury. The ALJ is persuaded that the claimant had experienced a temporary exacerbation of his underlying degenerative spine condition, and that temporary condition was effectively treated with injections. The ALJ also finds that the claimant's current low back complaints are related to his bilateral hip replacements and a related gait disturbance. Therefore, the claimant's current low back symptoms are not related to his December 12, 2018 fall at work.

CONCLUSIONS OF LAW

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

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

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

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

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

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

7. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that the right total hip replacement performed by Dr. Stryker constituted reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury. As found, the medical records and the opinions of Drs. Erickson and Lindberg are credible and persuasive.

8. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that additional bilateral L5-S1 TFESIs (as recommended by Dr. Clifford) constitute reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury. As found, the medical records and the opinions of Drs. Erickson and Lindberg are credible and persuasive.

ORDER

It is therefore ordered:

1. The claimant's request for a right total hip arthroplasty (as performed by Dr. Stryer) is denied and dismissed.

2. The claimant's request for additional bilateral L5-S1 TFESIs is denied and dismissed.

3. All matters not determined here are reserved for future determination.

Dated this 15th day of April 2021.

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

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

ISSUES

- Did Claimant overcome the DIME's determination of MMI by clear and convincing evidence?

- Did Claimant overcome the DIME's impairment rating by clear and convincing evidence?

- If Claimant overcame the DIME regarding impairment, what is the appropriate rating?

FINDINGS OF FACT

1. Claimant works for Employer as an eligibility specialist helping patients apply and qualify for various benefit programs. She suffered admitted injuries on November 8, 2018 when she slipped on a wet or greasy floor in the cafeteria. Claimant "did the splits" with her right leg in front of her and the left leg behind her. Despite bracing herself with her left arm, Claimant landed on her perineal area hard enough to cause a coccygeal dislocation and fracture. She experienced severe pelvic and low back pain that made it difficult to walk.

2. Claimant was taken to the emergency department at Rose Medical Center. The documented physical examination shows pain in the low back, left SI joint, and right knee. Claimant also reported tingling in the left toes. She reported no neck pain and examination of her neck showed no tenderness. The ER physician opined there was "no evidence of any fracture." He diagnosed soft tissue strains "due to unusual stretching of her muscles in this fall." He thought the tingling in the toes was probably related to some peripheral nerve stretching.

3. Claimant was referred to Concentra for authorized treatment. She saw PA Nathan Adams at her initial visit on November 14, 2018. Claimant reported pain in her back and neck and numbness and tingling in her toes. She was also having difficulty emptying her bladder. Examination of the low back showed paraspinal muscle tenderness, muscle spasms, and limited range of motion. The left extensor hallucis longus muscle was weak. Claimant's neck was described as "supple" with no masses. Mr. Adams diagnosed a low back "strain." He ordered physical therapy for the low back and an abdominal MRI to evaluate the bladder issue. No treatment was recommended for the neck pain.

4. Claimant followed up at Concentra on November 20, 2018 and saw Dr. Kristina Robinson. Claimant again described neck and low back pain and tingling in her toes. The back pain radiated to the left groin. Physical examination was limited to the low back and left leg. There is no indication Claimant's neck was examined. Dr. Robinson

recommended Claimant continue PT for her back. She offered no treatment for Claimant’s neck pain.

5. Claimant underwent a lumbar MRI on December 10, 2020. It showed multilevel degenerative changes causing mild canal and foraminal stenosis. No acute pathology was identified.

6. Claimant saw Dr. Robinson on December 11, 2020. She felt “about the same as last visit.” The report states she had “no neck pain.” Claimant described significant ongoing pelvic and tailbone pain, so Dr. Robinson ordered x-rays of the sacrum and coccyx. Someone from Concentra contacted Claimant later that afternoon and told her the x-rays showed a coccygeal subluxation.

7. Claimant returned to Concentra on December 12, 2020 and saw Mr. Adams. She was having “really bad” pain in her neck and left arm. Cervical x-rays were taken, which showed multilevel degenerative changes. Mr. Adams’ report documents, “Pt states that after the MRI, her neck hurt and she has n/t and coldness of her left hand. She did state that when she fell, she partially caught herself with her hands, mostly on the left. I explained that this may be an exacerbation of underlying OA . . . .” Mr. Adams’ report could be interpreted as suggesting Claimant’s neck pain started during or after the MRI. However, that would be inconsistent with neck pain already documented at her first two Concentra appointments. Claimant’s neck pain was probably present from the start of treatment at Concentra but was aggravated during the MRI.

8. Claimant followed up with her PCP, Dr. Morse, on December 14, 2018. Dr. Morse reviewed Claimant’s x-rays and advised she had a displaced coccygeal fracture and dislocation.

9. Claimant was understandably upset that Concentra failed to diagnose a displaced coccygeal fracture for six weeks, so she pursued a change of provider. The parties ultimately agreed on a change of physician to Dr. David Reinhard.

10. Claimant’s initial evaluation with Dr. Reinhard was on December 19, 2018. Dr. Reinhard took a detailed history and performed a thorough examination. Claimant testified Dr. Reinhard give her the opportunity to describe all the problems she attributed to the accident. Claimant reported stabbing and burning pain in both legs with numbness and a cold sensation in her feet. She described a needle-type sensation along the sides of her thighs and over the lateral hip. She reported bilateral gluteal pain, worse on the left, low back pain, and SI joint pain. She described pain along the left side of thoracic and cervical region and intermittent electric-type pains in the left upper extremity. Motor examination of Claimant’s lower extremities was “difficult” because of pain, particularly around the hips. Dorsiflexion and plantar flexion strength were normal. Sensation was intact to light touch. Her gait was antalgic. Cervical range of motion was mildly decreased for rotation with tenderness along the left cervical paraspinal musculature and along the medial border of the left scapula. She had normal strength and range of motion and her upper extremities. Passive internal rotation of the left hip produced exquisite hip and groin pain. She had exquisite tenderness to palpation of the SI joints and gluteal musculature,

and over the greater trochanteric regions particularly on the left. She also exhibited severe tenderness over the tip of the coccyx.

11. Dr. Reinhard diagnosed a coccygeal fracture, a lumbar strain with bilateral sacroiliitis, myofascial pain, trochanteric bursitis, a left hip contusion with possible internal derangement, bilateral sciatica, and cervical and thoracic pain, predominantly left-sided, of unclear etiology. He ordered lower extremity nerve conduction studies and an MRI of the left hip. He specified the hip MRI as non-contrast because Claimant is allergic to gadolinium.

12. The hip MRI was completed in late December 2018 and was normal.

13. Dr. Reinhard performed lower extremity nerve conduction testing on January 2, 2019. The results were normal with no evidence of radiculopathy, plexopathy, or peripheral neuropathy.

14. Claimant participated in physical therapy and massage therapy with some improvement. She eventually received more benefit form osteopathic manipulation.

15. On April 22, 2019, Dr. Reinhard ordered a cervical MRI "to see why she is still having significant problems with left-sided neck and suprascapular pain. We may want to do some trigger point injections for the left upper trapezius as another option."

16. The cervical MRI showed only some small disk bulges from C4-C7 "of no particular significance." Dr. Reinhard recommended Claimant continue with physical therapy and massage therapy.

17. Dr. Reinhard provided treatment for Claimant's neck pain the duration of his time as primary ATP. The MRI showed no underlying structural abnormality and Dr. Reinhard thought the pain was related to a "chronic cervical strain." He consistently included the neck in his list of work-related diagnoses. Although Dr. Reinhard initially stated Claimant's neck pain was "of unknown etiology," the ALJ infers he ultimately concluded it was causally related to the work accident.

18. Dr. Reinhard put Claimant at MMI on March 17, 2020 with permanent impairment ratings for the lumbar and cervical spines. He assigned an 18% lumbar rating and a 15% cervical rating, for a combined overall rating of 30% whole person. Dr. Reinhard also recommended maintenance treatment.

19. Respondents requested a DIME to challenge Dr. Reinhard's rating.

20. Dr. William Watson performed the DIME on June 23, 2020. Dr. Watson assigned the same Table 53 lumbar rating as Dr. Reinhard but the overall computed to 12% lumbar rating because Claimant's range of motion was slightly better. Dr. Watson did not provide a cervical rating because he determined the neck was unrelated to the work accident. He explained the basis for his conclusion as,

> [Claimant] also reports she injured her neck as a result of the fall. Her initial evaluation on the date of injury at Rose Medical Center is significant in that they examined her neck and she was asymptomatic. She was treated at Concentra but did not report any neck pain until 12/12/2018, 5 weeks after her injury. When she did report the neck pain, she said it had occurred while she was lying on the MRI table for the MRI of her lumbar spine. She told her providers at Concentra she thought she injured her neck [in the] fall although this is not supported by the medical records. At her initial visit with Dr. Reinhard she also reported the neck pain. However, Dr. Reinhard stated the etiology was unclear. After reviewing the medical records there is no clear mechanism of injury for a cervical spine. There is also no temporal relationship between the date of injury and the onset of her neck pain. It is my opinion that her complaints of neck pain are not related to this injury.

21. Respondents filed a Final Admission of Liability on July 30, 2020 admitting for Dr. Watson's 12% lumbar spine rating. The FAL also admitted to maintenance care after MMI.

22. Claimant saw Dr. Sander Orent for an IME at the request of her counsel. The IME was conducted in a virtual format because of COVID. Claimant described ongoing pain in her neck, low back, and coccyx. The neck pain radiated to her shoulder and the middle of her back. She also reported pain in the left hip and buttock. Dr. Orent could not perform a physical examination but Claimant pointed to an area of tenderness over the greater trochanteric bursa on the left hip and also demonstrated where she had pain in her shoulder and pain in her trapezius on the left. Dr. Orent opined Claimant's neck pain was related to the accident and noted she reported it to providers at Concentra from the outset. He opined Claimant is not at MMI because of (1) "worsening radicular symptomatology in her lower extremity," (2) left shoulder pain that "has not been addressed," and (3) a possible undiagnosed labral tear in the left hip. Dr. Orent recommended needed repeat electrodiagnostic testing, an orthopedic evaluation and possible MRI of the shoulder, and another MRI of the left hip using a high Tesla machine.

23. Dr. Orent testified at hearing consistent with his report. He acknowledged Claimant demonstrated no neck pain at the ER but emphasized she had reported neck pain from her first visit at Concentra. Citing his 14 years of experience in emergency medicine, he opined patients commonly focus on their most severe injuries immediately after an accident, and only notice more minor issues over the ensuing few days. Dr. Orent also explained that lying flat for the lumbar MRI could reasonably aggravate Claimant's neck pain, particularly given her severe pelvic pain. Dr. Orent opined Dr. Watson clearly erred in determining Claimant's neck pain was not causally related to the accident.

24. In his hearing testimony, Dr. Orent reiterated Claimant is not at MMI for the reasons specified in his report. Regarding impairment, he generally agreed with Dr. Reinhard's rating for the lumbar and cervical spines.

25. Claimant failed to overcome the DIME's determination of MMI by clear and convincing evidence. Dr. Orent's opinions regarding MMI reflect mere differences of

opinion with Dr. Reinhard and Dr. Watson. Claimant already had an MRI of the left hip, which was entirely normal. She cannot undergo an MR arthrogram or a contrast MRI because of her gadolinium allergy. Although another noncontrast MRI might show a labral tear, such a finding is not probable. There is no persuasive evidence Claimant reported discrete left shoulder issues to any providers before Dr. Orent's IME. Any pain in her left parascapular area is at least as likely related to her chronic cervical strain as opposed to any specific shoulder pathology. Finally, any recent worsening of Claimant's radicular symptoms does not persuasively call the original MMI date into question.

26. Claimant's testimony regarding her neck injury was credible and persuasive. Dr. Orent's opinions regarding causation of Claimant's neck pain are credible and persuasive. Claimant proved Dr. Watson's causation determination regarding causation of her neck pain is highly probably incorrect. Claimant injured her neck in the accident and her persistent symptoms and limitations despite treatment warrant a cervical rating.

27. Dr. Reinhard's impairment rating is more persuasive than Dr. Watson's rating.

28. Claimant proved by a preponderance of the evidence she suffered a 30% whole person impairment as determined by Dr. Reinhard.

CONCLUSIONS OF LAW

A. Claimant failed to overcome the DIME regrading MMI

A DIME's determination regarding MMI is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c). The party challenging a IME physician's conclusions must demonstrate it is "highly probable" the determination is incorrect. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). A party meets this burden if the evidence contradicting the DIME physician is "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). A "mere difference of medical opinion" does not constitute clear and convincing evidence. *E.g., Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (March 18, 2016).

"Maximum Medical Improvement" (MMI) is defined as the point when any medically determinable physical or mental impairment as a result of the industrial injury has become stable and when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5), C.R.S. A finding of MMI is premature if there is a course of treatment that has "a reasonable prospect of success" and the claimant is willing to submit to the treatment. *Reynolds v. Industrial Claim Appeals Office*, 794 P.2d 1080, 1081-82 (Colo. App. 1990). A finding of not-at-MMI can also rest on need for additional diagnostic testing if such testing has a reasonable prospect of diagnosing the claimant's condition and suggesting further treatment. *Soto v. Corrections Corp. of America*, W.C. No. 4-813-582 (February 23, 2012).

As an initial matter, it must be noted Dr. Orent's IME was conducted remotely rather than in-person. While that arrangement was understandable considering the ongoing pandemic, it means Dr. Orent has no hands-on clinical data on which to base his conclusions. Additionally, Dr. Orent is not recommending specific treatment but merely diagnostic testing that might or might not point the way to additional treatment. Although Dr. Orent makes some reasonable arguments, none rise to the level of "highly probable." Admittedly, Claimant's mechanism of injury could have caused a labral tear, and Dr. Reinhard's initial examination suggested possible internal derangement of the left hip. But Dr. Reinhard promptly obtained an MRI, which was normal. Claimant cannot undergo an MR arthrogram or an MRI with contrast because of her gadolinium allergy. A high Tesla MRI might show a labral tear, but the evidence presented does not persuade the ALJ such a finding is probable. It is at least as likely Claimant's hip pain reflects ongoing SI joint dysfunction and residual effects of her coccygeal fracture.

Nor did Claimant prove by clear and convincing evidence she has an undiagnosed left shoulder condition overlooked by multiple providers. There is no persuasive evidence Claimant reported discrete left shoulder issues to anyone before Dr. Orent's IME. Dr. Reinhard gave Claimant an opportunity to describe all her injury-related conditions, but she did not mention any symptoms that indicated a left shoulder injury. Any pain in Claimant's left shoulder and parascapular area are more probably related to her chronic cervical strain as opposed to specific shoulder pathology.

Finally, although worsening of Claimant's radicular symptoms might suggest she is no longer at MMI, it does not persuasively call the original MMI date into question.

B. Claimant overcame the DIME regarding cervical impairment

As with MMI, the DIME's whole person rating can only be overcome by clear convincing evidence. Section 8-42-107(8)(c). Determining the cause of a claimant's impairment is an "inherent" part of the diagnostic assessment that comprises the DIME. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1988). Therefore, the DIME's determination that a particular impairment is or is not related to the industrial injury is binding unless overcome by clear and convincing evidence. *Id*.

As found, Claimant overcame the DIME's causation determination regarding cervical impairment by clear and convincing evidence. Dr. Watson's most significant rationale for not rating the neck – his belief Claimant "did not report any neck pain until [ ] 5 weeks after her injury" – is demonstrably incorrect. It appears Dr. Watson simply overlooked the documented reports of neck pain at Claimant's first two Concentra appointments. This oversight caused Dr. Watson to improperly discount Claimant's credible statements regarding the onset and origin of her neck pain. Although Dr. Watson is correct that Claimant did not report neck pain at the ER, Dr. Orent convincingly explained why she would not have felt neck pain immediately given the more severe injuries to other areas of her body. Moreover, the ER failed to diagnose a displaced coccygeal fracture, which does not speak well for the thoroughness of their evaluation. Finally, Dr. Orent provided a reasonable and biologically plausible mechanism by which Claimant's fall could have injured her neck. Claimant's neck pain is predominantly on the left side, which correlates with the mechanism described by Dr. Orent. There is no persuasive evidence of any pre-injury neck problems and it is highly unlikely Claimant spontaneously and coincidentally developed neck pain shortly after a significant fall. To the contrary, it is highly probable the neck pain was proximately caused by the work accident. Claimant overcame Dr. Watson's causation determination regarding Claimant's neck impairment by clear and convincing evidence.

C. Dr. Reinhard provided the most appropriate and persuasive rating

Once the DIME's whole person rating is overcome "in any respect," the proper rating becomes a factual matter for determination based on a preponderance of the evidence. *Mosley v. Industrial Claim Appeals Office*, 78 P.3d 1150 (Colo. App. 2003); *Serena v. SSC Pueblo Belmont Op Co., LLC*, W.C. No. 4-922-344-01 (December 1, 2015). Multiple factors persuade the ALJ to adopt Dr. Reinhard's rating. Dr. Reinhard's longitudinal perspective based on a lengthy treatment relationship puts him in the best posture to assess Claimant's impairment. Dr. Reinhard's records reflect close attention to and familiarity with Claimant's condition. Additionally, his rating was contemporaneous with the established MMI date and therefore most accurately captures Claimant's level of impairment when her condition became "permanent." Dr. Reinhard and Dr. Watson utilized the same basic methodology in constructing their ratings, and Dr. Orent persuasively opined Dr. Reinhard's rating is consistent with rating protocols. And having found Dr. Watson's rating was overcome, the ALJ is disinclined to adopt his lumbar rating and cobble together a hybrid by combining it with Dr. Reinhard's cervical rating.

ORDER

It is therefore ordered that:

1. Claimant's request to set aside the DIME's determination of MMI is denied and dismissed.

2. Insurer shall pay Claimant PPD benefits based on Dr. Reinhard's 30% whole person impairment rating. Insurer may take credit for any PPD benefits previously paid in connection with this claim.

3. Insurer shall pay Claimant statutory interest of 8% per annum on all benefits not paid when due.

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

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

Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: April 15, 2021

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

ISSUES

I. Whether Claimant was an employee or independent contractor of the putative employer, [Employer C Redacted].

II. If Claimant was an employee, whether Claimant proved by a preponderance of the evidence he sustained a compensable industrial injury on May 25, 2017.

III. If Claimant proved he sustained a compensable injury, whether Claimant proved by a preponderance of the evidence he is entitled to temporary total disability benefits ("TTD") and reasonable and necessary medical treatment related to the industrial injury.

FINDINGS OF FACT

1. Claimant is a welder with several years of experience dating back to 2005, when he worked as an employee welder for [Employer D]. Claimant worked as a welder for [Employer A Redacted] beginning in 2008, and [Employer B Redacted] from 2011 to 2016. Claimant obtained his welding certification through [Employer E]. As of May 2017, Claimant had been certified by [Employer E] for 8 years, and had taken various tests through [Employer E] for recertification.

2. [Employer E] is an oil extraction company that owns all of the oil field batteries on which Claimant worked. As a general contractor in oil field work, [Employer E] enters into contracts with "roustabout" companies to build and maintain oil field battery sites and equipment. These roustabout companies enter into master service contracts with [Employer E]. Only companies with a master service contract with [Employer E] can be paid by [Employer E]. [Employer D], [Employer A] and [Employer B] are roustabout companies.

3. The putative employer, [Employer C], is a roustabout company that constructs and maintains gas and oil battery facilities. [Employer C] has a master service contract with [Employer E].

4. On May 25, 2017 Claimant sustained severe burns in an explosion and fire while performing welding services at the Sekich battery facility owned by [Employer E]. [Employer C] paid Claimant for his services at this site. The roustabout company contracting for services with [Employer E] at the Sekich site was [Employer F], not the putative employer.

5. Claimant was offered work at the Sekich battery site on May 25, 2017 by Justin L[Redacted]. Mr. [Redacted], an employee of [Employer E], arranges for construction and maintenance services at [Employer E] battery facilities. Claimant became acquainted with

Mr. L[Redacted] while he was working for [Employer A] at [Employer E] battery facilities and Mr. L[Redacted] was working for another company.

6. Claimant became acquainted with Brian K[Redacted], owner of [Employer C], around the same time he met Mr. L[Redacted]. At the time, Mr. K[Redacted] worked in a supervisory position at [Employer E].

7. Claimant testified Mr. L[Redacted] and Mr. K[Redacted] suggested that Claimant form his own company so that Claimant could have more opportunity to work on [Employer E] sites. Claimant testified he could not work directly for [Employer E] due to his immigration status. Claimant wanted to have more opportunities to work with [Employer E], so he proceeded to research how to form his own company and personally spoke to a banker and accountant about doing so.

8. Claimant subsequently formed [Employer G], filing articles of organization with the Secretary of State of Colorado in March 2014. Claimant was the owner, sole proprietor, registered agent and sole employee of the company. Colorado Secretary of State documents show periods of delinquency and cure for the company.

9. Claimant used his personal address as the address for [Employer G]. Claimant signed documents on behalf of [Employer G] as the owner/operator of the company, including promissory notes. [Employer G] had a business email address. Claimant did not advertise, rent office space, or print business cards for the company.

10. [Employer G] held a Gold Business Services Package with Wells Fargo Bank. Through this business account Claimant paid taxes and insurance for [Employer G]. He also used this business account to purchase welding supplies and equipment, internet, telephone services and trash hauling services needed in the field, and food for Claimant while working. Claimant also charged several personal expenses to this account.

11. Claimant used a 2002 Dodge Ram for transportation to and from worksites. Claimant purchased the vehicle from a former employer. The vehicle is equipped with oil field welding equipment, estimated at $20,000 or more. Claimant insured the truck through [Employer G].

12. Claimant testified that welding requires special gas for the welder, as well as a fire extinguisher, welding helmets, gloves, grinders, welding rods and monitors. All of these items were purchased by Claimant for his use through the [Employer G] bank account. Photographs of the site of the May 25, 2017 explosion show a fire extinguisher, welding stands, and the remains of a tent, all of which were confirmed by Claimant to belong to [Employer G].

13. Claimant testified that his welding work in the oil field needed to be inspected every day. Inspection was done with special equipment, including x-ray machines. [Employer E] is in charge of inspection and is responsible for bringing in the specialized company to perform the inspections in the field. [Employer C] did not inspect Claimant's

work. Claimant carried [Employer E] Welder Qualification Procedure Guidelines with him in his work truck because his welding had to be completed within [Employer E] specifications.

14. Claimant obtained a commercial general liability insurance policy for [Employer G] with National American Insurance Co. A January 25, 2016 Commercial Insurance Application lists the nature of [Employer G]'s business as "contractor." Separate applications for insurance completed by Claimant represent that [Employer G]'s gross receipts were $90,000 and that Claimant, as the owner/operator, was paid $31,500 from that amount. At the time of the explosion on May 25, 2017, a general liability policy was in place for [Employer G], effective September 28, 2016 through September 28, 2017. Claimant had similarly secured general liability insurance for [Employer G] before this policy period. Claimant also applied for general liability insurance for [Employer G] after the events of May 25, 2017. Repeatedly on his insurance applications, Claimant responded to the question "Provide a list of companies for which you operate under contract or agreement", by saying "TBD at the moment as the applicant has a few options to consider." Ex. O, Bates 418, 459.

15. Claimant applied for a federal tax identification number [Employer G] on October 10, 2016.

16. Claimant signed a Declaration of Independent Contractor Status Form on October 11, 2016, identifying [Employer G] as the trade name. This form states Claimant is not required to work exclusively; that a company contracting with Claimant does not establish a quality standard for Claimant; that Claimant is not paid a salary or hourly rate; that a company contracting with Claimant does not have the ability to terminate Claimant's work except for failure to meet specifications; that Claimant was not provided more than minimal training, that tools are not provided to Claimant; that time of performance was not dictated to Claimant; that Claimant was not paid as an individual; and that Claimant's business operations were not combined with any company contracting with Claimant. The form provides that Claimant is not entitled to workers' compensation benefits, is obligated to pay all federal and state income taxes for his business, and is required to provide workers' compensation insurance for all workers he hired. Such language was not in larger, bold, or underlined font. The document was not signed by the putative employer.

17. Subsequent to Claimant forming [Employer G], Mr. L[Redacted] assisted Claimant in setting up a system by which Mr. L[Redacted] assigned Claimant work at [Employer E] sites, and Claimant would submit invoices for his services to a roustabout company contracted with [Employer E]. These companies would pay [Employer G] for Claimant's services and then charge [Employer E] for the amount paid to [Employer G], even if they were not the roustabout company on the location of the [Employer E] site at which Claimant was performing his services. Claimant had this payment arrangement with JB Services and Ultimate Services. In 2016, Claimant established the same arrangement with [EMPLOYER C], pursuant to which he submitted invoices for his work on [Employer E] properties to [EMPLOYER C], who paid Claimant and invoiced [Employer E], with an additional fee.

18. Claimant testified that Mr. L[Redacted] knew of his skills and sought him out to do work for [Employer E]. Mr. L[Redacted] contacted Claimant and informed him of available work at various [Employer E] battery sites. Claimant testified that, "sometimes" Mr. K[Redacted] would contact Claimant and notify him that Mr. L[Redacted] wanted Claimant to perform work at a certain site. Mr. L[Redacted] determined what work was available for Claimant and assigned or offered Claimant that work. Mr. L[Redacted] communicated general plans and specifications of the work to be performed. Claimant testified that he was performing welding services only at [Employer E] battery facilities and only work arranged by Mr. L[Redacted] and Mr. K[Redacted] leading up to and on the date of injury.

19. Claimant testified that, during 2016 and 2017, he was only paid by [Employer C] and that he did not obtain contracts or work for any other companies during that time period.

20. Claimant testified that, on days there was bad weather and he was unable to perform welding in the field, he did some welding for an individual named Joe (no last name provided) who manufactured separators. He testified that he did this after May 25, 2017.

21. Claimant charged $70.00 per hour in full hour increments for his services. Claimant submitted invoices for his services to [Employer C] under his company name [Employer G]. Claimant testified that Mr. L[Redacted] would tell him how many hours to charge for his work. Claimant notified Mr. L[Redacted] when he was finished with a particular task and ask if there was more work. [Employer C] did not review or audit the time and amounts charged by [Employer G] for Claimant's work. [Employer C] charged [Employer E] for what was paid to Claimant, plus a handling fee. [Employer C] paid Claimant by check to [Employer G].

22. [Employer C] issued 1099-Misc forms to [Employer G]. The 1099 form for tax year 2016 notes $40,595.00 in nonemployee compensation. The 2017 1099 form documents nonemployee compensation of $50,187.50.

23. Claimant used an accountant to file taxes on his behalf and the behalf of [Employer G]. Claimant's 2016 and 2017 tax returns include a Schedule C, Profit and Loss Form, listing [Employer G] as the business name, as well as Schedule SE Self Employment Tax Forms. The 2016 Schedule C lists gross income as $58,860.00, and various expenses for contract labor, vehicles, machinery and equipment, repairs and maintenance, supplies, insurance, and legal and professional services. The 2017 Schedule C lists gross income as $50,188.00 and similar categories of expenses as 2016.

24. The May 25, 2017 explosion killed one individual and injured three others. [Employer C] was responsible for providing fire watch men on the ground. The fire watch man who accompanied Claimant to the Sekich battery on the date of the explosion was Roberto Y[Redacted], an employee of [Employer C]. The May 25, 2017 explosion resulted in an investigation by the Occupational Safety and Health Administration ("OSHA")

[Employer G], [Employer C], [Employer F], and [Employer E]. OSHA issued penalties to the companies, including penalties to [Employer G]. [Employer G] was represented by counsel through the OSHA process.

25. After the events of May 25, 2017, Claimant, on behalf of [Employer G], obtained a new policy of general liability insurance, again representing that he was the owner and employee of [EMPLOYER G] and obtained a salary from the gross receipts of the company.

26. On January 4, 2018, Claimant filed Articles of Organization for [Employer H].

27. Claimant filed a rejection of coverage form for [Employer G] with the Division of Workers' Compensation on March 26, 2018.

28. Claimant filed articles of dissolution for [Employer G] with the Colorado Secretary of State on April 23, 2018.

29. Claimant filed a claim for workers' compensation on May 9, 2019. An Employer's First Report of Injury was filed on May 23, 2019.

30. Angel K[Redacted] testified at hearing on behalf of [Employer C]. Ms. K[Redacted] is the office manager and is responsible for all operations except the physical labor. Ms. K[Redacted] has several years of experience working in the oil field. She explained oil field batteries and the various types of companies involved in the creation and maintenance of oil field batteries. She testified that [Employer E] paid for Claimant's welding certifications and recertifications, not [Employer C]. Ms. K[Redacted] explained that [Employer C] does not perform welding and does not have welding equipment. She testified that [Employer C] has invoiced [Employer E] for multiple other welders. She testified that most roustabout companies do not have their own welders and contract out for welding services. Claimant did not clock in or out for [Employer C]. [Employer C] did not assign work to Claimant, instruct Claimant how to weld or inspect his work. Claimant was not required to work exclusively for [Employer C].

31. Ms. K[Redacted] testified that Claimant invoiced [Employer C] through [Employer G]. Ms. K[Redacted] used Claimant's invoice to create an invoice for [Employer E], and then submit the invoice for approval to [Employer E] for an approval number. Ms. K[Redacted] explained that this was [Employer E]'s policy to assure that the subcontractor was assigned to the work charged and worked the hours charged. For the Sekich site, the invoice for [Employer G] was provided to Mr. L[Redacted] of [Employer E]. Once an approval number was received, [Employer C] would formally submit an invoice to [Employer E]. Once the invoice was paid, [Employer C] would provide [Employer G] a check. [Employer C] charged an additional $10.00 to [Employer E] for this billing service.

32. Ms. K[Redacted] testified that [Employer C] was not the roustabout on the Sekich site and [Employer C] received no financial benefit for the work done on that site. She testified that when Mr. L[Redacted] assigned work to Claimant, he did not ask permission

from [Employer C] to do so [Employer C] did not have the right to tell Claimant that he could not do a job assigned by Mr. L[Redacted]. While the nature of constructing a battery requires completion of items in a certain order, [Employer C] did not dictate the times that Claimant worked or require Claimant to arrive at [Employer C]'s office at any particular time. Claimant could take time off as he desired and did not need to ask permission of [Employer C] to do so. Ms. K[Redacted] testified that there are many specifications that must be followed in the oil field and that [Employer C] did not establish quality standards for Claimant's work. [Employer C] did not have the authority to terminate Claimant from the Sekich battery site, or any of the other sites on which Mr. L[Redacted] arranged for Claimant to work. [Employer C] held monthly safety meetings per federal and state requirements. Claimant was not required to attend those. U.S. Services did not share resources or overhead with [Employer G], such as office space, office equipment, software, administrative services, or bank accounts. They did not provide a telephone to Claimant or [Employer G].

33. Ms. K[Redacted] explained the federally governed safety forms required for work in the oil field, including the forms completed by Claimant and found in [Employer G]'s truck. She explained that [Employer C] provides forms to anyone that wants them to make sure that the required forms are available. She explained that when [EMPLOYER G] is doing welding in the field, [Employer G] is responsible for completing the forms, as required by OSHA.

34. Brian K[Redacted] testified at hearing. He testified that Mr. L[Redacted] of [Employer E] did not contact him for permission to contact Claimant to do work. He testified that when Mr. L[Redacted] contacted Claimant with work assignments, Mr. K[Redacted] was not able to prevent Claimant from doing that work. Despite Claimant's testimony to the contrary, he testified that he did not contact Claimant to tell him that Mr. L[Redacted] wanted him to work at any particular site. He testified that he did not control how Claimant performed his services. He testified that, unlike his employees, he did not require Claimant to be at his shop at any particular time.

35. The ALJ finds the testimony of Mr.L[Redacted] and Ms. K[Redacted] more credible and persuasive than Claimant's testimony.

36. The preponderant credible and persuasive evidence establishes Claimant was an independent contractor of [Employer C].

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

CONCLUSIONS OF LAW

Generally

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

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

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

Independent Contractor

Pursuant to §8-40-202(2)(a), C.R.S. "any individual who performs services for pay for another shall be deemed to be an employee" unless the person "is free from control and direction in the performance of the services, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent . . . business related to the service performed."

Section 8-40-202(2)(b)(II), C.R.S. enumerates nine factors to be considered in evaluating whether an individual is deemed an employee or independent contractor. To prove independence, it must be established that the person for whom the services are performed does not:

A. Require the individual to work exclusively for the person for whom services are performed (except that the individual may choose to work exclusively for that person for a finite period of time specified in the document);

B. Establish a quality standard for the individual (except that such person can provide plans and specifications regarding the work but cannot oversee the actual work or instruct the individual as to how the work will be performed);

C. Pay a salary or at an hourly rate instead of at a fixed or contract rate;

D. Terminate the work during the contract period unless the individual violates the terms of the contract or fails to produce results that meet the specifications of the contract;

E. Provide more than minimal training for the individual;

F. Provide tools or benefits to the individual (except that materials and equipment may be supplied);

G. Dictate the time of performance (except the completion schedule and range of mutually agreeable work hours may be established);

H. Pay the individual personally, instead of making checks payable to the trade or business name of the individual; and,

I. Combine their business operations in any way with the individual's business, or maintain such operations as separate and distinct.

Section 8-40-202(b)(IV), C.R.S., provides that a written document may create a rebuttable presumption of an independent contractor relationship if it meets the nine criteria listed in Section 8-40-202(b)(II), C.R.S. and includes language in larger or bold-faced or underlined font, that the worker is not entitled to workers' compensation benefits and is obligated to pay all taxes on moneys earned pursuant to the contract relationship. The document must be signed by both parties and duly notarized.

The test considered by the Colorado Supreme Court in the unemployment insurance case of *Industrial Claim Appeals Office v. Softrock Geological Services*, 325 P.3d 560 (Colo. 2014) concerning whether a worker is an employee or an independent contractor also applies to workers' compensation claims. The test requires the analysis of not only the nine factors enumerated in §8-40-202(2)(b)(II), C.R.S. but also the nature of the working relationship and any other relevant factors. *Pella Windows & Doors, Inc. v. Industrial Claim Appeals Office*, 458 P.3d 128 (Colo. App. 2020). The *Softrock* decision noted indicia that would normally accompany the performance of an ongoing separate business in the field and included whether: the worker used an independent business card, listing, address, or telephone; had a financial investment such that there was a risk of suffering a loss on the project; used his or her own equipment on the project; set the price for performing the project; employed others to complete the project; and carried liability insurance. *Softrock Geological Services*, 325 P.3d 565.

Although the Declaration of Independent Contractor Status Form addresses the nine factors in Section 8-40-202(b)(II), C.R.S., the form fails to create a rebuttable presumption of an independent contractor relationship, as it is not signed by both parties and does not include certain language in larger, bold-faced, or underlined font. Accordingly, it is Respondents burden of proof to establish by a preponderance of the evidence Claimant was not an employee.

As found, Respondents met their burden of proof. Analysis of the nine factors set forth in Section 8-40-202(2)(b)(II), C.R.S, along with of the nature of the working relationship and other factors, establish that Claimant was an independent contractor and not an employee of [Employer C].

Claimant was not required to work exclusively for [Employer C]. Although the majority of Claimant's reported income in 2016 and 2017 was paid by [Employer C], this was pursuant to the payment arrangement established by Claimant with [Employer C], in which Claimant invoiced [Employer C], [Employer C] paid Claimant, and in turn invoiced [Employer E]. [Employer C] paid Claimant for welding services performed on [Employer E] sites even when [Employer C] was not the roustabout company contracted to construct or maintain a particular site. Claimant chose this arrangement and was not required to exclusively perform services for [Employer C].

[Employer C] did not establish a quality standard for Claimant's work. Mr. L[Redacted] at [Employer E] determined what work was available for Claimant and offered Claimant the work. Mr. L[Redacted] communicated general plans and specifications of the work to be performed. There is no evidence [Employer C] oversaw Claimant's work or instructed Claimant how to perform his work. Claimant's welding was to be within standards and specifications set by [Employer E], not [Employer C]. [Employer E], not [Employer C], was responsible for ensuring Claimant's work was properly inspected.

[Employer C] did pay Claimant at an hourly rate. Claimant invoiced [EMPLOYER C] for full-hour increments as discussed with Mr. L[Redacted] at [Employer E], and Mr. L[Redacted] approved the invoices before formal submission. [EMPLOYER C] did not have the authority to terminate the work as assigned by Mr. L[Redacted] at [Employer E]. [EMPLOYER C] did not provide training to Claimant. Claimant had several years of experience as a welder, and was certified and recertified through [Employer E]. [EMPLOYER C] did not pay for Claimant's training or certification. Claimant was not required to attend safety meetings held by [EMPLOYER C].

Claimant provided his own work truck, tools, materials and equipment, which he purchased through his company, [EMPLOYER G]. There is no evidence [EMPLOYER C] provided Claimant any work, health or fringe benefits. [EMPLOYER C] did not dictate the time of performance of Claimant's services. As discussed, Mr. L[Redacted] at [Employer

E] offered Claimant work at various [Employer E] sites under different roustabout companies.

Claimant invoiced [EMPLOYER C] for his services through his business, [EMPLOYER G]. [EMPLOYER C] did not pay Claimant paid personally, but by check payable to [EMPLOYER G]. [EMPLOYER C] issued Claimant 1099 tax forms in his company's name. There is no evidence [EMPLOYER C] and [EMPLOYER G] combined their business operations. [EMPLOYER C]'s business operations were separate and distinct from those of Claimant's company, [EMPLOYER G].

Claimant was free from direction and control in the performance of his services for [EMPLOYER C]. [Employer E], not [EMPLOYER C], trained and certified Claimant. [Employer E], not [EMPLOYER C], was responsible for ensuring Claimant's work was properly inspected. Mr. L[Redacted], an employee of [Employer E], offered Claimant work and communicated the specifications, determined how many hours Claimant should invoice for his work, and approved draft invoices for his work.

Although Claimant did not have an office, advertise his business, or employ others, there is indicia of a separate business operated by Claimant. [EMPLOYER G] invested in equipment, supplies, cell phone, internet and trash hauling services, and maintained a business account and taxes. As the sole employee of [EMPLOYER G], insurance applications and tax records show that Claimant was provided a salary out of the profits of that company. [EMPLOYER G] purchased and maintained liability insurance before and after the explosion. Claimant, on behalf of his company [EMPLOYER G], has been involved in and represented by counsel as a defendant in personal injury litigation stemming from the incident. [EMPLOYER G] was investigated and fined as a separate entity by OSHA as a result of this incident. Claimant chose to form and operate [EMPLOYER G] so that he could have more opportunities to work at [Employer E] sites.

The nature of the working relationship between [EMPLOYER C] and Claimant, through [EMPLOYER G], was effectively a payment arrangement pursuant to which [EMPLOYER C] paid Claimant's invoices for work he performed for [Employer E]. Claimant could not contract directly with [Employer E] due to his immigration status. Claimant created his company to work for [Employer E], on any site determined by Mr. L[Redacted], regardless of the roustabout company contracted on a particular site. [EMPLOYER G] used at least two other roustabout companies for invoicing in this same manner. At the time of the May 25, 2017 explosion, Claimant was working on a site with a different roustabout company. Based on the totality of the evidence, Claimant was an independent contractor and not an employee of [EMPLOYER C].

As Respondents proved it is more probable than not Claimant was an independent contractor and not an employee, the remaining issues of compensability, medical benefits, and temporary indemnity benefits are moot.

ORDER

1. Respondents proved by a preponderance of the evidence Claimant was an independent contractor for [EMPLOYER C] at the time of his May 25, 2017 injury. Claimant's claim for benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

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

DATED: April 16, 2021

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether Respondents have produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Thomas G. Fry, M.D. that Claimant has not reached MMI as a result of his July 22, 2017 left wrist injury.

2. Whether Claimant has demonstrated by a preponderance of the evidence that the left wrist distal radioulnar stabilization surgery requested by Authorized Treating Physician (ATP) Andrew C. Trueblood, M.D. is reasonable, necessary and causally related to his July 22, 2017 industrial injury.

FINDINGS OF FACT

1. Claimant works for Employer on an oil rig in the Gulf of Mexico. As a Rig Worker, Claimant is engaged in physically demanding activities. On July 22, 2017 Claimant injured his left wrist when he felt a pop and strain while lifting a 240 pound slip from a well. Claimant resides outside the state of Colorado and has been receiving medical treatment from Authorized Treating Physician (ATP) Andrew C. Trueblood, M.D. in Missouri.

2. Claimant was initially diagnosed with a left wrist triangular fibrocartilage complex (TFCC) tear on October 12, 2017. On November 2, 2017 Claimant underwent a left wrist arthroscopy with intra-articular debridement and repair of the TFCC. Following the procedure Dr. Trueblood noted that Claimant's DRUJ was "fully stabilized in a reduced position in pronation and supination and neutral positions."

3. By November 16, 2017 Claimant's instability at the DRUJ had completely resolved. On December 14, 2017 Dr. Trueblood noted that Claimant would return to his office in six weeks for what was likely the final follow-up visit. Claimant was released to work with temporary restrictions of no lifting over five pounds and no pushing/pulling with the left upper extremity.

4. On January 25, 2018 the restrictions regarding pushing/pulling were eliminated and Claimant could lift up to 20 pounds with his left upper extremity. By March 8, 2018 Claimant's work restrictions allowed him to lift up to 50 pounds with his left upper extremity.

5. On April 12, 2018 Claimant reported to Dr. Trueblood that he was able to return to regular duty work without restrictions. Dr. Trueblood anticipated that Claimant would reach Maximum Medical Improvement (MMI) in two months from the date of the visit. The 50 pound lifting restriction remained in effect.

6. Claimant did not attend a scheduled appointment with Dr. Trueblood on October 3, 2018. He next visited Dr. Trueblood on February 14, 2019. Medical records reveal that Claimant did not undergo any treatment from April 12, 2018 until February 14, 2019.

7. On February 14, 2019 Claimant visited Dr. Trueblood for an examination. He noted that Claimant had returned to work and was "lost to follow up since April of 2018 at which time he had no substantial symptoms and had completed work conditioning." Claimant told Dr. Trueblood that he developed recurrent left wrist pain that was not caused by any specific injury. Claimant exhibited a mildly positive piano key sign. Dr. Trueblood summarized that Claimant was a "39-year-old male with left wrist TFCC repair lost to follow-up and passed the point of maximum medical improvement now with recurrent symptoms in disuse of his left hand."

8. On February 26, 2019 Claimant underwent an MRI of the left upper extremity. Dr. Trueblood's treatment record from March 5, 2019 noted the MRI findings demonstrated evidence of central perforation of the TFCC. However, there was no evidence of a full-thickness peripheral rim tear in the DRUJ. All tests of Claimant's left wrist were negative, with the exception of a mildly positive piano-key test. Dr. Trueblood did not assign Claimant any restrictions, but considered an intra-articular steroid injection to mitigate pain.

9. On May 17, 2019 Dr. Trueblood performed a second left wrist surgery. The procedure involved a repair of a full thickness tear of the peripheral rim of the TFCC. The surgery resolved Claimant's DRUJ instability.

10. On August 14, 2019 Claimant visited Dr. Trueblood for an evaluation. Dr. Trueblood directed Claimant to return in six weeks for a re-evaluation and advancement of activity. He remarked that the six week follow-up would most likely be Claimant's last visit. By September 25, 2019 Claimant again had a stable DRUJ on piano-key testing.

11. On November 8, 2019 Dr. Trueblood reported "I do not find any evidence of clinical instability at his DRUJ and see no mechanical reason why he should not be able to progress" when discussing an aggressive strengthening program. He anticipated MMI one year from the time of the last surgery or May of 2020.

12. On December 11, 2019 Claimant followed-up with Canadace N. Emmendorfer, PA-C. Claimant reported he had not been lifting more than 25 pounds and noted he had not participated in ballistic training. He was unsure if he would be able to return to regular duty due to a feeling of instability with any grip strengthening greater than 140 pounds of pressure. PA-C Emmendorfer reported some laxity with instability at Claimant's DRUJ and the possible need for an MRI.

13. On December 19, 2019 Claimant returned to Dr. Trueblood for an examination. Claimant reported occasional instability when lifting weights. A physical examination revealed a negative ulnar carpal compression test and a stable ECU tendon. Claimant also demonstrated a stable DRUJ on a piano-key test. Dr. Trueblood

recommended advanced weight-bearing activity as tolerated and a return to full duty work without restrictions. He again anticipated MMI one year from the revision surgery or approximately May 17, 2020.

14. On February 19, 2020 Claimant returned to Dr. Trueblood for an evaluation. Claimant mentioned that he was building a retaining wall approximately two weeks earlier at home. He reported a popping sensation in the left wrist. He exhibited a [p]ositive piano-key test with gross instability." Dr. Trueblood remarked that Claimant had gross instability at his DRUJ and would benefit from graft reconstruction of the distal radial ulnar joint.

15. On May 5, 2020 Claimant underwent an MRI arthrogram of his left upper extremity. He was diagnosed with a traumatic tear of the left wrist TFCC.

16. On July 21, 2020 Claimant's counsel wrote a letter to Dr. Trueblood regarding the request to perform a distal radioulnar stabilization with tendon graft. He specifically inquired whether the procedure was reasonable, necessary and related to Claimant's July 22, 2017 work injury. Dr. Trueblood responded that the work-related injury caused or accelerated the need for the distal radioulnar stabilization with tendon graft.

17. On July 22, 2020 Claimant visited Allison M. Fall, M.D. for an independent medical examination. Claimant reported that his surgeon let him "loose" following the second surgery. He explained that he injured his left wrist at home when stacking rocks to build a retaining wall. Claimant specified that he picked up a rock and felt a burning pain as he rotated his left wrist. Dr. Fall reasoned that Claimant had rehabilitated after the second surgery and been released to activities as tolerated. Building the retaining wall constituted a subsequent event that caused the need for a third surgery. Dr. Fall thus concluded that, while a third left wrist surgery might be medically reasonable and necessary, it is not related to the July 22. 2017 work injury.

18. On October 27, 2020 Claimant underwent a Division Independent Medical Examination (DIME) with Thomas G. Fry, M.D. After performing a physical examination and reviewing Claimant's medical records, Dr. Fry concluded that Claimant had not reached MMI. He reasoned that, within a reasonable degree of medical certainty, Claimant had never completely healed from the July 22, 2017 work incident. In considering Claimant's medical records, Dr. Fry noted that on February 19, 2019 Claimant "relate[d] he was lifting a 30-40 pound rock" using two hands. In fact, Claimant held most of the weight with his right wrist. Dr. Fry remarked that the episode "was relatively minor for an individual of his activity level and specifically was a rock that was mostly lifted with the right hand and balanced by the left." The retaining wall event thus simply constituted an aggravation of an underlying problem and not a new injury. Accordingly, Dr. Fry determined that it was appropriate for Claimant to undergo the third left wrist surgery proposed by Dr. Youngblood.

19. Dr. Fall testified at the hearing in this matter. She maintained that, based on the medical records and objective findings of Dr. Trueblood, Claimant reached MMI on December 19, 2019 for his July 22, 2017 industrial injury. Specifically, the reassuring exam and the report reflecting a stable joint suggested Claimant had reached MMI for his

left upper extremity injury. Dr. Fall reasoned that there was no initial plan for a third surgery and Claimant had been released to full duty with no restrictions. She commented that Dr. Trueblood again assigned work restrictions after the retaining wall incident. Moreover, Dr. Fall reiterated that Dr. Trueblood was never asked whether his opinion regarding the proposed third surgery was caused or aggravated by Claimant's work on the retaining wall. Finally, she commented that Dr. Fry downplayed the retaining wall injury.

20. Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Fry that Claimant has not reached MMI as a result of his July 22, 2017 left wrist injury. Specifically, Respondents have not demonstrated that it is highly probable that Dr. Fry's MMI determination is incorrect. Initially, on July 22, 2017 Claimant injured his left wrist at work when he felt a pop and strain while lifting a 240 pound slip from a well. On November 2, 2017 Claimant underwent a left wrist arthroscopy with intra-articular debridement and repair of the TFCC. On May 17, 2019 Dr. Trueblood performed a second left wrist surgery. The procedure involved a repair of a full thickness tear of the peripheral rim of the TFCC. The surgery resolved Claimant's DRUJ instability.

21. Following the second left wrist surgery Claimant had no clinical signs or symptoms of instability in the left wrist. Claimant's work restrictions varied over the next several months. By November 8, 2019 Dr. Trueblood found no medical evidence of instability at the DRUJ and there were no mechanical impediments to Claimant's progress. He anticipated that Claimant would reach MMI one year from the time of the last surgery or May of 2020. On December 19, 2019 Dr. Trueblood discharged Claimant to full duty work without restrictions. A physical examination revealed a negative ulnar carpal compression test and a stable ECU tendon on wrist range of motion. Moreover, Claimant had a stable DRUJ on the piano-key test. Dr. Trueblood reiterated that he anticipated MMI in one year from the revision surgery or approximately May, 2020. However, on February 19, 2020 Claimant mentioned to Dr. Trueblood that he was building a retaining wall approximately two weeks earlier at home and noted a popping sensation in his left wrist. Dr. Trueblood determined that Claimant had gross instability at his DRUJ and would benefit from graft reconstruction of the distal radial ulnar joint. In response to a letter from Claimant's counsel regarding the surgical request, Dr. Trueblood determined that the work-related injury caused or accelerated the need for the proposed third surgery.

22. In his DIME opinion Dr. Fry concluded that Claimant had not reached MMI because he had never completely healed from the July 22, 2017 work incident. In considering Claimant's medical records, Dr. Fry noted that on February 19, 2019 Claimant "relate[d] he was lifting a 30-40 pound rock" using two hands. In fact, Claimant held most of the weight with his right wrist. Dr. Fry remarked that the episode "was relatively minor for an individual of his activity level and specifically was a rock that was mostly lifted with the right hand and balanced by the left." The retaining wall event simply constituted an aggravation of an underlying problem and not a new injury. Accordingly, Dr. Fry determined that it was appropriate for Claimant to undergo the third left wrist surgery proposed by Dr. Youngblood. In contrast, Dr. Fall reasoned that Claimant had rehabilitated after the second surgical repair and been released to activities as tolerated. Building the retaining wall constituted a subsequent event that caused the need for a third

surgery. Furthermore, Dr. Trueblood again assigned work restrictions after the retaining wall incident. Dr. Fall thus concluded that the proposed third left wrist surgery was not related to the July 22. 2017 work injury. Finally, Dr. Fall explained that Claimant reached MMI on December 19, 2019.

23. Although Dr. Fall concluded that Claimant has reached MMI as a result of his July 22, 2017 industrial injury, she failed to identify Dr. Fry's specific error or improper application of the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised)* (*AMA Guides*). Notably, the medical records of Dr. Trueblood reflect that Claimant was not expected to reach MMI until approximately one year from the revision surgery or approximately May, 2020. Furthermore, Dr. Trueblood noted that the work-related injury caused or accelerated the need for the distal radioulnar stabilization with tendon graft. Dr. Fry agreed that Claimant had not reached MMI and reasonably determined that he had never completely healed from the July 22, 2017 work incident. The opinion of ATP Dr. Trueblood and the medical records support Dr. Fry's DIME opinion and reflect that Claimant has not attained MMI. Dr. Fall's contrary determination is a mere difference of medical opinion that does not constitute clear and convincing evidence to overcome Dr. Fry's opinion. Accordingly, Respondents have not produced unmistakable evidence free from serious or substantial doubt that Dr. Fry's conclusion that Claimant has not reached MMI is incorrect.

24. Claimant has demonstrated that it is more probably true than not that the left wrist distal radioulnar stabilization surgery requested by ATP Dr. Trueblood, is reasonable, necessary and causally related to his July 22, 2017 industrial injury. Initially, on February 19, 2020 Claimant visited Dr. Trueblood for an evaluation. Claimant mentioned that he was building a retaining wall approximately two weeks earlier at home. He reported a popping sensation in the left wrist. He exhibited a [p]ositive piano-key test with gross instability." Dr. Trueblood remarked that Claimant had gross instability at his DRUJ and would benefit from graft reconstruction of the distal radial ulnar joint. In response to an inquiry from Claimant's counsel, Dr. Trueblood explained that the work-related injury caused or accelerated the need for the distal radioulnar stabilization with tendon graft.

25. Although Claimant's industrial injury may not have been the sole cause of his disability it was a significant, direct, and consequential factor in his need for a third left wrist surgery as recommended by Dr. Trueblood. Moreover, as DIME Dr. Fry explained, the retaining wall episode simply constituted the aggravation of an underlying problem as opposed to a new injury. Claimant's July 22, 2017 industrial injury left him in a weakened condition that produced the need for a third left wrist surgery.

26. Dr. Fall acknowledged that the proposed third left wrist surgery was reasonable and necessary, but it was not related to the July 22, 2017 event. Instead, building the retaining wall at home constituted a subsequent event that caused the need for a third surgery. Dr. Fall's opinion is thus predicated on a lack of causal connection between Claimant's original industrial injury and need for a third surgery. However, the medical records, in conjunction with the persuasive opinions of Drs. Trueblood and Fry, reveal that Claimant's need for a third left upper extremity surgery is causally related to

his July 22, 2017 work injury. The original injury left Claimant’s body in a weakened condition. The retaining wall incident aggravated his symptoms and caused the need for a third surgery. Accordingly, the left wrist distal radioulnar stabilization surgery requested by ATP Dr. Trueblood, is reasonable, necessary and causally related to Claimant’s July 22, 2017 industrial injury.

CONCLUSIONS OF LAW

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

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

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

Overcoming the DIME

4. MMI is primarily a medical determination involving a diagnosis of the claimant’s condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). MMI exists at the point in time when “any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition.” §8-40-201(11.5), C.R.S. A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant’s medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Powell v. Aurora Public Schools* WC 4-974-718-03 (ICAO, Mar. 15, 2017). A finding that the claimant needs additional medical treatment including surgery to improve his injury-related medical condition by reducing pain or improving function is inconsistent

with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management,* WC 4-356-512 (ICAO, May 20, 2004);

5. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAO, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

6. A DIME physician's opinions concerning MMI and impairment carry presumptive weight pursuant to §8-42-107(8)(b)(III), C.R.S.; *see Yeutter v. Industrial Claim Appeals Office*, No. 18CA0498 (Apr. 11, 2019) 2019 COA 53. The statute provides that "[t]he finding regarding [MMI] and permanent medical impairment of an independent medical examiner in a dispute arising under subparagraph (II) of this paragraph (b) may be overcome only by clear and convincing evidence." *Id.* Subparagraph (II) is limited to parties' disputes over "a determination by an authorized treating physician on the question of whether the injured worker has or has not reached [MMI]." §8-42-107(8)(b)(II). "Nowhere in the statute is a DIME's opinion as to the cause of a claimant's injury similarly imbued with presumptive weight." *See Yeutter*, 2019 COA 53 ¶ 18. Accordingly, a DIME physician's opinion carries presumptive weight only with respect to MMI and impairment. *Id.* at ¶ 21.

7. "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAO, Nov. 17, 2000).

8. As found, Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Fry that Claimant has not reached MMI as a result of his July 22, 2017 left wrist injury. Specifically, Respondents have not demonstrated that it is highly probable that Dr. Fry's MMI determination is incorrect. Initially, on July 22, 2017 Claimant injured his left wrist at work when he felt a pop and strain while lifting a 240 pound slip from a well. On November 2, 2017 Claimant underwent a left wrist arthroscopy with intra-articular debridement and repair of the TFCC. On May 17, 2019 Dr. Trueblood performed a second left wrist surgery. The procedure involved a

repair of a full thickness tear of the peripheral rim of the TFCC. The surgery resolved Claimant's DRUJ instability.

9. As found, following the second left wrist surgery Claimant had no clinical signs or symptoms of instability in the left wrist. Claimant's work restrictions varied over the next several months. By November 8, 2019 Dr. Trueblood found no medical evidence of instability at the DRUJ and there were no mechanical impediments to Claimant's progress. He anticipated that Claimant would reach MMI one year from the time of the last surgery or May of 2020. On December 19, 2019 Dr. Trueblood discharged Claimant to full duty work without restrictions. A physical examination revealed a negative ulnar carpal compression test and a stable ECU tendon on wrist range of motion. Moreover, Claimant had a stable DRUJ on the piano-key test. Dr. Trueblood reiterated that he anticipated MMI in one year from the revision surgery or approximately May, 2020. However, on February 19, 2020 Claimant mentioned to Dr. Trueblood that he was building a retaining wall approximately two weeks earlier at home and noted a popping sensation in his left wrist. Dr. Trueblood determined that Claimant had gross instability at his DRUJ and would benefit from graft reconstruction of the distal radial ulnar joint. In response to a letter from Claimant's counsel regarding the surgical request, Dr. Trueblood determined that the work-related injury caused or accelerated the need for the proposed third surgery.

10. As found, in his DIME opinion Dr. Fry concluded that Claimant had not reached MMI because he had never completely healed from the July 22, 2017 work incident. In considering Claimant's medical records, Dr. Fry noted that on February 19, 2019 Claimant "relate[d] he was lifting a 30-40 pound rock" using two hands. In fact, Claimant held most of the weight with his right wrist. Dr. Fry remarked that the episode "was relatively minor for an individual of his activity level and specifically was a rock that was mostly lifted with the right hand and balanced by the left." The retaining wall event simply constituted an aggravation of an underlying problem and not a new injury. Accordingly, Dr. Fry determined that it was appropriate for Claimant to undergo the third left wrist surgery proposed by Dr. Youngblood. In contrast, Dr. Fall reasoned that Claimant had rehabilitated after the second surgical repair and been released to activities as tolerated. Building the retaining wall constituted a subsequent event that caused the need for a third surgery. Furthermore, Dr. Trueblood again assigned work restrictions after the retaining wall incident. Dr. Fall thus concluded that the proposed third left wrist surgery was not related to the July 22. 2017 work injury. Finally, Dr. Fall explained that Claimant reached MMI on December 19, 2019.

11. As found, although Dr. Fall concluded that Claimant has reached MMI as a result of his July 22, 2017 industrial injury, she failed to identify Dr. Fry's specific error or improper application of the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised)* (*AMA Guides*). Notably, the medical records of Dr. Trueblood reflect that Claimant was not expected to reach MMI until approximately one year from the revision surgery or approximately May, 2020. Furthermore, Dr. Trueblood noted that the work-related injury caused or accelerated the need for the distal radioulnar stabilization with tendon graft. Dr. Fry agreed that Claimant had not reached MMI and reasonably determined that he had never completely healed from the July 22, 2017 work

incident. The opinion of ATP Dr. Trueblood and the medical records support Dr. Fry's DIME opinion and reflect that Claimant has not attained MMI. Dr. Fall's contrary determination is a mere difference of medical opinion that does not constitute clear and convincing evidence to overcome Dr. Fry's opinion. Accordingly, Respondents have not produced unmistakable evidence free from serious or substantial doubt that Dr. Fry's conclusion that Claimant has not reached MMI is incorrect.

Proposed Left Wrist Surgery

12. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The question of whether a particular disability is the result of the natural progression of a preexisting condition, or the subsequent aggravation or acceleration of that condition, is itself a question of fact. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Finally, the determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

13. Section 8-41-301(1)(c), C.R.S. requires that an injury be "proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment." Thus, the claimant is required to prove a direct causal relationship between the injury and the disability and need for treatment. However, the industrial injury need not be the sole cause of the disability if the injury is a significant, direct, and consequential factor in the disability. *See Subsequent Injury Fund v. Industrial Claim Appeals Office,* 131 P.3d 1224 (Colo. App. 2006); *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001). Thus, if an industrial injury leaves the body in a weakened condition and the weakened condition proximately causes a new injury, the new injury is a compensable consequence of the original industrial injury. *Price Mine Service, Inc. v. Industrial Claim Appeals Office,* 64 P.3d 936 (Colo. App. 2003); *Lanuto v. Amerigas Propane, Inc.,* WC 4-818-912, (ICAO, July 20, 2011). The preceding principle constitutes the "chain of causation analysis" and provides that a subsequent injury is compensable if the "weakened condition played a causative role in the subsequent injury." *In Re Fessler*, WC 4-654-034 (ICAO, Dec. 19, 2007); *see Martinez v. City of Colorado Springs*, WC 5-073-295 (ICAO, Sept. 12, 2019) (an infection that resulted from claimant's weakened condition was compensable because it was a natural, although not necessarily a direct, result of the work-related injury).

14. As found, Claimant has demonstrated by a preponderance of the evidence that the left wrist distal radioulnar stabilization surgery requested by ATP Dr. Trueblood, is reasonable, necessary and causally related to his July 22, 2017 industrial injury. Initially, on February 19, 2020 Claimant visited Dr. Trueblood for an evaluation. Claimant

mentioned that he was building a retaining wall approximately two weeks earlier at home. He reported a popping sensation in the left wrist. He exhibited a [p]ositive piano-key test with gross instability." Dr. Trueblood remarked that Claimant had gross instability at his DRUJ and would benefit from graft reconstruction of the distal radial ulnar joint. In response to an inquiry from Claimant's counsel, Dr. Trueblood explained that the work-related injury caused or accelerated the need for the distal radioulnar stabilization with tendon graft.

15. As found, although Claimant's industrial injury may not have been the sole cause of his disability it was a significant, direct, and consequential factor in his need for a third left wrist surgery as recommended by Dr. Trueblood. Moreover, as DIME Dr. Fry explained, the retaining wall episode simply constituted the aggravation of an underlying problem as opposed to a new injury. Claimant's July 22, 2017 industrial injury left him in a weakened condition that produced the need for a third left wrist surgery.

16. As found, Dr. Fall acknowledged that the proposed third left wrist surgery was reasonable and necessary, but it was not related to the July 22, 2017 event. Instead, building the retaining wall at home constituted a subsequent event that caused the need for a third surgery. Dr. Fall's opinion is thus predicated on a lack of causal connection between Claimant's original industrial injury and need for a third surgery. However, the medical records, in conjunction with the persuasive opinions of Drs. Trueblood and Fry, reveal that Claimant's need for a third left upper extremity surgery is causally related to his July 22, 2017 work injury. The original injury left Claimant's body in a weakened condition. The retaining wall incident aggravated his symptoms and caused the need for a third surgery. Accordingly, the left wrist distal radioulnar stabilization surgery requested by ATP Dr. Trueblood, is reasonable, necessary and causally related to Claimant's July 22, 2017 industrial injury.

ORDER

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

1. Respondents have failed to overcome the DIME opinion of Dr. Fry. Claimant has not reached MMI for his July 22, 2017 left wrist injury.

2. Claimant's request for a left wrist distal radioulnar stabilization surgery requested by ATP Dr. Trueblood is granted.

3. Any issues not resolved in this order are reserved for future determination.

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

DATED: April 16, 2021.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-096-820-002

ISSUE

1. Whether Claimant established by clear and convincing evidence that the Division Independent Medical Examination (DIME) opinion of Jade Dillon, M.D., that Claimant reached maximum medical improvement (MMI) from her December 23, 2018 work injury is incorrect.

2. Whether Claimant established by clear and convincing evidence that the DIME opinion Dr. Dillon, that Claimant has no whole person permanent impairment related to her December 23, 2018 work injury is incorrect.

3. Whether Claimant established by a preponderance of the evidence that treatment of her left shoulder is reasonably necessary to cure or relieve the effects of her work injury.

4. Whether Claimant has proven by a preponderance of the evidence an entitlement to additional temporary disability benefits.

FINDINGS OF FACT

1. Claimant is a 53-year-old woman who was employed by Employer as a bus driver.

2. On December 23, 2018, Claimant was the restrained driver of a shuttle bus that was hit on the front driver's side by a pickup truck in the course of her employment with Employer. The collision broke a window in the driver's compartment of the bus and broke off the driver's side rear-view mirror of the bus. At the time of the collision, Claimant had both hands on the steering wheel of the bus and was wearing a Iap belt. Video of the incident demonstrates that Claimant did not strike any object on the interior of the bus, was not violently jerked in any direction and neither her head nor her shoulder moved significantly as a result of the collision. The bus did not stop abruptly as a result of the collision, and Claimant was able to drive the bus to the roadside and park the bus. (Exs. M-O).

3. Following the collision, Claimant was ambulatory at the scene and was evaluated by paramedics. Claimant complained of left lateral neck pain and requested to be placed in a cervical collar. Claimant was assessed by paramedics as having an injury of the neck and was transported by ambulance to UC Health for evaluation. (Ex. 8).

4. At UC Health on December 23, 2018, Claimant was evaluated in the emergency department and diagnosed with a neck strain. Claimant reported no areas of injury, other than her neck. Claimant was discharged with instructions to take ibuprofen and acetaminophen as needed and to follow up with occupational health. (Ex. 9).

5. On December 24, 2018, Claimant began a course of treatment and assessment by Darla Draper, M.D., at Concentra. Initially, Claimant reported that she had sustained injuries to her neck and back and was experiencing headaches. Dr. Draper diagnosed Claimant with cervical strain, thoracic myofascial strain, head contusion (although Claimant did not report striking her head) and post-traumatic headaches. Claimant was referred for physical therapy and started on metaxalone (a muscle relaxant). Dr. Draper assigned work restrictions to include lifting, pushing, and pulling up to 10 pounds, and restricted Claimant from driving a company vehicle due to functional limitations. Dr. Draper indicated Claimant could work her entire shift. She was referred for physical therapy and provided a prescription for metaxalone (a muscle relaxant). (Ex. D).

6. On December 24, 2018, Claimant initiated physical therapy at Concentra. Claimant reported symptoms in her neck and across her bilateral shoulders and cervical paraspinal muscles. The physical therapy evaluation included evaluation of Claimant's scapular position and cervical range of motion. (Ex. 10).

7. On December 31, 2018, Claimant returned to Dr. Draper and reported that her cervical/thoracic pain had increased with prolonged sitting and writing on a clipboard at work. Claimant reported that her headaches were improved and were now minimal. Dr. Draper's diagnosis was unchanged, and she referred Claimant for massage therapy. Claimant's work restriction were adjusted to allow Claimant to work a maximum of six hours per day. (Ex. D).

8. Claimant returned for physical therapy on December 28, 2018, reporting that she had no overall improvement in her symptoms. At physical therapy, in addition to cervical therapy, Claimant was also instructed to perform therapy directed at her scapula, including prone scapular retraction (i.e., "prone scap retraxn") as part of a home exercise program. (The physical therapy records designate exercises performed in the clinic with "CL;" exercises performed at home with "HE" and exercises performed both in the clinic and at home as "CL/HE.") (Ex. 10).

9. On January 3, 2019, Claimant returned to physical therapy for her fourth visit. Claimant presented with pain in the left shoulder and indicated she had not been performing exercises. Claimant received therapy for her cervical spine and shoulder area, including exercises performed in the clinic for her shoulder. (Ex. 10).

10. On January 8, 2019, Claimant returned to Concentra and saw physician assistant Rammohan Naidu, PA-C. Claimant reported having left-sided neck pain with radiation into the left shoulder and arm. Cervical x-rays were negative. PA Naidu again referred Claimant for physical therapy and instructed Claimant to return to the clinic in two weeks. PA Naidu adjusted Claimant's work restrictions to return to full-time duty (10 hours per day).

11. Claimant returned to Concentra on January 11, 2019 for an unscheduled visit with Dr. Draper. Claimant reported increasing pain with increased work hours, and Dr. Draper re-adjusted her work restrictions to 6 hours per day. Claimant again reported neck and upper back pain, left greater than right and denied headaches. Cervical x-rays were again

negative. Dr. Draper noted full cervical range of motion, with pain on bending, and limited thoracic range of motion in all planes. (Ex. D).

12. On January 11, 2019, Claimant returned to physical therapy reporting increased pain in her left shoulder and bilateral sides of the neck due to working 7 hours prior to therapy. Claimant received scapulothoracic soft tissue mobilization, and performed shoulder exercises, including shoulder shrug/arm elevation and shoulder shrugs with weight, and additional shoulder exercises "for proper shoulder retraction". (Ex. 10).

13. On January 28, 2019, Claimant again returned to Dr. Draper. At that time, Claimant reporting being much better with only infrequent "little" headaches. She reported tightness of the left upper chest, pain in the left upper back, and posterior neck pain only when flexing her neck to write. Dr. Draper's cervical examination was essentially normal, with no tenderness and no muscle spasms noted. Thoracic spine examination showed tenderness on the left greater than right, with normal motor tone. (Ex. D).

14. On February 1, 2019, Claimant returned to Dr. Draper for an unscheduled visit. Claimant reported experiencing right upper back/shoulder pain radiating into her right arm that began following physical therapy and massage therapy the previous day. Claimant reported tingling in both extremities, but denied numbness. At the time of her visit, Claimant indicated she was primarily experiencing pain in the left neck and upper back, with "a little pain" in the left upper back/shoulder. Dr. Draper's examination of Claimant's upper extremities was essentially normal. Examination of Claimant's cervical spine was normal, without tenderness or spasm, but with mildly decreased range of motion on lateral bend/rotation to the left. Examination of the cervical spine was normal. (Ex. D).

15. On February 13, 2019, Claimant saw Dr. Draper in follow up. Claimant reported sometimes getting numbness and tingling from the upper back down the arm and into her fingers, left more often than right. Claimant reported that she had started feeling depressed two weeks earlier. Dr. Draper recommended a psychological evaluation for evaluation of possible adjustment disorder and also referred Claimant for a physiatry evaluation. (Ex. D).

16. On February 20, 2019, Claimant saw John Aschberger, M.D., for a physical medicine evaluation. Claimant reported intermittent headaches and symptoms of numbness in her right arm and a tingling sensation in her left hand, but denied radicular symptoms. Dr. Aschberger evaluated Claimant's shoulders noting full range of motion bilaterally with equivocal impingement testing on the left with mild irritation, and tenderness at the anterior shoulder bilaterally. He found mild tightness to palpation at the trapezius and no distinct trigger points. Cervical range of motion was full. Dr. Aschberger's assessment was mild findings suggesting irritation at the shoulders but with full range of motion and no deficits identified. He recommended additional physical therapy to address poor posture and irritation and additional massage therapy. He noted that Claimant's findings were "mild" and did not anticipate any significant residual or impairment. (Ex. D).

17. On February 22, 2019, Claimant returned to Dr. Draper reporting intermittent tingling of bilateral fingers, and headaches three times per week. Claimant further reported that her symptoms had not improved with physical therapy, massage therapy or medications. Physical examination of Claimant's cervical spine and thoracic spine were normal. Dr. Draper also noted Claimant cried frequently and diagnosed her with adjustment disorder. Dr. Draper also ordered EMG testing to evaluate Claimant's paresthesia symptoms and a cervical spine MRI. (Ex. D).

18. On February 26, 2019, Claimant saw Ron Carbaugh, Psy.D., for a psychological assessment on referral from Dr. Draper. Claimant reported that the treatment she had received to date, including physical therapy, massage therapy, and a home exercise had provided no benefit to her. Dr. Carbaugh opined that psychological or other non-physiologic factors were impacting Claimant's symptom perception and response to care. He diagnosed Claimant with adjustment disorder with anxiety and depressed mood. He recommended six to eight psychological sessions to provide Claimant with cognitive and behavioral coping strategies. (Ex. D).

19. On March 1, 2019, Claimant saw Dr. Draper for an unscheduled visit. Claimant reported that she woke one week earlier with symptoms in her left middle finger and neck. Dr. Draper indicated that Claimant's left finger symptoms were not work related. Claimant's other complaints and symptoms were unchanged. Claimant indicated that she was not going to physical therapy as directed by Dr. Aschbacher and did not want to return to massage therapy indicating that the therapies increased her pain. Claimant reported that her pain was also increased by her modified work duties which included moving papers from one side of her body to the other to put paper into a shredder. Dr. Draper adjusted Claimant's work restrictions to include no lifting, pushing, or pulling more than 5 pounds occasionally, no bending or twisting and working no more than 4 hours per day. Physical examination of Claimant's cervical and thoracic spine was normal, with the exception of very mild decreased lateral rotation and bending to the right of the cervical spine. (Ex. D).

20. On March 5, 2019, Claimant returned to Dr. Aschbacher for a follow up visit. On examination, Dr. Aschbacher noted that Claimant limited passive motion at the shoulder, although eventually full motion was obtained. Active abduction and flection were restricted to 90 degrees. Impingement testing resulted in increased pain "but not well localized to the shoulder." He noted that Claimant had pain and provocative testing at the shoulder, but her examination was nonspecific. He indicated that if there was continued localized irritation, she would be a candidate to consider shoulder MRI, but it was not warranted based on his examination. Dr. Aschbacher assessed Claimant has having myofascial pain affecting the upper back. (Ex. D).

21. On March 8, 2019, Claimant saw Dr. Draper. Claimant reported that she was working with restrictions but not tolerating writing due to neck pain, and riding as a passenger in a bus. Dr. Draper again adjusted Claimant's work restrictions to include additional restrictions that she could not be a passenger in a company vehicle, and to limit writing to 10 minutes with a 3-minute break from that activity. (Ex. D).

22. On March 10, 2019, Claimant was seen at the St. Joseph Hospital emergency room for complaints of neck pain and headaches, with a new onset of bilateral upper extremity paresthesias. On examination, the ER physician, found Claimant to have normal range of motion of the neck with diffuse tenderness of the paraspinal musculature primarily in the upper neck region, with midline tenderness at C4. A cervical CT was performed and was negative. (Ex. I).

23. On March 11, 2019, Claimant underwent an electrodiagnostic evaluation with nerve conduction studies and needle EMG, performed by Allison Fall, M.D. Dr. Fall concluded that the studies were unremarkable, and that Claimant's appropriate diagnosis was myofascial pain of the upper back. (Ex. D).

24. Claimant underwent psychological therapy sessions with Dr. Carbaugh on March 12, 2019, March 20, 2019, April 10, 2019, May 8, 2019, June 4, 2019, July 3, 2019, and July 30, 2019. (Ex. D). Dr. Carbaugh's diagnosis throughout remained adjustment disorder with anxiety and depressed mood. (Ex. D).

25. On March 22, 2019, Claimant had a cervical MRI performed at Health Images, ordered by Dr. Draper. The MRI was interpreted as showing mild degenerative changes without central canal stenosis at any level and without significant neural foraminal narrowing. (Ex. L).

26. On March 29, 2019, Claimant saw Dr. Draper. Claimant noted that her physical symptoms were unchanged although she was "emotionally improved." She continued to report pain in her upper back and neck, increased with prolonged flexion of the neck. Claimant's pain diagram for this visit included diffuse pain anteriorly from the left side of the neck to her waist, and from the top of her head to her back posteriorly. Claimant now reported daily occipital headaches, and numbness and tingling in the fourth and fifth digits of her left hand. Dr. Draper's physical examination was unchanged from the previous visits. Claimant requested a change again in her work restrictions. Dr. Draper modified Claimant's work restrictions to include limiting writing to 10 minutes at a time with a 5-minute break from the activity. (Ex. D).

27. On April 5, 2019, Claimant returned again to Dr. Draper for an unscheduled visit. Claimant complained of pain in the back of the neck and upper back after physical therapy taped her left shoulder, and requested pain medication. Dr. Draper prescribed Norco. Claimant also began crying when discussing work. Dr. Draper recommended a neuropsychological assessment with Dr. Reilly. (Ex. D).

28. On April 8, 2019, Claimant saw Dr. Fall for a physiatry follow-up appointment, requesting pain medication. Dr. Fall's assessment was myofascial pain of the upper back. Dr. Fall prescribed a Lidoderm patch and Lunesta for sleep, and referred Claimant for chiropractic care. (Ex. D).

29. On April 12, 2019, Claimant saw Don Aspegren, D.C., for a chiropractic consultation. Dr. Aspegren noted positive cervical compression test and cervical normal range of motion with achiness in the cervical spine. Thoracic and lumbar range of motion

were normal, with thoracic stiffness in extremes of flexion. He diagnosed Claimant with myofascial pain, upper back, and performed chiropractic manipulations. Claimant returned to Dr. Aspegren for additional chiropractic treatment on April 17, 2019, and May 3, 2019, completing three of six recommended visits. (Ex. D). At Claimant's May 3, 2019 visit, she reported improvement in her cervical and upper thoracic symptoms, but that "activities such as going to work will flare her symptoms." (Ex. D).

30. On April 19, 2019, Claimant saw Dr. Draper. At that time, she reported taking only Lunesta for sleep and the lidocaine patch prescribed by Dr. Fall. Claimant reported that she started having left-sided chest pain 1 ½ months after her injury, which was now going toward the right side. She indicated that the pressure increased with use of her arms, but not with walking. Claimant reported an ER visit five days prior for burning of the left shoulder and upper arm, but apparently was informed it was not cardiac related. Claimant reported the ER provided muscle relaxers which claimant took for two days. Dr. Draper opined that Claimant's chest pressure was most likely not work-related. (Ex. D).

31. On April 26, 2019, Claimant saw Stephen A. Moe, M.D., a psychiatrist, on referral from Dr. Draper. Claimant reported her symptoms were localized in her neck and that her pain increased progressively with activity, such as work. Although Claimant has previously med with Dr. Carbaugh on at least four occasions, she reported to Dr. Moe that she had not met with a psychotherapist. Dr. Moe opined that Claimant had developed symptoms of depression and anxiety after her December 23, 2018 accident, which were not severe, but adversely affecting her functioning and sense of well-being. He diagnosed Claimant with adjustment disorder with depression and anxiety, and prescribed Cymbalta. Cymbalta was shortly discontinued and substituted with Celexa due to Claimant's report of side-effects. (Ex. F).

32. On April 30, 2019, Claimant saw Kevin Reilly, Psy.D., for a psychological consultation on referral from Dr. Draper. At that point in time, Claimant was performing office work 4 hours per day for Employer. Claimant reported pain in her neck and across her shoulders. Dr. Reilly indicated Claimant was referred for a neuropsychological assessment, but was not reporting any cognitive difficulties, only issues with chronic pain and disturbance of mood. Dr. Reilly recommended adding behavior medicine treatment and biofeedback for management of Claimant's pain complaints. He diagnosed Claimant with somatic symptom disorder with predominant pain and adjustment disorder with mixed anxious and depressed mood. After learning Claimant was also seeing Dr. Carbaugh, Dr. Reilly terminated his care as redundant. (Ex. G).

33. On May 13, 2019, Claimant returned to Dr. Moe and reported side-effects from both Cymbalta and Celexa. Dr. Moe prescribed Buspirone a substitute medication for anxiety and depression. (Ex. F).

34. On May 15, 2019, Claimant saw Dr. Aschberger. Claimant initially reported a low pain level, but upon further questioning by Dr. Aschberger reported no pain at the time of her examination. On examination, Dr. Aschberger found Claimant to have normal cervical and thoracic contours, full cervical range of motion and full shoulder range of motion. Claimant tolerated palpation without complaints of pain. Dr. Aschberger characterized

Claimant's examination as "negative." Dr. Aschberger recommended a work conditioning program and that Claimant increase her work hours. (Ex. D).

35. On May 23, 2019, Claimant returned physical therapy. Records indicate that as of May 23, 2019, Claimant had attended 25 physical therapy appointments. Claimant was educated on sleeping position and possible causes of shoulder pain and tingling in her fingers. (Ex. 10).

36. Beginning on May 24, 2019, Claimant began a course of biofeedback therapy with William Beaver, MA, LPC. After five sessions, Claimant made no progress and therapy was discontinued. Claimant was discharged from biofeedback on June 14, 2019. (Ex. H).

37. Claimant returned to Dr. Draper on May 29, 2019 for a follow up examination. Dr. Draper's physical examination of Claimant's left shoulder showed full range of motion without pain, no tenderness and normal to palpation. Examination of Claimant's cervical spine was normal, with no tenderness, no spasms and full range of motion. Examination of the thoracic spine was normal with the exception of mild decreased lateral rotation bilaterally. Dr. Draper adjusted Claimant's work restrictions to include a maximum of two hours per day of writing and computer work. (Ex. D).

38. On June 4, 2019, Claimant returned to Dr. Moe, reporting that her neck pain had not improved and requesting medication for sleep. Dr. Moe noted that Claimant had a generally positive affect and did not appear depressed, and prescribed Ambien. (Ex. F).

39. On June 5, 2019, Claimant saw Dr. Aschberger. On examination, he noted full cervical range of motion, full passive shoulder motion in all ranges, and no localized tenderness in the trapezial or parascapular musculature, with strength intact. He assessed Claimant has having complaints of upper back and cervical myofascial irritation. Dr. Aschberger opined that he saw nothing to indicate a permanent impairment. Dr. Aschberger released Claimant from his care at that time. (Ex. D).

40. On June 19, 2019, Claimant saw Dr. Draper. Claimant reported no change in symptoms or pain. Dr. Draper's examination of Claimant's left shoulder was normal, with no tenderness, palpation normal and full range of motion without pain. Cervical spine and thoracic examination results were unchanged from Dr. Draper's May 29, 2019 visit. (Ex. D).

41. On July 10, 2019, Claimant returned to Dr. Draper. Again, Claimant reported no change in symptoms or pain, with intermittent numbness and tingling of the distal digits in both hands. Dr. Draper examined Claimant's bilateral shoulders and noted no tenderness and full range of motion without pain. Examination of the cervical spine and thoracic spine was unchanged from Dr. Draper's May 29, 2019 visit. (Ex. D).

42. On July 16, 2019, Claimant saw Dr. Moe for a routine follow-up. She reported that Buspirone had been only minimally helpful for anxiety, and that her neck pain continued. She reported that she had undergone a trial of biofeedback that was not tolerated well and was discontinued. Dr. Moe's impression was adjustment disorder "possibly with an

undercurrent of histrionic traits as suggested by her tendency to use hyperbole, in her emotional reactivity and in her exquisite tendency to develop physical symptoms in response to medications, biofeedback, other factors." Dr. Moe switched Claimant's medication to Prozac. (Ex. F).

43. On July 30, 2019, Claimant saw Dr. Carbaugh. Claimant requested pain medications, which Dr. Carbaugh (as a psychologist) could not provide. Dr. Carbaugh noted that Claimant's subjective reports of pain "would be considered entirely inconsistent with her pain behavior. She moves her arms freely when discussing issues. She clearly is catastrophizing regarding her pain and her prognosis is poor for the assumption of more self[-]responsibility for symptom management." Dr. Carbaugh opined that it would be appropriate for Claimant to have four to six sessions of psychological counseling as maintenance care over the following six months. (Ex. D).

44. On August 14, 2019, Claimant saw Paula Pook, M.D., at Concentra. Dr. Pook examined Claimant's shoulders and noted no tenderness, full range of motion, normal strength, and no signs of impingement. Examination of the cervical and thoracic spine was normal, with full range of motion noted for both. Dr. Pook requested an MRI of Claimant's cervical spine and noted that if the MRI were negative Claimant's case would be closed as there would be nothing to treat. (Ex. D).

45. On August 19, 2019, Claimant underwent an independent medical examination (IME) performed by Lawrence Lesnak, M.D., at Respondents' request. Claimant reported no improvement in her symptoms and no benefit from any of the treatment she had received to date. Claimant reported her then-current symptoms included left greater than right posterior neck and bilateral suprascapular pain and discomfort. In addition, she noted daily tingling sensations in her fingers bilaterally. Dr. Lesnak reviewed Claimant's medical records and performed a physical examination. On examination, Dr. Lesnak found Claimant had full range of motion in her cervical spine and thoracic spine in all planes without reproduction of symptoms. Cervical provocative testing was also negative. In addition, Dr. Lesnak found Claimant had full active and passive range of motion for each shoulder. Rotator cuff impingement signs were negative bilaterally. Dr. Lesnak noted that Claimant had diffuse tenderness to palpation of her cervical paraspinal and suprascapular musculature, without trigger points or spasms. He characterized his examination as "completely normal." (Ex. B).

46. Based on his examination and record review, Dr. Lesnak opined that Claimant possibly sustained a mild cervical/trapezius strain/sprain as a result of her December 23, 2019 accident. He further opined that Claimant had no then-current clinical evidence of cervical or thoracic radiculitis, radiculopathies or myelopathy, and no evidence of symptomatic intrinsic shoulder joint pathology or rotator cuff impingement signs. He characterized Claimant as having "ongoing subjective complaints without any reproducible objective findings whatsoever." He further opined that Claimant also had "probably a significant degree of somatization/functional overlay, consistent with a symptom somatic disorder/somatoform disorder." He opined that if Claimant had sustained a soft tissue injury to her cervical/trapezial musculature, it "would have

completely resolved within several weeks to no more than two months following the occupational incident of 12/23/2018."

47. With respect to psychological issues, Dr. Lesnak opined that "it is possible that [Claimant] may have had a brief symptomatic adjustment disorder as a result of the occupational incident; however, this is not a permanent condition whatsoever and most likely not even symptomatic currently." He later stated that "the most accurate current psychologic/diagnosis would be that of a symptom somatic disorder/somatoform disorder." Dr. Lesnak opined that Claimant was at MMI, and that Claimant would not qualify for a permanent impairment rating. (Ex. B).

48. On August 23, 2019, Claimant returned to Concentra for an unscheduled visit seeking a refill of Flexeril. Dr. Draper noted that Claimant was resistant to any change in her work restrictions and her symptoms were unchanged except for stiffness in her neck. Dr. Draper cancelled the scheduled MRI because a prior MRI was performed on March 22, 2019. Dr. Draper noted that Claimant was close to MMI. (Ex. D).

49. On August 27, 2019, Claimant saw Dr. Moe in follow-up and reported a very positive response to Prozac, indicating she was not longer becoming irritable or angry with others and that she felt much calmer. Claimant reported no change in her neck symptoms and indicated her physical condition prevented her from working. Dr. Moe reiterated his diagnosis of adjustment disorder and noted Claimant was to follow up in two months and "likely to be at psychiatric MMI, and appropriate for a mental impairment rating, at that time." (Ex. F).

50. On September 13, 2019, Claimant returned to Dr. Pook. Dr. Pook's examination of Claimant's cervical and thoracic spine were normal, without tenderness or restrictions in range of motion. Dr. Pook placed Claimant at MMI and noted that she was ready for discharge. She completed a Physician's Report of Worker's Compensation Injury indicating that Claimant was able to return to work at full duty on September 13, 2019 without restrictions, and discharged Claimant from care, noting no need for further medical, psychiatric, or psychological care. Dr. Pook placed Claimant at MMI with no permanent impairment rating. (Ex. D).

51. Claimant returned to Dr. Reilly on September 17, 2019 for psychological care because Dr. Carbaugh had retired. Claimant reported her pain was so much that she could not return to work activities. Dr. Reilly reiterated his previous diagnosis of somatic symptom disorder with predominant pain and adjustment disorder with mixed anxious and depressed mood. (Ex. G).

52. On October 1, 2019, Claimant filed an application for Division Independent Medical Examination (DIME), In the application, Claimant requested that the DIME physician evaluate Claimant's right and left hand, left wrist, left elbow, and right and left shoulder, cervical and thoracic spine, and her psychological condition. (Ex. 15).

53. On February 4, 2020, J.E. Dillon, M.D., performed the requested DIME examination. In the "scope of exam" portion of the DIME report, Dr. Dillon noted that the

exam would “address issues with the cervical spine and upper extremities related to the occupational injury in question, including neurological issues, and also psychiatric issues that might have arisen from this occupational injury. This is consistent with what is listed on the Application for a Division Independent Medical Examination.” (Ex. A).

54. Dr. Dillon documented a physical examination of Claimant’s cervical region, and upper extremities. The ALJ infers that Dr. Dillon’s reference to Claimant’s “upper extremities” in her report encompassed the Claimant’s hands, wrist, elbow, and shoulders. Based on her examination and review of records, Dr. Dillon concluded that Claimant sustained cervical strain, myofascial only. She noted that “significant persistent symptoms well out of proportion to underlying pathology. Cervical strain is considered to be an injury [that] proceeds to resolution with time and no other injury has been identified. With symptoms only in the absence of any ratable underlying condition this does not qualify for an impairment rating.” Dr. Dillon determined that Claimant had no ratable condition of her cervical spine or any other ratable condition. She opined that Claimant reached MMI on August 21, 2019. In explaining her rationale, Dr. Dillon noted that “he Guides are clear that symptoms only with no associated underlying pathology that reasonably explains those symptoms does not constitute a ratable condition.” S

55. Dr. Dillon also conducted a psychological assessment of Claimant. In doing so, she reviewed the records from Drs. Carbaugh, Moe and Reilly. She diagnosed Claimant with somatic disorder/somatoform disorder with underlying histrionic personality disorder, and determined that the diagnosis was unrelated to her occupational injury and did not constitute a ratable condition. She also found that Claimant possibly had a component of adjustment disorder related to her injury and symptoms, that may have been an issue early in her treatment. However, she did not “consider a persistent adjustment disorder related to a condition for which there was no underlying pathology to explain her persistent symptoms.” She opined that Claimant has no mental, psychiatric, or psychological impairment. Dr. Dillon’s opinion demonstrates that she arrived at the conclusion that Claimant had a somatic disorder/somatoform disorder because there was no underlying pathology to explain her symptoms.

56. On March 11, 2019, Claimant underwent and electrodiagnostic evaluation with nerve conduction studies and needle EMG, performed by Allison Fall, M.D. Dr. Fall concluded that the studies were unremarkable, and that Claimant’s appropriate diagnosis was myofascial pain of the upper back. (Ex. 10).

57. On May 1, 2020, an MRI of Claimant’s left shoulder was performed at the request of Claimant’s primary care provider, Carlos Rodriguez, M.D. Dr. Rodriguez is not an authorized treating provider, and no records or reports from Dr. Rodriguez were offered or admitted into evidence. The MRI was interpreted as showing mild tendinosis with mild undersurface and interstitial tearing of the supraspinatus and infraspinatus tendons, with no full-thickness rotator cuff tear identified. The MRI also showed mild hypertrophic changes of the acromioclavicular joint with mild subacromial subdeltoid bursitis, and mild thinning of the articular cartilage overlying the glenoid and humeral head. (Ex. L). None of Claimant’s treating providers have opined that the findings on Claimant’s May 1, 2020 MRI were causally related to the December 23, 2018 motor vehicle accident.

58. David Yamamoto, M.D., was admitted to testify as an expert in occupational medicine and family medicine. At Claimant's request, Dr. Yamamoto performed an independent medical examination on July 28, 2020, and issued a report of his findings and opinions related to that IME. Dr. Yamamoto's IME included a physical examination of Claimant and a review of Claimant's medical records, including Dr. Dillon's DIME report, and Dr. Lesnak's August 21, 2019 report.

59. Dr. Yamamoto's examination of Claimant's left shoulder showed left shoulder anterior tenderness with positive impingement, and range of motion measurements. His examination of the cervical spine demonstrated tenderness in the midline, primarily over the posterolateral aspect with tenderness extending into the left trapezius. He also performed range of motion measurements of Claimant's cervical spine. Based on his examination and review of records, Dr. Yamamoto diagnosed Claimant with "1. Cervical strain/mechanical neck pain with ongoing symptoms with greater than 6 months of documented pain and rigidity with or without muscle spasms, associated with none to minimal degenerative changes on structural tests.; 2. Left shoulder partial rotator cuff tear with ongoing pain and decreased range of motion; 3. Anxiety and depression secondary to the work-related injury of 12/23/2018." (Ex. C).

60. Dr. Yamamoto opined that Claimant qualified for a Table 53 impairment for the cervical spine, and also has a left shoulder injury which he characterized as "not yet been investigated." In support of his opinion that Claimant had an as-yet uninvestigated left shoulder injury, Dr. Yamamoto noted that Claimant's pain diagrams, including those from December 31, 2018 and February 1, 2019 showed left shoulder involvement. At hearing, Dr. Yamamoto testified that Claimant's May 1, 2020 MRI demonstrated pathology in Claimant's left shoulder that her treating providers "just missed." With respect to Claimant's qualification for a Table 53 impairment rating, Dr. Yamamoto testified that Claimant had tenderness and loss of range of motion which he characterized as objective signs of injury.

61. Dr. Yamamoto also evaluated Claimant for a psychiatric impairment and assigned Claimant a 5% whole person impairment for anxiety and depression. He assigned a 4% whole person impairment based on Table 53 (II)(B) of the AMA Guide to the Evaluation of Permanent Impairment, and 7% impairment for loss of cervical range of motion, which combined for an 11% whole person impairment. For Claimant's left shoulder, he assigned a 10% range of motion impairment, which converts to a 6% whole person impairment. The cervical, shoulder and psychiatric impairment ratings assigned by Dr. Yamamoto equal a 20% whole person impairment.

62. Dr. Yamamoto opined that Claimant is not at MMI and that she had experienced a worsening of her condition. He opined that Claimant requires a functional capacity evaluation and that she "clearly cannot work without restrictions as a result of her 12/23/2018 injury." Further, recommended that Claimant undergo an orthopedic evaluation of the left shoulder and "may require surgery." He also recommended that Claimant be reevaluated by Dr. Moe.

63. On September 22, 2020, Dr. Lesnak issued an addendum to his August 21, 2019 IME report after reviewing additional records, including Dr. Dillon's DIME report, Dr. Yamamoto's IME report and Claimant's May 1, 2020 left shoulder MRI. Dr. Lesnak was admitted to testify as an expert in physical medicine and rehabilitation and occupational medicine. Dr. Lesnak reviewed Claimant's May 1, 2020 left shoulder MRI films and opined that the MRI showed mild, appropriate, age-related changes, with no evidence of trauma-related pathology or injury to the left shoulder. He opined that Claimant has some interstitial tearing of the shoulder tendons representing "typical, age-related fraying of some of the fibers of the rotator cuff tendons." The ALJ finds Dr. Lesnak's interpretation of Claimant's left shoulder MRI credible. Dr. Lesnak also opined that Claimant requires no treatment for her left shoulder, "regardless of causality."

64. Dr. Lesnak testified that at his examination of Claimant in August 2019, Claimant exhibited no objective signs of injury other than subjective complaints and his examination was normal. He testified that Claimant had no left shoulder complaints at his physical examination. He opined that Claimant has no ratable condition from her December 23, 2018 accident because there are no objective findings to support her diagnosis.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

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

OVERCOMING DIME - MMI

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000); *Kamakele v. Boulder Toyota-Scion,* W.C. No. 4-732-992 (ICAO, Apr. 26, 2010).

MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Powell v. Aurora Public Schools* W.C. No. 4-974-718-03 (ICAO, Mar. 15, 2017). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 *P.2d 1090 (Colo. App. 1990); Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (ICAO, Mar. 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *In Re Villela,* W.C. No. 4-400-281 (ICAP, Feb. 1, 2001).

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge D/B/A Colorado Athletic Club* W.C. No. 4-914-378-02 (ICAO, June 25, 2015). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect, and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries,* WC 4-712-812 (ICAO, Nov. 21, 2008); *Licata v. Wholly Cannoli Café* W.C. No. 4-863-323-04 (ICAP, July 26, 2016).

Claimant has failed to establish by clear and convincing evidence that the DIME physician's determination that Claimant was at MMI on August 21, 2019 is incorrect. Dr. Dillon's opinion is consistent with consistent with the opinions of Dr. Draper, Dr. Pook and Dr. Aschberger, each of whom found Claimant at, or near, MMI in August or September 2019.

With respect to Claimant's cervical spine, neither the Claimant's treating physicians nor Dr. Yamamoto have opined that Claimant requires additional treatment to cure or relieve the effects of her cervical injury. Accordingly, Claimant has not established that she is not at MMI with respect to her cervical complaints.

Claimant contends she is not at MMI because she sustained an injury to her left shoulder that required further evaluation and treatment. Claimant has not, however, demonstrated that she sustained a work-related shoulder injury that requires further evaluation and treatment. Claimant's position is based, in part, on Dr. Yamamoto's opinion that Claimant sustained an untreated, unevaluated partial tear of her rotator cuff as a result of her accident. Claimant contends her authorized treating physicians did not address her alleged shoulder injury, thereby necessitating additional evaluation.

The evidence does not support that Claimant sustained an injury to her left shoulder in the December 23, 2018 accident that requires additional evaluation. Claimant's shoulder complaints throughout her treatment were primarily complaints of diffuse pain throughout her upper back. The records do not reflect any complaints of pain in the shoulder joint. Although the May 1, 2020 MRI demonstrates some objective findings, the ALJ credits Dr. Lesnak's opinion that Claimant's left shoulder MRI demonstrates only mild, appropriate age-related changes and no evidence of traumatic or acute pathology.

Dr. Yamamoto's opinion that the December 23, 2018 accident was an acceleration-deceleration accident that resulted in a left shoulder partial rotator cuff tear is not supported by the evidence. The accident videos show that Claimant's bus was struck on the driver's side, which did not result in a sudden deceleration of the vehicle or any significant movement of Claimant's upper body or shoulder. Claimant's body was only slightly jarred in the collision, and the bus did not come to a sudden stop. Claimant was able to continue driving the bus a short distance and park it on the side of the road. The ALJ does not find that the damage sustained to the other vehicle to be evidence of significant forces imparted on Claimant.

Contrary to Dr. Yamamoto's testimony, Claimant's ATPs did examine, assess, and treat her shoulder over the course of approximately nine months until she was discharged by Dr. Pook. Claimant began physical therapy, which addressed Claimant's cervical and shoulder complaints within five days of the accident. Although only five physical therapy records were offered and admitted into evidence, the records demonstrate that Claimant attended 25 physical therapy sessions between December 24, 2018 and May 23, 2019. The physical therapy records show that Claimant received therapy for her shoulders, including home exercises. At Claimant's April 5, 2019 visit with Dr. Draper, she reported that physical therapy had taped her shoulder, indicating that her shoulder symptoms were addressed in physical therapy, and not "missed" as Dr. Yamamoto suggests. When Claimant saw Dr. Draper on February 1, 2019, her examination of Claimant's upper extremities was essentially normal. Dr. Aschberger also evaluated Claimant' shoulders multiple times and noted non-specific findings and equivocal provocative testing. On February 20, 2019, Dr. Aschberger referred Claimant for additional physical therapy to address her complaints of shoulder irritation. On March 5, 2019, Dr. Aschberger noted his consideration of a shoulder MRI, but determined that the Claimant's examination and findings did not warrant evaluation by MRI at that time. On May 15, 2019, Dr. Aschberger evaluated Claimant's shoulder and noted full range of motion and a negative examination. Similarly, on May 29, 2019, June 5, 2019, June 19, 2019, July 10, 2019, and August 14, 2019, Claimant's providers examined Claimant's left shoulder and found no deficits. None of Claimant's treating providers recommended additional treatment for Claimant's shoulder, or diagnosed Claimant with an injury to her left shoulder. The ALJ finds that Claimant has not established by clear and convincing evidence that Dr. Dillon's opinion regarding MMI for Claimant's physical complaints is incorrect.

With respect to Claimant's claim of psychiatric impairment, Dr. Dillon reviewed Claimant's relevant records and determined that Claimant was at MMI from a psychiatric perspective. Dr. Yamamoto did not persuasively address why he does not consider Claimant to be at MMI from a psychiatric perspective, other than to indicate he recommends additional follow up with Dr. Moe. Dr. Dillon's determination that Claimant is at MMI is consistent with Dr. Moe's note on August 27, 2019 that Claimant was likely to be at MMI at her next scheduled appointment. The ALJ concludes that Claimant has failed to establish by clear and convincing evidence that Dr. Dillon's opinion that Claimant was at MMI on August 21, 2019 to be incorrect.

OVERCOMING DIME - IMPAIRMENT

The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995); *Lafont v. WellBridge D/B/A Colorado Athletic Club* W.C. No. 4-914-378-02 (ICAO, June 25, 2015).

As a matter of diagnosis, the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003); *Sharpton v. Prospect Airport Services* W.C. No. 4-941-721-03 (ICAO, Nov. 29, 2016). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998); *Watier-Yerkman v. Da Vita, Inc.* W.C. No. 4-882-517-02 (ICAO Jan. 12, 2015); Compare *In re Yeutter*, 2019 COA 53 ¶ 21 (determining that a DIME physicians opinion carries presumptive weight only with respect to MMI and impairment). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

The questions of whether the DIME physician properly applied the *AMA Guides*, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000); *Paredes v. ABM Industries* W.C. No. 4-862-312-02 (ICAO, Apr. 14, 2014). A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO, Mar. 22, 2000); *Licata v. Wholly Cannoli Café* W.C. No. 4-863-323-04 (ICAO, July 26, 2016).

Cervical Spine

Claimant has failed to establish by clear and convincing evidence that Dr. Dillon's determination that Claimant has no ratable condition of her cervical spine is incorrect. Claimant contends, based on Dr. Yamamoto's testimony, that she qualifies for a cervical impairment rating pursuant to the AMA Guide, Table 53 (II)(B). The Division's Desk Aid #11 – Impairment Rating Tips, under the heading "Table 53 and Application of Spinal Range of Motion" provides: "In order to be assigned a spinal rating, the patient must have objective pathology and impairment that qualifies for a numerical impairment rating of greater than zero under Table 53. Spinal range of motion impairment must be completed and applied to the impairment rating only when a corresponding Table 53 diagnosis has been established." (Emphasis original).

Under Table 53 (II)(B), of the AMI Guide and Desk Aid #11 "the examiner may assign an impairment value for impairment or a specific disorder of the lumbar or cervical regions of the spine, so long as the medical evidence establishes the presence of a specific diagnosis, objective pathology, and six months of medically documented pain and rigidity." *In re Bryant*, W.C. No. 5-058-044-001 (ICAO, June 5, 2019). The term "objective pathology" cited in Desk Aid #11 refers to "the identification of a problem, injury, disorder, condition or disease that can be identified by virtue of objective signs or analysis." *Id*.

"Rigidity" is an elusive term without an accepted definition, but, in any event, need not be "objective." *Id*.

With respect to Claimant's cervical spine, she meets the requirement of a specific diagnosis, by virtue of the diagnosis of a cervical strain by Dr. Draper. Despite the diagnosis, the evidence does not demonstrate the presents of any "objective pathology," in Claimant's cervical spine that is causally related to her December 23, 2018 accident. Claimant's two cervical x-rays were negative, as were her cervical MRI and EMG study. The physical examinations by Claimant's treating providers document only subjective findings, such as complaints of tenderness, and with the exception of mildly limited range of motion, Claimant's physical examinations were normal. Dr. Draper's approximately 16 physical examinations of Claimant's spine were normal to palpation. Although Dr. Yamamoto's IME found tenderness in the cervical spine, patient reports of diffuse tenderness are subjective. The only arguably "objective" finding on examination is Dr. Aspegren noting a positive cervical compression test, but Dr. Aspegren's diagnosis was "myofascial pain, upper back," which is not a specific diagnosis. Moreover, no evidence was offered to explain the significance of such testing and whether it constitutes an "objective sign or analysis" of an injury. The medical records support Dr. Dillon's conclusion that Claimant presented with symptoms only with no associated underlying pathology that reasonably explains those symptoms" and therefore does not have a ratable condition of the cervical spine. Because Dr. Dillon determined Claimant had no ratable condition, she was not obligated to perform range of motion measurements. Accordingly, the ALJ concludes that Claimant has not established by clear and convincing evidence that Dr. Dillon's opinion that Claimant has no ratable condition of her cervical spine to be incorrect.

Shoulder

Claimant contends that Dr. Dillon's DIME is incomplete because she did not specifically address Claimant's left shoulder in her report, and that the failure to assign an impairment rating for Claimant's shoulder was incorrect. Claimant's DIME request sought evaluation of her hands, left wrist, left elbow, and shoulders, in addition to her cervical and thoracic spine. The ALJ infers from Dr. Dillon's statement in her report that the exam would "address issues with the cervical spine and upper extremities related to the occupational injury in question…" that Dr. Dillon intended the phrase "upper extremities" to encompass Claimant's request for evaluation of her hands, wrist, elbow, and shoulders. Dr. Dillon documented an examination of Claimant's upper extremities, which the ALJ infers included an examination of the shoulders. Nonetheless, Dr. Dillon diagnosed Claimant with only a cervical strain, which indicates she found no shoulder injury causally related to Claimant's December 23, 2018 accident. "The DIME physician's opinion concerning causation is an inherent part of a rating." *In Re Ortivez*, W.C. No. 4-846-292-02 (ICAP, November 26, 2012). Therefore, it is incumbent upon the Claimant to establish by clear and convincing evidence that the DIME's failure to find a compensable shoulder injury was incorrect. As discussed above, Claimant has failed to establish that she sustained a compensable injury to her left shoulder in the December 23, 2018 work accident. The ALJ finds that Claimant has failed to establish by clear and convincing evidence that the DIME physician's examination was incomplete or that the failure to assign an impairment rating for Claimant's left shoulder was error.

Psychiatric/Psychological rating

Claimant further contends that Dr. Dillon was incorrect in finding that Claimant does not have a permanent mental, psychiatric, or psychological impairment. Again, Claimant has failed to establish by clear and convincing evidence that the DIME physician's determination was incorrect. Dr. Dillon reviewed Claimant's medical records and determined that Claimant's psychiatric diagnosis was "somatic disorder/somatoform disorder with underlying histrionic personality disorder," which she determined were unrelated to Claimant's occupational injury and not a ratable condition. She considered the diagnosis of adjustment disorder and determined that there was no mental, psychiatric, or psychological impairment. Dr. Dillon's diagnosis was based on the assessments of Drs. Moe, Carbaugh and Reilly, and the fact that Claimant had no underlying pathology to explain her complaints. Dr. Yamamoto's opinion to the contrary is a mere difference of opinion with Dr. Dillon and does not constitute clear and convincing evidence that Dr. Dillon's opinion is incorrect.

CLAIMANT'S REQUEST FOR SHOULDER EVALUATION AND TREATMENT

Claimant seeks an order authorizing an orthopedic evaluation of Claimant's shoulder. Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Industrial Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO, May 31, 2006). The determination of whether services are medically necessary, or incidental to obtaining such service, is a question of fact for the ALJ. *Bellone v. Industrial Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO, May 31, 2006). The existence of evidence which, if credited, might permit a contrary result affords no basis for relief on appeal. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002)." *In the Matter of the Claim of Bud Forbes, Claimant*, No. W.C. No. 4-797-103, 2011 WL 5616888, at *3 (Colo. Ind. Cl. App. Off. Nov. 7, 2011). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School District No.11*, W.C. No. 3-979-487, (ICAO, Jan. 11, 2012); *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO, Feb. 12, 2009).

Claimant has failed to establish by a preponderance of the evidence that an orthopedic evaluation of Claimant's left shoulder is reasonable and necessary to cure or relieve the effects of an industrial injury. As noted above, the Claimant has failed to establish that the treatment and evaluation provided by her authorized treating providers was inadequate. Claimant's contention that her left shoulder was "missed" by her medical providers is incorrect.

At various times during Claimant's treatment for the injuries sustained in the December 23, 2018 accident, Claimant reported to her authorized treating providers diffuse pain in the left "shoulder" area. Claimant's first mention of "shoulder" pain was on January 8, 2019, when she complained of pain radiating from her neck into the left shoulder and arm. For example, on February 20, 2019, Dr. Aschberger evaluated Claimant's left shoulder and noted there were mild findings suggestive of irritation, but full range of motion and no deficits identified. He recommended physical therapy and massage, which Claimant resisted. At Dr. Aschberger's March 5, 2019 visit, he again evaluated Claimant's left shoulder and noted that there was no basis for a shoulder MRI at that time given her non-specific findings. Throughout, none of Claimant's authorized treating providers requested an orthopedic evaluation of Claimant's shoulder. Such an examination is only recommended by Dr. Yamamoto, who is not an authorized treating provider. The ALJ lacks authority to order an ATP to provide a particular form of treatment which has not been prescribed or recommended the ATP. *Torres v. City and County of Denver*, W.C. No. 4-937-329-03 (ICAO, May 15, 2018) *citing Short v. Property Management of Telluride*, W.C. No. 3-100-726 (ICAP May 4, 1995).

ADDITIONAL TEMPORARY TOTAL DISABILITY BENEFITS

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* 8-42-105(1). C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

Because Claimant has failed to overcome the DIME opinion that she was at MMI on August 21-, 2019, Claimant's entitlement to TTD benefits terminated on that date pursuant to § 8-42-105 (3)(a) – (d), C.R.S. As such, Claimant has failed to establish an entitlement to additional TTD benefits.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by clear and convincing evidence that the DIME physician's opinion that Claimant reached MMI on August 21, 2019 was incorrect.

2. Claimant has failed to establish by clear and convincing evidence that the DIME physician's opinion that Claimant has no permanent impairment is incorrect.

3. Claimant's request for an orthopedic evaluation of her left shoulder is denied and dismissed.

4. Claimant's request for additional temporary total disability benefits is denied and dismissed.

5. All matters not determined herein are reserved for future determination.

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

DATED: April 20, 2021

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that on August 9, 2020, she suffered an injury arising out of and in the course and scope of her employment with the employer.

2. If the claimant proves a compensable injury, whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment she received from St. Mary's Hospital is reasonable, necessary, and related to the work injury.

3. The issues of average weekly wage (AWW), temporary total disability (TTD) benefits, and temporary partial disability (TPD) benefits were also endorsed for hearing. The parties stipulated that these issues are reserved for future consideration, if the claim is found compensable.

DEPOSITION OBJECTIONS

1. The testimony of Crystal Lambrakos, Lifeguard Supervisor, was taken via deposition. In the respondents' position statement, the ALJ was asked to address two objections that were raised during the deposition. The ALJ addresses these objections here.

2. The first objection was raised by the claimant with regard to deposition exhibit D[1] offered by the respondents during the deposition. The ALJ hereby overrules the objection and the respondent's deposition exhibit D is part of the record.

3. The second objection was made by the respondents regarding a question asked by the claimant's counsel on cross examination of Ms. Lambrakos. Specifically, Ms. Lambrakos was asked "Do you understand how a 16 year old girl might believe that she had to attend?" The ALJ hereby overrules the objection and the witness's response to the question is part of the record.

FINDINGS OF FACT

1. The employer operates a public swimming pool in Hotchkiss, Colorado. The claimant began working for the employer when she was 14 years old. On August 9, 2020, the claimant was 16 years old. At the time of the hearing the claimant was 17 years old. During her employment, the claimant assisted with swim lessons, taught swim lessons, and was a lifeguard. The claimant worked in a seasonal position. The 2020 season was from June 2020 until Labor Day 2020.

[1] This deposition exhibit D is different from the respondents' exhibit D that was admitted into evidence at hearing.

2. The employer requires all lifeguards to hold valid Red Cross certification. During her employment with the employer, the claimant was certified by the Red Cross. The claimant's certification was scheduled to expire in May 2021.

3. On Sunday, August 9, 2020, the claimant attended a Red Cross certification class at the employer's pool facility. This was not a normally scheduled work shift for the claimant. The claimant was not paid for the time she was present at the Red Cross certification on that date. All participants in that class were charged $38.00. This cost was the amount the Red Cross charged the employer for each participant of the certification class.

4. Crystal Lambrakos, Lifeguard Supervisor, testified via post-hearing deposition. Ms. Lambrakos testified that she was the lifeguard supervisor on August 9, 2020. Ms. Lambrakos also testified that she notified the pool's lifeguards of the certification class that would be offered at the employer's facility on August 9, 2020. The employer offered the class at that time, because it was unclear with COVID-19 related restrictions, whether a later class could be offered. Ms. Lambrakos further testified that the certification class was not mandatory. If a lifeguard was unable to attend, they would need to find a certification class at another time.

5. The claimant and Ms. Lambrakos spoke regarding the August 9, 2020 class. The ALJ finds as persuasive Ms. Lambrakos's testimony that she specifically clarified with the claimant that the class was not mandatory. In addition, Ms. Lambrakos sent notification to all lifeguards that the class was not mandatory.

6. The claimant testified that she believed that the certification class was mandatory.

7. During the August 9, 2020, certification class, the participants were practicing rescue drills. In one drill, the claimant played the part of the "victim". During that drill, the claimant was placed on a backboard. While other participants were liffing the backboard, the claimant fell from the backboard, striking her head on the concrete.

8. Immediately following her fall, the claimant was unable to move her arms or legs. The claimant was airlifted from the employer's location to St. Mary's Hospital in Grand Junction, Colorado.

9. The ALJ credits the testimony of Ms. Lambrakos over the contrary testimony of the claimant. The ALJ finds that the Red Cross certification class on August 9, 2020 was a voluntary class. The claimant's subjective belief that the class was mandatory does not change the fact that the class was voluntary. As the claimant's certification was not set to expire until May 2021, the ALJ is further persuaded that her decision to go to the class on August 9, 2020 was voluntary. Furthermore,the ALJ notes that the class participants were not paid by the employer for the time they attended the class. On the contrary, participants were charged a fee to attend the class. These facts support the respondents' position that the claimant's injury did not "arise out of", nor did it occur "in the course and scope of" the claimant's employment with the employer. Based upon all of the foregoing, the ALJ finds that the claimant has failed to demonstrate that it is more

likely than not that she suffered an injury arising out of and in the course and scope of her employment.

CONCLUSIONS OF LAW

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

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

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

4. To establish a compensable injury an employee must prove, by a preponderance of the evidence, that his injury arose out of the course and scope of employment with his employer. Section 8-41-301(1)(b), C.R.S. (2006); see *City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991).

5. The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its “origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee’s service to the employer.” *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999

(Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v.* Americold D/B/A Atlas Logistics, W.C. No. 4-960-513-01, (ICAO, Oct. 2, 2015).

6. Section 8-40-201(8), C.R.S., provides that the term "employment" shall not "include the employee's participation in a voluntary recreational activity or program, regardless of whether the employer promoted, sponsored, or supported the recreational activity or program." Similarly, Section 8-40-301(1), C.R.S., defines the term "employee" to exclude any person employed by an employer "while participating in recreational activity, who at such time is relieved of and is not performing any duties of employment.

7. In *White v. Industrial Claim Appeals Office,* 8 P.3d 621 (Colo. App. 2000), the court held that the statutory term "recreational activity" should be given its plain and ordinary meaning as an activity that "has a refreshing effect on either the mind or the body." Determining whether an activity is "recreational" depends on consideration of the circumstances including whether the activity occurred during working hours, whether the injury occurred on the employer's premises, whether the employer initiated the activity, whether the employer exerted control over the employee's participation in the activity and whether the employer stood to benefit from the employee's participation in the activity. The question of whether an activity was "recreational" is one of fact for determination by the ALJ. *Lopez v. American Lumber Construction,* W.C. No. 4-434-488 (ICAO Oct. 29, 2003).

8. Determination of whether the claimant's participation in a recreational activity was "voluntary" requires consideration of the claimant's "motive" for participation in the activity. Compensability must be denied if participation in the activity was voluntary, even though the employer promoted, sponsored or supported the activity. When determining whether the claimant's participation was voluntary the ALJ may consider various factors including whether the activity occurred during working hours, whether the activity occurred on or off the employer's premises, whether the employer initiated, organized, sponsored or financially supported the activity and whether the employer derived benefit from the activity. *See Price v. Industrial Claim Appeals Office*, 919 P.2d 207 (Colo. 1996); *Dover Elevator Co. v. Industrial Claim Appeals Office,* 961 P.2d 1141 (Colo. App. 1998); *Finn v. United Parcel Service, Inc.* W.C. No. 4-757-425 (ICAO, Jan. 13, 2009). The *Price* court determined that the first two factors carry greater weight than the other factors because the time and place of injury are particularly strong indicators of whether an injury arose out of and in the course of the employee's employment. *Id.* at 211. Ultimately, the question of whether the claimant's participation in the recreational activity was voluntary is one of fact for determination by the ALJ. *In re Schniedwind*, W.C. No. 5-051-507-03 (ICAO, Mar. 12, 2109); *Kvale v. Infinity Systems Engineering,* W.C. No. 4-588-521 (ICAO, Mar. 23, 2005).

9. The ALJ recognizes that a Red Cross certification class is not necessarily a "recreational activity". However, the ALJ finds that Sections 8-40-201(8) and 8-40-301(1), C.R.S. and the related case law provide some guidance in the resolution of the present case. Here, the claimant voluntarily attended a certification class at the employer's facility. The claimant was not compensated for her time, and was charged a fee for the

cost of the class. These facts taken together lead the ALJ to conclude that on August 9, 2020, the claimant was not engaged in an activity arising out of and in the course and scope of her employment with the employer.

10. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that on August 9, 2020, she suffered an injury arising out of and in the course and scope of her employment with the employer. As found, the testimony of Ms. Lambrakos is credible and persuasive.

ORDER

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

Dated this 20th day of April 2021.

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

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

ISSUES

- Did Claimant prove he suffered compensable injuries on July 29, 2020 arising out of and in the course of his employment?

STIPULATIONS

If the claim is compensable, medical treatment Claimant received at Vail Health Hospital on July 29, 2020 was reasonably needed and related, and therefore should be covered under this claim. The issues of average weekly wage and temporary disability benefits are reserved for future determination, if necessary.

FINDINGS OF FACT

1. Employer is a small technology company that designs, installs, and services audiovisual, security, network, and lighting systems in custom homes and businesses. Employer is headquartered in Denver but it maintains offices in other locations, including a mountain office in Edwards, Colorado.

2. Claimant worked in the Edwards office service technician since May 2018. His job involved installing, programming, and servicing low voltage systems, including AV and security systems. Claimant typically travelled to customers' premises to perform these tasks.

3. Employer maintains a fleet of trucks that its technicians use to travel to their various job sites. Sometimes a technician needed to use their personal vehicle for service calls, and on those occasions, they were reimbursed for mileage. There is no persuasive evidence to suggest technicians were ever expected to travel to or from job sites at their own expense.

4. Employer's technicians are allowed personal use of the company vehicles "as a convenience." This includes taking vehicles home overnight or using company vehicles on weekends. Employees in the Denver office used the company vehicles after hours more frequently than did employees in the Edwards office. Nevertheless, Claimant made personal use of company vehicles at times.

5. The locations from which Claimant started his workdays varied based on the first scheduled job. Some days he commuted to Employer's office in Edwards to obtain his daily assignments. On other days he drove directly from his home to the first job site.

6. On July 29, 2020, Claimant was scheduled to meet a Sony repair technician at 8:00 a.m. at a customer's home in East Vail. Claimant took a company vehicle home the night of July 28 because he was going to drive directly to the customer's home without first going to the office in Edwards.

7. Claimant lives west of I-70 in Avon, Colorado. He left his home at approximately 7:30 a.m. on July 29 and began traveling toward the job site. On the way, he stopped at Loaded Joe's, a coffee shop adjacent to the I-70 interchange. This was Claimant's usual morning routine because he generally passed by Loaded Joe's regardless of whether he was driving to the office or straight to a service call. Claimant purchased a take-out cup of coffee got back in his truck to resume his journey.

8. Upon leaving Loaded Joe's, Claimant had two primary options to reach the job site in East Vail. He could have immediately gotten on eastbound I-70, or he could have driven slightly south on Avon Road, turned east on Highway 6, and joined I-70 a bit later. Employees have discretion regarding their routes, and there is no requirement they take the "shortest" or "fastest" route. Claimant testified he probably would have taken the Highway 6 option. Claimant's supervisor, Matthew M[Redacted], confirmed Highway 6 would not have taken appreciably longer because "it's not like there's a lot of traffic you're trying to avoid."

9. Claimant never made it to the customer's home in East Vail. At approximately 7:48 a.m., his truck went off the road when he suffered an epileptic seizure. Claimant suffered multiple, severe injuries and was transported by ambulance to the Vail Health Hospital. Shortly thereafter, he was taken to a hospital in Denver, where he underwent surgery for an unstable L1 burst fracture.

10. Claimant has no recollection of the accident. He recalls being "out the door with my coffee" at Loaded Joe's, but remembers nothing else until he "woke up" in the hospital in Denver.

11. At the time of the accident, Claimant was travelling westbound on Highway 6 in the direction of Employer's office in Edwards. He has no idea why he was driving west instead of going east toward the job site. Claimant had not planned to go to the office before meeting the Sony technician. He had all the tools and equipment he needed and there was no reason to go to the office.

12. Claimant spoke with Mr. M[Redacted] some days after the accident. Claimant did not understand why he was traveling westbound toward the office because he had the meeting with the Sony technician in the other direction that morning. Neither Claimant nor Mr. M[Redacted] could think of any reason Claimant would have gone to the office the morning of July 29. They both expected him to drive directly to the meeting with the Sony technician at the customer's home in East Vail. At the hearing, Mr. M[Redacted] confirmed he had scheduled the appointment for Claimant and did not ask Claimant to come to the office that morning.

13. Claimant later had a similar conversation with Arielle R[Redacted], who was Employer's Chief Executive Assistant in the Denver headquarters at the time of the accident. Claimant told Ms. R[Redacted] it appeared he was heading to the Edwards office at the time of the accident based on his direction of travel but he could not think of any reason he would have been doing so rather than driving to his scheduled appointment in East Vail.

14. In March 2020, Employer had implemented a tracking system known as "T-Sheets" to track employee's hours for payroll and client billing purposes. The T-Sheets system includes a smart phone app that allows employees to clock in and log their hours in "real-time."

15. Claimant did not immediately adopt the T-Sheets system. Instead, he continued to write his time in a personal notebook or on a piece of paper during the day. He would then enter his time in T-Sheets at the end of the day, or week, or at least before the end of the pay period.

16. Before July 27, 2020, Employer's clock-in, clock-out policy had been somewhat unclear. To clarify the policy and standardize the procedures for employees across all offices, Ms. R[Redacted] she sent a company-wide email advising, "Here is our timesheet policy moving forward: When going to a **job directly from your home in the morning**: clock in when you leave the house, clock out when you leave the job. When going to the **office directly from your home in the morning**: clock in when you arrive at the office, clock out when you leave the job." (Emphasis in original).

17. On July 28, 2020, Claimant emailed Ms. R[Redacted] to confirm he read her email and understood the policy.

18. Despite acknowledging the new policy, Claimant did not clock in with T-Sheets on Juy 29 before leaving his home to meet the Sony technician. Claimant thought he was clocked in that morning, and continued maintained that belief for several months after the accident. But Ms. R[Redacted] confirmed there are no entries in T-Sheets on July 29, and no documentary evidence Claimant clocked in using any other method.

19. Had Claimant met the Sony technician as planned that morning, he would still have been paid from the moment he left his home despite neglecting to clock in through T-Sheets.

20. On August 21, 2020, Claimant gave a recorded statement to Crystal G[Redacted], a claims representative for Insurer. He stated,

> My game plan that morning was, I was supposed to meet a Sony repairman over at a client's house at 8:00 in the morning. So, I left my house and went and grabbed some coffee as I usually do. And I was apparently—supposed to be headed to the job site, but for some reason I was headed to our office. And I was trying to kinda figure that out with my boss. I couldn't really figure out why I headed to the office. But like I said I don't really have much recollection of that morning. The last thing I really remember was getting my coffee from the coffee shop. And that's kinda the last thing I remember before waking up in the hospital.
>
> . . .

> So apparently, what happened was I guess I was driving from the coffee shop to the office for some reason. At which point I had a seizure and I ran off the road, rolled my truck . . . .
>
> . . .
>
> [Ms. G[Redacted]] What vehicle were you driving, you were driving in the work truck, right?
>
> Yeah, I was driving the work truck. Like I said, I was supposed to go straight to a job site that morning. . . . I don't know, I must've somehow got turned around. I don't know. . . . I'm just trying to figure it out. I don't know why I was headed to the office and not to the job site. But, yeah, I had taken my truck home the night before so I could drive straight there.

21. Claimant was questioned at hearing about his prior statements he was "heading to" or "toward the office" at the time of the accident. He testified,

> Q. You told [Mr. M[Redacted]] that you were headed toward the Conundrum office at the time of the accident?
>
> A. That may be true. I may have said that. That I was headed in that direction based on the police report and the information that I gathered, yes.
>
> Q. Isn't it true that when you talked to Mr. M[Redacted] you stated you had no idea why you were headed toward the Conundrum office instead of headed toward your first appointment?
>
> A. That's correct. Mr. M[Redacted] had scheduled me to meet at the residence at 8 o'clock in the morning. The direction was inconsistent with the schedule.
>
> Q. And you don't have any recollection of why you might have been headed to the office. Is that correct?
>
> A. That's correct . . . There was no reason for me to head to the office that morning. Like I said, I didn't need tools, I didn't need anything. I was supposed to be going to East Vail.
>
> . . .
>
> Q. In the recorded statement, you were heard stating, "I was supposed to head to the job site but for some reason I was headed to our office." . . . Do you recall providing a statement of that nature to Ms. G[Redacted] about three weeks after the accident?
>
> A. I recall making a statement of that nature. As I stated, I don't think I was headed to the office. The argument can be made that I was headed in the

> direction of the office. But like I said, I did not—I was not—I had no reason to go to the office.
>
> Q. OK. You had no reason to go to the office, but you were recorded stating, “I was headed to the office.”
>
> A. It would seem based on the police report and the direction that I was headed, I mean, that’s the direction I was going. I was not going to the office though. I was going to the job site. That was what I was scheduled to do and that’s where I was going.

22. Claimant’s explanation regarding his intended meaning when he said he was “heading to” the office is credible and persuasive.

23. Claimant, Mr. M[Redacted], and Ms. R[Redacted] all provided credible testimony. Except for some minor (and ultimately inconsequential) differences, they agree on the important facts regarding this matter.

24. There is no persuasive evidence of any personal reason for Claimant to have been traveling westbound on Highway 6 at the time of the accident.

25. Claimant proved he was travelling for work at the time of his accident and not merely commuting to the office. Claimant planned to meet the Sony technician in East Vail and had no intention of going to Employer’s office that morning. He was not engaged in a substantial personal deviation. Claimant was probably traveling west instead of east because of a mistake. Claimant proved he suffered compensable injuries arising out of and in the course of his employment.

CONCLUSIONS OF LAW

To establish a compensable claim, a claimant must prove he suffered an injury arising out of and in the course of employment. Section 8-41-301(1)(b); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). The “course of employment” requirement is satisfied if the injury occurred within the time and place limits of the employment relationship and during an activity that had some connection with the employee’s job-related functions.” *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991). An injury “arises out of” employment when it “has its origin in an employee’s work-related functions and is sufficiently related to those functions to be considered a part of the employee’s employment contract.” *Horodysyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). The claimant need not actually be performing work duties at the time of the injury, nor must the activity be a strict employment requirement or confer an express benefit on the employer. *Price v. Industrial Claim Appeals Office*, 919 P.2d 207, 210 (Colo. 1996). Rather, the question is whether the activity “is sufficiently interrelated to the conditions and circumstances under which the employee generally performs the job functions that the activity may reasonably be characterized as an incident of employment.” *Id*. at 210; *see also Panera Bread LLC v. Industrial Claim Appeals Office*, 141 P.3d 970 (Colo. App. 2006). Whether an injury arises out of and in the course of employment are questions of fact for the ALJ, based on the totality of circumstances. *Dover Elevator Co. v. Industrial Claim Appeals Office*, 961 P.2d 1141 (Colo. App. 1998).

Under the “going and coming rule,” injuries sustained while commuting to and from work are not compensable unless “special circumstances” create a sufficient nexus to the employment beyond the mere fact of the employee’s arrival at work. *Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo. 1999). *Madden* established an analytical framework centered on four “variables” to determine whether the requisite “special circumstances” exist. Those variables are: (1) whether the travel occurred during working hours, (2) whether the travel occurred on or off the employer’s premises, (3) whether the travel was contemplated by the employment contract, and (4) whether the obligations or conditions of employment created a “zone of special danger” out of which the injury arose. *Id.* at 864. If the claimant establishes only one of the four variables, “recovery depends on whether the evidence supporting the variable demonstrates a causal connection between the employment and the injury such that the travel to and from work arises out of and in the course of employment.” *Id*. at 865.

Claimant’s accident did not occur during working hours or on Employer’s premises, and the conditions of employment created no “zone of special danger” around commuting to work. Accordingly, the key question is whether the travel was contemplated by the employment contract. *Madden* cited examples of situations that satisfy this factor, such as (a) when a particular journey is assigned or directed by the employer, (b) when the employee’s travel is at the employer’s express or implied request or when such travel confers a benefit on the employer beyond the sole fact of the employee’s arrival at work, and (c) when travel was singled out for special treatment as an inducement to employment. The court emphasized those examples were “not an exhaustive list” of situations where travel can be considered part of the employment contract.

The “traveling employee” doctrine represents a well-established exception to the “going and coming” rule, consistent with the *Madden* framework. If the employer requires an employee to travel beyond a fixed location for performance of their duties, that travel is part of the job and any injuries during such travel are compensable. *Staff Administrators, Inc. v. Industrial Claim Appeals Office*, 958 P.2d 509 (Colo. App. 1997). Here, Claimant was instructed to travel directly from his home to meet the Sony technician in East Vail the morning of July 29, 2020. Had Claimant been following the expected and intended route when he had the seizure, compensability would have been clear and the case may not have even come to litigation.

The confounding factor, of course, is that Claimant was heading in the opposite direction of his morning assignment when the accident occurred. The direction of travel, coupled with his failure to sign in with T-Sheets, could support an inference Claimant was commuting to the office. But the preponderance of persuasive evidence shows he was probably in travel status rather than commuting to work at the time of the accident. Neither Claimant nor anyone affiliated with Employer has come up with any reason he would have been going “to” the office at the time of the accident. Claimant knew he was supposed to meet the Sony technician at 8:00 a.m., and planned to do so. He took the company truck home the previous night because he was going straight to the East Vail property in the morning. When Claimant left his home on July 29, he believed he was driving to meet the Sony technician. He had no reason to go to the office beforehand and did not intend to do so. Claimant was en route to the off-site appointment and became misdirected for unknown reasons. Claimant proved he was traveling for work and not commuting to the office the morning of July 29.

Having determined Claimant was in travel status that morning, the next question is, did he engage in a substantial deviation from his employment by turning the wrong direction and heading west on Highway 6?

Traveling employees generally enjoy continuous workers' compensation coverage except when they make "a distinct departure on a personal errand." *Wild West Radio, Inc. v. Industrial Claim Appeals Office*, 905 P.2d 6 (Colo. App. 1995). The deviation must also be "substantial" to remove an employee from the course and scope of employment. *Kelly v. Industrial Claim Appeals Office*, 214 P.3d 516, 519 (Colo. App. 2009). The ultimate question is "whether a claimant's conduct constituted such a deviation from the circumstances and conditions of the employment that the claimant stepped aside from his job and was performing an activity for his sole benefit." *Panera Bread, LLC v. Industrial Claim Appeals Office*, 141 P.3d 970, 972 (Colo. App. 2006).

Claimant's memory loss prevents us from knowing for certain why he was heading west on Highway 6 rather than east. But there is no persuasive evidence to suggest he was traveling toward any "personal" destination or activity, such as shopping or visiting a friend. Claimant has consistently and credibly maintained he was going to meet the Sony technician and there is no reason he would have been traveling "to" the office. Had he actually arrived at the office, Mr. M[Redacted] probably would have been displeased because that was not where Claimant was supposed to be. The only inference that makes sense to this ALJ is that Claimant simply made a mistake and turned the wrong direction at the roundabout at Avon Road and Highway 6. The travel in which he was engaged when he had the seizure was sufficiently interrelated with and incidental to his assigned duties to have arisen out of and occurred in the course of his employment.

ORDER

It is therefore ordered that:

1. Claimant's claim for injuries suffered on July 29, 2020 is compensable.

2. Insurer shall cover the treatment Claimant received at Vail Health Hospital on July 29, 2020, consistent with the parties' stipulation.

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

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

DATED: April 21, 2021

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-860-214-002

ISSUES

I. Whether Claimant established by a preponderance of the evidence that her condition has worsened, and her claim should be reopened for medical and temporary total disability benefits.

II. Whether Claimant established that the Bioness peripheral nerve stimulator (BPNS) is reasonable and necessary medical treatment to cure or relieve Claimant from the effects of her work injury.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. Claimant suffered a work injury on June 24, 2011. (Cl's Ex. 7 at 41). Her foot fell asleep at her desk, and when she stood up, this caused her foot to twist and Claimant to fall. (Cl's Ex. 5 at 23). Claimant had immediate onset of left ankle pain, which caused her to pass out. *Id.* The injury developed into significant issues with Complex Regional Pain Syndrome (CRPS). (Cl's Ex. 8 at 69-70).

2. Daniel S. Bennett, M.D., is board certified in both anesthesia and interventional pain medicine. Tr. at 28:3-4. He has been treating Claimant's CRPS for many years--well before MMI. At the hearing, he explained the disease.

> Complex regional pain syndrome (CRPS) is a disease of the spinal cord and brain. It's an abnormal rewiring after a peripheral injury where... the cord and brain become the problem. It affects multiple areas of the nervous system. It affects vascularity… There's a part of [the] nervous system that's call[ed] the sympathetic and parasympathetic, which are out of [conscious] control, that react to conditions physiologically and then change blood flow. So the hallmark of CRPS is… neuropathic pain. You see vascular dysfunction – meaning that the extremity will become blue and cold because [the individual has] clamped down or become hot or warm because [the individual] dilate[s]. You also see myoclonic activity – shaking of the extremity that is out of the control of the individual. And, if the brain becomes involved, you begin to see strange phenomena such as pain memory, where you push on the individual's extremity, and they feel your touch for minutes to an hour or longer afterwards, which is not a normal finding. You can see trophic changes, where the skin begins to lose its elasticity. Nails become brittle, and the begin to deform, if you will. And, eventually, as brain gets more involved, you begin to see contractures of that extremity, where the toes or the fingers will turn in, and we call that… [CRPS].
>
> Tr. at 47:21-48:14.

Health Status at Time of MMI

3. Linda Mitchell, M.D., performed a division independent medical exam (DIME) on November 4, 2016. She put Claimant at MMI as of that date and provided her a 10% whole person impairment for the CRPS, a 2% psychiatric impairment rating "for continued medication use," and an 11% extremity rating (which converted to a 4% whole person impairment) for the lower extremity. (Cl's Ex. 8 at 69). Dr. Mitchell noted that Claimant had a spinal cord stimulator, and that Claimant "has done well with the neurostimulator." *Id.* Claimant reported to Dr. Mitchell that her back pain was improving. *Id.* Dr. Mitchell recommended physical therapy for 12 weeks, a follow-up with Dr. Bennett every three months to adjust the nerve stimulator, and up to 10 acupuncture treatments a year for the CRPS. *Id.* at 69-70. She noted that Marilyn Myers, Psy.D., indicated that Claimant was stable and that psychological treatment would be tapered off over the next six months, but that Claimant should see a physician every three to six months to monitor medication use. *Id.* at 70. Finally, Dr. Mitchell stated that "[Claimant] is able to perform her regular job, although at times, works from home. I believe she is capable of working in a light category. She may need to periodically stay off her feet and elevate the left lower extremity." *Id.;* Tr. at 32:19-20, 32:22-24.

4. When Claimant went to the DIME, she mentioned she "finally felt human because the stimulator was working, I was getting good pain coverage. I was in therapy – I mean, things were going well. And I was working full-time… I was doing well at work that – over that period of time. I – I had minor accommodations, and I was able to work full-time." Tr. at 157:18-158:1 She had previous ups and downs with the stimulator, which required fixes and maintenance, and she was never back to normal or pain-free following the diagnosis of CRPS, but the stimulator was working when she saw the DIME. Tr. at 158:9-20. Between 2013 and the time of the DIME, with the exceptions of the surgeries, Claimant, for the most part, could work full time, and had continued to work full time. Tr. at 159:4-8.

5. Respondents filed a final admission following the DIME and admitted for a 12% whole person rating and an 11% scheduled rating, as well as maintenance medical treatment. Claimant filed an application for hearing seeking to overcome the DIME endorsing, among other issues, relatedness of the neuromas and medical benefits because many of the maintenance treatment recommended by Dr. Mitchell had not been approved by Respondents. (Cl's Ex. 4 at 15). In March 2017, Claimant answered several interrogatories in preparation for the hearing to overcome the DIME. At the time, she was contending that the neuromas on the bottom her foot were a part of the workers' compensation injury. Tr. at 195:18-23. Many of her answers in the interrogatories pertained to those neuromas. Tr. at 195:24-196:4. She was also struggling with movement and pain. Although Respondents got Claimant to agree that she stated in her interrogatories "Makes walking on inclines very problematic," Respondents later recognized that Claimant also stated, "stimulator helps to reduce pain." Tr. at 196:21-197:3. The parties entered into a stipulation to resolve the issues on May 2017. In the stipulation, the neuromas were removed from being a related condition, and the parties agreed that an electric wheelchair was not currently reasonable or necessary. Tr. at 196:1-4; (Cl's Ex. 4 at 15). Further, Respondents agreed to provide 8 different maintenance treatments through the stipulation that they had not been providing. Tr. at

198:7-11; (Cl's Ex. 4 at 16). Claimant stated that most of her pain that she reported in the interrogatories was either from the neuromas on her foot, or because she was not receiving maintenance care. For example, Claimant testified that she had an inability to do exercises since her physical therapy had been stopped before the strengthening phase; however, she was allowed to go back to physical therapy after the stipulation. Tr. at 197:8-25. Her doctors were also able to do trigger point injections following the stipulations and this helped eliminate Claimant's muscle spasms. Tr. at 197:22-25. She noted, "I still had some issues. But the stipulation allowed me to get most of those issues taken care of, but not all because [Respondents] didn't let everything in the stipulation." Tr. at 198:1-3. "A lot of what was in the interrogatories, I had fixed." Tr. at 203:6-20.

6. Dr. Bennett specializes in neuromodulation, which is spinal cord stimulation. Tr. at 28:12-15. His research also heavily focuses on neuromodulation and, in particular, neuropathic pain, and complex regional pain syndromes. *Id.* Neuromodulation is when an electric field is placed over an area of the spinal cord or brain to alter the way the excitatory or inhibitory compounds are transmitted, which can decrease pain. Tr. at 28:20 – 29:4. A constant current field essentially functions as a pacemaker for the spinal cord and brain. Tr. at 29:2-4. Dr. Bennett provides all phases of treatment for CRPS: intervention, physical, and surgical application of neuromodulation. Tr. at 30:20-23. Dr. Bennett used to be Level II certified in workers' compensation but chose not to continue his certification because his time was devoted between active patients and research. Tr. at 31:18-23.

7. Dr. Bennett first examined Claimant in August 2013, and eventually implanted a spinal stimulator to help control the pain from Claimant's CRPS. Cl's Ex. 8 at 55, 58. Shortly after the DIME when Dr. Mitchell placed Claimant at MMI, Dr. Bennett saw Claimant again on January 3, 2017. At the time, Dr. Bennett noted that Claimant was doing well surgically and had adequate stimulator coverage. Tr. 22 at 19-22; Cl's Ex. 9 at 111. "With the stimulator on, the neuropathic pain indications on examination were not present. And the vascular, of the blood flow, to the [left lower] extremity had normalized." Tr. at 34:7-9. Claimant also had no exaggeration of response to pain, abnormal responses to sensation, nor windup; and she had normal capillary refill. Tr. at 34-35; Cl's Ex. 9 at 111. Based on the examination, Dr. Bennett's overall impression was that Claimant had normal findings in the left lower extremity. Tr. at 36:7-11. He felt that surgically Claimant remained at MMI with open medical for IPG (battery replacements) every five years. Tr. 22 at 19-22; Cl's Ex. 9 at 111. At that appointment, Dr. Bennett also noted that Claimant remained working full-time. (Cl's Ex. 9 at 110, 111).

8. Claimant noticed some mild changes starting around the summer of the stipulation, but mainly because she had not yet stabilized on her new medications. She was still working full-time and was promoted at the end of 2017 with a large raise to a mentally demanding position. Tr. at 160:13-19, 159:10-13, 19-20; Tr. at 183:12-22 (she does not remember the title due to brain fog). She set up a new system to automate the roll out of trucks when they needed line repairs or to fix the hardware in the field. Tr. at 200:15-19. Claimant was laid off from her company on May 18, 2018 due to a large merger,

along with over 500 other people in her company, although she does not entirely remember the number of layoffs. 161:4-162-10.

Worsening of Condition -- Malfunction and Eventual Failure of the Stimulator

9. Before the layoff—somewhere around the Spring of 2018—Claimant noticed she was having physical issues, and it was around the time of the layoff in mid-May that she recognized the stimulator was acting up. Tr. at 160:21-161:1. Claimant had first started treating with Ellice Goldberg, D.O., in 2012, and had continued treatment for maintenance care with Dr. Goldberg after reaching MMI. Around that time of the layoff, Claimant recognized that the stimulator was having problems and her pain was increasing, and so Dr. Goldberg increased Claimant's restrictions for work on May 17, 2018, by taking Claimant completely off work. *Id.* at 162:20-163:1; Cl's Ex. 12 at 435, 438. Throughout Claimant's continuing appointments in 2018 with Dr. Goldberg, Claimant presented with increased aching back pain, aching foot pain that moved into stabbing pain, and instability; the constant pain from her foot also started creeping up her leg. *Id.* at 447, 464, 472, 478, 481, 490, 496 & 511.

10. Even after the layoff, Claimant still wanted (and felt able) to work, so she was looking for a job. Tr. at 163:20-164:3. Claimant contacted the Colorado Division of Vocational Rehabilitation and was working with them to find work. Cl's Ex. 27 at 424. Claimant noted that Dr. Bennett's team was working on some reprogramming of the stimulator, and she was hoping they could figure it out. *Id.* She had had some malfunctions with the stimulator before and waited through those times, and "just figured this would be the same thing." Tr. at 164:10-12. "I'd just wait through that and get it working and continue on." Tr. at 164:12-13. From the summer of 2018 through the end of 2018, Dr. Bennett and his team were working on the stimulator, yet the coverage was becoming less and less. Tr. at 165:18-165:3. Dr. Goldberg was also providing osteopathic manipulations around the spinal cord stimulator insert, which Claimant thought helped the foot, circulation, and gait. Tr. at 165:20-166:5. There was a slow and steady increase of pain, and Claimant was not getting better. Tr. at 166:10-17. Sometimes, the stimulator would start working again for a week, but then it would stop again.

11. On August 9, 2018, based on a request by Claimant, Dr. Goldberg changed Claimant's restrictions from May 2018 and stated that Claimant "has worsened in the last few months from MMI and she needs an electric wheelchair…[Claimant] has work restrictions with no lifting greater than 15 pounds[.] No walking over 1000 feet." Cl's Ex 12 at 513. Dr. Goldberg also recommended an increase in osteopathic manipulation and referred Claimant for regular massages and more acupuncture. Cl's Ex 12 at 513. The following visit, Dr. Goldberg stated that the back was continuing to worsen, and Claimant was having spasms and was unable to twist or bend. *Id.* at 521. The frequency of episodes was daily and increasing, and Claimant found them "incapacitating." *Id.* Despite a change in restrictions, the ALJ finds Claimant still had a decrease in her earning capacity as of May 17, 2018, based on her worsened condition.

12. Claimant had a follow-up visit with Dr. Bennett on October 16, 2018, as "[t]here had been a change in the programmability of her system." Tr. at 36:25-37:1. The neurophysiologist, during routine programming for the stimulator, realized that there were certain electrodes that he could not access. Tr. at 37:4-6; Cl's Ex. 9 at 114.

Claimant was still getting some coverage from the spinal cord stimulator, but not complete coverage. Tr. at 38:16-22; Cl's Ex. 9 at 115. The neurophysiologist could reprogram and obtain coverage briefly, but Claimant would report that would fade within days of leaving the office. Tr. at 39:21-24; *see, e.g.*, 39:25-40:1; Cl's Ex. 9 at 120. Dr. Bennett became "concerned about the stability of the hardware, itself." Tr. at 37:7-10, 40:6-11. The only option was to return to the operating room to disconnect the battery of the stimulator from the electrode and paddles to determine where in the circuit the problem was occurring. Tr. at 38:2-5. The operation occurred on January 7, 2019, and, upon analysis of the battery and the paddle, Dr. Bennett determined the problem was with the lead in the paddle, and not the IPG (battery). Tr. at 38:8-14; Cl's Ex. 9 at 125-27. The stimulator had stopped functioning. Tr. at 50:19-51:1, 57:8-14, 75:19-22, 171:24-25. Further, an X-ray of the thoracic spine at the level where the paddle had been placed (T-10) showed some degenerative changes at that level. Tr. at 41:14-22. The finding by Dr. Bennett regarding the malfunctioning of the stimulator corroborates Claimant's statements to her medical providers and testimony that her physical and mental condition worsened as of May 17, 2018 as well as Dr. Goldberg's decision to remove Claimant from work.

13. Dr. Bennett referred Claimant to neurosurgery because the lead sitting over the spinal cord needed to be taken out and cleaned, a new paddle needed to replace the non-working paddle, and there would be an extensive area of scar and adhesions that would need to be removed under microscope. Tr. at 41:3-12; Cl's Ex. 9 at 135.

14. In March 2019, Claimant received a letter from Mr. Talbage at the Division of Vocational Rehabilitation stating her file had been closed because of her pending surgeries. Cl's Ex. 27 at 424. Claimant has not reached back out to Mr. Talbage, because she is still waiting for something that would provide her with relief from the pain. Tr. at 168:13-22.

15. Claimant then started experiencing brain fog. Tr. at 167:11-12. She first thought it was just from the surgery, "[b]ut it – it just never ended." *Id.*

16. Dr. Bennett again saw Claimant on June 11, 2019. Dr. Bennett recommended a referral to neurosurgery, Dr. Beasley, for consideration of revision of the paddle versus replacement of the paddle. Tr. at 42:6-11.

17. Dr. Beasley ultimately gave the opinion of re-trialing below the paddle to see if they could capture new nerve fibers. Dr. Robinson, who Dr. Bennett referred Claimant to for a second opinion, determined that revision of the spinal cord stimulator was not appropriate, but suggested that Dr. Bennett could place a trial lead lower on the cord, and then Dr. Robinson could just place a new paddle beneath the old one without having to expose the old surgical site, and thus reduce complication. Tr. at 51:4-12; Cl's Ex. 9 at 181. Dr. Robinson recommended a trial of lead revision one level below the current spinal cord stimulator construct. Cl's Ex. 9 at 171, 174; Tr. at 56:3-5. Dr. Bennett noted "This is NOT normal maintenance of the SCS system," but rather a revision. Cl's Ex. 9 at 171.

18. Dr. Bennett also took Claimant off work status on January 30, 2020 – effective February 10, 2020 - because the extremity was worsening, she could not perform work with the pain, and he was going to implant a new stimulator lead for a trial. Tr. at 57:8-14; Cl's Ex. 9 at 191.

19. On February 10, 2020, Dr. Bennett performed the trial and implanted a new lead at the cauda margin of T-10. Cl's Ex. At 192-193; Tr. at 192. Claimant had a 70% reduction in pain, her temperatures normalized following the trial, and there was a significant decrease in the neuropathic findings. Tr. at 55:13-17; Cl's Ex. 9 at 197, 200. Unfortunately, Claimant also began receiving shocking and intermittent jumping of the signal. Tr. at 51:24-52:2; Cl's Ex. 9 at 200. As a result, by February 20, 2020, Dr. Bennett decided to pull the trial lead out. Tr. at 52:3; Cl's Ex. 9 at 201. Although Dr. Bennett still considered placing a paddle at a different level, he could not guarantee that Claimant would not continue to have intermittent shocking from the system. Tr. at 53:1-4. Thus, Dr. Bennett referred Claimant for removal of the spinal cord stimulator. Cl's Ex. 9 at 201. COVID delayed that procedure, but it was eventually performed. Cl's Ex. 9 at 222, 243.

20. Claimant brought up a peripheral nerve stimulator (PNS) to Dr. Bennett and asked if it was an option, and Dr. Bennett determined that Claimant should consider a trial of a peripheral stimulation *Id.*; Tr. at 184:11-15, 17-20. He requested Dr. Goldberg make an appropriate referral. *Id.* It would be less invasive than either of the plans from Drs. Robinson or Beasley. Tr. at 53:6-11.

21. In March of 2020, Dr. Bennett noted that Claimant "has not been able to work since January 2019"; the limited reduction of pain "is not enough to permit meaningful engagement at work." Cl's Ex. 9 at 205. Dr. Beasley finally removed the non-functioning spinal stimulator on June 16, 2020. Depo. Goldman at 79:18-25.

22. Greg Reichhardt, M.D., performed several medical exams on behalf of Respondents over the years regarding Claimant and her need for treatment. Although he originally stated in his testimony that there were no objective findings that Claimant had gotten worse, Dr. Reichhardt agreed that Claimant's spine cord stimulator was non-functioning as of January 2019 and was ultimately removed. *Id.* at 28:23-29:3. He also admitted that there was a CT myelogram on June 21, 2019 that noted mild flattening of the dorsal sacroiliac at the level of the spinal cord stimulator at T10. *Id.* at 29:6-7; *id.* at 34:16-21. Finally, while he had for years stated throughout the claim that Claimant did not have CRPS (even following Dr. Mitchell's determination that Claimant was at MMI for CRPS), by April 10, 2019, Reichhardt admitted that Claimant appeared to have CRPS of left foot, and her spinal stimulator was currently not working. Depo. Reichhardt at 69:8-15, 75:1-9; Rs' Ex A at 50.

Worsening of Condition – Opioid Treatment

23. Claimant had not been on opioids for chronic pain during her treatment of CRPS, except for following surgical procedures. Tr. at 43:2-5. However, on March 14, 2019, Dr. Bennett prescribed opioids to Claimant because of the breakdown of the spinal cord stimulator, severe break through pain into Claimant's lower extremity, and because she had tried multiple other medications in the past without benefit. Cl's Ex. 9 at 137-38; Tr. at 43:6-12, 75:19-25. Claimant had been experiencing flares of 8 out of 10 on a daily basis, which were negatively affecting her function. Cl's Ex. 9 at 138. Dr. Bennett hoped that the opioids would allow Claimant to continue work and function during the determination of a neurological solution for the stimulator. Tr. at 42:23-43:1; Cl's Ex. 9 at 140. Dr. Bennett wanted "to keep her from ending up in bed, I want to have her up and

about." Tr. at 57:5-7. Claimant noted that after the January surgery, "The – the pain increased" and so Claimant "finally relented" and went on opioids. Tr. at 167:12-14.

24. At each visit thereafter, Dr. Bennett continued to perform physical tests on Claimant for the CRPS, as well as perform screens for how the opioids were affecting Claimant. Tr. at 43:22-44:9. Dr. Bennett's goal was to maintain as much function as Claimant had at the time of her original DIME examination, with the absence of a functioning stimulator. Tr. at 45:7-12.

25. Claimant noted that "The opioids take the edge off. That's really all it does is take the edge off. It doesn't get rid of the pain." The opioids allow Claimant to sleep, but she will still wake up from the pain every, two, three, or four hours. Tr. at 169:12-17. They have also increased her brain fog, "it's not something that I would wish on anyone." Tr. at 169:7-8. She has been finding herself more overwhelmed and having a harder time cognitively. Tr. at 170:5-8. In contrast, with the stimulator, Claimant could almost entirely get rid of the pain–even down to a zero or one on the pain scale. Tr. at 169:20-22. She was also able to walk a reasonable distance, and both work and function "pretty normally." Tr. at 169:2-5.

26. While waiting for the trial to be re-approved, Dr. Bennett recognized that there was not going to be a way to put in a full new spinal cord stimulating unit, so on December 10, 2019, he tried an EMG-guided nerve block of the peripheral nerve to control the pain without the need to increase the opioid. Cl's Ex. 185; Tr. at 54:2-6. That was effective for several months. *Id.*; Cl's Ex. 9 at 189. "Blocks are never a long-term solution," but they are good for intermittent pain control, "primarily during flares, when everything else fails to bring the flare under control." Tr. at 54:8-13.

27. "Opioids can have widespread effects on the body." Depo. Reichhardt at 28:6-7; Tr. at 44:4-5 (Dr. Bennett); Depo. Goldman 84:5-21. "It is preferable to avoid opioids, if possible." Depo. Reichhardt at 28:10-11. Dr. Goldman, another record-only RME, noted that when a patient takes opioids, the physicians must be vigilant in assessing head to toe symptoms, especially in CRPS. Depo. Goldman 84:5-21. Further, Drs. Bennett and Goldman agreed that, at best, opioids provide usually only a 30% diminution of pain, on good days maybe up to 40%. Depo. Goldman at 84:5-21. Dr. Reichhardt reported that Claimant would need to continue opioid use as a bridge until she could undergo revision of the spinal cord stimulator or implantation of a classical proximal peripheral nerve stimulator. Depo. Goldman at 81:8-25; Rs' Ex. B at 97. Both Drs. Bennett and Goldman agree that while opioid medication can help reduce pain, they cannot primarily treat the vascular components of CRPS. Depo. Goldman at 84:22-85:6.

Worsening of Condition – Complaints and Exam Findings

28. On May 17, 2018, Claimant presented to Dr. Goldberg. At this appointment, Dr. Goldberg noted that Claimant's chief complaints included the following:

    - Increased pain with her leg being very painful.
    - Increased depression, but no active suicidal thoughts but wishing she was dead.
    - Desire of Claimant to go on short term disability.

29. At the May 17, 2018, Dr. Goldberg evaluated Claimant and performed a physical examination and noted that Claimant had "toes echhymotic and cold" on her left lower extremity, and diffuse pain and changes--these became constant findings in Dr. Goldberg's future records. *See, e.g.*, Cl's Ex. 12 at 441, 445 & 462.

30. Based on her assessment, Dr. Goldberg provided these diagnoses:

    - Complex regional pain syndrome of the left lower extremity.
    - Generalized anxiety disorder.
    - Mood disorder due to known physiological condition with depressive features.

    Based on Claimant's worsening medical and psychological condition, Dr. Goldberg took Claimant off work immediately and specified Claimant should go on short-term disability. She also advised Claimant to call if she had any suicidal ideations so Claimant could be hospitalized. Based on Claimant's worsening condition and being removed from work – Claimant had an increase in her disability and an actual decrease in her earning capacity since being placed at MMI. Cl's Ex.12, BS 439-442.

31. On May 18, 2018, Claimant returned to Dr. Goldberg. At this visit, Dr. Goldberg restated that she put Claimant on short term disability – the day before - because of Claimant's increase in pain and increased depression, i.e., worsened condition since being placed at MMI. Cl's Ex. 12, BS 443.

32. In January 2019, Dr. Bennett noted that Claimant was having allodynia, hyperpathia and mild windup. Cl's Ex. 9 at 136. Dr. Bennett continued to note that Claimant's left lower extremity was now positive for allodynia, hyperpathia, and mild windup. Tr. at 43:2-5. Dr. Bennett again saw Claimant on June 11, 2019. His physical examination showed a return of neuropathic symptoms. Tr. at 42:1-2. Again, Claimant had allodynia, hyperpathia and mild windup. Cl's Ex. 9 at 148. He also noted that trophic changes were present. *Id.*

33. Dr. Bennett confirmed that temperature changes of .5 degrees Celsius between extremities is significant; reaching one or two degrees Celsius, quite significant. He also noted her blue toes. Tr. at 55:5-7 & 69:19-23; *see, e.g.*, Cl's Ex. 9 at 210, 216, 222 & 255.

34. Dr. Bennett confirmed hypersensitivity to light touch--hyperpathia, consistent with CRPS. Tr. at 69:9-13.

35. By October 20, 2020, Dr. Bennett's findings demonstrated Claimant continued to worsen and her symptoms now included moderate-marked allodynia, windup with one-second separated brushstrokes, mottled skin, and dark blue fourth and fifth toes, coupled with significant temperature differences between the left and right lower extremity. Cl's Ex. 9 at 255.

36. Dr. Bennett noted a concern with diminished muscle tone and width when compared with the other extremity. Cl's Ex. 9 at 255; Tr. at 60:22-61:1. Muscular atrophy in CRPS appears as the syndrome progresses; "when you start seeing those changes, they're often irreversible." Tr. at 61:5-10. Along with the physical exams and temperature differences, this is showing "the CRPS is not getting better, [i]t's actually worsening without treatment." Tr. at 61:11-14.

37. When the stimulator started failing, Claimant noted that her gait changed. She started walking on her heel, instead of pushing off with her toes. Her posture also got worse, and as the pain got worse, “it just spiraled.” Tr. at 172:11-21. After the stimulator fully failed, Claimant began to notice that her foot was cold, and sometimes the coldness would go above her knee. Tr. at 173:3-4. The discoloration and pain got worse. Tr. at 173:5-6. Her left calf was remarkably different, showing atrophy. Tr. at 173:17:20. She recently measured her calves, and her right is 34 1/2 centimeters, her left is now down to 32 1/2 centimeters; the left atrophy has been “progressively getting worse since the stimulator has gone.” Tr. at 174:22-175:3.

38. By October 12 of 2020, even Dr. Reichhardt noted that Claimant was reporting her pain in her left foot as 8-9 out of 10, and that she was having significant symptoms from CRPS. *Id.* at 34:3-7; Rs’ Ex. B at 69, 74. Dr. Reichhardt admitted in his report of November 13, 2019 that Claimant’s prognosis without replacement of the spinal cord stimulator was “fair,” but with the spinal cord stimulator, it “would be better.” *Id.* at 30:5-12; Rs’ Ex. B at 109. He stated that he was “hopeful that she could be back to where she was prior to the malfunction of her spinal stimulator.” Rs’ Ex. B at 109; Depo. Reichhardt at 30:13-18.

39. Dr. Goldman noted that objective physical findings of worsening of CRPS would include wasting of the foot, a two-centimeter difference in girth in the calf muscles measured side to side, and visualization of soft tissue and the quality of the skin and fascia. Depo. Goldman at 96:21-97:20. However, in this case he was only able to make determinations regarding physical findings of trophic changes or atrophy changes to Claimant’s left lower extremity by reviewing other physicians’ observations. Depo. Goldman at 82:7-14. Dr. Goldman, as noted earlier, never examined Claimant.

Worsening of Condition – Psychological

40. On May 17, 2018, around the time that stimulator was starting to fail, Dr. Goldberg became concerned about Claimant psychologically, noting Claimant’s mood disorder due to a known physiological condition with depressive features, and so she decided to entirely restrict Claimant from work as of that date. Cl’s 12 at 441-42. Dr. Goldberg noted that Claimant presented for her appointment “with increase depression and pain and declining overall since MMI one year ago.” *Id.* at 439.

41. Following the failure of the stimulator, and Dr. Bennett placing Claimant on opioids, Dr. Bennett performed a brief battery for BHI 2 on July 11, 2019. Tr. at 88:9-21. Dr. Bennett recognized that Claimant was experienced a diminishment or decrease in function due to psychological issues. Cl’s Ex. 9 at 152. He referred Claimant to John Disorbio, M.D., for further evaluation. Tr. at 45:1-9; Cl’s Ex 9 at 156-58. Dr. Bennett had collaborated with Dr. Disorbio for many years on difficult cases, including a large number of CRPS and neuropathic pain cases. Tr. at 64:11-16.

42. Dr. Disorbio is a licensed clinical psychologist, who has worked in the field of pain medicine psychology for over 34 years and has treated “[t]housands of workers’ compensation patients, and, in particular, many patients with CRPS.” Tr. at 85:12-18. He is the co-author of the Battery for Health Improvement 2 (BHI 2), as well as the medical intervention risk report, an evidenced-based measure. Dr. Bennett referred Claimant to Dr. Disorbio because he was “very concerned” that she had been

"deteriorating from an emotional perspective." Tr. at 86:22-23. "[S]he was actually struggling to the degree of where she was having difficulty from a cognitive perspective as well as a physical perspective." Tr. at 86:24-87:1.

43. Dr. Disorbio first evaluated Claimant on August 23, 2019. When he first saw her, Claimant was reporting 9 out of 10 on the pain scale, but Dr. Disorbio felt Claimant still "was hopeful that we could get something done to reduce her pain and improve her function. But over the time that I started to treat her, it – she deteriorated over time because she became rather hopeless." Tr. at 89:19-23, 97:14-24. "She has struggled mightily." Tr. at 89:19. Compared to the two percent psychiatric impairment for continued medication use that Dr. Mitchell provided Claimant when she reached MMI, and Marilyn Myers, Psy.D., indication that Claimant was stable before MMI; Dr. Disorbio stated that "From my perspective, I have observed [Claimant], over the time that I've been treating her, that she has deteriorated from an emotional perspective… problems with memory, concentration, and she definitely has the vegetative signs of depression." *Compare* Tr. at 90:4-15 *with* Cl's Ex. 8 at 70. "She has difficulties with recall and just functioning, and I've watched her just struggle mightily at this point." When Dr. Disorbio saw her, he determined that she was not at MMI from a psychological perspective, but rather, worse than when she had presented for a DIME with Dr. Mitchell. Tr. at 92:10-14, 18-23; Tr. at 96:19-23 (Dr. Disorbio reviewed the DIME report after his initial evaluation of Claimant). The testing and treatment that Dr. Disorbio performed were designed as part of a multi-disciplinary approach to treat her diagnosed condition of CRPS. Tr. at 115:16-20 & Tr. at 93:19-22.

44. Claimant noted at hearing that she did not feel like she had a mental issue at the time of the DIME because "I was still able to work full-time. I was still functioning – a functioning human being." Tr. at 171:19-21. When asked to attribute her current depression and anxiety to her injuries or to something else, Claimant responded, "I would say 90 percent of it is to the injury, because it's like, you increase the pain. You lower the sleep because of the pain. You don't function as well, and the add the – the medications on top of it, and – I mean, it – and the medication's all for the pain." Tr. at 176:6-10. Claimant noted that she also had financial struggles, and there were so many issues still up in the air about getting her dysfunctional, non-operational stimulator being taking out. Tr. at 114:11-3; Cl's Ex. 11 at 376. She also noted, "I have to be careful, because there are times where I'm more focused on the pain than what I am doing." Tr. at 176:13-14. She named her biggest stressor as the brain fog, and noted that "sure, the litigation stuff adds to it." Tr. at 175:13-23. She does not believe she would be able to complete her previous work now, "I mean, I – if I can't even figure out the screens for a meeting, I'm – I'm sorry. You know, I mean, things – things have totally changed." Tr. at 200:20-24.

45. While Dr. Disorbio noted some of Claimant's distress was caused by the litigation process, the ALJ finds that this distress is not a factor in Claimant's worsening psychological condition. Instead, the ALJ finds that the malfunction of the stimulator with the associated increase in pain and disability is the cause of Claimant's worsened psychological condition.

Dr. Goldman – RME Record Only Review

46. L. Barton Goldman, M.D., is a non-shareholding physician of Rehab Associates of Colorado. Depo. Goldman 7:23-8:2. Dr. Reichhardt, who performed multiple RMEs and testified for Respondents in the claim, is the current president and shareholder of Rehab Associates of Colorado, and therefore, Dr. Goldman's supervisor. *Id.* at 7:15-21.

47. Dr. Goldman never personally examined Claimant, and stated in his report, "the patient's subjective history, the patient's pain questionnaire responses, physical examination, and any other data or information pertinent to this evaluation that I will be able to weigh the various commentaries within the most accurate and integral perspective and thereby provide the most comprehensive, accurate, and medically probable conclusions and recommendations towards the end of this document." (R's Exhibit A, pg. 6). *Id.* at 8:8-12. Dr. Goldman did not have access to these acknowledged pieces of important data from an actual physical exam and interview of Claimant.

Medical Treatment Reasonable, Necessary and Related -- Peripheral Nerve Stimulator

48. Lynn Zang, M.D., a neurologist who saw Claimant for new numbness of her left foot on Feb 25, 2019 and April 5, 2015, found that the numbness was likely a clinical worsening of her CRPS. Depo. Goldman at 73:5-9; (Cl's Ex. 16 at 196, 1103). However, she also gave the possible diagnosis of tarsal tunnel of the left lower extremity, after an NCV/EMG study. (Cl's Ex. 16 at 196, 1103).

49. Therefore, on May 20, 2019, Claimant saw Gregory P. Still, D.P.M, for consultation of possible tarsal tunnel of the left lower extremity. Cl's Ex. 10 at 265. Dr. Still thought Claimant may have some degree of tarsal tunnel and recommended a diagnostic block. *Id.* at 267. He also determined that surgery was not a good option because of her CRPS, but noted that with her CRPS she may be a candidate for a peripheral nerve stimulator. *Id.* at 266-67.

50. Gregory Paul Still, DPM, is board certified in foot and ankle surgery. He is a private practice podiatrist and does not usually take workers' compensation cases. Tr. at 130:7-8. Although Claimant first saw Dr. Still on her own (she had looked him up after hearing the possible diagnosis of "tarsal tunnel"), Dr. Goldberg specifically referred Claimant to him for evaluation of a peripheral nerve stimulator, and Dr. Still agreed to keep seeing Claimant "despite being work comp." Tr. at 130:9-10, 186:22-187:1; 74:15-16.

51. After initially ruling out some other potential causes of Claimant's pain, his focus became determining whether a peripheral nerve stimulation would help her. Tr. at 122:4-7. He performed some peripheral nerve blocks on different nerves to try to determine which were the biggest contributors to her pain. Tr. at 122:7-8, 16-22. Throughout 2019, her performed blocks on 3 of the 4 nerves in the lower extremity, below the knee. Tr. at 122:23-123:2. Claimant received relief with selective nerve blocks as well as blocks with more than one nerve. Tr. at 123:1-7. "Even though her pathology of her pain was mediated by more than one nerve, and that's common with CRPS, she got quite a bit of relief… at times, 70 percent of more relief of pain." Tr. at 123:8-11, 20-21. Dr. Still focused primarily on the tibial nerve and the superficial peroneal nerve because "those are the main nerves that provide both sensation and motor function in the leg." Tr. at 124:2-5. "I do think she has pain that is caused also by the sural nerve,

but that's a small sensory nerve, and I feel that is one that possibly could be… not treated right now, and –- and we could still probably obtain 70 to 90 percent relief of her pain. Tr. at 124:7-12. The outcomes of the various blocks focused Dr. Still toward considering a peripheral nerve stimulator, a minor surgery. Tr. at 124:14-18. He did not feel that she would benefit from any major surgical procedures on her leg or foot because doing surgery on someone with CRPS could make them worse. Tr. at 125:19-22. "She didn't have too many options left for treatment." Tr. at 125:5-6.

52. A peripheral nerve stimulator is a small device – an external pulse transmitter, like a battery pack. Tr. at 127:10-12. It is about the size of a thumb, and it is attached to the outside of a patient's extremity. Tr. at 127:11-13. It can be removed for showering/bathing/swimming and before bed. Tr. at 127:13-15. It is initially placed in a minor procedure and the leads do not need to be moved "very often with peripheral nerve stimulation because they stay in place pretty well. The catheter has a little anchor that deploys it into the soft tissue." Tr. at 138:2-5. Additional invasive procedures are not necessary because the batteries are contained in the external pack and can be charged overnight. 137:22-18:1. Peripheral nerve stimulators have been used for CRPS for over 30 years, but they are under-utilized because "let's face it, doctors typically don't get paid that much to do these stimulators." Tr. at 128:22-34. However, "there's more and more research indication that this is a great option. And – and not just recent research, but 25, 30 years' worth."[1]

53. Dr. Still performed a brief trial for the peripheral nerve stimulator on May 18, 2020. Tr. at 125:9; Tr. at 125:25. "[T]here's valid criticism in that a trial that did was only about an hour long or --- or maybe even 45 minutes, but that was all I was authorized to do by the workman's comp company." Tr. at 125:13-16. There are trials that are more extensive and accurate that can be done for 3-7 days, but those were not authorized by the workers' compensation company. Tr. at 125:9-21.[2] Dr. Still determined that even though Claimant did not have the longer trial, that the peripheral nerve stimulator was a good option, because she had already tried surgery, medications, and a spinal cord stimulation, and "[s]he doesn't have too many options left." Tr. at 128:12-15. "The risks are relatively low, and the cost is relatively low," "I feel the risk to benefit ratio on this is – is worth taking the risk." Tr. at 128:15-17.

[1] One of the studies referenced was paid for by Bioness. Dr. Still commented, of course they are studies funded by companies, "that's what we have to deal with in medicine. It's. . . unfortunate and fortunate." Tr. at 151:21-152:2. Dr. Goldman expressed concern over the Bioness study, but also stated, "It's not uncommon for the very first studies to be industry subsidized." Depo. Goldman at 87:1-2. Dr. Still also referenced a study of PNS from September 2020, a 30-year review of 165 patients treated with PNSs, "so the research is ongoing." Tr. at 151:15-17.

[2] Both Drs. Reichhardt and Goldman note that the Guidelines suggest that a longer trial of the peripheral nerve stimulator is necessary before they Guidelines recommend authorization of the peripheral nerve stimulator. Tr. at 35:18-24; Depo. Goldman at 18:20-22. However, Respondents refused to authorize a longer trial. Respondents cannot have it both ways. They cannot fail to authorize a longer trial, and then use the doctor's failure to perform a longer trial against the Claimant.

54. The trial peripheral stimulator targeted the tibial nerve and the superficial peroneal nerve, both located above the ankle level. Tr. at 126:1-5. Dr. Still acknowledged that there has been some criticism in the past of peripheral nerve stimulation being used for CRPS because it is a multi-nerve problem. And, even Dr. Reichhardt, stated that peripheral nerve stimulation could only address one nerve (although he also admitted that he does not have independent expertise regarding spinal cord stimulators and the difference in models and compatibility issues and was unable to find scientific support, Tr. at 32:17-33:20). Tr. at 131:10-12. However, the Bioness nerve stimulator could target two of the three nerves causing pain in Claimant's leg. Tr. at 126:6-10. When performing the trial with the Bioness trial stimulator, it yielded an estimated 90% relief of Claimant's pain that day. Tr. at 126:11-14. Based on the results of the trial, Dr. Still submitted a request for a peripheral nerve stimulator for Claimant. Tr. at 126:18-21.

55. Dr. Still learned about the workers' compensation medical treatment guidelines after the insurer denied the peripheral nerve stimulator. He noted that the guidelines are just that, guidelines. Tr. at 130:2-3. "We don't have randomized, double-blinded placebo… or controlled trials for many things in medicine." Tr. at 130:12-14. In his response to the insurance carrier after the denial, he was frustrated and blew off some steam at the workers' compensation process. Tr. at 135:23-136:6, 150:4-7 (Respondents were holding the treatment guidelines 'as such high dogma or like their bible was – yes, I mean, I understand I – I was unfortunately being over passionate about trying to care for the pa[tient]. "The American Society of Regional Anesthesia and Pain Medicine, on their website, they recognize that peripheral nerve stimulation is . . . a legitimate treatment option for CRPS type 2. And oftentimes, CRPS type 2 responds very robustly to directly stimulating a peripheral nerve." Tr. at 131:4-8. Additionally, Claimant's CRPS symptoms are localized in her left lower extremity, and so a peripheral nerve stimulator can target that area. Tr. at 131:19-132:6. If the CRPS had spread or would spread to her other extremity, the peripheral nerve stimulator would not be part of the discussion. *Id.* Without the peripheral nerve stimulator, all Dr. Still can offer Claimant is temporary relief through additional peripheral nerve blocks. Tr. at 135:1-6.

56. Dr. Bennett concurred with Dr. Still by stating he did not consider the workers' compensation medical treatment guidelines to be definitive for the standard of care for diagnosis or treatment of CRPS. Tr. at 82:10. "Guidelines are meant to – as a checklist to make sure you've thought of all of the elements. But guidelines, in general, are behind the science. The science is always advancing faster than the guideline. So in practice in clinical medicine, I use the latest science, the latest data, and the latest peer-reviewed journals to determine the best treatment in both diagnosis and treatment of CRPS." Tr. at 82:11-17. [3]

[3] Dr. Goldman testified that the Colorado medical treatment guidelines for the treatment of CRPS have not been adopted by the medical pain interventional groups. Depo. Goldman at 94:1-4, 13-15. Further, he stated that there is no gold standard for the evaluation, diagnosis, and treatment of CRPS in the field – there are always different views. Depo. Goldman at 94:19-95:2.

57. Dr. Bennett believes the peripheral stimulation is reasonably alternative to treat Claimant's injury. Claimant has an "excellent response to neuromodulation." Tr. at 59:9. There have been technical problems, not physiologic problems. She had a good response to the initial stimulator, the percutaneous trial done in conjunction with Dr. Robinson, and from the peripheral stimulation. Tr. at 59:11-15. "So electrical neuromodulation for [Claimant] would be the preferred method of treatment." Tr. at 59:15-17. Putting in a new spinal cord stimulator is very invasive because the doctors would have to remove parts of the anatomy to get a new lead in; there is also increased risk of bleeding because they would need to remove the scar from the space (both Drs. Robinson and Beasley's concerns), and the peripheral stimulation is less invasive and had a good reaction. Tr. at 59:18-60:2.

58. "The summary of my opinion, after following [Claimant] now since 2013, is that prior to failure of stimulation, she had normalized her exam. She was working full-time. She was functional, active human being. At this point in time, she has degrad[ed] way past that baseline. And we know that neuromodulation is effective in treatment of this disease, and it, particularly in her case, was very effective in treating her CRPS. Adding to that, she responded with peripheral stimulation identically to how she responded to central cord stimulation. That method's the least [invasive], and it's my opinion she would do very, very well and go back to her state at the DIME evaluation." Tr. at 63:7-19; *and see* Depo. Goldman at 9:17-19 ("[Claimant's] response to her stimulators is as good as I've seen in my career, actually").

Worsening of Condition – Wheelchair

59. On August 9, 2018, Dr. Goldberg determined that Claimant "has worsened in the last few months from MMI and she needs an electric wheelchair… No walking over 1000 feet." Cl's Ex 12 at 513. Although both parties had stipulated that an electric wheelchair was not reasonable or related at the time of MMI, by May 20, 2019, Respondents agreed that an electric wheelchair was reasonable and related, and approved it for Claimant's use. Depo. Goldman at 73:10-14; Rs' Ex. A at 47. Claimant began presenting to appointments in an electric wheelchair. *See, e.g.*, Depo. Goldman at 82:2-6.

Overall Opinions Concerning Worsening of Condition

60. Dr. Bennett's opinion is that treating a patient requires a team approach. Tr. at 53:15. Dr. Goldberg as the primary, Dr Bennett as the interventionist, Dr. Disorbio works with the biopsychosocial aspects of the disease; and Dr. Still is the surgical expert who also does peripheral nerve stimulation. Tr. at 53:17-22.

61. Dr. Bennett testified that he believes that Claimant's condition has worsened since she was at MMI. He noted that with CRPS, a patient can have spontaneous flare-ups that often last a day or two, or even up to a week. Tr. at 50:10-14. Flares can often be treated using different signals on the stimulator. Tr. at 50:14-15. After Dr. Bennett determined the malfunction of the spinal cord stimulator on January 7, 2019, he was concerned that Claimant was experiencing flares, but then the symptoms continued, "And there's been a – a continual devolution, if you will, of this – in symptoms," which "is directly attributable to the lack of neuromodulation at the present time." Tr. at 50:20-51:1. "There's been a steady diminishment in the left lower extremity's ability function.

There's been increase in neuropathic pain. That's the allodynia, hyperpathia, windup that we talked about earlier. And there is greater dysfunction psychologically, which is why Dr. Disorbio and I have co-managed that in order to maintain as much function as possible." Tr. at 58:3-10. "She has florid CRPS of the left lower extremity….It's only worsened over time. The only thing [Claimant] hasn't developed, which is my concern, is inturning or contraction of the extremity." Tr. at 58:17-21. If the continuation of the lack of blood flow continues, the calcium from the bones will be leached off, which is irreversible, and would compromise the extremity. Tr. at 59:1-6; (Cl's Ex. 9 at 259). Right now, Claimant's CRPS is localized to her left lower extremity. Tr. at 49:1-2.

62. Even Respondents' doctors have made findings that Claimant's condition has worsened. First, Dr. Reichhardt has now finally agreed that Claimant has CRPS. Depo. Goldman at 69:8-15, 75:1-9; (R's Ex A at 50). Additionally, in his examination of Claimant, he stated that Claimant's prognosis without placement of a spinal cord stimulator is only fair, but with a spinal cord stimulator, he anticipated her prognosis to be somewhat better. Depo. Goldman at 84:4-16. Further, if Claimant were to receive some kind of neuromodulation or neurostimulation, she could likely reduce or get off the opioid medication completely. *Id.* at 83:17-23. Dr. Goldman determined that Claimant received about two years of symptomatic and functional benefit from her spinal cord implantations between September 2014 and early 2017. 78:5-10; Rs' Ex A at 65. In the little over two-year period that she received both symptomatic and functional benefit from the spinal cord stimulator, Claimant did so without being on chronic opioid medication. Depo. Goldman at 80:21-81:2. Dr. Goldman determined as of one year ago that Claimant carries a primary clinical diagnosis of CRPS type two .Tr. at 80:1-5; Rs' Ex. A at 62. He also determined that Claimant was better off when she was getting pain reductions and functional gain from the spinal stimulator than she is now on opioid medication. Depo. Goldman at 92:2-8. "If we could put her back where she was in that very first stimulator and recreate that, she would be better off." *Id.* at 92:8-10. Dr. Goldman also expressed concern that the CRPS has migrated from just her lower leg into her foot, based on the physical findings of the examining doctors. Depo. Goldman at 79:5-7.

Unrelated Car Accident

63. Claimant was involved in a car accident in October 2019. Tr. at 185:8-10. The accident hurt her neck, shoulder, right wrist, and right knee. Tr. at 185:17-20. She reported levels of pain from 6-10 out of 10 to her chiropractor who treated her for the car accident. Tr. at 185:24-186:2. She also reported the accident to her primary care, Dr. Goldberg. Tr. at 186:15-21. She did not report it to other doctors because it was not part of her workers' compensation injury. *Id.* She did not receive any overlapping treatment for her left lower extremity. Tr. at 201:2-7. Claimant noted that her workers' compensation doctors would isolate the pain scale to pain in her foot or pain in her back. Tr. at 202:6-14. Claimant did not suffer an injury her left lower extremity in this accident and it is not relevant here.

TTD Rate

64. Claimant's TTD rate is $810.67 per week. (Cl's Ex. 5 at 19).

Overall Persuasiveness of the opinions of Drs. Reichhardt and Goldman

65. The ALJ considered the detailed reports and testimony of Drs. Reichhardt and Goldman. Nonetheless, the ALJ did not find their opinions to be as persuasive as Claimant's treating providers when it comes to whether Claimant's condition has worsened and whether the PNS is reasonable and necessary.

66. First, Drs. Reichhardt and Goldman were hired by Respondents. Although merely being hired by one party does not automatically demonstrate bias, in this case it appears to this ALJ that both experts seemed to engage in a form of confirmation bias by mainly looking at factors that did not support a worsening of condition or did not support a finding that the PNS was a reasonable option for this Claimant based on her unique circumstances.

67. Second, it appears to this ALJ that that both experts seemed to rely exclusively on the *Guidelines* to support their opinion that the PNS was not reasonable and necessary. However, by focusing exclusively on the *Guidelines*, they discounted the unique circumstances of Claimant's limited treatment options based on the failure of her prior stimulator and the inability to replace the broken leads. As a result, their heavy reliance on the *Guidelines* appears to be at the expense of considering Claimant's unique circumstances and limited treatment options.

68. Third, Drs. Reichhardt and Goldman relied heavily on the fact that the trial for the PNS performed by Dr. Still was not conducted over a 5–7-day period as set forth in the Guidelines. However, Dr. Still did perform a trial and Claimant did get good relief which was consistent with Claimant responding positively to neuromodulation treatment in the past. And, while not a perfect trial, it was still a trial that factored into Dr. Still's opinion - which the ALJ finds persuasive - to recommend the PNS.

Ultimate Findings

69. Claimant has suffered a change in her physical and mental condition, which is causally connected to the original compensable injury.

70. Claimant's worsening of condition has caused an increase in her disability based on a decrease in her work capacity – an actual wage loss – as of May 17, 2018, when Dr. Goldberg took Claimant off work because of the effects of Claimant's work injury. As a result, Claimant is entitled to temporary total disability benefits as of May 18, 2018.

71. The ALJ also finds that based on Claimant's worsening of condition, Claimant needs additional medical treatment, in the form of the PNS, to cure her from the effects of her work injury.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

1. The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a

reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

2. The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

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

4. In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Reopening

5. Section 8-43-303(1), C.R.S., provides that at any time within six years after the date of injury "any award" may be reopened on the ground a change in condition, and both compensation and medical benefits previously ordered may be increased. *See Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186, 189 (Colo. App. 2002); *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 220 (Colo. App. 2008). A change of condition sufficient to justify reopening refers "to a change in the condition of the original compensable injury or to a change in claimant's physical or mental condition, which can be causally connected to the original compensable injury." *Chavez v. Industrial Commission,* 714 P.2d 1328, 1330 (Colo. App. 1985). The power to reopen under the provisions of § 8-43-303 is permissive and left to the sound discretion of the ALJ.

6. As more fully set forth in the findings of fact above, the ALJ finds and concludes based on the persuasive medical evidence and testimony presented by the Claimant and Drs. Bennett, Disorbio, and Still, and even some of the opinions expressed by Respondents' medical experts, that the Claimant has established by a preponderance of the evidence

that her compensable physical and mental conditions have worsened from the time she was placed at MMI by Dr. Mitchell. All of the findings of fact set forth above support this conclusion, but the ALJ highlights the following evidence in support of this conclusion.

- The Claimant was receiving good coverage from the spinal cord stimulator (SCS) at the time of MMI. Dr. Bennett's records near that same time confirm that good coverage. By the Spring 2018, the Claimant's condition was deteriorating with Dr. Goldberg noting increasing symptoms/problems and taking Claimant off work on May 17, 2018.
- By January 7, 2019, Dr. Bennett confirmed that the SCS was no longer functioning.
- In March 2019, Dr. Bennett started the Claimant on chronic opioid medications; medications that she had not taken on a regular basis before for her work condition and medications that only treat her pain, not the other problems/symptoms/complications of CRPS.
- The Claimant's physical exam findings with reference to the specific markers for CRPS worsened during this time as well; her CRPS become florid in her left lower extremity.
- Her psychological screening tests deteriorated and demonstrated a clear reduction in mental/psychological functioning based on her worsening CRPS, as well as opioid side effects.
- In response to her worsening condition Claimant required and obtained a wheelchair reflecting clear limitations in her ability to ambulate effectively.

Worsened Work Restrictions and Work Capacity

7. Worsening of condition after MMI entitles an injured worker to additional temporary disability benefits if the worsened condition caused a "greater impact" on a claimant's temporary work capacity than existed at the time of MMI. *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). The critical issue in cases controlled by *City of Colorado Springs* is not whether the worsened condition actually resulted in additional temporary wage loss, but whether the worsened condition has had a greater impact on a claimant's temporary work "capacity." *See El Paso County Department of Social Services v. Donn,* 865 P.2d 877 (Colo. App. 1993); *Kreimeyer v. Concrete Pumping Inc.*, W.C. No. 4-303-116 (ICAO, March 22, 2001); *Ridley v. K-Mart Corp.,* W.C. No. 4-263-123 (ICAO, May 27, 2003).

8. Here, the Claimant has actually suffered additional wage loss from increased work restrictions, as well as loss of work capacity. At the time of MMI, Dr. Mitchell noted that the Claimant was working full-time in the light-duty category. As more fully set forth in the findings of fact above, the Claimant has essentially worked full time during most of this claim, despite the serious nature of her work injury. Dr. Goldberg imposed new restrictions and declared the Claimant disabled on May 17, 2018 when she restricted Claimant from working which was right around the same time that the Claimant was laid off from her job. The medical evidence supports reinstating TTD benefits as of May 18, 2018 based on the opinions of Claimant's authorized treating physician Dr. Goldberg.

Claimant's ongoing disability was further established in January 2019 when Dr. Bennett performed the procedure that confirmed the non-functioning spinal cord stimulator. Dr. Bennett was clear that this process was not maintenance, such as the replacement of a SCS battery. Although the Claimant tried to find work after the layoff, she has additional work restrictions and a loss of work capacity at this time compared to her light-duty work capacity at the time of MMI. Moreover, the failure of the SCS corroborates Claimant's contention that she was getting worse after being placed at MMI and further supports Dr. Goldberg's decision to remove Claimant from work on May 17, 2018. As a result, the ALJ finds and concludes Claimant has established by a preponderance of the evidence that her condition has worsened since being placed at MMI, that her claim should be reopened, and that she is entitled to TTD benefits as of May 18, 2018.

PNS as Reasonable and Necessary

9. The ALJ ultimately determines whether the Claimant demonstrated that it is more likely than not that the recommended PNS is reasonable medical treatment necessary to cure and relieve her from the effects of the admitted work injury. If so, the ALJ will order Respondents to pay for the recommended PNS pursuant to the Colorado Medical Fee Schedule.

10. It is appropriate for an ALJ to consider the Medical Treatment Guidelines (MTGs) in deciding whether a certain medical treatment is reasonable and necessary for claimant's condition*. See Deets v. Multimedia Audio Visual,* W. C. No. 4-327-591 (ICAO, March 18, 2005), *aff'd Deets v. Industrial Claim Appeals Office*, No. 05CA0719 (Colo. App. May 17, 2007) (NSOP) (medical treatment guidelines are a reasonable source for identifying the diagnostic criteria). The ALJ's consideration of the MTGs may include deviations from them where there is evidence justifying the deviations. *Logiudice v. Siemans Westinghouse,* W.C. No. 4-665-873 (ICAO, January 25, 2011). There is no authority mandating that an ALJ deny medical benefits based on the MTGs. *Thomas v. Four Corners Health Care*, W.C. No. 4-484-220 (ICAO, April 27, 2009); *see also Burchard v. Preferred Machining,* W.C. No. 4-652-824 (ICAO, July 23, 2008) (declining to require application of medical treatment guidelines for carpal tunnel syndrome in determining issue of PTD); *Jones v. T.T.C. Illinois, Inc.,* W.C. No. 4-503-150 (ICAO, May 5, 2006), *aff'd Jones v. Industrial Claim Appeals Office*, No. 06CA1053 (Colo. App. March 1, 2007) (NSOP) (it is appropriate for the ALJ to consider the guidelines on questions such as diagnosis, but the guidelines are not definitive). The MTGs also do not constitute evidentiary rules, and an expert's compliance with them does not dictate whether the expert's opinions are admissible, or whether they may constitute substantial evidence supporting a fact finder's determinations. *See also* § 8-43-201(3), C.R.S. (when deciding whether certain medical treatment is reasonable, necessary and related "[t]he director or administrative law judge is not required to utilize the medical treatment guidelines as the sole basis for such determinations.")

11. While the ALJ has considered the MTGs in connection with the findings of facts and these conclusions - along with the medical evidence and testimony provided by the Respondents' medical experts - the ALJ finds and concludes Claimant has established by a preponderance of the evidence that the PNS is reasonable, necessary, and related to the work injury. In addition, the PNS is not maintenance treatment, but medical

treatment designed to cure Claimant from the effects of her work-related CRPS. The ALJ bases this conclusion primarily on the credible and persuasive testimony presented by Dr. Still. Dr. Still is a foot and ankle specialist. He carefully evaluated the Claimant's condition and did his best to isolate the two nerves involved that will provide her with the most relief from a peripheral nerve stimulator (PNS) of up to 90%. He confirmed that the MTGs are just that: guidelines. They are not the state-of-the-art with respect to the evaluation and treatment of CRPS. A PNS is the Claimant's last, best chance to receive pain relief from neuromodulation. She has responded well to neuromodulation in the past. She deserves the opportunity to have this limited, minor invasive procedure to seek relief from her pain, as well as the other CRPS symptoms/complications in her left lower extremity. The Claimant's CRPS symptoms are isolated in her lower left extremity. The PNS provides an opportunity to the Claimant to either be once again free from opioid pain medication or, at least, reduce the amount of her current opioid pain medication. A PNS will also treat the non-pain related symptoms of CRPS and, hopefully, avoid the cascade of bone loss described by Dr. Bennett. As a result, the ALJ finds and concludes Claimant has established by a preponderance of the evidence that the PNS is reasonable, necessary, and related medical treatment to cure her from the effects of her work injury and Respondents are ordered to pay for the PNS under the medical fee schedule.

TTD Rate

12. Claimant's TTD rate is $810.67 per week.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim is reopened for a documented and established worsening of condition.
2. Respondents shall pay for the peripheral nerve stimulator recommended by Dr. Still as reasonable, necessary, and related medical treatment to cure Claimant from the effects of her work injury.
3. Claimant established her entitlement to TTD benefits beginning on May 18, 2018.
4. Respondents shall pay Claimant TTD benefits at the rate of $810.67 per week – subject to any offsets - beginning May 18, 2018 and continuing until terminated by operation of law.
5. Respondents shall pay interest at 8% per annum on all benefits not paid when due.
6. Issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: April 28, 2021.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-123-084-001

ISSUE

1. Whether Claimant established by a preponderance of the evidence that her average weekly wage (AWW) should be increased from the amounts admitted by Respondents.

STIPULATIONS

At hearing, the parties stipulated that Respondents would recalculate Claimant's previously paid Temporary Partial Disability payments without considering Claimant's personal time off (PTO) as earned wages.

FINDINGS OF FACT

1. Claimant sustained an admitted injury in the course of her Employment with Employer on November 3, 2019.

2. Claimant began working for Employer in June 2018 and her initial hourly pay rate was $13.25. Over the course of her employment, Claimant received periodic increases in her hourly pay rate. At the time of her injury, Claimant's hourly wage with Employer was $14.65 per hour. Following her injury, Claimant continued to work for Employer and received a raise to of $.37 per hour to $15.02 per hour effective March 15, 2020. (Ex. 2 and D).

3. On December 5, 2019, Respondents filed a General Admission of Liability (GAL) with respect to Claimant's workers' compensation Claimant and admitted for temporary partial disability benefits and calculated Claimant's AWW as $400.44. (Ex. A). On November 17, 2020, Respondents filed a second General Admission of Liability which increased Claimant's AWW to $517.34. The increase was effective August 1, 2020 to account of Claimant's cost of COBRA at the rate of $116.90 per week. (Ex. B).

4. During the ten full pay-periods prior to Claimant's injury (from May 26, 2019 to October 26, 2019), Claimant earned an average weekly wage of $406.36 and worked an average of 27.74 hours per week. (Ex. 2 and D). The ALJ finds that the average weekly wage over this time period is a fair approximation of Claimant's AWW.

5. The ALJ further finds that a fair approximation of Claimant's AWW beginning on March 15, 2020 should include her $.37 per hour raise because Claimant's actual wage loss for each hour she did not work due to her work-related injury increased by that amount. Considering Claimant's raise, her AWW increased by $10.26 per week effective March 15, 2020 (i.e., $.37 x 27.74 hours) . Thus, Claimant's AWW beginning March 15, 2020 was $416.62 (i.e., $406.36 + 10.26).

6. Claimant’s cost of COBRA benefits was $116.90 per week, beginning August 1, 2020. (Ex. E). As such, Claimant’s average weekly wage effective August 1, 2020 was $533.52 (i.e., $416.62 + $116.90).

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

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

AVERAGE WEEKLY WAGE

Section 8-42-102(2), C.R.S. (2016) requires the ALJ to calculate Claimant's average weekly wage (AWW) based on the earnings at the time of injury as measured by the Claimant's monthly, weekly, daily, hourly or other earnings. This section establishes the so-called "default" method for calculating Claimant's AWW. However, if for any reason, the ALJ determines the default method will not fairly calculate the AWW, § 8-42-102(3), C.R.S. (2016) affords the ALJ discretion to determine the AWW in such other manner as will fairly determine the wage. § 8-42-102(3), C.R.S. establishes the so-called "discretionary exception". *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of Claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp*., supra; *Avalanche Industries v. ICAO*, 166 P.3d 147 (Colo. App. 2007). Where the Claimant's AWW at the time of injury is not a fair approximation of Claimant's later wage loss and diminished earning capacity, the ALJ is vested with the discretionary authority to use an alternative method of determining a fair wage. *See id*.

Claimant has established by a preponderance of the evidence that the AWWs admitted by Respondents in the GALs filed on December 5, 2019 and November 17, 2020 are not fair approximations of Claimant's wage loss or diminished earning capacity. The ALJ concludes that Claimant's AWW at the time of injury is best calculated using the hourly rate she was earning at the time of her injury ($14.65 per hour), multiplied by her average weekly hours worked during the twenty weeks prior to her injury or 27.74 hours. As found, Claimant's AWW at the time of injury was, therefore, $406.62 per week. After March 15, 2020, Claimant's hourly wage increased, and her wage loss for each hour lost due to her injury increased commensurate with that raise of ($.37/hour). Thus, after March 15, 2020 Claimant's AWW is best determined by using her actual pay rate of $15.02 per hour, not $14.65 per hour, multiplied her average hours worked pre-injury. As such, a fair approximation of Claimant's AWW as of March 15, 2020 is $416.62.

As of August 1, 2020, Claimant was entitled to the inclusion of her cost of COBRA benefits as part of temporary disability benefits, as Respondents admit in their November 17, 2020 GAL and acknowledged at hearing. Accordingly, as found, Claimant's AWW as of August 1, 2020 is $533.52.

ORDER

It is therefore ordered that:

1. Claimant AWW from the date of injury until March 14, 2020 was $406.36

2. Claimant's AWW from March 15, 2020 until July 31, 2020 was $416.62.

3. Claimant's AWW beginning on August 1, 2020, is $533.52.

4. All matters not determined herein are reserved for future determination.

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

DATED: February 10, 2021

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

1. Whether Claimant has produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Wallace K. Larson, M.D. that he reached Maximum Medical Improvement (MMI) on December 8, 2017 with no permanent impairment as a result of his October 2, 2016 industrial injuries.

2. If Claimant has not overcome Dr. Larson's DIME opinion, a determination of the appropriate repayment schedule for an overpayment of Permanent Partial Disability (PPD) benefits.

STIPULATIONS

The parties agreed that, if Claimant fails to overcome Dr. Larson's DIME opinion, there is an overpayment in the amount of $4894.29 in PPD benefits.

FINDINGS OF FACT

1. Claimant is a 47-year-old male who works for Employer as a Youth Corrections Officer in Greeley, Colorado. On October 2, 2016 he responded to a unit in which two residents were threatening to assault staff. He approached one resident who was standing while other staff and his supervisor physically engaged the other youth. The standing resident stepped on top of Claimant's right foot and hit him in the chest. Claimant's right leg twisted and he fell to ground. He landed on his right hip, buttock and lower back. Once the resident was secured, Claimant realized he could not place weight on his right leg. Claimant was transported to North Colorado Medical Center's Emergency Room for treatment.

2. When Claimant reported his injuries to Employer he explained that his "right ankle buckled when I stepped back when a code red was called. Knee and ankle both hurt, abrasions on ankle and knee, swelling in ankle in knee, along with pain in ankle and knee." Claimant did not list or mention any concerns involving his lower back or hips.

3. At the emergency room medical providers noted that Claimant had suffered injuries to his right ankle and knee. He was having difficulty ambulating. X-rays of the knee and ankle were normal. Claimant received pain medications and crutches. Providers advised him to follow-up with occupational medicine.

4. On October 3, 2016 Claimant visited Authorized Treating Physician (ATP) Kevin Patrick Vlahovich, M.D. at Banner Occupational Health for an examination. Claimant's reported pain was "mostly lateral right knee and top of foot." A physical examination revealed only mild swelling with no bruising. Dr. Vlahovich diagnosed

Claimant with a sprain of unspecified parts of the right knee and a sprain of an unspecified ligament in the right ankle.

5. On October 21, 2016 Claimant returned to Dr. Vlahovich for a second evaluation. Dr. Vlahovich noted that Claimant continued to ambulate with crutches as well as knee and ankle braces. He referred Claimant to physical therapy and advised him to start weaning off his crutches and brace. Claimant subsequently returned to full time, modified employment.

6. On October 25, 2016 Claimant attended his first physical therapy session. Claimant reported that he had been on crutches for two weeks but had been weaning off of them. Claimant's reported pain levels were 0/10 at rest and 4-5/10 with a pivot. He did not mention hip or back pain.

7. On October 31, 2016 Claimant attended his second physical therapy appointment. Claimant reported that his leg swelled up work two nights earlier. He noted that his right hip was hurting more than his knee and remarked that he might have injured his hip during the October 2, 2016 altercation at work.

8. On November 22, 2016 Claimant returned to Dr. Vlahovich for an examination. Claimant reported the onset of right hip and lower back pain after starting physical therapy. Upon examination, Dr. Vlahovich noted tenderness and pain over the lateral right hip with movement. He referred Claimant to orthopedics for an evaluation of his right hip pain.

9. On November 28, 2016 Claimant visited Ryan Nettles, P.A., at Banner Orthopedics. P.A. Nettles administered a steroid injection in the trochanteric bursae of Claimant's right hip. He noted Claimant's knee and ankle had improved, but he suffered the delayed onset of right lateral hip pain. P.A. Nettles determined that, "[i]n my opinion, the onset of his symptoms could be in some part due to some trauma in the initial fall, but are more likely related to the knee and ankle injuries."

10. Claimant subsequently attended physical therapy treatment from early December 2016 through mid-January 2017. He also received chiropractic treatment during December 2016.

11. On January 13, 2017 Claimant returned to Dr. Vlahovich for an evaluation. Dr. Vlahovich reported that Claimant was participating in physical therapy and chiropractic care. However, Claimant suffered increasing symptoms in his right lower back and lateral thigh. Dr. Vlahovich found significant right back pain with straight leg raises and pain over the lateral hip with movement. He recommended continued physical therapy and chiropractic care. Dr. Vlahovich referred Claimant for a physiatry consultation.

12. Based on Dr. Vlahovich's referral, Claimant visited physiatrist Gregory Reichhardt, M.D. for an evaluation on February 15, 2017. Dr. Reichhardt recounted that a youth corrections resident stepped on top of Claimant's foot and knocked him to the ground. Claimant noted that he might have twisted to the right somewhat as he fell. He suffered the immediate onset of pain and swelling in the right ankle and right knee. At the

emergency room, Claimant received an ankle brace and a knee immobilizer. After about four weeks ATP Dr. Vlahovich referred him to physical therapy. Claimant mentioned right hip, gluteal and lower back pain. After considering Claimant's medical records Dr. Reichhardt commented that Claimant's right ankle and knee pain had largely resolved. A physical examination of the lumbar spine revealed tenderness to palpation at the LS-S1 level on the right side of the lower lumbar spine. Claimant was also mildly tender to palpation over the lateral aspect of the right hip. He exhibited normal intemal and external rotation of the hips.

13. At the February 15, 2017 evaluation Dr. Reichhardt discussed the possibility of a hip MRI with Claimant but noted that "any significant abnormalities would not likely be related to his work-related injury given the late onset of his symptoms." After the visit, Dr. Reichhardt spoke with ATP Dr. Vlahovich. Dr. Reichhardt summarized that Dr. Vlahovich's notes reflected Claimant's

> right lateral hip pain began about six weeks after his injury, his left leg numbness about two and a half months after, and the back pain about three months after. Given this, it would be difficult to explain any diagnosis other than perhaps some myofascial pain as being related to his work-related injury. As such, if his left leg numbness persists, it would be appropriate for him to follow up privately for a lumbar MRI.

14. On February 20, 2017 Claimant again visited Dr. Vlahovich for an examination. Dr. Vlahovich remarked that Claimant developed right hip pain about six weeks after his industrial injury and lower back pain three months after his injury. Claimant reported worsening pain in his lower back and right hip. Dr. Vlahovich advised Claimant that he could not explain why the pain was developing in his lower back and right hip. Dr. Vhalovich recounted he agreed with Dr. Reichhardt that, while there might be a work-related myofascial component to Claimant's lumbar pain, he should follow up with his family physician for treatment.

15. On February 27, 2017 Claimant returned to Dr. Reichhardt for an examination. Dr. Reichhardt addressed the causation of Claimant's hip symptoms. He summarized that

> after discussing this with Dr. Vlahovich, it sounded like the low back and hip may not be work-related other than perhaps some muscle pain associated with his gait deviation. [Claimant] states that he had pain over the right lateral hip since the initial date of the injury, but that when he was seen in the ER, they told him it was just a bruise from landing on that area when he fell, He did not bring it up with Dr. Vlahovich until later, however.

Dr. Reichhardt also noted that he spoke with Dr. Vlahovich about the cause of Claimant's hip symptoms. He explained that "[w]e were both of pretty much the same opinion as outlined in my last note on 2/15/17 that he might have some myofascial pain associated with the injury, but beyond this, it would be difficult to outline a medically probable work-related cause for his pain. We both agreed that it would be appropriate for him to follow up with a private primary care physician."

16. On March 8, 2017 Claimant visited Mark McFerran, M.D. at the Orthopaedic & Spine Center of the Rockies for an evaluation of his ongoing right hip pain. In performing a physical examination Dr. McFerran noted that the right hip was tender over the trochanteric bursa laterally. He remarked that "[t]his all looks like trochanteric bursitis, and 50% of the time this does not get better with cortisone. It is a deep injury. He may have split the bursa…This may always be an issue for him." Dr. McFerran characterized Claimant's condition as "chronic, traumatic hip bursitis."

17. On August 31, 2017 Claimant underwent a right hip MRI. The MRI revealed a "superolateral right hip acetabular labrum which extends to the junction with the anterior labrum suspicious for an acetabular labral tear." On September 5, 2017 Claimant received a second, fluorscopically guided, right hip injection.

18. On December 8, 2017 Claimant returned to Dr. Vlahovich for an examination. Dr. Vlahovich determined that Claimant reached Maximum Medical Improvement (MMI) as of the date of the examination. He recounted that Claimant twisted his right leg and fell while restraining two residents when working at a correctional facility. Dr. Vlahovich remarked that Claimant developed right hip pain during physical therapy. A right hip MRI revealed a labral tear. He diagnosed Claimant with a right knee sprain, a right ankle sprain, trochanteric bursitis of the right hip and a sprain of the right hip with an acetabular labral tear. In addressing causation, Dr. Vlahovich commented that the objective findings were consistent with Claimant's mechanism of injury. He specified that there was a greater than 50% probability that Claimant suffered knee and ankle sprains at work. Relying on the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides*), Dr. Vlahovich assigned Claimant an 8% permanent impairment rating for his right lower extremity. The impairment was based on right hip range of motion deficits. The rating converted to a 3% whole person impairment. Dr. Vlahovich also determined that claimant was entitled to receive medical maintenance benefits.

19. On January 5, 2018 Respondent filed a Final Admission of Liability (FAL) acknowledging Dr. Vlahovich's MMI, impairment and medical maintenance determinations. Claimant timely filed an objection and requested a Division Independent Medical Examination (DIME).

20. On March 15, 2018 Claimant underwent an independent medical examination with Anjmun Sharma, M.D. Dr. Sharma reviewed Claimant's medical records and performed a physical examination. Based on Claimant's mechanism of injury, Dr. Sharma determined that Claimant's lumbar back and hip symptoms were related to his October 2, 2016 work injury. He noted that Claimant suffered significant pain in his back that likely caused a delayed recovery. Relying on the *AMA Guides*, he assigned Claimant a 5% whole person impairment rating for the right hip. Dr. Sharma also assigned a 12% whole person rating for the lumbar spine that consisted of 7% pursuant to Table 53 of the *AMA Guides* "due to arthritis and other underlying conditions of the lumbar spine and

significant degenerative disc disease" and 5% for range of motion deficits. He also noted that Claimant had reached MMI and might require medical maintenance care.

21. On August 14, 2018 Claimant underwent a DIME with Wallace K. Larson, M.D. Dr. Larson recounted that on October 2, 2016 a resident at a correctional facility where Claimant works lowered his head and rammed into Claimant's chest. Claimant's right knee and ankle gave out and he fell to the floor. Claimant was transported to the emergency room with chief complaints of right ankle and knee injuries. Dr. Larson reviewed Claimant's medical records and conducted a physical examination. He concluded that Claimant reached MMI on December 8, 2017 with no ratable impairment or need for medical maintenance care. Dr. Larson specified that Claimant's right knee condition had resolved. He explained that Claimant's right hip and back symptoms were not related to his occupational exposure. He detailed that "[i]t is not reasonable to assume a minimal strain of his right knee and ankle resulted in the delayed development of any type of temporary or permanent pathology in the hip and or lumbar spine."

22. Dr. Sharma testified at the hearing in this matter. He maintained that Claimant's right hip and lower back injuries were causally related to his October 2, 2016 industrial incident. He noted that a positive c-sign reflected pathology in the hip that was consistent with Claimant's subjective complaints and MRI finding of an acetabular labral tear. Dr. Sharma explained that, absent the industrial accident and fall on October 2, 2016, there was no other possible cause of Claimant's right hip labral tear. Because of Claimant's fall at work and the MRI findings it would be erroneous not to provide an impairment rating for the right hip. Dr. Sharma also maintained that Claimant developed pathology in his lumbar spine as a result of his lower extremity injuries and an antalgic gait. He reasoned that, based on Claimant's ongoing gait abnormalities secondary to the right hip labral tear, there was increased wear and tear on the lumbar spine that accelerated over time. Therefore, Claimant suffered a permanent impairment to the lumbar spine as a result of the October 2, 2016 industrial accident.

23. Claimant testified at the hearing in this matter. He explained that he never had any lumbar or hip problems prior to his industrial injuries on October 2, 2016. He testified that when a resident pushed him to the ground at work he landed on his right side, hip and lower back. Claimant further stated that, due to his knee and ankle injuries, he did not begin weight-bearing activities and participating in physical therapy until about four weeks after his date of injury. He remarked that he still limps while performing his 12 hour work shifts. Claimant contended that his lower back symptoms are related to his October 2, 2016 industrial injury because of a change in his gait.

24. Claimant also testified that he is currently employed and earns a gross pay of $4,015 per month or $3,200 per month after taxes. The parties stipulated that, in the event Claimant fails to overcome Dr. Larson's DIME opinion, he received an overpayment of $4,894.29 in Permanent Partial Disability (PPD) benefits.

25. Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Larson that he reached MMI on December 8, 2017 with no

permanent impairment as a result of his October 2, 2016 industrial injuries. Initially, during an October 2, 2016 altercation at the correctional facility where Claimant works, he fell to the ground and landed on his right hip, buttock and lower back. When Claimant reported his injuries to Employer, he noted only right knee and ankle symptoms. Claimant did not list or mention any concerns involving his lower back or hips. ATP Dr. Vlahovich diagnosed Claimant with a sprain of unspecified parts of the right knee and a sprain of an unspecified ligament of the right ankle. Claimant first mentioned right hip symptoms on October 31, 2016 at his second physical therapy appointment. He specifically noted that his right hip was hurting more than his knee and remarked that he might have injured his hip during the October 2, 2016 altercation at work. On November 22, 2016 Claimant reported to Dr. Vlahovich the onset of right hip and lower back pain after starting physical therapy.

26. On February 15, 2017 Dr. Reichhardt noted that Claimant's right lateral hip pain began about six weeks after his injury, left leg numbness about two and a half months after the altercation and back pain about three months after the incident. Based on the delayed reported symptoms, Dr. Reichhardt commented "it would be difficult to explain any diagnosis other than perhaps some myofascial pain as being related to his work-related injury." By February 27, 2017 Claimant told Dr. Reichhardt that he had been suffering right hip pain since the date of his industrial injuries. However, Dr. Reichhardt explained that he and Dr. Vlahovich agreed that Claimant might have some myofascial pain associated with the injury, but "it would be difficult to outline a medically probable work-related cause for his pain." By December 8, 2017 Dr. Vlahovich determined that Claimant reached MMI. Dr. Vlahovich remarked that Claimant developed right hip pain during physical therapy and a right hip MRI revealed a labral tear. He diagnosed Claimant with a right knee sprain, a right ankle sprain, trochanteric bursitis of the right hip and a sprain of the right hip with an acetabular labral tear. He specified that there was a greater than 50% probability that Claimant suffered knee and ankle sprains at work. Dr. Vlahovich assigned Claimant an 8% permanent impairment rating for the right lower extremity based on right hip range of motion deficits.

27. On August 14, 2018 Claimant underwent a DIME with Dr. Larson. Dr. Larson reviewed Claimant's medical records and conducted a physical examination. He agreed that Claimant reached MMI on December 8, 2017 with no ratable impairment or need for medical maintenance care. Dr. Larson specified that Claimant's right knee condition had resolved. He explained that Claimant's right hip and back symptoms were not related to his occupational exposure. He detailed that "[i]t is not reasonable to assume a minimal strain of his right knee and ankle resulted in the delayed development of any type of temporary or permanent pathology in the hip and or lumbar spine." In contrast, Dr. Sharma maintained that Claimant's right hip and lower back injuries were causally related to his October 2, 2016 industrial incident. He explained that, absent the industrial accident and fall on October 2, 2016, there was no other possible cause of Claimant's right hip labral tear. Because of Claimant's fall at work and the MRI findings it would be erroneous not to provide an impairment rating for the right hip. Dr. Sharma also maintained that Claimant developed pathology in his lumbar spine as a result of his lower extremity injuries and an antalgic gait. He reasoned that, based on Claimant's ongoing gait

abnormalities secondary to the right hip labral tear, there was increased wear and tear on the lumbar spine that accelerated over time. Dr. Sharma thus assigned Claimant a 5% whole person impairment for the right hip and a 12% whole person rating for the lumbar spine.

28. Despite Dr. Sharma's opinion, the record reflects that Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Larson's MMI and permanent impairment determinations are incorrect. Claimant has failed to demonstrate that Dr. Larson improperly applied the *AMA Guides* or otherwise erred in concluding that Claimant did not suffer a permanent impairment as a result of the October 2, 2016 work incident. Dr. Sharma's contrary determination is insufficient to demonstrate that Dr. Larson's conclusion is clearly erroneous. Notably, Dr. Sharma failed to identify significant flaws with the opinions of Dr. Reichhardt or Dr. Larson that Claimant's hip and lower back symptoms were not work-related. Moreover, even ATP Dr. Vhalovich did not assign a permanent impairment rating for Claimant's lumbar spine and only assigned a range of motion rating for right hip symptoms. Claimant's delayed reporting of any hip or lumbar spine symptoms, in conjunction with the persuasive opinion of Dr. Reichhardt, support Dr. Larson's DIME determination that Claimant did not suffer any permanent impairment as a result of his October 2, 2016 industrial accident. Dr. Sharma's contrary determination constitutes a difference of opinion that is insufficient to render Dr. Larson's DIME opinion clearly erroneous. Accordingly, Claimant reached MMI on December 8, 2017 with no ratable impairment.

29. The parties agreed that, if Claimant failed to overcome Dr. Larson's DIME opinion, there is an overpayment of $4894.29 in PPD benefits. Claimant testified that he is currently employed and earns a gross pay of $4,015 per month or $3,200 per month after taxes. Respondent seeks recovery of the overpayment at $75 per week or $325 per month. This would result in repayment of the overpayment in 16 months. Claimant has not presented evidence that the amount would be unreasonable, unaffordable, or injurious. Accordingly, Claimant shall repay Respondent $325 per month in overpaid TPD benefits until recovered in full.

CONCLUSIONS OF LAW

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

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

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

Overcoming the DIME

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAO, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAO, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAO, Apr. 16, 2008).

6. A DIME physician's opinions concerning MMI and impairment carry presumptive weight pursuant to §8-42-107(8)(b)(III), C.R.S.; *see Yeutter v. Industrial Claim Appeals Office*, No. 18CA0498 (Apr. 11, 2019) 2019 COA 53. The statute provides that "[t]he finding regarding [MMI] and permanent medical impairment of an independent medical examiner in a dispute arising under subparagraph (II) of this paragraph (b) may be overcome only by clear and convincing evidence." *Id.* Both determinations require the DIME physician to assess, as a matter of diagnosis, whether the various components of the claimant's medical condition are causally related to the industrial injury. *See Eller v. Indus. Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo.App. 1998). Consequently, when a party challenges a DIME physician's determination of MMI or impairment rating, the determination on causation is also entitled to presumptive weight. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo.App. 1998).

7. “Clear and convincing evidence” is evidence that demonstrates that it is “highly probable” the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, “there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt.” *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAO, Nov. 17, 2000).

8. Claimant asserts that he must prove the causal nature of his lumbar spine and right hip conditions under a preponderance of the evidence standard. However, because the threshold issue of compensability is not in dispute, the DIME physician's opinions regarding causation are accorded presumptive weight. *See Eller v. Indus. Claim Appeals Office*, 224 P.3d 397, 400 (Colo. App. 2009) ("[A]n inquiry into the relatedness of a particular component of a claimant's overall impairment will carry presumptive effect when determined by a DIME," unless the "threshold showing necessary to prove compensability" is at issue.); *see also Leprino Foods*, 134 P.3d at 482 (a DIME physician's opinion concerning causation will be given presumptive weight because MMI and impairment "inherently require the DIME physician to assess, as a matter of diagnosis, whether the various components of the claimant's medical condition are causally related to the industrial injury."). Here, Respondent filed a FAL consistent with ATP Dr. Vlahovich’s MMI, impairment and medical maintenance determinations. Therefore, the threshold issue of compensability is not in dispute. The salient issue is thus whether Claimant has produced clear and convincing evidence to overcome Dr. Larson’s DIME opinion.

9. As found, Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Larson that he reached MMI on December 8, 2017 with no permanent impairment as a result of his October 2, 2016 industrial injuries. Initially, during an October 2, 2016 altercation at the correctional facility where Claimant works, he fell to the ground and landed on his right hip, buttock and lower back. When Claimant reported his injuries to Employer, he noted only right knee and ankle symptoms. Claimant did not list or mention any concerns involving his lower back or hips. ATP Dr. Vlahovich diagnosed Claimant with a sprain of unspecified parts of the right knee and a sprain of an unspecified ligament of the right ankle. Claimant first mentioned right hip symptoms on October 31, 2016 at his second physical therapy appointment. He specifically noted that his right hip was hurting more than his knee and remarked that he might have injured his hip during the October 2, 2016 altercation at work. On November 22, 2016 Claimant reported to Dr. Vlahovich the onset of right hip and lower back pain after starting physical therapy.

10. As found, on February 15, 2017 Dr. Reichhardt noted that Claimant’s right lateral hip pain began about six weeks after his injury, left leg numbness about two and a half months after the altercation and back pain about three months after the incident. Based on the delayed reported symptoms, Dr. Reichhardt commented “it would be difficult

to explain any diagnosis other than perhaps some myofascial pain as being related to his work-related injury." By February 27, 2017 Claimant told Dr. Reichhardt that he had been suffering right hip pain since the date of his industrial injuries. However, Dr. Reichhardt explained that he and Dr. Vlahovich agreed that Claimant might have some myofascial pain associated with the injury, but "it would be difficult to outline a medically probable work-related cause for his pain." By December 8, 2017 Dr. Vlahovich determined that Claimant reached MMI. Dr. Vlahovich remarked that Claimant developed right hip pain during physical therapy and a right hip MRI revealed a labral tear. He diagnosed Claimant with a right knee sprain, a right ankle sprain, trochanteric bursitis of the right hip and a sprain of the right hip with an acetabular labral tear. He specified that there was a greater than 50% probability that Claimant suffered knee and ankle sprains at work. Dr. Vlahovich assigned Claimant an 8% permanent impairment rating for the right lower extremity based on right hip range of motion deficits.

11. As found, on August 14, 2018 Claimant underwent a DIME with Dr. Larson. Dr. Larson reviewed Claimant's medical records and conducted a physical examination. He agreed that Claimant reached MMI on December 8, 2017 with no ratable impairment or need for medical maintenance care. Dr. Larson specified that Claimant's right knee condition had resolved. He explained that Claimant's right hip and back symptoms were not related to his occupational exposure. He detailed that "[i]t is not reasonable to assume a minimal strain of his right knee and ankle resulted in the delayed development of any type of temporary or permanent pathology in the hip and or lumbar spine." In contrast, Dr. Sharma maintained that Claimant's right hip and lower back injuries were causally related to his October 2, 2016 industrial incident. He explained that, absent the industrial accident and fall on October 2, 2016, there was no other possible cause of Claimant's right hip labral tear. Because of Claimant's fall at work and the MRI findings it would be erroneous not to provide an impairment rating for the right hip. Dr. Sharma also maintained that Claimant developed pathology in his lumbar spine as a result of his lower extremity injuries and an antalgic gait. He reasoned that, based on Claimant's ongoing gait abnormalities secondary to the right hip labral tear, there was increased wear and tear on the lumbar spine that accelerated over time. Dr. Sharma thus assigned Claimant a 5% whole person impairment for the right hip and a 12% whole person rating for the lumbar spine.

12. As found, despite Dr. Sharma's opinion, the record reflects that Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Larson's MMI and permanent impairment determinations are incorrect. Claimant has failed to demonstrate that Dr. Larson improperly applied the *AMA Guides* or otherwise erred in concluding that Claimant did not suffer a permanent impairment as a result of the October 2, 2016 work incident. Dr. Sharma's contrary determination is insufficient to demonstrate that Dr. Larson's conclusion is clearly erroneous. Notably, Dr. Sharma failed to identify significant flaws with the opinions of Dr. Reichhardt or Dr. Larson that Claimant's hip and lower back symptoms were not work-related. Moreover, even ATP Dr. Vhalovich did not assign a permanent impairment rating for Claimant's lumbar spine and only assigned a range of motion rating for right hip symptoms. Claimant's delayed reporting of any hip or lumbar spine symptoms, in conjunction with the persuasive opinion of Dr. Reichhardt, support Dr. Larson's DIME determination that Claimant did not suffer

any permanent impairment as a result of his October 2, 2016 industrial accident. Dr. Sharma's contrary determination constitutes a difference of opinion that is insufficient to render Dr. Larson's DIME opinion clearly erroneous. Accordingly, Claimant reached MMI on December 8, 2017 with no ratable impairment.

Overpayment

13. Section 8-40-201(15.5), C.R.S, defines "overpayment" as "money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable under said articles." There are thus three categories of possible overpayment pursuant to §8-40-201(15.5). *In Re Grandestaff,* No. 4-717-644 (ICAP, Mar. 11, 2013). An overpayment may occur even if it did not exist at the time the claimant received disability or death benefits. *Simpson v. ICAO,* 219 P.3d 354, 358 (Colo. App. 2009). Therefore, retroactive recovery for an overpayment is permitted. *In Re Haney,* W.C. No. 4-796-763 (ICAP, July 28, 2011).

14. When the parties are unable to agree upon a repayment schedule, the ALJ is empowered by §8-43-207(q), C.R.S. to conduct hearings to "[r]equire repayment of overpayments." In *Simpson v. Industrial Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009), *rev'd on other grounds*, the Colorado Court of Appeals determined that the ALJ has discretion to fashion a remedy with regard to overpayments. Further, the ALJ has the authority to decide the terms of repayment and the ALJ's schedule for recoupment will not be disturbed absent an abuse of discretion. *See Louisiana Pacific Corp. v. Smith*, 881P.2d 456 (Colo. App. 1994).

15. As found, the parties agreed that, if Claimant failed to overcome Dr. Larson's DIME opinion, there is an overpayment of $4894.29 in PPD benefits. Claimant testified that he is currently employed and earns a gross pay of $4,015 per month or $3,200 per month after taxes. Respondent seeks recovery of the overpayment at $75 per week or $325 per month. This would result in repayment of the overpayment in 16 months. Claimant has not presented evidence that the amount would be unreasonable, unaffordable, or injurious. Accordingly, Claimant shall repay Respondent $325 per month in overpaid TPD benefits until recovered in full.

ORDER

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

1. Claimant has failed to overcome Dr. Larson's DIME opinion that he reached MMI on December 8, 2017 with no permanent impairment.

2. Claimant shall repay Respondent $325 per month in overpaid TPD benefits until recovered in full.

3. Any issues not resolved in this order are reserved for future determination.

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

DATED: April 28, 2021.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-145-299-001

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that he suffered an injury arising out of and in the course and scope of his employment with the employer.

2. If the claimant proves a compensable injury, whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment he has received (including two surgeries performed by Dr. Wade Ceola) is reasonable, necessary, and related to the work injury.

3. If the claimant proves a compensable injury, whether the claimant has demonstrated, by a preponderance of the evidence, that he is entitled to temporary total disability (TTD) benefits and/or temporary partial disability (TPD) benefits beginning July 1, 2020 and ongoing.

4. If the claimant is found to be entitled to TTD and/or TPD benefits, whether the respondents have demonstrated, by a preponderance of the evidence, entitlement to a statutory offset.

FINDINGS OF FACT

1. The claimant is employed with the employer as a sheet metal worker. The claimant testified that in June or July 2020, he injured his back at work. He further testified that he was bending over to pick up a piece of duct work when he felt a pain in his back. This pain was initially "not real bad", but became worse. The claimant does not recall the exact date of this event.

2. The claimant testified that this back pain was similar to pain he had experienced one year prior. With regard to his prior experience, the claimant testified that he saw a chiropractor and did some exercises at home. He also testified that these activities relieved that prior back pain.

3. The claimant testified that after experiencing back pain in June or July 2020, he sought chiropractic care. He was seen by a chiropractor twice, and also attended physical therapy. When neither of these treatments were effective in resolving his pain, the claimant reported the incident to the employer.

4. On July 30, 2020, the employer prepared a First Report of Injury or Illness. That form identifies the date of the claimant's incident as July 1, 2020. The claimant testified that date was utilized because at that time, he believed that the incident occurred

approximately three weeks before July 30, 2020. The form also states that the injury occurred when the claimant was installing duct pieces.

Medical Treatment Prior to July 30, 2020

5. On February 19, 2016, the claimant was seen by chiropractor, Dr. David Jensen. On that date, the claimant reported deep and aching low back pain that had started one week prior. Dr. Jensen noted that the claimant had "no specific injury to the lower back". Dr. Jensen recommended ongoing chiropractic treatment for the claimant's low back.

6. There is a second medical record from Dr. Jensen also dated February 19, 2016. In that medical record, the claimant reported severe neck and upper back pain. Dr. Jensen also recommended ongoing chiropractic treatment for these symptoms. The claimant returned to Dr. Jensen on February 26, 2016. At that time, the claimant continued to report deep and aching low back pain.

7. In 2018, the claimant's primary care provider (PCP) was Dr. Bruce Bowen. On February 8, 2018, the claimant was seen by Dr. Bowen and reported bilateral tingling from his shoulders to his elbows. The medical record of that date indicates that this was a six month follow up regarding these symptoms. Dr. Bowen recommended that the claimant see a neurosurgeon for consultation for "radiculopathy of the neck with constant neck pain and numbness."

8. On June 8, 2018, the claimant was seen by Dr. Bowen. In the medical record of that date, Dr. Bowen noted that the claimant was referred to Dr. Wade Ceola in February 2018 for cervical spine radiculopathy and numbness. Dr. Bowen also noted that the claimant had an appointment "conflict and was not seen [by Dr. Ceola]".

9. On October 27, 2019, the claimant sought treatment at Aspen Valley Hospital After Hours Medical Care. At that time, the claimant reported left lower back and hip pain. The claimant also reported that the pain started while he was shoveling compost at his home.

10. On November 4, 2019, the claimant returned to Dr. Jensen. On that date, the claimant reported the same low back symptoms as those he had in 2016. Dr. Jensen again noted that the claimant did not have a specific low back injury. Dr. Jensen also noted that the claimant engaged in recurring lifting at work and at home. Dr. Jensen recommended the claimant continue chiropractic treatment, with physical therapy. Dr. Jensen also provided the claimant with exercises he could do at home.

11. The claimant testified that he does not recall undergoing massage and physical therapy at that time. However, he does recall the exercises provided to him by a chiropractor.

12. On June 29, 2020, the claimant sought chiropractic treatment with Dr. Amy Denicke. In the medical record of that date, the claimant reported acute low back pain radiating down his left leg and into his left foot. Dr. Denicke noted that the claimant's pain

originated in early June “as an insidious onset.” Dr. Denicke recommended that the claimant obtain magnetic resonance imaging (MRI) of his low back and see an orthopedic surgeon.

13. Medical records entered into evidence indicate that the claimant was seen by Dr. Denicke a second time on July 6, 2020. On that date, the claimant reported that he continued to have left low back pain that was radiating into his left leg.

14. On July 10, 2020, the claimant was seen by his new PCP, Dr. Michael Plachta. The claimant testified that Dr. Platcha took over Dr. Bowen’s practice. On July 10, 2020, the claimant identified his complaint as a pinched nerve in his leg. Dr. Plachta noted the claimant had “acute on chronic back pain”. Dr. Plachta recorded that the claimant “woke with acute pain 6-7 weeks ago, no known trauma.” Dr. Plachta also recorded that the claimant had a history of “3-4 years of back pain that has progressively worsened and began to include left sided [sciatica].” The claimant reported that he had undergone chiropractic treatment and physical therapy. However, those modalities were not improving his symptoms. Dr. Plachta prescribed tramadol and a lumbar spine MRI.

15. On July 27, 2020, the claimant underwent a lumbar spine MRI. The MRI showed, *inter alia*, an L4-L5 disc herniation that was impinging on the left L4 nerve root, and a synovial cyst at the L5-S1 level.

16. The ALJ finds no reference in the foregoing medical records of the claimant’s belief that he injured himself at work.

Medical Treatment After July 30, 2020

17. On July 31, 2020, the claimant contacted Dr. Plachta’s practice regarding a referral to Roaring Fork Physical Therapy. On that date, Dr. Plachta issued the requested referral.

18. In addition to the physical therapy request, on July 31, 2020, the claimant also asked Dr. Plachta to provide him with a “work note”. Dr. Plachta authored the requested letter on that same date. In the July 31, 2020 letter, Dr. Plachta noted that the claimant’s pain “started several years ago and comes and goes.” Dr. Plachta also noted that the claimant “woke from sleep with back pain about 7 weeks prior.” Dr. Platcha noted the results of the MRI and stated that the claimant would be undergoing medical therapy and physical therapy. He also indicated that a referral to a surgeon and/or pain specialist could be necessary.

19. On August 6, 2020, the claimant attended physical therapy at PRC Carbondale. At that time, the claimant was seen by Coby Jones, DPT. The claimant reported that his back pain started about seven weeks prior and was progressively worse. He also reported that his leg was hurting “one day”.

20. The claimant’s authorized treating provider (ATP) for this claim is Dr. Glenn Kotz. The claimant was first seen by Dr. Kotz on August 12, 2020. In the medical record of that date, Dr. Kotz recorded that the claimant “woke up one day with back pain,

radiculopathy to [left] leg and progressed to [left lower extremity] weakness and foot drop". Dr. Kotz listed the claimant's diagnoses as lumbar disc herniation with radiculopathy, synovial cyst, and lumbar spine degenerative disc disease. Dr. Kotz took the claimant off of all work and referred him to neurosurgeon, Dr. Wade Ceola.

21. The claimant testified that he did not report to any medical provider that he just "woke up" with this pain.

22. On August 19, 2020, the claimant was seen at Roaring Fork Physical Therapy by Caitlyn, Tivy, DPT. At that time, the claimant reported left lateral hip and back pain. The claimant also reported that the pain started a year ago. In addition, Therapist Tivy recorded the following history from the claimant: "the pain had improved [on] its own for a while and then came back after a drive to Missouri. [Patient] sought medical treatment from his physician (Plachta) - was diagnosed with drop foot at that time."

23. The claimant testified that when he travels to see family in Missouri he will drive. He is unsure of the date of a 2020 Missouri trip. The claimant testified that it was possible he drove to Missouri in June 2020.

24. On August 21, 2020, the claimant was seen by Dr. Ceola. At that time, the claimant reported chronic back pain for years, becoming much more acute in July. The claimant also reported that he then developed left leg weakness. Dr. Ceola reviewed the July 27, 2020 MRI and noted a left L4-L5 disc impinging on the L4 nerve root, and a posterior synovial cyst at the L5-S1 level. On exam, Dr. Ceola noted a profound left sided foot drop and quadricep weakness. Dr. Ceola proposed a possible posterior hemilaminotomy with discectomy at L4-L5. However, prior to proceeding with surgery, Dr. Ceola referred the claimant for electromyography and nerve conduction studies (EMG/NCS).

25. On August 24, 2020, the claimant returned to Dr. Kotz. At that time the claimant reported that his pain was worsening and Dr. Ceola wanted to do surgery.

26. On September 2, 2020, the respondents filed a Notice of Contest regarding a July 1, 2020 work injury.

27. On September 23, 2020, Dr. Kotz authored a notation of a different mechanism of injury. Specifically, Dr. Kotz noted "we initially saw Mr. Jones 8/12/20; we transcribed the injury incorrectly. He first felt his back pain at work when standing up from bent over (at waist) position".

28. On September 29, 2020, the claimant was seen by Dr. Jeffrey Thornton for EMG/NCS testing. Dr. Thornton performed the testing on the claimant's left lower extremity. In his report, Dr. Thornton noted the testing showed left common peroneal neuropathy of the fibular head and lumbar radiculopathy.

29. On October 1, 2020, the claimant returned to Dr. Ceola. At that time, Dr. Ceola noted that the EMG/NCS results confirmed radiculopathy and severe peroneal neuropathy of the fibular head. Based upon this information, Dr. Ceola recommended

two surgeries. First, a laminotomy, decompression, and partial facetectomy and/or disc removal at the left L4-L5. Second, an exploration and decompression of the left common peroneal nerve.

30. On October 1, 2020, Dr. Ceola submitted a request for authorization of the recommended lumbar spine surgery. In addition, a request for a left knee MRI was also submitted.

31. At the request of the insurer, Dr. Joseph Fillmore reviewed the requests for lumbar surgery and left knee MRI. In his October 7, 2020 report, Dr. Fillmore recommended denial of both the lumbar surgery and left knee MRI. In support of this recommendation, Dr. Fillmore noted that the claimant had a three to four year history of chronic low back pain, with a report of increased back pain when he woke up. Dr. Fillmore opined that the claimant's low back condition is a progression of the chronic low back pain. Dr. Fillmore also found no specific injury to the claimant's left knee.

32. On October 7, 2020, Dr. Ceola performed a far lateral transpedicular resection of the herniated disc at left L4-L5, with discectomy and medial decompression of the L5 nerve root. The claimant testified that this surgery was paid for by his private health insurance.

33. On November 3, 2020, Dr. Ceola performed a decompression of the left common peroneal nerve. The claimant testified that this surgery was paid for by his private health insurance.

34. On November 12, 2020, the claimant returned to Dr. Ceola. In the medical record of that date, Dr. Ceola noted that the claimant continued to have radiating leg pain, foot drop, and numbness, but that the pain was "markedly better". The claimant reported that he was returning to work on Monday and Dr. Ceola placed him on a 25 pound lifting restriction. Dr. Ceola also recommended the use of a lumbar corset and a lace up ankle brace.

35. On March 8, 2021, the claimant attended an independent medical examination (IME) with Dr. Michael Rauzzino. In connection with the IME, Dr. Rauzzino reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his IME report, Dr. Rauzzino identified the claimant's diagnoses as chronic low back pain, lumbar degenerative disc diseases, left foot drop (likely due to peroneal neuropathy), and left sided sciatica (likely due to the L4-L5 disc bulge). Dr. Rauzzino opined that the condition of the claimant's low back and left knee are not work related. Dr. Rauzzino was asked to opine regarding the reasonableness and necessity of the recommended lumbar and left knee surgeries. Dr. Rauzzino noted that he was not provided with the results of the EMG testing. However, he noted that if Dr. Ceola felt that the EMG results showed significant peroneal neuropathy and lumbar radiculopathy, then the surgeries would be medically necessary. Dr. Rauzzino reiterated that even if medically necessary, the surgeries are not related to the alleged July 1, 2020 work incident.

36. On March 17, 2021, Dr. Rauzzino issued a supplement to his IME report. The reason for the supplement was that Dr. Rauzzino was provided with Dr. Thornton's EMG/NCS report. In his March 17, 2021 report, Dr. Rauzzino reiterated his opinions that the claimant did not sustain a work injury that necessitated treatment of his lumbar spine and left knee.

37. The claimant testified that his current symptoms include pain, foot drop, and numbness in his left leg from the knee down.

38. Larry A[Redacted] Senior Claims Representative with the insurer, has handled the claimant's claim since it was initiated. Mr. A[Redacted] testified that on August 9, 2020, he had a telephone conversation with the claimant. During that call, the claimant stated that he twisted and then felt pain in his back. The claimant also stated that he bent over and felt back pain when he stood up. During this same August 9, 2020 call, the claimant denied having any prior low back issues.

39. The claimant testified that as of the date of the hearing, he was paid $39.00 per hour. He further testified that he typically works 45 to 46 hours per week. The claimant also testified that his W-2 "the year before" shows that he made $99,000.

40. The claimant testified that he stopped working for the employer on approximately August 15, 2020.

41. Wage records entered into evidence indicate that the claimant was off of work during the pay period beginning August 19, 2020 and into the pay period ending November 10, 2020. The claimant testified that since returning to work in November 2020, he works full time.

42. The ALJ does not find the claimant's testimony regarding the onset of his low back and radiculopathic symptoms to be credible or persuasive. The ALJ credits the contemporaneous medical records that indicate that the claimant woke up with low back pain approximately two months prior to his July 10, 2020 appointment with Dr. Plachta. The ALJ further credits the medical records and finds that the claimant did not assert that he was injured at work until after he had obtained the July 27, 2020 lumbar spine MRI.

43. The ALJ credits the medical records and the opinions of Drs. Rauzzino and Fillmore. Specifically, the ALJ credits Dr. Rauzzino's opinion that the condition of the claimant's low back and left knee are not work related. Therefore, the ALJ finds that the claimant has failed to demonstrate that it is more likely than not that he suffered a low back injury at work. The ALJ also finds that the claimant has failed to demonstrate that it is more likely than not that he suffered a left knee injury at work. Additionally, the ALJ finds no persuasive evidence on the record to support a finding that any preexisting low back condition and/or left knee condition were aggravated or accelerated during a lifting incident at work, resulting in the need for medical treatment.

CONCLUSIONS OF LAW

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

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

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

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

5. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that he suffered an injury arising out of and in the course and scope of his employment with the employer. As found, the medical records and the opinions of Drs. Rauzzino and Fillmore are credible and persuasive.

6. All remaining endorsed issues are dismissed as moot.

ORDER

It is therefore ordered that the claimant's claim is denied and dismissed.

Dated this 29th day of April 2021.

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

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that Respondents failed to timely designate an Authorized Treating Physician (ATP) in Wisconsin upon notice that she had moved out of state.

FINDINGS OF FACT

1. Claimant worked for Employer as an Assistant General Manager. On September 24, 2019 she sustained a work-related injury when she was reaching for a sauce bottle and felt a crack/pop sensation in her spine. Claimant specifically suffered a neck injury in the form of a herniated C5-C6 disc.

2. Claimant subsequently received medical care through Concentra Medical Centers and specialist referrals from October 10, 2019 through March 5, 2020. Respondents discovered that Claimant failed to attend an appointment at Concentra on March 19, 2020 and subsequently did not schedule any follow-up appointments.

3. On September 22, 2020 the parties attended a hearing before ALJ Goldman on the issues of compensability, medical benefits and Temporary Total Disability (TTD) benefits. ALJ Goldman's October 29, 2020 Order found the claim compensable and ordered Respondents to initiate ongoing TTD benefits.

4. On October 29, 2020 Respondents scheduled a demand appointment for Claimant to be evaluated at Concentra, 3300 28th St., Boulder, CO 80301 on November 12, 2020 at 11:00 AM. However, on the same day, Claimant's counsel informed Respondents that Claimant would be unable to attend the demand appointment because she had moved to Wisconsin. The correspondence reflects that Respondents were unaware that Claimant had moved until October 29, 2020. Although Respondents were informed that Claimant had relocated to Wisconsin, they lacked sufficiently detailed information to designate an Authorized Treating Physician (ATP).

5. On November 2, 2020 Respondents' counsel wrote to Claimant's counsel requesting Claimant's new address and the date she moved to Wisconsin. On November 9, 2020 the parties exchanged e-mails regarding Claimant's move and new address. Claimant's counsel responded that Claimant's home address "is 317 E. South Street, Lake Geneva, WI 53417." He also noted "[y]es it appears she moved in August . . . we didn't know either." The preceding correspondence reveals that, as of November 9, 2020, Respondents had a duty to designate an ATP in Wisconsin.

6. On November 10, 2020 Respondents sent a letter to Claimant's counsel stating that Claimant's treating physician Dr. Meza had not designated a new medical provider in Wisconsin. Respondents therefore selected an occupational medicine physician willing to assume care in Wisconsin. Respondents specifically designated

James C. Foster, M.D. of United Occupational Medicine at 9555 76th St., Pleasant Prairie, WI, 53158. The letter stated that Respondents would schedule an appointment and "provide all medical records to the newly-designated ATP, Dr. Foster."

7. Claimant's counsel immediately objected in writing to Respondents' designation and specified "the right to select an ATP passed to Claimant." Claimant also noted that she "was never seen by Dr. Meza." Finally, Claimant informed Respondents that the visit with Dr. Foster "appears to clearly be a 8-43-404 RIME request" and sought transportation to the examination.

8. Respondents scheduled an appointment for Claimant to visit new ATP Dr. Foster on November 24, 2020. Respondents sent a letter notifying Claimant and counsel of the appointment on November 11, 2020.

9. Respondents sent a letter to Dr. Foster on November 30, 2020 and included a copy to Claimant's counsel. The letter confirmed Dr. Foster's willingness to assume the role of ATP and summarized the medical treatment that Claimant had already received under the claim.

10. On December 8, 2020 Claimant's counsel sent a letter to Dr. Foster asserting that he was not the ATP because Claimant had not agreed to the designation. He also advised Dr. Foster that his office should obtain medical records and not use the summary from Respondents' counsel. Claimant's counsel requested a copy of any medical records Dr. Foster had obtained. In a follow-up letter to Dr. Foster dated December 9, 2020, Respondents reiterated that Dr. Foster's treatment recommendations would be authorized to the extent "such treatment is medically reasonable, necessary, and related to the September 24, 2019 cervical spine injury."

11. On December 15, 2020 Claimant filed an Application for Hearing that listed the following two issues: (1) the right of selection of the treating physician had passed to Claimant and (2) Respondents were attempting to dictate treatment in violation of §8-43-503(3), C.R.S. Claimant subsequently withdrew the penalty claim.

12. On December 22, 2020 Dr. Foster wrote a letter to counsel for both parties. Dr. Foster stated that he saw Claimant on December 4, 2020 but did not provide any treatment. He understood from Claimant that she "was not presenting for treatment" and "it is not even clear to me if there was a physician-patient relationship." Dr. Foster noted that, following the December 4, 2020 appointment, he had "left several messages" for Claimant but she had not responded. He remarked that "[i]t is not even clear to me she wanted me to treat her, or that she even wanted treatment." Dr. Foster commented that he had completed a written report, but he would not release the report "until it is clear to me what I am required to do."

13. On December 29, 2020 Claimant's counsel wrote to Respondents and noted that "Claimant is working on finding a good ATP for her ongoing neck problems. I will advise you who that is as soon as I know." As of the March 30, 2021 hearing in the

present matter Claimant had not provided the name of a physician or facility that should be authorized in Wisconsin.

14. On January 19, 2021 the parties attended a *Samms* conference with Dr. Foster. Dr. Foster subsequently released his December 20, 2020 written report addressing Maximum Medical Improvement (MMI), maintenance medical benefits and permanent impairment. Respondents received Dr. Foster's report on January 20, 2021. On the following day Respondents disclosed a copy of Dr. Foster's December 20, 2020 report to Claimant's counsel.

15. Dr. Foster's December 20, 2020 report specified that Claimant presented at his office on November 24, 2020 and December 4, 2020. At the first visit, Dr. Foster had no medical records. Claimant commented that she was under the impression that she was visiting Dr. Foster for an independent medical examination and he responded "that was definitely not my understanding." He also informed Claimant that "at least in the State of Wisconsin, she had the right to choose her provider and, from my perspective, did not need to see me." Claimant then signed records releases for multiple providers and scheduled a follow-up appointment for December 4, 2020.

16. Dr. Foster explained in the December 20, 2020 report that by December 4, 2020 he had obtained Claimant's medical records from Respondents' counsel as well as records he had independently requested. Dr. Foster thoroughly reviewed Claimant's medical records and performed a physical examination. He concluded that Claimant reached MMI on December 4, 2020 with no permanent impairment or need for medical maintenance benefits. He detailed that Claimant stated her symptoms had not changed substantially in close to one year. Specifically, Claimant's disc herniation from the September 24, 2019 industrial incident was "not a significant problem at this point, or the cause of her symptoms." Dr. Foster remarked that there were no objective findings to justify any permanent restrictions. He determined that no future treatment would be related to the September 24, 2019 incident.

17. On January 29, 2021 Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Foster's December 20, 2020 report. Respondents' attached a completed WC164 form to the FAL.

18. Claimant testified at the hearing in this matter that she was in the process of establishing care for her neck in Wisconsin but had been unsuccessful because of issues with housing and transportation. During the two months prior to the March 30, 2021 hearing, Claimant obtained the following treatment for her neck injury: Dr. Gary Myron, a primary care physician at Mercy Health, a cervical MRI at Mercy Health, and a phone appointment with Merle S. Rust, M.D., a neurosurgeon, who had reviewed her scan and declined to provide further treatment.

19. Claimant has failed to demonstrate that it is more probably true than not that Respondents failed to timely designate an ATP in Wisconsin upon notice that she had moved out of state. The record reflects that Respondents satisfied their obligation to timely designate a replacement ATP in Wisconsin willing to assume care. Respondents

first became aware that Claimant had relocated out-of-state on October 29, 2020. Specifically, Claimant's counsel responded that Claimant was unable to attend a demand appointment scheduled for November 12, 2020 at Concentra in Boulder, CO because she had moved to Wisconsin. The correspondence reflects that Respondents were unaware the Claimant had moved until October 29, 2020. Although Respondents were apprised that Claimant had relocated to Wisconsin, they lacked sufficiently detailed information to designate an ATP.

20. On November 2, 2020 Respondents' counsel wrote to Claimant's counsel requesting Claimant's new address and the date she moved to Wisconsin. On November 9, 2020 the parties exchanged e-mails regarding Claimant's move and new address. Claimant's counsel responded that Claimant's home address "is 317 E. South Street, Lake Geneva, WI 53417." He also noted "[y]es it appears she moved in August . . . we didn't know either." The preceding correspondence reveals that, as of November 9, 2020, Respondents had a duty to designate an ATP in Wisconsin.

21. In a November 10, 2020 letter to Claimant's counsel Respondents timely designated Dr. Foster as the new ATP. On the following day Respondents sent a letter notifying Claimant of an appointment scheduled for November 24, 2020. In a December 20, 2020 report Dr, Foster specified that Claimant presented at his office on November 24, 2020 and December 4, 2020. By December 4, 2020 he had obtained Claimant's medical records from Respondents' counsel as well as records he had independently requested. Dr. Foster thoroughly reviewed Claimant's medical records and performed a physical examination. He concluded that Claimant reached MMI on December 4, 2020 with no permanent impairment or need for medical maintenance benefits. He determined that no future treatment would be related to the September 24, 2019 incident.

22. A review of the record reveals that Respondents timely designated a physician willing to offer treatment in Wisconsin. On November 9, 2020 Respondents had some knowledge of facts that would lead a reasonably conscientious person to believe that Claimant relocated to Lake Geneva, WI and required medical treatment, Respondents were thus required to timely tender the services of a physician willing to assume care. On November 10, 2020 Respondents selected occupational medicine physician Dr. Foster to assume care in Wisconsin. Because Respondents timely designated Dr. Foster to treat Claimant in Wisconsin, he is Claimant's ATP.

CONCLUSIONS OF LAW

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

rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

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

4. Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). The statute implicitly contemplates that the respondent will designate a physician who is willing to provide treatment. *See Ruybal v. University Health Sciences Center*, 768 P.2d 1259, 1260 (Colo. App. 1988). If the employer fails to timely tender the services of a physician, the right of selection passes to the claimant and the selected physician becomes an ATP. *See Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987); *Garrett v. McNelly Construction Company, Inc.*, WC 4-734-158 (ICAO, Sept. 3, 2008). Whether the ATP refused to treat the claimant for non-medical reasons, whether the insurer received notice of the refusal to treat and whether the insurer "forthwith" designated a physician who was willing to treat the claimant are questions of fact for the ALJ*. Garrett v. McNelly Construction Company, Inc.*, WC 4-734-158 (ICAO, Sept. 3, 2008); *see Ruybal*, 768 P.2d at 1260.

5. If upon notice of the injury the employer timely fails to designate an ATP, the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987). The employer's obligation to appoint an ATP arises when it has some knowledge of the accompanying facts connecting an injury to the employment such that a reasonably conscientious manager would recognize the case might result in a claim for compensation. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006).

6. When a claimant relocates to a new state and an existing ATP refers her for additional medical care in the new state, the new physician becomes authorized. *See Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985). However, in the absence of a referral from the existing ATP, the respondents have a duty to designate a physician willing to assume care in the new state upon notice of the claimant's relocation. Specifically, when the respondents have some knowledge of facts that would lead a reasonably conscientious person to believe that the claimant is relocating to another state and requires treatment, the respondents must timely tender the services of a physician

willing to assume care. *Ries v. Subway of Cherry Creek*, W.C. No. 4-674-408 (ICAO, Aug. 4, 2011); *see Jones v. Adolph Coors Co*., 689 P.2d 681 (Colo. App. 1984) (noting that the respondents' duty is triggered once the employer or insurer has some knowledge of facts that would lead a reasonably conscientious manager to believe the case may involve a claim for compensation). If the respondents fail to timely designate an ATP, the right of selection passes to the claimant. The question of whether the respondents failed to timely tender the services of a physician is a determination of fact for resolution by the ALJ. *See Ruybal v. University of Colorado Health Sciences Center*, 768 P.2d 1259 (Colo. App. 1988); *Buhrmann v. University of Colorado Health Sciences Center*, W.C. No. 4-253-689 (ICAO, Nov. 4, 1996).

7. As found, Claimant has failed to demonstrate by a preponderance of the evidence that Respondents failed to timely designate an ATP in Wisconsin upon notice that she had moved out of state. The record reflects that Respondents satisfied their obligation to timely designate a replacement ATP in Wisconsin willing to assume care. Respondents first became aware that Claimant had relocated out-of-state on October 29, 2020. Specifically, Claimant's counsel responded that Claimant was unable to attend a demand appointment scheduled for November 12, 2020 at Concentra in Boulder, CO because she had moved to Wisconsin. The correspondence reflects that Respondents were unaware the Claimant had moved until October 29, 2020. Although Respondents were apprised that Claimant had relocated to Wisconsin, they lacked sufficiently detailed information to designate an ATP.

8. As found, on November 2, 2020 Respondents' counsel wrote to Claimant's counsel requesting Claimant's new address and the date she moved to Wisconsin. On November 9, 2020 the parties exchanged e-mails regarding Claimant's move and new address. Claimant's counsel responded that Claimant's home address "is 317 E. South Street, Lake Geneva, WI 53417." He also noted "[y]es it appears she moved in August . . . we didn't know either." The preceding correspondence reveals that, as of November 9, 2020, Respondents had a duty to designate an ATP in Wisconsin.

9. As found, in a November 10, 2020 letter to Claimant's counsel Respondents timely designated Dr. Foster as the new ATP. On the following day Respondents sent a letter notifying Claimant of an appointment scheduled for November 24, 2020. In a December 20, 2020 report Dr, Foster specified that Claimant presented at his office on November 24, 2020 and December 4, 2020. By December 4, 2020 he had obtained Claimant's medical records from Respondents' counsel as well as records he had independently requested. Dr. Foster thoroughly reviewed Claimant's medical records and performed a physical examination. He concluded that Claimant reached MMI on December 4, 2020 with no permanent impairment or need for medical maintenance benefits. He determined that no future treatment would be related to the September 24, 2019 incident.

10. As found, a review of the record reveals that Respondents timely designated a physician willing to offer treatment in Wisconsin. On November 9, 2020 Respondents had some knowledge of facts that would lead a reasonably conscientious person to believe that Claimant relocated to Lake Geneva, WI and required medical treatment, Respondents were thus required to timely tender the services of a physician willing to assume care. On November 10, 2020 Respondents selected occupational medicine physician Dr. Foster to assume care in Wisconsin. Because Respondents timely designated Dr. Foster to treat Claimant in Wisconsin, he is Claimant's ATP.

ORDER

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

1. Respondents timely designated Dr. Foster to serve as Claimant's ATP in Wisconsin effective November 10, 2020.

2. Any issues not resolved in this order are reserved for future determination.

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

DATED: April 29, 2021.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-123-792-001

ISSUE

1. Whether Claimant sustained a compensable injury to his left shoulder arising out of the course of his employment on August 20, 2019.

2. Whether Claimant sustained a compensable injury to his cervical spine arising out of the course of his employment on August 20, 2019.

3. Whether Claimant sustained a compensable traumatic brain injury arising out of the course of his employment on August 20, 2019.

4. Whether Claimant is entitled to medical benefits for his left shoulder, cervical spine and/or brain injury.

5. Claimant's average weekly wage.

FINDINGS OF FACT

1. Claimant is a 62-year-old airplane mechanic who worked for Employer from July 15, 2019 through December 18, 2019. During his employment, Claimant's hourly wage was $22.81 per hour. (Ex. V).

2. Claimant was paid bi-weekly by Employer. Between Claimant's date of hire, and August 9, 2019 (the pay period ending immediately prior to Claimant's injury), Claimant earned gross wages of $5,314.24. (Ex. W). For this period of 3 4/7 weeks, Claimant's average weekly wage was $1,430.75.

3. On August 20, 2019, Claimant sustained an admitted injury to his head (laceration) and coccyx arising out of the course of his employment with Employer. Claimant was working as an airplane mechanic for Employer and was asked to take a part to a plane using a four-wheeled motorized utility vehicle (the "cart"). The injury occurred when Claimant was driving the cart through a tunnel when another vehicle he was following stopped abruptly, and Claimant rear-ended the other vehicle. As a result of the collision, Claimant sustained an approximately 3-inch laceration on the top of his head. The evidence was conflicting as to the exact mechanism of injury, with Claimant variously reporting that he struck his head on the cart's roof or windshield, that he struck his head on a concrete wall, that he struck a curb with his head, and that his head struck the ground.

4. Paramedics were called to the scene and Claimant was evaluated. Claimant reported striking his head on the curb and also striking his head on the roof of the cart. Claimant denied pain to his neck and back, and did not report shoulder pain. Claimant denied loss of consciousness, head pain, nausea, vomiting or vision changes.

Examination of Claimant's cervical spine was negative. Claimant was then transported by ambulance to the emergency department at UC Health. (Ex. 9).

5. At the emergency department, Claimant's scalp laceration was sutured, and he was diagnosed with a closed head injury and laceration of the scalp. Claimant was then discharged with care instructions for a head injury and laceration. (Ex. 9).

6. Claimant next saw Gary Scofield, PA-C, at Concentra for suture removal and evaluation on September 4, 2019. At that time, Claimant reported pain in his lower back and coccyx (i.e., tailbone), and experiencing intermittent dizziness since the August 20, 2019 accident. Claimant denied loss of consciousness, vision issues (other than pre-existing blindness in his right eye), nausea or vomiting. Claimant reported he had been performing his regular job duties since the August 20, 2019 injury with no apparent functional difficulties. Claimant completed a pain diagram at the visit indicating pain in the back of his head and lower back/tail bone. PA Scofield diagnosed Claimant with a laceration of the scalp, closed head injury and contusion of coccyx. PA Scofield indicated that Claimant had a "possible mild concussion with post-concussion intermittent dizziness" and that PA Scofield would "keep case open for two weeks to reassess dizziness and sore tailbone." (Ex. B).

7. On September 20, 2019, Claimant returned to Concentra and was seen again by PA Scofield. Claimant reported mild intermittent dizziness and mild lower back pain. He denied nausea, vomiting or vision issues, and reported performing his regular job duties. Claimant requested and was provided a referral for chiropractic to address stiffness in his lower back. PA Scofield diagnosed Claimant with a closed head injury, contusion of coccyx, laceration of scalp, and strain of the lumbar region. It was noted that Claimant was "not at end of healing," and Claimant was advised to return for a follow up with PA Scofield visit on October 7, 2019. The evidence was unclear as to the reason, but Claimant did not return for the follow-up visit referenced by PA Scofield. (Ex. C).

8. On October 23, 2019, Claimant was seen at Conley Family Chiropractic by Darwin Stjernholm, D.C. In conjunction with that visit, Claimant completed a "Confidential Patient Case History" containing check boxes for Claimant to indicate symptoms he had at that time or previously. Claimant indicated he was experiencing frequent and constant dizziness, frequent pain or numbness in his hands, arthritis in his right ankle, and frequent pain in his tail bone. Claimant did not check boxes for neck pain or stiffness, pain between shoulders, pain or numbness in his shoulders, or headaches. In addition, Claimant indicated he had been involved in a motorcycle accident approximately one year previously. (Ex. 5).

9. On November 5, 2019, Claimant saw a dentist, Cindy Herbert, DDS, for a dental examination. Claimant reported hitting his head "about 2 weeks ago" when he fell out of a carrier at work. He reported that he was continuing to experience dizziness from that event. Dr. Herbert recommended that Claimant have an MRI or CAT scan before she performed any tooth extractions due to Claimant's reported dizziness. (Ex. 5). On December 2, 2019, Dr. Herbert performed extractions of three teeth. (Ex. 5).

10. Claimant returned to Dr. Stjernholm on November 5, 2019 for further treatment. At the November 5, 2019 visit, Dr. Stjernholm noted that Claimant's complaints included pain, stiffness and paresthesias in "head region," "cervical region," "thoracic region," "lumbar region," "sacral region," and "pelvic region," each with a pain level of "5." (Ex. 5). Claimant had no further chiropractic appointments with Dr. Stjernholm.

11. In December 2019, Employer terminated Claimant for violation of company policy. (Ex. U).

12. Respondents filed a General Admission of Liability (GAL) on January 10, 2020, admitting for medical benefits, and denying for other benefits. (Ex. 3).

13. Sometime in approximately March 2020, Claimant relocated to Florida.

14. On May 14, 2020, Claimant was seen by Glenn Tobias, D.O., at Concentra in Florida. Claimant indicated he was ejected from the cart after hitting the windshield during the August 20, 2019 and then hit his head and back on a concrete median. Claimant also reported injuries to his neck, back and shoulders. Claimant reported constant neck pain rating 7/10, blurred vision, dizziness, and photophobia. Dr. Tobias diagnosed Claimant with closed head injury and cervical pain. He requested a MRI of the cervical spine and physical therapy for Claimant's cervical pain and a neurologist referral for evaluation of Claimant's for a closed head injury. (Ex. D).

15. On May 21, 2020, Respondents informed Dr. Tobias that the request for a cervical MRI and neurologist were denied or contested due to the services not being related to the admitted injuries in the claim, and that compensability of the cervical spine had not been established. (Ex. 10).

16. On August 26, 2020, B. Andrew Castro, M.D., performed a medical record review at the request of Respondents. Based on his review of Claimant's medical records, Dr. Castro opined that the Claimant was likely at MMI from his work-related injuries and that no further treatment was reasonable or necessary. Dr. Castro noted that Claimant had no cervical complaints at the time of his injury and denied nausea, vomiting, vision issues or loss of consciousness. Dr. Castro indicated that as of the date of his review, "the patient is not having any neurologic findings of any worrisome neurologic condition." The basis of this conclusion, however, is questionable because Dr. Castro did not examine Claimant in August 2020, and the most recent medical record from May 14, 2020 documents blurred vision, dizziness, and photophobia. Dr. Castro concluded that further imaging of Claimant's head or neck was not indicated because Claimant "did not sustain a cervical spine injury or head injury as a result of this accident." Dr. Castro's opinion that Claimant did not sustain a spine injury is credible and persuasive. However, the opinion that Claimant did not sustain a head injury is not persuasive. (Ex. A).

17. On September 14, 2020, Claimant returned to Concentra in Florida and saw Jonetta Troyer, PA-C. Claimant reported being thrown from the Cart during the collision and hitting his head on a concrete wall. Claimant also reported experiencing memory issues, dizziness, and headaches. For the first time, Claimant reported limited range of

motion in his left shoulder and indicated he had seen an orthopedic surgeon who informed Claimant he had a “torn muscle” in the shoulder limiting movement. The record does not contain records of the referenced orthopedic consultation. PA Troyer assessed Claimant has having a contusion of the scalp, post-concussive syndrome, radiculopathy of the arm, and an acute neck strain. She requested a head MRI for assessment of a closed head injury, a cervical MRI, a neurology referral, and an orthopedic referral for assessment of Claimant’s left shoulder. (Ex. E).

18. On September 16, 2020, Respondents wrote PA Troyer and Dr. Tobias to communicate Respondents’ denial of the authorization of the requested cervical MRI, neurology referral and orthopedic referral. Respondents indicated that the requested referrals were not related to the admitted injuries, and that compensability of the closed head injury, cervical spine and left shoulder had not been established. (Ex. 11).

19. On September 30, 2020, Respondents’ counsel sent Dr. Tobias a letter requesting his opinion concerning the medical evidence supporting the diagnoses of closed head injury with dizziness, neck injury with shoulder pain and a shoulder injury. Dr. Tobias indicated that the medical evidence supporting a diagnosis of closed head injury with dizziness included Claimant having “daily persistent dizziness and [headaches] that he never had prior to [the August 20, 2019] injury.” With respect to the medical evidence supporting a diagnosis of a neck injury with shoulder pain, Dr. Tobias wrote “After the 8/20/19 [date of injury] – [Claimant] has had persistent L shoulder and cervical pain with L arm radiculopathy that he did not have prior to this injury.” Dr. Tobias’ characterization that Claimant had had “persistent” left shoulder and cervical pain with left arm radiculopathy, is not supported by the evidence, and is not credible or persuasive. Conversely, his opinion that Claimant sustained a closed head injury, based on persistent dizziness is credible. (Ex. 6).

20. Respondents also requested that Dr. Tobias indicate the medical evidence supporting a referral for a head MRI, neck MRI, orthopedist referral and neurologist referral. In response, Dr. Tobias wrote “Due to the issues [Claimant] is having the head/cervical MRI & orthopedist & neurologist are needed to get a complete understanding of his diagnosis & to confirm causality. This cannot truly be done at this level of care. Higher level diagnostics and specialists are needed due to the complexity of this case.” Dr. Tobias also opined that Claimant was not at maximum medical improvement (MMI). The ALJ finds credible Dr. Tobias’ opinion that Claimant was not at MMI with respect to his head injury, and that additional diagnostic testing and a neurological referral was reasonable and necessary to diagnose and assess Claimant’s condition. (Ex. 6).

21. On October 1, 2020, Claimant underwent a brain MRI, which was interpreted as normal for Claimant’s age. (Ex. N).

22. Between October 13, 2020 and November 30, 2020, Claimant saw Dr. Tobias on four occasions. At each visit, Claimant reported continued dizziness, neck pain, right shoulder pain and right arm numbness, without any significant changes. (Ex. G, H, I and

J). At Claimant's November 30, 2020 visit, he reported falling asleep on his left arm resulting in functional difficulties with his left wrist and tingling in his left thumb. (Ex. J).

23. On February 8, 2021, Claimant participated in a virtual independent medical examination (IME), with Sander Orent, M.D., due to the constraints of a virtual examination, Dr. Orent did not physically examine Claimant. Dr. Orent issued a report dated February 8, 2021, setting forth his opinions. (Ex. 4). Dr. Orent was admitted to testify as an expert in occupational, emergency, and internal medicine. Claimant reported to Dr. Orent that immediately following the August 20, 2019 accident he had immediate dizziness, a severe headache, nausea, balance issues and that he lost consciousness. Claimant further reported experiencing severe left arm pain and neck pain on the date of accident. Claimant also reported being the victim of a dog attack in 2017 in which he sustained a significant injury to the left shoulder, which Claimant apparently reported was "never investigated" beyond basic care. (Ex. 4).

24. At the time of his IME with Dr. Orent, Claimant reported experiencing left-sided headaches 3-4 times per week with photophobia, memory loss, and no history of similar symptoms before August 20, 2019. Claimant reported constant pain in his neck, numbness in his left arm into his fingers, which he indicated started at the time of accident, with additional biceps symptoms. Claimant reported his left shoulder pain had worsened as a result of the August 20, 2019 accident, and that he was experiencing leg weakness, difficulty squatting and an occasional "dragging foot." (Ex. 4).

25. Based on his IME and review of Claimant's medical records, Dr. Orent opined that Claimant has "substantial neurologic symptomology which is very disconcerting." He opined that Claimant was manifesting symptoms of weakness and radiculopathy in the left arm and "probably both legs." He opined that an EMG nerve conduction study is "absolutely mandatory at this time" to evaluate possible compression of the spinal cord due to a C4-5 herniated disc. Dr. Orent opined that Claimant requires additional treatment, including a surgical consultation, evaluation at a headache clinic and an ENT consultation. (Ex. 4).

26. In addressing the lack of any contemporaneous documentation of neck symptoms at the time of the accident, Dr. Orent opined that Claimant was confused and disoriented following the accident, and in pain from his tailbone injury, and therefore presumably did not report other symptoms. Dr. Orent acknowledged that his opinion on this issue was speculation. The ALJ finds that Dr. Orent's opinion on this issue is not credible or persuasive. While it is plausible that Claimant may not have reported some symptoms on the date of his accident, the medical records document Claimant's affirmative denial of pain in his neck and back, nausea, and loss of consciousness, not merely that such issues were not reported. Additionally, Claimant's only consistently-reported symptoms to other health care providers prior to May 2020 were lower back/tailbone pain and dizziness. (Ex. 4).

27. On February 1, 2021, Dr. Castro performed a IME at Respondents' request, including an examination of Claimant and medical record review. Dr. Castro was admitted to testify as an expert in orthopedic surgery. He testified by deposition consistent with his

reports. Claimant reported a history of headaches, neck pain, upper, mid, and lower back pain, buttock pain, left leg pain, leg numbness, left arm pain, finger triggering, memory loss, problems thinking, insomnia, depression, and stress. Claimant indicated that in the August 20, 2019 accident he landed head-first on his left side striking his left shoulder. Claimant described his then-current symptoms as dizziness, memory loss, left shoulder pain, neck pain, back pain, chronic tailbone pain, left arm numbness, loss of use of left hand and daily headaches. Based on his examination and review of medical records, Dr. Castro's opinions expressed in his August 26, 2020 report remained largely unchanged. Dr. Castro opined that Claimant's cervical spine, shoulder and lower back symptoms were not accident related, and that Claimant's report of symptoms in these areas were not consistent with his original presentation and had changed since the accident. He did agree that evaluation of Claimant's reported cervical radiculopathy was reasonable, albeit not related to Claimant's work injury. (Ex. A).

28. With respect to Claimant's head injury, Dr. Castro noted that he is not a traumatic brain injury or concussion specialist, but that Claimant's medical records did not document "substantial brain injury-type symptomatology." In testimony, Dr. Castro noted the absence of neurological findings consistent with a head injury, such as loss of consciousness, and abnormal mental status. Dr. Castro opined that it was "unclear" whether Claimant "sustained any substantial traumatic brain injury and needs any treatment moving forward…" Dr. Castro deferred to a brain injury specialist with respect to whether Claimant sustained "a substantial brain trauma," and opined that "at most" Claimant sustained a mild concussion. (Ex. A)

Prior Treatment/Conditions

29. In 2017, Claimant was the victim of a dog attack. Following the attack, Claimant underwent a series of imaging studies. Including MRIs of his cervical spine, right elbow, right ankle, and left shoulder. Claimant testified that the owner of the dog was a physician who requested the MRI studies as a precaution, and that Claimant had no treatment for his head, neck, or left shoulder. Claimant's testimony as to the reasons for conducting the MRI studies is not credible, and fails to explain why specific body parts were examined if Claimant had no significant symptoms in these body parts. Notwithstanding, Claimant's left shoulder MRI, taken on October 18, 2017, showed a full thickness tear of the supraspinatus tendon with moderately large joint effusion and hypertrophic changes of the acromioclavicular joint. The cervical MRI, taken November 9, 2017, showed herniated discs with spondylotic changes at C3-4, C4-5, C5-6 and C-6-7 with encroachment, a bulging disc with anterior vertebral offset at the C7-T1 level, and spinal stenosis with cord encroachment and compressive myelomalacia at the C-4-5 level.

CONCLUSIONS OF LAW

Generally

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

§ 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

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

COMPENSABILITY AND MEDICAL TREATMENT

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, … performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The Claimant must prove his injury arose out of the course and scope of his employment by a preponderance of the evidence. § 8-41-301(1)(b) & (c), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). "Arising out of" and "in the course of" employment comprise two separate requirements. *Triad Painting Co.*, 812 P.2d at 641.

An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co.*

v. Blair, 812 P.2d at 641; *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO, Nov. 21, 2014).

The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury "has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014). The mere fact that an injury occurs at work does not establish the requisite causal relationship to demonstrate that the injury arose out of the employment. *Finn v. Industrial Commission,* 437 P.2d 542 (Colo. 1968); *Sanchez v. Honnen Equipment Company,* W.C. No. 4-952-153-01 (ICAO, Aug. 10, 2015).

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). Our courts have held that in order for a service to be considered a "medical benefit" it must be provided as medical or nursing treatment, or incidental to obtaining such treatment. *Country Squires Kennels v. Tarshis,* 899 P.2d 362 (Colo. App. 1995). A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Industrial Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537, (ICAO, May 31, 2006). A service is incidental to the provision of treatment if it enables the claimant to obtain treatment, or if it is a minor concomitant of necessary medical treatment. *Country Squires Kennels v. Tarshis,* 899 P.2d 362 (Colo. App. 1995)*; Karim al Subhi v. King Soopers, Inc.,* W.C. No. 4-597-590, (ICAO, July 11, 2012). Medical treatment which has a "reasonable prospect" of diagnosing or defining a Claimant's condition to suggest a course of further treatment constitutes a compensable medical benefit. *Churchill v. Goodyear Tire and Rubber Co.*, W.C. No. 4-203-686 (ICAP, Jan. 25, 2007). The determination of whether services are medically necessary, or incidental to obtaining such service, is a question of fact for the ALJ. *Bellone v. Industrial Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO, May 31, 2006).

CERVICAL SPINE/NECK

Claimant has failed to establish by a preponderance of the evidence that he sustained a cervical spine/neck injury as the result of his August 20, 2019 work accident. Claimant was seen by multiple different health care providers in the three months following the August 20, 2019 accident. On the day of the accident, Claimant was seen by paramedics and an emergency room physician. The medical records demonstrate that Claimant denied neck pain to the paramedics, and did not report neck pain to the ER physician. Claimant was then seen twice at Concentra by PA Scofield, on September 4, 2019 and September 20, 2019. Again, Claimant did not report any neck pain or symptoms at these visits, and his complaints were limited to dizziness and lower back/coccyx pain.

When Claimant saw Dr. Stjernholm on October 23, 2019, he completed medical history form, in which he noted dizziness and a painful tail bone. Notably, Claimant did not indicate he was experiencing neck pain or stiffness or pain between his shoulders.

Claimant's first documented complaint of neck pain was not until May 14, 2020, approximately nine months after the August 20, 2019 accident. Claimant's position that until May 14 ,2020, Claimant's providers failed to document his alleged complaints of neck pain is not persuasive or supported by credible evidence. Dr. Orent's opinion that Claimant was experiencing neck pain at the time of his injury is, by his own admission, speculation and therefore not persuasive. Further, Dr. Orent's opinion regarding Claimant's neck injury is based on the Claimant's reports, which are inconsistent with Claimant's contemporaneous medical records.

Because Claimant has failed to establish that he sustained a compensable injury to his cervical spine as a result of the August 20, 2019 work accident, any treatment of Claimant's cervical spine is not reasonable and necessary to cure or relieve the effects of a work injury.

LEFT SHOULDER

Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury to his left shoulder as the result of his August 20, 2019 work accident. Claimant's first documented complaint of left shoulder pain was on September 14, 2020, more than one-year after his work-related accident. Between the date of the accident and September 14, 2020, Claimant was evaluated by multiple health care providers and did not report any symptoms in his left shoulder. Although Claimant reported to Ms. Troyer that an orthopedic surgeon had diagnosed Claimant with a "torn muscle" resulting in limited range of motion to his shoulder, no records of such an examination or opinion are in the record. If Claimant sustained an acute injury to his left shoulder in the August 20, 2019 accident, it is more likely than not that the symptoms would have manifested immediately or shortly after the accident rather than approximately 13 months later. Claimant's report to Dr. Orent in February 2021 that he landed on his left shoulder is the first report of this mechanism of injury, and is not credible. Because Claimant has failed to establish that he sustained a compensable injury to his left shoulder as a result of the August 20, 2019 work accident, any treatment of Claimant's cervical spine is not reasonable and necessary to cure or relieve the effects of a work injury.

TRAUMATIC BRAIN INJURY

Claimant has established by a preponderance of the evidence that he sustained a compensable injury to his head in addition to the admitted laceration arising out of the course of his employment with Employer. Claimant was diagnosed with a closed head injury and a possible concussion with post-concussion symptoms, and has consistently reported experiencing dizziness since shortly after August 20, 2019, to multiple providers both within and outside the workers' compensation system. Given the continued reports of dizziness over a significant period of time, as well as the relatively early diagnosis of a possible concussion, the ALJ concludes that it is more likely than not that Claimant's head injury was not limited to a scalp laceration.

Although Claimant did not initially report significant symptomatology of a severe brain injury, such as loss of consciousness, vision disturbances, nausea, vomiting, or memory loss. Claimant's records from Concentra on September 4, 2019 and September 20, 2019 document continued dizziness that had not resolved as of his last examination. At subsequent visits with other health care providers, including chiropractic visits with Dr. Stjernholm in October and November 2019, and a dental visit with Dr. Herbert in November 2019, Claimant continued to report dizziness. Claimant's report of dizziness to Dr. Herbert is credible evidence of continued dizziness, because Claimant saw Dr. Herbert for treatment unrelated to his workers' compensation claim. Claimant continued to report dizziness when he saw Dr. Tobias in May 2020.

The specific nature of Claimant's injury, however, has not been determined, in part, because Respondents denied Dr. Tobias' request for a neurological consultation to further evaluate Claimant's head injury. Although Dr. Castro opined that Claimant has not sustained a "substantial" brain injury, he also acknowledge that Claimant possibly sustained a mild concussion and would defer to a brain injury specialist to determine whether there is any substantial brain trauma resulting from Claimant's work injury.

The ALJ concludes that Claimant has established it more likely than not that he sustained a concussion as a result of the August 19, 2019 work accident, and further evaluation and treatment of that injury is reasonable and necessary to relieve or cure the effects of that injury. Toward that end, the MRI requested by PA Troyer and/or Dr. Tobias was a diagnostic procedure with a reasonable prospect of diagnosing or defining Claimant's condition. In addition, Dr. Tobias' request to refer Claimant to a neurologist is also reasonable and necessary to cure or relieve the effects of Claimant's work injury.

Claimant has established by a preponderance of the evidence an entitlement to an award of general medical benefits related to a concussion, and that the neurologic consultation and brain MRI requested by Dr. Tobias constitute compensable medical treatment.

AVERAGE WEEKLY WAGE

Section 8-42-102(2), C.R.S. (2016) requires the ALJ to calculate Claimant's average weekly wage (AWW) based on the earnings at the time of injury as measured by the Claimant's monthly, weekly, daily, hourly, or other earnings. This section establishes the so-called "default" method for calculating Claimant's AWW. However, if for any reason, the ALJ determines the default method will not fairly calculate the AWW, § 8-42-102(3), C.R.S. (2016) affords the ALJ discretion to determine the AWW in such other manner as will fairly determine the wage. § 8-42-102(3), C.R.S. establishes the so-called "discretionary exception". *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of Claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp*., supra; *Avalanche Industries v. ICAO*, 166 P.3d 147 (Colo. App. 2007).

Claimant's average weekly wage for the 3 4/7 weeks preceding his injury was $1,430.75. The ALJ finds this to be a fair approximation of Claimant's average weekly wage.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that he sustained injuries to his left shoulder or cervical spine as the result of his August 20, 2019 work accident.

2. Claimant's request for medical benefits for treatment of his cervical spine and left shoulder is denied and dismissed.

3. Claimant has established by a preponderance of the evidence that he sustained a concussion arising out of the course of his employment with Employer on August 20, 2019.

4. Respondents are liable for medical treatment that is reasonable and necessary to cure and relieve the effects of his occupational injury

5. Respondents are liable for the October 1, 2020 brain MRI and evaluation by a neurologist, requested by Dr. Tobias as medical treatments reasonable and necessary to cure or relieve the effects of Claimant's work injury.

6. Claimant's average weekly wage as of August 20, 2019 was $1,430,75.

7. All matters not determined herein are reserved for future determination.

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

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

DATED: May 3, 2021

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-150-145-001

ISSUES

- Did Claimant prove she suffered a compensable injury on September 5, 2020?

  If the claim is compensable, the ALJ will address the following issues:

- Did Claimant prove treatment at the Memorial Hospital emergency department on September 5, 2020 was compensable emergency treatment?

- Is Claimant entitled to TTD benefits from September 6, 2020 and ongoing?

- Did Respondents prove Claimant was responsible for termination of her employment?

STIPULATIONS

Claimant's average weekly wage is $355.00. Dr. Miguel Castrejon is the primary ATP.

FINDINGS OF FACT

1. Claimant worked as a housekeeper at Employer's Days Inn hotel.

2. Cecilia "Cecy" G[Redacted] is the manager for Employer. Ms. G[Redacted] supervises all hotel staff, including Claimant. Ms. G[Redacted] also manages an adjacent Super 8 hotel. The Days Inn and Super 8 hotels share a common parking lot and it is a quick walk between the two. Ms. G[Redacted] commonly moves back and forth between the two properties during her shift. Ms. G[Redacted] is readily accessible to employees at either hotel on her cell phone. She communicates regularly with employees, including Claimant, regarding schedules and work assignments.

3. On September 5, 2020, Claimant was cleaning rooms for Employer. She moved a heavy TV stand to clean behind it and felt pain in her anterior right shoulder. Shortly thereafter, Claimant developed pain in her low back when she moved the TV stand back to its original position.

4. Claimant estimated the initial injury occurred between 3:00 p.m. and 4:00 p.m. She continued working and cleaning rooms after the injury, during which time her pain slowly intensified. At one point, another housekeeper, Ms. Ortega, passed by and spoke to Claimant. Claimant told Ms. Ortega she had injured herself and Ms. Ortega helped Claimant carry out the trash.

5. Claimant cleaned all her assigned rooms except Room 213. By all accounts, Room 213 was in poor condition, including a broken toilet seat. Ms. G[Redacted]

estimated it would have taken one housekeeper approximately 45 minutes to clean the room. Claimant was unhappy about having to clean Room 213.

6. Ms. A[Redacted] works for Employer in the laundry. Claimant testified she went to the laundry twice and asked Ms. A[Redacted] for assistance moving the TV stand but Ms. A[Redacted] declined to help. Claimant testified she told Ms. A[Redacted] she had injured her shoulder during the second trip to the laundry. Ms. A[Redacted] credibly testified Claimant came into the laundry for supplies but did not ask for help and mentioned no injury. Claimant complained to Ms. A[Redacted] about Room 213, stating that it was too dirty for only one housekeeper to clean. Claimant told Ms. A[Redacted] she was not going to clean Room 213. Ms. A[Redacted] advised Claimant to contact Ms. G[Redacted] about the situation.

7. Instead of speaking with Ms. G[Redacted], Claimant called a co-worker named Norma who was not working that day and not at the property. Norma is another housekeeper with no supervisory or managerial duties. Claimant asked Norma to contact Ms. G[Redacted] and ask Ms. G[Redacted] to send someone to help clean Room 213. Claimant told Norma she (Claimant) had suffered a work injury and asked Norma to tell Ms. G[Redacted] about the injury. Norma did not contact Ms. G[Redacted] after speaking with Claimant.

8. Claimant did not clean Room 213. Instead, she simply went home. Claimant left the hotel at approximately 6:00 p.m. She made no contact with Ms. G[Redacted] or any other manager before leaving. When questioned about her behavior at the hearing, Claimant testified she had not previously registered Ms. G[Redacted]'s number with the "Hey Google" feature of her phone and it was easier to call Norma. When asked why she did not take the short walk across the parking lot to speak with Ms. G[Redacted], Claimant testified she was in pain and wanted to go home. Claimant's explanations of why she did not contact Ms. G[Redacted] are not credible.

9. Ms. G[Redacted] was later alerted by the front desk that Room 213 had not been cleaned. She contacted Claimant at approximately 7:00 p.m. and instructed Claimant to return to the hotel to clean the room. Claimant protested that the room was too dirty and she was unwilling to return. Although Claimant testified she also told Ms. G[Redacted] about the injury, Ms. G[Redacted] persuasively denied Claimant mentioned any injury. Ms. G[Redacted] advised Claimant she had abandoned her job and was terminated. Ms. G[Redacted] could not recall if the conversation was conducted verbally or via text. Claimant testified the conversation was via text. Claimant testified she deleted the text messages and offered no explanation for doing so. Ms. G[Redacted]'s account of the conversation is more credible than Claimant's account.

10. Ms. G[Redacted] called several other housekeepers after Claimant refused to come back and clean Room 213. She had difficulty reaching anyone because of the Labor Day holiday. The only housekeeper to answer her phone was Ms. Ortega. Ms. Ortega was at a party but agreed to return to the hotel and clean Room 213. Ms. Ortega had been driven to the party by her daughter and was without her own vehicle; Ms.

Ortega's daughter drove Ms. Ortega to the Employer. Ms. Ortega did not tell Ms. G[Redacted] that Claimant had sustained an injury earlier that day.

11. Employees are required to report all work injuries to Ms. G[Redacted]. Ms. G[Redacted] credibly testified her standard practice when an employee reports an injury is to refer them to one of Employer's designated providers and file a report with Insurer.

12. Claimant went to the Memorial Hospital emergency department at 9:00 p.m. on September 5. Her chief complaints were right shoulder pain and low back pain. Claimant stated, "She was at work today, doing cleaning, she was lifting a very old, heavy, TV stand, and while doing this, she felt a sharp pain in the anterior aspect of her shoulder. Patient also complains of low back pain that developed about an hour after the incident. Patient denies any prior injuries in the low back or shoulder." Examination of the right shoulder showed diffuse interior tenderness and decreased strength secondary to pain. There was no swelling, no spasm, and range of motion was normal. Examination of the low back showed tenderness of the bilateral lumbar paraspinals but no palpable spasm and normal range of motion. X-rays of the right shoulder were normal. Claimant was diagnosed with a right shoulder "sprain" and acute bilateral low back pain without sciatica. The ER physician recommended Claimant utilize OTC NSAIDs and apply ice to her shoulder and back, and follow up with her PCP in a few days. Claimant was not given any work restrictions.

13. Claimant saw her PCP, Dr. Bradley Stokes, at Peak Vista Community Health Centers on September 8, 2020. She complained of ongoing right shoulder and low back pain, with some burning in the right leg. Claimant stated the problems "started three days ago due to an injury. She was moving some very heavy items away and first hurt her right shoulder. She then stretched it out and felt a popping motion and heard a sound in her right shoulder. Since then she has had a lot of shoulder pain. She tried to move the item a second time and that hurt her low back." Rotator cuff testing showed pain, "a little weakness," and crepitus. Dr. Stokes thought the injury was "likely muscular." Claimant's low back was very tender to palpation and she had some weakness in the right lower extremity consistent with a painful effort. Dr. Stokes diagnosed acute right shoulder pain and low back pain. He prescribed a Medrol Dosepak and muscle relaxers. Dr. Stokes assigned no work restrictions.

14. Claimant returned to Dr. Stokes on September 15, 2020. The muscle relaxers were helpful but the prednisone was of no benefit. Claimant reported worsening pain particularly regarding her low back and right leg. Rotator cuff testing demonstrated pain and weakness. Her low back was tender to palpation. Dr. Stokes noted "significant" weakness while testing the right leg and positive straight leg raise test on the right. Dr. Stokes ordered MRIs of the right shoulder and low back to evaluate a possible rotator cuff tear and lumbar nerve root impingement.

15. Claimant underwent a right shoulder MRI on September 28, 2020. It showed a Grade 1 strain of the subscapularis muscle, an intermediate grade sprain of the anteroinferior glenohumeral capsular ligament, and a low-grade partial-thickness tear of the supraspinatus myotendinous junction.

16. Claimant returned to Employer to pick her last paycheck on September 25, 2020 or October 10, 2020. Ms. G[Redacted] gave Claimant her check and had Claimant sign for it. Claimant voiced no concern or disagreement about her termination. Claimant said nothing to Ms. G[Redacted] about her injury or the medical treatment she was receiving. She exhibited no outward signs of injury or limitation. Nothing about the encounter would reasonably have prompted Ms. G[Redacted] to suspect a work injury or refer Claimant to a medical provider.

17. Claimant followed up with Dr. Stokes on October 26, 2020. Her right shoulder pain was "worse" and radiating down her right arm. Examination showed right leg weakness and restricted right shoulder range of motion. Dr. Stokes referred Claimant to an orthopedist to evaluate the partial rotator cuff tear shown on the MRI. Claimant had been unable to obtain the lumbar MRI because of cost and lack of insurance. He noted, "she claims this was due to work and that they should have to pay for this imaging. She does have objective findings of weakness on exam."

18. Claimant filed a workers' compensation claim with the Division on October 19, 2020. It is not clear exactly when Insurer received notice of the claim. Shortly thereafter, Brazee Smith, a claims representative with Insurer, contacted Ms. G[Redacted] about the injury. Ms. G[Redacted] had no knowledge of Claimant's injury before the call from Ms. Smith. After speaking with Ms. Smith, Ms. G[Redacted] asked her staff whether they had any information about the injury. Ms. Ortega confirmed Claimant had told her about the injury while working on September 5.

19. The parties agreed to Dr. Miguel Castrejon as the primary ATP. Claimant's initial evaluation with Dr. Castrejon took place on November 12, 2020. Claimant told Dr. Castrejon "she was moving a heavy wooden cabinet that was situated over a carpeted surface. . . As she did so, she experienced a sharp pain to the anterior and lateral aspect of the shoulder. The patient then bent forward and attempted to lift and move the cabinet. This resulted in moderate sharp low back pain extending into the right leg." Claimant described sharp, stabbing pain to the anterior, superior, and lateral right shoulder extending to the upper arm. She had difficulty reaching away from her body and lifting items heavier than a gallon of milk. She also described constant low back pain radiating to the right leg. Her symptoms were "becoming worse and more limiting in her day to day activities." Examination of Claimant's back revealed tenderness, hypertonicity, muscle spasm, and limited range of motion. Straight leg raise was positive on the right. Strength and sensation were intact. Her right shoulder was tender over the anterior capsule, deltoid, and superior trapezius. Flexion and abduction were limited because of pain. Empty can and impingement tests were positive, and she had infraspinatus weakness. Dr. Castrejon opined Claimant's subjective complaints were supported by objective findings and "directly related to the activity described [at work.] The mechanism of injury is consistent with injury to the right shoulder and lumbar spine." Dr. Castrejon's examination suggested a rotator cuff tear, but the MRI report was not available for his review. He referred Claimant to Dr. Chris Jones, an orthopedic surgeon, for evaluation of her shoulder. He also ordered a lumbar MRI. Dr. Castrejon took Claimant "off work" until her next appointment.

20. Claimant followed up with Dr. Castrejon on November 30, 2020. Her pain was continuing to worsen. Examination of the lumbar spine once again showed hypertonicity, muscle spasm, and limited range of motion. Claimant had undergone the lumbar MRI but did not know the results and the report was unavailable. She had not been contacted by Dr. Jones' office. The medications Dr. Castrejon prescribed at the first visit were not helping and Claimant was "concerned." Dr. Castrejon maintained Claimant's "off work" status and asked her to return in two weeks.

21. Claimant did not see Dr. Castrejon again because Insurer implemented a "hard denial" of all additional treatment, including diagnostics and conservative care.

22. Claimant proved she suffered compensable injuries to her right shoulder and low back on September 5, 2020.

23. Claimant failed to prove the treatment she received at the Memorial Hospital emergency room on September 5, 2020 resulted from a "bona fide emergency." Claimant worked for several hours after the injury and drove herself home. She then waited several more hours before going to the emergency room. Had Claimant followed Employer's policies and reported the injury to Ms. G[Redacted], she would have been immediately referred to a designated provider. There is no persuasive reason Claimant could not have reported the injury before going to the emergency room. Claimant's trip to the emergency room was necessitated by her failure to notify Employer of the injury and not any "emergency."

24. Claimant failed to prove Dr. Stokes or Peak Vista are authorized. Claimant sought treatment at Peak Vista before reporting the injury to Employer.

25. Claimant failed to prove she left work because of her injury on September 5, 2020. Claimant continued cleaning rooms after the accident and left before finishing her assignment because she did not want to clean Room 213. Despite her injury, Claimant probably could have finished her duties on September 5 had she not had to clean Room 213.

26. Respondents proved Claimant was responsible for termination of her employment on September 5, 2020. Claimant walked off the job without notifying her supervisor. That volitional act justified her termination.

27. Claimant proved her condition worsened as of November 12, 2020 and caused a greater impact on her earning capacity than existed at the time of her termination. Medical providers documented progressive worsening of Claimant's symptoms and limitations in September, October, and November 2020. Dr. Castrejon's clinical findings were objectively worse than documented by earlier providers, particularly when compared to the emergency room records. And Dr. Castrejon reasonably restricted Claimant from all work as of November 12, 2020, whereas no prior provider thought she required work restrictions. Claimant is entitled to TTD benefits commencing November 12, 2020.

CONCLUSIONS OF LAW

A. Claimant proved a compensable injury

To receive compensation or medical benefits, a claimant must prove she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove entitlement to benefits by a preponderance of the evidence. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is evidence that leads the ALJ to find a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case are not interpreted liberally in favor of either the claimant or the respondents. Section 8-43-201.

As found, Claimant proved she suffered compensable injuries to her right shoulder and low back on September 5, 2020. She has consistently described the accident to medical providers, representatives of Respondents, and at hearing. Claimant's testimony regarding the accident was generally credible despite inconsistencies in other aspects of her testimony. The claimed injuries are reasonably consistent with the clinical findings documented by the emergency room, Dr. Stokes, and Dr. Castrejon. The shoulder MRI objectively demonstrated soft tissue "strain" and "sprain," consistent with a recent acute injury. There is no persuasive evidence Claimant had any right shoulder or low back problems before September 5, and no persuasive evidence of any other activity that more likely could have caused the injuries. Claimant's failure to tell Ms. G[Redacted] about the injury is baffling but does not negate the preponderance of persuasive evidence in favor of compensability.

B. Respondents are not liable for treatment at the Memorial Hospital emergency department

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Where the respondents dispute the claimant's entitlement to medical benefits, the claimant must prove the treatment is recently necessary and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must prove entitlement to disputed medical benefits by a preponderance of the evidence. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

Besides proving treatment is reasonably necessary and related, the claimant must prove the treatment was "authorized." *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006). Authorization refers to a provider's legal right to treat the claimant at the respondents' expense. *Mason Jar Restaurant v. Industrial Claim Appeals Office*, 862 P.2d 1026 (Colo. App. 1993). Providers typically become authorized by the initial selection of a treating physician, agreement of the parties, or upon referrals made in the "normal progression of authorized treatment." *Bestway Concrete v Industrial Claim*

Appeals Office, 984 P.2d 680 (Colo. App. 1999); *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985).

Emergency treatment for a work-related injury is authorized without regard to whether the claimant had a referral or prior approval from the respondents. *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990); *see also* WCRP 8-2. The emergency exception is not necessarily limited to life-threatening situations, and the existence of a "bona fide emergency" is a question of fact for the ALJ. *Hoffman v. Wal-Mart Stores*, W.C. No. 4-774-720 (January 12, 2010).

As found, Claimant's trip to the Memorial Hospital emergency room was not necessitated by a "bone fide emergency." Instead, it resulted from Claimant's failure to notify Ms. G[Redacted] or any other supervisor about her injury.

C. Dr. Stokes and Peak Vista are not authorized providers

Under § 8-43-404(5)(a)(I)(A), the employer has the right to choose the treating physician in the first instance. The employer must tender medical treatment "forthwith, " or the claimant has "the right to select a physician or chiropractor." *Id*.; *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987). The employer's obligation to offer medical treatment is triggered by "some knowledge of accompanying facts connecting the injury or illness with the employment and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Jones v. Adolph Coors Co*., 689 P.2d 681, 684 (Colo. App. 1984). Notice of an injury can be given to "employee's foreman, superintendent, manager," or "other person in charge." Section 8-43-102(1.5)(a); *Frank v. Industrial Commission*, 43 P.2d 158 (Colo. 1935); *Ferris v. King Soopers, Inc.*, W.C. No. 3-884-707 & 3-895-561 (April 5, 1990); *Zanini v. King Soopers*, W.C. No. 3-870-72 & 3-887-766 (December 4, 1989). As found, Claimant did not report the injury to Respondents after she started treating with Peak Vista. Although she filed her claim with the Division on October 19, 2020, there is insufficient persuasive evidence to establish Employer knew about the injury before Claimant's October 26, 2020 appointment with Dr. Stokes. The treatment she received at Peak Vista was not authorized.

D. Claimant was responsible for termination of her employment

Sections 8-42-103(1)(g) and 8-42-105(4)(a) provide, "where . . . a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." A claimant's responsibility for termination not only provides a basis to terminate temporary disability benefits, but also limits the initial eligibility for TTD. Section 8-42-103(1)(g); *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002); *Valle v. Precision Drilling*, W.C. No. 5-050-714-01 (July 23, 2018). The respondents must prove the claimant was terminated for cause or responsible for the separation from employment by a preponderance of the evidence. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). To establish that a claimant was responsible for termination, the respondents must show the claimant performed a volitional act or otherwise exercised “some degree of control over the circumstances which led to the termination.” *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 5 P.3d 1061, 1062 (Colo. App. 2002); *Padilla v. Digital Equipment Corp*., 902 P.2d 414 (Colo. App. 1995); *Velo v. Employment Solutions Personnel*, 988 P.2d 1139 (Colo. App. 1988). The concept of “volitional conduct” is not necessarily related to moral turpitude or culpability but merely requires the exercise of some control or choice in the circumstances leading to the discharge. *Richards v. Winter Park Recreational Association*, 919 P.2d 983 (Colo. App. 1996). The ALJ must consider the totality of the circumstances to determine whether the claimant was responsible for his termination. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004).

As found, Respondents proved Claimant was responsible for termination of her employment. Claimant’s volitional acts provided ample justification for termination, notwithstanding her injury. She walked off the job without completing her work and without telling her manager or any other person at the hotel. Claimant regularly communicated with Ms. G[Redacted] by calls and texts, and could have easily used either method to inform Ms. G[Redacted] she would not finish her assigned tasks. There is no persuasive evidence to suggest Claimant was so incapacitated by pain she could not have made the short walk across the parking lot to speak with Ms. G[Redacted]. Claimant’s explanation for not contacting Ms. G[Redacted] before leaving the property was neither credible nor persuasive. Claimant’s testimony she later told Ms. G[Redacted] she could not come back to the hotel because of any injury is similarly unpersuasive. Claimant simply refused to return, and Ms. G[Redacted] had to scramble and find another employee who could return to the hotel and clean the room.

E. Claimant’s condition worsened and caused a greater impact on her earning capacity as of November 12, 2020

Termination for cause is not a permanent bar to receiving temporary disability benefits, and a claimant can reestablish eligibility for TTD by showing a worsened condition that caused a subsequent wage loss. *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004). A post-termination wage loss is “caused by a worsened condition” if the worsening results in limitations which did not exist at the time of the termination, and cause a limitation on the claimant’s temporary earning capacity that did not exist at the time of the termination. *Martinez v. Denver Health*, W.C. No. 4-527-415 (August 8, 2005). The imposition of new work restrictions does not automatically establish a worsening, but is simply one factor to consider when evaluating the preponderance of evidence. *Apex Transportation, Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630 (Colo. App. 2014). The burden of proof to establish a subsequent worsening of condition and consequent wage loss is on the claimant who has been found responsible for a termination. *Green v. Job Site, Inc.*, W.C. No. 4-587-025 (July 19, 2005).

Claimant proved her condition worsened as of November 12, 2020 and caused a greater impact on her earning capacity than existed at the time of her termination. Medical providers consistently documented progressive worsening of Claimant’s symptoms and limitations in September, October, and November 2020. Dr. Castrejon’s clinical findings were objectively worse than documented by earlier providers, particularly when compared to the initial emergency room records. No provider before Dr. Castrejon thought Claimant required work restrictions. Dr. Castrejon reasonably restricted Claimant from all work as of November 12, 2020 based on his clinical findings and evidence of progressive worsening without treatment. Claimant is entitled to TTD benefits commencing November 12, 2020.

ORDER

It is therefore ordered that:

1. Claimant suffered compensable injuries to her right shoulder and low back on September 5, 2020.

2. Claimant's average weekly wage is $355 per week, with a corresponding TTD rate of $236.67.

3. Dr. Castrejon is the ATP.

4. Insurer shall cover medical treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's compensable injury.

5. Claimant's request for medical benefits related to the September 5, 2020 treatment at Memorial Hospital is denied and dismissed.

6. Claimant's request for medical benefits for treatment received at Peak Vista is denied and dismissed.

7. Claimant's request for TTD benefits from September 6, 2020 through November 11, 2020 is denied and dismissed.

8. Insurer shall pay Claimant TTD benefits at the rate of $236.67 per week commencing November 12, 2020 and continuing until terminated according to law.

9. Insurer shall pay Claimant statutory interest of 8% per annum on all benefits not paid when due.

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

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

DATED: May 5, 2021

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

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that she suffered compensable injuries during the course and scope of her employment with Employer on July 29, 2020.

2. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive Temporary Partial Disability (TPD) or Temporary Total Disability (TTD) benefits for the period August 27, 2020 until she reached Maximum Medical Improvement (MMI) on February 1, 2021.

3. Whether Respondents have established by a preponderance of the evidence that Claimant was responsible for her August 27, 2020 termination from employment under §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. (collectively "termination statutes").

FINDINGS OF FACT

1. Claimant worked for Employer as a Logistics Manager. On July 29, 2020 Claimant was closing Employer's store for the day when she was attacked by three shoplifters. One of the shoplifters swung a machete at Claimant during the robbery while she was also repeatedly rammed with a shopping cart by another perpetrator. Claimant feared for her life when she was attacked with the machete and did not realize the perpetrators were attempting to steal merchandise until the altercation had ended.

2. Officer Haden Jonsgaard provided the following description of the July 29, 2020 robbery. He explained:

> [Claimant] was standing in the breezeway or vestibule of the store waiting for the males to pay for their merchandise. One male suddenly began trying to push the cart through the breezeway without having paid for the items in the cart. The male rammed her with the cart. The other male subject then swung his machete at [Claimant] and she jumped back to avoid being hit. This subject then pushed the other male with the shopping cart which in turn caused [Claimant] to be rammed into the door and pinned by the shopping cart.

3. Employers' First Report of Injury specifically provided that Claimant "states waiting to lock front door, customers stealing pushed cart into [her] shoving her into wall, scrapes/bruising to both shins." Claimant's injury was characterized as a lower leg contusion.

4. On the date of the altercation Claimant was concurrently employed at a U-Pump-It gas station. Claimant worked 11 hours each week and earned $12.00 per hour. Claimant has continued to work at U-Pump-It during the duration of the present claim.

5. Claimant did not immediately seek medical treatment. On August 13, 2020 she visited AFC Urgent Care and reported “shin pain, leg pain and anxiety.” She explained that she was struck by a cart during the course of a store robbery. Claimant’s left shin had developed swelling and drainage. Claimant also remarked that she had experienced nightmares and anxiety since the incident. After conducting a physical examination, John Vermilyen diagnosed Claimant with a left lower leg abrasion/contusion, cellulitis of the left leg and anxiety. She received antibiotics and was advised to elevate her lower extremities for two days.

6. Claimant provided a written statement to American Family Care on August 13, 2020 at the request of her medical provider. The statement noted:

> 2 guys pushed a shopping cart into the right side of my body. After being hit I turned and grabbed the shopping cart to push it off me then 1 of the guys swung a machete at me. As I moved back to avoid the machete I was again hit in the front by the cart pushing me back approximately 10 feet into a glass wall.

7. Claimant followed-up with AFC Urgent Care and visited Gary Cantrell, D.O. on August 15, 2020. The treatment plan was to address Claimant’s cellulitis of the left lower leg from an abrasion/contusion when she was struck by a cart on July 29, 2020. Dr. Cantrell referred Claimant to a mental health professional for anxiety and depression.

8. On August 20, 2020 Claimant returned to AFC Urgent Care and received treatment from Thomas Dickey, P.A. He diagnosed Claimant with shin abrasions and Post-Traumatic Stress Disorder (PTSD). P.A. Dickey released Claimant to full duty employment.

9. On August 27, 2020 Employer terminated Claimant. The termination was predicated on Claimant’s violation of Employer’s “Shoplifter Prevention Violation” policy. Specifically, Claimant “block[ed] the shoplifter’s path, and exit[ed] the building in response to a shoplifting incident” on July 29, 2020.

10. On September 3, 2020 Claimant returned to AFC Urgent Care for a follow-up regarding shin and leg pain. Claimant reported bilateral shin pain, lower lumbar and right hip pain. Claimant had undergone a spinal lumbar fusion approximately four years earlier, but remarked “this is a different pain.” Mr. Vermilyen diagnosed Claimant with PTSD/anxiety, gradually improving shin pain, back and right hip pain. Mr. Vermilyan remarked that the back and right hip pain were “consistent with strain due to the injuries received to the lower extremities.”

11. On September 10, 2020 Claimant returned to AFC Urgent Care for treatment. Claimant again reported PTSD, bilateral shin pain, lower lumbar and right hip

pain as a result of the July 29, 2020 altercation at work. Edward Hansmeier assessed Claimant with a right lower lumbar strain and anxiety.

12. On September 17, 2020 Claimant visited Hyeran Lee, NP at AFC Urgent Care. NP Lee noted that Claimant's cellulitis of the lower left leg was healing. NP Lee also remarked that Claimant had a strain of the muscle, fascia and tendon of the right hip. NP Lee thus recommended physical therapy twice per week. Finally, NP Lee directed Claimant to follow-up with her psychologist for anxiety.

13. By October 29, 2020 Claimant continued to report lower back pain and anxiety. Kara Carpino noted that Claimant's shin pain had resolved. She assessed Claimant with anxiety and a right lower lumbar pain/strain. Ms. Carpino commented that Claimant's hip pain was gradual and constant. Claimant continued to undergo physical therapy for lower back and right hip pain. Ms. Carpino diagnosed Claimant with: (1) PTSD; (2) a strain of the muscle, fascia and tendon of the right hip and (3) right lower lumbar pain and strain.

14. On December 17, 2020 Claimant returned to NP Lee for an examination. Claimant reported shin, leg and back pain. After conducting a physical examination, NP Lee diagnosed Claimant with a right lower lumbar pain/strain and right shin pain.

15. On January 18, 2021 Claimant visited Henry M. Johnston, II, M.D. at AFC Urgent Care for an examination. He reviewed Claimant's medical history and performed a physical examination. Dr. Johnston diagnosed Claimant with: (1) PTSD; (2) right shin pain and; (3) right lower lumbar pain and strain.

16. On February 1, 2021 Claimant returned to Dr. Johnston for an evaluation. Dr. Johnston characterized Claimant's work-related diagnoses as PTSD and lower back pain. He determined that Claimant had reached Maximum Medical Improvement (MMI) effective February 1, 2021. However, no Level II impairment rating has been scheduled. Claimant remains on medications prescribed through the chain of referral.

17. Claimant testified at the hearing in this matter. She noted that her current physical symptoms include right lower extremity pain, right hip locking, loss of balance and right lower back pain. She also suffers tightness in her lower back from trying to protect her hip. Claimant's mental symptoms include panic attacks and nightmares. She takes panic attack medication, sleeping pills and antidepressants. Claimant explained that her current work restrictions include no more than five hours standing or sitting, no lifting in excess of 25 pounds and no pushing/pulling in excess of 15 pounds.

18. Claimant remarked that she is still employed by U-Pump-It. She currently works 22 hours each week and earns $12.00 per hour. Claimant operates a cash register but does not have to lift or stock any products.

19. Claimant has demonstrated that it is more probably true than not that she suffered compensable injuries during the course and scope of her employment with Employer on July 29, 2020. Initially, on July 29, 2020 Claimant was closing Employer's store for the day when she was attacked by three shoplifters. One of the shoplifters swung

a machete at Claimant while she was also repeatedly rammed with a shopping cart by another perpetrator. Claimant was diagnosed with a left lower leg abrasion/contusion, cellulitis of the left leg and anxiety. By September 3, 2020 Claimant returned to AFC Urgent Care and reported bilateral shin pain, lower lumbar and right hip pain. Mr. Vermilyen diagnosed Claimant with PTSD/anxiety, gradually improving shin pain, back and right hip pain. He remarked that the back and right hip pain were "consistent with strain due to the injuries received to the lower extremities." By September and October of 2020 Claimant's left lower extremity symptoms had resolved. However, she continued to undergo physical therapy for lower back and right hip pain. Ms. Carpino diagnosed Claimant with: (1) PTSD; (2) a strain of the muscle, fascia and tendon of the right hip and (3) right lower lumbar pain and strain. On February 1, 2021 Dr. Johnston determined that Claimant had reached MMI.

20. The preceding chronology reflects that Claimant's work-related injuries included left lower extremity abrasions/contusions that have resolved. Claimant has also suffered: (1) PTSD; (2) a strain of the muscle, fascia and tendon of the right hip and (3) right lower lumbar pain and strain. As noted in the medical records, Claimant's back and right hip pain symptoms were consistent with a strain caused by her lower extremity injuries. Therefore, the medical records in conjunction with Claimant's credible testimony, demonstrate that she suffered a variety of injuries as a result of the July 29, 2020 work incident in which she was attacked by shoplifters. Accordingly, Claimant's work activities on July 29, 2020 aggravated, accelerated or combined with her pre-existing condition to produce a need for medical treatment.

21. Claimant has proven that it is more probably true than not that she is entitled to receive TPD or TTD benefits for the period August 27, 2020 until she reached MMI on February 1, 2021. The record reveals that Claimant's July 29, 2020 industrial injuries caused a disability lasting more than three work shifts, she left work as a result of the disability and the disability resulted in an actual wage loss. Moreover, Claimant had concurrent employment with U-Pump-It when she suffered her work injuries and continued to work there during the duration of her claim. The record reveals that Claimant suffered numerous injuries as a result of the July 29, 2020 robbery that either eliminated or decreased her ability to earn wages, Accordingly, Claimant is entitled to receive TPD or TTD benefits as a result of her July 29, 2020 work injuries.

22. Respondents have failed to establish that it is more probably true than not that Claimant was responsible for her August 27, 2020 termination from employment under the termination statutes. Initially, on August 27, 2020 Claimant was terminated for violating Employer's "Shoplifter Prevention Violation" policy. Specifically, Claimant "block[ed] the shoplifter's path, and exit[ed] the building in response to a shoplifting incident" on July 29, 2020. However, in describing the July 29, 2020 robbery of Employer's store, Claimant credibly detailed that she was attacked by three shoplifters. One of the shoplifters swung a machete at Claimant during the robbery while she was also repeatedly rammed with a shopping cart by another perpetrator. Claimant feared for her life and did not realize the perpetrators were attempting to steal merchandise until the altercation had ended. The police report of Officer Jonsgaard and Claimant's written statement to American Family Care support her description of the July 29, 2020 incident.

23. The preceding descriptions of the July 29, 2020 robbery reflect that Claimant did not exercise control over the circumstances surrounding her termination from employment. Instead, Claimant feared for her life during a violent altercation and robbery. Claimant's actions on July 29, 2020 reflect that she did not precipitate her employment termination by a volitional act that she would reasonably expect to cause the loss of employment. Claimant was thus not responsible for her August 27, 2020 termination from employment.

CONCLUSIONS OF LAW

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

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

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

Compensability

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

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.,* W.C. No. 4-650-711 (ICAO, Feb. 15, 2007); *David Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

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

7. The provision of medical care based on a claimant's report of symptoms does not establish an injury but only demonstrates that the claimant claimed an injury. *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020). Moreover, a referral for medical care may be made so that the respondent would not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id.* Although a physician provides diagnostic testing, treatment, and work restrictions based on a claimant's reported symptoms. It does not follow that the claimant suffered a compensable injury. *Fay v. East Penn manufacturing Co., Inc.*, W.C. No. 5-108-430-001 (ICAO, Apr. 24, 2020); *cf. Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997) ("right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment"). While scientific evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory supporting compensability when making a determination. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020).

8. As found, Claimant has demonstrated by a preponderance of the evidence that she suffered compensable injuries during the course and scope of her employment with Employer on July 29, 2020. Initially, on July 29, 2020 Claimant was closing Employer's store for the day when she was attacked by three shoplifters. One of the shoplifters swung a machete at Claimant while she was also repeatedly rammed with a shopping cart by another perpetrator. Claimant was diagnosed with a left lower leg abrasion/contusion, cellulitis of the left leg and anxiety. By September 3, 2020 Claimant

returned to AFC Urgent Care and reported bilateral shin pain, lower lumbar and right hip pain. Mr. Vermilyen diagnosed Claimant with PTSD/anxiety, gradually improving shin pain, back and right hip pain. He remarked that the back and right hip pain were "consistent with strain due to the injuries received to the lower extremities." By September and October of 2020 Claimant's left lower extremity symptoms had resolved. However, she continued to undergo physical therapy for lower back and right hip pain. Ms. Carpino diagnosed Claimant with: (1) PTSD; (2) a strain of the muscle, fascia and tendon of the right hip and (3) right lower lumbar pain and strain. On February 1, 2021 Dr. Johnston determined that Claimant had reached MMI.

9. As found, the preceding chronology reflects that Claimant's work-related injuries included left lower extremity abrasions/contusions that have resolved. Claimant has also suffered: (1) PTSD; (2) a strain of the muscle, fascia and tendon of the right hip and (3) right lower lumbar pain and strain. As noted in the medical records, Claimant's back and right hip pain symptoms were consistent with a strain caused by her lower extremity injuries. Therefore, the medical records in conjunction with Claimant's credible testimony, demonstrate that she suffered a variety of injuries as a result of the July 29, 2020 work incident in which she was attacked by shoplifters. Accordingly, Claimant's work activities on July 29, 2020 aggravated, accelerated or combined with her pre-existing condition to produce a need for medical treatment.

Temporary Partial/Temporary Total Disability Benefits

10. Section 8-42-106(1), C.R.S. provides for an award of TPD benefits based on the difference between the claimant's Average Weekly Wage (AWW) at the time of injury and the earnings during the continuance of the Temporary Partial Disability (TPD). Specifically, an employee shall receive 66.66% of the difference between his wages at the time of his injury and during the continuance of temporary partial disability. In order to receive TPD benefits the claimant must establish that the injury caused the disability and consequent partial wage loss. §8-42-103(1), C.R.S.; *see Safeway Stores, Inc. v. Husson,* 732 P.2d 1244 (Colo. App. 1986) (temporary partial compensation benefits are designed as a partial substitute for lost wages or impaired earning capacity arising from a compensable injury). Section 8-42-106(2), C.R.S. provides that TPD shall continue until either of the following occurs: "(a) The employee reaches maximum medical improvement; or (b)(I) The attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment." *See Evans v. Wal-Mart*, WC 4-825-475 (ICAO, May 4, 2012).

11. To prove entitlement to Temporary Total Disability (TTD) benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity

evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

12. As found, Claimant has proven by a preponderance of the evidence that she is entitled to receive TPD or TTD benefits for the period August 27, 2020 until she reached MMI on February 1, 2021. The record reveals that Claimant's July 29, 2020 industrial injuries caused a disability lasting more than three work shifts, she left work as a result of the disability and the disability resulted in an actual wage loss. Moreover, Claimant had concurrent employment with U-Pump-It when she suffered her work injuries and continued to work there during the duration of her claim. The record reveals that Claimant suffered numerous injuries as a result of the July 29, 2020 robbery that either eliminated or decreased her ability to earn wages, Accordingly, Claimant is entitled to receive TPD or TTD benefits as a result of her July 29, 2020 work injuries.

Termination for Cause

13. Under the termination statutes in §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for her termination, respondents must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

14. As found, Respondents have failed to establish by a preponderance of the evidence that Claimant was responsible for her August 27, 2020 termination from employment under the termination statutes. Initially, on August 27, 2020 Claimant was terminated for violating Employer's "Shoplifter Prevention Violation" policy. Specifically, Claimant "block[ed] the shoplifter's path, and exit[ed] the building in response to a shoplifting incident" on July 29, 2020. However, in describing the July 29, 2020 robbery of Employer's store, Claimant credibly detailed that she was attacked by three shoplifters. One of the shoplifters swung a machete at Claimant during the robbery while she was also repeatedly rammed with a shopping cart by another perpetrator. Claimant feared for her life and did not realize the perpetrators were attempting to steal merchandise until the altercation had ended. The police report of Officer Jonsgaard and Claimant's written statement to American Family Care support her description of the July 29, 2020 incident.

15. As found, the preceding descriptions of the July 29, 2020 robbery reflect that Claimant did not exercise control over the circumstances surrounding her termination from employment. Instead, Claimant feared for her life during a violent altercation and robbery. Claimant's actions on July 29, 2020 reflect that she did not precipitate her employment termination by a volitional act that she would reasonably expect to cause the loss of employment. Claimant was thus not responsible for her August 27, 2020 termination from employment.

ORDER

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

1. Claimant suffered compensable injuries during the course and scope of her employment with Employer on July 29, 2020.

2. Claimant is entitled to receive TPD or TTD benefits as a result of her July 29, 2020 work injuries.

3. Claimant was not responsible for her August 27, 2020 termination from employment.

4. Any issues not resolved in this order are reserved for future determination.

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

Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 5, 2021.

DIGITAL SIGNATURE:

Peter J. Cannici

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

ISSUE

I. Have Respondents, by clear and convincing evidence, overcome the DIME opinion of Dr. Higginbotham regarding Claimant's Impairment Ratings for her Thoracic and Lumbar spine?

FINDINGS OF FACT

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

Initial Work Injury / Subsequent Treatment

1. This is an admitted claim. Claimant worked as a caseworker with [Redacted Employer]. On July 8, 2019, Claimant was involved in a motor vehicle accident while returning to the office after transporting foster children. She was rear-ended by another vehicle, which in turn caused her vehicle to hit the one in front of her. (Ex. A)

2. Claimant presented to CCOM Pueblo later that same day where she was seen by Buddy Leckie, PA-C. Claimant reported pain in the neck, abdomen and both wrists. Claimant further reported that although the driver's side air bags deployed, she was able to exit her vehicle, and walk and talk 'normally' following the accident. Upon learning that Claimant had not yet been evaluated in the emergency room, PA Leckie directed Claimant to go to the emergency room for a more complete evaluation. (Ex. F, pp. 64-65)

3. On that date, Claimant was seen in the emergency room at St. Mary-Corwin Medical Center. According to the ER report, Claimant was complaining of headache, neck pain, right-sided chest wall pain, and lower abdominal pain. Claimant also had a small area of ecchymosis to her left knee, but had good range of motion. (Ex. I, p. 254)

4. A CT scan of the head showed no acute intracranial hemorrhage. (Ex. I, pp. 259-260) A CT scan of the chest, abdomen and pelvis identified no acute findings. *Id* at 260-262. The CT of the cervical spine showed no evidence of an acute cervical spine fracture. *Id* at 263-263. Claimant was diagnosed with 'motor vehicle collision', strain of neck muscle, abdominal wall pain and contusion of left knee. She was discharged with prescriptions for naproxen and Norflex, and directions to apply ice and to perform gentle stretching and range of motion. *Id* at 254.

5. Claimant returned to PA Leckie on July 10, 2019. PA Leckie wrote that Claimant's primary problem was pain located in the neck, abdomen, and left and right wrists. Claimant also *reported* back pain/*stiffness* from the lumbar region to her neck, headache and trouble sleeping. On exam, PA Leckie noted that Claimant appeared in discomfort and was tender to palpation over her entire low back and cervical region.

6. PA Leckie's diagnoses included: (1) strain of muscle, fascia and tendon at neck level; (2) driver injured in collision with unspecified motor vehicles in traffic accident; (3) unspecified injury of muscle, fascia and tendon of right hip; (4) unspecified injury of muscle, fascia and tendon of left hip; and (5) sprain of ligaments of cervical spine. PA Leckie referred Claimant to physical therapy, directed Claimant to apply ice and heat, and to use Tylenol. He also imposed temporary work restrictions. (Ex. F, pp. 74-75).

7. Claimant underwent physical therapy at Centura Center for Rehabilitation from July 10, 2019 through September 10, 2019. (Ex. H).

8. On July 26, 2019, PA Leckie noted that Claimant had returned to modified duty work, but was reporting some cognitive dysfunction. PA Leckie referred Claimant for a neurology evaluation and took Claimant off work until she was cleared by neurology. (Ex. F, pp. 89-90).

Claimant is seen by Dr. Olsen / Additional Referrals

9. On July 30, 2019, Claimant was first seen by Dr. Daniel Olson at CCOM, who noted that Claimant was being followed post-MVA for some postconcussive type symptoms, some generalized back and neck pain, and some headaches. Claimant requested to see a chiropractor. A referral was made to Dr. Dressen. Claimant was also scheduled to see Dr. Ales in neurology later that week. Dr. Olson began Claimant on nortriptyline to help with sleep and headaches. (Ex. F, pp. 97-98)

10. Claimant underwent chiropractic treatment with Dr. Donald Dressen from August 5, 2019 through November 25, 2020. (Ex. G).

11. At her initial appointment with Dr. Dressen on August 5, Claimant's pain diagram marked her cervical, thoracic, and lumbar regions on her back, and circled "Tenderness" "Muscle Spasms" "Weakness", and "Stiffness". *Id* at 174.

12. On subsequent visits, Claimant was highly, if not completely, consistent in continuing to mark each of these three regions of her spine, and circling, at a minimum, "Tenderness", and "Stiffness" on the following dates: Aug 7, 15, 19, 21, 26; September 3, 11, 18, 25; October 2, 16, 31; November 13; December 2, 23; [In 2020]: January 8; February 3, 17; March 2, 16, 18, 25: April 13, 16, 28, 30; May 13; June 1, 15, 29; July 13; August 5, 31; November 25. (Ex. G, pp. 171-211, Ex. 5, pp. 56-108).

13. Additionally, there were references to Thoracic and Lumbar *myospasms,* which appeared sporadically throughout these same dates, including her most recent visit. *Id.*

14. On September 10, 2019, Clamant was discharged from physical therapy. In the Discharge Evaluation report, the physical therapist noted that Claimant had improved her range of motion, strength, and pain levels for all body parts, but continued to struggle primarily with balance and prolonged activities. Claimant was discharged to a home exercise program. (Ex. H, pp. 246—248).

15. In a report dated October 1, 2019, PA Leckie wrote that Claimant reported that she was moving and walking better, but was still having trouble with mental focus and concentration, Her headaches, light sensitivity and nausea have all decreased. On physical exam, PA Leckie noted slight tenderness to palpation over the bilateral upper traps. Claimant could turn her head in both directions without pain. There was active full range of motion in the low back and no pain with raising her arms above her head. There were no low back or cervical trigger points or nodules noted on palpation. PA Leckie again released Claimant to return to modified duty work at four hours per day. (Ex. F, pp. 138-139)

16. On November 21, 2019, Dr. Olson saw Claimant for reevaluation. Dr. Olson noted that Claimant appeared significantly improved compared to his last visit. Dr. Olson wrote that Claimant appeared to be making excellent progress, and advanced her to regular duty with no restrictions. (Ex. F, pp. 149-151)

17. Claimant continued to follow up with her providers at CCOM, with continued conservative treatment through the fall and winter of 2019, and into the spring of 2020. On April 1, 2020, Dr. Olson noted that Claimant was working full-time. She reported still getting some tightness in her traps as well as her mid scapular area. However, she felt the therapy cane was helping.

18. On exam, Dr. Olson found that neck range of motion showed full flexion and extension. There continued to be some tightness in both traps. Although there was some discomfort on palpation of the mid scapular area, there were no trigger points identified. (Ex. F, pp. 158-160)

19. On May 5, 2020, PA Leckie wrote that Claimant reported improving with chiropractic care. Claimant reported that although she still got some *tightness* in her upper back and neck, it was "much better". (Ex. F, pp. 162-164).

Dr. Olsen Places Claimant at MMI, with No Impairment

20. On June 9, 2020, Claimant saw Dr. Olson in follow up. Dr. Olson noted that Claimant continued to see Dr. Dressen every other week. He was working on some strengthening, that this was causing some achiness in her upper trunk muscles, but he opined that it was more of an achiness, and not an injury.

Claimant's functional scores were improving. Dr. Olson placed Claimant at maximum medical improvement and recommended maintenance care with Dr. Dressen two times a month for the next six months. (Ex. F, pp. 167-169) Dr. Olson further indicated that no permanent impairment was warranted. (Ex. F, p. 165).

21. On June 11, 2020, Respondents filed a Final Admission of Liability, consistent with Dr. Olson's June 9, 2020 determinations of MMI and permanent impairment. (Ex. B). Claimant timely objected to the Final Admission of Liability, and requested a DIME. On her Notice and Proposal and Application for a Division Independent Medical Examination, Claimant identified cervical spine, right and left hips, and traumatic brain injury. Claimant did not originally identify the thoracic or lumbar spines as areas that she wished to be evaluated as part of the DIME. (Ex. C).

Dr. Higginbotham's DIME Report

22. Dr. Thomas Higginbotham was selected as the DIME physician, and performed the DIME evaluation on October 6, 2020. (Ex. E) Dr. Higginbotham documented that Claimant reported that her headaches were, for the most part, gone or manageable. Reported discomforts were worse about the neck and upper thoracic area. Dr. Higginbotham noted that Claimant reported that the neck discomforts were present most of the time. Claimant further reported that the discomforts were present in thoracic areas *intermittently*, and in the lumbar spine *occasionally*, and related to increased physical activity. (Ex. E, pp 44-45)

23. Dr. Higginbotham conducted an in-person physical examination as part of his DIME evaluation of Claimant. Dr. Higginbotham observed that Claimant was able to get on and off the exam table, walk and stand up without difficulties. (Ex. E, p. 45). On the postural exam, the pelvic crests were noted to be dislevel, with the left slightly higher than the right. The shoulders were level. There was no gross scoliotic curve or lordosis. The skin of the back was noted to be normal. The chest was non-tender. There was negative axial loading and Spurling's maneuvers bilaterally. (Ex. E, pp. 45-46)

24. On palpatory examination, Dr. Higginbotham documented the degree of tenderness that was noted in various areas throughout the spine. Out of 15 areas, Dr. Higginbotham noted "none" for 13 areas and "mild" for 2 areas (thoracic paraspinal and lumbar paraspinal). Dr. Higginbotham also documented that there was no muscle tone asymmetry or spasm. Dr. Higginbotham observed that Claimant was able to get up from sitting without deficit, and got up in a sit-up manner from supine position without concern. (Ex. E, p. 46)

25. For Claimant's thoracic and lumbar spines, Dr. Higginbotham provided diagnoses of persistent thoracalgia with *mild myofascial strain*, and persistent lumbalgia with *mild lumbar myofascial* strain. (Ex. E, p. 48). Dr. Higginbotham agreed that Claimant reached MMI as of June 9, 2020. (Ex. E, p. 48). He assigned a total impairment of 11% whole person for the cervical spine (based on 4% for specific disorders under Table 53.II.B. plus 7% for ROM deficits). He assigned 5% whole person for the thoracic spine (based on 2% for specific disorders under Table 53.II.B, plus 3% for ROM deficits), He also assigned 6% whole person for the lumbar spine (based on 5% for specific disorders under Table 53.II.B, plus 1% for ROM deficits). The total combined whole person impairment rating was 20%. (Ex. E, p. 49).

26. Under the heading titled "Rationale For Your Decision" and a subheading of "IR", Dr. Higginbotham wrote: "No range of motion measurements were made by the WC provider at the time of declaring MMI. Chiropractic care and physiotherapy was directed to *discomforts* about the cervical, thoracic *and* lumbar spines." (Ex. E, p. 49)(emphasis added).

Dr. Primack's IME Report

27. Dr. Scott Primack conducted an IME pursuant to Respondents' request on November 23, 2020. (Ex. D). Dr. Primack noted in his report that Claimant advised him that she does not have pain every day at every part of her spine. Rather, she would periodically have problems at the neck, mid back or lower lumbar spine. Dr. Primack reported that the area that appeared to have the most consistency of discomfort was at the cervical spine. The secondary area that bothered her appeared to be at the lower lumbar spine, which included her back and hips. Dr. Primack noted that Claimant did not even describe any thoracic spine problems to him during his evaluation. (Ex. D, p. 25)

28. Dr. Primack also conducted a physical examination of Claimant. Regarding the cervical spine, Dr. Primack noted that range of motion was restricted in rotation, and facet loading was positive at the cervical spine. Regarding the thoracic spine, Dr. Primack found pain with palpation, but no abnormalities with rotation or with thoracic facet loading. At the lumbar spine, Dr. Primack wrote that flexion was normal and there was no increased tone, no spasms, and no limitations in rotation*. Id.* Straight leg raise in the supine position was negative. Rotation around the pelvis did not elicit significant discomfort. *Id* at 26.

29. For Claimant's cervical spine, Dr. Primack provided a diagnosis of cervical facet syndrome at C4-5 and C5-6, with some deficits in rotation. Regarding the thoracic spine, Dr. Primack opined that while Claimant may have tenderness, there was no evidence of any type of pain with facet loading, nor was there kyphosis or scoliosis. Regarding the lumbar spine, Dr. Primack wrote that

Claimant had no specific area of pain in the lumbar spine from her initial evaluation. (Ex. D, p. 26).

30. Dr. Primack opined that Claimant did not have a thoracic spine diagnosis. He further noted that, while there were areas of tenderness on his exam in the lumbar spine, Claimant did not have any compromise to the facet joints or discs at the lumbar spine. Dr. Primack noted that in Dr. Higginbotham's clinical exam, there was similarly only tenderness, and this was seen in only one area of the paraspinal muscles, and was described as "mild". Otherwise, Dr. Primack noted, Dr. Higginbotham documented that there was no tenderness at the midline of the lumbar spine, the midline at the sacroiliac joint, the iliolumbar gluteal area, the sciatic notch, or the IT band. *Id* at 27.

31. Dr. Primack noted that, as documented in Dr. Higginbotham's own report, Claimant only had problems at the lumbar spine *occasionally* and at the thoracic spine *intermittently*. Dr. Primack opined that Claimant did not have a permanent residual impairment to either the thoracic or lumbar spines that would warrant an impairment rating. However, Claimant did qualify for an impairment rating for the cervical spine based on her cervical facet syndrome. Dr. Primack assessed a 7% impairment of the whole person for the cervical spine (based on 4% for specific disorders under Table 53.II.B, plus 3% for ROM deficits). Dr. Primack further wrote that Dr. Higginbotham's documentation of the level of permanent impairment was in error. *Id* at 27, 32-33.

Dr. Primack Testifies at Hearing

32. Dr. Primack testified at hearing. He further explained his opinions and conclusions and the bases for same. He agreed with the statement in the Impairment Rating Tips issued by the Division of Workers' Compensation that, *in order to provide a permanent impairment rating, you need a specific diagnosis supported by objective pathology.* (*also see* Ex. J, p. 270). Dr. Primack explained that under our system of rating impairment, pain itself is not an impairment. Rather, one must not only identify the source of the pain, but one must go on to establish, based on the clinical exam, a specific diagnosis that would be considered permanent.

33. Dr. Primack testified that the system of impairment is based upon pathology, not just pain. "So you have to go with the diagnosis and pathology." (Hrg. Tr. p. 4). Otherwise, Dr. Primack commented, if impairment were based on discomfort alone, the entire state during ski season would be walking around with an impairment. *Id.*

34. Dr. Primack testified that the clinical exam is one of the cornerstones of making the diagnosis. He further testified that in someone who has myofascial pain or strain, evidence of objective pathology would be findings of tone, spasms and trigger points, which Dr. Primack characterized as the hallmarks of someone

who is having a strain. Dr. Primack explained that these findings are objective because they are things that providers can palpate for and feel, and are independent of a patient's reported symptomatology.

35. In contrast, tenderness to palpation does not constitute evidence of objective pathology, because this just means that the patient is *saying* that the area is tender. While a report of pain alone may help in directing further investigation for correlative findings, tenderness on palpatory exam alone is not an objective finding and does not mean that the patient has pathology. Rather, it is just the patient saying "ouch". Dr. Primack opined that reports of discomfort, such as stiffness, tightness or pain, are similarly subjective symptoms, and do not constitute evidence of objective pathology.

36. Dr. Primack explained that there are some components of permanent impairment ratings that are not contained in the *AMA Guides to the Evaluation of Permanent Impairment*, 3rd Ed. Revised, but that are specific to the Level II accreditation system. Dr. Primack further testified that the requirements under Level II for a specific diagnosis and objective pathology are on top of the requirements for 6 months of pain and rigidity set forth in Table 53 of the *AMA Guides*.

37. In reviewing Dr. Higginbotham's documented findings on clinical exam regarding the thoracic and lumbar spines, Dr. Primack testified that he saw no evidence of rigidity. Further, Dr. Primack testified, according to Dr. Higginbotham's report, although Claimant had mild tenderness with palpation, there was no increased muscle tone or asymmetry or spasm, which is the objective part. Dr. Primack testified that the notation in Dr. Higginbotham's report that Claimant was able to go from sit to stand and stand to sit without deficits meant that all those muscles in her spine were contracting in a fairly normal manner.

38. Dr. Primack testified that on his own clinical examination of Claimant, he also did not find anything constituting evidence of objective pathology for either the thoracic or the lumbar spines.

39. Regarding Dr. Higginbotham's diagnoses of persistent thoracalgia and persistent lumbalgia, Dr. Primack testified that these diagnoses are not sufficient to support a permanent impairment rating for the thoracic and lumbar spines. Dr. Primack explained that thoracalgia and lumbalgia are simply *descriptors* that indicate that someone has pain. However, our system of impairment is not based upon pain, but rather pathology. Dr. Primack further testified that these terms do not say anything about the condition that is causing the pain.

40. Specifically, Dr. Primack testified, these diagnoses are not based on tenderness, but rather upon tone, spasm, and latent trigger responses, which

are independent of the patient saying “ouch”. Dr. Primack testified that Claimant does not have permanent mild thoracic or lumbar myofascial strains because these diagnoses have to be supported by objective findings, and they did not meet criteria in this case. There are no components of Dr. Higginbotham’s clinical exam, he opined, that are independent of the patient saying “ouch”.

41. Dr. Primack reiterated that the documentation of clinical findings in Dr. Higginbotham’s report does not support the diagnoses of thoracic and lumbar myofascial strains. Further, he testified, based upon his review of the other medical records in this case, he did not find any specific diagnosis by anyone other than Dr. Higginbotham that would support a permanent impairment rating for the thoracic and lumbar spines. And, Dr. Primack reiterated, on his own physical exam, he did not find anything to indicate a specific diagnosis, strain or otherwise.

42. Dr. Primack testified that it appeared that Dr. Dressen directed some chiropractic treatment to all areas of Claimant’s spine because that was where Claimant reported pain. However, Dr. Primack testified, the fact that Dr. Dressen directed treatment at all areas of Claimant’s spine does not constitute objective evidence of pathology of an injury to all areas of her spine, and does not mean that Claimant had permanent impairment.

43. Regarding range of motion, Dr. Primack testified that you cannot perform range of motion as a component of the impairment rating unless you first have a diagnostic-specific permanent residual impairment to that body part. Dr. Primack testified that under the AMA Guides, you cannot utilize range of motion measurements to satisfy the criteria for rigidity under Table 53. Rather, you must make the diagnosis first, and then you can evaluate range of motion.

44. Dr. Primack testified that, beyond a mere difference of professional opinion, Dr. Higginbotham was wrong in assigning impairment ratings for the thoracic and lumbar spines in this case. Dr. Primack opined that Dr. Higginbotham erred because his impairment rating assessment was not consistent with his clinical exam and with how the system works. Specifically, Dr. Primack stated, you have to have a specific diagnosis which must be permanent and which must correlate with your clinical examination, and that was not the case here.

45. In addition, Dr. Primack reiterated, Dr. Higginbotham erred because you cannot use range of motion without first establishing pain and rigidity. Here, although Claimant had pain, she did not fulfill the criteria for rigidity because per the Division of Workers’ Compensation guidelines, you cannot use range of motion as your criteria for rigidity.

46. Dr. Primack testified, consistent with his written report, that in his opinion, the appropriate impairment rating for the thoracic and lumbar spines was 0% in this case.

Dr. Higginbotham Testifies at Hearing

47. Dr. Higginbotham also testified at hearing. Several aspects of Dr. Higginbotham's testimony were in alignment with the testimony provided by Dr. Primack: Dr. Higginbotham agreed with the statement in the Division of Workers' Compensation Impairment Rating Tips that impairment ratings are given when a specific diagnosis and objective pathology are identified.

48. Dr. Higginbotham agreed that, in order to provide an impairment rating for the spine under Table 53, you have to have a valid diagnosis and that diagnosis must be supported by objective findings or objective pathology.

49. Dr. Higginbotham also agreed that for the spine, if you do not have a basis for an impairment rating for a specific disorder under Table 53, no impairment rating should be provided, even if the patient had range of motion deficits.

50. Dr. Higginbotham agreed with Dr. Primack's statement that the clinical exam is important and is the cornerstone of an evaluation. He also agreed with Dr. Primack that the "ouch" elicited on palpation is not objective. However, he stated that such subjective findings can lead us to look further to determine if, for example, the complaints are psychogenic, behavioral, or if there is something deeper going on.

51. Dr. Higginbotham also agreed that the condition requiring a valid diagnosis supported by objective findings or pathology in order to provide an impairment rating is a requirement, and are not discretionary with the physician. Dr. Higginbotham agreed that, if someone had a non-surgical injury that fully resolved, that person would not qualify for a permanent impairment rating.

52. Dr. Higginbotham clarified that the mechanism of injury alone does not qualify for impairment. Similarly, Dr. Higginbotham stated, the need for ongoing care is not really relevant to the determination of a permanent impairment rating.

53. Dr. Higginbotham testified that a strain is a pull-type injury to a tendon or a muscle. Dr. Higginbotham explained that if you call a strain mild or moderate, this implies that there has been some tissue tearing. If you call a strain severe, there has to be probable tissue or muscle disruption. Dr. Higginbotham explained that this was why Claimant's strain was labeled as mild, to minimize the degree of the strain that was present. Dr. Higginbotham also verified that Claimant did not sustain any discogenic, bony, vascular, or neurologic problems or any structural injury as a result of the work injury.

54. Despite the ‘mild’ categorization of Claimant’s strains, Dr. Higginbotham nevertheless testified that it was his opinion that the myofascial strains that he diagnosed were of a *permanent* nature. In explaining why he felt there was some degree of permanency from the work injury, Dr. Higginbotham discussed what he believed was a significant mechanism of injury, the consistency of Claimant’s complaints, and the reproducibility of complaints on his exam.

55. Dr. Higginbotham testified that a myofascial strain can carry with it a tender spot that can be found on palpation and is a recognition of the symptoms by the patient when you palpate that tender area. He further stated that, as physicians do not have a way to measure the degree of tension and tightness and tone, you have to have some sort of “verifiable acceptance” of a patient’s complaint. Dr. Higginbotham noted that he found Claimant to be “verifiable” and felt that her mechanism of injury was consistent.

56. Dr. Higginbotham also testified that the objective pathology has to be determined with your hands. Dr. Higginbotham stated that he felt that the strain patterns set up the tender areas that led him to further evaluate and find some limitations with motion and with pain. Dr. Higginbotham testified, “So, you know, those are the objectiveness that I – that I find.”

57. Dr. Higginbotham did testify that while he did not find evidence of tonicity on clinical exam, he did find evidence of “tautness” that he felt on palpation and that elicited the reports of pain. When asked the difference between tonicity and tautness, he responded:

> It’s the tautness—it’s the **tautness** that **I felt on palpation**—that elicited the pain. And whether the pain causes tension or whether it’s actually increased tone, I…felt it had to do more with the eliciting the pain with the palpation that causes her to split or tight [sic.], and that was taut to me. (Hrg Tr., p. 99)(emphasis added).
>
> …So the …muscle tone appeared to be symmetrical. But on palpation, when it elicited discomfort, …*you* ***feel*** *a sense of banding. You* ***feel*** *a sense of tightness, tautness*. *Id* at 99-100.

58. Dr. Primack described tautness as an objective finding that they feel with their hands, and that is akin to findings of increased tone and spasms. Dr. Primack testified that as such, if actual tautness were present, one would expect it to be documented in the report. However, Dr. Primack noted, there was nothing *in Dr. Higginbotham’s report* that indicated tautness.

59. Dr. Higginbotham acknowledged that he did not document any findings of *tautness* in his written report. However, he also clarified that the evidence of *tonicity* that he found lacking was actually based upon a *visual observation*, in *looking* for symmetry in muscle tone. (Hrg Tr., p.101).

60. Dr. Higginbotham, however, distinguished *tautness* from an actual spasm, and made no findings of increased muscle tone, stiffness, muscle spasm or asymmetry.

61. Dr. Higginbotham also testified that he used range of motion as prima facie evidence of rigidity in order to establish an impairment rating under Table 53 Dr. Higginbotham testified that he felt the discussion regarding the appropriate manner for establishing tightness or rigidity for purposes of Table 53 was splitting hairs. "Rigidity, range of motion, I mean … what's the difference? You've got to have [loss of] range of motion if you're rigid. And if you find out that you have a loss of range of motion, you have a degree of rigidity." (Hrg. Tr. pp. 109-110,).

62. Upon redirect, Dr. Primack took issue with the lack of documentation of tautness in Dr. Higginbotham's DIME report, but acknowledged:

> *Tautness is something you feel with your hands.* That's not a subjective complaint. It's something that you feel. And [changing the subject]….that becomes a different issue because, in the medical treatment guidelines and how it's taught, you cannot utilize range of motion as a component of your rigidity. Because you have to have a Table 53 diagnosis before you can do range of motion. *Id* at pp. 104-105. (emphasis added).

63. Dr. Primack also acknowledged that while muscle strains are generally not of a permanent nature, *spinal myofascial strains* can indeed validly meet criteria for a Table 53 permanent diagnosis. Regarding thoracic myofascial strains, Dr. Primack stated:

> Thoracic myofascial strain, if it's permanent, for the rest of one's life, yes that would meet criteria. *Id* at 107 (emphasis added).

When asked about mild myofascial strain, Dr. Primack acknowledged:

> If you're calling something…mild *that will be mild for the rest of your life,* it that's what you feel, then that could meet criteria, yes. And *then,* you could use range of motion. *Id.*

64. Dr. Higginbotham agreed that there was not a way to test whether a person is giving good effort on range of motion testing. He further agreed that there is some subjectivity to the testing of range of motion. Dr. Primack concurred that range of motion testing is not entirely objective. As Dr. Primack explained, although you are using a goniometer, you are only as good as the patient saying that this is the best I can do.

65. While [albeit erroneously] defending his use of range of motion to support a finding of rigidity, Dr. Higginbotham summarized his findings at the end of the hearing, on Page 110 (with emphasis added).

> We're just splitting hairs. The only thing I cans say is that somebody who wasn't having problems before has a significant injury mechanism, soft tissue strain patterns happened, tearing of tissues – microtearing, because it wasn't a moderate strain. And we've had ongoing problems with it. We've had consistent treatment directed to this realm. Complaints have been continuous, and they still are...in that manner.
>
> Did I not put tautness in my exam? Shame on me. But I will tell you, *when you feel it, and you palpate* something and the pain is reproducible, there's tautness underneath that. I think as a[n] osteopath, Dr. Primack would definitely understand that all the more. It is part of the somatic dysfunction that we treat.
>
> I have nothing more to say about that. *(borrowing from, but not crediting, Forrest Gump).*
>
> {End of Hearing Testimony}

CONCLUSIONS OF LAW

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

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. §8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. §8-43-201, C.R.S.

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

C. Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

D. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). The ALJ finds that Dr. Primack and Dr. Higginbotham are both highly competent practitioners. Each performed their respective examinations to the best of their abilities. Each has testified in a sincere and credible manner. They are largely in agreement on the proper DIME process to follow, and the correct way to draw valid conclusions therefrom. Unsurprisingly, there are a few philosophical differences and interpretations of the AMA Guides, which the ALJ must now resolve. And, interestingly enough, both are DOs; thus are highly attuned to the very 'hands-on' nature of medical practice. Thus, the ALJ must weigh the *persuasiveness* of their respective positions (bearing in mind the applicable burden of proof in such cases) based upon the most accurate interpretation of the AMA Guides, and the case law which flows therefrom.

E. Further, courts are to be "mindful that the Workmen's Compensation Act is to be liberally construed to effectuate its humanitarian purpose of assisting injured workers." *James v. Irrigation Motor and Pump Co.*, 503 P.2d 1025 (Colo. 1972).

Overcoming the DIME, Generally

F. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In re Dazzio,* W.C. No. 4-660-149 (ICAO, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

G. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In re Gurrola,* W.C. No. 4-631-447 (ICAO, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAO, Apr. 16, 2008).

H. A DIME physician's opinions concerning MMI and impairment carry presumptive weight pursuant to § 8-42-107(8)(b)(III), C.R.S.; *see Yeutter v. Industrial Claim Appeals Office*, No. 18CA0498 (Apr. 11, 2019) 2019 COA 53. The statute provides that "[t]he finding regarding [MMI] and permanent medical impairment of an independent medical examiner in a dispute arising under subparagraph (II) of this paragraph (b) may be overcome only by clear and convincing evidence." *Id.* Subparagraph (II) is limited to parties' disputes over "a determination by an authorized treating physician on the question of whether the injured worker has or has not reached [MMI]." § 8-42-107(8)(b)(II).

I. The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995); *Lafont v. WellBridge D/B/A Colorado Athletic Club* W.C. No. 4-914-378-02 (ICAO, June 25, 2015).

J. As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003); *Sharpton v. Prospect Airport Services* W.C. No. 4-941-721-03 (ICAO, Nov. 29, 2016). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998); *Watier-Yerkman v. Da Vita, Inc.* W.C. No. 4-882-517-02 (ICAO Jan. 12, 2015). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

K. The questions of whether the DIME physician properly applied the *AMA Guides*, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000); *Paredes v. ABM Industries* W.C. No. 4-862-312-02 (ICAO, Apr. 14, 2014). A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO, Mar. 22, 2000); *Licata v. Wholly Cannoli Café* W.C. No. 4-863-323-04 (ICAO, July 26, 2016).

Issues Not in Dispute

L In this case, there is no dispute between the ATP, the DIME physician, and the IME physician (and the parties also concur) that Claimant reached MMI on June 9, 2020. Further, while Dr. Primack reached different (lesser) ROM figures for Claimant's cervical spine, he took no issue with the higher ROM figures reached by Dr. Higginbotham, since he felt that the DIME physician had articulated a sufficiently valid basis in his DIME report for Claimant's placement onto Table 53 (II)(B) for her cervical spine. Any such ROM difference between the two would fall within a permissible margin of error, with deference to the DIME's figures. Correspondingly, using Dr. Primack's own logic [which this ALJ adopts], assuming Claimant were validly placed onto Table 53(II)(B), the DIME's own ROM figures would again prevail, since there has been no dispute of the accuracy of the actual measurements themselves; any such deviation from the IME's fall within a permissible margin of error.

What are the elements needed for valid Permanent Diagnosis?

M. Dr. Primack has stated that one must establish a permanent diagnosis, consisting of three components: a history in support, a clinical examination in support, and correlative imaging studies - if they exist. Dr. Higginbotham essentially concurs with this analysis, as does this ALJ. There are no imaging studies to correlate here (nor would any such studies likely be of great assistance for this diagnosis in any event), leaving the remaining two elements to be explored. In his report (consistent with his testimony) Dr. Higginbotham diagnosed Claimant with "Persistent thoracalgia, with mild *thoracic myofascial strain",* and "Persistent lumbalgia, with mild *lumbar myofascial strain".* All parties agree that thoracalgia and lumbalgia are merely descriptor of pain. However, Dr. Primack (with the ALJ's concurrence) agreed that *- if it is permanent - lumbar and thoracic myofascial strain can indeed constitute a valid diagnosis.* The devil is in the details.

Dr. Primack's Medico-legal Error

N. Dr. Primack insists that in order to constitute six months of documented rigidity, there must be *objective* evidence in the record of said rigidity. This ALJ would have agreed with Dr. Primack's contention – up until this ALJ's own visit to the woodshed in *Bryant v. Transit Mix Concrete,* WC #5-058-044-001 (ICAO, June 5, 2019). In overcoming Dr. Higginbotham's (yes-*that* Dr. Higginbotham) DIME opinion in that case, this ALJ placed the requirement of *objectivity* for the 6-month rigidity requirement, and ICAO made it clear that *such documentation of rigidity need not be objective in nature.* The case was thereby remanded to correct this ALJ's boo-boo. ICAO further clarified that, under Table 53 of the AMA Guides, there is currently not an accepted definition for rigidity.

Thus, while there must still be *specific diagnosis* and *objective pathology,* the documentation of the six-months of rigidity need not be *“objective”.*

O. In reviewing the medical records, there is ample evidence of medical documentation by the chiropractor (the ALJ concludes that chiropractic does quality as ‘medical’ documentation) that Claimant complained of “tenderness” (i.e., **pain**) and “stiffness” (i.e., **rigidity**) in her thoracic and lumbar spine from August, 2019 through November, 2020. Further, said reports also document periodic accounts of myospasms in both regions during this period. There are also (less frequent) complaints of pain and stiffness in the ATP’s records as well. Based upon ICAO’s holding in *Bryant*, the ALJ now concludes that there is sufficient medical documentation of *pain and rigidity* for at least six months to place Claimant onto Table 53 (II)(B).

Dr. Higginbotham’s Medico-legal Error

P. Dr. Primack opined that Dr. Higginbotham should never have performed range of motion at all, since Claimant never qualified for a Table 53 diagnosis. Dr. Higginbotham countered that range of motion is part and parcel of any clinical exam – not unlike checking vital signs, for example. The ALJ does not take issue with Dr. Higginbotham looking at range of motion (which could, of course, validly lead to looking closer for other clinical findings) as part of the exam, if he wishes to do so. However, Dr. Primack has the correct legal argument that a DIME physician cannot use limited range of motion to satisfy the rigidity requirement for a permanent diagnosis. There must be evidence in the clinical exam, independent of range of motion, before one can be placed onto Table 53. To do otherwise would, indeed, put the cart before the horse.

Q. Up until the end of the testimony, Dr. Primack held the upper hand. He was indeed correct that the four corners of the DIME report did not contain sufficient objective evidence of rigidity during the clinical exam to constitute a valid permanent diagnosis of myofascial strain. Dr. Higginbotham’s findings were less than, well…palpable. But then, Dr. Higginbotham finished testifying. While it did not appear in his written report – as is plainly should have – Dr. Higginbotham finally described **feeling** ***“tautness”*** during the clinical exam of Claimant. In Dr. Higginbotham’s case, he explained, he actually *looks for tonicity*, but *feels for tautness.* As noted in *Bryant*, supra, there is currently not an accepted definition for rigidity. However, in this case, the ALJ does conclude that, in the final analysis, the DIME physician did sufficiently describe *rigidity* (“tautness”) in his clinical exam – thus constituting sufficient objective evidence of rigidity to support a permanent diagnosis. Once that is established, any boo-boo in putting the ROM cart before the horse is mooted. The DIME’s ROM measurements are then to be given deference, absent an error in their actual administration or calculation.

R. Thus, Dr. Higginbotham has established a valid permanent diagnosis for mild myofascial strain of Claimant’s thoracic and lumbar regions. He has established sufficient medical documentation for six months of pain and rigidity to place Claimant onto Table 53(II)(B), and thereby, ultimately use her ROM figures. There are no math errors alleged, nor seen, by the ALJ in combining the figures to reach a whole-person impairment rating. Any deviations from the AMA Guides in reaching his conclusions are deemed by the ALJ to be technical in nature, and not material. The DIME opinion, therefore, is upheld.

ORDER

It is therefore Ordered that:

1. The DIME opinion of Dr. Higginbotham is upheld in its entirety.

2. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein are reserved for future determination.

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

DATED: May 6, 2021

/s/ William G. Edie

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

ISSUES

I. In calculating Claimant's Average Weekly Wage in this case, should the ALJ use the "default" method provided by C.R.S. 8-42-102(2), or the "exception" method provided by C.R.S. 8-42-102(3)?

STIPULATED FINDINGS OF FACT

Based upon the Stipulation of the parties the ALJ makes the following Findings of Fact:

1. Claimant sustained a work injury to his left knee on August 14, 2017 while working as an Equipment Mechanic III for the State of Colorado/Department of Transportation. (Exhibit A)

2. Respondent admitted to an average weekly wage in the amount of $1,057.62 based on Claimant's gross monthly salary of $4,583.00 at the time of injury. (Exhibit B and C)

3. Claimant received a raise, effective 7/1/2018, raising his base pay to $5,222.00 a month. (Exhibit D)

4. Clamant received a raise, effective 7/1/2019, raising his base pay to $5,379.00 a month. (Exhibit D)

5. Claimant began receiving Temporary Total Disability benefits on 7/3/18 and received it until 9/3/18, a period of 9 weeks.

6. Claimant began receiving Temporary Partial Disability benefits on 9/4/2018 and received them until 10/31/2018, a period of 8 2/7 weeks.

7. Claimant was paid 6.5 hour of Temporary Partial Disability benefits for the period from 12/21/2018 to 12/27/18.

8. Claimant was paid 7.5 hours of Temporary Partial Disability benefits from 1/28/19 to 4/5/19.

9. Claimant was paid 10.5 hours of Temporary Partial Disability benefits from 5/9/19 to 6/6/19.

10. Claimant was paid 2 hours of Temporary Partial Disability benefits from 6/26/19 to 6/26/19.

11. Claimant was paid 4.5 hours of Temporary Partial Disability benefits for period ending 7/15/19.

12. Claimant began receiving Temporary Total Disability benefits on 10/29/19 and received them until 2/2/20, a period of 13 6/7 weeks.

13. Claimant was paid 2 weeks of Temporary Partial Disability benefits from 2/3/20 to 2/16/20 at the rate of $413.73 per week.

14. Claimant was paid 15.50 hours of Temporary Partial Disability benefits from 4/22/20 to 5/14/20.

CONCLUSIONS OF LAW

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

Average Weekly Wage, Generally

1. § 8-42-102(2), C.R.S. (2016) requires the ALJ to calculate Claimant's AWW based on the earnings at the time of injury as measured by the Claimant's monthly, weekly, daily, hourly or other earnings. This section establishes the so-called "default" method for calculating Claimant's AWW.

2. However, if for any reason, the ALJ determines the default method will not fairly calculate the AWW, § 8-42-102(3), C.R.S. (2016) affords the ALJ discretion to determine the AWW in such other manner as will fairly determine the wage. § 8-42- 102(3), C.R.S. establishes the so-called "discretionary exception". *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of Claimant's wage loss and diminished earning capacity. *Campbell,* supra; *Avalanche Industries v. ICAO,* 166 P.3d 147 (Colo. App. 2007).

Average Weekly Wage, Case Law

3. In *Campbell*, Claimant's initial injury occurred ten years before her deteriorating condition caused her to cease working. Her employer argued that her AWW should be based on the wages she earned at the time of her initial injury, rather than the higher wages she had earned through salary increases and promotions during the intervening years. The Colorado Court of Appeals determined that it would be "*manifestly unjust* to base Claimant's disability benefits in 1986 and 1989 on her *substantially* lower earnings in 1979", and determined that her AWW should be based upon the higher salary earned at the time her deteriorating condition caused her to stop working. The rationale for the Court's decision was one of fairness:

> The entire objective of wage calculation [under the Act] is to arrive at a *fair* approximation of the Claimant's wage loss and diminished earning capacity.

> Although [AWW] generally is determined from the employee's wage at the time of injury, if for any reason this general method *will not render a fair computation* of wages, the administrative tribunal has long been vested with discretionary authority to use an alternative method in determining a *fair* wage". Id at 82. (emphasis added).

It is noted that in *Campbell*, Claimant had received several promotions, and over the 10-year period, her earnings had more than doubled.

4. In the *Avalanche* case, Claimant's AWW had significantly increased between her date of injury and the date of disability (with a different employer, and with medical benefits now factored in), from 415 to $625 – more than a 50% increase. The Avalanche Court noted that the discretionary exception is limited to situations where the default provision *"results in an injustice."* (citing *Coates, Reid & Waldron v. Vigil*, 856 P. 2d 850 (Colo. 1993)). (emphasis added).

5. In *Pizza Hut v. /CAO,* 18 P.3d 867, (Colo. App. 2001), Claimant was injured while working as a delivery driver. He then obtained a second job at a hospital. Claimant concurrently held two jobs for a short period, and then quit the delivery job. The Colorado Court of Appeals affirmed the increase in Claimant's average weekly wage and reinforced the principle that the *ALJ had discretion* to calculate Claimant's wages based on earnings from a subsequent employer and not upon wages earned at the time of injury, as the former represented a better calculation of Claimant's AWW.

Average Weekly Wage, as Applied

6. In this case, Clamant received an approximate 11% monthly pay increase from the date of injury until 7/1/2018, and another 3% monthly increase for the fiscal year following. The cumulative increase for the two year period is approximately 17%, but with the bulk of the increase the first year, likely as a result of a promotion – although the reason is undisclosed by the record. There is no evidence of change in employer.

7. While Claimant's first year's wage increase is fairly substantial, the second year's increase is more modest, and in keeping with the market. Perhaps as time goes on, and Claimant were to receive regular, substantial increases through the ensuing years – and then suffer another worsening – this issue might be revisited. At such point, an argument might be made that Claimant's wages had so increased, over such a substantial period of time, that to base his TTD payments on his AWW from the date of injury would constitute an *"injustice".* Such is simply not the case at this juncture.

8. The ALJ will not apply the *exception* to the *default* provision in this case, at least at this time. As noted by Respondents, increasing average weekly wage every time an employee receives an annual wage increase would effectively allow the *exception* provision to swallow the *default* provision, and effectively turn the statutory provision on its head.

ORDER

It is therefore Ordered that:

1. Claimant’s Average Weekly Wage in this case is to be calculated based upon his date of original work injury.

2. All matters not determined herein are reserved for future determination.

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

DATED: May 6, 2021

/s/ William G. Edie

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

ISSUES

I. In calculating Claimant's Average Weekly Wage in this case, should the ALJ use the "default" method provided by C.R.S. 8-42-102(2), or the "exception" method provided by C.R.S. 8-42-102(3)?

STIPULATED FINDINGS OF FACT

Based upon the Stipulation of the parties the ALJ makes the following Findings of Fact:

1. Claimant sustained a work injury to his left knee on August 14, 2017 while working as an Equipment Mechanic III for the State of Colorado/Department of Transportation. (Exhibit A)

2. Respondent admitted to an average weekly wage in the amount of $1,057.62 based on Claimant's gross monthly salary of $4,583.00 at the time of injury. (Exhibit B and C)

3. Claimant received a raise, effective 7/1/2018, raising his base pay to $5,222.00 a month. (Exhibit D)

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10. Claimant was paid 2 hours of Temporary Partial Disability benefits from 6/26/19 to 6/26/19.

11. Claimant was paid 4.5 hours of Temporary Partial Disability benefits for period ending 7/15/19.

12. Claimant began receiving Temporary Total Disability benefits on 10/29/19 and received them until 2/2/20, a period of 13 6/7 weeks.

13. Claimant was paid 2 weeks of Temporary Partial Disability benefits from 2/3/20 to 2/16/20 at the rate of $413.73 per week.

14. Claimant was paid 15.50 hours of Temporary Partial Disability benefits from 4/22/20 to 5/14/20.

CONCLUSIONS OF LAW

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

Average Weekly Wage, Generally

1. § 8-42-102(2), C.R.S. (2016) requires the ALJ to calculate Claimant's AWW based on the earnings at the time of injury as measured by the Claimant's monthly, weekly, daily, hourly or other earnings. This section establishes the so-called "default" method for calculating Claimant's AWW.

2. However, if for any reason, the ALJ determines the default method will not fairly calculate the AWW, § 8-42-102(3), C.R.S. (2016) affords the ALJ discretion to determine the AWW in such other manner as will fairly determine the wage. § 8-42- 102(3), C.R.S. establishes the so-called "discretionary exception". *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of Claimant's wage loss and diminished earning capacity. *Campbell,* supra; *Avalanche Industries v. ICAO,* 166 P.3d 147 (Colo. App. 2007).

Average Weekly Wage, Case Law

3. In *Campbell*, Claimant's initial injury occurred ten years before her deteriorating condition caused her to cease working. Her employer argued that her AWW should be based on the wages she earned at the time of her initial injury, rather than the higher wages she had earned through salary increases and promotions during the intervening years. The Colorado Court of Appeals determined that it would be "*manifestly unjust* to base Claimant's disability benefits in 1986 and 1989 on her *substantially* lower earnings in 1979", and determined that her AWW should be based upon the higher salary earned at the time her deteriorating condition caused her to stop working. The rationale for the Court's decision was one of fairness:

> The entire objective of wage calculation [under the Act] is to arrive at a *fair* approximation of the Claimant's wage loss and diminished earning capacity.

> Although [AWW] generally is determined from the employee's wage at the time of injury, if for any reason this general method *will not render a fair computation* of wages, the administrative tribunal has long been vested with discretionary authority to use an alternative method in determining a *fair* wage". Id at 82. (emphasis added).

It is noted that in *Campbell*, Claimant had received several promotions, and over the 10-year period, her earnings had more than doubled.

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Average Weekly Wage, as Applied

6. In this case, Clamant received an approximate 11% monthly pay increase from the date of injury until 7/1/2018, and another 3% monthly increase for the fiscal year following. The cumulative increase for the two year period is approximately 17%, but with the bulk of the increase the first year, likely as a result of a promotion – although the reason is undisclosed by the record. There is no evidence of change in employer.

7. While Claimant's first year's wage increase is fairly substantial, the second year's increase is more modest, and in keeping with the market. Perhaps as time goes on, and Claimant were to receive regular, substantial increases through the ensuing years – and then suffer another worsening – this issue might be revisited. At such point, an argument might be made that Claimant's wages had so increased, over such a substantial period of time, that to base his TTD payments on his AWW from the date of injury would constitute an *"injustice".* Such is simply not the case at this juncture.

8. The ALJ will not apply the *exception* to the *default* provision in this case, at least at this time. As noted by Respondents, increasing average weekly wage every time an employee receives an annual wage increase would effectively allow the *exception* provision to swallow the *default* provision, and effectively turn the statutory provision on its head.

ORDER

It is therefore Ordered that:

1. Claimant's Average Weekly Wage in this case is to be calculated based upon his date of original work injury.

2. All matters not determined herein are reserved for future determination.

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

DATED: May 6, 2021

/s/ William G. Edie

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-145-937-001

ISSUES

I. What is the correct average weekly wage?

STIPULATIONS

- The parties agree that the average weekly wage – and corresponding disability benefit rate – is subject to the applicable offsets.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. On August 10, 2020, Gerardo C[Redacted] suffered a compensable injury. **Ex. 1**.
2. On August 14, 2020, Gerardo C[Redacted] (decedent) died as a result of the industrial injuries he sustained on August 10, 2020. **Ex. 1.**
3. A General Admission for a Fatal Case was filed by Respondents on February 12, 2021. **Ex. 1.** The General Admission admitted to a date of injury of August 10, 2020 and death of August 14, 2020. The average weekly wage admitted was $1,112.67, putting the temporary rate at $741.78.
4. The dependents admitted on the General Admission included Angelica C[Redacted] (spouse), Daniella C[Redacted] (child), and Sofia Regina C[Redacted] (child). **Ex. 1.**
5. Wage records and the General Admission establish the decedent worked for Employer from about December 1, 2019 through August 10, 2020. **Ex. 1** and **2.** The exact date the decedent started his employment with Employer is unknown because the only evidence submitted at hearing about the decedent's dates of employment and his earnings are his wage records. His wage records, however, do not provide the amount he earned each day. Instead, his wage records provide the amount he earned each week. Moreover, the wage records provided end on August 1, 2020, and do not include the decedent's earnings from August 2, 2020 through August 10, 2020 – the date of his injury.
6. The decedent's first weekly pay period with Employer is from December 1, 2019 through December 7, 2019. During this period, the decedent only worked 9 hours. As a result, it appears the decedent only worked one day during the first weekly pay period with Employer.
7. In addition, although the decedent worked for Employer from about December 1, 2019 through August 10, 2020, the wage records submitted into evidence go from December 1, 2019, through August 1, 2020. **Ex. 2.**

8. Based on the decedent's wage records, the decedent's earnings were as follows:

Beginning Pay period	Ending Pay Period	Regular Hours	Regular Wages	Overtime Hours	Overtime Wages	Base Hourly Wage	Overtime Hourly Wage	Toal Weekly Hours	Holiday Pay	Total Wages
12/1/2019	12/7/20/19	9.00	$126.00	0.00	$0.00	$14.00	$0.00	9.00		$126.00
12/8/2019	12/14/2019	40.00	$560.00	8.50	$178.50	$14.00	$21.00	48.50		$738.50
12/15/2019	12/21/2019	40.00	$560.00	2.00	$42.00	$14.00	$21.00	42.00		$602.00
12/22/2019	12/28/2019	40.00	$560.00	10.00	$210.00	$14.00	$21.00	50.00		$770.00
12/29/2019	1/4/2020	40.00	$560.00	18.00	$378.00	$14.00	$21.00	58.00	$189.00	$1,127.00
1/5/2020	1/11/2020	40.00	$560.00	5.00	$105.00	$14.00	$21.00	45.00		$665.00
1/12/2020	1/18/2020	40.00	$560.00	9.00	$189.00	$14.00	$21.00	49.00		$749.00
1/19/2020	1/25/2020	40.00	$560.00	32.25	$677.25	$14.00	$21.00	72.25		$1,237.25
1/26/2020	2/1/2020	40.00	$560.00	25.00	$525.00	$14.00	$21.00	65.00		$1,085.00
2/2/2020	2/8/2020	40.00	$560.00	27.50	$577.50	$14.00	$21.00	67.50		$1,137.50
2/9/2020	2/15/2020	16.00	$224.00	0.00	$0.00	$14.00	$21.00	16.00		$224.00
2/16/2020	2/22/2020	0.00	$0.00	0.00	$0.00	$0.00	$0.00	0.00		$0.00
2/23/2020	2/29/2020	0.00	$0.00	0.00	$0.00	$0.00	$0.00	0.00		$0.00
3/1/2020	3/7/2020	0.00	$0.00	0.00	$0.00	$0.00	$0.00	0.00		$0.00
3/8/2020	3/14/2020	0.00	$0.00	0.00	$0.00	$0.00	$0.00	0.00		$0.00
3/15/2020	3/21/2020	40.00	$600.00	10.00	$225.00	$15.00	$22.50	50.00		$825.00
3/22/2020	3/28/2020	40.00	$600.00	45.00	$1,012.50	$15.00	$22.50	85.00		$1,612.50
3/29/2020	4/4/2020	40.00	$600.00	44.50	$1,001.25	$15.00	$22.50	84.50		$1,601.25
4/5/2020	4/11/2020	40.00	$600.00	50.00	$1,125.00	$15.00	$22.50	90.00		$1,725.00
4/12/2020	4/18/2020	40.00	$600.00	72.00	$1,620.00	$15.00	$22.50	112.00		$2,220.00
4/19/2020	4/25/2020	40.00	$600.00	39.50	$888.75	$15.00	$22.50	79.50		$1,488.75
4/26/2020	5/2/2020	40.00	$600.00	52.50	$1,181.25	$15.00	$22.50	92.50		$1,781.25
5/3/2020	5/9/2020	40.00	$560.00	32.00	$672.00	$14.00	$21.00	72.00		$1,232.00
5/10/2020	5/16/2020	40.00	$560.00	54.25	$1,139.25	$14.00	$21.00	94.25		$1,699.25
5/17/2020	5/23/2020	40.00	$560.00	40.00	$840.00	$14.00	$21.00	80.00		$1,400.00
5/24/2020	5/30/2020	28.00	$420.00	56.00	$1,260.00	$15.00	$22.50	84.00	$270.00	$1,950.00
5/31/2020	6/6/2020	40.00	$560.00	48.00	$1,002.00	$14.00	$20.88	88.00		$1,562.00
6/7/2020	6/13/2020	40.00	$560.00	64.00	$1,344.00	$14.00	$21.00	104.00		$1,904.00
6/14/2020	6/20/2020	40.00	$560.00	7.00	$147.00	$14.00	$21.00	47.00		$707.00
6/21/2020	6/27/2020	40.00	$560.00	40.00	$840.00	$14.00	$21.00	80.00		$1,400.00
6/28/2020	7/4/2020	40.00	$560.00	40.00	$840.00	$14.00	$21.00	80.00		$1,400.00
7/5/2020	7/11/2020	40.00	$560.00	40.00	$840.00	$14.00	$21.00	80.00		$1,400.00
7/12/2020	7/18/2020	40.00	$560.00	40.00	$840.00	$14.00	$21.00	80.00		$1,400.00
7/19/2020	7/25/2020	40.00	$560.00	28.00	$588.00	$14.00	$21.00	68.00		$1,148.00
7/26/2020	8/1/2020	40.00	$560.00	32.00	$672.00	$14.00	$21.00	72.00		$1,232.00
Total Earnings										**$38,149.25**

9. As found, and set forth in the table above, the decedent was paid either $14.00 or $15.00 per hour, and overtime at either $21.00 or $22.50 per hour, during the following periods:

- From December 1, 2019, through February 15, 2020, the decedent was paid $14.00 per hour, and $21.00 per hour for overtime.

- From February 16, 2020 through March 14, 2020, the decedent did not work.

- From March 15, 2020 through May 2, 2020, the decedent was paid $15.00 per hour, and $22.50 per hour for overtime.

- From May 3, 2020, through May 23, 2020, the decedent was paid $14.00 per hour, and $21.00 per hour for overtime.

- From May 24, 2020, through May 30, 2020, the decedent earned $15.00 per hour, and $22.50 per hour for overtime.
- Then from May 31, 2020, through August 1, 2020, the decedent went back to earning $14.00 per hour, and $21.00 per hour for overtime.

10. The reason the decedent was paid a different hourly rate for different periods of time is unknown.
11. The wage records reveal – and the ALJ finds – that the decedent did not work at all between February 16, 2020 and March 14, 2020.
12. The decedent worked overtime almost every single week. The decedent's overtime ranged from a mere 2 hours during one week in December 2019 up to a staggering 72 hours of overtime during one week in April 2020.
13. Excluding his first week of employment, and the 4 weeks the decedent did not have any earnings in February and March 2020, the decedent averaged about 32.5 hours of overtime per week during his employment.
14. However, starting in March 2020, the decedent's average overtime hours increased. Between March 15th and August 1st, the decedent averaged about 41.75 hours of overtime per week.
15. No credible evidence was presented establishing the decedent would not have continued to work significant overtime but for the industrial injury.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

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

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. What is the correct average weekly wage?

Section 8-42-102(2), C.R.S., requires the ALJ to calculate the claimant's AWW based on the earnings at the time of injury as measured by the claimant's monthly, weekly, daily, hourly or other earnings. This section establishes the so-called "default" method for calculating the AWW. However, if for any reason the ALJ determines the default method will not fairly calculate the AWW § 8-42-102(3), C.R.S., affords the ALJ discretion to determine the AWW in such other manner as will fairly determine the wage. Section 8-42-102(3) establishes the so-called "discretionary exception." *Benchmark/Elite, Inc. v. Simpson,* 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.*

There are 245 days between December 1, 2019 and August 1, 2020. This equals 35 weeks. Merely averaging the decedent's earnings during that time period of $38,149.25 results in an AWW of $1,089.98. But such calculation understates the decedent's AWW because:

- He did not work a full week during his first pay period of December 1st through December 7th.
- He did not appear to work a full week during the February 9th through February 15th pay period.
- He did not work at all from February 16th through March 14th.

As found, the decedent worked overtime almost every single week. The decedent's overtime ranged from a mere 2 hours during one week in December 2019 up to a staggering 72 hours of overtime during one week in April 2020.

Excluding his first week of employment, and the 4 weeks the decedent did not have any earnings in February and March 2020, the decedent averaged about 32.5 hours of overtime per week during his employment.

However, starting in March 2020, the decedent's average overtime hours increased. Between March 15th and August 1st, the decedent averaged about 41.75 hours of overtime per week. Plus, during March 2020, the decedent started earning $15.00 per hour – during certain weeks.

Based on the totality of the circumstances, the ALJ finds that the most reasonable manner to determine the decedent's average weekly wage, i.e., his wage loss and diminished earning capacity at the time of his death, is to average his earnings from March 15, 2020, which is the week he came back to work after taking about a month off, through August 1, 2020. This 20-week period considers the decedent earning both $14.00 and $15.00 per hour for his regular wages and $21.00 and $22.50 per hour for his overtime wages. It also includes a week in which he worked only 10 hours of overtime and another week in which he worked a staggering 72 hours of overtime.

As set forth in the table below, from March 15, 2020 through August 1, 2020 - 20 weeks - the decedent earned $29,688. This results in an average weekly wage of $1,484.40.

Beginning Pay period	Ending Pay Period	Regular Hours	Regular Wages	Overtime Hours	Overtime Wages	Base Hourly Wage	Overtime Hourly Wage	Toal Weekly Hours	Holiday Pay	Total Wages
3/15/2020	3/21/2020	40.00	$600.00	10.00	$225.00	$15.00	$22.50	50.00	$0.00	$825.00
3/22/2020	3/28/2020	40.00	$600.00	45.00	$1,012.50	$15.00	$22.50	85.00	$0.00	$1,612.50
3/29/2020	4/4/2020	40.00	$600.00	44.50	$1,001.25	$15.00	$22.50	84.50	$0.00	$1,601.25
4/5/2020	4/11/2020	40.00	$600.00	50.00	$1,125.00	$15.00	$22.50	90.00	$0.00	$1,725.00
4/12/2020	4/18/2020	40.00	$600.00	72.00	$1,620.00	$15.00	$22.50	112.00	$0.00	$2,220.00
4/19/2020	4/25/2020	40.00	$600.00	39.50	$888.75	$15.00	$22.50	79.50	$0.00	$1,488.75
4/26/2020	5/2/2020	40.00	$600.00	52.50	$1,181.25	$15.00	$22.50	92.50	$0.00	$1,781.25
5/3/2020	5/9/2020	40.00	$560.00	32.00	$672.00	$14.00	$21.00	72.00	$0.00	$1,232.00
5/10/2020	5/16/2020	40.00	$560.00	54.25	$1,139.25	$14.00	$21.00	94.25	$0.00	$1,699.25
5/17/2020	5/23/2020	40.00	$560.00	40.00	$840.00	$14.00	$21.00	80.00	$0.00	$1,400.00
5/24/2020	5/30/2020	28.00	$420.00	56.00	$1,260.00	$15.00	$22.50	84.00	$270.00	$1,950.00
5/31/2020	6/6/2020	40.00	$560.00	48.00	$1,002.00	$14.00	$20.88	88.00	$0.00	$1,562.00
6/7/2020	6/13/2020	40.00	$560.00	64.00	$1,344.00	$14.00	$21.00	104.00	$0.00	$1,904.00
6/14/2020	6/20/2020	40.00	$560.00	7.00	$147.00	$14.00	$21.00	47.00	$0.00	$707.00
6/21/2020	6/27/2020	40.00	$560.00	40.00	$840.00	$14.00	$21.00	80.00	$0.00	$1,400.00
6/28/2020	7/4/2020	40.00	$560.00	40.00	$840.00	$14.00	$21.00	80.00	$0.00	$1,400.00
7/5/2020	7/11/2020	40.00	$560.00	40.00	$840.00	$14.00	$21.00	80.00	$0.00	$1,400.00
7/12/2020	7/18/2020	40.00	$560.00	40.00	$840.00	$14.00	$21.00	80.00	$0.00	$1,400.00
7/19/2020	7/25/2020	40.00	$560.00	28.00	$588.00	$14.00	$21.00	68.00	$0.00	$1,148.00
7/26/2020	8/1/2020	40.00	$560.00	32.00	$672.00	$14.00	$21.00	72.00	$0.00	$1,232.00
Total Wages over 20 Weeks										**$29,688.00**
AWW (Total/20)										**$1,484.40**

As a result, the ALJ finds and concludes that the decedent’s average weekly wage is $1,484.40.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. The decedent’s average weekly wage is $1,484.40.

Issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: May 7, 2021

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-101-089-001 and 5-148-953-001

ISSUES

- Whether Insurer 1 has proven by a preponderance of the evidence that they may withdraw their already-filed General Admissions of Liability in W.C. 5-101-089-001?

- If Insurer 1 failed to meet its burden of proof to withdraw its General Admissions of Liability, whether Insurer 1 proved by a preponderance of the evidence that Claimant's last injurious exposure occurred after Insurer 1's workers' compensation insurance policy lapsed, and therefore whether Insurer 2 is liable for Claimant's occupational disease?

- If Insurer 1 met its burden of proof to withdraw its General Admissions of Liability, whether Claimant has proven by a preponderance of the evidence that she sustained a compensable occupational disease with a date of onset of August 20, 2020 while Employer was insured by Insurer 2 (W.C. No. 5-148-953-001)?

- If Claimant has proven by a preponderance of the evidence that she sustained a compensable occupational disease with a date of onset of August 20, 2020, whether Claimant has proven by a preponderance of the evidence that the medical treatment she received from Work Partners was reasonable, necessary and authorized under the Colorado Workers' Compensation Act?

FINDINGS OF FACT

1. Claimant, a 65-year-old female, began working for Employer, an automobile sales dealership, in May 2016. Claimant's job was the controller of the accounting department of the dealership, which involved gathering information to produce financial statements. Claimant testified her job duties involved using a keyboard, mouse, and ten-key calculator operations, with occasional phone use. Claimant testified she worked seated at a desk with two computer screens. She testified that her workday was eight hours, and that she engaged with a computer 90% of her workday.

2. Claimant testified that even when she supervised other employees' data entry, she did so on her computer. She testified that when she is reviewing documents, she must frequently scroll through the documents using the mouse in her right hand.

3. On April 25, 2017, Claimant was evaluated by Dr. Michael Rooks. Claimant complained of bilateral wrist, forearm, and hand pain. Dr. Rooks noted in his report indicated that Claimant reported having these symptoms for years. Claimant testified at hearing that she did not recall seeing a doctor for similar complaints prior to 2017.

4. Claimant testified that in 2018, she began noticing shooting pains in her bilateral forearms, wrists, and hands. Claimant testified that her hands would also fall asleep at night and she began wearing hand braces to work for Employer due to the pain. Claimant testified that the dealership's owner, Mr. B[Redacted], observed her wearing the braces and inquired about the braces. Claimant testified that Mr. B[Redacted] advised her to file a workers' compensation claim after she explained why she needed the braces. Claimant testified that she did not want to file a workers' compensation claim due to the stigma of doing so, and the possibility that filing a claim would raise the cost of Mr. B[Redacted]'s insurance.

5. Claimant eventually did decide to pursue a workers' compensation claim, and Employer produced its first Report of Injury on October 4, 2018. Claimant completed the report herself, and noted that Mr. B[Redacted] was notified of the claim.

6. Claimant was referred to Dr. Lori Fay at Work Partners for treatment on October 19, 2018. Dr. Fay's note indicates Claimant's belief that she was injured due to repetitive computer work over her two years with Employer. Claimant reported an increase in bilateral wrist and hand pain, tingling, and numbness, as well as forearm aches and weakness about six months earlier. Dr. Fay opined Claimant had carpal tunnel syndrome, lateral epicondylitis, and deQuervain's tenosynovitis from cumulative trauma at work. Dr. Fay noted Claimant did not have other activities or hobbies that would aggravate the condition, and although she had a history of thyroid disease, she was not undergoing treatment for that condition. Dr. Fay ordered a Job Demands Analysis ("JDA") to help confirm causation.

7. Torrey Kay Beil, a vocational consultant, performed a JDA on Insurer 1's behalf on November 6, 2018. Ms. Biel observed Claimant's work in her workstation, concluding that Claimant worked at an ergonomically correct workstation for more than seven hours daily and used a mouse more than four hours day, which were risk factors for the development of cumulative trauma conditions. Ms. Beil also noted Claimant consistently had her bilateral elbows and wrists resting on the surface of her desk.

8. Claimant underwent an electromyelogram ("EMG") on December 17, 2018 with Dr. Dean. The EMG showed bilateral moderate carpal tunnel syndrome and bilateral mild cubital tunnel syndrome.

9. Claimant underwent surgery on her left upper extremity on February 21, 2019, under the auspices of Dr. James Rose. Claimant's surgery included carpal and cubital tunnel release procedures.

10. Claimant testified she continued to do her regular work after that surgery with help of a brace on her left side. Claimant testified that she had some relief of her symptoms after surgery, but not total relief: she still had numbness in the fourth and fifth fingers as well as shooting pains into the left hand. Claimant testified that her right hand also progressively worsened: pain in the wrist and tingling at night.

11. Insurer 1 filed a General Admission of Liability (“GAL”) on March 25, 2019 admitting for medical benefits only.

12. Claimant was subsequently referred to Dr. Randy Viola at the Steadman Clinic on October 21, 2019. Claimant testified that after she had surgery on her left upper extremity, the symptoms in her right upper extremity were getting progressively worse. Dr. Viola noted Claimant had a gradual and insidious onset of symptoms consistent with bilateral carpal tunnel syndrome, and had constant symptoms even after her prior surgery. Dr. Viola noted Claimant complained of a pain level of six out of ten. Dr. Viola noted Claimant had ongoing neuropathic pain, weakness, numbness, and tingling in the left hand, as well as untreated carpal and cubital tunnel syndrome on the right side. Dr. Viola opined Claimant was a potential surgical candidate to deal with the on the right side, including right sided carpal tunnel release and cubital tunnel release. Dr. Viola also recommended magnetic resonance image (“MRI”) scans of the left elbow and wrist.

13. Claimant underwent MRI scans of the left wrist and elbow at the Steadman Clinic on October 28, 2019. The MRI of the left elbow showed edema and perineural scarring of the subcutaneous transposed ulnar nerve. No muscle denervation change was noted. The MRI also showed moderate common flexor tendinopathy with chronic partial tearing and broad shallow partial stripping. Moderate common extensor tendinopathy with chronic thin interstitial partial tear was also noted. Additionally, laxity of the lateral ulnar collateral ligament with posterior radial head subluxation suggesting and old sprain was also reported. MRI of the left wrist showed severe pisiform triquetral arthrosis with marginating osteitis and effusion with synovitis; severe scaphoid trapezium arthrosis with diffuse cartilage loss to bone and osteitis; moderate scaphoid trapezoid arthrosis with joint space narrowing and bone edema and chondral thinning; mild first carpal metacarpal (“CMC”) arthrosis with volar marginal chondral loss to bone; large radioulnar and moderate radiocarpal and midcarpal effusions with synovitis; chronic ulnolunate abutment; chronic tear on the radial aspect of the triangular fibrocartilage; adjacent chondral loss to the bone and trace edema proximal ulnar aspect of lunate and neutral ulnar variance in neutral position; cystic decompression of joint fluid along the dorsal margin of the distal pole scaphoid, median nerve edema in the carpal tunnel post carpal tunnel release with scarring of the flexor retinaculum and palmar fascia; mild edema superficial thenar muscles concerning for neuropathy but no muscle atrophy was also noted.

14. Claimant underwent repeat EMG studies with Dr. Dean on November 13, 2019. Dr. Dean noted Claimant had a left carpal tunnel release and left cubital tunnel release in February 2019. In comparing the EMG results with the prior EMG, Dr. Dean opined that the left cubital tunnel was perhaps modestly better or about the same. Dr. Dean noted that the left carpal tunnel showed one measure that is nominally improved and one measure that is nominally worse. Dr. Dean opined that the left carpal tunnel may be minimally worse than one year ago. The right carpal tunnel was noted to by somewhat better and the right cubital tunnel was unchanged.

15. Claimant returned to Dr. Viola on April 20, 2020 with complaints of ongoing hand and wrist pain. Dr. Viola noted Claimant had no significant improvement since her surgery a year prior. Dr. Viola recommended bilateral hand and wrist surgeries and Claimant underwent those recommended surgeries with Dr. Viola on May 22, 2020.

16. Insurer 1 filed a second General Admission of Liability on June 19, 2020, admitting for one day of temporary total disability ("TTD") benefits.

17. Claimant testified that she worked closely with Mr. B[Redacted], Employer's owner, and communicated with him every day he was in the office. Claimant testified that she was familiar with the payment of Employer's workers' compensation insurance premiums, because she paid them. Claimant testified that Insurer 1's coverage for Employer ended on September 30, 2019. Claimant testified that she and Employer were made aware of Insurer 1's cessation of coverage by written notice. Claimant testified that Employer then obtained replacement coverage with Insurer 2.

18. Claimant testified after she was made aware that Insurer 1 was seeking to withdraw its admissions of liability in her claim by written notice in the mail in 2020, she filed a second Claim for Compensation against Insurer 2. Claimant's two claims were then consolidated for purposes of this hearing.

19. Claimant underwent an independent medical evaluation ("IME") at the request of Insurer 1 with Dr. J. Tashoff Bernton, on August 11, 2020. Dr. Bernton reviewed Claimant's medical records, including the JDA, obtained a medical history and performed a physical evaluation in connection with the IME. Dr. Bernton opined in his IME report that Torrey Beil's JDA report was internally inconsistent and flawed, and that in fact there were not occupational risk factors present for Claimant's carpal and cubital tunnel syndrome.

20. Dr. Bernton testified on Insurer 1's behalf at hearing consistent with his IME report. Dr. Bernton opined that Claimant had bilateral carpal tunnel syndrome, cubital tunnel syndrome, and arthritis of the wrist. Dr. Bernton testified that repetitive trauma occurs because a task is repeated consistently over time with sufficient force and frequency that there's no recovery from performing it before it has to be performed again. Dr. Bernton testified that aggravation of osteoarthritis could also lead to carpal tunnel syndrome due to increased amounts of inflammatory fluid in the area and compression of the carpal tunnel nerves.

21. Dr. Bernton testified about the calculation of time Claimant performed certain activities at work in Ms. Beil's JDA report. Dr. Bernton concluded that the report was flawed, and no repetitive injury risk factors actually existed in Claimant's occupational duties. Dr. Bernton opined in his testimony that Ms. Beil's report was way off base.

22. Dr. Bernton specifically testified about Ms. Beil's time calculations and took issue with the amount of time Claimant was observed working. Dr. Bernton

ultimately opined that Claimant’s carpal tunnel syndrome and cubital tunnel syndrome likely developed as an idiopathic condition.

23. Dr. Bernton testified he did not ever discuss apparent time discrepancies in the JDA with Ms. Beil.

24. Dr. Bernton also opined that if Claimant’s condition were related to her work her employer, Claimant’s continued full-duty work after September 2019 would represent a permanent worsening of her underlying upper extremity condition.

25. Insurer 2 referred Claimant for an IME with Dr. John Raschbacher on January 21, 2021. Dr. Raschbacher reviewed Claimant’s medical records, including the JDA and Dr. Bernton’s IME, obtained a medical history and performed a physical examination as part of his IME. Dr. Raschbacher opined Claimant had bilateral carpal tunnel and cubital tunnel syndrome, right worse than left, but did not relate those conditions to her work. The doctor related Claimant’s current diagnoses to preexisting, degenerative conditions, including osteoarthritis, and not to her work activities.

26. Dr. Raschbacher testified at hearing consistent with his IME report. Dr. Raschbacher testified that Claimant was predisposed to developing carpal and cubital tunnel syndrome, and that her work did not aggravate those conditions. Dr. Rashbacher testified that the JDA performed by Ms. Beil was not useful in determining whether Claimant’s condition was work related.

27. Dr. Raschbacher testified that the existence of a pre-existing condition does not prevent a claimant for receiving treatment for that condition if it’s aggravated by a new injury. Dr. Raschbacher testified that for a pre-existing condition to be aggravated, the employee must move off of their baseline condition. Specifically with carpal and cubital tunnel syndromes, Dr. Raschbacher testified that those conditions arise when there is a narrowing of those tunnels. The doctor testified that if risk factors for carpal tunnel or cubital tunnel syndrome are present in a workplace, it is more likely that a patient’s conditions are related to work activity.

28. Claimant testified that her job duties had not changed since Insurer 2 assumed coverage from Insurer 1 in September 2019. She testified that her symptoms had continued to progress, especially in her right hand and wrist, with her job duties. Claimant testified there had not been a day since she reported the claim in October 2018 where symptoms in her right or left hand or wrist had gone away completely. Claimant testified she does not engage in activities or hobbies outside of work that aggravate her bilateral upper extremity condition.

29. The ALJ notes that while both Dr. Raschbacher and Dr. Bernton both testified that the JDA performed by Ms. Beil was not helpful to determining whether claimant’s condition was related to her work for Employer, or aggravated by her work for Employer, neither Insurer 1 nor Insurer 2 sought a new JDA to determine the force used by Claimant and time spent keyboarding during a work day for Employer.

30. The ALJ notes that the Colorado Workers' Compensation Medical Treatment Guidelines set forth at W.C.R.P. 17-5(D)(1)(b) sets forth that the examining physician should assess the individual's ability to perform job duties. Specifically the Medical Treatment Guidelines state in pertinent part:

> This frequently includes a job site evaluation including an ergonomic assessment as well as the patient's description of the job duties. Job title alone is not sufficient information. The clinician is responsible for documenting specific information regarding repetition, force, other risk factors, and duration of employment. Refer to risk factors as listed in Section D.3.d Risk Factors Definitions Table and Section D.3.e Diagnosis-Based Risk Factors Table. A formal job site evaluation may be necessary. A formal job site evaluation may not be necessary when the physician is intimately familiar with the job position and associated work activities and there are no new job alterations.

31. In this case, while both IME physicians were critical of Ms. Biel's report, neither of the physicians sought clarification from Ms. Biel's report or requested a new JDA to assess Claimant's work activities, including the repetition, force or other risk factors and duration of employment. The ALJ rejects the opinions of both Dr. Bernton and Dr. Raschbacher as being not credible or persuasive as to the causation of Claimant's bilateral carpal tunnel and cubital tunnel syndrome.

32. The ALJ credits the reports from Dr. Viola, Dr. Fay, Dr. Rose, and the JDA from Torrey Beil and finds that Insurer 1 has failed to prove by that it is more likely than not that Claimant's condition is not to her work with Employer.

33. The ALJ credits the reports from Dr. Viola, Dr. Fay and Dr. Rose over the reports and contrary opinions of Dr. Bernton and Dr. Raschbacher, and finds that Insurer 1 has failed to prove by a preponderance of the evidence that it is entitled to withdraw its admissions of liability based on a finding that Claimant did not sustain an occupational disease while employed with Employer.

34. The ALJ further rejects the opinions of Dr. Bernton and finds that Insurer 1 has failed to prove that it is more likely than not that Claimant's continued work for Employer after September 2019 has resulted in a last injurious exposure that resulted in an aggravation that was both permanent and substantial.

35. The ALJ notes that the testimony of Dr. Bernton that Claimant's continued work with Employer resulted in her ongoing need for medical treatment after Insurer 2 began providing insurance coverage for Employer is undermined by his opinion that Claimant's work for Employer did not cause her condition.

36. The ALJ notes that the EMG studies performed by Dr. Dean on November 13, 2019, roughly two months after Insurer 1 stopped providing insurance coverage, demonstrated that the right upper extremity was in fact improved from an EMG standpoint when compared to the EMG studies from the previous year. The ALJ further

finds that the EMG study with regard to the left showed that Claimant's condition was only minimally worse. The ALJ therefore finds that Insurer 1 has failed to demonstrate that it is more likely true than not that there was a last injurious exposure with Employer that caused a substantial and permanent aggravation of her condition.

37. The ALJ relies on the EMG reports of Dr. Dean along with the medical records from Dr. Viola in concluding that Insurer 1 has failed to demonstrate that Claimant had a last injuries exposure that caused a substantial and permanent aggravation of her condition which would result in Insurer 2 becoming liable for the cost of Claimant's medical treatment.

38. Because the ALJ has found that Insurer 1 did not meet its burden of proof with regard to withdrawing the admission of liability, and has found that there is insufficient evidence to establish that a last injurious exposure occurred during the time Insurer 2 was providing workers' compensation insurance coverage, Claimant does not have a burden of proof to meet to establish an entitlement to benefits in W.C. 5-148-983-001.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, C.R.S., 2019. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*. A party seeking to modify an issue determined by a general of final admission of liability, a summary order or a final order shall bear the burden of proof for any such modification. Section 8-43-201, *supra.*

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2006).

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

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

4. The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S., as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

5. This section imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test. The test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). A claimant is entitled to recovery if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* The onset of a disability occurs when the occupational disease impairs the claimant's ability to perform his regular employment effectively and properly or when it renders the claimant incapable of returning to work except in a restricted capacity. *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App.2002); *In re Leverenz*, WC 4-726-429 (ICAO, July 7, 2010).

6. Normally, the claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified or aggravated the disease for which compensation is sought. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999. However, in this case, because Insurer 1 has filed an admission of liability admitting for the injury, it is Insurer 1's burden of proof to establish the basis for the modification that would allow Insurer 1 to withdraw the admission of liability. See Section 8-43-201, C.R.S.

7. As found, Insurer 1 has failed to establish by a preponderance of the evidence that Claimant's upper extremity condition was not a condition that resulted directly from Claimant's employment with employer or the conditions under which her work was performed. As found, the opinions expressed by Dr. Fay, Dr. Viola and Dr. Rose are found to be credible and persuasive with regard to this issue.

8. A claimant is allowed to recover from the last employer in whose employ the last injurious exposure occurred and resulted in an aggravation that is both permanent and substantial. *Monfort, Inc. V. Rangel*, 867 P.2d 122 (Colo. App. 1993). The addition of the phrase "substantial permanent aggravation" in effect limits liability for occupational diseases to those employers that caused the claimant to be exposed to a harmful concentration of a hazard, which exposure resulted in a substantial and permanent aggravation of the disease. *Robbins Flower Shop v. Cinea*, 894 P.2d 63 (Colo. App. 1995).

9. As found, Insurer 1 has failed to prove by a preponderance of the evidence that Claimant sustained a last injuries exposure that resulted in an aggravation that is both permanent and substantial. As found, the EMG records and reports from Dr. Dean along with the records from Dr. Viola are found to be credible and persuasive in this regard.

ORDER

It is therefore ordered that:

1. Insurer 1's request to withdraw their admission of liability is denied and dismissed.

2. Insurer 1's request that Insurer 2 be found liable for the ongoing medical and disability benefits under the Colorado Workers' Compensation Act based on the last injurious exposure is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

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

DATED: May 7, 2021

Keith E. Mottram

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-031-585

ISSUES

I. Determination of the extent of Claimant's scheduled upper extremity rating.

II. Whether Claimant proved by a preponderance of the evidence her scheduled upper extremity impairment rating should be converted to a whole person impairment rating.

III. Whether Claimant is entitled to an award for disfigurement.

FINDINGS OF FACT

1. Claimant is a 75-year-old woman who works for Employer as a bank teller.

2. Claimant sustained an admitted industrial injury on November 18, 2016 when she slipped and fell on ice, landing on her left shoulder. Claimant was diagnosed with a closed fracture of the proximal left humerus and underwent an open reduction and internal fixation of the proximal humerus with Synthes with rotator cuff repair on November 19, 2016, performed by Patrick McNair, M.D.

3. Claimant subsequently complained of neck pain, headaches, and left arm pain.

4. On January 4, 2018, Claimant saw orthopedic surgeon Armodios Hatzidakis, M.D. upon the referral of her authorized treating physician (ATP) Dr. Ogrodnick. Claimant reported 6-7/10 left shoulder pain, disruption with sleeping, and difficulty performing activities of daily living. Dr. Hatzidakis noted Claimant admitted to having some referred cervical spine pain with diagnostically diagnosed degenerative disc disease at her mid-to-low cervical spine with spurring. Dr. Hatzidakis further noted that a CT scan of the left shoulder revealed evidence of healing of the tuberosities but the collapse of the humeral head with subsequent penetration of the hardware into the glenohumeral joint as well as end-stage glenohumeral osteoarthritis. He opined that Claimant was a good candidate for surgery.

5. On May 14, 2018, Claimant underwent a reverse left shoulder arthroplasty with hardware removal and biopsy and culture, performed by Dr. Hatzidakis.

6. Claimant subsequently reported continued pain in her left shoulder, shoulder blade and neck, as well as daily left-sided headaches. Exams noted tenderness along the distal clavicle, AC joint and trapezius. On April 11, 2019, Dr. Hatzidakis administered a diagnostic injection over the AC joint and recommended Claimant undergo evaluation for any infection. The injection provided Claimant minimal relief.

7. On June 13, 2019, Carlos Cebrian, M.D. performed an Independent Medical

Examination (IME) at the request of Respondents. Claimant reported pain in her left shoulder, left clavicle, and left shoulder blade, as well as pain up the left side of her neck and daily headaches. On examination, Dr. Cebrian noted full cervical range of motion with some discomfort on the left side, no tenderness to palpation over the paracervical muscles, and tenderness to palpation of the posterior left shoulder, posterior AC joint and clavicle. Dr. Cebrian opined that additional testing was reasonable to determine if Claimant had a low-grade infection. He noted that if the testing was unremarkable, Claimant would be at maximum medical improvement (MMI) with permanent impairment and restrictions. Dr. Cebrian anticipated permanent impairment for the reverse shoulder arthroplasty and range of motion deficits as well as permanent work restrictions of no lifting over 10 pounds with left upper extremity and no lifting above shoulder level.

8. Claimant continued to have left shoulder and neck pain and ultimately underwent a third left shoulder surgery on October 1, 2019. Dr. Hatzidakis performed a left shoulder arthroscopy with extensive debridement, arthroscopic subacromial decompression with arthroscopic greater tuberoplasty, and arthroscopic distal clavicle resection.

9. Claimant reported doing well after the October 2019 surgery. By November 15, 2019, Claimant reported being pain-free at rest, with a “twinge” of pain with some activities. On December 16, 2019, Claimant reported feeling as though she had “turned the corner” and was pleased with her better range of motion. She reported 3/10 pain at rest. On examination, Dr. Ogrodnick noted painful 85 degrees shoulder abduction and 150 degrees forward flexion. He opined that Claimant was approaching MMI.

10. On January 9, 2020, Claimant presented to Dr. Hatzidakis with an unrelated new complaint of right shoulder pain after injuring her right shoulder on January 2, 2020 while doing laundry and shaking out an item of clothing. Claimant reported pain in the anterolateral right shoulder radiating down the right upper extremity, decreased range of motion, difficulty sleeping, and cervical spine discomfort with pain that mostly radiates into the posterior superior shoulder into the trapezius. Claimant was subsequently diagnosed with a right full-thickness superior rotator cuff tear with associated retraction.

11. Claimant returned to Dr. Hatzidakis on January 14, 2020 for follow-up on her left shoulder. Claimant reported doing quite well and being pleased with the results of her left shoulder surgery although she continued to have some pain reaching across her body. On examination of the left shoulder, Dr. Hatzidakis noted minimal tenderness over the AC joint, 120 degrees forward flexion, 80 degrees abduction, 20 degrees external rotation, and internal rotation to the sacrum. He recommended Claimant increase activity as tolerated and continue physical therapy.

12. On January 20, 2020, Claimant reported 0/10 left shoulder pain to Dr. Ogrodnick. Claimant was working six four-hour shifts per week and wanted to increase her time. On examination of the left shoulder, Claimant had 132 degrees forward flexion and 63 degrees abduction. On February 7, 2020, Claimant reported to Dr. Ogrodnick that she was using her left shoulder much more of late due to her right shoulder injury. She reported being pleased with her shoulder agility out in the front of her body but not out to

the left side or behind her body.

13. Claimant returned to Dr. Ogrodnick on February 17, 2020, at which time he placed Claimant at MMI. On examination of the left shoulder, Dr. Ogrodnick noted 136 degrees forward flexion, 32 degrees extension, 9 degrees external rotation, 21 degrees internal rotation, 100 degrees abduction, and 24 degrees adduction. He noted remarkably solid rotator cuff strength, negative impingement findings and no biceps tenderness. Using the AMA Guides, Dr. Ogrodnick assigned Claimant 41% left upper extremity impairment rating, consisting of a 30% rating under Table 19 of the AMA Guides for implant arthroplasty, combined with a 15% rating for decreased range of motion. He noted that the 41% upper extremity rating converted to 25% whole person impairment. Dr. Ogrodnick released Claimant to work with permanent work restrictions limiting lifting with the left upper extremity to 8 pounds, and no overhead lifting with the left upper extremity. He opined that maintenance treatment was not required with the exception of annual post-operative exams with an orthopedist.

14. On March 10, 2020, Claimant saw Dr. Hatzidakis and reported that her left shoulder was doing much better and was now her dominant shoulder. Claimant reported having minimal pain in the left shoulder and being pleased with the result of the surgery. Claimant’s main complaint was her right shoulder. On examination of the left shoulder, Dr. Hatzidakis noted near full active range of motion without crepitation, weakness or instability. There was no tenderness over the AC joint. He opined Claimant had reached MMI for the left shoulder. Claimant was leaning towards proceeding with arthroscopic rotator cuff repair for her right shoulder. As of the date of hearing, Claimant had not undergone surgery to address her right shoulder condition.

15. Claimant worked modified duty between the date of injury and being placed at MMI. At the time Dr. Ogrodnick placed Claimant at MMI, she was working full duty with accommodations from Employer. Claimant continued to in such capacity until June 2020 when she took a leave of absence for unrelated low back issues.

16. On July 14, 2020, Greg Reichhardt, M.D. performed a Division Independent Medical Examination (“DIME”). As part of his evaluation, Dr. Reichhardt reviewed Claimant’s medical records Claimant reported pain over the left shoulder extending along the upper trapezius towards her neck at times and extending down the upper arm to the elbow. She rated the pain at 3.5-7.5/10, and reported the pain was aggravated by lifting, reaching, pulling, dressing, performing housework, bathing, and washing/blow drying her hair. She complained that the pain interfered with activities of daily living. On examination, Dr. Reichhardt noted no tenderness to palpation of the cervical spine, no cervical paraspinal muscle spasms, and normal cervical range of motion for Claimant’s age. There was moderate tenderness to palpation over the lateral aspect of the left shoulder, mild tenderness to palpation over the mid and distal aspect of the upper trapezius, and no scapular winging. He noted 90 degrees forward flexion, 50 degrees extension, 38 degrees adduction, 86 degrees abduction, 58 degrees internal rotation, and 60 degrees external rotation. There was mild supraspinatus and infraspinatus weakness.

17. Dr. Reichhardt agreed with Dr. Ogrodnick that Claimant reached MMI as of February 17, 2020. Dr. Reichhardt assigned 38% left upper extremity impairment using the AMA Guides, consisting of 12% impairment for range of motion deficits and 30% impairment for implant arthroplasty under Table 19 of AMA Guides. Dr. Reichhardt noted that the 38% combined left upper extremity impairment converted to 23% whole person impairment. He agreed with Dr. Ogrodnick's recommendations for work restrictions and maintenance care.

18. Dr. Cebrian performed a second IME of Claimant on January 7, 2021 and issued an IME report dated February 5, 2021. Dr. Cebrian interviewed and examined Claimant and reviewed additional medical records. Claimant reported pain at night when rolling over onto her left shoulder and with increased or repetitive activity. She reported pain located in the posterior aspect of the shoulder that went into the lateral deltoid, pain in the clavicle and up to the left trapezius, and occasionally down into her arm and into her fourth and fifth fingers. Claimant further reported difficulties reaching overhead. Dr. Cebrian noted Claimant's right shoulder had been bothering her since May 2019 and that Claimant had been diagnosed with a right torn rotator cuff. Examination revealed full cervical spine range of motion without tenderness to palpation. Dr. Cebrian noted the following left shoulder range of motion measurements: 116 degrees flexion, 46 degree extension, 98 degrees abduction, 40 degrees adduction, 62 degrees external rotation, and 60 degrees internal rotation. Claimant reported discomfort with movement over the clavicle, deltoid, and into the trapezius muscle. Dr. Cebrian agreed Claimant reached MMI on February 17, 2020, and agreed with the permanent work restrictions assigned by Dr. Ogrodnick.

19. Using the AMA Guides, Dr. Cebrian assigned Claimant 37% combined upper extremity impairment, consisting of 10% impairment for range of motion deficits combined with 30% impairment for implant arthroplasty under Table 19 of the AMA Guides. He noted that 37% upper extremity impairment converted to 22% whole person impairment. Dr. Cebrian opined that DIME physician Dr. Reichhardt did not err in his assignment of 38% upper extremity impairment. He noted that his own range of motion measurements were similar to Dr. Reichhardt's, while Dr. Ogrodnick found greater impairment for range of motion deficits.

20. Dr. Cebrian opined that Claimant did not evidence functional impairment beyond Claimant's left glenohumeral joint and there was no proximal disorder. He opined that the situs of Claimant's functional impairment is in her left proximal humerus and glenohumeral joint. Dr. Cebrian further opined that the performance of a distal clavicle resection does not have any negative effect on a person's function, and the distal clavicle resection did not cause Claimant functional impairment beyond the glenohumeral joint. He concluded that Claimant has had greater right shoulder and cervical spine complaints secondary to her unrelated right shoulder injury than she has had due to her left shoulder.

21. Dr. Cebrian testified by pre-hearing deposition as an expert in occupational medicine. Dr. Cebrian testified consistent with his IME reports. He opined that Claimant's functional impairment is isolated to her upper extremity at the shoulder joint. Dr. Cebrian explained that Claimant's original left shoulder work injury was to Claimant's left proximal

humerus, which is the upper part of the arm, just below the ball of the humeral head. A fracture in a proximal humerus would be located below the shoulder joint. Dr. Cebrian explained that the surgical repair of the fracture caused aggravation of Claimant's left shoulder joint, warranting a shoulder replacement.

22. Dr. Cebrian testified that Claimant has degenerative disc disease in the cervical spine, which is unrelated to the work injury and developed over a long period of time. He further testified that Claimant has history of pre-existing rheumatoid arthritis which can increase degenerative changes throughout the entire body. Dr. Cebrian testified that, per his review of the medical records, Claimant's left shoulder was doing well in 2020, noting that in December 2020 Claimant informed Dr. Hatzidakis that her left shoulder was 80% normal. Dr. Cebrian testified that the pathology resulting from the work injury is related to the proximal humerus and the shoulder/glenohumeral joint and does not extend to her neck or trunk. He explained that a distal clavicle resection involves the removal of a portion of the AC joint and is performed to reduce pain and has no bearing on function. He further explained that a reverse shoulder arthroplasty replaces the glenoid, which is an extension of the scapula, and attaches in the left upper quadrant of the back. Dr. Cebrian testified that it is common for people who undergo reverse total shoulder replacement to have pain in the left upper quadrant of the back, as well as decreased range of motion and difficulty with overhead activity.

23. Claimant testified at hearing regarding her symptoms and functional limitations. As a result of the left shoulder work injury, Claimant cannot reach overhead or behind her back with her left arm. Claimant has difficulties reaching across her body and trouble turning a steering wheel. Claimant can no longer lift heavy items and her left arm becomes weak and tires easily with the performance of household chores. Claimant has altered the way in which she performs certain activities of daily living as a result of her work injury. Claimant acknowledges she is pain-free at rest. Claimant's pain is exacerbated by activity, and is located at the top of her left shoulder extending into the left side of her neck, as well as in the left shoulder blade extending into her left upper back and neck. Claimant also continues to experience left-sided headaches and disruptions in her sleep when rolling onto her left shoulder at night.

24. Claimant was diagnosed with rheumatoid arthritis several years prior to the work injury, which mostly affected her hands. Claimant also has diabetes and unrelated issues with her low back, neck, right shoulder and hips, as well as pain in her knees. At times, Claimant experiences headaches unrelated to the work injury, which are different in nature than the headaches resulting from the left shoulder injury. Claimant describes the former describes as pain across her forehead and the latter as distinctly left-sided.

25. The ALJ specifically finds Dr. Reichhardt's assigned 38% scheduled impairment accurately represents the extent of Claimant's scheduled impairment.

26. The ALJ specifically finds Claimant's testimony regarding her pain and functional limitations, as supported by the medical records, more persuasive than Dr. Cebrian's opinion, which appears to be more focused on the situs of injury. Claimant proved it is

more probable than not she sustained functional impairment beyond the arm at the shoulder, entitling her to conversion of her scheduled impairment rating to a whole person impairment rating.

27. As a result of the November 16, 2018 work injury, Claimant has a visible disfigurement to the body consisting of a scar on Claimant's anterior left shoulder measuring approximately six inches in length. The scar and surrounding area are indented and discolored. Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, entitling her to additional compensation.

CONCLUSIONS OF LAW

Generally

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

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

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

Scheduled Impairment Rating

The increased burden of proof required by the DIME procedures is not applicable to scheduled injuries. Section 8-42-107(8)(a), C.R.S. states that "when an injury results in permanent medical impairment not set forth in the schedule in subsection (2) of this section, the employee shall be limited to medical impairment benefits calculated as provided in this subsection (8)." Therefore, the procedures set forth in §8-42-107(8)(c), C.R.S., which provide that the DIME findings must be overcome by clear and convincing evidence, are applicable only to non-scheduled injuries. The court of appeals has explained that scheduled and non-scheduled impairments are treated differently under the Act for purposes of determining permanent disability benefits. Specifically, the procedures of §8-42-107(8)(c), C.R.S. only apply to non-scheduled impairments. *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000); *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998); *Gagnon v. Westward Dough Operating CO. D/B/A Krispy Kreme* WC 4-971-646-03 (ICAO, Feb. 6, 2018). Claimant has the burden of showing the extent of his scheduled impairment by a preponderance of the evidence. *Burciaga v. AMB Janitorial Services, Inc. and Indemnity Care ESIS Inc*., WC 4-777-882 (ICAO, Nov. 5, 2010); *see Morris v. Olson Heating & Plumbing Co.,* WC 4-980-171 (ICAO, May 20, 2019) (whether the claimant sustained a whole person or extremity impairment is one of fact for the ALJ and the DIME opinion on the issue is not entitled to any enhanced weight).

The preponderant evidence establishes the extent of Claimant's scheduled impairment is most accurately reflected by Dr. Reichhardt's 38% assigned scheduled impairment. The scheduled impairment ratings assigned by Drs. Ogrodnick, Reichhardt and Cebrian vary based on the impairment found for range of motion measurements on each of their examinations. Dr. Reichhardt's examination was performed approximately five months after Dr. Ogrodnick's February 17, 2020 impairment rating, and approximately six months before Dr. Cebrian's second IME on January 7, 2021. There is no indication Dr. Reichhardt's range of motion measurements or assigned rating is likely incorrect or that those of Dr. Ogrodnick or Dr. Cebrian are more likely correct. Based on these circumstances, the ALJ is persuaded Dr. Reichhardt's assigned 38% scheduled impairment most accurately represents the extent of Claimant's scheduled impairment.

Conversion of a Scheduled Impairment Rating to Whole Person Impairment Rating

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

Because §8-42-107(2)(a), C.R.S. does not define a "shoulder" injury, the dispositive issue is whether a claimant has sustained a functional impairment to a portion of the body listed on the schedule of impairments. *See Strauch v. PSL Swedish Healthcare*, 917 P.2d 366, 368 (Colo. App. 1996). Whether a claimant has suffered the loss of an arm at the shoulder under §8-42-107(2)(a), C.R.S., or a whole person medical impairment compensable under §8-42-107(8)(c), C.R.S., is determined on a case-by-case basis. *See DeLaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000).

The Judge must thus determine the situs of a claimant's "functional impairment." *Velasquez v. UPS,* WC 4-573-459 (ICAO Apr. 13, 2006). The situs of the functional impairment is not necessarily the site of the injury. *See In re Hamrick*, WC 4-868-996-01 (ICAO, Feb. 1, 2016). Pain and discomfort that limit a claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule of impairments. *In re Johnson–Wood*, WC 4-536-198 (ICAO, June 20, 2005). However, the mere presence of pain in a portion of the body beyond the schedule does not require a finding that the pain represents a functional impairment. *Lovett v. Big Lots,* WC 4-657-285 (ICAO, Nov. 16, 2007).

Respondents contend that any functional impairment beyond Claimant's left shoulder is unrelated to the work injury, noting Claimant's unrelated conditions and complaints with respect to her hands, low back, neck, right shoulder, hips and knees. Respondents further point to Claimant's reported improvement after her October 2019 surgery, and to Dr. Cebrian's opinion that Claimant's pathology and functional impairment are limited to the proximal humerus and shoulder joint.

The ALJ notes the medical records do indicate Claimant reported improvement in her left shoulder symptoms and function after her October 2019 surgery, including references to being pain-free or 3/10 pain. However, documentation regarding the absence of pain or decreased pain specifically refer to Claimant being at rest. Although Claimant is admittedly pain-free at rest, functional impairment cannot be ascertained based on the claimant's pain level while idle, as functional impairment refers to the effect a medical impairment has on the claimant's activity level. *Copp v. City of Colorado Springs* WC 4-271-758 (ICAO, Jan. 24, 2001); *Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333 (Colo. 1996).

The medical records after her October 2019 surgery document Claimant's limitations reaching across, out to the side, behind and overhead, as well as a subsequent increase in pain in her left shoulder, clavicle, trapezius, and neck, aggravated with activities and interfering with her activities of daily living. Claimant credibly testified that she experiences left-sided headaches and pain and discomfort in her left shoulder extending to her neck and left upper back, exacerbated by activity. This pain and discomfort has limited her ability to reach overhead, out to the side, behind her back, and above shoulder height, as well as her ability to lift items of certain weight.

Claimant's ATPs, the DIME physician, and Respondents' IME physician all agree with permanent work restrictions prohibiting Claimant from overhead lifting and lifting more than eight pounds with the left upper extremity. These restrictions are the result of the work injury. While Claimant's injury and treatment was to the proximal humerus and shoulder joint, the situs of functional impairment is not necessarily the site of injury. The totality of the credible and persuasive evidence establish Claimant has suffered functional impairment beyond the list of scheduled disabilities and is entitled to permanent partial disability ("PPD") benefits based on a whole person impairment. Claimant credibly acknowledged she has prior and current unrelated conditions and complaints. The ALJ is not persuaded the functional limitations at the arm beyond the left shoulder are the result of Claimant's other conditions and not the work injury.

Disfigurement

Section 8-42-108(1), C.R.S. provides that a claimant is entitled to additional compensation if he is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view."

As found, Claimant has sustained a serious permanent disfigurement to an area of the body normally exposed to public view, entitling her to additional compensation. The ALJ concludes Claimant shall be awarded $2,500.00 for this disfigurement.

ORDER

1. Claimant suffered functional impairment beyond the shoulder at the arm and off the schedule of injuries listed at § 8-42-107(2), C.R.S. Claimant is entitled to permanent partial disability benefits based upon a whole person impairment rating of 23%.

2. Insurer shall pay Claimant $2,500.00 for the disfigurement award. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

3. Insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

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

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

DATED: May 7, 2020

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-123-800-004

ISSUES

I. Whether Claimant is entitled to the 11% scheduled impairment rating provided by Dr. Reichhardt.

STIPULATIONS

- The parties agreed to reserve the issue of conversion of Claimant's impairment rating to a whole person.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. Claimant was born on May 17, 1976 and was 43 years old on the date of injury. Moreover, Claimant's primary language is Spanish, and she does not speak English.
2. Claimant suffered a compensable injury on October 24, 2019, while moving packages of towels from a bin to a table. The bin contained 8 packages of clean towels and each package contained 18 towels. (*Cl. Ex., pg. 00259*). In order to move each package of towels, Claimant had to bend over and reach into the bottom of the bin and grab a package of towels. Once she grabbed the package of towels, she would then lift and move the package to a table that was about waist high. (*Cl. Ex., pgs. 00216, 00223).* Although Claimant was not lifting above shoulder height while standing straight up - the position of her body when reaching into the bin and grabbing a package of towels and lifting - resulted in an above shoulder lift. As she reached with arms outstretched for the last bundle, she felt a sharp pain in the right side of her neck. (*Cl. Ex., pg. 00223*). As a result, she could not turn her neck or lift her right arm. (*Transcript, pg. 85, lines 7-13*).
3. Claimant took her lunch break and by the time she was finished, she could not turn her head to the right. (*Cl. Ex. Pg. 00216*). She reported her injury to her supervisor but was not immediately sent for medical treatment. After some convincing, her supervisor called a supervisor to take Claimant to St. Joseph's Hospital Emergency Department. The supervisor was not present when Claimant injured herself. *Id*.
4. While at the hospital, the supervisor from work assisted Claimant by translating. Claimant was evaluated for neck pain. She reported recurrent headaches and neck pain that began 9:50 that morning while at work. It was noted that Claimant's pain began one hour after she bent over to pick up a pile of towels. Claimant denied suffering from any fall or trauma. Under neck exam, it was found that her neck was supple. The provider noted Claimant had pain localized to the right sternocleidomastoid, diagnosed her with neck pain, and discharged her to outpatient follow up. (*Cl. Ex. Pg. 0028-0034*).

5. On November 6, 2019, Claimant followed up with her primary care physician, Dr. Esteban Gallegos, at Kaiser Permanente. Dr. Gallegos, who was able to interpret, noted the following history:

   > About 2 weeks ago, she was lifting bags of towels at work at a gym. On one of them, she did a significant strain. About an hour later, she had severe pain that brought her to tears. She went to the ED. She was reassured and was given valium and ibuprofen. She was discharged with ibuprofen. She has also used patches and heat. She is doing better, but still has pain with rotation and bending toward her right. I asked about worker's comp, but she is not clear why her job did not send her there. Instead, she says they activated her insurance and she was able to come in today to be seen. She's been unable to work since that time. Has looked for a transfer to something that does not require such heavy lifting, but there are no vacancies." (Cl. Ex. Pg. 0040 and 42).

6. Claimant started treating at Concentra on November 18, 2019. (*Cl. Ex. Pg. 0046*). At this visit, Claimant was assessed with a cervical strain and right shoulder strain after providing the following history and being physically examined:

   > Pt reports she was performing a task she normally does not have to perform. Pt reports she was lifting heavy bags filled with towels and pt reports as she was lifting, she felt mild aching pain in her neck and right shoulder which gradually worsened with increased tension, soreness. *Id*.

   On exam, Claimant was found to have demonstrated tenderness in the right cervical paraspinals, right trapezius muscles, but not the cervical spine. And, consistent with a shoulder injury, her right shoulder exam revealed tenderness in the right trapezius and lateral shoulder. At this visit, the provider, PA-C Rasis, concluded that physical therapy was medically necessary to address objective impairment and functional loss and to expedite Claimant's return to full duty. PA-C Rasis also provided lifting restrictions. As a result, PA-Rasis found on her examination and evaluation of Claimant that there were sufficient findings to conclude Claimant suffered a shoulder injury, required restrictions, and required additional medical treatment in the form of physical therapy to cure and relieve her from the effects of her work injury. (*Cl. Ex. Pg. 46-48 and 00223-00229*).

7. On that same day, Claimant began physical therapy at Concentra. She was evaluated for cervical strain and right shoulder strain. She complained of continued tightness, aching and pain along her right neck and upper/posterior shoulder and pressure, indicating that she feels like she has limited motion. (*Cl. Ex. Pg. 0050-0052*).

8. A few days later, Claimant saw PA-C Rasis again. She was not working based on restrictions from her last visit - a five-pound limit for lifting, pushing, and pulling. (*Cl. Ex. 0061*). She reported ongoing neck stiffness on the right side, aching pain and soreness in the trapezius and lateral region, and shoulder pain with abduction. PA-Rasis noted: muscle pain, neck pain and joint stiffness. On physical examination at this appointment, Claimant had tenderness in the right paracervical, and trapezius

muscles and abduction shoulder range of motion measured 110 degrees. (*Cl. Ex. Pg. 0068-0069*).

9. Claimant completed five (5) physical therapy visits between November 20, 2019, and December 3, 2019. She reported consistent limited range of motion along with pain and soreness in her cervical spine and right shoulder. The soreness was worse after physical therapy. (*Cl. Ex. Pg. 00100*).

10. PA-C Rasis ordered an MRI of Claimant's right shoulder because she did not improve with physical therapy. She reported feeling like her arm was heavy. *Id*.

11. Claimant's right shoulder MRI had these findings: mild tendinosis of the supraspinatus and infraspinatus tendons; no rotator cuff tear; mild degenerative changes in the AC joint and in the humeral head: no signs of labral tear or biceps complex pathology. (*Cl. Ex. Pg. 00102-00103*).

12. Claimant returned to physical therapy and reported soreness and fatigue with carrying weight and after exercise. Notes reveal that she was having trouble improving her condition. However, she was tolerating more weight and exercise. (*Cl. Ex. Pg. 00261*).

13. Claimant continued to be off work and reported a slight improvement of her neck soreness. She had ongoing shoulder soreness, mild aching pain with increased pain while trying to lift anything heavy. (*Cl. Ex. Pg. 00113).* Based on Claimant's symptoms and PA-Rasis' assessment of Claimant's condition, PA-C Rasis prescribed Diclofenac. (*Cl. Ex. Pg. 00116*).

14. By January 6, 2020, Claimant was working with restrictions and reported improvement in her shoulder pain. (*Cl. Ex. Pg. 00119).* That said, Claimant returned the next day with aching and soreness along the upper lateral aspect of her right arm. (*Cl. Ex. Pg. 00124*).

15. Claimant's active range of motion for her cervical spine and right shoulder were recorded at her January 15, 2020 physical therapy visit. Notes indicate, "C/S ROM limited in left-sided flexion with reported pain along the right upper trap. Pain level 5 out of 10. Shoulder ROM; flexion 140, abduction 140. Left side bending 15 degrees, reported pain along the upper trap. Left rotation 40 degrees, right rotation 60 degrees." (*Cl. Ex. Pg. 00141*).

16. At her January 20, 2020 visit with PA-C Rasis, Claimant was not working due to restrictions and reported frustration with her physical therapy. She felt that she was being pushed too hard and it was causing increased tension in her shoulder. Thus, Claimant's reports of pain and soreness in her arm continued. (*Cl. Ex. Pg. 00144*).

17. Based on range of motion measurements at her January 23, 2020 visit, Claimant's right shoulder flexion was 120, abduction was 85, and her IR/ER rotation strength was 4-/5. (*Cl. Ex. Pg. 00147-00151*).

18. In late February, the physical therapy notes reflect some improvement. (*Cl. Ex. Pg. 00191-00192*).

19. On March 5, 2020, Claimant returned to physical therapy. At this visit, Claimant was fully engaged in community and life events, but that she was still under work

restrictions by her treating provider that limited her participation in one or more job functions. At this time, Claimant had not met fully regained the functional use of her right shoulder and was suffering from ongoing impairment. As demonstrated by the physical therapy notes, Claimant had only regained:

- 50% of her active range of motion (AROM) of her shoulder.
- 60% of her lifting capacity to perform her job – which required 40 pounds of lifting.
- 60% of her lifting carrying capacity to perform her job – which required 40 pounds of carrying. (*Cl. Ex. Pg. 00195-00196*).

20. On March 6, 2020, the following day, Claimant returned to Concentra and was seen by Dr. Trina Bogart. Despite Claimant not meeting all her physical therapy goals, and showing functional limitations and impairment the day before, Dr. Bogart noted that Claimant completed physical therapy and is comfortable with her home exercise program. The notes from this visit conflict with the physical therapy records from the day before and note Claimant has full function and requires no more intervention or ongoing monitoring. The final report from this visit also states Claimant understands and agrees to MMI. "On exam, she has no crepitus and no warmth." Abduction was noted to be over 120 degrees, but no specific measurement was provided. Moreover, even though Dr. Bogart's notes listed a cervical strain, there is no mention of neck pain or indication of a cervical exam in this evaluation. In the end, Dr. Bogart discharged Claimant at MMI with no restrictions and no impairment. The ALJ finds that Dr. Bogart placing Claimant at MMI without an impairment rating or permanent restrictions is inconsistent with the physical therapy records the day before – which reveal Claimant was still suffering from functional impairment involving her shoulder. As a result, the ALJ does not find Dr. Bogart's opinion that Claimant had no impairment on March 6, 2020 to be persuasive or consistent with the underlying medical records. (Cl. Ex. Pg. 00200-00201).

21. Claimant underwent an IME with Mark Paz, M.D., on August 18, 2020. Dr. Paz issued a report and testified at hearing.

22. Dr. Paz noted that Claimant reported that as she was lifting a package of towels, she felt a "sharp pain" in the back of her neck, indicated by pointing to her right posterior neck. *RHE at 11*. Claimant stated that the right-sided neck pain radiated to the lateral aspect of the right elbow and to the posterior aspect of the right arm. *Id*. Claimant was given a patch for her neck at the emergency department. *Id*. Claimant reported her therapy treatments were of no benefit in reducing the neck or upper extremity symptoms. *RHE at 12*. Claimant specifically stated that at the time of her last visit at Concentra on March 6, 2020, she was continuing to experience pain and felt no better. *Id*. Claimant reported that she had continued to experience right arm pain and weakness since that time. *Id*. Claimant stated that her pain was not as severe or intense as it was initially, as she had been staying within the assigned restrictions. *Id*.

23. Dr. Paz performed a physical examination of both the neck and right shoulder. According to Dr. Paz, Claimant had a negative empty can sign, negative Neer's,

negative Yergason's, and negative Speed's test. *RHE at 15*. During Hawkins maneuver, however, Claimant reported symptoms at the base of her posterior neck. *Id*. He noted that during active range of motion measurements of the cervical spine that Claimant demonstrated poor effort during direct measurements and on gross examination of the neck. *Id*. That said, there is no other credible evidence that any other physician observed and documented Claimant providing poor effort. Moreover, Dr. Paz did not document Claimant provided poor effort regarding range of motion of her shoulder. And, it is the shoulder that was rated by Dr. Reichhardt.

24. Dr. Paz concluded that Claimant did not have a diagnosis for the neck or right shoulder symptoms which were supported by objective findings on physical examination. *RHE at 17*. He stated in his report and during his testimony that neither ongoing complaints of neck pain nor right shoulder pain were supported by objective findings upon physical examination. *Id*. Dr. Paz opined that the diagnostic results of the shoulder MRI did not correlate with findings on physical examination. *Id*. Dr. Paz specifically concluded that the mechanism of injury reported by Claimant did not correspond to an objective diagnosis. *Id*. Pain is not a medical diagnosis. Id.

25. Dr. Paz agreed with the ATP that MMI was reached on March 6, 2020. *RHE at 18*. Claimant's restricted range of motion in the shoulder was self-limited and did not correspond to a medical diagnosis or warrant a permanent impairment rating. Id. There was likewise no Table 53 diagnosis corresponding to subjective complaints of neck pain and therefore no permanent impairment for the injury. Id. Dr. Paz noted a significant disparity in his range of motion measurements during direct and indirect examination of the Claimant. *Id.* Dr. Paz agreed with the ATP that no permanent restrictions or further medical care was necessary for the injury.

26. Dr. Paz's medical report and subsequent hearing testimony conflicts with the medical records, Claimant's statements, the AMA Guides, and the Shoulder Injury Medical Treatment Guidelines, Rule 17, Exhibit 4 (*Guidelines*).

27. After Dr. Paz performed his IME, Claimant underwent a Division Independent Medical Examination (DIME) with Dr. Gregory Reichhardt. Dr. Reichhardt reviewed Claimant's medical records, performed a physical examination, and provided Claimant an eleven percent (11%) scheduled impairment rating, which corresponds to a seven percent (7%) whole person rating, for her right shoulder injury.

28. Dr. Paz testified that Dr. Reichhardt did not properly complete his DIME report because he did not do any provocative testing. (*Transcript, Pg. 48, Lines 11-15*; *Pg. 42-43, Lines 24-3*). Later he asserted that Dr. Reichhardt only performed the Hawkins test in his DIME. (*Transcript, Pg. 48, Lines 11-15*) Even later, Dr. Paz testified that Dr. Reichhardt completed the Neer's and Hawkins tests, but not Speed's, empty can, or the painful arc. (*Transcript, Pg. 43, Lines 5-12*). The DIME report shows that Dr. Reichhardt performed the Hawkins, and Speed's test during his exam. (*Cl. Ex. Pg. 00228*).

29. Dr. Paz's testimony about the lack of additional provocative testing is not found persuasive when compared to the *Guidelines*. Physicians need not perform every provocative test, "Generally, more than one test is needed to make a diagnosis. Clinical judgement should be applied when considering which tests to perform as, it

is not necessary to perform all of the listed tests on every patient." (*Guidelines Rule 17, Exhibit 4, page 8*). Dr. Reichhardt performed two provocative tests on Claimant's shoulder and appears to have used his clinical judgement not to perform additional testing. Thus, Dr. Paz's assertion that there is a lack provocative testing is not found to be persuasive.

30. In addition, Dr. Paz challenged Dr. Reichhardt's analysis of the initial injury and the resulting impairment. He testified that a shoulder impingement results from overhead activities over time and Claimant was not performing overhead activities when she was injured. (*Transcript, pg. 48, Lines 2-5*). This analysis leaves out the fact that Claimant was bending over the cart with half of her body inside the bin of towels. When asked, Dr. Paz agreed that lifting from that position could replicate an overhead injury. (*Transcript, pg. 72, Lines 7-12*).

31. Dr. Paz testified that Dr. Reichhardt was the only physician that had positive findings for impingement. (*Transcript, pg. 45, Lines 11-20*). Interestingly, Dr. Paz's report states, "The Hawkins, maneuver, Ms. P[Redacted] reported symptoms at the base of the neck posterior and inferior columns." (*Cl. Ex. Pg. 00219*). Under the *Guidelines*, the Hawkins exam is positive for impingement when the maneuvers produce pain. (*Guidelines, Rule 17, Exhibit 4, pg. 11).* And, Dr. Paz's medical assistant recorded a positive result for the Hawkins maneuver. (*Cl. Ex. Pg. 00208*). Thus, Dr. Paz's claim that his exam did not yield any positive signs of impingement is also not persuasive.

32. Dr. Paz also testified that the MRI did not have significant objective findings to support shoulder impingement. The MRI findings were: mild tendinosis of the supraspinatus and infraspinatus tendons without rotator cuff tear; mild degenerative changes in the acromioclavicular joint and in the humerus head. (*Cl. Ex. Pg. 102-103*). Tendinosis is inflammation within the tendons. (*Transcript, pg.41-42, Lines 1-2*). On cross examination, Dr. Paz agreed that the *Guidelines* list tendinopathy as a symptom of impingement. (*Transcript, pg. 81, Lines 12-14*).

33. Dr. Paz testified that there is no connection between the sternocleidomastoid muscle and the shoulder. (*Transcript, pg. 32, Lines 1-3*). He states that the initial sternocleidomastoid strain reported to St. Joseph's Hospital could not have any relationship to the shoulder pain. Upon review, the *Guidelines* provide that the ipsilateral sternocleidomastoid and trapezius muscles are extremely important for scapular control and ultimately shoulder function. (*Guidelines* Rule 17, Exhibit 4, page 49.)

34. Dr. Paz testified that he was informed in training that an impairment worksheet should be completed for every alleged impairment, even if the impairment rating is zero percent (0%). (*Transcript, pg. 62, Lines 4-7).* During his exam, Dr. Paz took range of motion measurements of Claimant's neck and right shoulder but did not complete a worksheet for either injury. (*Transcript, pg. 62, Lines 17-21).* His assistant recorded the measurements for cervical range of motion (*Transcript, pg. 65-66, Lines 19-5*), and right shoulder range of motion (*Transcript, pg. 66, Lines 10-18; Cl. Ex. Pg. 00207*). When asked why he did not complete the worksheets he said, "[w]ell, first, there has to be an injury, a loss of use of, derangement of, and there wasn't." (*Cl. Ex. Pg. 66, Lines 20-24*). When asked to clarify whether he was

saying there was no injury and no impairment, Dr. Paz stated there was no impairment. (*Transcript, pg. 67, Lines 11- 16*).

35. Dr. Paz assessed Claimant with adjustment disorder despite having no psychology or psychiatry training. (Transcript, pg. 75-76, Lines 19-9). Although Claimant is not claiming any mental impairment, the AMA guides specify that evidence of mental impairments should be documented primarily on the basis of reports from individual providers, such as psychiatrists and psychologists, and facilities such as hospitals and clinics. (AMA Guides Third, § 14.2, pg. 236). He admitted that this diagnosis was based on his observations and he did not conduct a mental status exam, or even a mini mental status exam. (Transcript, pg. 75-76, Lines 19-9). No such evidence appears in Claimant's medical history. As a result, Dr. Paz assessing Claimant with an adjustment disorder without any supporting clinical evidence detracts from the reliability and persuasiveness of his opinion that Claimant has no ratable impairment.

36. Dr. Paz also assessed Claimant with right arm paresthesias reportedly due to Claimant's statement about numbness and tingling in her right arm. (Cl. Ex., pg. 00220) Dr. Paz, however, admitted that there is no history of numbness or tingling in his report or elsewhere and could not explain how this assessment came to be in his report. (Transcript, pg. 74-75, Lines 9-12).

37. Based on the findings above, the ALJ does not find Dr. Paz's testimony to be credible or persuasive in concluding that Claimant did not suffer any impairment to her right shoulder due to her work injury.

38. On September 3, 2020 and September 8, 2020, Claimant underwent a Division Independent Medical Examination (DIME) with Dr. Gregory Reichhardt. Dr. Reichhardt interviewed Claimant and obtained a history from Claimant similar to the history obtained by Dr. Paz. The following history was obtained by Dr. Reichhardt:

> [Claimant] indicates she was injured on 10/24/19 when she was sent to another area to take towels out of a container. She notes that she then placed them on a table. There were eight packages of 18 clean towels. As she was removing the last package from the bottom of the container (which required her to bend over with the upper half of her body in the container), she experienced intense pain in the neck and right arm. She took a break, but had difficulty moving her body.

39. Dr. Reichhardt also reviewed Claimant's medical records and performed a physical examination. After Dr. Reichhardt obtained a detailed history from Claimant, reviewed her medical records, and performed a physical examination, Dr. Reichhardt concluded Claimant suffered a shoulder injury when she lifted the towels at work. He also concluded Claimant's work injury caused these diagnoses:

    a. "right shoulder and periscapular pain" from "lifting towels."

    b. "right subacromial impingement with periscapular myofascial pain."

    (Cl. Ex, pg. 00228).

40. Dr. Reichhardt completed a shoulder worksheet with range of motion measurement and percentages of permanent impairment. (*Cl. Ex. Pg. 00230*). He concluded that based on her work injury, Claimant has an eleven percent (11%) scheduled rating for her right shoulder, which converts to a seven percent (7%) whole person impairment rating. *Id*. He did not complete a worksheet for her neck but noted that she has some symptoms along the upper trapezius and at the base of her neck. (*Cl. Ex. Pg. 00224*). "[S]ome symptoms extending up into the cervical spine, but this appears to be related to a myofascial pain associated with her shoulder injury and not a separately ratable cervical injury." (*Cl. Ex. Pg. 00229*).

41. Dr. Reichhardt's report has significant support in the record. Physical therapy records show an equivocal result for an empty can test on November 20, 2020. (*Cl. Ex. Pg. 0069*). A positive result for an empty can test on December 5, 2020. (*Cl. Ex. Pg. 00101).* Plus, a positive painful arc test on February 3, 2020. (*Cl. Ex. Pg. 00163*). Dr. Paz, Respondents Independent Medical Examiner (IME) had a positive response to his Hawkins test, even though that is not how it was characterized. (*Cl. Ex. Pg. 00219, Hearing Transcript*).

42. Dr. Reichhardt recorded the method of injury as "lifting towels," explaining that Claimant lifted the towels while she was bent over at the waist leaning into the cart to get the last package. While she was reaching into the cart, she experienced an intense pain in the right side of her neck and body. (Cl. Ex. Pg. 00259).

43. Dr. Reichhardt's opinion is bolstered by the MRI results. Claimant's MRI showed tendinosis of her right shoulder tendons. Tendinosis - swelling of the tendons - is a symptom of impingement syndrome. (*Guidelines*, *Rule 17, Exhibit 4, pg. 83*).

44. As a result, the ALJ finds Dr. Reichhardt's opinion to be credible and persuasive regarding Claimant's work-related injury and the rating he provided.

45. Other symptoms consistent with impingement are delayed presentation; complaints of functional losses due to pain, stiffness, weakness, and a catching sensation; and sleep complaints. (*Guidelines, Rule 17, Exhibit 4, pg. 84*). At first, Claimant reported pain in her neck and was treated for that issue at the emergency room. Whether it was because of a communication issue, distraction from her neck pain, or delayed onset of pain, Claimant's report of shoulder pain was not recorded until November 18, 2019. (*Cl. Ex. Pg. 0046*). That said, she consistently reported pain in her shoulder and neck throughout her treatment, although her level of pain varied. (*Cl. Ex. Pg. 00224-00227*). In addition, there are consistent reports of joint stiffness and some weakness. *Id.* Claimant notes weakness when she feels fatigued. *Id.* She also complains of pain interrupting her sleep. (*Cl. Ex. Pg. 00217*).

46. Throughout Claimant's treatment, tenderness to palpitation of her right lateral shoulder and trapezius muscle is consistently noted. (*Cl. Ex. Pg. 0047, 0069, 0075, 00105, 00114, 144-145, 163, 00181, 00228*). And there is no credible evidence from her treating providers that her shoulder tenderness was not consistent with her underlying injury.

47. Claimant's testimony also tracked her medical records and the findings of her medical providers. As a result, the ALJ finds Claimant to be credible.

48. The ALJ finds Claimant suffered a work-related injury to her right shoulder.

49. The ALJ also finds that Claimant suffered permanent impairment involving her right shoulder as found by Dr. Reichhardt. The permanent impairment consists of an eleven percent (11%) scheduled rating, which equates to a 7% whole person rating.

CONCLUSIONS OF LAW

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

General Provisions

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

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant is entitled to the 11% scheduled impairment rating provided by Dr. Reichhardt.

The increased burden of proof required by the DIME procedures is not applicable to scheduled injuries. Section 8-42-107(8)(a), C.R.S. states that “when an injury results in permanent medical impairment not set forth in the schedule in subsection (2) of this section, the employee shall be limited to medical impairment benefits calculated as provided in this subsection (8)." Therefore, the procedures set forth in §8-42-107(8)(c), C.R.S., which provide that the DIME findings must be overcome by clear and convincing evidence, are applicable only to non-scheduled injuries. The court of appeals has explained that scheduled and non-scheduled impairments are treated differently under the Act for purposes of determining permanent disability benefits. Specifically, the procedures of §8-42-107(8)(c), C.R.S. only apply to non-scheduled impairments. *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000); *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998); *Gagnon v. Westward Dough Operating CO. D/B/A Krispy Kreme* WC 4-971-646-03 (ICAO, Feb. 6, 2018). Claimant has the burden of showing the extent of his scheduled impairment by a preponderance of the evidence. *Burciaga v. AMB Janitorial Services, Inc. and Indeminity Care ESIS Inc*., WC 4-777-882 (ICAO, Nov. 5, 2010); *see Morris v. Olson Heating & Plumbing Co.,* WC 4-980-171 (ICAO, May 20, 2019) (whether the claimant sustained a whole person or extremity impairment is one of fact for the ALJ and the DIME opinion on the issue is not entitled to any enhanced weight).

As set forth above, the ALJ found Claimant to be credible and her testimony to be persuasive. The ALJ also found Dr. Reichhardt’s opinions to be credible and persuasive. The ALJ did not, however, find Drs. Paz and Bogart’s opinions to be credible and persuasive.

Based on the credible and persuasive testimony of Claimant and Dr. Reichhardt - the ALJ finds and concludes Claimant established by a preponderance of the evidence that she suffered a permanent impairment due to her work-related injury. The ALJ also finds and concludes that Claimant established by a preponderance of the evidence that she sustained an eleven percent (11%) scheduled impairment rating to her right shoulder as provided by Dr. Reichhardt.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered an 11% scheduled impairment rating of her right shoulder.

2. Whether Claimant’s 11% scheduled impairment rating should be converted to a whole person rating is reserved.

3. All other issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: May 8, 2021.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NOS. 4-958-955-03

ISSUES

The issues set for determination included:

- Did Claimant prove by a preponderance of the evidence that his cervical myelopathy condition and resulting fusion surgery was reasonable and necessary, as well as related to the August 18, 2014 work injury?

- If the cervical myelopathy condition was related to the MVA, are the requested physical therapy ("PT") treatments reasonable and necessary

1. There was no evidence in the record Claimant sustained prior injuries to his cervical spine before August 5, 2014. There were no records which documented treatment for the cervical spine before 2014. There was a reference to chronic back problems in the first evaluation done by Kevin Vlahovich, M.D.

2. On August 18, 2014, Claimant suffered an admitted industrial injury while working for Employer. Claimant was employed as a truck driver and was involved in a serious motor vehicle accident ("MVA"). Another vehicle crossed the center lane and struck his truck, which caused it to hit a concrete wall, cross an irrigation ditch and crash through a wood fence.

3. Claimant testified he remembered hitting his left arm, shoulder and hip on the driver's door and his knee hit the dash. He also thought he may have hit his head on the door. Claimant was restrained by a seatbelt at the time of the accident.

4. The photographs of the truck admitted into evidence corroborated Claimant's testimony that there was a significant impact. The ALJ concluded Claimant injured his head, neck, left arm and shoulder as a result of the MVA. He required medical treatment for these injuries.

5. Claimant was transported by ambulance to Longmont United Hospital, where he was examined in the Emergency Department ("ED"). Claimant reported diffuse tenderness to his neck, mild tenderness to his left wrist and snuff box area and mild tenderness to the left knee and popliteal fossa. No loss of consciousness was reported and Claimant's symptoms were characterized as "moderate". Claimant had no associated neurological symptoms.

6. X-rays were taken of Claimant's cervical spine at the ED. The films were read by William Wahl, M.D., who noted in the cervical vertebral body height and alignment were maintained. No compression deformity, subluxation or displacement was present. There was degenerative disease with disc space narrowing, plate sclerosis and ventral osteophyte at C3-C4, along with mild disc space narrowing at C5-C6. Claimant was discharged from the hospital and prescribed 800 mg ibuprofen and Norco tablets. He was also placed in a left thumb Spica Velcro wrist splint.

7. On August 25, 2014, Claimant was evaluated by Ken Frisbie, PA-C at Banner Health Occupational Medicine ("Banner Health"), the ATP for Employer. Claimant reported pain in the left arm and shoulder, as well as the neck and back. He did not report any numbness or tingling. PA-C Frisbie's diagnoses included: strain-cervical spine; lumbosacral sprain, lumbar spine, sprain, left wrist; contusion, multiple sites; post-concussion syndrome; headache; myofascial syndrome; pain left shoulder. PA-C Frisbie referred Claimant for treatment.

8. Claimant received treatment from Jordan Blakely, RMT at Medical Massage of the Rockies on September 2, 2014. At that time, Claimant reported a headache, neck pain (described as worst pain), along with pain in the mid low back and hip as well as left leg sciatica.

9. A General Admission of Liability ("GAL") was filed on behalf of Respondents on September 5, 2014. The GAL admitted for wage and medical benefits.

10. On September 10, 2014, Claimant was evaluated by E. Jeffrey Donner, M.D. At that time, he complained of pain in the posterior aspect of his neck and left shoulder, as well as diffuse intermittent numbness in the left arm. Dr. Donner noted Claimant did not appear to be in severe pain and found generalized tenderness around the proximal aspect of the humerus, as well as the rotator cuff. Claimant's cervical spine revealed tenderness in the posterior aspect around the C3-4 area, as well as decreased cervical range of motion ("ROM"). Dr. Donner's assessment was: shoulder pain; neck sprain; shoulder sprain; neck pain. He recommended MRI scans of the left shoulder and cervical spine.

11. Dr. Vlahovich (at Banner Health) oversaw Claimant's treatment beginning on November 14, 2014. Dr. Vlahovich adopted PA-C Frisbie's diagnoses and issued work restrictions. Claimant underwent a course of conservative treatment from August 2014-March 2015, which included medications, physical therapy ("PT") and massage therapy.

12. Claimant received twelve (12) massage therapy treatments through November 25, 2014. Those records reflected pain on the left side of neck, the left

shoulder (including rhomboid, scalene and trapezius muscles). The November 25, 2014 note reflected modest improvement in symptoms.

13. The PT records from North Colorado Medical Outpatient Rehab reflected that Claimant reported neck and left shoulder pain for which he received treatment from December 5, 2014 through June 30, 2015. Claimant received multiple modalities of treatment, which included hot pack, electrical stimulation and manual therapy. The treatment notes showed Claimant had pain in the cervical spine and left shoulder; with pain complaints that waxed and waned. Claimant received a total of thirty-five (35) treatments at this facility, including after the shoulder surgery.

14. On March 31, 2015, Claimant underwent a left shoulder arthroscopy, with subacromial decompression and resection of the distal clavicle, which was performed by Mark Grossnickle, M.D. The surgery was performed to address left shoulder impingement, with AC injury. Claimant received PT following the surgery.

15. On April 8, 2015, Dr. Vlahovich reported that "Since the [shoulder] surgery, James has been going to physical therapy. His arm symptoms have resolved, but he still has posterior shoulder/scapula complaints." In the May 11, 2015 evaluation, Claimant reported his shoulder pain was resolved and there were no specific complaints of pain, numbness or tingling in the arm. Claimant's neck was not sore and the cervical spine had full range of motion ("ROM"). There was diminished ROM in the left shoulder, but Claimant could raise his arm above his head. Bilateral upper extremity passive ROM was full. Claimant reported scapula pain. Under the Discussion section of the report, Dr. Vlahovich again specifically reported: "Left arm complaints have resolved".

16. The ALJ found the medical records showed Claimant did not report pain in cervical spine in the period from the date of injury to June 2015. No neurological problems referable to the cervical spine were documented in the medical records. He testified at hearing that he had neck and shoulder pain after the surgery.

17. Claimant was referred to Gregory Reichhardt, M.D. who evaluated him on June 1, 2015, who noted bilateral scapular winging and thought fascioscapulohumeral muscular dystrophy was a possibility. Claimant did not report numbness or tingling in the left arm. Dr. Reichhardt's impression included the fact Claimant had residual periscapular pain, some mild residual cognitive deficits and a history of a preexisting learning disability. A trial of trigger point injections was administered by Dr. Reichhardt, who also performed an EMG and referred Claimant to a neuromuscular clinic for further evaluation of the underlying neuromuscular disorder. Dr. Reichhardt did not offer an opinion on causation at this time, including on fascioscapulohumeral muscular dystrophy. The ALJ inferred Claimant's scapular symptoms were due, at least in part to the fascioscapulohumeral muscular dystrophy.

18. Dr. Vlahovich documented that Claimant's shoulder pain was resolved in the June 10, 2015 medical note and Claimant was diagnosed with fascioscapulohumeral muscular dystrophy, without facial weakness.

19. On July 6, 2015, Claimant underwent an MRI of his cervical spine. The films were read by Vincent Herlihy, M.D. Dr. Herlihy's impression was: diffuse congenital cervical central canal narrowing, with superimposed degenerative disc disease including a small focal central disc protrusion at C4-C5. There were also scattered areas of mild to moderate uncovertebral osteoarthritis at C5-C6 and C6-C7. There was moderate to severe central canal stenosis at C4-C5, with ventral cord contact in flattening, but no abnormal cord signal. There was moderate central canal stenosis at C3-C4 and C5-C6, with cord contact but no abnormal cord signal. There was mild central canal stenosis at C3-C4 and C5-C6. There was mild to moderate left and mild right neural foraminal stenosis at C2-C3 and C6-C7; moderate bilateral neural foraminal stenosis at C5-C6 and mild bilateral neural foraminal stenosis at C6-7. Dr. Herlihy also noted focal left prevascular neck lymphadenopathy. The ALJ inferred that the osteoarthritis and stenosis were degenerative conditions.

20. On September 17, 2015, Claimant returned to Dr. Reichhardt and complained of left shoulder pain. Tenderness to palpation was found in the shoulder region with decreased ROM. Dr. Reichhardt's impression was: left shoulder pain: mechanism of injury-8/8/14 work-related accident; left shoulder MRI demonstrated mild AC hypertrophy; 3/31/15 operative arthroscopy with subacromial decompression and resection of the distal clavicle; EMG/NCV on 6/18/15 demonstrated diffuse denevation in the upper and lower extremities and ideology unclear, potentially related to fascioscapulohumeral dystrophy; 7/6/15 cervical MRI: central cervical stenosis C2-to C7, moderate to severe at C4-6, disco-osteophyte complex at C3-4, focal disc protrusion at C4-5, disc bulges at C5-6, C6-6, multilevel uncovertebral arthritis; bilateral scapular winging, probably related to fascioscapulohumeral dystrophy; cognitive complaints, with neuropsychological evaluation by Dr. Thwaites in December 2014, demonstrating some mild residual cognitive deficits; chronic opioid use; tobacco use disorder. Claimant was to have a neurosurgical evaluation.

21. Dr. Reichhardt evaluated Claimant at regular intervals as his ATP and his diagnoses remained the same for the evaluations on October 6 and November 4, 2015. At the latter visit, Claimant reported neck, shoulder and periscapular pain. Dr. Reichhardt referred Claimant to Dr. Quickert for cervical spine injections.

22. Claimant was evaluated by Julie Quickert, APRN at Premier Vein and Pain Center on November 6, 2015 for left-sided neck and left shoulder pain On examination, she noted tenderness with palpation of the cervical spine most

pronounced at the left C5-6 level. She also found tenderness with palpation of the left trapezius and reduced ROM of the neck. APRN Quickert recommended a left C5-6 facet injection since the Claimant was not getting pain relief with conservative therapy.

23. On November 23, 2015, Timo Quickert, M.D. performed a left C5 and C6 medial branch block. He had wanted to do a C5-6 facet injection but was notified by The impression post procedure was that the left C5 and 6 medial branch blocks correlated to the left C5 and 6 facet joint innervation.

24. On December 2, 2015, Dr. Reichhardt evaluated Claimant, at which time Claimant rated his pain as 5/10. He continued to report pain over the left side of the neck and the left periscapular area. He reported that after the C5-C6 medial branch block, his pain went from a 5/10 to a 3.5 out of 10 to 4/10 on a short-term basis after that he experienced a temporary increase in his pain. Then pain went back to baseline at 5/10. Dr. Reichhardt characterized this response to the medical branch block as ”nondiagnostic”. Dr. Reichhardt recommended a C6–7 level block should be considered and performed trigger point injections focusing on paraspinals, left upper trapezius at the T-1 level and the right C6–7 cervical paraspinal using 1% lidocaine.

25. Claimant returned to Dr. Quickert on December 7, 2015, he noted Claimant reported great relief for 24 hours after the medial branch block. Claimant received a left C6–7 level block. Dr. Quickert recommended a left C5 and C6 nerve ablation/rhizotomy.

26. When Dr. Reichhardt examined Claimant on December 17, 2015, Claimant reported the set of trigger point injections over C6–7 gave him good relief for about one week to one and a half week to 2 weeks. On examination, Dr. Reichardt found tenderness to palpation over the periscapular muscles in the C6-7 area as well as decreased cervical range of motion. He also found crepitus over the left periscapular muscles particularly in the upper trap and elevator scapula area, as well as palpable trigger points over those areas. On December 30, 2015, Claimant continued with neck and periscapular pain as well as some achiness in his legs. On exam, Dr. Reichardt noted decreased cervical range of motion. Dr. Reichhardt noted there were no myelopathic findings on the exam.

27. When Dr. Reichhardt examined Claimant on January 13, 2016, at which time Claimant reported pain over his neck in the periscapular area and headaches were starting to come back. Dr. Reichhardt had a lengthy discussion with Claimant about the injection issues. He reviewed Claimant’s response to C5–C6 injection. Based on his previous review of Claimant’s pain diary and his response, he found that Claimant had a diagnostic response to the first block. Dr. Reichhardt said it was reasonable for Claimant to have a block at C6–7 and he referred Claimant for that injection. On

January 30, 2016, Dr. Quickert performed a C6–C7 medial branch block as requested by Dr. Reichhardt.

28. On or about January 20, 2016, a medical record review was prepared by Floyd Ring M.D. on behalf of Respondent-Insurer. This review was done in conjunction with the proposed injections at C6-7. Dr. Ring stated it would be reasonable to consider the injection at C-6–7. However, if there was no significant benefit, further injections would not be warranted and the patient should be seen by an IME to determine if this was related to his muscular dystrophy versus pathology related to the accident. The ALJ noted Dr. Ring raised the question whether Claimant's continued symptoms were related to the MVA injuries versus muscular dystrophy.

29. Dr. Vlahovich also noted in his that Claimant on February 19, 2016, at which time headaches had resolved but were returning, but Claimant was reporting leg weakness.

30. On April 5, 2016 Dr. Quickert performed a second left C6 and C7 medial branch block. Dr. Reichhardt evaluated Claimant the same day. Claimant brought his pain diary for the medial branch block which he had had three hours before. Dr. Reichhardt reported that the pain since the procedure had been 1/10 and on physical exam Dr. Reichhardt noted less tenderness to palpation of the cervical spine. Dr. Reichhardt discussed having a rhizotomy with Claimant. Dr. Reichhardt then referred Claimant back to Dr. Quickert for consideration of a rhizotomy.

31. On April 28, 2016, Claimant underwent an independent medical examination with Kathy McCranie, M.D. at the request of Respondents. At that time, Claimant reported left shoulder pain, which went around the entire shoulder blade and chest. He had a pins and needles type sensation going down his left arm, along with pain on the left side of his neck. He also had symptoms from periodic limb movement disorder, which manifested in twitching in the shoulders and legs. On examination, Claimant's deep tendon reflexes were +2 in the upper and lower extremities, with Hoffman negative bilaterally. There was no clonus and the motor exam was 5/5 in the bilateral upper and lower extremities. Sensation was normal to vibration in the upper and lower extremities, with decreased sensation reported in bilateral upper arms and in the left hand, predominantly middle finger.

32. Dr. McCranie's impressions were: chronic cervical pain and status post strain, left C6 and C7 facet-mediated pain, multilevel cervical degenerative disc disease; left shoulder pain; mild concussion; history of bilateral knee contusions, with complaints of left distal thigh pain; status post right wrist sprain, resolved; status post traumatic headaches resolved; probable fascialscapulohumeral muscular dystrophy non-work related; periodic limb movement disorder, non-work related. Dr. McCranie did not recommend further massage therapy, chiropractic care, acupuncture or PT. She opined

that Claimant's cervical stenosis was more likely due to normal degeneration considering the patient's age and smoking history. His examination was not suggestive of myelographic picture that would require surgical intervention. The ALJ noted Dr. McCranie attributed the spinal stenosis to normal degeneration and did not conclude the fascialscapulohumeral condition was related to the work injury. None of the physicians concluded the fascioscapulohumeral muscular dystrophy was caused by the MVA.

33. On May 10, 2016, Claimant underwent an IME performed by Richard Stieg, M.D. at his attorney's request. Dr. Stieg is board-certified in neurology and pain medicine. Claimant reported to Dr. Stieg his residual symptoms of this accident to be constant left shoulder pain aggravated by motion and weather changes and constant pain in the neck with headaches on occasion, much less severe than the shoulder pain. On examination, Claimant exhibited "intermittent numbness in both arms" which he could "shake out" in a few minutes. He had what was described as an "unphysiological" diminution to pinprick over the left entire upper quadrant of the body exclusive of the neck and face.

34. Although Dr. Stieg had not reviewed all of the records, his preliminary impressions included: status-post left shoulder injury (details unknown), Grade-I cerebral concussion with probable mild residual neurocognitive deficits, chronic myofascial pain syndrome, cervical area, and "unphysiological" sensory motor findings of the left upper quadrant, nighttime movement disorder by history. Regarding the sensory motor findings, Dr. Stieg added the following note: "This may be a reflection of the patient's anxiety and depression and/or reflect a somatic disorder secondary to the patient's painful musculoskeletal injuries". Claimant did not report dropping items, or weakness in his arm since the accident occurred to Dr. Stieg. The ALJ found Dr. Stieg also made no findings consistent with myelopathy.

35. On July 1, 2016, Claimant returned to Dr. Vlahovich. On examination, Dr. Vlahovich described Claimant's neck as mildly sore to palpation posteriorly, with no spasms present. Cervical active ROM was full and equal in all directions and mildly painful. Claimant had nearly full active ROM in the left shoulder. Dr. Vahovich's diagnoses were: strain of muscle, facia and tendon at neck level, subsequent encounter; other specified dorsopathies, lumbosacral region; strain of muscle(s) and tendon(s) of the rotator cuff to the left, subsequent encounter; other motor vehicle non-traffic accident involving collision with stationary on jacked; other recurrent depressive disorders. Claimant was referred for a second orthopedic opinion, as well as a neuromuscular evaluation for the scapular problems. Claimant had declined further genetic testing. The ALJ found there were no neurological abnormalities found in this examination.

36. In a follow-up evaluation with Dr. Vlahovich on August 8, 2016, similar findings were documented on physical exam. Dr. Vahovich's diagnoses included pain in left knee and left shoulder. Claimant was referred to Ronald Carbaugh, Psy.D.

37. On September 9, 2016, Dr. Reichhardt became concerned about Claimant's reflexes exhibiting spread of the biceps reflex to the finger extensors. This is abnormal and an indication of a central nervous system abnormality. Ultimately it was determined that this abnormality was related to the myelopathy condition and cord compression with which Claimant was diagnosed. The ALJ notes that this abnormal finding manifested approximately two years post-accident.

38. Claimant was evaluated Regina Bower, M.D. on October 27, 2016, whose assessment was cervical spondylosis with myelopathy; myelomalacia of spinal cord; Hoffman's reflex positive; gait disturbance; tobacco dependence. These were new diagnoses, which were not present when Kai Strobbe, PA-C conducted a neurological evaluation on June 9, 2016. Claimant was referred to a neurosurgeon.

39. Claimant returned to Dr. Donner on November 7, 2016 and was complaining of pain in the posterior cervical thoracic area, which was aggravated by neck movement. He also reported pain radiating into his left arm, associated with numbness in the older distribution but no weakness. On examination, the modified Spurling maneuver did not cause full radicular arm pain, but caused some proximal left arm pain. There were no Lhermittes findings and mild numbness was present in the ulnar distribution of his left hand, but no weakness or atrophy.

40. Dr. Donner reviewed the MRI scan and noted there were degenerative discs at C4-5, C5-6 and C6-7, with a hypertrophic and partially ossified posterior longitudinal ligament. It was not clear whether Dr. Donner had Claimant's other treatment records to review. Dr. Donner's assessment was: a worsening of his cervical condition, with increasing cervical stenosis and no significant improvement with conservative treatment over the past two years. Dr. Donner opined it would be reasonable to address all the pathology where he has stenosis from C4-5 through C6-7 with either anterior cervical decompression and fusions or artificial disc replacements. The ALJ inferred Dr. Donner's treatment recommendation was for the cervical stenosis condition and symptoms that were related to it.

41. On December 30, 2016, a physician review was conducted by Anant Kumar, M.D. on behalf of Respondent-Insurer. Dr. Kumar noted Claimant's condition was extremely complicated, as he had fascialscapulohumeral muscular dystrophy. Dr. Kumar noted most patients with this muscular dystrophy had neck and suprascapular area discomfort and he had not done well with a shoulder surgery. Dr. Kumar opined that the request for C3 to C5 cervical spine fusion should be denied, as there were better treatment options for him. Claimant had congenital stenosis and his spinal canal

was narrow to 7 mm. at C3-4, 6 mm. at C4, 8 mm. at C5-6 and 9 mm. at C6-7. Dr. Kumar stated a posterior laminoplasty would be a better approach to address all these have levels especially because the cervical spine fusion at C3-C5 would cause adjacent level degeneration and worsening of the C5–6 level. Dr. Kumar stated Claimant was neurologically intact and in such a patient, he recommended continued non-operative care, until he showed signs of neurological deficits or spasticity.

42. On December 30, 2016, a physician review was conducted by Jon Erickson, M.D. on behalf of Respondent-Insurer, which was an appeal of the denial based upon Dr. Kumar's opinion. Dr. Erickson noted Claimant had been diagnosed with fascioscapulohumeral muscular dystrophy, which was potentially complicating his recovery. That diagnosis had not been fully confirmed. Dr. Erickson reviewed the request for anterior cervical decompression discectomy, with fusion of C3-C4 and C4-C5. Dr. Erickson reviewed the MRI and stated there was nothing that would lead him to believe there was any form of acute injury. The ALJ found Dr. Erickson's opinion persuasive.

43. Dr. Erickson also cited the DOWC Medical Treatment Guidelines ("MTG") concerning potential cervical fusion indicated that injections had to be at least 80% effective in controlling pain before surgery can be suggested. The MTG also required every individual prior to any kind of cervical or low back surgery needed to undergo a forensic psychological/psychiatric evaluation to determine whether any further interventional treatments stood a potential to make him better. Dr. Erickson recommended a denial of any cervical spine surgery until the above recommendations were satisfied.

44. The ALJ found that the opinions expressed by Dr. Kumar and Dr. Erickson raised the issues of whether the proposed surgery was reasonable and necessary, as well as related to the industrial injury.

45. On January 11, 2017, Claimant was seen at the University of Colorado Hospital in the Neuromuscular Department by Vera Fridman, M.D. Claimant underwent an EMG and Dr. Fridman's impression was: "This is an abnormal study. There is electrophysiological evidence for widespread myotonia with mild myopathic changes seen in the left triceps muscle. Myotonia can be seen in the setting of myotonic dystrophy, myotonia congenita, or other channelopathies, as well as toxic, inflammatory and dystrophic myopathies". The report's clinical note indicated myotonic dystrophy type-I was suspected. It was recommended that Claimant have further evaluation for this condition. The ALJ found this was this first such detailed reference to electrophysiological evidence for myotonia and myopathic changes. Dr. Fridman did not offer an opinion regarding the cause of the myotonia and myopathic changes.

46. On April 26, 2017, Claimant underwent an independent medical examination with Brian Reiss, M.D. at the request of Respondents. He reviewed Claimant‘s treatment records, concluding that the MVA may have caused a cervical strain with pain, but the proposed surgery was not a treatment for that pain, but rather a treatment for the unrelated myelopathy. Dr. Reiss opined Claimant probably had scapular dyskinesia, which can be painful, but would not be improved by any cervical surgery. The scapular dyskinesia may or may not be related to Claimant‘s probable muscular dystrophy. Dr. Reiss concluded Claimant‘s pain complaints were probably related to the effects of the motor vehicle accident, but not his neurological complaints. He recommended a more specifically directed physical therapy, neuromuscular reeducation program for the myofascial pain and scapular dyskinesia.

47. On examination, Claimant was complaining of a headache, which was constant, as well as neck pain. He also had left shoulder pain, which was somewhat better since surgery. Dr. Reiss noted abnormal scapular motion with range of motion of the shoulder. He did not see any true scapular winging when he was leaning against the wall, stating it looked more like scapular dyskinesia. ROM on extension of Claimant‘s neck was 10°, with posterior neck pain. Flexion ROM was full with a little bit of neck pain; rotation right and left appeared to be full, with minor pain. Dr. Reiss' assessment was cervical strain with pain and scapular dyskinesia cervical stenosis and myelopathy.

48. When Dr. Reichhardt evaluated Claimant on July 18, 2017, Claimant had five out of five strength in the intrinsic muscles of the hand. Claimant did not report problems with his grip or dropping things. On August 16, 2017, Dr. Reichhardt wrote a letter answering questions posed by Respondents' counsel Lynda Newbold. Dr. Reichhardt had been asked to evaluate some neuromuscular clinic records and an IME prepared by Dr. Brian Reiss. Dr. Reichhardt opined "Based on the information that I've had available to me, I would consider his cervical stenosis to be in part related to his work–related injury and partially related to underlying degenerative changes. Neck surgery is most predominantly required as a result of the myelomalacia but there is also the potential that it will help his neck complaints. Somewhat less reliably, it may improve some of the upper back and periscapular area complaints". The ALJ noted Dr. Reichhardt stopped short of concluding the myomalacia was a condition caused or aggravated by the work injury and his use of the words most "predominantly" was significant, when explaining that the reason for neck surgery was due to myelomalacia.

49. Claimant returned to Dr. Vlahovich on September 27, 2017. At that time, Claimant reported worsening of numbness in both hands and arms, as well as the feeling of pressure. He also reported depression due to the restriction of his activities and was seeing Dr. Carbaugh. On examination, cervical active ROM was slightly limited and mildly painful. Claimant had nearly full ROM in both shoulders. Dr.

Vlahovich‘s diagnoses were: strain of muscle, fascia and tendon at neck level, subsequent encounter; low back pain; pain in left knee; pain in left shoulder; unspecified symptoms and signs involving cognitive functions and awareness.

50. Dr. Vlahovich spoke with Dr. Reichhardt about acute progressive changes in sensation in his upper extremities and Dr. Bower was to evaluate Claimant ASAP. Dr. Vlahovich also gave Claimant wrist splints and if improvement was noted, this problem would be more related to CTS, as opposed to the work injuries. Dr. Vlahovich ordered PT and a walker for the cervical myelopathy.

51. Claimant was initially evaluated by Michael Finn, M.D. on October 24, 2017. Dr. Finn stated the reason for the referral was cervical myelopathy. Claimant noted progressive decline, neurologic symptoms over the last month and more profoundly over the past week where he has noticed declining balance, progressive gait instability and problems with manual dexterity. Claimant’s October 9, 2017 MRI showed multilevel degenerative disc disease, most severe at C4-5, which was causing severe spinal canal stenosis and mild T2 hyperintensity in the spinal cord (that represented edema or myelmalcacia). Dr. Finn described him as being grossly myelopathic and hyperreflexic. Dr. Finn’s impression was that Claimant required an anterior cervical discectomy and fusion at C4-5, along with decompression at C3-4 and C5-6 because of the stenosis. Claimant was admitted for the surgery. The ALJ inferred Claimant‘s neurologic symptoms progressed as his stenosis worsened, which ultimately necessitated the surgery.

52. Claimant underwent surgery on October 26, 2017, which was performed by Dr. Finn. Dr. Finn described the reason for the referral for surgery as “acutely progressive myelopathy”. The preoperative and postoperative diagnoses were: cervical myelopathy with a cervical disc herniation, C4–5, and circumferential cervical stenosis, C3 to C5. The ALJ found Dr. Finn did not offer an opinion on the impact of the MVA on Claimant’s myelopathy.

53. On November 6, 2017, Dr. Vlahovich evaluated Claimant after the cervical surgery, which time the diagnoses remain the same. No orthopedic referral for the knee was planned at the time, but Claimant was to continue with cognitive therapy/psych with Dr. Carbaugh. Dr. Vlahovich noted Claimant‘s hand numbness may not resolve from surgery, as they might be due in part to carpal tunnel syndrome. Claimant was to continue with the duloxetine, gabapentin and ropinirole. Dr. Vlahovich also evaluated Claimant on November 13, December 4 and 19, 2017. The diagnoses remained the same and Dr. Vlahovich monitored Claimant‘s prescriptions, as well as post-surgical treatment.

54. Claimant returned to Banner Health on January 29, 2018 and was evaluated by Cathy Smith, M.D. This was twelve weeks after the cervical fusion and discectomy. Claimant reported his headaches were 90-95% better, with right arm strength, numbness and tingling much better. His left leg remains week and he still had pain/weakness in his left arm. Dr. Smith‘s impression of the work-related incident was: muscle strain, neck; low back pain; left knee pain. The diagnoses were the same as Dr. Vlahovich: strain of muscle, fascia and tendon at neck level, subsequent encounter; low back pain; pain in left knee; pain in left shoulder; unspecified symptoms and signs involving cognitive functions and awareness. Dr. Smith continued Claimant‘s work restrictions, prescribed ropinirole for periodic limb disorder from stenosis, Cymbalta, gabapentin and meloxicam.

55. The follow-up evaluation with Dr. Smith on February 26, 2018 was similar in terms of the findings on examination and the continuation of Claimant‘s prescriptions.

56. On March 7, 2018, Claimant was reevaluated by Dr. Reichhardt. At that time, he complained of pain in the neck and left shoulder area, with some numbness and tingling in the left hand, digits one through five. Claimant said he felt better than he had in a long time. On examination, Claimant had a normal gait, balance and coordination. Strength was normal in the upper and lower extremities. Reflexes continue to demonstrate speed of the finger flexors with biceps and pronator teres, with normal reflexes at triceps, patellae and Achilles. Sensation was diminished in left hand, digits one through five.

57. Dr. Reichhardt’s impression was: neck pain, left shoulder pain, upper and lower extremity paresthesias. Dr. Reichhardt stated Claimant’s cervical disorder, cervical cord compression myelopathy and subsequent need for treatment were related to his work–related accident.

58. Dr. Reichhardt testified as an expert in Physical Medicine and Rehabilitation at hearing. He is Level II accredited pursuant to the WCRP. Dr. Reichardt testified that Claimant had left arm symptoms briefly which then arose again later. He had some initially diffuse am symptoms that went away before the shoulder surgery. Dr. Reichhardt opined that there were pre-existing degenerative changes that were aggravated by the motor vehicle/semi-truck accident and this aggravation necessitated Claimant’s cervical surgery. Although some of the degenerative changes were pre-existing**,** but for the accident, Dr. Reichhardt said Claimant wouldn’t have required the surgery within the timeframe that involved the case. Dr. Reichhardt stated that the need for surgery was accelerated or hastened by the motor vehicle accident. On cross-examination, Dr. Reichhardt agreed spinal stenosis could progress cause symptomatic myelopathy without a specific injury.

59. Dr. Reiss testified as an expert on behalf of Respondents. He is a board-certified orthopedic surgeon and is Level II accredited, pursuant to the WCRP. His practice is limited to surgery and treatment of disorders of the spine, and he has been practicing in this area since 1988. Dr. Reiss examined Claimant in April 2017. Dr. Reiss listened to the hearing testimony of Dr. Reichhardt and confirmed that this testimony did not change the opinions expressed in his written report of April 26, 2017.

60. Dr. Reiss testified that, in general, cervical stenosis is an asymptomatic condition. It is usually discovered and investigated when it becomes symptomatic from natural progression causing myelopathy, or when another event such as a motor vehicle accident causes neck pain and an MRI performed for another reason identifies the stenosis on imaging. Dr. Reiss said stenosis was a degenerative condition, is very common, and is not caused by motor vehicle accidents. The myelopathy occurred because the area for the spinal cord becomes smaller and smaller due to the stenosis progression and neurological symptoms occur when the spinal cord has inadequate space for it to function. It is usually subtle at first and can worsen over time.

61. Dr. Reiss stated if patient has a motor vehicle accident and doesn’t have myelopathy signs or symptoms, that is because the cervical stenosis was there all along and had not been changed by the accident. In this case, Dr. Reiss posited Claimant had neck pain probably secondary to a cervical strain as a result of the accident. He did not have myelopathy as a result of the accident.

62. Dr. Reiss reviewed the available imaging. The initial MRI of July 6, 2015 showed nothing that appeared to be acute. Dr. Reiss testified if a person has acute narrowing of the canal (stenosis) the cord cannot adapt to that change. If the narrowing is occurring gradually, such as during progression of the underlying stenosis, the cord adapts to the change of space. If the space available for the spinal cord was acutely changed via trauma, almost always this causes symptoms and acute damage to the spinal cord. Dr. Reiss stated the lack of myelomalacia, any edema of the cord and no abnormal signal in July showed there was not an acute damage to the cord. This opinion was persuasive to the ALJ.

63. Dr. Reiss disagreed with Dr. Reichhardt’s opinion and said there was not a connection between the motor vehicle accident and the myelopathy which appeared more than two years post-accident. Dr. Reiss agreed Claimant had neck pain after the accident, but this did not in any way imply myelomalacia, myelopathy or stenosis. One year after the accident, Dr. Reichhardt documented a normal neurological exam (on June 1, 2015) with no evidence of myelopathy and no neurological deficits. Claimant was also evaluated at Banner Neurosurgery Clinic in October 2015 with no evidence of myelopathy. Dr. Reiss testified the natural history of myelopathy secondary to stenosis

is such that at some point it will start to cause symptoms, subtly at first, then slowly progressing.

64. Dr. Reiss noted Claimant complained of numbness in his ring and fifth fingers, which is an ulnar distribution and not a sign of cervical cord disorder, as that was a very specific nerve root distribution. Claimant developed numbness much later in the thumb and index finger which was related to the C6 nerve root and not the spinal cord. The medical records also reflected that there were no further arm symptoms after the surgery on his left shoulder, which then returned later. Dr. Reiss said if the spinal cord been damaged in the accident causing symptoms in his arm, those would not have gone away. There was a very high probability therefore that these symptoms were related to other conditions and a very low probability that these symptoms were transient but related to spinal cord damage. Dr. Reiss clarified that some of Claimant's symptoms were probably related to the underlying myotonic dystrophy condition. These included the abnormal movement of the scapula and some of his pain in the shoulder could also be related to that. The movement disorder was highly unlikely to be related to myelopathy, but would reasonably be related to the myotonic dystrophy disorder.

65. Dr. Reiss also disagreed with Dr. Reichhardt that Claimant had a herniated disc as result of the accident, which worsened over time. Dr. Reiss testified Claimant required surgery because of the spinal stenosis and the progressive narrowing of the canal. The ALJ credited Dr. Reiss' opinions with regard to the progression of Claimant's symptoms and his need for cervical surgery. In this regard, the ALJ found Dr. Reiss' explanation regarding the course of Claimant's myelopathy to be more credible. The ALJ also credited Dr. Reiss' conclusions that the initial MRI in July 2015 showed no evidence of trauma had Claimant suffered trauma to the spinal cord as a result of the accident, the symptoms would not have gone away.

66. Based upon the medical evidence and Dr. Reiss' opinions, the ALJ concluded the MVA did not cause or accelerate Claimant's spinal stenosis condition. Claimant required cervical surgery because this degenerative condition worsened and he developed symptoms related to myelopathy.

67. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Medical Benefits

In the case at bar, Claimant suffered injuries arising out of his employment. Respondents were therefore liable under the Act to provide treatment to cure and relieve the effects of the injury to each of the parts of Claimant's body that were injured in the MVA on August 18, 2014. § 8-42-101(1)(a), C.R.S. The issue to be determined in this case was whether Claimant met his burden of proof to show that cervical surgery was reasonable, necessary, as well as causally related to the industrial injury.

Accordingly, although there was no question Claimant injured his left arm and cervical spine, that did not end the inquiry, as Claimant bore the burden of proof of showing that the need for medical benefits were causally related to his work-related injury or condition. *Ashburn v. La Plata School District 9R,* W.C. No. 3-062-779 (ICAO May 4, 2007). This required a review of Claimant's progression of symptoms, as well as consideration of the expert opinions. Based upon the totality of the evidence, the ALJ concluded Claimant did not prove by a preponderance of the evidence that the MVA aggravated, accelerated, or combined with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167, 1169 (Colo. App. 1990). Rather, the ALJ determined Claimant's symptoms were caused by the stenosis in the cervical spine and the progression of that condition.

As a starting point, the ALJ found Claimant reported symptoms to the left arm and cervical spine after the MVA. This included at the ED, as well as his first appointment at Banner Health. (Findings of Fact 5, 7). X-rays that were taken at the time showed Claimant's cervical spine had degenerative changes. (Finding of Fact 6). Claimant was diagnosed as suffering a strain of the cervical spine. (Findings of Fact 7, 11). Based upon this evidence in the record, the ALJ concluded the MVA caused an injury to Claimant's left arm/shoulder and his cervical spine. (Finding of Fact 4).

As determined in Findings of Fact 8, 11-14, Claimant received treatment for symptoms in the cervical spine, as well as the left shoulder and Respondents were liable for said treatment. The diagnostic tests showed degenerative changes in the cervical spine, but as Dr. Reiss noted, there was no evidence of spinal cord injury in the June 2015 MRI. (Finding of Fact 62). No injury to the spinal cord was found in the acute phase and the records of Claimant's early treatment documented the fact that his neck symptoms waxed and waned, including showing some improvement. (Findings of Fact 12-13, 15).

Claimant did not have neurological symptoms and was not diagnosed with myelopathy, including when he was evaluated by Dr. Reichhardt in December 2015 and January 2016. (Findings of Fact 26-27). During this time, Dr. Reichhardt and Claimant's IME physician, Dr. Stieg confirmed there was no myelopathy, but there was a potential diagnosis of fascioscapulohumeral muscular dystrophy. *Id.* In addition, Respondents IME physician, Dr. McCranie found no myelopathy and concluded Claimant's symptoms were attributable to stenosis in the cervical spine, which was due to normal degeneration considering the patient's age and smoking history. (Finding of Fact 32). Thus, the evidence admitted at hearing showed Claimant had an underlying degenerative condition, as well as fascioscapulohumeral muscular dystrophy which impacted his symptoms and recovery. The ALJ found the fascioscapulohumeral muscular dystrophy was not caused by the MVA and the IME raised the question whether Claimant's symptoms were related to the non-occupational conditions. *Id.*

Admittedly, Claimant had a complicated clinical course, as reflected in the medical records. As determined in Findings of Fact 27-30, 35-38, Claimant received substantial treatment in 2015-2016, including injections. He was seen at regular intervals by Dr. Reichhardt and Dr. Vlahovich. The treatment Claimant received was provided to address symptoms in his neck, arm and left knee. However, the ALJ found it was the development of neurological problems, specifically those related to the myelopathy that lead to the cervical surgery. This was shown in the medical records from Dr. Finn, who noted the referral was for myelopathy and the basis for the surgery to Claimant's neck. (Findings of Fact 51-52).

The evidence in the record led the ALJ to conclude that the injuries Claimant sustained in the MVA did not cause his spinal stenosis or myelopathy, which ultimately necessitated the surgery. In this regard, the ALJ determined the myelopathy condition was not caused, aggravated or accelerated by the MVA. (Finding of Fact 66). Claimant did not have neurological symptoms after the accident. As found, Claimant did not develop myelopathy or myelomalacia until almost two years after the accident. (Finding of Fact 37). The testing done at the University of Colorado by Dr. Fridman confirmed myotonic changes and myelopathy, with suspected myotonic dystrophy as a diagnosis. (Finding of Fact 45).

The ALJ credited Dr. Reiss' expert testimony in which he provided a credible explanation for the progression of Claimant's symptoms. Dr. Reiss opined that Claimant's progression of symptoms was related to the stenosis and he developed myelopathy, not as a result of the accident, but because of degeneration. Dr. Reiss explained that Claimant's myelopathy occurred because the area for the spinal cord becomes smaller and smaller due to the stenosis progression and neurological symptoms occur when the spinal cord has inadequate space for it to function. Dr. Reiss testified Claimant's neurological symptoms were related to the stenosis and Claimant required surgery because of neurological deficits from the stenosis. The ALJ credited Dr. Reiss' testimony regarding the progression of the stenosis and the surgery was required to address the stenosis and resulting myelopathy. (Findings of Fact 60-65). It was Dr. Reiss' credible testimony that led the ALJ to conclude that it was the progression of the stenosis which directly led to the need for surgery, as opposed to the work injury. *Id.* In addition, Claimant's surgeon, Dr. Finn, never offered the opinion that the need for surgery was related to the MVA. (Finding of Fact 52). After considering all of the evidence, the ALJ was persuaded that the surgery was not related to the injury, as the evidence in the record led to the conclusion that surgery was performed because of the natural progression of Claimant's preexisting stenosis and the resulting myelopathy.

The ALJ considered Claimant's argument that the condition of his cervical spine was worsened by injuries suffered in the MVA and therefore, the medical treatment he received (including cervical fusion surgery and PT) was reasonable necessary to cure and relieve the effects of the work injury. Claimant cited Dr. Reichhardt's testimony and more particularly, his conclusion that the need cervical surgery was caused by the MVA. The ALJ found Dr. Reichhardt initially opined that the neck surgery was "most predominantly required as a result of the myelomalacia". (Finding of Fact 48). Later, Dr. Reichhardt stated the need for surgery was accelerated or hastened by the MVA. (Finding of Fact 57-58). The ALJ weighed the respective opinions of the experts and credited the opinion of Dr. Reiss, who is a surgeon. On this basis, Claimant's request for medical benefits was denied and dismissed.

ORDER

It is therefore ordered:

1. Claimant failed to establish the cervical surgery was related to the work injury.

2. Claimant's request for medical benefits, specifically for payment of the cervical fusion procedure is denied and dismissed. The request for authorization and payment of the PT treatment proposed by Dr. Finn is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

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

DATED: May 10, 2021

STATE OF COLORADO

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that the lumbar surgery proposed by Dr. Barker is reasonable, necessary, and related to her work injury?

FINDINGS OF FACT

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

Claimant's Prior Back Surgery

1. Claimant had a previous lumbar spine surgery with the same surgeon requesting surgery now, Dr. John Barker. Claimant initially reported to Dr. Barker on May 8, 2019 that she had reached over to plug in her cell phone when she felt a pop in her back, with immediate onset of severe left leg pain. (Ex. 1, p. 1). On her initial clinical exam, she was unable to perform heel walking, and her left anterior tibialis strength was down to 3/5 with reflexes at only 2+ throughout. *Id.* at 2.

2. An MRI performed on May 7, 2019, showed a "left paracentral disc extrusion that moves caudally at L4-5 which compresses the left transitioning L5 nerve root." *Id.* Claimant was diagnosed with lumbar disc extrusion at L4-5 and lumbar radiculopathy. "At this time, given [Claimant's] level of weakness she would like to undergo lumbar microdiscectomy for correction.

3. Claimant underwent the previous surgery on May 23, 2019. (Ex. 1, pp. 7-8). Dr. Barker performed a discectomy of the left L4-L5 with a left L5 hemilaminectomy. Claimant followed up with Dr. Barker on June 6, 2019, reporting that her left leg pain was "markedly improved." *Id* at 10. The weakness had already improved, though not yet to preoperative levels. Claimant did report that she was already able to walk three miles per day just two weeks after surgery.

4. Claimant was told her strength was returning and to keep walking as much as possible. Claimant planned to return to work July 1, 2020, noting there was no light duty in her profession as a nurse. *Id* at 11. The follow-up note reflects that they would see Claimant back only "if her symptoms worsen or her strength does not return to normal." *Id.* Claimant did not return for any additional care for this injury.

Claimant's Hearing Testimony

5. At hearing, Claimant testified that she had virtually returned to normal enough to perform the full duties of a job as a nurse without pain or limitation, at least until January 25, 2020. When asked how she felt by and leading up to January 25, 2020, Claimant stated, "I was

feeling almost back to normal. I mean, the pain went away very quickly after the surgery. I still had very mild left foot weakness, which is pretty common with that kind of injury. But I was – I was working full duty… doing everything that I was doing prior to the injury. I was exercising up to four times a week." (Tr. pp. 17-18)

6. On January 25, 2020, Claimant was working in the emergency room as a registered nurse, and she was getting ready to discharge one of her patients. The patient was a large woman, estimated to be about 300lbs. The woman was rather short, and the stretcher she needed to be moved from was particularly high. Claimant and her coworker, a CNA, attempted to perform what is called a "stand pivot transfer." Claimant positioned the wheelchair as close to the stretcher as possible. The CNA was behind the patient and Claimant was directly in front of the patient. Claimant then described the following:

> And the patient had her arms on my shoulders, and then I pulled her towards me to help get her feet to the floor. And when she came down off the stretcher, she stepped on my right foot. And so there was nothing I could do but – because I didn't want her to fall. So I did this whole *lifting and twisting,* and *we both fell* into the wheelchair onto the right side. (Tr. pp. 18-19) (emphasis added).

7. At hearing, Claimant distinguished her current symptoms from those from her first injury:

> Well, after I injured my back this time, it was a completely different pain. Very sharp to dull ache just continuously. If I turned the wrong way or twisted, it was severe. It's where I can't sleep at night. ...If I overdo it, if I walk too much, …just vacuuming the floor sometimes can set it off. I'll have spasms and pain all night long. And I never had that with my previous injury, it was just always…the nerve pain down my leg. So this is much worse. (Tr., pp. 16-17).

Claimant's Medical Treatment

8. Claimant reported the incident to her boss, who recommended that Claimant go see one of their workers' compensation doctors. Claimant saw Dr. Janette Javier on January 30, 2020. (Ex. 2, pp. 23-26). Claimant reported that since the work incident she had been having "left lower lumbar pain above the level of her previous microdiscectomy". *Id.* She described the pain as being in her back, and sharp, with only *some* of the symptoms extending into her leg. Dr. Javier was not sure of the extent of Claimant's injury, so she placed Claimant under restrictions, and cautioned her to watch for worsening pain. An MRI was also ordered.

9. The MRI was performed on February 25, 2020. (Ex. C). There were essentially no findings at L1-L2 and L2-L3. At L3-L4. There was a small broad-based posterior disc bulge with central annular tear, and bilateral ligamentum flavum and facet joint hypertrophy. At L4-L5, there was a "small to moderate broad-based posterior disc bulge, improved from prior study [from May 7, 2019], with mild to moderate narrowing of the left lateral recess". There

was a small broad-based posterior disc bulge at L5-S1 with bilateral facet joint hypertrophy. *Id.*

10. Claimant reported to Dr. Javier on March 3, 2020 that she felt the physical therapy was helping make her pain "somewhat better." (Ex. 2, p. 34). However, Claimant continued to have pain in the lower lumbar region, with extension into her left lower extremity. Dr. Javier ultimately referred Claimant back to Dr. John Barker, due to her relatively normal appearing MRI, yet with continued significant pain in her back with left lower extremity weakness.

11. Claimant first saw Dr. Barker on June 4, 2020. (Ex. 1, pp. 12-14). Dr. Barker documented that Claimant's leg pain had gone away after the previous surgery he performed "for an extruded fragment." *Id* at 12. She had had severe foot drop from the surgery, most of which had went away, along with her strength returning. "Unfortunately, she was lifting a patient on January 22, 2020 when she injured her back during the transfer." *Id* at 12. Claimant reported ongoing low back pain since the incident. The pain had improved over four months of physical therapy, but it had far from resolved. "She is no longer able to work in the emergency room and she now does a desk job with case management." *Id.*

12. Dr. Barker reviewed the February 25, 2020 MRI, and came to a different conclusion than the radiologist. (Ex. 1, p. 13). Dr. Barker found that she did not have any recurrent disc herniation; instead, she has degenerative disc disease at 3-4 and L4-5 with posterior *annular tears* at those levels. He further noted a severely degenerated disc at L5-S1 with Modic changes. Claimant also had facet arthropathy at L5-S1 and at L4-L5 to a lesser extent. *Id.*

13. Since the physical therapy and medications had not relieved her symptoms, Dr. Barker recommended facet injections at L4-5 and L5-S1. Dr. Barker wanted to avoid surgery if the injections helped. However, in the event they failed, he wanted to consider a discogram, and possible lumbar disc arthroplasty as opposed to a fusion. *Id.*

14. The facet blocks were performed on June 17, 2020 for *axial low back pain*. (Ex. 3). Bilateral facet injections were performed at the L4-L5 and L5-S1 levels. *Id.* at 63. Claimant described a level 3 / 10 pain prior to the injections, and 3 / 10 pain after the injections. *Id.* at 64. She returned to Dr. Barker on August 6, 2020, reporting that the injections did not help with her pain. (Ex. 2, p. 15). "She still has *severe low back pain.* She has some numbness in her leg but no pain." *Id.* Dr. Barker ordered a discogram, and was then to see her again to go over the results.

15. The discogram was performed on August 27, 2020. (Ex. I). It revealed severe findings. Dr. Barker requested authorization to perform disc replacement surgeries at L3-L4, and L4-L5. The discogram showed a grade 4 and a grade 5 annular tear at L3-L4. It showed a grade 5 annular tear at L4-5.

16. Dr. Barker further requested authorization to fuse L5-S1. The discogram showed that the L5-S1 "disc is *completely macerated* with contrast noted throughout the intervertebral space." *Id* (emphasis added).

17. Dr. Barker further explained his rationale in his note from the September 3, 2020 evaluation of Claimant. (Ex. 1, pp. 18-20). Dr. Barker stated that Claimant had concordant pain at L4-4 and L4-5, with minimal pain at L2-3, which was used as a control. *Id.* at 19. He further stated,

> She had grade 6 degeneration on the CT scan at L5-S1 with grade 5 degeneration at L4-5 and grade 3 degeneration at L3-4. She had minimal dye leakage on the discogram CT scan at L2-3. Based on these results, she needs an L3-S1 surgical procedure. We would like to avoid fusion as much as possible. We will plan on an L3-4 and L4-5 disc replacement. I told her we are not allowed to do a 3 level disc replacement so we will plan on an L5-S1 anterior lumbar interbody fusion." *Id.*

Dr. Barker's Proposed Surgery is Denied

18. Despite those findings, Respondents denied the requested L3-L4, L4-L5 disc replacement with L5-S1 fusion, pending a Rule 16 medical records review with Dr. Michael Rauzzino. (Ex. 4). Dr. Rauzzino authored his report on September 16, 2020, indicating the surgery was not reasonable, necessary, or related. Dr. Rauzzino stated that the specific request was not consistent with the Colorado Medical Treatment Guidelines ("Guidelines"). Dr. Rauzzino is asked if the current condition is related to the work incident, to which he replies, "I do not think it is *entirely* related to the single incident on 01/25/20 as she had preexisting lumbar issues, but *I do not have all of the records necessary* to make a *full* determination." (Ex. L, p. 005)(emphasis added).

19. In his report, Dr. Rauzzino cited the Guidelines, highlighting that he does not believe "all pain generators are adequately identified" and that the "spine pathology be limited to one level" in regard to the disc replacement. Dr. Rauzzino concludes that he would not recommend *any* additional care for Claimant, other than home exercise and working on her weight. *Id.* at 71. He also notes, regarding the relatedness of the proposed surgery to the work injury, that "…the mechanism of injury is simply not consistent with an injury to cause four separate discs to *fail."(*Ex. L, p. 006)(emphasis added).

20. In his report, Dr. Rauzzino opined that since she is not a surgical candidate, Claimant is at MMI, and since the MRI did not show a structural injury, she would have no permanent impairment. *Id* at 007.

Dr. Barker's Deposition Testimony

21. Dr. Barker testified via deposition on March 22, 2021. He is a board certified orthopedic surgeon. Prior to his deposition, Dr. Barker was provided a copy of Dr. Rauzzino's report for his own review. Dr. Barker testified that Claimant began seeing him as a patient on May 8, 2019 for her previous condition, a herniated disc in her lumbar spine. He treated her condition with an L4-5 discectomy. The primary purpose of the surgery was to treat Claimant's severe left leg pain versus back pain. Dr. Barker also noted that Claimant was able to walk three miles within two weeks of the surgery and that her leg pain was "markedly improved."

22. Dr. Barker testified that he did not see Claimant again until June 4, 2020, in connection with her work injury. He documented that she had injured herself lifting a patient and that she was "complaining of back pain more than leg pain." He reviewed the actual films of the MRI from May, 2019 to the MRI of February, 2020. He testified that the MRI shows annular tearing. Dr. Barker explained that annular tears cause back pain, which is why he is recommending that she have a disc replacement at L3-4 and L4-5 and a fusion at L5-S1.

23. The main reason for recommending this procedure was that a three level disc replacement is not an FDA approved procedure. Since a two level disc replacement is FDA approved, Dr. Barker opined that the best option was the two level disc replacement, with the one level fusion for the completely macerated disc. He further testified this is a procedure which is performed by many other surgeons in this community.

24. Dr. Barker clarified that this particular surgery was to help Claimant's axial back pain, instead of her previous condition that was primarily leg pain. He explained that the goal is to remove the pain generators, which he has personally identified to be the annular tears, and the degenerative discs.

25. Dr. Barker was asked to provide an opinion on causation. He testified that annular tears can show up simply through degeneration, or they can happen as a part of an injury, but it is impossible to say what truly caused the tear itself. Dr. Barker explained that you must correlate the patient's history with the findings to determine what either caused Claimant's tears, or caused them to become symptomatic. Dr. Barker explained:

    > According to what [Claimant] told me, it seems to me that the tears were either *caused by* the lifting incident **or** the tears were *preexisting* and were asymptomatic and then were *rendered symptomatic by the lifting incident.* (Barker Tr., pp. 13-14) (emphasis added).

    Dr. Barker explained the grades of annular tears, with 1 being the least severe and 5 being the worst. which Claimant has multiple of. (Barker Tr., p. 15).

26. Dr. Barker clearly disagreed with Dr. Rauzzino's assessment of the mechanism of injury as well. "So that's a pretty clear-cut mechanism of injury, and right after the lifting injury, the patient started complaining of back pain." (Barker Tr., p. 17). Dr. Barker also disagreed about the pain generators, and felt they had adequately been identified via the imaging, discogram, examination, and subjective reporting. *Id.* Dr. Barker again disagreed with Dr. Rauzzino's recommendation for home exercise and weight loss, as he felt that would do nothing for Claimant's condition after already 13 months. There is no additional treatment to improve her condition other than surgery. *Id* at 18.

Dr. Rauzzino's Deposition Testimony

27. Dr. Rauzzino testified via deposition on March 29, 2021. Consistent with his report, he opined that Claimant's need for surgery was not work related, nor was it reasonably necessary. (Rauzzino Tr. P. 9).

28. He testified that understanding the mechanism of injury is an important piece of the causation analysis. He testified that Claimant's injury is described as a twisting and falling injury based on representations from claimant in the medical records. There may have been a lifting component, but it was not heavy lifting and the injury was more of a twisting injury than a lifting injury. (*Id*., 9.)

29. Based on the described mechanism of injury, Dr. Rauzzino does not find it medically reasonable to believe that claimant injured three levels of lumbar discs during the twisting incident. (*Id*., 10.) Dr. Rauzzino testified that the forces involved in the incident were not powerful enough to injure claimant's spine at three levels. He noted that claimant had pre-existing lumbar spine issues, including a back surgery in 2019 and pre-existing multilevel lumbar degenerative dis disease. (*also see* Ex L, p. 5.)

30. Dr. Rauzzino testified that identification of the pain generators is imperative when treating a low back injury. He stated that failure to correctly identify the pain generators is the most common reason spine surgeries fail. He stated that is very important to understand where the pain is coming from so you can treat it accurately and effectively.

31. Dr. Rauzzino testified that the back is a complex structure with different muscles, nerves and bones and the presence of back pain does not mean there will be a good or simple surgery to correct the pain. This is why the Colorado Medical Treatment Guidelines require the identification of the pain generator to ensure reasonable outcomes from surgical intervention.

32. Dr. Rauzzino testified that he follows and consults the Colorado Medical Treatment Guidelines when examining and treating patients. The Medical Treatment Guidelines are based on scientific evidence and they are well controlled and well thought out studies. They exist for a reason and are useful in determining who might do well with surgery and who might not do well with surgery.

33. Dr. Rauzzino disputes the three possible pain generators listed by Dr. Barker. He acknowledged that discs, facet joints and nerves can all be pain generators, but stated that Dr. Barker left out the most common and important low back pain generator, which are myofascial injuries. People with sore or soft muscles tissue injures are the main cause of back pain.

34. Dr. Rauzzino stated that claimant has axial back pain, which is pain without radiation into the legs. This pain is very difficult to localize, and can be caused by many different things. In Claimant's case, she has multiple discs with degeneration spanning from L2-3, L3-4, L4-5 and L5-S1, but it is impossible to say whether those discs were her sole pain generator.

35. Dr. Rauzzino testified that the Colorado Medical Treatment Guidelines recommend that artificial lumbar disc replacement only be performed when the spine pathology is limited to one level, because there is not enough scientific evidence that two-level disc replacement would be successful. He opined that the surgery being requested by Dr. Barker is a two-level disc replacement and a lumbar fusion, which is essentially a three-level surgery. He testified that a three-level spinal surgery is not something that is typical or common, and is not something that is likely to be successful. A surgery at three levels of the spine has a success rate that is so low that it is not a reasonable thing to do.

36. Dr. Rauzzino further felt it was unreasonable to assume that all three of Claimant's discs were injured in that one particular incident. (Rauzzino Tr., p. 10). It was Dr. Rauzzino's opinion that Claimant's ongoing symptoms were "soft tissue and myofascial injuries, which is really where the vast, vast majority of back pain resides." (Rauzzino Tr. pp. 14-15).

37. Dr. Rauzzino summarized that, within a reasonable degree of probability, the requested back surgery is not related to the work incident of January 25, 2020. Dr. Rauzzino also opined that, within a reasonable degree of probability, the requested back surgery is not reasonable and necessary to treat the work incident of January 25, 2020 based on the Colorado Medical Treatment Guidelines.

CONCLUSIONS OF LAW

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

Generally

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

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

3. Assessing weight, credibility, and sufficiency of the evidence in Workers Compensation proceeding is the exclusive domain of administrative law judge.

University Park Care Center v. Industrial Claim Appeals Office, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The ALJ finds Claimant to have testified credibly in her hearing testimony, including describing, as best she could, her mechanism of injury. Further, the ALJ finds that Claimant has accurately reported her symptoms to her medical providers throughout her treatment, in a sincere effort to maximize her recovery. As a nurse, she is acutely aware of the need to do so. Claimant had recovered quite well from her original, non-work injury, but became symptomatic - with severe axial back pain - immediately following her work injury in 2020.

4. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). In this instance, the ALJ has read the reports and sworn depositions of two medical experts. The ALJ finds that both experts have provided sincere, yet contrasting, professionally rendered medical opinions. As such, the ALJ will determine which experts are more *persuasive*, as opposed to per se *credible.*

Medical Benefits, Generally

5. The Claimant is not entitled to medical care that is not *causally related* to his work-related injury or condition. As noted in *Bekkouche v. Riviera Electric*, W.C. No. 4-514-998 (May 10, 2007), "A showing that the compensable injury caused the need for treatment is a threshold prerequisite to the further showing that treatment is reasonable and necessary." Where the relatedness, reasonableness or necessity of medical treatment is disputed, the Claimant has the burden to prove that the disputed treatment is *causally related* to the injury, and *reasonably necessary* to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.,* W.C. No. 4-117-758 (ICAO April 7, 2003).

6. The Claimant has the burden to prove her entitlement to medical benefits by a preponderance of the evidence. §8-43-201, C.R.S. The Respondents are only liable for the medical treatment that is *reasonable and necessary* to cure and relieve the work-related injury. §8-42-101(1)(a), C.R.S.

Causation, Generally

7. The mere fact that a claimant suffers from a pre-existing condition does not disqualify a claim for compensation or medical benefits if the work-related activities aggravated, accelerated, or combined with the pre-existing condition to produce disability or a need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition, and the claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities and not the underlying pre-existing condition. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949). The claimant must prove by a preponderance of the evidence that his symptoms were proximately caused by an industrial aggravation of a pre-existing condition rather than simply the natural progression of the condition. *Melendez v. Weld County School District #6*, W.C. No. 4-775-869 (ICAO, October 2, 2009).

8. In his report, Dr. Rauzzino notes that Claimant's "mechanism of injury is simply not consistent with an injury that would cause *four* [the ALJ notes that *three* discs, not *four* are actually proposed for repairs in this instance] separate discs to *fail."* Dr. Rauzzino's opinion on *causation* for the poor state of Claimant's discs is duly noted, and Dr. Barker does not disagree. However, as noted above, the evidence in this case points directly Claimant being *asymptomatic for axial back pain* up until the date of work injury, then being consistently, severely symptomatic from that point onwards - and for many months afterwards, at that. Clearly, her discs at L3/L4, L4/L5, and L5/S1 were likely in poor shape already, but as has been pointed out, patients can have remain symptom free for years, despite having imaging studies that appear alarming. While Dr. Rauzzino is Level II accredited, and Dr. Barker is not, the ALJ finds and concludes that Claimant has shown that her need for medical treatment is *causally related* to her work injury.

Medical Treatment Guidelines

9. Pursuant to WCRP 17-2 (A), 7 Code Colo. Regs. 1101-3, health care practitioners are to use the Medical Treatment Guidelines referenced as Exhibits at WCRP 17, 7 Code Colo. Regs. 1101-3 (the "Medical Treatment Guidelines") when furnishing medical aid under the Workers' Compensation Act. The ALJ may also appropriately consider the Medical Treatment Guidelines as an evidentiary tool. *Logiudice v. Siemans Westinghouse,* W.C. 4-665-873 (ICAO January 25, 2011). However, the ALJ is not required to grant or deny medical benefits based upon the Medical Treatment Guidelines. *Thomas v. Four Corners Health Care,* W.C. 4-484-220 (ICAO April 27, 2009).

10. The Medical Treatment Guidelines are not definitive, but merely guidelines, and the ALJ has the discretion to make findings and orders which follow or deviate from the Medical Treatment Guidelines depending upon the evidence presented in a particular case. *Jones v. T.T.C. Illinois, Inc.,* W.C. 4-503-150 (ICAO May 5, 2006), *aff'd Jones v. Industrial Claims Appeals Office,* N. 06CA1053 (Colo. App. March 1, 2007) (not selected for official publication); *Nunn v. United Airlines,* W.C. 4-785-

790 (ICAO September 9, 2011). Pursuant to Rule 17-5(C) of the Rules of Workers' Compensation, "The treatment guidelines set forth care that is generally considered reasonable for most injured workers. However, the Division recognizes that reasonable medical practice may include deviations from these guidelines, as individual cases dictate."

11. The applicable section of Rule 17, Exhibit 1 of the Medical Treatment Guidelines for Low Back Pain (Effective March 30, 2014) states, in its entirety:

11. ARTIFICIAL LUMBAR DISC REPLACEMENT:

a. Description: This involves the insertion of a prosthetic device into an intervertebral space from which a degenerated disc has been removed, sparing only the peripheral annulus. The endplates are positioned under intraoperative fluoroscopic guidance for optimal placement in the sagittal and frontal planes. The prosthetic device is designed to distribute the mechanical load of the vertebrae in a physiologic manner and maintain ROM.

General selection criteria for lumbar disc replacement includes symptomatic onelevel degenerative disc disease. The patient must also meet fusion surgery criteria, and if the patient is not a candidate for fusion, a disc replacement procedure should not be considered. Additionally, the patient should be able to comply with pre-and post-surgery protocol.

There is some evidence that disc replacement has a slight *advantage* over multidisciplinary intensive treatment - 60 hours over 5 weeks. Multi-disciplinary therapy of some type should always be trialed before surgical consideration given the inherent risks of surgery. There is *strong* evidence that disc replacement is not inferior to fusion at 24 months for relief of back pain, reduction of disability and provision of patient satisfaction. There is *good* evidence that the Charite disc is not inferior to allograft fusion with the BAK cage for single level disease and some evidence that the ProDisc is non –inferior to circumferential fusion with iliac crest autograft for single level disease.

There is *some* evidence that a two-level lumbar disc replacement is not inferior to circumferential fusion in patients with 2 level degenerative disc disease 24 months after surgery. However, at this time the FDA has approved this procedure for only one level.

Long-term follow-up studies for several of the current discs is lacking. Patients who had a lumbar ProDisc-L placed had lower scores at 5 years than previously, although 88% were satisfied or somewhat satisfied and 60% would undergo the procedure again. Seventeen-year follow up of Charite disc replacement found spontaneous ankylosis in 60% and reoperation in 11%. There was no adjacent level degeneration in in the 17% of functional implants. Patient with ankylosis were more satisfied than those without.

The ten year outcome for the Acro-flex lumbar disc replacement on a small series of patients reported a 39.3% rate of surgical revision most with conversion to fusion. The study also reported adjacent level disc degeneration in the majority of those with disc disease and 50% of those with fusion. There is *good* evidence from a comparison of ProDisc-L versus circumferential fusion that arthroplasty is not inferior to fusion and for preservation of motion over fusions. There is some evidence from a five year follow up of ProDisc-L versus circumferential fusion that arthroplasty reduces the risk of adjacent disease. This study found a three times lower rate of new adjacent disc disease for disc replacement (6.7% versus 23.8%). The rate of surgery at an adjacent level did not differ significantly. Both groups improved in most scores similarly.

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The theoretical advantage of total disc arthroplasty is that it preserves range of motion and physiologic loading of the disc. This could be an advantage for adults who are physically active. Studies do not demonstrate a long-term advantage of measured function or pain over comparison groups undergoing fusion. The longevity of this prosthetic device has not yet been determined. Significant technical training and experience is required to perform this procedure successfully. Surgeons must be well-versed in anterior spinal techniques and should have attended appropriate training courses, or have undergone training during a fellowship. Mentoring and proctoring of procedures is highly recommended. Reasonable pre-operative evaluation may include an angiogram to identify great vessel location. The angiogram may be either with contrast or with magnetic resonance imaging. An assistant surgeon with anterior access experience is required.

Informed decision making should be documented for all invasive procedures. This must include a thorough discussion of the pros and cons of the procedure and the possible complications as well as the natural history of the identified diagnosis. The purpose of surgery, is to facilitate active therapy by providing short-term relief through reduction of pain. Since most patients with these conditions will improve significantly over time, without invasive interventions, patients must be able to make well-informed decisions regarding their treatment.

b. Complications:

- Nerve and vascular injury.
- Dural tears.
- Sexual dysfunction (retrograde ejaculation).
- Mal-positioning of the prosthesis.
- Suboptimal positioning of the prosthetic may compromise the long-term clinical result.
- Complex Regional Pain Syndrome (CRPS).
- Complications from abdominal Surgery (e.g., hernia or adhesions).
- Re-operation due to complications.

c. Surgical Indications:

- Symptomatic one-level degenerative disc disease established by objective testing (CT or MRI scan followed by [positive provocation discogram]);
- Symptoms unrelieved after six months of active non-surgical treatment;
- All pain generators are adequately defined and treated;
- All physical medicine and manual therapy interventions are completed;

- *Spine pathology limited to one level;* and
- Psychosocial evaluation with confounding issues addressed.

d. Contraindications:

- Significant spinal deformity/scoliosis.
- Symptomatic facet joint arthrosis – If imaging findings and physical exam of pain on extension and lateral bending are present, exploration of facet originated pain should be completed prior to disc replacement.
- Spinal instability at the pathologic or adjacent level requiring fusion.
- Deficient posterior elements.
- Infection.
- Any contraindications to an anterior abdominal approach (including multiple prior abdominal procedures).
- Evidence of nerve root compression, depending on the device used.
- Previous compression or burst fracture.
- Multiple-level degenerative disc disease (DDD).

- Spinal canal stenosis.
- Spondylolysis.
- Spondylolisthesis greater than 3 mm.
- Osteopenia, osteoporosis or any metabolic bone disease.
- Chronic steroid use or use of other medication known to interfere with bone or soft tissue healing.
- Allergy to device components/materials.
- Depending on the device selected, pregnancy or desire to become pregnant.
- Morbid obesity (e.g., body/mass index [BMI] of greater than 40, over 100 pounds overweight).
- Active malignancy.
- Generalized chronic pain

e. Post-Operative Treatment: An individualized rehabilitation program based upon communication between the surgeon and the therapist and using the therapies as outlined in Section F. Therapeutic Procedures Non-Operative. In all cases, communication between the physician and therapist is important to the timing of exercise progressions. Bracing may be appropriate. A formal physical therapy program should be implemented post-operatively. Post-operative active treatment will frequently require a repeat of the therapy sessions previously ordered. The implementation of a gentle aerobic reconditioning program (e.g., walking) and back education within the first post-operative week is appropriate in uncomplicated post-surgical cases. Some patients may benefit from several occupational therapy visits to improve performance of ADLs. Participation in an active therapy program which includes restoration of ROM, core stabilization, strengthening, and endurance is recommended to be initiated at the discretion of the surgeon. Lifting and bending are usually limited for several months at least. Sedentary duty may be able to begin within six weeks in uncomplicated cases. The goals of the therapy program should include instruction in a long-term home based exercise program (refer to F.12. Therapy – Active). (emphasis added)

12. A cursory review of the Guidelines reveals that the prognosis for such procedure is mixed. It is noted that the current version of the Guidelines is just over seven years old, and techniques may well have advanced in the previous seven years. There is nothing in the record to update any updated on FDA approval, other than Dr. Barker's indication that a two-level - but not three level - disc replacement

is now FDA approved. He indicated that he, and others in the community, now perform this procedure. While it is clear that such procedure is not entirely within the current version of the Guidelines, those same Guidelines suggest a possible superior result to a fusion, largely, and not surprisingly, regarding range of motion issues. The criteria for defining success itself from such procedures is itself a work in progress.

13. The ALJ notes that Dr. Barker has significant advantages over Dr. Rauzinno in forming his opinion. He has actually reviewed the films, instead of just the narrative. As a treating physician, he has performed a *physical* examination – a task apparently not requested that Dr. Rauzzino perform. A question that must always ask is whether a *treating* physician would actually make a surgical recommendation without performing a *physical* exam on the patient in his office. And, if he is not willing to skip this step with his own surgical patients, how persuasive is a record reviewing physician's opinion?

14. The ALJ concludes that Dr. Barker has sufficiently identified a pain generator to recommend a surgery. Such process is inexact, but all reasonable steps have been taken in an attempt to do so. The ALJ does not find that further conservative treatment would likely improve Claimant's medical condition. And the ALJ does not find that it is reasonable to declare Claimant to be at MMI, and just give up on further treatment. A reasonable, if potentially risky, surgical alternative is being proposed by her own treating physician. In the end, the desired result may not be reached, but the ALJ finds that Claimant, in consultation with her own surgeon, deserves the chance to find out. A deviation from the Guidelines is warranted in this case, and the ALJ so finds.The surgery, as proposed, is reasonable and necessary to cure Claimant of her work injury.

ORDER

It is therefore Ordered that:

1. Respondents shall pay for the surgery as proposed by Dr. Barker.

2. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein are reserved for future determination.

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

DATED: May 10, 2021

/s/ William G. Edie

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

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he sustained a compensable mental impairment pursuant to §8-41-301, C.R.S. during the course and scope of his employment with Employer on February 7, 2017 in case number 5-038-340-004.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered compensable head injuries during the course and scope of her employment with Employer on September 16, 2017 in case number 5-056-226-003.

3. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period February 7, 2017 until terminated by statute.

FINDINGS OF FACT

Mental Impairment Claim (Case No. 5-038-340-004)

1. Claimant worked for Employer as a Construction Project Administrator. He was employed in the preceding capacity for approximately 29 years.

2. In early 2015 Employer's Manager of Network Operations Dennis P[Redacted] began supervising Claimant. Mr. P[Redacted] continued to supervise Claimant through May 2018.

3. Claimant's title was Supervisor of Regional Operations when Mr. P[Redacted] became his supervisor. Claimant's office was located in Glenwood Springs. Colorado. However, in October 2016 Claimant was transferred to Employer's facility in Eagle, Colorado. Because Claimant was living in Gypsum, Colorado at the time of the transfer, the length of his commute decreased. Moreover, because Respondents had designated Eagle as a "resort community," Claimant received a raise of approximately $1,000.00 per month.

4. Although Claimant worked at Employer's facility in Eagle, Mr. P[Redacted] was stationed at a facility in Fort Collins, Colorado. Mr. P[Redacted] explained that he physically saw Claimant about twice per month.

5. Claimant testified that his transfer to the Eagle facility was a demotion. He also felt his annual bonus had been significantly reduced. Claimant further noted that Employer had made untruthful allegations against him regarding his time card entries. He maintained that he was under a great deal of mental stress as a result of harassment from Mr. P[Redacted]. Claimant generally described a hostile work environment. He

explained that the extraordinary stress culminated in a sudden cardiac event that required emergency treatment on February 7, 2017.

6. On January 15, 2020 Claimant underwent a psychiatric independent evaluation with Gary S. Gutterman, M.D. Dr. Gutterman prepared a report dated February 12, 2020. He asked Claimant to identify the ways in which Mr. P[Redacted] failed to treat him appropriately after his transfer to the Eagle facility. The following is a list of Claimant's allegations against Mr. P[Redacted] prior to the February 7, 2017 incident:

- Mr. P[Redacted] watched him daily;
- Mr. P[Redacted] required him to attend early meetings;
- Mr. P[Redacted] called corporate security regarding Claimant's timesheets because he had concerns about false information regarding absences;
- Mr. P[Redacted] sent Claimant into the field despite work restrictions;
- Mr. P[Redacted] put rocks and leaves on the tires of Claimant's company car to determine whether he was leaving work;
- Mr. P[Redacted] gave Claimant an unfavorable review that significantly reduced his bonus and raise;
- Mr. P[Redacted] violated HIPPA laws by sharing Claimant's confidential medical information with other employees.

7. Mr. P[Redacted] testified at the hearing in this matter. He explained that, because he was based in Fort Collins and Claimant was located in Eagle, he only saw Claimant approximately two times per month. He could not watch Claimant on a daily basis or require him to attend early morning meetings. Furthermore, because of different work locations, Mr. P[Redacted] could not place rocks and leaves on Claimant's tires.

8. Mr. P[Redacted] remarked that he did not report Claimant to corporate security about false timesheets. Rather, Mr. P[Redacted] consulted with Claimant to validate that the actual time he had spent at doctors' appointments was accurately reflected on submitted timesheets. He also contacted the adjuster for Claimant's Workers' Compensation claims to reconcile Claimant's appointment times with timesheets.

9. Mr. P[Redacted] acknowledged that he occasionally required Claimant to go into the field despite his medical restriction of no driving. However, he explained that, if there was a need for Claimant to go into the field, he asked co-employees to drive Claimant. In fact, Mr. P[Redacted] believed that traveling with co-employees would be a good opportunity for Claimant to share his institutional job knowledge.

10. In addressing Claimant's unfavorable reviews, Mr. P[Redacted] explained that Employer developed a new evaluation process in 2015. The evaluation ranked employees on a behavioral axis and a performance axis. Mr. P[Redacted] remarked that he was attempting to make Claimant a better teammate and partner with his co-employees. Because Claimant was not progressing along the behavioral axis, Mr. P[Redacted] gave him a low rating. The evaluation adversely affected Claimant's raise and bonus.

11. Mr. P[Redacted] acknowledged that he received medical records from one of Claimant's authorized treating providers without requesting them. The medical records were M164 forms that are provided to supervisors of injured workers. Mr. P[Redacted] noted that, when he received questions from Claimant's co-employees asking about Claimant's status, he responded in a general manner.

12. Claimant also asserted that a major source of stress was related to a bathroom location. Claimant's co-employee Michelle Lake at the Eagle facility had an office on the main floor immediately adjacent to a bathroom. Ms. Lake asked Claimant to use the upstairs bathroom on occasion because of smells that permeated the hallway near her office. A trip to the upstairs bathroom required Claimant to walk up a flight of stairs then traverse 15 to 20 feet down another hallway.

13. Claimant also specifically identified Mr. P[Redacted]' initial decision not to permit him to have a cubicle door as an example of unfair treatment. Mr. P[Redacted] explained that he had reservations about Claimant's request for the installation of a door for two reasons. First, the cost of the door was not part of his overall budget. Second, he encouraged Claimant to interact with fellow employees at the Eagle facility to share his extensive job knowledge. Mr. P[Redacted] believed installing a door would defeat the purpose of sharing job knowledge. He also explained that an office with a door became available on the second floor of the Eagle facility. Moreover, the office was immediately adjacent to the upstairs bathroom. He offered Claimant the opportunity to move into the office but Claimant declined.

14. Respondents have established an Integrity Line that allows employees to express concerns about their direct supervisors. On January 12, 2017 Claimant contacted Kyleen H[Redacted] to disclose his concerns about Mr. P[Redacted]. Ms. H[Redacted] was an employee of Respondents' insurance broker. Her position involved advocating for injured workers to facilitate the Workers' Compensation process and address concerns. Ms. H[Redacted] testified that during a January 12, 2017 phone conversation with Claimant he mentioned only the following two problems: a co-employee had requested him not use a bathroom close to her office and; he was not permitted to have a door installed on his office.

15. On February 7, 2017 Claimant suffered what Dr. Gutterman diagnosed as an Acute Anxiety Disorder. According to the emergency room note, Claimant was reading an e-mail when he developed chest pain. The February 6, 2017 e-mail was from Employer's Human Resources Manager Monique Amundson. Ms. Amundson confirmed Claimant's Integrity Line concerns including the following: (1) the use of adjacent

bathroom facilities at the Eagle location; (2) his change in job title; and (3) the need for an office door.

16. Claimant detailed that by February 7, 2017 he was under a great deal of stress after being demoted and transferred to Employer's Eagle facility. He faced harassment, discrimination and isolation. Claimant described a hostile work environment. The extraordinary stress culminated in a sudden cardiac event on February 7, 2017 that required emergency treatment.

17. In Dr. Gutterman's February 12, 2020 report he diagnosed Claimant with an episode of Acute Anxiety Disorder that necessitated hospitalization on February 7, 2017. During his January 22, 2021 deposition, Dr. Gutterman remarked that chest pain from an episode of Acute Anxiety Disorder typically occurs due to a recent stressor as opposed to the accumulation of stressors over time. He explained that an individual maintains a certain level of emotional and psychological equilibrium. An acute stressor thus triggers a worsening of anxiety symptoms.

18. After reviewing the February 6, 2017 e-mail from Ms. Amundson to Claimant, Dr. Gutterman determined that the document was not a stressor that would evoke significant symptoms of distress in an individual in similar circumstances because the e-mail was "fairly benign." Dr. Gutterman explained that the e-mail simply outlined aspects of a discussion between Claimant and Ms. Amundson. They also set up an additional meeting on the following day to discuss other administrative issues. Dr. Gutterman remarked that there did not seem to be "anything critical or threatening in the e-mail, just again outlining information." He thus would not expect the e-mail to trigger an acute anxiety disorder or reaction in most individuals.

19. Dr. Gutterman believed that Claimant suffered an Acute Anxiety Disorder that caused his chest pain. These types of symptoms of acute anxiety are caused by situational stress as opposed to an accumulation of stressors. Dr. Gutterman noted that Claimant was reading an e-mail on February 7, 2017 when he experienced chest pain. He determined that reading the e-mail would not evoke significant symptoms of distress in an individual in similar circumstances. Dr. Gutterman did not believe that "any employment stress that [Claimant] enumerated has led to a permanent mental impairment or mental disorder." He remarked that several of the employment stressors Claimant mentioned were "either highly questionable" or "routine administrative requirements and routine aspects of employment."

20. In his February 12, 2020 report Dr. Gutterman stated that Claimant suffers the following: (1) an Adjustment Disorder with Mixed Emotional Features, and (2) an Acute Anxiety Disorder. Dr. Gutterman reasoned that Claimant's Adjustment Disorder was based on a combination of several stressors, both inside and outside of work. The stressors included the physical manifestations of previous Workers' Compensation claims, the death of his father, his relationship with Mr. P[Redacted], using an upstairs bathroom and not getting a door for his office. Dr. Gutterman commented that the February 7, 2017 emergency room visit resulted from situational incidents involving HR and company e-mails with a backdrop of other stressors. Dr. Gutterman concluded that the Adjustment Disorder was not caused by stress primarily in the work environment but

resulted from a multitude of stressors superimposed on the diagnosis of Adjustment Disorder.

21. Claimant has failed to establish that it is more probably true than not that he sustained a compensable mental impairment pursuant to §8-41-301, C.R.S. during the course and scope of his employment with Employer on February 7, 2017 in case number 5-038-340-004. Claimant's contention that he suffered from a mental impairment is largely predicated upon a succession of work events that provoked significant anxiety. The work events involved a job transfer from Glenwood Springs to Eagle, a change in job title that Claimant characterized as a demotion, the reduction of an annual bonus based on a performance review, the request to use an upstairs bathroom at the Eagle facility, not receiving a door for his office and harassment from his supervisor Mr. P[Redacted]. Claimant contends that the extraordinary stress culminated in a sudden cardiac event after reading a work-related e-mail that required emergency treatment on February 7, 2017. However, the evidence reveals that Claimant likely did not suffer a psychologically traumatic event that is generally outside of the usual experience of an individual in his job position and would evoke significant symptoms of distress in a worker in similar circumstances.

22. The succession of job events that Claimant described would not likely evoke significant symptoms of distress in a similarly situated individual. Dr. Gutterman persuasively concluded that Claimant did not meet the criteria for a work-related mental stress claim. He stated that Claimant suffers the following: (1) an Adjustment Disorder with Mixed Emotional Features, and (2) an Acute Anxiety Disorder. Dr. Gutterman reasoned that Claimant's Adjustment Disorder was based on a combination of several stressors, both inside and outside of work. The stressors included the physical manifestations of previous Workers' Compensation claims, the death of his father, his relationship with Mr. P[Redacted], using an upstairs bathroom and not getting a door for his office. Dr. Gutterman commented that the February 7, 2017 emergency room visit resulted from situational incidents involving HR and company e-mails with a backdrop of other stressors. He concluded that the Adjustment Disorder was not caused by stress primarily in the work environment but resulted from a multitude of stressors superimposed on the diagnosis of Adjustment Disorder. After reviewing the February 6, 2017 e-mail from Ms. Amundson to Claimant, Dr. Gutterman determined that the document was not a stressor that would evoke significant symptoms of distress in an individual in similar circumstances because the e-mail was "fairly benign." Dr. Gutterman explained that the e-mail simply outlined aspects of a discussion between Claimant and Ms. Amundson. He remarked that there did not seem to be "anything critical or threatening in the e-mail, just again outlining information." He thus would not expect the e-mail to trigger an acute anxiety disorder or reaction in most individuals.

23. Claimant's symptoms did not arise out of and in the course of employment because they involved job actions taken in good faith by Employer. As credibly detailed by Mr. P[Redacted], he was based in Fort Collins and Claimant was based in Eagle. He thus only saw Claimant approximately two times per month. He could not watch Claimant on a daily basis, require him to attend early morning meetings or place rocks and leaves on Claimant's tires. Mr. P[Redacted] also encouraged Claimant to interact with fellow employees at the Eagle facility to share his extensive job knowledge. He believed

installing a door would defeat the purpose of sharing job knowledge. He also explained that an office with a door became available on the second floor of the Eagle facility that was immediately adjacent to the upstairs bathroom. He offered Claimant the opportunity to move into the office but Claimant declined. Mr. P[Redacted]' testimony generally reveals that he acted in good faith while supervising Claimant. Any mental impairment that Claimant suffered can be attributed to a disciplinary action, work evaluation, job transfer, demotion or similar action. Based on the medical records, credible testimony of Mr. P[Redacted] and persuasive testimony of Dr. Gutterman, Claimant has failed to demonstrate that he suffered from a permanent mental impairment as a result of a psychologically traumatic event that was outside of a similarly situated worker's experience while working as a Supervisor of Regional Operations. Accordingly, Claimant's claim is denied and dismissed.

Head Injury (Case No. 5-056-226-003)

24. Claimant testified that on September 6, 2017 he sustained fall at work that resulted in a head injury. The September 6, 2017 fall is the subject matter of case number 5-056-226-003. Claimant was not sure if he lost consciousness during the fall since he was alone when it happened. He testified that after the fall he drove himself to the nearest fire station and was then transferred to Vail Valley Medical Center for emergency care. Claimant contends that the preceding head injury occurred during the course and scope of his employment with Employer.

25. Claimant has a prior history of Workers' Compensation injuries. On February 24, 2015 Claimant sustained a compensable work-related injury in case number 4-989-017 when he slipped and fell on ice. Claimant was evaluated on March 2, 2015 by Bruce Lippman Sr., M.D. Claimant reported that he landed on his buttocks and right upper extremity. He noted neck stiffness, right wrist discomfort, and a constant headache. Dr. Lippman assessed Claimant with a cervical strain and a right upper extremity contusion. Claimant did not report a head injury. On April 6, 2015 Dr. Lippman evaluated Claimant and remarked that his only remaining symptom was right wrist soreness. Claimant ultimately underwent right wrist surgery on August 12, 2015. The medical records after April are devoid of any reference to a head injury or head injury type complaints.

26. On January 11, 2016 Claimant sustained another compensable work-related injury in case number 5-004-904 when he again slipped and fell on ice. On January 18, 2016 Dr. Lippman evaluated Claimant. Claimant reported he fell on ice and hit the back of his head with no loss of consciousness. He noted dizziness, nausea, headaches and neck tightness. Dr. Lippman assessed Claimant with a concussion without loss of consciousness, a cervical strain and a lower back strain. He remarked that this was Claimant's first head injury or concussion.

27. On June 23, 2016 Claimant was rear-ended in a low-speed motor vehicle accident while working for Employer in case number 5-026-332. Claimant presented to Valley View Hospital with complaints of neck pain. He reported no loss of consciousness. The attending physician noted that a CT scan of the head was not warranted because Claimant did not exhibit seizures, vomiting, vision changes, gait instability or loss of consciousness. Claimant was diagnosed with a concussion and neck pain.

28. On October 4, 2016 Jeffrey Siegel, M.D. evaluated Claimant and administered a brain MRI. Dr. Siegel reviewed the brain MRI and noted no intracranial pathology. He assessed Claimant with dizziness after three concussive injuries over the past couple of years. Dr. Siegel found no acute or subacute neuropathology other than Claimant's reported residual concussive symptoms. He determined that no further treatment or diagnostic recommendations were necessary.

29. On December 20, 2016 Dr. Siegel again evaluated Claimant. Claimant reported that about six days earlier he bent down, experienced vertigo and fell forward into a cabinet wall. However, Claimant denied passing out. Dr. Siegel determined that it was unclear whether Claimant sustained another concussion.

30. On May 17, 2017 Claimant visited Marc Wasserman, M.D. at Blue Sky Neurology. Claimant told Dr. Wasserman that he had suffered head traumas in both February 2015 and December 2016. He also disclosed that, following the December 2016 incident, his symptoms progressively worsened. Dr. Wasserman believed that Claimant's neurological examination was "somewhat embellished" and believed there might be a psychological overlay. He thus ordered a neuropsychological evaluation.

31. On July 14, 2017 Claimant underwent a neuropsychological evaluation with Katherine Giles, Psy.D. Claimant reported that he hit his head on the ground during the February 2015, January 2016 and December 2016 incidents. He also experienced whiplash as a result of the June 2016 motor vehicle accident. Claimant reported that his cognitive problems began following the February 2015 slip and fall but progressively worsened with each subsequent concussive injury. Dr. Giles concluded that most of Claimant's evaluation scores were invalid and not interpretable. She commented that Claimant's scores fell below levels of patients with significant brain injuries and degenerative neurological conditions. The results were also inconsistent with Claimant's observed ability to provide a coherent history. Dr. Giles thus summarized that Claimant's clinical profile suggested a possible preoccupation with physical functioning and health matters. He tended to develop physical and cognitive symptoms in response to emotional distress or "conversion somatization." Dr. Giles diagnosed concussions without loss of consciousness, post-concussive syndrome, chiari malformation type 1 and depression. She noted that cognitive dysfunction is atypical in Chiari type 1 malformations but the structural abnormality could produce or exacerbate Claimant's symptoms. She recommended a follow-up with Marc Wasserman M.D.

32. On August 15, 2017 Claimant visited Dr. Wasserman for an evaluation. Dr. Wasserman commented that, because the July 14, 2017 neuropsychological evaluation showed validity measures outside typical parameters, interpretation was difficult. He also noted that Claimant reported severe depressive symptoms as well as tendencies towards conversion and somatization. He summarized:

> [Claimant] does have a Chiari malformation, but I do not think all of his current symptoms can be explained by that. He shows possible somatization as well as depression on his neuropsychological evaluation and I think psychological factors play a great deal into his current symptomology.

33. On February 10, 2021 the parties conducted the post-hearing evidentiary deposition of Nicholas K. Olsen, D.O. Dr. Olsen performed four independent medical evaluations of Claimant on the following dates: July 31, 2017; January 8, 2018; June 20, 2018 and; April 8, 2019. He testified that he reviewed over a banker's box of Claimant's medical records.

34. In the July 31, 2017 evaluation, Dr. Olsen reviewed medical records and performed a physical examination. Dr. Olsen noted that Claimant initially reported the inability to recall whether he struck his head or lost consciousness in the February 2015 incident but later claimed he sustained his first concussion at the time. Claimant also reported that a third incident occurred in December 2016 when he leaned over to work on a pedestal and fell over into snow with no head injury. Dr. Olsen determined that Claimant inaccurately portrayed his injuries compared to the medical records because there was no documented head injury until January 11, 2016. In fact, Dr. Olsen explained that Claimant suffered a mild concussion without loss of consciousness on January 11, 2016. The symptoms significantly improved prior to Claimant's June 2016 motor vehicle accident. Dr. Olsen also remarked that Claimant did not suffer any loss of consciousness in the June 2016 motor vehicle accident. He found the potential for conversion or somatization, as noted by Dr. Giles, to be a likely explanation for Claimant's current complaints. Dr. Olsen concluded there was little objective evidence to support further treatment for Claimant's January 11, 2016 injury or the June 23, 2016 motor vehicle accident.

35. On September 7, 2017 Claimant returned to Dr. Lippman for an evaluation. Claimant reported that on the prior day he squatted down to look at an electrical box at work and the next thing he knew he was flat on his back. He awoke dazed and confused. Dr. Lippman questioned whether Claimant sustained a head injury because it was unclear what precipitated the event.

36. In his January 8, 2018 report Dr. Olsen documented Claimant's history of the September 7, 2017 accident. Dr. Olsen specifically noted that Claimant "opened the box, squatted down to look at the cables, and from there I can't remember anything until I was on the ground." Claimant did not say that he struck his head, was lightheaded, smelled something or was overheated during the incident.

37. Dr. Olsen testified that Claimant did not need any medical treatment to cure and relieve the effects of the September 6, 2017 accident. Although Claimant drove himself to the emergency room, medical providers did not institute any treatment. Dr. Olsen could not state within a reasonable degree of medical probability that Claimant sustained any kind of work-related injury on September 6, 2017. He summarized:

> [Claimant] indicated that he couldn't remember striking his head on September 6, 2017. There was no worsening of the subject of complaints reported to me between the two evaluations, no difference between the report of cognitive complaints to myself and to Dr. Giles. And the medical records that I reviewed from Dr.

> Littman's report do not indicate him reporting head injuries as first seen, and he did not have any treatment recommended in the emergency room for an alleged head injury.

38. Claimant has failed to demonstrate that it is more probably true than not that he suffered compensable head injuries during the course and scope of his employment with Employer on September 6, 2017 in case number 5-056-226-003. The record reflects that Claimant has repeatedly asserted he suffered numerous head injuries while working for Employer. However, Claimant's complaints have been largely inconsistent with medical records and psychological testing. Claimant has not always been forthcoming with medical providers and misrepresented his degree of impairment. Claimant has exaggerated the number of his concussions by stating that he struck his head when hitting his head was not reflected in the medical records. He has also failed various validity measures during neuropsychological evaluations.

39. Dr. Olsen persuasively explained that on September 6, 2017 Claimant "opened the box, squatted down to look at the cables, and from there I can't remember anything until I was on the ground." Claimant did not say that he had struck his head during the incident. Although Claimant drove himself to the emergency room, medical providers did not institute any treatment. Moreover, on the day after the incident Claimant reported to Dr. Lippman that he had squatted down to look at an electrical box and the next thing he knew he was flat on his back. Dr. Lippman questioned whether Claimant sustained a head injury because it was unclear what precipitated the incident. The combination of Claimant's questionable reporting of prior accidents, failure of validity measures on psychological testing and persuasive medical opinion of Dr, Olson reflect that Claimant did not likely suffer a work injury on September 6, 2017. Claimant's work activities did not aggravate, accelerate or combine with a pre-existing condition to produce a need for medical treatment.

CONCLUSIONS OF LAW

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

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as

unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

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

Mental Impairment Claim (Case No. 5-038-340-004)

4. The test for distinguishing between an accidental injury and an occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993). “Occupational disease” is defined by §8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

5. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, §8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

6. The Workers’ Compensation Act has authorized recovery for a broad range of physical injuries, but has “sharply limited” a claimant’s potential recovery for mental injuries. *Mobley v. King Soopers*, WC No. 4-359-644 (ICAO, Mar. 9, 2011). Enhanced proof requirements for mental impairment claims exist because “evidence of causation is less subject to direct proof than in cases where the psychological consequence follows a physical injury.” *Davidson v. City of Loveland Police Department*, WC No. 4-292-298 (ICAO, Oct. 12, 2001), *citing Oberle v. Industrial Claim Appeals Office*, 919 P.2d 918 (Colo. App. 1996). A claimant experiencing physical symptoms caused by emotional stress is subject to the requirements of the mental stress statutes. *Granados v. Comcast*

Corporation, WC No. 4-724-768 (ICAO, Feb. 19, 2010); *see Esser v. Industrial Claim Appeals Office*, 8 P.3d 1218 (Colo. App. 2000), affd 30 P.3d 189 (Colo. 2001); *Felix v. City and County of Denver* W.C. Nos. 4-385-490 & 4-728-064 (ICAO, Jan. 6, 2009).

7. Section 8-41-301(2)(a), C.R.S. imposes additional evidentiary requirements regarding mental impairment claims. The section provides, in relevant part:

> A claim of mental impairment must be proven by evidence supported by the testimony of a licensed physician or psychologist. For purposes of this subsection (2), "mental impairment" means a recognized, permanent disability arising from an accidental injury arising out of and in the course of employment when the accidental injury involves no physical injury and consists of a psychologically traumatic event that is generally outside of a worker's usual experience and would evoke significant symptoms of distress in a worker in similar circumstances. A mental impairment shall not be considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, lay-off, demotion, promotion, termination, retirement, or similar action taken in good faith by the employer.

The definition of "mental impairment" consists of two clauses that each contains three elements. The first clause requires a claimant to prove the injury consists of: "1) a recognized, permanent disability that, 2) arises from an accidental injury involving no physical injury, and 3) arises out of the course and scope of employment. *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023, 1030 (Colo. 2004). The second clause requires the claimant to prove the injury is: "1) a psychologically traumatic event, 2) generally outside a worker's usual experience, and 3) that would evoke significant symptoms of distress in a similarly situated worker." *Id.*

8. Effective July 1, 2018 §8-41-301, C.R.S. was amended by House Bill 17-1229. The amendments broadened the category of compensable mental impairment injuries to include Post Traumatic Stress Disorder (PTSD) arising from events "within a worker's usual experience" where "the worker repeatedly visually witnesses serious bodily injury, or the immediate aftermath of serious bodily injury, or one or more people as the result of the intentional act of another person or an accident." §8-41-301(3)(b)(II)(C), C.R.S.; *see Montoya v. Fremont County Sheriff's Office*, W.C. No. 5-084-877 (ICAO Oct. 16, 2019). Additionally, the PTSD is not required to evoke symptoms of distress in a worker in similar circumstances. *Id*.

9. As found, Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable mental impairment pursuant to §8-41-301, C.R.S. during the course and scope of his employment with Employer on February 7, 2017 in case number 5-038-340-004. Claimant's contention that he suffered from a mental impairment is largely predicated upon a succession of work events that provoked significant anxiety. The work events involved a job transfer from Glenwood Springs to Eagle, a change in job title that Claimant characterized as a demotion, the reduction of an annual bonus based on a performance review, the request to use an upstairs bathroom

at the Eagle facility, not receiving a door for his office and harassment from his supervisor Mr. P[Redacted]. Claimant contends that the extraordinary stress culminated in a sudden cardiac event after reading a work-related e-mail that required emergency treatment on February 7, 2017. However, the evidence reveals that Claimant likely did not suffer a psychologically traumatic event that is generally outside of the usual experience of an individual in his job position and would evoke significant symptoms of distress in a worker in similar circumstances.

10. As found, the succession of job events that Claimant described would not likely evoke significant symptoms of distress in a similarly situated individual. Dr. Gutterman persuasively concluded that Claimant did not meet the criteria for a work-related mental stress claim. He stated that Claimant suffers the following: (1) an Adjustment Disorder with Mixed Emotional Features, and (2) an Acute Anxiety Disorder. Dr. Gutterman reasoned that Claimant's Adjustment Disorder was based on a combination of several stressors, both inside and outside of work. The stressors included the physical manifestations of previous Workers' Compensation claims, the death of his father, his relationship with Mr. P[Redacted], using an upstairs bathroom and not getting a door for his office. Dr. Gutterman commented that the February 7, 2017 emergency room visit resulted from situational incidents involving HR and company e-mails with a backdrop of other stressors. He concluded that the Adjustment Disorder was not caused by stress primarily in the work environment but resulted from a multitude of stressors superimposed on the diagnosis of Adjustment Disorder. After reviewing the February 6, 2017 e-mail from Ms. Amundson to Claimant, Dr. Gutterman determined that the document was not a stressor that would evoke significant symptoms of distress in an individual in similar circumstances because the e-mail was "fairly benign." Dr. Gutterman explained that the e-mail simply outlined aspects of a discussion between Claimant and Ms. Amundson. He remarked that there did not seem to be "anything critical or threatening in the e-mail, just again outlining information." He thus would not expect the e-mail to trigger an acute anxiety disorder or reaction in most individuals.

11. As found, Claimant's symptoms did not arise out of and in the course of employment because they involved job actions taken in good faith by Employer. As credibly detailed by Mr. P[Redacted], he was based in Fort Collins and Claimant was based in Eagle. He thus only saw Claimant approximately two times per month. He could not watch Claimant on a daily basis, require him to attend early morning meetings or place rocks and leaves on Claimant's tires. Mr. P[Redacted] also encouraged Claimant to interact with fellow employees at the Eagle facility to share his extensive job knowledge. He believed installing a door would defeat the purpose of sharing job knowledge. He also explained that an office with a door became available on the second floor of the Eagle facility that was immediately adjacent to the upstairs bathroom. He offered Claimant the opportunity to move into the office but Claimant declined. Mr. P[Redacted]' testimony generally reveals that he acted in good faith while supervising Claimant. Any mental impairment that Claimant suffered can be attributed to a disciplinary action, work evaluation, job transfer, demotion or similar action. Based on the medical records, credible testimony of Mr. P[Redacted] and persuasive testimony of Dr. Gutterman, Claimant has failed to demonstrate that he suffered from a permanent mental impairment as a result of a psychologically traumatic event that was outside of a similarly situated

worker's experience while working as a Supervisor of Regional Operations. Accordingly, Claimant's claim is denied and dismissed.

Head Injury (Case No. 5-056-226-003)

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

13. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.,* W.C. No. 4-650-711 (ICAO, Feb. 15, 2007); *David Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

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

15. The provision of medical care based on a claimant's report of symptoms does not establish an injury but only demonstrates that the claimant claimed an injury. *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020). Moreover, a referral for medical care may be made so that the respondent would not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id.* Although a physician provides diagnostic testing, treatment, and work restrictions based on a claimant's reported symptoms. It does not follow that the claimant suffered a compensable injury. *Fay v. East Penn manufacturing Co., Inc.*, W.C. No. 5-108-430-001 (ICAO, Apr. 24, 2020); *cf. Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997) ("right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence, that

the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment”). While scientific evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory supporting compensability when making a determination. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020).

16. As found, Claimant has failed to demonstrate by a preponderance of the evidence that he suffered compensable head injuries during the course and scope of his employment with Employer on September 6, 2017 in case number 5-056-226-003. The record reflects that Claimant has repeatedly asserted he suffered numerous head injuries while working for Employer. However, Claimant’s complaints have been largely inconsistent with medical records and psychological testing. Claimant has not always been forthcoming with medical providers and misrepresented his degree of impairment. Claimant has exaggerated the number of his concussions by stating that he struck his head when hitting his head was not reflected in the medical records. He has also failed various validity measures during neuropsychological evaluations.

17. As found, Dr. Olsen persuasively explained that on September 6, 2017 Claimant “opened the box, squatted down to look at the cables, and from there I can’t remember anything until I was on the ground.” Claimant did not say that he had struck his head during the incident. Although Claimant drove himself to the emergency room, medical providers did not institute any treatment. Moreover, on the day after the incident Claimant reported to Dr. Lippman that he had squatted down to look at an electrical box and the next thing he knew he was flat on his back. Dr. Lippman questioned whether Claimant sustained a head injury because it was unclear what precipitated the incident. The combination of Claimant’s questionable reporting of prior accidents, failure of validity measures on psychological testing and persuasive medical opinion of Dr, Olson reflect that Claimant did not likely suffer a work injury on September 6, 2017. Claimant’s work activities did not aggravate, accelerate or combine with a pre-existing condition to produce a need for medical treatment.

ORDER

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

1. Claimant’s claim in Workers’ Compensation case number 5-038-340-004 is denied and dismissed.

2. Claimant’s claim in Workers’ Compensation case number 5-056-226-003 is denied and dismissed.

3. Any issues not resolved in this order are reserved for future determination.

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

DATED: May 11, 2021.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-145-854-001

ISSUE

1. Whether Claimant established by a preponderance of the evidence that he sustained an injury to his right knee arising out of the course of his employment with Employer on May 21, 2020.

2. Whether Claimant established by a preponderance of the evidence an entitlement to an award of medical benefits for a work-related injury to his right knee arising out of the course of his employment with Employer on May 21, 2020.

3. Whether Claimant established by a preponderance of the evidence an entitlement to temporary total disability (TTD) benefits.

4. Whether Respondents are entitled to an offset against Claimant's TTD benefits, if awarded, based on Claimant's receipt of unemployment benefits.

FINDINGS OF FACT

1. Claimant is a 55-year-old man who was employed by Employer as a maintenance technician for approximately seventeen years, ending on October 6, 2020.

2. Claimant's job duties included performing maintenance and cleaning at a multi-story apartment complex.

3. On May 21, 2020, while working for Employer, Claimant was carrying a ladder and toolbox up a flight of stairs to go to apartment units to perform maintenance services. Claimant stepped up the stairs when he hyperextended his right knee and felt a "pop" in the right knee. Claimant's supervisor was present when the injury occurred, assisted Claimant down the stairs and drove Claimant for medical treatment.

4. Prior to May 21, 2020, Claimant had no medical treatment for his right knee, no complaints of right knee pain, no restrictions and no diagnosis related to his right knee. Prior to May 21, 2020, Claimant's right knee had not impeded Claimant's ability to perform his regular duties as a maintenance technician for Employer. Claimant's testimony regarding the lack of prior symptoms and the mechanism of injury was credible.

5. On May 21, 2020, Claimant was seen at Concentra by Lacie Esser, PA-C. Claimant was accompanied during his visit with Ms. Esser by his supervisor, "Anthony." Claimant reported he was carrying tools and a ladder up some stairs when he stepped up with his right foot and his right knee buckled/shifted causing significant pain. Anthony reported to Ms. Esser that he witnessed the Claimant's injury and it "looked really bad." Ms. Esser's examination demonstrated effusion of the right knee with diffuse tenderness over the anterior knee and in the quadriceps tendon, with some deficit in active range of motion. Patellofemoral testing was positive for patellar grind and patellofemoral

apprehension testing. Ms. Esser diagnosed Claimant with a strain of the right knee and recommended that Claimant undergo an MRI of the right knee. Claimant was also provided with a right knee brace. Ms. Esser assigned work restriction to include no squatting, no kneeling, wearing a splint or brace on his right leg, no walking on uneven surfaces, no climbing ladders or stairs, and seated duty only. Ms. Esser's report was co-authored by Lori Long-Miller, M.D. (Ex. 2).

6. X-rays of Claimant's right knee performed on May 21, 2020 demonstrated no acute fracture or dislocation, degenerative changes, a bipartite patella, and several loose bodies in the suprapatellar bursa. (Ex. 2).

7. On May 27, 2020, Claimant again saw Ms. Esser at Concentra. Claimant's knee was still swollen and painful, and Claimant was working with restrictions. On examination, Claimant had right knee effusion grade of 2+ and swelling, with tenderness over the anterior knee. Ms. Esser characterized Claimant's range of motion as "severely limited" and ordered an MRI ordered STAT for concern of internal derangement. Work restrictions included no squatting, kneeling, wearing a brace, no stair climbing or ladder use, and "seated duty only." Ms. Essert noted that Claimant had significant difficulties with the physical requirements of his job. Claimant's supervisor was present for Claimant's examination. (Ex. 2).

8. An MRI of Claimant's right knee was performed on May 28, 2021, and was interpreted as showing no fracture or ligamentous or meniscus tear. With effusion, synovitis, and multiple chronic and degenerative findings. (Ex. D).

9. On June 8, 2020, Claimant saw Michael Hewitt, M.D., on referral from Ms. Esser. Dr. Hewitt observed that Claimant had an antalgic gait with decreased stance on the right leg, and that the right leg alignment was within normal limits. Claimant reported his knee hyperextended and "gave way" and he grabbed a railing to prevent a fall. Dr. Hewitt reviewed Claimant's MRI which showed moderate knee effusion and a large cyst within his distal femur. Claimant also has advanced patellofemoral chondromalacia with complete loss of patellofemoral articular cartilage. Dr. Hewitt diagnosed Claimant with right knee advanced patellofemoral chondromalacia with intraosseous and intraarticular ganglion cyst. He recommended conservative treatment and consideration of a cortisone injection in the future. (Ex. B).

10. On June 12, 2020, Claimant saw Thomas Corson, D.O., at Concentra for a re-check of his right knee. Claimant had not yet begun physical therapy and reported his symptoms were about the same. On examination, Dr. Corson noted effusion of the knee and diffuse tenderness over the knee, with pain on flexion. Dr. Corson indicated Claimant was approximately 25% of the way to meeting the physical requirements of his job and diagnosed Claimant with a strain of the right knee. Claimant was scheduled for physical therapy and advised to return in two weeks. Claimant's work restrictions remained in place and were unchanged. (Ex. 2).

11. On June 16, 2020, Claimant began physical therapy at Concentra. Over the course of the next three months (between June 16 and September 9, 2020), Claimant attended 19 physical therapy appointments. (Ex. 5).

12. On June 26, 2020, Claimant returned to Concentra and saw Ms. Esser. Claimant continued to have pain, tenderness, swelling of his right knee with limited range of motion, and an antalgic gait on the right. Claimant's work restrictions remained unchanged. (Ex. 2).

13. On July 14, 2020, Claimant saw Dr. Long-Miller at Concentra reporting slow improvement in his knee with continued swelling and pain. Dr. Long-Miller diagnosed a right knee strain and work restrictions remained unchanged for modified duty. (Ex. 5).

14. On August 3, 2020, Dr. Hewitt performed a right knee cortisone injection in Claimant's right knee, which was medically reasonable. (Ex. B). The following day, August 4, 2020, Dr. Hewitt noted that Claimant had experienced minimal improvement with conservative treatment, and that the final treatment option was knee arthroscopy to address the intraarticular ganglion cyst. Dr. Hewitt opined that the arthroscopy to address the cyst "is both medically reasonable and appropriate, given his acute working event." (Ex. B).

15. On August 5, 2020, Claimant reported to Ms. Esser that the injection performed by Dr. Hewitt had increased his pain and that he had to miss work due to the pain. (Ex. 5)

16. On August 18, 2020, Claimant was evaluated by Karen Hill, D.O., at Concentra. Dr. Hill noted mild effusion and swelling in the lateral aspect of the right knee with tenderness and crepitus. Claimant's work restrictions remained unchanged. (Ex. 5).

17. On August 20, 2020, Respondents filed a Notice of Contest asserting that Claimant's claimed injury was not work-related. (Ex. 1).

18. On August 26, 2020, Claimant saw Ms. Esser and reported he was no longer working because Employer could not accommodate his work restrictions. Claimant was still under the same work modifications and was referred to Cary Motz, M.D., for a second opinion regarding his knee. (Ex. 5).

19. On September 1, 2020, Dr. Hewitt submitted a surgery order to Insurer seeking authorization for an arthroscopic removal of a cyst of Claimant's right knee meniscus. (Ex. 3)

20. On September 8, 2020, Claimant saw Dr. Motz for a second opinion. Dr. Motz disagreed with Dr. Hewitt's recommendation for an arthroscopy. Instead, Dr. Motz posited that Claimant's symptoms were primarily related to patella patellofemoral arthritic issues which would not be addressed in the surgery proposed by Dr. Hewitt. Dr. Motz felt that a patellectomy or partial knee replacement would be more likely to address Claimant's symptoms. (Ex. 4).

21. On September 20, 2020, Claimant saw Ms. Esser. Claimant reported that he was not working and requested that his work restriction be revised to see if Employer would be able to accommodate them to allow him to return to work, but he also reported he could not perform his full duty. Ms. Esser modified Claimant's work restrictions to remove the "seated work only" restriction and amending it to "sit as needed." (Ex. 5)

22. On October 5, 2020, Dr. Hewitt noted that Claimant would like to proceed with arthroscopy, but authorization for surgery had been denied pending an independent medical examination regarding causality. (Ex. B).

23. On February 1, 2021, Claimant was examined by Timothy O'Brien, M.D., for an independent medical examination at the request of Respondents. Dr. O'Brien's examination demonstrated that Claimant's right knee had decreased range of motion when compared to the left, but was otherwise negative. Dr. O'Brien opined that Claimant did not sustain a work-related injury on May 21, 2020, did not aggravate or accelerate any underlying arthritic condition, that Claimant did not require any medical attention or treatment for his knee, and that claimant did not require any activity restrictions. Instead, Dr. O'Brien opined that the treatment Claimant received, and any future treatment is "causally related to [Claimant's] personal health and his current station in life." Dr. O'Brien opined that the forces of Claimant climbing stairs would not be sufficient to cause any injury or aggravate a pre-existing condition. Dr. O'Brien's opinion, however, does not address whether the actual reported mechanism of injury (i.e., hyperextension of Claimant's right knee) could result in an injury or aggravation of preexisting condition. (Ex. A). Dr. O'Brien's opinions are neither credible nor persuasive.

24. Dr. O'Brien's opinions are based on his examination and review of some medical records. However, Dr. O'Brien did not conduct a full review of medical records and in at least one instance, mischaracterized another provider's findings. For example, Dr. O'Brien's report does not indicate that he reviewed Claimant's May 21, 2020 Concentra visit in which Claimant's supervisor describes the incident as "really bad." Also, in discussing Dr. Hewitt's June 8, 2020 visit, Dr. O'Brien indicates Dr. Hewitt's examination "demonstrated that the right lower extremity was, **'…within normal limits**." (Emphasis original). Dr. Hewitt's report does not, however, conclude that the Claimant's right lower extremity was "within normal limits," but rather that Claimant's "right lower extremity alignment" was within normal limits. (Emphasis added). In reaching his opinions, Dr. O'Brien noted that although Claimant has no medical records which support Dr. O'Brien's opinions, Dr. O'Brien believes had Claimant's right knee "been examined by a trained orthopedic surgeon and that exam occurred anytime within the year that preceded the incident of May 21, 2020, the orthopedic exam and interview would have produced factual information that supports my opinion." Dr. O'Brien's opinion in this regard is speculative and not persuasive.

25. Claimant credibly testified that prior to May 21, 2020, he had worked for approximately 17 years without work restrictions. Additionally, prior to May 21, 2020, Claimant had no treatment for his right knee, no documented complaints, and no diagnosis of any condition existing in his right knee.

26. Claimant was terminated from his employment with Employer on October 6, 2020. At the time of his termination, Claimant continued to be subject to work restrictions which prevented him from performing his regular job duties. Upon termination of his employment, Claimant sustained actual wage loss due to his industrial injury and resulting disability. Claimant has not worked since October 6, 2020, and began receiving unemployment benefits beginning in November 2020. Claimant initially received $504.00 per week in gross unemployment benefits, which was increased to $804.00 per week sometime in 2021. At the time of hearing, Claimant's net unemployment benefits were $762.00 per week.

27. The parties stipulates that, if Claimant did sustain a compensable injury is entitled to temporary disability benefits from the date October 6, 2020, forward, Respondents are entitled to an offset in temporary disability benefits based on Claimant's receipt of unemployment benefits starting November 2020.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

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

COMPENSABILITY

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, … performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The Claimant must prove his injury arose out of the course and scope of his employment by a preponderance of the evidence. § 8-41-301(1)(b) & (c), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). "Arising out of" and "in the course of" employment comprise two separate requirements. *Triad Painting Co.*, 812 P.2d at 641. An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d at 641; *Hubbard v. City Market,* W.C. No. 4-934-689-01 (ICAO, Nov. 21, 2014). The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury "has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014). The mere fact that an injury occurs at work does not establish the requisite causal relationship to demonstrate that the injury arose out of the employment. *Finn v. Industrial Commission,* 437 P.2d 542 (Colo. 1968); *Sanchez v. Honnen Equipment Company,* W.C. No. 4-952-153-01 (ICAO, Aug. 10, 2015).

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

If the precipitating cause of an injury is a preexisting health condition that is personal to the claimant, the injury does not arise out of the employment unless a "special hazard" of the employment combines with the preexisting condition to contribute to the accident or the injuries sustained. *National Health Laboratories v. Industrial Claim Appeals Office*, 844 P.2d 1259 (Colo. App. 1992); *Rice v. Dayton Hudson Corp.,* W.C. No. 4-386-678 (ICAO, July 29, 1999); *Alexander v. Emergency Courier Services,* W.C. No. 4-917-156-01 (ICAO, Oct. 14, 2014). This rule is based upon the rationale that, unless a special hazard of the employment increases the risk or extent of injury, an injury due to the claimant's preexisting condition lacks sufficient causal relationship to the employment to meet the arising out of employment test. *Ramsdell v. Horn*, 781 P.2d 150

(Colo. App. 1989); *Alexander v. Emergency Courier Services,* W.C. No. 4-917-156-01 (ICAO, Oct. 14, 2014). In order for a condition of employment to qualify as a "special hazard" it must not be a "ubiquitous condition" generally encountered outside the workplace. *Ramsdell v. Horn, supra*; *Briggs v. Safeway,* Inc. W.C. No. 4-950-808-01 (ICAO, July 8, 2015). Conversely, if the precipitating cause of the injury involves conditions or circumstances of the employment, there is no need to prove a "special hazard" for the injury to arise out of the employment. *Cabela v. Industrial Claim Appeals Office,* 198 P.3d 1277 (Colo. App. 2008); *H&H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). "[T]here is no requirement that a particular activity of employment which aggravates the preexisting condition be unique to the employment, or that it constitute a 'special hazard" of the employment. To the contrary, the special hazard requirement applies only where the precipitating cause of an injury is a preexisting non-industrial condition which the claimant brings to the workplace." *Shelton v. Eckstein Electric Company*, W.C. No. 4-724-391 (ICAO, May 3, 2008).

Claimant has established by a preponderance of the evidence that he sustained an injury to his right knee arising out of the course of his employment with Employer on May 21, 2020. Claimant credibly testified that he had no prior knee diagnosis, symptoms, or restrictions on his ability to work, and was asymptomatic until May 21, 2020. While performing his job duties, Claimant hyperextended his knee while ascending stairs carrying tools and a ladder. Claimant's description of the mechanism of injury was consistent throughout his medical records, and the incident was witnessed by Claimant's supervisor who took him for his initial medical treatment and accompanied Claimant to the initial appointment. Dr. O'Brien's opinion that the incident was insufficient to cause any injury is not credible or persuasive. Given Claimant's underlying knee pathology, the ALJ concludes that Claimant's May 21, 2020 injury aggravated or combined with Claimant's pre-existing conditions to necessitate the need for medical treatment.

Respondents argue that Claimant's injury is not compensable because Claimant has a pre-existing, weakened condition and that there was no "special hazard" involved with the mechanism of injury. Respondents' contention that the "special hazard" rule applies under these circumstances is misplaced. No credible evidence exists that Claimant's underlying knee condition caused Claimant to hyperextend his knee. As such, there is no credible evidence that Claimant's underlying condition was the "precipitating cause" of his injury. Instead, as found, Claimant's work injury, sustained in the performance of his job duties, aggravated, or combined with his previously asymptomatic underlying condition to produce a need for medical treatment and disability that did not exist prior to May 21, 2020. Accordingly, the "special hazard" rule is not applicable in this case. Even if the "special hazard" rule were applicable, Claimant was not engaged in a "ubiquitous condition" because he was carrying tools and a ladder while ascending stairs. Claimant has established by a preponderance of the evidence that he sustained a compensable injury to his right knee on May 21, 2020.

MEDICAL TREATMENT

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). Our courts have held that in order for a service to be considered a "medical benefit" it must be provided as medical or nursing treatment, or incidental to obtaining such treatment. *Country Squires Kennels v. Tarshis,* 899 P.2d 362 (Colo. App. 1995). A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Industrial Claim Appeasl Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537, (ICAO, May 31, 2006). A service is incidental to the provision of treatment if it enables the claimant to obtain treatment, or if it is a minor concomitant of necessary medical treatment. *Country Squires Kennels v. Tarshis,* 899 P.2d 362 (Colo. App. 1995)*; Karim al Subhi v. King Soopers, Inc.,* W.C. No. 4-597-590, (ICAO, July 11, 2012). Medical treatment which has a "reasonable prospect" of diagnosing or defining a Claimant's condition to suggest a course of further treatment constitutes a compensable medical benefit. *Churchill v. Goodyear Tire and Rubber Co.*, W.C. No. 4-203-686 (ICAP, Jan. 25, 2007). The determination of whether services are medically necessary, or incidental to obtaining such service, is a question of fact for the ALJ. *Bellone v. Industrial Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO, May 31, 2006).

Claimant has established by a preponderance of the evidence that he sustained a compensable injury to his right knee arising out of the course of his employment with Employer on May 21, 2020. Consequently, Employer is liable for medical treatment that is reasonably necessary to cure or relieve the effects of Claimant's injury. The evaluation, care and treatment Claimant has received to date, including treatment at Concentra Medical Centers, treatment, and evaluation with Dr. Hewitt, a second opinion from Dr. Motz, and physical therapy, were reasonably necessary to cure or relieve the effects of Claimant's industrial injury.

TEMPORARY DISABILITY BENEFITS

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* 8-42-105(4); *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S. The existence of disability is a question of fact for the ALJ.

Claimant has established an entitlement to temporary total disability benefits beginning October 6, 2020. Claimant was terminated from his employment on October 6, 2020. At the time of his termination, Claimant remained under work restrictions that prevented Claimant from resuming his prior pre-injury employment. Claimant is medically incapacitated with restrictions of bodily function that cause him to have work restrictions and impairment in his wage-earning capacity. Because none of the criteria set forth in § -42-105(3), C.R.S., have been fulfilled, Claimant has established by a preponderance of the evidence an entitlement to TTD benefits beginning October 6, 2020. Respondents have not endorsed the issue of whether Claimant is responsible for his own termination, and the ALJ makes no findings on that issue.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable injury to his right knee on May 21, 2020.

2. Respondents are liable for the medical treatment for Claimant's right knee rendered to date.

3. Respondents are liable for all medical treatment that is reasonably necessary to cure or relieve the effects of Claimant's industrial injury.

4. Claimant is entitled to temporary total disability benefits from October 6, 2020 until terminated by law.

5. Respondents are entitled to offset from Claimant's temporary disability benefits for unemployment benefits Claimant received.

6. All matters not determined herein are reserved for future determination.

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

DATED: May 12, 2021

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-125-817-003

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that she suffered compensable injuries during the course and scope of her employment with Employer on November 15, 2019.

FINDINGS OF FACT

1. Claimant worked for Employer as a Security Guard. On November 15, 2019 Claimant was working at Medtronic Surgical Solutions in Boulder, Colorado.

2. On November 15, 2019 Claimant arrived at her job site approximately 15 minutes prior to the beginning of her shift. Claimant waited in her automobile until shortly before her shift began. She entered her work building, detected an odor that she perceived could be natural gas and opened a window. Claimant called the Boulder Fire Department to report the potential leak. Claimant then waited outside the building for the firefighters to arrive. She remained outside the building while the firefighters addressed the situation inside the building.

3. The date and time of the fire alarm at Medtronic was recorded by the Fire Department as 11:53:00 p.m. on November 15, 2019. The first firefighting unit arrived at Medtronic at 11:57 p.m. When the firefighters arrived, Claimant informed them she was not feeling ill.

4. The firefighters entered the building and noticed a "mild smell" of natural gas. They searched the lower floor and did not detect any smell and "nothing on TIFF." The firefighters moved to the main floor, arrived at the cafeteria and discovered three large gas appliances. The pilot light on one of the stoves was extinguished. Claimant explained that the door to the cafeteria was closed and locked before she provided the keys to the firefighters. Firefighter Lance Day shut off the gas to all three appliances, while Lt. Vineyard cleared "all other units" as the "gas smell began to dissipate."

5. Fire Department personnel located Claimant after resolution of the incident and explained the situation in the kitchen. The first Fire Department units departed Medtronic at 12:16 a.m. and the last unit left at 12:23 a.m. on November 16, 2019. Claimant worked the remainder of her overnight shift from November 15-16, 2019.

6. Claimant returned to the building, left the windows open and completed her work shift. However, she closed the windows at about 3:00 a.m. because the weather was cold. Claimant explained that by about 6:00 a.m. she started to feel "dazed and confused." Claimant's husband picked her up at about 8:00 a.m. and took her home.

7. On November 23, 2019 Claimant reported she had suffered a work injury due to an exposure to natural gas. Claimant listed the date of injury as November 23, 2019 on her Workers' Claim for Compensation.

8. On December 3, 2019 Claimant first sought treatment for her injuries at North Suburban Medical Center. Claimant reported intermittent dizziness and headaches that began two weeks earlier after a gas exposure at work. She also noted symptoms of nausea, vomiting, shortness of breath and subjective fever. Claimant remarked that worsening nausea and vomiting prompted her visit to the emergency department. Differential diagnoses included monoxide poisoning, chemical inhalation, anxiety, migraine headaches and tension headaches.

9. On February 5, 2021 J. Tashof Bernton, M.D. performed an independent medical examination of Claimant. He conducted a physical examination and reviewed Claimant's medical records. Dr. Bernton also testified at the hearing in this matter. He explained that there are four steps physicians are instructed to follow when assessing potential toxic exposures: (1) acquire as much information regarding the agent and mechanism of exposure as possible; (2) research what effects are known to occur based on exposure to the agent in question; (3) compare the patient's symptoms to the types of symptoms known to occur from an exposure; and (4) assess whether the symptoms described by the patient are consistent with the reported exposure. Applying the preceding analysis, Dr. Bernton concluded that Claimant did not suffer any injuries requiring medical treatment as a result of her natural gas exposure at work on November 15, 2019.

10. Dr. Bernton testified that the natural gas to which Claimant was exposed would have consisted of the following two components: (1) hydrocarbons that make up the natural gas and (2) mercaptans that are added to the natural gas to create an odor for safety. Mercaptans have a classic "rotten egg" smell that most people associate with a natural gas leak. Natural gas is a pure asphyxiant that does not have any toxic interaction with the body unless there is such a high concentration that a person cannot breathe. The concentration of mercaptans added to natural gas is 10 parts per million (ppm). The OSHA permitted level for exposure to mercaptans is 10 ppm. The concentration of mercaptans in pure natural gas is thus the approximate level that OSHA has set as a safe exposure to humans.

11. Dr. Bernton remarked that the complications of exposure to mercaptans involve sinus irritation, eye irritation and a "knockdown" phenomenon that can include a loss of consciousness. The preceding symptoms are acute with an immediate presentation. The symptoms of exposure to mercaptans do not manifest themselves over a period of time. When small amounts of natural gas are present, the concentration of mercaptans "is greatly below the level at which any toxic effects may occur."

12. Dr. Bernton explained that Claimant's exposure to natural gas was "quite slight" based upon the nature of the gas source, opening windows as soon as she arrived and the recorded observations of the Fire Department. He reasoned that Claimant's symptoms of headaches, dizziness, floaters in the eyes, aching in both legs, nasal

congestion and irritation were not medically probable manifestations of her low-level gas exposure on November 15, 2019. Dr. Bernton determined “with great confidence” that Claimant’s natural gas exposure for approximately 15-20 minutes did not constitute a toxic exposure with the potential to cause injuries.

13. Dr. Bernton summarized that it is not medically probable Claimant suffered an injury requiring medical treatment as a result of her exposure to natural gas at work on November 15, 2019. He testified that there is no acute or chronic toxicity to low concentrations of natural gas. Even at higher levels, the primary risk from natural gas exposure is asphyxiation from a large enough volume of gas so that oxygen has been displaced and an individual cannot breathe. Dr. Bernton commented that any effects from Claimant’s exposure to natural gas at work would not have required restrictions or caused any permanent impairment. The amount of natural gas emitted from a pilot light into a building with multiple rooms and open windows would not produce any toxic effect as an asphyxiant and there were not enough mercaptans to have a toxic effect. Dr. Bernton determined that an exposure to natural gas and mercaptans would require a significantly greater concentration and length of time to have a toxic effect.

14. Claimant has failed to demonstrate that it is more probably true than not that she suffered compensable injuries during the course and scope of her employment with Employer on November 15, 2019. Initially, Claimant entered her work building on November 15, 2019, detected an odor that she perceived could be natural gas and opened a window. Claimant called the Boulder Fire Department to report the potential leak. Firefighters entered the building and noticed a “mild smell” of natural gas. They discovered that a pilot light had been extinguished on one of the stoves. Firefighters shut off the gas to all three appliances, and the smell began to dissipate.

15. As persuasively explained by Dr. Bernton, Claimant’s symptoms and onset are inconsistent with an exposure to natural gas or mercaptans. The symptoms expected from a toxic exposure to natural gas and/or mercaptans would be acute and involve sinus irritation, eye irritation and a “knockdown” phenomenon that includes a loss of consciousness. Furthermore, Claimant did not report an injury until one week after the exposure and did not seek treatment until more than two weeks after the incident. Although Claimant initially reported headaches and dizziness, the preceding symptoms are not associated with exposure to natural gas or mercaptans. Claimant’s subsequent onset of “floaters” in her eyes, pain in her legs and nasal problems are also not associated with exposure to natural gas.

16. Dr. Bernton persuasively explained that it is not medically probable Claimant suffered an injury requiring medical treatment as a result of her exposure to natural gas at work on November 15, 2019. He testified that there is no acute or chronic toxicity to low concentrations of natural gas. Even at higher levels, the primary risk from natural gas exposure is asphyxiation from a large enough volume of gas so that oxygen has been displaced and an individual cannot breathe. Dr. Bernton commented that any effects from Claimant’s exposure to natural gas at work would not have required restrictions or caused any permanent impairment. The amount of natural gas and mercaptans emitted from a pilot light into a building with multiple rooms and open windows

would not produce any toxic effect. Dr. Bernton determined that any exposure to natural gas and mercaptans would require a significantly greater concentration and length of time to have an adverse effect. He concluded “with great confidence” that Claimant’s natural gas exposure for approximately 15-20 minutes did not constitute a toxic exposure with the potential to cause injuries.

17. Based on the medical records and persuasive opinion of Dr. Bernton, Claimant did not likely suffer an injury during the course and scope of her employment for Employer on November 15, 2019. Because there is no toxicity to low concentrations of natural gas, Claimant’s limited exposure could not have caused an injury at work on November 15, 2019. Claimant’s work activities on November 15, 2019 thus did not aggravate, accelerate or combine with her pre-existing condition to produce a need for medical treatment. Accordingly, Claimant’s request for Workers’ Compensation benefits is denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence

before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.,* W.C. No. 4-650-711 (ICAO, Feb. 15, 2007); *David Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

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

7. The provision of medical care based on a claimant's report of symptoms does not establish an injury but only demonstrates that the claimant claimed an injury. *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020). Moreover, a referral for medical care may be made so that the respondent would not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id.* Although a physician provides diagnostic testing, treatment, and work restrictions based on a claimant's reported symptoms. It does not follow that the claimant suffered a compensable injury. *Fay v. East Penn manufacturing Co., Inc.*, W.C. No. 5-108-430-001 (ICAO, Apr. 24, 2020); *cf. Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997) ("right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment"). While scientific evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory supporting compensability when making a determination. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020).

8. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she suffered compensable injuries during the course and scope of her

employment with Employer on November 15, 2019. Initially, Claimant entered her work building on November 15, 2019, detected an odor that she perceived could be natural gas and opened a window. Claimant called the Boulder Fire Department to report the potential leak. Firefighters entered the building and noticed a "mild smell" of natural gas. They discovered that a pilot light had been extinguished on one of the stoves. Firefighters shut off the gas to all three appliances, and the smell began to dissipate.

9. As found, as persuasively explained by Dr. Bernton, Claimant's symptoms and onset are inconsistent with an exposure to natural gas or mercaptans. The symptoms expected from a toxic exposure to natural gas and/or mercaptans would be acute and involve sinus irritation, eye irritation and a "knockdown" phenomenon that includes a loss of consciousness. Furthermore, Claimant did not report an injury until one week after the exposure and did not seek treatment until more than two weeks after the incident. Although Claimant initially reported headaches and dizziness, the preceding symptoms are not associated with exposure to natural gas or mercaptans. Claimant's subsequent onset of "floaters" in her eyes, pain in her legs and nasal problems are also not associated with exposure to natural gas.

10. As found, Dr. Bernton persuasively explained that it is not medically probable Claimant suffered an injury requiring medical treatment as a result of her exposure to natural gas at work on November 15, 2019. He testified that there is no acute or chronic toxicity to low concentrations of natural gas. Even at higher levels, the primary risk from natural gas exposure is asphyxiation from a large enough volume of gas so that oxygen has been displaced and an individual cannot breathe. Dr. Bernton commented that any effects from Claimant's exposure to natural gas at work would not have required restrictions or caused any permanent impairment. The amount of natural gas and mercaptans emitted from a pilot light into a building with multiple rooms and open windows would not produce any toxic effect. Dr. Bernton determined that any exposure to natural gas and mercaptans would require a significantly greater concentration and length of time to have an adverse effect. He concluded "with great confidence" that Claimant's natural gas exposure for approximately 15-20 minutes did not constitute a toxic exposure with the potential to cause injuries.

11. As found, based on the medical records and persuasive opinion of Dr. Bernton, Claimant did not likely suffer an injury during the course and scope of her employment for Employer on November 15, 2019. Because there is no toxicity to low concentrations of natural gas, Claimant's limited exposure could not have caused an injury at work on November 15, 2019. Claimant's work activities on November 15, 2019 thus did not aggravate, accelerate or combine with her pre-existing condition to produce a need for medical treatment. Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed.

ORDER

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

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

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

DATED: May 12, 2021.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-975-232-005

ISSUE

1. Whether the ALJ should impose penalties against Claimant for violation of a May 19, 2020 Prehearing Order issued by a Prehearing Administrative Law Judge (PALJ).

FINDINGS OF FACT

1. On May 14, 2020, the parties participated in a prehearing conference before PALJ Gallivan. The issues identified for the prehearing conference were identified as: "1) Claimant's motion to compel production of a payment log and claim file; 2) Claimant's motion to compel Respondents to file a new final admission of liability; and 3) Claimant's motion to alter the name of the employer in Division records." (Ex. S).

2. On May 19, 2020, the PALJ issued a "Prehearing Order for Prehearing Conference Held on May 14, 2020," in which he denied Claimant's identified motions (the "May 19 PHC Order").

3. The May 19 PHC Order, indicates that Respondent objected to providing Claimant a copy of the claims file noting, among other things "Claimant's repeated contact with the adjuster despite having been previously instructed to communicate only with Respondents' counsel." PALJ Gallivan noted that "Respondents characterize Claimant's conduct in this case as 'harassment.'" (Ex. S.).

4. The PALJ further indicated that "Respondents' characterization of Claimant conduct has been supported by her actions following the prehearing, in which she engaged in improper *ex parte* communication with the undersigned, even after having been explicitly directed not to." (Ex. S). Based on the PALJ's statement, Claimant's *ex parte* communications took place between the conclusion of the May 14, 2020 PHC and the issuance of the May 19 PHC Order.

5. In addition to the May 19 PHC Order, the PALJ issued, *sua sponte*, a second "Prehearing Order for Prehearing Conference Held on May 14, 2020." (the "Sua Sponte Order." The Sua Sponte Order states: "This order is being issued *sua sponte* due to Claimant's conduct following the prehearing conference." (Ex. T).

6. In the Sua Sponte Order, the PALJ indicated Claimant had directly contacted the PALJ at his personal number leaving a voice mail, despite being directed not to contact the PALJ directly. The Sua Sponte Order also indicates that Claimant subsequently sent three emails on which the PALJ, the adjuster and several of Employer's employees were either the direct recipient or copied on the email. (Ex. T).

7. Based on this conduct, the PALJ issued the following orders:

a. "Claimant is hereby barred from contacting PALJ David Gallivan regarding this workers' compensation claim outside of a properly noticed prehearing conference. This includes any communication via telephone or electronic mail.

b. Claimant is hereby barred from contacting any employee of Sedgwick CMS[1] or [Redacted] regarding this workers' compensation claim. This includes telephone calls, electronic mail and extends to including any such individuals such as recipients on messages sent to counsel for Respondents.

c. Any violation of this order will be considered grounds for sanctions, including but not limited to dismissal of the workers' compensation claim and referral to the Director for the imposition of monetary penalties up to $1,000 per violation."

(Ex. T).

8. After the May 19, 2020 issuance of the Sua Sponte Order, Claimant sent multiple emails on which multiple employees of Sedgwick and [Redacted] were included. The emails and recipients are summarized in Respondents' Exhibit BB, and the emails themselves are contained in Respondents' Exhibit CC. The emails were sent by Claimant on seventeen dates between July 9, 2020 and March 18, 2021.

9. At hearing Claimant testified that the emails identified in Exhibit BB were not an exhaustive list of the emails on which she included employees of either Sedgwick or Employer after the issuance of the Sua Sponte Order. In addition, she testified that she had attempted to contact some individuals by telephone as well.

10. Claimant testified at hearing that she had no intention of complying with the Sua Sponte Order because she did not believe the Order to be valid. Claimant testified that the issue of her contact with Respondents' employees was not an issue identified for the May 14, 2020 Prehearing Conference.

CONCLUSIONS OF LAW

Claimant by her own admission, intentionally and repeatedly violated the Sua Sponte Order. Although Claimant's position statement indicates she is not challenging the validity of the Sua Sponte Order, the position statement does assert that the PALJ lacked jurisdiction and that the issue addressed in the Sua Sponte Order was not properly before the PALJ. Notwithstanding, "jurisdictional limitations cannot be waived or eliminated by consent and cannot be waived by estoppel In addition, jurisdictional issues may be raised *sua sponte* by a judge regardless of the arguments of the parties." *In re Claim of Villegas*, W.C. No. 4-88-298-002 (ICAO, Feb. 18., 2021) (internal citations omitted). Although Claimant's violation of the Sua Sponte Order would justify the imposition of penalties in other circumstances, the ALJ concludes the PALJ lacked

[1] Sedgwick CMS is the third-party administrator for Claimant's claim.

jurisdiction or statutory authority to enter the Sua Sponte Order. Consequently, the Sua Sponte Order was not a “lawful order” for which penalties may be imposed under § 8-43-304 (1), C.R.S.

Section 8-43-304(1) authorizes the imposition of penalties of not more than $1000 per day upon any person who violates the Act or who “fails, neglects, or refuses to obey any lawful order made by the director or panel.” This provision applies to orders entered by a PALJ. § 8-43-207.5, C.R.S. (order entered by PALJ shall be an order of the director and is binding on the parties); *Kennedy v. Industrial Claim Appeals Office,* 100 P.3d 949 (Colo. App. 2004). In cases where a party fails, neglects, or refuses to obey an order, penalties may be imposed under § 8-43-304(1), even if the Act imposes a specific violation for the underlying conduct. *Holliday v. Bestop, Inc.,* 23 P.3d 700 (Colo. 2001); *Giddings v. Industrial Claim Appeals Office,* 39 P.3d 1211 (Colo. App. 2001).

To form the basis for the imposition of a penalty, the order violated must be one within the jurisdiction and authority granted to the PALJ in the Act. *See e.g.*, *Muragara v. Sears Roebuck & Co.*, W.C. Nos. 4-726-134, 4-712-263 (ICAO, Sept. 8, 2015)(PALJ lacked authority to issue order barring a *pro se* claimant from filing applications for hearing without an attorney). “Prehearing ALJs and hearing ALJs are not judges of general jurisdiction.” *Id*. Instead, “the administrative tribunals which adjudicate workers’ compensation claims are created by statute, and the jurisdiction, powers, duties, and authority of these tribunals are limited to that provided by statute.” *Lewis v. Scientific Supply Co., Inc.*, 897 P.2d 905, 908 (Colo. App. 1995). Accordingly, an administrative law judge lacks authority to create a penalty where none exists. *Baker v. Weld County School District 6 and Pinnacol Assurance*, W.C. No. 4-993-326-004 (ICAO April 20, 2021).

Section 8-43-207.5, C.R.S. sets forth the jurisdiction and authority of PALJs. Under § 8-43-207.5 (1), C.R.S., PALJs have authority to conduct prehearing conferences on the limited issues of:

> Ripeness of legal, but not factual, issues for formal adjudication on the record before the director or an administrative law judge in the office of administrative courts; discovery matters; and evidentiary disputes.

In conjunction with prehearing conferences, § 8-43-207.5 (2) grants the PALJ authority to order parties to participate in prehearing conferences, issues interlocutory orders, issue subpoenas, make evidentiary rulings, permit depositions, approve settlement agreements, and “strike the application for hearing of a party for failure to comply with any provision of this section.”

The Sua Sponte Order purporting to bar Claimant from communicating with Respondent’s employees does not fall within the scope of prehearing conferences or the authority granted to PALJs under § 8-43-207.5, C.R.S. As such, the PALJ lacked jurisdiction and authority to issue the Sua Sponte Order. Consequently, a violation of the Sua Sponte Order does not form the basis for the imposition of a penalty against Claimant.

As with a PALJ, the authority and jurisdiction of hearing ALJs are also defined by statute in § 8-43-207 (1), C.R.S. As relevant to the present issue, § 8-43-207 (1), C.R.S., authorizes an ALJ to "Control the course of the hearing and the conduct of persons in the hearing room;" and to "Impose the sanctions provided in the Colorado rules of civil procedure, except for civil contempt pursuant to rule 107 thereof, for willful failure to comply with any order of an administrative law judge issued pursuant to articles 40 to 47 of this title." § 8-43-207 (1)(h) and (p). While Claimant's conduct likely constituted "contempt" as the term is defined in C.R.C.P. 107, civil contempt under C.R.C.P. 107 is expressly excluded from an ALJ's authority.

Despite the flagrant and intentional violation of the PALJ's order, the ALJ may not impose a penalty based on the violation of an order for which there is no authority under the Act, and the ALJ "has no authority to create a penalty where none exists. To the contrary, an ALJ's authority is limited to that which is conferred by the Act." *Baker v. Weld County School District 6 and Pinnacol Assurance*, W.C. No. 4-993-326-004 (ICAO April 20, 2021), citing *Dee Enterprises v. Industrial Claim Appeals Office*, 89 P.3d 430, 437 (Colo. App. 2003) (ALJ may not exercise jurisdiction, exert any powers, perform any duties, or assume any authority unless the right is granted by statute).

Because no authority exists under the Act, the PALJ lacked jurisdiction to impose restrictions on the Claimant's ability to contact the identified individuals. Consequently, the ALJ lacks authority to impose penalties under § 8-43-304 (1), C.R.S.

ORDER

It is therefore ordered that:

1. Respondent's request for penalties against Claimant is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

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

DATED: May 14, 2021

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

I. Have Respondents, by clear and convincing evidence, overcome the DIME opinion of Dr. Larsen on the issue of MMI?

II. If Respondents have overcome said DIME opinion, what is the correct scheduled Impairment Rating?

III. If the DIME opinion has not been overcome, has Claimant shown, by a preponderance of the evidence, that he is entitled the shoulder surgery as proposed by Dr. Walden?

III. If the DIME opinion has been overcome, has Claimant shown, by a preponderance of the evidence, that his scheduled shoulder Impairment Rating should be converted to that of the Whole Person?

FINDINGS OF FACT

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

The Work Injury, and Subsequent Treatment

1. Claimant sustained an admitted work injury on February 11, 2019. Claimant was employed by the Respondents for over 14 years as a merchandiser, a job which required lifting cases of alcohol weighing between 35 and 75 pounds. Prior to the date of injury, Claimant was experiencing no problems with his left shoulder.

2. Claimant was seen on February 11, 2019 at Concentra Medical Centers by PA Ginsburg. His initial report reflects that Claimant was, "pulling 12 cases of liquor up the stairs and his left shoulder popped, causing severe left clavicle and A/C joint pain." PA Ginsburg noted a prior rotator cuff repair in 2004, which completely resolved. Claimant was prescribed hydrocodone and Ibuprofen 800mg. (Ex. 6, p. 108). Physical therapy also began on February 12, 2019. (Ex. 10, p. 273).

3. On March 5, 2019, PA Ginsberg ordered an MRI of the left shoulder, and referred Claimant to an orthopedic specialist (Ex. 6, p. 121). An MRI of the left shoulder on March 14, 2019 revealed a SLAP tear, mild tendinosis of the intra-articular portion of the long biceps, mild tendinosis of the subscapularis and mild tendinosis of the supraspinatus and infraspinatus. Osteoarthritis was noted at the acromioclavicular joint. (Ex. 7, p. 210).

4. Orthopedist Michael Simpson, MD examined Claimant on March 19, 2019. Dr. Simpson noted an injury to the left shoulder when pulling a dolly upstairs. He reviewed

the MRI and recommended an ultrasound guided injection (Ex. 6, pp 59-60). The left acromioclavicular joint and glenohumeral were injected on April 3, 2019 (Ex. 5, p. 66). Claimant continued to participate in physical therapy.

5. Claimant returned to Dr. Simpson on April 10, 2019. The injections did not provide relief, as Claimant was still experiencing shoulder pain. Since conservative treatment was unsuccessful, Dr. Simpson recommended surgery. (Ex. 5, Page 69). On May 9, 2019, Dr. Simpson performed arthroscopic surgery of the left shoulder, which included rotator cuff repair, biceps tendinosis, subacromial decompression and distal clavicle resection. (Ex. 5, pp. 76-77).

6. On June 20, 2019, Claimant returned to Dr. Peterson, his authorized treating physician at Concentra, 6-weeks post-surgery. (Ex. 6, pp. 139-142). Dr. Peterson noted Claimant was progressing well in physical therapy.

7. On July 10, 2019, Claimant followed up with Dr. Simpson. (Ex. 5, pp. 88-89). Dr. Simpson noted Claimant was doing very well. His motion was appropriate for two months out from the surgery he had. He was to continue therapy and could begin gradual strengthening as tolerated.

8. On July 18, 2019, Claimant followed up with Dr. Peterson. (Ex. 6, pp. 143-146). He was out of the sling and taking ibuprofen 800 mg only. His range of motion was improving slowly; however, he was still weak. Dr. Peterson referred him for additional PT.

9. On August 21, 2019, Dr. Simpson re-examined Claimant, and noted pain with abduction. Claimant was placed on a Medrol Dosepak, followed with 200 mg. of Celebrex twice daily. (Ex. 5 pp. 91-92). The Medrol Dosepak and Celebrex did not alleviate the pain on the top of his shoulder. The pain was constant, most notably after physical therapy, and when lifting his arm up and out to the side. Dr. Simpson ordered an MRI as well as a corticosteroid injection of the shoulder. (Ex. 5, pp. 93-95).

10. On September 11, 2019, Claimant followed up with Dr. Simpson. (Ex. 5, pp. 93-95). He reported the Celebrex and Medrol Deepak had not changed his symptoms. He described his pain as 5/10 on a pain scale, severe after physical therapy and lifting up and out on the side. It was sharp, tingling and felt like a pin was in it. His hand was going numb. Dr. Simpson noted he would like to do a corticosteroid injection for his shoulder but Claimant had a very bad reaction to the injection previously. Dr. Simpson referred Claimant for an MRI.

11. On September 16, 2019, the Claimant was re-examined by Dr. Peterson. His physical exam revealed tenderness in the A/C joint and trapezius muscle with a positive painful arc. He discontinued physical therapy until the MRI and follow-up appointment with Dr. Simpson. (Ex. 5, pp. 153-154).

12. The MRI took place on September 22, 2019. (Ex. 7, p. 204). Dr. Simpson opined that it showed postoperative repair, with no evidence of a re-tear. He administered a corticosteroid injection of the left subacromial bursa (Ex. 5, pp. 97-98). A second

injection was performed by Dr. Peterson on October 11, 2019. (Ex. 6, p. 157). Dr. Simpson noted on October 30, 2019 that neither injection relieved Claimant's pain. He then placed Claimant on a regime of Gabapentin, as well as a Lidoderm patch. Claimant's acromioclavicular joint was injected at Dr. Simpson's office on November 13, 2019, again with no relief. Claimant was subsequently referred to Dr. Walden. (Ex. 5, pp. 104-105 and 107-A).

Claimant is seen by Dr. Walden

13. Claimant was examined by Dr. Walden on December 12, 2019. Claimant described his pain as a sensation of "an icepick going into the front portion of the shoulder," as well as pain around the sternoclavicular joint. Dr. Walden recommended a diagnostic injection to the sub coracoid region. This occurred on the same date, but without immediate relief. (Ex. 3, pp. 27-28). Claimant was seen by Dr. Peterson on December 18, 2019, but there was still no improvement. (Ex. 6, p. 169).

14. On January 9, 2020, Claimant reported to PA Cerchia with Dr. Walden's Office that the pain around his corticoid had diminished, but continued in the subacromial area. A second lidocaine injection was administered into the left subacromial bursa. (Ex. 3, pp. 32-34).

15. On February 6, 2020, Dr. Walden noted that both injections were beneficial, but Claimant was still having difficulty raising his arm above head level in the adducted position. It was the opinion of Dr. Walden that this patient would benefit from arthroscopic subcoracoid decompression, as well as removal of scar tissue from the subacromial space. (Ex. 3, p. 36).

16. The surgery recommended by Dr. Walden was denied in a Peer Review Report. (Ex. 4, p. 55). Dr. Walden wrote to Respondents on March 2, 2020. (Ex. 4, p. 41). He provided literature on coracoid impingement syndrome, stating that one of the primary causes is post-operative rotator cuff repair. In addition to the MRI findings, a sub coracoid injection appeared to temporarily eliminate the pain. Finally, Claimant had undergone conservative measures including physical therapy, anti-inflammatory medication and sub coracoid injections, yet still was experiencing significant symptoms. Claimant, he opined, met the criteria for the surgical procedure, as detailed in the attached article.

17. Dr. Walden notes that he had been consulted as an expert with board certification in orthopedic surgery and sports medicine. It is his opinion that this medical intervention would allow the Claimant to return to more normal function. *Id* at 41.

18. Claimant saw Dr. Peterson on February 12, 2020. (Ex. 6, p. 179). He noted that the surgery had not been authorized. The physical exam revealed limited range of motion in all planes with pain.

Dr. Farber's IME

19. Claimant was subsequently referred by Respondents to orthopedist Adam Farber, MD, for an independent medical examination on April 28, 2020 (Ex. 8). Per Dr. Farber's report, Claimant complained of stabbing pain in the top of the shoulder, as well as pain into the neck and left trapezius. This was consistent with the pain diagram completed in the questionnaire. Claimant had difficulty with adduction of the left upper extremity above shoulder level (Ex. 8, p. 226). The physical exam included tenderness, positive medial border of the scapula, the scapular spine, the left trapezius and the left lateral side of the neck. In addition, Claimant's rotator cuff strength measured 5 out of 5 with resisted abduction, 5 out of 5 with resisted forward flexion, 5 out of 5 with resisted external rotation and 5 out of 5 with resisted internal rotation. There was 5 out of 5 strength with resisted biceps and triceps strength testing. The coracoid impingement test did not provide symptoms consistent with impingement (Ex. 8, p. 230).

20. It is the opinion of Dr. Farber that Claimant reached maximum medical improvement on February 12, 2020. He opined that Claimant has a 6% upper extremity impairment from loss of range of motion. He found no evidence of sub coracoid impingement, and no necessity for the surgery recommended by Dr. Walden (Ex. 8, p. 232).

21. Dr. Peterson examined the Claimant on March 11, 2020. He discussed Claimant's medical treatment, and performed a physical exam. In written correspondence to Respondents. Dr. Peterson placed Claimant at MMI effective April 28, 2020 (Ex. 1, p. 5). In his report of maximum medical improvement dated June 2, 2020, Dr. Peterson noted that, per Claimant, Dr. Farber did not do formal goniometer measurements, and used active assist to push Claimant's arm (Ex 6, p. 195). The physical exam noted pain with range of motion as well as tenderness throughout the shoulder region. The impairment for loss of range of motion for the left upper extremity was 12%. This combined with a 10% impairment rating for the distal clavicle resection resulted in an extremity impairment rating of 21%, converting, if applicable, to 13% of the whole person. Work restrictions included lifting 30 pounds occasionally with occasional overhead lifting of 10 pounds (Ex. 6, p. 199).

22. Respondents admitted for the 21% upper extremity rating in an Amended Final Admission of Liability dated June 17, 2020. (Ex. 1, p. 1). Claimant requested a DIME, which was performed by orthopedist Karl Larsen, MD on September 21, 2020. (Ex. 2).

Dr. Larsen's DIME Report

23. In his DIME report, Dr. Larsen notes Claimant's primary complaint is pain with forward elevation and abduction. The physical exam revealed tenderness diffusely over the anterior shoulder and lateral subacromial space, and not just the coracoid. There was no posterior or parascapular tenderness but mild tenderness in the area of the A/C joint along the surface of the clavicle as well as the sternal clavicular joint. (Ex. 2, pp. 18-19).

24. Range of motion measurements taken by Dr. Larsen yielded a 15% impairment. This was combined with a 10% impairment for the distal clavicle resection

for a 24% impairment rating of the upper extremity, converting, if applicable, to a 14% whole person (Ex. 2, p. 20).

25. It is the opinion of Dr. Larsen that [Claimant] is not at MMI. He provided a diagnosis of capsular contracture, which can produce a coracoid impingement. He notes this is a rare diagnosis, but added that Dr. Walden is an accomplished shoulder surgeon. It is the opinion of Dr. Larsen that the proposed capsular release and sub coracoid decompression would improve the function of Claimant's left shoulder. A posterior capsular release would also be of benefit to the Claimant (Ex. 2, p. 21).

Dr. Farber's IME Addendums

26. Dr. Farber prepared an addendum to his report dated June 22, 2020. (Ex. 8, p. 214). He reviewed the report of maximum medical improvement from Dr. Peterson. He did not address the statement of Dr. Peterson that Dr. Farber had not taken formal goniometer measurements or the difference in the range of motion. Rather, Dr. Farber disagreed with the 10% upper extremity rating provided by Dr. Peterson for the distal clavicle resection. Dr. Farber repeats his opinion that the preoperative MRI scan and lack of relief from the corticosteroid injection did not necessitate the need for distal clavicle resection surgery by Dr. Simpson. Dr. Farber further disagreed with Dr. Peterson concerning work restrictions (Ex. 8, p. 215).

27. In the second addendum dated January 27, 2021, Dr. Farber states it is his standard practice to use a goniometer during an independent medical evaluation. He further notes a discrepancy between the range of motion measurements of Dr. Peterson and Dr. Larsen, suggesting a lack of consistency. Once again, Dr. Farber states that the distal clavicle resection that was performed by Dr. Simpson was not warranted and the 10% upper extremity rating for this procedure is not correct (Ex. 8, pp. 212-21).

Dr. Larsen's Deposition

28. The deposition of Dr. Larsen was taken by the Respondents on January 11, 2021. (Ex. 9). Dr. Larsen testified that at the time of his examination, Claimant had not decided whether he wished to pursue the surgery recommended by Dr. Walden. (Ex. 9, p. 246). Should Claimant elect not to proceed with the surgery, he would be at maximum medical improvement with an effective date of February 5, 2020, which was his last physical therapy appointment. (Ex. 9, p. 249).

29. Dr. Larsen testified that Claimant likely had arthritis of the acromioclavicular joint, but which was likely aggravated by the work injury, and therefore required resecting the bone. This is why the surgery performed by Dr. Simpson was authorized. (Ex. 9, p. 252).

30. In his examination, Dr. Larsen noted tightness of the posterior shoulder capsule. This can be the result of pulling injuries or scarring from prior surgery. A posterior capsular tightness can produce sub coracoid impingement by anterior displacement of the labral head, though this is a rare diagnosis. (Depo. Transcript, p. 14).

31. It is the opinion of Dr. Larsen that Claimant would benefit from the surgery proposed by Dr. Walden. Dr. Walden performed a lidocaine challenge in the sub coracoid region, which seemed to provide improvement a positive sign that the surgery could be beneficial. (Depo. Transcript, p. 21). Dr. Larsen did not think the surgery would bring claimant "back to 100%, pain free, normal, shoulder function, but it would improve his condition.

Dr. Farber Testifies at Hearing

32. At hearing, Dr. Farber was qualified as an expert in orthopedic surgery, focusing on the shoulder, knee and elbow. He has been accredited by the Division of Workers' Compensation. He does not have hospital privileges in Colorado, but travels to Denver one day per month to perform independent medical examinations. (Hearing Transcript, pp. 13-14, 38-39).

33. Dr. Farber testified that the MRI taken of Claimant's left shoulder in 2004 noted some arthritis of the acromioclavicular joint. There is no evidence that the injury of February 11, 2019 required a distal clavicle resection. (Hearing Transcript, p.31).

34. The location of pain in the Claimant's left shoulder is not consistent with the diagnosis of coracoid impingement. Claimant had tenderness in multiple areas around his shoulder, not just localized to the coracoid process. (Hearing Transcript, pp. 22, 25). Claimant received a diagnostic injection of a local anesthetic and steroid, but did not have a positive response. The MRI scans did not support a diagnosis of coracoid impingement. *Id* at 22-23.

35. Dr. Farber also testified that the MRI scan from September 22, 2019 did not support Dr. Walden's recommendation for a bursectomy. The subacromial corticosteroid injection administered on January 9, 2020 did not provide symptomatic relief. (Hearing Transcript, p. 21). It is the opinion of Dr. Farber that the surgery recommended by Dr. Walden would not eliminate Claimant's symptoms. *Id* at 30. Dr. Farber reiterated that it is his practice to use a goniometer for range of motion measurements, that the appropriate impairment rating of Claimant's injury is 6% of the upper extremity. *Id* at 33, 36. He opined that it not appropriate to assign an impairment for the distal clavicle resection, because this condition was not originally work related.

36. Dr. Farber testified that Claimant's industrial injury did not cause a functional limitation beyond the upper extremity. There is no plausible explanation as to why he would be developing symptoms related to the trapezius or neck. (Hearing Transcript, pp. 37-38).

37. Dr. Farber acknowledged that he did not have the advantage of examining the Claimant prior to the shoulder surgery. He acknowledged that there is no indication in Dr. Peterson's or any other opinion in the medical record that the distal clavicle resection was improper. (Hearing Transcript, pp. 43-47).

38. Dr. Farber disagreed with the opinions of Dr. Larsen and Dr. Walden about the recommendation for additional surgery. He disagrees with the opinions of Dr. Larsen and Dr. Peterson concerning the 10% upper extremity rating for the distal clavicle resection. (Hearing Transcript, p. 48).

39. Dr. Farber explained that a subcoracoid decompression occurs when the prominence or a spur on the bone is shaved down. (Hearing Transcript, p. 16). He opined that the bone to be shaved down was not the result of any industrial injury, but rather is just how Claimant was born. (Hearing Transcript, p. 18).

40. Dr. Farber has over 550 pages of medical records, and acknowledged that there is no indication that Claimant was not compliant with treatment, or any indication of exaggeration of symptoms. (Hearing Transcript, p. 49).

Claimant Testifies at Hearing

41. Claimant testified that after surgery, he restarted physical therapy, but had difficulty regaining full range of motion in the left shoulder. He could not raise his left arm above shoulder level, and could not reach behind his back with his left arm past the center belt loop. (Transcript, p. 56). He testified that after approximately 40 visits, there was no further improvement in his range of motion. (Transcript, pp 57, 68).

42. Claimant clarified that he can only reach in back to the center belt loop. Physical therapy initially assisted with range of motion, but Claimant testified that he had reached a point that it would not increase any further. (Hearing Transcript, pp. 57, 70).

43. Claimant testified that he has pain like a constant icepick in the front and top of the shoulder and stiffness and soreness in the back of the shoulder. He also has pain going up into his neck around the outside of the shoulder. (Transcript, pp. 58-59). At the end of the physical therapy session, he would receive manipulation around the shoulder blade and up into his neck – "cracking my neck or moving my neck around to loosen things up." (Hearing Transcript, pp. 57-58).

44. Claimant testified that pain in the neck and soreness in the back of his shoulder is caused by vacuuming, carrying groceries, steering his vehicle with his left arm and sleeping. He will sleep on the couch, with pillows behind him, to avoid rolling over onto his left side. (Hearing Transcript, pp. 60-61).

45. Claimant testified that Dr. Walden administered a series of injections and he experienced relief after several days. He initially had some concerns about this proposed surgery, but after consultation with Dr. Walden, he now wishes to proceed with this treatment. (Hearing Transcript, pp. 61-62).

Physical Therapy Records

46. Beginning on June 5, 2019, the physical therapy notes provide that the Claimant was administered cervicothoracic spinal manipulation, CTJ HVLAT, as well as

instruction for sleep positioning and bed mobility techniques for minimization of irritation. (Ex. 10, p. 383). This spinal manipulation was continued on a repeated basis at Claimant's physical therapy appointments during the months of July and August of 2019.

47. On June 24, 2019, a physical therapist provided soft tissue mobilization for the infraspinatus, supraspinatus and deltoid muscles with active range of motion. (Ex. 10, p. 408). This exercise was repeated on a continuous basis through July and August, 2019.

48. The physical therapy records confirm the Claimant's testimony that he received treatment for the back of his shoulder and his neck. The pain diagram completed by the Claimant prior to the MRI on September 22, 2019 demonstrates symptoms in the back of the shoulder up into the neck (Ex. 7, p. 206). Seven months later April 28, 2020, the pain diagram completed by the Claimant still demonstrate symptoms in the same area (Ex. 8 p. 240).

CONCLUSIONS OF LAW

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

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. §8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. §8-43-201, C.R.S.

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

C. Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). In this instance, the ALJ finds that Claimant has testified credibly at hearing – while still finding that, more likely than not, Dr. Farber used goniometers during his range of motion testing. Otherwise, Claimant provided accurate feedback to his medical providers throughout the process, in an attempt to improve the condition of his shoulder.

D. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). The ALJ finds that each expert has rendered their opinions to the best of their ability, based upon the information they were provided. The real issue here is one of *persuasiveness.*

E. Further, courts are to be "mindful that the Workmen's Compensation Act is to be liberally construed to effectuate its humanitarian purpose of assisting injured workers." *James v. Irrigation Motor and Pump Co.*, 503 P.2d 1025 (Colo. 1972).

Overcoming the DIME Opinion on MMI, Generally

F. The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*; *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590, 592 (Colo. App. 1998); *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186, 189-190 (Colo. App. 2002); *Sholund v. John Elway Dodge Arapahoe,* W.C. No. 4-522-173 (ICAO October 22, 2004); *Kreps v. United Airlines,* W.C. Nos. 4-565-545 and 4-618-577 (ICAO January 13, 2005). The MMI determination requires the DIME physician to assess, as a matter of diagnosis, whether the various components of a claimant's medical condition are casually related to the injury. *Martinez v. ICAO*, No. 06CA2673 (Colo. App. July 26, 2007). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding the cause of a particular component of a claimant's overall medical impairment, MMI or the degree of whole person impairment, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAP, Oct. 4, 2001).

G. This enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.* Where the evidence is subject to conflicting inferences a mere difference of opinion between qualified medical experts does not necessarily rise to the level of clear and convincing evidence. Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries,* WC 4-712-812 (ICAO November 21, 2008).

H. As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

I. However, the mere fact that a Claimant suffers from a pre-existing condition does not disqualify a claim for compensation or medical benefits if the work-related activities aggravated, accelerated, or combined with the pre-existing condition to produce disability or a need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition, and the claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities and not the underlying pre-existing condition. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949). Moreover, an otherwise compensable injury does not cease to arise out of a worker's employment simply because it is partially attributable to the worker's pre-existing condition. *See Subsequent Injury Fund v. Thompson*, 793 P.2d 576, 579 (Colo. 1990); *Seifried v. Industrial Comm'n*, 736 P.2d 1262, 1263 (Colo. App, 1986) ("[I]f a disability were [ninety-five percent] attributable to a pre-existing, but stable, condition and [five-percent] attributable to an occupational injury, the resulting disability is still compensable if the injury has caused the dormant condition to become disabling.")

J. Generally, the Claimant must prove by a preponderance of the evidence that his symptoms were proximately caused by an industrial aggravation of a pre-existing condition rather than simply the natural progression of the condition. *Melendez v. Weld County School District #6*, W.C. No. 4-775-869 (ICAO, October 2, 2009). However, in this instance, the DIME physician has concluded that Claimant's current symptoms were proximately caused by the work injury, rather than the inevitable, natural progression of his shoulder condition. Respondents must now overcome the DIME in this regard.

Overcoming the DIME on MMI, as Applied

K. In this instance, Dr. Farber has provided a number of opinions, which dispute the conclusions drawn by Dr. Larsen. He opines that the distal clavicle resection performed by Dr. Simpson was not necessitated by Claimant's work injury. He thus disputes the 10% assigned for that procedure. He opines that Claimant's current pain complaints are not consistent with Dr. Larsen's diagnosis of coracoid impingement. He feels that the September, 2019 MRI does not support the need for a bursectomy. He feels that Dr. Larsen's ROM measurements (15%) and Dr. Peterson's ROM measurements (12%) are inconsistent with one another [varying by 3%], and thus suspect. Instead, however, he urges the adoption of the 6% ROM that he measured himself – assuming he did so. In the final analysis, Dr. Farber's opinions, however well-informed they might be, are exactly that – his medical opinions. Respondents have presented insufficient evidence that Dr. Larsen *erred* in some critical fashion; instead, it is more of "that's not the way I think he should have done it." The ALJ finds that the mere difference in medical opinion as expressed by Respondents' expert does not rise to the level of overcoming the DIME opinion. Claimant is not yet at MMI, and will not achieve it until he attempts surgical intervention.

Medical Benefits, Generally

L. For a compensable injury, Respondents must provide all medical benefits that are reasonably necessary to cure and relieve the injury. C.R.S. § 8-42-101 (2020). Respondents are liable for reasonable and necessary medical treatment by a physician to whom a claimant has been referred by an authorized treating provider. *Rogers v. Industrial Commission*, 746 P.2d 565 (Colo. App. 1987). An aggravation of a pre-existing condition is compensable. *State v. Richards*, 405 P.2d 675 (Colo. 1965). The question of whether there has been a permanent aggravation is one of fact for determination by an ALJ. *Monfort Inc. v. Rangel*, 867 P.2d 122 (Colo. App. 1993).

Medical Benefits, as Applied

M. In this instance, the ALJ finds the cumulative opinions of the DIME physician, Dr. Larsen, and the referred orthopedist, Dr. Walden to be more persuasive than Respondent's IME physician, Dr. Farber. Dr. Walden is also an accomplished orthopedic surgeon, and has spent more time with Claimant than has the IME. The ALJ finds his rationale for the proposed surgery to be persuasive. Despite Claimant's extensive efforts at conservative care, he has essentially "topped out" without surgical intervention. Dr. Watson (with Dr. Larsen's concurrence) has sufficiently identified the pain generator to the ALJ's satisfaction. And while no one is promising a 100% shoulder, there is a reasonable likelihood that Claimant's condition can be improved with surgery. The ALJ further finds that there is sufficient evidence to conclude that the proposed surgery is related to the original work injury. At a minimum, Claimant's preexisting shoulder condition was rendered permanently aggravated by the work injury, such as to now require medical treatment.

Overcoming the DIME's Impairment Rating

N. Respondents have presented insufficient evidence that the Impairment Rating methodology by the DIME physician is suspect. However, since Claimant is not at MMI, that issue is moot for now. Once Claimant receives all reasonable, necessary, and related medical treatment, it is hoped that his need for an Impairment Rating for ROM might be reduced.

Conversion to Whole Person

O. Whether the Claimant sustained a "loss of an arm at the shoulder" within the meaning of § 8-42-107 (2) (a), C.R.S., or a whole person medical impairment compensable under § 8-42-107 (8), C.R.S. is one of fact for determination by the ALJ. In resolving this question, the ALJ must determine the situs of the Claimant’s "functional impairment," and the situs of the functional impairment is not necessarily the location of the injury itself. Langton v. Rocky Mountain Health Care Corp., supra; Strauch v. PSL Swedish HealthcaSystem, supra. Because the issue is factual in nature, we must uphold the ALJ’s determination if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; Walker v. Jim Fuoco Motor Co., 942 P.2d 1390 (Colo. App. 1997). This standard of review requires us to defer to the ALJ’s resolution of conflicts in the evidence, credibility determinations, and plausible inferences drawn from the record. Metro Moving and Storage Co. v. Gussert, 914 P.2d 411 (Colo. App. 1995).

P. Whether the Claimant has sustained an “injury” which is on or off the schedule of impairment depends on whether the claimant has sustained a “functional impairment” to a part of the body that is not contained on the schedule. *Strauch v. PSL Swedish Health Care System*, 917 P.2d 366 (Colo. App. 1996). Functional impairment need not take any particular impairment. Discomfort which interferes with the claimant’s ability to use a portion of his body may be considered “impairment.” *Mader v. Popejoy Construction Company, Inc.*, W.C. No. 4-198-489, (ICAO August 9, 1996). Pain and discomfort which limits a claimant’s ability to use a portion of his body may be considered a “functional impairment” for determining whether an injury is on or off the schedule. *See, e.g., Beck v. Mile Hi Express Inc.*, W.C. No. 4- 238-483 (ICAO February 11, 1997).

Q. Implicit from this is that the ALJ cannot make this determination until Claimant has reached MMI. Until that occurs, it is not knowable exactly what functional limitations Claimant might actually have. For this reason, the ALJ will defer any findings on conversion, as being not ripe for adjudication at this time. Upon reaching MMI, Claimant may, potentially at least, re-raise this issue.

ORDER

It is therefore Ordered that:

1. Respondents have not overcome the DIME opinion of Dr. Larsen. Claimant is not at MMI.

2. Respondents shall pay for the shoulder surgery as proposed by Dr. Walden.

3. Claimant's request to convert his extremity rating for his shoulder is not ripe for adjudication at this time.

4. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

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

DATED: May 13, 2021

/s/ William G. Edie

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

ISSUES

1. Whether Respondents have produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Bryan Counts, M.D. that Claimant has not reached Maximum Medical Improvement (MMI) as a result of her August 20, 2017 industrial injury.

2. Whether Claimant has demonstrated by a preponderance of the evidence that the T11-12 thoracic fusion surgery performed by Jeffrey Donner, M.D. was reasonable, necessary and causally related to her August 20, 2017 industrial injury.

3. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits for the period April 21, 2020 until August 8, 2020 and Temporary Partial Disability (TPD) benefits for the period August 9, 2020 until February 19, 2021.

4. Whether Claimant has established by a preponderance of the evidence that she is entitled to a disfigurement award pursuant to §8-42-108, C.R.S.

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $596.60.

FINDINGS OF FACT

1. Claimant worked for Employer as a flight attendant. On August 20, 2017 during a layover in Saint Louis, Missouri she sustained an industrial injury to her back when she slipped and fell in water on a bathroom floor.

2. Claimant immediately obtained medical care with the DePaul Hospital in Saint Louis. Providers documented that Claimant was complaining of lower midline back pain that radiated down her right lower extremity into her right foot.

3. After returning to Colorado Claimant received treatment from Concentra Medical Centers. Medical records consistently document midline to lower back pain with radiation to the right side.

4. From August into November 2017 Claimant received conservative treatment from Robert Nystrom, D.O. and Shimon Blau, M.D. Claimant underwent epidural steroid and trigger point injections. Dr. Blau recommended an MRI in November 2017 and Dr. Nystrom referred Claimant to William D. Biggs, M.D. for an orthopedic evaluation.

5. On November 6, 2017 Claimant underwent lumbar and thoracic MRIs. Mark Reese, M.D. interpreted the imaging. Regarding the lumbar spine, Dr. Reese described mild bilateral neuroforaminal narrowing at L3-L4, L4-L5 and L5-S1 in the setting of lower lumbar spine spondylolytic changes. More significantly, in the thoracic spine region Dr. Reese noted a right central and right lateral disc extrusion at T10-T11 that appeared to extend into the right neural foramen.

6. On November 13, 2017 Claimant returned to Dr. Blau for an examination. He recommended right-sided transforaminal epidural steroid injections. Dr. Blau performed the injections over the right T10-T11 and T11-T12 levels on December 21, 2017. However, as Dr. Blau documented in his January 2, 2018 report, the injections did not benefit Claimant.

7. On January 19, 2018 Dr. Biggs reviewed the MRI scans. He noted multilevel Scheuermann-type changes, worse in the lower thoracic spine, and agreed with Dr. Reese that Claimant had a disc herniation on the right side at T10-T11. He projected that a discectomy by itself would not be sufficient. Dr. Biggs concluded that “I think she would have to have a fusion. I would not recommend doing that, but I think that is probably her only surgical option at this point.”

8. In January 2018 Dr. Nystrom referred Claimant to Jeffrey Donner, M.D. Dr. Donner reviewed the scans and proposed a right T10-11 lateral discectomy.

9. On February 12, 2018 Claimant visited PA-C Chris Kottenstette for an evaluation. For the first time Claimant reported right radiating pain in a thoracic dermatome. PA-C Kottenstette noted that Claimant did not exhibit any left-sided symptoms.

10. On February 14, 2018 Claimant visited Dr. Donner for an examination. Dr. Donner reported that Claimant was “interested in surgical options due to unremitting intense right thoracolumbar pain unresponsive to extensive conservative management.” Dr. Donner specified that the pain radiated laterally into the posterolateral line on the right side and was aggravated by activities. After a physical examination, Dr. Donner assessed Claimant with a chronic right T10 radiculopathy due to a large right T10-T11 disc herniation that had been unresponsive to conservative treatment. He also noted a left-sided T11-T12 small herniation that was not clinically significant. Dr. Donner remarked that Claimant would proceed with a right T10-T11 lateral discectomy.

11. On March 20, 2018 Claimant underwent a right T10-T11 lateral discectomy. Claimant suffered wound dehiscence or separation and was placed on cephalexin as noted in a review by emergency medicine physician John Mathew Luttrell, M.D. During an April 6, 2018 examination providers noted that there was not much cellulitis or drainage and recommended discharge with pain medication.

12. By early 2019 Dr. Donner documented Claimant’s use of both oxycodone 15-mg strength and OxyContin 30- mg strength. He recommended a repeat MRI of the

thoracic spine region. The April 4, 2019 MRI revealed small disc protrusions at T10- T11, T11-T12, and T12-L1 as described by David Goodbee, M.D.

13. On April 11, 2019 Dr. Donner reviewed the thoracic spine MRI scans. He noted a right central disk protrusion at T11-T12 along with degeneration at T10-T11. He recommended thoracic fusion surgery involving T10-T11 and T11-T12.

14. On April 28, 2019 B. Andrew Castro, M.D. performed a medical records review. Dr. Castro determined that further surgical intervention was not reasonable based on minor MRI findings. Moreover, Claimant had a previous discectomy that had decompressed and only exhibited degenerative changes. Dr Castro summarized that "[a]n isolated thoracic fusion for back pain in a 25-year-old which has failed all attempts at conservative management for a treatment as well as a diagnostic regard with escalating narcotic pain medication usage is not indicated and not appropriate and will not benefit this patient from a functional or pain standpoint."

15. On May 22, 2019 Dr. Castro performed an independent medical examination of Claimant. He issued a report on June 3, 2019. Dr. Castro again concluded that fusion surgery was not warranted. He explained that "all clinical indicators lead to the conclusion the patient had a terrible outcome from the original surgery and doubling down with a more debilitating procedure will not benefit this patient from a pain or a functional standpoint." Respondents subsequently denied Claimant's request for the proposed thoracic surgery.

16. On January 14, 2020 Claimant underwent the proposed thoracic spinal fusion surgery through her personal insurance. In contrast to her first surgery, Claimant noted improvement with decreased pain that allowed her to decrease her use of opioid medications.

17. On March 24, 2020 Claimant underwent an evaluation with John T. Sacha, M.D. Dr. Sacha determined that Claimant had reached Maximum Medical Improvement (MMI) on January 10, 2020. Relying on Table 53 of the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised)* (*AMA Guides*) he assigned Claimant a 5% whole person permanent impairment of her thoracic spine. He recommended maintenance care including a consultation and follow-up with a psychiatrist who specializes in medication management.

18. On April 21, 2020 Claimant underwent an evaluation with Authorized Treating Physician (ATP) Amanda Cava, M.D. at Concentra. She concluded that Claimant had reached MMI and assigned a 6% whole person permanent impairment of the thoracic spine. Dr. Cava noted that there were work restrictions unrelated to Claimant's industrial injury. Specifically, because Claimant's thoracic spinal fusion surgery was not covered by Workers' Compensation, ongoing restrictions should be assigned by Dr. Donner.

19. On September 9, 2020 Claimant underwent a Division Independent medical Examination (DIME) with Bryan Counts, M.D. After reviewing medical records and

performing a physical examination, he noted thoracic spine range-of-motion deficits. Dr. Counts concluded that Claimant had not reached MMI. He expressed that the January 14, 2020 thoracic spinal fusion surgery was “quite successful.” Dr. Counts reasoned that the surgery was both medically necessary and related to Claimant’s August 20, 2017 work-related injury. He noted that the Medical Treatment Guidelines authorize a spinal fusion after a failed discectomy. He specifically commented that the Lower Back Medical Treatment Guidelines permit revision surgery when previous operations have failed and significant functional gains are present. Dr. Counts recommended the completion of physical therapy and tapering off Percocet. He anticipated that Claimant would reach MMI in about four weeks.

20. Following the DIME, Claimant returned to Dr. Cava for an evaluation on November 5, 2020. Dr. Cava noted that Claimant’s pain and stiffness had worsened after physical therapy but she was demonstrating “functional improvement and tolerating therapy well.” Claimant was also weaning off oxycodone. Dr. Cava assigned work restrictions of not lifting in excess of 30 pounds constantly.

21. On December 29, 2020 Dr. Castro issued another records review. He referenced his prior evaluations and concluded that Claimant’s January 14, 2020 thoracic spinal fusion surgery was not reasonable, necessary or related to her work-related injury. Dr. Castro also explained that additional physical therapy would not provide functional benefit and Claimant should have been tapered from oxycodone. He reasoned that Claimant’s thoracic spinal fusion surgery addressing the T11-12 level was unrelated to her August 20, 2017 industrial injury.

22. On February 19, 2021 Dr. Cava determined that Claimant had reached MMI. She commented that Claimant was off pain medications for her work-related injury, but had an unrelated foot injury that was preventing her from returning to work. Dr. Cava assigned a permanent impairment rating but did not issue permanent physical restrictions. She recommended medical maintenance benefits in the form of two visits with Dr. Donner over the following 12 months.

23. On March 4, 2021 John S. Hughes, M.D. performed an independent medical examination of Claimant. After reviewing Claimant’s medical records and conducting a physical examination, he determined that Claimant’s thoracic spinal fusion surgery was reasonable, necessary, and causally related to her August 20, 2017 work-related injury. Dr. Hughes noted that Claimant had not reached MMI and agreed with Dr. Donner’s post-operative rehabilitation program.

24. In addition to issuing several reports, Dr. Castro testified at the hearing in this matter. He explained that Dr. Counts was incorrect in reasoning that Claimant’s second surgery was causally related to her August 20, 2017 industrial injuries. He detailed that thoracic fusion surgery is not warranted in the absence of instability, spinal canal compression, neural foraminal compression or substantial residual disc herniations. The preceding findings were confined to the T10-T11 level. At the T11-T12 level, there was only a small disc bulge on the left side that was unrelated to Claimant’s industrial injury

or symptoms. Dr. Castro remarked that Dr. Counts was incorrect in his causation assessment because Claimant's intractable pain complaints were likely related to her escalating doses of narcotics. He further testified that Dr. Counts incorrectly cited to the Division of Workers' Compensation Medical Treatment Guidelines for the Lower Back in support of his causation opinion because there are no thoracic Medical Treatment Guidelines and thoracic fusions rarely succeed.

25. Dr. Castro explained that Dr. Counts was wrong in concluding that Claimant had not reached MMI more than 10 months after her first surgery. Notably, the T11-12 level was not work-related. Claimant thus reached MMI within 10 months after her March 20, 2018 right T10-T11 lateral discectomy. Furthermore, Dr. Castro specified that Dr. Counts was incorrect in failing to place Claimant at MMI in his September 9, 2020 DIME because physical therapy would not likely have improved Claimant's condition 10 months after the second surgery. Finally, weaning off narcotics should have occurred six weeks to three months after the first surgery.

26. Dr. Castro summarized that Dr. Counts was incorrect in his DIME conclusions because Claimant reached MMI as determined by Dr. Cava on April 21, 2020 with a 6% whole person impairment rating. The thoracic fusion surgery performed by Dr. Donner and subsequent treatment was not authorized. The fusion was also not reasonable, necessary or related to Claimant's August 20, 2017 industrial injury.

27. Claimant testified at the hearing in this matter. She explained that when Dr. Cava determined she had reached MMI on April 21, 2020 she was unable to perform her regular job duties. Claimant commented that she had not completely healed from her second surgery. Furthermore, because her job required lifting up to 50 pounds and her work restrictions precluded lifting in excess of 35 pounds, she was unable to perform her regular job duties. Claimant was thus off of work from April 21, 2020 to August 8, 2020.

28. Claimant began working as a Customer Service Representative through Arrow Tech on August 9, 2020. For the period August 9, 2020 to February 19, 2021 or 189 days Claimant earned total wages of $13,772.57. During this same period of time at the admitted Average Weekly Wage (AWW) of $596.60 Claimant would have earned $16,108.20. Claimant thus suffered a wage loss of $2,335.63 for the period August 9, 2020 to February 19, 2021.

29. Claimant underwent a disfigurement evaluation at the hearing in this matter. As a result of her August 20, 2017 industrial injury, Claimant sustained permanent disfigurement from two surgeries. Both of the surgeries occurred in the same location and resulted in scarring. As a result, Claimant has a four inch long sunken scar down the midline of her back. Claimant testified that the second surgery did not change the scar except to make it about one inch longer. The disfigurement is serious, permanent and normally exposed to public view. Accordingly, Claimant is entitled to receive a disfigurement award in the amount of $800.00.

30. Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Counts that Claimant has not reached MMI as a result of her August 20, 2017 industrial injury. Specifically, Respondents have not demonstrated that it is highly probable that Dr. Counts' MMI determination was incorrect. Initially, on August 20, 2017 Claimant sustained an industrial injury to her back when she slipped and fell in water on a bathroom floor while working as a flight attendant. On March 20, 2018 Claimant underwent a right T10-T11 lateral discectomy. On April 11, 2019 Dr. Donner reviewed Claimant's thoracic spine MRI scans and recommended fusion surgery involving T10-T11 and T11-T12. Because Respondents denied the surgical request, Claimant underwent the thoracic spine fusion surgery through her personal insurance on January 14, 2020. In contrast to her first surgery, Claimant noted improvement with decreased pain that allowed her to decrease opioid medications. On April 21, 2020 Claimant's ATP Dr. Cava concluded that she had reached MMI and assigned a 6% whole person permanent impairment of the thoracic spine.

31. On September 9, 2020 Claimant underwent a DIME with Bryan Counts, M.D. After reviewing medical records and performing a physical examination, he noted thoracic spine range-of-motion deficits. Dr. Counts concluded that Claimant had not reached MMI. He noted that the thoracic fusion surgery was "quite successful." Dr. Counts reasoned that the second surgery was both medically necessary and related to Claimant's August 20, 2017 work-related injury. He remarked that the Medical Treatment Guidelines authorize a spinal fusion after a failed discectomy. He specifically noted that the Lower Back Medical Treatment Guidelines permit revision surgery when previous operations have failed and significant functional gains are present. Dr. Counts recommended physical therapy and tapering off Percocet.

32. In contrast, Dr. Castro explained that Dr. Counts was wrong in concluding that Claimant had not reached MMI more than 10 months after the first surgery. He detailed that thoracic fusion surgery was not warranted in the absence of instability, spinal canal compression, neural foraminal compression or substantial residual disc herniations. The preceding findings were confined to the T10-T11 level. At the T11-T12 level, there was only a small disc bulge on the left side that was unrelated to Claimant's work injury or symptoms. Dr. Castro emphasized that the T11-T12 level was not related to Claimant's original Workers' Compensation injury. He remarked that Dr. Counts was incorrect in his causation assessment because Claimant's intractable pain complaints were likely related to her escalating doses of narcotics. Dr. Castro further testified that Dr. Counts was incorrect in citing the Division of Workers' Compensation Medical Treatment Guidelines for the Lower Back in support of his causation opinion because there are no thoracic Medical Treatment Guidelines and thoracic fusions rarely succeed. Furthermore, Dr. Cava also determined that Claimant had reached MMI on April 21, 2020. She commented that Claimant was off pain medications for her work-related injury, but had an unrelated foot injury that was preventing her from returning to work.

33. Despite the opinions of Drs. Castro and Cava, Respondents have failed to demonstrate that Dr. Counts' DIME opinion was clearly erroneous. Although Drs. Castro

and Cava concluded that Claimant had reached MMI as a result of her August 20, 2017 industrial injury, they failed to identify Dr. Counts' specific error or improper application of the *AMA Guides.* Dr. Counts' determined Claimant had not reached MMI because she had not healed from the second surgery. The opinion of Dr. Hughes and the medical records support Dr. Counts' DIME opinion and reflect that Claimant has not attained MMI. Specifically, after reviewing Claimant's medical records and conducting a physical examination, Dr. Hughes determined that Claimant's thoracic spinal fusion surgery was reasonable, necessary, and causally related to her August 20, 2017 work-related injury. Dr. Hughes noted that Claimant had not reached MMI and agreed with Dr. Donner's post-operative rehabilitation program. Contrary determinations by Drs. Castro and Cava are mere differences of medical opinion that do not constitute clear and convincing evidence to overcome Dr. Counts' DIME opinion. Accordingly, Respondents have not produced unmistakable evidence free from serious or substantial doubt that Dr. Counts' conclusion that Claimant has not reached MMI is incorrect.

34. Claimant has demonstrated that it is more probably true than not that the thoracic fusion surgery performed by Dr. Donner was reasonable, necessary and causally related to her August 20, 2017 industrial injury. Initially, an April 4, 2019 thoracic MRI revealed small disc protrusions at T10-T11, T11-T12 and T12-L1. On April 11, 2019 Dr. Donner reviewed Claimant's thoracic spine MRI scans and noted a right central disc protrusion at T11-T12 along with degeneration at T10-T11. He recommended fusion surgery involving T10-T11 and T11-T12. Claimant underwent the procedure on January 14, 2020. In contrast to her first surgery, Claimant noted improvement with decreased pain that allowed her to diminish the use of opioid medications.

35. In addition to Dr, Donner's opinion, DIME Dr. Counts reasoned that the thoracic fusion surgery was medically necessary and related to Claimant's August 20, 2017 work-related injury. After reviewing Claimant's medical records and conducting a physical examination, Dr. Hughes also determined that Claimant's thoracic spinal fusion surgery was reasonable, necessary, and causally related to her August 20, 2017 work-related injury. In contrast, Dr. Castro emphasized that the T11-T12 level was not related to Claimant's original Workers' Compensation injury. However, the bulk of the medical records and persuasive medical opinions demonstrate that the thoracic spinal fusion surgery was causally related to Claimant's August 20, 2017 industrial injury. Accordingly, the January 14, 2020 thoracic fusion surgery performed by Dr. Donner was reasonable, necessary and causally related to Claimant's August 20, 2017 industrial injury.

36. Claimant has proven that it is more probably true than not that she is entitled to receive TTD benefits for the period April 21, 2020 until August 8, 2020 and TPD benefits for the period August 9, 2020 until February 19, 2021. Claimant explained that when Dr. Cava determined she had reached MMI on April 21, 2020 she was unable to perform her regular job duties. She commented that she had not completely healed from her second surgery. Furthermore, because her job required lifting up to 50 pounds and her work restrictions precluded lifting in excess of 35 pounds, she was unable to perform her regular job duties. Claimant was thus off of work from April 21, 2020 to August 8, 2020.

37. In contrast, Dr. Cava noted in her April 21, 2020 MMI determination that there were work restrictions unrelated to Claimant's industrial injury. Specifically, because Claimant's second surgery was not covered by Workers' Compensation, ongoing restrictions should be assigned by Dr. Donner. However, because Claimant's thoracic spinal fusion surgery was reasonable, necessary and related to her August 20, 2017 industrial injury, any restrictions and limitations from the surgery were causally related to her August 20, 2017 work injury. She was thus unable to perform her regular job duties because of her industrial injury. Claimant has demonstrated her disability and an impairment of earning capacity by her inability to effectively and properly perform her regular job functions. Accordingly, Claimant is entitled to receive TTD benefits for the period April 21, 2020 until August 8, 2020.

38. For the period August 9, 2020 to February 19, 2021 or 189 days Claimant earned total wages of $13,772.57. During this same period of time at the admitted AWW of $596.60 Claimant would have earned $16,108.20. Claimant thus suffered a wage loss of $2,335.63 for the period August 9, 2020 until Dr. Cava placed her at MMI on February 19, 2021. The medical records and Claimant's credible testimony thus reflect that her August 20, 2017 industrial injury caused her disability and consequent wage loss. Accordingly, Claimant is entitled to receive TPD benefits based on her wage loss of $2,335.63 during the period August 9, 2020 to February 19, 2021.

CONCLUSIONS OF LAW

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

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

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and

bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Overcoming the DIME

4. MMI is primarily a medical determination involving a diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." §8-40-201(11.5), C.R.S. A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Powell v. Aurora Public Schools* WC 4-974-718-03 (ICAO, Mar. 15, 2017). A finding that the claimant needs additional medical treatment including surgery to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management,* WC 4-356-512 (ICAO, May 20, 2004);

5. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAO, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

6. A DIME physician's opinions concerning MMI and impairment carry presumptive weight pursuant to §8-42-107(8)(b)(III), C.R.S.; *see Yeutter v. Industrial Claim Appeals Office*, No. 18CA0498 (Apr. 11, 2019) 2019 COA 53. The statute provides that "[t]he finding regarding [MMI] and permanent medical impairment of an independent medical examiner in a dispute arising under subparagraph (II) of this paragraph (b) may be overcome only by clear and convincing evidence." *Id.* Subparagraph (II) is limited to parties' disputes over "a determination by an authorized treating physician on the question of whether the injured worker has or has not reached [MMI]." §8-42-107(8)(b)(II). "Nowhere in the statute is a DIME's opinion as to the cause of a claimant's injury similarly imbued with presumptive weight." *See Yeutter*, 2019 COA 53 ¶ 18. Accordingly, a DIME physician's opinion carries presumptive weight only with respect to MMI and impairment. *Id.* at ¶ 21.

7. "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial*

Claim Appeals Office, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAO, Nov. 17, 2000).

8. As found, Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Counts that Claimant has not reached MMI as a result of her August 20, 2017 industrial injury. Specifically, Respondents have not demonstrated that it is highly probable that Dr. Counts' MMI determination was incorrect. Initially, on August 20, 2017 Claimant sustained an industrial injury to her back when she slipped and fell in water on a bathroom floor while working as a flight attendant. On March 20, 2018 Claimant underwent a right T10-T11 lateral discectomy. On April 11, 2019 Dr. Donner reviewed Claimant's thoracic spine MRI scans and recommended fusion surgery involving T10-T11 and T11-T12. Because Respondents denied the surgical request, Claimant underwent the thoracic spine fusion surgery through her personal insurance on January 14, 2020. In contrast to her first surgery, Claimant noted improvement with decreased pain that allowed her to decrease opioid medications. On April 21, 2020 Claimant's ATP Dr. Cava concluded that she had reached MMI and assigned a 6% whole person permanent impairment of the thoracic spine.

9. As found, on September 9, 2020 Claimant underwent a DIME with Bryan Counts, M.D. After reviewing medical records and performing a physical examination, he noted thoracic spine range-of-motion deficits. Dr. Counts concluded that Claimant had not reached MMI. He noted that the thoracic fusion surgery was "quite successful." Dr. Counts reasoned that the second surgery was both medically necessary and related to Claimant's August 20, 2017 work-related injury. He remarked that the Medical Treatment Guidelines authorize a spinal fusion after a failed discectomy. He specifically noted that the Lower Back Medical Treatment Guidelines permit revision surgery when previous operations have failed and significant functional gains are present. Dr. Counts recommended physical therapy and tapering off Percocet.

10. As found, in contrast, Dr. Castro explained that Dr. Counts was wrong in concluding that Claimant had not reached MMI more than 10 months after the first surgery. He detailed that thoracic fusion surgery was not warranted in the absence of instability, spinal canal compression, neural foraminal compression or substantial residual disc herniations. The preceding findings were confined to the T10-T11 level. At the T11-T12 level, there was only a small disc bulge on the left side that was unrelated to Claimant's work injury or symptoms. Dr. Castro emphasized that the T11-T12 level was not related to Claimant's original Workers' Compensation injury. He remarked that Dr. Counts was incorrect in his causation assessment because Claimant's intractable pain complaints were likely related to her escalating doses of narcotics. Dr. Castro further

testified that Dr. Counts was incorrect in citing the Division of Workers' Compensation Medical Treatment Guidelines for the Lower Back in support of his causation opinion because there are no thoracic Medical Treatment Guidelines and thoracic fusions rarely succeed. Furthermore, Dr. Cava also determined that Claimant had reached MMI on April 21, 2020. She commented that Claimant was off pain medications for her work-related injury, but had an unrelated foot injury that was preventing her from returning to work.

11. As found, despite the opinions of Drs. Castro and Cava, Respondents have failed to demonstrate that Dr. Counts' DIME opinion was clearly erroneous. Although Drs. Castro and Cava concluded that Claimant had reached MMI as a result of her August 20, 2017 industrial injury, they failed to identify Dr. Counts' specific error or improper application of the *AMA Guides.* Dr. Counts' determined Claimant had not reached MMI because she had not healed from the second surgery. The opinion of Dr. Hughes and the medical records support Dr. Counts' DIME opinion and reflect that Claimant has not attained MMI. Specifically, after reviewing Claimant's medical records and conducting a physical examination, Dr. Hughes determined that Claimant's thoracic spinal fusion surgery was reasonable, necessary, and causally related to her August 20, 2017 work-related injury. Dr. Hughes noted that Claimant had not reached MMI and agreed with Dr. Donner's post-operative rehabilitation program. Contrary determinations by Drs. Castro and Cava are mere differences of medical opinion that do not constitute clear and convincing evidence to overcome Dr. Counts' DIME opinion. Accordingly, Respondents have not produced unmistakable evidence free from serious or substantial doubt that Dr. Counts' conclusion that Claimant has not reached MMI is incorrect.

Proposed Thoracic Fusion Surgery

12. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The question of whether a particular disability is the result of the natural progression of a preexisting condition or the subsequent aggravation or acceleration of that condition is a question of fact. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Finally, the determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

13. As found, Claimant has demonstrated by a preponderance of the evidence that the thoracic fusion surgery performed by Dr. Donner was reasonable, necessary and causally related to her August 20, 2017 industrial injury. Initially, an April 4, 2019 thoracic MRI revealed small disc protrusions at T10-T11, T11-T12 and T12-L1. On April 11, 2019 Dr. Donner reviewed Claimant's thoracic spine MRI scans and noted a right central disc

protrusion at T11-T12 along with degeneration at T10-T11. He recommended fusion surgery involving T10-T11 and T11-T12. Claimant underwent the procedure on January 14, 2020. In contrast to her first surgery, Claimant noted improvement with decreased pain that allowed her to diminish the use of opioid medications.

14. As found, in addition to Dr, Donner's opinion, DIME Dr. Counts reasoned that the thoracic fusion surgery was medically necessary and related to Claimant's August 20, 2017 work-related injury. After reviewing Claimant's medical records and conducting a physical examination, Dr. Hughes also determined that Claimant's thoracic spinal fusion surgery was reasonable, necessary, and causally related to her August 20, 2017 work-related injury. In contrast, Dr. Castro emphasized that the T11-T12 level was not related to Claimant's original Workers' Compensation injury. However, the bulk of the medical records and persuasive medical opinions demonstrate that the thoracic spinal fusion surgery was causally related to Claimant's August 20, 2017 industrial injury. Accordingly, the January 14, 2020 thoracic fusion surgery performed by Dr. Donner was reasonable, necessary and causally related to Claimant's August 20, 2017 industrial injury.

Temporary Total/Partial Disability Benefits

15. To prove entitlement to Temporary Total Disability (TTD) benefits a claimant must demonstrate that the industrial injury caused a disability lasting more than three work shifts, she left work as a result of the disability, and the disability resulted in an actual wage loss. *See* Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

16. Section 8-42-106(1), C.R.S. provides for an award of TPD benefits based on the difference between the claimant's AWW at the time of injury and the earnings

during the continuance of the disability. Specifically, an employee shall receive 66.66% of the difference between her wages at the time of her injury and during the continuance of temporary partial disability. In order to receive TPD benefits the claimant must establish that the injury caused the disability and consequent partial wage loss. §8-42-103(1), C.R.S.; *see Safeway Stores, Inc. v. Husson,* 732 P.2d 1244 (Colo. App. 1986) (temporary partial compensation benefits are designed as a partial substitute for lost wages or impaired earning capacity arising from a compensable injury). Section 8-42-106(2), C.R.S. provides that TPD shall continue until either of the following occurs: the employee reaches MMI; or the attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin the employment." *See Evans v. Wal-Mart*, WC 4-825-475 (ICAO, May 4, 2012).

17. As found, Claimant has proven by a preponderance of the evidence that she is entitled to receive TTD benefits for the period April 21, 2020 until August 8, 2020 and TPD benefits for the period August 9, 2020 until February 19, 2021. Claimant explained that when Dr. Cava determined she had reached MMI on April 21, 2020 she was unable to perform her regular job duties. She commented that she had not completely healed from her second surgery. Furthermore, because her job required lifting up to 50 pounds and her work restrictions precluded lifting in excess of 35 pounds, she was unable to perform her regular job duties. Claimant was thus off of work from April 21, 2020 to August 8, 2020.

18. As found, in contrast, Dr. Cava noted in her April 21, 2020 MMI determination that there were work restrictions unrelated to Claimant's industrial injury. Specifically, because Claimant's second surgery was not covered by Workers' Compensation, ongoing restrictions should be assigned by Dr. Donner. However, because Claimant's thoracic spinal fusion surgery was reasonable, necessary and related to her August 20, 2017 industrial injury, any restrictions and limitations from the surgery were causally related to her August 20, 2017 work injury. She was thus unable to perform her regular job duties because of her industrial injury. Claimant has demonstrated her disability and an impairment of earning capacity by her inability to effectively and properly perform her regular job functions. Accordingly, Claimant is entitled to receive TTD benefits for the period April 21, 2020 until August 8, 2020.

19. As found, for the period August 9, 2020 to February 19, 2021 or 189 days Claimant earned total wages of $13,772.57. During this same period of time at the admitted AWW of $596.60 Claimant would have earned $16,108.20. Claimant thus suffered a wage loss of $2,335.63 for the period August 9, 2020 until Dr. Cava placed her at MMI on February 19, 2021. The medical records and Claimant's credible testimony thus reflect that her August 20, 2017 industrial injury caused her disability and consequent wage loss. Accordingly, Claimant is entitled to receive TPD benefits based on her wage loss of $2,335.63 during the period August 9, 2020 to February 19, 2021.

Disfigurement

20. Section 8-42-108, C.R.S. provides that a claimant may obtain additional compensation if he is seriously disfigured as the result of an industrial injury. As found, Claimant underwent a disfigurement evaluation at the hearing in this matter. As a result of her August 20, 2017 industrial injury, Claimant sustained permanent disfigurement from two surgeries. Both of the surgeries occurred in the same location and resulted in scarring. As a result, Claimant has a four inch long sunken scar down the midline of her back. Claimant testified that the second surgery did not change the scar except to make it about one inch longer. The disfigurement is serious, permanent and normally exposed to public view. Accordingly, Claimant is entitled to receive a disfigurement award in the amount of $800.00.

ORDER

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

1. Respondents have failed to overcome the DIME opinion of Dr. Counts that Claimant has not reached MMI for her August 20, 2017 industrial injury.

2. Claimant's request for Respondents to pay for the January 14, 2020 thoracic fusion surgery performed by Dr. Donner is granted.

3. Claimant earned an AWW of $596.60.

4. Claimant shall receive TTD benefits for the period April 21, 2020 until August 8, 2020.

5. Claimant shall receive TPD benefits based on her wage loss of $2,335.63 during the period August 9, 2020 to February 19, 2021.

6. Claimant shall receive a disfigurement award in the amount of $800.00.

7. Any issues not resolved in this order are reserved for future determination.

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

For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at https://oac.colorado.gov/resources/oac-forms.

DATED: May 14, 2021.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-118-981-003 and 5-135-641-002

ISSUES

I. Whether Claimant sustained any permanent impairment, and if so, the extent of that impairment.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the Judge enters the following specific findings of fact:

PRIOR WORK INJURY AND SETTLEMENT OF CLAIM

1. Claimant, who is currently 30 years old, suffered a prior work-related back injury on February 16, 2018 while working for a prior employer. (Respondents' Hearing Submission A, pg. 2 and C, pg. 128) On the date Claimant was injured while moving beams. Claimant leaned over leaned over to pick up a beam and as he stood up, he experienced back pain. (Ex. B, pg. 11)

2. Between the date of injury and August 7, 2018, Claimant was neither taken off from work entirely nor placed on modified duty. Claimant was prescribed pain medications and underwent physical therapy, lumbar MRI and was referred to a chronic pain specialist. (Ex. B). He was diagnosed with herniated disc, chronic low back pain and depression. (Ex. B, pgs. 79 & 100)

3. On June 14, 2018, Claimant was seen for a psychological evaluation. At this time, Claimant was complaining of pain in both of his legs. Claimant stated that he had an annular tear at L5, pinched nerves and a herniated disc at L4 and that he was having ongoing functional limitations because the pain adversely effected "almost every aspect of his life." (Ex. B, pg. 103) Claimant was referred for 8 visits of cognitive behavioral therapy over a period of 8-12 weeks. (*Id*.)

4. On June 24, 2018, Claimant was seen by Eric M. Shoemaker, D.O., who diagnosed Claimant with an L5-S1 disc protrusion and bulge with central annular tear. (Ex. B, pg. 112)

5. On June 26, 2018, Claimant underwent a bilateral S1 transforaminal epidural steroid injection ("ESI") by Dr. Shoemaker for the diagnosis of "chronic pain syndrome." (Ex. B. pgs. 115-116)

6. On July 9, 2018, Dr. Jones reported that Claimant was not at MMI and would likely require permanent work restrictions. (Ex. B, pg. 118)

7. On July 20, 2018, Dr. Shoemaker recommended a second ESI, cognitive behavioral therapy, continued medications, and a follow up with Claimant in two weeks. (*Id*. at 121-122)

8. On August 2, 2018, Claimant underwent a second ESI with Dr. Shoemaker. (Ex. B, pg, 125)

9. On August 9 and 15, 2018, Claimant was seen for psychological counseling for chronic pain syndrome with Edward Cotgageorge, Ph.D. (Ex. B, pgs. 125-126)

10. On August 17, 2018, and before Claimant was placed at MMI, Claimant entered into a full and finale settlement agreement and settled his February 16, 2018 claim for (One Hundred Thousand Dollars) $100,000. The settlement agreement was approved by the Director of the Division of Workers' Compensation on August 17, 2018. The settlement agreement sets forth in detail the extent of Claimant's prior work injury. The settlement agreement specifically indicates Claimant's prior work injury included:

    a. Back injury including chronic low back pain.

    b. Lumbosacral strain.

    c. L4-S2 bilateral foraminal stenosis.

    d. L5 annular tear.

    e. Right greater than left radiculopathy.

    f. Depression.

    See (Ex. A, pgs. 2 & 8)

11. At the time of the settlement, Claimant was in active – and ongoing - medical treatment and had not been placed at MMI or evaluated for permanent impairment.

12. On December 27, 2018, Claimant was seen at SCHC Monfort Family Clinic complaining of worsened back pain with no additional injury, two episodes of urinary incontinence "one month ago and four months ago," the inability to sit or sleep without pain, limping with walking and inability to run. Claimant explained that he was not working due to his February 2018, injury, that he had done PT and steroid injections for the prior work injury "before considering surgery" and he had since settled this claim and no longer treating under workers' compensation. (Ex. N. pg. 402)

13. No evidence was presented that Claimant worked from the date of his February 16, 2018 injury through July 24, 2019.

CLAIMANT HIRED BY EMPLOYER ON JULY 25, 2019

14. On July 25, 2019, Employer hired Claimant as a sanitation driver. (Ex. C, pg. 128 & Ex. EE, pg. 841). Claimant's job required him to lift 50 pounds from ground level, bend, stand and sit, driving in a seated position for long periods of time, climb to heights and walk on uneven surfaces. (Ex. EE, pg. 841). Lance Norris ["Norris"], Employer Health Safety and Environment Director, testified that Claimant's job was to drive trucks, clean up wastewater, clean Porta Johns out, hook up hoses and that the job required a lot of physical activity, including a lot of lifting, bending, and twisting. (3/26/21 Hearing Transcript ["HT"] pg. 28 lns. 3-18)

CLAIMANT ALLEGES NEW
BACK AND SHOULDER INJURY ON SEPTEMBER 7, 2019.

15. On September 7, 2019, Claimant alleged he injury his "right back/shoulder" while picking up tools, hoses, and equipment. (Ex. C, pg. 128)

16. On September 9, 2019, Clamant reported to Employer that on September 7, 2019, he injured his "right back/shoulder picking up tools, hoses, and equipment. (Ex. C, pg. 128) There were no witnesses to this injury despite Employer's investigation. (Norris HT pg. 30 lns. 10-20) This injury is designated WC No. 5-118-981 and is a non-lost-time claim. Claimant was seen by Julie Parsons, M.D., who kept Claimant at full duty at all times for this injury. (Ex. L, pg. 232 – 314)

17. Between September 7, 2019 and October 21, 2019, Claimant underwent minimal conservative treatment consisting of massage, applying heat and had no work restrictions. In fact, Claimant was seen by Dr. Julie Parsons on October 2, 2019, complaining of back pain but stating that his neck felt better. (*Id*. at 233) Dr. Parsons diagnosed cervical and lumbar strains. (*Id*. at 236)

18. On October 23, 2019, Dr. Parsons placed Claimant at MMI without impairment. She also stated that Claimant was no longer taking medications for "this injury" and that Claimant did not require maintenance medical treatment. (*Id.* at 244)

19. Between September 7, 2019 and October 20, 2019, Claimant continued to work full duty as a regular sanitation driver for Employer at full wages, including overtime. (Ex. EE, pgs. 739 and Ex. NN, pg. 841) During this time period, no physician restricted Claimant from full duty, regular employment with Employer and Claimant never called in sick or otherwise complained to Employer or any medical provider that he was unable to perform or had difficulty performing any of his sanitation driver job duties. (Norris, HT pgs. 21-34)

SECOND INJURY WITH EMPLOYER ON OCTOBER 21 ,2019

20. On October 21, 2019, Claimant had a second injury with. On that date, while getting out of his truck, Claimant twisted his ankle. (Norris, HT pgs. 34-35) This injury is designated WC No. 5-135-641. This too was a non-lost-time claim. Following the left ankle injury, Claimant returned to modified duty for Employer working in the office where he could elevate his foot. (Norris, HT pg. 35) Claimant was seen by Dr. Parsons on October 23, 2019 at which time he was placed at MMI with no impairment and released to full duty. (Ex. L, pg. 247)

CLAIMANT TERMINATED FROM EMPLOYER ON OCTOBER 31, 2019

21. On October 31, 2019, Claimant was terminated from Employer. (Norris, HT pg. 36)

CLAIMANT STARTS NEW JOB WITH NEW EMPLOYER

22. On December 5, 2019, Claimant began work as a water truck driver for subsequent employer Kinetic Energy. (Ex. FF, pgs. 841A-842 & 850). Claimant's job qualifications include a Class A CDL which requires a fit for duty physical, involves getting out of the truck and connecting the tanker to the water source that is being loaded onto the truck, operating a pump to suck water into the tank and connecting a hose to the tank, and when the truck is full, closing the valves, taking the hose off, coiling it up and putting back onto the truck. (Ex. FF, pg. 841A & Norris, HT pgs. 36-37) Claimant's Kinetic Energy wage records show Claimant working full time with overtime from the time he was hired through February 18, 2020, when he was involved in a work related motor vehicle accident. (Ex. FF, pgs. 846-883)

23. On December 17, 2020, Claimant was seen by Dr. Shoemaker (who also treated Claimant for the prior February 2018, work related back injury Claimant settled for $100,000 with a different employer), who noted the two current work injuries with Employer. According to Dr. Shoemaker, Claimant's first injury on September 7, 2019 "occurred due to some heavy lifting that was unusual for his job" and the second injury occurred on October 27, 2019, when Claimant *"rolled his ankle and fell backwards landing on his back and his head whipping back hitting the ground*" and that Claimant may have sustained a concussion with head impact and no loss of consciousness although Claimant reported symptoms of increased drowsiness and headaches which are probably cervicogenic though there may be a post concussive component. (Ex. M, pgs. 324 & 341) Dr. Shoemaker repeats the October 27, 2019, mechanism of injury throughout his treatment records. (Ex. M) Regarding the lumbar spine, Dr. Shoemaker noted that Claimant's symptoms and recent lumbar MRI findings were identical to his symptoms and lumbar MRI findings from the February 2018 prior work injury. (Ex, M, pg. 341)

24. On May 20, 2020, Claimant underwent an IME with Scott Primack, D.O. Dr. Primack opined that Claimant was at MMI for his temporary exacerbation of his pre-existing back injury from his prior 2018 work injury on October 31, 2019, with no impairment. (Ex. K, pgs. 213-222)

25. On June 16, 2020, Dr. Shoemaker responded to a letter from Claimant's attorney and stated that he agreed with Dr. Primack that Claimant did not sustain any new lumbar spine injury or impairment on September 7 or October 21, 2019. Dr. Shoemaker, however, also opined that Claimant reached MMI for the lumbar spine on March 2, 2020 and MMI for the cervical spine on January 6, 2020. (Ex. J, pgs. 203-204). Dr. Shoemaker did not differentiate between the September 7 and October 21, 2019, injury dates other than to state his understanding that these two work injuries were combined into a single claim. (*Id*.at 203) Dr. Shoemaker further opined that Claimant had no lumbar spine impairment but he had a 21% WP cervical spine impairment, after combining a 4% specific disorder based upon Table 53.II.B of the AMA Guidelines with an 18% whole person for loss of range of motion. (Ex. J, pg. 204)

26. A prehearing conference was held on September 16, 2020, before PALJ Phillips who noted that both the September 7, 2019, and October 27, 2019, injuries were denied by Insurer. The ALJ granted Respondents' unopposed motion to consolidate both claims for one hearing on issues including compensability and/or to consolidate both claims for one Division IME ["DIME'] in the event final admissions of liability were filed. (Ex. G, pg. 145)

27. On October 14, 2020, Insurer filed a final admission of liability per Dr. Parsons October 23, 2019, report that Claimant reached MMI for his left ankle and low back pain and neck pain on that date with no impairment and attaching a copy of PALJ Phillips' prehearing conference order. (Ex. F, pg. 133)

28. One DIME for both claims was then scheduled with James P. Regan, which Claimant underwent on December 4, 2020. (Ex. H, pg. 176) Dr. Regan agreed with Dr. Shoemaker that Claimant reached MMI for the cervical spine in "January 2020" and he reached MMI for the lumbar spine on "3/2/20." (*Id.* at 184) Dr. Regan gave claimant a 31% WP impairment for the cervical and lumbar spine consisting of the following: 20% WP cervical spine impairment (4% for specific disorder based on Table 53 IIB plus 17% for loss of range of motion) combined with a 14% lumbar spine impairment (5% for specific disorder combined with 9% for loss of range of motion) (Ex. H, pg. 184) Dr. Regan did not specify which injury (September 7, 2019 or October 27, 2019) resulted in permanent impairment.

29. In his DIME report, Dr. Regan stated that claimant's neck and low back pain symptoms began on September 7, 2019, when Claimant lifted a case of gallon jugs of liquid and on October 21, 2019, claimant strained his left ankle when he was climbing down off of a truck and then fell backwards hitting his back on the ground and his head whipped back and hit the ground as well. (Ex. H, pg. 179)

According to Dr. Regan's DIME report, Claimant had a prior low back injury with two ESIs but per Claimant "the pain resolved after the second injection." (*Id*. at 179) No mention was made by Claimant (or referenced in Dr. Regan's DIME report) about Claimant's August 2018, $100,000 settlement of the February 2018, injury or the December 27, 2018, visit to SCHC Monfort Family Clinic (almost 5 months post settlement) where Claimant complained of back pain so bad he was unable to sit or sleep without pain, he could not run, he walked with a limp, and had two episodes of urinary incontinence "one month ago and four months ago." (Ex. N. pg. 402)

30. During his physical examination of Claimant, Dr. Regan reported that Clamant "is working and doing light lifting" and he has "modest low back pain but the neck is his greatest concern." According to Dr. Regan, Claimant "has worse pain if sitting an hour or standing an hour. He limits bending and will squat to get down. He has pain with any sideways movement of the neck or rotation of the neck. Upward gaze is difficult for him." (Ex. H, pg. 183) Dr. Regan was not aware that Claimant had been working full duty, regular work as a sanitation driver for Employer and as a water truck driver for Kinetic Energy since the date of the first injury except for a short period of time between his October 31, 2019 termination date from Employer and his December 5, 2019, start date with Kinetic Energy, where the ALJ infers Claimant was looking for employment. Nor did Dr. Regan have any information of the physical requirements both jobs entailed.

31. According to Dr. Regan's DIME report, Claimant "was only seen for the lumbar and cervical." Dr. Regan stated that "I feel he did not sustain a significant ankle injury on 9/7/19. The 10/21/19 visit was a follow up for the September event, not an additional injury to the ankle. . . I did not have the paperwork in hand regarding the ankle." (Ex. H, pg. 185)

32. In answers to interrogatories Claimant stated that ***on October 21, 2019, he "was getting off of his truck and twisted his left ankle" and that "this injury is only related to Claimant's left ankle."*** (Ex. G, pg. 170, No. 14) Claimant also stated that he "***has had no injuries to his neck, bilateral shoulders, bilateral upper extremities mid back or lower back after his September 7, 2019, injury."*** (Ex. G, pg. 170 No. 13) (emphasis added) This is completely different from the mechanism of injury that both Dr. Shoemaker and Dr. Regan have of Claimant twisting his left ankle after he fell from his truck and landed on this back and head after his head whipped around and hit the ground for which he may have had a concussion but no loss of consciousness.

33. The ALJ finds that the second injury on October 21, 2019 occurred when Claimant was getting off his truck and twisted his ankle. The ALJ finds that the mechanism of injury documented by Dr. Shoemaker and copied by Dr. Regan, *i.e.,* that Claimant *"rolled his ankle and fell backwards landing on his back and his head whipping back hitting the ground*" and sustained a concussion but no LOC did not happen. Dr. Primack explained that the medical treatment provided to Claimant for his neck by his treating physicians, including Dr. Shoemaker, after

October 21,2019, was based upon the erroneous belief that Claimant fell to the ground on his back and head, when in fact, he did not. None of the treatment following the October 21, 2019, injury would have been recommended or provided had the treating physician's known Claimant simply twisted his ankle coming down the truck as none of the treatment was related to the September 7, 2019 injury. (Primack HT, pgs. 75-82) The ALJ rejects the claim that Claimant sustained cervical spine impairment from the first injury and that the huge discrepancy in the mechanism of the second injury should be disregarded. The ALJ finds Claimant to be not credible.

34. Surveillance simply reiterated Dr. Primack's opinion that Claimant, who demonstrated no loss of function or physical difficulty, sustained no impairment from his lumbar and cervical strains. Surveillance shows Claimant walking normally, bending at the waist, walking a dog, climbing in and out of his Kinetic Energy semi-truck and driving, wearing a hard hat and removing large hoses from his truck and working for his subsequent employer with no difficulty or impediment to his lumbar and cervical spines. (Ex. DD, pgs. 723, 724 & 726 & Ex. K pgs. 221-222 & 231)

35. Dr. Regan attended the full day hearing in this claim, listened to the testimony of Dr. Primack and he also testified at hearing. After learning of Claimant's 2018, work injury and settlement, that Claimant was in active treatment with two incidences of incontinence from back pain in December 2018, the discrepancy with the mechanism of the second injury (spraining ankle coming down truck vs. spraining ankle after falling from truck and landing on back and having a whiplash type injury hitting head on the ground and suffering a concussion with no loss of consciousness), that Claimant worked full duty as a sanitation driver for Employer at all times post injury through termination date, that Claimant worked full duty as a water truck driver that required a CDL for a subsequent employer, one month post termination through ongoing, and after hearing Dr. Primack's testimony, Dr. Regan admitted that his DIME physician opinion that Claimant sustained a 31% WP impairment rating was wrong and that it violated Level II accredited teachings. Dr. Regan testified further that he changed his DIME opinion and now opined that Claimant has no permanent impairment as a result of the September 7, 2019, injury and Claimant has no permanent impairment as a result of the October 21, 2019, injury. Dr. Regan admitted that his original DIME opinion regarding permanent impairment of both injuries and to Claimant's lumber and cervical spines was wrong and inconsistent with Level II accredited teachings. Dr. Regan testified that his true and correct Division IME opinion is that Claimant sustained no impairment of any kind in both claims. (Regan HT, pgs. 213-215 & 219)

36. Dr. Regan also agreed that his original DIME opinion that Claimant had whole person cervical and lumbar spine impairments were wrong for another, independent reason: his initial opinion that Claimant sustained a lumbar and cervical spine impairment was incorrect based upon Table 53 II b of the AMA Guidelines, 3rd edition revised. That Table permits a physician to give a 4%

specific cervical disorder impairment and a 5% specific lumbar spine impairment for disc or soft tissue lesion with a minimum of six months of documented pain and rigidity. (Ex. II pg. 914) Dr. Primack explained that both Drs. Regan and Shoemaker opined that Claimant reached MMI for his cervical spine on January 6, 2020, 4 months after the first injury and 10 weeks after the second injury and MMI for his lumbar spine on March 2, 2020, less than 6 months after the first injury and 4 ½ months after the second injury). A Table 53 II b specific disorder for a cervical or lumbar spine impairment absent 6 months of documented pain and rigidity is wrong as both Drs. Primack and Regan testified to a hearing. (Regan HT, pgs. 175, 196-200 & 204-218). Dr. Regan also admitted that there was insufficient evidence in the records to support that Claimant had 6 months of documented pain and rigidity to the cervical and lumbar spines. *(Id.)* Both physicians agreed that because Claimant does not have impairment for a lumbar or cervical specific disorder, he cannot have impairment for loss of range of motion. (Regan HT, pgs. 199-201) The ALJ finds that Dr. Shoemaker's opinion that Claimant sustained a 21% cervical spine impairment (1% higher than Dr. Regan's initial cervical spine impairment for additional loss of range of motion) is wrong for these same reasons. Both Drs. Shoemaker and Regan opined that Claimant reached MMI for the cervical spine on January 6, 2020, much less than 6 months from the date of either injury. Consequently, Dr. Shoemaker's cervical spine impairment is also wrong and inconsistent with Level II accredited teachings.

37. Dr. Regan objected the notion that because his DIME actually took place more than 6 months from the date of either injury, this would somehow fulfill the 6 month requirement of documented pain and rigidity necessary for a Table 53 II b cervical or lumbar spine specific disorder. (Regan HT, pgs. 226-230). While Dr. Primack had explained that it may be appropriate for a rating physician at the time of MMI to project outward that an injured worker is anticipated to have 6 months of documented pain and rigidity even though 6 full months have not passed from date of injury until date of MMI, this projection is done at MMI. It is not appropriate per Level II accredited teachings for a physician examining an injured worker months AFTER MMI to include that time period in the 6 months because permanent impairment is determined "at MMI." (*Id*.)

38. Furthermore, Dr. Regan admitted that his original DIME physician opinion with regard to permanent lumbar impairment was wrong because it violated Level II accredited teachings with respect to causality and apportionment. Having learned about the extent of Claimant's 2018 back injury, the degree of medical treatment he had for that injury, the six-figure settlement and that Claimant continued in active treatment for significant back symptoms as late as December 2018 (none of which Dr. Regan was aware of at the time he rendered his original DIME physician opinion regarding permanent lumbar spine impairment), Claimant, in hindsight, factually had a 5% specific disorder to the lumbar spine as of December 27, 2018 (when he was seen for incontinence for back pain) for which he was compensated by prior settlement. Consequently, Dr. Regan agreed that another reason his original DIME physician opinion is wrong is that if Claimant

even had a 5% specific lumbar spine disorder from the injuries in this case (which Dr. Regan opined Claimant does not), that 5% would be apportioned to the 2018 injury as it was not caused by the 2019 injuries in this case resulting in no lumbar spine impairment in this case. (Regan HT, pgs. 173-180)

39. The ALJ finds that Dr. Regan changed his DIME physician opinion and that Dr. Regan's true and correct DIME opinion is that Claimant sustained no permanent impairment of any kind in these claims. Claimant failed to overcome Dr. Regan's opinion that he sustained no permanent impairment by clear and convincing evidence. The ALJ rejects Dr. Shoemaker's opinion regarding Claimant's permanent cervical impairment because it is not consistent with Level II accredited teachings for the same reasons Dr. Regan's original opinion admittedly fails. Moreover, Dr. Shoemaker's understanding of the mechanism of Claimant's second injury is wrong. As found, Claimant sprained his ankle coming out of his truck. Claimant did not sprain his ankle from falling from his truck, landing on his back, and having a whiplash injury where his head hit the ground and he did not have a concussion with no loss of consciousness as documented by Dr. Shoemaker.

40. Claimant chose to not testify; however, the ALJ finds that statements made by Claimant to his medical providers, including the DIME physician, regarding his mechanisms of injury and subsequent subjective pain complaints and alleged impact of the injuries on his level of function, activities of daily living and ability to work to be not credible. The ALJ finds testimony from Dr. Primack and Dr. Regan regarding his changed but true and correct DIME opinion that Claimant sustained no impairment in these claims to be credible and persuasive.

41. Claimant sustained no lumbar spine impairment as the 5% whole person lumbar spine specific disorder was not caused by the injuries in these claims.

42. Claimant sustained no cervical spine impairment as the 4% whole person cervical spine specific disorder was not caused by the injuries in these claims.

43. Claimant sustained no ankle impairment.

44. Claimant sustained no impairment to any other body part in these claims.

CONCLUSIONS OF LAW

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

1. The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

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

3. In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI, and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect, and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAP, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

6. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals*

Office, 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008).

7. If a party has carried the initial burden of overcoming the DIME physician's impairment rating by clear and convincing evidence, the ALJ's determination of the correct rating is then a matter of fact based upon the lesser burden of a preponderance of the evidence. *See Deleon v. Whole Foods Market, Inc*., W.C. No. 4-600-47 (ICAP, Nov. 16, 2006). The ALJ is not required to dissect the overall impairment rating into its numerous component parts and determine whether each part has been overcome by clear and convincing evidence. *Id.* When the ALJ determines that the DIME physician's rating has been overcome, the ALJ may independently determine the correct rating. *Lungu v. North Residence Inn*, W.C. No. 4-561-848 (ICAP, Mar. 19, 2004); *McNulty v. Eastman Kodak Co*., W.C. No. 4-432-104 (ICAP, Sept. 16, 2002)

8. Where an ALJ determines that a DIME physician changed his opinion concerning MMI or impairment, the party seeking to overcome that new opinion bears the burden of proof by clear and convincing evidence. *Dazzio,* W.C. No. 4-660-149 (ICAO June 30, 2008); *Clark v. Hudick Excavating, Inc.*, W.C. No. 4-524-162 (ICAO November 5, 2004).

9. As found, Dr. Regan changed his DIME opinion concerning impairment and testified that his true and correct DIME opinion is that Claimant sustained no impairment from the September 7, 2019, injury and no impairment from the October 21, 2019, injury. The ALJ accepts Dr. Regan's changed DIME opinion and finds that Claimant failed to overcome Dr. Regan's new DIME opinion by clear and convincing evidence and not even by a preponderance of the evidence.

10. As found, Dr. Primack persuasively explained that Dr. Regan failed to comply with the *AMA Guides*, specifically Table 53 II b and that Dr. Regan's 31% whole person impairment rating was contrary to the persuasive medical evidence. Instead, Dr. Regan primarily relied on Claimant's subjective complaints in assigning an impairment rating. Dr. Regan testified that he agreed with Dr. Primack that his original DIME rating was wrong. As found, Dr. Shoemaker also gave a 21% WP cervical spine impairment which Dr. Regan admitted he followed and provided a 20% WP rating finding 1% less for loss of ROM. As found, Dr. Primack and Dr. Regan agreed that Dr. Regan's cervical and lumbar impairment ratings did not comply with Table 53 II b which requires "an intervertebral disk or other soft tissue lesion, un-operated, with medically documented injury and a minimum of six months medically documented pain and rigidity. Dr. Primack testified that Claimant did not have six months of complaints of "pain" or "rigidity"

regarding his cervical and lumbar spines and was not expected to have ongoing pain and rigidity after MMI. Consequently, Claimant did not have a Table 53 II B diagnosis for his cervical or lumbar spines. Dr. Primack explained and Dr. Beatty agreed that without any impairment for a Table 53 specific disorder for the lumbar or cervical spines, Claimant cannot be given an impairment rating for loss of range of motion. In fact, Dr. Regan remarked that the objective pathology to support his opinion regarding the cervical and lumbar impairments was the range of motion testing he performed during his DIME. Moreover, he was unable to cite medical records to demonstrate six months of pain and rigidity in Claimant's cervical and lumbar spines pursuant to Table 53 II B of the *AMA Guides,* and admitted that six months of pain and rigidity for Claimant's cervical and lumbar spine does not exist in these claims. Accordingly, Dr. Regan's initial cervical and lumbar spine ratings were erroneous and do not comply with the *AMA Guides* as Dr. Regan himself admitted.

11. As found, Dr. Primack summarized that pursuant to the General Principles of the Colorado DOWC Impairment Rating Tips, impairment ratings should only be given "when a specific work-related diagnosis and objective pathology can be identified. He commented that Dr. Regan failed to identify any objective pathology to support a permanent impairment for his diagnoses of neck and back strain, knee contusion and wrist strain. Dr. Primack explained that it is wrong to assign an impairment rating based on a claimant's subjective complaints, particularly when such claimant is not credible Moreover, Dr. Primack detailed that Dr. Regan incorrectly performed his impairment rating. He explained that a DIME physician is supposed to begin with a pathological or anatomic diagnosis. Instead, Dr. Regan used range of motion deficits to ascertain or identify an objective pathology. Accordingly, Dr. Regan's initial approach was not consistent with Level II accredited teachings.

12. As found, Claimant sustained no lumbar spine impairment as the 5% whole person lumbar spine specific disorder was not caused by the injuries in these claims and/or would otherwise be apportioned to the 2018 work injury for which Claimant was compensated.

13. As found, Claimant sustained no cervical spine impairment as the 4% whole person cervical spine specific disorder was not caused by the injuries in these claims.

14. As found, Claimant sustained no ankle impairment.

15. As found, Claimant sustained no impairment to any other body part.

16. As found, Claimant's true and correct DIME physician opinion is Claimant sustained no permanent impairment of any kind in these claims. Claimant failed to overcome the DIME physician's opinion regarding permanent impairment by clear and convincing evidence and even by a preponderance the evidence.

ORDER

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

1. Claimant failed to overcome Dr. Regan’s true and correct changed Division IME opinion that Claimant sustained no permanent impairment in both claims.

2. Issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: May 15, 2021.

/s/ Glen Goldman
Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-132-708-001

ISSUES

The issues set for determination were:

- Whether Claimant demonstrated by a preponderance of the evidence that the March 15, 2019 motor vehicle accident occurred in the course and scope of his employment while on travel status.

- What was Claimant's Average Weekly Wage?

- Is Claimant is entitled to an award of medical benefits for treatment for injuries caused by the MVA?

- Is Claimant entitled to TTD benefits?

PROCEDURAL POSTURE

The ALJ issued a Summary Order on December 12, 2020. On or about December 22, 2020, Respondents requested a full Order.

Claimant filed a Motion for Corrected Order on December 29, 2020, to which there was no Response filed. The ALJ granted Claimant Motion for a Corrected Order and the Claimant's TTD rate was $987.84 per week, with benefits to begin on March 16, 2021.

STIPULATION

The parties stipulated at the onset of the hearing that Claimant's pay entitled him to the maximum TTD rate for his date of injury, $987.84 per week. This Stipulation was accepted by the Court and is made part of this Order.

FINDINGS OF FACT

1. Claimant is a licensed dentist and has worked in that capacity since 1964. Claimant lives in Niwot, Colorado.

2. Claimant began working for Respondent-Employer at its Fort Morgan office in 2018. He testified that his employment was pursuant to a written agreement. That agreement was not admitted into evidence.

3. Respondent-Employer is a dental practice owned and operated by S[Redacted employer name], DDS, his father, and others. The S[Redacted] own and operate dental clinics in three states including Colorado. M[Redacted] was an office manager who performs administrative work for these clinics, including the La Junta clinic where Claimant worked at the time of his accident. S[Redacted] testified Ms. M[Redacted] performed the HR function for the offices.

4. There was no dispute to the Claimant was an "employee", as that term is defined by the Act.

5. Claimant testified he was informed that the Fort Morgan office was closing and was contacted to work in the La Junta office. The evidence in the record established there were discussions regarding the terms of his employment.

6. Claimant and S[Redacted] discussed his employment in a series of emails they exchanged. Claimant requested reimbursement for mileage, which Employer declined. S[Redacted] confirmed this in his testimony and stated that mileage was included in the minimum guarantee. The ALJ found travel was a term negotiated by Claimant and Respondent-Employer during these communications.

7. The terms and conditions of Claimant's work at the La Junta office were memorialized in an email, dated August 22, 2018. That email specified:

- Starting September 4th work Monday, Tuesday, Wednesday, Thursday of the week.
- Start and end times to be determined and flexible, as you've indicated
- The minimum daily guarantee you have proposed is $600/day, **which also covers travels**.
- We have agreed that we will cover the cost of a hotel.
- 32% of production seems fair compensation with a minimum daily guarantee of $600 per day to start. During the middle of the month we will talk to determine if this will work out in the long term for both of us, and if so a long-term contract will be written up and agreed upon for both parties
- S[Redacted] will communicate with you regarding performance and how we perceive the situation working in the La Junta office. [Emphasis added].

8. The ALJ finds the wording of this email explicitly specified that the "minimum daily guarantee" encompassed compensation for travel.

9. The ALJ concluded that the employment agreement specifically contemplated Claimant driving from his home in Niwot to La Junta, Colorado. Employer was aware Claimant was required to travel to be employed. Employer included

Claimant’s mileage reimbursement in the minimum daily guarantee paid to Claimant. Employer paid for Claimant‘s hotel stays in La Junta during the time he worked there as part of the agreement.

10. Travel was part of the agreement between Claimant and Employer.

11. Claimant testified that he would drive from his home in Niwot to La Junta on Monday. Claimant would then work at the dental office in La Junta on Tuesday, Wednesday, Thursday, then drive back to Niwot after he completed his work on Thursday. Employer paid for the expense of his hotel stay while he was in La Junta. Claimant testified he worked under this agreement through March 2019.

12. Claimant received a W-2 Wage and Tax Statement form at year-end for his wages in 2018.

13. On October 23, 2018, Ms. Olson sent an email regarding issues at the La Junta office. Ms. Olson stated treatment planning needed to be done for every patient and patients were not to be referred out when the work could be done in the office. If the treatment could not be provided, that patient could be referred out. Production had to be increased and Ms. Olson specified the office needed to be producing $5000 per day.

14. On February 7, 2019, M[Redacted] (Regional Human Resource Director) sent an email to Claimant in which she specified that the practice opened at 8:30 a.m. and closed at 5:00 p.m. The email stated Claimant was expected to be in the office during these hours. Ms. Olson stated if Claimant was late coming into the office, Employer would not pay the daily rate, but according to the time Claimant arrived. M[Redacted] also said the hotel would not be booked until Claimant arrived in La Junta, that Employer planned on Claimant “being there on Monday the day before you start on Tuesday, this is each week”. The ALJ concluded Employer required Claimant to be in La Junta starting on Monday in order to work full days Tuesday through Thursday. By setting the starting time for Claimant to begin work on Tuesday morning, this necessitated his travel to La Junta the day before.

15. On February 18, 2019, S[Redacted] wrote Claimant to thank him for all of his hard work “so they could get the office open all last week to make up for a slower January”. S[Redacted] said Claimant‘s regular schedule would resume as normal, but he could work more than three days. S[Redacted] said they hoped to find someone soon for Mondays or Fridays. The ALJ inferred the office was short-staffed when Claimant was working in the La Junta office. Exhibit 5, which documented when various dentists worked supported this conclusion.

16. Based upon the staffing issues, the ALJ found Claimant's work in the La Junta office conferred a benefit on Employer.

17. Claimant wrote an email to S[Redacted] and Ms. M[Redacted] on February 24, 2019, expressing various concerns. These included question about the schedule and his pay checks. Claimant also was concerned that the office was not going to be open at various times.

18. Claimant testified the most direct route from La Junta to his home was to take Highway 60 from La Junta to I-25, then I-25 north to Highway 52 at the Erie, Colorado exit, then Highway 52 to Niwot.

19. During the week of March 11-14, 2019, Claimant traveled from Niwot to La Junta and worked at Employer's premises. There was inclement weather in Colorado that week, which delayed Claimant's return home after working in La Junta. Claimant testified there was a lot of snow because of a "cyclone blizzard" and there were road closures which prevented him from returning home on Thursday. He stayed an additional night (March 14, 2019) in La Junta and returned home on March 15, 2019. Employer paid for the additional night stay, which was confirmed by S[Redacted]. S[Redacted] testified he did not know about what was paid the week of March 11 through March 15, 2019, but he agreed that the receipt from the Holiday Inn where Claimant stayed the week of March 11 through March 11, 2019, was proof that Respondent paid the entire bill in one payment.

20. On March 15, 2019, Claimant was injured in a motor vehicle accident which occurred as he was traveling home. Claimant's injuries did not occur on Employer's premises and was outside his regular working hours.

21. The payroll transaction detail from September 18, 2018 through March 22, 2019 was admitted into evidence. During these months, Claimant was paid based upon his production at the dental office. For the paychecks dated September 18, 2018, October 3, 2018, October 15, 2018, October 29, 2018, and December 3, 2018, a $500.00 cash advance repayment was taken out. A $250.00 cash advance repayment was taken out in the checks on November 2, 2018 and November 13, 2018. The cash advance repayment was not taken out on the remaining paychecks through March 22, 2019. The ALJ noted Claimant's production exceeded his daily minimum during the period covered by the records and Employer benefitted by his production.

22. Claimant received treatment in the Emergency Department of Good Samaritan Medical Center on March 15, 2019. He was complaining of pain in his left shoulder and right ankle. At the ED, he was evaluated by Klementyna Breyer, M.D., whose clinical impression was: close fracture of one rib of left side, initial counter; sprain

of left shoulder, unspecified shoulder sprain type, initial encounter; injury of head, initial encounter.

23. On July 31, 2019, Claimant was evaluated by Julie Stapleton, M.D. for short term and attention issues arising out of the MVA. Dr. Stapleton‘s impression was: motor vehicle accident 3/15/2019; mild traumatic brain injury, post-concussive complaints, primarily neurocognitive fatigue; post-traumatic adjustment disorder, with mood and anxiety related to marked changes in his day-to-day experience, and lifestyle planning; post-traumatic memory impairment, further evaluate other cognitive challenges. Dr. Stapleton ordered neurofeedback, hyperbaric oxygen therapy, additional cognitive therapy, counseling, cognitive stimulants.

24. On April 5, 2019, Claimant was evaluated by Robert Leland, M.D. At the Boulder Centre for Orthopedics. At that time, he presented with left sided low back pain. Claimant reported his shoulder pain had generally resolved. Tenderness was found over the left shoulder on examination. Dr. Leland diagnosed a nondisplaced coracoid process fracture, left shoulder. Claimant was to follow-up as needed.

25. Claimant received hyperbaric treatments at the Hyperbaric Institute, Beginning on August 21, 2019.

26. The ALJ found Claimant required the medical treatment to cure and relieve the effects of the MVA.

27. Claimant received a W-2 Wage and Tax Statement form at year end for his wages in 2019.

28. On or about March 4, 2020, a Worker‘s Claim for Compensation was filed on behalf of Claimant. It stated Claimant injured his head, left shoulder and left ribs in a motor vehicle accident. On April 1, 2020, a Notice of Contest was filed on behalf of Respondents. The ground for denial was: injury/illness not work-related.

29. Claimant proved that he suffered an injury arising out of and in the course of his employment.

30. Pursuant to the Stipulation of the parties, Claimant‘s AWW was $ 987.84 per week.

31. Claimant has not worked since March 15, 2019 and is entitled to TTD benefits.

32. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Colorado Workers' Compensation Act (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. (2016). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Compensability

An injury must arise out of and in the course of the Claimant's employment to be compensable. 8-41-301(2)(b) and (c), C.R.S. Injuries sustained by employees going to and from work are usually not compensable. *Berry's Coffee Shop, Inc. v. Palomba*, 161 Colo. 369, 423 P.2d 2 (Colo. 1967). However, one exception to the coming and going exclusion is present when "special circumstances" create a causal relationship between the employment and the travel beyond the employee's arrival at work*. Madden v. Mountain West Fabricators*, 977 P.2d 861, 863 (Colo. 1992); *Monolith Portland Cement v. Burak*, 772 P.2d 688 (Colo. 1989). Where Claimant is injured while on travel status, under certain circumstances that injury is compensable. *SkyWest Airlines, Inc. v. Industrial Claim Appeals Office of State*, 2020 COA 131, 19CA1783 (August 27, 2020).

The *Madden* Court identified several factors to be evaluated to determine whether special circumstances exist. These factors include, but are not limited to, the following: (1) whether the travel occurred during working hours; (2) whether the travel occurred on or off the premises; (3) whether the travel was contemplated by the employment contract; and (4) whether the obligations or conditions of employment created a "zone of special danger" in which the injury arose. *Madden v. Mountain West Fabricators*, 977 P.2d at 865. The question of whether Claimant presented "special circumstances sufficient to establish the required nexus a factual determination to be resolved by the ALJ based upon the totality of circumstances. *Anthony Morrison v. Rock Electric, Inc.*, W.C. 4-939-901-03 (ICAO February 22, 2016).

In *Madden*, Claimant was injured in a motor vehicle accident while traveling from his home in Grand Junction to a construction site. The accident occurred before his shift started and he was not being paid. Claimant was not required to use his car for his employment and was not reimbursed for mileage expenses. The Court found Claimant failed to prove there was a nexus between his injuries and the employment, focusing on the fact that the travel did not occur during work hours and the accident did not occur on the employer's premises. In addition, Claimant was not earning a wage at the time of his injuries, nor was he paid for the travel. The Court concluded the travel did not confer a benefit on the employer apart from Claimant's arrival at work and the case was not compensable.

The Colorado Supreme Court applied the *Madden* factors in *Staff Adm'rs, Inc. v. Reynolds*, 977 P.2d 866, 867 (Colo. 1999). In that case, Claimant was injured in a MVA as he was driving to a temporary construction site operated by Employer-Armendariz Construction Company. Claimant did not meet with other workers at a service station in Grand Junction, Colorado, where Employer customarily paid for the cost of fuel. The ALJ concluded Employer expected Claimant to travel as part of his job and he performed services at a substantial distance from his home. The ALJ's decision that the claim was compensable was affirmed by the ICAO and then by the Court of Appeals. The Colorado Supreme Court also affirmed this decision. Chief Justice Mullarkey stated:

> "Applying these variables to the facts of this case, we find that there is no evidence that Reynolds' injury occurred during working hours or that it occurred on his employer's premises. In addition, there is no evidence in this case that Reynolds' injury occurred within a zone of special danger warranting recovery. However, there is sufficient evidence to support the ALJ's finding that travel was contemplated by Reynolds' employment contract with his employer, Armendariz Construction Company, to warrant recovery under the Workers' Compensation Act of Colorado". *Staff Adm'rs, Inc. v. Reynolds*, *supra,* 977 P.2d at 867.

As the Court in *Staff Adm'rs, Inc. v. Reynolds*, 977 P.2d 866 recognized, even where not all of the *Madden* factors were present, it was possible that an employee's injuries "arose out" of his/her employment. In the case at bar, after the factors articulated by the *Madden* Court were applied, the ALJ concluded travel was contemplated by the employment contract, although the first two factors were not present. As found, the travel did not occur during work hours (first factor) and the travel occurred off Employer's premises (second factor). (Finding of Fact 20).

As determined in Findings of Fact 6-10, the third *Madden* factor was present, as the travel was expressly contemplated by the employment contract and negotiated by Claimant and Dr. Sefcik. *Id.* As found, mileage was included in the daily minimum paid to Claimant and part of the negotiation on the agreement. (Finding of Fact 6-10). The question of reimbursement was addressed in the written terms of the employment agreement. (Finding of Fact 7). Employer also paid for the cost of Claimant's hotel when he worked in La Junta. (Finding of Fact 9). Under the specific facts of the case, Claimant's travel was the *sine qua non* of his employment, as without the travel he would not have worked for Employer. Therefore, the ALJ concluded travel was part of the agreement between Claimant and Employer. (Findings of Fact 9-10).

When considering the role travel played, the ALJ determined Claimant's travel to the La Junta office conferred a benefit on Employer, as at least during part of his employment the office was short-staffed and he may have been the only dentist present. Claimant's as an experienced dentist was also a benefit to Employer. (Finding of Fact 21). In addition, the evidence in the record showed Claimant was required to travel to La Junta on Monday, as he was expected to be in the office beginning on 8:30 a.m. on Tuesday. (Findings of Fact 14-16). But for this requirement under the contract, Claimant would not have travelled to La Junta and been injured in the collision on March 15, 2020. The ALJ concluded the accident occurred as a result of Claimant's employment at the dental clinic in La Junta.

The presence of the third factor made this case factually distinct from the circumstances in *Madden* and within the ambit of *Staff Adm'rs, Inc.* Under the totality of circumstances presented by this case, the ALJ concluded there was a causal connection between Claimant's travel to La Junta and his employment. Claimant's agreement with Employer specifically contemplated the travel to La Junta. Therefore, the injuries he sustained while traveling were compensable. *Loffland Brothers v. Baca*, 651 P.2d 431, 432-433 (Colo. App. 1982); *Cf. Lewis Essary v. General Dynamics,* W.C. 5-117-912 (ICAO December 1, 2020). This case is factually distinct from *Madden* and *Essary,* and accordingly, Claimant's injuries were compensable.

In coming to this decision, the ALJ considered Respondents' arguments that Claimant's employment as a dentist required no travel other than his commute from his home to work and work to home. When considering Respondents' argument that travel was not contemplated as part of the employment agreement, beyond ensuring Claimant's arrival at work and departure from work, the ALJ found to the contrary, as it was specifically negotiated by Claimant and S[Redacted]. (Findings of Fact 6-8).

Respondents also averred this commute provided no benefit to Employer other than Claimant's arrival at work and the commute did not constitute a special hazard, as it involved the same hazards to Claimant as to any person traveling from La Junta to Niwot. However, the ALJ found to the contrary, as Claimant worked in the La Junta office at the time Employer was short-staffed and this conferred a benefit on Employer. (Findings of Fact 15-16). Employer also benefited financially from Claimant's production. (Finding of Fact 21).

The ALJ concluded that under the specific facts of this case, Claimant's travel to La Junta was contemplated by the employment agreement and, in particular, the cost of the hotel was borne by Employer. (Finding of Fact 10). Mileage, although not a separate payment, was included in his remuneration. (Finding of Fact 6). As found, Employer set the starting time for Claimant to arrive at the office (on Tuesday), which necessitated his travel the day before (on Monday). (Finding of Fact 14). This position required Claimant to commute the day before and but for the trip to the La Junta office, Claimant would not have been injured on March 15, 2020. Accordingly, Claimant suffered a compensable injury and is entitled to benefits under the Colorado Workers' Compensation Act.

ORDER

It is therefore ordered:

1. Since Claimant suffered a compensable injury while in travel status, Respondents shall pay benefits under the Colorado Workers' Compensation Act.

2. Respondents shall pay for Claimant's medical treatment, pursuant to the Workers' Compensation Fee Schedule, to cure and relieve the effects of his injury.

3. Respondents shall pay Claimant TTD benefits at a rate of $ 987.84 per week from March 16, 2019 until terminated by law.

4. All matters not determined herein are reserved for future determination.

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

(20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 17, 2021

STATE OF COLORADO

Digital signature

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Timothy L. Nemechek

Administrative Law Judge

Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-093-609-002

ISSUES

I. Whether Claimant has overcome by clear and convincing evidence the opinion of the Division Independent Medical Examination (DIME) physician Matthew Brodie, who found zero impairment due to no causation. If so, should Claimant be awarded the 17% whole person impairment assessed by Dr. Brodie.

II. Whether Respondents have proven by a preponderance of the evidence that they are entitled to recovery of a stipulated $25,740.62 payment of permanent impairment benefits, provided Claimant fails to overcome the opinion of the DIME, and if so, at what rate should the overpayment be repaid.

III. Whether Claimant has established by a preponderance of the evidence an entitlement to medical maintenance benefits.

STIPULATIONS

At the start of the first hearing, the parties stipulated that should Claimant fail to overcome DIME Dr. Brodie's opinions on causation and permanent impairment, then Respondents are owed an overpayment in the amount of $25,740.62.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. Claimant is currently employed by Employer as an engineer. He had worked before for Employer from 2006 to 2016. He began his current period of employment in November 2017.
2. On 11/11/2018 Claimant was leaving work at 11:30 p.m. when he slipped on ice in the Employer's parking lot. He fell onto the concrete on his buttocks, then continued falling backwards, hitting the back of his head on the concrete. A co-worker helped him up. He was dazed because of hitting his head. The co-worker asked him questions to assess his mental functioning. "HT2, p. 49, l. 7, l. 19-25.
3. The accident admittedly arose out of and in the course and scope of employment. Respondents do not seek to withdraw their admission, HT1, p. 157 l. 4-6.
4. That night Claimant's "right glute was pretty sore." He had "a huge bump" on the back of his head. "I was thinking the right glute was killing me - was pretty sore. I had my wallet in my right back pocket. I thought that might have padded my fall at bit." HT2, p. 50, l. 5-10.

5. When Claimant got home, he woke up his wife, Kimberly F[Redacted]. She testified, "he woke me up, he was freaked out. He told me that he slipped and fell in the parking lot at work . . . he fell on his butt, landed, smacked his head on the concrete . . . his butt was really sore, he said he had a headache, and he did have a lump on the back of his head because I felt it," HT2, p. 41, l. 13-25 - p. 42, l. 1-2.

6. The next day Claimant called his sister, Fyll C[Redacted]. He told her, "Sister, I fell and hit my head and my butt on the ice." She testified, "I told him to make sure to watch for a concussion because I had fallen on the ice and hit my head and ended up with a concussion." HT2, p. 33, l. 25 - 34, l. 1, 2-5.

7. On his way to work the next day, Claimant stopped at the home of his friend, Deborah E[Redacted]. He told Ms. E[Redacted], "he had slipped and fell and his coworker saw him slip and fall," HT2, p. 10, l. 5-6. He told her "he was feeling very sore," HT2, p. 10, l. 9.

8. At work the next day, 11/12/2018, Claimant reported the accident to his supervisor. His supervisor completed a form entitled, "Accident Investigation Report," Cl. Exh. P. 40-41. The form reflected Claimant reported his accident on 11/12/2018 at 4:00 p.m. It showed the accident happened on 11/11/2018 at 11:35 p.m., when Claimant "was walking to car to leave for the night and slipped and feel *[sic]* in parking lot landed on back." The supervisor described the "nature of injury" as "No injuries at time just sore back side and bumped head." A witness was listed by name, address, and telephone number.

9. The ALJ finds Claimant had symptoms in his right gluteal area and head the night of the accident which continued the next day. This is based on the supervisor's accident report and the testimony of witnesses Ms. F[Redacted], C[Redacted], and E[Redacted], which are found to be credible.

10. A year and a half before the work accident, in May 2017, Claimant was injured in a non-work-related auto accident. He injured his neck and upper back. At the time of the work accident, he was in treatment for his auto accident injuries with chiropractor Dr. Kayla Bennett.

11. On 11/15/2018 Claimant attended a previously scheduled appointment with Dr. Bennett for his auto accident injuries. At that point in time, the swelling had gone down in his head and his headaches had subsided, but he still had pain in his right glute, HT2, p. 52, l. 9-15. According to Dr. Bennett's note, Claimant did not report his work accident to her.

12. Claimant does not remember the conversation he had with Dr. Bennett at that time. He does remember he didn't think his work injury "was too serious at the time. Again, I thought I would be okay. I didn't think I needed any medical attention either. I was just going to ride it out, and I was there for my neck," HT2, p. 52, l. 20-23. In the past he had had low back pain. He would do his stretches, ride it out, and it would go away. HT2, p. 53, l. 5-9.

13. Authorized treating physician ("ATP") Dr. John Sacha testified on behalf of Claimant. He noted that it is not uncommon for people who have previously had

pain to take a wait-and-see approach to seeking treatment. He testified, "Everyone has a little different tolerance for pain. And in someone in his case who has had chronic neck pain for a long time and chronic on-and-off low back pain, he had a little more tolerance. He is going to be a little more patient before he comes in," HT1, p. 133, l. 16-20.

14. Claimant's symptoms persisted and worsened. His wife recalled, "He was getting worse. He wasn't feeling well. He had headaches for a few days, but then they got better. His lower back was starting to hurt. He had some tingling. He started limping a little bit. Things just started developing gradually." HT2, p. 42, l. 17-21.

15. Claimant testified that on 11/16/2018 his pain in his "right glute transitioned over to my left glute, my lower back, like the thigh area, and down the calf" on his left side. HT2, p. 53, l. 14-18. He knew it happened on 11/16/2018 because he made a note of it, HT2, p. 53, l. 19-25.

16. Claimant had had a herniated disk in the year 2000, at L5-S1. Thereafter, he had occasional sciatica, which he described as a "zinger" from his back down his leg, but it would be temporary and go away. HT2, p. 54, l. 5-8. He did not need medical attention when this occurred: There are no medical records, dating back to 2009 reflecting any visit for "zingers" or sciatica in the leg.

17. Claimant's post-injury left leg symptoms were different. They were both more severe, more continuous down the leg, and persistent. Symptoms did not abate until surgery months later. HT2, p. 54, l. 16-20.

18. On 11/23/2018 Claimant was awakened from sleep by his left foot. "My foot kind of exploded. It went numb and tingling. The sensation that your foot fell asleep. I had some cramping. It was tight. And it was spasming a little bit, you know. And I tried to walk it off, and it wouldn't go away," HT2, p. 56, l. 15-19. He knew it happened on 11/23/2018 because he made a note of it, HT2, p. 56, l. 13.

19. He did not go to the doctor right away because he "wanted to give it more time," HT2, p. 57, l. 2. When he did go to the doctor it was because he "got scared and panicked," HT2, p. 57, l. 13. "[T]he numbing would not go away. I was concerned that my foot -- was not going to go away. It was new. It was different. And I -- you know, usually your foot falls asleep, you get it back. This -- you know, this never happened before that it would -- I couldn't get it to – you know, to stop," HT2, p. 57, l. 7-13.

20. On 11/28/2018, Claimant sought "answers" (HT2, p. 57, l. 24) from chiropractor Dr. Bennett. She wrote that he had "a new problem" in his left foot; that at night he had had a terrible cramp in the bottom of his foot that was "almost debilitating"; and that he's had a "constant numbness" since. He also had pain in his left buttock area." She wrote, "He denies any acute trauma to the foot or back." Resp. Exh. p. 70.

21. Dr. Bennett reported that Claimant's description of his pain as debilitating "would coincide with a patient in distress." In response to whether there was a specific question and answer regarding any acute trauma, she replied that she did not

recall the exact conversation she had with Claimant on 11/28/2018, but that "it can be likely that due to the 'debilitating' pain, the fall at work was just not mentioned." Cl Exh. p. 16. In general, she found Claimant to be "always genuine and sincere," Cl. Exh. p. 16.

22. Claimant also did not remember his exact conversation with Dr. Bennett. He thought he would have told her "it happened at home in bed while I was sleeping. My foot became -- it kind of freaked me out. So, my foot began to spasm. I thought I told her I slipped on ice at work. I understand she says I didn't. I don't recall a direct question." HT2, p. 58, l. 10-14.

23. That night Claimant went to the E.R. He was seen at 1:06 a.m., so it was the next day. He went because he was "scared"; he had never had "this constant numbness and tingling that was not going away," HT2, p. 60, l. 4-5. He had awakened his wife before he went; she described him as "freaking out," HT2, p. 43, l. 1.

24. He told the E.R. admitting nurse he fell at work. She advised him to contact his Employer, HT2, p. 60, l. 12-17. She wrote, "He fell on ice on 11/11 and had buttock pain, then started having left buttock pain radiating down his left leg on 11/16, and now has left foot numbness." Cl Exh. p. 48, p. 75. Dr. Brodie did not include this history in his DIME report. He had concluded that there is no record documenting that Claimant reported to anyone he had any symptoms before 11/23/2018, 12 days after the accident, HT2, 133, l. 7-8: HT2, p. 125, l. 20-22. This history is contrary to that conclusion.

25. The history set forth by the E.R. doctor was less clear. It included that Claimant had slipped and fallen on his back. It included that Claimant had a foot spasm a week earlier. But it mixed up the two ("Last week had spasm and whole foot went numb. Did slip and fall onto back a week ago.") The doctor noted Claimant had been in treatment for 1.5 years. Claimant's auto accident was 1.5 years earlier. The doctor thought Claimant had said he had "back spasms" for 1.5 years. This does not match any pre-injury medical record. (Chiropractor Dr. Bennett had regularly evaluated Claimant for spasms but none were documented in the lumbar spine.)

26. ATP Dr. Sacha testified, "Knowing [Claimant] and having him for a patient for a long period, he is a very anxious guy, and he has the flight of ideas.... And the way he overcomes it is he writes notes every time he comes into any event or any clinic visit. Writes copious notes. And he writes down all the things that he has to ask me that day because if you have to ask [Claimant], Hey, answer this question, he has a hard time doing it. He has a hard time focusing. So getting information out of him is difficult. . .. [He is an] anxious guy with flight of ideas and everything has to get out all at once. But if you slow him down, take your time, you look at the way he does things, writes notes, you realize that he is not a great historian, but he eventually gets to the story. . . And he has a way of dealing with his learning issue or learning disability or memory issue of taking aggressive notes and asking questions on the notes." HT1, p. 75, l. 6-17; 20-25; p. 76, l. 8-11.

27. In addition, in the E.R., "clearly he was in distress. He was on two types of oral steroids and an opioid analgesic in the emergency room. That doesn't occur. That is extremely rare," HT1, p. 76, l. 19-22.

28. DIME Dr. Brodie similarly reported that Claimant "didn't necessarily stay on topic." He was articulate but with "somewhat rapid and pressured speech with rapid topic changes," Cl. Exh. p. 35.

29. Dr. Sacha concluded, consistently with Dr. Bennett, that "the bottom line is, at every visit that he ever came in, he was perfectly upfront. He never hid anything. He never was evasive, even a little bit. He wasn't even a little bit slimy on any of the topics. And that is the most important thing," HT1, p. 76, l. 3-7.

30. The two steroids prescribed by the E.R. were dexamethasone and methylprednisolone, Cl Exh. p. 50. These are prescribed for acute disk herniations, HT1, Dr. Sacha, p. 49, l. 11-12. Claimant had not been prescribed these medications before the work injury, nor any opioid analgesic, except by his dentist, in connection with a procedure in 2016, HT2, p. 68, l. 11-12, 18-19.

31. On the advice of the E.R. nurse, Claimant contacted his employer on 11/29/2018. HT2, p. 60, l. 12-17. On 11/30/2018, the Employer asked him to complete a form entitled, "Employee's Statement of Accident Report." Claimant completed the form as follows (Cl. Exh. p. 42):

> "(11-11-18) I was leaving the building at the northwest entrance during cold, snowy weather. After exiting, I passed the steps and sidewalk, then slipped and fell back in the slick parking lot. I landed on my rear-end and the back of my head. The fall caused a lump to develop on the back of my head and pain/soreness in my right buttock. A few days later, the pain in my right buttock transferred over to my left buttock, followed by pain with a dull ache to the thigh, knee and calf area. (11-23-18) 9:30 p.m. - Experienced a severe spasm to the left foot which created numbness w/pins and needles sensation to the entire foot. There's pain and tightness in the arch of the foot. (11-29-18) 1:00 a.m. - Admitted myself to the E.R. to get checked out."

32. Also, on 11/30/2018, Employer supplied to Claimant a list of worker's compensation doctors. On the same date, he saw his personal physician, Dr. Collander. He told Dr. Collander he had "fairly generalized discomfort throughout the foot. numbness that has also been in his thigh and calf." "The precipitating event was a fall; the actual mechanism of injury appears to have been slipped on ice and fell onto his back on 11/11, noted lower back pain on 11/16. He went to the er 2 days ago, since it happened at work, they recommend he contact work comp which he has done." Cl. Exh. P. 78.

33. In support of his no-causation opinion, DIME Dr. Brodie wrote, "The medical records from November 29 and November 30th, 2018 document a slip-and-fall incident but do not describe a work exposure relationship." Cl. Exh. P. 38. Dr. Collander's November 30th, 2018 report does describe a "work exposure relationship" ("since it happened at work . . ."). Dr. Brodie reviewed this report

without noting the work-exposure portion. To the extent Dr. Brodie intended to imply that the accident did not happen, or did not happen at work, this is not correct. As a factual matter, the accident had been reported the next day, though that information had not been available to Dr. Brodie. As a legal matter, Respondents admitted the accident happened at work and do not seek to withdraw their admission, HT1, P. 157, l. 4-6. The November 30, 2018 report also contains a report of symptoms earlier than 12 days post-accident.

34. Following authorized medical treatment including lumbar surgery and admittedly compensable lost time (see Final Admission Cl. Exh. p. 18), Claimant was placed at maximum medical improvement and assessed by ATP Dr. Sacha to have 13% whole person lumbar permanent impairment, Cl. Exh. p. 174-177. Respondent admitted for 13% impairment and began paying PPD. Claimant was then evaluated in a DIME by Dr. Brodie. Though Dr. Brodie assessed impairment of 17%, he found no causation and therefore zero impairment related to the admitted work injury. Respondents filed a Final Admission claiming an overpayment of PPD in the stipulated sum of $25,740.62.

35. Dr. Brodie's no-causation opinion was based on two propositions: That Claimant had highly similar if not identical symptoms pre- and post-work injury; and that he had no symptoms or pain until 12 days after the work injury. In his testimony, he made a third proposal. He hypothesized that Claimant became symptomatic 12 days after the work injury due to a pre-injury asymptomatic herniated disk. These propositions are discussed below.

Differences in condition pre- and post-injury:
Left lower extremity radiculopathy.

36. In early December 2018, Claimant began treatment with the Employer's authorized physicians. By that time, he was "having problems walking." He testified he had "constant pain, continuous pain going down my leg, down to my foot, through the thigh and the calf," HT2, p. 64, l. 20-22. This is found credible as consistent with reports made to ATP physicians, as below.

37. On 12/3/2018, ATP Dr. Corson reported Claimant had "worsening pain in the lower back/ buttock with radiation into the LLE along with numbness and tingling in the "entire" left foot, from the toes to the heel." Dr. Corson's diagnosis on that date and on subsequent dates, was "Lumbar radiculopathy, acute," Cl. Exh. p. 80, 81.

38. The next day Claimant told the physical therapist he had "numbness/tingling in L posterior thigh, calf, and whole foot, unable to walk without limitations," Cl Exh. p. 85

39. On 12/18/2018, Dr. Corson reported Claimant's "pain radiates to left buttock, left thigh, left calf, left great toe, and left lateral foot," Cl. Exh. p. 91.

40. On 1/19/2019 Claimant told Dr. Sacha his pain was "constant in nature, bilateral low back, left buttocks, left leg numbness and tingling, diffuse over the left foot"; "Pain with straight leg raising, neural tension testing on the left side, positive bowstring test on the left," Cl. Exh. Pp. 100, 101.

41. On 2/4/2019 Claimant told Dr. Sacha he had "increasing radicular symptoms," and Dr. Sacha found on exam that he had "decreased muscle endurance with toe raising and walking on his heels," Cl. Exh. p. 107.

42. On 2/6/2019, Claimant told authorized surgeon Dr. Castro he had "left lower extremity, buttock, leg, posterior thigh, and calf pain, which is on the left side. Numbness, tingling, and pain in his left lower extremity," Cl. Exh. p. 109.

43. On 2/13/2109, Dr. Sacha noted "mild atrophy of the calf on the left compared to the right," Cl. Exh p. 112.

44. On 3/18/2019 ATP surgeon Dr. Gallizzi reported that "the patient describes his pain as an ache, burning, numbness, throbbing and radiating." His assessment was "severe left leg weakness from his disc protrusion," Cl. Exh p. 136

45. On 4/8/2019, Dr. Gallizzi noted, "Signs and symptoms of a left L5 and L4 radiculopathy as well as motor weakness," Cl. Exh p. 152.

46. On 4/30/2019, Claimant underwent lumbar surgery by Dr. Gallizzi.

47. DIME Dr. Brodie agreed that this evidence was evidence of left-sided radiculopathy; that Claimant's symptoms were consistent with the post-injury MRI; and that lumbar surgery was reasonable given these complaints and findings. HT2, p. 154, l. 4-16.

48. Dr. Brodie acknowledged that before the work injury, no provider had recommended a lumbar MRI, lumbar injections, or lumbar surgery, all of which occurred after the work injury. HT2, p. 154, l. 25- p. 155, l. 1-3.

49. In fact, pre-work injury, Claimant had been treating with an injection doctor, in connection with his neck. Dr. Sacha testified if he had needed lumbar injections pre-injury, that doctor "would have worked it up and treated it," HT1, p. 52, l. 20.

50. Dr. Brodie acknowledged the absence of any left lower extremity symptoms prior to the work injury, HT2, p. 130, l. 17-25:

    > "So I'm just scanning now to see if I see whether or not it is documented that he had left lower extremity symptoms. I'm not sure I see that. But it certainly can happen. Oh, there it is. Okay. Actually, no, I lied.
    >
    > "So I'm not sure that I see left lower extremity symptoms that have occurred prior to November 11th, but I certainly see bilateral buttocks and bilateral low back pain in the records."

51. Dr. Brodie equated pre-injury low back pain and buttocks pain with post-injury radiculopathy. He did not see how the post-injury condition could be "differentiated from the chronic history of back pain," HT2, p. 126, l. 6-7.

52. Dr. Sacha responded in rebuttal: "This patient did not have radiculopathy prior to the date of injury . . . there is a huge difference here on what his premorbid and postmorbid states are," Deposition Transcript, hereinafter "DT," p. 34, l. 2-3, 10-12.

53. In addition, DIME Dr. Brodie misconstrued the pre-injury extent of Claimant's back pain, which, as discussed below, he had misunderstood to have been treated by the chiropractor.

MRI - Acute, severe, large herniation

54. The post-injury lumbar MRI was described by ATP surgeon Dr. Castro on 2/6/2019 as follows: "There is acute disc herniation at the L4-L5 level causing severe lateral disc compression compressing the traversing L5 root." "Impression: Large disc herniation," Cl. Exh p. 110 - 111.

55. ATP surgeon Dr. Gallizzi also described Claimant's MRI as showing an extruded piece of disk which had "coursed to the pedicle level of L5," "pending his nerve against pedicle on left side," Cl. Exh. P. 136, 153.

56. Dr. Sacha testified that spine surgeons regularly look at the MRI images themselves, and develop an expertise in reading them, DT p. 11, l. 24-25, p.12, l. 1-6. As a spine specialist, Dr. Sacha also reads MRI images himself, and is able to interpret them, DT p. 11, l. 11-12. During his hearing testimony, Dr. Sacha had the MRI images on his screen, HT1, p.30, l. 11-12.

57. Dr. Brodie did not review the MRI images himself. He claimed surgeons had not told him before that MRIs can show a herniation to be "acute," "which implies that it happened recently," HT2, p. 147, l. 14. He testified (HT2, p. 149, l. 2-7):

> "I have communicated in the last 25 years with more neurosurgeons and back surgeons I could possibly even count, including Dr. Castro, and never have they specifically told me that they can read an MRI and say this just happened. And the literature doesn't say it either."

58. Dr. Castro's 2/6/2019 report, which was included in the DIME medical packet, "told" Dr. Brodie that he can "read an MRI and say this just happened," by virtue of his characterization of Claimant's herniation as "acute." Dr. Brodie reviewed his report, but his review omitted that Dr. Castro found Claimant's MRI to show his herniation to be acute. Cl Exh p 31.

59. Dr. Sacha testified that the principle that MRI findings can correlate with acuity is an accepted principle "in the radiology community as well as in the clinical spine community. It is not only standard of care, it is standard of care in all of the medical treatment guidelines as well," DT p. 10, l. 24-25, p. 11, l. 1-3. He commented, "I can't say why someone who is giving commentary, expert commentary, on spinal disease, doesn't know that," DT p. 8, l. 23-25.

60. As credibly and persuasively explained by Dr. Sacha, T2 weighted MRI images "light up" (HT1, p. 30, l. 25) in the presence of swelling, which shows that the herniation is acute, HT1, p. 31, l. 4-6. Dr. Sacha testified,

> "And what T2 weighting specifically looks for is fluid content. When you have an acute disk herniation where a piece breaks off or it is pinching on a nerve acutely, you see increased uptake of the MRI picture on the part of the disk that is herniated and on the spinal nerve that is being compressed**. . . .** He had acute swelling of the

> spinal nerve that was being pinched. He had acute swelling around the herniated free fragment that broke off." HT1, p. 31, l. 8-14, 17-19

61. Dr. Brodie stated that without a previous MRI for comparison, you can't tell when a herniation occurred. See Brodie report, Cl. Exh p. 37. Dr. Sacha testified, "We know it's an acute problem just based on the MRI alone . . .You don't need another MRI to tell you whether that is an acute disk herniation. You can see it on the actual findings of the MRI . . . someone with clinical experience in looking at spine MRIs, it is something you don't miss," HT1, p. 32, l. 13-14, 18-20, p. 33, l. 1-3.

62. The ALJ is persuaded by Dr. Sacha's testimony, which is consistent with Dr. Castro's finding, that the MRI showed that Claimant's herniation occurred acutely. Both physicians are spine specialists who regularly interpret MRI images themselves, as opposed to requiring the expertise of others. In addition, Dr. Sacha's explanation of how the MRI images correlate to acuity contains specific scientific detail which enhances the persuasiveness of his opinion.

63. In addition to characterizing Claimant's herniation as "acute," Dr. Castro also characterized it as "severe." Dr. Sacha credibly and persuasively explained that severe "means there is no room in the nerve root hole where the nerve exits to go to the back and down the leg . . . There was severe narrowing of the nerve root hole, which is the neuroforamen. He had swelling of the nerve root which shows that it is being acutely compressed. HT1, p. 35, l. 3-5, 8-10. That the compression was severe was corroborated by Dr. Sacha "when we did his diagnostic and therapeutic injections, we saw the severe narrowing and pinching of the nerve and had reproduction of the symptoms. His examination correlated with an acute severe pinched L5 nerve," HT1, p. 35, l. 11-15.

64. Patients with severe herniations tend to be more symptomatic, "Well, if you think of a nerve as a big bundle of wires, and running in those wires are pain fibers, motor fibers, sensory fibers, and even fibers that (inaudible) leg where they are at, which are proprioceptive fibers. When you pinch those, you start killing off individual pieces of nerve and you end up with more symptoms." HT1, p. 35, l. 21-25, p. 36, l. 1-2. Due to their level of symptoms, patients with severe nerve compression tend to seek medical care. HT1 p. 36, l. 14-15. Pre-injury, Claimant sought no medical care for lumbar discogenic pain.

65. The large size of Claimant's herniation is also relevant, but more significant is "that a chunk of it broke off and migrated away from the original position into the neuroforamen. So, it is the worst kind of disk herniation to have. You got a big piece of disk that breaks off and sits right on top the nerve. And that is what he had. It is called an extruded fragment that migrates. So not only is it a large disk herniation, it is a large, extruded fragment with a piece of it sitting on the nerve root." HT1 p. 37 l. 20-25, p. 38 l. 1-4.

Mechanism of injury

66. Both testifying experts agree that the mechanism of injury in this case is consistent with a herniated disk. Dr. Sacha credibly testified:

> "The main mechanisms we see for these lumbar disk herniations where you get the big, extruded fragments are either trauma, a fall, a trip, a slip-on ice, or a lift-and-twist injury when people are at extremes of flexion and twisting with heavy weights. Those are the two main -- those are the two main mechanisms we see for almost everyone that walks in the door, and he had one of those." HT1, p. 38, l. 18-25, p. 39, l. 1.
>
> "Pretty significant forces" are required to break "the entire disk off and put it onto the spinal nerve," HT1, p. 130, l. 4-19.

67. Dr. Brodie testified, "So a lot of times in medicine, someone will say, I fell on my butt. And then you find out that they have a herniated disk in their back. So that could be close to what this scenario is all about." HT2, p. 125, l. 12-15.

68. In addition, Claimant's clinical presentation, the MRI, and the diagnostic injections also correlated with an acute severe pinched L5 nerve, HT1, p. 35, l. 14-18; HT1, p. 51, l. 23-25, p. 52, l. 1. Dr. Brodie agreed Claimant's "symptoms are highly consistent with a herniated disk causing pressure into the nerve root," HT2, p. 127, l. 25, p. 128, l. 1.

Differences in condition
New findings/complaints post injury

69. Lumbar MRI, injections, surgery: As stated, the pre-work injury records contain no recommendations for a lumbar MRI, lumbar injections, or lumbar surgery. Even Dr. Brodie agreed there was no such documentation, "not in the records I have," HT2, p. 155, l. 3. Dr. Sacha testified, but for his work injury, Claimant would not have needed lumbar surgery, "It would not have been medically indicated prior to the work comp claim," HT1, p. 56, l. 19-20.

70. Work restrictions: On 1/22/2019 (Cl. Exh. p. 104) ATP Dr. Corson restricted claimant to four hours of work per day; and on 2/22/2019 (Cl Exh. p. 115) Dr. Corson reported that Claimant could "barely function" and he took him off all work entirely. On 3/27/2019, Dr. Sacha described Claimant as being "near debility," (Cl. Exh p. 141). Dr. Sacha testified, "if he didn't have the work injury, he wouldn't have needed any restrictions," HT1, p. 58, l. 15-16.

71. Dr. Brodie acknowledged pre-work injury, there were "no indications that there was some type of permanent restriction or limitation one way or the other. I don't think the records really talk about it much," HT2, p. 217, l. 19-22.

72. However, Dr. Brodie marked his apportionment chart (Cl. Exh. p. 22) to indicate that pre-injury, Claimant did have permanent restrictions. He acknowledged he was wrong: "Yeah, I - yep. You could say that I got over my skis on that, because technically, I don't have that specific information," HT2, p. 218, l. 5-7.

He also acknowledged he had no data regarding any pre-injury lost time, HT2, p. 219, l. 3.

73. Dr. Brodie also marked the apportionment chart (Cl. Exh. p. 22) to show Claimant had more than three episodes of functional disability in the prior year. He acknowledged there may be nothing in the record to support that "I didn't summarize functional changes in the records. It could be there. I just didn't summarize it. And maybe it's not there at all. I don't know for sure." HT2, p. 222, l. 18-21.

74. While this is not an apportionment case, these statements are relevant because they also reflect the extent of Claimant's prior condition, and whether it was the same pre-injury as post-injury, so as to support a finding of no causation.

75. These statements are also relevant as reflecting a methodology admittedly less than rigorous, in a process which, according to the governing authorities, demands attention, and care. If apportionment is done, "you have to have very good, sound objective reasons to meet all the rules," Sacha, HT1, p. 115, l. 20-21. As a matter of law, apportionment which is arbitrary and speculative cannot be sustained, *Matthews v. Industrial Commission*, 355 P.2d 300 (Colo. 1960). W.C.R.P. 12-3(B) requires, "If there is insufficient information to measure the change accurately, the physician shall not apportion." Dr. Brodie's apportionment chart reports data that is not actually in the medical records, according to his own admission. As observed by Dr. Brodie, when there is "inconsistency" between the "medical data" and what a person reports the data to say, that "adversely impacts" that person's "reliability," Brodie report, Cl. Exh p. 38 ("inconsistency of medical data adversely impacts reliability").

76. Limping/use of a cane: In successive appointments, ATP Dr. Corson documented that Claimant was limping, on 12/3, 12/26/2018, 1/4 and 1/22/2019, Cl. Exh. pp 81, 94, 98, 104. In addition, on 1/22/2019 Claimant reported he had trouble walking due to issues with his left leg and left foot, Cl. Exh. p. 103; on 2/18/2019 Claimant showed shuffling and antalgia on the left, Cl. Exh. p. 115; and on 2/22/2019, Dr. Corson reported Claimant to be dependent on his cane, Cl. Exh p. 115. Dr. Sacha testified, "He couldn't do toe raises in a rapid fashion or walk on his heel at all," HT1, p. 44, l. 11-13. There are no pre-injury records showing any limping or use of a cane. Dr. Sacha commented, "This is a huge clinical difference," HT1, p. 44, l. 15. Dr. Brodie "didn't pay attention" to limping, HT2, p. 166, l. 14.

77. Pain ratings: On 12/4/2018, the physical therapist reported Claimant had a pain level of 7, Cl. Exh. p. 86; On 1/9/2019, Dr. Sacha reported Claimant had "fairly severe back pain," Cl. Exh. p. 100; on 3/18/2019 ATP surgeon Dr. Gallizzi reported Claimant's pain level was 9, Cl. Exh. p. 125; and on 3/25/2019 Dr. Corson reported Claimant's pain level was 8, Cl. Exh. p. 138. The only pre-injury provider who documented any lumbar pain levels was chiropractor Dr. Bennett. Over the course of her 13-month pre-work injury treatment period, lumbar pain levels were either 2 or 3. Dr. Sacha characterized the pre- and post-injury discrepancy in pain levels as "a clear difference clinically, and it is a clear

difference functionally," HT1, p. 45, l. 24-25. Dr. Brodie had not noticed the difference, "Oh, I don't recall that specifically, but I hear what you are saying. And yeah, if that is what it is, then that is what it is. Yep, that is fine," HT2, p. 159, l. 22-24.

78. Restricted range of motion: Dr. Corson documented restricted and painful lumbar and thoraco-lumbar ranges of motion from 12/3/2018 - 4/1/2019, Cl. Exh. pp. 81, 86 (P.T.), 97-98, 104, 115, 123, 139, 144. Chiropractor Dr. Bennett is the only provider who documented lumbar range of motion pre-injury. It was consistently normal. Dr. Sacha testified about Claimant's post-injury restricted range, "It is very different than what he looked premorbid. The premorbid examination showed full range of motion and no functional deficits, HT1, p. 47, l. 14-17. Dr. Brodie did not remember seeing Dr. Bennett's record of full range of lumbar motion, "I don't remember seeing that, and it's not captured in my record review. And so I can't really say one way or another," HT2, p. 158, l. 1-3.

79. Oral steroids and opiate medications: As stated, oral steroids and opiates were prescribed post-injury but not pre-injury (except by Claimant's dentist in 2016). Dr. Sacha testified, "so there is another important piece of information because dexamethasone and a Medrol Dosepak, they are steroids that are given for acute disk herniations," HT1, p. 49, l. 9-12. Dr. Brodie acknowledged the absence pre-injury of either prescription "in the records that I have," HT2, p. 160, l. 12.

80. Muscle spasms: Both Dr. Sacha and Dr. Corson document persistent lumbar spasms spanning a period from 12/3/2018 through 4/10/2019, see Cl. Exh. Pp 81, 94, 97, 101, 104, 107, 112, 115, 118, 141 and 158. Dr. Sacha credibly testified, "Prior to him having the work injury, he never had any of these objective findings," HT1, p. 46, l. 12-13. As stated, spasms were regularly evaluated by chiropractor Dr. Bennett (in her section labeled "Palpable tenderness and muscle spasms") but none were found in the lumbar spine.

81. Left calf: On 2/4/2019 Dr. Sacha reported that Claimant had a noticeable cramp in his left calf and "some decreased muscle endurance with toe raising and walking on his heels," Cl. Exh. p. 107. On 2/13/2019 (Cl. Exh. p. 112) Dr. Sacha reported Claimant had "mild atrophy of the calf on the left compared to the right." Dr. Sacha explained, "Basically he is progressing because he was pinching on that nerve . . . the nerve gets irritated when it is pinched and so is hyperactive electrically and so the muscles clamp down. And when you start seeing that that is a really significant sign," HT1, p. 48, l. 4-5, 9-12. There is no similar pre-injury evidence.

82. Positive clinical testing: Dr. Sacha found Claimant had a positive "bowstring test" on the left. This is an "objective test that shows you have an acute pinched nerve," HT1, p. 39, l. 20-21.

83. On other clinical testing, Claimant had 0/5 "Waddell's." "This is the nonphysiological test that I just told you about. We always want to make sure patients are on the up-and-up. And in this case, he had nothing to indicate that he wasn't being perfectly truthful. And everything was very objective," Sacha, HT1, p. 41, l. 1-5.

84. Auto accident chiropractor Dr. Bennett also found that the nature, extent, and severity of Claimant's complaints and findings, pre- and post-injury, were different (Cl. Exh. p. 15)

> [Claimant] never presented with trouble walking, muscle spasms in the left lumbar spine, painful lumbar ranges of motion, pain ratings that were 8-9 out of 10 for the lumbar spine, cramping in the left calf, motor weakness on the left, positive lumbar nerve tests or poor functioning impacting his ability to work due to lumbar spine pain.
>
> "[Claimant] described any low back pain as a 3 out of 10 on 9/20/2017. He had no neurologic deficits upon exam in the lumbar spine on 9/20/2017. He had a normal active range of motion in flexion, bilateral lateral flexion, bilateral rotation and extension in the lumbar spine. He had no worsening of range of motion in the lumbar spine from 9/20/2017 to 10/18/2018. He had no documented muscle atrophy in the left calf, cramping in the left calf, or motor weakness on the left. He had no documented positive lumbar nerve tests. He never required the use of a cane to walk during his treatment in my office. There is no documentation that he missed work due to lumbar region pain from 9/20/2017 - 11/15/2018.

85. Dr. Brodie did not contend Dr. Bennett's statement based on her chart was factually incorrect, HT2, p. 228, l. 14.

86. Lay witnesses also attested to the difference in Claimant, pre- and post-work injury. Ms. E[Redacted] testified that Claimant had been able to move and set up rental furniture for a party, help carry couches, retrieve pails of holiday decorations (a two-person job), ride his motorcycle, golf, and take care of his yard, before his injury, but not after. The golf involved walking, which Claimant had no difficulty with, pre-injury, HT2, p. 15, l. 13-14. Witness Ryan G[Redacted] went skiing, rode motorcycles, played golf and Frisbee with Claimant, until he was injured at work, HT2, p. 26, l. 6, l. 21. Claimant's sister, Ms. C[Redacted], testified that she traveled to Colorado every four to eight weeks in connection with her business in Colorado. She testified that Claimant would pick her up at the airport, load, and unload three to four large suitcases, help her set up and tear down her workspace which involved a lot of lugging and dragging stuff, and moved things in and out of storage for her. On one occasion, pre-injury, in January 2018, Ms. C[Redacted] observed her brother tap-dancing. After his work injury, he was no longer able to help her. "He was moving really slow; he couldn't walk well; he had difficulty driving . . . He was in a lot of pain. He was crying a lot every time I talked to him. He just wasn't the same. He just wasn't living the same life he was before. Everything was - he was in constant pain. It was even hard for him to talk." To this day, "He is just not the same person." HT2, p. 36 l. 1-7, p.37 l. 4-5. Claimant's wife testified that before the work injury, Claimant took care of a big backyard which required constant work, raking, pruning, mowing; he shoveled snow; fixed things around the house; worked on their vehicles; he had been an avid skier, a huge motorcycle rider, he loved to

golf. After the work injury, he wasn't able to do those things. "It's actually been very depressing for him," HT2, p. 44, l. 24-25. After the injury, "He started limping. He was getting tingling and numbing all the time. He wasn't able to do his physical activities anymore . . . he would get really upset, and he would cry. And he would, was - it was very depressing for him. He wasn't able to do these things anymore," HT2, p. 45, l. 6-11, l. 13-14.

Differences in condition: Low back pain - Chiropractic chart

87. Based on chiropractic and massage records, Dr. Brodie stated in his report that "Claimant had received care for highly similar if not identical symptoms repetitively in the 12 months prior to November 11, 2018," Cl. Exh. p. 37.

88. He concluded, with respect to both charts, "that the claimant reported with low back symptoms, specifically requested low back treatment, and specifically received low back treatment," Cl. Exh. p. 38.

89. Chiropractor Dr. Bennett categorically denied that this was an accurate representation of her chart (Cl. Exh. p. 14-15):

> "This is not an accurate representation of my chart. [Claimant] never received chiropractic manipulative therapy to his lumbar spine from 9/20/2017-10/18/2018. He subjectively reported mild low back pain. He twice reported lower extremity weakness in 26 encounters. *My objective findings did not warrant treatment to be necessary for any low back pain*." [Emphasis added]

90. Dr. Bennett's notes were arranged in sections labeled subjective, objective, assessment, and plan. See for example, Cl. Exh. p. 248. The objective section is also divided into "visual inspection," "range of motion," "palpable tenderness and muscle spasm," and "chiropractic evaluation." The section labeled "plan" showed treatment rendered. On each date, the "plan" section began with the phrase, "Treatment today consisted of . . .."

91. At the first visit, Claimant reported a history of having had low back problems, which he described as "chronic." Cl. Exh. p. 245. Accordingly, Dr. Bennett listed under her subjective section, "complaint #3" to be low back pain, which she described as mild, with a pain level of 3. This was carried forward from visit to visit, but with occasional modifications.

92. Neither the assessment section, nor the plan section, ever included the lumbar spine (until 11/28/2018, i.e., after the work injury). Nor does the narrative subjective section contain any specific reference to the lumbar spine.

93. In the "palpable tenderness" section there were references on some dates to sacroiliac joint tenderness. In the "chiropractic evaluation" section reference was made to "segmental and somatic dysfunction" to include lumbar levels (until 1/30/2018, Cl. Exh. p. 274, when those levels were removed permanently).

94. In his report, Dr. Brodie's review of Dr. Bennett's notes (Cl. Exh. p. 27-30) make repeated references to tenderness at the sacroiliac joint and segmental dysfunction of lumbar levels, but no references at all to the absence of the

lumbar spine in Dr. Bennett's treatment section, nor to its absence in assessment section.

95. With regard to these lumbar-related entries, Dr. Bennett wrote as follows (Cl. Exh. p. 9):

> "I estimate less than 5 minutes per visit was spent on [Claimant's] low back from visits dated 9/26/17 - 10/18/18. [Claimant's] appointment times were scheduled for 30 minutes. Documented time for manual therapy as well as re-establishment of muscle strength, coordination and improvement of functionality focused only on the cervical and thoracic spine was 15 minutes. Subjective discussion, objective findings, and chiropractic manipulative therapy focused only on the cervical spine and thoracic spine likely took 10 minutes."

96. Dr. Bennett also wrote, "These entries were minimally significant. [Claimant's] primary complaints were neck pain and middle back pain throughout his treatment at my office." Cl. Exh. p. 10.

97. Dr. Brodie initially testified that "the chiropractic treatment notes were heavily weighted in my analysis," HT2, p. 144, l. 17-18, by which he found there was no causal relationship in Claimant's case. He "confronted" Claimant with the chiropractic records, stating to him, "look at these records, these records say you received treatment for your back and that you asked for it," HT2, p. 145, l. 7, l. 9-11.

98. When Dr. Brodie was confronted with Dr. Bennett's statements to the contrary, he insisted that her records "document the treatment occurred" (to the low back). He found her contrary statement to be "weird," HT2, p. 197, l. 1-3. But, he backed off from characterizing his reliance on her records to be "heavily weighted," "I'm not relying on the chiropractic notes for every, you know, kind of final rating of this causality opinion," HT2, p. 202, l. 2-3. He took refuge in the massage chart, "the massage therapist was definitely treating those areas in the same time interval, HT2, p. 204, l. 22-24. He acknowledged the chiropractic records may not document treatment, but alleged she was treating the low back without documenting it: "Claimant was receiving treatment [to the low back] regardless of whether the chiropractor was writing in her notes that she was giving treatment," HT2, p. 206, l. 8-9. He then accepted that she did not treat the low back at all, "Yeah, it may be – it could be that Dr. Bennett is correct. It certainly doesn't seem to jive with what the massage therapist is saying," HT2, p. 222, l. 9-11. He testified, "And if we assume she never did give treatment to the low back . . . I probably was again not perfectly clear because the massage therapy notes don't contradict my statement, HT2, p. 223, l. 20-25, p. 224, l. 1-2. He acknowledged for example that though chiropractic evaluation included reference to the sacroiliac joint (on 12/13/2017), "no treatment. That is correct. It certainly documents the symptoms, but no treatment," HT2, p. 227, l. 15-17. Dr. Brodie acknowledged that Dr. Bennett's assessment section, also did not include the lumbar spine, which again he characterized as "weird," HT2, p. 226, l. 16.

99. In addition, Dr. Brodie mis-quoted Dr. Bennett in his review of two of her notes. He made three changes in his review of Dr. Bennett's note dated 12/13/2017. The phrase "PP with continued neck and back pain. . ." was the first phrase in the narrative subjective section of each of her notes. (Her reference to back pain likely referred to thoracic pain, Cl Exh. p. 9.) Dr. Brodie inserted the word "low" before the word back, compare Cl. Exh. p. 266 (Bennett note) to Cl Exh. 28 (Brodie review of that note). He acknowledged the word "low" does not appear in the original, HT2, p. 210, l. 11. In the same note, Dr. Bennett wrote, Claimant "had the return of burning pain next to his spine in his lower *neck*." Dr. Brodie's review changed that to he "had the return of burning pain next to his spine in the lower *back*." He acknowledged, "that is probably an error on my part," HT2, p. 212, l. 12-13. In the same note, Dr. Bennett wrote, in reference to Claimant's neck, that "his burning pain *is back*." Dr. Brodie's review changed that to, Claimant had a "burning pain *in his back*." When asked, "Do you see that there is another change here?" He replied, "Um-hum. Yep. I sure do." HT2, p. 212, l. 23.

100. In another note, dated 10/25/2017, Cl Exh. p. 256, Dr. Bennett wrote, Claimant was "more sore this week and the pain feeling burning in his lower *neck.*" In his review of that note, Cl Exh. p. 27, Dr. Brodie wrote that her note "documents being more sore this week, the feeling of burning in his lower *back*." He acknowledged that he changed lower *neck* to lower *back*, "Yeah, I definitely was in error with putting – you know stating it that way," HT p. 213, l. 12-13.

101. The ALJ finds that Dr. Brodie's interpretation of the chiropractic chart as reflecting treatment of Claimant's low back was mistaken by his own admission. He apparently did not see the sections showing no lumbar treatment or assessment. As it pertains to his misquoting, his misperception also extended to errors in sections he did review.

102. Dr. Bennett stopped including the lumbar spine in any billing as of 1/16/2018, see Cl. Exh. p. 273 and every odd-numbered page thereafter through p. 297. But Dr. Brodie did not base his opinion on billing by Dr. Bennett: He "wasn't tracking billing." He said he was tracking what "was in her plan section" HT2 p. 198, l. 3-6 (though this was the section that showed no lumbar treatment). In any case, the billing is therefore immaterial to Dr. Brodie's understanding of the chiropractic chart.

103. Dr. Brodie reiterated in his report that Claimant's denial that he requested low back treatment from the chiropractor was inconsistent with the chiropractic record, and, that this inconsistency affected Claimant's reliability. Cl. Exh. p. 38. However, it was Dr. Brodie's statements that were inconsistent with the record. Using his own metric, that impacts his reliability.

Differences in condition: Prior low back and gluteal pain - Massage

104. Claimant was in massage therapy from 7/9/2017 to 3/11/2018. There is an appointment dated 2/17/2017 but the date is in error, Cl. Exh. p. 243. Twelve visit notes spanning these eight months are in evidence, Resp. Exh. H. In addition to treatment for his neck and upper back, Claimant was treated by

massage on some dates for his gluteal area, left and right, and his low back. The records contain no complaints pertaining to Claimant's left leg, foot numbness, limping, or any limitations or restrictions in function. Contemporaneous chiropractic notes show low back pain ratings of either a 3, or a 2. Cl. Exh. p. 245 - 280. Claimant had never complained of gluteal pain to his chiropractor, Cl Exh. p. 15.

105. Claimant testified his pre- and post-accident gluteal pain was different. His prior gluteal pain felt like a knot. Post-accident it "kind of felt, you know, connected. It kind of flowed down my leg," HT2, p. 56, l. 1-3, "After the fall it was constant, the sensation constantly down my lower back, into my glute, into my thigh, and down the leg," HT2, p. 55, l. 1-3.

106. Dr. Sacha testified, "We don't do massage on acute disk herniations. And the reason we don't is if you push on someone's gluteal area and they have an extruded fragment, you can actually make it far worse. The nerve is electrically excitable and pushing on the sciatic notch can actually really cause a lot of pain" HT1 p. 99, l. 16-23. Dr. Sacha clarified his testimony in his deposition, "You cannot tolerate deep tissue in the superior buttocks where the sciatic nerve runs. So, if the masseuse only rubbed the back, no big deal. If they rub the area where the sciatic nerve goes, the superior buttocks, and through the piriformis notch, then it will be severe and the patient won't tolerate it," DT p. 38, l. 17-23, but that it varies from patient to patient, DT, p. 38, l. 23-24. Dr. Brodie had also testified, "Massage therapy is typically pretty painful, regardless, if you have a herniated disk," HT2, p. 183, l. 10-11.

107. Massage records reflect treatment to the gluteal area but not with the precision of identifying the sciatic notch as the area of massage; nor is there data regarding Claimant's individual tolerance. However, Claimant's documented problems post-work injury were different and worse than those in the massage chart.

Differences in condition: Prior low back, other evidence

108. Claimant testified that before the work injury he had "had low back pain on and off" with "flareups now and then," HT2, p. 53, l. 5-6. He had "low level back pain. It would come and go. It was mild. It didn't stop me from doing anything . . . Yeah, it wasn't an issue, " HT2, p. 74, l. 15-19. The ALJ finds this testimony to be credible as corroborated by Dr. Bennett, Cl. Exh. P. 15 ("He subjectively reported mild low back pain . . . My objective findings did not warrant treatment to be necessary for any low back pain.")

109. Pre-work injury, Claimant testified he was not limited in either his job or any of his activities due to lumbar pain, gluteal pain, foot numbness, or any leg symptoms, HT2, p. 69. The ALJ finds Claimant's testimony to be credible as corroborated by Dr. Brodie's testimony that there is no pre-injury evidence of restrictions or functional disability; and as also corroborated by Dr. Bennett, Cl. Exh. p. 11, 12; and by the testimony of lay witnesses to Claimant's participation in physically demanding activities - before his work injury.

110. Medical providers for Claimant's auto accident also included physiatry/injections, Cl. Exh. 8, pp. 178-198; physical therapy, Cl. Exh. 9, pp. 199-222; and neurosurgery, Cl. Exh. 10, pp. 223-242. None of these providers evaluated or treated Claimant's low back. The neurosurgery chart included an intake checklist on which Claimant indicated he had had back pain and leg symptoms. But, his current problem list (Cl Exh. p. 223) did not include any lumbar problem, nor was any visit note directed to the lumbar spine, except his one report of "occasional right-sided lower extremity weakness, though it is rare and intermittent" (see below).

111. When Claimant began treatment at Concentra, he completed a checklist form pertaining to his medical history. While he testified his post-work injury condition was not the same as his previous condition, he also testified he would have checked the boxes which pertained to his prior back history, HT2, p. 110, l. 9-15. In fact, on 1/30/2019, ATP Dr. Corson had crossed out "he denies" in relation to whether Claimant had experienced "similar symptoms in the past." Cl. Exh. p. 81. Furthermore, Dr. Sacha, who saw Claimant at the same location (i.e., with the same chart) as Drs. Corson and Castro, was provided by Respondents with pre-injury medical records. HT2, p. 111, l. 1-9.

Differences in condition: Right leg weakness

112. Before his work injury, Claimant twice reported right leg weakness, i.e., on the contralateral side. It was different from his post-injury *left* leg radiculopathy. Claimant testified, "The right leg weakness was just temporary. It was there and gone. The left leg and that pain going down to my foot was continuous. Constant and continuous until I had surgery," HT2, p. 78, l. 5-9.

113. As stated, Claimant described his pre-injury right leg weakness to his neurosurgery provider as "rare and intermittent," Neurosurgery report 10/25/2018, Cl. Exh p. 239. Chiropractor Dr. Bennett commented on that report, that it "implies that the 'weakness' [Claimant] described was relatively insignificant in respect to his daily activities." Cl Exh p. 13. Dr. Sacha agreed: "It's not causing any distress. Doesn't need to be treated. Doesn't need to be evaluated. Isn't functionally limiting him," HT1 p. 107, l. 21-24.

114. Dr. Brodie agreed; and he agreed that Claimant's post-injury left-leg radiculopathy was considerably more significant (HT2, p 180, l. 13-25, p. 181, l. 1-3, 11-13):

> Q: Is it fair to state that while the evidence documents that [Claimant] had no significant functional disability on account of right leg weakness, in contrast, after the work injury, he was, quote, barely functioning and near debility due to his left leg radiculopathy?
>
> A. That seems true, yes.
>
> Q. And is it also true that Dr. Bennett's records of right leg weakness say nothing about numbness and tingling going all

> the way down the leg or achy pain in the thigh and calf or cramping in the calf or that whole litany of left-sided problems that were documented after the work injury were absent in Dr. Bennett's prework injury records concerning her two isolated mentions of right leg weakness? Is that a fair statement?
>
> A. Yes. Dr. Bennett's notes do not seem to document the lower extremity symptoms. So I believe I'm agreeing with you.

115. Dr. Brodie stated in his report that three chiropractic notes documented that Claimant was to see his neurosurgeon for right leg weakness or low back pain. This was allegedly inconsistent with Claimant's report that he was seen there for neck pain. This alleged inconsistency was discussed under Dr. Brodie's "rationale for your decision" section, Cl. Exh p. 38, last paragraph; see also p. 34. When Dr. Brodie testified, he claimed .that "at least one of" those three chiropractic notes documented that Claimant saw his neurosurgeon "because of back pain." HT2, p. 175, l. 6-7, namely the chiropractor's August 23, 2018 note, HT2, p. 175, l. 8-10. However, Dr. Bennett's 8/23/2018 note (Cl. Exh. p. 292) does not say Claimant saw his neurosurgeon for low back pain, which is corroborated by the neurosurgery note itself, Cl. Exh. p. 238-242.

116. The ALJ finds that Claimant's pre-injury episodes of right-leg weakness is not the same condition as his post-injury left leg radiculopathy.

Differences in condition: Left foot numbness

117. On 1/13/2016, i.e., almost three years before the 11/11/2018 work injury, Claimant saw his personal physician for left foot numbness. Claimant reported "throbbing at night, does not bother during the day." Claimant reported previous sciatica. The doctor concluded the foot numbness was a "residual neuropathy of prior sciatica." He was given a prescription and advised to call if there was no improvement in two weeks. Resp. Exh. p. 16-17.

118. Claimant did not call or return to his physician for foot numbness until nearly three years later - after the work injury that is the subject of this claim. He testified that he did not return because "I didn't have a problem. It was nothing to go to - go to him for. I didn't think I needed any medical attention. It was no issue." HT2, p. 76, l. 9-11. He testified that before the work injury, "It was – it was – you know, it was always there but the intensity would come and go. I felt it more at night in bed. Daytime, it was pretty mild during the daytime. I was usually unaware of it," HT2, p. 75, l. 5-8.

119. Claimant had reported his history to chiropractor Dr. Bennett when he met her in September 2017. He advised her that he had "constant numbness on his left lateral foot." Cl. Exh. p. 245. In the 13 months of pre-injury treatment thereafter, no discussion of his left foot appears in the narrative subjective section of the chiropractic notes. After the work injury, "His left foot pain was worse than had ever been reported in his previous visits," Dr. Bennett, Cl. Exh. p. 16.

120. In addition, Claimant testified his foot numbness was different, pre- and post-work injury. Previously, his numbness was with his “pinkie toe and “a little bit behind it on the outside of the left foot,” HT2, p. 74, l. 24-25, p. 75, l. 1. “Afterwards, the whole foot was numb. The top, bottom. The intensity went through the toes and the ball and the arch and went back to the heel. The sensation was coming down from my back. It was going all the way down to my foot. It was totally different. It was -- caused difficulty walking. Again, I recall being off my feet and seeing doctors. And, you know, it was a different experience.” HT2 p 76, l.25, p. 77, l. 1-7.

121. Dr. Sacha credibly testified that left lateral numbness is consistent with a disc injury at L5-S1. Claimant’s problem post-injury was at L4-5, “Lateral foot numbness is specifically in an S1 distribution. And he does have a little discogenic problem at L5-S1, and that might be why he had some old on-and-off symptoms, but that is not what we treated him for. We treated him for his L4-5 disk herniation, acute pinched nerve, acute extruded fragment, HT1, p. 110, l. 3-9.

122. Furthermore, even had the pre-injury left foot problem been in the same distribution, Claimant’s condition was aggravated after the work injury. As credibly and persuasively explained by Dr. Sacha (HT1, p. 108, l. 18-25; p. 109, l. 1-14):

> When you have a mild discogenic back problem that flares up here and there and causes a little bit of symptoms, you will have segmental issues. One little issue in one little place and one in another. So you could have like a little bit of foot something. You could have a little bit of buttocks something. You could have a little bit of back something.
>
> The more important thing is, is when it is not centralized -- it is called centralized pain. When it is not centralized and it is acute, it is consistent. It is a one long band of problems from the back all the way down to the foot.
>
> And post injury, he had this consistency of, I got a ton of back pain, ton of leg pain. It is consistent. It goes all the way down like a waterfall. It is numb. It is tingly. I don't even know where my foot is in space.
>
> Where it premorbidly occasionally had a little knickknack, very brief, not disconcerting type of symptoms that weren't even treated. They received no meds, no steroids, no opioid analgesics, and not any workup.

123. In connection with the 1/13/2016 report of Claimant’s personal physician, Dr. Brodie wrote that it reflected that Claimant had reported “highly similar, if not identical symptom pattern occurring as of January 13, 2016.” Cl. Exh p. 37. Dr. Brodie acknowledged in his testimony that Claimant’s post-injury left foot

symptoms were worse; that the 2016-foot complaint did not include any left leg radiculopathy; nor was Claimant restricted in any activities; nor did he seek medical care until he went to the E.R. after the work injury. HT2, p. 165, l. 9-25 - p. 166, 1-25.

124. The ALJ finds that Claimant's pre-injury foot numbness was not in the same location or the same severity as was his post-injury left foot numbness.

Onset and progression of symptoms

125. As found, Claimant's testimony regarding the onset of right gluteal and head pain the night of the accident and persisting thereafter is corroborated by the testimony of the lay witnesses, and by the supervisor's accident report the next day. His progression of symptoms thereafter is documented by the histories taken by the E.R. nurse (Cl. Exh. p. 48, 75); his personal physician (Cl. Exh. p. 78); the contemporaneous history he provided to his Employer (Cl. Exh. p. 42); the testimony of lay witnesses; and his contemporaneous notation of dates 11/16/2018 and 11/23/2018 as dates of worsening, which are then replicated in contemporaneous records.

126. Dr. Brodie maintained that symptoms should appear "within hours" or within "maybe a day" of the work accident, HT2, p. 123, l. 11, which in fact, they did. He contended Claimant had no pain and no symptoms for 12 days (HT2, p. 133, l. 7-8; HT2, p. 125, l. 20-22). But he also acknowledged Claimant had symptoms earlier (HT2, p. 120, l. 18-25, p. 121, l. 1-5):

> Q: [Claimant] testified this morning, and he testified that immediately after a slip-and-fall on November 11th, 2018, he hit his head, so he had head pain and headache, and he had right glute pain. He testified that he did not seek medical care for his low back or his lower extremities until November 28, 2018. Is that testimony consistent with what he conveyed to you at your Division Independent Medical Exam?
>
> A: I'm looking at the record that I had submitted to the Division. And that sounds pretty close.

127. The ALJ finds Dr. Brodie's understanding that Claimant had no symptoms, and no pain, until 12 days after his injury, is not consistent with the record, including, in part, his own testimony.

128. Dr. Brodie was asked if he went through a "sort of timeline when he [Claimant] said his symptoms occurred, and how they occurred?" Dr. Brodie answered yes, he had reviewed the records in advance and had some questions, "you know, the *prior history* was really important, the *prior history* of all the chiropractic treatment with the back pain, the butt pain, the lower extremity symptoms. And I wanted to clarify it. (emphasis added)" HT2, p. 135, l. 10-14.

129. Consistent with his focus on pre-injury records, as opposed to post-accident history, while Dr. Brodie's report itemized each and every pre-injury chiropractic

and massage note, he itemized only 15/50 or 30% of the post-injury records.[1] In his written report, he made repeated reference to two reports of right leg weakness (see, for example, Cl. Exh. p. 34, 38); which is of questionable relevance when post-injury records showed Claimant's herniation to be on his left.

130. Both Dr. Sacha and Dr. Brodie testified to an inflammatory process which can cause new symptoms over time. Dr. Sacha testified that progression of symptoms over time is common with disk herniations, HT1, p. 67, l.12-16. He explained that:

> [I]nflammatory mediators that rush to the disk and rush to the swollen nerve root which increases the swelling, causes more compression, and with time, that is when you start getting progressive killing off of those axons. So it is called an inflammatory cascade . . . you have a whole bunch of inflammatory mediators coming to cause a big raucous at the site, the nerve roots swell more, it becomes compressed more, and you start killing off individual axons. And so as you kill off each individual axon, that is why you start getting more symptoms. HT1, p. 68, l. 2-6, 9-15. See also HT1, p. 136, l. 10-25, p. 137, l. 1-2.

131. Dr. Brodie also testified to an inflammatory process. He was asked whether 12 days after an accident, symptoms can change sides. HT2, p. 128, l. 17-25; p. 129, l. 1-10 (though symptoms had changed sides earlier, on 11/16/2018). He answered that symptoms can change over time (HT2, p. 130, l. 11-18):

> "Can they -- the symptoms, you couldn't call them necessarily migratory, but at some point in time with a disk herniation, it is thought that the disk has inflammatory chemical mediators inside of the disks, the fluid inside the center of the disk, and it is thought that that disk leaking that fluid can irritate the nerve roots."

132. Dr. Sacha commented, "Dr. Brodie made the argument for us that it can occur, and it frequently does. And in fact, it almost – these types of symptoms getting worse is very common with larger disk herniations," DT p. 30, l. 18-21.

[1] See Brodie report, Cl. Exh. p. 31-32, Dr. Brodie reviewed 15 authorized physician notes. An additional 35 notes were submitted by Respondents as part of the DIME packet, see Resp. Exh. p. 152-155. These notes were not itemized in Dr. Brodie's written review:

Dr. Sacha: 1/9, 1/22, 2/4, 2/13, 2/27, 3/6, 4/10, 6/5, 6/26, 7/17, 10/9/2019, 3/9/2020
Dr. Corson: 12/6, 12/12, 12/26/2018, 1/4, 1/22, 2/1, 2/18, 3/5, 3/25, 4/1, 4/22, 5/8, 5/16, 5/31, 6/14, 6/28, 7/19, 7/26, 8/1, 8/14, 9/6, 10/1, 11/1/2019

133. In relation to Claimant being awakened from sleep due to foot numbness on 11/23/2018, Dr. Sacha testified that while sleeping cannot cause a disk to herniate, it can aggravate it, by certain positions during sleep. “First of all, you don’t get an extruded disk fragment sleeping. That doesn’t occur. It is impossible. It is clinically impossible,” HT1, p. 81, l. 9-11. He testified,

> You need something -- to get a large extruded fragment, you have to have a traumatic event. So you have to have landed on your buttocks. You have to have a traumatic event where you lift and twist with force because you are extruding a big piece of disk off the main portion of the disk. So it doesn't just occur with time. It is not a degenerative process. It is not an insidious process. It is not something that happens from just sitting in your chair. It occurs from an episode or an event, a traumatic event. And that has got to be pretty significant forces because you broke the entire disk off and put it onto the spinal nerve, HT1, p. 130, l. 4-19.

134. Nor can you herniate a disk while sleeping. Dr. Sacha testified he “did a full lit search” and “there is nowhere in any of the literature at any point where sleep causes disk herniations,” DT p. 47, l. 25, p. 48, l. 1-4; see also HT1, p. 82, l. 5-6.

135. However, certain positions while sleeping can cause a worsening of condition, DT p. 48, l. 12-13. Dr. Sacha testified that the position Claimant was in while sleeping aggravated his herniated disk and caused more symptoms, HT1, p. 82, l. 6-7. “Sleep doesn’t cause disk herniations. Sleep can aggravate disk herniations,” DT p. 48, l. 20-21. “You are increasing disk pressure, putting more pressure on the nerve, especially with a specific type of disk herniation that [Claimant] had from his work injury, an extrude fragment far lateral sitting on the nerve root.” DT p. 48, l. 24-25; p. 49, l. 1-3. As a result, sleeping did not cause Claimant’s work-related injury, it was merely the natural progression of the work injury that caused Claimant to become more symptomatic while sleeping.

136. Dr. Brodie proposed an alternative theory. Based on his proposal that an MRI cannot show a herniation to be acute, he speculated that Claimant may have had the same herniation pre-injury, but that it was asymptomatic until 12 days after the work injury when his foot awakened him from sleep. He testified that 30 to 40 percent of individuals have a herniated disk, but no symptoms, HT2, p. 127, l. 5-7; p. 132, l. 14-15; p. 133, l. 23-25; p. 147, l. 24-25. He testified that Claimant probably had a herniated disk before the work injury, HT2, p. 127, l. 20-22 (“he probably had this problem in his back, likely a herniated disk”), see also HT2, p. 151, l. 21-22; because he had the same symptoms before the work injury, HT2, p. 134, l. 1-2 ("we know before the work injury, he had the same symptoms;") HT2, p. 151, l. 21-24 ("records show a lot of similar symptoms"); HT2, p. 128, l. 11-12 (foot symptoms after the work accident "were similar to the symptoms before the fall event").

137. By definition Dr. Brodie’s theory requires an aggravation, if Claimant’s hypothetical pre-injury disk herniation was asymptomatic, or even just less symptomatic. But pre-injury, Claimant was active in a range of physically

demanding activities; he had also been in massage, which can "actually make it (a herniated disk) far worse," (Sacha, HT1, p. 99, l. 19-20). Yet none of these pre-injury activities aggravated this hypothetical pre-injury disk herniation. Instead, pursuant to Dr. Brodie's hypothetical, coincidently the aggravation spontaneously occurred after the work injury, but without any relationship to it. Logically, this is highly improbable.

138. In addition, Dr. Brodie's theory is contingent on Claimant having no symptoms for 12 days: and contingent on Claimant having the same symptoms pre-and post-injury. Both contentions are inconsistent with the factual information contained in Claimant's medical records, Claimant's testimony, and the testimony of the lay witnesses. Moreover, Dr. Brodie's theory is internally inconsistent (same symptoms pre- and post-injury; yet asymptomatic pre-injury).

139. The ALJ finds Dr. Brodie's theory is built on unnecessary speculation, and dependent upon a mistaken understanding of the facts. There is a known mechanism of injury involving the significant forces necessary to herniate a disk and break off a chunk of it; and an MRI which, as found, showed both the herniation and the extruded chunk of it to have been acute; a dramatic change in Claimant's condition post-injury consistent with his MRI findings; including symptoms which began right after the work accident.

140. The ALJ finds that Claimant herniated his disk when he fell on his buttocks at work, which, as expressed by Dr. Brodie, is "what this scenario is all about"; thereafter, the symptoms of that herniation and of the extruded disk progressed due to a process called an "inflammatory cascade"; and then progressed again while Claimant was sleeping. As a result, Claimant's symptoms, need for medical treatment, and his disability were caused by his work injury when he slipped and fell and herniated his disk – which extruded and resulted in a disk fragment impinging a nerve. Thus, the slip and fall was the primary causative factor of Claimant's symptoms, need for medical treatment, and his disability.

Medical Treatment Guidelines

141. Low back injury causation is discussed in the Division of Workers' Compensation, Low Back Medical Treatment Guidelines, Rule 17, Exhibit 1, p. 12, 7 CCR 1101-3. When evaluating causation, the ALJ may consider the provisions of the Guidelines because they represent the accepted standards of practice in worker's compensation cases and were adopted pursuant to an express grant of statutory authority. Although the ALJ is not bound by the Guidelines, the causation analysis it contains is reasonable and helpful in this case.

142. Page 12 of Rule 17, Exhibit 1, states that "most low back cases result from injuries" but it also acknowledges that aggravation of previously symptomatic conditions, or previously asymptomatic conditions are also compensable. The Guidelines state as follows:

> "Work-related conditions may occur from the following:
>
> - a specific incident or injury,

- aggravation of a previous symptomatic condition, or
- a work-related exposure that renders a previously asymptomatic condition symptomatic and subsequently requires treatment."

143. The aggravation principles in the Guidelines mirrors the law. "Few principles are more fundamental to the Worker's Compensation (Act) than the rule that 'this state does not distinguish between disabilities that are the result of employment-related aggravation of pre-existing conditions and those that are not.' Thus, where a 'pre-existing condition is aggravated by an employee's work, the resulting disability is a compensable industrial disability,' *Subsequent Injury Fund v. Thompson*, 793 P.2d 576, 579 (Colo. 1990)." *Weber v. Shiloh House*, W.C. 4-540-459 (ICAO 5/20/2005).

144. Dr. Sacha credibly and persuasively testified that:

> [F]rom a causality standpoint, clearly, the patient has at the very least a permanent exacerbation of a previous problem. That being said, all of the data in this case, including all the diagnostic studies, show that the acute extruded disk herniation was an acute event that is causally related to this gentleman's date of work comp injury. Nothing else. Again, it says right below those bullet points on -- in the Medical Treatment Guidelines that most low back cases result from injuries. He had an injury. Okay? And he had an injury that causes extruded disk fragments. DT p. 37, l. 11-22.

145. In addition, the Guidelines also state as follows (p. 13-14):

> Clinicians need to ask the following question: Would the recommended treatment for the condition be the same if the work-related exposure had never occurred? If the answer to this question is "no," the provider may consider that the non-occupational elements contributing to back pain do not play a major role in the medical analysis of most cases.

146. As found, Claimant would not have needed lumbar surgery or work restrictions if the work-related exposure – slip and fall - had never occurred.

Permanent impairment

147. ATP Dr. Sacha had found 13% whole person impairment, Cl. Exh. p. 175. Due to a clerical error, it should have been 14%, HT1, p. 121, l. 4-6.

148. Though he found no causation, Dr. Brodie assessed Claimant's lumbar permanent impairment to be 17% whole person. His Table 53 and neurological rating was the same as what Dr. Sacha found. The difference was in the range of motion, which was in the ballpark of reasonable variability. Dr. Sacha had found invalid forward flexion. He credibly testified that Claimant:

> [W]as worse when he saw me so he had a harder time doing the forward flexion. And he had improved a little bit as he got

> further away from his surgery when he did the Division IME. . .. So both impairment ratings are appropriate, both impairment ratings are done the right way, and they are both within a kind of plus-minus of what we see from practitioner to practitioner. He was - if he was slightly better when he saw me, he probably would have gotten the forward flexion as well. They might have been identical." HT1, p. 119, l. 15-25, p. 120, l. 1.

149. The ALJ finds that Dr. Brodie's 17% whole person lumbar impairment was correctly done.

Medical Maintenance

150. Dr. Sacha testified that Claimant was still under his care and has chronic residual nerve damage at L5. He testified Claimant needs to be kept on neuropathic pain medicines and muscle relaxers; he may need another injection or two if his pain worsens. Further invasive treatment is not contemplated at this time, with the hope that the neuropathic pain will "quiet down" but he does have permanent damage and axonal loss on the EMG. HT1, p. 121, l. 17 - p. 123, l. 8.

151. The ALJ finds these treatments are reasonably designed to relieve the effects of the injury or to prevent deterioration of the Claimant's present condition. This evidence is credible and persuasive.

Ultimate findings

152. The ALJ is persuaded that Claimant's condition before and after his work injury was not the same, nor was it highly similar. Claimant's debility post-injury is dramatically different from his pre-injury functioning, which involved participation in a wide range of physically demanding activities. If Claimant's condition had been the same pre-injury, he would not have been able to function at the level he was functioning.

153. In addition, Claimant's medical condition post-injury had a myriad of new attributes. As stated, DIME Dr. Brodie acknowledged Claimant had no prior left leg radiculopathy; no restrictions ("I got over my skis on that"); nor any functional disability ("Maybe it's not there [in the record] at all"); no prior prescriptions for oral steroids or opiates; no pre-injury recommendations for a lumbar MRI, lumbar injections, or lumbar surgery, despite that Claimant was involved with medical professionals in connection with an earlier auto accident.

154. Other new complaints and findings had not been noticed by Dr. Brodie. These included limping, which included dependence on a cane ("I didn't pay attention to that"); painful and limited range of motion ("I don't remember seeing that"); high pain ratings ("I don't recall that specifically"). Also, present post-injury but not pre-injury was positive neurological clinical testing; atrophy and cramping of the left calf; and persistent muscle spasms.

155. The ALJ finds that the specific symptoms identified by Dr. Brodie as evidence of the same condition, pre- and post-injury, were not the same. These were right leg

weakness, left foot numbness, and low back and gluteal pain. The right leg was the contralateral side. The symptoms were "rare and intermittent," as opposed to post-injury left leg symptoms that were persistent and continuous. Nor did the right leg have any other symptom, unlike the array of radicular complaints in the left leg post-injury; and it was not functionally disabling. The left foot was also not functionally disabling pre-injury; the severity of the foot post-injury was vastly increased, as was the scope of the numbness.

156. With regard to the low back, Dr. Brodie "heavily weighted" the chiropractic chart as evidence that Claimant's pre- and post-injury condition was "highly similar if not identical," one of his two predicates for his no-causation opinion. This was based on his understanding that the chart reflected that "claimant reported with low back symptoms, specifically requested low back treatment, and specifically received low back treatment," "repetitively in the 12 months before November 11, 2018.

157. However, Dr. Brodie's understanding of the chiropractic chart was radically incorrect. Not only was there no repetitive treatment of Claimant's low back over 12 months, but there was also no treatment. Despite that he had written individual reviews of each of more than two dozen chiropractic notes, he evidently never noticed that neither the treatment section, nor the assessment section, ever included the low back; his comment, when it was brought to his attention, in both instances, was that that was "weird."

158. Even had Dr. Brodie's mistaken understanding of the chiropractic chart been correct, it would still not support a finding of an equivalent condition, pre- and post-work injury. Absent from the chiropractic chart was any documentation of left leg radiculopathy nor any of the many complaints and findings associated with it, which were present post-injury. In addition, the ALJ credits chiropractor Dr. Bennett's description of Claimant's pre-injury low back pain as mild; not functionally limiting; and not requiring any treatment. In contrast, post-injury, Claimant presented with "fairly severe low back pain."

159. That leaves the massage provider as the only provider who treated Claimant's back or his gluteal area. However, Claimant's post-accident symptoms were different, and worse. Again, absent was any documentation of left leg radiculopathy, functional limitation, nor of any of the myriad of other findings documented post-injury. The fact that Claimant tolerated massage to his gluteal area may itself show the lack of a herniated disk.

160. In addition, following the last massage visit on March 11, 2018, no provider treated Claimant's low back or related symptoms, until after the work injury.

161. The ALJ finds the evidence is clear and unmistakable that Claimant's condition before and after his work injury was not the same. This is not a mere difference of expert opinion. Rather, the opposing opinions are based on different facts. Dr. Brodie had a mistaken understanding of both Claimant's pre- as well as his post-injury condition. Pre-injury, he misunderstood the chiropractic chart; in his written report he mistakenly focused on the right leg when Claimant's disk injury was on the left (see Cl. Exh. p. 38, last paragraph); and in any case, the post-

injury left leg was far more severe than the pre-injury right leg; he failed to appreciate the distinction in the left foot, pre- and post-injury. Post-injury, Dr. Brodie did not pay attention to, remember, or see many of the new findings documented in the ATP records.

162. Based on Dr. Brodie's mistaken and incomplete understanding of the facts about the nature, extent, and significance of Claimant's complaints and findings pre- versus post-injury, the ALJ finds his opinion that Claimant's condition was highly similar if not identical to be not credible and not persuasive.

163. Having found Claimant's condition to be different after his work injury, the next question is the cause of that difference. Dr. Sacha characterized this as a "bread and butter case," HT1, p. 6, l. 6, i.e., an obvious case of a work accident-causing injury. Indeed, Employer admitted liability. Dr. Brodie proposes a spontaneous activation of a hypothetical pre-injury asymptomatic herniated disk, coincidently contemporaneous with Claimant's work injury.

164. First, supporting work causation, both experts agree that the mechanism of injury is consistent with Claimant's disk injury, which, in turn, is consistent also with the MRI and Claimant's clinical presentation.

165. Second, as found, the ALJ is persuaded by the testimony of Dr. Sacha, which is consistent with that of Dr. Castro, that the MRI showed Claimant's herniation to be "acute." The ALJ is persuaded that the chunk of herniation which broke off also occurred acutely.

166. Third, the ALJ is persuaded by Dr. Sacha's testimony that "significant forces" are required to break "the entire disk off and put it onto the spinal nerve." The only such event in the record is the admitted work injury.

167. Fourth, as found, Claimant had both early and progressive symptoms from the date of accident through the date of medical care on 11/28/2018. As stated, this is corroborated by the supervisor's accident report the next day, the testimony of the lay witnesses; the histories taken by the E.R. nurse and the personal physician, as well as the history Claimant provided to his employer; and his contemporaneous recording of 11/16/2018 and 11/23/2018 as dates of worsening, which are then replicated in contemporaneous records.

168. As found, Dr. Brodie is not correct in finding that Claimant had no symptoms and no pain for 12 days. This is not a product of a mere difference of expert opinion. This is a difference of opinion based on different facts. While some of these facts were not available to Dr. Brodie when he prepared his DIME report, others were. In addition, Dr. Brodie acknowledged Claimant's early symptoms in his testimony.

169. Fifth, the ALJ finds the testimony of Dr. Sacha to be credible and persuasive that worsening symptoms from an acute disk herniation can develop over time due to a process called an "inflammatory cascade." Dr. Brodie testified to the same process, as accounting for new symptoms as long as 12 days after an injury. While the context was different Dr. Brodie endorsed the same process as causing a delay in the appearance of new symptoms.

170. Sixth, the ALJ finds the testimony of Dr. Sacha to be credible and persuasive that sleep can make disk injury more symptomatic, which occurred in this case; but that sleep can neither cause a herniation nor cause a chunk of herniation to break off.

171. Dr. Brodie's alternative hypothetical requires as underlying predicates that the MRI cannot diagnose a herniation as acute; that symptoms pre- and post-injury were the same; and that Claimant had no symptoms for 12 days post-injury. As found, none of these predicates are consistent with the facts can Dr. Sacha's credible and highly persuasive testimony.

172. Dr. Brodie's hypothetical also requires an aggravation to make the hypothetical asymptomatic herniation symptomatic. That fact that this allegedly occurred after the work injury is too coincidental to be probable, especially considering pre-injury opportunities for aggravation including Claimant's participation in physically demanding activities and potentially his exposure to massage.

173. As found, the ALJ is persuaded by the totality of the evidence that Claimant would not have needed lumbar surgery but for the admitted accident of 11/11/2018. As stated in the Medical Treatment Guidelines for the low back (p. 13-14), when treatment would not have been the same before the work injury, "the non-occupational elements contribution to back pain do not play a major role."

174. The ALJ finds the admitted traumatic work accident of November 11, 2018 caused Claimant's disk to herniate and caused the "free fragment" chunk of disk to break off. While Claimant may have had a pre-existing condition or susceptibility to injury due to that condition, the work accident aggravated, accelerated, or combined with that pre-existing condition so as to produce his need for medical treatment, disability, and his permanent impairment.

175. The ALJ finds the Claimant's lumbar impairment is due to a new acute injury or an acute aggravation that occurred on November 11, 2018 when he slipped and fell and is not due to the natural progression of any pre-existing condition.

176. Based on the totality of the evidence, the ALJ finds that Claimant has proven that it is highly probable, unmistakable, and free from serious or substantial doubt that DIME Dr. Brodie's zero impairment, based on no causation, is in error. The Claimant has overcome the DIME's zero impairment rating by clear and convincing evidence.

177. The ALJ finds the absence of a report of injury in two of the November 2018 chiropractic notes is insubstantial in relation to the weight of the other evidence. The ALJ finds Claimant's explanation as to the first appointment adequate and his explanation as to the second appointment supported by the chiropractor and mitigated by a report that night to the E.R. In general, it is well known that inconsistencies, contradictory evidence, and incomplete explanations are common in the legal process. *Cf., People v. Brassfield*, 652 P.2d 588 (Colo. 1982) (inconsistencies are not uncommon in the adversary process which, of

necessity, must rely on the sometimes contradictory and often incomplete testimony of human observers in attempting to reconstruct historical events).

178. As found, Dr. Brodie's 17% whole person impairment rating was correctly done. Respondents did not offer evidence to overcome this rating.

179. As found, future medical maintenance treatment is reasonably designed to relieve the effects of the injury or to prevent further deterioration of Claimant's condition. This evidence is credible and persuasive.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

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

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential*

Insurance Co. v. Cline, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant has overcome by clear and convincing evidence the opinion of the Division Independent Medical Examination (DIME) physician Matthew Brodie, who found zero impairment due to no causation. If so, should Claimant be awarded the 17% whole person impairment assessed by Dr. Brodie.

The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995); *Lafont v. WellBridge D/B/A Colorado Athletic Club* W.C. No. 4-914-378-02 (ICAO, 6/25/2015).

As a matter of diagnosis, the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003); *Sharpton v. Prospect Airport Services* W.C. No. 4-941-721-03 (ICAO 11/29/2016). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998); *Watier-Yerkman v. Da Vita, Inc.* W.C. No. 4-882-517-02 (ICAO 1/12/2015). But see *Yeutter v. Industrial Claims Appeals Office,* 2019 COA 53, 18CA0498 (determining that a DIME physician's opinion carries presumptive weight only with respect to MMI and impairment); and *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844, 846 (Colo. App. 2000) (DIME opinion concerning causation need not be overcome by clear and convincing evidence where dispute involved the "threshold requirement" that the claimant establish a compensable injury). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution oftlineby a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

The questions of whether the DIME physician properly applied the *AMA Guides,* and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000); *Paredes v. ABM Industries* W.C. No. 4-862-312-02 (ICAO 4/14/2014). A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado,* W.C. No. 4-350-36 (ICAO 3/22/2000); *Licata v. Wholly Cannoli Cafe* W.C. No. 4-863-323-04 (ICAO 7/26/2016).

If an industrial disability is attributable to both a pre-existing condition and an occupational injury, the resulting disability and medical benefits are compensable if the injury has caused a pre-existing condition to become industrially disabling. See *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986). Thus, a pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). This is because compensation is not dependent on the state of an employee's health or his freedom from constitutional weakness. *Peter Kiewit Sons' Co. v. ICAO*, 236 P.2d 296 (Colo. 1951).

As found, Claimant sustained a new injury on account of his admitted slip-and-fall at work, or at a minimum aggravated a pre-existing condition. As found, the evidence is unmistakable and free from serious or substantial doubt that Claimant's condition was not the same after his work injury; that the mechanism of injury and the objective MRI evidence was consistent with an acute injury; and that there were different clinical findings after the work accident consistent with the slip-and-fall and with the MRI.

DIME Dr. Brodie's no-causation opinion was significantly dependent on the proposition that Claimant's condition before and after his work injury was "highly similar if not identical." As found, the facts are unmistakable that Dr. Brodie was incorrect. As found, this is not a mere difference of professional opinion. Rather, Dr. Brodie's opinion was based on an incomplete and incorrect understanding of the facts as set forth in the underlying medical records. *Cf., Salazar v. Holiday Retirement Corp.,* W.C. 4-639-040 (ICAO 1/2/2007) (when DIME formed his opinion based on an incorrect understanding of the facts, it was more than a mere difference of opinion). Like a house built on sand, an expert's opinion is no better than the facts and data on which it is based. *See Kennemur v. State of California*, 184 Cal.Rptr. 393, 402–03 (Cal. Ct. App. 1982).

As found, it is highly unlikely that Claimant's dramatically different presentation occurred spontaneously as a natural progression of an underlying condition, such as an asymptomatic herniated disk, only coincidently contemporaneous with the work injury. Nor is there any evidence that Claimant, pre-injury, had an asymptomatic herniated disk.

As found, the aggregate evidence establishes that Claimant had ongoing and progressive symptoms from the date of the accident through the date of the first medical appointment. The DIME's no-causation opinion specifically relied on his understanding that Claimant had no pain and no symptoms for 12 days. This proposition is based on an incorrect understanding of the facts. For this reason, and the many other reasons found above, the DIME's opinion is not credible or persuasive.

An opinion which is unsupported by the aggregate medical evidence is not a mere difference of opinion; it is an opinion which lacks credibility. *King v. The Children's Hospital*, W.C. 5-004-801-02 (ICAO 10/11/2018).

As a result, the ALJ finds and concludes Claimant has overcome the opinion of Dr. Brodie that Claimant has no impairment due to no causation of the underlying injury

– disk herniation - by clear and convincing evidence. But, as found, Dr. Brodie's 17% permanent impairment rating was correctly done.

II. Whether Respondents have proven by a preponderance of the evidence that they are entitled to recovery of a stipulated $25,740.62 payment of permanent impairment benefits, provided Claimant fails to overcome the opinion of the DIME, and if so, at what rate should the overpayment be repaid.

As found, Claimant has overcome the zero-impairment finding of the DIME. Therefore, there is no overpayment.

III. Whether Claimant has established by a preponderance of the evidence an entitlement to medical maintenance benefits.

The need for medical treatment may extend beyond the point of maximum medical improvement where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claims Appeals Office,* 916 P.2d 609 (Colo. App. 1995). An award for Grover medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended, nor a finding that Claimant is actually receiving medical treatment. *Holly Nursing Care Center v ICAO*, 992 P.2d 701 (Colo. App. 1999). Claimant must prove entitlement to Grover medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc*., 865 P.2d 915 (Colo. App. 1993). Once a claimant establishes the probable need for future medical treatment, he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc*., 77 P.3d 863, 866 (Colo. App. 2003).

In *Milco Construction v. Cowan*, 860 P.2d 539 (Colo. App. 1992), the Court of Appeals established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission*, supra. The Court stated that an ALJ must first determine whether there is substantial evidence in the record to show the reasonable necessity for future medical treatment "designed to relieve the effects of the injury or to prevent deterioration of the claimant's present condition." If the claimant reaches this threshold, the Court stated that the ALJ should then enter "a general order, similar to that described in Grover."

As found, the ALJ finds Dr. Sacha's testimony concerning Claimant's future medical needs to be persuasive and uncontroverted. Thus, Claimant has established his entitlement to medical maintenance benefits.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant has overcome by clear and convincing evidence the zero-impairment rating of DIME Dr. Matthew Brodie.

2. Claimant’s low back injury and 17% rating for it is causally related to the admitted November 11, 2018 work injury. Respondents shall pay a PPD award in accordance with this rating.
3. Respondents shall pay for all reasonable, necessary, and related medical maintenance care.
4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.
5. Respondents’ claim of an overpayment of PPD is denied and dismissed.
6. Issues not expressly decided herein are reserved to the parties for future determination.

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

DATED: May 19, 2021.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Have Respondents successfully appealed the Order, dated 10/21/2020 by PALJ Phillips, which denied Respondents' Motion to Cancel the DIME process?

II. Have Respondents successfully appealed the Order, dated 11/6/2020 by PALJ Phillips, which then denied Respondents' Motion for a Stay of her Order Denying their Motion to Cancel the DIME process?

III. Assuming such appeals are not successful, have Respondents, by clear and convincing evidence, overcome the DIME opinion by Dr. Rook?

IV. Has Claimant shown that Penalties should be assessed against Respondents?

V. Has Claimant shown that Attorney Fees should be assessed against Respondents for pleading an unripe issue?

FINDINGS OF FACT

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

Procedural History

1. This is an admitted claim. Claimant injured his knee on July 2, 2018. Claimant treated for this injury and was later recommended for surgery, which was initially denied by Respondents. After a hearing, the ALJ ordered the surgery. Following surgery, Claimant continued to treat and was placed at Maximum Medical Improvement by Dr. Terrance Lakin on June 15, 2020, and was given a 16% scheduled impairment rating to the left knee. (Ex. B).

2. On June 29, 2020, Respondents' filed a FAL. This was based upon Dr. Lakin's, the ATP, MMI/rating report. Dr. Lakin found that he could return to full duty work with no restrictions. He noted that the Claimant told him on that date he had popping in his left hip "but is not painful, just bothersome." *Id.*

DIME Process Begins / So far, so good

3. On July 29, 2020, Claimant, through counsel, [Redacted], filed an Objection to FAL and requested a DIME. (Ex. 3).

4. On that same date, Claimant's Counsel filed a Notice and Proposal and Application for DIME. Claimant proposed either Jack Rook, M.D., Thomas Higginbotham, D.O., or Timothy Hall, M.D. to conduct the DIME. *Id.*

5. M[Redacted], Respondents' claims adjuster, did not agree with any of the proposed doctors, including Dr. Rook. On August 24, 2020, Respondents filed a Notice of Failed DIME Negotiations, indicating parties were unable to agree upon a physician.

6. On August 27, 2020, the DIME Physician Panel was issued, listing Dr. William Watson, Dr. Wallace Larson, and Dr. Jack Rook. (Ex. 4). Consistent with Rule 11-4(A)(5), this notice provided, in pertinent part:

> Within five (5) business days of issuance of the three-physician list, the *requesting party* **shall** *strike* one name *and inform the other party and the Division.* The other party **then** shall have five (5) business days to *strike one* of the *remaining* physicians and inform the DIME Unit in writing, with confirmation to the requesting party. (Ex. 4)(emphasis added).

Settlement takes the Forefront

7. Claimant's counsel did not exercise his strike as required. Instead, on August 31, 2020 at 11:44 a.m., Claimant's Counsel sent an email to Ms. M[Redacted], stating:

> *Mr. [Claimant] accepts the $10,000 settlement. Please send documents to me. Thank you.* (Ex. J-5).

8. On September 1, 2020, Ms. M[Redacted] sent settlement documents to Claimant's Counsel via email, stating, *"Here you go. Thanks.* (Exhibit J-6 to J-16).

9. Neither party *ever* submitted a DIME strike. As it was Claimant's DIME, he was to issue the first strike. Ms. M[Redacted] believed that the claim was resolved via settlement and that the DIME process was not proceeding, based upon the representation from Claimant's counsel.

DIME Process Continues in the Background

10. On September 14, 2020, the IME Unit issued a DIME Physician Confirmation and Invoice indicating Dr. Jack Rook would conduct the DIME. (Ex. 5, p. 21). This notice also invoiced Claimant for the DIME fee of $1400, noting that ***"Payment is due 14 days from the date of this invoice."*** *Id* at 22. This notice also stated:

*****IMPORTANT: MEDICAL RECORDS NEED TO BE SEND TO*****

Attention: Dr. Jack Rook

Address: 923 W Colorado Avenue

Colorado Springs, CO 80905 Id at 21.

11. Ms. M[Redacted] sent an email to Claimant's Counsel following up on the status of the settlement documents being signed by Claimant on September 16, 2020, stating, *"Hi [Redacted] Just checking on these. Has Mr. [Claimant] been able to sign these? Thanks." (*Ex. J, p. 18). Claimant's counsel never responded.

12. On September 22, 2020, Ms. M[Redacted] followed up, asking, *"Hi [Redacted]. Checking in again on these. Thanks!"* Again, Claimant's counsel never responded. (Ex. J. p. 18)

13. On September 29, 2020, Ms. M[Redacted] inquired again, *"Hi [Redacted]. Has your client been in to sign the settlement documents? Please let me know what's going on. Thanks."* (Ex. J, p. 17). Once again, Claimant's counsel never responded.

Settlement Discussions End

14. Then, on October 1, 2020, at 1:41 p.m., Claimant's Counsel's office sent an email to the IME Unit, with a copy to Ms. M[Redacted] that a DIME appointment had been scheduled for November 2, 2020 at 1:00 p.m. with Dr. Jack Rook.

15. One minute later, Ms. M[Redacted] (who testified that she was "very surprised" by the email) emailed Claimant's Counsel at 1:42 p.m., stating: *"This claim settled. We had an agreement to settle. What is going on? Please advise IMMEDIATELY."* (Ex. J, p. 21)(emphasis supplied).

16. This time, Claimant's Counsel promptly responded, stating that: *"Mr. [Claimant] simply backed out of settlement at the last minute and elected to go forward with the DIME."* (Exhibit J-20 and J-21).

M[Redacted] Testifies at Hearing

17. Ms. M[Redacted] testified that had she known that the DIME panel was proceeding, without a settlement, she likely would have struck Dr. Rook from the panel. Ms. M[Redacted] also testified, in her 22 years as an adjuster, she had never had a claimant back out of a settlement after the DIME was selected by the DIME unit.

18. When asked why she never received a DIME strike [from Claimant] during the process, Ms. M[Redacted] stated: *"I wasn't surprised because the claim had settled, but there was no DIME process going on."* (Transcript, p. 29).

19. Ms. M[Redacted] confirmed receipt of the DIME confirmation and invoice (dated 9/14/2020). When asked if she was surprised by this, she stated: *"I honestly didn't even realize the DIME was still going on because we settled."* (Transcript, p. 30).

20. Ms. M[Redacted] testified that she is not attempting to enforce the settlement, but is requesting to put the parties back in the position just prior to her detrimental reliance on Claimant counsel's representation that the claim had settled and the DIME would not go forward. In other words, Respondents request a new panel and an opportunity to exercise their DIME strike. Ms. M[Redacted] also testified [upon hearing Claimant complain of the extra costs in paying for a second DIME exam] that Respondents would agree to pay for the new DIME, if ordered.

Claimant Testifies at Hearing

21. Claimant testified that he was aware of the $10,000 settlement offer, but testified that he had not accepted it and that there was "an offer on the table and there was still further time before that offer was to come to pass." (Transcript, pp. 44-45).

22. Claimant testified that he did not advise his counsel that he accepted the offer but that he would *"think about it and talk it through with [his] family." Id* at 45. [The ALJ notes that any hint of 'uncertainty' now alleged by Claimant was never conveyed to Respondents until October 1, 2021].

23. Claimant initially denied that he gave his attorney authority to advise Respondents that he accepted the offer. (Transcript, p. 44). But minutes later, Claimant testified that he must have accepted the offer, if his attorney wrote the email stating that he did accept it. *Id* at 46.

24. Claimant testified that he decided not to accept the settlement and proceed with the DIME after Dr. Rook was selected as the DIME, but his reason was not because Dr. Rook was selected; in fact, it was not even a consideration:

> I didn't consider that, no. I had not known Rook. I hadn't talked to Rook any previous times. So he was a random doctor, like many other ones that I've seen. (Transcript, pp. 47-48).

25. Instead, Claimant claimed the reason was because:

> I backed out due to ongoing pain and it not getting any better. I have a father that – a couple car accidents in his day, and I watched him limp around the house every single day in excruciating pain. And I didn't want to end up like that late in my life or not be able to – not be able to achieve anything later in my life due to my pain. And I decided to put the monetary part aside and take care of myself first and foremost. (Transcript, p. 64).

Respondents Object to the DIME Process Moving Forward

26. On October 7, 2020, immediately after learning that Claimant "backed out of the settlement" and scheduled the DIME appointment with Dr. Rook, Respondents attempted to have the DIME with Dr. Rook cancelled by filing a Motion with the DOWC. On October 21, 2020, PALJ Phillips denied that Motion. (Exhibits I and J).

27. After receiving PALJ Phillips' Order, on October 26, 2020, Respondents filed a Motion to Stay the Order and an Application for Hearing to Appeal the ruling.

28. Respondents' Motion to Stay the DIME was pending when the DIME appointment on November 2, 2020 was scheduled. *Neither party submitted medical records to the DIME*. (Exhibit C-5). PALJ Phillips Order denying the Motion was entered on November 6, 2020. (Exhibit G).

The DIME Process Moves Forward Anyway

29. Instead of cancelling the November 2, 2020 appointment due to not having any medical records pursuant W.C.R.P. 11-4(B)(6), Dr. Rook proceeded with the DIME appointment. He concluded that Claimant was not at MMI, based solely on his physical examination and Claimant's subjective history. Based upon Claimant's assertions of pain in his left knee, left hip, and low back, Dr. Rook gave a provisional lower extremity rating of 44% based upon rating the hip in addition to the knee. He noted that Claimant had not received any treatment for the hip and low back, and recommended further evaluation including an MRI of the hip and knee and an orthopedic surgeon consultation for both areas. (Exhibit C).

30. Dr. Rook also noted in his DIME report the following:

> *No medical records* were forwarded to me for review prior to this DIME. As of the date of this dictation which is the day following the independent medical examination, *I have not been provided with any medical records for review. I had my staff contact the plaintiff's attorney in the week prior to the division independent medical examination and we have not heard anything from them.* I've also contacted the division of labor regarding this issue….This is a problem which needs to be rectified as *it puts the examiner at a disadvantage* when performing the independent medical examination. (Ex. C, p. 5)(emphasis added).

On the same page, Dr. Rook further noted:

> At the time of this dictation *I also had not received any paperwork from the DIME unit. I therefore am at a disadvantage with regards to knowing the areas to be addressed, the issues in the case, and even the parties that*

> *are to receive this report*……After discussing the pertinent issues with the patient, it seems to me that the pertinent issues would be maximum medical improvement, future treatment needs, impairment rating, and the areas to be addressed would include his low back, left hip, and left knee. Id. (emphasis added).

Penalty and Procedural Issues Ongoing

31. At a Prehearing Conference om December 15, 2020, Claimant had moved to compel a follow-up DIME; for Respondents to provide records for the follow-up DIME and pay for the follow-up DIME; and to strike Respondents' Application for Hearing. PALJ Phillips denied the motion to compel the follow-up DIME because W.R.C.P. 11-7(A) states that the follow-up DIME shall occur after Claimant has completed the recommendations by the DIME and that the recommended treatment had not yet occurred. (Exhibit F).

32. Regarding the Motion to Strike Respondents Application for Hearing, Claimant argued that the issue of holding the DIME in abeyance was not ripe. PALJ Phillips disagreed and found that Respondents raised equitable issues, including detrimental reliance, and hold the DIME in abeyance is necessarily encompassed in the appeal of her Orders denying the cancelling of the DIME and staying that prior order. (Id.).

33. Apparently dissatisfied with the Order from December 15, 2020, at another Prehearing Conference before a different PALJ, Claimant moved to reconsider the motion to strike the issue of holding the DIME in abeyance, strike the DIME process, and strike the DIME report. PALJ Broniak denied the motion with regard to holding the DIME in abeyance for the same reasons as PALJ Phillips. However, PALJ Broniak found that striking the DIME process and Dr. Rook's DIME report were duplicative of the appeal of PALJ Phillips Orders and therefore unripe for the sole reason that they were duplicative. PALJ Broniak struck those two issues. (Exhibit E).

34. During the prehearing process, Claimant was ordered to answer one supplemental interrogatory #17, which was answered [by Claimant's counsel] on January 27, 2021. (Ex. L).

> 17. Please provide the date when Claimant decided to back out of the settlement agreement for $10,000. Please also state what actions you took to communicate to Respondents that Claimant decided to back out of the settlement agreement and the dates of those actions.
>
> ANSWER: Objection. Irrelevant. Discussions of settlement are inadmissible as evidence.

> SUPPLEMENTAL ANSWER: Upon information and belief, the Claimant decided to reject the settlement agreement on or about *September 28, 2020*. This was communicated to Marchelle Robinson, claims representative, on or about October 1, 2020. (emphasis added).

CONCLUSIONS OF LAW

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

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. §8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. §8-43-201, C.R.S.

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

C. Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

D. In this case, the ALJ finds that throughout the entire process, Ms. M[Redacted] acted with competence, diligence and professionalism in dealing with Claimant. She communicated with regularity, and documented it. The ALJ also finds that Ms. M[Redacted] testified credibly, and reasonably, in the hearing. Her stated reliance upon the representations made to her is credible, and any lack of even greater pro-action (as now argued by Claimant) is mitigated by her reasonable reliance on what she reasonably believed at the time.

ALJ's Authority to Review the Order of the PALJ

E. The propriety of a PALJ's order may be addressed at a subsequent OAC hearing by the ALJ, who may review such an order. *Industrial Claims Appeals Office v. Orth,* 965 P.2d 1246, 1254 (Colo. 1998). *See also Kilpatrick v. Industrial Claims Appeals Office,* 356 P.3d 1008, 1013 (Colo. App. 2015) (while it is true that a PALJ's order may be addressed at the subsequent OAC hearing and the ALJ has authority to override a PALJ's ruling, the statute authorizing a PALJ to decide certain issues does not make the ALJ review a prerequisite for appellate review). Such process is quite sensible; the PALJ herein was without a mechanism to fully develop the facts at a prehearing conference. Such luxury was afforded this ALJ at a full hearing, and any overrule of the PALJ's Order herein does not imply any deficiencies on the part of the PALJ. We all have our roles to play.

Candid Observations about the DIME Selection Process

F. The Workers Compensation Statutes, and the Rules promulgated in connection therewith, are a thorough, refined, and sincere effort to ultimately appoint an impartial, and fully informed physician to perform the examination and produce a report. Once a physician has successfully run that gauntlet, their opinions are given great deference, so that all parties, and ALJs, may reasonably rely upon the DIME. This affords greater predictability to the process; informed decisions may then be made, settlements reached. In volunteering for the DIME panels, physicians pledge to be neutral and objective. No doubt they are all sincere in their pledge. But one cannot ignore the fact that they each have their own, sincerely held, professional proclivities. Reputations are often developed over time for being favorably disposed towards Claimants or Insurers. While not always an exact science, a*ny legal practitioner - or adjuster - who ignores this reality is not practicing with due diligence.*

G. Hence, a bit of game theory comes into play with the DIME selection process – and ultimately with the settlement process itself. It is an open secret that Claimant's Counsel initially proposed a panel consisting of Drs. Rook, Higginbotham, and Hall for a sound reason. Having not been born yesterday, and monitoring her files with diligence, Ms. M[Redacted] timely demurred on that one. The Division *[which the ALJ finds to have acted correctly throughout this entire process]* then submitted a random list of three names, coincidentally, to include Dr. Rook once again. The most rational opening move would have been to timely strike the name of the least Claimant-oriented doctor, await the Respondent's strike, and take the guy in the middle. Or, if two of the three choices are not to your liking, consider abandoning the DIME process altogether – and save the $1400 buy-in. *A rational corollary would have been to inform one's client of who's who in this process.* It is for this reason that the ALJ views, with *great* skepticism, Claimant's assertion that Dr. Rook was "just another doctor", whose default selection by the Division had no effect on his decision to back out of the deal. Either Claimant is fudging his answer, or his attorney was not keeping him informed of critical stages in the DIME process. Pick your poison. An unanswered question is whether Claimant would be singing this same tune today if the Division had randomly selected, for example, Dr. Larson.

Equitable Estoppel in Workers Compensation Cases, Generally

H. Statutes may not stand in the way of equitable relief where the facts and circumstances demand an equitable remedy. *Johnson v. Industrial Commission*, 761 P.2d 1140, 1146 (Colo. 1988)(insurer did not waive the right to offset against future benefits payable to claimant one half amount of SSDI benefits when insurer was not adequately informed of the receipt of double benefits until immediately prior to seeking the offset). *See also Kremer v. Blue Star Investment and Colorado Comp Ins. Authority,* W.C. 3-778-925 (ICAO Feb 12, 1996)(ALJ applied equitable estoppel and found claimant detrimentally relied on insurer conduct, i.e. the adjuster authorizing care, which was later denied); *Martin v. Century Papers and Transportation Ins. Co.,* W.C. No. 3-955-480 (ICAO Aug. 11 1994)(ALJ applied equitable estoppel and found claimant detrimentally relied upon statement at the settlement conference that the third party settlement would have nothing to do with worker's compensation benefits and insurer was barred from taking a subsequent offset).

I. The doctrine of equitable estoppel has four elements which are: (1) the party to be estopped must know the relevant facts; (2) the party to be estopped must also intend that its conduct be acted on or must so act that the party asserting the estoppel has a right to believe the other party's conduct is so intended; (3) the party asserting the estoppel must be ignorant of the true facts; and (4) the party asserting the estoppel must detrimentally rely on the other party's conduct. *Johnson v. Industrial Commission*, 761 P.2d at 1146.

Equitable Estoppel, as Applied

J. Starting with element (3), the ALJ finds that Ms. M[Redacted] had no idea that the Claimant was even being indecisive, much less rejecting the deal, until it was too late. She had every reason to think this was just a settlement that was just taking longer than expected to consummate. Claimant's attorney *reached out to her* to accept the $10,000 offer – and he did so during his 5-day window to exercise his own strike. His failure to timely exercise his own first strike is the best evidence that he was not moving forward with the DIME process. Assuming, as Claimant now argues, that Respondent could just go ahead and exercise her own strike on the during days 6 through 10 [note* this ALJ notes that a *literal* reading of Rule 11-4(A)(5) does not necessarily allow for this], such a [non]-move by Claimant would then give him a 50/50 chance of getting his *last* choice to perform the DIME. Such a move is either negligent, irrational, or a breathtaking gambit. Pick your poison. On three occasions, Ms. M[Redacted] reached out to follow-up, and got …no response. The ALJ concludes that she was ignorant of the true fact that Claimant was, at first, *waffling*, then outright *rejecting* the deal – past the 11th hour.

K. Element (4) is easy; Ms. M[Redacted] relied upon Claimant's actions to her own detriment. She never exercised her strike of Dr. Rook – assuming the Rules even permitted her to do so. Claimant's camp ran out the clock on her, and now assert the defense from the movie Animal House: *"Come on, Flounder. You can't spend your whole life worrying about your mistakes. You [messed] up. You trusted us."* She relied upon the word of Claimant's counsel, with whom she had settled other cases without apparent incident. She exercised diligence in following up on the paperwork on three occasions, and was met with silence – instead of being told that the deal was either off, or at least in question. And, once again, she also detrimentally relied upon Claimant's failure to exercise his own preemptory strike to conclude that the DIME process was being abandoned.

L. Sufficient evidence supports element (1). The relevant facts in this case are that, initially, the $10,000 deal was *not a sure thing*, and later, that the deal was off entirely. The ALJ once again views with *great* skepticism Claimant's assertion that he never accepted the offer (despite his attorney's acceptance on his behalf via email), and was never tendered settlement documents. Then Claimant does a 180, and states he must have accepted the offer after all. Only one answer is correct, and the former implicates a serious miscommunication between attorney and client. But either way, whether this waffling was known to Claimant *and* his attorney, or to Claimant *only,* such waffling is imputed to Claimant as a party. And instead of communicating this uncertainty/rejection to Respondents in good faith, Claimant's camp kept it under wraps as long as possible (too long, in fact -*see* Conclusions P, Q, *infra*).

M. Element (2) has alternative theories of application. The second alternative has more benign implications, so we'll look at that. Claimant (as a party) *"must so act that the party asserting the estoppel has a right to believe the other party's conduct is so intended [that its conduct be acted on]".* Even Claimant acknowledges that his position morphed from *accepting* the $10,000 [with no counter-offer], to *waffling*, to *rejecting* it and pressing forward with the DIME. He now asserts [via Interrogatory] that he ultimately *rejected* the offer on September *28*, 2020. The ALJ, once again, views this answer with *great* skepticism. What actually happened is that Claimant was unexpectedly dealt a Blackjack on September *14*, 2020, when the Division randomly selected Dr. Rook as the DIME examiner. He then waited until the last minute (the 14th day deadline) to *accept* and pay on September 28, to have the DIME go on. Instead of informing Respondents, Claimant's camp stonewalled Ms. M[Redacted], and ran out the clock on her. She still had every right to believe, up until October 1, that there were just delays in getting the papers signed. Reasonably enough, she made no effort to stop the DIME process until that point, based upon Claimant's cumulative actions – and inactions.

N. The ALJ finds and concludes that Respondents have established the elements of Equitable Estoppel in this case. As a result of Claimant's conduct, the DIME process has been compromised. The only appropriate remedy is to put the parties back, *as much as practicable*, to the position they were in before Claimant's inequitable conduct. *Back to a new DIME panel*. Respondents have offered to pay the second $1400 fee to start over, since the first $1400 to Dr. Rook is a sunk cost. And Respondents have deeper pockets, so that's an acceptable compromise. While that somewhat alters the risk/benefit dynamics of the process, such is the best that can be accomplished. **The PALJ's Orders, dated October 21, 2020 and November 6, 2020 are hereby vacated.**

The DIME Process had been further Compromised, in any Event

O. No medical records were sent by either party to Dr. Rook. The reason Respondents did not do so is a matter of record. They still didn't think the DIME process was moving forward. Claimant has no such excuse. According to Dr. Rook's report, he tried to contact Claimant for records, and got….no answer. While Dr. Rook likely should have declined the exam until he got the records, he chose to go forward, but noted his protest in the process. And with good reason. He was left with a physical exam, and a patient-supplied history. That's it. He even had to guess at the issues involved. No checks and balances, in the form of the written medical records, which might have yielded issues of apportionment, for example. The process by which this all occurred was simply not clean.

P. While not explicitly raised by Respondents as their own Penalty Issue, the ALJ has also reviewed Rule 11-4(A)(8), which reads, in its entirety:

> The requesting party shall schedule the DIME with the physician *within fourteen (14) days of receiving the DIME physician confirmation. The* requesting party shall immediately notify the DIME Unit and the opposing party **in writing of the date and time of the examination.** Absent good cause as determined by the Director or an ALJ, failure to make the appointment **and advise all parties** within fourteen (14) days may result in a Director's order to show cause why the DIME process should not be terminated. (emphasis added).

Q. Claimant apparently paid his DIME fee on September 28 (the 14th day), but waited *three more days*, until October 1, 2020 *to inform Respondents* (Ex. J-21). It is duly noted that this was not a last-minute, Friday 'til Monday oversight. September 28, 2020 was a Monday. October 1, 2020 was a Thursday. Three more days of delay, right in the middle of the workweek, before informing Respondents that the DIME was moving forward. And on September 29, 2020, Ms. M[Redacted] was *still* inquiring, in good faith, (and still being ignored) where the settlement documents were. Claimant violated Rule 11-4(A)(8), thus further compromising the entire DIME process.

Overcoming the DIME on the Merits

R. This issue is moot. Because the DIME selection process was fatally flawed, the ALJ will not explore any alleged deficiencies in the DIME itself, unless so Ordered.

Penalties / Attorney Fees as Initially Alleged by Claimant

S. In his opening statement, Claimant's counsel was tepid, as best, in even pursuing any penalty issue. No evidence at hearing was adduced at all on this issue. Claimant did not even mention or argue penalties in his position statement. And, upon review what documents and pleadings that were entered as exhibits, the ALJ finds nothing to support a penalty for failure *by Respondents* to exercise a DIME panel strike. Respondents have shown far greater cause for not doing so than has Claimant. Lastly, nothing in the record suggests Respondents pled an unripe issue during the prehearing process. No penalties or attorney fees will be assessed against Respondents.

ORDER

It is therefore Ordered that:

1. The PALJ Orders dated 10/21/2020 and 11/6/2020 are vacated.

2. A new DIME panel shall be empaneled forthwith, and if pursued by Claimant, the cost of the exam shall be borne by Respondents.

3. Claimant's claim for Penalties is denied and dismissed.

4. Claimant's claim for Attorneys Fees is denied and dismissed.

5. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. All matters not determined herein are reserved for future determination.

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

DATED: May 19, 2021

/s/ William G. Edie

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
W.C. No. 5-159-765-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

[Redacted],

Claimant,

v.

[Redacted],

Employer,

and

SELF-INSURED,

Self-Insured Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on April 28, 2021, in Denver, Colorado. The hearing was recorded by Google Meets (reference: 4/28//21, beginning at 8:30 AM, and ending at 12:15 PM) .

The Claimant was present in person, virtually, and represented by [Redacted], Esq. [Redacted], Esq. represented the self-insured Respondent.

Hereinafter [Redacted] shall be referred to as the "Claimant." The [Redacted], shall be referred to as the "Employer." All other parties shall be referred to by name.

Claimant's Exhibits 1 through 19 were admitted into evidence, without objection. Respondents' Exhibits A through M were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which was filed, electronically, on May 10, 2021. On May 12, 2021, Respondent indicated that it had no objections as to form. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern the causal relatedness and reasonable necessity of psychotherapy sessions from August 2,2020 for the Claimant's compensable injury on her left wrist and arm. The Claimant relies on the opinion of the authorizing treating physician (ATP) Kathryn Buikema, M.D., that the sessions are reasonably necessary to treat her work-related injury. Underlying the Claimant's theory is the proposition that the admitted, compensable injury aggravated and accelerated all of the Claimant's stressors, thus, warranting psychotherapy to cure and relieve the Claimant from the effects of the admitted injury. Respondent rely on the opinion of the Independent Medical Examiner (IME) Robert Kleinman, M.D. that the Claimant's need for the psychotherapy sessions are not related because her chronic pain is not the main stressor due to her work-related injury.

The Claimant bears the burden of proof, by a preponderance of the evidence, on all issues.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Procedural Posture/Findings

1. On January 28, 2021, the Claimant filed an Expedited Application for Hearing, endorsing the issue of medical benefits, specifically, whether the psychotherapy sessions are reasonably necessary and causally related to the Claimant's admitted August 2, 2020 injury to her left wrist.(Claimant's Exhibit 2, pp. 7-14).

2. On February 3, 2021, the Respondents filed a Response to the Application for Hearing, endorsing causation, relatedness, "CRS 8-42-101(1)(a); CRS 8-42-104; intervening injury/event, and offsets.

3. On January 14, 2021, the Respondent filed a General Admission of Liability (GAL) admitting for medical benefits, an average weekly wag (AWW) of $1,314.07 and temporary total disability (TTD) benefits OF $876.05 per week from January 5,2021 and "ongoing.". (Claimant's Exhibit 1, pp. 1-6).

Preliminary Findings

4. Claimant is a 27-year-old female police officer for the Employer.

5. On August 2, 2020, the Claimant was called to help other officers with arresting a violent suspect who was resisting arrest. The Claimant was attempting to place handcuffs on the suspect when the chain of the handcuffs twisted around her left wrist area, injuring her left wrist which was the subject of the GAL. After taking the violent suspect to the police station, placing the suspect ibn a cell and attempting to remove the handcuffs, the Claimant asserts that the suspect attempted to assault her, and in defending herself, the Claimant allegedly used unacceptable force with the suspect. The ALJ takes administrative notice of the fact that the Claimant is not a large woman.

6. As a result, of the incident in the jail cell, the Employer initiated an internal investigation of the Claimant's interaction with the suspect.

7. The Claimant is left-handed and has no prior history of left-hand pain or injury prior to the August 2, 2020 incident. As a result of the the left hand injury, the Claimant developed chronic pain, and a long-term placement in light duty desk duty for nine months and continuing, to which the Claimant credibly testified that she was depressed because being a patrol cop was her dream job. These results were directly and causally related to the Claimant's interactions with the drunk and violent suspect of August 2, 2020. The ALJ hereby finds that the consequences of the August 2, 2020 incident aggravated and accelerated all of the Claimant's stressors beyond normal life stressors, thus, warranting psychotherapy to help the Claimant recover from the effects of her admitted injury.

Medical

8. The Claimant was receiving medical treatment for the injury and underwent surgery on January 6, 2021. The surgery was to repair the Claimant's ulnar nerve which had been severely torn as a result of the handcuff chain when the Claimant was attempting to arrest the violent suspect.

9. The Claimant's ATP, Kathryn Elizabeth Buikema, D.O., recommended psychotherapy sessions as part of the medical treatment to relieve the effects of the work injury. In her November 16, 2020 report, Dr. Buikema noted from a functional standpoint, lack of psychological support will most likely lengthen the time it takes for her to achieve MMI (maximum medical improvement) and regain full function. (Claimant's Exhibit 2, p. 12).

10. A Prior Authorization Request for the psychotherapy sessions was made to the claims adjuster, Jackie Bonavida, and it was denied. The adjuster (who is not a medical professional) made her own medical diagnosis and claimed the sessions were not related to the physical injury (Claimant's Exhibit 14, p. 161).

11. Respondents also denied the sessions claiming since compensability (at the time) had not been established, they were denied for non-medical reasons (Claimant's Exhibit 7, pp. 24-25). Compensability has now been admitted.

Independent Medical Examination (IME) by Robert Kleinman, M.D.

12. Respondent sent the Claimant to undergo an IME with Dr. Kleinman, a psychiatrist. Dr. Kleinman stated the opinion that the main stressors in the Claimant's life were caused by the possibility of losing her job with the Employer due to an internal affairs investigation and criminal matter surrounding the arrest on the date of injury. Although Dr. Kleinman considered the Claimant's chronic pain a stressor, he minimized it as a stressor despite the fact that the Claimant told him that she was not that worried about the internal affairs investigation and the stressors in her private life were within normal bounds. Dr. Kleinman minimized the non-work related stressors and he made a judgment call to weigh the non-work related stressors against the work-related factor of chronic pain,. The ALJ finds that Dr. Kleinman, essentially and arbitrarily, slanted the non-work-related stressors against work-relatedness. Overall, the ALJ does not find Dr. Kleinman to be credible or persuasive. In fact, the ALJ finds the Claimant's ATP, Dr. Buikema more credible than Dr. Kleinman.

13. The Claimant was diagnosed with Adjustment Disorder with Mixed Anxiety and Depression by Rebekah Vint, M.A. The ATPs and Dr. Kleinman also agreed with this diagnosis, however, as found, he weighed this factor against work-relatedness.

14. Dr. Buikema, the ATP, testified at hearing on behalf of Claimant. It was her testimony that the psychotherapy sessions were reasonably necessary and causally related to the work incident. Regarding the internal affairs investigation, the Claimant testified that she was defending herself when arresting the suspect and subsequently fingerprinting the suspect when she he attacked. her. The ALJ finds her testimony credible, persuasive and a compelling reason why the Claimant was not worried about the internal affairs investigation, which likely would conclude, according to the Claimant, that her actions in defending herself were justified. The ALJ finds that Dr. Buikema's opinions concerning the Claimant's need for psychotherapy because of her admitted, work-related injury are amply supported by the Claimant's credible testimony. Dr. Kleinman's opinions are not supported by the Claimant's reported mental condition after her injury because Dr. Kleinman parlayed everyday stressors, in his opinion, to the major cause of the Claimant's need for psychotherapy. The ALJ does not find this persuasive.

15. The Claimant testified at hearing regarding her work injury, treatment received, her chronic pain due to the injury, and that the psychotherapy sessions were helpful to her recovery and she wanted to continue with them. The ALJ finds her testimony in this regard highly credible.

16. The Claimant has proven, by preponderant evidence that the medical care for her left arm and wrist and the recommended psychotherapy sessions, recommended by the ATPs, is causally related to the compensable injury and reasonable necessary to cure and relieve the effects thereof.

Ultimate Findings

17. The ALJ finds the opinions of Dr. Buikema on reasonable necessity and causal relatedness of the need for psychotherapy highly persuasive and credible. Indeed, the ALJ finds that Dr. Buikema's opinion concerning the Claimant's need for psychotherapy supports the fact that the consequences of the August 2, 2020 incident with the drunken, violent suspect aggravated and accelerated all of the Claimant's stressors, thus, warranting the need for psychotherapy to cure and relieve the effects of her admitted, compensable injury. The ALJ further finds the opinions of Dr. Kleinman to be lacking in credibility on the reasonable necessity and causal relatedness of the August 2, 2020 incident. This ALJ determines and finds Dr. Kleinman is not credible and the ATPs are credible since they "have no skin in the game" The ALJ further finds that Dr. Kleinman improperly minimized the consequences of the Claimant's admitted injury by trying to attribute the Claimant's present stressors to stressors of everyday life. Such an attribution flies in the face of the totality of the evidence.

18. Between conflicting medical and lay opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the opinions of ATPs Dr. Buikema on the reasonable necessity and causal relatedness of the psychotherapy sessions to the work injury, and to reject opinions to the contrary. Both Dr. Buikema and Dr. Peter established the work-relatedness of the left shoulder injury of August 2, 2020, from which the Claimant suffered continued pain and that the psychotherapy sessions are related to the work-injury.

19. The Claimant has proven, by preponderant evidence that the medical care for her left arm and wrist and the recommended psychotherapy sessions, recommended by the ATPs, is causally related to the admitted, compensable injury of August 2, 2020, and that it is reasonably necessary to cure and relieve the effects thereof.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinions of Dr. Buikema on reasonable necessity and causal relatedness of the need for psychotherapy were highly persuasive and credible. Indeed, as found, Dr. Buikema's opinion concerning the Claimant's need for psychotherapy supports the fact that the consequences of the August 2, 2020 incident with the drunken, violent suspect aggravated and accelerated all of the Claimant's stressors, thus, warranting the need for psychotherapy to cure and relieve the effects of her admitted, compensable injury. As further found, the opinions of Dr. Kleinman were lacking in credibility on the reasonable necessity and causal relatedness of the August 2, 2020 incident. Dr. Kleinman was not credible and the ATPs were credible. Dr. Kleinman improperly minimized the consequences of the Claimant's admitted injury by trying to attribute her present stressors to stressors of everyday life. Such an attribution flies in the face of the totality of the evidence.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting medical opinions, the ALJ made a rational choice, based on substantial evidence, to accept the opinions of ATP Dr. Buikema and to reject the opinions of Dr. Kleinman.

Aggravation and Acceleration of All Stressors

c. If an industrial injury aggravates or accelerates a preexisting condition, the resulting disability and need for treatment is a compensable consequence of the industrial injury. Thus, a claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury **if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought.** § 8-41-301(1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). An injury resulting from the concurrence of a preexisting condition and a hazard of employment is compensable. *H & H Warehouse v. Vicory*, *supra*. *Duncan v. Indus. Claims App. Office*, 107 P.3d 999 (Colo. App. 2004). Even where the direct cause of an accident is the employee's preexisting disease or condition, the resulting disability is compensable where the conditions or circumstances of employment have contributed to the injuries sustained by the employee. *Ramsdell v. Horn*, 781 P.2d 150 (Colo.App. 1989). *Also see* § 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225-334 (ICAO, April 7, 1998). As found, the Claimant's pre-existing stressors of daily life were aggravated and accelerated by the admitted industrial injury—to the point that Claimant needed psychotherapy.to recover from the effects of the admitted injury.

Burden of Proof

d. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits, beyond those admitted.. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985);

Faulkner v. Indus. Claim Appeals Office, 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained her burden with respect to the psychotherapy recommended by her ATP, Dr. Buikema.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondent shall pay all of the the costs of the psychotherapy, recommended by Kathryn Buikema, D.O., the Claimant's authorized treating physician, at the hands of the psychotherapist whom the Claimant had been seeing, subject to any limitations imposed by statute.

B. The General Admission of Liability, dated January 14, 2021, shall remain in full force and effect.

C. Any and all issues not determined herein are reserved for future decision.

DATED this 20th day of May 2021.

DIGITAL SIGNATURE

EDWIN L. FELTER, JR.
Administrative Law Judge

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that she suffered compensable injuries during the course and scope of her employment with Employer on July 4, 2019.

2. Whether Claimant has established by a preponderance of the evidence that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her July 4, 2019 industrial injuries.

FINDINGS OF FACT

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

2. On May 29, 2019 Claimant executed an employment contract with Employer. In pertinent part, the contract provided that Claimant's employment would begin on July 1, 2019 at 10:00 a.m. Claimant was required to report to Employer's rehearsal studio located at 403 AABC, Aspen, CO 81611. Because Claimant was required to travel over 100 miles to commence her employment, Employer provided roundtrip airfare and housing accommodations.

3. Claimant's employment duties required her to attend rehearsals and performances at Employer's studio and theater. Claimant remarked that the studio was approximately 4.7 miles from her residence. She was not required by her employment contract to work anywhere aside from the theater or rehearsal studio.

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

5. On July 4, 2019 Claimant was riding her bicycle from her residence to rehearsal when the front wheel abruptly stopped and she fell. Claimant's right hand took the brunt of the fall and she suffered a non-displaced fracture of the scaphoid bone in her right wrist. Claimant also testified that she sustained contusions, cuts and abrasions on her legs, knees, feet, right arm and shoulder, both hands and right cheek as a result of the fall.

6. Two individuals cycling behind Claimant witnessed the accident and stopped to assist her. Claimant’s colleague and local roommate Alice Sherman came along on her bike several minutes later. Claimant was sitting and recovering on the side of the bike path. Ms. Sherman immediately sent a text message to Employer’s Stage Manager to inform him of the accident. Employer then provided Claimant with transportation to the Aspen Valley Hospital Emergency Room. Medical providers examined and treated Claimant’s injuries.

7. Claimant has demonstrated it is more probably true than not that she suffered compensable injuries during the course and scope of her employment with Employer on July 4, 2019. Initially, Claimant is a New York-based actor who auditioned and received a part in Employer’s Aspen, Colorado play. She accepted the role and relocated to Colorado for the period July 1 through August 3, 2019. Employer provided Claimant with roundtrip airfare and housing accommodations for the duration of the production. The preceding facts reflect that Claimant was a traveling employee under continuous coverage during her employment. Because Claimant’s employment required travel away from home, she was within the course of employment throughout the production unless she made a distinct departure or personal deviation from her work activities.

8. The record reveals that Claimant was not engaged in a deviation from her employment duties while riding her bicycle to the rehearsal studio on July 4, 2019. Claimant’s employment duties required her to attend rehearsals and performances at Employer’s studio and theater. The studio was approximately 4.7 miles from her residence. She was not required by her employment contract to work anywhere aside from the theater or rehearsal studio. Because Claimant was riding a bicycle to rehearsal, she was within the scope of the employment relationship. There was no evidence that Claimant’s injuries as a result of the bicycle accident occurred during a personal deviation. Because Claimant’s bicycle accident on July 4, 2019 occurred during her continuous coverage under the travel status doctrine, her injuries are compensable.

9. Claimant has established it is more probably true than not that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her July 4, 2019 industrial injuries. When Claimant fell off her bicycle on July 4, 2019 her right hand took the brunt of the fall. She suffered a non-displaced fracture of the scaphoid bone in her right wrist. Claimant credibly explained that she also sustained contusions, cuts and abrasions on her legs, knees, feet, right arm and shoulder, both hands and right cheek as a result of the accident. Claimant subsequently received care and treatment at the Aspen Valley Hospital Emergency Room for her injuries. All of the preceding medical treatment was reasonable, necessary and related to Claimant’s July 4, 2019 industrial injuries. Employer is thus financially responsible for the payment of Claimant’s reasonable and necessary medical expenses for all medical treatment related to her July 4, 2019 work injuries.

CONCLUSIONS OF LAW

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

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

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

4. To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with her employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of her employment and during an activity that had some connection with her work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991).

5. Generally, injuries sustained by employees while they are traveling to or from work are not compensable because travel is not considered the performance of services arising out of and in the course of employment. *Madden v. Mountain West Fabricators*, 977 P.2d 861, 863 (Colo. 1999). However, the travel status doctrine also applies in a broader context to employees who travel away from home in order to work in a temporary position or on a temporary project. *See Tatum--Reese Development Corp. v. Industrial Commission,* 30 Colo. App. 149, 490 P.2d 94 (Colo. App. 1971) (the “coming and going rule” denying compensation to an employee injured while on his way to or from work did not apply because the employee was in “travel status” required by the employer); *Burch v. Flint Energy Services, Inc.,* W.C. No. 4-643-153 (ICAO, Sept. 14, 2006).

6. An employee whose work requires travel away from home is within the course of employment continuously during the trip except when the employee makes a distinct departure on a personal errand. *See SkyWest Airlines, Inc. v. Industrial Claim*

Appeals Office, 2020COA131 ¶14 (Aug. 27, 2020) (quoting *Madden* for the proposition that "under the 'travel status' doctrine, 'if the employee's job duties require travel[,] . . . that travel is considered to be a part of the job, and any injury occurring during such travel will be compensable.'"); *Phillips Contracting, Inc. v. Hirst*, 905 P.2d 9 (Colo. App. 1995) (where the claimant was hired in Texas, transported by the employer to Colorado to work on a project and housed in temporary quarters, his injuries during a motor vehicle accident while returning to his temporary residence were compensable because he was a traveling employee under continuous coverage); *see also Continental Airlines v. Industrial Commission*, 709 P.2d 953 (Colo. App. 1994).

7. As found, Claimant has demonstrated by a preponderance of the evidence that she suffered compensable injuries during the course and scope of her employment with Employer on July 4, 2019. Initially, Claimant is a New York-based actor who auditioned and received a part in Employer's Aspen, Colorado play. She accepted the role and relocated to Colorado for the period July 1 through August 3, 2019. Employer provided Claimant with roundtrip airfare and housing accommodations for the duration of the production. The preceding facts reflect that Claimant was a traveling employee under continuous coverage during her employment. Because Claimant's employment required travel away from home, she was within the course of employment throughout the production unless she made a distinct departure or personal deviation from her work activities.

8. As found, the record reveals that Claimant was not engaged in a deviation from her employment duties while riding her bicycle to the rehearsal studio on July 4, 2019. Claimant's employment duties required her to attend rehearsals and performances at Employer's studio and theater. The studio was approximately 4.7 miles from her residence. She was not required by her employment contract to work anywhere aside from the theater or rehearsal studio. Because Claimant was riding a bicycle to rehearsal, she was within the scope of the employment relationship. There was no evidence that Claimant's injuries as a result of the bicycle accident occurred during a personal deviation. Because Claimant's bicycle accident on July 4, 2019 occurred during her continuous coverage under the travel status doctrine, her injuries are compensable.

Medical Benefits

9. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The question of whether a particular disability is the result of the natural progression of a preexisting condition or the subsequent aggravation or acceleration of that condition is a question of fact. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Finally, the determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual

determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

10. As found, Claimant has established by a preponderance of the evidence that she is entitled to receive authorized medical treatment that is reasonable and necessary to cure or relieve the effects of her July 4, 2019 industrial injuries. When Claimant fell off her bicycle on July 4, 2019 her right hand took the brunt of the fall. She suffered a non-displaced fracture of the scaphoid bone in her right wrist. Claimant credibly explained that she also sustained contusions, cuts and abrasions on her legs, knees, feet, right arm and shoulder, both hands and right cheek as a result of the accident. Claimant subsequently received care and treatment at the Aspen Valley Hospital Emergency Room for her injuries. All of the preceding medical treatment was reasonable, necessary and related to Claimant's July 4, 2019 industrial injuries. Employer is thus financially responsible for the payment of Claimant's reasonable and necessary medical expenses for all medical treatment related to her July 4, 2019 work injuries.

ORDER

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

1. Claimant suffered compensable injuries while working for Employer on July 4, 2019.

2. Employer is financially responsible for the payment of Claimant's reasonable and necessary medical expenses for all medical treatment related to her July 4, 2019 work injuries.

3. Any issues not resolved in this order are reserved for future determination.

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

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

DATED: May 20, 2021.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-093-609-002

ISSUES

I. Whether Claimant suffered a compensable injury or illness due to exposure to mold at work.

II. Whether Claimant is entitled to a general award of medical benefits for all treatment provided for her injury or illness.

III. Whether Claimant is entitled to temporary total disability (TTD) benefits beginning June 2017.

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

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. Claimant is employed with Respondents and began working for Respondents in 2016. (Hearing Testimony).
2. In early 2017, Claimant and her fellow employees were told they would be moving to a new building known as [Redacted]. (Hearing Testimony).
3. When Claimant visited [Redacted] before beginning work at that location, she was unhappy with the appearance and cleanliness of the building. (Hearing Testimony). The building did have some water damage on some walls and portions of the ceiling. (*See* Claimant's Exhibit 1). The Claimant also observed a substance that appears to be bacteria, but this substance was never tested. (*See* Claimant's Exhibit 1, Hearing Transcript).
4. Claimant began working at [Redacted] in June 2017. (Hearing Testimony).

Claimant's Alleged Illness and Diagnosis

5. Claimant contends that she began getting sick "almost instantly" after moving into the [Redacted] building. (Hearing Transcript p. 60, line 13).
6. Although Claimant alleges other employees in her building also complained of headaches or stomach aches, Claimant only presented one witness in support of this claim. This witness was a coworker of Claimant's who also worked in the [Redacted] building. This coworker, however, admitted that she had regular headaches before moving to the building. Plus, after she moved to the building, she did not find the increase in frequency or severity of her headaches significant enough to seek medical treatment for headaches. (Hearing Transcript p. 25, lines 12-17).
7. Respondents called Ms. Cari Z[Redacted] as a witness. She also worked at [Redacted]. She was unaware of any other employees with health complaints relating to the building. (Hearing Transcript p. 126).

8. Respondents did not receive any official complaints or claims of illness from any other employees working in the [Redacted] building. (Hearing Transcript).

9. Claimant's first alleged symptom that she noticed was a rash on her arm. (Hearing Transcript p. 61, line 7).

10. Claimant claimed this rash resulted from working in the building but did not provide any credible and persuasive medical evidence that the rash was related to mold exposure.

11. Claimant eventually developed other symptoms such as migraines, numbness and tingling, chronic pain in her limbs and stomach, constipation, and blood in her stools. Claimant attributes these symptoms to mold exposure. (Hearing Testimony).

12. The first time Claimant sought medical treatment for any symptoms allegedly related to mold exposure was October 10, 2018 at Parker Adventist Hospital Emergency Department, where she was treated for a migraine headache. (Claimant Exhibit 3). There, she told her treating providers that she had a history of migraines, but they had grown more frequent and more severe over the past six months. (*Id.*).

13. During this emergency visit, the cause of her migraine was not diagnosed. (See Claimant Exhibit 3, Hearing Transcript p. 65).

14. Claimant sought a specialist to diagnose the cause of her migraines, which led her to Neurology of the Rockies and Dr. Claude Fountin. (Hearing Transcript p. 66).

15. Dr. Fountin noted that Claimant may have "environmental exposure at her place of work," but it is not clear from these records if that supposition came from his evaluation and assessment or from Claimant's recounting of her suspicions. (Claimant's Exhibit 4). The records from Neurology of the Rockies do not suggest that any testing was done to support a notion that Claimant's headaches resulted from mold, or that her place of work was the cause of the headaches. (*Id*.).

16. Dr. Fountin recommended relocation based on "concerns regarding environmental toxins at her place of work," but did not officially restrict Claimant from returning to [Redacted] (*Id*.).

17. Based on her health concerns, Claimant began to work in a different building in March 2019. (Hearing transcript p. 75, lines 7-12).

18. Dr. Fountin ultimately could not diagnose Claimant. As a result, Claimant went to see Dr. Nancy Brown, who Claimant understood to be a mold specialist. (See Hearing Transcript p. 68).

19. Before seeing Dr. Brown, Claimant went to an allergy specialist for further testing. (Hearing Transcript p. 69, lines 10-11).

20. Claimant had an allergy skin test done to see if she was allergic to mold. (Hearing Transcript p. 69). Claimant tested negative for a mold allergy. (*Id.*) The specialist then allegedly told Claimant "there is no way to really determine" a mold allergy without a urine sample. (*Id*.) Claimant did not then do the urine test to test for mold. (Hearing Transcript p. 92 line 25). Claimant did not produce any medical records to support any interactions with this allergy specialist.

21. On January 25, 2019, Claimant was evaluated by Dr. Nancy Brown. At this first appointment, Dr. Brown indicated that Claimant's symptoms were consistent with mold toxicity. (Respondents Exhibit I at 070).

22. Claimant submitted to a urine test to test for mycotoxins on January 30, 2019. The results of this test revealed Claimant's level of Ochratoxin A was positive as was her level of Mycophenolic Acid. These reports, however, do not indicate whether the levels were considered high or minimal. Then, the test results contain an explanation of the cause of the Mycophenolic A. The documentation says that Ochratoxin A is a chemical produced by molds and that exposure is done mainly through water damaged buildings. That said, it also indicates that minimal exposure can occur through contaminated foods such as cereals, grape juices, dairy, spices, wine, dried fruit, and coffee. The documentation also indicates the other mycotoxin can be produced by the Penicillium fungus. But it says nothing about what causes the fungus. Moreover, the reliability of the definitions – and the cause of elevated levels – was not corroborated and supported by credible and persuasive evidence. (Respondents Exhibit I at Adventist.074-076; *see also* Hearing Transcript p. 37, lines 17-18).

23. Dr. Brown stated on March 1, 2019 that Claimant should not be "present at any time" in the [Redacted] building. (Claimant's Exhibit 6).

24. Claimant continued to see Dr. Brown throughout 2019 and 2020. Dr. Brown's notes indicate Claimant would sometimes report improvement, and sometimes report worsening of symptoms. (Respondents Exhibit I).

25. Dr. Brown's own assessment indicates that Claimant's diagnosis of mold toxicity "is confirmed by the fact that since removing herself from the building in question, and being treated appropriately for mold toxicity, her symptoms are improving." (Claimant's Exhibit 6). This statement was made in March 2019. On the other hand, Dr. Brown's notes from February 14, 2020 indicate that Claimant's symptoms are worse, and that she "only feels bad when she is at work." (Respondents Exhibit I, at Adventist.062). It should be noted that Claimant had not worked in the [Redacted] Building for over one year at that time. Moreover, Dr. Brown does not seek to reconcile these two conclusions – which are inconsistent - in any of her records. As a result, her opinion is not found to be reliable or persuasive.

26. Claimant claims to be continuing to see Dr. Brown regularly, as recently as one-month before the hearing. (Hearing Transcript p. 98, lines 17-20). That said, Claimant submitted just three pages of notes from Dr. Brown in support of her claim of mold toxicity.

27. Claimant has a history of taking phentermine, a weight loss drug, including during the time she worked at [Redacted]. (Hearing Transcript p. 83). Claimant stated that Dr. Brown instructed her to stop taking phentermine. (Hearing Transcript p. 96, lines 17-18).

28. Claimant provided a medical record that showed Dr. Florina Mata believed that phentermine was contributing to Claimant's symptoms. (Claimant's Exhibit 3, p. 9). This record was dated August 17, 2020. (*Id*.).

29. Claimant was evaluated by Dr. Michael Volz on September 4, 2020. (Respondents' Exhibit H). Dr. Volz is board certified in internal medicine and allergy and immunology. He is also Level II accredited. (Hearing Transcript p. 31).

30. Dr. Volz reviewed Claimant's symptoms, many of which were self-reported, as well as Claimant's medical records from 2017 to 2019. (*Id*.)

31. Dr. Volz noted that based on Claimant's urine screen, she had no elevated levels of mold, and only two types of mold were even present. (Hearing Transcript p. 37, lines 17-18).

32. Dr. Volz questioned whether the mycotoxins present in Claimant's urine came from mold exposure, since he would expect to see more types of mycotoxins if mold were the source. (Hearing Transcript p. 38, lines 1-8).

33. In his report, Dr. Volz noted that many of Claimant's symptoms can be attributed to phentermine use (Respondents Exhibit H at Adventist. 057-058), and the timing of her symptoms corresponded to the times Claimant was taking phentermine. (*Id*. at Adventist. 059). Because of this, Dr. Volz stated that the use of phentermine "cannot be dismissed as not being involved or having a limited effect." (*Id*).

34. Dr. Volz rejected Dr. Brown's conclusion that Claimant's chronic inflammation resulted from the toxic effects of mold: "this assertion is not supported by any objective test since there were just 2 mycotoxins measurable in her urine." (*Id.* at Adventist.058).

35. Dr. Volz stated that he was not presented with any studies to suggest that the mycotoxins present in Claimant's systems had affected her immune system, and that all of her immune system tests results have been normal. As a result, Claimant's alleged viral infection is not attributable to the workplace of [Redacted]. (*Id*. at Adventist.059).

36. Dr. Volz stated that when a patient is experiencing mold toxicity, their symptoms should resolve within a few weeks to a few months at the most. (Hearing Transcript p. 34, lines 12-13).

37. Dr. Volz stated that upon reviewing the mold assessment done at [Redacted], there was "NO objective information to support" the conclusion working in [Redacted] was the cause of Claimant's symptoms. (Respondents' Exhibit H at Adventist.059).

38. He also concluded that Claimant's use of Phentermine must be considered a factor to at least some of Claimant's symptoms – including her migraines. (*Id*. at 60).

39. In his report, Dr. Volz ultimately concluded that "there is a high degree of medical probability that molds alleged to have been [at] the former [Redacted] has not been established and is not responsible for the claimant's health." (*Id*. at 60).

40. When asked why he would be in a better position than Dr. Brown to determine whether Claimant's symptoms resulted from mold, he reiterated that there was "no objective information to support findings that there was mold in that environment." (Hearing Transcript p. 48, lines 21-23).

41. Claimant asked Dr. Volz if there had been a report from OSHA recommending a mold pull, it could possibly change Dr. Volz's evaluation. (Hearing Transcript p. 50). Dr. Volz indicated that it could possibly change. (*Id*.). That said, OSHA made no such

recommendation (discussed *infra*), so this statement is not relevant to Dr. Volz' ultimate conclusions.

Mold Testing of [Redacted]

42. Respondents hired Higgins & Associates to perform a mold assessment. (Hearing Transcript). This testing was conducted on January 11, 2019. (Respondents Exhibit G, at Adventist.037).

43. The testing from Higgins & Associates did not reveal a significant amplification of elevated levels of airborne mold compared to outside levels based on the time of year the tests were performed — the winter. (*Id*. at Adventist.038). In the end, the testing revealed the mold levels in the building were considered low and normal. (*Id.* Adventist.038).

44. The Occupational Safety and Health Administration (OSHA) does not have a permissible mold standard. But OSHA does recommend further investigation if there is 1,000 viable colony forming units per cubic meter. (Hearing Transcript p. 106, lines 5-12; Claimant's Exhibit 10 p. 3).

45. The levels measured inside [Redacted] ranged from 40 to 227 spores per cubic meter. (Respondents Exhibit G at Adventist.038), far below the OSHA recommendation.

46. Claimant stated during the hearing that she was unaware of any mold testing done as of March 2019. (Hearing Transcript p. 86, line 14-15). However, Respondents offered evidence that indoor mold testing was done, showing that Claimant was simply not privy to that information at the time.

47. After the testing done by Higgins & Associates, OSHA conducted an inspection of [Redacted]. (Claimant's Exhibit 10). This inspection found no violations of OSHA standards. (*Id.*).

48. Higgins & Associates did not do any surface testing as part of their January 19, 2021. (Hearing Transcript p. 107, line 19). Mr. G[Redacted] testified that outside of sterile environments, surface testing would be unusual unless mold is visible. (Hearing transcript pp. 107-108). Here, there was no mold growth observed during the evaluation. (Hearing Transcript p. 108, line 21).

49. Mr. G[Redacted] testified that he observed that there was water damage that was old but was told the damage was not recent (Hearing Transcript pp. 116-117). He observed these spots with infrared cameras, which revealed these spots were dry at the time of the evaluation. (Hearing Transcript p. 120, lines 1-6).

50. When asked why an ERMI or other air quality tests were not performed, Mr. G[Redacted] testified that they were asked to test for mold, specifically because there was an employee complaint related to "specific allergies to mold." (Hearing Transcript p. 112).

51. At hearing, Mr. G[Redacted] testified that he relied on a representative of Respondent Employer for information on where employees worked and how many employees had complained of symptoms. (Hearing Transcript pp. 113-114).

52. During the hearing, Claimant said to Mr. G[Redacted] that a subsequent OSHA report recommended "that a microorganism or a mold pull be done." (Hearing Transcript p. 118-119). However, the OSHA report referenced did not require such. (See Claimant's Exhibit 10, discussed further *infra*).

53. In March 2019, OSHA did an inspection of the [Redacted] building. (Claimant's Exhibit 10).

54. This OSHA inspection did not find any violations of standards. They did, however, offer suggestions to Respondents to reduce exposure. (*Id*.)

55. During the inspection, OSHA did not do any surface mold testing. The report also stated that the compliance officer did not observe any areas of mold growth. (*Id*.).

56. The OSHA investigation also revealed that their review of [Redacted]'s injury and illness logs "did not reveal a pattern of mold related illnesses." (*Id*.).

57. The report from OSHA acknowledged that [Redacted]'s prior report on mold spore assessment "did not reveal a pattern of mold spores in the building in excess of the amount found outdoors." (*Id*.).

58. The suggestions from the report included evaluating and optimizing ventilation, preventive maintenance for HVAC and heating symptoms, and further cleaning and disinfection. (*Id.*).

59. Claimant suggested that the report from OSHA requested Respondents conduct a mold report (Hearing Transcript p. 49, lines 23-25), however, no such request was made in the OSHA report. (Claimant's Exhibit 10). OSHA did recommend an indoor air quality inspection but acknowledged the results of Respondents' prior mold spore assessment. (*Id*. at page 3).

60. Claimant suggested that the report from OSHA recommended doing a "mold pull" in the building (Hearing Transcript p. 50, lines 3-5), but in fact there was no such recommendation in the report. (Claimant's Exhibit 10).

61. Claimant's home has not been tested for mold. (Respondents' Exhibit I at Adventist.065).

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

1. The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights

of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

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

3. In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

I. Whether Claimant suffered a compensable injury or illness due to exposure to mold at work.

4. A claimant proves compensability by showing, by a preponderance of the evidence, that the injury arose out of and in the course of the claimant's employment. *Loofbourrow v. Indus. Claims Appeals Office*, 321 P.3d 548, 552, 2011 Colo. App. LEXIS 1632, *5, 2011.

5. Pursuant to § 8-40-201(14), C.R.S., a claimant sustains an occupational disease when the disease "results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment."

6. Claimant has not shown that it is probable that she has suffered from mold toxicity. Although Claimant submitted a few pages of records from Dr. Nancy Brown that allegedly supported Claimant's claim of mold toxicity, Respondents submitted more of Dr. Brown's notes which contained internal contradictions. Thus, the ALJ does not find Dr. Brown's opinions to be credible or persuasive.

7. This court finds Dr. Michael Volz to be a more credible and persuasive medical expert. Dr. Volz is Board Certified in internal medicine and allergy and immunology. He is also Level 2 accredited in the state of Colorado. Dr. Volz was also able to explain the

inability to attribute Claimant's symptoms to mold toxicity, rather than making conclusory and overly definite statements. Thus, Dr. Volz' determination that Claimant was not likely suffering from mold toxicity is found to be credible and persuasive.

8. Even if Claimant had proven that she was suffering from mold toxicity, Claimant has not shown that there were high levels of mold present in her workplace. The burden of proof is on the Claimant to show the existence of a hazard that resulted in her occupational disease. Claimant must show that her occupational disease "results directly from the employment or the conditions under which work was performed…" Claimant presented photographs of wet spots and bacterial growth in the [Redacted] building but did not provide any additional persuasive evidence of any mold growth related to these issues.

9. Respondents, on the other hand, presented a report and testimony from a professional well versed in mold testing, both of which confirmed that there were no elevated – above normal levels - of mold in the [Redacted] Building. Claimant's evidence of a further OSHA evaluation did not refute the findings of Respondent's evidence that there was no elevated level of mold in Claimant's place of work.

10. Claimant questioned the limited scope of Respondents' mold testing. But Claimant's only allegation of an occupational disease is her alleged mold toxicity. That a full air quality test was not performed does not affect whether there is excessive airborne mold in the building.

11. Because of Claimant's lack of evidence, and Respondents' evidence of normal indoor mold levels, this court is persuaded that even if Claimant were suffering from mold toxicity, that the mold toxicity did not come from her place of employment.

12. The ALJ therefore finds and concludes Claimant failed to establish by a preponderance of the evidence that she suffered a compensable injury in the form of an occupational disease.

13. Because this claim is not compensable, this order will not address the other issues raised by Claimant.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's claim for Workers' Compensation Benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding

procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: May 21, 2021.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-140-596-001

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that he suffered a compensable work injury on October 31, 2019?

II. If compensable, has Claimant shown, by a preponderance of the evidence, that the lumbar surgery being proposed by Dr. Stanton is reasonable, necessary, and related to his 10/31/2019 work injury?

STIPULATIONS

There is a second case involving these parties, WC5-140-597-001, with an injury date of 5/20/2020. This second case involved injuries to Claimant's cervical spine and shoulder. All issues in that case have been resolved. However, there are a number of medical records in the hearing packet for this case which relate to the 5/20/2020 injury. The parties stipulated that rather than the painstaking process of excising such records, the ALJ would simply disregard any medical records not related to this work injury.

The parties further stipulated to an Average Weekly Wage ("AWW") for this 2019 case of $735.00, and an AWW of $741.60 for the 2020 case. And TTD benefits (if compensable) will apply in this case for two days, November 4 and November 5, 2020.

The ALJ approved these stipulations.

FINDINGS OF FACT

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

Claimant's Hearing Testimony

1. On October 31, 2019 Claimant was a janitor for [Employer Redacted]. As a janitor, Claimant's duties included cleaning bathrooms, sweeping, vacuuming, mopping floors, and emptying trash cans. Claimant testified he was required to pick up items weighing between 20 to 25 pounds and to bend over to pick up trash cans and cleaning equipment. Claimant was working 40 hours a week on average. Claimant testified he had no assistance in the performance of his job duties. Claimant further testified he had no difficulty performing his job duties prior to October 31, 2019.

2. Claimant testified that he injured himself on October 31, 2019. He squatted down to pick up a mop bucket to empty it in the toilet. This mop bucket weighed approximately 20 to 25 pounds. At the top of the lift, Claimant

felt a sharp stabbing pain in his lower back, hips, and both legs. The pain went from Claimant's lower back down the back of both legs into his feet. Claimant rated his pain at 9 / 10. Claimant reported experiencing spasms with muscle tightening. These spasms were in the lower back, but not in the legs. The spasms felt to him like an electrical shock.

3. Claimant testified he put away the rest of his cleaning equipment and went to lunch, hoping the pain would go away. However, the pain did not go away. Right after lunch, Claimant then reported his injury to his supervisor Mr. F[Redacted]. Claimant's supervisor directed him to Optum Urgent Care to get treatment for his lower back. Claimant was taken off work for one week until November 8, 2019. When Claimant returned to work, he continued to have pain in both legs and his low back.

4. Claimant testified after initially seeking medical treatment from Optum Urgent Care, he was referred to Total Functional Physical Therapy. He testified he received PT from November 7, 2019 to December 18, 2019 and that he received between 10-12 sessions of physical therapy. Claimant testified physical therapy helped reduce some of the pain in his lower back; however, it did not help the pain in his legs. Claimant testified he continued to have pain down the back of his left leg but no pain in the right leg.

5. Claimant testified he later received a steroid injection in his lower back with Dr. Salek. He received no relief from this injection. Claimant testified he also received chiropractic care with Dr. Abercrombie from August 13, 2020 to October 20, 2020. He reported that the chiropractic treatment alleviated symptoms in his low back, but not in his left leg. Claimant indicated the pain in his low back improved to a 3-4 / 10. He stated he only had pain in his left leg upon discharge from chiropractic care, and no pain in the right leg. Claimant testified he was ultimately referred to Dr. Stanton who ordered a L4-5 microdiscectomy. Claimant never received this surgery because the Insurer denied it.

6. Claimant testified that he is not currently experiencing pain in his lower back. However, he testified he is still experiencing a constant achy pain in his left leg from his hamstring down to the calf muscle. At hearing, Claimant reported no current pain in his right leg. Bending at the waist, squatting down, or working on the floor aggravates his left leg. He stated that prior to this injury, he was able to lift weights 3 times a week up to 140 pounds without any pain or discomfort. Now, he is no longer lifting weights. Claimant testified he used to be able to run 2.5 to 3 miles for exercise with no pain or problems but he can no longer run due to his injury.

7. Claimant testified that he used to go hiking once or twice a week but that he is not able to go hiking as often. Claimant stated hiking causes pain

in his left leg and lower back. Claimant further testified that he has pain in his left leg with cleaning around the house and using the bathroom. According to Claimant, the pain in his left leg requires him to kneel while working as a janitor whereas prior to this injury he was able to squat or bend. He never had to kneel to perform work prior to this injury. Pain in his left leg and low back causes him to move slower at work and now requires him to take more breaks.

8. Claimant testified that he had also injured his low back in 2012 while lifting a cafeteria table. He received 8 weeks of physical and 2 weeks of chiropractic care. Claimant indicated he received no further treatment for this injury, and that his pain went away. Claimant also testified he had some pain in the lower back and hips upon wakening in 2015 for which he sought medical treatment. These symptoms came on gradually. Ultimately, Claimant received an MRI, which showed a herniated disc.

9. Claimant testified he received physical therapy, which lessened his pain, as well as injections, which did not help his symptoms. Claimant never had a surgery for this herniated disc and these symptoms resolved. Claimant did follow-up in 2017 with his family physician, Dr. Lesh, for muscle soreness in his low back from lifting weights. He had no other treatment for his 2017 low back muscle soreness, aside from medication, and this soreness resolved. Claimant was able to resume lifting weights, and he had no issues with his low back until October 31, 2019.

10. Claimant testified that prior to his October 31, 2019 injury he took on added responsibility, including working up to 6 days a week. He stated he had no pain or difficulty performing these extra duties. Claimant testified he never sought medical treatment of any kind for his low back or lower extremities while working for the City of Manitou Springs prior to October 31, 2019.

11. Claimant acknowledged that he had experienced low back pain since 2008. However, he stated this pain was localized in his low back towards the ball of his hip with occasional pain to the right leg. He stated he did complete a rehabilitative exercise program per Dr. Salek's recommendation. Specifically, Claimant testified he performed rehabilitative exercise with Dr. Abercrombie from August of 2020 to October 16, of 2020. Claimant further testified he continued with home exercise, based upon Dr. Abercrombie's discharge instructions. This included ball exercises, planks, and stretching 5 times a week. Claimant stated these exercises did not bother him like hiking, because they worked different muscles. Claimant testified no treatment to date has addressed the pain in his left leg. Claimant reported no left leg pain until this injury on October 31, 2019.

Claimant's Medical Treatment after the Work Injury

12. Claimant presented to Dr. Baptist on October 31, 2019. He reported

right sided back pain and lumbar radiculitis. A pain diagram indicated pain around a 7-8 / 10, which was described as stabbing and aching. Claimant was taken off work, referred to physical therapy, and prescribed medication. (Ex. C, pp. 20-25). Claimant followed up with Dr. Rudderow on November 6, 2019. He reported he was at work when he lifted a heavy mop bucket. When he bent over to put it down, he felt a pull and pain in the right lower back. Claimant also reported lower back pain in the past. He stated his pain was improved and down to a 5-6 / 10. (Ex. C, pp. 27-30).

13. Claimant was referred to Total Function Physical Therapy, and treated from November 7, 2019 to December 18, 2019. Claimant had 11 physical therapy sessions for his lower back and leg symptoms. At his initial visit, Claimant reported left hip, left leg, right leg, and low back pain. Pain from muscle spasms was a 10 / 10, pain in the leg was a 7 / 10, and pain in the butt was an 8 / 10.

14. Claimant reported experiencing pain hourly. Claimant indicated his symptoms were aggravated by bending. On December 16, 2019 Claimant reported that all his pain was on his left side. Claimant noted this pain went down into his left thigh. Claimant reported his left leg symptoms start when he first gets to work.

15. Claimant was discharged from physical therapy on December 18, 2019. Upon discharge he reported improvement with PT, and an easier time with work lifting, kneeling, and bending. However, Claimant indicated that driving over 45 minutes still caused him pain and any prolonged performance of a physical activity caused him pain. Claimant reported a flare up of pain in the anterior thigh, which he described as ‘dull and achy’. (Ex. 2, pp. 85-118).

16. Claimant returned to Dr. Rudderow on December 4, 2019. During this period, Claimant was doing physical therapy and home exercises. However, Claimant indicated that pain from this work injury was the worst pain he ever had. He stated his pain was minimal in the morning but it gets worse towards the end of the day, up to a 5 / 10. Claimant reported his pain is triggered from prolonged sitting or running. Claimant also reported pain in the left leg that radiates down to the knee along with occasional numbness on the bottom of his left foot. He described the numbness in his left foot as new. Pain diagrams from this date indicate pain in the left and right lower extremities at 6 / 10. Claimant was referred to physiatry. (Ex. C, pp. 34-38).

17. Claimant was seen again by Dr. Rudderow on February 19, 2020. Claimant reported continued pain of 6 / 10. Claimant reported he was working full time, and that lifting anything over 25 to 30 pounds triggered more pain. He reported difficulty with squatting. Claimant reported not much improvement or change since the last visit. He continued to do home exercises, but that he

finished physical therapy around Christmas. Claimant reported continued numbness on the bottom of his left foot and back pain that radiates around his thighs. Claimant stated that prior to being injured he would have some back pain and stiffness. However, this back pain would resolve once he got up and started moving. Claimant was given a referral to physiatry for possible injections in his back. (Ex. 1, pp. 15-17).

18. Claimant was seen by PA-C Aaron White at the Colorado Springs Orthopedic Group on February 27, 2020 for low back pain with radiation into the left lower extremity. Claimant reported an acute onset of back pain from moving a mop bucket. Claimant reported his initial pain did improve after a week, but he was now having radiation down both lower extremities, left greater than right. Claimant rated his pain as moderate, and described it as a dull, stabbing, aching pain. This was made worse with activity such as bending and lifting.

19. Physical exam revealed tenderness to palpation over the paraspinous musculature lumbosacral junction. The clinical impression noted greater than 51% probability the patient's condition was directly related to his duties at work. The treatment plan indicated that Claimant did not respond well to anti-inflammatory medications or formal physical therapy. PA-C White ordered an MRI of the lumbar spine. (Ex. 3, pp. 120-123).

20. Claimant returned to Colorado Springs Orthopedic Group on April 2, 2020. He was again evaluated by PA-C Aaron White. The MRI report revealed a significant disc desiccation and a disc herniation at the L4-5. PA-C White recommended an L4-5 epidural steroid injection. (Ex. 3, pp. 123-124).

21. Claimant returned to Dr. Rudderow on April 8, 2020. Claimant reported no change in his symptoms and continued pain at a 6 / 10. Claimant reported intermittent numbness and tingling in his left foot. He reported worsening pain on days that he works and less pain on days he does not work. Claimant reported he continued to do exercise at home including planking but that home exercises have not helped. (Ex. 1, pp. 19-21).

22. Claimant was seen by Dr. Salek for an epidural steroid injection on April 21, 2020. Claimant gave a history of acute onset of back pain while moving a mop bucket with symptoms radiating down both lower extremities, his left greater than right. Claimant described pain increasing with squatting, bending, and sitting. Physical exam revealed positive straight leg raise. Dr. Salek noted that Claimant seems to be "quite religious" with planks and other core strengthening modalities. The Left L4-5 interlaminar ESI was administered. (Ex. 5, pp. 142-145).

23. Claimant returned to Dr. Rudderow on May 6, 2020, with continued pain down his left leg. This was noted to be 6 / 10. Claimant reported he continued to do home exercises and stretches 3 times a week. Claimant indicated he would get help lifting items at work that are beyond his restrictions. Claimant stated he recently had an epidural shot but that injection did not provide any relief. (Ex. 1, pp. 55-57).

24. Claimant was initially seen by Dr. Stanton on May 7, 2020 for an evaluation of his lumbar spine. Claimant reported no great relief from his first injection. Physical exam was unchanged from his initial visit with PA-C Aaron White. Impression included an L4-5 herniated disc and left lower extremity radiculopathy. Dr. Stanton indicated that Claimant was still a reasonable candidate for an additional epidural injection. (Ex. 3, pp. 125-126).

25. Claimant returned to Dr. Salek on May 19, 2020 for a follow-up on his left L4-5 epidural steroid injection. According to this note, Claimant received minimal relief from the injection. Claimant reported his symptoms became worse for one week after the injection. Physical exam was positive for the straight leg raise. Claimant was having mostly left sided symptoms in the hip, which at times radiated into the posterior lateral aspect of his calf. (Ex. 5, pp. 146-148).

26. Dr. Salek noted at this visit:

> The critical nature of a good rehabilitation exercise program was emphasized with the patient. Certainly, this is always a primary objective to avoid more invasive treatments and/or surgery. In order to facilitate this, written instructions were provided as appropriate as well as possible referral to therapy, either formal or informal. In any event, the patient must continue a program on their own for core strengthening, flexibility, endurance, and mobility. This is critical for the recovery as well as for the long-term back wellness. Patient has verbalized understanding. *Id* at 148.

27. Claimant returned to Dr. Rudderow on May 27, 2020. Claimant's pain diagram indicated low back and left leg pain at a 7 / 10. Claimant told Dr. Rudderow his pain usually started after being at work for about 4 to 5 hours. The pain gets worse during the day. Claimant reported relief with being off work for a couple of days, but then the pain comes back with working again. Claimant stated flexing forward and squatting seemed to trigger more pain, and that this pain sometimes radiated down the left leg. (Ex. 1, pp. 73-75).

28. Claimant received a second epidural steroid injection from Dr. Salek on June 8, 2020. Claimant followed up with Dr. Salek to discuss his response to the ESI on June 22, 2020. Claimant reported moderate relief of

his symptoms for a few days after the procedure. Claimant indicated his symptoms started to progressively return when he went back to work. (Ex. 5, pp. 149-152).

29. Claimant returned to Dr. Rudderow on June 24, 2020 with the same complaints as noted on prior visits. (Ex. 1, pp. 79-83).

30. Claimant returned to Dr. Stanton for a follow-up on June 25, 2020. Claimant reported he was still having significant pain and weakness of his lower left leg. This pain and weakness were worse with work activities including bending, lifting, and twisting. Claimant indicated that the extensive bending he must do at work makes it difficult to complete a workday. He stated he is not feeling great in terms of his workday, and he is not recovering as well as he would like. Claimant's pain diagram indicated pain in the low back, left leg, right hip, and left foot. Pain was rated at a 6 / 10. Dr. Stanton noted that further review of Claimant's MRI revealed an L4-5 central extruded disk herniation, slightly eccentric left sided. Dr. Stanton recommended a L4-5 microscopic discectomy. (Ex. 3, pp. 127-133).

31. Claimant returned to Dr. Rudderow on July 29, 2020. Claimant reported he continued to have numbness and tingling that radiated down the back of his left leg to the bottom of his left foot. Claimant was given a referral for chiropractic treatment. Physical exam revealed Claimant's lumbar area was tender to palpation, left greater than right. (Ex. 2, pp. 87-90).

Dr. Reiss' IME

32. Claimant presented to orthopedic spine surgeon Brian Reiss, MD for an Independent Medical Exam on August 26, 2020. Claimant primarily complained of left lower extremity pain which was intermittent, and not present at the time of the examination. In his report, Dr. Reiss opined that a microdiscectomy would be likely to help his left lower extremity pain but unlikely to make a difference to any lower back pain. Dr. Reiss suggested a rehabilitation program directed at core strengthening, stretching, and aerobic conditioning. Dr. Reiss noted that if Claimant's lower extremity symptomatology became more symptomatic, then he would suggest repeating the MRI to reassess the status of the L4-5 disc. If the herniated disc is still compressing the L5 nerve root, then a microdiscectomy would be reasonable.

33. Dr. Reiss reviewed the March 19, 2020 MRI. He noted there was a herniated disc at L4-5 with contact of the left nerve root and no contact with the right nerve root. Dr. Reiss diagnoses indicated left lower extremity symptomatology and herniated disc at L4-5 that is apparently new and probably secondary to the work injury. Dr. Reiss noted previous back issues involved the

right lower extremity but there was no past history of left lower extremity complaints. Dr. Reiss stated that medical care has been reasonable and necessary and related to the October 31, 2019 work incident. Dr. Reiss opined surgical intervention at this time was not indicated, and he would reinstate a physical therapy, aerobic conditioning, and stretching program. Dr. Reiss wrote Claimant was not at maximum medical improvement but that Claimant would hopefully reach MMI with 2 months of exercise and conditioning with physical therapy. (Ex. B, pp.9-14).

Chiropractic Treatment with Dr. Abercrombie

34. Claimant reported to Dr. Abercrombie for chiropractic treatment on August 13, 2020. Claimant reported left posterior hip and lateral upper to lower leg pain with numbness on the bottom of the foot that is constant. Claimant reported intermittent lower back pain daily. Claimant indicated that squatting and bending causes pain as well as sitting too long. Pain was reported at a 5-7 / 10. Physical exam revealed segmental restriction at L3-4, L4-5, L5-S1, and a facet load test caused pain at the left greater than right L3-S1 segments. There was also hamstring tightness and numbness at the left foot. The treatment plan included flexibility exercises and McKenzie protocols. (Ex. 8, pp. 189-192).

35. Claimant returned to Dr. Abercrombie on August 21, 24, and 28, 2020. His symptoms and treatment remained unchanged. On September 2 and 4, 2020 Claimant reported some improvement in his left lower leg symptoms, with decreased pain and numbness as well as improvement with his lower back. However, Claimant noted symptoms in his upper leg and hip were unchanged. On September 10 and 23, 2020 Claimant reported aching hips in the morning upon awakening, but improved pain in the lower left leg. On September 25, 2020 Claimant presented with more tingling and achiness at the left lateral thigh. Claimant was instructed on a home exercise program.

36. On October 7, 2020 Claimant returned to Dr. Abercrombie and reported his lower back ached during workdays. Claimant indicated his back ached while on a hike. Claimant also reported tingling of the left posterior thigh that occurs while he is at work doing repetitive bending. Claimant reported pain levels at a 2 / 10 when not working and a 4-5 / 10 when working. On October 12, 2020 Claimant reported he had a spasm while doing laundry. He reported pain upon standing back up from a bend.

37. Claimant returned to Dr. Abercrombie on October 16, 2020 and stated his recent lower back flare up is better after having a setback doing laundry. Claimant reported a 20% improvement with his lumbar condition. Claimant’s diagnosis remained unchanged and Dr. Abercrombie opined that Claimant was likely at a plateau with conservative treatment. Dr. Abercrombie

indicated that Claimant was taught selective flexibility and lumbar strengthening -stabilization exercises using a physio-ball and will continue these exercises indefinitely. (Ex. 8, pp. 189-217).

Medical Evaluation / Treatment Continues

38. Claimant returned to Dr. Rudderow for a follow-up on September 9, 2020. Claimant stated he was feeling a bit better. Claimant reported his left hip pain was slightly worse and that the tingling on the bottom of his left foot was unchanged. (Ex. 2, pp. 97-99)

39. Claimant was seen by Dr. Rudderow on October 21, 2020. Claimant reported an exacerbation of his low back pain when he bent over to lift a laundry basket. However, Claimant indicated the aggravation of his symptoms was better after a week. Claimant stated he feels pretty good when he starts his workday but part way into it he starts to get achy and tired. He stated Dr. Abercrombie got him an exercise ball that he was using at home until he hurt his back lifting the basket a week and a half ago. Since that time, he was not doing home exercises. (Ex. C, pp. 108-112).

40. Claimant presented to Dr. Rudderow on December 2, 2020. Claimant reported he still had numbness going down the back of his left leg to his calf. He also reported continued numbness on the bottom of the left foot which was unchanged. He reported doing planks every other day as well as stretching daily. Claimant reported he still hikes but has trouble going downhill especially landing on the left foot. Claimant was told to continue with home exercises, stretches and to follow-up with Dr. Stanton for surgery. (Ex. C, pp. 117-123)

41. Claimant returned to Dr. Stanton on December 10, 2020. The recommended left sided L4-5 microdiscectomy had been denied by the Insurer. Claimant reported his left lower extremity radicular symptoms persisted. Claimant indicated he experienced little relief from physical therapy and chiropractic treatment. Dr. Stanton again recommended a left sided L4-5 microdiscectomy. (Ex. 3, pp. 134-136).

Further Records Review by Dr. Reiss

42. Dr. Reiss completed an additional records review at Respondents' request on January 11, 2021. Dr. Reiss opined that it was not probable that the discectomy would provide significant benefits. Dr. Reiss asserted that Claimant's primary complaint was low back pain. Dr. Reiss stated that Claimant should be doing core strengthening, aerobic conditioning, and stretching. Dr. Reiss said that when he evaluated Claimant there was no report of leg symptomatology. Further, as of October 2020,

Claimant did not have any leg symptomatology. Dr. Reiss stated it was not clear that [Claimant] was having significant left lower extremity pain.

43. Dr. Reiss reviewed MRI imaging from 2015, and stated it is not clear that there is any significant difference between the findings in 2015 and the findings in 2020. Dr. Reiss asserted that, at most, the work injury represents an aggravation of a pre-existing condition. Dr. Reiss concluded his report noting decompressive surgery in the lumbar spine should not be pursued, in the absence of any neurologic deficit, unless there is significant functionally limiting lower extremity pain which does not appear to exist in this case. Dr. Reiss also stated decompressive surgery is not indicated in the treatment of axial lower back pain, which would appear to be [Claimant] primary complaint. (Ex. B, pp. 16-18).

44. Claimant returned to Dr. Rudderow on January 13, 2021. Claimant reported his condition was unchanged from his prior visit. He continued to have pain at a 5 / 10. Claimant reported he continued to do home exercises and stretches. Claimant reported he tried to go running but that did not go well, and he later developed pain in the right leg as well. (Ex. C, pp. 124-127).

Claimant’s Preexisting Back Issues

45. Prior to this work injury, Claimant reported to NP Julie Klaker at UC Health on August 24, 2015 with reports of low back pain. Claimant reported an onset of back pain 6 years ago that was worsening. Location of pain was the hip with pain radiating to the right leg. There was no injury. Claimant reported pain upon awakening that improved during the day.

46. Claimant returned to NP Klaker at UC Health on October 1, 2015. NP Klaker noted lumbar back pain with radiculopathy affecting the right lower extremity. Claimant reported onset of back pain from 12 years ago. Claimant described his back pain as fluctuating but persistent. Claimant reported symptoms were relieved from over the counter medication. NP Klaker ordered an MRI to address the right sided radiculopathy. Claimant returned to NP Klaker on November 17, 2015 to discuss his MRI results. The MRI showed a lumbar disc herniation.

47. Claimant reported improvement in symptoms since not working and lifting. Claimant was referred to PT and a spinal surgeon for evaluation. Claimant returned to NP Klaker on February 1, 2016. Claimant described his symptoms as stable, occurring occasionally with pain in the lower back that radiates to the right thigh. Claimant reported completing 10 sessions of physical therapy. Claimant indicated he did not feel the need to continue with PT. He never called the spine specialist. (Ex. D, pp. 144-57)

48. Claimant presented to his PCP, Dr. Lesh at Colorado Springs Family Practice with reports of back pain on March 28, 2017. Claimant reported experiencing low back pain after working out. Claimant reported pain going down the right leg and muscle spasm. Claimant was given medication and told to follow-up. Claimant returned to Dr. Lesh's office on April 18, 2017. Claimant stated his back was better, he denied any tingling, numbness, or radicular symptoms. Claimant denied any medication. (Ex. D, pp. 131-136)

49. Claimant had an MRI of the lumbar spine prior to this work injury on October 26, 2015. According to Dr. Damien, that MRI revealed a small disc herniation at the L4-5. Client had another MRI on March 19, 2020. According to Dr. Melody, that MRI revealed a central disc extrusion at the L4-5 level which *contacts* the descending left L5 nerve root. Claimant received a third MRI on August 7, 2020. According to Dr. Carollo that MRI revealed moderate left paracentral disc herniation at the L4-5 level with an inferiorly extending extruded disc herniation. Dr. Carollo noted that disc intensity material *abuts* the descending L5 nerve root. (Ex. I, pp. 238-250)

Dr. Stanton's Deposition

50. Dr. Stanton testified by deposition on January 7, 2021 as an expert in orthopedic surgery. Dr. Stanton testified that Claimant's L4-/L5 disc herniation was probably related to the October 31, 2019 work injury. Dr. Stanton testified that a lumbar microscopic discectomy was appropriate, instead of more conservative treatment. Claimant had tried physical therapy, injections, and chiropractic treatment with little relief. Dr. Stanton testified that Claimant's prior low back disc herniation from 2015 did not change his opinion about the origin of Claimant's current symptoms, because it appeared there was an exacerbation of that disc disease with his current injury. Dr. Stanton referred to Claimant's injury as an acute on chronic phenomenon.

51. Dr. Stanton testified that he disagreed with Dr. Reiss' report that stated there was no neurologic deficit. Specifically, Dr. Stanton said Claimant's radiating pain down his leg constituted neurologic symptoms. Dr. Stanton agreed with Dr. Reiss that a microdiscectomy would be likely to help with Claimant's left lower extremity pain, but unlikely to make a difference to any low back pain. Dr. Stanton stated the nature of disc surgery is to relieve radicular pain as opposed to back pain. Dr. Stanton stated that if Claimant did not get the microdiscectomy that it was possible the injury would resolve on its own. However, he clarified that at this point he does not believe Claimant is progressing with conservative care and that surgery is the next logical option.

52. Dr. Stanton was asked if it was possible or probable that Claimant's

disc desiccation and herniation at the L5 with contact on the left nerve root was consistent with the mechanism of injury. He stated that it seemed probable. He further stated that if a patient has had conservative care and they say they're not recovering, that they're still hurting, and the symptoms are consistent with the imaging, then surgery is reasonable and indicated.

53. Dr. Stanton stated that Claimant's condition was unlikely to improve with additional physical therapy. Dr. Stanton also testified that Claimant's treatment with Dr. Abercrombie included active resistance of motion. Dr. Stanton was asked about Claimant's reported exacerbation and setback of his work-related injury on October 12, 2020. Dr. Stanton stated it would not be uncommon for someone with an injury of Claimant's nature, during simple activities of daily living, to have some sort of exacerbation. He stated that three months of chiropractic treatment and six weeks of physical therapy was reasonable conservative care for Claimant's injury.

Dr. Reiss' Deposition

54. Dr. Reiss testified by deposition as an expert in orthopedic surgery on February 18, 2021. Dr. Reiss testified that Claimant reported intermittent left lower extremity symptoms, constant lower back pain, and no right leg symptomatology. Dr. Reiss testified that an MRI of the lumbar spine from March 2020 showed a small disc protrusion that was close to and may have been touching the L5 nerve root without compressing or displacing it but potentially irritating it. Dr. Reiss opined that the March 2020 MRI had similar findings when compared to the 2015 MRI and there was little change. Dr. Reiss testified Claimant did not have a neurological *deficit* but possible neurological *irritation* of the L5 nerve root.

55. Dr. Reiss opined that Claimant's reported numbness in his left foot was not consistent with an L5 issue; rather, this would be consistent with an S1 distribution. As a result, any surgery targeting L4/L5 would not address Claimant's symptoms in his foot.

56. Dr. Reiss stated the size of the herniated disc does not necessarily indicate if the disc protrusion is causing pain. He clarified that a small protrusion does not necessarily mean it is not an irritant. Dr. Reiss opined that surgery was unlikely to be successful, because the disc protrusion was preexisting for 5 years. Dr. Reiss testified he did not know if the home exercise program given to Claimant at physical therapy was directed towards core strengthening or not. Dr. Reiss also stated Claimant did not carry through with an appropriate exercise program to keep his core strong, as he was not doing them "a whole heck of a lot." (Transcript, p. 17)

57. Dr. Reiss opined that surgery would not be likely to help Claimant, and that he would not suggest surgical intervention. Instead, he recommended an exercise program directed towards the lumbar spine. Dr. Reiss stated his January 11, 2021 report noted Claimant's major complaint was his lower back and not radicular symptoms. However, Dr. Reiss confirmed Claimant did not report low back pain during his August 26, 2020 exam and that Claimant primarily complained of left lower extremity pain. Dr. Reiss conceded that "basically every note" indicates persistent left lower extremity radicular symptoms.

Dr. Stanton's Rebuttal Deposition

58. Dr. Stanton testified for a rebuttal deposition on March 25, 2021. Dr. Stanton testified that he was able to review Dr. Reiss' most recent report dated January 11, 2021 as well as MRI images of Claimant's lumbar spine from October 26, 2015. Dr. Stanton testified that after reviewing the MRI from 2015, his previous opinion that Claimant's need for a L4-5 microdiscectomy was probably related to the October 31, 2019 injury remained unchanged. Dr. Stanton opined that there was an exacerbation of a previous injury, and that the L4-5 microdiscectomy was both reasonable and necessary to address Claimant's symptoms. He summarized:

> …his exam is consistent…So let me just kind of lay it out for you. He had a disc herniation – it was small—in 2015. Patient reported to me he had a new onset of pain following a work injury. New imaging showed an enlargement of that disc herniation consistent with his symptoms.
>
> So at that point in time he had undergone conservative care to that point, and he was not getting better. He was asking for help. The next smallest, most reasonable thing to do is a microdiscectomy to help that problem. (Transcript, p. 9)

59. Dr. Stanton testified that after reviewing the 2015 lumbar MRI it was evident Claimant had a small disc herniation. However, new imaging showed an enlargement of that disc herniation that is consistent with Claimant's current symptoms. Dr. Stanton stated that the sole indication for a microdiscectomy is not functional deficit and that it is reasonable to proceed with surgery if a patient has pain that is not responding to conservative care. Dr. Stanton stated Claimant's physical therapy from November 7, 2019 to February 8, 2020 as well as Claimant's chiropractic treatment from August 13, 2020 to October 2020 was reasonable. He stated Claimant's lumbar condition should have resolved with conservative care during that time if he did not need surgery.

60. Dr. Stanton reiterated that Claimant experienced an aggravation of a preexisting condition. Dr. Stanton disagreed with Dr. Reiss that Claimant's left

foot numbness could not be due to an L4/L5 disc bulge. Dr. Stanton stated the disc herniation at the L4/5 was, more likely than not, irritating the S1 nerve root, since the S1 nerve root traverses the disc herniation. (Transcript, p. 14). This causes Claimant's left foot numbness. He testified that Claimant's more recent MRI showed a disc herniation that is larger and protrudes more, which would result in more nerve root contact and an escalation of Claimant's symptoms. Dr. Stanton opined that the disc herniation on the 2020 MRI is clearly a larger herniation than the disc herniation shown on the 2015 MRI.

61. Dr. Stanton also clarified that there is also a corresponding inflammatory response that goes along with a larger disc herniation and that this inflammatory response is identified by Claimant's symptomatology rather than a MRI. Dr. Stanton testified it is not uncommon for a patient to have bilateral symptoms that eventually transition into primarily unilateral symptoms based on the mechanical location of the disc herniation.

CONCLUSIONS OF LAW

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

Generally

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

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion).

C. In this instance, the ALJ finds Claimant to be sincere in recounting what occurred. Claimant has remained reasonably consistent with describing his mechanism of injury. He has, to the best of his abilities, described his symptoms to his treating providers, and the IME, in a sincere effort to get better. Not surprisingly, his described symptoms over the past 18 months are not entirely internally consistent; as is common, they sometimes wax and wane. His initial ambivalence about surgery helps demonstrate a lack of secondary gain motives, and his overall history suggests that Claimant, perhaps more than most, made earnest efforts to make conservative measures work for him.

D. The ALJ further finds that the medical experts in this case have all rendered sincere medical opinions, but as is not infrequent, such opinions differ. In final analysis, the ALJ must decide who is more *persuasive* (as opposed to *credible*, per se), in light of their respective expertise and access to all pertinent information. In this instance, the ALJ finds that, taken as a whole, Dr. Stanton has the more persuasive argument.

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

Compensability, Generally

F. A compensable injury is one that arises out of and occurs within the course and scope of employment. § 8-41-301(1)(b), C.R.S. An injury occurs in the course of employment when it was sustained within the appropriate time, place, and circumstances of an employee's job function. *Wild West Radio v. Indus. Claim Apps. Office*, 905 P.2d 6 (Colo. App. 1995). An injury arises out of employment when there is a sufficient causal connection between the employment and the injury. *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which benefits are sought. *Snyder v. Indus. Claim Apps. Office*, 942 P.2d 1337 (Colo. App. 1997).

G. An aggravation of a preexisting condition is compensable. *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. 1990). If there is a direct causal relationship between the mechanism of injury and resultant disability, the injury is compensable if it caused a preexisting condition to become disabling. *Duncan v. Indus. Claim Apps. Office*, 107 P.3d 999 (Colo. App. 2004). However, there must be some affirmative causal connection beyond a mere assumption that the asserted mechanism of injury was sufficient to have caused an aggravation. *Brown v. Indus. Comm'n*, 447 P.2d 694 (Colo. 1968). It is not sufficient to show merely that the asserted mechanism could have caused an aggravation, but rather Claimant must show that it is more likely than not that the mechanism of injury did, in fact, cause an aggravation.

H. The Workers' Compensation Act creates a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" contemplates the physical or emotional trauma caused by an "accident." An "accident" is the cause and an "injury" is the result. No benefits flow to the victim of an industrial accident unless the accident causes a compensable "injury." A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.,* WC 4-650-711 (ICAO February 15, 2007).

I. The mere fact that a claimant experiences pain at work does not necessarily require a finding of a compensable injury. In *Miranda v. Best Western Rio Grande Inn,* WC 4-663-169 (ICAO April 11, 2007), the panel stated "pain is a typical symptom caused by the aggravation of a pre-existing condition. However, an incident which merely elicits pain symptoms caused by a pre-existing condition does not compel a finding that the claimant sustained a compensable injury."

Compensability, as Applied

J. In this case, Claimant credibly testified that he injured his lumbar spine while lifting a mop bucket at work on October 31, 2019. Claimant's testimony, corroborated by the medical records, show that Claimant noticed an immediate onset of severe pain that started in the lower back and went down both legs. Claimant reported his injury to his supervisor the same day it occurred. As a result of this injury, Claimant had difficulty performing his job. Claimant credibly testified that bending, squatting, or working on the floor aggravates pain in his left leg and that this injury has slowed him down at work. Claimant also testified this injury caused him to alter how he performs certain tasks, such as having to kneel on the floor at work, whereas before the injury he could bend over.

K. Claimant credibly testified, again consistent with his medical records, that he was still experiencing pain in his left greater than right leg with no current pain in his lower back. Claimant reported a lumbar spine injury in 2015. However, Claimant testified, consistent with the records, that any pain or symptoms from his 2015 herniated disc resolved with chiropractic care and physical therapy. Although Claimant did return for 3 visits with his family physician in early 2017, he was released from care with no medication, denied needing additional physical therapy, and he made no mention of lower back or leg symptoms in his third and last visit. Claimant also testified that he had no pain or difficulty in his lower back or legs when performing his job as a janitor with the City of Manitou Springs until this October 31, 2019 injury.

L. Dr. Stanton testified that Claimant’s L4-5 disc herniation was probably related to the October 31, 2019 work injury. Dr. Stanton testified MRI imaging from 2015 did not change his opinion as to the etiology of Claimant’s current symptoms. Specifically, Dr. Stanton stated more recent imaging from the 2020 MRI showed an *enlargement* of the disc herniation when compared to the 2015 MRI that is consistent with Claimant’s escalating symptomatology. Dr. Reiss even opined “*at most* the work injury represents an aggravation of a pre-existing condition.” Further, Dr. Reiss noted that in his August 2020 report that Claimant’s *previous* back issues involved the right lower extremity, but there was no past history of left lower extremity complaints. The evidence, then, does not suggest Claimant’s current symptoms and imaging results are due to a pre-existing disc herniation. By a preponderance of the evidence, the ALJ concludes that Claimant has shown a compensable work injury.

Medical Benefits, Generally

M. Once a Claimant has established the compensable nature of his work injury, he is entitled to a general award of medical benefits and respondents are liable to provide all reasonable, necessary, and related medical care to cure and relieve the effects of the work injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission,* 759 P .2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office,* 797 P. 2d 777 (Colo. App. 1990). However, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his need for medical treatment. *Merriman v. Indus. Comm'n,* 210 P. 2d 622 (197); *Standard Metals Corp.* V. *Ball,* 172 Colo. 510,474, P. 2d 622 (1970); *Section 8-41-301(1)(c), C.R.S.* Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of employment. *Snyder v. City of Aurora,* 942 P. 2d 1337 (Colo. App. 1997). Stated differently, occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability were caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball, supra.*

N. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Al/right Colorado, Inc.,* W.C. No. 4-117-758 (!CAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission,* 682 P. 2d 513 (Colo. App. 1984).

Medical Benefits, as Applied

O. Dr. Reiss stated that Claimant does not need a lumbar surgery because Claimant did not exhibit any neurological *deficit*. However, Dr. Stanton opined that the sole indication for a microdiscectomy is not functional *deficit* (defined as weakness). Instead, it is reasonable to proceed with surgery if the patient has *pain* that is not responding to conservative care. Dr. Reiss' opinion that Claimant is not a surgical candidate and that an exercise program directed towards the spine is more appropriate is not persuasive. Claimant already underwent a reasonable course of physical therapy, chiropractic treatment, and injections with no success. In addition, contrary to Dr. Reiss' contention, the medical records show Claimant followed his home exercise regimen that included core strengthening exercises such as planks, use of a flexion ball, and stretching. Claimant was also instructed in a home exercise program by Dr. Abercrombie. Dr. Stanton further indicated that the chiropractic treatment with Dr. Abercrombie included active resistance of motion and Dr. Salek commented that "Claimant seems to be "quite religious with planks and other core strengthening modalities."

P. Lastly, Dr. Reiss opined that Claimant is not a surgical candidate because a microdiscectomy is not intended to address axial lower back pain "which would appear to be [Claimant]' primary complaint." Dr. Reiss went on to state that as of October 2020, Claimant did not have any leg symptomatology. The ALJ is not persuaded. Claimant reported lower extremity symptoms in nearly every medical visit to date. Even Dr. Reiss acknowledged during his deposition that "basically every note" indicates persistent left lower extremity radicular symptoms. In his August 2020 report, Dr. Reiss notes that "he primarily complained of left lower extremity pain."

Q. Claimant has already shown that he sustained a lumbar spine injury while lifting a mop bucket on October 31, 2019. The ALJ finds that this compensable injury is the proximate cause of Claimant's need for medical treatment including, but not limited to, the proposed lumbar spine microdiscectomy. Dr. Stanton opines that Claimant has undergone a reasonable course of physical therapy, injections, and chiropractic care without lasting resolution of symptoms. He further opines that Claimant's condition was unlikely to improve with additional care and as a result surgery is *reasonable, necessary and related to* the original work injury of October 31, 2019. The ALJ concurs.

ORDER

It is therefore Ordered that:

1. Claimant suffered a compensable work injury to his lower back on October 31, 2019.

2. Respondents shall pay for all reasonable, necessary, and related medical treatment, including, but not limited to, the surgery as proposed by Dr. Stanton.

3. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

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

DATED: May 21, 2021

/s/ William G. Edie

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

WORKERS' COMPENSATION NO. 5-134-649-001

ISSUES

The issues set for determination were:

- Did Claimant prove by a preponderance of the evidence that her need for shoulder surgery is reasonable, necessary and causally related to her industrial injury.

PROCEDURAL HISTORY

A Summary Order was issued on July 23, 2021. Following a Status Conference that was held on July 27, 2021, an Amended Summary Order was issued on August 3, 2021. Pursuant to § 8–42–503(3), C.R.S. (2020), the Amended Summary Order issued by the ALJ ordered Respondents to pay for a review of the plain x-ray and MRI films by a board-certified radiologist, who was asked to prepare a written report. James Piko, M.D. was the radiologist who conducted the review and prepared the report. Claimant requested a full Order on or about August 16, 2021.

Dr. Piko subsequently issued a report with regard to the x-rays and MRI-s taken of Claimant's right arm and shoulder, which was filed with the Court on September 24, 2021. The record was then closed and this Order follows.

FINDINGS OF FACT

1. Claimant was sixty-seven (67) years old (D.O.B. 7/27/53) as of the date of injury.

2. Claimant's medical history was significant in that she was treated for right shoulder pain prior to the injury. On June 2, 2017, Claimant underwent a right scapula x-ray for distal medial scapular pain that had been going into her right shoulder in the past month with no known injury.

3. Claimant began working for Respondent-Employer in February of 2018. Her job duties included working in shipping and receiving, putting merchandise in order, stocking product.

4. On June 5, 2018, a right shoulder x-ray was taken after Claimant fell. The radiologist's impression was: mild superior migration of the humeral head with respect to the glenoid; subacromial space narrowing at 6 mm and mild acromioclavicular and glenohumeral degenerative changes. Claimant was noted to have swelling, pain, tenderness by Cristen Mazzella, M.D. at Kaiser Permanente.

5. Claimant was seen for a follow-up evaluation at Kaiser on February 21, 2019 for shoulder pain. She was noted to be doing home exercises and referred for physical therapy ("PT").

6. Claimant testified she injured her shoulder when she fell at work in November 2019. She testified that she did not pursue a workers' compensation claim because she could not afford to go on workers' compensation benefits and take time off. Claimant testified she advised her boss of the injury.

7. On December 5, 2019, Claimant was evaluated at Kaiser after she was injured when she fell on ice (two weeks before) while getting the mail. Claimant was evaluated by Pamela Clift, P.A. at Kaiser and noted in the questionnaire that this was not related to "third party liability-workers' compensation. The exact location of this fall was not identified, however, the ALJ concluded it was not at work.

8. An x-ray of her right shoulder revealed an articular fracture of the humeral head; mild osteoarthritis of the glenohumeral joint; unremarkable acromioclavicular joint, probable rotator cuff tear, with an associated small degenerative bone spur arising from the anterior inferior aspect of the acromium and degenerative subcortical systic and sclerotic bone changes in the superior aspect of the greater tuberosity. Claimant was prescribed oxycodone and a Fentanyl patch.

9. An x-ray was taken of Claimant's right shoulder on January 6, 2020, which showed no interval changes since the previous study (December 11, 2019). The x-ray showed osteoarthritis and narrowing of the subacromial space consistent with rotator cuff pathology and a probable tear. The ALJ found these x-rays were objective evidence of degenerative changes in the right shoulder.

10. Claimant returned to Kaiser on January 29, 2020 and February 20, 2020, related to the right shoulder fracture and reported ongoing shoulder pain and weakness. Claimant was working on her motion and trying to use her left arm as much as possible, instead of her right arm. The ALJ inferred that the osteoarthritis and rotator cuff tear shown in the x-rays were the cause of shoulder pain and weakness.

11. The ALJ found the records from Kaiser before August 2020 documented Claimant's treatment for pain in the right shoulder. The x-rays showed degenerative

changes in Claimant’s right shoulder, including a probable torn rotator cuff. The x-rays also showed an articular fracture which was the result of trauma from the fall which occurred in November 2019.

12. Claimant denied that she had problems with her shoulder 2-3 months before her work injury. The Kaiser records showed Claimant was complaining of pain in her shoulder six months before the work injury.

13. There was no evidence in the record that Claimant had restrictions related to her prior shoulder injury. Claimant testified she was able to perform all of her job duties before August 2020, including stocking and reaching overhead. No physician recommended shoulder surgery before August 2020.

14. On August 2, 2020, Claimant was injured while working as a sales associate for Employer. She was attacked by a shoplifter and thrown to the ground. Claimant landed on her right side between two flower beds. The ALJ found Claimant injured her neck, shoulder, hips and head. This was a significant injury. Claimant’s Employer offered to take her to the emergency department, but Claimant declined to go because she feared catching COVID.

15. Claimant was evaluated by Tiffany Knudsen, P.A. in the Emergency Department at Kaiser Permanente on August 3, 2020. She was complaining of hip and shoulder pain. PA Knudsen noted a hematoma and tenderness to palpation along the IT band bilaterally, with no midline spinal tenderness. Claimant had tenderness to palpation on the right pelvis, as well as scapular winging. Tenderness to palpation was present on the proximal and distal humerus. X-rays taken of the right shoulder showed no acute osseous abnormality, but mild glenohumeral osteoarthritis was present. There was a loss of the acromial humeral distance consistent with a large rotator cuff tear.

16. On August 14, 2020, Claimant was evaluated by Diana Halat, N.P. at Concentra. She had pain in her neck, head, both thighs and right shoulder. On examination, Claimant‘s right shoulder had tenderness in the AC joint, with no crepitus and no warmth. NP Halat‘s assessment was: assault, cervical sprain, initial encounter; shoulder dislocation, right, initial encounter; sprain, lumbar, initial encounter; sprain hip/thigh, unspecified laterality, initial encounter. Claimant was prescribed acetaminophen and referred to Cary Motz, M.D. (orthopedic surgeon), as well as for PT. The report was countersigned by Sophia Rosebrook, D.O., who also signed the WCM 164.

17. Claimant was evaluated by Dr. Motz on August 18, 2020, who evaluated her right shoulder. Pain was noted when Claimant abducted and reached across her chest, with Dr. Motz noting significant crepitus in the shoulder. Claimant‘s range of

motion (“ROM”) was 100° forward flexion, 0° of abduction, 20° external rotation and 70° of abduction. Dr. Motz’ impression was: rotator cuff tear; possible glenohumeral arthritis. Dr. Motz did not have Claimant‘s X-rays from Kaiser at the time of the evaluation and an MRI was ordered.

18. Claimant returned to Concentra on August 19, 2020 and was evaluated by Kathy Okamatsu, N.P. At that time, she had pain in the head, right shoulder, bilateral hips, both thighs, neck and lower back. Bruising was noted on her legs. N.P. Okamatsu‘s assessment was the same as the evaluation on August 14, 2020. Claimant was noted to have attended one PT visit and was not cleared for a return to work.

19. On August 21, 2020, Claimant underwent an MRI of the right shoulder. The films were read by Munib Sana, M.D., whose impression was: ruptured and retracted long head biceps tendon; complete tear of the supraspinatus tendon, with significant retraction; high-grade partial tearing of the subscapularis tendon, with severe muscle atrophy; moderate grade interstitial tearing of the interior half of the infraspinatus tendon; high riding humeral head with acromial remodeling; moderate-sized joint effusion with synovitis. Dr. Sana stated those findings were age indeterminate and the ALJ inferred Dr. Sana was offering no opinion as to whether the findings were acute v. chronic, but severe muscle atrophy was present.

20. Claimant returned to Dr. Motz on September 2, 2020. Dr. Motz reviewed the MRI, which he said showed a massive retracted supraspinatus and infraspinatus tear, with significant atrophy. (It was unclear whether Dr. Motz reviewed the actual MRI and x-ray films.) He stated there was a significant loss of the acromiohumeral distance with remodeling of the head and some degenerative changes of glenohumeral joint. Dr. Motz‘ impression was: acute-on-chronic right massive rotator cuff tear; rotator cuff arthropathy. This description was persuasive to the ALJ.

21. Dr. Motz opined that clearly Claimant had a long-standing rotator cuff tear given the significant remodeling that was noted on the MRI, which was exacerbated with this fall. Dr. Motz performed a subacromial steroid injection at that time. Dr. Motz also noted Claimant had begun PT to work on her function, but there would limitations due to the chronic rotator cuff tear and arthropathy.

22. On September 3, 2020, a General Admission of Liability (“GAL“) was filed on behalf of Respondents. The GAL admitted for medical and temporary total disability benefits.

23. Dr. Motz re-evaluated Claimant on September 29, 2020, at which time she reported no significant change following the steroid injection. She was making progress with PT. Dr. Motz‘ impression was the same as the prior appointment. He believed that

Claimant would need a reverse total shoulder arthroplasty and characterized this as a chronic issue. Dr. Motz opined that the need for surgery was not related to the work injury two months ago and released Claimant from his care. There was no evidence Dr. Motz saw Claimant after that time. The ALJ inferred that Dr. Motz' opinion was that the surgery was reasonable and necessary, but not related to the industrial injury.

24. Claimant was evaluated by Nathan Faulkner, M.D. on October 2, 2020. At that time, she complained of persistent pain in the right shoulder, especially reaching across her body. She had not worked since the injury and denied any antecedent shoulder pain or dysfunction. This was not an accurate report of her prior medical history by Claimant. There was no evidence Dr. Faulkner had Claimant's prior treatment records from Kaiser at this evaluation.

25. Dr. Faulkner noted the MRI of August 21, 2020 showed a full-thickness tear of the supraspinatus and anterior infraspinatus retracted to the glenoid. There was a high-grade partial thickness tearing of the subscapularis with a large effusion. Grade 2 atrophy of the supraspinatus and subscapularis was present. Dr. Faulkner opined Claimant would benefit from an arthroscopic rotator cuff repair, as she had already ruptured her proximal biceps. In this report, Dr. Faulkner did not offer an opinion on relatedness or causation.

26. A surgery request was made by Dr. Faulkner on or about October 6, 2020. Authorization was requested for a right shoulder arthroscopy with debridement, subacromial decompression, rotator cuff repair, possible subscapular repair.

27. Respondents denied the request for authorization of the surgery.

28. Claimant was examined by John Sacha, M.D. on November 23, 2020. At that time, Dr. Sacha reviewed the MRI of the cervical spine, which showed straightening of her cervical lordosis and some mild disc degeneration at C5-6. On examination, cervical paraspinal spasm was noted, along with segmental dysfunction in the mid to lower cervical spine on the right side, with pain on extension, as well as extension rotation to the right. The examination of the right shoulder showed diminished range of motion and pain with Hawkins and Neer testing.

29. Dr. Sacha's impression was: cervical facet syndrome; history of rotator cuff tear; anxiety with adjustment disorder. Dr. Sacha misidentified the surgery proposed for Claimant-reverse arthroplasty. Dr. Sacha was concerned that Claimant was still wearing a shoulder sling and there was a high risk of Claimant developing adhesive capsulitis/worsening cervical symptoms due to prolonged use of a sling. Dr. Sacha was going to contact Dr. Faulkner to discuss discontinuing the sling.

30. Claimant returned to Dr. Sacha on December 14, 2020, at which time Claimant had cervical paraspinal spasm and segmental dysfunction was noted. Crepitus with ROM pain was noted with Hawkins and Neer testing. Dr. Sacha recommended right C4-7 facet injections.

31. On December 28, 2020, Dr. O'Brien performed an IME at the Respondents' request and concluded that Claimant had degenerative changes in her right shoulder, as evidenced by a high-riding humeral heard. Dr. O'Brien opined that this was an incurable condition, with symptoms of crepitus or pain that can wax and wane. These symptoms would progressively worsen until a reverse total shoulder arthroplasty is needed. Dr. O'Brien stated that the pre-injury MRI findings were consistent with a longstanding rotator cuff tear, including the findings of the high riding humeral head, re-mottling of the undersurface of the acromion, glenohumeral joint arthritic changes, moderate to severe subscapularis atrophy associated with fatty atrophy. He believed the August 2, 2020 assault was a temporary aggravation and she reached MMI on or before September 3, 2020, which was not a credible opinion to the ALJ.

32. Dr. O'Brien opined that the surgery Claimant required was a reverse total shoulder arthroplasty. This opinion about what procedure was required was consistent with Dr. Motz' opinion. Dr. O'Brien did not believe the arthroscopic surgery would succeed, which would potentially make a reverse total shoulder arthroplasty more difficult.

33. Sander Orent, M.D. was present as a medical chaperone during Dr. O'Brien's IME with Claimant. On January 5, 2021, Dr. Sander Orent drafted a Rebuttal to Dr. O'Brien's IME report. Dr. Orent disagreed with Dr. O'Brien's description of Claimant's functionality prior to the August 2, 2020 injury. Dr. Orent also disagreed with Dr. O'Brien's description of Claimant's current shoulder symptoms. Dr. Orent opined that Claimant suffered a major injury to her right shoulder on August 2, 2020 and that Claimant's need for right shoulder surgery was causally related to her injury on August 2, 2020. The ALJ noted Dr. Orent did not evaluate Claimant.

34. Dr. Faulkner testified by way of an evidentiary deposition that was taken on March 1, 2021. Dr. Faulkner was qualified as an expert in the field of orthopedic surgery and Level II-accredited. Dr. Faulkner testified that 60-70% of his practice is performing shoulder surgeries. Dr. Faulkner stated he reviewed the actual films of Claimant's right shoulder x-ray and MRI and noted that Claimant had a "full thickness tear of the supraspinatus, as well as infraspinatus and she had a high-grade partial tearing of her subscapularis, as well as proximal biceps rupture.

35. Dr. Faulkner said he believed that the findings were acute in a nature. However, Dr. Faulkner did not have Claimant's prior records from Kaiser Permanente to review and she denied any prior injuries when he evaluated her. Dr. Faulkner said that Claimant's rotator cuff tear was acute because she only had a mild amount of atrophy of the rotator cuff. Dr. Faulkner disagreed with the radiologist's reading of the August 21, 2020 MRI and stated the findings of severe muscle atrophy were wrong. Dr. Faulkner was well-qualified and his expertise in the area of shoulder surgery was persuasive to the ALJ. His opinion was hurt by his lack of review of the prior records from Kaiser.

36. Dr. Faulkner recommended Claimant undergo shoulder arthroscopy and rotator cuff repair surgery. Dr. Faulkner stated he recommended this type of surgery because of the acute traumatic nature of the rotator cuff tear and size. Dr. Faulkner said surgery was required to repair the structures in the shoulder. Dr. Faulkner also testified that Claimant had failed conservative treatment in the form of physical therapy and injections.

37. The ALJ found Dr. Faulkner did not discuss how potential contraindications would be addressed. Dr. Faulkner testified the criteria surgeons looked at to see if someone needed a replacement versus rotator cuff repair was the amount of humeral head subluxation versus how high-riding the humeral head was relative to the glenoid. He did not believe Claimant had mild humeral head migration. Dr. Faulkner agreed that in patients with more advanced cases of humeral head migration, these patients will not do well with rotator cuff repair that a reverse shoulder replacement was required.

38. Claimant testified the pain she felt in her right shoulder was worse after the August 2, 2020 fall. Claimant said she wanted to have the surgery recommended by Dr. Faulkner. Claimant was a credible witness when describing her pain.

39. On or about September 21, 2021, Claimant's medical images were reviewed by Dr. Piko, who prepared a report detailing his findings. Dr. Piko reviewed x-rays of the right shoulder from June 5, 2018 which showed osteopenia, a high-riding humeral head and acromial enthesophyte formation contributing to high grade subacromial arch stenosis; Impression-advanced osteoarthrosis. The December 5, 2019 x-ray showed persistent chronic osteoarthrosis and a high riding humeral head. The December 11, 2019 x-ray also showed persistent chronic osteoarthrosis and a high riding humeral head. The January 6, 2020 x-ray showed persistent chronic osteoarthrosis and a high riding humeral head; no acute fracture or dislocation.

40. Dr. Piko reviewed the films of the MRI of the right shoulder done on August 21, 2020, that showed a complete tear of the supraspinatus tendon, anterior infraspinatus tear, subscapularis tendon had diffuse partial thickness tearing, along with

attenuated biceps tendon. In addition, the superior labrum at the biceps labral anchor tendon was torn and the inferior axillary capsule had central disruption. The posterior banc of the inferior glenohumeral ligament was torn, consistent with a P-HAGL lesion. Low grade supraspinatus atrophy was present, along with fibrovascular marrow changes at the superior humeral head.

41. Dr. Piko concluded that Claimant had a chronic appearing rotator cuff tear. Cephalad migration of the proximal humeral head and high-grade subacromial arch stenosis was present, along with a large joint effusion and sub- deltoid/subacromial bursa fluid extravasation. A SLAP tear extended into the biceps tendon. While some fibers were present, this was essentially complete interstitial tear and the origin was indistinct. The subscapularis tendon had intermediate grade partial tearing.

42. Dr. Piko opined these findings appeared long-standing and the serial x-rays confirmed chronic rotator cuff tearing/insufficiency, as well as osteoarthrosis. Dr. Piko stated no significant changes over the course of these exams were present from before and after stated injury. Dr. Piko's opinion that Claimant's shoulder had no changes to the rotator cuff over the course of various x-rays and the MRI was persuasive to the ALJ.

43. Claimant proved surgery was required for her shoulder. Claimant did not prove that her need for arthroscopic shoulder surgery was reasonable and necessary and related to her work injury.

44. The ALJ concluded Claimant's need for surgery was the result of several factors, including her prior trauma, the preexisting degenerative changes in the right shoulder and the work injury of August 2, 2020.

45. The ALJ determined it was more probable than not that Claimant required a reverse total shoulder arthroplasty.

46. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). In this case, the question of whether Claimant was entitled to medical benefits turned on the opinions offered by the expert witnesses.

Medical Benefits

In the case at bench, Claimant had the burden of proof to show that the surgery proposed by Dr. Faulkner was reasonable, necessary and related to the industrial injury. Claimant asserted the injuries sustained when she was assaulted aggravated the underlying condition of her shoulder and necessitated the surgery. Claimant relied upon the expert opinion of Dr. Faulkner to support her claim that the work injury caused the need for surgery. Respondents, while admitting that she was injured on August 2, 2020, averred Claimant’s need for surgery was because of the degenerative changes in her shoulder. Respondents cited the opinions of Dr. Motz and Dr. O’Brien in support of their contentions. The question of whether Claimant proved by a preponderance of the evidence that they need for the arthroscopic surgery proposed by Dr. Faulkner was reasonable, necessary and related to her work injury required a review of her medical history, the trauma she sustained on August 20, 2020 and an evaluation of the respective opinions offered by the experts. The ALJ found Claimant did not meet her burden of proof that the surgery proposed by Dr. Faulkner was reasonable and necessary.

As a starting point, the ALJ found Claimant had degenerative changes in her right shoulder for which she required treatment before her August 2020 injury. As determined in Findings of Fact 2, 4-9, Claimant treated at Kaiser in 2017 and 2018 for right shoulder symptoms before her work-related injury. Claimant also required treatment in early 2019 and after a fall in November 2019, she treated in December 2019 and January 2020 at Kaiser for right shoulder issues. (Finding of Fact 7). The medical evidence in the record included x-rays taken in 2019 and 2020, in which the radiologist(s) noted the presence of a probable rotator cuff tear and osteoarthritis in the glenohumeral joint. (Findings of Fact 8-9). The ALJ concluded that these x-rays were objective evidence of degenerative changes in the right shoulder that were present before August 2020. No MRI was done before the 2020 injury.

Based upon the totality of the evidence, the ALJ found that the condition of Claimant‘s shoulder was the result of a combination of factors. (Finding of Fact 44). This included her degenerative changes and traumatic injury, as documented by the prior x-rays and need for treatment. *Id.* The ALJ also concluded Claimant suffered a significant injury on August 2, 2020 that caused an increase in her shoulder symptoms. (Finding of Fact 14). In this regard, the ALJ credited Claimant‘s testimony regarding her symptoms. (Finding of Fact 38). It is well-settled that a pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* (Colo. App. 1990). Therefore, while Claimant’s injuries on August 2, 2020 increased the symptoms in her shoulder, the objective evidence regarding damage to the structures of the shoulder showed that these were similar both before and after her injury. (Finding of Fact 42). As such, Claimant’s need for surgery was the result of all of these factors.

In this regard, the ALJ concluded that the evidence admitted at hearing established that surgery was required for Claimant’s right shoulder. (Finding of Fact 41). However, there was a conflict between the respective experts (Drs. Faulkner, Motz and O’Brien) as to what procedure needed to be performed and whether the condition of Claimant’s shoulder was related to the industrial injury. There were issue with regard to all of these experts’ credibility. Under the facts of this case, the ALJ concluded Claimant did not prove that an arthroscopic surgery was reasonable and necessary for her shoulder. The ALJ’s reasoning was two-fold. First, the ALJ determined that the surgical procedure required by Claimant was a reverse total shoulder arthroplasty. This was based upon the opinions of Dr. Motz (Finding of Fact 23), as well as Dr. O’Brien (Finding of Fact 32). Both experts concluded that Claimant had a high riding humeral head and this was the surgery she required. *Id.* The ALJ found these opinions more credible as to what surgery Claimant required.

The ALJ‘s conclusion was further based upon Dr. Faulkner‘s deposition testimony in which he agreed that if Claimant had a higher riding humeral head, a total shoulder arthroplasty was the procedure she required. (Finding of Fact 36). The ALJ determined the objective radiographic evidence established Claimant indeed had a high riding humeral head. This determination was based upon the final expert opinion of radiologist, Dr. Piko who, after reviewing all the films taken of Claimant‘s shoulder found, as follows:

- June 5, 2018: a high-riding humeral head; advanced osteoarthrosis.
- December 5, 2019: persistent chronic osteoarthrosis; a high riding humeral head.
- December 11, 2019: persistent chronic osteoarthrosis and a high riding humeral head.
- January 6, 2020: persistent chronic osteoarthrosis and a high riding humeral head.
- August 21, 2020 MRI: complete tear of the supraspinatus tendon; anterior infraspinatus tear, diffuse partial thickness tearing of subscapularis tendon; torn superior labrum at the biceps; torn labral anchor tendon; central disruption of inferior axillary capsule; torn posterior banc of the inferior glenohumeral ligament.

Accordingly, because the medical evidence showed that Claimant had a high riding humeral head, the ALJ concluded the proposed arthroscopic surgery was not reasonable and necessary.

Second, the ALJ also considered the DOWC MTG when evaluating the proposed surgery. Dr. Faulkner recommended a right shoulder arthroscopy with debridement, subacromial decompression, rotator cuff repair possible subscapular repair. (Finding of Fact 25). The Colorado Workers' Division of Workers' Compensation Medical Treatment Guidelines ("DOWC MTG") address surgical indications and potential contraindications for the surgery at issue here:

"Shoulder Injury Medical Treatment Guidelines

10. ROTATOR CUFF TEAR:

a. Description/Definition:

Partial or full-thickness tears of the rotator cuff tendons, most often the supraspinatus, can be caused by vascular, traumatic or degenerative factors or a combination. Further tear classification includes: a small tear is less than 1cm; medium tear is 1 to 3cm; large tear is 3 to 5cm; and massive tear is greater than 5cm, usually with retraction. Partial thickness cuff tears usually occur in age groups older than 30. Full-thickness tears can occur in younger age groups; however, they are uncommon. Approximately 25% of asymptomatic patients over 60 have full thickness tears and between 40-60% have partial thickness tears. About 50% of those with asymptomatic full thickness tears will become symptomatic with tear progression in 2 years. This is more common with larger initial tears. Only about 10% of partial tears increase in size over time. Tendons

> do not repair themselves over time. The patient usually complains of pain along anterior, lateral shoulder or posterior glenohumeral joint."

...

"f. Surgical Indications:

> "Goals of surgical intervention are to restore functional anatomy by re-establishing continuity of the rotator cuff, addressing associated pathology and reducing the potential for repeated impingement.

...

> If no increase in function for a partial tear is observed after 6 to 12 weeks, a surgical consultation is indicated. For full-thickness tears, it is thought that early surgical intervention produces better surgical outcome due to healthier tissues and often less limitation of movement prior to and after surgery. Patients may need pre-operative therapy to increase ROM.
>
> Full thickness tears are uncommon in the 40-60 age groups. About 25% of asymptomatic patients over 60 will have a full thickness tear. Full-thickness tears greater than 1 cm, in individuals less than 60 should generally be repaired. Smaller tears appear to show less likelihood of progression (25%). Only about 10 percent of partial tears increase in size over time. The recovery rate for those with a full thickness tear without surgery is 60%. **In patients over 65 the decision to repair a full rotator cuff tear depends on the length of time since the injury, the amount of muscle or tendon that has retracted, the level of fatty infiltration and the quality of the tendon.** For patients with lack of active elevation above 90 degrees, arthroscopic biceps tenotomy may be effective in returning some elevation. The recurrence rate may be up to 50% in older patients with multiple tendon full-thickness tears. Pseudo paralysis or severe rotator cuff arthropathy are contraindications to the procedure." [Emphasis added]

The foregoing section of the DOWC MTG set forth the criteria to be evaluated in patients over the age of sixty-five when rotator cuff repair is being considered. The evidence in the form of the MRI revealed multiple structures within the shoulder joint, which had tears and degeneration. (Findings of Fact 19, 41-42). As found, Dr. Faulkner's testimony did not address these conditions in detail and also did not address the concern about atrophy, other than to say he disagreed with the radiologist's interpretation as to the degree of muscle atrophy. (Findings of Fact 35-36). Dr. Faulkner did not explicitly articulate how potential contraindications would be addressed. In fact, Dr. Faulkner stated he would have additional x-rays taken and agreed if Claimant had a high riding humeral head, a reverse shoulder arthroplasty was required. (Finding of Fact 36). The contraindications referenced by the DOWC MTG were not addressed and the conclusion that Claimant requires a different surgical procedure provide an additional basis for denial. Accordingly, Claimant’s request for medical benefits will be denied.

ORDER

It is therefore ordered:

1. Claimant’s request for payment of the arthroscopic repair of the torn rotator cuff in her right shoulder is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

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

DATED: May 23, 2022

STATE OF COLORADO

Digital signature

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Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-064-648-002

ISSUES

1. Whether Claimant has proven by clear and convincing evidence that the DIME physician's opinion that Claimant has reached maximum medical improvement is incorrect.

2. If Claimant overcomes the DIME opinion regarding MMI, whether Claimant is entitled to temporary disability benefits.

3. If Claimant overcomes the DIME opinion, whether Claimant is entitled to medical benefits.

4. If Claimant fails to overcome the DIME, whether Claimant has overcome the DIME opinion with respect to permanent partial disability impairment rating.

5. If Claimant fails to overcome the DIME, whether Claimant has proven by a preponderance of the evidence that she is entitled to maintenance medical benefits.

6. Respondents' entitlement to offset for overpayments.

PRELIMINARY ISSUE

At hearing, the ALJ granted Claimant's oral motion to withdraw the issue of disfigurement without prejudice with leave to refile due to the fact that Claimant appeared by telephone without video sufficient to permit the ALJ to make a disfigurement ruling.

FINDINGS OF FACT

1. Claimant is a 57-year-old woman who worked for Employer for approximately 17 years. On September 26, 2017, Claimant was working in the mailroom for Employer when her foot became entangled in a floormat causing Claimant to fall into a large mail-sorting machine striking her shoulder and hip and twisting her right knee.

2. Claimant first sought medical treatment for her September 26, 2017 work accident at UC Health on October 27, 2017. Claimant reported injuries to her right knee, right hip, and right shoulder after tripping over a floor mat during the course of her employment. (Ex. C). On examination, Claimant had decreased range of motion in her right shoulder but no tenderness, swelling or deformity. Claimant's right hip showed decreased range of motion and tenderness with normal strength. Her right knee had normal range of motion without swelling or effusion, with tenderness over the MCL and patellar tendon. Assessment was fall with multiple contusions and strains to right foot, right knee, right hip and right shoulder." Physical therapy was recommended. (Ex. C).

3. Claimant began a course of physical therapy at Pro Active Physical Therapy and Sports Medicine and completed six sessions from November 1 through November 17, 2017. (Ex. C).

4. Over the course of the next three years, Claimant's authorized treating physician (ATP), was James Rafferty, M.D., at UC Health. Dr. Rafferty saw Claimant approximately twenty-nine times during this time frame, the first being in approximately June 2018. Prior to that time, Claimant was seen by other providers at UCH. No records from Dr. Rafferty or UCH are included in the Court record prior to May 20, 2019. (Ex. 1).

RIGHT KNEE

5. Around the first of November 2017, Claimant slipped and fell on ice while taking trash to a dumpster during the course of her employment with Employer. On November 17, 2017, Claimant returned to UCH and reported failing approximately two weeks prior, landing on her right knee, and twisting the medial aspect of her right knee. She noted that her hip discomfort had improved. (Ex. C).

6. On November 28, 2017, Claimant had an MRI of her right knee that showed a focal horizontal tear of the right knee medial meniscus and the junction of the body and the posterior horn and trace joint effusion. (Ex. 1).

7. On December 12, 2017, Claimant saw David Beard, M.D., at Orthopaedic & Spine Center of the Rockies (OSCR). Claimant's right knee had no obvious effusion, and was stable to testing, with some pain on McMurray's testing. Dr. Beard reviewed Claimant's November 28, 2017 MRI. Dr. Beard diagnosed Claimant with a right knee meniscal tear and recommended an arthroscopic partial medial meniscectomy. Dr. Beard's report from does not expressly state whether Claimant's right knee meniscal tear was related to her September 26, 2017 work accident. (Ex. 4).

8. On February 6, 2018, Dr. Beard performed a right knee arthroscopy with a partial medial meniscectomy. Dr. Beard's operative report indicates that he visualized the medial meniscus and there was only partial-thickness tearing of the superior surface of the posterior horn of the meniscus, and less than 5% of the meniscus was removed. Dr. Beard did not identify any additional meniscal pathology. (Ex. 4).

9. On March 23, 2018, Claimant again saw Dr. Beard, reporting that she fell on her right knee shortly after her sutures were removed. Dr. Beard indicated that Claimant would follow up with a different provider for "determination of her MMI and her impairment rating." Based on this statement, the ALJ infers that Dr. Beard attributed Claimant's knee injury to her September 26, 2017 work accident. (Ex. 4).

10. On May 2, 2018, Claimant saw Dr. Beard for a follow up on her right knee and he noted minor soft tissue swelling near the surgical incisions without ecchymosis or effusion. Claimant had full range of motion and negative testing, with tenderness to palpation along the medial femoral condyle. Dr. Beard recommended that Claimant follow up with her workers' compensation provider and return to him as needed. (Ex. 4).

11. On June 14, 2018, Claimant had a right knee MRI which showed an ill-defined tear of the medial meniscal body. (Ex. 1). (The medical records in evidence do not identify the provider who ordered the June 14, 2018 MRI or the indications for the MRI.)

12. On July 31, 2018, Claimant returned to Dr. Beard reporting persistent knee pain. On examination, Claimant had a small amount of soft tissue swelling around the surgical incisions, but an otherwise negative examination. Dr. Beard indicated that there was no indication for an additional surgery and that she should follow up with her workers compensation provider for determination of MMI and an impairment rating, "as deemed appropriate." (Ex. 4).

13. On November 7, 2018, Claimant saw Kirk Kindsfater, M.D. at OSCR for evaluation of continued right knee pain. (Claimant was referred to Dr. Kindsfater by Dr. Reichhardt for a shoulder evaluation, but Dr. Kindsfater did not evaluate Claimant's shoulder). Dr. Kindsfater reviewed Claimant's June 2018 right knee MRI and noted a potential intrasubstance tearing, although the MRI was of poor quality. The MRI showed moderate patellofemoral arthrosis and early advanced arthrosis along the medial patellofemoral articulation. Dr. Kindsfater recommended a repeat arthroscopic debridement of the right knee. (Ex. 4).

14. On January 4, 2019, Claimant had a right knee MRI performed which showed a radial tear of the posterior horn of the medial meniscus and mild adjacent stress-related edema. (Ex. 1). (The MRI report was ordered by Dr. Rafferty. However, no records from Dr. Rafferty before May 20, 2019 are in the record before the Court.).

15. On January 14, 2019, Dr. Kindsfater reviewed Claimant's January 4, 2019 MRI. He noted that Claimant had a radial tear of the posterior horn of the medial meniscus without other significant pathology, and recommended a right knee arthroscopy with partial medial meniscectomy. (Ex. 4).

16. Claimant returned to Dr Kindsfater on February 27, 2019 at which time he noted that Claimant was a good candidate for a right knee arthroscopy. Dr. Kindsfater did not address whether Claimant's knee pathology observed on the MRI and the need for treatment were related to her work-injury. (Ex. 4).

17. On March 4, 2019, Dr. Kindsfater performed a right knee arthroscopy for a "recurrent tear" of the posterior horn of Claimant's medial meniscus. In his April 11, 2019 report, Dr. Kindsfater referred to Claimant's surgery as "a Work Comp scope." Claimant continued to report pain in her knee following surgery in the medial side of the joint. Dr. Kindsfater's examination of Claimant's knee was unremarkable with the exception of mild effusion. He was unsure why Claimant continued to have pain while walking, and that grade II arthrosis was identified intraoperatively. (Ex. 4).

18. On May 2, 2019, Claimant again saw Dr. Kindsfater. On examination he noted medial joint line tenderness, and a small-to-moderate amount of effusion, but no other positive findings. X-rays demonstrated interval narrowing of the medial joint space and a mild subchondral irregularity and advancing chondrosis/chondrolysis (cartilage

breakdown) of the medial joint. He aspirated Claimant's knee and recommended a steroid injection. He noted that if Claimant had further progression of her chondrolysis, she would be a candidate for knee arthroplasty in the near future. The right knee steroid injection was performed on May 6, 2019. (Ex. 4).

19. Claimant returned to Dr. Kindsfater on June 3, 2019, with continued knee pain. She reported approximately one and one-half weeks of relief with the steroid injection. Claimant had mild effusion of the knee and mild limitations in range of motion with an audible, painful popping in the knee on a squatting and rotation movement. He noted that Claimant's knee appeared to be getting worse, with some advancement of right medial compartment arthrosis and a slight irregularity of the medial femoral condyle on x-rays. (Ex. 4). Due to the advancement in Claimant's right knee arthrosis, Dr. Kindsfater recommended that Claimant consider a total knee arthroplasty (TKA). On September 23, 2019, Dr. Kindsfater submitted a request to Insurer for authorization of a right knee total arthroplasty. The stated diagnosis was primary osteoarthritis of right knee, osteoarthritis of the right knee, and degeneration disease of medial meniscus of right knee.

20. On July 23, 2019, Claimant had a right knee MRI that showed longitudinal tearing of the posterior remnant, which was new when compared to the January 2019 MRI. Additionally, the MRI showed chondral thinning, fissuring and erosion of the peripheral portion of the medial tibia and femur with mild bone reactive changes, which had also progressed since the prior study. (Ex. 3).

21. In his August 30, 2019 treatment note, Dr. Rafferty noted although Claimant's knee arthritis was not caused by her accident on September 26, 20167, her TKA would be the only available option to cure her of the effects of her work-related injury. (Ex. 1).

22. On September 23, 2019, Claimant underwent a right hybrid TKA performed by Dr. Kindsfater. The operative report indicates that Claimant had a rapid progression of symptoms and had developed "endstage arthrosis." (Ex. 4).

23. On November 21, 2019, Dr. Kindsfater responded to a letter from Respondents' counsel and indicated Claimant was not at MMI , that the anticipated date of MMI was September 2020, and that Claimant's anticipated return to work was January 2, 2020. (Ex. 4).

24. On February 13, 2020, Dr. Kindsfater examined Claimant's right knee and noted a relatively benign examination, with excellent range of motion and mild soft tissue thickening, with some tenderness over the IT band and patella. His impression was stable knee arthroplasty on the right, with mild patellofemoral disease on the left. (Ex. 4).

25. Claimant was seen by Ian Weber, M.D., on referral from Dr. Rafferty for evaluation of her right knee on May 15, 2020, June 3, 2020, and August 21, 2020. At the May 15, 2020 visit, Dr. Weber reviewed x-rays of Claimant's right knee and noted that she had a Depew TKA, with correct positioning and correct alignment. He noted that the component sizes looked "excellent" and that there were "[n]o abnormalities with fractures or any other type of issues." Claimant reported some pain and swelling of the knee, and Dr. Weber

noted “a little mid flexion instability.” By her August 21, 2020 visit, Dr. Weber found Claimant had “severe valgus instability at about 45 she is gotten [sic] easily 5-10mm in each direction. She also has lack of full extension and she is short about 10°.” Dr. Weber recommended that Claimant undergo a knee revision and that he believed the “tibial component will be loose” and “this type of knee system does have a track record of early tibial loosening.” (Ex. 7).

RIGHT SHOULDER

26. X-rays of Claimant’s right shoulder were performed on November 17, 2017, which showed no acute bony abnormality of the shoulder, and moderate osteoarthritis of the AC joint with small subacromial enthesophyte and inferiorly directed osteophytes. (Ex. 1).

27. On November 28, 2017, Claimant had an MRI of her right shoulder which showed mild to moderate right shoulder insertional tendinopathy with shallow infraspinatus bursal-sided fraying and undersurface tearing at the insertion. No full thickness rotator cuff tear, trace subacromial-subdeltoid bursitis and acromioclavicular joint osteoarthritis with a small subacromial spur.

28. At her December 12, 2017, appointment with Dr. Beard, Claimant had full strength and range of motion of the right shoulder and a mildly positive Hawkins test. Other shoulder testing was negative. He reviewed Claimant’s November 28, 2017 MRI studies of her right shoulder and noted the MRI showed supraspinatus and infraspinatus tendinopathy, but no evidence of high-grade partial or full-thickness rotator cuff tearing, and some acromioclavicular joint osteoarthritis. The biceps tendon and labrum were normal. Based on his examination, Dr. Beard diagnosed Claimant with a right shoulder rotator cuff contusion without evidence of tearing. He indicated that no surgical intervention of the right shoulder was recommended. Dr. Beard’s report does not address whether Claimant’s right shoulder injury was work-related. (Ex. 4).

29. On February 13, 2018, Dr. Beard performed a steroid injection in Claimant’s right shoulder subacromial space. (Ex. 4). As a result of the injection, Claimant, who is diabetic, experienced an increase in her glucose levels, which disqualified her from additional steroid injections. (See Ex. 1, 4/1/20 Rafferty Note).

30. On March 23, 2018, Claimant again saw Dr. Beard and reported that the steroid injection in her right shoulder gave approximately one week or relief, but that her symptoms recurred. Dr. Beard did not recommend any further surgical intervention and recommended against another shoulder injection given the resulting increase in her glucose levels. He indicated that Claimant would follow up with a different provider for “determination of her MMI and her impairment rating.” Based on this statement, the ALJ infers that Dr. Beard attributed Claimant’s shoulder injury-to her September 26, 2017 work accident. (Ex. 4).

31. On June 21, 2018, Claimant saw Gregory Reichhardt, M.D., on referral from James Rafferty, M.D[1]. Claimant reported pain over the lateral shoulder with popping on

[1] No records from Dr. Rafferty

abduction and chest pain over the right periscapular area. Claimant also reported pain over her hip. Examination of Claimant's right shoulder demonstrated no tenderness to palpation over the shoulder, but tenderness over the right periscapular area with trigger points. Dr. Reichhardt diagnosed Claimant with right shoulder pain, right hip pain, and right knee pain, all of which he attributed to her September 26, 2017 work fall. (Ex. 2).

32. At appointments with Dr. Reichhardt on July 30, 2018, September 4, 2018 and September 20, 2018, Claimant's shoulder symptoms were primarily trigger points in the periscapular area, without reported symptoms in the shoulder joint. (Ex. 2).

33. On October 4, 2018, Dr. Reichhardt found a moderately positive right shoulder Hawkins' impingement sign, and mildly limited range of motion. Claimant continued to complain of right hip tenderness to palpation. (Ex. 2).

34. On December 18, 2018, Claimant saw Rose Christensen, PA-C, at Western Orthopaedics for evaluation of her right shoulder. Ms. Christensen is a physician assistant for Armodios Hatzidakis, M.D., and orthopedist. Ms. Christensen's diagnosis was a right shoulder strain with compounding post-traumatic stiffness of symptomatic AC joint arthrosis with possible rotator cuff pathology. Ms. Christenson ordered an MRI with gadolinium to evaluation Claimant's shoulder further. (Ex. 6).

35. Claimant returned to Dr. Reichhardt on December 19, 2019 for a follow up evaluation and reported continued pain over the right shoulder extending along the upper trapezius. Claimant requested a compounded cream for her shoulder and hip, which Dr. Reichhardt requested. He noted that if the compounded cream were not effective, Claimant would like to consider a PRP injection for her gluteal tendons. (Ex. 2). Insurer denied Claimant's request for a compounded cream and the PRP injection.

36. On February 18, 2019, Claimant had another right shoulder MRI performed. The MRI showed mild right shoulder supraspinatus and infraspinatus insertional tendinopathy, and no evidence of a rotator cuff tear. The radiologist noted that Claimant's tendinopathy appeared improved when compared to her 2017 MRI. The MRI also showed trace subacromial-subdeltoid bursitis, and mild acromioclavicular joint osteoarthritis. (Ex. 1)

37. On April 9, 2019, Claimant was seen by Armodios Hatzidakis, M.D., for evaluation of her right shoulder. Based on his examination, Dr. Hatzidakis diagnosed claimant with right shoulder adhesive capsulitis with degenerative joint disease of the acromioclavicular joint. He recommended that Claimant undergo physical therapy for her shoulder, and discussed arthroscopic manipulation under anesthesia to address the adhesive capsulitis. (Ex. 6).

38. On April 11, 2019, Claimant saw Dr. Reichhardt, and noted new tenderness over the lateral epicondyle of the right shoulder. Dr. Reichhardt also indicated Claimant had decreased shoulder range of motion, with 140 degrees of shoulder forward flexion. However, Claimant's shoulder forward flexion had improved from 90 degrees measured on February 26, 2019. (Ex. 2).

39. Between June 4, 2019 and September 29, 2020, Claimant saw Dr. Reichhardt three times, with essentially unchanged complaints of shoulder pain. At his July 24, 2019 visit, Claimant reported bilateral shoulder pain, and Dr. Reichhardt noted limitations in bilateral range of motion and positive Hawkins' impingement signs bilaterally. (Ex. 2).

40. Between June 17, 2019 and April 1, 2020, Claimant saw Dr. Rafferty approximately monthly, Dr. Rafferty documented physical examinations of Claimant's shoulder only on June 17, 2019 and June 25, 2019. On June 17, 2019, Dr. Rafferty's diagnosis of Claimant's right shoulder was impingement syndrome, acromioclavicular joint osteoarthritis, and myofascial strain trapezius muscle. On November 21, 2019, Dr. Rafferty added subacromial bursitis to his assessment of Claimant's right shoulder. As of April 1, 2020, Dr. Rafferty's assessment of Claimant's right shoulder was impingement syndrome, acromioclavicular joint osteoarthritis, myofascial strain and subacromial bursitis. (Ex. 1).

41. On May 5, 2020, Claimant saw Dr. Hatzidakis and Claudine Richter, PA-C. Dr. Hatzidakis discussed "definitive treatment" for Claimant's right shoulder being "arthroscopic debridement, distal clavicle resection with capsular scar release and manipulation under anesthesia." (Ex. 6).

42. On May 6, 2020, Dr. Rafferty authored a letter in response to correspondence from Respondents' counsel. Dr. Rafferty opined that Claimant has not yet reached MMI from her September 26, 2017 injuries. He indicated that there continued to be treatment available for Claimant's right shoulder impingement syndrome and AC joint osteoarthritis, including possible surgery recommended by Dr. Hatzidakis. Similarly, he indicated that additional treatment for Claimant's hip, including PRP injections and compounded cream, which had been recommended but denied by Insurer. With respect to Claimant's right knee, Dr. Rafferty indicated that Claimant required a second opinion from Ian Weber, M.D., regarding potential additional treatment for ongoing knee symptoms following her TKA. He opined that Claimant could return to work with restrictions, including a 20-pound lifting/carrying restriction, no repetitive lifting, no crawling, kneeling, squatting, or climbing, seated work only, and the ability to change positions at will. (Ex. 1).

43. Claimant saw Dr. Rafferty on May 8, 2020 and June 4, 2020, without documenting an examination of Claimant's right shoulder. (Ex, 2)

44. On July 2, 2020, Dr. Hatzidakis responded to questions posed by Respondents' counsel via letter. Therein he indicated that he did not believe Claimant was at MMI and that Claimant had a right shoulder strain and resultant symptomatic AC arthrosis and adhesive capsulitis which had not fully resolved with conservative care. He indicated that no permanent impairment could be assessed because Claimant was not at MMI and that maintenance medical care was appropriate, consisting of "continued conservative care vs. surgery as proposed." (Ex. 6).

45. On July 2, 2020, Dr. Rafferty issued a report in which he addressed causation of Claimant's right shoulder, right hip, and right knee injuries. With respect to Claimant's right shoulder, Dr. Rafferty attributed Claimant's right shoulder impingement syndrome

and myofascial strain to her work injury based on the timing of the complaints. He indicated that her acromioclavicular osteoarthritis "appeared to be work-related secondary to event at work on 09/26/17" without further analysis. He opined that Claimant's partial-thickness rotator cuff tear was unrelated to her work and that trace subacromial bursitis was "possibly work-related." (Ex. 1)

46. With respect to Claimant's right hip, he opined her piriformis syndrome, gluteus tendinopathy, trochanteric bursitis and possible labrum tear were work-related "secondary to work-related trauma; twisting left on planted right foot." (Ex. 1). He also opined that her right knee meniscus tear was work-related secondary to trauma, and her right knee osteoarthritis pathology was not work-related, but "appears to be a symptomatic aggravation of this condition." (Ex. 1).

RIGHT HIP

47. On March 20, 2018, Claimant had an x-ray of her right hip performed that showed mild right hip osteoarthritis. (Ex. 1).

48. On July 2, 2018, Dr. Reichhardt performed trigger point injections in Claimant's right hip and indicated if her hip pain did not improved, he would consider a hip MRI arthrogram. When Claimant returned to Dr. Reichhardt on July 30, 2018, she reported that her hip pain was improved, and he performed additional trigger point injections in the shoulder musculature. (Ex. 2).

49. On November 20, 2018, Claimant had a right hip MRI which showed bilateral gluteus medius and minimus tendinopathy with mild bilateral greater trochanteric bursitis. (Ex. 1). Dr. Reichhardt reviewed Claimant's right hip MRI at his November 26, 2018 office visit and noted that the MRI showed no labral tear. He revised his diagnosis of Claimant's hip to include possible trochanteric bursitis and insertional gluteus medius and minimis tendinopathy with possible myofascial involvement.(Ex. 2).

50. On June 4, 2019, Claimant saw Dr. Reichhardt. Claimant indicated she would like to consider a PRP injection for her right hip, and Dr. Reichhardt indicated she was a reasonable candidate for the procedure for treatment although the Colorado workers' compensation treatment guidelines do not discuss PRP for this purpose. Dr. Reichhardt also noted that Claimant could not have additional steroid injections because of adverse reactions related to Claimant's pre-existing diabetes. (Ex. 2). Later, in his July 24, 2019 note, Dr. Reichhardt indicated that the PRP is not a recommended treatment for gluteal tendinosis, but for ,

51. On June 29, 2019, Claimant saw Julie Quickert, APRN, for consideration of PRP injections. Ms. Quickert recommended a PRP injection in the right gluteal tendon insertion site. (Ex. 5).

52. On July 30, 2019, Dr. Rafferty authored a letter to Respondent's third-party administrator, advocating for a PRP injection for Claimant's right hip. He noted that Claimant has MRI evidence of gluteal tendon pathology and trochanteric bursitis, and had not responded to conservative measures. (Ex. 1).

53. On August 26, 2019, Dr. Reichhardt authored a letter to Respondents' counsel addressing questions posed to him. He deferred the determination of MMI to Dr. Rafferty, and indicated that while he would recommend PRP injections to her hip, he would defer to Dr. Rafferty on this issue as well. (Ex. 2).

54. On November 3, 2020, Respondents filed a Final Admission of Liability (FAL) admitting for medical and temporary disability benefits paid to date. Respondents asserted an overpayment of $9,396.04 for overpayment of TTD benefits. (Ex. A). The FAL states that Claimant was paid $64,699.13 in TTD when Claimant should have been paid $55,303.09. The FAL provides a calculation of Claimant's TTD benefits for the periods of December 20, 2017 through March 20, 2018, and March 4, 2019 through June 20, 2019 at $580.33 per week, and from July 1, 2019 to June 22, 2020 at the rate of $683.64 per week. Claimant did not present evidence or argument contesting overpayments for Claimant's TTD benefits. Claimant applied for social security disability (SSDI) benefits, but her claim was denied. Claimant appealed the denial in 2020, but has not received a response to the appeal. No evidence exists that Claimant has received SSDI benefits that would entitle Respondents to offsets against future benefits for SSDI benefits.

EXPERTS

DIME PHYSICIAN – BRADLEY ABRAHAMSON, M.D.

55. On October 20, 2020, Claimant underwent a Division Independent Medical Examination (DIME), with Bradley S. Abrahamson, M.D. Dr. Abrahamson opined that as a result of her September 26, 2017 work accident, Claimant's only injuries were contusions to the right shoulder, right hip, right knee and possibly the ankle. He further opined that Claimant had no permanent impairment as a result of her work accident. (Ex. 9).

56. Dr. Abrahamson opined that Claimant's right horizontal meniscal tear was degenerative in nature and not likely caused by Claimant's work injury. He indicated that a focal horizontal medial meniscus tear in a middle-aged to older adult is considered a degenerative tear and often an incidental finding. Despite his opinion that Claimant's horizontal meniscal tear was degenerative in nature, he opined that Claimant's initial knee arthroscopy was reasonable as a "diagnostic and potentially therapeutic work-related procedure." Because the meniscus was stable at the time of the initial arthroscopy, Dr. Abrahamson opined that the subsequent knee surgeries should not be considered work-related. He determined that while Claimant does need further care, including a likely revision to her TKA, such treatment is not work-related. (Ex. 9).

57. Dr. Abrahamson reviewed Claimant's imaging studies of her right shoulder and opined that the findings of insertional tendinopathy, bursitis and AC joint osteoarthritis were degenerative in nature. He opined that while the undersurface tearing at the insertion of the infraspinatus "could" be traumatic, but in his opinion, it would been more painful and limited Claimant from lifting a cup of coffee if it were traumatic.

58. Dr. Abrahamson also reviewed Claimant's right hip imaging studies and concluded that her right hip tendinopathy was likely the result of a long process of inflammation, and most likely chronic, non-traumatic findings.

59. With respect to Claimant's shoulder, hip and ankle, Dr. Abrahamson opined that Claimant sustained contusions to these areas that did not result in permanent impairment, and that physical therapy and physiatry consultations were reasonable and work-related. He found that Claimant had no work restrictions. (Ex. 9).

60. Dr. Abrahamson found that although he found that Claimant sustained only contusions, which should resolve within 8-10 weeks, Claimant continued to have pain beyond that point. He assigned an MMI date of June 23, 2020, in agreement with Dr. Farber.

ADAM FARBER, M.D.

61. Adam Farber, M.D., performed an independent medical examination (IME) at Respondents' request on June 23, 2020 and issued a report of the same date. Subsequently, Dr. Farber prepared eight addenda to his initial report between July 6, 2020 and January 18, 2021. (Ex. C). Dr. Farber was admitted as an expert in orthopedic surgery, and his testimony was presented through two depositions, dated September 30, 2020 and March 29, 2021. (Ex. E).

62. As part of his initial IME, Dr. Farber performed a physical examination of Claimant and reviewed medical records. Dr. Farber opined that, as a result of Claimant's September 26, 2017 work injury, she sustained contusions to the right knee, right hip, and right shoulder, each of which had resolved, as well as a right ankle sprain. He also noted "[d]iffuse multifocal complaints of multiple joints with subjective complaints out of proportion to objective findings." Dr. Farber also opined that Claimant's two partial meniscectomies and the TKA were work related, based on the fact that the surgeries were reportedly "covered" by her workers' compensation carrier. In addition, Claimant had the following pre-existing conditions:

- Fibromyalgia
- History of right shoulder adhesive capsulitis requiring manipulation under anesthesia
- Type 1 diabetes mellitus
- Right shoulder acromioclavicular joint osteoarthritis (degenerative)
- Mild right knee tricompartmental osteoarthritis (degenerative)
- Right shoulder rotator cuff tendinopathy (degenerative)
- Right knee horizontal medial meniscal tear (degenerative)

- Bilateral hand trigger fingers
- Bilateral hip gluteal tendinopathy (degenerative)

63. Dr. Farber opined that Claimant's described mechanism of injury is not consistent with the development of rotator cuff tendinopathy, shoulder impingement syndrome, or acromioclavicular arthrosis. Dr. Farber indicated that rotator cuff tendinopathy is "a degenerative condition affecting the tendons of the rotator cuff, but not a post-traumatic entity." He also opined that shoulder impingement syndrome is an overuse condition resulting from repetitive overhead arm activities, and not a post-traumatic condition. Acromioclavicular joint disease is also a degenerative condition that is not the result of trauma except where there is evidence of AC joint separation or a distal clavicle fracture, which did not occur. He indicated that Claimant's mechanism of injury is consistent with a right shoulder contusion, that imaging studies demonstrated no acute structural pathology. Ultimately, he opined that Claimant's right shoulder symptoms and examination are consistent with myofascial pain likely due to pre-existing fibromyalgia.

64. Dr. Farber opined that Claimant had reached MMI for her work-related conditions and that there was no evidence of any permanent impairment of her right shoulder, ankle, or hip. With respect to Claimant's right knee, Dr. Farber indicated that because her right knee procedures were related, he assigned a 34% lower extremity permanent impairment. In reaching his impairment rating, Dr. Farber assigned a 20% impairment for Claimant's TKA, and 14% for range of motion for a combined 34% lower extremity permanent impairment. Dr. Farber indicated that Claimant required no medical maintenance care for her right shoulder, ankle, or hip. However, he did believe that lifetime medical maintenance was warranted for arthroplasty surveillance purposes, consisting of annual orthopedic evaluation and x-rays of the knee. Additionally, should Claimant require surgical intervention for hardware failure, it would be considered maintenance medical care.

65. Dr. Farber indicated that PRP injections are not reasonable or necessary and that there is no convincing evidence in medical literature to support the use of such injections for non-arthritic hip pathology.

66. In his addenda, Dr. Farber disagreed with Dr. Hatzidakis' assessment of shoulder adhesive capsulitis. Although Claimant had radiographic evidence of AC joint arthrosis, such findings are common in the general population and usually an incidental finding. Dr. Farber did not feel that Claimant's clinical symptoms were consistent with symptomatic AC Joint arthrosis.

67. In his September 30, 2020 deposition, Dr. Farber testified that there is no objective medical evidence that Claimant requires surgical intervention of her right shoulder. Dr. Farber testified that Claimant's multiple shoulder complaints to not correlate with a diagnosis, and that the Claimant's response to trigger point injections in the trapezius and shoulder blade are "not indicative of an intra-articular problem that can benefit from surgery." He testified that Claimant's shoulder symptoms were more likely myofascial symptoms that cannot be addressed or fixed with surgery.

68. In his July 20, 2020 addenda and testimony, Dr. Farber opined that there was no objective evidence to support a diagnosis of mid-flexion instability of the right knee arthroplasty and that there was no objective evidence to support a revision to her total knee replacement regardless of whether the total knee replacement was causally related to her industrial injury.

JAMES RAFFERTY, M.D.

69. Dr. Rafferty's testimony was presented by deposition and he was admitted to testify as an expert in occupational medicine. Dr. Rafferty first saw Claimant on April 17, 2018, and prior to that she was seen by a UCH physician assistant on three occasions. (Records from these visits were not offered or admitted into evidence). Dr. Rafferty saw Claimant approximately 29 times. With respect to Claimant's right knee, Dr. Rafferty testified that Claimant had consistent pain since her initial visit that had not been relieved despite three knee surgeries, that Claimant been doing poorly since her TKA and that her symptoms were unusual in that they had not resolved. He opined that Claimant's right knee injury is work related, but offered no analysis or rationale for the opinion.

70. Dr. Rafferty testified that he agreed with Dr. Farber that none of the imaging study findings of Claimant's right knee were a direct result of Claimant's work-related injury. However, he disagreed that the symptoms Claimant has reported are not work-related. Dr. Rafferty testified that Claimant's September 26, 2017 work injury "aggravated, accelerated, or combined with her preexisting conditions to cete the necessity for treatment.

71. With respect to Claimant's right shoulder, Dr. Rafferty testified that Claimant failed all attempts at conservative care, including a subacromial injection in 2017 by Dr. Beard. Because of Claimant's diabetes, she is unable to receive additional injections. Dr. Rafferty testified that Claimant's right shoulder injury is work-related, but provided no analysis or rationale for the opinion.

72. With respect to Claimant's right hip, Dr. Rafferty testified that Claimant had not responded sufficiently to the treatment she had received for trochanteric bursitis, tendinopathy of the gluteus medius and minimus muscles. He testified that if Claimant were not diabetic, she would be a candidate for steroid injections. He testified he requested PRP (platelet rich plasma) injections because Claimant is not a candidate for steroid injections in her hip, and that such injections are supported by literature, although the use of PRP for trochanteric bursitis or gluteus medius tendinopathy is not addressed in the workers' compensation treatment guidelines. Additionally, he requested a compounded cream for trochanteric bursitis because Dr. Reichhardt requested the treatment. Dr. Rafferty testified that use of a compounded cream was "a crapshoot" and "[t]here is no way to predict whether or not one is going to respond satisfactorily to them. They are used on a trial basis." He testified that Claimant is a surgical candidate for her right hip as long as her diabetes is controlled.

73. Dr. Rafferty testified that Claimant's right knee, right shoulder and right hip injuries are work-related. When expressing the opinion, Dr. Rafferty did not provide a rationale for the opinion. With respect to Claimant's hip, he testified that Claimant's trochanteric bursitis was work related, but did not otherwise specify the diagnoses he attributed to her work injury. He opined that Claimant is not at MMI for these conditions because "there is still treatment available to her on each of those three conditions."

JOHN HUGHES, M.D.

74. On January 12, 2021, Claimant John Hughes, M.D., performed an independent medical examination of Claimant at Claimant's request and issued a report of the same date. Dr. Hughes' testimony was presented by deposition, and he was admitted to testify as an expert in occupational medicine.

75. Based on his examination and review of records, Dr. Hughes opined that Claimant sustained work-related right knee sprain/strain with development of a medial meniscal tear., a right shoulder contusion with development of symptomatic rotator cuff tendinopathy, subacromial bursitis, and acromioclavicular joint osteoarthritis. He also opined that Claimant sustained a contusion of the right hip with persistent trochanteric bursitis. Dr. Hughes opined that Claimant's right shoulder injuries were at MMI, and that she has a permanent impairment based on reduced ranges of motion of her right shoulder. Similarly, he opined that Claimant's right hip injury was at MMI and that she has a permanent impairment based on reduced active ranges of motion. With respect to Claimant's right knee, he opined that surgical treatment for her right knee, beginning March 4, 2019 was reasonable and related to her September 26, 2017 work accident, and that Claimant was not at MMI for her knee and that she merits right knee revision as proposed by Dr. Weber.

76. Dr. Hughes further opined that Dr. Abrahamson's failure to assign a permanent impairment for Claimant's right knee was in error because Dr. Abrahamson opined that the Claimant's initial surgery was work-related, but that she had no residual impairment. With respect to Claimant's right knee, Dr. Hughes credibly testified that the AMA Guides provide that the alteration of anatomic structure associated with a partial meniscectomy provides a medical basis for the assignment of a permanent impairment rating for the right knee.

77. Dr. Hughes testified that Claimant's meniscus tear, identified in the November 28, 2017 MRI was caused by Claimant's work accident, and that the work accident made Claimant's right knee arthritis symptomatic. He further opined that Claimant's work-related injuries "set in motion a progressive osteoarthritic degenerative cascade that was not solved by her first surgery, and she progressed and ultimately required a [re]placement arthroplasty of her right knee.

KATHLEEN D'ANGELO, M.D.

78. Kathleen D'Angelo, M.D., was retained by Respondents to perform an independent medical examination of Claimant. Dr. D'Angelo reviewed Claimant's medical records,

interviewed Claimant, and performed a physical examination. In conjunction with the IME, Dr. D'Angelo prepared a 201-page report. (Ex. F). On August 31, 2020, Dr. D'Angelo prepared a 34-page Addendum to her original IME report to address the propriety of PRP treatment based on her review of additional records (primarily physical therapy records). Dr. D'Angelo did not testify at hearing.

79. In her initial IME report, Dr. D'Angelo concluded that Claimant's work-related diagnoses were limited to myofascial irritation of the right shoulder, right knee, and right hip "due to contusion," and that all conditions were at MMI. She further opined that Claimant's right shoulder impingement syndrome, right knee medial meniscal tear, right knee osteoarthritis and chondromalacia, and right hip gluteal tendinopathy were not work related. (Ex. F).

80. With respect to Claimant's right knee, Dr. D'Angelo opined that Claimant's November 28, 2017 MRIs of her right shoulder and right knee demonstrated only degenerative changes with no evidence of acute traumatic findings. She indicated that that Claimant's right knee horizontal medial meniscal tear and her right shoulder tendinopathy (including fraying and undersurface tearing of the supraspinatus and infraspinatus tendons "are ubiquitous findings in any individual of [Claimant's] age at the time of her MRI studies." (Ex. F).

81. Citing medical literature, Dr. D'Angelo opined that traumatic tears of the medial meniscus typically involve a vertical tear, rather than a horizontal or complex tear, and that the posterior horn is the most common area for chronic degenerative tears of the meniscus. She further indicated that degenerative meniscal lesions are very common findings that can be considered early stage of osteoarthritis in middle-aged patients. Dr. D'Angelo concluded that in her opinion, Claimant's initial medial meniscal tear was a chronic in nature, and that it was "not medically probable" that the finding was causally related to Claimant's mechanism of injury.

82. With respect to Claimant's right shoulder, Dr. D'Angelo opined that positive results from trigger point injections in the tissue adjacent to Claimant's right shoulder indicate pain from a myofascial source, rather than any intraarticular pathology. Similarly, Claimant's positive response to right hip injections in July 2018 suggest that Claimant's hip symptoms are not due to intraarticular pathology.

83. In the Addendum, Dr. D'Angelo opined that Claimant's gluteal tendinopathy was not causally related to her September 26, 2017 work injury. She also indicated that there is no conclusive or definitive medical data to support the use of PRP for gluteal tendinopathy. (Ex. F).

84. Dr. D'Angelo did opine that Claimant's right knee required an impairment assessment based on the surgical intervention to Claimant's knee. Using range of motion measurement obtained by Dr. Kindsfater's office in April 2019, Dr. D'Angelo assigned Claimant a 7% lower extremity impairment rating for range of motion deficits, and a 10% impairment for AMA Guides Table 40 disorder (torn meniscus, meniscectomy, or partial meniscectomy), which combine for a 16% lower extremity permanent impairment rating.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

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

Overcoming DIME on MMI

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.;

Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000); *Kamakele v. Boulder Toyota-Scion,* W.C. No. 4-732-992 (ICAO, Apr. 26, 2010).

MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Powell v. Aurora Public Schools* W.C. No. 4-974-718-03 (ICAO, Mar. 15, 2017). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (ICAO, Mar. 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management,* W.C. No. 4-356-512 (ICAO, May 20, 2004). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge D/B/A Colorado Athletic Club* W.C. No. 4-914-378-02 (ICAO, June 25, 2015). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect, and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office*, *supra*.

The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries,* WC 4-712-812 (ICAO, Nov. 21, 2008); *Licata v. Wholly Cannoli Café* W.C. No. 4-863-323-04 (ICAP, July 26, 2016).

Claimant has failed to prove by clear and convincing evidence that Dr. Abrahamson's opinion on MMI is incorrect. DIME physician, Dr. Abrahamson concluded that Claimant was at MMI on June 23, 2020. Dr. Abrahamson's assignment of MMI for Claimant is based on his conclusion that Claimant's only work-related injuries were contusions of her right knee, right shoulder, and right hip, which do not require additional treatment. Claimant contends she is not at MMI due to the need for additional treatment to Claimant's right knee, right shoulder, and right hip. Specifically, that Claimant requires a revision to her TKA, surgery on her right shoulder and treatment for her hip, including PRP injections and potentially surgery.

Although Dr. Rafferty and Dr. Hughes disagree with Dr. Abrahamson's assignment of MMI, the evidence that Dr. Abrahamson's MMI opinion is incorrect is not "unmistakable and free from serious or substantial doubt."

Right Knee

Claimant contends her right knee is not at MMI because she requires a revision to her TKA. DIME physician, Dr. Abrahamson, opined that Claimant's initial meniscectomy was a reasonable diagnostic and potentially therapeutic procedure and, therefore work-related. However, Dr. Abrahamson also opined that because Claimant's meniscus was stable after her February 6, 2018 arthroscopy, subsequent knee surgeries were not work-related. Claimant has failed to establish that Dr. Abrahamson's opinion in this regard is incorrect. During the February 6, 2018 meniscectomy, Dr. Beard examined Claimant's medial meniscus and found only the partial tear he addressed during the surgery and did not identify any additional pathology of the medial meniscus. Dr. Kindsfater performed the March 9, 2019 arthroscopy for a "recurrent tear" of the posterior horn of Claimant's medial meniscus, described as a "radial tear." Thus, the tear Dr. Kindsfater addressed was, more likely than not, new pathology that was not present during the February 6, 2018 arthroscopy.

The indication for Claimant's total knee replacement was advancing arthritis of her knee, which had a rapid progression. Although Dr. Hughes testified that Claimant's knee injury caused a cascading effect that led to her later knee surgeries, his opinion on this matter was conclusory and did not persuasively explain how such a process was the result of the knee contusion Claimant sustained on September 26, 2017. None of Claimant's treatment providers offered a cogent or persuasive explanation relating the progression of Claimant's arthritis to her September 26, 2017 work injury, or how the removal of 5% of her medial meniscus on February 6, 2018 resulted in rapid progression of arthritis. Dr. Farber's opinion that each of Claimant's surgeries was related was not based on medical evidence, but apparently on insurance coverage issues. The ALJ does not find Dr. Farber's opinion on this issue to be persuasive.

Because Claimant has failed to establish that Claimant's TKA was reasonably necessary to cure or relieve the effects of her work injury, it follows that the revision recommended by Dr. Weber is also not established as work-related. Accordingly, the ALJ finds that Claimant has failed to establish by clear and convincing evidence that Dr. Abrahamson's opinion that Claimant's right knee is at MMI is incorrect.

Right Shoulder

With respect to Claimant's right shoulder, Dr. Abrahamson, Dr. Hughes, Dr. Farber, and Dr. D'Angelo each opined that Claimant's right shoulder is at MMI. Dr. Rafferty's opinion that Claimant's shoulder is not at MMI is primarily based on the surgical recommendation from Dr. Hatzidakis. The ALJ credits Dr. Farber's opinion that Claimant's right shoulder pathology is more likely than not degenerative in nature and not work-related, and that her symptoms are more likely than not myofascial in nature. Dr. Farber's opinion that such a condition is not one that can be repaired surgically was credible.

Right Hip

As with Claimant's right shoulder, Dr. Abrahamson, Dr. Hughes, Dr. Farber, and Dr. D'Angelo opined that Claimant's right hip is at MMI. Dr. Abrahamson determined that Claimant's hip pathology was also degenerative in nature and that as a result of her work injury, Claimant sustained a contusion to the hip. Dr. Hughes diagnosed Claimant with a hip contusion "with persistent trochanteric bursitis," and Claimant presented no persuasive evidence that the contusion to Claimant's hip resulted in hip pathology or that her hip contusion caused Claimant to develop trochanteric bursitis or insertional tendinopathy.

Regardless of whether PRP injections are recommended under the Treatment Guidelines, the evidence presented demonstrated that the efficacy of PRP treatments for gluteal tendinopathy is questionable at best. Similarly, Dr. Rafferty's testimony related to a compounded cream indicated that it was a "crapshoot" with indeterminate benefit. Accordingly, the ALJ concludes that the Claimant has failed to establish by clear and convincing evidence that further treatment to Claimant's hip is reasonably likely to improve the condition. Claimant has not established that Dr. Abrahamson's MMI opinion is highly probably incorrect.

Temporary Disability Benefits and Medical Benefits

Because Claimant has failed to establish by clear and convincing evidence that the DIME opinion on MMI is incorrect, Claimant is not entitled to further or ongoing temporary disability benefits or medical benefits.

Overcoming DIME On Impairment

Claimant seeks to overcome Dr. Abrahamson's determination that Claimant had no permanent impairment. As a matter of diagnosis, the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003); *Sharpton v. Prospect Airport Services* W.C. No. 4-941-721-03 (ICAO, Nov. 29, 2016). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo.

App. 1998); *Watier-Yerkman v. Da Vita, Inc.* W.C. No. 4-882-517-02 (ICAO Jan. 12, 2015); Compare *In re Yeutter*, 2019 COA 53 ¶ 21 (determining that a DIME physicians opinion carries presumptive weight only with respect to MMI and impairment). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

The questions of whether the DIME physician properly applied the *AMA Guides*, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000); *Paredes v. ABM Industries* W.C. No. 4-862-312-02 (ICAO, Apr. 14, 2014). A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO, Mar. 22, 2000); *Licata v. Wholly Cannoli Café* W.C. No. 4-863-323-04 (ICAO, July 26, 2016).

Right Knee

Impairment of a lower extremity is a scheduled injury under § 8-42-107(2)(w) & (w.5), C.R.S. The increased burden of proof required by the DIME procedures is not applicable to scheduled injuries. Section 8-42-107(8)(a), C.R.S. states that "when an injury results in permanent medical impairment not set forth in the schedule in subsection (2) of this section, the employee shall be limited to medical impairment benefits calculated as provided in this subsection (8)." Therefore, the procedures set forth in §8-42-107(8)(c), C.R.S., which provide that the DIME findings must be overcome by clear and convincing evidence, are applicable only to non-scheduled injuries. The court of appeals has explained that scheduled and non-scheduled impairments are treated differently under the Act for purposes of determining permanent disability benefits. Specifically, the procedures of § 8-42-107(8)(c), C.R.S. only apply to non-scheduled impairments. *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000); *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998); *Gagnon v. Westward Dough Operating CO. D/B/A Krispy Kreme* W.C. No. 4-971-646-03 (ICAO, Feb. 6, 2018). Claimant has the burden of showing the extent of his scheduled impairment by a preponderance of the evidence. *Burciaga v. AMB Janitorial Services, Inc., and Indemnity Care ESIS Inc*., W.C. No. 4-777-882 (ICAO, Nov. 5, 2010); *Maestas v. American Furniture Warehouse and G.E. Young and Company*, W.C. No. 4-662-369 (ICAO, June 5, 2007).

Claimant has established by a preponderance of the evidence that she is entitled to a permanent impairment rating for her right knee and that Dr. Abrahamson's failure to assign a permanent impairment rating for Claimant's right knee is incorrect.[2] As noted above, Dr. Abrahamson determined that Claimant's February 6, 2018 meniscectomy was

[2] Although the clear and convincing standard is not applicable in this instance, the ALJ concludes that Claimant has established that Dr. Abrahamson's assignment of no impairment for Claimant's right knee was incorrect by clear and convincing evidence as well.

reasonably necessary to cure or relieve the effects of her industrial injury. Dr. Hughes, Dr. D'Angelo and Dr. Farber agree that Claimant should receive an impairment rating related to the February 6, 2018 meniscectomy. As Dr. Hughes testified, Table 40 of the AMA Guides provides for an impairment of the lower extremity for a torn meniscus, meniscectomy, or partial meniscectomy. See AMA Guides, p. 68. Table 40 provides for a lower extremity impairment of 0-10% for one meniscus. In addition, Claimant is entitled to an impairment rating for loss of range of motion to her left knee. Because Dr. Abrahamson determined that Claimant's initial, February 6, 2018 meniscectomy was work-related, Claimant is entitled to an impairment rating for that surgery. However, Claimant has not established an entitlement to an impairment rating associated with either her March 9, 2019 meniscectomy or the September 23, 2019 TKA, because Claimant has failed to establish that those surgeries were work-related.

Once the ALJ determines that the DIME's opinion has been overcome, the claimant's correct medical impairment then becomes a question of fact, and the ALJ is free to calculate Claimant's impairment rating based upon the preponderance of the evidence. *See Garlets v. Memorial Hosp.*, W.C. No. 4-336-566 (I.C.A.O. Sept. 5, 2001). "The only limitation is that the ALJ's findings must be supported by the record and consistent with the AMA Guides and other rating protocols." *Deleon v. Whole Foods Market, Inc.*, W.C. No. 4-600-477 (I.C.A.O. Nov. 16, 2006).

Although Dr. Abrahamson provided calculations for range of motion of Claimant's knee, he did not provide an impairment rating. Moreover, the range of motion measurements Dr. Abrahamson provided were taken after Claimant's TKA, and therefore, do not represent an accurate measurement of range of motion deficits attributable to Claimant's injury following the February 6, 2018 meniscectomy. Similarly, the impairment rating assigned by Dr. Farber includes a rating for Claimant's TKA and range of motion measurements taken after the TKA, which does not accurately reflect the impairment that resulted from Claimant's work-related conditions. Dr. Rafferty did not assess Claimant's impairment based on his opinion that Claimant was not at MMI as late as October 14, 2020.

The ALJ finds that Dr. D'Angelo's impairment rating, which utilized the range of motion of Claimant's knee as of April 11, 2019, and assigned ratings for Claimant's meniscectomies but not the TKA, is a reasonable and appropriate impairment rating for Claimant's right knee that is supported by the evidence and the AMA Guides. Specifically, the April 11, 2019 ranges of motion utilized by Dr. D'Angelo of 0° extension and 128° flexion were taken after Claimant's 2019 meniscectomy but are substantially similar to the measurements taken by Dr. Beard on March 23, 2018 (i.e., 0° extension and 125° flexion), and thus reflect the Claimant's range of motion deficits following the February 6, 2018 meniscectomy, and also yield a 7% range of motion impairment under the AMA Guides Table 39. The ALJ also finds that the assessment of a 10% impairment for a partial meniscectomy to be reasonable. The ALJ concludes that Claimant is entitled to a 16% right lower extremity permanent impairment rating.

Right Shoulder and Right Hip

With respect to Claimant's right shoulder and right hip, the ALJ finds that Claimant has not established by a preponderance of the evidence that Dr. Abrahamson's assignment of no impairment rating was incorrect.

Maintenance Medical Benefits

Respondents are liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." § 8-42-101(1)(a), C.R.S. Colorado courts have ruled that the need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or prevent further deterioration of her condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995).

An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that the claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999); *Hastings v. Excel Electric*, W. C. No. 4-471-818 (ICAO, May 16, 2002). The claimant must prove entitlement to *Grover* medical benefits by a preponderance of the evidence. *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915 (Colo. App. 1993); *Mitchem v. Donut Haus*, W.C. No. 4-785-078-03 (ICAO, Dec. 28, 2015). An award of *Grover* medical benefits should be general in nature. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003); *Anderson v. SOS Staffing Services,* W. C. No. 4-543-730, (ICAO, July 14, 2006).

Claimant has failed to establish by a preponderance of the evidence she is entitled to reasonable, necessary, and related medical maintenance benefits designed to relieve the effects of his work-related injury or prevent further deterioration of his condition pursuant to *Grover v. Industrial Comm'n*, 795 P.2d 705 (1988). As found, Claimant has failed to establish that her total knee replacement was the result of her industrial injury, consequently, revision of the surgery is not designed to relieve the effects of or prevent further deterioration of Claimant's work-related knee injury. With respect to Claimant's shoulder, as found, the ALJ credits Dr. Farber's opinion that Claimant's right shoulder is at MMI and that surgery on the shoulder is not reasonably likely to relieve the effects of her myofascial injuries or shoulder contusion. Finally, Claimant has failed to establish that either PRP injections or compounded cream is reasonably likely to relieve the effects of her right hip contusion.

Offsets/Overpayment

Section 8-40-201(15.5), C.R.S., defines "overpayment" to include "money received by a claimant that exceeds the amount that should have been paid or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits." Respondents FAL indicates that Claimant received an overpayment of $9,396.04. Given the time gap between the DIME report of November 20, 2020 and that date of MMI of June 23, 2020, during which Respondents were obligated to continued to pay Claimant TTD benefits, and the fact that Claimant presented no evidence contradicting or challenging the FAL's calculation, the ALJ concludes it is more likely than not that Claimant received an overpayment as asserted by Respondents. However, the only evidence of the amount of overpayment is a conclusory calculation unsupported by testimony or other documentary evidence. Respondents are entitled to offset overpayment against future permanent disability payments. The parties are hereby required to confer on the issue of the amount of overpayment, if the issue is not resolved by agreement, either party may file an application for hearing to determine the amount of overpayment. Respondents have not established any additional basis for offsets.

ORDER

It is therefore ordered that:

1. Claimant attained MMI status on June 23, 2020.

2. As a result of her September 26, 2017 work injury, Claimant sustained a 16% permanent impairment to her right lower extremity.

3. Claimant is not entitled to permanent impairment ratings for her right shoulder or right hip.

4. Claimant has failed to establish by a preponderance of the evidence an entitlement to maintenance medical benefits.

5. Respondents are entitled to offset against permanent partial disability payments any overpayments previously made. The parties are directed to confer on the issue of the amount of overpayment. If the issue is not resolved, either party may file an application for hearing to determine the amount of overpayment.

6. All matters not determined herein are reserved for future determination.

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

DATED: May 24, 2021

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

- Did Claimant overcome the DIME determination of MMI by clear and convincing evidence?

- If Claimant has overcome the DIME as to MMI, did Claimant prove entitlement to additional diagnostic evaluations or treatment to bring her to MMI?

FINDINGS OF FACT

1. Claimant works for Employer as a city bus driver. She suffered admitted injuries on April 6, 2018 in a serious motor vehicle accident. An oncoming vehicle turned in front of the bus, causing a "T-bone" accident. The resulting impact caused the bus to jump the curb and collide with adjacent trees and fencing.

2. Claimant's bus was only equipped with a "lap belt" as opposed to a "tri-belt" that straps over the shoulder. As a result, Claimant's chest struck the steering wheel, her head struck the side window hard enough to break it, and she injured multiple other parts of her body, including her shoulders, neck, low back, and both knees.

3. As relates to her right knee specifically, Claimant struck her knee on a "big bar" near or on the steering column.

4. Claimant was initially seen at the UCHealth emergency department and diagnosed with multiple contusions and "strains." The ER provider documented left knee symptoms but for unknown reasons mentioned nothing about the right knee.

5. Employer referred Claimant to CCOM, where her care was primarily managed by Dr. Thomas Centi and PA-C Steven Byrne. At her initial visit on April 10, 2018, Claimant described pain in multiple areas of her body, including her bilateral knees. Dr. Centi's examination showed objective evidence of injury to the right knee, including swelling and bruising from the knee to the mid-calf. The initial diagnoses included "contusion of the right knee." X-rays of the right knee showed degenerative changes but no fracture or other acute bony injury. Claimant was tearful and having flashbacks from the accident, so Mr. Byrne referred her for counseling with Amy Alsum, LCSW.

6. Claimant followed up at CCOM on April 17, 2018. She was emotionally labile and distraught about the accident. The driver of the other vehicle was hospitalized in critical condition and Claimant was struggling with feelings of guilt even though the accident was not her fault. She was scheduled to see Ms. Alsum the following week. Examination of the right knee showed mild swelling, bruising, and tenderness around the patella and the medial joint line.

7. Claimant started seeing Ms. Alsum on April 24, 2018. Their sessions focused on anxiety triggers and exposing Claimant to driving again so she could return to work.

8. On April 26, 2018, Claimant's knee remained tender to palpation along the medial joint line. Claimant was attending therapy with Ms. Alsum and working on her fear of driving and ongoing emotional distress regarding the accident. Claimant was referred to physical therapy for her neck and back.

9. At her June 5, 2018 appointment, Claimant reported ongoing 4-5/10 medial right knee pain. Many of her other injuries had resolved, and her primary concerns related to the right knee, neck, low back, and injury-related anxiety. The right knee was mildly tender to palpation and the bruising was "resolving." The ALJ interprets this to mean bruising was visible after two months, which suggests significant blunt trauma associated with the initial accident.

10. Claimant saw Dr. Neubauer at CCOM on June 26, 2018. She was still having right knee pain mostly on the medial side. There was tenderness to palpation along the medial aspect of the right knee at the patella but no visible swelling or bruising. Dr. Neubauer extended Claimant's PT and amended the orders to include therapy for the right knee.

11. Claimant had her initial PT evaluation regarding the knee on August 1, 2018. She reported 5/10 right knee pain, with a range of 4-9/10. The knee was tender to palpation over the right medial patellar tendon. The therapist wrote, "[Claimant] presents with knee stiffness, weakness, and difficulty prolonged ambulating, and stair use. Patient will benefit from skilled physical therapy to restore mobility and strength."

12. On August 4, 2018, the therapist noted Claimant was "able to go up and down stairs at home with a little less pain."

13. At a follow-up appointment on November 15, 2018, Dr. Centi noted "essentially" full ROM of the right knee. Claimant reported significant benefit from psychological treatment with Ms. Alsum, and Dr. Centi thought Claimant was close to MMI.

14. Claimant returned to work on December 9, 2018. After driving while accompanied by a mentor for approximately one week, Claimant returned to full duties.

15. Dr. Centi placed Claimant at MMI on December 20, 2018. Claimant indicated she was "doing very well with [Ms. Alsum] and her sessions, has returned to driving and has done extremely well, very happy with her progress. She considers it to be almost gone." The right knee was described as "only mildly tender anteriorly, essentially FROM." Dr. Centi released Claimant with no impairment and no restrictions. He opined Claimant required no maintenance care but also recommended she "complete" her sessions with Ms. Alsum.

16. Claimant completed numerous pain diagrams during the time she treated at CCOM. Each pain diagram documented right knee pain.

17. Claimant requested a DIME, which was performed by Dr. John Tyler on April 3, 2019. Claimant described her "greatest difficulty" as "still struggling with the events from an emotional standpoint related to the accident and the fear factor about being back in the bus and driving although she feels confident and qualified to be a bus driver at this time. She has had no issues since she has returned to being a bus driver and absolutely loves her job." Dr. Tyler opined, "the working relationship she has currently with Amy Alsum is excellent and should be continued. . . . I believe the need for this counseling should be determined by Amy Alsum but should be completed within the next 6 months as well."

18. Claimant also reported aching in the right knee "to the point that she states she cannot stand or walk cooking and has to have a stool now in her kitchen as the knee joint has a throbbing and aching sensation which makes it difficult for her to put weight on it on a consistent basis." Dr. Tyler noted palpable "grinding" the anterior medial joint line. Anterior and posterior drawer signs were negative and patellar tracking was normal. There was no lateral or medial ligament instability. Dr. Tyler questioned the accuracy of Dr. Centi's records noting "[the] physical exam reports are identical and appear to be copy and pasted notes as they are identical in wording and location of every statement." Claimant also told Dr. Tyler that Dr. Centi did not actually examine her on December 20, 2018. Dr. Tyler's diagnoses included "possible worsening of left internal knee derangement based upon severity of trauma noted at the time of injury and based on pictures shown of the need to me today, as well as crepitation felt with in the anterior medial knee joint line (not fully evaluated)." (Emphasis added). Dr. Tyler stated,

> [I] recommend . . . an initial consultation with an orthopedic surgeon specializing in knee pathology and will defer to that surgeon as to the patient's need for [ ] further diagnostic studies or interventions . . . . If that surgeon feels interventional work might be of benefit to her such as injections of any sort, then that would be considered under maintenance care. But if a surgical intervention such as an arthroscopic procedure would be required, then upon the date of that surgery, her case should be reopened until completion of her physical therapy post-operatively."

19. Despite making recommendations for additional evaluation and treatment, Dr. Tyler opined Claimant was at MMI as of December 20, 2018 as determined by Dr. Centi. Confusingly, Dr. Tyler provided no impairment rating in his initial report even though he documented multiple areas of ongoing symptomatology and limitations.

20. The DIME Unit wrote to Dr. Tyler on April 23, 2019 indicating deficiencies in his report, including his analysis of Claimant's spine impairment. Dr. Tyler issued an addendum report on September 17, 2019 assigning a 13% lumbar spine rating. He did not mention the knee or psychological issues.

21. Dr. Allison Fall performed an IME for Respondents on August 22, 2019. Examination of Claimant's right knee was largely normal, showing only pain along the medial patellar tendon. Otherwise, Dr. Fall found normal range of motion, no medial or lateral joint line tenderness, no ligamentous instability, no meniscal signs, and no significant crepitus. Dr. Fall opined, "given her current level of function and benign physical examination it is unlikely that an orthopedic surgeon would recommend interventions such as surgery. In fact, there is no indication for surgery based on her examination. It is also unlikely she would benefit from injections. However, that could be done under maintenance care." Dr. Fall agreed Claimant was at MMI as of December 20, 2018.

22. Dr. Miguel Castrejon performed an IME for Claimant on August 28, 2019. Regarding the right knee, Claimant described constant, dull to sharp and stabbing pain medially that worsens with prolonged standing and walking. She also reported ongoing nightmares, forgetfulness, and anxiety. Dr. Castrejon opined Claimant was not at MMI for her injury-related PTSD, depression, and anxiety. Regarding the right knee, Dr. Castrejon opined it "makes no sense" for Dr. Tyler to state Claimant was at MMI because he also recommended an orthopedic evaluation that might lead to a recommendation for injections or surgery. Dr. Castrejon opined Claimant is not at MMI for her right knee. He recommended a right knee MRI followed by a consultation with an orthopedic specialist. He also recommended a neurological evaluation to address the ongoing PTSD and headaches.

23. Dr. Fall testified at hearing consistent with her report. She noted the right knee osteoarthritis documented in 2014 had progressed by the time of the MVA. Dr. Fall opined an MRI of Claimant's right knee would show significant degenerative findings but would not lead to a change in treatment. Dr. Fall opined no additional treatment would be reasonably expected to improve the condition of Claimant's right knee, and any treatment for pre-existing osteoarthritis would be unrelated to the work accident. Dr. Fall opined Claimant requires no additional psychological treatment, as evidenced by her return to full duties. Dr. Fall reiterated her agreement with the December 20, 2018 MMI date and opined Dr. Castrejon's report reflects a "mere difference of opinion."

24. Claimant has a remote history of symptoms in the right knee. On July 7, 2014, she was seen at the Penrose St. Francis Hospital emergency room with complaints of anterior right knee pain "x3 days." She indicated the onset of symptoms had been "gradual" with no injury. Claimant had a history of DVT in the right leg and went to the ER "to make sure that this was not a DVT." Examination of the right knee showed no significant swelling, effusion, or obvious deformity. The joint was stable with no ligamentous laxity. There was moderate tenderness around the patella. X-rays showed mild medial and patellofemoral compartment osteoarthritis. The ER provider diagnosed "right knee pain" and opined, "the patient does appear to have some osteoarthritis of the right knee which is likely secondary to the patient's body habitus."

25. Claimant credibly attested the knee pain resolved within two weeks of the ER visit. There is no persuasive evidence she had any ongoing issues with her right knee

or required any further evaluation or treatment. The July 2014 ER visit appears to have been an isolated episode that resolved quickly without sequelae.

26. Claimant was a credible witness. Claimant's testimony and statements to Dr. Tyler and Dr. Castrejon that her knee has never returned to its pre-injury state and still causes significant functional limitations are credible and persuasive.

27. Dr. Castrejon's analysis is credible and highly probably correct regarding the errors in Dr. Tyler's determination of MMI.

28. Claimant proved by clear and convincing evidence she was not at MMI on December 20, 2018. Dr. Tyler clearly erred by placing Claimant at MMI despite recommending she "complete" her psychological treatment and recommending additional diagnostic evaluation for the right knee. Claimant had not finished psychological treatment by December 20, 2018. Moreover, she never saw a psychologist or psychiatrist, despite significant ongoing injury-related PTSD and anxiety. She had minimal PT for the knee and should have been afforded an orthopedic evaluation before putting her at MMI.

29. No ATP has recommended a knee MRI, orthopedic evaluation, or other diagnostic testing. The ALJ cannot order Respondents to cover a knee MRI or orthopedic consultation only recommended by IMEs.

CONCLUSIONS OF LAW

A. Claimant overcame the DIME regarding MMI

A DIME's determination regarding MMI is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c). The party challenging a DIME physician's conclusions must demonstrate it is "highly probable" the determination is incorrect. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). A party meets this burden if the evidence contradicting the DIME physician is "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). A "mere difference of medical opinion" does not constitute clear and convincing evidence. *E.g., Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (March 18, 2016).

"Maximum Medical Improvement" (MMI) is defined as the point when any medically determinable physical or mental impairment because of the industrial injury has become stable and when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5), C.R.S. Diagnostic procedures constitute a compensable medical benefit that must be provided before MMI if such procedures have a reasonable prospect of diagnosing the claimant's condition and suggesting further treatment. *E.g*., *Watier-Yerkman v. Da Vita, Inc*., W.C. No. 4-882-517-02 (January 12, 2015); *Soto v. Corrections Corp. of America*, W.C. No. 4-813-582 (February 23, 2012).

As found, Claimant overcame the DIME regarding MMI by clear and convincing evidence. Although Claimant had pre-existing osteoarthritis in her right knee, it was asymptomatic and nondisabling before the April 2018 MVA. Dr. Tyler specifically noted Claimant's right knee pathology was "not fully evaluated," and appropriately recommended additional workup by a knee specialist. Reading Dr. Tyler's report and considering the additional recommendations contained therein, one would have expected him to find Claimant not at MMI. The ALJ agrees with Dr. Castrejon that declaring Claimant to be at MMI while simultaneously recommending she "complete" psychotherapy and undergo an orthopedic evaluation was incongruous and "makes no sense." Claimant should have been offered an evaluation with a knee specialist and allowed to complete psychological treatment before being put at MMI.

B. The ALJ cannot order evaluations or treatment recommended solely by IMEs.

The ALJ can only award treatment recommended by an ATP and lacks jurisdiction to order treatment recommended solely by an IME. *Torres v. City and County of Denver*, W.C. No. 4-937-329-03 (May 15, 2018); *Short v. Property Management of Telluride*, W.C. No. 3-100-726 (May 4, 1995). IMEs (including DIMEs) are not authorized providers, so their treatment recommendations are not a covered benefit because they were not made during the natural progression of authorized treatment.

The only exception to this rule relates to "essential tests" needed to complete a DIME. *E.g., Tomsha v. Catholic Health Initiatives*, W.C. No. 5-088-642-002 (March 18, 2021) (diagnostic scalene block); *Potter v. Grounds Service Co. Inc*., W.C. No. 4-935-523-04 (August 15, 2018) (EMG/NCV testing); *Omer v. Lonestar Steakhouse*, W.C. No. 4-293-337 (February 15, 2001) (blood tests, spirometry, and CT scan); *Beede v. Allen Mitchek Feed & Grain*, W.C. No. 4-317-785 (April 20, 2000) (exercise stress test and EKG).

Although Dr. Tyler recommended an evaluation by an orthopedic knee specialist, he did not indicate such evaluation was "necessary for a complete IME." Moreover, the Panel has determined that a surgical consultation cannot fairly be considered an "essential test" subject to WCRP 11-4(A). *Potter v. Grounds Service Co. Inc*., W.C. No. 4-935-523-04 (August 15, 2018). As the Panel explained in *Potter*,

> Such a consultation is a request to secure an opinion from another physician. It does not involve special equipment and is not a test at all. . . . Such a consultation constitutes a medical benefit. Pursuant to *Torres*, absent a prior recommendation for the consultation by an authorized physician, the ALJ is without authority to order the respondents liable for [a] neurosurgical consultation.

Admittedly, an MRI can be considered an "essential test" in the context of a DIME. *Brickell v. Overhead Door Co*., W.C. No. 4-586-287 (February 4, 2005). But careful review of the DIME reports shows Dr. Tyler did not request to recommend an MRI. Rather, the MRI was recommended by Dr. Castrejon.

Even though the ALJ has no doubt the MRI and orthopedic evaluation are reasonably needed and causally related to the work accident, there is no basis to acquire Respondents to pay for them at this time.

ORDER

It is therefore ordered that:

1. Claimant's request to set aside the DIME's determination of MMI is granted.

2. Insurer shall cover evaluations and treatment from authorized providers reasonably needed to bring Claimant to MMI.

3. Claimant's request for a knee MRI recommended by Dr. Castrejon is denied and dismissed.

4. Claimant's request for an orthopedic consult recommended by Dr. Tyler and Dr. Castrejon is denied and dismissed.

5. This Order does not limit Claimant's right to pursue any additional testing or evaluations that may be recommended by an ATP.

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

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

DATED: May 24, 2021

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-150-437

ISSUES

I. Whether Claimant proved by a preponderance of the evidence he sustained a compensable industrial injury on October 7, 2020.

II. Whether Claimant proved by a preponderance of the evidence the medical treatment he received is reasonable, necessary and related to a compensable industrial injury and whether he is entitled to a general award of medical benefits.

III. Whether Claimant proved by a preponderance of the evidence he is entitled to temporary indemnity benefits.

STIPULATIONS

The parties agreed that would later confer and establish Claimant's average weekly wage ("AWW").should the claim be found compensable.

FINDINGS OF FACT

1. Claimant is a 62-year-old male.

2. On June 6, 2006, Claimant sustained a work injury to his left shoulder while working for a different employer. Claimant underwent treatment, including surgery, and was eventually placed at maximum medical improvement ("MMI") on April 13, 2007 by his authorized treating physician ("ATP"), Mark Winslow, D.O. Dr. Winslow assigned Claimant permanent work restrictions of lifting no more than 50 pounds below the shoulder level and 20 pounds above the shoulder level. Claimant testified he was unaware of the permanent restrictions assigned by Dr. Winslow.

3. Claimant began working for Employer as a commercial truck driver in April 2012. Claimant's job duties include transporting and unloading glass at various locations across Colorado. The glass Claimant handles weighs between 5 to 150 pounds. The job description for Claimant's position notes that frequent lifting of more than 50 pounds is required. Claimant was aware of this requirement at the time he began his employment with Employer.

4. Claimant testified that on August 21, 2020, he sustained a lower back injury while delivering glass for Employer. Claimant testified he was able to finish his shift that day without any problems or pain. He subsequently went on a scheduled two-week vacation beginning August 24, 2020, during which time he went RV camping with his family.

Claimant testified he fully recovered from the August 21, 2020 incident. He returned to work after his vacation as scheduled and was able to perform his regular duties without any issues.

5. Claimant alleges he sustained a work injury while working for Employer on Wednesday, October 7, 2020. On October 7, 2020, Claimant began his assigned delivery route from Denver, Colorado to Montrose, Colorado. Claimant testified he did not have any issues until getting to the Rifle, Colorado area. He testified that he began noticing some pain in his low back towards the end of completing his deliveries in Rifle. Claimant experienced gradually worsening pain as he was unloading glass in Grand Junction, Colorado and was in significant pain by the time he reached Montrose, Colorado, such that he experienced difficulties entering and exiting his truck and required the assistance of customers to unload the larger pieces of glass. Claimant spent the night in Montrose as scheduled. Claimant testified he continued to experience pain the following morning. He completed two deliveries in Montrose and began his drive back to Denver. Claimant testified he stopped in Grand Junction and called the Transportation Manager, Billy R[Redacted], to notify Mr. R[Redacted] of his alleged injury and request medical attention. Claimant testified he drove back in pain and arrived in Denver on the afternoon of Thursday, October 8, 2020. Claimant testified he was not sent for medical treatment at that time, so he took personal time off and sought treatment with his primary care physician at UC Health, Lindsey Cassidy, M.D.

6. Claimant presented to Dr. Cassidy on October 9, 2020. Claimant reported having left hip pain for about six weeks, radiating into the bottom of his foot for the last three to four days. The pain and pain radiating down left leg had considerably worsened over the last three to four days. Claimant reported that he would have some pain moving heavy glass, but that his previous pain, which was 4/10, was not as bad as his current pain, which had become 8-9/10 over the last four days. Dr. Cassidy wrote, “[Claimant] states he cannot think of anything that would of made it worse over the last few days. With his job, he always lifts heavy objects.” Claimant denied recent accident or trauma. On examination, Dr. Cassidy noted tenderness to palpation of bilateral paraspinal muscles at the lumbar level, mild tenderness to palpation of the left SI joint, and a positive straight leg raise. Dr. Cassidy assessed Claimant with acute left-sided low back pain with left-sided sciatica. She noted Claimant has a history of degenerative joint disease of the lumbar spine. Dr. Cassidy prescribed Claimant pain medication and referred Claimant for a lumbar spine x-ray and physical therapy.

7. Claimant underwent lumbar spine x-rays on October 9, 2020, which revealed scoliosis and degenerative change and bilateral L5 pars defect with grade 1 anterolisthesis at the L5-S1 level.

8. Employer's First Report of Injury completed October 14, 2020 notes an injury date of August 21, 2020 and that Employer was notified of the alleged injury on October 11, 2020.

9. Claimant filed a Worker's Claim for Compensation on October 14, 2020. In response to question "How did the injury occur?" Claimant wrote, "Pain thru out day worrining (*sic*)." (Exhibit 1, p.1).

10. Claimant subsequently presented to authorized provider Nazia Javed, M.D. on October 12, 2020 with complaints of extreme low back pain radiating down to his left foot. Dr. Javed noted a date of injury of August 21, 2020. Regarding the mechanism of injury, Dr. Javed wrote,

> Patient states he was lifting a heavy glass 48 inches in diameter and weighted maybe 400 lb with the help of 3 other people, was basically unloading it from his truck and felt sharp pull in low back and the next day felt sharp pain in low back. He states that he was off work for 2 weeks and so he rested and did some stretching exercises for his low back. His pain got better and he did not notice andy (*sic*) radicular pains in LE. He resumed his work duties in September and was feeling fine with no LBP. He continued with back exercises on his own. He does mention with certain stretching exercises at times he felt mild pull in back but it resolved. He mentions since last Wednesday his low back pain has gotten worse and has been feeling constant sharp pain more in left lower back and he feels pain is radiating down his LLE. Has felt paresthesias in LLE.
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> (Exhibit H p. 32-33)

11. A handwritten note included with Dr. Javed's medical record notes "48 inches wide, 400 pounds, lifting off the truck, low back pain with left hip. Last Wednesday at home felt pain was worse. Went to work drove to Grand Junction. Lifting glass & unloading, some glass pieces 100-250." (Exhibit H, p. 35). Claimant testified he does not recall making such statement to Dr. Javed.

12. Dr. Javed provided an assessment of lumbar discogenic pain and lumbar degenerative discs and diagnosed Claimant with lumbar discogenic pain and lower left extremity pain. She instructed Claimant to use ice and heat and prescribed a Medrol Dosepak. Claimant was released to light duty work, with restrictions of no commercial driving or lifting/pushing/pulling from October 12, 2020 to October 19, 2020.

13. Dr. Javed referred Claimant for a lumbar spine MRI, which Claimant underwent on October 23, 2020. The MRI demonstrated moderate to severe bilateral L5-S1 foraminal stenosis with compression of the exiting L5 nerve roots.

14. Dr. Javed subsequently referred Claimant for evaluation with Brian Fuller, M.D. and for physical therapy. She released Claimant to work modified duty from October 27, 2020 to November 12, 2020 with restrictions of no lifting/carrying/pushing/pulling more than five pounds, avoiding bending and prolonged sitting, and alternating sitting/standing every 30 minutes as needed.

15. Respondents filed a Notice of Contest on October 27, 2020, reflecting the August 21, 2020 date of injury. The parties subsequently stipulated to a date of injury of October 7, 2020 for the worker's compensation claim at issue.

16. Claimant presented to Dr. Fuller on November 3, 2020. Dr. Fuller noted Claimant had been experiencing low back pain since August 21, 2020 while performing work duties. Dr. Fuller reviewed Claimant's lumbar MRI and x-rays and performed a physical examination. He recommended a left transforaminal epidural steroid injection and possible left sacroiliac injection, possible medial branch neurotomy, EMG, x-rays and possible spine surgeon consultation.

17. On November 3, 2020, Dr. Fuller requested authorization for a left L5-1, S1-2 transforaminal epidural steroid injection. On November 6, 2020, Insurer denied Dr. Fuller's request for authorization on the basis that compensability of the alleged injury had not been established.

18. On November 19, 2020, Dr. Fall performed an Independent Medical Examination ("IME") at the request of Respondents. Regarding the mechanism of injury, Dr. Fall wrote,

> [Claimant] reports that on 10/07/2020, he was on his route and got to his first stop at Rifle. He does not know if that is where it happened. Nothing stood out. As the day went on, the pain started shooting down the left side, and his back was hurting. When he woke up that morning, he was fine. By the time he got to Montrose, which was his last stop, he could not get up to clean his windshields. It even hurt to stand. He got to the hotel, took Advil, and went to bed. The next day, his pain level was 10/10.
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> * * *
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> He states that he called his supervisor on Sunday and told him that he needed to see a comp doctor. He was told to come in on Monday. He believes that the pain began on a Thursday and two days later, he saw his family doctor, and she ordered an x-rays and told him not to lift. He then took paid time off. After he had reported it to his supervisor, he was sent to Dr. Javed who he saw three or four days after the injury. He believes it was the following Monday when he saw her.

(Exhibit E, p. 16)

19. Claimant mentioned to Dr. Fall an incident in August 2021 where he lifted a piece of glass that was heavier than usual and felt a shift or movement in his back and left hip but no pain. He reported to Dr. Fall that he returned to work after that incident with no issues in function. Dr. Fall examined Claimant and reviewed Claimant's medical record, including the lumbar MRI and x-rays. Her assessment was low back pain with differential diagnoses including left L5 radiculopathy versus left sacroiliac dysfunction.

20. Dr. Fall noted that Claimant's mechanism of injury was unclear, noting the medical records indicated some discrepancies in Claimant's reports regarding the August 21, 2020 incident, as well as the onset of pain on October 7, 2020. She pointed to the handwritten note indicating Claimant felt pain at home on Wednesday. Dr. Fall opined that no acute event or incident occurred on October 7, 2020. She concluded that Claimant's MRI did not reveal any acute findings. She noted that the MRI findings were likely longstanding and explained that degenerative changes do not necessarily require a specific acute event to become symptomatic. Dr. Fall was unable to state within a reasonable degree of medical probability that Claimant injured his back at work.

21. Respondents denied further treatment with Dr. Javed and Dr. Fuller. Claimant continued medical treatment on his own with Dr. Cassidy, who referred Claimant to Mara Mindy Isser Sax, D.O. and Nolan Wessell, M.D.

22. On January 11, 2021, Claimant underwent a left L5 transforaminal epidural injection, performed by Dr. Sax. The injection did not provide Claimant sufficient relief.

23. Claimant presented to Dr. Wessell on February 17, 2021. Dr. Wessell noted Claimant had a longstanding history of chronic low back pain that significantly worsened in October 2020 when transporting heavy pieces of glass. Dr. Wessell's assessment was: lumbar degenerative disc disease, degenerative facet arthritis, lumbar radiculopathy, lumbar pars defect and spondylolisthesis at L5-S1 level. Dr. Wessel recommended surgical intervention.

24. On March 11, 2021, Claimant underwent L5-S1 anterior lumbar interbody fusion and L5-S1 minimally invasive posterior spinal fusion, performed by Dr. Wessell. The operative notes document an admission diagnosis of degenerative disk disease L5-S1 and degenerative spondylolisthesis L5-S1.

25. Claimant has not worked since March 5, 2021. Claimant testified at hearing that continues to experience a lot of pain and remains on full restrictions from his back surgeon. Claimant did not have prior back injuries or treatment to his back.

26. Dr. Fall testified at hearing as a Level II accredited expert in physical medicine and rehabilitation. Dr. Fall testified consistent with her IME report and continued to opine Claimant did not sustain a work injury. She explained that Claimant did not identify a specific incident resulting in his symptoms, and again pointed to the handwritten note indicating Claimant felt pain at home the Wednesday of the incident. Dr. Fall explained that a pars defect, noted on Claimant's imaging, is a stress fracture. She further explained that pars defects are not necessarily associated with pain or trauma and can be the result of a degenerative condition.

27. The ALJ finds the testimony of Dr. Fall, as supported by the medical records, more credible and persuasive than Claimant's testimony.

28. Claimant failed to prove it is more probable than not he sustained a compensable industrial injury arising out of and in the scope of his employment on October 7, 2020.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance*

Co. v. Cline, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

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

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its “origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee’s service to the employer.” *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v.* Americold D/B/A Atlas Logistics, WC 4-960-513-01, (ICAO, Oct. 2, 2015).

The mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms or the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Atsepoyi v. Kohl’s Department Stores*, WC 5-020-962-01, (ICAO, Oct. 30, 2017). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As found, Claimant failed to prove it is more likely than not he sustained a compensable industrial injury on October 7, 2020. The preponderant evidence does not establish the requisite causal nexus between Claimant’s work on October 7, 2020 and his symptoms, disability and need for treatment. Claimant contends that, during his work shift on October 7, 2020 he experienced an onset of low back pain that gradually worsened. Claimant did not identify any specific incident or trauma on October 7, 2020 leading to the occurrence of symptoms. Discrepancies in the record regarding Claimant’s condition leading up to the alleged work injury and the onset of pain undermine Claimant’s credibility.

Claimant testified that he was not experiencing any issues after the August 21, 2020 incident. However, Dr. Cassidy’s October 9, 2020 medical note reflects Claimant’s reports of experiencing 4/10 left hip pain for six weeks, which worsened in the last three to four days without specific trauma (the ALJ notes the alleged onset of pain at work on Wednesday, October 7, 2020 would be two days prior to the October 9, 2020 evaluation of Dr. Cassidy). Notably, a handwritten note contained in Dr. Javed’s October 12, 2020 medical records specifically documents Claimant’s reports of experiencing pain at home last Wednesday and then going to work and driving to Grand Junction. The medical note directly contradicts Claimant’s assertion that he was fine prior to work on October 7, 2020 and experienced a gradual onset of pain while at work.

Dr. Fall credibly explained that Claimant likely suffers from degenerative low back changes, as evidenced on MRI and x-ray. Dr. Fall’s opinion is in line with the assessments and diagnoses of other physicians who evaluated Claimant, all noting degenerative diagnoses. The totality of the credible and persuasive evidence establishes that it is more likely Claimant was already experiencing pain at home prior to beginning his work duties on October 7, 2020, and that the occurrence of symptoms at work were the result of a pre-existing condition unrelated to his employment.

As Claimant failed to prove he suffered a compensable industrial injury, the remaining issues are moot.

ORDER

1. Claimant failed to prove by a preponderance of the evidence he sustained a compensable industrial injury on October 7, 2020. Claimant’s claim for benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

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

DATED: May 25, 2021

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that she sustained an injury arising out of and in the course and scope of her employment with the employer on July 1, 2019 (WC 5-118-535).

2. If the July 1, 2019 claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that treatment she received from Peak Family Medicine is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.

3. Whether the claimant has demonstrated, by a preponderance of the evidence, that she sustained an injury arising out of and in the course and scope of her employment with the employer on March 28, 2020 (WC 5-149-176).

4. If the March 28, 2020 claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that treatment she received from Cedar Point Health is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.

RESERVED ISSUES

At the hearing, the parties stipulated that the endorsed issues of average weekly wage (AWW), temporary total disability (TTD) benefits, and temporary partial disability (TPD) benefits, would be reserved for future determination, if necessary.

FINDINGS OF FACT

1. The claimant has been employed with WalMart for six years. On July 1, 2019, the claimant was working in her position as a self check-out host. During that shift, a customer spilled a two liter bottle of soda. The claimant began cleaning up the spill, utilizing a mop and mop bucket. While attempting to wring out the mop, the mop bucket tipped over, causing the claimant to fall toward the ground. The incident was recorded by store surveillance video.

2. The claimant testified that the front of her right knee struck the mop bucket as she fell. She further testified that she immediately felt extreme pain in the front of her right knee.

3. The claimant reported the incident to the employer. The claimant testified that the employer presented her with a list of medical providers. From that list, the claimant selected Peak Family Medicine.

Medical Treatment Prior to July 1, 2019

4. Prior to the July 1, 2019 incident involving the mop bucket, the claimant sought treatment of her right knee.

5. On April 8, 2014, x-rays were taken of the claimant's right knee. The x-rays showed no fracture or dislocation. However, the radiologist, Dr. Raymond Welsh, noted a "rounded density" in the suprapatellar bursa. Dr. Welsh opined that this was a possible loose body.

6. On April 17, 2014, magnetic resonance imaging (MRI) was taken of the claimant's right knee. The MRI results were also read by Dr. Welsh who noted advanced patellofemoral compartment chondromalacia with areas of full thickness chondral loss. This included high grade chondral loss of the far inferior medial trochlea with cystic changes and spurring. Dr. Welsh also noted a small joint effusion.

7. The claimant testified that she underwent the 2014 MRI of her right knee because she was experiencing mild knee pain that was "uncomfortable". The claimant further testified that these 2014 right knee symptoms did not impact her ability to perform her job duties or activities at home.

8. On December 14, 2016, the claimant was seen by her primary care physician (PCP), Dr. Darrin Green. On that date, the claimant reported a number of issues that included right leg pain that impacted her ability to walk. Dr. Green noted that the claimant had a prior history of right knee pain with chronic osteoarthritis in both knees. The medical record of that date also indicates that the claimant had a prior left total knee replacement.

9. On January 12, 2017, the claimant returned to Dr. Green and reported pain in both knees. The claimant made similar complaints to Dr. Green on April 12, 2017, July 6, 2017, October 5, 2017, and December 28, 2017. At the December 28, 2017 appointment, the claimant specifically reported that her employer was trying to increase her hours, but the claimant was trying to limit them. Dr. Green specifically noted that the claimant "[f]eels like she can't tolerate 40 hours per week."

10. On April 29, 2019, the claimant was seen by Dr. Green to refill her pain medications. At that time, the claimant reported consistent pain in her back and knees.

Medical Treatment After July 1, 2019

11. Following the July 1, 2019 incident, the claimant was first seen at Peak Family Medicine on July 10, 2019. At that time, the claimant was seen by Issac Klostermann, PA. After his exam, PA Klostermann diagnosed a contusion of the right knee. He ordered a right knee x-ray and referred the claimant to physical therapy. In addition, he recommended the use of a knee brace and anti-inflammatories. PA

Klostermann assigned work restrictions of no kneeling, squatting, bending, stooping, climbing stairs or ladders.

12. On July 22, 2019, the claimant returned to PA Klostermann. At that time, PA Klostermann noted that the x-rays did not show any fracture. He also noted that the claimant's "symptoms are difficult to discern as they remain significant and non-focal". He recommended ongoing physical therapy, a home exercise program, a TENS unit, anti-inflammatories, and a knee brace.

13. The claimant returned to PA Klostermann on August 1, 2019, with continuing knee[1] pain. The claimant reported that she experienced knee pain at work and at physical therapy. On that date, PA recommended a right knee MRI. In addition, he added more frequent sitting breaks to the claimant's work restrictions.

14. On August 7, 2019, the claimant reported worsening symptoms. On that date, PA Klostermann limited the claimant to walking two hours per day and standing two hours per day.

15. On August 28, 2019, PA Klosterman ordered the recommended right knee MRI.

16. On September 19, 2019, an MRI of the claimant's right knee showed severe degenerative change in the lateral patellofemoral joint space.

17. On September 26, 2019, the claimant returned to PA Klostermann. At that time, PA Klostermann noted that the MRI showed chronic degenerative joint disease without acute damage. PA Klostermann noted the claimant's report that she did not have knee pain prior to the July 1, 2019 incident. Based upon that information, PA Klostermann opined that the claimant's right knee condition was work related, "despite no additional acute pathology on MRI."

18. On October 4, 2019, the insurer notified the claimant that her claim was denied. The reason provided for the denial was that the claimant's injury was not work related.

19. Following the respondents' denial, the claimant did not pursue further medical treatment because coverage was denied by her personal insurance and she could not afford to pay personally. The claimant also testified that she continued working full time for the employer.

March 28, 2020 Incident

20. The claimant alleges that on March 28, 2020, there was a second incident involving her right knee. The claimant testified that while she was working on March 28, 2020, she stopped to speak with a member of management. At that conclusion of their

[1] The medical record of that date identified the reason for the appointment "wc Right knee". However, the medical report references the claimant's left knee injury and pain. Based upon the ALJ's review of the records, she finds that this was a typographical error and the claimant's right knee was the knee examined by PA Klostermann.

discussion, the claimant turned and twisted her right knee. The claimant testified that she immediately felt pain in her right knee. Specifically, the claimant testified that it felt as though her "knee split two ways". The claimant went to the pharmacy and purchased a knee brace.

21. On June 18, 2020, the claimant was seen by Jeffrey Johnson, DC-FNP with Colorado Injury and Pain Specialists. On that date, the claimant reported pain in her lumbar spine, thoracic spine, left foot and right knee. The claimant's lumbar spine pain was identified as being related to the claimant's scoliosis. With regard to her right knee pain, FNP Johnson noted that the claimant's report that she "was injured July 2019 when she fell, and again in March when she twisted wrong at work." FNP Johnson recommended physical therapy and a psychological evaluation. Thereafter, the claimant continued treatment with Colorado Injury and Pain Specialists. However, the focus of that treatment was related to the claimant's scoliosis symptoms.

22. Following the March 28, 2020 incident, the claimant did not initially seek medical treatment. Subsequently, she sought treatment at Cedar Point Health on September 21, 2020. At that time, the claimant was seen by Barbara Budagher, PA-C. The claimant reported the twisting incident in March. PA Budagher opined that the claimant had possible internal derangement of the right knee. She recommended the claimant continue wearing her knee brace. In addition, PA Budagher referred the claimant for right knee x-rays. Based upon the September 21, 2020 medical record, it does not appear that the July 2019 incident, related treatment, or imaging was discussed with PA Budagher.

23. On September 23, 2020, the claimant was seen by Christopher Polsey, PA-C with Cedar Point Health. PA Polsey noted that the claimant had a right knee MRI in 2019 for a "separate claim". On exam, he noted pain, diffuse swelling and crepitus. PA Polsey ordered a right knee MRI and assigned work restrictions.

24. On October 6, 2020, an MRI of the claimant's right knee showed severe degenerative changes in the patellofemoral joint space.

25. On October 8, 2020, the claimant returned to Cedar Point Health and was seen by Dr. Randal Shelton. At that time, Dr. Shelton reviewed the recent MRI results and noted the claimant's "long-standing history of bilateral knee pain." Dr. Shelton specifically noted that the claimant had prior left knee surgery and:

> [h]er right knee was also hurting at that time, advised knee x-rays, but declined by the [patient], and thought to be secondary to [osteoarthritis]. There are other notes referring to bilateral knee pain since that time. Her MRI shows only [osteoarthritis], end stage, with no acute internal derangement. This is unchanged from her 2019 MRI.

26. Dr. Sheton opined that the condition of the claimant's right knee was not work related. As a result, he recommended that the claimant follow up with her PCP and he closed her case.

27. On February 10, 2021, the claimant attended an independent medical examination (IME) with Dr. John McBride. In connection with the IME, Dr. McBride reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his IME report, Dr. McBride opined that the claimant has end stage "primary (wear and tear)" patellofemoral osteoarthritis in her right knee. Dr. McBride also opined that the claimant did not suffer an injury to her right knee on July 1, 2019 or on March 28, 2020. In support of his opinions, Dr. McBride noted that there was evidence of end stage osteoarthritis in the claimant's right knee as early as 2014.

28. Dr. McBride's testimony was consistent with his written report. Dr. McBride testified that the September 18, 2019 right knee MRI showed no evidence of trauma. Based upon his review of the video of the September 1, 2019 incident, Dr. McBride testified that he did not see a direct blow to the claimant's knee. Dr. McBride reiterated his opinion that the claimant did not suffer an injury to her right knee on July 1, 2019. In addition, it is Dr. McBride's opinion that the July 1, 2019 incident did not aggravate the pre-existing osteoarthritis in the claimant's right knee. With regard to the March 28, 2020 incident, Dr. McBride restated his opinion that the claimant did not injure her right knee on July 1, 2019 or on March 28, 2020. In support of this opinion, Dr. McBride noted that the more recent MRIs show the same osteoarthritis related condition of the claimant's right knee as the MRI performed in 2014.

29. The claimant testified that her current symptoms include difficulty walking, limited mobility, and limited bending.

30. The ALJ does not find the claimant's testimony regarding the nature and onset of her right knee symptoms to be credible or persuasive. The ALJ credits the medical records and the opinions of Dr. McBride over the contrary opinions of PA Klostermann. The ALJ specifically credits Dr. McBride's opinion that the claimant did not injure her right knee on July 1, 2019 or on March 28, 2020. The ALJ is also persuaded that the July 1, 2019, and March 28, 2020 incidents did not aggravate, accelerate, or combine with the claimant's pre-existing right knee osteoarthritis to necessitate treatment. Therefore, the claimant has failed to demonstrate that it is more likely than not that she suffered a compensable right knee injury on July 1, 2019. The claimant has also failed to demonstrate that it is more likely than not that she suffered a compensable right knee injury on March 28, 2020.

CONCLUSIONS OF LAW

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

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

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

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

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

July 1, 2019 incident (WC 5-118-535)

5. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that she sustained an injury arising out of and in the course and scope of her employment with the employer on July 1, 2019. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that the July 1, 2019 incident aggravated, accelerated, or combined with her pre-existing right knee arthritis to necessitate medical treatment. As found, the medical records and the opinions of Dr. McBride are credible and persuasive.

March 28, 2020 incident (WC 5-149-176)

6. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that she sustained an injury arising out of and in the course and scope of her employment with the employer on March 28, 2020. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that the March 28, 2020 incident aggravated, accelerated, or combined with her pre-existing right knee arthritis to necessitate medical treatment. As found, the medical records and the opinions of Dr. McBride are credible and persuasive.

ORDER

It is therefore ordered:

1. The claimant’s claim regarding an alleged July 1, 2019 injury (WC 5-118-535) is denied and dismissed.

2. The claimant’s claim regarding an alleged March 28, 2020 injury (WC 5-149-176) is denied and dismissed.

Dated this 25th day of May 2021.

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

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-971-581-005

ISSUES

1. Whether the respondents have overcome, by clear and convincing evidence, the findings of the Division-sponsored independent medical examination (DIME) physician regarding maximum medical improvement (MMI), and permanent impairment.

2. Whether the claimant has demonstrated, by a preponderance of the evidence, that spinal cord stimulator (SCS) replacement is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted December 17, 2014 work injury.

3. At hearing, the parties agreed that the endorsed issue of overpayment was reserved for future determination.

FINDINGS OF FACT

1. The claimant suffered an admitted injury at work on December 17, 2014. The injury occurred when the claimant was removing a ladder from his work vehicle. While lifting the ladder from the vehicle, the claimant slipped on ice and felt pain in his right shoulder. The claimant reported the December 17, 2014 incident to the employer and he was sent for medical treatment.[1]

2. On December 27, 2014, the claimant was seen at Glenwood Medical Associates by Dr. Brett Hesse. On that date, Dr. Hesse diagnosed the claimant with a shoulder strain. Dr. Hesse also noted that the claimant had a right rotator cuff tear with "possible spontaneously relocated shoulder dislocation." A right shoulder x-ray taken on that day showed no acute injury and no acute degenerative changes.

3. Subsequently, magnetic resonance imaging (MRI) of the claimant's right shoulder showed a full thickness tear of the supraspinatus and a partial tear of the subscapularis. Based upon these MRI findings, Dr. Hesse referred the claimant for an orthopedic consultation.

4. Thereafter, the claimant was seen by surgeon, Dr. Ferdinand Liotta. On January 14, 2015, Dr. Liotta performed a right rotator cuff repair.

[1] Since December 17, 2014, the claimant has undergone extensive medical treatment, including multiple surgeries, injections, and implantation of a spinal cord stimulator (SCS). The ALJ has reviewed the voluminous medical records entered into evidence. However, given the extent of these records and related treatment, the ALJ does not recite every treatment the claimant has received since December 17, 2014.

5. On January 19, 2015, the respondents filed a General Admission of Liability (GAL). In that GAL, the respondents admitted for medical treatment and temporary total disability (TTD) benefits beginning December 18, 2014 and ongoing.

6. When the claimant continued to experience symptoms, Dr. Liotta administered injections to the claimant's right shoulder on April 27, 2015. Subsequently, Dr. Liotta performed a second right shoulder surgery on June 16, 2015. The claimant continued to have symptoms, and on November 16, 2015, Dr. Liotta: performed an examination of the claimant's right shoulder, under anesthesia.

7. On April 12, 2016, the claimant was seen by Dr. Joel Cohen for psychological testing. At that time, Dr. Cohen diagnosed the claimant with somatic symptom disorder and adjustment reaction with mixed features reflective of anger and frustration. Dr. Cohen opined that the claimant would be a good candidate for an SCS trial.

8. Following a series of stellate ganglion blocks, on June 7, 2016, the claimant was seen by Dr. Giora Hahn. Dr. Hahn noted that the claimant had exhibited signs of thoracic outlet syndrome (TOS). Dr. Hahn opined that while the claimant was likely not a good candidate for further surgical treatment, the claimant was a good candidate for a cervical SCS.

9. On June 17, 2016, the claimant was seen by Dr. Richard Sanders. Dr. Sanders opined that the claimant had fairly severe symptoms of right neurogenic TOS and right neurogenic pectoralis minor syndrome. Dr. Sanders noted the claimant had a good response to a right scalene muscle block, and greater improvement with a right pectoralis minor muscle block. Dr. Sanders opined that the claimant was a candidate for surgical decompression of the right thoracic outlet and pectoralis minor areas. As a result, Dr. Sanders referred the claimant to Dr. Stephen Annest for consultation.

10. On June 27, 2016, the claimant was seen by Dr. Annest. On that date, Dr. Annest recommended the claimant undergo TOS surgery on the right. Thereafter, on July 27, 2016, Dr. Annest submitted a request for prior authorization to the respondents for the following: pec minor tenotomy; transaxillary rib resection; dissection of artery; supraclavicular neurolysis peripheral nerve; brachial plexus neurolysis; and tissue graft.

11. At the request of the respondents, Dr. Wallace Larson reviewed the claimant's medical records. On August 1, 2016, Dr. Larson issued a written report in which he opined that the claimant injured his right shoulder at work on December 17, 2014. Dr. Larson further opined that the claimant did not have a clear diagnosis of right-sided TOS. Therefore, he opined that the recommended TOS decompression surgery was not reasonable and necessary treatment for the claimant.

12. Based upon the opinions of Dr. Larson, the respondents denied authorization of all treatment of the claimant's right-sided TOS, including the TOS decompression surgery. Neither Dr. Annest nor the claimant appealed the denial or challenged the denial through the administrative hearing process.

13. Despite the respondents' denial of authorization, the claimant underwent the right-sided TOS decompression surgery on August 23, 2016. This procedure was paid for by the claimant's personal insurance.

14. Thereafter, the claimant began to have left shoulder symptoms. The ALJ finds no persuasive evidence on the record that treatment of the claimant's left shoulder condition was ever covered by the respondents.

15. On March 6, 2017, the claimant was seen by Dr. David Lorah. On that date, Dr. Lorah noted that the claimant would be reviewing a recent left shoulder MRI with Dr. Liotta. Dr. Lorah also noted that it was his understanding that the claimant's left shoulder had "not been authorized for treatment through [workers' compensation]."

16. On June 22, 2018, the claimant attended an independent medical examination (IME) with Dr. Barton Goldman. In connection with the IME, Dr. Goldman reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his IME report, Dr. Goldman opined that the claimant suffered an injury to his right shoulder at work on December 17, 2014, resulting in the need for right shoulder surgery (and subsequent surgical revisions). In that report, Dr. Goldman included the claimant's right-sided TOS diagnosis and subsequent surgery as work related. Dr. Goldman further opined that the condition of the claimant's left shoulder, including treatment of left-sided TOS was not related to the claimant's work injury.

17. Dr. Goldman also stated that the claimant reached maximum medical improvement (MMI). Dr. Goldman recommended against further invasive treatment for the claimant. He recommended maintenance medical treatment of 10 to 15 sessions of physical therapy, and 10 massage therapy sessions over the next year. With regard to permanent impairment, Dr. Goldman assessed 21 percent for the claimant's right upper extremity, with a whole person impairment rating of 13 percent.

18. Subsequently, Dr. Annest referred the claimant to Dr. Giancarlo Barolat. The claimant was seen by Dr. Barolat on August 8, 2018. At that time, Dr. Barolat noted that the majority of the claimant's pain was in the axillary and pectoral areas bilaterally, (left greater than right). In addition, Dr. Barolat noted marked hypoesthesia in the right pectoral area; tenderness to palpation over the supraclavicular fossa bilaterally; and marked allodynia in the left pectoral, axillary, and upper chest wall area. Dr. Barolat opined that the claimant's pain was in a T1-T4 nerve root distribution. Dr. Barolat recommended a staged SCS trial. In addition, he noted that if the SCS trial produced more than 50 percent relief, the claimant would be a candidate for implantation of a permanent SCS.

19. On August 17, 2018, Dr. Goldman issued an addendum to his IME report. In the addendum, Dr. Goldman clarified that the claimant reached MMI as of November 27, 2017. Dr. Goldman noted that after that date, the claimant's treatment was focused on his non-work related left-sided issues.

20. On September 10, 2018, Dr. Barolat implanted two SCS paddle leads for purposes of conducting an SCS trial. Subsequently, the claimant reported to Dr. Barolat that he experienced 70 to 80 percent improvement in his pain. The claimant also reported that he wanted to move forward with full implantation of the SCS. On September 25, 2018, Dr. Barolat surgically implanted the SCS.

21. The claimant has undergone extensive treatment and procedures to address complications and revisions related to the SCS. The claimant testified that he now needs a new SCS implanted because his current device was damaged when he was pinned to his vehicle by a horse.

22. Janine A[Redacted] is a claims adjuster with the insurer. On December 18, 2020, Ms. A[Redacted] executed an affidavit regarding the claimant's workers' compensation claim. In her affidavit, Ms. A[Redacted] confirmed that the insurer did not receive a referral from an authorized provider for the claimant to see Dr. Barolat. In addition, the insurer did not authorize the claimant's treatment with Dr. Barolat. The insurer did not receive a request for authorization for the implantation (and later revisions) of the SCS. The insurer has not paid any medical bills related to the implantation of the SCS and subsequent revisions. The ALJ finds the information contained in Ms. A[Redacted]'s affidavit credible and persuasive.

23. Following a request by the respondents, on December 10, 2018, the claimant attended a 24-month DIME with Dr. Jade Dillon. Prior to completing her DIME report, Dr. Dillon reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In her DIME report, Dr. Dillon opined that the claimant's right shoulder and related surgeries were related to the claimant's work injury. Dr. Dillon noted her belief that the SCS was authorized medical treatment under this claim. As a result, Dr. Dillon opined that the claimant was not at MMI because he was recovering from a recent SCS revision surgery. Dr. Dillon assessed a provisional impairment rating of 21 percent for the claimant's right upper extremity (13 percent whole person); and an additional one percent for unilateral phrenic nerve disorder. This resulted in a total whole person impairment rating of 14 percent.

24. On July 1, 2019, the claimant attended a second IME with Dr. Goldman. As with the prior IME, Dr. Goldman reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his IME report, Dr. Goldman again opined that the claimant had reached MMI as of November 27, 2017. He also noted that the claimant never was, (and continued not to be), a good candidate for an SCS. Dr. Goldman also noted that the pain related diagnoses (beyond the claimant's initial right rotator cuff tear) were based primarily on subjective symptomatology that was never verified via diagnostic studies or other objective data, as required by the Colorado Medical Treatment Guidelines (MTG).

25. The claimant attended a second DIME with Dr. Dillon on July 21, 2020. In her DIME report, Dr. Dillon again opined that the claimant had not reached MMI. In support of this opinion, Dr. Dillon noted that the claimant was in need of replacement of his SCS. In that same report, Dr. Dillon referred to Dr. Goldman's opinion in his July 1, 2019, IME report that the SCS was not in compliance with the MTG and expressed her

agreement with Dr. Goldman on that issue. Specifically, Dr. Dillon noted “[w]hile I agree that the placement of the stimulator may not have been in accordance with the medical treatment guidelines, the fact is that this was done as an authorized procedure as part of this case and one cannot, as a DIME physician at a later date, reverse an authorization and exclude complications that have arisen from the specific authorized treatment.”

26. Dr. Dillion testified via deposition. During her testimony, it was clarified that treatment of the claimant’s right sided TOS, and the SCS trial and implantation were not authorized by the respondents. Based upon this clarification, Dr. Dillon testified that the claimant would have been at MMI “a long time ago”. She further testified that she agreed with Dr. Goldman regarding the date that the claimant reached MMI. Dr. Dillon further testified that it is her opinion that the claimant’s mechanism of injury did not cause or exacerbate the TOS. Therefore, it is Dr. Dillon’s opinion that all treatment following the diagnosis of TOS, including the SCS, would be “outside the scope” of the claim.

27. Dr. Dillon testified that she did not relate the claimant’s diagnosis of TOS to his right rotator cuff tear, or the related repair surgery. To the extent that the TOS existed, that condition was not caused, nor exacerbated by the original injury to the claimant’s right shoulder. Dr. Dillon opined that pursuant to the MTG the claimant did not meet the diagnostic criteria for occupational TOS. Dr. Dillon opined that she would have recommended physical therapy for six months when the claimant reached MMI for his right rotator cuff injury. As that period has elapsed, the only maintenance care she would recommend (as related to the right rotator cuff) would be a home exercise and stretching program.

28. Dr. Goldman testified that he was focused on the relatedness of the claimant’s left shoulder and left shoulder procedures in his IME reports. Therefore, Dr. Goldman assumed that the work-relatedness of the claimant’s right-sided had already been addressed. Dr. Goldman testified that he agrees with Dr. Larson’s opinions regarding the right sided TOS surgery.

29. Dr. Barolat testified via deposition. Dr. Barolat testified that the claimant suffered an injury to the right brachial plexus either at the time of the shoulder injury or at the time of the surgery to correct the shoulder injury. Dr. Barolat also testified that the claimant’s neuropathic pain spread to the left side. Dr. Barolat testified that he did not review the claimant’s prior medical records, (including the results of electrodiagnostic testing), before moving forward with the SCS trial and permanent implantation.

30. Dr. Barolat also testified that the claimant’s current SCS has technically failed and needs to be revised. This revision would involve implantation of an entirely new system, because the manufacturer of the original SCS has gone bankrupt. Dr. Barolat based his opinion regarding relatedness of the spinal cord stimulator on the claimant’s subjective history and a theory that the claimant’s TOS was “somehow” related to the initial work injury to his right shoulder.

31. The ALJ credits the medical records, the testimony of Dr. Dillon and the opinions of Drs. Goldman and Larson. The ALJ does not credit the opinions of Dr. Barolat. The ALJ finds that the respondents have overcome the DIME physician’s initial opinions

on MMI and permanent impairment. Dr. Dillon's initial opinion that the claimant was not at MMI was based upon an incorrect belief related to what treatment had and had not been authorized. Furthermore, once Dr. Dillon had an understanding regarding this, she changed her opinion regarding MMI. Specifically, she agreed with Dr. Goldman that the claimant reached MMI on November 27, 2017. Dr. Dillon also agreed with Dr. Goldman's permanent impairment rating of 21 percent for the claimant's right upper extremity. Finally, Dr. Dillon testified that it is her opinion that the claimant would not need additional maintenance treatment.

32. The ALJ further credits the medical records, Dr. Goldman's opinions, and the testimony of Dr. Dillion, and finds that the claimant has failed to demonstrate that it is more likely than not that a replacement SCS is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury. As noted above, the SCS treatment was not authorized or made part of this claim. Therefore, the ALJ finds that replacing an unauthorized SCS is not reasonable and necessary medical treatment in this case. Nor is the requested replacement SCS related to the claimant's December 17, 2014 work injury.

CONCLUSIONS OF LAW

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

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

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

4. Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the DIME physician's finding of MMI and permanent medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and

free from substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it is highly probable that the DIME physician is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving & Storage, supra*. A mere difference of opinion between physicians fails to constitute error. See *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-356 (March 22, 2000). The ALJ may consider a variety of factors in determining whether a DIME physician erred in her opinions including whether the DIME appropriately utilized the Medical Treatment Guidelines and the AMA Guides in her opinions.

5. When a DIME physician issues conflicting or ambiguous opinions concerning whether or not the claimant has reached MMI, the ALJ may resolve the inconsistency as a matter of fact so as to determine the DIME physician's true opinion. *Magnetic Eng'g, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

6. As found, the respondents have overcome the initial opinions of the DIME physician by clear and convincing evidence. The DIME physician, Dr. Dillon, changed her opinions regarding MMI and permanent impairment once she understood that she based her initial opinions on an incorrect understanding of what was authorized treatment under the claimant's workers' compensation claim. The ALJ finds that Dr. Dillon's current opinions (as expressed in her deposition testimony) are based upon a correct understanding of the claimant's claim. As noted above, the medical records, the opinions of Drs. Goldman and Larson, and the testimony of Dr. Dillon are found to be credible and persuasive.

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

8. As found, the claimant has failed to demonstrate, by a preponderance of the evidence that replacement of his SCS is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted December 17, 2014 work injury. As found, the initial SCS implantation was not authorized by the respondents. Therefore, a replacement the claimant's current SCS is likewise not related to the claimant's work injury. As noted above, the medical records, the opinions of Dr. Goldman, and the testimony of Dr. Dillon are found to be credible and persuasive.

ORDER

It is therefore ordered:

1. The respondents have overcome the opinions of the DIME physician on the issues of MMI and permanent impairment.

2. The claimant reached MMI on November 27, 2017.

3. The claimant shall be assigned a permanent impairment rating of 21 percent for his right upper extremity.

4. The claimant's claim for maintenance medical treatment, including a replacement SCS, is denied and dismissed.

5. All matters not determined here are reserved for future determination.

Dated this 25th day of May 2021.

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

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ISSUES

- Did Claimant prove his claim should be reopened based on a change of condition?

- Is Claimant entitled to medical benefits, including a right shoulder surgery performed by Dr. FitzPatrick on September 25, 2020?

- Is Claimant entitled to additional TTD benefits commencing September 25, 2020?

- Are Respondents entitled to offset PPD benefits already paid against any additional TTD benefits owed to Claimant?

FINDINGS OF FACT

1. Claimant worked for Employer as a distribution sales manager. He suffered admitted injuries on August 24, 2016 when he stepped backward through an open trapdoor and fell down a flight of approximately 20 wooden stairs.

2. Claimant was referred to CCOM for authorized treatment, where he saw PA-C Steven Byrne. After a brief course of treatment, he was put at MMI on November 14, 2016 with no impairment, no restrictions, and no need for further care related to the work accident. Claimant disagreed he had recovered from his injuries and asked about additional therapy or other treatment options. Mr. Byrne advised Claimant he had finished treatment for the work-related injuries and any ongoing issues were related to pre-existing problems, for which he should see his personal providers.

3. Respondents filed a Final Admission of Liability (FAL) denying further treatment as not reasonable, necessary, or related to the compensable injury. Claimant did not object to the FAL and the claim closed.

4. Claimant's condition steadily worsened during 2017. He sought treatment with his personal physicians, as he had been instructed to do when discharged by CCOM. Eventually, Claimant underwent a left shoulder rotator cuff repair, biceps tenodesis, and subacromial decompression surgery by Dr. Jennifer FitzPatrick on October 20, 2017.

5. On December 29, 2017, Claimant applied for a hearing seeking to reopen his claim based on a worsening of condition.

6. Hearings were held before the undersigned ALJ regarding the petition to reopen on June 7, 2018 and September 17, 2018. The claim was reopened in a final Order dated November 21, 2018.

7. One of the disputed issues in the prior litigation was whether the left shoulder was related to the accident. That issue was resolved and Claimant's favor, and

the left shoulder was deemed a compensable component of the work injury. Additionally, Dr. FitzPatrick was found to be an authorized provider and Insurer was ordered to cover the October 2017 left shoulder surgery.

8. Claimant was placed at MMI on November 12, 2019. He was given a combined 20% whole person rating for the cervical spine and left shoulder.

9. Neither party contested the rating, and Respondents filed an FAL on January 13, 2020. Respondents invoked the $86,697.04 benefit "cap" based on a rating of less than 26%. The FAL admitted for the remaining balance of indemnity benefits payable to the cap, which totaled $61,852.94.

10. The admitted PPD has been paid in full. Claimant has received $86,697.04 in TTD and PPD benefits.

11. On February 8, 2020, Claimant sought treatment at the Parkview Medical Center emergency department after slipping on ice outside his home. Claimant did not fall to the ground, but he squatted quickly and aggravated his left knee and hip. Claimant credibly testified he did not injure or aggravate his left shoulder because of the accident. Claimant's testimony is corroborated by the ER records, which document left knee pain and swelling but contain no mention of any left shoulder issue.

12. Dr. FitzPatrick evaluated Claimant on February 10, 2020 regarding his left knee and hip. Claimant explained he "recently slipped on ice with left hip and left knee pain since that time. Felt a pop at that time. Feels that knee bent more than it normally can." Claimant also told Dr. FitzPatrick he was "still" having pain in his left shoulder from the 2016 work injury. There was no indication he injured the left shoulder when he slipped on the ice or that his shoulder has gotten any worse. X-rays showed a nondisplaced patellar fracture. Dr. FitzPatrick recommended a CT of the left hip. She recommended no treatment for the left shoulder and stated Claimant could follow up for the left shoulder "in the future."

13. Claimant returned to Dr. FitzPatrick on July 27, 2020 regarding his left shoulder. His primary complaint was "progressive pain with time, no fall or injuries since time of surgery." The worsening shoulder pain was limiting Claimant's ability to complete ADLs. Dr. FitzPatrick ordered a left shoulder MRI, which was completed on September 1, 2020.

14. Dr. FitzPatrick reevaluated Claimant on September 3, 2020. She personally reviewed the MRI images. Dr. FitzPatrick noted a full-thickness "re-tear" of the rotator cuff. The supraspinatus was retracted back to the mid-humerus. Dr. FitzPatrick recommended an arthroscopic rotator cuff revision repair and documented, "he would like to undergo revision as he is having increasing pain and disabilities with activities of daily living."

15. Dr. FitzPatrick performed an arthroscopic revision rotator cuff repair on September 25, 2020.

16. The surgery caused additional disability and impact on Claimant's earning capacity commencing September 25, 2020.

17. Dr. William Ciccone II performed an IME for Respondents on December 9, 2020. Dr. Ciccone opined the September 25, 2020 left shoulder surgery was reasonably needed but not causally related to the work accident. Dr. Ciccone stated, "[t]he claimant was placed at MMI on 11/25/2019. According to the records provided, the claimant suffered another injury on 2/8/2020 when he slipped on ice. The claimant had complaints of left shoulder pain on 2/10/2020 in the orthopedic examination. It appears that claimant had increased left shoulder pain following the fall. . . . I believe the fall on 2/8/2020 may have aggravated his pre-existing pathology necessitating revision surgery." Dr. Ciccone reiterated this conclusion in his deposition testimony.

18. Dr. Ciccone's supposition Claimant re-injured or aggravated his left shoulder on February 8, 2020 is inconsistent with the contemporaneous medical records and is refuted by Claimant's credible testimony. Dr. Ciccone's causation opinions are neither credible nor persuasive.

19. The most recent medical record in evidence is Dr. FitzPatrick's February 25, 2021 report. Claimant was recovering well but still had a few PT sessions remaining. Claimant was "very happy" the results of surgery and the shoulder felt better than it had in years. Dr. FitzPatrick opined Claimant was "nearing MMI, but still can make some strength gains."

20. The record contains no formal declaration of MMI or release to full duty from an ATP.

21. Claimant's testimony was credible and persuasive.

22. Claimant proved his claim should be reopened effective September 25, 2020 based on a change of condition. The worsening of Claimant's left shoulder in 2020 reflects the natural progression of his compensable injury. There is no persuasive evidence of any intervening or nonindustrial cause.

23. The left shoulder surgery performed by Dr. FitzPatrick on September 25, 2020 was reasonably needed and causally related to the August 24, 2016 work accident.

24. Claimant proved entitlement to TTD benefits commencing September 25, 2020.

25. Respondents may offset PPD already paid against TTD owed to Claimant under *Donald B. Murphy Contractors, Inc. v. Industrial Claim Appeals Office*, 916 P.2d 611 (Colo. App. 1995).

CONCLUSIONS OF LAW

A. This claim should be reopened based on a change of condition.

Section 8-43-303 authorizes an ALJ to reopen any award on the grounds of error, mistake, or a change in condition. The allowance for reopening reflects a "strong legislative policy" that the goal of achieving a fair and just result overrides the interests of litigants in obtaining final resolution of their dispute. *Padilla v. Industrial Commission*, 696 P.2d 273, 278 (Colo. 1985). Thus, a "final" award means only that the matter has been concluded subject to reopening if warranted under the applicable statutory criteria. *Renz v. Larimer County School District Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996). The authority to reopen a claim is permissive, and whether to reopen a claim if the statutory criteria have been met is left to the ALJ's discretion. *Id*. The party requesting reopening bears the burden of proof. Section 8-43-304(4).

A "change in condition" refers either to a change in the condition of the original compensable injury, or a change in the claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). If a claimant's condition is shown to have changed, the ALJ should consider whether the change represents the natural progression of the industrial injury, or results from an intervening cause. *Goble v. Sam's Wholesale Club*, W.C. No. 4-297-675 (May 3, 2001).

As found, Claimant proved his claim should be reopened based on a change of condition. Although Claimant's left shoulder remained symptomatic when he was put at MMI, it progressively worsened in 2020. The September 1, 2020 MRI documented a recurrent rotator cuff tear, which was subsequently confirmed intraoperatively. Claimant did not injure or aggravate his left shoulder on February 8, 2020 when he slipped on ice. The worsening of Claimant's left shoulder that ultimately culminated in surgery on September 25, 2020 reflects the natural progression of his industrial injury, without contribution from any nonindustrial factor.

B. Claimant is entitled to TTD benefits commencing September 25, 2020.

A claimant's entitlement to TTD benefits after a reopening is governed by *City of Colorado Springs Disposal v. Industrial Claim Appeals Office*, 954 P.2d 677 (Colo. App. 1997). *City of Colorado Springs* held that a worsening after MMI does not automatically entitle a claimant to additional TTD benefits, unless the worsened condition causes a "greater impact upon [the] claimant's temporary work capability." The dispositive question is whether the claimant proves "increased disability, as measured by [their] capacity to earn wages." *Friesz v. Wal-Mart Stores, Inc*., W.C. No. 4-823-944-01 (July 26, 2012). The ICAO has repeatedly held that *City of Colorado Springs* does not require a claimant to establish an "actual wage loss," and a claimant may recover TTD even if he not working immediately before his condition worsened. *E.g.*, *Hebert v. Blac Frac Tanks, Inc*., W.C. No. 4-919-279-01 (October 19, 2018); *Garcia v. Frontier Airlines*, W.C. No. 4-677-511

(August 17, 2011); *Moss v. Denny's Restaurants*, W.C. No. 4-440-517 (September 27, 2006).

As found, Claimant proved the September 25, 2020 shoulder surgery caused increased disability and greater impact on his earning capacity than existed before surgery. Although Claimant was not given any formal restrictions, a claimant need not present a medical opinion or restrictions to establish TTD. *E.g., Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983). After surgery, Claimant reasonably required some period of convalescence during which he could not have worked in any capacity. Claimant is entitled to TTD benefits commencing September 25, 2020 and continuing until the occurrence of a terminating event listed in § 8-42-105(3).

C. Insurer may offset PPD paid against additional TTD owed to Claimant

Section 8-42-107.5 limits the combined total of temporary disability and permanent partial disability benefits a claimant may receive based on their final impairment rating. The cap for a whole person rating less than 26% for Claimant's date of injury is $86,697.04. As found, Claimant's overall final whole person rating is 20% and Insurer has admitted and paid Claimant $86,697.04 in temporary and permanent partial disability benefits.

Where, as here, a claim is reopened after a claimant has been paid up to the applicable benefit cap, the respondents may offset PPD benefits paid against any additional TTD benefits owed. *Donald B. Murphy Contractors, Inc. v. Industrial Claim Appeals Office*, 916 P.2d 611 (Colo. App. 1995). There is no appreciable difference between Claimant's case and the factual scenario addressed in the *Murphy* case. Accordingly, Insurer may offset PPD benefits previously paid to Claimant against any additional TTD benefits owed as a result of this Order.

ORDER

It is therefore ordered that:

1. This claim is reopened effective September 25, 2020.

2. Insurer shall cover all reasonably necessary medical expenses related to the September 25, 2020 left shoulder surgery performed by Dr. FitzPatrick.

3. Claimant is eligible for TTD benefits at the admitted rate commencing September 25, 2020 and continuing until terminated according to law.

4. Insurer may offset PPD benefits previously paid against any additional TTD benefits owed to Claimant, pursuant to *Donald B. Murphy Contractors, Inc. v. Industrial Claim Appeals Office*, 916 P.2d 611 (Colo. App. 1995).

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

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

DATED: May 25, 2021

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

ISSUES

- Is Claimant's claim for medical benefits after MMI closed such that a petition to reopen would be required before Claimant can pursue additional evaluations or treatment? If so, Claimant is well beyond the time for reopening.

- If the claim remains open for medical benefits after MMI, Insurer will authorize a one-time evaluation with the ATP, Dr. Michael Dallenbach, to determine what, if any, additional injury-related treatment is reasonably needed.

FINDINGS OF FACT

1. Claimant suffered an admitted industrial injury to his wrist on June 18, 1992.

2. He underwent surgery and was left with a metal plate and screws in his wrist.

3. Claimant reached MMI on July 27, 1993 with an 18% upper extremity impairment rating.

4. Insurer filed a Final Admission of Liability (FAL) on September 12, 1994 admitting for the impairment rating. The FAL did not state a physician regarding medical benefits after MMI.

5. Claimant was last paid indemnity benefits in this claim as of April 15, 1994.

6. ALJ Barbara Henk conducted a hearing on May 24, 1995 on the sole issue of Claimant's entitlement to medical benefits after MMI.

7. In her Findings of Fact, Conclusions of Law, and Order dated June 6, 1995, Judge Henk found Claimant needed replacement braces and follow-up appointments with his treating surgeon "once or twice per year for the indefinite future." Judge Henk determined "Claimant needs continuing care to relieve the effects or prevent deterioration of this injury" as contemplated by *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988).

8. Judge Henk's FFCLO also concluded,

> Respondents urge the Administrative Law Judge to place limits on the type of future care that Claimant can obtain. The Administrative Law Judge must decline to limit the future care because such limits would be speculative. Milco Construction, 860 P.2d at 545 requires the entry of "a general order . . . without prejudice to the rights of either party to request reopening in accordance with the statute." Therefore, the Administrative Law Judge will

enter a general order keeping medical benefits open, but will not attempt to limit or specify the type of future care Claimant may obtain. Respondents are protected by the ordinary requirements that the care be reasonable, necessary, related to the injury, and in compliance with the fee schedule.

9. Judge Henk ordered Respondents to "pay . . . Claimant's continuing authorized medical benefits necessary as a result of this work-related injury." The Order also provided "[a]ll other issues shall remain open for future determination."

10. Neither party appealed the Order, and it became final.

11. Insurer did not file an Amended FAL after Judge Henk issued her Order.

12. Insurer covered ongoing "*Grover"* benefits for several years. The last date of service for medical treatment paid by Insurer was January 28, 2013. Respondents have not paid for any further medical benefits since that date.

13. No affirmative action was even taken to close the award of medical benefits after MMI.

14. This claim remains open for medical benefits after MMI despite the lack of activity since 2013.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment from authorized providers that is reasonably necessary to cure or relieve the employee from the effects of the industrial injury. Section 8-42-101(1)(a); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The need for medical treatment may extend beyond maximum medical improvement (MMI) if the claimant requires periodic maintenance care to relieve the effects of the injury or prevent deterioration of their condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). If the claimant establishes the probability of a need for future treatment, he is entitled to a general award of medical benefits after MMI, subject to the respondents' right to dispute compensability, reasonableness, or necessity of any particular treatment. *Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003); *Milco Construction v. Cowan*, 860 P.2d 539 (Colo. App. 1992).

A general award of *Grover* benefits is open-ended and can contain no automatic expiration date. *Benedict v. Industrial Claim Appeals Office*, 740 P.2d 541 (Colo. App. 1987). In *Benedict*, the court held that "medical benefits may remain ongoing if they were ordered at the time a final award . . . was entered. . . . [O]nce such an agreement is made, or if a similar award is entered, we conclude that the payment of medical expenses must remain open until the carrier files a petition under § 8-53-113[1] to 'end or diminish' medical benefits." *Id*. at 543-44. The rule in *Benedict* applies whether *Grover* benefits are awarded

[1] The current reopening statute is codified at § 8-43-303. As to the issues involved in the present litigation, there is no material difference between the current version of the reopening statute and the version referenced in *Benedict*.

by a FAL or an ALJ. *E.g., Karathanasis v. Chili's Grill & Ba*r, W.C. No. 4-461-989 (August 8, 2003) (ALJ erred by imposing a 2-year limit on the award of medical benefits after MMI); *Eddy v. Toby's Vacuum Truck Service*, W.C. No. 3-113-338 (October 5, 2001). Accordingly, Claimant's claim remains open for medical benefits after MMI, and reopening is not required.

ORDER

It is therefore ordered that:

1. Claimant's claim for medical benefits after MMI remains open and no petition to reopen is required.

2. Insurer shall cover a one-time evaluation with Dr. Michael Dallenbach to determine what, if any, additional medical care Claimant may require.

3. All issues not decided herein or otherwise closed by operation of law are reserved for future determination.

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

DATED: May 26, 2021

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

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered compensable injuries during the course and scope of his employment with Employer on February 26, 2019.

2. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Partial Disability (TPD) benefits for the period February 27, 2019 until he reached Maximum Medical Improvement (MMI) on September 30, 2020.

3. Whether Respondents have established by a preponderance of the evidence that Claimant was responsible for his termination from employment under §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. (collectively “termination statutes”).

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $699.09.

FINDINGS OF FACT

1. Claimant worked for Employer as a Delivery Driver. On February 25, 2019 Employer's Shipping/Receiving Supervisor Nick A[Redacted] completed an Employee Warning Report because Claimant had been discriminating against a co-employee by calling him a racist. Claimant received a warning because his behavior was "highly offensive” and “must stop immediately.” The Report specified that the “failure to demonstrate immediate and sustained improvement in these areas may result in further disciplinary action, up to and including termination.”

2. Claimant testified that on February 26, 2019 he injured his right elbow while performing his job duties. Claimant was delivering steel plates on a pallet weighing approximately 400 pounds. The person helping Claimant dropped the pallet and the steel began to slide. When Claimant tried to hold the pallet by himself, he felt a snap in his right elbow.

3. On February 27, 2019 Claimant presented to Injury Care Associates and reported a right elbow injury. Authorized Treating Physician (ATP) Christian Updike, M.D. noted that Claimant was lifting a pallet off of a truck and hyper-extended his right elbow “with high force.” Because Claimant exhibited slight, diffuse swelling of the right elbow, Dr. Updike recommended an MRI. Dr. Updike also assigned Claimant work restrictions of no lifting in excess of one pound, no driving and wearing a splint/brace.

4. On March 1, 2019 Claimant returned to Dr. Updike for an evaluation. He reported improved right elbow symptoms with only mild pain. Claimant was working modified duty. Dr. Updike noted that the MRI showed a high grade partial thickness tear

of the common extensor tendon, but Claimant was clinically minimally symptomatic. There was no fracture or loose body. Dr. Updike noted that Claimant's "tennis elbow" was minimally symptomatic and did not require surgery.

5. Claimant returned to Dr. Updike at Employer's request on March 5, 2020 because of his unwillingness to return to work based on pain and stress. Dr. Updike concluded that Claimant's MRI findings did not warrant being taken off of work. He noted that Claimant mentioned mental stress and had sought treatment at the VA Crisis Center. Dr. Updike authored a note taking Claimant off of work due to his personal condition that was unrelated to his Workers' Compensation claim. Claimant did not inform Dr. Updike of his prior history of anxiety.

6. On March 8, 2019 Claimant returned to Dr. Updike for an elbow evaluation and a Department of Transportation (DOT) physical. Claimant reported right elbow aching and intermittent soreness. Claimant was informed that he would not pass his DOT physical due to his high blood pressure.

7. On March 8, 2019 Claimant received an Employee Attendance Warning Report because he was absent from work and failed to contact his supervisor. The Report also noted that Claimant's five absences since the beginning of the year were excessive and would not be tolerated. The document specified that Claimant "needs to call into his supervisor prior to his shift starting if he is going to be absent or late" and "[a]ny future violations of our attendance policy, or any policy, may result in additional disciplinary action up to and including termination."

8. Claimant received another warning on March 11, 2019 regarding public urination. Mr. A[Redacted] testified the area in question was located on Employer's premises. He remarked that Claimant had received verbal warnings about public urination prior to the March 11, 2019 incident. Furthermore, Employer's Assistant Supervisor Sean B[Redacted] testified that Claimant had been warned several times about urinating on the premises. He specified that he saw Claimant out the back doors of Employer's facility urinating in public.

9. On March 11, 2019 Mr. A[Redacted] provided a note that Claimant's DOT physical had expired and his Commercial Driver's License (CDL) was no longer valid. Mr. A[Redacted] explained that it was Employer's policy for drivers to possess valid licenses.

10. On March 11, 2019 Claimant was terminated from employment with Employer. The Termination Report reflects that Claimant was specifically dismissed for violating Employer's policies and procedures. The Report also noted that Claimant's performance had been unsatisfactory in multiple areas. Mr. A[Redacted] summarized that the combination of Claimant's unexcused absences, public urination and unsatisfactory job performance culminated in his termination from employment.

11. On March 29, 2019 Claimant visited his Primary Care Physician (PCP) and reported sleep disturbances. He was assessed with chronic insomnia. Claimant did not report any right elbow pain or dysfunction.

12. Claimant returned to his PCP on March 5, 2020 or about one year later and reported lower back pain. However, he did not mention any ongoing, chronic right elbow or upper extremity pain and dysfunction. Furthermore, on March 23, 2020 Claimant reported to his PCP that he continued to have lower back pain and was no longer working due to Covid-19.

13. On May 27, 2020 Claimant again visited his PCP for pain in multiple joints. He reported symptoms primarily in his hands and elbows but also mentioned his knees and hips. Claimant did not attribute any of his symptoms to the February 26, 2019 work incident.

14. Claimant did not return to Injury Care Associates for his right elbow condition until approximately 15 months after his February 26, 2019 work incident. On June 24, 2020 ATP Ericson B. Tentori, D.O. evaluated Claimant. Claimant reported that he had been terminated by Employer and informed that he would no longer receive treatment for his right elbow injury. He noted that he worked for another employer as a fork lift operator but was "let go" after eight months. On physical examination, Dr. Tentori noted Claimant had diffuse tenderness circumferentially to the right forearm and wrist. He recommended re-opening of Claimant's claim, electrodiagnostic testing and a follow-up evaluation with Sean Griggs, M.D.

15. On July 8, 2020 Claimant returned to Dr. Tentori for an examination. Claimant reported ongoing moderate and occasionally severe pain affecting his right upper extremity from elbow to fingertips with associated paresthesia/weakness. Dr. Tentori determined that Claimant might have Carpal Tunnel Syndrome (CTS) unrelated to his original elbow injury.

16. On August 7, 2020 Claimant underwent EMG testing of his right upper extremity. The testing revealed severe right CTS that affected Claimant's motor and sensory fibers.

17. On August 12, 2020 Claimant returned to Dr. Tentori for an examination. Dr. Tentori remarked that Claimant had been evaluated by Dr. Griggs. However, Dr. Griggs had not addressed Claimant's right elbow. Instead, Dr. Tentori explained that Dr. Griggs "appears to have erroneously addressed/treated body parts which per my review of this claim are unrelated to the original work injury," In fact, Dr. Griggs had assessed Claimant with left finger trigger abnormality and clinical CTS. He administered injections to Claimant's bilateral wrists/carpal tunnel. Although Claimant's electrodiagnostic testing revealed severe CTS on the right side, Dr. Tentori could not connect the condition to Claimant's original right elbow injury.

18. On September 30, 2020 Claimant again visited Dr. Tentori for an evaluation. Dr. Tentori considered Claimant's medical records and performed a physical examination. He reasoned that it was not medically probable that Claimant's ongoing right elbow pain was a consequence of the February 26, 2019 work incident. However, he noted that Claimant "clearly injured his right elbow in February 2019." Dr. Tentori explained that, based on the nature of the original work injury, Claimant had received an appropriate diagnostic workup and course of treatment. He commented that, "[w]hile the claim was

open in 2019, it is my interpretation of the notes generated by Dr. Updike and Dr. Griggs that [Claimant] was without pain or acute findings with regard to the lateral eplcondylar region of his right elbow." Dr. Tentori thus concluded that Claimant reached Maximum Medical Improvement (MMI) with no permanent impairment for his February 26, 2019 right elbow injury and did not require medical maintenance care.

19. On October 1, 2020 Claimant underwent an independent medical examination with Lawrence A. Lesnak, D.O. On March 31, 2021 the parties completed the evidentiary deposition of Dr. Lesnak. Claimant reported to Dr. Lesnak that he and a customer were unloading a pallet weighing approximately 300 pounds on February 26, 2019. The customer was on a truck and lifted the pallet too high. The weight of the pallet thus shifted. The pallet struck Claimant's right forearm in three places. Claimant reported he developed acute right elbow pain. He also told Dr. Lesnak that, after he was terminated by Employer, he obtained full-time employment at Packrat as a delivery driver and worked until he was laid off. Claimant then worked full-time at Spec Building as a warehouse worker/delivery driver until he was again laid off. He did not report to Dr. Lesnak that he was unable to perform his job duties with the preceding employers due to any ongoing right elbow pain.

20. Dr. Lesnak acknowledged that Claimant may have sustained a mild soft tissue injury from being struck by the pallet on February 26, 2019. He noted that, when Claimant was evaluated by Dr. Updike, there was no evidence of any acute injury or trauma related to his right forearm or elbow. Dr. Lesnak commented that Claimant's right elbow MRI showed degenerative changes, but no evidence of any type of acute injury or trauma. He testified that, because Claimant underwent the MRI on the day after the injury, the imaging would have revealed blood in the area. Instead, the MRI only revealed the common degenerative finding of a partial thickness tear that Dr. Lesnak characterized as a "wear and tear abnormality." Dr. Lesnak commented that by March 8, 2019 Claimant reported that his right elbow condition had improved and he only had mild symptom

21. Dr. Lesnak noted that Claimant was terminated from his employment with Employer but then worked full time unrestricted for at least 10 months with other employers. He explained that, by the time Claimant's claim was reopened in June 2020, his symptoms were completely unrelated to any potential injury he may have sustained during the February 26, 2019 work incident. In fact, Dr. Lesnak reasoned that any soft tissue injury would have healed on or around March 8, 2019 and no further medical treatment would have been reasonable, necessary or related to the February 26, 2019 accident. He noted that there was no medical evidence to suggest Claimant required any activity limitations or work restrictions. Dr. Lesnak remarked that Claimant reported an extremely high level of somatic pain complaints that were also documented by other physicians. He concluded that Claimant more likely than not has significant, unrelated psychological issues affecting his subjective complaints.

22. Claimant testified at the hearing in this matter. He explained that after his termination from Employer he worked for a container delivery company called 1-800-PACKRAT. He noted that he worked for approximately six to eight months delivering containers and earned the same amount of money that he had made while working for Employer. Claimant remarked that he then worked for SPEC Building for about seven months. He delivered roofing materials and worked in a warehouse, Claimant noted that he was laid off due to Covid-19 and received unemployment benefits.

23. Claimant has demonstrated that it is more probably true than not that he suffered a compensable injury during the course and scope of his employment with Employer on February 26, 2019. However, the record reveals that his injury is limited to the right elbow. Claimant's CTS and other pre-existing conditions were not aggravated or accelerated by his February 26, 2019 industrial incident.

24. Initially, on February 26, 2019 Claimant injured his right elbow while delivering metal plates on a pallet weighing approximately 400 pounds. The person helping Claimant dropped the pallet and the plates started to slide. Claimant tried to catch the pallet, but developed acute right elbow pain. On February 27, 2019 Dr. Updike assigned Claimant work restrictions of no lifting in excess of one pound, no driving and wearing a splint/brace. A right elbow MRI showed a high grade partial thickness tear of the common extensor tendon, but no fracture or loose body. On March 1, 2019 Dr. Updike noted that Claimant's "tennis elbow" was minimally symptomatic and did not require surgery. Although Dr. Updike concluded that Claimant's MRI findings did not warrant taking him off of work, he nevertheless removed Claimant from work due to his unrelated, personal mental stress condition.

25. Claimant did not return to Injury Care Associates for his right elbow condition until approximately 15 months after his February 26, 2019 work incident. On June 24, 2020 ATP Dr. Tentori noted Claimant had diffuse tenderness circumferentially to the right forearm and wrist. He recommended re-opening Claimant's claim, electrodiagnostic testing and a follow-up evaluation with Dr. Griggs. Electrodiagnostic testing revealed severe CTS on the right side that was unrelated to Claimant's February 26, 2019 right elbow injury. By September 30, 2020 Dr. Tentori concluded that it was not

medically probable that Claimant's ongoing right elbow pain was a consequence of the February 26, 2019 work incident. Nevertheless, he noted that Claimant "clearly injured his right elbow in February 2019." Dr. Tentori explained that, based on the nature of the original work injury, Claimant had received an appropriate diagnostic workup and course of treatment. He explained that, while the claim was open in 2019, Claimant did not exhibit pain or acute findings in the lateral eplcondylar region of his right elbow. Dr. Tentori thus concluded that Claimant had reached MMI with no permanent impairment and did not require medical maintenance care.

26. Similarly, Dr. Lesnak's opinion reflects that Claimant's February 26, 2019 work injury was limited to his right elbow. Dr. Lesnak explained that Claimant likely only sustained a mild soft tissue injury or contusion to his arm or a sprain to his elbow as a result of the February 26, 2019 incident. Furthermore, the MRI taken within days of the incident did not demonstrate any acute injury. The findings on the MRI were merely degenerative and constituted a wear and tear type injury common in people Claimant's age. Dr. Lesnak determined that, when Claimant's claim was reopened in June 2020, his symptoms were completely unrelated to any potential injury he may have sustained during the work incident. In fact, Dr. Lesnak explained that any soft tissue injury would have healed on or around March 8, 2019 and no further medical treatment would have been reasonable, necessary or related to the February 26, 2019 accident. He noted that there was no medical evidence to suggest that Claimant needed any type of activity limitations or work restrictions.

27. The preceding chronology and persuasive medical opinions from Drs. Tentori and Lesnak reflect that Claimant's work-related injury is limited to his right elbow. The medical records establish that Claimant's other complaints and symptoms are unrelated to the February 26, 2019 lifting incident. Claimant's receipt of medical care based on reported symptoms does not establish an injury, but only demonstrates that he claimed an injury. Accordingly, Claimant suffered an industrial injury while working for Employer on February 26, 2019 that was limited to his right elbow.

28. Claimant has failed to prove that it is more probably true than not that he is entitled to receive TPD benefits for the period February 27, 2019 until he reached MMI on September 30, 2020. Claimant contends that he suffered a wage loss as a result of his work injury and should receive TPD benefits until he reached MMI. However, the record reveals that any decrease in Claimant's wages was not likely attributable to his right elbow work injury.

29. The record reflects that Claimant was working modified duty after the February 26, 2019 work incident until he requested Dr. Updike to remove him from work. On March 1, 2019 Dr. Updike noted that Claimant's "tennis elbow" was minimally symptomatic and did not require surgery. Although Dr. Updike concluded that Claimant's MRI findings did not warrant taking him off of work, he nevertheless removed Claimant from work due to his personal, unrelated mental stress condition. Furthermore, Dr. Lesnak determined that by early March 2019 Claimant's right elbow injury would have resolved and he would not have required work restrictions. Claimant was capable of work performing driving and warehouse duties for approximately one year without any issues. In fact, Claimant explained that after his March 11, 2019 termination from Employer he

worked for container delivery company 1-800-PACKRAT. He noted that he worked for approximately six to eight months and earned the same amount of money he had made while working for Employer. Claimant remarked that he then worked for SPEC Building for about seven months but was laid off due to Covid-19 and received unemployment benefits.

30. Furthermore, Claimant returned to modified duty work with Employer after his work-related right elbow injury at his full rate of pay. In fact, wage records reflect that the number of hours Claimant worked each week varied widely both before and after his work injury. Even before Claimant's February 26, 2019 industrial injury, he worked from 24 to 40 hours each week. Notably, after Claimant's work injury he worked 40 regular hours plus 1.50 overtime hours for the period ending March 1, 2019. Based on Claimant's unrelated symptoms and varied work schedule, it is unlikely that any decrease in Claimant's work hours were attributable to his February 26, 2019 work injury. Accordingly, Claimant has not established that the February 26, 2019 incident caused a disability and consequent partial wage loss. Claimant's request for TPD benefits is thus denied and dismissed.

31. Respondents have established that it is more probably true than not that Claimant was responsible for his termination from employment. The record reflects that a combination of Claimant's unexcused absences, public urination and unsatisfactory job performance culminated in his termination from employment. Specifically, on February 25, 2019 Mr. A[Redacted] completed an Employee Warning Report because Claimant had been discriminating against a co-employee. The Report specified that the "failure to demonstrate immediate and sustained improvement in these areas may result in further disciplinary action, up to and including termination." On March 8, 2019 Claimant received an Employee Attendance Warning Report because he was absent from work and failed to contact his supervisor. The Report also noted that Claimant's five absences since the beginning of the year were excessive and would not be tolerated. The document specified that "[a]ny future violations of our attendance policy, or any policy, may result in additional disciplinary action up to and including termination." Claimant received another warning on March 11, 2019 regarding public urination. Mr. A[Redacted] testified the area in question was located on Employer's premises. He remarked that Claimant had received verbal warnings about public urination prior to the March 11, 2019 incident. Furthermore, Mr. B[Redacted] testified that Claimant had been warned several times about urinating on the premises.

32. On March 11, 2019 Claimant was terminated from employment with Employer. Employer's Termination Report reflects that Claimant was specifically dismissed for violating Employer's policies and procedures. The Report also noted that Claimant's performance had been unsatisfactory in multiple areas. Mr. A[Redacted] summarized that the combination of Claimant's unexcused absences, public urination and unsatisfactory job performance culminated in his termination from employment. Through his repeated violations of Employer's policies and procedures Claimant exercised some control over the circumstances surrounding his termination from employment. Claimant thus precipitated his employment termination by a volitional act that he would reasonably expect to cause the loss of employment. Accordingly, he was responsible for his termination.

CONCLUSIONS OF LAW

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

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

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

Compensability

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

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.,* W.C. No. 4-650-711 (ICAO, Feb. 15, 2007); *David Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

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

7. The provision of medical care based on a claimant's report of symptoms does not establish an injury but only demonstrates that the claimant claimed an injury. *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020). Moreover, a referral for medical care may be made so that the respondent would not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id.* Although a physician provides diagnostic testing, treatment, and work restrictions based on a claimant's reported symptoms, it does not follow that the claimant suffered a compensable injury. *Fay v. East Penn manufacturing Co., Inc.*, W.C. No. 5-108-430-001 (ICAO, Apr. 24, 2020); *cf. Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997) ("right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment"). While scientific evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory supporting compensability when making a determination. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020).

8. As found, Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable injury during the course and scope of his employment with Employer on February 26, 2019. However, the record reveals that his injury is limited to the right elbow. Claimant's CTS and other pre-existing conditions were not aggravated or accelerated by his February 26, 2019 industrial incident.

9. As found, initially, on February 26, 2019 Claimant injured his right elbow while delivering metal plates on a pallet weighing approximately 400 pounds. The person helping Claimant dropped the pallet and the plates started to slide. Claimant tried to catch the pallet, but developed acute right elbow pain. On February 27, 2019 Dr. Updike assigned Claimant work restrictions of no lifting in excess of one pound, no driving and wearing a splint/brace. A right elbow MRI showed a high grade partial thickness tear of the common extensor tendon, but no fracture or loose body. On March 1, 2019 Dr. Updike noted that Claimant's "tennis elbow" was minimally symptomatic and did not require surgery. Although Dr. Updike concluded that Claimant's MRI findings did not warrant taking him off of work, he nevertheless removed Claimant from work due to his unrelated, personal mental stress condition.

10. As found, Claimant did not return to Injury Care Associates for his right elbow condition until approximately 15 months after his February 26, 2019 work incident. On June 24, 2020 ATP Dr. Tentori noted Claimant had diffuse tenderness circumferentially to the right forearm and wrist. He recommended re-opening Claimant's claim, electrodiagnostic testing and a follow-up evaluation with Dr. Griggs. Electrodiagnostic testing revealed severe CTS on the right side that was unrelated to Claimant's February 26, 2019 right elbow injury. By September 30, 2020 Dr. Tentori concluded that it was not medically probable that Claimant's ongoing right elbow pain was a consequence of the February 26, 2019 work incident. Nevertheless, he noted that Claimant "clearly injured his right elbow in February 2019." Dr. Tentori explained that, based on the nature of the original work injury, Claimant had received an appropriate diagnostic workup and course of treatment. He explained that, while the claim was open in 2019, Claimant did not exhibit pain or acute findings in the lateral eplcondylar region of his right elbow. Dr. Tentori thus concluded that Claimant had reached MMI with no permanent impairment and did not require medical maintenance care.

11. As found, similarly, Dr. Lesnak's opinion reflects that Claimant's February 26, 2019 work injury was limited to his right elbow. Dr. Lesnak explained that Claimant likely only sustained a mild soft tissue injury or contusion to his arm or a sprain to his elbow as a result of the February 26, 2019 incident. Furthermore, the MRI taken within days of the incident did not demonstrate any acute injury. The findings on the MRI were merely degenerative and constituted a wear and tear type injury common in people Claimant's age. Dr. Lesnak determined that, when Claimant's claim was reopened in June 2020, his symptoms were completely unrelated to any potential injury he may have sustained during the work incident. In fact, Dr. Lesnak explained that any soft tissue injury would have healed on or around March 8, 2019 and no further medical treatment would have been reasonable, necessary or related to the February 26, 2019 accident. He noted that there was no medical evidence to suggest that Claimant needed any type of activity limitations or work restrictions.

12. As found, the preceding chronology and persuasive medical opinions from Drs. Tentori and Lesnak reflect that Claimant's work-related injury is limited to his right elbow. The medical records establish that Claimant's other complaints and symptoms are unrelated to the February 26, 2019 lifting incident. Claimant's receipt of medical care based on reported symptoms does not establish an injury, but only demonstrates that he claimed an injury. Accordingly, Claimant suffered an industrial injury while working for Employer on February 26, 2019 that was limited to his right elbow.

Temporary Partial Disability Benefits

13. Section 8-42-106(1), C.R.S. provides for an award of TPD benefits based on the difference between the claimant's AWW at the time of injury and his earnings during the continuance of the temporary partial disability. Specifically, an employee shall receive 66.66% of the difference between his wages at the time of his injury and during the continuance of temporary partial disability. In order to receive TPD benefits the claimant must establish that the injury caused the disability and consequent partial wage loss. §8-42-103(1), C.R.S.; *see Safeway Stores, Inc. v. Husson,* 732 P.2d 1244 (Colo. App. 1986) (temporary partial compensation benefits are designed as a partial substitute

for lost wages or impaired earning capacity arising from a compensable injury). Section 8-42-106(2), C.R.S. provides that TPD shall continue until either of the following occurs: "(a) The employee reaches maximum medical improvement; or (b)(I) The attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment." *See Evans v. Wal-Mart*, WC 4-825-475 (ICAO, May 4, 2012).

14. As found, Claimant has failed to prove by a preponderance of the evidence that he is entitled to receive TPD benefits for the period February 27, 2019 until he reached MMI on September 30, 2020. Claimant contends that he suffered a wage loss as a result of his work injury and should receive TPD benefits until he reached MMI. However, the record reveals that any decrease in Claimant's wages was not likely attributable to his right elbow work injury.

15. As found, the record reflects that Claimant was working modified duty after the February 26, 2019 work incident until he requested Dr. Updike to remove him from work. On March 1, 2019 Dr. Updike noted that Claimant's "tennis elbow" was minimally symptomatic and did not require surgery. Although Dr. Updike concluded that Claimant's MRI findings did not warrant taking him off of work, he nevertheless removed Claimant from work due to his personal, unrelated mental stress condition. Furthermore, Dr. Lesnak determined that by early March 2019 Claimant's right elbow injury would have resolved and he would not have required work restrictions. Claimant was capable of work performing driving and warehouse duties for approximately one year without any issues. In fact, Claimant explained that after his March 11, 2019 termination from Employer he worked for container delivery company 1-800-PACKRAT. He noted that he worked for approximately six to eight months and earned the same amount of money he had made while working for Employer. Claimant remarked that he then worked for SPEC Building for about seven months but was laid off due to Covid-19 and received unemployment benefits.

16. As found, furthermore, Claimant returned to modified duty work with Employer after his work-related right elbow injury at his full rate of pay. In fact, wage records reflect that the number of hours Claimant worked each week varied widely both before and after his work injury. Even before Claimant's February 26, 2019 industrial injury, he worked from 24 to 40 hours each week. Notably, after Claimant's work injury he worked 40 regular hours plus 1.50 overtime hours for the period ending March 1, 2019. Based on Claimant's unrelated symptoms and varied work schedule, it is unlikely that any decrease in Claimant's work hours were attributable to his February 26, 2019 work injury. Accordingly, Claimant has not established that the February 26, 2019 incident caused a disability and consequent partial wage loss. Claimant's request for TPD benefits is thus denied and dismissed.

Termination for Cause

17. Under the termination statutes in §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore*

v. Industrial Claim Appeals Office, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for her termination, respondents must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* W.C. No. 4-432-301 (ICAO, Sept. 27, 2001).

18. As found, Respondents have established by a preponderance of the evidence that Claimant was responsible for his termination from employment. The record reflects that a combination of Claimant's unexcused absences, public urination and unsatisfactory job performance culminated in his termination from employment. Specifically, on February 25, 2019 Mr. A[Redacted] completed an Employee Warning Report because Claimant had been discriminating against a co-employee. The Report specified that the "failure to demonstrate immediate and sustained improvement in these areas may result in further disciplinary action, up to and including termination." On March 8, 2019 Claimant received an Employee Attendance Warning Report because he was absent from work and failed to contact his supervisor. The Report also noted that Claimant's five absences since the beginning of the year were excessive and would not be tolerated. The document specified that "[a]ny future violations of our attendance policy, or any policy, may result in additional disciplinary action up to and including termination." Claimant received another warning on March 11, 2019 regarding public urination. Mr. A[Redacted] testified the area in question was located on Employer's premises. He remarked that Claimant had received verbal warnings about public urination prior to the March 11, 2019 incident. Furthermore, Mr. B[Redacted] testified that Claimant had been warned several times about urinating on the premises.

19. As found, on March 11, 2019 Claimant was terminated from employment with Employer. Employer's Termination Report reflects that Claimant was specifically dismissed for violating Employer's policies and procedures. The Report also noted that Claimant's performance had been unsatisfactory in multiple areas. Mr. A[Redacted] summarized that the combination of Claimant's unexcused absences, public urination and unsatisfactory job performance culminated in his termination from employment. Through his repeated violations of Employer's policies and procedures Claimant exercised some control over the circumstances surrounding his termination from employment. Claimant thus precipitated his employment termination by a volitional act that he would reasonably expect to cause the loss of employment. Accordingly, he was responsible for his termination.

ORDER

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

1. On February 26, 2019 Claimant suffered an industrial injury to his right elbow.

2. Claimant earned an AWW of $699.09..

3. Claimant's request for TPD benefits for the period February 27, 2019 until he reached MMI on September 30, 2020 is denied and dismissed.

4. Claimant was responsible for his termination from employment.

5. Any issues not resolved in this order are reserved for future determination.

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

DATED: May 26, 2021.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-572-788-003

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that he continues to require post-MMI medical maintenance treatment, to prevent further deterioration of his current condition, which is reasonable, necessary, and related to his original work injury?

II. Has Claimant made a proper showing that he is entitled to a change of physician, in this case, from Dr. Kurz to Dr. Hall?

FINDINGS OF FACT

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

Background: The Work Injury, and Subsequent Treatment

1. This is an admitted claim. Claimant was employed as a Medical Training Specialist. He was responsible for ensuring that firefighters, EMT's, and paramedics maintained their certifications by earning the proper continuing medical education and meeting all other requirements to maintain their medical skills. Claimant also worked as a paramedic on a rescue squad on an as-needed basis. He was hired in July, 2002, and he retired in January, 2020.

2. On or about January 14, 2003 Claimant intended to carry an empty box down some stairs so it could be disposed of. He tripped on a floor mat at the top of the stairs, lost his balance and began to "tumble down the stairs" before grabbing onto a hand rail and injuring his low back in the process.

3. Claimant saw Dr. David Richman on January 24, 2003 and the doctor noted, "…Mr. [Claimant] is a 41 year old male who on January 14, 2003 was walking into work and tripped over a mat on the floor. He grabbed the handrail next to a stairwell to stop his fall, and twisted and pulled his back. He did not have the immediate onset of pain, but later in the day his pain was gradually worsening to include left leg pain. He took some Motrin for a couple of days which seemed to help. His symptoms have steadily gotten worse since then with pain as bad as 10/10 in severity, or a low as 4/10 in severity…He describes his back pain as aching, and the buttock and leg pain is burning…" (Ex. 10, p. 305). Dr. Richman assessed "acute low back strain, possible SI sprain, cannot rule out discogenic lesion and radiculitis." Dr. Richman recommended medications, and physical therapy. He imposed no work restrictions. *Id* at 306.

4. On January 28, 2003 Dr. Richman reviewed a lumbar MRI performed the previous day. He reported, "…As I suspected, he does have a herniated disc at L5/S1

with displacement of the S1 nerve root…There is a disc herniation with inferior and left lateral displacement pushing on the S1 nerve root." *Id* at 310. Dr. Richman presented the options of referral to a spine surgeon instead of continued conservative care. Claimant elected conservative care. The doctor recommended starting with epidural steroid injections ("ESI").

5. Dr. Bertram Willman performed ESI's on February 5 and February 21, 2003. *Id* at 322, 323. Dr. Richman met with Claimant on March 3, 2003 and reported, "…Jeff has had a *significant improvement* from the first two epidural steroid injections. He [Claimant] states that his first injection gave him approximately 75% improvement which included his back pain. His leg pain is virtually gone at this point after his second epidural injection and now he feels he is between 80 and 90% improved overall…" *Id* at 312 (emphasis added).

6. Claimant returned to Dr. Willman for a third ESI on March 14, 2003. *Id* at 324. On April 2, 2003, Dr. Richman noted, "…Jeff did not have any further improvement after the third epidural injection. He states overall that he is significantly better, with only intermittent pain now. It actually feels more like tightness. He does however have some residual left foot weakness with plantar flexion. He's working full duty…" (Ex. 10, p 315).

Claimant is placed at MMI

7. Dr. Richman placed Claimant at MMI and noted, "…No specific maintenance is necessary with the exception of occasional ketoprofen and ambien. If he has recurrent symptoms in the next year, he should be allowed to have epidural injections once again…" Dr. Richman issued a 7% whole-person impairment rating, and issued no permanent work restrictions.

8. Respondent filed a FAL on April 11, 2003, admitting to Dr. Richman's 7% impairment rating, and to liability for post-MMI medical maintenance care. (Ex. Q).

Post-MMI Treatment is Ongoing

9. Claimant returned to Dr. Richman's office, and saw Dr. Jason Peragine on July 22, 2003. Dr. Peragine noted, "…The patient is seen today because he experiences intermittent low back pain without any radiating symptoms into the legs about every 2 weeks that lasts 2-3 days at a time. These flares or exacerbations of pain are brought on by increased activity, but not by any particular activity specifically." (Ex. 10, p. 318). Dr. Peragine recommended, "…We would like for the patient to see a manual therapist for deep tissue massage and myofascial release therapy in treatment of the myofascial pain in the left lumbar paraspinal musculature. This will be considered *maintenance care* under the patient's original work related injury as he is still at maximum medical improvement." *Id* at 319 (emphasis added).

10. Claimant presented to Respondent's Occupational Health Clinic on January 12, 2005. Dr. Delos Carrier reported that, since MMI, "…Mr. [Claimant] states that he has had intermittent back pain since that point, but in the last five or six days he states that his back pain has been gradually getting worse. He states that the medication Dr. Richman gave him upon discharge has run out and he is asking for a refill of this medication. In particular, he is asking for Soma, ketoprofen, ibuprofen, and cyclobenzaprine." Dr. Carrier renewed the prescriptions, and recommended Claimant return as needed. (Ex. 3, p. 20-21).

11. Dr. Carrier requested a new MRI on May 11, 2005 and reported Claimant was no longer at MMI. *Id* at 27. On May 16, 2005, Dr. Carrier reviewed the MRI results and referred Claimant to Dr. Steven Benecke for ESI. *Id* at 30. A May 16, 2005 MRI revealed the previously noted disc extrusion at L5-S1, and a new finding of "mild apophyseal [facet] joint degenerative changes at L3-4, L4-5, and L5-S1."

12. Dr. Benecke performed ESI's on May 19 and also May 25, 2006. Ex. 9. Pp. 300, 301). On June 8, 2005, Dr. Carrier reported, "Mr. [Claimant] states that his back pain has *improved tremendously* following the injections that he received in the lower back region. He states that his last physical therapy appointment is today and he feels that he is able to be discharged and is safely able to perform all aspects of his duties as a firefighter. He would like a prescription refill of soma, however, he uses this to help maintain his back pain under control." Dr. Carrier placed Claimant at MMI. (Ex. 3, p. 34) (emphasis added).

13. Claimant returned to Dr. Carrier for a flare-up of his low back pain on August 24, 2005; "…He states he has been doing a lot more patient runs with the Fire Department, and as a result he has had increased lower back pain." Dr. Carrier recommended physical therapy and prescribed cyclobenzaprine. *Id* at 38.

14. Dr. Carrier saw Claimant next on May 10, 2006; "Mr. [Claimant] returns for reevaluation of his lower back pain. He states he has bilateral sciatic pain as well. He states that this has increased recently but he is unsure why. He has had no increase in activity…I believe this lower back pain represents a reexacerbation of the old injury that he had on 01/12/2005. There does not seem to be a precipitating factor for this, therefore there does not appear to be a new injury, and I am keeping the [sic] Mr. [Claimant] at maximum medical improvement though he does need physical therapy and possibly another epidural steroid injection for maintenance of his baseline medical condition with lower back pain." (Ex. 3, p. 42).

15. Claimant returned to Dr. Carrier with a flare-up of low back pain on June 5, 2006. Dr. Carrier recommended a new MRI. Dr. Carrier reviewed the MRI results on June 7, 2006; "…he has stable, moderate broad-based central L5-S1 disc with continuous caudal extrusion; mild mass effect on proximal bilateral S1 nerve roots, left greater than

right; mild L5-S1 acquired central spinal stenosis; mild L3-L4 through L5-S1 bilateral facet osteoarthritis." *Id* at 51.

16. Dr. Carrier refilled Claimant's medications on July 3, 2006. He noted that Claimant "…states that he feels approximately 95 to 100% better than when he first came into the clinic. He has been going to physical therapy as directed and as of today he has been discharged from physical therapy." *Id* at 53.

17. On April 30, 2007, Dr. Carrier reported, "Mr. [Claimant] called today stating that his lower back pain has returned and he is feeling very stiff and pain in the region that he previously had lower back pain. He states that he has been sitting for prolonged periods of time and this has re-exacerbated his old injury." Dr. Carrier referred Claimant to Dr. Meyer for pain management consultation. (Ex. 3, p. 60).

Facet Arthropathy is first Suspected

18. On August 14, 2007, Dr. Meyer assessed "…A 46 year old gentleman with a clinical presentation and history most consistent with *facet arthropathy* symptoms. I think there is a minimal component of radiculitis secondary to the chronic disc herniation at this point and it is predominantly not a clinical issue...I think that if he is able to stay in better core strength status that the facets will not become symptomatic as frequently; however, they may be episodically a problem and under his approach should be nonsteroidals in one to two weeks…" (Ex. 8, p. 297) (emphasis added).

19. On October 24, 2007, Dr. Carrier assessed "Lower back pain with crescendo/decrescendo characteristic to it." He refilled medications and recommended Claimant continue a home exercise program. (Ex. 3, p. 63). On November 6, 2007, Dr. Carrier requested authorization for 6-12 sessions of acupuncture. He confirmed this treatment was necessary to maintain MMI. *Id* at 66.

20. A lumbar MRI on March 5, 2008 revealed "the facet joints are degenerated and somewhat hypertrophied" at L3-4. At L4-5, "there is mild facet degeneration bilaterally." At L5-S1, "Facet joints are degenerated and hypertrophied. At this level there is moderate right and mild left foraminal stenosis." (Ex. 6, p. 269)

21. On September 25, 2008, Dr. Meyer referenced left sided L3-4 fact injections he performed "about five months ago," and which were beneficial. (Ex. 8, p. 298). Dr. Meyer also performed bilateral facet injections at this visit.

22. Dr. Carrier saw Claimant on October 16, 2008 and noted Claimant reported about 75% improvement from the recent facet injection by Dr. Meyer. Dr. Carrier discharged Claimant but added that; "…he will most probably need repeat injections in the future." (Ex. 3, p. 79).

23. Dr. Carrier referred Claimant to Dr. Jenks on November 3, 2009 for evaluation of chronic low back and facet pain. *Id* at 81. Dr. Jenks saw Claimant on November 17, 2009 and noted, "…His low back pain comes and goes. It is always aggravated, however, with standing for about 20 minutes. He does have about a week a month where he has fairly incapacitating low back pain." Dr. Jenks confirmed the previous facet injections provided "marked relief," and that "…he states that it is just recently that the pain started to return." (Ex. 7, p. 277).

24. Dr. Jenks performed bilateral lumbar facet injections on December 23, 2009. On January 12, 2010 he reported, "significantly improved lumbar facet syndrome following facet injections." Dr. Jenks repeated the facet injections on July 15, 2011. On August 4, 2011 he reported "Jeff's low back pain is over 90% better following the bilateral L4-5 and L5-S1 facet injections." Dr. Jenks performed bilateral facet injections on October 24, 2014. On November 11, 2014 he reported Claimant's low back pain was "significantly improved." (Ex. 7).

25. Claimant saw Dr. Miguel Castrejon at the City Clinic on December 4, 2014. Dr. Castrejon confirmed Claimant "…has clinical indications for facet mediated pain. By review of his injection history he meets criteria to consider medial branch blocks ("MBB") followed by rhizotomy. I am requesting authorization for Dr. Jenks to proceed with MBB's and consideration for rhizotomy."

26. Dr. Jenks performed bilateral MBBs on December 19, 2014. (Ex. 7, p. 288). On December 22 he noted, "…it *clearly appears that his low back pain is facet* in origin. Therefore, I have recommended bilateral L2, L3, L4 and L5 medial branch rhizotomies…" (Ex. 7, p. 290). Dr. Jenks performed the rhizotomies on January 12, 2015. *Id* at 291. On February 13, 2015, Dr. Jenks diagnosed "status post lumbar facet rhizotomy with *improved* but ongoing low back pain." *Id* at 294. (emphasis added).

27. An MRI without contrast was taken of Claimant's lumbar spine on February 27, 2015. It showed: "Mild to moderate degenerative changes of the L5-S1 disc space and mild degenerative changes of the L3-4 and L4-5 disc spaces with mild segmental neural canal stenosis without evidence of nerve root impingement or cauda equina compression." The remainder of the exam was unremarkable. (Ex. 6, p. 271)

28. On May 7, 2015, Dr. Castrejon reported, "…He is post rhizotomy with no reported change in terms of his symptoms. He has had a recent flare-up with no leg symptoms and was referred for lumbar MRI. The study revealed DDD L5-S1 with no nerve root compromise. He was referred to chiropractic and has done extremely well." (Ex. 3, p. 131).

29. On October 30, 2015, Paula Homberger, PA-C at the City Clinic confirmed that, "…[Claimant] remains at MMI and *does require continued maintenance care*

including medication management and chiropractic." She refiled Claimant's medications and prescribed additional chiropractic treatment. (Ex. 3, p. 135).

30. Claimant saw Dr. Jay Neubauer at the City Clinic on July 25, 2017. Dr. Neubauer noted Claimant complained of 7/10 right sided low back pain that "has gotten worse over the past few weeks." Dr. Neubauer referred Claimant to pain management specialist Dr. Leggett. *Id* at 144.

31. Claimant saw Dr. Michael Sparr (instead of Dr. Leggett, but also with the same medical group) on August 22, 2017. Dr. Sparr noted, "…He has had a recurrence of pain over the past several months which has been somewhat refractory to chiropractic treatment. It appears he has recurrent facet dysfunction and arthralgias, greatest at L5-S1, to a lesser degree L4-L5, right sided." (Ex. 8, p. 197). Dr. Scheper performed right sided lumbar *facet* injections on September 19, 2017. *Id* at 199.

32. On September 28, 2017, Dr. Sparr reported Claimant "…responded *exceptionally* well" to the recent injections. *Id* at 202 (emphasis added). However, on October 19, 2017, Dr. Sparr reported "…Unfortunately, he is reporting recurrent annoying pain in the right central lumbar region. Overall he has worsened tremendously since my last evaluation. His pain has averaged 7/10 in the past week. He attributes his increased pain to a training session at work a short time ago when he was required to be on his feet the entire day…" *Id* at 203. Dr. Sparr performed a right-sided rhizotomy (a/k/a radiofrequency ablation or "RFA") on November 7, 2017. On November 28, 2017, he noted Claimant had an "excellent response," and he recommended repeating the procedure on the left side. *Id* at 208.

33. On September 20, 2018, Dr. Sparr noted, "…{Claimant] responded exceptionally well to rhizotomies and has been active and able to tolerate normal lordotic activities as a paramedic. He returns today with rather severe central lumbar pain. He does not feel that is related to any specific injury, just began to feel tightness and soreness within the central lumbar region a few inches above the belt line approximately 2 weeks ago…" *Id* at 209. Dr. Sparr recommended trigger point injections in conjunction with chiropractic treatment from Dr. Abercrombie. *Id* at 210.

34. On October 11, 2018, Dr. Sparr reported, "…He is still somewhat tender over the L5-S1 greater than L4-L5 *facets. Facet loading is again quite positive." Id* at 213. Dr. Sparr administered trigger point injections, and noted additional facet injections and rhizotomies may be considered. *Id* at 214. (emphasis added).

35. On October 25, 2018, Dr. Sparr noted, "…He feels the trigger point injections were helpful for perhaps 2 days. Over the ensuing weekend while working a college hockey game he began experiencing severe back pain with radiation to the right lower extremity." (Ex. 4, p. 215). Dr. Sparr explained, "…The patient has had worsening lumbar pain and lower extremity symptoms. The symptoms in the L4 distribution are

worrisome for L4 radiculopathy." *Id* at 216. Dr. Sparr recommended a new MRI and he administered trigger point injections.

36. A MRI on October 26, 2018 was compared to the MRI from December 27, 2015. The radiologist reported, "1. The significant abnormality with right L4 nerve compression is a new finding, not present on the prior study from 2015. 2. Left L5-S1 disc protrusion, bulging and stenosis has progressed since the previous exam, now likely impinging upon the left S1 nerve. 3. No other significant interval change." The MRI also revealed at the L5-S1 level; "probable shallow left-sided disc protrusion *exacerbated by facet arthropathy."* And at the L4-5 level; "there is moderate *bilateral facet arthropathy."* (Ex. 6, p. 272).

37. On November 5, 2018, Dr. Sparr noted, "…Mr. [Claimant] has experienced a disc herniation as noted on MRI. This is a new finding. I will order an epidural steroid injection which should be quite beneficial…" (Ex. 4, p. 219). Dr. Sparr administered the injection on November 8, 2018. On November 15, 2018 he reported, "The patient had a fair response to the recent epidural steroid injection. He may benefit from a 2nd. I will schedule a similar injection…" *Id* at 223.

38. Dr. Michael Rauzzino saw Claimant on November 19, 2018 and concluded, "I recommend that he continue to maximize his injection therapy with Dr. Scheper. I also recommend that Dr. Sparr perform an EMG/NCV. If his symptoms improve, it is hoped that he can avoid surgery; if not, he would likely need a right far lateral MIS decompression." (Ex. 5, p. 256).

39. Dr. Scheper performed right-sided lumbar ESI on December 4, 2018. Dr. Sparr performed EMG/NCV testing on December 13, 2018. He noted, "...This is a moderately abnormal electrodiagnostic study of the right lower extremity. There is evidence of acute to subacute right L4 radiculopathy with moderate denervation. There is evidence of subacute to chronic right L5 radiculopathy which is very mild…His electrodiagnostic findings as well as the combination of numbness and weakness are sufficient to warrant surgical intervention." (Ex. 4, p. 227).

40. On January 8, 2019, Dr. Rauzzino reported, "…His pain is better. He is not sure whether his motor strength is getting better or not. He is interested in pursuing surgical decompression and this is reasonable in the face of the positive EMG." Dr. Rauzzino recommended a repeat MRI. (Ex. 5, p. 259).

41. Findings of a lumbar MRI on January 10, 2019 included; "…There is mild left more pronounced than right L1-2 and moderate L2-3, L3-4, L4-5, and L5-S1 zygapophyseal [facet] joint capsule thickening and osteophytes, most pronounced at the L3-4 through L5-S1 levels." (Ex. 6, p. 274). The MRI also revealed; "There is severe left lateral recess stenosis at L5-S1. This is unchanged." *Id* at 275.

42. On January 16, 2019, Claimant presented to Paula Homberger, PA-C, for a follow-up/maintenance office visit. He reported he was still having increased low back pain, a dull achiness in the back and weakness in the left leg. He had seen Dr. Rauzzino, who recommended an MRI. He was scheduled to see Dr. Rauzzino again in February but was unsure if he wanted to have surgery at that time. He had been taking over-the-counter ibuprofen prn.

43. The treatment plan was for Claimant to continue his home exercise program and regular exercise; OTC ibuprofen prn with food, continue Voltaren gel prn, gabapentin 300 mg advancing from QD to TID; heat prn, with barrier to prevent burning; follow-up with Dr. Rauzzino as scheduled; and follow-up with Dr. Sparr as scheduled. (Ex. B).

44. On January 17, 2019, Claimant followed up with Dr. Sparr. He reported a moderate decrease in pain since he was last seen. He had had an appointment with Dr. Rauzzino and a new MRI was obtained. Dr. Sparr reviewed the repeat MRI with Claimant noting there was a right foraminal disc extrusion at L4-L5 resulting in compression of the exiting right L4 nerve within the foramen but decreased in size slightly from the prior study extrusion itself had a decreased signal of inflammation. There was ongoing severe left lateral recess stenosis at L5-S1.

45. Dr. Sparr noted that Dr. Rauzzino apparently felt that surgical intervention was not absolutely necessary, but could be considered if Claimant's lower extremity symptoms got worse. Dr. Sparr noted that Claimant previously had an abnormal electrodiagnostic study showing right-sided L4 radiculopathy and left L5 findings that were chronic. He noted Claimant took Motrin and naproxen intermittently, did not like opiates, and did not tolerate neural modulatory medications such as gabapentin and Gralise.

46. Claimant reported he still had central lower lumbar pain, but lower extremity symptoms had diminished. He had some numbness and tingling in the medial leg but diminished from previous evaluations. Dr. Sparr recommended Claimant continue anti-inflammatories and prescribed no other medications. He noted Claimant might be a candidate for further facet injections. (Ex. C).

47. Dr. Sparr reviewed the MRI and noted, "…[Claimant] still has central lumbar pain but lower extremity symptoms have diminished. He has some numbness and tingling in the medial leg but diminished from previous evaluations…Right L4 radiculopathy is improving. He has a follow-up with Dr. Rauzzino in February. He would like to avoid surgery if he continues to improve…" (Ex. 4 pp. 229-230).

48. Claimant saw Dr. Rauzzino again on February 26, 2019 and the doctor reported, "…We discussed surgical options today. He would like to try to avoid surgery on his back if at all possible even though he is fairly symptomatic. He thinks he can probably manage the leg pain right now. With regard to the back pain, he has had relief

with Dr. Scheper’s rhizotomies and I think this would be a good place for him to return to try to take care of some of his back pain…” (Ex. 5, p. 261).

49. On March 5, 2019, Dr. Sparr reported, “…His pain has continued to improve. At this time he has no lower extremity symptoms, only a fairly constant right lateral buttock pain. Central low back pain is bilateral but not severe…” (Ex. 4, p. 231).

50. Claimant reported to Dr. Sparr that he had been on his feet for several training courses over the last few weeks, and thought that might have contributed to his symptoms. Dr. Sparr noted Dr. Rauzzino had reviewed the additional MRI study, noted that the herniated disc was shrinking in size, and recommended conservative measures. Dr. Sparr opined right-sided hip pain might be related to radiculitis, but appeared to be more related to trochanteric bursitis. He planned to request authorization for trochanteric bursal injection. (Ex. E).

51. On April 2, 2019, Ms. Homberger refilled Claimant’s Mobic and tizanidine prescriptions. (Ex. F).

Dr. McCranie’s IME

52. Dr. Kathy McCranie performed an IME for Respondents on June 4, 2019. Dr. McCranie opined Claimant sustained a “new injury” while working the college hockey game first referenced in Dr. Sparr’s October 25, 2018 report. But she noted that, “…He has undergone a successful course of treatment for this with complaints of mild residual right lower extremity pain.” (Ex. A, p. 16). Dr. McCranie noted that his prior lumbar facet injections had a reported 75% improvement. She also noted that upon examination, Claimant was noted to have *positive facet compression* tests on the right side, but negative on the left. *Id.*

53. She also recommended Claimant undergo right-sided lumbar medial branch blocks at L3-4 and L4-5 prior to consideration of a repeat rhizotomy procedure, to address his persistent right-sided lumbar pain. Dr. McCranie noted that chiropractic care has allowed Claimant to “…stay functional with full-time and full duty work.” She recommended Claimant continue receiving chiropractic care, within the purview of the MTG’s. Dr. McCranie also recommended Claimant continue using Meloxicam 7.5 mg daily, as well as Voltaren gel once per day.

Post-MMI Treatment Continues

54. Claimant returned to Dr. Sparr on July 16, 2019 and the doctor reported, “…The patient has recurrent lumbosacral pain which appears to be directly related to bilateral L5-S1 and L4-L5 facet dysfunction and arthralgias. In the past he has responded exceptionally well to bilateral facet joint injections at these levels. When I saw him previously he was noted to have a lumbar disc extrusion and radiculopathy. This has fortunately resolved…” (Ex. 4, p. 235). Dr. Sparr recommended lumbar medial branch

blocks bilaterally, and explained his rationale for doing both sides, not just the right side as recommended by Dr. McCranie. On exam, he noted bilateral tenderness over the affected facets. Dr. Scheper performed the bilateral medial branch blocks on September 6, 2019. *Id* at 238.

55. On September 11, 2019, Dr. Sparr reported that after the blocks, "…[Claimant] noted excellent relief with standing, significant relief with walking and sitting. We both agreed this was a very positive diagnostic study." *Id* at 240. Dr. Sparr noted the plan was "…proceed with RFA's L3-L5 branches with the patient very familiar with the procedure and is eager to proceed as he recalls the relief he has experienced in the past."

56. On September 18, 2019, Claimant followed up with PA Homberger. He reported feeling the same, with a dull ache in his low back. He reported 24 hours of relief of his back pain following the MBB. Ms. Homberger noted Dr. Sparr was recommending a repeat RF ablation. Claimant denied numbness or tingling. He had been taking Mobic qam prn, had not been using tizanidine recently, had been using the Voltaren gel with some relief. He denied any new complaints or concerns. His patellar reflexes were 2+ bilaterally. Straight-leg raising was negative bilaterally. The treatment plan was for Claimant to continue his home exercise program and regular exercise; Mobic, tizanidine, and Voltaren gel; heat prn; and follow-up with Dr. Sparr as scheduled and for RF ablation. (Ex. 3, p. 181).

57. Dr. Sparr's request for authorization of RFA's was denied. On October 1, 2019, Dr. Sparr addressed the denial;

> …The disc herniation was more likely related to his daily work for the [Employer] than something that occurred at an October 20 hockey game, particularly since he was treated for severe pain weeks prior to the hockey game. Since that time he has had 2 epidural steroid injections and his discogenic and radicular pain subsequently resolved. Surgical intervention was considered by Dr. Rauzzino, but not felt to be necessary. At this point in time he is continuing to experience central lumbar pain directly related to the facet joints that have been painful since 2003. His current pain is not related to the new disc problem, but even if it was it would still be a work-related injury." (Ex.4, p. 246).

It appears the denial was rescinded, and Dr. Scheper performed a left-sided rhizotomy on October 17, 2019, and a right-sided rhizotomy on November 7, 2019. *Id* at 248, 250.

58. On December 3, 2019 Dr. Sparr noted the rhizotomies had been performed, and; "…[Claimant] reports it was extremely beneficial and he is now 80% improved. He still has some achiness within his back but no longer the sharp pain… The patient had an excellent response to the recent bilateral L4-L5 and L5-S1 facet rhizotomies. At this point he is stable. I have not scheduled a follow-up." *Id* at 253. Dr. Sparr diagnosed "lumbar facet joint arthropathy" and "myofascial pain/myalgia."

59. On March 16, 2020, PA Homberger confirmed, "…He remains at MMI and will continue on his current maintenance plan including medication management and chiropractic visits prn." (Ex. 3, p. 185). She refilled prescriptions for Mobic, Voltaren gel, and Ambien. Under Subjective Complaints, she also noted, among other things: "…He is still having a dull ache in his low back. The pain is worse with prolonged standing, *such as he does when teaching CPR. Id* at 194. However, under Work History, she noted: "He has been working full duty for the City of Colorado Springs *without any difficulty*." *Id*. (emphasis added).

Claimant is Examined by Dr. Kurz

60. Claimant returned to the City Clinic on December 15, 2020 and met with Dr. Nicholas Kurz for the first and only time. There was no associated pain chart with this visit, nor a patient questionnaire. Under the paragraph titled Subjective Complaints, Dr. Kurz' paragraph reads identically to that in PA Homberger's report from 3/16/2020. Dr. Kurz' Work History also reads identically to PA Homberger's from 3/16/2020 – despite Claimant's subjective complaints of *pain while teaching CPR*. (Ex. 3, pp. 189-190).

61. The imaging study narratives from 3/5/2008, 10/26/2018, and 1/10/2019 are referenced, but no other medical histories from the other medical providers are noted in his report. Dr. Kurz makes no mention of Claimant's facet issues at any point in his report.

62. Dr. Kurz noted the previous work-related L5-S1 disc protrusion in 2005 (sic) had improved. He stated the previous area of mild injury had improved, but over the years Claimant's multilevel degenerative disc disease had progressively worsened and now it was, with greater than 51% medical probability, the cause of his complaints and no longer causally related to his remote mechanism of injury. He further stated that the previously recommended prn NSAIDs and Ambien were, to a greater than 51% medical probability, no longer treating his previous L5-S1 disc bulge symptoms, which had objectively improved per imaging and EMG.

63. Dr. Kurz then declared that; "…his current complaints are more likely related to his multilevel advanced DDD, which is causally unrelated to his previous MOI/DOI. Therefore this chronic, degenerative condition should be followed by his PCP, outside of the WC system." *Id* at 190.

Claimant's Hearing Testimony

64. Claimant testified that the facet injections he received, beginning in 2008 (with Dr. Jenks), were "probably the most beneficial" treatment modality he has received. He testified the rhizotomies he has received also provided "significant benefit." Claimant

testified the latest rhizotomies, performed by Dr. Scheper in October and November of 2019, “worked extremely well” and were “very successful.”

65. Claimant testified that he has days that are good, and days that are not so good. He typically awakens with a stiff and sore back, but is able to obtain relief using stretches taught to him by chiropractor Dr. Abercrombie. He has days on which he is more severely impacted, and on such days he tries to take things as easy as possible. Claimant takes medications on an as-needed basis, and still has some anti-inflammatory medicine left from the latest prescription from Ms. Homberger. Claimant testified that his “bad days” occur more frequently now than they did after the rhizotomies in 2019.

66. He testified he is generally never pain-free; some days he can control the pain better than other days. He stated that the type and location of his back pain remains the same as it was shortly after the original accident. He described an 8-inch diameter circle of pain in the lower back. He only occasionally experiences radicular symptoms in the lower extremities. Claimant stated he sustained no other back injuries after the original injury in 2003. He specifically denied any injury at the hockey game in the fall of 2018, but explained did stand a lot during that game, and standing is one of the aggravators of his low back pain.

67. Claimant testified he requested to see PA Homberger in December, 2020, since she is the person he had dealing with at the City Clinic recently, but was told he would need to see Dr. Kurz. After meeting with Dr. Kurz, Claimant testified he felt his concerns were “extremely ignored.” He felt “extremely blown off” and that his complaints were “irrelevant.” He was left with the impression that “because my injury was so long ago there was nothing else they were going to do for me and I was on my own.”

68. Claimant testified that Dr. Kurz performed only a cursory examination, and that the appointment lasted less than 10 minutes. Claimant testified it appeared Dr. Kurz “had his mind made up before he even walked in the door.” It appeared to Claimant that Dr. Kurz was not objective, and that Dr. Kurz was generally unfamiliar with Claimant’s prior treatment.

69. Claimant has no trust or confidence in Dr. Kurz. Claimant requests a change of physician to Dr. Hall because he feels Dr. Hall is objective and will listen to him; that he will perform a complete examination and do what is in the best interests of Claimant’s health while improving his function.

70. Claimant testified the maintenance treatment he received prior to being discharged by Dr. Kurz was beneficial. He testified that Dr. Sparr and Dr. Scheper “did wonderful work;” he holds Dr. Abercrombie in high regard (“he taught me some wonderful stretches to do”) and the treatment Dr. Abercrombie provided was “extremely beneficial.” Claimant testified he wants to continue receiving treatment from the various specialists he has seen.

Dr. Kurz' Hearing Testimony

71. Dr. Nicholas Kurz is Respondent's designated treating physician. He testified as an expert in occupational medicine. Dr. Kurz testified this case features "this ongoing complaint of expanding problems which are causally unrelated to that initial stumble." He feels Claimant's problems are "causally unrelated," because the initial MRI that was performed shortly after the injury showed a "single level acute bulge on chronic degeneration at a 40ish year old male." Then, he explained, over 18 years he sees other issues with the degenerative process. Dr. Kurz again pointed to a "bump" in 2018 with the "weekend new injury, and subjective findings of a new injury at a different site which caused nerve problems and was objectively quantified again with one more step - the nerve conduction study."

72. He noted that the 2018 MRI showed a lot of new findings, but improvement in the original pathology. The L5 nerve roots were normal, and there was no significant right-sided herniation of L4. A nerve conduction study proved that. He noted Dr. Rauzzino's opinion that the L5-S1 disc had improved and shrunk. He testified that the bulk of Claimant's complaints for which Dr. Sparr was treating him were not at the L5 level, which was the injury 18 years ago, but at the new disc herniation.

73. Dr. Kurz maintains Claimant sustained no injury affecting his facet joints, but rather, "this patient is an active guy, he is a hiker and a biker and a golfer, and he does other things over the last 18 years that would more likely cause his facets wear and tear than the twist that he had on the stairs 18 years ago." Dr. Kurz claimed the "serial MRI's showed there were "no facet issues," and the "mild disc issue" was treated conservatively. Dr. Kurz opined that when the neurosurgeon said Claimant was not a surgical candidate and MRI is stable with normal facets, at that point injections at multiple levels for other complaints are not compatible with medical maintenance for a single-level disc bulge.

74. Dr. Kurz testified that Claimant's ongoing symptoms are from "normal wear and tear and aging, and not slipping on the stairs 18 years ago." Dr. Kurz testified that 90% of cases do not require medical maintenance, and that such maintenance is only appropriate if it allows the patient to function. Dr. Kurz would have "pulled the plug" on Claimant's maintenance care in 2015.

Dr. Hall's Hearing Testimony

75. Dr. Timothy Hall has been practicing medicine in Colorado since 1989. He practices at Intermountain Rehabilitation Associates. Dr. Hall treats a variety of chronic and acute pain issues. He treats headaches, as well as neck and back pain, neurological conditions, he administers injections and prescribes medications. Dr. Hall holds Level II accreditation through the D.W.C. and is board certified in physical medicine and

rehabilitation. Dr. Hall testified at hearing as an expert in physical medicine and rehabilitation.

76. Dr. Hall performed an IME of Claimant on January 13, 2021. He reviewed the medical records, examined Claimant, and came to a primary diagnosis of facet syndrome. He noted there had been a history of some discogenic involvement, but most recently the treatment that has helped has been to the facet joints. Dr. Hall explained that facet joints are small joints on either side of the vertebrae, which exist throughout the spine. In the cervical and lumbar spine, they allow for movement to occur. Like other joints, they have synovial surfaces and they can become injured and can degenerate. Dr. Hall testified that a sudden "twisting motion" can cause injury to the facet joints.

77. Dr. Hall explained that injuries can hasten the process of degeneration. He explained that Claimant's current situation is due to a combination of the original injury, and degeneration of the facet joints that has occurred over the years. Dr. Hall clarified that Claimant's low back pain is not solely due to facet issues, but that given Claimant's favorable response to specific facet treatment, the facet issues are responsible for the majority of Claimant's pain.

78. Dr. Hall testified that Claimant's treatment has reasonable, necessary, and related to the effects of his injury, and has been "quite consistent over the years." Dr. Hall allowed that while further intervention may not be required "at this very moment," it remains probable, considering his history, that Claimant will require further interventions. Dr. Hall explained that facet rhizotomies have a "life span or generally a year or so, so it is expected that he would require more treatment." Dr. Hall testified that to maintain MMI, facet rhizotomies should be made available to Claimant periodically.

79. Dr. Hall explained that one cannot be "that certain" of the exact source of all of Claimant's pain. Dr. Hall noted that Claimant's original diagnosis was L5-S1 discogenic pain, and Claimant received benefit from ESI's early on. Dr. Hall explained that those contain a relatively large dose of steroid, and the injections may very well have been providing relief for facet pathology as well as disc pathology. He noted that treatment since 2007 has focused on a "slightly different" diagnosis of facet pathology, versus disc pathology.

80. Dr. Hall explained it can be difficult to determine which diagnosis is correct, as both conditions are in the low back, and both can produce similar symptoms. Dr. Hall noted the facet joint and the discs work in unison with respect to load bearing and allowing movement in the lumbar spine, "so that if there is a breakdown in one entity, there is more likely a breakdown in another." Meaning that if early on, Claimant's problem was primarily discogenic symptomatology, then over the years the facets are then also at greater risk of becoming degenerated more quickly over time. The fact that Claimant's lumbar disc issue improved does not mean he became symptom-free in the facet joints. Dr. Hall pointed out that there is also severe left lateral recess stenosis at L5-S1 which is

unchanged, and that problem can create local pain as well as leg pain. Dr. Hall testified that "medical maintenance has worked wonderfully." It has kept Claimant "not pain free, but in a lot less pain than he'd otherwise be."

CONCLUSIONS OF LAW

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

Generally

A. The purpose of the Act, Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S.

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

C. Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). In this case, the ALJ finds Claimant to have been sincere and credible in describing his symptoms to the ALJ, and his medical providers. Further, the ALJ finds that Claimant has been appropriately motivated in attending his medical appointments and taking proper ownership of his own ongoing rehabilitation in a sincere effort to maintain his health.

D. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs*

Motors, Ltd. v. Industrial Commission, 441, P.2d 21 (Colo. 1968). In this instance, the medical professionals, as is not uncommon, hold contrasting views. The ALJ will determine the merits of their positions based upon the *persuasiveness* of their views, as opposed to *credibility* per se.

E. Further, courts are to be "mindful that the Workmen's Compensation Act is to be liberally construed to effectuate its humanitarian purpose of assisting injured workers." *James v. Irrigation Motor and Pump Co.*, 503 P.2d 1025 (Colo. 1972).

Medical Maintenance Benefits, Generally

F. The Court of Appeals has established a two-step procedure for awarding ongoing medical benefits under *Grover v. Industrial Commission,* 759 P. 2d 705 (Colo. 1988). Citing *Grover,* the Court reaffirmed that "before an order for future medical benefits may be entered there must be substantial evidence in the record to support a determination that future medical treatment will be reasonably necessary to relieve the injured worker from the effects of the work related injury or occupational disease." Thus, while Claimant does not have to prove the need for a specific medical benefit and respondents remain free to contest the reasonable necessity of any future treatment, Claimant must prove the probable need for some treatment after MMI due to the work injury. If Claimant reaches this threshold, the court stated, then the ALJ should enter "a general order, similar to that described in *Grover",* supra.

Medical Maintenance Benefits, as Applied

G. Here, Claimant's initial injury appeared to be the L5-S1 disc. However, as Dr. Hall explained, it can be difficult to correctly diagnose between injuries to a lumbar disc and to facet joints. He opined that, over time, the facet joints became increasingly symptomatic, while the disc issue improved. Claimant experiences flares of pain, then receives maintenance treatment that brings him back to baseline, and the cycle repeats itself. The facet joint treatment (initially, perhaps as a side effect of treating discogenic pain) Claimant has received has been very effective, not only in reducing his pain but in maintaining his level of function.

H. Claimant testified that prior to retirement he missed no time from work, other than to attend medical appointments. The ALJ notes that as recently as June, 2019, even Dr. McCranie recommended injections for "right-sided lumbar facetogenic pain." She also recommended chiropractic care and use of prescription medications – all to maintain MMI. And on March 16, 2020, PA Homberger at the City Clinic recommend ongoing prescription medications, use of heat, and more treatment with Dr. Abercrombie – all to maintain MMI. The only physician on record who opposes maintenance care is Dr. Kurz. It is duly noted that Dr. Kurz made no mention in his report that Claimant might have even had facet joint issues.

I. Dr. Kurz' notes from Claimant's sole visit appear to have been directly imported from PA Homberger's notes from 3/16/2019. On one hand, the Work History indicated that Claimant had been working full duty "….*without any difficulty*." However, the same report, under Subjective Complaints, notes that Claimant experiences *pain,* which is *worse when he is teaching CPR* [while at work]. It is unclear from the record how much of Claimant's 18-year medical history, beyond the imaging narratives, was actually studied at this single visit. In the final analysis, the ALJ finds the opinions of Dr. Hall, and even Dr. McCranie, to be more persuasive than those of Dr. Kurz. It is worth noting that a great number of other physicians along the way have opined that the treatment to date was certainly *reasonable and necessary* to maintain MMI for Claimant, and the ALJ also finds their opinions to be persuasive as well. And finally, the ALJ finds *substantial evidence* to find that Claimant's ongoing need for care is *related* to his original work injury (now to include his lumbar facet joints), and are thus necessary to maintain him at MMI.

Change of Physician, Generally

J. A claimant may not change the physician without the insurer's permission or "upon the *proper showing* to the division." § 8-43-404(5)(a), C.R.S.; *In Re Tovar*, W.C. No. 4-597- 412 (ICAO, July 24, 2008); *Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d570 (Colo. App. 1996). Because § 8-43-404(5)(a), C.R.S. does not define "proper showing" the ALJ has discretionary authority to determine whether the circumstances presented warrant a change of physician. *Jones v. T.T.C. Illinois, Inc.*, W.C. No. 4-503- 150 (ICAO, May 5, 2006). The ALJ's decision regarding a change of physician should consider the Claimant's need for reasonable and necessary medical treatment while protecting the Respondents' interest in being apprised of the course of treatment for which it may ultimately be liable. *Id*.

K. Respondents cite *Luke v. Hospital Shared Services*, W.C. 4-788-773-01 in support of their position. In *Luke*, the ALJ found that the Claimant had undergone a comprehensive course of treatment for her injuries and that the ATPs had been providing appropriate maintenance treatment for the claimant's injuries. Relying upon Respondents' expert's opinion, the ALJ concluded that the treatment proposed by the Claimant's expert was *not related* to the compensable injury. The Respondent's expert had testified that, given the Claimant's mechanism of injury he would have expected a quick recovery. Since Claimant had continued pain complaints, however, the expert did not believe they were related to her work-related trip and fall. The ALJ in *Luke* found that the Claimant failed to make a proper showing for a change of physician.

Change of Physician, as Applied

L. The facts in this case are readily distinguishable from *Luke.* In this instance, the ALJ has found that Claimant's need for ongoing post-MMI care is, in fact, *related* to his original work injury. And the need for ongoing care involves Claimant's lumbar *facet arthropathy*, an injury not even acknowledged by Dr. Kurz. To his credit, Dr. Kurz simply laid it all out there, and stated he would have pulled the plug on post-MMI treatment back in 2015. Such blunt honesty is commendable, since it portends a philosophical divide not likely to be reconciled. Claimant will ask for more treatment, and the ATP will not be professionally comfortable in arranging for it. More litigation could well ensue. It will be better for all not to have this uncomfortable relationship continue further. The ALJ hastens to add that such change of physician is not made lightly. Mere discomfort with an ATP on the part of a Claimant will not, of itself, justify such a change. Neither will a mere difference of medical opinion between Claimant and ATP justify such a change, without more in support. *In this case*, Claimant has made a proper showing that his post-MMI care should be transferred to Dr. Hall.

ORDER

It is therefore Ordered that:

1. Claimant is entitled to post-MMI medical maintenance benefits, to be paid by Respondents.

2. Claimant's request for a change of physician to Dr. Hall is granted.

3. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

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

DATED: May 26, 2021

/s/ William G. Edie

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-095-865-003

ISSUE

1. Whether Claimant has established by a preponderance of the evidence that his scheduled impairment rating for his left lower extremity should be converted to a whole person impairment for the purposes of permanent partial disability benefits.

2. Whether Claimant has established by a preponderance of the evidence an entitlement to an additional $308.72 in mileage reimbursement.

FINDINGS OF FACT

1. Claimant is a 49-year-old man who has been employed by Employer for approximately 18 years. On February 1, 2019, was involved in a work-related motor vehicle accident and sustained admitted injuries including, a comminuted left acetabular fracture with multiple displaced fragments in a work-related motor vehicle accident which was the result of Claimant's femur being forced into the acetabulum. Claimant also sustained fractures to his left foot, right calcaneus (heel), right fibula and a left arm laceration.

2. Claimant was initially taken to Good Samaritan Hospital and then transferred to Denver Health. On February 5, 2019, Claimant underwent an ORIF (open reduction internal fixation) surgical repair of the left acetabulum. Claimant's right calcaneus fracture was initially treated non-operatively. Claimant was discharged from Denver Health on February 11, 2019, and entered an in-patient rehabilitation facility. Claimant was discharged from in-patient rehabilitation on or about March 8, 2019. (Ex. A, 8).

3. On March 21, 2019, Claimant saw Eric Tentori, D.O., and Dr. Tentori served as Claimant's authorized treating provider (ATP) for the duration of his claim. Between March 21, 2019, and October 13, 2020, Claimant saw Dr. Tentori regularly for evaluation of his work-related injuries. At the March 21, 2019 appointment, Dr. Tentori recommended that Claimant see physiatrist Yusuke Wakeshima, M.D. for pain management and that William Ciccone, M.D., at Cornerstone Orthopedics assume care for Claimant's left hip injury. Additionally, Claimant was referred to Daniel Ocel, M.D., for treatment of his foot fractures. (Ex. C).

4. As part of his recovery, Claimant underwent extensive outpatient physical therapy, including numerous visits at Injury Care Associates, and A Fox Physical Therapy.

5. Over the course of his care, Claimant progressed using a wheelchair, to a walker and crutches, to eventually unassisted ambulation by August 2019. Additionally, Dr. Tentori periodically modified Claimant's activity restrictions to account for Claimant's improvement in function.

6. Claimant saw Dr. Tentori regularly from April 3, 2019, until October 2020, for a total of approximately 27 visits. (Ex. C, G, K, M. P, R, T, W, X, AA, BB, EE, and FF). At Claimant's October 3, 2019 visit with Dr. Tentori, Claimant reported his left hip had improved and was "without concerns/issues." After October 3, 2019, Claimant's primary issues related to his symptoms in his feet and ankles, although he periodically reported pain in his hip, groin, and gluteal area.

7. Claimant initially saw Dr. Wakeshima on March 21, 2019, on referral from Dr. Tentori for a physiatry consultation. Dr. Wakeshima followed Claimant over the next 18 months for pain management and rehabilitation monitoring. At Claimant's initial evaluation, Claimant's primary left hip complaints included pain in the groin and hip at a level of 2/10. Claimant's most significant pain was a burning sensation in his left foot which was related to a contused sciatic nerve. On March 21, 2019, Dr. Wakeshima noted that Claimant had difficulty sleeping, but the records did not attribute the difficulty to any specific work-related injury. At the time, Claimant was not yet independently ambulatory. (Ex. D).

8. On March 25, 2019, Claimant saw William Ciccone, M.D., for evaluation of his left hip. Between March 25, 2019, and August 21, 2019, Claimant saw Dr. Ciccone on six occasions. At Dr. Ciccone's August 21, 2019, evaluation, Claimant was ambulating with a limp and has some deficits in hip range of motion. Dr. Ciccone's assessment was that Claimant was making good progress and that further orthopedic follow-up was not necessary. He recommended that Claimant limit "high-impact" activities and increase his activity as tolerated. (Ex. E).

9. By August 26, 2020, Claimant reported to Dr. Wakeshima that he experienced occasional left groin/hip region pain. Although Dr. Wakeshima's records document ongoing tenderness in Claimant's left gluteal region, and pain with internal rotation of the left hip, the medical records do not document any correlating functional deficits. (Ex. GG).

10. On September 8, 2020, Dr. Wakeshima evaluated Claimant for the purpose of an impairment rating. Claimant reported pain "about the right hip" registering 2/10. On examination, Dr. Wakeshima found no pain to palpation of Claimant's gluteal region, no pain with lumbar range of motion, normal strength in the lower extremities, and intact sensation in the lower extremity and back. Examination of Claimant's hip demonstrated "[slight] pain with internal rotation and internal rotation of the hip with pain radiating to the groin," with normal strength. Dr. Wakeshima assigned Claimant a 21% left lower extremity permanent impairment rating for range of motion deficits in the left hip. (Ex. H).

11. On October 13, 2020, Dr. Tentori placed Claimant at maximum medical improvement (MMI). Dr, Tentori released from Claimant from care and all activity restrictions were removed. He assigned Claimant a 21% left lower extremity permanent impairment for hip range of motion deficits and a 5% impairment for sciatica neuropathy of the left leg, which combines for a 25% left lower extremity impairment and converts to a 10% whole person impairment. In addition, Claimant was assigned a 6% right lower

extremity impairment, which converts to a 2% whole person impairment. Dr. Tentori's impairment rating was based on measurements taken by Dr. Wakeshima. (Ex. II).

12. On October 30, 2020, Respondents filed a Final Admission of Liability (FAL), admitting for permanent partial disability benefits for a 25% left lower extremity impairment and a 6% right lower extremity impairment, consistent with Dr. Tentori's October 13, 2020 report. (Ex. JJ).

13. Claimant testified that he continues to experience issues with his left hip, including difficulty sleeping when laying on his left side or back, difficulty driving, and difficulty with daily activities such as sleeping, walking, climbing stairs, putting on pants and putting a sock on his left foot. When demonstrating the areas where he experiences ongoing pain, Claimant indicated his left hip/lower back and left upper buttock, near his beltline on his torso. In addition, Claimant walks with a noticeable limp favoring his left leg. Claimant testified that he did not have these issues prior to his work-related injury. Given the severity of Claimant's injury and the nature of the surgery performed, the ALJ finds Claimant's testimony describing his functional limitations credible.

14. By stipulation of the parties, Ronald Swarsen, M.D., was qualified as an expert in occupational medicine and testified at hearing. Dr. Swarsen did not examine Claimant and reviewed some, but not all of Claimant's medical records. Dr. Swarsen testified that Claimant sustained an acetabular fracture with no trauma to Claimant's leg, and with respect to this aspect of Claimant's injuries, all of Claimant's injuries were within the pelvis. Dr. Swarsen testified that the muscles of the hip that control the movement of the leg originate in the in the pelvis and attach to the femur. (See Ex. 12). He testified that the Claimant has deficits in motion of the hip joint that impact Claimant's ability to dress and perform activities of daily living. Dr. Swarsen opined that Claimant's left lower leg impairment should be a whole person impairment. The Claimant' injuries are limited to the pelvis, which does limit Claimant's leg range of motion, but his functional problems are the result of decreased hip range of motion.

15. By stipulation of the parties, Carlos Cebrian, M.D., was qualified as an expert in occupational medicine and testified at hearing. Dr. Cebrian performed an independent medical examination of Claimant at Respondents' request on February 1, 2021. At that time, Claimant reported constant aches and pains in his lateral left hip and into the buttocks, with occasional swelling. Claimant also reported discomfort in the left hip when lying on his left side. On examination of Claimant's left hip, Dr. Cebrian noted mild discomfort to palpation over the greater trochanter, and an otherwise negative examination. Although slightly better, Dr. Cebrian's range of motion measurements of Claimant's left hip were consistent with the measurements taken by Dr. Wakeshima, and Dr. Cebrian noted that Dr. Wakeshima made no errors in performance of the impairment rating. Dr. Cebrian agreed with Dr. Tentori's assessment of MMI as October 13, 2020. (Ex. A).

16. Dr. Cebrian (through both his report and testimony) opined that Claimant's left lower extremity impairment should be a scheduled impairment and not converted to a whole person impairment. Dr. Cebrian reasoned that the AMA Guides, Table 3.4 instructs

that an impairment rating for a fracture of the acetabulum should be determined based on restricted motion of the hip, which provides a lower extremity impairment. In other words, the way to determine an impairment resulting from an acetabular fracture is to measure the range of motion of Claimant's leg. He also opined that there is no functional impairment that extends beyond Claimant's femoroacetabular joint, and that the situs of his impairment is limited to Claimant's left leg, as a result of pathology of the femoroacetabular joint. Finally, Dr. Cebrian opined that Claimant has occasional and mild discomfort that does not impact his ability to meet his personal, social, or occupational demands.

17. The Court took judicial notice of the AMA Guides.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or

every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Conversion of Scheduled Impairment to Whole Person Impairment

Section 8-42-107(1)(a), C.R.S. limits medical impairment benefits to those provided in §8-42-107(2), C.R.S. when a claimant's injury is one enumerated in the schedule of impairments. § 8-42-107(l)(a), C.R.S. The schedule includes the "loss of a leg at the hip joint or so near thereto as to preclude the use of an artificial limb," but does not define "hip" or specifically include an injury limited to the "hip." § 8-42-107(2)(w), C.R.S., When an injury results in a permanent medical impairment not set forth on a schedule of impairments, an employee is entitled to medical impairment benefits paid as a whole person. *See* §8-42-107(8)(c), C.R.S.

In the context of an impairment rating, the term "injury" contained in Section 8-42-107(l)(a), C.R.S. "refers to the situs of the functional impairment, meaning the part of the body that sustained the ultimate loss, and not necessarily the situs of the injury itself." *Walker v. Jim Fuoco Motor Co.*, 942 P.2d 1390, 1391 (Colo. App. 1997); *see also Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366 (Colo.App.1996). Depending upon the facts of a particular claim, therefore, damage to the lower extremity may or may not reflect functional impairment enumerated on the schedule of benefits. *See Strauch v. PSL Swedish Healthcare System, supra; see also Abeyta v. Wackenhut Services*, W.C. No. 4-519-399 (September 16, 2004). Although physicians use the AMA Guides in calculating the nature and extent of the medical impairment, the Guides "do not determine the situs of the functional impairment. That question is to be resolved by applying the statutory impairment standards to the facts of the case." *Walker*, *supra*.

The ALJ must thus determine the situs of a claimant's "functional impairment." *Velasquez v. UPS,* W.C. No. 4-573-459 (ICAO Apr. 13, 2006). The situs of the functional impairment is not necessarily the site of the physical injury or the medical reason for the loss, but the portion of body that sustains the ultimate loss. *See In re Hamrick*, W.C. No. 4-868-996-01 (ICAO, Feb. 1, 2016); *In re Zimdars,* W.C. No. 4-922-066-04 (ICAO, Feb. 4, 2015); *Venegas v. Maldonados Services, Inc.*, W.C. No. 5-067-002-001 (ICAO, Jan. 22, 2021). Pain and discomfort that limit a claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule of impairments. *In re Johnson –Wood*, W.C. No. 4-536-198 (ICAO, June 20, 2005); *Vargas v. Excel Corp.,* W.C. 4-551-161 (ICAO, Apr. 21, 2005). However, the mere presence of pain in a portion of the body beyond the schedule does not require a finding that the pain represents a functional impairment. *Lovett v. Big Lots,* WC 4-657-285 (ICAO, Nov. 16, 2007); *O'Connell v. Don's Masonry,* W.C. 4-609-719 (ICAO, Dec. 28, 2006).

Claimant bears the burden of proof by a preponderance of the evidence to establish functional impairment beyond the leg at the hip and the consequent right to PPD benefits awarded under § 8-42-107(8)(c), C.R.S. Whether Claimant met the burden of proof presents an issue of fact for determination by the ALJ. *Delaney v. Industrial Claim*

Appeals Office, 30 P.3d 691 (Colo. App. 2001); *Johnson-Wood v. City of Colorado Springs,* W.C. No. 4-536-198 (ICAO June 20, 2005). *In re Claim of Barnes*, 042420 COWC, 5-063-493 (ICAO, April 24, 2020).

Claimant has established by a preponderance of the evidence that his left lower leg extremity rating related to his left hip should be converted to a whole person impairment rating. The evidence demonstrates that the situs of functional impairment for Claimant includes not only his left leg, but also his left hip into his torso. Claimant credibly testified that he continues to experience difficulty with sitting, sleeping and certain activities of daily living, such as driving and getting dressed. Claimant's pain as described at hearing extends to his upper and lower buttocks on the left side, which is consistent with his reports of gluteal pain throughout his course of treatment. Although Claimant's treating physicians did not detail specific functional impairments in medical records, the ALJ does not find the absence in the records to be dispositive of the issue. Claimant sustained a significant fracture to his left hip with ongoing sequela that extends beyond the leg at the hip into the torso, and which has manifested in limiting Claimant's ability to perform activities that are not limited to the use of his left leg. For example, Claimant testified that he is unable to sleep on his left side or back due and that he has to frequently shift positions while driving due to pain in his hip and buttocks. Neither of these are impaired by Claimant's leg below the hip, but by the hip itself and the buttocks. The ALJ finds and concludes that Claimant's left acetabulum fracture resulted in functional impairments beyond the leg at the hip and that Claimant has established by a preponderance of the evidence that his left lower extremity rating should be converted to a whole person impairment.

MILEAGE

The Act obligates respondents to reimburse claimants for mileage expenses "for travel to and from work-related medical care …." § 8-43-203(3)(a)(IV), C.R.S. Prior to January 1, 2020, the W.C.R.P. did not impose timing requirements upon claimants for the submission of mileage reimbursement to insurers. On January 1, 2020, the Division adopted W.C.R.P. Rule 16-9, which provided: "Injured workers shall submit requests for mileage reimbursement within 120 days of the date of service or reimbursement may be denied unless good cause exists." The identical rule is now contained at W.R.C.P. 16-8-2 (B).

Claimant submitted a request for mileage reimbursement to Insurer on or about October 27, 2020, a portion of which (582 miles) was submitted more than 4 months after the mileage was incurred. Because the miles were incurred more than 120 days prior to submission, Insurer did not reimburse Claimant for those miles. Claimant asserts he has established good cause for entitlement to payment of $308.72 for those miles because insurer did not inform him of the requirement that mileage must be submitted within 120 days of the service.

"A party who acts under a statute is presumed to know all of its terms." *Kowalchik v. Brohl*, 411 P.3d 681, 2012 COA 49, (Colo. App. 2012), *citing*, *Paul v. Inds. Comm'n*, 632 P.2d 638, 639 (Colo. App, 1981). Claimant has cited no authority that would require Respondents to notify Claimant of a change in the regulations or to advise him that mileage must be submitted within 120 days. Claimant lack of knowledge of the applicable regulations does not constitute “good cause” sufficient to evade the requirements of W.C.R.P. 16-9 (now 16-8-2). Claimant request for additional mileage reimbursement is therefore denied.

ORDER

It is therefore ordered that:

1. Claimant’s scheduled impairment rating for his left lower extremity is converted to a whole person impairment.

2. Claimant’s request for reimbursement of mileage expenses submitted more than 120 days after they were incurred is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

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

DATED: May 27, 2021

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

- Did Claimant prove the right ulnar nerve decompression surgery performed by Dr. Jennifer Kummer was reasonably needed and causally related to her admitted work accident?

- If Claimant proved the surgery was recently necessary and related, are Respondents relieved of liability for the surgery because it was not pre-authorized?

FINDINGS OF FACT

1. Claimant works as a building secretary at Employer's high school in Woodland Park. She suffered admitted injuries on May 28, 2019 when she slipped and fell on a linoleum floor. Claimant's feet went up in the air and she fell on her right arm, right shoulder, and back.

2. Claimant's most severe pain after the accident was in her right shoulder and back. But her entire right arm also hurt, and she experienced "funny bone pain" in her right elbow.

3. Over the summer, Claimant began to notice numbness and weakness in her right small finger. Claimant noted nerve pain along the right side of her right hand, going into the fourth and fifth digits. She described similar symptoms in her thumb and index finger. Because there were so many other "major things going on" from a physical standpoint, that issue was "not at the forefront of my mind."

4. Claimant received treatment from her personal chiropractor over the summer and did not pursue treatment under the workers' compensation claim until the end of August 2019.

5. Employer referred Claimant to CCOM for authorized treatment. She saw Edith Reichert, FNP at her initial visit on August 28, 2019. Ms. Reichert documented, "Pt was at work on 5/28/19 when she fell on wet linoleum and braced her fall with her right arm. She has seen a chiropractor which is helped her back, but has also seen a massage therapist, she has been seeing her own PCM for her shoulder." Ms. Reichert diagnosed "sprains" of the lumbar spine, right shoulder, right wrist, and right thumb.

6. Claimant saw Dr. Ronald Hollis for her right shoulder on September 30, 2019. Dr. Hollis recommended arthroscopic surgery for a possible rotator cuff repair, biceps tenodesis, distal clavicle resection, and decompression. Insurer denied the surgery as not reasonably needed.

7. Claimant saw Dr. Clark Walker and Dr. Martin Boublik at Steadman Hawkins on November 1, 2019 regarding her shoulder. The report documents that after

her accident, “initially she had mostly right wrist and back pain. However, she subsequently developed worsening right shoulder pain. . . . [P]atient also experiences a burning/tingling type pain over the right side of the neck and into the medial border of the scapula. She also endorses numbness/tingling that will radiate from the neck down to her arm and into her fingers intermittently.” Claimant was diagnosed with rotator cuff tendinosis, traumatic impingement, and adhesive capsulitis. Dr. Walker and Boublik recommended six weeks of PT, with consideration of injections if she did not improve. They also referred Claimant to Dr. Jennifer Kummer, a hand specialist, for evaluation of her right wrist.

8. A treatment note from Well Within Therapeutics dated November 21, 2019 indicates Claimant’s chief complaint as “RUE – wrist to neck.” The accompanying pain diagram reflects symptoms in the entire right upper extremity.

9. A cervical MRI was performed on November 23, 2019 to investigate the source of Claimant’s neck pain and right upper extremity symptoms. The radiologist appreciated a broad-based disc bulge at C5-6 causing “moderate-to-severe right foraminal narrowing, and likely explains this patient’s right-sided radicular symptoms.”

10. Claimant was referred to Dr. Chad Prusmack for evaluation of her neck. She initially saw Dr. Prusmack’s PA-C, Davit Whatmore, on January 9, 2020. The accompanying pain diagram indicates stabbing, burning, and aching pain in her right arm, and tingling in her right hand. Mr. Whatmore noted that after the work accident, “The patient had significant onset of nerve pain radiating into the right arm and additional axial neck pain that has not resolved. . . . At this point the pain is actually unfortunately escalating. The patient is now starting to notice weakness into the arms particularly on the right side and the pain causes her a lot of limitation with sleeping.” He reviewed the MRI images and noted a large disc herniation at C5-6 causing bilateral stenosis, right greater than left. After consulting with Dr. Prusmack, Mr. Whatmore stated, “This is a patient with a slip and fall injury at work now over 7 months out from that original injury failing conservative care and now with progressive weakness in the right upper extremity. Based on a large nature of the disc herniation with severe neural compression, we will recommend the patient undergo a foraminotomy with discectomy at C5-6 with insertion of a disc arthroplasty.”

11. Dr. Prusmack’s office submitted a request for authorization of surgery, which was reviewed by physician advisor Dr. Patrick Curry on February 5, 2020. Dr. Curry opined, “Since [the accident], she has been struggling with right-sided arm pain. An MRI is significant for a right-sided C5-C6 paracentral disc protrusion.” Dr. Curry opined a slip and fall “can result in a disc herniation and intractable radiculopathy.” He recommended the surgery be approved.

12. Dr. Prusmack performed a C5-6 anterior cervical discectomy and artificial disc replacement on February 18, 2020. Claimant eventually received significant benefit from the surgery. She explained her right arm was “completely non-functional” prior to the surgery, but afterwards her nerve pain decreased, as did the symptoms in her index finger and thumb. However, the symptoms in her fourth and fifth fingers remained. She

discussed the ongoing symptoms with Dr. Prusmack, who explained it was "a separate issue, not related to the neck." Dr. Prusmack suspected an ulnar nerve issue.

13. Claimant completed a pain diagram at CCOM on April 24, 2020. She circled her entire right arm and right hand. Claimant credibly testified that she consistently reported to CCOM symptoms including elbow pain and numbness, tingling, and weakness in the fourth and fifth digits of her right hand, from the start of treatment.

14. Claimant followed up with Dr. Prusmack on May 11, 2020. He reported, "The patient is experiencing new numbness in the fourth and fifth digits. The patient notes that it splits the ring finger and that it is mostly at night." He added, "The patient does have tenderness and swelling over the right wrist joint, which is not a neck issue, and I believe she needs and evaluation for joint injury and the wrist with Dr. Jennifer Kummer."

15. Also on May 11, 2020, Claimant's physical therapist documented, "Pt. explains symptoms started after fall in May 2019. Fell on back and head/neck, R UE slapped the ground. . . . Prior to surgery was having pain throughout her entire R UE, R UE felt weak, pain-numbness and tingling in the R hand."

16. Claimant saw Dr. Kummer on June 19, 2020. Dr. Kummer recommended Claimant try splinting, Voltaren gel, and physical therapy.

17. Claimant underwent electrodiagnostic testing on June 23, 2020, which showed bilateral ulnar neuropathy.

18. On July 6, 2020, Mr. Whatmore reported, "The EMG did in fact show the presence of bilateral ulnar neuropathy as Dr. Prusmack had suspected. There were no signs of any cervical radiculopathy or plexopathy. The patient states that with some slight changes in her thyroid medication, the symptoms in the left arm seem to have improved but she is still having a fair amount of discomfort in the right ulnar gutter. . . . [W]e will refer the patient to Dr. Davis Hurley for consideration of additional interventions and optional ulnar nerve transposition surgery."

19. Claimant saw Dr. Hurley on July 28, 2020. He noted the bilateral EMG abnormalities and stated, "The left side is asymptomatic, the right side does show significant tenderness especially along the medial upper condyle and ulnar nerve. She has ulnar nerve symptoms. Possibility of double crush phenomenon from the cervical spine and elbow. She feels the symptoms are worsening in the ring and small finger. She feels there was bruising and swelling at the time of injury last year around the elbow. It is possible that she had bruising of the ulnar nerve at the elbow at that time and she has failed to improve." Dr. Hurley discussed the specific mechanism of injury with Claimant and documented, "the symptoms began as the result of a fall. . . . She states she landed with her arm outstretched and had a direct blow to the inner aspect of the elbow or forearm and wrist. States that she had swelling and bruising on the arm at the time of the injury last year." Dr. Hurley requested authorization for an ulnar decompression surgery. Insurer denied the surgery pending an IME.

20. Dr. Kathy McCranie conducted an IME for Respondents on September 9, 2020. Dr. McCranie saw no evidence of direct injury to the elbow that would cause a traumatic ulnar neuropathy. She noted Claimant had reported "gradual" onset of ulnar symptoms and emphasized Dr. Prusmack's May 11, 2020 reference to "new" numbness and tingling in the 4th and 5th fingers. Dr. McCranie concluded, "it is not medically probable that this condition is related to her work injury and is more likely related to other pre-existing conditions."

21. Claimant followed up with Dr. Kummer on October 13, 2020 regarding the ulnar neuropathy. She described ongoing weakness in the right hand, and numbness and tingling in the 4th and 5th fingers. Claimant told Dr. Kummer, "her symptoms of elbow pain at the medial elbow as well as the numbness and tingling started immediately after her fall that she suffered while at work. She states she noted the symptoms but they were masked by the pain she had [in] her neck and her shoulder after the fall. She states that her neck and shoulder pain have improved. However, the pain at the medial elbow and numbness and tingling have progressively worsened as her neck and shoulder issues have improved." Because of the progressive symptoms and constant numbness and tingling, Dr. Kummer recommended an ulnar nerve decompression and possible transposition.

22. Dr. Kummer submitted a request for authorization of cubital tunnel surgery on November 3, 2020. Insurer denied the request on November 12, 2020. Claimant elected to move forward with surgery under her health insurance rather than wait and risk additional nerve injury while waiting for litigation to play out. Dr. Kummer performed a right ulnar nerve decompression surgery on November 19, 2020.

23. Dr. Kummer is an authorized provider on this claim.

24. Claimant's care was transferred from CCOM to Dr. Elizabeth Bisgard on November 25, 2020. Dr. Bisgard reviewed the history of the case and noted that, "[Claimant] frequently received copies of the [CCOM] reports and disputed what was documented. She recalled repeatedly telling Dr. Centi and Edith about symptoms that were not documented in her file but she noted on her pain diagram. I also noted the reports were in template format and frequently information appeared to be copied and pasted from the prior note with little or no additional information." Regarding the progression of symptoms, Dr. Bisgard wrote, "as [Claimant's] cervical symptoms improved [after neck surgery] she had more difficulty with pain, numbness, tingling, and weakness in her right arm and wrist. She had been having symptoms of numbness and tingling in her right fifth finger after the slip and fall which gradually developed into numbness and tingling [sic]. She specifically reported to Dr. Centi her symptoms but this was not documented in his record. Her symptoms progressed in her right hand. In follow-up visit with Dr. Prusmack on May 11, he documented new numbness in her fourth and fifth fingers. However, she stated the symptoms were always there but just worse."

25. Dr. Bisgard concluded, "After a thorough review of the medical records and history provided by [Claimant], it is my opinion based on a reasonable degree of medical probability that the ulnar neuropathy is directly due to her work injury. . . . [Claimant]

reviewed the [CCOM] records and adamantly disputes the documentation. At this point I give more credibility to [Claimant's] history rather than the medical records for the reasons above. The surgery provided by Dr. Kummer was reasonable and necessary and claim related."

26. Dr. Bisgard testified at hearing to expand on the opinions expressed in her reports. She explained Claimant's symptoms could have been coming from the cervical spine or the elbow because they were consistent with both cervical radiculopathy and ulnar neuropathy. She noted it was appropriate to initially focus on the neck, but if Claimant's symptoms were solely related to the herniated disc, she would have expected them to resolve after neck surgery. The symptoms unfortunately did not resolve after surgery, and it was appropriate to look next to the shoulder and then the elbow is possible pain generators.

27. Dr. Bisgard noted that although the EMG demonstrated bilateral ulnar neuropathies, Claimant was only symptomatic on the right side. Dr. Bisgard opined Claimant likely had asymptomatic ulnar compression and/or ulnar neuropathy before the fall, but the work accident aggravated the right side and caused it to become symptomatic. Dr. Bisgard explained the symptoms had been "masked" and when the symptoms from the neck and shoulder began to improve, the elbow and hand symptoms became more apparent. The Dr. Bisgard testified this is a common occurrence; the most painful or symptomatic body part receives the most attention, and once that issue is relieved, other symptoms and other parts of the body become more noticeable.

28. In support of her conclusion that the right ulnar neuropathy is related to the accident, Dr. Bisgard cited the undisputed fact Claimant fell and landed on her right arm; the mechanism of injury was consistent with her symptoms; the EMG was consistent with ulnar neuropathy; and CCOM's records were unreliable because of their "template" style format. Dr. Bisgard also considered Claimant a credible historian and credited the history she provided. Dr. Bisgard concluded that "but for" the slip and fall at work, Claimant would not have needed the ulnar decompression surgery. She further testified the treatment Claimant received for ulnar neuropathy has been reasonably necessary.

29. Dr. McCranie testified at hearing consistent with her report. Dr. McCranie did not consider Claimant a reliable historian based on perceived inconsistencies in the medical records. Dr. McCranie opined that if Claimant had sustained an acute traumatic right ulnar neuropathy, the pain would have been immediate and severe and would not/could not have been "masked." According to Dr. McCranie, the mechanism of injury as described by Claimant was not a direct blow to the elbow and was not sufficient to cause an acute traumatic right ulnar neuropathy. Dr. McCranie testified Claimant described a gradual onset of symptoms, which was inconsistent with an acute traumatic ulnar neuropathy. Dr. McCranie believes it more likely the ulnar neuropathy is idiopathic or caused by a metabolic condition.

30. Claimant's description of her accident and the onset and progression of her ulnar neuropathy symptoms at hearing and in her discussions with Dr. Bisgard was credible.

31. Dr. Bisgard's causation opinions are credible and more persuasive than the contrary opinions offered by Dr. McCranie.

32. Claimant proved the ulnar nerve decompression surgery performed by Dr. Kummer was reasonably needed and causally related to the work accident.

33. The denial of pre-authorization does not relieve Insurer of liability for a surgery that was reasonably needed, causally related, and performed an authorized provider.

CONCLUSIONS OF LAW

A. The ulnar decompression surgery was reasonably necessary and causally related to the admitted accident

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Even if the respondents admit liability and pay for some treatment, they retain the right to dispute the reasonable necessity or relatedness of any other treatment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). Where the respondents dispute the claimant's entitlement to medical benefits, the claimant must prove the treatment is reasonably necessary and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

The existence of a pre-existing condition does not preclude a claim for medical benefits if an industrial injury aggravates, accelerates, or combines with the pre-existing condition to produce the need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). The ultimate question is whether the need for treatment was proximately caused by an industrial aggravation or merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

As found, Claimant proved the ulnar nerve decompression surgery performed by Dr. Kummer was reasonably needed and causally related to the work accident. The accident probably aggravated a pre-existing but asymptomatic neuropathy and proximately caused the need for surgery. The ALJ credits Claimant's description of the accident and the onset and progression of the right ulnar neuropathy. Dr. Hurley's theory of a "double crush" phenomenon is probably correct. Claimant's initial upper extremity symptoms probably reflected a combination of cervical radiculopathy and ulnar neuropathy. As noted by Dr. Bisgard, Claimant's ulnar-related symptoms were to some degree "masked" by the issues with the neck and shoulder. But after the cervical pathology was addressed, the ulnar symptoms became more apparent. Once Dr. Prusmack realized those symptoms were not related to the neck injury, he made the appropriate referral to upper extremity specialist, Dr. Kummer. Dr. Prusmack's reference to the ulnar symptoms as "new" probably reflects a misunderstanding of what Claimant said or meant during the appointment. Claimant probably had some level of symptoms in the right 4th and 5th fingers immediately or shortly after the accident, which gradually became worse over time. The ALJ also considers it significant that Claimant had electrodiagnostic abnormalities in both elbows, but symptoms manifested only in the arm that suffered a trauma. Dr. Bisgard's analysis and opinions are credible and persuasive. Dr. McCranie's conclusions are in large part predicated on discounting and disbelieving Claimant's statements. But the ALJ found Claimant reliable and credible, which undercuts the usefulness of Dr. McCranie's opinions.

B. The denial or prior authorization does not relieve Insurer of liability for the surgery.

Respondents argue they are not liable for the ulnar nerve surgery regardless of reasonable necessity and causation because Dr. Kummer did not obtain prior authorization under WCRP 16. The ALJ disagrees with this proposition. The Rule 16 pre-authorization procedures are intended to protect providers by creating an administrative mechanism to determine whether the carrier will cover or deny recommended treatments. It is not intended to trump the statutory requirement to provide treatment reasonably needed to cure and relieve the effects of any injury, or the ALJ's authority to adjudicate disputed medical benefits. *E.g., Arszman v. Target Corporation*, W.C. No. 4-798-406 (December 15, 2011); *Urtusuastegui v. JBS USA, LLC*, W.C. No. 4-795-733 (November 8, 2018); *Repp v. Prowers Medical Center*, W.C. No. 4-530-649 (September 12, 2005). Because the ALJ has determined the surgery was reasonably necessary, causally related, and performed by an authorized provider, the lack of prior authorization does not vitiate Insurer's liability for the treatment.

ORDER

It is therefore ordered that:

1. Insurer shall cover all reasonably needed treatment from authorized providers to cure and relieve the effects of Claimant's compensable ulnar neuropathy, including but not limited to, the November 19, 2020 ulnar decompression surgery performed by Dr. Jennifer Kummer.

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

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

DATED: May 27, 2021

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

ISSUES

- Did Claimant prove he suffered a compensable injury to his right ankle on November 18, 2020?

  If Claimant proved a compensable injury, the ALJ will address the following issues:

- Is Claimant entitled to reasonably necessary treatment from authorized providers?

- Is Claimant entitled to temporary total disability (TTD) and/or temporary partial disability (TPD) benefits?

- Average weekly wage.

FINDINGS OF FACT

1. Claimant is a 64-year-old food service director for Aviva at Fitzsimons, a rehabilitation facility.

2. Weekly, Claimant uses a hand truck to bring food and produce into the kitchen that was delivered to the back door.

3. On Wednesday, November 18, 2020, Claimant was bringing the loaded hand truck in from the back door. Claimant alleges he "bumped" the horizontal bar between the wheels of the hand truck with his right foot. When he pushed the bar with his right foot around the area of the anterior ankle joint, he states he felt a "twinge" in the ankle. He experienced ankle discomfort but continued unloading the food and did not report an injury.

4. Later in the day he developed swelling over the dorsum of his foot and ankle. (Id., at 002).

5. The next day Claimant went to work and was limping. He took no medication and assumed it was a sprain that would improve.

6. On Friday, November 20, 2020, Claimant felt ill and his wife recorded his temperature at 102.8.

7. Claimant called his supervisor and let him know he would not be in to work the following day. He explained that he had a history of gout and that he thought he was having a gouty attack. He did not mention "bumping" his ankle on the hand truck or any other work-related incident.

8. On Saturday, November 21, 2020, Claimant had a telehealth visit and was told that he likely had COVID. Claimant continued to experience fever and significant night sweats. Claimant continued to have ankle pain and swelling.

9. That following Monday, Claimant developed redness in his right ankle and foot. He called his primary care physician (PCP) and was prescribed indomethacin for gout.

10. On Wednesday, his PCP diagnosed gout and presumptive positive COVID.

11. On Thursday, November 25, 2020, Claimant experienced cognitive issues described as expressive aphasia. He was transported to St. Anthony ER, where he was evaluated and diagnosed with possible congestive heart failure. A follow-up COVID test was negative.

12. Claimant was admitted to the hospital and received an extensive work-up. He was diagnosed with acute systolic and diastolic heart failure and acute idiopathic gout of the ankle with an unclear cause. He was also evaluated for a possible stroke.

13. The right ankle was x-rayed and showed soft tissue swelling but no fracture, lytic lesions, or sclerotic lesions.

14. Claimant did not report ankle trauma to multiple physicians during his initial days at the hospital.

15. A recommendation was made for an aspiration to assess for gout verses a septic joint. Claimant also continued to experience cognitive symptoms. A brain MRI showed a questionable right temporal lobe subacute infarct, which did not correlate with his symptoms. His symptoms were identified as meningitis.

16. Aspiration of the right ankle revealed no fluid in the joint.

17. Claimant described his ankle as feeling similar to prior episodes of gout in his great toe. Claimant was started on steroids and antibiotics.

18. Claimant was seen by an infectious disease specialist. An echocardiogram showed mild aortic regurgitation and mild pulmonary hypertension. There was concern regarding possible bacterial endocarditis.

19. On November 28, 2020, Claimant reported the incident at work involving his right ankle bumping into the hand truck.

20. An MRI of the right leg on November 28, 2020 showed small effusions at the ankle without synovial proliferation or loose bodies. There was excess fluid along the flexor tendon, possibly indicating tenosynovitis.

21. On December 4, 2020, the lateral ankle and foot became red, and Claimant’s right arm became swollen. He was diagnosed with a blood clot in his right

upper extremity. On December 6, 2020, Claimant underwent a wash out of his right wrist, left shoulder, right great toe, and dorsal foot for infected joints.

22. Claimant was transferred to Clear Creek Rehabilitation where he remained until January 19, 2021. He remained on IV antibiotics for another two weeks, and he began a course of physical and occupational therapy at home.

23. At present Claimant reports he has completed his therapy, is on an independent exercise program, and is doing much better though still having difficulty with prolonged ambulation.

24. On January 4, 2021, Dr. Hattem, M.D., performed a Physician Advisor review on behalf of Insurer. Dr. Hattem opined Claimant’s conditions (Staph aureus bacteria with questionable right ankle septic joint) are not work related. Dr. Hattem based his opinions on the following: Claimant was evaluated by multiple physicians and initially denied having right ankle trauma; he only later reported the alleged incident at work; he reported it felt like a gout attack; Claimant has a pre-existing history of gout that places him at a greater risk for developing a septic joint; that “even if he had bumped his right foot at work, it is unlikely that this would have caused a septic joint because even when he presented to the emergency department there was no evidence of laceration, abrasion, or puncture that would have caused an infection.” Dr. Hattem noted a septic joint would not likely develop absent skin penetration. Dr. Hattem ultimately concluded Claimant’s hospitalization was unrelated to his work activities or any incident at work.

25. Dr. Elizabeth Bisgard performed an IME for Respondents on March 8, 2021. Dr. Bisgard examined Claimant, took a detailed history, and reviewed the available medical records. Dr. Bisgard diagnosed staphylococcus aureus bacteremia resulting in endocarditis and other complications not clearly delineated in the medical records, and history of gout. Dr. Bisgard opined Claimant’s condition and hospitalization was not work-related for essentially the same reasons as Dr. Hattem. Dr. Bisgard emphasized multiple factors, including: Claimant merely described “bumping” his ankle on a horizontal bar of the hand truck at work; there was no break in the skin or open wounds to create an entry point for bacteria; Claimant denied any specific trauma to the ankle on multiple occasions and his symptoms were similar to other episodes of gout he had in his toes, and that any gout flare is unrelated to work; given his underlying history of gout, prior surgery for tophaceous gout, and alcohol use, he is at risk for increased risk of recurrent gout attacks.

26. The opinions of Dr. Hattem and Dr. Bisgard are credible and persuasive.

27. Claimant has failed to prove he suffered a compensable injury on November 18, 2020. Although there may have been an “incident” at work (bumping his ankle), it did not proximately cause any “injury.”

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App.

2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which he seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). A claimant does not have to provide expert medical opinion evidence and can support a claim by any competent evidence. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983). Nevertheless, the presence or absence of expert opinion evidence is a valid factor to consider when evaluating the totality of evidence.

The Workers' Compensation Act recognizes a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence," whereas an "injury" is the physical trauma caused by the accident. Section 8-40-201(1). In other words, an "accident" is the cause, and an "injury" is the result. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). Workers' compensation benefits are only payable if an accident results in a compensable "injury." The mere fact that an incident occurred at work and caused symptoms does not establish a compensable injury. Rather, a compensable injury requires medical treatment or causes disability. *E.g., Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (August 17, 2016).

The mere existence of a pre-existing condition does not disqualify a claim for compensation or medical benefits. If an industrial injury aggravates, accelerates, or combines with a pre-existing condition to produce disability or a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). In evaluating whether a claimant suffered a compensable aggravation, the ALJ must determine if the need for treatment was the proximate result of the claimant's work or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

As found, Claimant failed to prove he suffered a compensable injury on November 18, 2020. Dr. Hattem and Dr. Bisgard's opinions and conclusions are credible, and Claimant offered no persuasive contrary evidence to establish a causal connection. The minor "bump" to Claimant's ankle was probably coincidental and was insufficient to cause sepsis or any other condition affecting Claimant's right foot or ankle. Although Claimant clearly had significant medical issues that required treatment, the persuasive evidence fails to show those conditions were proximately caused by his work activities.

ORDER

It is therefore ordered that:

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

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

DATED: June 1, 2021

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-118-426-002

ISSUES

- Did Claimant prove entitlement to medical benefits after MMI?

- Did Claimant prove she suffered functional impairment beyond her right leg?

FINDINGS OF FACT

1. Claimant works as an officer in the maximum-security ward at Employer's Mental Health Institute in Pueblo. She suffered an admitted injury to her right knee on February 22, 2019 while attempting to restrain a combative patient.

2. Dr. Terrence Lakin was Claimant's primary ATP.

3. After participating in several months of conservative care, Claimant was referred to Dr. Roger Davis for a surgical evaluation.

4. At her initial evaluation with Dr. Davis on August 16, 2019, Claimant described right knee pain, stiffness, "catching," "popping," and "locking."

5. On October 15, 2019, Dr. Davis performed an arthroscopic debridement and partial synovectomy for medial shelf plica. Dr. Davis found some superficial fraying and inflammation of the patella, a prominent medial shelf plica engaging in flexion and extension, some evidence of contusion about the medial femoral ridge, and mild cystic change at the base of the ACL. The medial and lateral menisci and articular cartilage were in good condition, and no loose bodies were identified.

6. At a December 23, 2019 follow-up appointment, Dr. Davis documented "she continues to have some popping and catching about the anterior aspect of her right knee but overall feels improved compared to preoperatively. Still has some pain about the anteromedial aspect of her right knee which she rates at 2 out of 10 today." Dr. Davis recommended Claimant continue her rehabilitation exercises and released her to a trial of full duty. He thought she was nearing MMI and would see her back in one month "if needed."

7. There is no persuasive evidence of additional appointments with Dr. Davis after December 23, 2019.

8. Claimant testified she considers the surgery unsuccessful because she continued to experience pain and occasional locking.

9. Claimant suffered a flare in mid-March 2020 because of multiple restraint episodes involving patients. Dr. Lakin was concerned about "a job mismatch" and ordered a functional capacity evaluation (FCE).

10. The FCE was completed on May 8, 2020. It was considered valid based on internal consistency measures. The FCE showed Claimant could perform light-medium lifting, constant standing, walking, and sitting, and occasional crawling, kneeling, and squatting. Claimant's limitations were consistent with most of her preinjury duties.

11. Dr. Lakin put Claimant at MMI on May 11, 2020 and performed an impairment rating. He noted Claimant had difficulty returning to her job and walking on uneven surfaces patrolling along the fence lines. She also had several flareups of knee pain that caused her to call in sick. Claimant reported her pain increased "the more she uses her right knee." She described difficulty with squatting, and descending stairs. Examination of the right knee showed tenderness to palpation medially, and mild crepitus. The knee appeared stable with no McMurray's clicks. Dr. Lakin provided a 5% lower extremity/2% whole person rating. He also assigned permanent restrictions consistent with the FCE. Dr. Lakin recommended no specific maintenance treatment, but recommended Claimant follow up with Dr. Davis "if needed if problems with the right knee related to this injury or surgery."

12. Claimant saw Dr. Timothy Hall for a DIME on September 8, 2020. Claimant indicated she was not working at the time, which she thought was because of her restrictions. She told Dr. Hall, "She has no limitations and activities of daily living as a consequence of her knee." Examination of the knee showed local tenderness medially on the right side, but no inflammation or instability. Meniscal signs were negative and patellar tracking was normal. Claimant had some range of motion loss, which provided the basis for Dr. Hall impairment rating. Dr. Hall agreed with the May 10, 2020 MMI date determined by Dr. Lakin. He assigned a 14% lower extremity/6% whole person rating for the right knee. Dr. Hall agreed with the restrictions set forth by the FCE, except he recommended no permanent lifting restrictions. He opined "as I review with the patient her work requirements, it is my opinion that she is capable of returning to her previous occupation. That was also the opinion of the FCE." Finally, Dr. Hall opined "no maintenance care is required."

13. Respondent filed a Final Admission of Liability (FAL) admitting for the 14% lower extremity rating assigned by Dr. Hall. The FAL denied liability for medical benefits after MMI.

14. Claimant continues to experience pain and occasional "locking" in the right knee, depending on her activity level. She has "intermittent" difficulty with squatting, crouching, and climbing stairs. Claimant estimated she walks 4000 steps per day at work. She "protects" her right knee because it is no longer as strong as before the injury.

15. Claimant has received no additional medical care for her right knee since being put at MMI. Claimant contacted Dr. Lakin's office "a couple of times" on unknown dates but was told he had nothing else to offer. Claimant contacted Dr. Davis' office twice after March 8, 2021 but received no call back.

16. No medical provider has recommended any treatment for the knee. Claimant testified she needs additional medical care for her knee but identified no specific treatment she believes she needs or will need in the future.

17. Claimant failed to prove she requires additional medical treatment to relieve the effects of her injury or prevent deterioration of her condition.

18. Claimant failed to prove she suffered functional impairment beyond her right leg. Neither Dr. Lakin's MMI report nor Dr. Hall's DIME report documented any symptoms or functional impairments proximal to the right leg. Claimant described no proximal symptoms or functional impairments at hearing.

CONCLUSIONS OF LAW

A. Medical benefits after MMI

Respondents are liable for authorized medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101(1)(a); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Medical benefits may extend beyond MMI if a claimant requires treatment to relieve symptoms or prevent deterioration of their condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). If the claimant establishes the probability of a need for future treatment, he is entitled to a general award of medical benefits after MMI, subject to the respondents' right to dispute causation or reasonable necessity of any particular treatment. *Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003). A claimant need not be receiving treatment at the time of MMI or prove a particular course of treatment has been prescribed to obtain a general award of *Grover* medical benefits. *Miller v. Saint Thomas Moore Hospital*, W.C. No. 4-218-075 (September 1, 2000). Proof of a current or future need for "any" form of treatment will suffice for an award of post-MMI benefits. *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). The claimant must prove entitlement to post-MMI medical benefits by a preponderance of the evidence. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997)

Claimant failed to prove she requires additional medical treatment to relieve the effects of her injury or prevent deterioration of her condition. Claimant's current knee symptoms are similar to those she was experiencing in the several months leading up to MMI. Claimants' knee appears stable and there is no persuasive evidence to suggest additional surgery or further conservative care would be of benefit. No medical provider has recommended any treatment for the knee. Claimant testified she needs additional medical care for her knee but identified no specific treatment she believes she needs at present or will need in the future.

B. Whole person "conversion"

The term "injury" as used in the context of permanent partial disability "refers to the manifestation in a part or parts of the body which have been impaired or disabled as a result of the industrial accident." *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366, 368 (Colo. App. 1996). Whether a claimant has sustained a scheduled injury or a whole person impairment is a question of fact for determination by the ALJ. *Id.* In resolving this question, the ALJ must determine "the situs of the functional impairment," which refers to "the part of the body that sustained the ultimate loss, and not necessarily the situs of the injury itself." *Walker v. Jim Fuoco Motor Co*., 942 P.2d 1390, 1391 (Colo. App. 1997). The schedule of disabilities refers to the loss of "a leg." Section 8-42-107(2)(a). To establish entitlement to a whole person rating, the claimant must show functional impairment to part(s) of her body other than the "leg." It is the claimant's burden to prove a non-scheduled impairment by a preponderance of the evidence. *Cassius v. Entegris*, W.C. No. 4-732-489 (March 26, 2010).

Functional impairment need not take any particular form, and "pain and discomfort which interferes with the claimant's ability to use a portion of the body may be considered 'impairment' for purposes of assigning a whole person impairment rating." *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (June 30, 2008). Referred pain from the primary situs of the initial injury may show functional impairment to the whole person. *E.g., Latshaw v. Baker Hughes, Inc*., W.C. No. 4-842-705 (December 17, 2013); *Mader v. Popejoy Construction Co., Inc*., W.C. No. 4-198-489 (August 9, 1996). Although medical opinions may be relevant to this determination, the ALJ can also consider lay evidence such as the claimant's testimony regarding pain and reduced function. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *City Market, Inc. v. Industrial Claim Appeals Office*, 68 P.3d 601 (Colo. App. 2003); *Olson v. Foley's*, W.C. No. 4-326-898 (September 12, 2000).

As found, Claimant failed to prove she suffered functional impairment beyond her right leg. Claimant has returned to her regular job and appears to be managing her knee issues with minor modifications and precautions. Neither Dr. Lakin's MMI report nor Dr. Hall's DIME report documented any symptoms or functional impairments proximal to the right leg. Claimant described no proximal symptoms or functional impairments at hearing. The preponderance of persuasive evidence shows Claimant's functional impairment is limited to her right leg.

ORDER

It is therefore ordered that:

1. Claimant's request for medical benefits after MMI is denied and dismissed.

2. Claimant's request for additional PPD benefits based on Dr. Hall's whole person rating is denied and dismissed.

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

DATED: June 1, 2021

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-125-131-001

ISSUE

1. Whether Respondent has proven by clear and convincing evidence that the DIME physician improperly assigned permanent impairment ratings for Claimant's cervical and lumbar spine.[1]

FINDINGS OF FACT

1. Claimant was involved in motor vehicle accident while working as a code inspector for Employer on June 11, 2019. Claimant was driving her work vehicle when she slowed her vehicle to avoid a dog in the road. Claimant's vehicle was then rear-ended by another driver.

2. Following the collision, Claimant called the "OUCH Line" at Denver Health where she reported pain in her back, neck, right shoulder, left knee and right arm. Denver Health then referred Claimant to Christian Updike, M.D., at Injury Care Associates. (Ex. A).

3. Claimant saw Dr. Updike, on June 11, 2019, and Dr. Updike served as Claimant's authorized treating physician (ATP) for the remainder of her claim. At Claimant's initial visit she reported pain in her low back, neck, right arm, right hand, right elbow, left knee and right ankle. Claimant denied symptoms in her left arm, left ankle and right knee. Claimant reported a history of hip pain and that a previously-scheduled bursal injection in her right hip was to take place within a few days. On examination, Dr. Updike noted bilateral trapezial spasms and limited rotation of the neck, with induration of the right trapezius. On examination of Claimant's lower back, Dr. Updike noted tenderness with some reported limitation of range of motion on forward flexion and mild back tightness on straight leg raise test. He further noted tenderness in the anterior right biceps, and that Claimant's left shoulder was nontender in the glenohumeral region. Dr. Updike diagnosed Claimant with cervicalgia without radiculopathy, low back pain, and right arm soreness (noting that Claimant's right arm symptoms suggested myofascial symptoms). (Ex. C).

4. Between June 13, 2019, and July 24, 2019, Claimant saw Dr. Updike six times. At each visit, Dr. Updike examined Claimant's neck. Dr. Updike routinely found indurations and knots in Claimant's bilateral trapezius muscles, tightness, and limited range of motion of the cervical spine musculature. Examinations of Claimant's lower back were positive for complaints of diffuse soreness only. On June 17, 2019, Dr. Updike opined that Claimant's symptoms were related to her work injury. (Ex. C).

5. On June 16, 2019, Claimant saw Vitaly Domashevich, M.D., at Peak Pain. Claimant had begun treatment at Peak Pain in September 2017 for chronic low back pain

[1] The litany of issues listed in Claimant's position statement were not endorsed by Claimant in her Application for Hearing nor were they endorsed at hearing. Consequently, this Order addresses only the issue endorsed by Respondent.

resulting from a 2013 automobile accident. At the June 16, 2019 visit, Claimant reported that her low back pain had significantly flared up since the June 11, 2019 accident. Dr. Domashevich's documented physical examination and diagnosis of Claimant was identical to his examination of Claimant on May 23, 2019. He indicated that Claimant most likely sustained a whiplash injury in a motor vehicle accident approximately one month earlier, and did not diagnosis Claimant with any new injury to her lower back. Both before and after the accident, diagnosed Claimant with multilevel lumbar spondylosis (DDD/facet OA); low back pain and bilateral hip pain. The diagnosis remained unchanged from September 2017. (Ex. I).

6. At subsequent visits on July 12, 2019, August 30, 2019, September 27, 2019, November 1, 2019, and February 28, 2029, Dr. Domashevich's documented physical examination and diagnosis of Claimant were virtually identical and did not document objective evidence of injury to Claimant's lumbar or cervical spine.(Ex. I).

7. On June 17, 2019, Dr. Updike indicted that an MRI of Claimant's lumbar spine was not medically indicated based on her lack of neurologic findings and the mechanism of injury. Which he indicated could possibly cause a low back strain, but was extremely unlikely to cause any herniation of the low back. Nonetheless, Dr. Updike ordered MRIs of Claimant's neck and low back on June 26, 2019, due to Claimant's continued pain complaints. (Ex. C).

8. Beginning on June 19, 2019, Claimant saw Robyn Smolin, P.T., at Injury Care Associates on referral from Dr. Updike. Claimant attended ten physical therapy visits through August 1, 2019. The physical therapy records document moderate limitations in lumbar range of motion through August 1, 2019. (Ex. C).

9. On July 2, 2019, Claimant had MRIs of her lumbar and cervical spine performed on referral from Dr. Updike. The lumbar MRI was interpreted as showing no acute findings, with similar findings compared to a prior lumbar MRI taken October 31, 2018. The cervical MRI was interpreted as showing a very minimal posterior subluxation of C3 on C4 and C4 on C5; multilevel degenerative changes; moderate foraminal stenosis on the left at C3-4, severe bilaterally at C4-5 and C5-6, and mild on the right at C6-7. (Ex. D).

10. On July 3, 2019, Dr. Updike reviewed Claimant's MRI results and indicated that her lumbar MRI had no significant changes from October 2018 and that there was no structural damage to her low back. He also indicated that Claimant's MRI demonstrated pre-existing foraminal stenosis which might have been aggravated as a result of Claimant's work injury. Dr. Updike referred Claimant for follow up with a pain specialist, and recommended that Claimant see Domashevich, due to his familiarity with Claimant and his presumed knowledge of Claimant's baseline status. Dr. Updike also referred Claimant for chiropractic treatment with Michael Varney, D.C. (Ex. C).

11. On August 5, 2019, Claimant saw Dr. Varnay and that her shoulder pain "shifted" from the right to the left shoulder. In total, Claimant saw Dr. Varnay four times between August 5, 2019, and August 22, 2019. Dr. Varney noted lumbar range of motion with pain

and stiffness on left rotation at the August 5, 2019 visit. At each subsequent visit, Dr. Varnay's physical examination was identical, and incorrectly indicated that Claimant was employed as "CNA." Given the identical nature of each physical examination, the ALJ does not find the physical examinations documented after August 5, 2019, to be credible evidence. (Ex. C).

12. At her August 13, 2019 visit with Dr. Updike, Claimant reported new problems, including left shoulder pain and right knee pain. On examination, Dr. Updike noted reported tenderness over the right IT band in Claimant's hip, and diffuse neck tenderness with induration. He noted that Claimant's neck symptoms appeared to be "merely muscular." No examination of Claimant's lower back was documented. (Ex. C).

13. On August 21, 2019, Dr. Updike identified ongoing induration in Claimant's bilateral neck muscles, and noted that Claimant's left shoulder was primarily tender around the periscapular muscles, with no evidence of rotator cuff pain. Dr. Updike again noted that Claimant's lumbar MRI showed no changes when compared to Claimant's October 2018 MRI. (Ex. C).

14. Dr. Updike examined Claimant's neck and lower back again on August 28, 2019, noting that the low back was slightly less tender, and that Claimant had "continued induration" in the bilateral trapezius muscles. (Ex. C).

15. On September 11, 2019, Dr. Updike noted that Claimant had returned to full duty work with no significant flare ups. Claimant had continuing complaints of neck pain, low back pain, hip pain and left shoulder with "popping" in the left glenohumeral joint. On examination of Claimant's neck, Dr. Updike found good range of motion with end-range tightness. Dr. Updike's diagnosis was cervicalgia without radiculopathy, low back pain and right knee pain. (Ex. C).

16. On September 20, 2019, Claimant reported to Dr. Updike that Dr. Domashevich had recommended a surgical consult for her lumbar spine, although no recommendation is documented in Dr. Domashevich's records. Dr. Updike disagreed with this reported recommendation indicating that Claimant had no anatomical changes to her lumbar spine justifying surgery. He noted that it was possible Claimant was having ongoing inflammation of the lower back and neck. He further noted that Claimant's left shoulder did not warrant surgery. (Ex. C).

17. On September 30, 2019, Claimant began physical therapy with Pro Active Physical Therapy. Claimant attended 30 physical therapy appointments at Pro Active between September 30, 2019, and May 1, 2020. (Records from 15 of these visits were offered and admitted into evidence).Claimant initially reported low back pain worse with bending and twisting, cervical pain worse with sitting, and shoulder pain with lifting. The Pro Active records from September 30, 2019, indicate that Claimant's lumbar active range of motion on flexion was 100%, 50% on extension, 50% on right side bend, and left side bend was within normal limits. Claimant's cervical range of motion was noted to be 80% on right rotation and 100% on left rotation. These assessments of Claimant's range of motion remained unchanged over the course of treatment, and are documented identically at the

May 1, 2020 visit as at the September 30, 2019 visit, with no interval changes documented. Claimant's "Functional Status" documented in the Pro Active physical therapy records indicate that Claimant's "Prior" status was 100% for bending, sitting, and lifting, and her "Current" status was 50%, 60% and 50%, respectively As with Claimant's range of motion assessment, Claimant's "Functional Status" remained unchanged at each visit where it was documented. At each visit, Claimant's reported pain lumbar pain was 7/10, cervical pain was 7/10 and left shoulder pain was 6/10. The ALJ finds the Pro Active Physical Therapy records documentation of Claimant's range of motion, functional status, and pain reports to be unreliable, without credibility and of no evidentiary value. (Ex. 9).

18. On October 17, 2019, Claimant saw Dr. Updike with new complaints of leg cramps. Dr. Updike opined that it was "questionable" whether these symptoms were work-related, but ordered an EMG to evaluate the reported symptoms. Dr. Updike referred Claimant to Bryan Castro, M.D., for review the EMG result and for an opinion on lumbar pain management. (Ex. C).

19. On November 22, 2019, Claimant saw Dr. Castro. Dr. Castro examined Claimant and reviewed her prior imaging studies. He noted that Claimant's x-rays and MRIs showed mild to moderate degenerative changes, no instability patterns, and moderate advanced disc space collapse and degenerative changes, but no severe central or foraminal stenosis. He also indicated that the EMG study did not demonstrate any significant neural dysfunction. Dr. Castro's examination was unremarkable. Dr. Castro opined that Claimant's had ongoing back pain and neck pain secondary to a whiplash-type injury. He indicated that surgical intervention was not required, and that Claimant may benefit from medial branch blocks and rhizotomies, such as those performed previously by Dr. Domashevich. (Ex. G).

20. On March 4, 2020, Dr. Updike determined that Claimant was at maximum medical improvement (MMI) for her neck, lower back, right knee, and left shoulder. He referred Claimant to Samuel Chan, M.D., for the performance of an impairment rating. At his April 16, 2020 visit, Dr. Updike indicated that an radiofrequency ablation (RFA) recommended by Dr. Domashevich would be reasonable maintenance care to be completed within six months. (Ex. C).

21. Claimant saw Dr. Chan on April 27, 2020. Dr. Chan reviewed Claimant's medical records and performed an examination. Dr. Chan noted that Claimant had a history of chronic cervical and lumbar spine pain in the past and that her then-current symptoms were "essentially unchanged, comparing before and after the motor vehicle accident." He noted that with respect to Claimant's cervical and spine pain, her complaints appeared "rather escalated." He opined that the June 11, 2019 motor vehicle accident may have temporarily exacerbated her symptoms, but that there was no additional permanent impairment with respect to Claimant's cervical or lumbar spine. Similarly, with respect to Claimant's hip, Dr. Chan opined that there were no new traumatic lesions and that the degenerative changes were pre-existing. Dr. Chan opined there was no permanent impairment of the Claimant's hip. Dr. Chan did assign Claimant a 9% upper extremity impairment for her left shoulder due to range of motion deficits. (Ex. J).

22. On May 29, 2020, Respondent filed a Final Admission of Liability admitting for maintenance care as recommend by Dr. Updike in his April 16, 2020 report, and admitting for permanent partial disability benefits based on a 9% left upper extremity impairment for Claimant's left shoulder.(Ex. K).

23. On July 27, 2020, Dr. Domashevich authored a letter to Claimant's counsel addressing his assessment of Claimant's injuries. Dr. Domashevich opined that Claimant sustained an exacerbation of pre-existing chronic pain symptoms due to her work-related injury. Dr. Domashevich opined that Claimant's lower back pain was "most likely related to superficial injury during accident," and that Claimant "[n]ever completed returned to baseline by spring of 2020." Dr. Domashevich noted that by the end of February 2020, Claimant continued to complain of worsened subjective symptoms, "most notably her left-sided low back and neck pain symptoms." With respect to Claimant's neck, he opined that Claimant had worsened neck pain most likely related to a whiplash injury in the accident, and Claimant had not returned to baseline. He opined that Claimant reached MMI in March 2020. Dr. Domashevich also opined that Claimant should be assigned an "additional 5% whole person impairment" based on the "severity of her subjective worsening of [] symptoms." Dr. Domashevich's statement that Claimant had chronic neck pain is not supported by treatment records which do not reflect treatment or evaluation of Claimant's neck. (Ex. I).

CLAIMANT'S RELEVANT TREATMENT PRIOR TO JUNE 11, 2019

24. Prior to the June 11, 2019 work accident, Claimant had a significant history of chronic lower back pain and hip pain, with some indication of prior neck pain. Claimant had multiple procedures performed on her lower back between November 2017 and December 2018, and before the accident was scheduled for an injection to take place shortly after June 11, 2019.In addition, Claimant was referred for physical therapy in January 2018, and was continuing to receive physical therapy for her pre-existing lower back pain and hip pain on May 22, 2019 (20 days before the June 11, 2019 accident).

25. On August 18, 2017, Claimant had an MRI of her lumbar spine performed at Health Images. Claimant was referred for the MRI by Hugh McPherson, M.D. (No records from Dr. McPherson were offered into evidence). The MRI report indicates it was compared to a prior MRI from November 17, 2014. The MRI was interpreted as showing a L4-L5 disc protrusion with mild thecal sac stenosis with moderate and minimal right degenerative foraminal narrowing, mild degenerative thecal sac stenosis at L2-3 and moderate degenerative foraminal stenosis at L3-4 (bilateral) and L1-2 (left side). (Ex. 7).

26. In September 2017, Claimant saw Andrew Smolenski, M.D., at Peak Pain (the same clinic as Dr. Domashevich) on referral from Dr. McPherson for chronic low back pain. Claimant reported that her pain began in 2013 following an auto accident in which she was rear-ended. Claimant reported undergoing physical therapy, lumbar facet RFA and had improvement for approximately one year. She reported that over the previous year, her pain had steadily increased and radiated into both hips, pain ranging from 5/10 to 10/10. Claimant denied radiation to her leg or other leg symptoms. Dr. Smolenski

diagnosed claimant with multilevel lumbar spondylosis (DDD/facet OA); low back pain, and bilateral hip pain. (Ex. I).

27. On November 22, 2017, Claimant underwent a medial branch blocks in the lumbar spine for preoperative diagnoses of low back pain, lumbar spondylosis, and lumbar facet arthropathy performed by Dr. Smolenski. (Ex. F).

28. Claimant continued treatment with Peak Pain, under Dr. Domashevich with visits on December 4, 2017, January 3, 2018, January 24, 2018, April 11, 2018, August 25, 2018, September 26, 2018, October 24, 2018, and November 30, 2018, for a chief complaint of low back pain. Claimant's diagnosis remained unchanged throughout this time (i.e., multilevel lumbar spondylosis (DDD/facet OA); low back pain, and bilateral hip pain). On January 18, 2018, Dr. Domashevich referred Claimant for physical therapy for SI joint arthralgia and lumbar spondylosis. (Ex. I).

29. On December 20, 2018, Dr. Domashevich performed bilateral L3, L4 and L5 medial branch nerve radiofrequency ablation (RFA) "to anesthetize L4-L5 and L5-S1 facet joints." (Ex. E).

30. On May 5, 2018, Dr. Domashevich performed a left L4-L5 transforaminal epidural steroid injection (TESI) for a diagnosis of left lumbar radiculopathy. (Ex. E).

31. On September 7, 2018, Dr. Domashevich performed bilateral L4-5 TESIs for lumbar radiculopathy. (Ex. E).

32. On October 10, 2018, Dr. Domashevich performed a left SI joint injection and a left trochanteric bursa injection for diagnoses of left SI joint arthralgia and left trochanteric bursitis. (Ex. E).

33. On November 9, 2018, Dr. Domashevich performed another TESI for left foraminal stenosis at L4-5 and L5-S1. (Ex. E).

34. On November 31, 2018, Claimant had a lumber MRI performed at Health Images, on referral from Dr. Domashevich. The MRI was interpreted as unchanged when compared to the August 18, 2017 lumbar MRI. The radiologist characterized the MRI as showing "unchanged severe degenerative changes including multilevel mild central canal stenosis and moderate-severe bilateral neuro foraminal narrowing." (Ex. 7)

35. On December 28, 2018, Dr. Domashevich performed a right SI L2-3 TESI and right trochanteric bursa injection for diagnoses of right lumbar radiculopathy and right trochanteric bursitis. (Ex. E).

36. On May 6, 2019, Claimant was seen at Pro Active Physical Therapy for diagnoses of pain and stiffness in the right shoulder and low back pain. The physical therapy record identifies the referring provider as James Johnson, M.D and notes that the May 6, 2019 visit was Claimant's 13th visit. (No records from Dr. Johnson and no records from Pro Active Physical Therapy prior to May 6, 2019, were offered into evidence). (Ex. 9).

37. Claimant was seen for her 14th and 15th visits at Pro Active Physical Therapy on May 15, 2019, and May 22, 2019, respectively. At both visits, Claimant reported continued lateral right hip pain and that she was unable to lay on her right side. Claimant was reported to be tender to palpation over her greater trochanter (presumably on the right). The records note that Claimant was to continue physical therapy as prescribed. (Ex. 9).

38. On May 23, 2019 (19 days prior to her June 11, 2019 work accident), Claimant saw Dr. Domashevich, for follow up for continued injection therapy. Dr. Domashevich noted that Claimant had right lower back and right thigh pain and was doing slightly better after massage of the right trochanteric bursa, with no obvious tenderness. He indicated that his plan was to proceed with a R L1-2 TESI. (Ex. I). The ALJ infers that the referenced injection is the bursal injection referenced in Dr. Updike's June 11, 2019 report.) (Ex. I).

CHIROSPORT

39. Beginning on September 28, 2017, Claimant was seen at Chirosport Chiropractic Health Center. Claimant's September 18, 2017, November 9, 2017, and January 9, 2018 records at Chirosport note complaints of frequent aching discomfort in her neck, both hips and lower back, each measuring between 6 and 9 on the VAS pain scale, with modification in the subjective VAS scores at each visit. (Ex. E).

40. On February 26, 2019, Claimant returned to Chirosport for treatment. At that time, Claimant reported pain in the upper back, low back, and left hip, measuring 7, 8 and 9 out of 10 on the VAS scale. (Ex. E).

41. On March 5, 2019, Claimant was seen at Chirosport with reports of pain in the neck, right hip, low back, and upper back measuring 6, 8, 7 and 7 on the VAS scale, respectively. (Ex. E).

42. On April 1, 2019, Claimant reported to Chirosport pain in her right hip, left trapezius, upper back, and low back. Claimant received electric muscle stimulation to the lumbar, sacroiliac, and lumbosacral regions. (Ex. E).

43. On April 29, 2018, Claimant reported to Chirosport pain in her right hip, upper back, low back, and neck measuring 9, 9, 8 and 8 on the VAS scale, respectively. (Ex. E).

44. On August 1, 2019, Claimant reported to Chirosport pain in the back of her neck, low back and right hip, each measuring 8 on the VAS scale. (Ex. E)

45. Claimant testified that she purchased a package from Chirosport for chiropractic and massage because she was on a "health kick." Claimant testified that her insurance would pay for the package if she had existing issues and the chiropractor had to report certain "codes" to obtain payment. The implication of Claimant's testimony was that the complaints and assessments from Chirosport were merely to permit the chiropractor to obtain payment and not an accurate reflection of her complaints or symptoms. At each of Claimant's 8 Chirosport visits between September 18, 2017, and August 1, 2019, the

provider's "objective" findings, "assessment," "plan," and "diagnosis" were identical, with the exception of noting EMS treatment at the three final visits. For example, at every Chirosport visit, the "Objective" findings indicate "[a]n extremity subluxation was discovered and adjusted in the left elbow." In contrast, at each visit, Claimant's subjective findings were updated and varying visual analog scale (VAS) pain ratings were assigned. While the ALJ finds the "objective" findings, "assessments," "plans," and "diagnoses" listed in the Chirosport records to be of no evidentiary value, the ALJ finds the Claimant's areas of reported discomfort to be more likely than not, accurate.

DIME

46. After the Respondent filed an FAL, Claimant underwent a Division Independent Medical Examination (DIME), with Charles Wenzel, D.O., on August 28, 2020. Dr. Wenzel issued a report related to the DIME on September 14, 2020. Dr. Wenzel examined Claimant and reviewed relevant medical records. Claimant denied any prior neck pain, left shoulder pain or right knee injuries, and indicated that she had a radiofrequency ablation on January 10, 2019, and was pain free until her accident on June 11, 2019. On examination of Claimant's cervical spine, Dr. Wenzel noted that cervical palpation was unremarkable with no tenderness noted. His work-related diagnoses were cervical pain, chronic, aggravated; lumbar pain, chronic, aggravated; and left knee contusion, resolved. (Ex. M).

47. Dr. Wenzel agreed with Dr. Chan's assessment that there was no impairment rating. He opined that Claimant had no Table 53 or Table 54 diagnoses, and therefore, no cervical or lumbar range of motion deficits may be used to assign a permanent impairment rating. He further stated that Claimant "has a history of chronic pain in the cervical and lumbar regions, and there is no objective evidence for any functional deficits as a result of [the June 11, 2019 accident]." Nonetheless, Dr. Wenzel went on to assign Claimant 1% whole person impairment for the cervical spine and a 1% whole person impairment for the lumbar spine. Dr. Wenzel also opined that Claimant's complaints of left shoulder and right knee pain were not related to her work injury, and assigned no impairment rating. He did recommend medical maintenance care in the form of follow up with pain management for facet injections if indicated, for up to six months. (Ex. M).

48. Although he found Claimant had no permanent impairment, Dr. Wenzel completed impairment worksheets for Claimant's cervical and lumbar spine. With respect to Claimant's cervical spine, he listed a 6% impairment due to specific disorder of the cervical spine under Table 53 II.C of the AMA Guide. Range of motion of the cervical spine corelated to an additional 4% impairment. Claimant's whole person impairment for the cervical spine, if applicable, was 10%. Similarly, Dr. Wenzel listed a 7% lumbar impairment due to a specific disorder of the lumbar spine under Table 53 II.C., and range of motion measurement correlating to a 2% lumbar impairment. Claimant's whole person impairment for the lumbar spine, if applicable, was 9%. Claimant's whole person impairments for her cervical spine and lumbar spine combine for an 18% impairment rating. (Ex. M).

49. On September 25, 2020, the Division issued a "Incomplete Notice – DIME Report" (the "Notice") to Dr Wenzel, based on his assignment of impairment ratings for Claimant's cervical and lumbar spine based "on her subjective complaints of increased pain." The Notice advised Dr. Wenzel that under the Act, "a physician shall not render a medical impairment based on chronic pain without anatomic or physiologic correlation. Anatomic correlation must be based on objective findings." The Notice further instructed Dr. Wenzel to review the following excerpts from the Division's Impairment Rating Tips:

a. "In order to be assigned a spinal rating, the patient must have objective pathology and impairment that qualifies for a numerical impairment rating greater than zero under Table 53."

b. "Whenever 6 months of treatment of the spine has occurred and a Table 53 zero percent rating is assigned, the physician must provide justification for the zero percent rating, based on the lack of physiologic findings. The rating physician shall be aware that a zero percent rating in this circumstance implies that treatment was performed in the absence of medically documented pain and rigidity."

(Ex. N).

50. On October 7, 2020, Dr. Wenzel issued a revised DIME report. In that report, Dr. Wenzel revised his opinion and assigned Claimant an 18% whole person impairment based on the measurements and specific disorder ratings he declined to assign in his September 14, 2020 DIME Report. In explaining his rationale for assignment of permanent impairment ratings, Dr. Wenzel wrote:

> "Although [Claimant] has a pre-existing history of neck and low back pain, there was no prior impairment rating or available range of motion measurements for which to perform an apportionment or normalization according to the AMA Guides. Additionally, she has had over six months treatment for medically documented pain and rigidity. Accordingly, I assigned the above ratings." (Ex. M)

51. Dr. Wenzel's testimony for hearing was presented through a pre-hearing deposition. Dr. Wenzel was offered and admitted as an expert in occupational medicine without objection.

52. Dr. Wenzel testified that under Table 53 and the Colorado Impairment Rating Tips, he believed he was required to provide the patient with an impairment rating because Claimant had more than six months of treatment with documented pain and rigidity, regardless of whether there was objective pathology at the time of the DIME evaluation. Dr. Wenzel testified that his understanding was that if a claimant received six months of treatment, the claimant would qualify for a Table 53 diagnosis. He testified that other than Claimant receiving six months of treatment, there was no evidence definitively indicating that Claimant sustained an injury to her lumbar spine or neck as a result of her June 11, 2019 accident. Dr. Wenzel testified that in his opinion, loss of range of motion constitutes

“rigidity.” Dr. Wenzel also testified that he considers medically documented pain and rigidity, spasms, indurations, subluxation, nerve encroachment and limited range of motion to be “pathology” under the AMA Guides.

53. Dr. Wenzel testified that he was not aware of any evidence that Claimant’s neck or back were independently disabling prior to June 11, 2019, or that she had any work restrictions prior to June 11, 2019.

RETAINED EXPERTS/NON-DIME IMEs

54. On November 12, 2020, Claimant underwent an independent medical examination (IME) with Lawrence Lesnak, D.O., at Respondent’s request. Dr. Lesnak reviewed Claimant’s records and performed an examination. Dr. Lesnak was admitted to testify as an expert in physiatry, and testified at hearing. Dr. Lesnak opined that there was no objective evidence that Claimant sustained an injury to her lumbar spine as the result of the June 11, 2019 auto accident, including no evidence on MRI. Dr. Lesnak also opined that Claimant had no cervical spine diagnosis attributable to her work accident, but provided no cogent explanation for this opinion. Dr. Lesnak testified that the AMA Guides and Division Rating Tip Sheet requires objective evidence of injury, which he defined as a change on an imaging study or reproducible objective evidence of injury for six months or more. He also opined that “rigidity” is not synonymous with decreased range of motion or stiffness.

55. Dr. Lesnak opined that Claimant’s only probable injury as a result of the June 11, 2019 collision was a mild left anterior knee contusion. He opined that there is “absolutely no evidence the patient sustained any type of injuries to her cervical spine, lumbar spine, right knee, right hip or left shoulder whatsoever.” He also opined that the reported mechanism of injury would be “completely inconsistent” with an injury to Claimant’s lumbar or cervical spine and that Claimant sustained no aggravation of any preexisting condition. As part of his examination, Dr. Lesnak performed range of motion measurements of Claimant’s cervical and lumbar spine which are documented in his report. (Ex. P).

56. On December 24, 2020, Claimant underwent an IME performed by Shimon Blau, M.D., at Claimant’s request. Dr. Blau reviewed Claimant’s medical records and performed a physical examination. Dr. Blau testified at hearing and was qualified as an expert in physical medicine and rehabilitation. Dr. Blau’s documented examination of Claimant’s lumbar spine was positive for trigger points in Claimant’s left trapezius area, but other objective testing of Claimant’s lumbar spine was negative. Dr. Blau opined that Claimant sustained an aggravation of her pre-existing chronic lumbar condition, and therefore qualifies for an impairment rating of the lumbar spine. With respect to Claimant’s cervical spine, Dr. Blau noted that Claimant disputes she had chronic neck pain prior to the June 11, 2019 accident, but regardless of whether Claimant had a chronic neck condition, Claimant qualified for an impairment rating for an acute aggravation of the condition. (Ex. 19).

57. Based on his examination and assessment, Dr. Blau opined that Claimant opined that Claimant has 15% impairment for the cervical spine, 20% for the lumbar spine and 2% impairment for the left shoulder, which combine to yield a 33% whole person impairment. With the exception of cervical rotation, Claimant's cervical and lumbar range of motion as measured by Dr. Blau were significantly lower than those measured by Dr. Wenzel two months earlier, and significantly lower than Dr. Lesnak's measurements six weeks earlier (with the exception of lumbar flexion). (Ex. 19).

58. On March 15, 2020, Claimant was involved in another motor vehicle accident in which she was rear-ended. Claimant had increased neck and lower back pain and she was taken to Parker Adventist Hospital's emergency department, evaluated, and discharged. (Ex. 19). Claimant reported the March accident to Dr. Domashevich at her June 19, 2020 appointment, to Dr. Blau, but does not appear to have reported the March 15, 2020 accident to Dr. Updike; Dr. Chan; Dr. Wenzel despite seeing each physician following the accident.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

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

OVERCOMING DIME ON IMPAIRMENT

The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995); *Lafont v. WellBridge D/B/A Colorado Athletic Club* W.C. No. 4-914-378-02 (ICAO, June 25, 2015).

As a matter of diagnosis, the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003); *Sharpton v. Prospect Airport Services* W.C. No. 4-941-721-03 (ICAO, Nov. 29, 2016). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998); *Watier-Yerkman v. Da Vita, Inc.* W.C. No. 4-882-517-02 (ICAO Jan. 12, 2015); Compare *In re Yeutter*, 2019 COA 53 ¶ 21 (determining that a DIME physicians opinion carries presumptive weight only with respect to MMI and impairment). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

The questions of whether the DIME physician properly applied the *AMA Guides*, and ultimately whether the rating was overcome by clear and convincing evidence present questions of fact for determination by the ALJ. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000); *Paredes v. ABM Industries* W.C. No. 4-862-312-02 (ICAO, Apr. 14, 2014). A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-36 (ICAO, Mar. 22, 2000); *Licata v. Wholly Cannoli Café* W.C. No. 4-863-323-04 (ICAO, July 26, 2016).

Cervical Spine

Respondent has failed to establish by clear and convincing evidence that the DIME physician's assignment of a 10% whole person impairment for Claimant's cervical is incorrect. The Division's Desk Aid #11 – Impairment Rating Tips, under the heading "Table 53 and Application of Spinal Range of Motion" provides: "In order to be assigned a spinal rating, the patient must have objective pathology and impairment that qualifies for a numerical impairment rating of greater than zero under Table 53. Spinal range of motion impairment must be completed and applied to the impairment rating only when a corresponding Table 53 diagnosis has been established." (Emphasis original).

Under Table 53 (II)(C), of the AMA Guide and Desk Aid #11 "the examiner may assign an impairment value for impairment or a specific disorder of the lumbar or cervical regions of the spine, so long as the medical evidence establishes the presence of a specific diagnosis, objective pathology, and six months of medically documented pain and rigidity." *In re Bryant*, W.C. No. 5-058-044-001 (ICAO, June 5, 2019). "Objective pathology' is in addition to 'six months of medically documented pain and rigidity.'" *Id*. Contrary to Dr. Wenzel's understanding, a claimant must have more than six months of medically documented pain and rigidity to qualify for an impairment rating. Objective pathology must also exist. The term "objective pathology" cited in Desk Aid #11 refers to "the identification of a problem, injury, disorder, condition or disease that can be identified by virtue of objective signs or analysis." *Id*. "Rigidity" is an elusive term without an accepted definition, but, in any event, need not be "objective." *Id*.

With respect to Claimant's cervical spine, the evidence indicates that Claimant was assigned a specific diagnosis of her cervical spine by Dr. Chan – a cervical strain. The ALJ does not find Dr. Lesnak's opinion credible that "objective pathology" refers only to a change in an imaging study or reproducible objective findings for greater than six months. Rather, as noted above, "objective findings" includes objective signs of an injury or problem. As noted throughout Claimant's records, Dr. Updike continually noted indurations and knots in Claimant's cervical musculature which were noted on objective examinations, and not based solely on Claimant's subjective complaints, unlike complaints of tenderness which are subjective. In addition, Claimant had more than six months of complaints of pain, knots, indurations, and decreased range of motion of her lumbar spine, which the ALJ concludes satisfies the requirement for pain and rigidity. Respondent has failed to establish that it is highly probable that Dr. Wenzel's assignment of a permanent impairment rating for Claimant's cervical spine is incorrect.

Lumbar Spine

Respondent has established by clear and convincing evidence that Dr. Wenzel improperly assigned of a permanent impairment rating for Claimant's lumbar spine. Unlike Claimant's cervical spine where objective signs of an injury existed, there was no credible evidence of objective signs of injury to Claimant's lumbar spine or credible evidence of rigidity for more than six months. As found, Claimant had a long history of chronic lower back pain dating to approximately 2013 or 2014, and was involved in active treatment, including ongoing physical therapy for her lower back within weeks of her June 11, 2019 accident.

Claimant saw Dr. Updike approximately 18 times over a period of approximately ten months. With the exception of a report of mild back tightness on straight leg raise testing on the date of injury, Dr. Updike did not document any positive objective findings with respect to Claimant's lumbar spine. For example, Dr. Updike did not find spasms or indurations in Claimant's lumbar spine. Instead, Dr. Updike's records document only subjective lower back pain complaints. The consensus among Claimant's treating providers, and Dr. Wenzel was that Claimant's lumbar MRI showed no objective evidence of injury, which the ALJ finds credible. Dr. Domashevich's July 27, 2020 letter also noted that Claimant's accident resulted in worsened complaints of subjective symptoms, but did not identify any objective pathology indicating Claimant sustained a permanent impairment to her lumbar spine. Similarly, Dr. Blau's examination did not demonstrate any objective signs of lumbar pathology related to the June 11, 2019 accident, other than Claimant's reports of pain. Dr. Blau's opinion that Claimant qualifies for an impairment rating because she likely sustained an aggravation of her pre-existing back condition conflates the standard for compensability with the standard for the assignment of a permanent impairment rating. While the aggravation of a pre-existing condition may have rendered Claimant's claim compensable, and entitle her to medical treatment and temporary disability benefits, the mere fact of an aggravation of pain does not equate to the objective pathology necessary for the assignment of an impairment rating. Claimant must still meet the requirements for impairment under the AMA Guides, which she DOES not.

Although Claimant did report complaints of pain for more than six months, there is no credible evidence that Claimant had more than six months of documented rigidity. While the initial physical therapy records at Injury Care Associates document moderate limitations in range of motion, there is no credible documentation of limited range of motion related to Claimant's June 11, 2019 auto accident after August 5, 2019.

Based on the totality of the evidence, the ALJ concludes that Respondent established by clear an convincing evidence that Dr. Wenzel's assignment of a permanent impairment rating for Claimant's lumbar spine was incorrect.

ORDER

It is therefore ordered that:

1. Claimant is entitled to a 10% whole person impairment rating for her cervical spine as assigned by the DIME physician, Dr. Wenzel.

2. Claimant is not entitled to a permanent impairment rating for her lumbar spine.

3. All matters not determined herein are reserved for future determination.

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

DATED: June 2, 2021

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

Whether Respondents have produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Martin Kalevik, D.O. that Claimant has not reached Maximum Medical Improvement (MMI) as a result of her August 21, 2019 industrial injuries.

FINDINGS OF FACT

1. Claimant worked for Employer as a Senior Marketer. On August 21, 2019 Claimant slipped on a wet bathroom floor and fell to the ground while at work. Specifically, Claimant struck her right hip, twisted when she hit the floor and rolled onto her left hip.

2. Claimant initially sought medical treatment with Authorized Treating Physician (ATP) Kathryn Bird, D.O. at Concentra Medical Centers on August 21, 2019. Claimant reported that she slipped and fell on a wet bathroom floor at work and was experiencing numbness, tingling and burning pains in her left hip. She noted lower back, right ankle and left hip injuries. Dr. Bird assessed Claimant with a right ankle strain and a lumbosacral strain. She released Claimant to regular duty work with no restrictions.

3. Claimant received chiropractic treatment from Scott Parker, D.C. at Concentra from September 24 through November 14, 2019. She attended a total of 11 chiropractic sessions. Claimant was released from chiropractic treatment on November 14, 2019 with improved symptoms.

4. Claimant underwent physical therapy at Concentra from August 22 through November 18, 2019. She attended a total of 30 physical therapy sessions. Upon discharge, Claimant was advised to continue her home exercise program.

5. On September 30, 2019 Claimant underwent a lumbar spine MRI. The MRI revealed no central foraminal compromise, a very minimal central disc protrusion at L5-S1 with no nerve root contact or displacement and mild facet changes distal to the L3 level.

6. On November 18, 2018 Claimant returned to Dr. Bird for an examination. Claimant reported that she still had back pain at a 4/10 level. Dr. Bird noted that Claimant had suffered a lumbar strain on August 21, 2019. She determined that Claimant had reached her functional goals and was tolerating regular activity. Dr. Bird thus released Claimant to Maximum Medical Improvement (MMI) with no permanent impairment or work restrictions. She also did not recommend any medical maintenance care.

7. On December 2, 2019 Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Bird's MMI and impairment determinations. The FAL specifically

acknowledged a 0% permanent impairment rating and noted that the claim was for medical benefits only.

8. On December 5, 2019 Claimant timely filed an Objection to the FAL and requested a Division Independent Medical Examination (DIME). Martin Kalevik, D.O. was selected to perform the DIME.

9. On August 27, 2020 Claimant underwent the DIME with Dr. Kalevik. He recounted that Claimant had slipped and fallen on a wet floor in a bathroom at work. Claimant reported lower back, right ankle and left hip symptoms. After reviewing Claimant's medical records and performing a physical examination Dr. Kalevik diagnosed Claimant with the following: (1) chronic lower back pain; (2) chronic right SI joint dysfunction; (3) bilateral hip pain; (4) left thigh numbness; (5) suspected left meralgia paresthetica; and (6) a history of unrelated thoracic pain. He concluded that Claimant had not reached MMI because she remained "significantly symptomatic" and her injuries affected her activities of daily living. Relying on the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised)* (*AMA Guides*) Dr. Kalevik assigned Claimant an 11% provisional whole person permanent impairment rating for her lumbar spine. He also assigned 3% provisional scheduled impairment ratings for the left and right lower extremities. Dr. Kalevik recommended additional diagnostic testing and treatment in the form of an EMG/nerve conduction study of Claimant's left lower extremity, an MRI of her right hip with an orthopedic evaluation, a physiatry evaluation, an SI joint injection and possible nerve block after evaluation of the hip and left leg numbness, and a repeat lower back MRI.

10. On December 8, 2020 Claimant underwent an independent medical examination with Lawrence A. Lesnak, D.O. Dr. Lesnak noted that Claimant exhibited subjective complaints without reproducible objective findings. He disagreed with Dr. Kalevik and agreed with ATP Dr. Bird that Claimant has reached MMI. Dr. Lesnak determined that Claimant's pain complaints suggested symptoms of somatic disorder. She also had significant psychosocial issues affecting her symptoms and perceived function. Dr. Lesnak's physical examination did not produce any reproducible objective findings that revealed pathology in the lumbar spine, sacroiliac joint or hip.

11. Dr. Lesnak also testified at the hearing in this matter. He maintained that Claimant was appropriately placed at MMI by Dr. Bird on November 18, 2019. Dr. Lesnak remarked that the further medical treatment and diagnostic examinations recommended by Dr. Kalevik were not reasonable and necessary because Claimant has no objective findings that would warrant ongoing treatment. Dr. Lesnak specifically commented that Claimant's physical examination did not reveal any reproducible objective findings in her right hip. He explained that Dr. Kalevik clearly erred in removing Claimant from MMI and assigning provisional impairment ratings for her lumbar spine and bilateral hips.

12. Claimant testified at the hearing in this matter. Claimant specified that she experiences symptoms in her right hip, left leg, throughout her lower back and down her right leg. She noted that she suffers constant pain that requires her to take two Aleve tablets per week to alleviate the symptoms.

13. On April 9, 2021 the parties conducted the post-hearing evidentiary deposition of Dr. Kalevik. Dr. Kalevik maintained that Claimant has not reached MMI and recommend further diagnostic testing. In reviewing Claimant's medical records, Dr. Kalevik noticed that Claimant's case ended less than three months after her work injury and she was still symptomatic in her back and right hip with 4/10 pain levels. He explained that Claimant exhibited significant symptoms on physical examination. Dr. Kalevik commented that Claimant demonstrated range of motion loss in the flexion/extension of the lumbar spine and into the right hip on extension. He thus determined that further diagnostic testing including a right hip MRI and EMG/nerve conduction studies were necessary. Dr. Kalevik noted that Claimant also required a physical medicine evaluation. Finally, Dr. Kalevik disagreed with Dr. Lesnak's opinion that Claimant exaggerated her symptoms. Specifically, in evaluating Claimant for possible malingering and symptom magnification Dr. Kalevik did not notice any exaggeration or inconsistencies in her presentation.

14. Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Kalevik that Claimant has not reached MMI as a result of her August 21, 2019 industrial injuries. Specifically, Respondents have not demonstrated that it is highly probable that Dr. Kalevik's' MMI determination was incorrect. Initially, on August 21, 2019 Claimant slipped on a wet bathroom floor and fell to the ground while at work. Specifically, Claimant struck her right hip, twisted when she hit the floor and rolled onto her left hip. After receiving conservative care, ATP Dr. Bird determined that Claimant had suffered a lumbar strain and released her to MMI with no permanent impairment or work restrictions.

15. Claimant subsequently underwent a DIME with Dr. Kalevik. He recounted that Claimant had slipped and fallen on a wet floor in a bathroom at work. Claimant reported lower back, right ankle and left hip symptoms. After reviewing Claimant's medical records and performing a physical examination Dr. Kalevik diagnosed Claimant with the following: (1) chronic lower back pain; (2) chronic right SI joint dysfunction; (3) bilateral hip pain; (4) left thigh numbness; (5) suspected left meralgia paresthetica; and (6) a history of unrelated thoracic pain. He concluded that Claimant had not reached MMI because she remained "significantly symptomatic" and her injuries affected her activities of daily living. Relying on the *AMA Guides* Dr. Kalevik assigned Claimant an 11% provisional whole person permanent impairment rating for her lumbar spine. He also assigned 3% provisional scheduled impairment ratings for the left and right lower extremities. Dr. Kalevik recommended additional diagnostic testing and treatment. In contrast to Dr. Kalevik's DIME determination, Dr. Lesnak agreed with Dr. Bird that Claimant reached MMI on November 18, 2019. He explained that Dr. Kalevik clearly erred in removing Claimant from MMI and assigning provisional impairment ratings for her lumbar spine and bilateral hips. Dr. Lesnak commented that Claimant's physical examination did not reveal any reproducible objective findings in her right hip. He explained that Claimant had significant psychosocial issues affecting her symptoms and perceived function.

16. Although Drs. Bird and Lesnak concluded that Claimant had reached MMI as a result of her August 21, 2019 industrial injuries, they failed to identify Dr. Kalevik's

specific error or improper application of the *AMA Guides.* Dr. Kalevik determined Claimant had not reached MMI because she remained “significantly symptomatic” and required additional diagnostic testing and treatment. Claimant’s credible testimony and the medical records support Dr. Kalevik’s opinion that Claimant has not reached MMI. Dr. Kalevik’s opinion reflects that additional diagnostic procedures are necessary to ascertain Claimant’s condition or suggest further treatment. Additional treatment may thus be reasonably expected to improve Claimant’s condition. Contrary determinations by Drs. Bird and Lesnak are mere differences of medical opinion that do not constitute clear and convincing evidence to overcome Dr. Kalevik’s’ DIME opinion. Accordingly, Respondents have not produced unmistakable evidence free from serious or substantial doubt that Dr. Kalevik’s’ conclusion that Claimant has not reached MMI is incorrect.

CONCLUSIONS OF LAW

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

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

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

4. MMI is primarily a medical determination involving a diagnosis of the claimant’s condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). MMI exists at the point in time when “any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition.” §8-40-201(11.5), C.R.S. A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant’s medical condition are causally related to

the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Powell v. Aurora Public Schools* WC 4-974-718-03 (ICAO, Mar. 15, 2017). A finding that the claimant needs additional medical treatment including surgery to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Abeyta v. WW Construction Management,* WC 4-356-512 (ICAO, May 20, 2004);

5. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAO, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

6. A DIME physician's opinions concerning MMI and impairment carry presumptive weight pursuant to §8-42-107(8)(b)(III), C.R.S.; *see Yeutter v. Industrial Claim Appeals Office*, No. 18CA0498 (Apr. 11, 2019) 2019 COA 53. The statute provides that "[t]he finding regarding [MMI] and permanent medical impairment of an independent medical examiner in a dispute arising under subparagraph (II) of this paragraph (b) may be overcome only by clear and convincing evidence." *Id.* Subparagraph (II) is limited to parties' disputes over "a determination by an authorized treating physician on the question of whether the injured worker has or has not reached [MMI]." §8-42-107(8)(b)(II). "Nowhere in the statute is a DIME's opinion as to the cause of a claimant's injury similarly imbued with presumptive weight." *See Yeutter*, 2019 COA 53 ¶ 18. Accordingly, a DIME physician's opinion carries presumptive weight only with respect to MMI and impairment. *Id.* at ¶ 21.

7. "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAO, Nov. 17, 2000).

8. As found, Respondents have failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Kalevik that Claimant has not reached MMI as a result of her August 21, 2019 industrial injuries. Specifically, Respondents have not demonstrated that it is highly probable that Dr. Kalevik's' MMI determination was incorrect. Initially, on August 21, 2019 Claimant slipped on a wet bathroom floor and fell

to the ground while at work. Specifically, Claimant struck her right hip, twisted when she hit the floor and rolled onto her left hip. After receiving conservative care, ATP Dr. Bird determined that Claimant had suffered a lumbar strain and released her to MMI with no permanent impairment or work restrictions.

9. As found, Claimant subsequently underwent a DIME with Dr. Kalevik. He recounted that Claimant had slipped and fallen on a wet floor in a bathroom at work. Claimant reported lower back, right ankle and left hip symptoms. After reviewing Claimant's medical records and performing a physical examination Dr. Kalevik diagnosed Claimant with the following: (1) chronic lower back pain; (2) chronic right SI joint dysfunction; (3) bilateral hip pain; (4) left thigh numbness; (5) suspected left meralgia paresthetica; and (6) a history of unrelated thoracic pain. He concluded that Claimant had not reached MMI because she remained "significantly symptomatic" and her injuries affected her activities of daily living. Relying on the *AMA Guides* Dr. Kalevik assigned Claimant an 11% provisional whole person permanent impairment rating for her lumbar spine. He also assigned 3% provisional scheduled impairment ratings for the left and right lower extremities. Dr. Kalevik recommended additional diagnostic testing and treatment. In contrast to Dr. Kalevik's DIME determination, Dr. Lesnak agreed with Dr. Bird that Claimant reached MMI on November 18, 2019. He explained that Dr. Kalevik clearly erred in removing Claimant from MMI and assigning provisional impairment ratings for her lumbar spine and bilateral hips. Dr. Lesnak commented that Claimant's physical examination did not reveal any reproducible objective findings in her right hip. He explained that Claimant had significant psychosocial issues affecting her symptoms and perceived function.

10. As found, although Drs. Bird and Lesnak concluded that Claimant had reached MMI as a result of her August 21, 2019 industrial injuries, they failed to identify Dr. Kalevik's specific error or improper application of the *AMA Guides.* Dr. Kalevik determined Claimant had not reached MMI because she remained "significantly symptomatic" and required additional diagnostic testing and treatment. Claimant's credible testimony and the medical records support Dr. Kalevik's opinion that Claimant has not reached MMI. Dr. Kalevik's opinion reflects that additional diagnostic procedures are necessary to ascertain Claimant's condition or suggest further treatment. Additional treatment may thus be reasonably expected to improve Claimant's condition. Contrary determinations by Drs. Bird and Lesnak are mere differences of medical opinion that do not constitute clear and convincing evidence to overcome Dr. Kalevik's' DIME opinion. Accordingly, Respondents have not produced unmistakable evidence free from serious or substantial doubt that Dr. Kalevik's' conclusion that Claimant has not reached MMI is incorrect.

ORDER

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

1. Respondents have failed to overcome the DIME opinion of Dr. Kalevik that Claimant has not reached MMI for her August 21, 2019 industrial injuries.

2. Any issues not resolved in this order are reserved for future determination.

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

DATED: June 2, 2021.

DIGITAL SIGNATURE:
Peter J. Cannici

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

ISSUES

I. Whether Claimant proved by a preponderance of the evidence she sustained a compensable industrial injuries to her right shoulder and left knee on July 11, 2020.

II. If compensable, whether Claimant proved by a preponderance of the evidence the medical treatment she received is authorized, reasonable, necessary and related to a compensable industrial injury and whether she is entitled to a general award of medical benefits.

III. If compensable, whether Claimant proved by a preponderance of the evidence she is entitled to temporary total disability ("TTD") benefits from July 14, 2020, ongoing.

STIPULATIONS

1. The ALJ approved the parties' stipulation of an average weekly wage ("AWW") of $493.44.

FINDINGS OF FACT

1. Claimant is a 50-year-old woman who worked for Employer as a package handler. Claimant's job duties included sorting and lifting packages.

2. Claimant alleges she sustained a work injury to her right shoulder and left knee on July 11, 2020. Claimant initially testified she felt a pop in her knee when twisting and pulling a heavy bag off a slip belt, then hurt her shoulder pushing a heavy box. She later testified that she first injured her shoulder and then her knee, in close proximity. Claimant testified that, by the end of her shift, her right shoulder hurt the most.

3. Claimant testified that at the end of her shift she notified supervisors Jasmine O[Redacted] and Kim Cisneros of her alleged injuries and how they occurred. She testified that she did not request medical attention at the time because she was not scheduled to work over the next few days and planned to rest and see if there was any improvement in her condition.

4. Jasmine O[Redacted], Sort Operations Manager, testified that on July 11, 2020, Claimant told her she hurt her left shoulder at some time throughout the night. Ms. O[Redacted] testified that Claimant stated she did not know exactly how or when she injured herself during the shift, but that the items on the belt were very heavy all night so it could have been any time. Ms. O[Redacted] asked Claimant if she wanted to see a

doctor, which Claimant declined at the time. Ms. O[Redacted] testified Claimant did not indicate she hurt her knee or that her knee popped when she reported the shoulder injury.

5. Kim C[Redacted], Safety Operations Manager, testified she was present when Claimant reported an injury to Ms. O[Redacted]. She testified Claimant said her left shoulder was hurting and that she did not know how or when it happened. Ms. C[Redacted] testified Claimant did not indicate her knee popped or that she sustained any knee injury.

6. On Sunday, July 12, 2020, Claimant sent a text message to Ms. C[Redacted] stating her right shoulder was still hurting. The message contains no reference to Claimant's right or left knee.

7. The following day, July 13, 2020, Ms. C[Redacted] texted Claimant at 12:15 p.m. instructing Claimant to meet her at 1:00 p.m. Claimant responded stating, "Ok I'm heading there now. I have to take 2 buses and walk there. I won't get there before 1." (Exhibit E-6). At 1:41 p.m., Ms. C[Redacted] notified Claimant her paperwork was at the guard shack, to which Claimant responded she was almost there.

8. Instead of taking the bus, Claimant was able to get a ride from a friend, who drove her to the guard shack. At that time, Claimant retrieved paperwork from Employer, including the Employee Notice of Authorized Treating Physicians, which identified CO Occupational Medical Partners ("COMP") as one of the authorized providers, along with North Suburban Medical Center as the designated emergency room option.

9. On July 13, 2020, Ms. C[Redacted] prepared a Safety Compliant Management System Report regarding Claimant's injury. Ms. C[Redacted] wrote, "[Claimant] stated her left shoulder started hurting. Unknown how or when she may have done this." (Exhibit A-1). Ms. C[Redacted] began entering data into the system on July 13, 2020 and updated the form once Claimant's medical documentation was received.

10. On July 14, 2020, Claimant sought evaluation at North Suburban Medical Center with complaints of right shoulder pain and left knee pain and swelling that began three days prior at work with no associated fall or trauma. Claimant reported that her job required lifting heavy boxes. On examination, Claire Sakamoto, PA-C noted tenderness to the posterior aspect of the left knee with full range of motion, and tenderness to the lateral aspect of right shoulder with full range of motion. X-rays of the shoulder and knee revealed arthritis. PA-C Sakamoto's diagnosed Claimant with a shoulder strain and knee sprain. Claimant was provided an arm sling and knee wrap and instructed to rest, ice and elevate and take pain medication. PA-C Sakamoto placed on light duty work with limited use of her right shoulder and limited walking/weight-bearing on the left knee.

11. That same day, Claimant also sought treatment at Thornton COMP with complaints of right shoulder and left knee pain. Claimant reported that she lifted a

package that was heavier than expected and felt pain in her right shoulder and left knee, including a pop in her left knee. Left knee x-rays demonstrated chronic degenerative changes. A right shoulder x-ray revealed mild osteoarthritis of the AC joint. Claimant reported a previous history of left knee injury in which she hyperextended her left knee approximately 22 years prior. On examination, Monica Fanning-Schubert, APN, noted swelling and decreased range of motion of the left knee, and right shoulder tenderness. Claimant was assessed with left knee pain and swelling and right shoulder pain. She was prescribed medication and referred for physical therapy for the right shoulder and left knee. Claimant was released to modified duty with five-pound lifting/carrying restrictions, no kneeling/squatting/climbing, and limiting standing/walking to 15-20 minutes/hour, along with no overhead lifting or reaching away from the body with the right arm.

12. Claimant subsequently sent screenshots of her medical documentation to Ms. C[Redacted] via text message on July 14, 2020. Claimant wrote, "And my knee did pop when I hurt my shoulder. The reason I didn't say nothing than (*sic*) was it wasn't hurt at that moment. Plus I did tell Jessica that night my right knee was swallow (*sic*)." The ALJ infers Claimant meant "swollen" when she wrote "swallow." Claimant testified she mistakenly referred to her right knee in the text message when she meant her left knee.

13. Ms. C[Redacted] testified that the first time she was made aware Claimant was alleging a knee injury was on July 14, 2020.

14. Claimant underwent physical therapy and continued to report left knee complaints. APN Fanning-Schubert referred Claimant for a left knee MRI, which Claimant underwent on August 1, 2020. The MRI revealed: 1) a complex medial meniscal body and posterior horn tear with horizontal and vertical components; 2) suggestion of prominent enchondroma of the distal left femur; 3) apparent chronic full-thickness tear of the anterior cruciate ligament; 4) mild to moderate patellar chondromalacia; and 5) small to moderate left knee joint effusion with synovitis.

15. Claimant attended a follow-up evaluation at Thornton COMP on August 6, 2020, at which time the left knee MRI results were discussed with Claimant. Bryan Alavarez, M.D. opined that Claimant has a medial meniscus tear of the body and posterior horn, along with most likely a chronic tear of the anterior cruciate ligament ("ACL"). He noted Claimant has a remote history of knee injury in her 20's and an x-ray performed in 2019. Dr. Alvarez recommended Claimant see an orthopedic specialist.

16. On August 27, 2020, Claimant presented to Rajesh Bazaz, M.D. at Western Orthopaedics. She reported experiencing a twisting injury to her left knee on July 11, 2020 with immediate onset of pain. On examination of the left knee, Dr. Bazaz noted some effusion, decreased range of motion, and reproducible medial joint tenderness and positive McMurray's test. He noted that the left knee MRI revealed left knee acute medial meniscus pathology. He opined that Claimant has some level of chronic ACL insufficiency, but nothing that was previously causing her instability. Dr. Bazaz noted that, after the reported pop in her knee on July 11, 2020, Claimant has had medial-sided

pain that has not improved. He opined that Claimant's medial meniscus tear correlates with her history and physical exam. Dr. Bazaz noted that Claimant's medical records included complaints regarding a right shoulder issue, which Claimant did not make any mention of at his evaluation.

17. Dr. Bazaz recommended Claimant proceed with a left knee arthroscopy with partial medial meniscectomy, for which he requested authorization on September 17, 2020. Respondents denied the request for left knee surgery.

18. By September 1, 2020, Claimant was not reporting any right shoulder complaints but continued to complain of 5-9/10 left knee pain. She continued on work restrictions. As of December 2, 2020, Dr. Alvarez's work restrictions for Claimant consisted of no kneeling/squatting/climbing/crawling, limiting lifting/carrying to 10 pounds, and walking/standing 20-25 minutes/hour.

19. As a result of the work injury, Claimant has not worked since July 14, 2020. Claimant did not sustain any injuries since the work incident on July 11, 2020. Claimant testified she had no prior left knee injuries and a prior injury to her right knee approximately 20 years prior. Claimant testified that since then, she has not had any problems with her knees and had been able to work up. Claimant has not had any prior shoulder injuries.

20. The ALJ credits Claimant's testimony, as supported by the credible opinion of Dr. Bazaz and the medical records, and finds it is more likely than not Claimant sustained a compensable industrial injury to her right shoulder and left knee on July 11, 2020.

CONCLUSIONS OF LAW

Generally

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

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

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

Compensability

A claimant is required to prove by a preponderance of the evidence that at the time of the alleged injury he was performing service arising out of and in the course of employment and the alleged injury or occupational disease was proximately caused by the performance of such service. §8-41-301(1)(b)&(c), C.R.S. A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v.* Americold D/B/A Atlas Logistics, WC 4-960-513-01, (ICAO, Oct. 2, 2015).

Claimant proved it is more likely than not she sustained a compensable industrial injury to her right shoulder and left knee on July 11, 2020. The record indicates Claimant tends to confuse her left and right sides of her body. The ALJ is persuaded Claimant misspoke when she initially reported a left shoulder injury to Ms. O[Redacted] and Ms. C[Redacted] and a right knee injury to Ms. C[Redacted] via text message. In a text message to Ms. C[Redacted] the day following the injury, Claimant referred to her right shoulder and has continued to do so in her reports to medical providers. Claimant was also consistent in her reports to the medical providers regarding a left knee injury. Claimant explained that she did not mention her left knee injury to Ms. O[Redacted] and Ms. C[Redacted] on the date of injury because she was focused more on right shoulder, which hurt more at the time. Claimant ultimately reported her left knee injury to Ms. C[Redacted] on July 14, 2020, only three days after the incident.

Objective findings of a left knee injury were noted in the days and weeks after the injury. Swelling and tenderness of the left knee was noted at an evaluation on July 14, 2020. An MRI obtained three weeks after the incident revealed what Dr. Bazaz credibly opined was an acute meniscal tear. There is no indication Claimant was suffering from any symptomatic left knee condition leading up to the work injury. Claimant credibly testified she was able to perform her regular job duties leading up to the work injury. No evidence was offered indicating it is likely the meniscal tear occurred outside of work prior or subsequent to the date of injury. Dr. Bazaz credibly opined that Claimant's medial meniscus tear correlates with her history and physical exam. Thus, despite some inconsistencies in Claimant's testimony and her reports of an injury, the totality of the credible and persuasive evidence establishes Claimant sustained an industrial injury to her right shoulder and left knee, for which she required medical treatment and was placed on restrictions.

Medical Treatment

Respondents are liable for medical treatment that is causally related and reasonable and necessary to cure and relieve the effects of the industrial injury. §8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* WC 4-835-556-01 (ICAO, Nov. 15, 2012).

Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires that respondents must provide injured workers with a list of at least four designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. Specifically, if the employer or insurer fails to provide an injured worker with a list of at least four physicians or corporate medical providers, "the employee shall have the right to select a physician." §8-43-404(5)(a)(I)(A), C.R.S. W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, "the employer shall provide the injured worker with a written list of designated providers." W.C.R.P. Rule 8-2(E) additionally provides that the remedy for failure to comply with the preceding requirement is that "the injured worker may select an authorized treating physician of the worker's choosing." An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. industrial Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006).

Claimant sought treatment for her work injury at the facilities identified as authorized providers on Employer's list of designated treatment providers. Claimant initially presented to the emergency room listed on the Employee Notice of Authorized Treating Physicians, and followed up the same day at one of the other listed options. Claimant's initial treatment at North Suburban Medical Center, as well as her treatment at COMP and subsequent referrals, was authorized treatment that was reasonable, necessary and casually related to the industrial injury. Accordingly, Respondents are liable for such treatment and future treatment that is causally related to the injury and reasonably necessary to cure and relieve Claimant of its effects.

Temporary Total Disability

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S. requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997).

TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

As a result of the industrial injury, Claimant has not been able to resume her prior work and has not worked since July 14, 2020. As of the date of hearing, none of the above-listed occurrences resulting in termination of TTD has occurred. Accordingly, Claimant is entitled to TTD benefits from July 14, 2020, and ongoing.

ORDER

1. Claimant showed by a preponderance of the evidence she suffered a compensable industrial injury to her right shoulder and left knee on July 11, 2020.

2. Insurer is liable for reasonable, necessary and casually-related medical treatment to cure and relieve Claimant from the effects of the compensable injury, including the medical treatment Claimant received at North Suburban Medical Center, COMP and related referrals.

3. Respondents shall pay TTD benefits from July 14, 2020 and ongoing, until terminated by operation of law.

4. All matters not determined herein are reserved for future determination.

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

DATED: June 7, 2021

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Did Claimant prove her average weekly wage (AWW) should be adjusted to account for post-injury changes in the minimum wage?

- Did Claimant prove her AWW should be based on potentially higher wages she could have earned working for the Spanish Peaks Veterans Community Living Center?

FINDINGS OF FACT

1. Claimant worked for Employer as a Food Service Supervisor. suffered admitted injuries on December 20, 2018, when she tripped and fell. She injured multiple parts of her body, including her face, both hands and wrists, and both knees.

2. Insurer filed a General Admission of Liability (GAL) on May 21, 2019, with an AWW of $491.08. The admitted AWW was based on 13 weeks of wages before the accident.

3. Claimant's base rate of pay at the time of injury was $11.33 per hour. She worked a full-time schedule, with some overtime in a typical week. Based on the admitted AWW, Claimant averaged $37.88 of overtime per week ($11.33 x 40 = $453.20 + $37.88 = $491.08). This equates to 2.23 hours per week ($11.33 x 1.5 = $17.00), ($37.88 / $17.00 = 2.23 hours).

4. Claimant was on restrictions working reduced hours from May 6, 2019 through July 7, 2019. Insurer admitted for TPD benefits.

5. Claimant underwent a TFCC repair surgery on December 24, 2019.

6. Claimant was off work December 24, 2019 through April 6, 2020. Insurer admitted for TTD benefits.

7. Besides ongoing issues involving her wrists, Claimant continues to have symptoms and limitations relating to her knees.

8. On April 7, 2020, Claimant started a new job an administrative assistant at the Spanish Peaks Veterans Community Living Center. She thought she could do the job because it was less physically demanding than her preinjury job. However, Claimant could not tolerate various aspects of the job, including 2-3 hours of walking per day, squatting to write information on boards, and more extensive keyboarding than she anticipated. Claimant resigned on April 10, 2020, and Insurer reinstated TTD benefits.

9. Claimant's work restrictions in April 2020 were: lifting and carrying no more than five pounds; no crawling, kneeling, or squatting; and wear a brace on the left wrist.

10. Claimant was paid $14.50 per hour at the Veterans nursing home. She anticipated working four 10-hour shifts per week. Claimant worked only 31.13 hours before resigning on April 10.

11. Colorado has a state minimum wage that exceeds the Federal minimum wage. The Department of Labor and Employment adjusts the Colorado minimum wage on January 1 of each year. Since Claimant's date of injury, the Colorado minimum wage has been as follows:[1]

January 1, 2018	$10.20
January 1, 2019	$11.10
January 1, 2020	$12.00
January 1, 2021	$12.32

12. There is no persuasive evidence Employer is exempt from the Colorado minimum wage. Employer would have had to adjust Claimant's base wage rate to at least $12.00 per hour on January 1, 2020, and at least $12.32 on January 1, 2021.

13. Claimant proved her AWW should be increased on January 1, 2020, and again on January 1, 2021 to reflect the adjusted Colorado minimum wage. The corresponding AWW calculations are:

Eff. Date	40-hours	Avg OT	Total
January 1, 2020	$480.00	$40.14	$520.14
January 1, 2021	$492.80	$41.21	$534.01

14. Claimant's AWW is $520.14 effective January 1, 2020.

15. Claimant's AWW is $534.01 effective January 1, 2021.

16. Claimant failed to prove her AWW should be adjusted to reflect the potentially higher wages she might have earned at the Spanish Peaks Veterans Community Living Center. The short duration of work (three days) does not allow an accurate determination of her average earnings over a sustained period. Claimant's testimony she expected to work 40 hours per week is unsubstantiated by any other persuasive evidence. Additionally, the job was unsuitable because it exceeded Claimant's physical abilities and work restrictions.

[1] Claimant submitted minimum wage data from 2020 and 2021. However, the state minimum wage history is readily available on the Colorado Department of Labor and Employment website. https://cdle.colorado.gov/wage-and-hour-law/minimum-wage. The accuracy of the CDLE website cannot reasonably be questioned, and the minimum wage history compiles therein is a proper subject of administrative notice. CRE 201.

CONCLUSIONS OF LAW

Section 8-42-102(2), C.R.S. provides that compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993).

The discretionary authority regarding AWW extends to post-injury pay raises a claimant would have received but for the injury. *Ebersbach v. UFCW Local No. 7*, W.C. No. 4-240-475 (May 5, 1997); *Romero v. Cub Foods*, W.C. No. 4-218-823 (September 28, 2000). The critical question is whether the post-injury wage increase was "sufficiently definite" rather than merely speculative. In *Ebersbach*, *supra*, the ICAO held that the claimant was entitled as a matter of law to have her AWW adjusted to account for post-injury pay raises she was eligible to receive under a union contract. The Panel stated,

> [T]he facts in this case cannot be meaningfully distinguished from those in *Campbell*. Here, at the time of the injury, the claimant had a contractual right to an increase in her hourly earnings as of May 7, 1995. This right was not contingent on performance evaluations or other subjective factors. Thus, the undisputed evidence establishes that the claimant would have been earning an additional twenty-five cents per hour subsequent to that date but for the intervention of the industrial injury. The claimant's right to receive the increase was sufficiently definite that it would be manifestly unjust to deprive her of the benefit of the increase when calculating her average weekly wage.

Similarly, in *Marr v. Current Inc*., W.C. No. 4-407-504 (September 20, 2000), the ALJ recomputed the claimant's average weekly wage to include a pay raise the claimant received approximately one month after the injury. The ICAO affirmed based on the rule in *Campbell*. The dispositive factor was whether the pay raise was sufficiently definite to be included in the AWW. The Panel held that,

> [T]his claimant's raise is inherently definite. It is undisputed the claimant received and 80 cent per hour wage increase . . . and all subsequent wages were paid at the [higher] rate. Under these circumstances, this claim is factually indistinguishable from the circumstances in *Campbell*.

As found, Claimant proved her AWW should be increased on January 1, 2020, and January 1, 2021, to reflect the adjusted Colorado minimum wage. Claimant's entitlement to wage increases on January 1, 2020, and January 1, 2021, was mandated by Article XVIII § 15 of the Colorado Constitution. There is no persuasive reason to think Employer would have violated the law and refused to increase Claimant's rate of pay to at least the minimum wage. Because Claimant would have been paid at least the Colorado minimum wage, it would be manifestly unjust to continue using her wages “at the time of injury” as the measure of her injury-related wage loss.

Claimant failed to prove her AWW should be adjusted to $580 based on her brief employment at the Spanish Peaks Veterans Community Living Center. Claimant’s potential earnings from the Veterans nursing home are not sufficiently definite to support an additional increase in the AWW. Although a claimant’s AWW can be calculated “based on anticipated earnings rather than past earnings,” Claimant’s expectation she would work 40 hours per week at the nursing home is not substantiated by other persuasive evidence. *Wheeler v. Archdiocese of Denver Management Corp*., W.C. No. 4-669-708 (December 21, 2010). The job was not a salaried position and there is no persuasive evidence Claimant was guaranteed a minimum number of hours. Claimant started the job at the start of the COVID-19 pandemic, which certainly could have affected the work schedules of employees in long-term care facilities. Claimant worked the job for less than one week and we can only speculate what she would have actually earned over a sustained period. Additionally, the job was unsuitable because it exceeded Claimant’s physical abilities and work restrictions. Under the circumstances, the ALJ is unpersuaded Claimant’s potential earnings at the nursing home provides a “fair approximation” of her earning capacity and actual wage loss caused by the injury.

ORDER

It is therefore ordered that:

1. Claimant’s average weekly wage shall be adjusted to $520.14 effective January 1, 2020.

2. Claimant’s average weekly wage shall be adjusted to $534.01 effective January 1, 2021.

3. Claimant’s request to adjust her average weekly wage to $580 based on potential earnings from the Spanish Peaks Veterans Community Living Center is denied and dismissed.

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

If you are dissatisfied with the Judge’s order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email

address, it need not be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: June 8, 2021

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

ISSUE

Whether Claimant has established by a preponderance of the evidence that he should be permitted to reopen his February 21, 2019 Workers' Compensation claim based on a change in condition pursuant to §8-43-303(1), C.R.S.

FINDINGS OF FACT

1. Claimant is a 69 year-old male who worked as a local truck driver for Employer. On February 21, 2019 Claimant was involved in a motor vehicle accident (MVA) while driving a truck eastbound on I-70 in Colorado around exit 279. Another semi truck clipped the rear driver side of Claimant's vehicle when changing lanes. Claimant was thrown forward then slammed back into the seat. After taking pictures at the scene, Claimant pulled off I-70 into a service station and contacted Employer. Claimant completed his work shift at about 3:30 p.m.

2. On February 22, 2019 Claimant visited Concentra Medical Centers for treatment. Authorized Treating Physician (ATP) Karen Larson, M.D. conducted an examination. She diagnosed Claimant with a cervical strain, thoracic strain and lumbar strain with radicular leg pain. Dr. Larson prescribed Cyclobenzaprine 10mg oral tablets and referred Claimant to physical therapy.

3. On March 1, 2019 Claimant visited Concentra for physical therapy. Claimant reported constant bilateral numbness/tingling in his anterior, lateral and posterior legs. He had difficulty standing without bracing himself and reported significant weakness in his bilateral lower extremities. A physical examination of Claimant's bilateral hips revealed tenderness in the gluteus minimus and maximus with limited range of motion.

4. On March 15, 2019 Claimant visited ATP Charles Bellows, M.D. at Concentra for an evaluation. Claimant presented for a recheck of his neck, back and legs but noted he was feeling a "little bit better." Dr. Bellows reported that Claimant was about 25% of the way toward meeting the physical requirements of his job for Employer. He assessed Claimant with cervical and lumbar strains. Dr. Bellows assigned work restrictions that included no lifting, pushing or pulling in excess of 20 pounds frequently. He also noted that Claimant could only bend occasionally and should not drive a company vehicle due to functional limitations.

5. On March 26, 2019 Claimant returned to his fifth of six physical therapy visits at Concentra. Jaci Settler, DPT remarked that Claimant continued to demonstrate improvement in ambulation, symptoms and range of motion. She noted that Claimant would begin functional activities including squatting and ambulation for endurance.

6. On March 29, 2019 Claimant again visited Dr. Bellows for an evaluation. Dr. Bellows diagnosed Claimant with cervical and lumbar strains. He noted that Claimant was making progress in physical therapy and his condition was improving. Dr. Bellows maintained work restrictions that included no lifting, pushing or pulling in excess 20 pounds frequently. He also noted that Claimant could only bend occasionally and should not drive a company vehicle due to functional limitations.

7. On April 5, 2019 Dr. Bellows released Claimant from care and determined he had reached Maximum Medical Improvement (MMI) with no permanent impairment. He noted that Claimant had achieved 100% of his goals in physical therapy and returned to baseline. Dr. Bellows commented that Claimant's active problems included cervical and lumbar strains, a history of back surgery, an MVA, radicular leg pain and a strain of the thoracic spine. Claimant exhibited no tenderness and full range of motion in both his cervical and lumbosacral spines. Notably, Claimant had no joint pain, no muscle pain, no back pain, no neck pain, no joint swelling, no joint stiffness, no muscle weakness, no limping, no night pain, and full range of motion. Dr. Bellows remarked that Claimant understood his functional restoration and post-discharge plans.

8. On April 12, 2019 Respondents' filed a Final Admission of Liability (FAL) consistent with Dr. Bellows' MMI and impairment determinations. The FAL also denied medical maintenance benefits.

9. Claimant testified at the hearing in this matter. He explained that when he was released to MMI he had not returned to baseline because he required pain medications. Claimant remarked that he was not at 100% by April 5, 2019 because he could only complete his work assignments with pain medications. He specified that he had symptoms of sharp left hip pain, numbness, tingling and instability that worsened after being placed at MMI.

10. Claimant initially sought a Division Independent Medical Examination (DIME). However, he testified he did not follow-up with the process because of the costs associated with the DIME.

11. More than six months after reaching MMI Claimant visited personal physician Peak Orthopedic & Spine for an examination on October 22, 2019. Claimant reported worsening, constant, sharp, aching 8/10 posterolateral hip pain, Associated symptoms included numbness, tingling, instability and muscle spasms from the left hip into the back. Claimant also had pain radiating into the lateral thigh and lateral calf. X-rays revealed mild degenerative changes in both hips, slight joint space narrowing and osteophyte formation. Robert Greenhow, M.D. determined that possible diagnoses included early osteoarthritis and a labral tear. Treatment options included a referral to a spine specialist and a left hip MRI.

12. On November 13, 2019 Claimant visited Hugh McPherson, M.D. at Peak Orthopedic & Spine for an examination. Claimant reported a nine-month history of pain in the left posterior lateral buttock down through the leg and calf and radiating up to the

lower back. He attributed the onset of his symptoms to his February 21, 2019 MVA. Dr. McPherson assessed Claimant with a prior fusion of the lumbar spine, osteoarthritis with radiculopthy of the lumbar spine, and degenerative disc disease of the lumbar spine. He concluded that Claimant's left leg symptoms were likely related to L3 foraminal narrowing.

13. On January 8, 2020 Claimant visited personal physician Stephen F. Pehler, M.D. at Colorado Orthopedic Consultants with chief complaints of lower back pain, left lower extremity radiculopathy and left hip pain. Dr. Pehler reviewed MRI images of the lumbar spine and left hip. The MRI demonstrated a prior L4-S1 healed fusion, L3-4 neuroforaminal stenosis, bilateral facet joint hypertrophy and edema, and a superior labral tear of the left hip. Dr. Pehler discussed surgical repair in the form of an oblique, lumbar, interbody fusion at L3-L4 for Claimant's neuroforaminal stenosis and nerve root impingement.

14. On May 13, 2020 Claimant visited Sophia Rosebrook, D.O. at Concentra. Dr. Rosebrook recounted that Dr. Bellows had closed Claimant's case on April 2, 2019. The MMI report noted that Claimant was feeling fine. However, Claimant denied "having agreed to any of that" and was still significantly symptomatic. Dr. Rosebrook explained that the case might need to be reopened because Claimant felt he had not reached MMI. Although Dr. Rosebrook remarked that Claimant may not have been at MMI on April 2, 2019 because he sought care outside of the Workers' Compensation system, she wanted documentation from the period prior to Claimant's February 21, 2019 MVA to assess causality. Dr. Rosebrook specifically summarized "this case needs to be reopened [Claimant] was never at MMI based on review."

15. On June 3, 2020 Claimant returned to Dr. Rosebrook for a recheck of his lumbar and cervical spines. Dr. Rosebrook noted that it was not clear whether Insurer's adjuster had approved reopening of Claimant's case. She could not provide treatment until the matter was officially reopened.

16. On June 12, 2020 Dr. Rosebrook responded to inquiries from insurer regarding Claimant's case. She explained that "[b]ased on EXTENSIVE case review, patient interview and questioning, and physical exam, it is my professional medical opinion that his [symptoms] are directly correlated…and that this case should be reopened & patient should get further evaluation and treatment of cervical/lumbar/left hip injuries." She emphasized that Dr. Bellows should not have placed Claimant at MMI.

17. On August 24, 2020 Wallace K. Larson, M.D. performed a records review of Claimant's case. On September 2, 2020 Dr. Larson reviewed additional documents and issued an addendum report. After considering Claimant's mechanism of injury and reviewing medical records, Dr. Larson explained that Claimant's symptoms were far out of proportion from what would be expected from a minor MVA. Although Claimant had a history of degenerative disc disease in the lumbar spine and a previous lumbar spine surgery, he did not exhibit any objective injuries as a result of his February 21, 2019 MVA. Dr. Larson summarized that Claimant's reported symptoms were not consistent with what could reasonably be related to the February 21, 2019 accident. He detailed that

Claimant's symptoms lacked the expected temporal relationship for L3-L4 foraminal stenosis. Notably, Claimant was free of symptoms by April 5, 2019. Moreover, Claimant did not report groin pain immediately following the MVA and the accident did not likely cause a labral tear. Dr. Larson concluded that the MVA did not aggravate, accelerate or worsen Claimant's pre-existing lower back condition.

18. On October 9, 2020 Claimant underwent an independent medical examination with Timothy O. Hall, M.D. Dr. Hall reviewed Claimant's medical records and performed a physical examination. He diagnosed Claimant with the following: (1) lumbar disc disease/spondylolisthesis with the potential for spinal stenosis; (2) L4-S1 healed fusion, L3-L4 neuroforaminal stenosis, bilateral facet joint hypertrophy and edema; (3) superior labral tear of the left hip; and (4) diffuse myofascial pain in the cervicothoracic area. Dr. Hall determined that Claimant's ongoing lower back, hip, leg, upper back and neck symptoms all related to his February 21, 2019 MVA. He explained that Claimant did not have the preceding symptoms and was fully functional prior to the MVA. Dr. Hall also commented that Claimant was predisposed to an injury at the level above his prior fusion and labral tears are common in MVAs. Moreover, the MVA rendered Claimant's degenerative disc disease symptomatic. He concluded that the February 21, 2019 MVA constituted a "very good explanation for [Claimant's] rather diffuse symptoms."

19. On October 22, 2020 Dr. Larson issued a report after reviewing additional medical records and Dr, Hall's independent medical examination. Dr. Larson maintained that medical records documented that Claimant had reached MMI by April 5, 2019. Claimant's constellation of subjective symptoms did not suggest "a specific area or areas of anatomic or structural injury." Dr. Larson explained that Dr. Hall's opinion that Claimant's symptoms were caused by the February 21, 2019 MVA was speculative because it was based solely on subjective reports. He thus reiterated that Claimant's symptoms were not related to the February 21, 2019 MVA.

20. Claimant has failed to establish that it is more probably true than not that he should be permitted to reopen his February 21, 2019 Workers' Compensation claim based on a change in condition pursuant to §8-43-303(1), C.R.S. Initially, Claimant was involved in a MVA while driving a truck for Employer. Another semi clipped the rear driver side of Claimant's vehicle when changing lanes. Claimant was thrown forward then slammed back into the seat. He received medical treatment on the day following the accident and obtained follow-up care through Concentra. After undergoing conservative treatment including physical therapy Dr. Bellows determined that Claimant had reached MMI with no impairment, medical maintenance treatment or permanent restrictions on April 5, 2019. Dr. Bellows noted that Claimant had achieved 100% of his goals in physical therapy and returned to baseline. He remarked that Claimant's active problems included cervical and lumbar strains, a history of back surgery, radicular leg pain and a strain of the thoracic spine. Respondents then filed an FAL consistent with Dr. Bellows' MMI and impairment determinations. Claimant contends that he suffered a worsening of condition after reaching MMI that is causally related to his February 21, 2019 MVA. However, the

medical records reflect that he has not suffered a change in condition pursuant to §8-43-303(1), C.R.S. that is causally related to his February 21, 2019 work accident.

21. Claimant explained that when he was released to MMI he had not returned to baseline because he required pain medications. He remarked that he was not at 100% by April 5, 2019 because he could only complete his work assignments with pain medications. More than six months after reaching MMI Claimant visited his personal physician and reported worsening pain in the left hip area. X-rays revealed mild degenerative changes in both hips, slight joint space narrowing and osteophyte formation. Dr. Greenhow determined that possible diagnoses included early osteoarthritis and a labral tear. An MRI demonstrated a prior L4-S1 healed fusion, L3-4 neuroforaminal stenosis, bilateral facet joint hypertrophy with edema, and a superior labral tear of the left hip. On November 13, 2019 Dr. McPherson assessed Claimant with a prior fusion, osteoarthritis with radiculopthy, and degenerative disc disease of the lumbar spine. He concluded that Claimant's left leg symptoms were likely related to L3-L4 foraminal narrowing. Dr. Pehler discussed possible surgical repair.

22. Dr. Larson summarized that Claimant's reported symptoms were not consistent with what could reasonably be related to the February 21, 2019 accident. Although Claimant had a history of degenerative disc disease in the lumbar spine and a previous surgery, he did not exhibit any objective injuries as a result of his February 21, 2019 MVA. Dr. Larson detailed that Claimant's symptoms lacked the expected temporal relationship for L3-L4 foraminal stenosis. He concluded that the MVA did not aggravate, accelerate or worsen Claimant's pre-existing lower back condition. In contrast, Dr. Hall determined the MVA rendered Claimant's degenerative disc disease symptomatic. Dr. Hall concluded that the February 21, 2019 MVA constituted a "very good explanation for [Claimant's] rather diffuse symptoms." Similarly, Dr. Rosebrook emphasized that Claimant's case should be reopened because he never reached MMI for his February 21, 2019 MVA.

23. Relying on the opinions of Drs. Hall and Rosebrook, Claimant contends that he had not reached MMI by April 5, 2019 and his symptoms continued to worsen. However, he did not challenge Dr. Bellows' MMI determination by pursuing a DIME and his claim subsequently closed. To reopen his claim Claimant is required to prove a change in condition that is causally connected to the original injury. However, because Claimant had an opportunity but failed to request foreseeable medical treatment at the time of MMI, his need for additional medical treatment or testing is insufficient to support a reopening of the claim. Moreover, although Claimant's symptoms may have changed after he reached MMI, it is speculative to attribute any worsening to his February 21, 2019 MVA. Instead, the persuasive medical records and temporal relationship of Claimant's symptoms to the MVA reflect that any worsening of his condition is related to degenerative changes from L3-L4 foraminal narrowing. There is simply an attenuated causal connection between a worsening of Claimant's symptoms after MMI and his February 21, 2019 MVA. Claimant has thus failed to establish that he suffered a worsening of condition that is causally related to his February 21, 2019 MVA. Accordingly, Claimant's request to

reopen his Workers' Compensation claim based on a change in condition is denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

4. Section 8-43-303(1), C.R.S. provides that a worker's compensation award may be reopened based on a change in condition. In seeking to reopen a claim the claimant shoulders the burden of proving his condition has changed and that he is entitled to benefits by a preponderance of the evidence. *Osborne v. Industrial Commission*, 725 P.2d 63, 65 (Colo. App. 1986). A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082, 1084 (Colo. App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* W.C. No. 4-358-465 (ICAO, Oct. 25, 2006). When the claimant has an opportunity but fails to request foreseeable medical treatment at the time of MMI, the need for additional medical treatment or testing is insufficient to support a reopening of the claim. *See Bowles v. Energy Air Systems, Inc.*, W.C. No. 4-400-573 (ICAO, Dec. 26, 2003); *Anderson v. Ready Mix Concrete*, W.C. No. 3-948-266 (ICAO, June 19, 1992). The determination of whether a claimant has sustained his burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* W.C. No. 4-543-945 (ICAO, July 19, 2004).

5. A request for continuing medical treatment must be presented at the time of MMI. *Hanna v. Print Expediters Inc.*, 77 P.3d 863 (Colo. App. 2003). Furthermore, the issue of medical benefits is closed if the respondents file an uncontested final admission that denies liability for future medical benefits. *Burke v. Industrial Claim Appeals Office*, 905 P. 2d 1 (Colo. App. 1994). When a claim is closed, the claimant is precluded from receiving further benefits unless there is an order reopening the claim on the grounds of error, mistake or change of condition. *See Milco Construction v. Cowan,* 860 P.2d 539 (Colo. App. 1992), (a claim may reopened for further medical treatment when the claimant experiences an "unexpected and unforeseeable" change in condition); *Brown and Root, Inc. v. Industrial Claim Appeals Office*, 833 P.2d 780 (Colo. App. 1991).

6. As found, Claimant has failed to establish by a preponderance of the evidence that he should be permitted to reopen his February 21, 2019 Workers' Compensation claim based on a change in condition pursuant to §8-43-303(1), C.R.S. Initially, Claimant was involved in a MVA while driving a truck for Employer. Another semi clipped the rear driver side of Claimant's vehicle when changing lanes. Claimant was thrown forward then slammed back into the seat. He received medical treatment on the day following the accident and obtained follow-up care through Concentra. After undergoing conservative treatment including physical therapy Dr. Bellows determined that Claimant had reached MMI with no impairment, medical maintenance treatment or permanent restrictions on April 5, 2019. Dr. Bellows noted that Claimant had achieved 100% of his goals in physical therapy and returned to baseline. He remarked that Claimant's active problems included cervical and lumbar strains, a history of back surgery, radicular leg pain and a strain of the thoracic spine. Respondents then filed an FAL consistent with Dr. Bellows' MMI and impairment determinations. Claimant contends that he suffered a worsening of condition after reaching MMI that is causally related to his February 21, 2019 MVA. However, the medical records reflect that he has not suffered a change in condition pursuant to §8-43-303(1), C.R.S. that is causally related to his February 21, 2019 work accident.

7. As found, Claimant explained that when he was released to MMI he had not returned to baseline because he required pain medications. He remarked that he was not at 100% by April 5, 2019 because he could only complete his work assignments with pain medications. More than six months after reaching MMI Claimant visited his personal physician and reported worsening pain in the left hip area. X-rays revealed mild degenerative changes in both hips, slight joint space narrowing and osteophyte formation. Dr. Greenhow determined that possible diagnoses included early osteoarthritis and a labral tear. An MRI demonstrated a prior L4-S1 healed fusion, L3-4 neuroforaminal stenosis, bilateral facet joint hypertrophy with edema, and a superior labral tear of the left hip. On November 13, 2019 Dr. McPherson assessed Claimant with a prior fusion, osteoarthritis with radiculopthy, and degenerative disc disease of the lumbar spine. He concluded that Claimant's left leg symptoms were likely related to L3-L4 foraminal narrowing. Dr. Pehler discussed possible surgical repair.

8. As found, Dr. Larson summarized that Claimant's reported symptoms were not consistent with what could reasonably be related to the February 21, 2019 accident.

Although Claimant had a history of degenerative disc disease in the lumbar spine and a previous surgery, he did not exhibit any objective injuries as a result of his February 21, 2019 MVA. Dr. Larson detailed that Claimant's symptoms lacked the expected temporal relationship for L3-L4 foraminal stenosis. He concluded that the MVA did not aggravate, accelerate or worsen Claimant's pre-existing lower back condition. In contrast, Dr. Hall determined the MVA rendered Claimant's degenerative disc disease symptomatic. Dr. Hall concluded that the February 21, 2019 MVA constituted a "very good explanation for [Claimant's] rather diffuse symptoms." Similarly, Dr. Rosebrook emphasized that Claimant's case should be reopened because he never reached MMI for his February 21, 2019 MVA.

9. As found, relying on the opinions of Drs. Hall and Rosebrook, Claimant contends that he had not reached MMI by April 5, 2019 and his symptoms continued to worsen. However, he did not challenge Dr. Bellows' MMI determination by pursuing a DIME and his claim subsequently closed. To reopen his claim Claimant is required to prove a change in condition that is causally connected to the original injury. However, because Claimant had an opportunity but failed to request foreseeable medical treatment at the time of MMI, his need for additional medical treatment or testing is insufficient to support a reopening of the claim. Moreover, although Claimant's symptoms may have changed after he reached MMI, it is speculative to attribute any worsening to his February 21, 2019 MVA. Instead, the persuasive medical records and temporal relationship of Claimant's symptoms to the MVA reflect that any worsening of his condition is related to degenerative changes from L3-L4 foraminal narrowing. There is simply an attenuated causal connection between a worsening of Claimant's symptoms after MMI and his February 21, 2019 MVA. Claimant has thus failed to establish that he suffered a worsening of condition that is causally related to his February 21, 2019 MVA. Accordingly, Claimant's request to reopen his Workers' Compensation claim based on a change in condition is denied and dismissed.

ORDER

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

Claimant's request to reopen his February 21, 2019 Workers' Compensation claim based on a change in condition is denied and dismissed.

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

DATED: June 8, 2021.

DIGITAL SIGNATURE:

Peter J. Cannici

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

ISSUES

I. Have Respondents shown, by a preponderance of the evidence, that Claimant was responsible for his own termination, thus ineligible for TTD benefits?

II. Assuming that Respondents have met such burden, has Claimant shown that his wage loss (at least for certain time periods) is nonetheless still attributable to his work injury?

STIPULATIONS

The parties stipulated that Claimant's Average Weekly Wage is $811.66.

FINDINGS OF FACT

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

Claimant Works at this Location for Years without Documented Issues

1. In 2008, Claimant started his work at the farm, which raises pigs, and on 2/7/16 he was hired by [Employer], as the pig farm operation had been purchased by [Employer]. (Ex. 5, p. 2).
2. Claimant's work evaluation of 3/23/16, was mainly 'good' with some 'satisfactory' ratings and no ratings for 'needs improvement'. (Ex. 5, p.1).

Claimant has Performance Issues with New Supervisor

3. On May 20, 2019, Claimant's new supervisor, Kayla D[Redacted], issued a Job Performance Evaluation for Claimant, which he signed on May 22, 2019. (Ex. D, p. 17.) That memorandum gave the Claimant 30 days to improve his performance to continue in the Utility position at Farm 31. There were not allegations of absenteeism per se.

4. Eleven days later, on May 31, 2019 Claimant received a written warning, which he signed on June 10, 2019. (Ex. E, p. 18.). Claimant's conduct leading to this written warning was instructing an employee to use flex pipe to unclog a bin while the augur was still running. The augur was supposed to be stopped prior to clearing it. The warning was labeled as "Step 2-1st Written Warning". *Id.* At hearing, Claimant admitted that this incident happened, but testified the employee was already using the flex pipe to unclog the bin before he arrived on the scene.

5. At hearing, Ms. D[Redacted] testified that Claimant advised her of the incident at the time it happened, and admitted to her in person that he had instructed the employee to use

the flex pipe to unclog the bin with the augur running. Ms. D[Redacted] testified she discussed this conduct with Claimant at the time, that his conduct was a violation of [Employer Redacted]'s safety policy, and that every [Employer] employee has responsibility for ensuring compliance with safety policies. She stated that Claimant knew better, as he had previously taken [Employer]s safety course on its lock-out, tag-out policy. Claimant admitted that this behavior violated [Employer]s safety policy.

6. On July 1, 2021 Claimant was demoted, in writing, from the Utility position to a Level 3 employee. (Ex. F, p. 19.) At hearing, Ms. D[Redacted] testified that she demoted Claimant based on the numerous job performance issues as outlined in her memo. It was not labeled as a disciplinary action per se. This demotion resulted in a reduction to Claimant's pay, but not his benefits.

7. Claimant was once again disciplined for poor work performance for conduct occurring on September 22, 2019. (Ex. G, p. 20.) On this date, Claimant noticed the in-use light on the alarm system was blinking. He unplugged the phone line and the light went off. When he plugged the phone line back in, the light was no longer blinking. Claimant never called maintenance or reported this alarm failure to his supervisor, and it was not detected until Ms. D[Redacted] ran a test on the alarm a week later. His warning was labeled as "Step 3- 2nd Written Warning". *Id.*

8. Claimant acknowledged he essentially deactivated the alarm system and that he should have informed his supervisor or maintenance and completed a work order. At hearing, Ms. D[Redacted] testified that the alarm system allows [Employer] to monitor temperatures in the barns. A significant fluctuation in temperature that is not corrected can kill the livestock; thus, it is critical this system remain in place and is active at all times.

9. At hearing, Claimant testified that he was disciplined numerous times by Ms. D[Redacted] after her arrival at Farm 31. He further testified that he had engaged in this type of behavior Ms. D[Redacted] disciplined him for in the past without incident and believed Ms. D[Redacted]'s way of doing things was incorrect. He testified that he believed things were done at Farm 31 the 'right way' before Ms. D[Redacted] arrived, and she essentially did not have adequate knowledge of how the Farm should run.

Claimant Injures his Shoulder at Work / Placed on Work Restrictions

10. Claimant sustained an admitted injury to his right shoulder while working at [Employer] on November 4, 2019. (Ex 1, p. 1). He testified that he had not sustained any shoulder injury prior to this incident, and that he never received or provided any work restrictions to [Employer] prior to this injury.

11. Claimant testified that he reported his injury to his immediate supervisor, who was still Kayla D[Redacted]. He testified that he worked under Ms. D[Redacted] from around May, 2019 when she arrived as the manager of Farm 31.

12. Following Claimant’s right shoulder injury with [Employer], he was placed on modified duty effective November 15, 2019. (Ex. J, p. 23.) This included no lifting or carrying over 20 pounds, and no lifting carrying for more than 30 minutes for weights between 11 and 20 pounds, and no pushing or pulling over 40 pounds, and no pushing or pulling between 21 and 40 pounds for more than 30 minutes. (Exhibit J, p. 23). Employer accommodated Claimant’s light duty restrictions, and Claimant returned to regular work.

Performance Issues Continue

13. On November 29, 2019 Claimant received another written warning from Ms. D[Redacted]. (Ex. H, p. 21.) It was labeled as “Step 4-Termination or suspension pending investigation for discharge.” This warning was for insubordination. Claimant had been instructed to power wash the farrowing hallway when he was finished with lunch. When Ms. D[Redacted] followed up, she discovered that Claimant had requested that someone else to perform the activity for him. He was also scheduled to drive the skid to haul away dead pigs on November 30 and December 1, 2019. This task required no lifting whatsoever. Again, however, Claimant had another co-worker do this work for him.

14. Claimant admitted that he was not required to lift anything when he drove the skid and that his job duties on November 30 and December 1, included driving the skid. However, he testified that he was not able to power-wash the hallway on November 29, since this activity bothered his shoulder, so he asked “Andrew” to finish the job. He further testified that he did not discuss his physical problems with power-washing the hallway with Ms. D[Redacted] before he assigned the duty to someone else, as she was already done for the day. Ms. D[Redacted], however, testified that she had not left for the day, when Claimant delegated the power-washing activity, and that she saw the Claimant later that day before he finished his shift.

15. Ms. D[Redacted] testified that no one, Claimant or otherwise, ever discussed with her his inability to perform any power washing activity or any other aspect of his modified duty, nor had Claimant been instructed by anyone else not to complete his power-washing or skid driving duties.

16. Claimant was terminated on December 3, 2019 for insubordination. (Ex. I, p. 22.). Ms. D[Redacted] testified that his job performance and failure to follow instructions from his supervisor was progressive over time. His termination had nothing to do with his inability to lift dead pigs or otherwise work beyond his assessed work restrictions. Ms. D[Redacted] testified that Claimant was not required to perform any work duties in excess of his work restrictions, that power-washing the hallway uses around 20 pounds of force and takes no more than 30 minutes, and that driving the skid to haul dead pigs did not require Claimant to engage in any lifting at all.

17. At hearing, Ms. D[Redacted] testified that she discussed Claimant’s termination with him in person at the time, and he advised her that he had planned to quit anyway. (also *see*

Ex. I, p. 22). Ms. D[Redacted] testified that [Employer] can accommodate work restrictions of 5 pounds lifting, carrying, pushing and pulling for any employee who sustains an injury in the workplace. She testified that such tasks include things like inventory checking, taking head counts, visual wellness inspections, and office duties.

18. Ms. D[Redacted] testified that if Claimant had not been terminated due to the behavior he engaged in, he would still be able to work for his regular wages with [Employer] to this day.

Claimant Receives Unemployment Benefits

19. Following Claimant's termination, he applied for unemployment benefits. (Ex. P,). He was awarded unemployment benefits, and initially received benefits starting on December 14, 2019. *Id* at 38. Initially, he received $478 per week; however, on April 15, 2020 his benefits increased an additional $600 per week due to COVID relief benefits. *Id* at 37. On August 12, 2020, his COVID payment ended and his benefits were reduced back to $478. *Id* at 35. His benefits increased again on February 2, 2021 for bi-weekly COVID relief payments of an additional $300. On March 15, 2021 he received his last unemployment benefit check. *Id* at 33.

Work Restrictions Change after Claimant is Terminated / Surgery Discussed

20. Claimant was removed from work by PA Daniel Klepacz, on December 19, 2019, until his next appointment. (Ex. K, p. 24.) The WC 164 indicates Claimant is not presently working, and he was referred to physical therapy. There is no accompanying narrative report to indicate whether or not Claimant's condition had worsened to any extent; however, the box is checked stating that MMI date unknown at this time because *evaluation and PT beginning, possible surgery*. *Id.*

21. On January 13, 2021 Dr. Bomberg, while acknowledging that Claimant had not resumed his work with [Employer], returned the Claimant to light duty work, effective that date. He later clarified that the prior work restrictions assessed on November 19, 2019 would be appropriate. (Ex. L, p. 26; Ex. N, p. 30.). However, the WC 164 he signed that same date states that Claimant is Unable to Work *from 1/13 to next* [appointment]. Ex. 1, p. 4).

22. In his narrative, Dr. Bomberg noted severe degenerative changes to Claimant's shoulder, but stated: "There is bone marrow edema, probable from this injury…..I think that in these cases where there is an injury and the patient has previously not noted any difficulties that this exacerbates the underlying problem, and also we see this bone edema that is *probably* from the contusion that the patient sustained in his injury. (Ex. L, p. 26)(emphasis added).

23. On February 3, 2020, Claimant was removed from work by PA Klepacz *from 2/3 to next.* (Ex. 4, p. 5). Although this report was created by PA, Daniel Klepacz, it was signed by Dr. Bomberg on February 12, 2020. There is no medical narrative per se to indicate if

Claimant's condition had worsened. However, the WC 164 now states there is a Treatment Plan for *PT,* and MMI date is unknown because *physical therapy.* The report does note that Claimant is not presently working, and Claimant's recommended PT treatment did not change.

24. On March 9, 2020 Dr. Carr removed Claimant from work entirely. (Ex. 4, p. 6). This report again contains no medical narrative per se to indicate if Claimant's medical condition had worsened. However, the WC 164 now states there is a Treatment Plan for *Reverse shoulder surgery,* and MMI date is unknown because *surgery needed.* It does note that Claimant was not presently working, and continued to recommend physical therapy.

25. Dr. Carr subsequently returned the Claimant to light duty work with a 5-pound lift, carry, push and pull restriction on June 17, 2020. (Ex. Q, pp. 39-40.). However, this same WC 164 checked the box that Claimant is Unable to Work from *{date left blank}*. Both the WC 164 and its accompanying narrative state that conservative treatment has failed, and that the reverse shoulder surgery is recommended. Claimant has not been removed entirely from work by any physician since that time.

26. However, on January 18, 2021 Respondents, apparently for the first time, authorized the recommended shoulder replacement surgery. (Ex. O, p. 31.) It is unknown if such surgery has been scheduled. Claimant testified that he has not returned to any work, and has not been asked by Employer to return to modified work in writing.

CONCLUSIONS OF LAW

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

Generally

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

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

3. When determining credibility of witnesses, the ALJ should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline,* 98 Colo. 275, 57 P.2d 1205 (1936); C.J.I, Civil 3:16 (2007). The ALJ finds that Kayla D[Redacted] has been a reliable historian in this case. Overall (except as noted, infra) the ALJ finds that Claimant has been rather forthright as well, in owning up to his mistakes, and in expressing the job dissatisfaction that ultimately led to his termination.

Temporary Total / Partial Disability / Responsible for Termination

4. To establish entitlement to TTD and TPD benefits the Claimant maintains the burden of proof by a preponderance of the evidence that his wage loss has some connection to his industrial injury. *PDM Molding v. Stanberg*, 898 P.2d 542 (Colo. 1995). Once Claimant establishes entitlement to temporary disability benefits, it becomes incumbent upon the Respondent to prove, by a preponderance of the evidence, that the temporarily disabled employee is responsible for his termination of employment, and if proven, the resulting wage loss of the injured worker shall not be attributable to the on-the-job injury. C.R.S. sec. 8-42-105 (4), sec. 8-42-103 (1)(g), *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004).

5. Claimant will be held responsible for his separation of employment from the insured if he performed some volitional act, or exercised some control over the circumstances of the termination. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994) (opinion after remand, 908 P.2d 1185 (Colo. App. 1995)). The determination of the fault issue is ordinarily one of fact for resolution by the ALJ. *Id.*

6. Claimant had apparently enjoyed a good working relationship with this farm for a number of years. However, once [Employer] bought the business, things deteriorated for Claimant. He began to be supervised by a supervisor who he did not like, nor did he particularly respect. Various work protocols apparently become more demanding and formalized. Right or wrong, Claimant did not adapt to his new chain of command. He was counseled, in writing, that his performance was lacking, then formally demoted, based upon his inability (as perceived by new management) to perform as a utility. Then, on two separate occasions, Claimant violated serious safety protocols, for which he was warned in writing. It is clear from the documentation – and the ALJ so finds - that anyone in Claimant's shoes would know he was on very thin ice. It is also clear from

the records that Claimant was, in effect, counseled in writing back when he was demoted (number 1 on the scorecard), regardless of how such document is labeled. It is also clear that in each of the next two write-ups (numbers 2 and 3 on the scorecard), Claimant exercised considerable control over the circumstances leading to his written discipline. He just went ahead and performed these volitional acts, when there was no need to do so.

7. The final straw occurred on November 29, 2019, and become formalized on December 3, 2019. In that instance, once again, the ALJ finds that Claimant committed the volitional act of 'delegating' his assigned tasks to others, without authority. Each task was within his work restrictions. To the extent there is a conflict in the evidence over whether Claimant was given de facto delegation authority by a different supervisor, the ALJ resolves that in favor of Ms. D[Redacted]. Claimant, once again, exercised some control over the circumstances leading to his termination, and the ALJ finds that such termination was due to Claimant's conduct, and not as a result of his work injury. Had he followed instructions, he could still be working modified duty at [Employer].

8. It is noted that while Respondent's have shown substantial compliance with their own internal processes in completing a termination, the ALJ does not feel bound to formally "check all four boxes" in sequence to perfect a termination. Perhaps for some sort of union grievance process, maybe for unemployment, but not here. Progressive discipline may be bypassed altogether if such actions are sufficiently egregious. In any event, the ALJ finds that Respondents have shown that Claimant was responsible for his own termination, effective 12/3/2019.

Was Claimant's Subsequent Wage Loss Attributable to his Work Injury?

9. Despite Claimant's termination for cause, Claimant now requests that there be a finding that his condition *worsened* after his termination, thus restoring his TTD benefits. The ALJ is unable to make such finding. However, the available evidence shows that Claimants *prognosis* and *treatment plan* fluctuated with the times, depending upon which ATP was evaluating him at that particular appointment. As a result of that process (and not due to a *worsening*, per se), Claimant went from modified duty, to off work, back to modified duty, back off work, and then back to modified duty. As such, the ALJ will analyze this case as occurred in *Hittinger v. Brookdale Senior Living, Inc.,* W.C. 5-082-915-003 (ICAO, March 16, 2019). In *Hittinger*, the ALJ found that while Respondents had shown that Claimant was properly terminated for cause, her subsequent wage loss, at least in part, was still attributable to her work injury, based upon the recommendations of her ATPs.

10. So it is here. To the extent there is a conflict, on any given treatment date, between what was stated on the WC 164 and what is stated in the accompanying narrative, the ALJ will rely upon the narrative as representing the actual intent of the ATP.

11. Claimant was on modified duty when he was terminated on 12/3/2019. His wage loss, beginning that date, was *not attributable to his work injury*, until he was placed onto “no-work” status on 12/19/2019.

12. Claimant remained on “no work” status from 12/19/2019 until 1/13/2020. For that period, Claimants wage loss was *attributable to his work injury.*

13. On 1/13/2020, Claimant was placed back on modified duty (which the ALJ finds could have been accommodated by Employer), until his next appointment. From 1/13/2020 through 2/3/2020, Claimant’s wage loss was *not attributable* to his work injury.

14. On 2/3/2020, Claimant was placed back onto “no work status”. This remained in effect through his next appointment (on 3/9/2020), and continued up until his next appointment on 6/17/2020, after which he was rendered, once again, available for modified duty. From 2/3/2020, through 6/17/2020, Claimant’s wage loss was *attributable* to his work injury.

15. From 6/17/2020, through the present, Claimant’s wage loss is *not attributable to his work injury.* He is therefore not entitled to TTD from that point forward.

16. However, since surgery has now been authorized, it is likely that **if** Claimant goes through with it, he will likely be placed back onto “no work“ status for a considerable period of time. That, however, will wait for another day.

17. The ALJ notes further that the unemployment benefit information supplied by the parties is not pertinent to the issue of termination for cause; however, it presents issues of *offsets,* the calculations of which will be left to the parties.

ORDER

It is therefore Ordered that:

1. Claimant’s Average Weekly Wage is $811.66.

2. Claimant is entitled to TTD payments from 12/19/2019 through 1/13/2020.

3. Claimant is entitled to TTD payments from 2/3/2020 through 6/17/2020.

4. Any TTD payments are to be offset by applicable unemployment benefits paid during the same time periods.

5. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. All matters not determined herein are reserved for future determination.

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

DATED: June 9, 2021

/s/ William G. Edie

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

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that she suffered an occupational disease to her right upper extremity that began on June 12, 2020 during the course and scope of her employment with Employer.

2. Whether Claimant has established by a preponderance of the evidence that she is entitled to receive reasonable, necessary and causally related medical treatment for her June 12, 2020 cumulative trauma injuries.

FINDINGS OF FACT

1. Claimant worked at Employer's [Redacted] facility as a night shift machine operator. The position generally included both production and sanitation duties except on Sundays when her duties involved only sanitation. Claimant's schedule was Friday through Tuesday from 8:00 pm to 4:30 am.

2. Employer's [Redacted] Leader William B[Redacted] testified that the Mountain View plant is a fluid dairy facility that produces and bottles milk, orange juice, coffee creamers and broth. Mr. B[Redacted] further remarked that there are three distinct rooms at this facility: (1) the blow mold room, where containers are produced; (2) the filler room where containers are filled with milk; and (3) the case stacker room where the containers are placed into crates.

3. Claimant testified that her job duties as a night shift machine operator specifically included the following: finishing production from the prior shift until approximately 10:00 pm; taking the weights of milk containers during production; cleaning the machines; lifting belts into tubs to be cleaned; reviewing paperwork; inspecting machines; and tearing down vacuum systems.

4. Claimant detailed her job functions. She stated there are three rooms for work and cleaning. Claimant explained that the clean in place process occurs daily. She is first required to spray the conveyors and machines to remove excess milk and debris. This process takes about 20-30 minutes of continuous spraying while holding the hose. Foaming the walls, conveyors, machines and floors takes another 15-20 minutes. Once the foam is applied, she has to immediately rinse or it sticks to the machines and traps bacteria. Rinsing takes about an hour and a half per machine. There are three machines in each room. Depending on the production schedule Claimant must clean between one and three machines.

5. Claimant noted that she sometimes worked up to six days each week because of overtime and a lack of personnel. She remarked that she was only one of two

people responsible for cleaning. Claimant's longer hours caused more repetitive hose use that required a forceful grip on the nozzle during cleaning. Claimant specified that when she was moved to work the third or night shift in May 2019, there was a large drop in consistency in her department and her work duties intensified. Claimant began to develop symptoms in her right upper extremity because of constant gripping and squeezing of the hose nozzle.

6. On June 13, 2020 Claimant reported a work-related injury to her supervisor and Employer's former Resource Leader Kiet N[Redacted] . Mr. N[Redacted reported that the occurrence was caused by "constant gripping (& squeezing) of the hose nozzle, muscle and tendon causing soreness on the right hand. Due to overtime, the whole right arm is sore as well."

7. On June 17, 2020 Claimant presented for initial care to Nurse Practitioner Monica L. Fanning-Schubert at Occupational Medical Partners. Claimant reported pain in her right neck, posterior shoulder, elbow, forearm, wrist, hand and right trigger finger due to repetitive, cumulative trauma. NP Fanning-Schubert documented that the mechanism of injury was using a heavy pressure spray handle with a forceful grip to clean 2-3 hours per day, pulling hoses and gripping bottles of milk for quality checks. She listed the mechanism of injury as "Cumulative Trauma Repetitive Use." NP Fanning-Schubert diagnosed Claimant with right trigger finger as a result of her work activities.

8. On June 30, 2020 Jill Adams completed a Job Demands Analysis and Risk Factor Analysis for the position of Fresh Employee at Employer's facility. Ms. Adams produced a report and an addendum report after interviewing Claimant. Claimant was unavailable for observation on the date of the job site visit. Relying on the Colorado Division of Workers' Compensation *Medical Treatment Guidelines* (*Guidelines*), Ms. Adams did not find evidence of any Primary or Secondary Risk Factors involved in Claimant's job duties. After conducting time studies of Claimant's job tasks Ms. Adams specifically determined that gripping/coupling while using a hose nozzle/wand did not fit within the Primary or Secondary Risk Factors regarding pinch force or lifting.

9. Notably, the Job Demands Analysis specified that Claimant spent about 1-2% of her workday preparing to enter her work area including applying safety gear. She spent the majority of her time or about 65-70% of her workday operating machines. Claimant was specifically responsible for operating and monitoring milk filling production equipment. The final 25-30% of Claimant's workday involved the sanitation process.

10. The Job Demands Analysis detailed that Claimant works in teams of 5-8 employees and rotates cleaning operations. She was responsible for using 1-2 hoses/nozzles in one of three rooms to rinse, apply foam cleaner, and again rinse all machinery, walls and equipment. The final rinse lasted between 45 minutes and one hour. Frequently, two employees were responsible for sanitizing a room, but occasionally one employee completed the task. Total sanitization of each room typically lasted 2.5-3.0 hours.

11. On July 28, 2020 Jonathan L. Sollender, M.D. issued a report outlining his independent medical examination of Claimant. He reviewed the Job Demands Analysis prepared by Ms. Adams. Dr. Sollender compared the data collected by Ms. Adams to the criteria for force, awkward posture, repetition, cold exposure, vibration and computer use delineated in the *Guidelines*. He noted that Ms. Adams did not identify a single occupational risk factor that met the threshold level for an exposure. Dr. Sollender diagnosed Claimant with right trigger finger and mild right lateral epicondylitis. Recounting Claimant's work activities, he remarked that Claimant was not exposed to any occupational risk factors as outlined in Rule 17, Exhibit 5 of the *Guidelines*. Dr. Sollender summarized that Claimant was not exposed for the requisite time period to force, awkward posture, repetition, cold, vibration or computer tasks significant enough to cause any upper extremity occupational disease.

12. On August 18, 2020 John Burris, M.D. authored a report following an independent medical examination and records review of Claimant. Dr. Burris determined that he was unable to establish a cumulative trauma disorder diagnosis based on the Job Demands Analysis. He specifically noted the absence of Primary and Secondary Risk Factors. Because of the absence of risk factors delineated in the Job Demands Analysis, causation could not be established between Claimant's work activities and a cumulative trauma or shoulder disorder.

13. On January 14, 2021 Dr. Burris authored an addendum report after reviewing additional medical records. Dr. Burris determined that the additional records reflected that Claimant's physical symptoms corresponded to psychosocial stressors. He determined that his prior opinion on causation remained unchanged.

14. On January 14, 2021 Authorized Treating Physician (ATP) Bryan T. Alvarez, M.D. authored a letter addressing Claimant's repetitive trauma condition. He remarked that Claimant worked 12-hour days, three days per week, with one week of four hour days. Claimant reported that for the preceding year there were crew shift changes and she had to work eight hour days for five days each week. Dr. Alvarez explained that most of Claimant's shift involved sanitation duties. Claimant used a heavy pressure spray handle to clean areas about two to three times per shift. Using a spray handle required a forceful, repetitive grip that sometimes twisted her hand and wrist into an awkward position. Claimant also pulled a 40-foot hose over obstacles. Finally, Claimant repetitively gripped bottles of milk to perform quality control checks. Claimant eventually developed neck, right shoulder and right elbow pain. On June 12, 2020 Claimant noted pain in her right third digit. Dr. Alvarez concluded that Claimant's repetitive work activities caused her right upper extremity symptoms

15. On September 21, 2020 NP Fanning-Schubert authored correspondence disagreeing with Dr. Burris's opinion on the cause of Claimant's trigger finger. NP Fanning-Schubert asserted that the main risk factor for Claimant's trigger finger injury was forceful, repetitive gripping of a power hose that could have produced vibration. She acknowledged that she was unsure of the grip force necessary for Claimant to use the

hose. NP Fanning-Schubert recognized that Claimant's right shoulder and neck complaints were not work-related.

16. Mr. B[Redacted] testified that the night shift crew was responsible for finishing production from the prior shift followed by cleaning. He specified that the night shift typically began cleaning between 12:00-1:00 a.m. Mr. B[Redacted] explained that cleaning the machines was divided into the following three parts: (1) rinsing the machines for 30 minutes; (2) foaming the machines with a cleaning agent for about 20 minutes; and (3) rinsing the cleaner off the machines. He remarked that, because the chemicals had to sit on the machines, there was a break between applying the foam cleaner and the final rinse. Mr. B[Redacted] noted that the sprayers used at the facility were similar to a nozzle and garden hose with a locking mechanism to permit continuous spraying without manually engaging the trigger.

17. Mr. N[Redacted explained that night shift cleaning typically began between 11:00 p.m. and 12:00 a.m. except on Sundays when no production occurred. He testified that there were typically three employees working on the night shift with managers available to fill in and help with breaks, lunches or finishing production. Mr. N[Redacted further remarked that the total time an employee would continuously use the sprayer during the night shift lasted from 30-90 minutes. He summarized that a night shift employee typically used a hose for approximately two hours out of an eight-hour shift. Mr. N[Redacted noted that the nozzles had a locking mechanism that could be depressed to provide continuous spraying without hand pressure.

18. Employer's Senior Human Resource Leader at Mountain View Jeff S[Redacted] commented that night shift employees typically worked an eight-hour shift with at least two fifteen-minute breaks and one thirty-minute lunch. He noted that employees were required to notify a supervisor or resource leader as soon as they felt they might have sustained a work injury.

19. Ms. Adams testified that the primary objective of a worksite evaluation is to observe the performance of the job and address the presence of any risk factors specified by the Colorado Division of Workers' Compensation. She commented that Mountain View employees were permitted to take two scheduled fifteen-minute breaks and a thirty-minute lunch. Employees also had natural breaks during the sanitation process including waiting for foam to sit on the machines.

20. Ms. Adams described that the sanitation process involved using a hose and nozzle to rinse machines Employees then applied foam cleaner. The final rinse involved removing the cleaner. The sanitation process tasks varied and typically lasted approximately two to three hours per shift. Ms. Adams explained that activities during the sanitation process varied because employees moved around the entire room to access different machines. In fact, based on Claimant's testimony, Ms. Adams characterized Claimant's job tasks as "more varied than what I observed."

21. Ms. Adams testified that she was evaluating Primary and Secondary Risk Factors outlined by the Division of Workers' Compensation for grip force during an eight-hour shift. She detailed that the Primary Risk Factor for grip is two pounds of pinch force for six hours and the Secondary Risk Factor for grip is two pounds of pinch force for three hours. Although Ms. Adams recognized that Claimant applied hand force to use the sprayer, it did not occur for a sufficient time to constitute a Primary or Secondary Risk factor. Ms. Adams also noted that she did not observe any risk factors for vibration or awkward wrist postures. Finally, she did not note any risk factors for shoulder pathology.

22. In delineating Claimant's job duties Dr. Burris relied on the Job Demands Analysis prepared by Ms. Adams. Dr. Burris diagnosed Claimant with myofascial pain based on the diffuse nature of her complaints and lack of findings on examination. He remarked that trigger finger is an inflammation of the tendon that restricts movement within the tendon sheath. Dr. Burris explained that cumulative trauma disorders are caused by performing repetitive tasks without permitting tissues to rest. He commented that, because Claimant's work activities varied, her tissues had an opportunity to rest.

23. In order to perform a medical causation analysis for a cumulative trauma condition pursuant to the *Guidelines*, the first step is to make a diagnosis, the next step is to clearly define the job duties and the final step is to compare the job duties with the delineated Primary Risk Factors. Dr. Burris compared Claimant's job duties with the Primary Risk Factors in the *Guidelines*. He considered the Primary Risk Factor Definition Table for Force and Repetition/Duration. Dr. Burris remarked that the algorithm for establishing medical causation specifies that, if no Primary or Secondary Risk factors are present, then the injury is probably not work-related. He determined that Claimant's job duties did not meet any of the Primary or Secondary Risk Factors to satisfy the minimum thresholds in the *Guidelines* for developing a cumulative trauma disorder. Specifically, based on the Job Demands Analysis, there were no risk factors associated with a trigger finger diagnosis. Finally, Dr. Burris disagreed with NP Fanning-Schubert's analysis because Claimant did not perform her job tasks for the requisite time periods to meet the criteria established by the Division of Workers' Compensation in Rule 17 of the *Guidelines*.

24. Claimant disagreed with several details of Ms. Adams' Job Demands Analysis. She specifically noted that she was not on a team of 5-8 employees. Instead, there were five employees to cover all seven days of the week. Claimant testified the amount of time it took to clean the machines listed in the Job Demands Analysis was inaccurate because it did not consider running liquid through the machines for an in-depth cleaning. She further noted that she originally worked in 40-degree rooms all shift but the temperature was raised to 48 degrees after employee complaints. Finally, she occasionally worked in the cooler room with the temperature set at 32 degrees,

25. Claimant has failed to demonstrate that it is more probably true than not that she suffered an occupational disease to her right upper extremity that began on June 12, 2020 during the course and scope of her employment with Employer. Although Claimant attributed her right upper extremity symptoms to her work activities, a review of

her job duties reflects that they lacked the requisite force or repetition to cause a cumulative trauma disorder. Furthermore, Claimant engaged in a variety of activities throughout each shift. The record reflects that Claimant spent about 1-2% of her workday preparing to enter her work area including applying safety gear. She spent the majority of her time or about 65-70% of her workday operating and monitoring milk filling production equipment. The final 25-30% of Claimant's workday involved the sanitation process.

26. Relying on the *Guidelines* in conducting a Job Demands Analysis, Ms. Adams did not find evidence of any Primary or Secondary Risk Factors in Claimant's job duties. The Job Demands Analysis detailed that Claimant works in teams of 5-8 employees and rotates cleaning operations. She was responsible for using 1-2 hoses/nozzles in one of three rooms to rinse, apply foam cleaner, and again rinse all machinery, walls and equipment. The final rinse lasted between 45 minutes and one hour. Frequently, two employees were responsible for sanitizing a room, but occasionally one employee completed the task. Total sanitization of each room typically took 2.5-3.0 hours. Ms. Adams also remarked that Claimant engaged in a variety of tasks during the sanitation process. She detailed that the Primary Risk Factor for grip is two pounds of pinch force for six hours and the Secondary Risk Factor for grip is two pounds of pinch force for three hours. Although Ms. Adams recognized that Claimant applied hand force to use the sprayer/nozzle, it did not occur for a sufficient time to constitute a Primary or Secondary Risk factor. After conducting time studies of Claimant's work activities Ms. Adams specifically determined that gripping/coupling while using the hose nozzle/wand did not fit within the Primary or Secondary Risk Factors regarding pinch force or lifting. Ms. Adams also noted that she did not observe any risk factors for vibration or awkward wrist postures. Finally, she did not note any risk factors for shoulder pathology.

27. Dr. Burris persuasively maintained that Claimant did not suffer a work-related exposure that constituted a cumulative trauma condition pursuant to the *Guidelines*. He remarked that trigger finger is an inflammation of the tendon that restricts movement within the tendon sheath. Dr. Burris explained that cumulative trauma disorders are caused by performing repetitive tasks without permitting tissues to rest. He commented that, because Claimant's work activities varied, her tissues had an opportunity to rest. Dr. Burris compared Claimant's job duties with the delineated Primary Risk Factors in the *Guidelines*. He considered the Primary Risk Factor Definition Table for Force and Repetition/Duration. Dr. Burris remarked that the algorithm for establishing medical causation specifies that, if no Primary or Secondary Risk factors are present, then the injury is probably not work-related. He determined that Claimant's job duties did not meet any of the Primary or Secondary Risk Factors to satisfy the minimum thresholds in the *Guidelines* for developing a cumulative trauma disorder. Specifically, based on the Job Demands Analysis, there were no risk factors associated with a trigger finger diagnosis. Similarly, Dr. Sollender compared the data collected by Ms. Adams to the criteria for force, awkward posture, repetition, cold exposure, vibration and computer use delineated in the *Guidelines*. He noted that Ms. Adams did not identify a single occupational risk factor that met the threshold level for an exposure. Dr. Sollender diagnosed Claimant with right trigger finger and mild right lateral epicondylitis.

Considering Claimant's work activities, he remarked that Claimant was not exposed to any occupational risk factors as outlined in Rule 17, Exhibit 5 of the *Guidelines*. Dr. Sollender summarized that Claimant was not exposed for the requisite time period to force, awkward posture, repetition, cold, vibration and computer tasks to cause an upper extremity occupational disease.

28. In contrast, Dr. Alvarez explained that most of Claimant's shift involved sanitation duties. Claimant used a heavy pressure spray handle to clean areas about two to three times per shift. Using a spray handle required a forceful, repetitive grip that sometimes twisted her hand and wrist into an awkward position. Dr. Alvarez thus concluded that Claimant's work activities caused her right upper extremity injuries. Similarly, NP Fanning-Schubert disagreed with Dr. Burris's opinion on the cause of Claimant's trigger finger. She explained that the main risk factor for Claimant's trigger finger injury was forceful, repetitive gripping of a power hose that could have produced some vibration. Moreover, Claimant testified that the Job Demands Analysis was inaccurate because it underestimated the amount of time she engaged in the sanitation process. Despite Claimant's testimony and the opinions of Dr. Alvarez and NP Fanning-Schubert, the record reveals that Claimant did not engage in forceful and repetitive activities for an amount of time that meets the threshold for a cumulative trauma condition. The opinions of Dr. Alvarez and NP Fanning-Schubert failed to consider the force or time periods necessary for the development of a cumulative trauma condition. In fact, NP Fanning-Schubert acknowledged that she was unsure of the grip force necessary for Claimant to use the hose. In contrast, the *Guidelines* provide a detailed methodology and algorithm for evaluating the cause of cumulative trauma conditions. Accordingly, based on the Job Demands Analysis, a review of the medical records and the persuasive opinions of Drs. Burris and Sollender, Claimant did not engage in forceful and repetitive activities for an amount of time that meets the threshold for the development of a cumulative trauma condition. Claimant's employment activities did not cause, intensify, or, to a reasonable degree, aggravate her condition to produce a need for medical treatment. Claimant's claim is thus denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

4. The test for distinguishing between an accidental injury and an occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

5. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, §8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

6. Rule 17, Exhibit 5 provides an algorithm for evaluating Cumulative Trauma Conditions (CTC) pursuant to the *Guidelines*. In addressing applicability, the *Guidelines* note that "CTC's of the upper extremity comprise a heterogeneous group of diagnoses which include numerous specific clinical entities including disorders of the muscles, tendons and tendon sheaths, nerves, joints and neurovascular structures." W.C.R.P. Rule 17, Exhibit 5, p. 6. In determining a diagnosis when performing a cumulative trauma

analysis the *Guidelines* delineate specific musculoskeletal conditions and peripheral nerve disorders. Nevertheless, the Guidelines provide that "[l]ess common cumulative trauma conditions not listed specifically in these Guidelines are still subject to medical causation assessment." W.C.R.P. Rule 17, Exhibit 5, p. 21.

7. The *Guidelines* provide, in relevant part:

> Indirect evidence from a number of studies supports the conclusion that task repetition up to 6 hours per day unaccompanied by other risk factors is not causally associated with cumulative trauma conditions. Risk factors that are likely to be associated with specific CTC diagnostic categories include extreme wrist or elbow postures, force including regular work with hand tools greater than 1 kg or tasks requiring greater than 50% of an individual's voluntary maximal strength, work with vibratory tools at least 2 hours per day; or cold environments.

W.C.R.P. Rule 17, Exhibit 5, p. 20.

8. The *Guidelines* include a Primary Risk Factor Definition Table for Force and Repetition/Duration. The Table requires six hours of two pounds pinch force or 10 pounds of hand force three or more times per minute. Other Primary Risk Factors involving Force and Repetition/Duration include six hours of lifting 10 pounds in excess of 60 times per hour and six hours of using hand tools weighing two pounds or more. An additional Primary Risk Factor category is Awkward Posture and Repetition/Duration. The factor requires four hours of wrist flexion greater than 45 degrees, extension greater than 30 degrees or ulnar deviation greater than 20 degrees, six hours of elbow flexion greater than 90 degrees, four hours of supination/pronation with task cycles 30 seconds or less or awkward posture for at least 50% of a task cycle. Secondary Risk Factors require three hours of two pounds pinch force or 10 pounds of hand force three or more times per minute. Other Secondary Risk Factors involving Force and Repetition/Duration include three hours of lifting 10 pounds greater than 60 times per hour and three hours of using hand tools weighing two pounds or more. Finally, Secondary Risk Factors for Awkward Posture and Repetition/Duration include three hours of elbow flexion greater than 90 degrees and three hours of supination/pronation with a power grip or lifting. W.C.R.P. Rule 17, Exhibit 5, pp. 26-27. If neither Primary nor Secondary Risk Factors are present, the *Guidelines* provide that "the case is probably not job related." W.C.R.P. Rule 17, Exhibit 5, p. 24.

9. The *Guidelines* also specifically delineate factors for the development of shoulder pathology. They include the following: (1) overhead work of 30 minutes per day for a minimum of five years; (2) shoulder movement at the rate of 15-36 repetitions per minute and no two second pauses for 80% of the work cycle; and (3) shoulder movement with force greater than 10% of maximum with no two second pauses for 80% of the work cycle. Moreover, jobs requiring heavy lifting in excess of 10 times per day over the years may contribute to shoulder disorders. Notably, the *Guidelines* provide that, because of the lack of multiple, high quality studies, each case must be evaluated individually when

addressing the likelihood of cumulative trauma contributing to shoulder pathology. W.C.R.P. Rule 17, Exhibit 4, p. 16.

10. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she suffered an occupational disease to her right upper extremity that began on June 12, 2020 during the course and scope of her employment with Employer. Although Claimant attributed her right upper extremity symptoms to her work activities, a review of her job duties reflects that they lacked the requisite force or repetition to cause a cumulative trauma disorder. Furthermore, Claimant engaged in a variety of activities throughout each shift. The record reflects that Claimant spent about 1-2% of her workday preparing to enter her work area including applying safety gear. She spent the majority of her time or about 65-70% of her workday operating and monitoring milk filling production equipment. The final 25-30% of Claimant's workday involved the sanitation process.

11. As found, relying on the *Guidelines* in conducting a Job Demands Analysis, Ms. Adams did not find evidence of any Primary or Secondary Risk Factors in Claimant's job duties. The Job Demands Analysis detailed that Claimant works in teams of 5-8 employees and rotates cleaning operations. She was responsible for using 1-2 hoses/nozzles in one of three rooms to rinse, apply foam cleaner, and again rinse all machinery, walls and equipment. The final rinse lasted between 45 minutes and one hour. Frequently, two employees were responsible for sanitizing a room, but occasionally one employee completed the task. Total sanitization of each room typically took 2.5-3.0 hours. Ms. Adams also remarked that Claimant engaged in a variety of tasks during the sanitation process. She detailed that the Primary Risk Factor for grip is two pounds of pinch force for six hours and the Secondary Risk Factor for grip is two pounds of pinch force for three hours. Although Ms. Adams recognized that Claimant applied hand force to use the sprayer/nozzle, it did not occur for a sufficient time to constitute a Primary or Secondary Risk factor. After conducting time studies of Claimant's work activities Ms. Adams specifically determined that gripping/coupling while using the hose nozzle/wand did not fit within the Primary or Secondary Risk Factors regarding pinch force or lifting. Ms. Adams also noted that she did not observe any risk factors for vibration or awkward wrist postures. Finally, she did not note any risk factors for shoulder pathology.

12. As found, Dr. Burris persuasively maintained that Claimant did not suffer a work-related exposure that constituted a cumulative trauma condition pursuant to the *Guidelines*. He remarked that trigger finger is an inflammation of the tendon that restricts movement within the tendon sheath. Dr. Burris explained that cumulative trauma disorders are caused by performing repetitive tasks without permitting tissues to rest. He commented that, because Claimant's work activities varied, her tissues had an opportunity to rest. Dr. Burris compared Claimant's job duties with the delineated Primary Risk Factors in the *Guidelines*. He considered the Primary Risk Factor Definition Table for Force and Repetition/Duration. Dr. Burris remarked that the algorithm for establishing medical causation specifies that, if no Primary or Secondary Risk factors are present, then the injury is probably not work-related. He determined that Claimant's job duties did not meet any of the Primary or Secondary Risk Factors to satisfy the minimum thresholds

in the *Guidelines* for developing a cumulative trauma disorder. Specifically, based on the Job Demands Analysis, there were no risk factors associated with a trigger finger diagnosis. Similarly, Dr. Sollender compared the data collected by Ms. Adams to the criteria for force, awkward posture, repetition, cold exposure, vibration and computer use delineated in the *Guidelines*. He noted that Ms. Adams did not identify a single occupational risk factor that met the threshold level for an exposure. Dr. Sollender diagnosed Claimant with right trigger finger and mild right lateral epicondylitis. Considering Claimant's work activities, he remarked that Claimant was not exposed to any occupational risk factors as outlined in Rule 17, Exhibit 5 of the *Guidelines*. Dr. Sollender summarized that Claimant was not exposed for the requisite time period to force, awkward posture, repetition, cold, vibration and computer tasks to cause an upper extremity occupational disease.

13. As found, in contrast, Dr. Alvarez explained that most of Claimant's shift involved sanitation duties. Claimant used a heavy pressure spray handle to clean areas about two to three times per shift. Using a spray handle required a forceful, repetitive grip that sometimes twisted her hand and wrist into an awkward position. Dr. Alvarez thus concluded that Claimant's work activities caused her right upper extremity injuries. Similarly, NP Fanning-Schubert disagreed with Dr. Burris's opinion on the cause of Claimant's trigger finger. She explained that the main risk factor for Claimant's trigger finger injury was forceful, repetitive gripping of a power hose that could have produced some vibration. Moreover, Claimant testified that the Job Demands Analysis was inaccurate because it underestimated the amount of time she engaged in the sanitation process. Despite Claimant's testimony and the opinions of Dr. Alvarez and NP Fanning-Schubert, the record reveals that Claimant did not engage in forceful and repetitive activities for an amount of time that meets the threshold for a cumulative trauma condition. The opinions of Dr. Alvarez and NP Fanning-Schubert failed to consider the force or time periods necessary for the development of a cumulative trauma condition. In fact, NP Fanning-Schubert acknowledged that she was unsure of the grip force necessary for Claimant to use the hose. In contrast, the *Guidelines* provide a detailed methodology and algorithm for evaluating the cause of cumulative trauma conditions. Accordingly, based on the Job Demands Analysis, a review of the medical records and the persuasive opinions of Drs. Burris and Sollender, Claimant did not engage in forceful and repetitive activities for an amount of time that meets the threshold for the development of a cumulative trauma condition. Claimant's employment activities did not cause, intensify, or, to a reasonable degree, aggravate her condition to produce a need for medical treatment. Claimant's claim is thus denied and dismissed.

ORDER

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

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

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

DATED: June 10, 2021.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-120-654

ISSUES

I. Whether Claimant proved by a preponderance of the evidence he sustained a compensable industrial injury on September 13, 2019.

II. Whether Claimant proved by a preponderance of the evidence the medical treatment he received is reasonable, necessary and related to the industrial injury, and whether he is entitled to a general award of medical benefits.

III. Whether Claimant proved by a preponderance of the evidence he is entitled to temporary indemnity benefits from September 14, 2019, ongoing.

IV. Whether the right of selection of the authorized treating physician ("ATP") passed to Claimant.

V. Determination of Claimant's average weekly wage ("AWW").

VI. Whether Respondent-Employer is subject to penalties pursuant to §8-43- 408(1), C.R.S. for failing to carry workers' compensation insurance.

VII. Whether Claimant is entitled to a disfigurement award.

FINDINGS OF FACT

Non-Appearance of Respondent-Employer

1. The Longmont Address is the only address for Respondent-Employer on file with the OAC. The Longmont Address is the address listed for Respondent-Employer on checks Respondent-Employer issued to Claimant. Claimant has picked up tools from Respondent-Employer at the Longmont address and knows the address to be the address of Respondent-Employer.

2. On January 12, 2021, Claimant's counsel sent copies of the Application for Hearing and interrogatories to Respondent-Employer at the Longmont address via certified mail. USPS certified mail receipts note the documents were delivered to Respondent-Employer on January 14, 2021.

3. On January 28, 2021, Claimant's counsel sent a copy of a hearing confirmation to Respondent-Employer at the Longmont address via certified mail. A USPS certified mail receipt notes the document was delivered to Respondent-Employer on February 1, 2021.

4. OAC records reflect Notice of Hearing for the April 15, 2021 hearing was mailed to Respondent-Employer at the Longmont Address on March 9, 2021. OAC records contain no indication the Notice of Hearing was returned as undeliverable.

5. In a notarized affidavit, Process Server Christopher Lacey detailed multiple instances of attempting to effect service of process on Respondent-Employer in February 2021. Mr. Lacey determined the Longmont address is the usual place of abode and the appropriate address for Respondent-Employer, noting he observed the white van driven by Respondent-Employer parked at such address. Mr. Lacey observed a camera at the front door and garage door of the property and, when attempting to serve Respondent-Employer, could hear dogs barking and individuals speaking inside of the property. Mr. Lacey believes Respondent-Employer was avoiding service of process.

6. The ALJ finds Notice of Hearing was sent to an address at which it was likely to be received by Respondent-Employer. Notice of Hearing was sent to the Longmont Address, at which Respondent-Employer had received an Application for Hearing, interrogatories, and hearing confirmation. Checks issued to Claimant by Respondent-Employer identify the Longmont Address as Respondent-Employer's address. Claimant credibly testified that he knows the Longmont Address to be that of Respondent-Employer. Mr. Lacey determined the Longmont Address is the appropriate address for Respondent-Employer and credibly stated his belief that Respondent-Employer was avoiding service of process. The record indicates the Longmont Address is the correct and most recent address for Respondent-Employer. The OAC sent Notice of Hearing to the Longmont Address and there is no indication the mail was returned as undeliverable. The totality of the evidence indicates it is likely Respondent-Employer received notice of the hearing, is attempting to avoid the proceedings and elected not to appear. Accordingly, the ALJ proceeded with the hearing and now issues this order on the merits.

September 13, 2019 Work Injury

7. Claimant worked for Respondent-Employer for approximately eight or nine months performing various construction duties.

8. Claimant worked for Respondent-Employer on a full-time basis, working from approximately 7:30 a.m. to 5:00 p.m.

9. Claimant earned between $1,100.00 and $1,200.00 per week working for Respondent-Employer.

10. On September 13, 2019, Claimant sustained an industrial injury while performing his regular job duties during a scheduled work shift. While using a hammer to remove a nail from a piece of wood, the nail struck Claimant in his left eye. Claimant experienced an immediate onset of pain and blurry vision.

11. The same day of the incident, Claimant sought treatment at North Colorado Medical Center emergency room where he saw Matthew J. Uyemura, M.D. Dr. Uyemura diagnosed Claimant with a left corneal laceration with traumatic left cataract. He determined Claimant required urgent surgical repair as a result of the work injury. Dr. Uyemura performed further evaluation of Claimant at his own clinic and performed a left corneal repair with left lenesctomy and anterior vitrectomy on September 13, 2019. Dr. Uyemura performed the surgery at BSC Mountain Vista Surgery Center/Banner Health. Claimant was discharged with restrictions of no heavy lifting or bending over and was instructed to keep his eye shield in place.

12. Claimant attended a follow-up evaluation with Dr. Uyemura on September 14, 2019. Dr. Uyemura noted Claimant was doing well after the procedure. He planned to treat Claimant’s residual cortical material with steroids and wait before taking further treatment steps. He instructed Claimant to keep his eye covered with an eye shield and restricted Claimant from lifting greater than 20 pounds and bending over. Claimant was to keep dirt and dust out of his eye.

13. Claimant continued to follow-up with Dr. Uyemura, who referred Claimant to Aimee M. Verner, M.D. for additional evaluation of the work injury. Claimant first presented to Dr. Verner on September 18, 2019. Dr. Verner opined that Claimant would likely need multiple operations and procedures to regain his best-corrected visual acuity.

14. On September 30, 2019, Claimant underwent removal of retained cortical material fragments in his left eye, performed by Dr. Uyemura. Dr. Uyemura restricted Claimant from heavy lifting and straining for three weeks. He instructed Claimant to keep dirt and debris out of his eye for at least a week, and to avoid environments were dirt and debris may occur.

15. At an October 2, 2019 follow-up evaluation, Dr. Verner noted Claimant has scarring and irregularity in the left cornea. She remarked that treatment options included specialty contact lenses or, possibly, a full-thickness cornea transplant if the scarring was too dense.

16. On October 11, 2019, Claimant saw Dr. Uyemura and reported continued blurry vision and mild irritation. Dr. Uyemura noted Claimant's vision would not improve until he underwent a cornea repair and lens implant with Dr. Verner. Dr. Uyemura opined that Claimant could return to work as long as Claimant wore goggles all the time. He noted Claimant needed to be careful at work due to his depth perception being off. Dr. Uyemura instructed Claimant to try to avoid straining when lifting and not lifting much over 50 pounds.

17. Claimant continued to see Drs. Uyemura and Verner and continued to report blurry vision and eye irritation. As of the date of hearing, Claimant had yet to undergo a cornea transplant.

18. Respondent-Employer was aware of the incident and did not send Claimant for medical treatment or provide Claimant a list of designated providers. Claimant spoke with Respondent-Employer about his injury and asked for insurance to cover his medical treatment. It is Claimant's belief Respondent-Employer did not have workers' compensation insurance. On September 18, 2019 and September 17, 2019, Respondent-Employer issued checks to Claimant in the amount of $900.00 and $1,400.00, respectively. The memo section of the aforementioned checks read "Cirujia."

19. On October 4, 2019, Respondent-Employer issued Claimant a check for $700.00. In the memo section of the check, Respondent-Employer wrote "Workers comp check." Claimant testified that when he attempted to further discuss a workers' compensation claim with Respondent-Employer, Respondent-Employer gave him the "runaround" for some time, then eventually told Claimant to just sue him.

20. As a result of the work injury, Claimant did not work or earn wages from September 14, 2019 to late February 2020 or early March 2020. Claimant was unable to return to performing his regular duties due to the risk of further injuring his eye, lifting restrictions, as well as safety concerns performing certain construction duties with his poor depth perception. When Claimant returned to working, he performed duties such as picking up debris. Claimant has not worked for Respondent-Employer since the date of the work injury. Claimant has earned $600/week since returning to work.

21. Claimant's testimony is found credible and persuasive.

22. Claimant proved it is more probable than not he sustained a compensable industrial injury arising out of and in the scope of his employment for Respondent-Employer on September 13, 2019. Claimant suffered an injury to his left eye that resulted in disability and the need for medical treatment.

23. Claimant’s treatment at North Suburban Medical Center was emergency care. Respondent-Employer was on notice of Claimant’s on-the-job injury and did not provide Claimant a list of designated treatment providers. Accordingly, the right of selection of an ATP passed to Claimant. The treatment Claimant received with Banner Surgery Center, Dr. Uyemura, the Eye Care Center of Northern Colorado, and Dr. Verner was authorized treatment. The aforementioned treatment was directly related to Claimant’s industrial injury and was reasonable and necessary to cure and relieve Claimant of the effects the injury.

24. As of the date of hearing, the expenses for the authorized, reasonable and necessary treatment related to Claimant’s eye injury total $18,574.90, consisting of the following expenses: Matthew Uyemura, M.D. (9/13, 9/30, and 1/28/20 charges were reduced) of $3,367; Rocky Mountain Anesthesia of $3,078; Eye Care Center of Northern Colorado of $717.84; Banner Health of $10,732.95 (NCMC and ER services from 9/13/19); and Mountain Vista Orthopaedic Surgery for lens material after the statement write-off of $1,396.95.

25. Claimant has yet to be placed at maximum medical improvement (“MMI”) by an ATP. He continues to experience issues with his eye and has yet to undergo a cornea transplant. Claimant is entitled to a general award of reasonably necessary medical benefits as related to the industrial injury.

26. As Claimant averaged between $1,100.00 and $1,200.00 per week for Respondent-Employer, Claimant’s AWW is $1,150.00. Based on Claimant’s AWW of $1,150.00, Claimant’s TTD rate is $766.67.

27. Claimant proved it is more probable than not he is entitled to temporary total disability (“TTD”) benefits from September 14, 2019 through February 28, 2020, and temporary partial disability (“TPD”) benefits from March 1, 2020, ongoing. As a result of the industrial injury, Claimant was unable to resume his prior work, which resulted in actual wage loss for more than three work shifts. When Claimant returned to work, certain work was unavailable to Claimant due to his work injury, resulting in Claimant earning less than his AWW of $1,150.00.

28. Respondent-Employer is subject to penalties for its failure to carry workers’ compensation insurance as required at the time of Claimant’s compensable injury.

29. The ALJ was unable to adequately observe Claimant’s alleged disfigurement via video at the hearing. Claimant’s counsel indicated he would submit photographs of Claimant’s alleged disfigurement with his post-hearing position statement. As of the date

of this order, no photographs were received from Claimant. Accordingly, there is insufficient evidence for the ALJ to make a determination regarding disfigurement.

CONCLUSIONS OF LAW

Generally

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

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

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

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its “origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee’s service to the employer.” *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v.* Americold D/B/A Atlas Logistics, WC 4-960-513-01, (ICAO, Oct. 2, 2015).

As found, Claimant proved it is more likely than not he sustained an industrial injury arising out of and in the course of his employment with Respondent-Employer. Claimant was struck in the left eye with a nail while performing his usual job duties during a regular work shift. The incident caused disability and the need for medical treatment. Accordingly, Claimant sustained a compensable industrial injury on September 13, 2019.

Medical Treatment

Respondents are liable for medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. §8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* WC 4-835-556-01 (ICAO, Nov. 15, 2012). For a service to be considered a “medical benefit” it must be provided as medical or nursing treatment or incidental to obtaining such treatment. *Country Squires Kennels v. Tarshis,* 899 P.2d 362 (Colo. App. 1995). A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant’s physical needs. *Bellone v. Industrial Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., WC 4-517-537 (ICAO, May 31, 2006).

Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the Colorado Workers’ Compensation Act requires that respondents must provide injured workers with a list of at least four designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. Specifically, if the employer or insurer fails to provide an injured worker with a list of at least four physicians or corporate medical providers, “the employee shall have the right to select a physician.” §8-43-404(5)(a)(I)(A), C.R.S. W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, “the employer shall provide the injured worker with a written list of designated providers.” W.C.R.P. Rule 8-2(E) additionally provides that the remedy for failure to comply with the preceding requirement is that “the injured worker may select an authorized treating physician of the worker’s choosing.” An employer is deemed notified of an injury when it has “some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim.” *Bunch v. industrial Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006).

If upon notice of the injury the employer timely fails to designate an ATP, the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987). The employer’s obligation to appoint an ATP arises when it has some knowledge of the accompanying facts connecting an injury to the employment such that a reasonably conscientious manager would recognize the case might result in a claim for compensation. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006).

As Claimant proved he sustained a compensable industrial injury, Respondent-Employer is liable for reasonable and necessary medical treatment that is causally related to the industrial injury. Respondent-Employer was on notice of Claimant’s on-the-job injury and did not provide Claimant a list of designated treatment providers. As such, the right to select an ATP passed to Claimant. Claimant sought evaluation due to the work injury and required treatment, including two surgeries. No evidence was presented indicating Claimant’s left eye condition and need for treatment was the result of some issue unrelated to the work injury. The preponderant evidence establishes that Claimant’s treatment with North Colorado Medical Center, Dr. Uyemura, Dr. Verner, and the associated clinics and surgical centers was directly related to Claimant’s industrial injury and was reasonable and necessary to cure and relieve Claimant of the effects the injury. Respondent-Employer is liable for the costs Claimant incurred for the medical treatment he has received for the work injury, totaling $18,574.90, as well as further reasonably necessary and causally related treatment.

AWW

Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell*, 867 P.2d at 82. Where the claimant’s earnings increase periodically after the date of injury the ALJ may elect to apply §8-42-102(3), C.R.S. and determine that fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability, not the earnings on the date of the injury. *Id.; see e.g. Burd v. Builder Services Group Inc*., WC 5-085-572 (ICAO, July 9, 2019) (determining that signing bonus claimant received when he began employment is not a "similar advantage or fringe benefit" specifically enumerated under §8-40-201(19)(b) and therefore cannot be added into claimant's AWW calculation); *Varela v. Umbrella Roofing, Inc.*, WC 5-090-272-001 (ICAO, May 8, 2020) (noting that a claimant is not entitled to have the cost or value of the employer's payment of health insurance included in the AWW until after the employment terminates and the employer's contributions end).

At the time of injury, Claimant earned an average of $1,100.00 to $1,200.00 per week. A fair approximation of Claimant's wage loss and diminished earning capacity is an AWW of $1,150.00.

Temporary Indemnity Benefits

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S. requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

Section 8-42-106(1), C.R.S., provides for an award of TPD benefits based on the difference between the claimant's AWW at the time of injury and the earnings during the continuance of the temporary partial disability. In order to receive TPD benefits the claimant must establish that the injury caused the disability and consequent partial wage loss. §8-42-103(1), C.R.S.; *see Safeway Stores, Inc. v. Husson,* 732 P.2d 1244 (Colo. App. 1986) (temporary partial compensation benefits are designed as a partial substitute for lost wages or impaired earning capacity arising from a compensable injury).

As a result of the industrial injury, Claimant was unable to resume his prior work, which resulted in actual wage loss for more than three work shifts. Claimant's left eye condition impaired his ability to safely, effectively and properly perform his regular employment. Although Claimant received checks from Respondent-Employer on September 18, 2019 and September 27, 2019, there is insufficient evidence establishing those checks were wages paid to Claimant for his missed time and not for time worked prior to the incident. Claimant credibly testified he did not work from September 14, 2019 to late February 2020 or early March 2020. As found, Claimant is entitled to TTD benefits from September 14, 2019 to February 28, 2020, a period of 24 weeks at a rate of $766.67. The total amount of TTD owed to Claimant is $18,400.08 ($766.67 x 24 weeks).

As of March 1, 2020, Claimant returned to performing some work, earning $600.00 per week, which is less than his AWW of $1,150.00. Claimant's impaired earning capacity was the result of the work injury, as Claimant was unable to find certain work and perform certain duties due to his left eye condition. Thus, Claimant is entitled to TPD benefits from March 1, 2020, ongoing. Based on Claimant's AWW and weekly earnings during this time period, Claimant is entitled to TPD at a rate of $366.66 ($1,150 - $600 = $550. $550 x 2/3 = $366.66). As of the date of the hearing, the total amount of TPD owed to Claimant is $21,475.28 ($366.66 x 58.57 weeks).

Penalties for Uninsured Employers

Every employer subject to the provisions of the Workers' Compensation Act shall carry workers' compensation insurance. §8-44-101, C.R.S. Section 8-43-408(1) C.R.S., provides that in cases where the employer is subject to the provisions of the Act and has not complied with the insurance provisions required by the Act, the injured employee may claim the compensation and benefits provided in those articles. Prior to July 1, 2017, Section 8-43-408(1), C.R.S., provided that, in such cases, the compensation or benefits payable to the claimant were to be increased by fifty percent. Effective July 1, 2017, Section 8-43-408(1), C.R.S. was amended to remove the language regarding a fifty percent increase in the claimant's compensation or benefits.

If compensation is awarded, the ALJ shall compute and require the employer to pay a trustee an amount equal to the present value of all unpaid compensation or benefits or require the employer to post a bond a bond within 10 days of the order. §8-43-408(2), C.R.S.

Section 8-43-408(5), C.R.S., provides that in addition to any other compensation or benefits paid or ordered, an employer that is uninsured at the time an employee suffers a compensable injury shall pay an additional amount equal to 25% of the compensation and benefits to the Colorado Uninsured Employer Fund.

The present value of all unpaid compensation or benefits owed to Claimant is $57,750.26. This amount represents the sum of the owed medical benefits, TTD and TPD ($58,450.26) minus $700.00 paid to Claimant on October 9, 2019 for the injury.

As found, Respondent-Employer did not carry workers' compensation insurance at the time of Claimant's industrial injury. Accordingly, Respondent-Employer shall pay an additional $14,437.57 (25% of $57,750.26) to the Colorado Uninsured Employer Fund.

ORDER

1. Claimant suffered a compensable industrial injury to his left eye on September 13, 2019 arising out of and in the course and scope of his employment with Respondent-Employer.

2. Respondent-Employer shall pay for Claimant's reasonable and necessary medical treatment related to Claimant's September 13, 2019 injury, including reimbursement of $18,574.90 in outstanding medical expenses. Respondent-Employer is also liable for additional medical treatment that is reasonable, necessary and causally related to the work injury.

3. Claimant's AWW is $1,150.00.

4. Respondent-Employer shall pay Claimant TTD in the amount of $18,400.08, representing a period of 24 weeks at a TTD rate of $766.67, subject to applicable offsets.

5. Respondent-Employer shall pay Claimant TPD in the amount of $21,475.28, representing a period of 58.57 weeks at a rate of $366.66, subject to applicable offsets.

6. Claimant's claim for a disfigurement award is dismissed, without prejudice.

7. For failing to maintain workers' compensation insurance, Respondent-Employer shall pay $14,437.57 (25% of $57,750.26) to the Colorado Uninsured Employer Fund. The check shall be payable to the Division of Workers' Compensation, 633 17th Street, 9th Floor, Denver, CO 80202, Attention Iliana Gallegos, Revenue Assessment Officer.

8. Respondent-Employer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

9. In lieu of payment of the above compensation and benefits to the Claimant, the Respondent-Employer shall:

   a. Deposit the sum of $57,750.26 with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to and sent to the Division of Workers' Compensation, 633 17th Street, 9th Floor, Denver, Colorado 80202, Attention: Gina Johannesman / Trustee Special Funds Unit; or

b. File a surety bond in the sum of $57,750.26 with the Division of Workers' Compensation within ten (10) days of the date of this order:

    i. Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation; or

    ii. Issued by a surety company authorized to do business in Colorado.

    iii. The bond shall guarantee payment of the compensation, penalties and benefits awarded.

10. Respondent-Employer shall notify the Division of Workers' Compensation, and counsel for the Claimant, of payments made pursuant to this order.

11. The filing of any appeal, including a petition to review, shall not relieve the Respondent-Employer of the obligation to pay the designated sum to the Claimant, to the trustee or to file the bond as required by paragraph (b) above. §8-43-408(2), C.R.S.

12. Any interest that may accrue on a cash deposit shall be paid to the parties receiving distribution of the principal of the deposit in the same proportion as the principal, unless an agreement or Order authorizing distribution provides otherwise.

13. Pursuant to § 8-42-101(4), C.R.S., any medical provider or collection agency shall immediately and forthwith cease and desist from any further collection efforts from the Claimant because the Respondent-Employer is solely liable and responsible for the payment of all medical costs related to the Claimant's work injury.

14. All matters not determined herein are reserved for future determination.

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

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

DATED: June 10, 2021

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-107-502-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

[Redacted],

Claimant,

v.

[Redacted],
Employer,

and

SELF-INSURED,

Self-Insured Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on May 27, 2021, in Denver, Colorado. The hearing was recorded by Google Meets (reference: 5/27/21 , Google Meets, beginning at 1:30 PM, an ending at 3:00 PM).

The Claimant was present in person, virtually, and represented by [Redacted], Esq. Respondent was represented by [Redacted], Esq., Assistant City Attorney.

Hereinafter [Redacted] shall be referred to as the “Claimant." [Redacted], shall be referred to as the “Employer” or “Respondent.” All other parties shall be referred to by name.

Claimant’s Exhibits 1 through 8 were admitted into evidence, without objection. Respondent’s Exhibits A through K were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant , which was filed, electronically, on June 4, 2021. On June 9, 2021, counsel for Respondent filed a response, indicating that counsel for Claimant emailed the proposed decision to a “fictitious person” at the Respondent   Further, counsel for Respondent indicates receipt of the proposal via U.S. Mail at the close of business on June 8, 2021. Ultimately, Respondent indicates that the proposed order “are consistent with the rulings made by the ALJ on May 27, 2021” from the bench. Respondent further indicates that the Respondent will file a Final Admission of Liability, consistent with the permanent impairment, rating assigned by the Division Independent Medical Examiner (DIME), Caroline Gellrick, M.D. After a consideration of the proposed decision and response thereto, the ALJ has modified the proposal and hereby issues the following decision.

ISSUE

The sole issue herein concerns whether Respondent has overcome the DIME rating of 34% whole person and 7% whole person, separately, for mental impairment.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. The Claimant suffered the compensable occupational disease (OD) of prostate cancer, with complications, on June 7, 2019. See § 8-41-209, C.R.S. He was initially referred for treatment to COSH at Denver Health and eventually underwent a robotic assisted laparoscopic prostatectomy with Samson Shen, M.D., at Kaiser on November 5, 2019 (Claimant’s Exhibit 7).

2. After surgery, the Claimant continued in treatment with authorized treating physician (ATP) Jennifer Pula, M.D. (COSH). Dr. Pula placed the Claimant at maximum medical improvement (MMI) on August 20, 2020 (Claimant’s Exhibit 4).

3. On May 7, 2019, ATP Dr. Pula rendered the opinion that Claimant had suffered a 39% whole person permanent medical impairment. This included an assigned whole person impairment of 34% for his prostate cancer, with a 7% whole person impairment from Stephen Moe, M.D., a psychiatrist. Claimant’s MMI date of August 20, 2020, is not challenged by either party (Claimant’s Exhibit 4, bates stamp 52) and the ALJ finds that MMI was reached on August 20, 2020..

Division Independent Medical Examination (DIME) of Caroline Gellrick, M.D.

4. Respondent sought a DIME, which was performed by Dr. Gellrick. DIME Dr. Gellrick was of the opinion that Claimant was entitled to a 39% whole person impairment rating, which included a 7% whole person for mental impairment.

5. Dr. Gellrick was of the opinion that the Claimant’s impairment rating contained a 20% whole person impairment for bladder dysfunction.

Respondent’s Independent Medical Examiner (IME), John Burris, M.D.

6. Respondent challenged the DIME opinion of Dr. Gellrick, relying on the medical testimony of IME Dr. Burris. Dr. Burris disagreed with DIME Dr. Gellrick’s bladder rating of 20% whole person for the Claimant’s dysfunction. He stated the opinion that Claimant’s whole person impairment for bladder dysfunction was limited to 5% whole person. Dr. Burris offered no clearly convincing, underlying rationale for his 5% attributable to the bladder, as opposed to Dr. Gellrick’s 20% rating, attributable to the bladder

7. Although Dr. Burris expressed an arguable, credible difference of opinion with DIME Dr. Gellrick’s rating, he did not demonstrate that the rating of DIME Dr. Gellrick was clearly erroneous, nor did this difference of opinion rise to the level of “highly persuasive, probable and free from serious and substantial doubt.

The Claimant

8. The Claimant credibly testified that he has ongoing/continuous bladder problems including daily leakage for which he must wear an absorbent pad throughout the day. His bladder dysfunction causes limitations to activities of daily living. Although he is performing the essential functions of his job as a firefighter, this is interfered with by an ongoing problem of bladder leakage. His bladder problem has improved somewhat since April 20, 2021, but it is still continuous, not sporadic. Additionally, the Claimant requires and receives ongoing medical attention from his doctors at the Urology Center of Colorado (TUCC).

Claimant’s IME, Ronald Swarsen, M.D..

9. Dr. Swarsen, is a Level II certified doctor, was called to testify. Dr. Swarsen stated that DIME Dr. Gellrick’s impairment rating was consistent with the AMA *Guides to the Evaluation of Permanent Impairment* 3rd Ed., Rev.

Ultimate Findings

10. The ALJ finds that the opinions of Dr. Swarsen and of DIME Dr. Gellrick on the degree of permanent medical impairment are more credible than the opinion of IME Dr. Burris.

11. Between conflicting medical opinions on the degree of permanent medical impairment, the ALJ makes a rational choice, based on substantial evidence, to

accept the opinions of DIME Dr. Gellrick and Claimant's IME Dr. Swarsen, and to reject the opinion of IME Dr. Burris.

12. Respondent has failed to demonstrate that the DIME opinion of Dr. Gellrick is free from serious and substantial doubt, and that it is highly probable that Dr. Gellrick's opinion is clearly in error. Therefore, Respondent failed to overcome the DIME opinion concerning the degree of Claimant's permanent medical impairment by clear and convincing evidence. The DIME opinion of Dr. Gellrick has **not** been overcome in any respect.

13. The opinions of DIME Dr. Gellrick and IME Dr. Swarsen support the Claimant's need for post-maximum medical improvement (MMI) medical maintenance care *Grover* meds). The ALJ finds that the Claimant has proven the need for *Grover* meds by a preponderance of the evidence..

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, 2012 COA 85. The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof).

See Young v. Burke, 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinions of Dr. Swarsen and of DIME Dr. Gellrick on the degree of permanent medical impairment were more credible than the opinion of IME Dr. Burris. Therefore, the opinions of the former support the DIME determination of permanent medical impairment.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting medical opinions, the ALJ made a rational choice, based on substantial evidence, to accept the DIME opinions of Dr. Gellrick, the IME opinion of Dr. Swarsen, and to reject the IME opinion of Dr. Burris.

Elevated Burden of Proof

c. The DIME's determinations regarding whole person impairment are binding unless overcome by clear and convincing evidence. §8-42-107(8)(b) and (c), C.R.S.; *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998).

d. "Clear and convincing evidence" means evidence which is stronger than a mere preponderance. It is evidence that is highly probable and free from serious or substantial doubt." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Therefore, the party challenging a DIME's conclusions must demonstrate it is "highly probable" that the impairment findings are incorrect. *Qual-Med*, 961 P.2d at 592. A party meets this burden if the evidence contradicting the DIME physician is "unmistakable and free from serious or substantial doubt." *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). As found, this is **not** the case herein.

e. A DIME physician must rate impairment in accordance with the provision of the AMA Guides. §8-42-101(3.7), C.R.S.; *Wilson v. Indus. Claim Appeals Office*, 81 P.3d 1117 (Colo. App. 2003). Whether the DIME physician properly applied the AMA Guides is an issue of fact for determination by the ALJ. *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000). Once the ALJ determines that the DIME's rating has been overcome in any respect, the ALJ is free to calculate the claimant's impairment rating based upon the preponderance of the evidence. *Garlets v. Memorial Hospital*, W.C. No. 4-336-566 (Sept. 5, 2001). As found herein above, the DIME opinion of Dr. Gellrick has **not** been overcome in any respect.

f. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to post-MMI medical maintenance benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained his buirden on post-MMI medical maintenance benefits.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. Respondent having failed to overcome the Division Independent Medical Examination of Caroline Gellrick, M.D., the degree of Claimant's permanent medical impairment is 34% whole person, plus 7% whole person impairment for mental impairment, to be paid separately under the provisions of §8-42-107 (7) (b) (III).

B. The Claimant reached maximum medical improvement on August 20, 2020. Therefore, Respondent shall pay the Claimant permanent partial disability benefits, based on 34% working unit, plus 7% working unit for mental impairment, paid according to the limitations set forth in §8-42-107 (7) (b) (III), C.R.S.

C. Respondent shall pay all of the authorized, reasonably necessary and causally related post-maximum medical improvement maintenance benefits, subject to the Division of Workers' Compensation Medical Fee Schedule.

D. Respondent shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all indemnity benefits due and not paid when due.

DATED this 14th day of June 2021.

DIGITAL SIGNATURE

EDWIN L. FELTER, JR.
Administrative Law Judge

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

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that his average weekly wage (AWW) should be higher than the previously admitted to AWW of $1,341.64.

FINDINGS OF FACT

1. The claimant worked for the employer at the [REDACTED] (a coal mine) for 20 years. In January 2020 he was working full-time in Surface Utility on the overland belts. The claimant earned a different hourly rate depending upon the shift worked. In addition the claimant was eligible for overtime pay. The different hourly rates were negotiated by the union and ratified every five years.

2. The claimant suffered an injury at work on January 17, 2020. The respondents have admitted liability for the injury. In addition, the respondents have admitted an average weekly wage (AWW) of $1,341.64.

3. The ALJ calculates that when the admitted AWW is multiplied by 52 weeks in a year, the total indicates annual earnings of $69,765.28.

4. The respondents began paying the claimant temporary total disability (TTD) benefits based upon the AWW of $1,341.64 beginning on January 18, 2020.

5. The pay records entered into evidence indicate that the claimant's year to date gross earnings for 2019 were $82,541.45. The claimant argues that this is the amount that should be used in calculating the claimant's AWW on the date of his injury in January 2020. When this total is divided by 52 weeks in a year, it results in an AWW of $1,587.33.

6. In December 2019, the claimant was paid $6,939.59 for "Annual Incentive". Danny C[REDACTED], Human Resources Manager for the employer testified that this annual incentive fluctuates each year. The amount of the incentive depends upon market conditions, mine production, the quality of the coal produced, whether or not there are MSHA[1] or other safety violations. An employee can be paid a bonus between zero percent to 10 percent of their gross wages. This rate is determined by mine ownership.

7. The pay records indicate that the claimant received a YTD total of $2,049.84 for "Bonus". This was paid to the claimant in three payments. The first was on January 11, 2019 in the amount of $375.00. The second was on January 25, 2019 in the amount

[1] Mine Safety and Health Administration.

of $324.84. The claimant was then paid an additional $1,350.00 on November 15, 2019. The parties agree that the payment of $1,350.00 was the annual Christmas bonus.

8. Mr. C[Redacted] testified that each year all employees are paid a Christmas bonus, which fluctuates between $1,200.00 to $1,500.00 per year. In 2019, the claimant's Christmas bonus was $1,350.00.

9. The pay records indicate that the claimant received a YTD total of $1,817.02 for "Incentive". Mr. C[Redacted] testified that such payments are paid as an "extra bonus".

10. Each year, the claimant is paid a clothing allowance of $650.00 per year. Mr. C[Redacted] testified that in 2019 employees were paid an additional clothing allowance of $1,000.00. This one time payment was paid pursuant to the union contract.

11. The claimant was also paid $600.00 in 2019 for "Safety". Mr. C[Redacted] testified that these payments are made following a monthly drawing. Each month in which there are no safety violations, employees are entered into a drawing to win between $100.00 and $500.00.

12. The claimant testified that the clothing allowance of $650.00 and the Christmas bonus are paid every year. The claimant also testified that "Incentive", "Bonus", and "Safety" amounts are not paid every year. When these other incentives and bonuses are paid, the payments fluctuate in amount.

13. The claimant testified that the "Annual Incentive" is paid each year, but those payments vary from year to year. The claimant also testified that the incentive paid as the "Annual Incentive" used to be paid monthly, but at some point was converted to an annual payment.

14. The respondents agree that the claimant's AWW should be increased. However, the respondents argue that such an increase should only reflect the annual Christmas bonus and annual clothing allowance. The respondents calculate that the AWW should be increased by $62.03 per week, for a total AWW of $1,403.67.

15. The ALJ is persuaded that the annual clothing allowance and a Christmas bonus of between $1,200.00 and $1,500.00 are paid to the claimant every year and the claimant can rely on receiving those payments. As the Christmas payment for 2019 was $1,350.00, the ALJ adopts this amount in calculating the claimant's AWW.

16. In calculating the claimant's AWW, the ALJ declines to include the 2019 "Incentive", "Bonus", and "Safety" amounts as these vary each year, and are not always paid to employees. Therefore, the claimant does not have access to those amounts on a day-to-day basis,nor an immediate expectation of receiving the benefit under appropriate, reasonable circumstances.

17. The ALJ also declines to include the amount of the 2019 “Annual Incentive”. The ALJ credits the testimony of Mr. C[Redacted] that this incentive fluctuates upon market conditions, mine production, the quality of the coal produced, whether or not there are safety violations. Although the claimant testified that he received the Annual Incentive each year, it is clear that the amount paid varied from year to year. Therefore, the claimant does not have access to that payment on a day-to-day basis, nor does he have an immediate expectation of receiving the benefit under appropriate, reasonable circumstances.

18. The ALJ calculates that the claimant’s AWW for this claim should be $1,393.94. The ALJ reaches this AWW as follows: The claimant’s gross earnings for 2019 were $82,541.45. The ALJ deducts from that total $6,939.59 in Annual Incentive; $2,049.84 in Bonus; $1,817.02 in Incentive; and $600.00 in Safety for a total of $71,135.00. Then, the ALJ adds back $1,350.00 for the Christmas bonus for a new total of $72,485.00. When this is then divided by 52 weeks in a year, the average is $1,393.94.

19. The ALJ recognizes that there is an order on appeal regarding the claimant’s entitlement to temporary total disability (TTD) benefits beginning on May 26, 2020 and thereafter. The present order is not intended to impact, in any way, any rulings, decisions, orders, or appeals related to that prior matter. Therefore, this present order applies to the calculation of TTD benefits from January 18, 2020 through May 25, 2020. Any additional TTD benefits which may be found to be due beginning May 26, 2020, would be assessed utilizing the new AWW of $1,393.94, once the current appeals have been exhausted on that prior matter.

CONCLUSIONS OF LAW

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

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

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness’s testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and

action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

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

5. Section 8-42-102(2), C.R.S. requires the ALJ to base claimant's average weekly wage (AWW) on his earnings at the time of the injury. In order for a particular payment to be considered "wages" it must have a "reasonable, present-day, cash equivalent value," and the claimant must have access to the benefit on a day-to-day basis, or an immediate expectation of interest in receiving the benefit under appropriate, reasonable circumstances. *Meeker v. Provenant Health Partners*, 929 P.2d 26 (Colo. App. 1996). Under some circumstances, the ALJ may determine the claimant's TTD rate based upon his AWW on a date other than the date of the injury. *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). Section 8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO, May 7, 2007).

6. Section 8-40-201(19)(a), C.R.S., defines wage as "the money rate at which the services rendered are recompensed under the contract of hire in force at the time of injury." Section 8-40-201(19)(b), C.R.S., provides that "wages" shall include the value of certain fringe benefits including health insurance, and the reasonable value of board, rent, housing, and lodging. However, it also states that wages, "shall not include any similar advantage or fringe benefit not specifically enumerated in this subsection (19)."

7. In *Meeker v. Provenant Health Partners*, 929 P.2d 26, the Colorado Court of Appeals developed a test for whether an employer-paid benefit is a wage or enumerated fringe benefit. *Meeker* held that an employer-paid benefit constitutes wages if it has a "reasonable, present-day, cash equivalent value," and the employee has access to the benefit on a "reasonable day-to-day basis," or has "an immediate expectation of interest in receiving the benefit under appropriate, reasonable circumstances." *Id.*

8. In *Dan Yex v. ABC Supply Company and Ace/ESIS Insurance*, W.C. No. 4-910-373 (May 16, 2014), ICAP relied on the *Meeker* case, and its progeny *Orrell v. Coors Porcelain*, WC No. 4-251-934 (May 22, 2997), and determined that an employee's bonus earned during the employer's busy season was properly excluded from the AWW. The claimant in *Yex* had injured his back in December 2012 and asserted he received a bonus in April 2012. The ALJ found the employees were awarded bonuses if their branch showed a profit in the previous calendar year. Some years resulted in a bonus and others did not. Under *Meeker*, the ALJ reasoned that the bonus did not have a present day cash

equivalent value, the claimant did not have access to the proceeds of the bonus on a day to day basis, and did not have an immediate expectation of receiving the bonus. The bonus was appropriately identified as a fringe benefit not included in the calculation of wages.

9. As found, the claimant was paid fringe benefits in the form of “Incentive”, “Bonus”, and “Safety” as these payments were not paid every year, and when paid would vary in amount.

10. As found, the “Annual Incentive” was also a fringe benefit. As found, although the claimant received the Annual Incentive each year, that amount varied from year to year.

11. As found, the claimant did not have access to those amounts on a day-to-day basis, or an immediate expectation of receiving the benefit under appropriate, reasonable circumstances. However, with regard to the annual payments for a Christmas bonus and clothing allowance, the claimant did have an immediate expectation of receiving the benefit under appropriate, reasonable circumstances. As found, the AWW for this claim shall be $1,393.94.

ORDER

It is therefore ordered:

1. The claimant’s AWW for this claim shall be $1,393.94.

2. As noted above, this order shall be applied to the calculation of TTD benefits from January 18, 2020 through May 25, 2020.

3. Any additional TTD benefits which may be found to be due beginning May 26, 2020, would be assessed utilizing the new AWW of $1,393.94, once the current appeals have been exhausted on that prior matter.

4. The respondents shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined here are reserved for future determination.

Dated this 16th day of June 2021.

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

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

ISSUES

- Did Claimant prove she suffered a compensable injury on October 17, 2019?

  If Claimant proved a compensable injury, the following issues will be addressed:

- Medical benefits.
- Average weekly wage.
- Two weeks of temporary total disability benefits.

FINDINGS OF FACT

1. Claimant has worked as a sales representative in Employer's call center for almost seven years. Her job primarily entails speaking with customers and potential customers by telephone.

2. Claimant's medical history incudes allergies to sulfa drugs. She also has a documented history of sinus congestion, cough, post-nasal drip, and sore throat.

3. At some point, Claimant conflated her allergy to sulfa drugs with an allergy to the element sulfur. For years, Claimant has experienced recurrent episodes of hoarseness, voice loss, headaches, and breathing difficulty she attributes to strong odors, sulfur smells, fireworks, match smoke, and wine sulfur exposure. She has this "reaction" multiple times per year and "deduced" they are triggered by "substances with sulfur."

4. Claimant also has reactions to asphalt paving operations.

5. On May 8, 2018, she sought treatment at Urgent Care for congestion, cough, itchy throat, and dyspnea she attributed to an "allergic reaction." She stated, "she took a walk around 11 am and there was construction going on. Pt believes she may have inhaled something in the air. . . . Last year she had pneumonia after exposure to match smoke, the sulfur smell."

6. Similarly, on April 18, 2019, Claimant went to Urgent Care for sinus congestion, cough, and difficulty breathing she believed was triggered by an "allergic reaction." Claimant reported, "She is very allergic to sulfa. . . . They are paving at her work and she walked to her car and thinks there was a sulfa component in the air. States she started coughing a lot."

7. Claimant was evaluated by an allergy specialist, Dr. Mark Ebadi on May 2, 2019, to investigate her complaints of recurrent laryngitis, hoarseness, and sudden onset dyspnea triggered by "strong odors, sulfur smells, and smoke." The testing was "totally

negative" for all environmental allergens. Dr. Ebadi opined, ["Claimant's] laryngitis is most likely due to postnasal drainage and frequent and forceful throat clearing. GERD may also be a contributing factor. Her clinical history is also highly suggestive of vocal cord dysfunction – her episodes of dyspnea occur sporadically, often triggered by strong smells, and are characterized by throat tightening, hoarseness, and inspiratory dyspnea when they do occur."

8. On May 13, 2019, Claimant's PCP, Dr. Kimberly Winter, documented, "[Claimant] is here to review short-term disability paperwork. She has missed a significant amount of work due to allergic reaction to the sulfur used in the paving of the parking lot at her work. She has a sulfa allergy and had tried to not be at work that day but the work was done a day earlier than planned. She immediately started having trouble breathing." Physical examination revealed no abnormality besides a slightly hoarse voice.

9. Claimant saw Dr. Winter for another such incident in August 2019.

10. Claimant usually works at Employer's call center in Golden, Colorado. The parking lot at the call center was being re-surfaced on October 17, 2019. Not wishing to cause potential distress or discomfort to a long-term employee, Claimant's manager recommended she work at Employer's alternate facility in downtown Denver the rest of the week.

11. During her lunch break on October 17, Claimant left the office building to locate the light rail station for her daily commutes the rest of the week. She walked around the corner of the building and discovered a street paving operation underway. She briefly smelled asphalt, covered her mouth, and quickly retreated inside. Claimant felt "tightening" in her throat and had difficulty breathing.

12. Claimant testified she left work and went to Urgent Care "the same day." However, her timeline is not supported by the medical records, which show she was seen at AFC Urgent Care the next day (October 18, 2019). Her chief complaint was "Allergic reaction [Onset 1 day(s)]." The physical examination showed no abnormalities. Notably, the oropharyngeal examination was entirely normal, including the posterior pharynx. No lung or breathing abnormalities were appreciated. The provider documented "no throat swelling or voice changes. No mucous membrane involvement. No wheezing. No angioedema." Claimant was given a nonspecific diagnosis of "allergic reaction" and prescribed prednisone.

13. Claimant saw Dr. Winter on October 23, 2019 for "another episode of voice hoarseness caused by breathing reaction to sulfur and asphalt." The examination was normal except some erythema in the posterior oropharynx. Dr. Winter assessed, "recurrent reaction to chemical substance, the sulfur in asphalt. This causes vocal cord dysfunction." She took Claimant off work for an unspecified time. Claimant testified she missed approximately two weeks from work.

14. Claimant saw Dr. Elizabeth George and Dr. Brian Modena at National Jewish Health on January 10, 2020. She reported a lengthy history of reactions to items

“including fireworks, hot asphalt, red wine, matches (she deduced this was substances with sulfur). . . . The reaction is characterized by rhinorrhea, loss of voice, coughing, shortness of breath which has progressed to throat closure more recently, she describes this as a ‘lung pain’ or her ‘lungs were on fire.’” Claimant’s voice was “mildly hoarse” but examination of her oral cavity and pharynx were normal with no inflammation, edema, exudate, or lesions. Dr. George and Modena opined, “She likely has some susceptibility to inflammation of the pharynx and vocal cords which is likely driven by a combination of gastroesophageal reflux, postnasal drip, and overuse.” They further opined, “We suspect there may still be a component of VCD given her constellation of symptoms secondary to strong odors with residual hoarseness which points to involvement of vocal cords.” Claimant was not diagnosed with any allergic condition.

15. Dr. Jeffrey Schwartz, a pulmonologist, performed an IME for Respondents on April 22, 2020. He also testified at hearing to elaborate on the opinions expressed in his report. Dr. Schwartz explained an “allergy” is an immunologic reaction to an organic substance. One cannot have an “allergy” to sulfur because sulfur is an inorganic element. Some individuals (including Claimant) can have allergic reactions to sulfonamide, an antibiotic commonly called sulfa. Although sulfonamide contains a sulfur molecule, the allergic reaction is not caused by the sulfur. Dr. Schwartz opined there is no evidence to suggest Claimant had an allergic reaction to asphalt fumes and there is no pathophysiological basis to conclude Claimant’s reported lung symptoms are related to asphalt exposure. Dr. Schwartz agreed asphalt fumes can cause irritations to the skin or lungs if inhaled directly, but these reactions typically occur among road crew workers with prolonged and repeated exposure to asphalt. It is not plausible for a reaction to occur from brief exposures such as those described by Claimant. Dr. Schwartz opined Claimant’s subjective complaints of throat swelling are not supported by objective evidence, and pointed to normal upper airway examinations on October 18 and October 23, 2019. Dr. Schwartz opined the symptoms reported by Claimant have no physiologic basis and are most commonly psychogenic. Ultimately, Dr. Schwartz concluded the symptoms Claimant experienced in October 2019 were unrelated to exposure to asphalt fumes or any other work-related cause.

16. Dr. Schwartz’s opinions and conclusions are credible and persuasive.

17. Claimant failed to prove she suffered a compensable injury arising out of and in the course of her employment.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The mere fact an employee experiences symptoms at or after work does not automatically establish a compensable injury. *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (October 27, 2008); *Garamella v. Paul’s Creekside Grill, Inc.*, W.C. No. 4-519-141 (March 6, 2002). The claimant must prove that an injury directly and proximately caused the condition for which she seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). A claimant need not provide expert medical opinion evidence and can support a claim by any competent evidence. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983).

The existence of a pre-existing condition does not disqualify a claim for compensation or medical benefits. If an industrial injury aggravates, accelerates, or combines with a pre-existing condition to produce disability or a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). In evaluating whether a claimant suffered a compensable aggravation, the ALJ must determine if the need for treatment was the proximate result of the claimant's work or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

As found, Claimant failed to prove she suffered a compensable injury on October 17, 2019. By her own account, Claimant immediately turned around once she saw the paving operation and went back inside the office building. There is no persuasive evidence of any biologically plausible mechanism whereby such a fleeting exposure to asphalt fumes would proximately cause a need for medical treatment or disability. Dr. Schwartz's causation opinions and conclusions are credible and persuasive. Claimant suffered no physical injury to her vocal cords or respiratory system because of the asphalt fumes.

At most, Claimant's symptoms reflect an idiosyncratic psychological response to an otherwise non-injurious stimulus. But Claimant has not presented her claim as one based on mental impairment, and, in any event, there is no persuasive evidence she satisfies the requirements of § 8-41-301(2) and (3) regarding mental impairment claims. She did not prove she experienced a psychologically traumatic event generally outside her usual work experience that would evoke significant symptoms of distress in a worker in similar circumstances. *E.g., Granados v. Comcast Corporation*, W.C. No. 4-724-768 (February 19, 2010). Nor does she satisfy § 8-41-302(1), because the "hazard" allegedly triggering her emotional reaction (asphalt paving) is far more common outside her employment than inside a call center.

ORDER

It is therefore ordered that:

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

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

DATED: June 16, 2021

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-096-055-003

ISSUES

The issues set for determination included:

- Did Claimant prove by a preponderance of the evidence that she sustained a compensable injury on December 11, 2018?

- If Claimant has proven by a preponderance of the evidence that she sustained a compensable injury, has she also proven by a preponderance of the evidence that she is entitled to TTD benefits?

- Is Claimant entitled to medical benefits to cure and relieve the effects of her December 11, 2018 injury?

- What was Claimant's average weekly wage ("AWW").

PROCEDURAL POSTURE

After the hearing, Claimant filed a Motion for an Adverse Inference Based on Spoliation of Evidence and to Reopen the Record if Necessary on March 16, 2020. Respondent opposed said Motion and denied spoliation of evidence occurred in this instance, filing the Response to the Motion on March 30, 2020. The ALJ concluded said Motion was moot, as it is unnecessary to decide the compensability and benefits issues before the Court.

The undersigned issued a Summary Order on April 12, 2021. Respondent filed a timely Request for Specific Findings of Fact and Conclusions of Law on April 19, 2021. Claimant filed timely proposed Amended Findings of Fact, Conclusions of Law and Order on April 26, 2021. Respondent filed an Objection to Claimant's Amended Findings of Fact, Conclusions of Law and Order on May 3, 2021.

On or about May 4, 2021, Claimant filed a Motion to Strike Respondent's Objection to Claimant's proposed Amended Findings of Fact, Conclusions of Law and Order. Respondents filed a "Response to the Motion to Strike on May 13, 2021. That Motion is granted because the Summary Order set a deadline of five (5) working days for submissions of revised proposed orders and any objection. Respondent's submission was untimely and stricken.

FINDINGS OF FACT

1. Claimant worked as a cashier for Employer for a little more than thirteen years.

2. Claimant‘s medical history was significant for a right elbow injury which occurred approximately 7-8 years ago. She also injured her right shoulder approximately 10 years ago. There was no evidence Claimant had residual problems/work restrictions related to these injuries. She did not require treatment for her shoulder or elbow in the year before December 2018.

3. Claimant treated at St. Anthony's North Family Med. Ctr. for head and neck pain in 2014-15 following a motor vehicle accident, as well as for migraine headaches in 2017-18. Claimant had a fall in July 2018 and treated for right knee and right-sided pain (one time). There was no evidence in the form of medical records admitted at hearing that Claimant required treatment for cervical/thoracic spine in the year before December 11, 2018.

4. There was evidence admitted at hearing that Claimant was subject to disciplinary action while working for Employer. This evidence included write-ups. The ALJ declined to conclude that this was motive for Claimant to claim an injury on December 11, 2018, if one did not occur.

5. Claimant testified she was off work in 2018 for approximately four (4) months for treatment of a non-work injury to her left ankle, which required surgery. The ALJ found this impacted Claimant's earnings. From September 3, 2018 – December 9, 2018, Claimant earned a total of $15,515.05 in the weeks prior to her injury.[1] Claimant's AWW for this 14 weeks was $1,108.22.

6. On December 11, 2018, Claimant sustained an injury while she was folding clothes. [Claimant Redacted] took a lunch break that day from 4:24pm–4:45pm. She then worked in the clothes department to straighten out the clothing because the cashier area was not that busy. Claimant testified the injury occurred when she reached over to grab an Eddie Bauer fleece to put in a basket. She said she felt pain all the way down her right side, from her shoulder to her back. Claimant described the pain as "substantial" and said it felt like she pulled something. There was no one in her immediate vicinity. The ALJ found Claimant was credible when describing the injury.

7. Claimant testified she was not able to move as quickly after she was hurt. Claimant reported the injury 10-15 minutes later to Michelle O'Connor, who was a front-end supervisor for Employer and also told two cashiers with whom she worked ([Names Redacted]). Claimant estimated the time of the injury to be about 6:15 p.m.[2]

8. After taking a break, Claimant worked as a cashier assistant and cashier. This was depicted on the video. The ALJ reviewed the video, which corroborated Claimant's description of what she was doing that evening. Claimant testified she met

[1] Exhibit 10.

[2] Hearing Transcript ("Hrg. Tr.") p. 25:3-4.

with the manager, Joyce, who completed the incident report.[3] Claimant completed her shift at 9:00 p.m.

9. There were video cameras in the area where Claimant was injured. These were within the exclusive control of Employer. P[Redacted] testified as a representative of Employer with regard to the video recording system. He is an Assistant General Manager. Assistant General Managers, as well as General Managers have access to the video. P[Redacted] said the video is stored on the server for 90 days and can be downloaded. Mr. P[Redacted] was contacted by the corporate office to find the video on which Claimant appeared. Mr. P[Redacted] testified he reviewed the camera feeds for Claimant's date of injury; a process which took two days.

10. There were fourteen cameras in the warehouse on December 11, 2018, three were focused on the area where Claimant was folding clothes. Mr. P[Redacted] testified he went back 15-20 minutes before the time of the injury. There was not a continuous video of Claimant working her entire shift that day, as there were times she went out of the picture. Mr. P[Redacted] copied those portions of the recording onto a file. Mr. P[Redacted] confirmed there was no video for the period 6:18 to 6:53 p.m.[4]

11. Mr. P[Redacted] admitted on cross-examination there were areas of the floor not covered by video and it was conceivable that something could happen and not be shown on the video. In addition, he was unsure where the Eddie Bauer fleeces were located on December 11, 2018.

12. The ALJ found Employer had exclusive control over the cameras and resulting video recordings on December 11, 2018.[5]

13. Claimant was treated at Concentra, the ATP for Employer and was evaluated by Darla Draper, M.D. on December 13, 2018. At that time, Claimant had pain in the right shoulder/upper arm, back and neck. Claimant's pain diagram specified the pain ran down her right side, including the mid to lower back.

14. Dr. Draper's diagnoses were: strain of muscle, fascia tendon at neck, shoulder/upper arm; strain of muscle and tendon of unspecified wall thorax. Dr. Draper issued work restrictions, including no use of the right upper extremity. Claimant was allowed to lift and push/pull up to 20 pounds occasionally up to three hours per day, but was restricted from reaching above shoulder level.

[3] Exhibit 1.

[4] This refers to the actual time. The video timestamp was actually one hour behind.

[5] As noted, *supra*, the ALJ concluded that Claimant's Motion for an Adverse Evidentiary Inference Based On Spoliation and to Reopen the Record If Necessary was moot, as it was not necessary to determine the issue of compensability. However, to the extent Employer failed to preserve relevant portions of the video that it knew or should have known were relevant and these were not maintained/preserved, Claimant would have been entitled to such an inference. *Aloi v. Union Pacific*, 129 P. 3d 999, 1002 (Colo. 2006)

15. Claimant returned to Concentra on December 27, 2018 and January 7, 2019 and was evaluated by Dr. Draper and Diana Halat, NP, respectively. Claimant‘s pain complaints remained consistent and she was prescribed physical therapy (“PT“), chiropractic treatment, acupuncture and an N wave unit. Claimant’s work restrictions were continued at those appointments.

16. Dr. Draper evaluated Claimant on January 21, 2019. Dr. Draper‘s assessment was right shoulder strain; strain of upper arm, right; thoracic myofascial strain; allergic reaction; cervical strain. Claimant’s restriction of no use of right upper extremity was in place through the January 21, 2019 appointment. Claimant’s other restrictions included: lift and push/pull up to 20 pounds occasionally up to three hours per day, but was restricted from reaching above shoulder level. Claimant was to sit 50% of the day. Dr. Draper referred Claimant to John Sacha, M.D. The ALJ inferred Dr. Draper was of the opinion Claimant required additional treatment for her work injury at the time she referred Claimant to Dr. Sacha.

17. On January 23, 2019, Claimant was evaluated by Dr. Sacha. She reported pain with right anterosuperior and posterior shoulder, worse with overhead activity. Claimant also said she had mild radiating pain when the shoulder pain was bad, which extended down to the right buttock. The right shoulder was positive for pain on the right, with diminished range of motion (“ROM”) with internal rotation. Crepitus was noted in the right shoulder. The ALJ found this was objective evidence of physiology present in the right shoulder. Dr. Sacha‘s impression was: rotator cuff tendinitis, rule out full–thickness tear; secondary myofascial pain. Dr. Sacha recommended a right MRI arthrogram of the shoulder.

18. On February 12, 2019, Claimant underwent an open MRI of the right shoulder. The films were read by Stephen Abrams, M.D., whose impression was: no evidence for full-thickness rotator cuff tear; no evidence for labral tear; focal thickening and increased signal within the distal/anterior supraspinatus tendon. This most likely represented tendinopathy/tendinosis or partial intrasubstance tearing. Trace amount of fluid in the subacromial/subdeltoid bursa was likely related to subacromial bursitis.

19. Claimant returned to Dr. Sacha on February 19, 2019. At that time, he reviewed the MRI of the shoulder, which showed supraspinatus tendinitis. Dr. Sacha could not rule out a very small partial tear, but no full-thickness tear was present. Dr. Sacha‘s impression was: shoulder impingement. He recommended treatment which included ultrasound-guided right shoulder injection scheduled for later this week. Claimant was to continue with chiropractic treatments and acupuncture. Claimant‘s work restrictions were continued.

20. Dr. Sacha reevaluated Claimant on March 11, 2019. He noted mild tenderness over the trapezius and cervical paraspinal muscles, as well as an equivocal Spurling test. Dr. Sacha‘s impression was: shoulder impingement; secondary myofascial pain. He referred Claimant to Mark Failinger, M.D. and based upon this referral, the ALJ inferred Dr. Sacha believed Claimant required treatment. Claimant

was okayed for full duty. Dr. Sacha did not conclusively state Claimant was at MMI and no WCM 164 was completed by him to that effect.

21. Claimant testified she tried returning to work after Dr. Sacha released her to full duty and completed a partial shift. Dr. Draper reinstated restrictions and she has not been offered modified duty by Employer. The ALJ determined Claimant could not perform her regular job duties with the restrictions issued by Dr. Draper.

22. The attending physician, Dr. Draper, did not release Claimant to return to work through March 13, 2019. Dr. Draper evaluated Claimant on March 13, 2019. Dr. Draper referenced Dr. Sacha's March 11, 2019 report and noted Claimant was 25% of the way toward meeting the physical requirements of her job. Dr. Draper's assessment was: right shoulder strain; strain of upper arm and the work restrictions were continued.

23. On March 21, 2019, Dr. Failinger re-evaluated Claimant. On examination, Dr. Failinger noted discomfort on the right side of Claimant's neck, as well as some decreased turning to the right. His impression was: right entire neck, shoulder girdle, back and buttocks pain. Dr. Failinger stated he could not explain this type of injury, as there was "no injury just reaching out, with no lifting and no slip and fall". He could not explain the pain, which she described as diffuse.

24. Claimant received PT at Concentra from December 17, 2018 through March 18, 2019. She also received PT at Concentra Advanced Specialties from March 22, 2019, through July 22, 2019. The records showed Claimant received multiple modalities of treatment at these facilities, with some improvement.

25. When Dr. Failinger saw Claimant again on March 28th, he reviewed the MRI films, which he described as poor quality. He ordered a repeat MRI and the inference derived by the ALJ was that Dr. Failinger wanted to determine whether there were objective bases for Claimant's pain complaints.

26. On April 3, 2018, Claimant returned to Dr. Draper, who noted the repeat MRI was ordered by Dr. Failinger because of the poor quality of the first MRI. Dr. Draper's assessment was the same as the March 13 and 27, 2019 evaluations and Claimant continued to have work restrictions.

27. Dr. Sacha evaluated Claimant on April 8, 2019.[6] At that time, she had complaints of shoulder pain on the right side, right low back and buttocks pain, right periscapular pain and right arm pain. The neck pain was noted to have resolved. Dr. Sacha said Claimant had pain behaviors, but found pain with Hawkins and Neer testing. Tenderness was also noted over the trapezius, but no cervical paraspinal spasm was present.

28. Dr. Sacha's impression was: shoulder strain; non-physiologic presentation; expanded complaints. Dr. Sacha recommended MMI, case closure and

[6] This report was admitted as Exhibit B, pp. 21-22.

impairment rating. He found Claimant was at MMI as of the date of evaluation, with no work restrictions. Claimant was to follow-up with Dr. Failinger after the repeat MRI, if this could be done as maintenance. Dr. Sacha assigned a 3% upper extremity impairment, which converted to a 2% whole person impairment. The ALJ noted no WCM 164 was completed by Dr. Sacha.

29. There is no evidence in the record Claimant returned to Dr. Sacha after April 8, 2019.

30. On April 17, 2019, Claimant was reevaluated by Dr. Draper. Dr. Draper referenced Dr. Sacha's April 8, 2019 report. On examination, Claimant had tenderness in the subacromial bursa, with limited ROM in all planes. Dr. Draper's assessment was: right shoulder strain; strain of upper arm, thoracic myofascial strain; and cervical strain. A lidocaine patch was prescribed by Dr. Draper and Claimant was given a referral to a massage therapist, as well as a referral to Dr. McCranie for a second opinion.[7] Dr. Draper returned Claimant to full work/activity as of this appointment. Dr. Draper estimated the date of MMI as April 28, 2019.

31. Claimant returned to Dr. Failinger on April 18, 2019. At that time, she identified her worst symptoms as in her back, right buttock and mid-back, as her shoulder was not bothering her as much. Dr. Failinger administered an injection at this time. Dr. Failinger made no findings with regard to MMI. The ALJ inferred Dr. Failinger administered was the injection to cure and relieve the effects of Claimant's continuing symptoms. Claimant testified the second injection administered by Dr. Failinger helped her symptoms.[8]

32. One day later, on April 19, 2019, Dr. Draper saw Claimant, and stated she was off for the rest of her shift. Dr. Draper reimposed work restrictions, including no use of the right upper extremity and no reaching above the right shoulder. Claimant was allowed to lift and push/pull up to 20 pounds occasionally up to three hours per day. Claimant was to sit 50% of the time, change position as needed and limit standing to 30 minutes at a time.

33. Claimant underwent a closed right shoulder MRI on April 25, 2019. The films were read by Brian Cox, M.D. Dr. Cox's impression was: moderate supraspinatus tendinosis; mild infraspinatus tendinosis; moderate tendinosis involving the biceps tendon; mild acromioclavicular degenerative joint disease with moderate subacromial bursa edema.

34. Claimant underwent an IME with Michael Striplin, M.D on April 25, 2019, at the request of Respondent. At that time, Claimant complained of ongoing pain in the right side of her neck that radiated to her right shoulder girdle, down the right side of her

[7] No report from Dr. McCrainie was admitted into evidence.

[8] Hrg. Tr. p. 37: 15-19.

back, to her right buttock. Dr. Striplin noted tenderness in the right upper extremity on examination.

35. Dr. Striplin opined that the diagnosis of the shoulder strain was not justified since a strain implied that there was force that was sufficient enough to stress the body part. Dr. Striplin believed there was not significant enough force involved to cause an injury on the date of injury, Dr. Striplin noted an MRI scan of the right shoulder showed tendinosis and tendinopathy with possible partial intrasubstance tearing of the supraspinatus tendon and subacromial bursitis. He opined the abnormalities noted on the MRI scan were consistent with Claimant's age.

36. In his evidentiary deposition, Dr. Stiplin testified that an acute traumatic event can aggravate an underlying degenerative condition, but he did not believe Claimant experienced a strain of any body part. He disagreed with all of Claimant's ATP-s. He also opined many of Claimant's symptoms were subjective, as opposed to objective signs of injury. Dr. Striplin said the mechanism of injury does not fit with the diagnosis of strain and did not fit with the distribution of her complaints now involving the low back and buttock. Symptoms to Claimant's cervical spine, right trapezius, right shoulder going down to her right buttock could not be summed up with a single diagnosis. There was no logical explanation as to why a diagnosis of impingement should cause pain in the buttock and down the leg. Dr. Striplin said there was no evidence and no reasonable basis, to believe Claimant strained any body part. The ALJ credited the opinions of Claimant's treating physicians who found Claimant required treatment because of the injury over those of Dr. Striplin.

37. Claimant returned to Dr. Failinger on May 2, 2019, at which time the MRI was reviewed. Cuff tendinosis was present, along with degenerative changes in the labrum, but there was no major tear. Dr. Failinger's impression was: back pain; right buttock pain; right shoulder girdle pain; and right neck pain. Dr. Failinger noted Claimant's pain pattern was fierily diffuse, but her shoulder picture was clearers. She had problems was with abduction, which was her biggest weakness. Dr. Failinger injected Claimant with cortisone for diagnostic and therapeutic purposes.

38. On May 8, 2019, Claimant was evaluated by Dr. Draper. On examination, tenderness was found in Claimant's superior and posterior shoulder. Dr. Draper's assessment was: right shoulder strain; strain of upper arm, thoracic myofascial strain; and cervical strain, and lumbosacral strain. Lumbosacral strain was a new diagnosis. Claimant's same work restrictions were continued.

39. Claimant received a COBRA notice for herself and her husband from Costco on June 17, 2019.[9] Claimant stated she was unable to keep their insurance coverage nor have they obtained any other health insurance since then.[10] The cost of

[9] Exhibit 11.

[10] Hrg. Tr. pp. 39:14-40:3.

COBRA, beginning June 17, 2019, adds an additional $364.27 to Claimant's average weekly wage, ($1,578.50 per month x 12 months / 52 weeks), totaling $1,472.49.

40. Claimant returned to Dr. Draper on June 26, 2019. At that time, Dr. Draper noted she was not working as her restrictions could not be accommodated and her pain complaints/symptoms remained unchanged. Claimant reported some relief with the injections. On examination, tenderness was found in the superior and posterior shoulder (right), as well as right lumbar spine. Dr. Draper's assessment was cervical strain; thoracic myofascial strain; right shoulder strain; strain of the upper arm, right; lumbosacral strain. Dr. Draper prescribed a lidocaine patch. Dr. Draper estimated the date of MMI as June 28, 2019.

41. Dr. Draper stated Claimant's restrictions were: lift and push/pull up to 20 pounds occasionally up to three hours per day, but was restricted from reaching above shoulder level, as well as no use of right upper extremity. Claimant was to sit 50% of the day and change position as needed. Claimant was to limit standing to 30 minutes at a time. The ALJ concluded the treatment provided by Dr. Draper to Claimant was to cure and relieve the effects of the work injury.

42. In a follow-up evaluation on October 18, 2019, Paula Pook, M.D. (ATP) at Concentra reiterated Claimant's diagnoses and continued the lifting and push/pull work restrictions. Dr. Pook did not find Claimant was at MMI.

43. Claimant suffered an injury arising out of and in the course of her employment.

44. The medical treatment Claimant received through October 18, 2019 was reasonable and necessary, as well as related to the December 11, 2018 injury.

45. The treatment provided by Drs. Draper, Sacha, and Failinger and their referrals were authorized, reasonable, and necessary.

46. Claimant had continuous work restrictions after December 11, 2018, except for March 11, 2019 (full-duty release) and April 17-18, 2019 (full-duty release). The ALJ concluded Claimant's wage loss was attributable to the December 11, 2018 injury.

47. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. (2019). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S. (2019).

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. (2018). The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385, 389 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005). In the case at bench, Claimant's entitlement to benefits turned on her credibility, as well as that of the expert witnesses.

Compensability

Claimant had the burden of proof in this case. The question is whether Claimant met this burden and proved she was injured on December 11, 2018. Claimant was required to prove by a preponderance of the evidence that, at the time of the injury, she was performing service arising out of and in the course of the employment and that the injury or occupational disease was proximately caused by the performance of such service. §§ 8-41-301(1)(b) & (c), C.R.S. (2019). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990).

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995). Claimant must establish a nexus between the work activities and the claimed disability. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985).

In the case at bench, the ALJ was persuaded Claimant suffered a compensable sprain/strain injury to the cervical/thoracic spine and right upper extremity on December 11, 2018, as she was reached over to grab an Eddie Bauer fleece. (Finding of Fact 43). As determined in Findings of Fact 6-7, the injury occurred while Claimant was working for Employer. This injury included an aggravation of the underlying condition of the right upper extremity. Support for this decision was based, first, upon Claimant's description of what happened, including confirmation that she was performing those job duties at the time she stated her injury occurred. *Id.* The ALJ found Claimant to be credible and her description of what happened on December 11, 2018 was corroborated by what was depicted on the video. *Id.*

Second, the conclusion the Claimant suffered a compensable injury was supported by the medical records and evidence in the case. Specifically, the treatment records of Drs. Draper, Sacha and Failinger led the ALJ to conclude that she was injured. In this regard, the ALJ concluded from the Dr. Draper's treatment records that Claimant suffered a sprain/strain, which required treatment. Dr. Draper treated Claimant from December 13, 2018 through June 26, 2019. (Findings of Fact 13-16, 26, 30, 32, 38, 40-41). Dr. Sacha also treated Claimant on multiple occasions and the ALJ concluded this treatment and the referral to Dr. Failinger was evidence that Dr. Sacha believed the injury was work re-related. (Finding of Fact 20).[11] Claimant also received treatment from Dr. Failinger on multiple occasions to address the symptoms which were the result of the work injury. (Findings of Fact 23, 25, 37). The ALJ ultimately decided that Claimant's doctors continued to treat her for symptoms that they attributed to her work injury. In short, the records of the ATP-s provided direct and inferential evidence that Claimant's treating physicians found Claimant was injured while working and required treatment. *Id.*

The evidence revealed that the sprain/strain was superimposed on degenerative conditions present in her right shoulder, which was confirmed by the second MRI. (Finding of Fact 33). The MRI also reflected objective evidence that Claimant's shoulder was injured, as was the crepitus documented by Dr. Sacha. (Finding of Fact 17).

In reaching this conclusion, the ALJ considered Respondent‘s arguments that the injury was not directly shown on the video and Claimant had an injury history, as well as a discipline history with Employer. Respondent also argued that there was insufficient force to cause an injury. The ALJ concluded prior injuries and evidence of disciplinary action did not foreclose the possibility that Claimant was injured on December 11, 2018. (Finding of Fact 4). The ALJ also considered the conclusions from Dr. Striplin, including his expert testimony regarding whether Claimant could have been injured as she claimed. The ALJ credited the opinions of Claimant's ATP-s over those offered by Dr. Striplin. (Finding of Fact 36).

[11] Dr. Sacha concluded Claimant sustained a permanent medical impairment, which was further evidence that he believed the injury was work-related.

In short, the evidence cited by Respondent did not dispel the conclusion that it was more probable than not the Claimant was injured arising out of and in the course of her employment. Accordingly, Claimant is entitled to receive benefits under the Colorado Worker's Compensation Act.

Medical Benefits

Given the finding on the issue of compensability, the ALJ concluded Claimant proved she was entitled to medical benefits to cure and relieve the effects of his industrial injury, which are to be provided by Respondent. § 8-42-101(1)(a), C.R.S. (2019). The treatment provided by Drs. Draper, Sacha, and Failinger and their referrals, were authorized, reasonable, necessary. (Finding of Fact 45).

Respondent has argued, in effect, that Claimant did not require medical treatment other than maintenance after Dr. Sacha declared she was at MMI. As found, both Dr. Draper and Dr. Failinger provided treatment after April 8, 2019. This included PT, massage therapy and an injection. Neither of these physicians stated Claimant was at MMI. Based upon the evidence in the record, the ALJ found the treatment Claimant has received through October 18, 2019 was reasonable and necessary. (Finding of Fact 43). That does not foreclose Respondent from contesting treatment in the future, however. As the Panel noted in *Davis v. Little Pub Holdings, LLC,* W.C. No. 4-947-977-01 (ICAO June 17, 2015), this determination does not preclude Respondent from challenging the reasonableness, relatedness, and the necessity for any particular treatment in the future.

Average Weekly Wage

§ 8-42-102(2), C.R.S. (2019) requires the ALJ to calculate Claimant's AWW based on the earnings at the time of injury as measured by the Claimant's monthly, weekly, daily, hourly or other earnings. This section establishes the so-called "default" method for calculating Claimant's AWW.

However, if for any reason, the ALJ determines the default method will not fairly calculate the AWW, § 8-42-102(3), C.R.S. (2016) affords the ALJ discretion to determine the AWW in such other manner as will fairly determine the wage. § 8-42-102(3), C.R.S. establishes the so-called "discretionary exception". *Benchmark/Elite, Inc. v. Simpson,* 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of Claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra; Avalanche Industries v. ICAO*, 166 P.3d 147 (Colo. App. 2007)

In *Campbell*, Claimant's initial injury occurred ten years before her deteriorating condition caused her to cease working. Her employer argued that her AWW should be based on the wages she earned at the time of her initial injury, rather than the higher wages she had earned through salary increases and promotions during the intervening years. The Colorado Court of Appeals determined that it would be "manifestly unjust to base Claimant's disability benefits in 1986 and 1989 on her substantially lower earnings in 1979", and determined that her AWW should be based upon the higher salary earned at the time her deteriorating condition caused her to stop working. *Campbell v. IBM Corp., supra,* 867 P.2d at 82. The rationale for the Court's decision was one of fairness and Justice Plank stated:

> "The entire objective of wage calculation [under the Act] is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. Although [AWW] generally is determined from the employee's wage at the time of injury, if for any reason this general method will not render a fair computation of wages, the administrative tribunal has long been vested with discretionary authority to use an alternative method in determining a fair wage". *Campbell v. IBM Corp., supra,* 867 P.2d at 82.

Likewise, in *Pizza Hut v. ICAO*, 18 P.3d 867, (Colo. App. 2001), Claimant was injured while working as a delivery driver. He then obtained a second job at a hospital. Claimant concurrently held two jobs for a short period, then quit the delivery job. The Colorado Court of Appeals affirmed the increase in Claimant's average weekly wage and reinforced the principle that the ALJ had discretion to calculate Claimant's wages based on earnings from a subsequent employer and not upon wages earned at the time of injury, as the former represented a fairer calculation of Claimant's AWW.

In the case at bar, Respondent argued Claimant received an extra bonus check on September 16, 2018 in the amount of $1,730.40 and she would not get those more often than every 6 months. Respondent asserted it was reasonable to consider the 26 weeks of wages with check dates from July 8, 2018 December 9, 2018, which totaled $24,685.71. Respondent calculated Claimant's AWW as follows: $24,685.71 divided by 26 equaled an AWW of $949.45.

The ALJ concluded Claimant's her earnings for 2018 reflected time off taken for surgery and would be less than Claimant's actual AWW. (Finding of Fact 5). Further, AWW encompasses the bonus Claimant received during this time. Accordingly, the ALJ concluded the fairest calculation of Claimant's AWW was to use the fourteen (14) weeks before her injury in which Claimant earned a total of $15,515.05. Using this period, the ALJ found Claimant's AWW was $1,108.22. *Id.*

Temporary Total Disability Benefits

To prove entitlement to TTD benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The ALJ determined Claimant sustained a wage loss as a result of her work injury. (Finding of Fact 46). She was entitled to TTD benefits, until such time as these were terminated. The evidence in the record established Claimant had work restrictions as determined by an ATP which were in place through October 2019, with the exception of a few days in April 2019. (Findings of Fact 27-32).

More specifically, Claimant‘s TTD claim is complicated by the fact that Dr. Sacha (an ATP) concluded she was at MMI as of April 8, 2019 and assigned a medical impairment rating. (Finding of Fact 27-29). Then, Dr. Draper returned Claimant to full duty on April 17, 2019 but did not find she was at MMI (even though she referenced Dr. Sacha's MMI determination in her report). (Finding of Fact 30). When Claimant returned to Dr. Draper on April 19, 2019, Dr. Draper reimposed work restrictions. (Finding of Fact 32). Dr. Draper kept Claimant's work restrictions in place after that. (Findings of Fact 38, 40). There was no evidence in the record that Claimant was returned to full duty by an ATP, or was found to be at MMI after that. Given this evidence, the ALJ concluded Claimant was entitled to TTD following her industrial injury, except for the time in April 2019 when she had been returned to full duty.

ORDER

It is therefore ordered:

1. Claimant's Motion for an Adverse Evidentiary Inference Based On Spoliation and to Reopen the Record If Necessary is denied, as moot.

2. Claimant's Motion to Strike Respondent's Objection, as untimely is granted. Respondent's Objection is stricken.

3. Claimant met her burden of proof and proved she suffered an injury on December 11, 2018.

4. Respondent shall pay for Claimant's medical benefits (pursuant to the Colorado Workers' Compensation Fee Schedule) to cure and relieve the effects of her injury. This includes the treatment provided Drs. Draper, Sacha, and Failinger and their referrals, which are authorized, reasonable, necessary and related to the work injury.

5. Claimant's AWW was $1,108.22 with TTD rate $738.81 from December 12, 2018 – June 16, 2019. From June 17, 2019, and continuing, Claimant's AWW is $1,522.45 [because of COBRA], with a corresponding TTD rate of $981.66.

6. Respondent shall pay Claimant TTD at the applicable TTD rates set forth in the preceding from December 15, 2018 and continuing, except for the following period: April 8-18, 2019.

7. All matters not determined herein are reserved for future determination.

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

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

DATED: June 16, 2021

STATE OF COLORADO

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether EMPLOYER A[REDACTED], LLC has demonstrated, by a preponderance of the evidence, that on August 31, 2018, the claimant was an independent contractor pursuant to Section 8-40-202(2), C.R.S.

2. Whether Employer B[Redacted] Homes, LLC and/or Jared K[Redacted] have demonstrated, by a preponderance of the evidence, that on August 31, 2018, the claimant was an independent contractor pursuant to Section 8-40-202(2), C.R.S.

3. Whether EMPLOYER C[REDACTED] Development, Inc. and have demonstrated, by a preponderance of the evidence, that on August 31, 2018, the claimant was an independent contractor pursuant to Section 8-40-202(2), C.R.S.

4. If the claimant is deemed an employee of any respondent, whether the claimant has demonstrated by a preponderance of the evidence that he sustained an injury arising out of and in the course and scope of his employment on August 31, 2018.

5. The parties have stipulated that if the claimant is deemed an employee of any respondent, the medical treatment the claimant received at Denver Health following the August 31, 2018 incident is reasonable, necessary, and related medical treatment.

6. The parties have also agreed to reserve the endorsed issues of temporary total disability (TTD) benefits and temporary partial disability (TPD) for future determination, if necessary.

FINDINGS OF FACT

1. This matter involves a number of potential employers of the claimant and conflicting testimony regarding those relationships. The ALJ has considered all evidence and testimony presented at the hearing and makes the following findings of fact.

2. Robert K[Redacted] has management and ownership interests in Employer C[Redacted], Inc.[1] ([Redacted]). On August 31, 2018, EMPLOYER C[REDACTED] had workers' compensation coverage through INSURER C[Redacted].

3. Jared K[Redacted] has management and ownership interests in Employer B[Redacted] Homes, Inc. (Employer B[Redacted]). On August 31, 2018, Employer B[Redacted] did not have workers' compensation coverage.

[1] Documents entered into evidence indicate that KED Development, Inc. does business as KED Builders. For continuity, the ALJ uses the KED Development, Inc. or KED throughout this order.

4. Robert K[Redacted] is Jared K[Redacted]'s father. After working many years with his father, Jared K[Redacted] established Employer B[Redacted] Homes, Inc. as a construction company.

5. EMPLOYER A[REDACTED] owns property located at [Address redacted], Colorado. On November 1, 2017, EMPLOYER A[REDACTED] entered into a General Contractor Agreement with Employer B[Redacted] Homes to build a duplex on that property. In this order, the construction project at [Address redacted], Colorado. will be referred to as "the Columbine project".

6. At no time did EMPLOYER A[REDACTED] have any interaction with the claimant.

7. As the general contractor, Employer B[Redacted] contracted with EMPLOYER C[REDACTED] as a subcontractor to complete framing and siding on the Columbine project.

8. The claimant has training as a roofer. For many years, the claimant worked with his father and brother in the family roofing company. From 2007 until 2017, the claimant and his brother operated the family roofing business. On September 13, 2017, the claimant filed Articles of Organization for his company Employer D[Redacted]. Although the claimant is a skilled roofer, he performs other construction work while working as EMPLOYER D[REDACTED].

9. The claimant has a work truck for EMPLOYER D[REDACTED]. In addition, he has hats and shirts that bear his company's logo that he wears at all of his job sites. The claimant wore these EMPLOYER D[REDACTED] clothing items while performing work on the Columbine project. The claimant has an email address specifically for EMPLOYER D[REDACTED].

10. The claimant has his own tools that he uses to perform his work through EMPLOYER D[REDACTED]. These tools include items such as rollers, knives, shovels, brooms, vacuums, hand tools (such as hammers and drills), hoses, and a backpack type leaf blower.

11. The claimant provides invoices to his customers for the work he performs. Those invoices are issued by EMPLOYER D[REDACTED]. Customers pay the claimant in the business name. Invoices entered into evidence show that the claimant was performing work as EMPLOYER D[REDACTED] throughout the spring and summer of 2018. The type of work the claimant billed for varied greatly. Those invoices include work such as: roof repair; material pick up; bending a drip cap; installing an ice and water shield; pick-up and installation of signs; dryer vent clean-out; construction, staining, and painting of patio furniture; fence installation; gutter clean-out; roof repair and dry-in; installation of shingles and metal flashing; a roof tear-off and dry-in; roof removal and dry-in; chimney cap fabrication and installation; picking up a sign, digging a hole, and installing a sign; a total ridge replacement; chimney area repair; and bending and installation of a metal drip cap.

12. The invoices from the spring and summer of 2018 also vary in the hourly rate the claimant charged his customers. These invoices reflect “man hours” billed at $50.00 per hour; $55.00 per hour; $60.00 per hour; and $70.00 per hour. In addition, on July 13, 2018, EMPLOYER D[REDACTED] invoiced RMC, LLC for materials.

13. The claimant has a bank account in the name of EMPLOYER D[REDACTED]. The claimant deposits customer payments into that account. The claimant also uses that account to pay various company expenses including materials for jobs, fuel for his work vehicle, and his cellphone.

14. The claimant came to work on the Columbine project after he ran into Robert KRedacted] at a roofing supply company. After that initial discussion, the claimant met with Jared KRedacted] and Robert KRedacted] to discuss his work on the Columbine project. At that meeting, it was discussed that the claimant was willing to perform work at the Columbine project for $30.00 per hour, if he was paid in cash. If he was not paid in cash, the claimant agreed to work for $60.00 per hour, plus materials and “run it through [EMPLOYER D[REDACTED]]”.

15. The parties agreed that the claimant would be paid the $60.00 per hour, plus materials. The claimant was initially assigned to work on sealing the garage floors. This was agreeable because there was living space below the garages. Therefore, the claimant’s expertise as a roofer was ideal for completing the garage floors (which was the ceiling of the living space). The claimant also agreed to help with siding, clean-up, or any other task available to him at the Columbine project.

16. The claimant was to provide invoices to EMPLOYER C[REDACTED] for his hours and materials. It was understood between Robert K[Redacted] and Jared K[Redacted] that EMPLOYER C[REDACTED] would then bill Employer B[Redacted] Homes for the claimant’s invoices.

17. The claimant was not restricted from working for other customers while working at the Columbine project. The claimant was able to come and go at the Columbine project based on his needs and other projects.

18. While completing the garage floors at the Columbine project, the claimant utilized his own tools. He provided some of his own materials and on August 22, 2018, EMPLOYER D[REDACTED] issued an invoice to EMPLOYER C[REDACTED] for $1,700.00 for materials related to cutting and bending a metal drip cap.

19. After the claimant completed the garage floor work at the Columbine project, the claimant began working on the duplex roof. During the roofing aspect of the Columbine project, Robert K[Redacted] also worked on the roof. While working on the roof in this manner, the claimant continued to use his own tools. When the claimant’s work on the roof began, there was no discussion regarding the claimant’s pay arrangement. The ALJ is persuaded that the parties understood that the claimant would work on the roof at the agreed rate of $60.00 per hour, plus materials.

20. On August 29, 2018, EMPLOYER D[REDACTED] issued an invoice to EMPLOYER C[REDACTED] for 63 man hours (at $60.00 per hour) and $1,755.16 for materials. The time billed on that invoice was as follows:

3 hours on Thursday, August 16;
12.5 hours on Saturday, August 18;
10.75 hour on Monday, August 20;
3.75 hours on Tuesday, August 21;
7.75 hours on Wednesday, August 22;
12.5 hours on Thursday, August 23;
6.75 hours on Friday, August 24; and
6 hours on Saturday, August 8/25.

21. On August 21, 2018, EMPLOYER C[REDACTED] paid the claimant $1,700.00 for materials. As of the date of the hearing, the claimant has not been paid any other amount for his Columbine project invoices.

22. Due to a delay in receiving materials, in late August 2018, the roofing work at the Columbine project was not completed. On August 30, 2018, Jared K[Redacted] was in the process of locating a water main to run a water line on the Columbine project. This was done by digging a trench from the road toward the location of the connection to the duplex.

23. As the claimant was unable to continue working on the roof, he agreed to help Jared K[Redacted] with the trench project. As noted above, the parties understood that the claimant was willing to perform different work at the Columbine project. When this work in the trench began, there was no discussion regarding the claimant's pay arrangement. The ALJ is persuaded that the parties understood that the claimant would work in the trench at the agreed rate of $60.00 per hour, plus materials.

24. Work on the trench continued on August 31, 2019. On that date, the claimant was in the trench with his own shovel. Jared K[Redacted] was operating a small excavator outside of the trench. The claimant utilized the shovel to locate any piping so that the excavator would not cause damage. While the parties were engaged in this activity on August 31, 2018, the trench collapsed and the claimant was buried.

25. Subsequently, the claimant was airlifted from the Vail area for medical treatment at Denver Health. The claimant suffered serious injuries from the trench cave-in. These injuries included multiple facial fractures, a skull fracture, and a pelvic fracture.

26. Following the August 31, 2018 incident, EMPLOYER D[REDACTED] began invoicing customers on November 30, 2018. Those invoices indicate that EMPLOYER D[REDACTED] continued to provide customers with a variety of services, including: snow shoveling; snow plowing; steel fabrication for steps; door fabrication and installation; rooftop snow removal; roofing repair and inspection work; fence and chimney repair; gutter cleaning and repair; tree light installation; freezer removal and disposal; flooring repair and installation; dishwasher disposal; mattress delivery; wood repairs; painting;

dryer vent cleaning; sprinkler blowout; lawn mowing and raking; tree installation; cabinet fabrication and staining; bike rack installation; and sod, mulch and rock installation.

27. The claimant credibly testified that he understood that while he was working at the Columbine project he was working as an independent contractor. As the ALJ understands the claimant's position, the claimant believes that once he began performing work on the roof and/or in the trench, he was no longer an independent contractor, rather an employee of some combination of the respondents in this case. Therefore, the claimant asserts that the injuries he sustained on August 31, 2018 from the trench cave-in should be compensable until the Colorado Workers' Compensation Act.

28. The ALJ finds that the respondents in this matter have successfully demonstrated that it is more likely than not that on August 31, 2018, the claimant was working as an independent contractor. The ALJ finds that while working at the Columbine project the claimant was free from the direction and control of the respondents and was customarily engaged in an independent business in the construction industry. The ALJ also finds that because the claimant was an independent contractor at the time of his injuries, those injuries are not compensable under the Colorado Workers' Compensation Act.

CONCLUSIONS OF LAW

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

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

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

4. “Employee” includes “every person in the service of any person, association of persons, firm or private corporation. . . under any contract of hire, express or implied.” Section 8-40-202(b), C.R.S.

5. Under Section 8-40-202(2)(a), C.R.S. “any individual who performs services for pay for another shall be deemed to be an employee” unless the person “is free from control and direction in the performance of the service, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent trade, occupation, profession, or business related to the service performed.”

6. The respondent has the burden of proving that the claimant was an independent contractor rather than an employee. Section 8-40-202(2)(b)(II), C.R.S., sets forth nine factors to balance in determining if claimant is an employee or an independent contractor. See *Carpet Exchange of Denver, Inc. v. Industrial Claim Appeals Office*, 859 P.2d 278 (Colo. App. 1993). Those nine factors are whether the person for whom services are provided:

- required the individual to work exclusively for the person for whom services are performed; (except that the individual may choose to work exclusively for that person for a finite period of time specified in the document);

- established a quality standard for the individual; (except that such person can provide plans and specifications regarding the work but cannot oversee the actual work or instruct the individual as to how the work will be performed);

- paid a salary or hourly rate but rather a fixed or contract rate;

- may terminate the work during the contract period unless the individual violates the terms of the contract or fails to produce results that meet the specifications of the contract;

- provided more than minimal training for the individual;

- provided tools or benefits to the individual; (except that materials and equipment may be supplied);

- dictated the time of performance; (except the completion schedule and range of mutually agreeable work hours may be established);

- paid the individual personally, instead of making checks payable to the trade or business name of the individual; and,

- combined their business operations in any way with the individual's business, or maintained such operations as separate and distinct.

7. A document may satisfy the requirement to prove independence, but a document is not required. Section 8-40-202(2)(b)(III), C.R.S, provides that the existence of any one of those factors is not conclusive evidence that the individual is an employee. Consequently, the statute does not require satisfaction of all nine criteria in Section 8-40-202(2)(b)(II) in order to prove by a preponderance of the evidence that the individual is not an employee. *Nelson v. Industrial Claim Appeals Office*, 981 P.2d 210 (Colo. App. 1999).

8. In *Industrial Claim Appeals Office v. Softrock Geological Services*, 325 P.3d 560 (Colo. 2014) the Supreme Court revised the standard previously used to analyze whether or not an employee is customarily engaged in an independent trade or business. The previous standard had sought to simply ask if the employee had customers other than the employer. If not, it was reasoned the employee was not "engaged" in an independent business and would necessarily be a covered employee. However, in *Softrock* the Court stated "we also reject the ICAO's argument that whether the individual actually provided services for someone other than the employer is dispositive proof of an employer-employee relationship." 325 P.3d at 565. Instead, the fact finder was directed to conduct "an inquiry into the nature of the working relationship." Such an inquiry would consider not only the nine factors listed in Section 8-202(2)(b)(II), but also any other relevant factors. *Pierce v. Pella Windows & Doors*, W.C. No. 4-950-181, May 4, 2015.

9. The *Softrock* Court pointed to *Long View Systems Corp. v. Industrial Claim Appeals Office*, 197 P.3d 295 (Colo. App. 2008) in which the Panel was asked to consider whether the employee "maintained an independent business card, listing, address, or telephone; had a financial investment such that there was a risk of suffering a loss on the project; used his or her own equipment on the project; set the price for performing the project; employed others to complete the project; and carried liability insurance." 325 P.3d at 565. This analysis of "the nature of the working relationship" also avoided a second problem presented by the single-factor test disapproved by the *Softrock* decision. That problem involved a situation where, based on the decisions of the employee whether or not to pursue other customers, the employer could be subjected to "an unpredictable hindsight review" of the matter which could impose benefit liability on the employer. See *Pierce v. Pella Windows & Doors*, W.C. No. 4-950-181, May 4, 2015.

10. The ALJ has considered the nine factors listed in Section 8-40-202(2)(b)(II), C.R.S. and the totality of the circumstances of the relationship of the parties and concludes that while working at the Columbine project the claimant was free from the direction and control of the respondents. In addition, the claimant was customarily engaged in an independent business in the construction industry.

11. The ALJ specifically notes that the claimant was not required to work exclusively at the Columbine project. As evidenced by his varied hours on the August 29, 2018 invoice to EMPLOYER C[REDACTED], the claimant worked at the Columbine project when it was convenient for him. The ALJ finds no persuasive evidence that any of the respondents established a quality standard for the claimant.

12. Although the claimant was paid an hourly rate, the rate of $60.00 per hour was negotiated by the claimant and he could “run it through” his business. In addition, $60.00 per hour is comparable to the amounts invoiced to other EMPLOYER D[REDACTED] customers in 2018. The respondents provided no training to the claimant. No tools were provided to the claimant. The claimant supplied some of his own materials and invoiced EMPLOYER C[REDACTED] for those materials. Payment was made to EMPLOYER D[REDACTED] and not to the claimant personally. The claimant did not combine his business operations with the respondents’ businesses. EMPLOYER D[REDACTED] was separate and distinct from the respondents’ business operations.

13. In addition, the claimant used a company vehicle, company bank account, wore shirts and hats with his business logo, and billed for his services through his company. The ALJ finds that all of these factors support a conclusion that the claimant was engaged in an independent trade or business as a construction contractor. As found, the ALJ concludes that the claimant performed all of his work at the Columbine project free from the direction and control of the respondents.

14. With regard to EMPLOYER A[REDACTED], the claimant had no interaction with that respondent. Therefore, the ALJ concludes that the claimant was not subject to any direction or control from EMPLOYER A[REDACTED], LLC.

15. With regard to EMPLOYER C[REDACTED], the claimant performed work at the job site and billed for his services. The ALJ finds that although the claimant worked with Robert K[Redacted] on the roofing project, there was no direction and control from EMPLOYER C[REDACTED] in the completion of the claimant’s work. The ALJ is not persuaded by the claimant’s assertion that due to his work in the roof his status somehow was converted from that of an independent contractor to an employee. Although the tasks the claimant performed changed, the claimant’s relationship with the respondents did not change when he started work on the roof. This is further supported by the agreement of the parties that the claimant would perform any type of work necessary at the Columbine project.

16. With regard to Employer B[Redacted] Homes and Jared K[Redacted], the ALJ concludes that the claimant was free from the direction and control of these respondents at the Columbine project. The ALJ is not persuaded by the claimant’s assertion that due to his work in the trench his status converted from that of an independent contractor to an employee. Although the task the claimant performed changed, the claimant’s relationship with the respondents did not change when he started work in the trench. This is further supported by the agreement of the parties that the claimant would perform any type of work necessary at the Columbine project.

17. For all of the foregoing reasons, the ALJ concludes that the claimant was working as an independent contractor at the time of his injury on August 31, 2018.

ORDER

It is therefore ordered that the claimant's workers' compensation claim related to an August 31, 2018 injury is denied and dismissed.

Dated this 17th day of June 2021.

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

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NOS. WC 5-121-549 & 5-133-113-001

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that she suffered an industrial injury or occupational disease to her left shoulder that began on September 4, 2019 during the course and scope of her employment with Employer.

2. Whether Claimant has established by a preponderance of the evidence that she suffered an industrial injury to her left shoulder on February 24, 2020 during the course and scope of her employment with Employer.

3. Whether Claimant has proven by a preponderance of the evidence that she is entitled to receive reasonable, necessary and causally related medical benefits for her industrial injuries.

FINDINGS OF FACT

1. Claimant works for Employer as a bus driver and trainer. Her job duties involve operating school buses and instructing other operators in safe driving practices.

2. Claimant testified that on September 4, 2019 she suffered the first of two left shoulder injuries as she lifted the hood of a bus at work. Claimant noted she did not have any left shoulder problems prior to the incident.

3. On September 18, 2019 Respondent completed a First Report of Injury. The document specified that Claimant was driving a bus and began to experience left shoulder pain when turning the steering wheel.

4. Employer referred Claimant to Midtown Medical for treatment. On September 18, 2019 Claimant visited Authorized Treating Physician (ATP) Kirk Holmboe, M.D. for an examination. Dr. Holmboe recounted that Claimant had been suffering left shoulder pain over the past few weeks that had recently increased. Claimant specifically noted that the pain worsened when she raised her arm and turned the steering wheel of her bus. She denied prior shoulder and neck problems, but had past intermittent paresthesias in the left hand. Dr. Holmboe diagnosed Claimant with left shoulder impingement. He recommended physical therapy and an MRI.

5. On October 22, 2019 Claimant underwent a left shoulder MRI. The imaging revealed a full-thickness tear of the supraspinatus tendon with mild rotator cuff tendinopathy, a large joint effusion and an attenuated biceps tendon.

6. On October 24, 2019 Carlos Cebrian, M.D. performed a records review of Claimant's claim. He considered Claimant's job description and the physical demands of her position. Dr. Cebrian remarked that Claimant attributed her left shoulder symptoms to

her work activities for Employer. She specifically noted the gradual onset of symptoms. Dr. Cebrian thus evaluated whether it was medically probable that Claimant's symptoms were related to a specific event or the cumulative effects of her work activities. He performed a causation analysis pursuant to the Colorado Division of Workers' Compensation *Medical Treatment Guidelines* (*Guidelines*). Dr. Cebrian explained that, in order to perform a medical causation analysis for a cumulative trauma condition pursuant to the *Guidelines*, the first step is to make a diagnosis, the next step is to clearly define the job duties and the final step is to compare the job duties with the delineated primary risk factors.

7. Dr. Cebrian explained that left shoulder rotator cuff tendinosis with impingement was part of Claimant's differential diagnosis. He remarked that "[t]endinosis is damage to the tendon at the cellular level which describes chronic degeneration without inflammation." In defining Claimant's job duties, Dr. Cebrian compared the length and level of her work exposure to the normal population. He then compared Claimant's job duties with the delineated primary risk factors. Dr. Cebrian specifically explained scientific support for any cause and effect between the diagnosis and exposure. He detailed:

> It is important to understand that degeneration is not a wear and tear process. The concept and terminology of wear and tear has been outdated by appreciating the genetics and biochemistry behind degeneration. Degeneration takes place at a cellular level. Degeneration is the result of the inability to replace normal tissues as one ages. This is not the result of external trauma to the tissues but the aging of the cells. Over time, there is progressive loss of the number of cells that are available to produce new healthy tissue.

Dr. Cebrian remarked that Claimant's symptoms when engaging in certain work activities reflected an underlying disease process rather than a causal relationship between the disease and the work exposure. Furthermore, symptoms at work do not require a medical inference that work activities caused the condition. The symptoms may instead be the "reasonable and symptomatic manifestation of the underlying condition."

8. Dr. Cebrian applied the *Guidelines* in evaluating Claimant's left shoulder symptoms. The *Guidelines* specifically include factors for the development of shoulder pathology. They include the following: (1) overhead work of 30 minutes per day for a minimum of five years; (2) shoulder movement at the rate of 15-36 repetitions per minute and no two second pauses for 80% of the work cycle; and (3) shoulder movement with force greater than 10% of maximum with no two second pauses for 80% of the work cycle. Dr. Cebrian concluded that Claimant's left shoulder symptoms were not related to her employment. He noted that Claimant did not suffer an acute injury, but instead experienced the gradual onset of symptoms. Dr. Cebrian determined that Claimant's complaints were not caused by cumulative trauma. He emphasized that Claimant did not engage in forceful and repetitive activity for an amount of time that satisfied the minimum thresholds in the *Guidelines*. He commented that "[t]he medical literature does not support turning a bus steering wheel as an exposure which would lead to a cumulative trauma injury."

9. Claimant subsequently sought treatment through Kaiser Permanente for her left shoulder complaints. On December 16, 2019 she reported ongoing left shoulder pain. Claimant's examination was consistent with impingement. On December 31, 2019 Claimant underwent a subacromial steroid injection in her left shoulder. The physician noted that having a tear in the rotator cuff does not require surgical intervention and could be treated non-operatively. Claimant subsequently underwent a non-work-related knee surgery and was out of work for multiple weeks.

10. On February 24, 2020 Claimant returned to work for Employer. Claimant was performing third party tests that required her to pull a wagon full of cones and arrange them on a paved surface. She remarked that the wagon's tires were not fully inflated and it was strenuous to pull the wagon out of a shed. Claimant noted she injured her left shoulder while pulling the wagon.

11. After reporting her injury to her supervisor, Claimant obtained medical treatment on March 3, 2020 with ATP Dr. Holmboe. Dr. Holmboe noted Claimant's prior left shoulder complaints. Claimant remarked her left shoulder pain had significantly improved after receiving an injection, but increased after pulling the wagon at work. Dr. Holmboe diagnosed Claimant with a left shoulder strain and impingement as well as an underlying partial thickness tear of the rotator cuff. He requested a review of Claimant's MRI and referred her for physical therapy and an orthopedic evaluation.

12. On May 6, 2020 Claimant visited Eric McCarty, M.D. for an evaluation. Dr. McCarty examined Claimant and reviewed the October 22, 2019 MRI. He diagnosed Claimant with a left shoulder injury including a tear of the supraspinatus tendon. Dr. McCarty noted persistent inflammation around the biceps, AC joint pain and impingement. He remarked that Claimant might have incurred further injury as a result of the February 24, 2020 incident. Dr. McCarty commented that an injection would only provide a temporary benefit. He thus recommended a left rotator cuff repair, subacromial decompression, distal clavicle excision and biceps tenodesis.

13. On June 11, 2020 Claimant underwent an independent medical examination with Mark S. Failinger, M.D. Dr. Failinger performed a physical examination and reviewed prior medical records. Claimant reported that she experienced left shoulder pain when pulling a wagon full of cones at work on February 24, 2020. She noted that there were 72 cones in the wagon each weighing about two pounds for a total wagon weight of approximately 150 pounds. Dr. Failinger diagnosed Claimant with an exacerbation of a pre-existing rotator cuff tear and tendinosis. However, he noted that it was critical to know how difficult it was to roll the cart. Dr. Failinger summarized that "[i]f in fact the cart [was] very easy to roll, despite the 150 pounds of cones that are on it, it is not with reasonable medical probability that [Claimant] sustained an acceleration of permanent aggravation or pre-existing disease." He reasoned that in the absence of further information the "action of pulling a cart likely below chest level would not, with reasonable medical probability, cause any further work related injury to the rotator cuff." Dr. Failinger thus concluded that Claimant did not likely suffer a work-related injury or the acceleration of a pre-existing condition while pulling the cart at work on February 24, 2020.

14. Claimant testified at the hearing in this matter. She stated that on September 4, 2019 she injured her left shoulder while lifting the hood of her bus during a pre-trip inspection. Claimant commented that she again injured her left shoulder while pulling a wagon loaded with cones while setting up a driver training course on February 24, 2020. She remarked that the tires on the wagon were flat.

15. Claimant’s supervisor Charles C[Redacted] testified at the hearing in this matter. He acknowledged that he is familiar with Claimant’s job duties, including the bus she operates, the wagon used to transport cones and the area where she was performing the test when she experienced left shoulder pain on February 24, 2020. He explained that all of Employer’s buses have power steering and do not require significant force to turn the steering wheel. Furthermore, the hoods on all of the buses are spring-loaded, and after unlatching, can be raised with minimal to no effort. Mr. C[Redacted] also explained that the area where Claimant was setting out cones for the driver test on February 24, 2020 is paved and smooth. He commented that there is a slight downhill grade from the shed where the wagon is stored to the testing area.

16. On May 20, 2021 the parties conducted the post-hearing evidentiary deposition of Dr. Failinger. Dr. Failinger maintained that Claimant did not likely suffer a work-related injury or the acceleration of a pre-existing condition while pulling the cart at work on February 24, 2020. He recounted that Claimant did not immediately feel pain while pulling the wagon, but experienced left shoulder symptoms more than halfway to her destination. Claimant did not state that the wagon wheels were flat or specify the type or grade of ground she was traversing with the wagon. Dr. Failinger determined that, based on his review of the medical records and MRI, Claimant would not have torn her supraspinatus tendon while pulling the wagon. He elaborated that the supraspinatus tendon is not fired or engaged until the arm is raised to or above 70 degrees or lifting the shoulder so that the elbow reaches chest level. Dr. Failinger commented that below the 70 degree level the supraspinatus tendon and rotator cuff cannot be torn.

17. Dr. Failinger explained that the weight of the cart mattered because of the force needed to initiate movement. He detailed that “you would almost have to crouch down, reach your arms out, and then pull with all your strength going forward, like you would be pulling to start the movement. It would take that kind of a force in order to initiate, create, not only the movement of the cart, but also to create strain or stress or further tearing of a preexisting rotator-cuff tear.” Dr. Failinger noted that Claimant’s arms would not have been in a position to use the rotator cuff while pulling the wagon. He commented that in pulling a wagon “you would get your arm down at your side and you're elevating it behind you and it's, you know, reaching up to 30 degrees.” Pulling a wagon to keep it moving would thus not require the use of the supraspinatus tendon. Accordingly, Claimant did not likely suffer a left shoulder injury while pulling the cart full of cones at work on February 24, 2020.

18. Claimant has failed to demonstrate that it is more probably true than not that she suffered an industrial injury or occupational disease to her left shoulder that began on September 4, 2019 during the course and scope of her employment with Employer. Claimant has also failed to establish that it is more probably true than not that she suffered an industrial injury to her left shoulder on February 24, 2020 during the

course and scope of her employment with Employer. Initially, Claimant has provided a variety of accounts and descriptions of her left shoulder symptoms. Moreover, there are numerous conflicts between Claimant's testimony and her prior statements. When reporting the September 4, 2019 injury to Employer Claimant stated that she experienced the onset of pain when turning the steering wheel of her bus. Moreover, when Dr. Cebrian performed a records review he generally noted that Claimant attributed her left shoulder symptoms to her work activities for Employer. She specifically mentioned the gradual onset of symptoms. However, Claimant testified that her complaints began when lifting the hood of a bus. Similarly, Claimant reported to Dr. Failinger that she experienced left shoulder pain when pulling a heavy wagon full of cones at work on February 24, 2020. However, Claimant testified that the wagon had flat tires. She failed to mention the flat tires to Employer or Dr. Failinger despite her repeated assertions that the wagon was heavy. In contrast, Mr. C[Redacted] credibly explained that all of Employer's buses have power steering and do not require significant force to turn the steering wheels. Furthermore, the hoods on all of the buses are spring-loaded, and after unlatching, can be raised with minimal to no effort. Mr. C[Redacted] also remarked that the area where Claimant was placing cones for the driver test on February 24, 2020 is paved and smooth. He commented that there is a slight downhill grade from the shed where the wagon is stored to the testing area.

19. The medical records also demonstrate that Claimant did not likely suffer a left shoulder injury while working for Employer on September 4, 2019 or February 24, 2020. In evaluating whether Claimant's left shoulder symptoms in 2019 were related to a specific event or the cumulative effects of her work activities Dr. Cebrian performed a detailed causation analysis pursuant to the *Guidelines*. Dr. Cebrian persuasively concluded that Claimant's left shoulder symptoms were not related to her employment. He noted that Claimant did not suffer an acute injury, but instead suffered the gradual onset of symptoms. Dr. Cebrian determined that Claimant's complaints were not caused by cumulative trauma. He explained that overuse does not increase degeneration of the tendons. Dr. Cebrian persuasively emphasized that Claimant did not engage in forceful and repetitive activity for an amount of time that satisfies the minimum threshold in the *Guidelines*. He commented that "[t]he medical literature does not support turning a bus steering wheel as an exposure which would lead to a cumulative trauma injury." Furthermore, Dr. Failinger maintained that Claimant did not likely suffer a work-related injury or the acceleration of a pre-existing condition while pulling the wagon at work on February 24, 2020. He recounted that Claimant did not immediately feel pain while pulling the wagon but experienced left shoulder symptoms more than halfway to her destination. Claimant did not state that the wagon wheels were flat nor specify the type or grade of ground she was traversing. Dr. Failinger determined that, based on his review of the records and MRI, Claimant would not have torn her supraspinatus tendon while pulling the wagon. He explained that the supraspinatus tendon is not fired or used until the arm is raised to or above 70 degrees or lifting the shoulder so that the elbow reaches chest level. Dr. Failinger summarized that below the 70 degree level the supraspinatus tendon and rotator cuff cannot be torn.

20. In contrast, Drs. Holmboe and McCarty suggested that Claimant's left shoulder injuries and tear of the supraspinatus tendon were caused by her work activities

for Employer. However, neither physician engaged in a causation analysis pursuant to the *Guidelines*. Furthermore, neither Drs. Holmboe nor McCarty evaluated the circumstances under which Claimant was performing her job duties, inquired into the specific forces at work or otherwise engaged in any causation assessment. Therefore, based on Claimant's inconsistent accounts, the medical records and persuasive opinions of Drs. Cebrian and Failinger, Claimant has failed to demonstrate that she suffered a left shoulder injury while working for Employer on September 4, 2019 or February 24, 2020. Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

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

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.,* W.C. No. 4-650-711 (ICAO, Feb. 15, 2007); *David Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

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

7. The provision of medical care based on a claimant's report of symptoms does not establish an injury but only demonstrates that the claimant claimed an injury. *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020). Moreover, a referral for medical care may be made so that the respondent would not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id.* Although a physician provides diagnostic testing, treatment, and work restrictions based on a claimant's reported symptoms. It does not follow that the claimant suffered a compensable injury. *Fay v. East Penn manufacturing Co., Inc.*, W.C. No. 5-108-430-001 (ICAO, Apr. 24, 2020); *cf. Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997) ("right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment"). While scientific evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory supporting compensability when making a determination. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020).

8. The test for distinguishing between an accidental injury and an occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993). "Occupational disease" is defined by §8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by

> the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

9. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, §8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

10. Rule 17, Exhibit 5 provides an algorithm for evaluating Cumulative Trauma Conditions (CTC) pursuant to the *Guidelines*. In addressing applicability, the *Guidelines* note that “CTC’s of the upper extremity comprise a heterogeneous group of diagnoses which include numerous specific clinical entities including disorders of the muscles, tendons and tendon sheaths, nerves, joints and neurovascular structures.” W.C.R.P. Rule 17, Exhibit 5, p. 6. In determining a diagnosis when performing a cumulative trauma analysis the *Guidelines* delineate specific musculoskeletal conditions and peripheral nerve disorders. Nevertheless, the Guidelines provide that “[l]ess common cumulative trauma conditions not listed specifically in these Guidelines are still subject to medical causation assessment.” W.C.R.P. Rule 17, Exhibit 5, p. 21.

11. The *Guidelines* delineate factors for the development of shoulder pathology. They include the following: (1) overhead work of 30 minutes per day for a minimum of five years; (2) shoulder movement at the rate of 15-36 repetitions per minute and no two second pauses for 80% of the work cycle; and (3) shoulder movement with force greater than 10% of maximum with no two second pauses for 80% of the work cycle. Moreover, jobs requiring heavy lifting in excess of 10 times per day over the years may contribute to shoulder disorders. Notably, the *Guidelines* provide that, because of the lack of multiple, high quality studies, each case must be evaluated individually when addressing the likelihood of cumulative trauma contributing to shoulder pathology. W.C.R.P. Rule 17, Exhibit 4, p. 16.

12. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she suffered an industrial injury or occupational disease to her left shoulder that began on September 4, 2019 during the course and scope of her employment with Employer. Claimant has also failed to establish by a preponderance of the evidence that she suffered an industrial injury to her left shoulder on February 24, 2020 during the course and scope of her employment with Employer. Initially, Claimant has provided a variety of accounts and descriptions of her left shoulder symptoms. Moreover, there are

numerous conflicts between Claimant's testimony and her prior statements. When reporting the September 4, 2019 injury to Employer Claimant stated that she experienced the onset of pain when turning the steering wheel of her bus. Moreover, when Dr. Cebrian performed a records review he generally noted that Claimant attributed her left shoulder symptoms to her work activities for Employer. She specifically mentioned the gradual onset of symptoms. However, Claimant testified that her complaints began when lifting the hood of a bus. Similarly, Claimant reported to Dr. Failinger that she experienced left shoulder pain when pulling a heavy wagon full of cones at work on February 24, 2020. However, Claimant testified that the wagon had flat tires. She failed to mention the flat tires to Employer or Dr. Failinger despite her repeated assertions that the wagon was heavy. In contrast, Mr. C[Redacted] credibly explained that all of Employer's buses have power steering and do not require significant force to turn the steering wheels. Furthermore, the hoods on all of the buses are spring-loaded, and after unlatching, can be raised with minimal to no effort. Mr. C[Redacted] also remarked that the area where Claimant was placing cones for the driver test on February 24, 2020 is paved and smooth. He commented that there is a slight downhill grade from the shed where the wagon is stored to the testing area.

13. As found, the medical records also demonstrate that Claimant did not likely suffer a left shoulder injury while working for Employer on September 4, 2019 or February 24, 2020. In evaluating whether Claimant's left shoulder symptoms in 2019 were related to a specific event or the cumulative effects of her work activities Dr. Cebrian performed a detailed causation analysis pursuant to the *Guidelines*. Dr. Cebrian persuasively concluded that Claimant's left shoulder symptoms were not related to her employment. He noted that Claimant did not suffer an acute injury, but instead suffered the gradual onset of symptoms. Dr. Cebrian determined that Claimant's complaints were not caused by cumulative trauma. He explained that overuse does not increase degeneration of the tendons. Dr. Cebrian persuasively emphasized that Claimant did not engage in forceful and repetitive activity for an amount of time that satisfies the minimum threshold in the *Guidelines*. He commented that "[t]he medical literature does not support turning a bus steering wheel as an exposure which would lead to a cumulative trauma injury." Furthermore, Dr. Failinger maintained that Claimant did not likely suffer a work-related injury or the acceleration of a pre-existing condition while pulling the wagon at work on February 24, 2020. He recounted that Claimant did not immediately feel pain while pulling the wagon but experienced left shoulder symptoms more than halfway to her destination. Claimant did not state that the wagon wheels were flat nor specify the type or grade of ground she was traversing. Dr. Failinger determined that, based on his review of the records and MRI, Claimant would not have torn her supraspinatus tendon while pulling the wagon. He explained that the supraspinatus tendon is not fired or used until the arm is raised to or above 70 degrees or lifting the shoulder so that the elbow reaches chest level. Dr. Failinger summarized that below the 70 degree level the supraspinatus tendon and rotator cuff cannot be torn.

14. As found, in contrast, Drs. Holmboe and McCarty suggested that Claimant's left shoulder injuries and tear of the supraspinatus tendon were caused by her work activities for Employer. However, neither physician engaged in a causation analysis pursuant to the *Guidelines*. Furthermore, neither Drs. Holmboe nor McCarty evaluated

the circumstances under which Claimant was performing her job duties, inquired into the specific forces at work or otherwise engaged in any causation assessment. Therefore, based on Claimant's inconsistent accounts, the medical records and persuasive opinions of Drs. Cebrian and Failinger, Claimant has failed to demonstrate that she suffered a left shoulder injury while working for Employer on September 4, 2019 or February 24, 2020. Accordingly, Claimant's request for Workers' Compensation benefits is denied and dismissed.

ORDER

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

Claimant's claims for Workers' Compensation benefits are denied and dismissed.

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

DATED: June 18, 2021.

DIGITAL SIGNATURE:

Peter J. Cannici

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

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that he suffered a compensable injury to his left knee on October 17, 2020?

II. If compensable, has Claimant shown, by a preponderance of the evidence, that he is entitled to all reasonable, necessary, and related medical treatment, to include the left knee surgery as proposed by Dr. Walden?

III. If compensable, has Claimant shown, by a preponderance of the evidence, that he is entitled to Temporary Total Disability payments from October 17, 2020 and ongoing, subject to any offsets and/or reductions?

IV. If compensable, have Respondents shown, by a preponderance of the evidence, that Claimant willfully misled his prospective Employer about his ability to physically perform his job, and if so, was Claimant subsequently injured on the job as a result of the physical ability about which the Claimant willfully misled Employer?

V. What is Claimant's Average Weekly Wage?

FINDINGS OF FACT

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

Introduction

1. Claimant is a 53-year-old correctional officer hired at [Employer Redacted] on July 15, 2020. Respondents' Hearing Exhibits (Ex A). Claimant alleges he suffered an injury to the meniscus of his left knee while escorting an inmate for medical care during his October 17, 2020 shift.

Claimant's Previous Right Knee Injury and Subsequent Treatment

2. Prior to Claimant's hire, he was under the care of David Walden, M.D., for a right knee injury suffered with another employer. Dr. Walden performed arthroscopic meniscal repair to the right knee on October 2, 2019. Claimant was released from Dr. Walden's care on January 2, 2020. (Ex. G, p. 73).

3. Claimant was placed at MMI for the right knee on January 30, 2020 by Michael Dallenbach, M.D., and given a 25% scheduled impairment of the right knee. *Id* at 74. Claimant underwent a Functional Capacity Examination ("FCE") on this same date. Id at 82. In his narrative, Dr. Dallenbach noted:

> The following work restrictions are derived from the FCE performed 1/30/20, at which point in time James demonstrated the following: *No lift greater than 40 pounds; no carry greater than 50 pounds; no pushing greater than 80 pounds; no pulling greater than 50 pounds.* Regarding activities, he demonstrated the ability to walk on a frequent basis, climb stairs occasionally, stoop constantly, but was ***unable*** *to kneel or crouch. Id* at 74. (emphasis added).

4. The following are noted from the FCE's Test Information:

- Floor to Knuckle (lift) Occasional: 40# max tolerable limit. *Right Knee straining,* 5# increments.
  Walk: Task tolerable. **Pain behaviors when pivoting of[f] right LE.**
  Crouch: Task not tolerable. **Sig[nificant] compensation to left LE,** Right Knee pain reported.
  Climb Stairs: …*Right knee pain* (Id at 86)(emphasis added).

- Under Functional Abilities Summary, it was noted that Claimant fell significantly below 100% of Industrial Standard for Walk, Carry, and Climbing Stairs. Id at 87.

- Under the various tasks performed, under Kneel, it was noted:

> Task not tolerable, *Requires assistance arising from task position*. Right knee pain. *Id* at 95.

5. At the time of discharge, Dr. Dallenbach's report indicates "Functional Restoration and Status of Healing: [Claimant] is at MMI but will have permanent restrictions and/or permanent disability." *Id* at 71. Dr. Dallenbach states that "Functional restoration and post discharge plans were *discussed with the patient.* The patient *expressed understanding*." *Id*. (emphasis added)

6. At hearing, Claimant testified that he applied for his position with the Employer in May 2020. The job was "pretty physical" and involved all types of awkward positions, including kneeling, crouching, and squatting. Claimant's job description included the ability to forcibly break up fights, subdue inmates with force, move heavy objects, physically move people, access elevated surfaces, move over obstacles, and using force to gain entrance into confined areas. (Ex. D, pp. 11-12).

7. The Job Performance Characteristics for a correctional officer, signed by Claimant on May 11, 2020, require the applicant to *Occasionally*:

- Lift up to 150 pounds
- Carry up to 150 pounds
- Push up to 150 pounds
- Pull up to 150 pounds

- Squat
- Kneel
- Crawl.
- And *Frequently* climb stairs (Ex. D, pp.14-15).

Claimant signed a medical questionnaire and consent form indicating that he had read and understood the job description setting forth the essential functions of the job and stated that he did not require any reasonable accommodation. *Id* at 20. Claimant indicated that he did not have a disability as determined by a physician. *Id*. Claimant was approved for the job by the reviewing nurse on May 11, 2020 based upon his stated answers. *Id* at 21. On the signed Acknowledgement, Claimant certified that he was able to perform the essential functions of the positions as listed *without any restrictions or limitations. Id* at 14 (emphasis added).

The Work Incident, and Subsequent Treatment

8. In the late evening of October 17, 2020, Claimant was escorting an inmate to the medical ward when the inmate became unstable. Claimant was on the inmate's left side and Captain Robert Smotherman was on the inmate's right. According to an incident statement completed by Captain Smotherman, Claimant complained of pain in the left knee after the inmate transferred weight back and forth onto both escorting officers. (Ex. D, p. 23). Claimant had to push the inmate back up to stop his fall. Captain Smotherman indicated in his report that Claimant refused to sign a workers' compensation packet, give his information, get an anatomical, or write a "5-1(c)" statement. (Ex. D, p. 23). A later 5-1(C) statement was completed by Claimant, but was not signed or dated. *Id* at 22. An incident report from October 17, 2020 reflects that Claimant was not initially seeking medical treatment. *Id* at 24.

9. However, Claimant presented to Parkview Medical Center emergency department on October 18, 2020, upon the advice of Captain Smotherman. He had tried to reach other potential ATPs without success, since it was a Sunday. Triage notes from the ER state that a large inmate weighing about 400 pounds lost his balance and fell onto the Claimant's left knee. (Ex. I, p.116). Claimant reported experiencing immediate pain over the medial aspect of the knee, and especially with flexion. There was pain with valgus stress testing of the medial collateral ligament area, but without ligamentous instability. *Id*. Claimant denied any prior injury to the left knee. *Id*.

10. A physical examination showed no significant swelling or deformity of the left knee. *Id* at 117. There was full active and passive flexion and extension of the knee with mild pain on full flexion of the knee. *Id*. Claimant presented in no acute distress; there was no ligamentous instability noted. Id at 118. X-rays of the left knee were normal, and showed no acute injury or abnormality. *Id* at 119. Claimant was discharged with narcotic medications.

11. Claimant presented to Thomas Centi, M.D., at CCOM on October 21, 2020. Claimant reported that the inmate shifted his entire body weight onto him, causing him to shift

his weight onto the left side, twisting and adjusting his knee to keep from falling and holding the inmate up. (Ex. J, p. 122). The x-ray showed no acute injury. Claimant reported no history of previous injury of the left knee.

12. On physical examination of the knee, there was flexion of 120 degrees, and moderate discomfort on movement and palpation of the medial aspect soft tissue. *Id* at 123. Claimant had full extension. There was a slight antalgic gait with no effusions. Claimant was "slightly positive" for McMurray's test medially and negative for anterior/posterior drawer test, Lachman's test, Valgus, and Varus test. On the pain diagram, Claimant marked specifically the medial aspect of his left knee [the portion of the knee later demonstrated to have a tear]. (Ex. 5, p. 17). Dr. Centi diagnosed Claimant with a strain and recommended physical therapy. *Id*.

13. A patient history filled out by Claimant on October 21, 2020 reflected no prior history of treatment for the left knee. (Ex. J, p. 125). Claimant indicated the requirements of his job included kneeling/squatting, ladder/stair climbing, and lifting up to 400 pounds. Claimant was taking Vicodin at that time.

14. Claimant reported not feeling any better on October 28, 2020. (Ex. 6, p. 19). Physical examination did note scant edema on the *medial aspect* of the knee upon examination. *Id* at 20. Nurse Practitioner Joyce ordered the MRI of the left knee. Dr. Centi issued a referral for Claimant to see an orthopedist when he reviewed the MRI and examined Claimant on November 17, 2020. *Id* at 30. Physical examination on this date continued to document mild edema, mild effusion, and medial tenderness. *Id* at 31.

15. Respondents filed a Notice of Contest for further investigation on October 29, 2020.

16. However, Claimant continued to treat with Dr. Centi and reported no improvement with physical therapy. Dr. Centi ordered an MRI pursuant to ongoing knee pain. It was noted on November 6, 2020 that Claimant would be out of town for a job, but Claimant still had "point tenderness of the *medial* aspect [of his left knee]".. (Ex. J, p. 133). Claimant reported that he had a new employer and started work with them this week (of November 6) and would be out of town most of next week. *Id* at 134.

17. An MRI performed on November 9, 2020 Impression noted:

> 1. Posterior horn medial meniscus horizontal longitudinal undersurface 1 cm tear.
> 2. Subjacent subchondral osteoedema and contusion or stress change of the peripheral medial tibial plateau.
> 3. Small joint effusion. (Ex. L, pp. 175-176).

This MRI made no reference to left knee arthritis.

18. Dr. Centi referred Claimant for orthopedic evaluation on November 17, 2020. As of December 11, 2020, Claimant was now doing seasonal work as an airplane de-icer. (Ex. J, p. 142).

19. Claimant saw orthopedist Dr. David Walden on December 15, 2020 for evaluation of his left knee. In the description of the incident, it noted that the inmate was handcuffed, and that the inmate weighed more than 400 pounds. (Ex. K, p. 169). Claimant stated that the inmate's weight shifted to his left and that Claimant "believes his knee may have been twisted." Claimant reported immediate sharp pain and it is indicated that he elevated his knee and noted swelling. Claimant reported a great deal of pain in the knee in bringing his knee down from an elevated position when he stood a few hours later. Dr. Walden indicated that the mechanism of injury, clinical exam, and MRI findings were consistent with an ***acute*** *meniscus tear* and recommended arthroscopic repair. *Id* at 170. Dr. Walden reviewed the MRI films himself, and reached conclusions similar to those of the reading radiologist. (Ex. 8, p. 67).

20. On December 18, 2020, Respondents sent a letter to Dr. Walden indicating that the surgery was denied, as the claim was under a Notice of Contest pursuant to W.C.R.P. 16-7(B). (Ex. M).

21. On December 18, 2020, Claimant reported to CCOM that his new, part-time, seasonal job will be a sitting position. (Ex. J, p. 148). Claimant reported some improvement with PT, but was still using one crutch as needed, and his knee still hurt "a lot" when getting out of vehicles. *Id.*

22. On December 23, 2020, Claimant reported to CCOM that he was using crutches as needed and was stiff and sore with most movements, especially with stairs, and that he didn't attend a therapy appointment because he was training for his de-icing job (with Integrated De-Icing). (Ex. J, p. 152).

23. On December 31, 2020, Claimant reported to CCOM that he had been able to go fishing since his injury and that was hard to schedule therapy appointments around his new work schedule. *Id* at 156. Claimant requested that he stop therapy because it is "one less stressor due to work schedule." *Id* at 157.

24. Claimant continued to follow up with CCOM despite the denial of the left knee surgery. As of February 2, 2021, Claimant was still reporting ongoing left knee pain that was not improving. (Ex. 6, p. 47). Dr. Centi simply stated in his report to continue his medications, his home exercises, and "Continue with Orthopedics for surgery when scheduled." *Id.* at 48. Dr. Centi still noted that this was a work related condition. *Id.* Claimant's final note from CCOM of record dated February 25, 2021 reads similarly. *Id.* at 52. Claimant had a diagnosis of a tear of the medial meniscus, he was taking Ultram and Mobic for pain, doing his home exercises, and still advised to "Continue with Orthopedics when scheduled." *Id.*

IME with Dr. Hall

25. Claimant underwent an IME with Timothy Hall, M.D., on February 12, 2021. (Ex. 9). Dr. Hall indicates that the records begin with Colorado Sport & Spine therapy records, with an initial evaluation by Dr. Centi on October 21, 2020. *Id* at 70. Dr. Hall's report does not specifically indicate that he reviewed the October 18, 2020 ER record from Parkview. Claimant described the incident to Dr. Hall, and indicated that the inmate did not fall but instead was "caught by [Claimant]." *Id* at 71. Claimant completed the workday, even though his captain thought he should immediately be evaluated. Claimant stated that he was hoping he simply "tweaked" the knee and that it would calm down. Claimant reported no history of problems with the left knee prior to the incident. Dr. Hall noted:

> [Employer] has in my opinion a fairly straightforward situation. The mechanism of injury is certainly consistent with meniscal tear. When his foot was planted, his upper body rotated under the weight of his inmate pivoting on a fixed knee. This is the common mechanism of injury to the meniscus. He had symptoms immediately. He has not history of problems. I do not understand why this would be contested. *Id*.

Dr. Hall documented that Claimant's condition has not changed much at all since the initial injury. (Ex. 8, p. 72). He noted that "The longer he goes without surgery, the less likely he will have a good outcome." *Id.*

26. On March 1, 2021, Valerie Joyce, PA, at CCOM noted that Claimant continued to work for the de-icing company and was wearing a knee brace. (Ex. 6, p. 52).

IME with Dr. O'Brien

27. Claimant underwent an IME with Timothy O'Brien, MD, on March 18, 2021 (the report was issued on March 31, 2021). Claimant reported that the inmate began to faint and that he caught the inmate to prevent both of them from falling. (Ex. E, p. 36). Claimant reported he 'tweaked' his knee, and began to note increasing left knee pain as he was walking with a fellow corrections officer. He spent the rest of his shift with the knee elevated. It was noted that Claimant was working as a de-icer for the airlines and took as much part-time work as he can in order to help out with finances. *Id*.

28. Claimant reported his right knee felt pretty good from his prior surgery with Dr. Walden, but that it sometimes hurt because he was now dependent upon trying to protect the left knee. *Id*. Claimant reported that he had to give up hunting and fishing due to the alleged injury. *Id*. On physical examination, Dr. O'Brien indicated he could not perform a McMurray's test because Claimant would not allow flexion beyond 90 degrees and could not relax enough for the test to be performed. *Id* at 37. Dr. O'Brien also wrote that "Any gentle brushing of the skin or light palpation along the medial joint line caused wincing and withdrawal." *Id.* (No other medical provider has noted an exaggerated pain response to examination).

29. Dr. O'Brien noted right knee problems dating back to 2006. The records reflect that Claimant was seen by Nathaniel Moore, M.D., at MedNow Clinics in 2017 and 2018 for bilateral osteoarthritis. *Id* at 39-40. On October 8, 2017, Dr. Moore notes that Claimant was treating for musculoskeletal pain in the context of bilateral knee pain, rated at 8/10. (Ex. F, p. 58). The diagnosis indicated bilateral primary osteoarthritis of knee. *Id* at 59-67. Dr. Moore prescribed narcotic medications for pain.

30. Dr. O'Brien opined that neither Dr. Walden nor Dr. Hall had undertaken the due diligence to review the most contemporaneous medical report from the emergency room on October 18, 2020 in coming to their conclusions. (Ex. E, pp. 45-46). Dr. O'Brien opined that the October 17, 2020 incident resulted in a minor left knee strain that was innocuous and self-healing. Dr. O'Brien opined that the injury mechanism did not result in a meniscal tear. Dr. O'Brien stated that the meniscal pathology seen on the MRI was normal for a person of Claimant's age and identical findings are present in over 60% of cases.

31. Dr. O'Brien opined that Dr. Walden was over-reading the MRI *(this, despite the fact that Dr. O'Brien apparently did not look at these very films himself),* and that there was no objective evidence of an acute injury, since there was no tissue breakage or yielding of any significance in the initial medical records. Dr. O'Brien opined that with an acute tear, there would have been substantial swelling and bruising evidence on the exam and MRI. Dr. O'Brien opined that the surgery recommended by Dr. Walden was directed at a longstanding and preexisting age-related meniscal fissure and would not likely provide any benefit. *Id* at 46. Dr. O'Brien also opined that Claimant's account of the incident was inconsistent with the medical documentation and that he was an unreliable examinee.

32. Dr. O'Brien states in his report that Claimant's healing "definitely" occurred by November 9, 2020, and that he had already returned to his pre-injury level of function. (Ex. E, p. 45). The final line of Dr. O'Brien's report reads, "[Claimant] is capable of resuming all recreational activities and occupational endeavors with no restrictions." *Id.* at 47.

33. Posts from Claimant's Facebook account reflect that he was dissatisfied with the Employer and that he frequently fishes. Claimant indicated that he was fishing throughout November and December 2020. During this period Claimant made frequent posts indicating dissatisfaction with his job and fellow employees. (Ex. N).

Hearing Testimony of Claimant

34. Claimant testified that his job was quite physical and involved self-defense training for physical altercations, kneeling, crouching, squatting, and climbing up multiple levels of stairs in the facility on a daily basis. However, he had never had to actually deal with a physically combative inmate during his tenure. Claimant testified on the date of injury, he assisted in loading the inmate, to whom he referred as "a big boy," onto a backboard and carried him down a flight of stairs. Claimant testified the stabilization

board did not have wheels and took four men to lift. He estimated that the inmate weighed 300-400 pounds.

35. Claimant was in a standing position, with the inmate to his immediate right, while assisting the inmate to walk. Right arm around inmate's shoulder, left arm holding inmate's left bicep. Claimant testified that the inmate told him he was going to faint and shifted his weight onto Claimant's right side, causing him to brace against the weight of the inmate with his (outside) left knee, since Claimant's right knee was right next to the inmate's left knee. Claimant testified that he felt a sharp twinge up his left knee and initially thought it was just a tweak.

36. Claimant testified that he had no left knee issues prior to the incident. Claimant testified that he had initially gone to MedNow Clinic due to his back, and not his knees. Claimant testified that he did not have any arthritis issues. Claimant testified that the MedNow records are simply wrong.

37. Claimant testified that he did not recall the permanent work restrictions imposed by Dr. Dallenbach on January 30, 2020. Claimant testified that he did not disclose the restrictions to the Employer because he was unaware that he had restrictions. However, Claimant testified that he recalled that he was given permanent impairment rating by Dr. Dallenbach. He testified:

> I didn't even know I had a permanent restriction, to be honest with you. After that whole case was over, I was focused on getting better. And I did. I felt fine; I could do the job. And I did do the job for six months.

38. Claimant testified that he had not been happy working for the Employer and just "shut up for a paycheck."

39. Claimant stated that it was his understanding that the only treatment for his knee would be the surgery proposed by Dr. Walden. Claimant would like to undergo the surgery, especially with Dr. Walden, given how well the last (to his right knee) surgery proved to work out for Claimant in the end. He was not offered any modified duty by Employer, and has not worked for them since the date of injury.

Hearing Testimony of Dr. O'Brien

40. Dr. O'Brien testified that Claimant did not indicate any prior left knee issues to him upon questioning. Dr. O'Brien testified that the prior medical records indicated a history of noteworthy bilateral osteoarthritis.

41. Dr. O'Brien testified that the history provided by Claimant to the emergency room was different that that reported to other providers, and involved a fall against the left knee. A direct blow to the knee would not be consistent with the type of mechanism that produces a meniscus tear. Dr. O'Brien testified that the emergency room records on

the date after the injury were of special significance as the most contemporaneous documentation. Dr. O'Brien testified that there was a documented absence of swelling or any accumulation of fluid in the knee at the emergency room and that they were able to obtain full range of motion passively and actively.

42. Dr. O'Brien opined that the knee examination was completely inconsistent with a recent acute meniscus tear. If there were an acute meniscus tear, there would be substantial bleeding and accumulation of fluid in the knee. That would have been documented by even the most inexperienced examiner in an emergency room. With an acute tear the knee would have been massively swollen within minutes. This swelling would have been associated with substantial loss of range of motion both passively and actively. Dr. O'Brien testified that the x-ray done at the emergency room would have detected any fluid and bleeding and would have been very easy to see. Dr. O'Brien testified that "tweaking of the knee is not what people complain of when they've acutely torn their meniscus."

43. Dr. O'Brien testified that the MRI findings from November 9, 2020 corroborate the diagnosis of osteoarthritis from 2017. The MRI shows long-standing degenerative changes, including meniscal cysts which take many months, if not years, to form and become evident on a scan. Dr. O'Brien estimated the meniscal tear had been present for at least a year or two based on the nature of the study. The small effusion seen on the MRI was a physiologic amount of fluid there to nourish cartilage. There was no accumulation of blood or synovial fluid suggestive of an acute condition.

44. The MRI reflects age-related degeneration of the meniscus evident by the meniscal cysts, bone marrow edema, and fluid increase indicative of chronic arthritic changes. Dr. O'Brien also noted that the left knee study was nearly identical to those of the right knee done one year earlier, after which time Dr. Walden found extensive arthritis throughout the knee during surgery. Dr. O'Brien testified that although the radiologists identified the findings using the term "tear," from an orthopedic standpoint there is 'not really a tear' because this occurs only there the structure is exposed to sufficient energy to separate tissue. In this instance, there was no such force, and the findings show soft-tissue fracturing due to age-related fluid loss, not an acute meniscus tear.

45. Dr. O'Brien testified that the injury in this instance did not cause the need for medical treatment. He opined that the surgery recommended by Dr. Walden was not reasonably necessary regardless of relatedness, and would actually put Claimant at higher risk of hurting the knee.

Deposition Testimony of Dr. Moore

46. Dr. Moore testified that Claimant treated through him for opiate addiction. Dr. Moore testified that Claimant was treating for pain in the context of osteoarthritis in the bilateral knees. Dr. Moore testified that he would have to rely upon his records in regard to Claimant's pain complaints and that bilateral osteoarthritis could certainly be a cause of pain and a reason to take pain medications. {In summary, the ALJ finds

that Dr. Moore's testimony, while sincere, is of limited utility in deciding the issues in this case. To the extent that Respondents wish to impute some sort of drug-seeking behavior to Claimant, the evidence falls far short}.

CONCLUSIONS OF LAW

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

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

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

C. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002).

D. In this instance, the ALJ finds Claimant to have been reasonably, if imperfectly, consistent in describing his mechanism of injury, and relating the symptoms to his various medical providers at each step of his diagnosis and treatment. However, in light of the documentation in evidence, Claimant is less persuasive in his assertions that he was unaware of his limitations and restrictions when applying for his position at [Employer], to be addressed, *infra.*

Compensability, Generally

E. Claimant must prove by a preponderance of the evidence that he is a covered employee who suffered an injury arising out of and in the course of employment. C.R.S. § 8-41-301(1); S*ee*, *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett, 33 P.3d 1230* (Colo. App. 2001). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 592 P.2d 792 (Colo. 1979).

F. An injury occurs "in the course of" employment where Claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" requirement is narrower and requires claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract.

Compensability, as Applied

G. The evidence suggests that Claimant suffered from some degree of arthritis in both knees prior to this work incident. He received treatment in the form of painkillers from Dr. Moore. However, there is nothing in the record suggesting he brought a pre-existing torn meniscus into his new position at [Employer], Dr. O'Brien's opinion notwithstanding. In the unlikely event (which the ALJ specifically does *not* find) that Claimant's left medial meniscus was already torn, the evidence is clear that it became *symptomatic* on the date of this work incident, and will require further medical treatment as a direct result. The ALJ is much more persuaded by the MRI radiologist (who actually read the films), and Dr. Walden (a practicing orthopedist who also read the films) than Dr. O'Brien, who only read the narrative, and then criticized the other two for "over-reading" the films. The MRI showed an acute injury to the medical meniscus, which is completely consistent with Claimant's symptoms in the ensuing months.

H. Dr. O'Brien places great weight on the original ER records, and places blame on the other physicians for not exercising 'due diligence' in acquiring said records. Given that physicians base their opinions on what records they are actually provided, what exactly *would* constitute 'due diligence' in acquiring those records not provided? Were there other medical records that Dr. O'Brien did not receive/review, would he then confess to a lack of 'due diligence' himself? More records are always better than fewer, but Dr. O'Brien's emphasis on the ER records is misplaced when determining a mechanism of injury. ER personnel are focused on identifying injuries and pain generators and stabilizing the patient. Causation is of secondary concern, as is the precise mechanism of injury, unless it helps to target a treatment modality. The patients are in varying degrees of distress, and ER personnel are often multitasking. Leading questions are sometimes asked, certain dots get [mis]connected, and things can get lost in translation in that environment. "He fell **into** me, and hurt my left knee", can become "He fell **onto** me, and hurt my left knee." In such instance, the ALJ actually finds that a more precise mechanism of injury can be described in the calm of a physician's office after the fact, and even more so while being forged in the crucible of cross-examination. There is nothing in the record suggesting any material inconsistency by Claimant in describing how he got hurt, and how he felt in the ensuring months.

I. The ALJ finds Dr. Hall's straightforward reasoning, and that of Dr. Walden, and also that of Dr. Centi, to be far more persuasive than that of Dr. O'Brien. Claimant has shown, by a preponderance of the evidence, that he tore his left medial meniscus while assisting this inmate on October 17, 2020.

Medical Benefits, Generally

J. Respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. § 8-42-101 (1)(a), C.R.S. (2009); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). Where a claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997). Whether the claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P .2d 496 (Colo. App. 1997).

Medical Benefits, as Applied

K. The ALJ has found that Claimant sustained a compensable injury to his left knee. Respondents shall pay for all reasonable, necessary, and related treatment for Claimant's left knee, specifically, but not limited to, the left knee surgery requested by Dr. Walden. The ALJ is largely unpersuaded by the findings of Dr. O'Brien.

L. Instead, the ALJ credits the opinions of Drs. Walden, Hall, and Centi. The examinations, findings, and opinions of these three physicians, one of them an ATP and another a treating surgeon, are more reliable and persuasive than those of Dr. O'Brien. Drs. Walden, Centi, and Hall have all commented on whether the surgery is reasonably necessary, and/or whether it is related. They have all expressed consistent opinions at odds with those of Dr. O'Brien. Dr. O'Brien's statement that Claimant can resume full activity, despite his reported severe pain, documented tear, and request for surgery from a respected surgeon, does not carry the day.

Temporary Total Disability, Generally

M. To receive temporary disability benefits, the Claimant must prove the injury caused a disability. C.R.S. § 8-42-103(1); *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). As stated in *PDM Molding*, the term "disability" refers to the Claimant's physical inability to perform regular employment. *See also McKinley v. Bronco Billy's,* 903 P.2d 1239 (Colo. App. 1995). Once the Claimant has established a "disability" and a resulting wage loss, the entitlement to temporary disability benefits continues until terminated in accordance with C.R.S. § 8-42-105(3)(a)-(d). Claimant is not required to prove that the industrial injury is the "sole" cause of his wage loss to recover temporary disability benefits. *Jorge Saenz Rico v. Yellow Transportation, Inc*. W.C. No. 4-547-185 (ICAO December 1, 2003), citing *Horton v. Industrial Claim Appeals Office*, 942 P.2d 1209 (Colo. App. 1996).

N. Claimant has established that he was injured at work. He was taken out of work beginning October 18, 2020 by the provider at Parkview Hospital and has remained under restrictions by an ATP. Respondents have not offered Claimant modified duty. He is therefore entitled to TTD from October 18, 2020 and ongoing, subject to any applicable offsets and/or reductions.

Reduction of Benefits Pursuant to C.R.S. §8-42-112(1)(d)

O. Compensation provided for under the Act shall be reduced by fifty percent where "the employee *willfully* misleads an employer concerning the employee's physical ability to perform the job, and the employee is subsequently injured on the job *as a result of the physical ability* about which the employee willfully misled the employer." C.R.S. § 8-42-112(1)(d). (emphasis added). The term "willful" as used in this statute means "with deliberate intent." *City of Las Animas* *v. Maupin*, 804 P.2d 285, 286 (Colo. App. 1990); *citing Bennett Properties Co. v. Industrial Commission,* 165 Colo. 135, 437 P.2d 548 (1968). The burden of proof is on the employer to show that the employee acted willfully. *Johnson v. Denver Tramway Corp.,* 115 Colo. 214, 171 P.2d 410 (1946).

Did Claimant Willfully Mislead his Employer?

P. Claimant argues that he cannot practically be expected to know the precise details of prior restrictions given to him, nor does the fact that Claimant received permanent restrictions for a prior right knee injury make his actions willful *per se*. Under the facts presented, the ALJ cannot concur. Claimant was an active participant in his FCE, and the validity criteria were met in his assessment; i.e., Claimant was indeed putting forth his best effort. As a result, he was duly compensated for a 25% LE Impairment Rating. *That means you are being compensated right now for your future inability to perform certain demanding tasks*. The ALJ finds that this would have been explained to Claimant during the process of his prior settlement for his right knee.

Q. But Claimant cannot have it both ways, by *now* arguing that his right knee disability was not really an impediment to performing the functions of this demanding position handling correctional inmates, some of whom outweigh even him, and some of whom have bad intentions – hence the hand-to-hand training. His right knee was so bad that he needed assistance just getting up off the floor. He was unable to even assume a crouching position. His lifting capacity had been seriously compromised, and due to his knee. Walking up stairs (it's a prison, after all) elicited pain. And despite Claimant's assertion that he got better before he applied for this position, *he was placed at MMI on the date of the FCE.*

R. Claimant signed the Job Performance Characteristics on May 11, 2020. When he did so, he knew he could not perform the tasks as outlined. But instead, he stated he did not have a disability as determined by a physician. He stated he could perform the essential functions of this job without any restrictions or limitations, and did not require any special accommodation. Even in this age of freewheeling interpretations of just about anything, some things are formalized into writing for a reason, and the parties are thereby placed on notice of their contents. The ALJ finds that Claimant willfully misled Employer concerning his physical ability to perform this job. Why did he do this? Simply stated, he was afraid if he disclosed his limitations, he might not get the job. It's quite understandable why one might do this, but there can be consequences when things go south. Be careful what you ask for.

Did Claimant Subsequently Injure his Left Knee, as a Result of his Nondisclosure of his Right Knee Disability?

S. After Claimant was hired, he performed the job for five months without any issue related to his left knee. He repeatedly participated in physical training *exercises*, none of which were evidenced to be hindered by Claimant's left knee. Claimant would argue that these facts would suffice to show that he had the ability to perform the tasks required by his job description. The ALJ is not persuaded. Up until his work injury, Claimant describes a fairly routine workday, albeit long (and unsatisfying, as he later acknowledged). However, *exercises* are no substitute for having to deal with the real thing, which occurred unexpectedly on this date. Claimant had never been in a real altercation up until this date. Whether this inmate's actions were medically induced, or an act of passive aggression remains unknown. However, prison personnel must be equipped to deal with issues such as this - and far worse. Hence, the questionnaire.

T. Claimant argues that his *right* knee limitations had nothing to do with the subsequent injury to his *left* knee. A closer examination of the record reveals that it is not so simple as matching body parts. In determining the Crouch component of the FCE, it was noted that there was **significant compensation to the left lower extremity**, due to pain in the right. (Finding of Fact #4, *supra*). Claimant himself in his testimony confirms that he had to use his left leg as a brace, since his right knee alone was not strong enough to support the shifting weight of the inmate (Finding of Fact #35, *supra*). And the more he had to crouch, due to the inmate's weight, the weaker and more painful his right knee became – so out goes his left leg as a 'brace', and the rest is history. The ALJ finds that Claimant's left knee injury came about as a result of his willfully undisclosed right knee disability. Further, the ALJ finds that Claimant's limited lifting abilities (amply put forth in the FCE) also contributed to his inability to hold this inmate upright, thus leading to the left knee injury.

Average Weekly Wage

U. Respondents did not address this issue in their brief. Both parties supplied identical payroll records for Claimant's tenure. The ALJ has reviewed Claimant's straightforward analysis, and finds it persuasive. Claimant's Average Weekly Wage is $852.00

ORDER

It is therefore Ordered that:

1. Claimant suffered a compensable injury to his left knee on October 17, 2020.

2. Respondents shall pay for all reasonable, necessary, and related medical treatment, including, but not limited to, the surgery as proposed by Dr. Walden.

3. Respondents shall pay TTD payments to Claimant from October 17, 2020 and ongoing, subject to any offsets from other employment, as well as reductions as provided by this Order.

4. Claimant's compensation shall be reduced by 50%, as provided by C.R.S. 8-42-112(1)(d).

5. Claimant's Average Weekly Wage is $852.00

6. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

7. All matters not determined herein are reserved for future determination.

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

DATED: June 18, 2021

/s/ William G. Edie

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-140-351-001

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she suffered industrial injuries on May 28, 2020 during the course and scope of her employment with Employer.

2. Whether Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive reasonable, necessary and causally related medical benefits for her industrial injuries.

3. Whether Claimant has proven by a preponderance of the evidence that Respondents failed to timely provide a list of at least four designated physicians in compliance with §8-43-404(5)(a)(I)(A), C.R.S. and she was thus permitted to select David W. Yamamoto, M.D. as her Authorized Treating Physician (ATP).

4. Whether Claimant has established by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits for the period June 5, 2020 until terminated by statute.

5. Whether Respondents have proven by a preponderance of the evidence that Claimant was responsible for her termination from employment under §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. (collectively "termination statutes") and is thus precluded from receiving indemnity benefits.

6. Whether Claimant has demonstrated by a preponderance of the evidence that she is entitled to recover penalties for Respondents' failure to report the injury to the Division of Workers' compensation within 10 days after notice or knowledge of the injury pursuant to §8-43-101(1), C.R.S. §8-43-103(1), C.R.S. and WCRP Rules 5-2 (A), (B)(1), and (B)(2).

7. Whether Claimant has established by a preponderance of the evidence that she may recover penalties for Respondents' failure to admit or deny liability as required by §8-43-203(2)(a), C.R.S.

8. Whether Claimant has proven by a preponderance of the evidence that she is entitled to recover penalties for Respondents' failure to provide a complete copy of their claim file within 15 days.

9. Whether Respondents have demonstrated by a preponderance of the evidence that they are permitted to recover penalties for Claimant's late reporting of her injury pursuant to §8-43-102(1)(a), C.R.S.

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $640.00.

FINDINGS OF FACT

1. Claimant is a 44-year-old female who performs janitorial duties for Employer. On May 28, 2020 she was vacuuming in a Ball Aerospace office facility. Claimant testified that she was using a vacuum that was much heavier than the device she regularly used. She noted that she had to bend over to vacuum under approximately 100 tables and chairs at the work site.

2. Claimant began her work shift on May 28, 2020 at 5:30 a.m. She testified that after she had been vacuuming for about 30 minutes to two hours she began to develop left arm pain. Claimant then took a break and told two co-workers about her left arm pain. She then "stood around" until 1:30 p.m. and did not resume working. In fact, Claimant noted that she was suffering pain at a 10/10 level by the end of her work shift. She left the site at the end of her shift and went home.

3. Claimant testified that she woke up on May 29, 2020 with a stiff neck. She went to work and informed job site supervisor Mary R[Redacted] that she was feeling pain in her neck and left arm. Claimant also informed Ms. R[Redacted] that she believed using a different vacuum for her shift had caused the pain. However, Claimant acknowledged that Ms. R[Redacted] is not her supervisor and did not work for Employer. She recognized that she is required to report any work injuries to her direct supervisor and Area Manager Maria Anna M[Redacted].

4. On June 8, 2020 Claimant sent Ms. M[Redacted] a text message specifying that she was going to the emergency room and would not make it to work. Claimant explained that she had been feeling badly for two or more weeks, her left arm had been falling asleep and she was having trouble breathing. She noted that she had been experiencing symptoms for a little over two weeks. Claimant remarked that she would keep Ms. M[Redacted] updated about her condition. Ms. M[Redacted] asked whether Claimant had been tested for COVID-19 and she replied that she had not. Claimant noted that because she had "so many health problems am not sure what could be causing it." Throughout the correspondence Claimant did not mention any work incident or symptoms while using a vacuum at work on May 28, 2020.

5. On June 8, 2020 Claimant visited the Swedish Medical Center Emergency Room because of breathing difficulties and concerns about a possible COVID-19 infection. Claimant denied any recent trauma. Notably, she did not mention any specific work incident while using a vacuum cleaner. Claimant had multiple complaints involving left arm paresthesias, neck pain, chest discomfort, lightheadedness, and shortness of breath. The medical record specifically provided:

> She first reports ongoing left arm paresthesias ongoing for 3 weeks left paraspinal and left shoulder pain ongoing for 2 weeks, intermittent chest pressure for approximately 1 week, and shortness of breath with exertion

> for approximately 1 week. She also reports 2-3 episodes of lightheadedness over the past 3 weeks.

Claimant mentioned that her neck pain felt like she had fallen asleep “in a weird position.” She noted left arm weakness but it was not easy to discern because the pain in her neck and left shoulder made it difficult to use her left arm.

6. At the emergency room Claimant underwent several diagnostic studies. The testing included a CT scan of the head and neck, an x-ray of the chest, an EKG, and an MRI of the neck. The neck CT scan revealed “at least moderate canal stenosis.” The MRI showed a small central disc extrusion at C4-5 with slight dorsal displacement of the cord, a small right paracentral disc extrusion at C3-4 without canal or foraminal compromise and degenerative spondylosis at C4-5 and C5-6. The report specified that displacement of the cord at C4-5 was the likely cause of her symptoms. Claimant received work restrictions for two days.

7. On the evening of June 8, 2020 Claimant sent another text message to Ms. M[Redacted]. She stated she would not make it to work the next day because she was undergoing tests. In response to Ms. M[Redacted]’s inquiry, Claimant noted she did not have any restrictions and would be able to work on Thursday, June 11, 2020. She commented that she would not be able to use the backpack vacuum because “its my upper left arm & upper neck.” Claimant again did not mention any work-related incident on May 28, 2020.

8. On June 9, 2020 Claimant again texted Ms. M[Redacted] and stated that testing revealed a herniated disc in her back. She was also awaiting results from her COVID-19 test. On the evening of June 10, 2020 Claimant sent another text message to Ms. M[Redacted] explaining that she would not make it to work on Thursday or Friday due to pain. Claimant had a doctor’s appointment and would provide a work excuse. Claimant did not note any injuries while vacuuming at work on May 28, 2020.

9. On Thursday morning June 11, 2020 Claimant texted Ms. M[Redacted] and remarked that “I think I messed up my arm when I used Mary’s heavy vacuum twice because it took you forever to bring us one and Ester even used it once and her arm was hurting.” Claimant testified that on June 11, 2020 “when I found out that I had two herniated discs, that is when I did tell her what was really going on with me.” She noted she would return to work on the following Monday. In a subsequent text Ms. M[Redacted] commented that she did not control the available vacuums and inquired whether Claimant could perform her job duties. Claimant replied that she was taking muscle relaxers and reiterated she would return to work on Monday.

10. On June 12, 2020 Claimant visited primary care provider Megan Champion, M.D. for an evaluation. Claimant informed Dr. Champion that she was injured at work using a heavy vacuum. She testified that she was referred to a specialist at the University of Colorado because Dr. Champion did not handle work-related injuries.

11. On Friday evening June 12, 2020 Claimant texted Ms. M[Redacted] with a note from CU Health reflecting that she could return to work on June 19, 2020 with restrictions. Claimant completed a Claim for Workers' Compensation on the same date through her attorney. There is no certificate on the claim reflecting that the document was sent to Employer.

12. On June 15, 2020 Ms. M[Redacted] texted Claimant inquiring why she was not at work. Claimant responded she had a work excuse through June 19. 2020. On June 18, 2020 Claimant told Ms. M[Redacted] that her doctors had extended the work excuse until June 25, 2020. On the morning of June 25, 2020 Ms. M[Redacted] again texted Claimant requesting a phone call. On June 29, 2020 Ms. M[Redacted] sent Claimant a text message and asked her to complete a leave of absence form but Claimant did not respond.

13. On July 1, 2020 Claimant visited David W. Yamamoto, M.D. for an examination. Claimant reported that while she was vacuuming at work on May 28, 2020 her left arm began to hurt. She noted left-sided neck pain with numbness into the left arm. Dr. Yamamoto diagnosed Claimant with a cervical strain, a herniated cervical disc, a trapezius strain and radicular pain in the left arm. He referred Claimant for physical therapy and a specialist evaluation. Dr. Yamamoto also assigned Claimant work restrictions.

14. On August 26, 2020 Employer received a Director's Order from the Division of Workers' Compensation (DOWC) advising that Claimant had filed a claim for Workers' Compensation. The Order specified that Claimant had filed a claim for compensation on June 15, 2020 and noted that Respondents' were required to file a position statement admitting or contesting liability within 20 days. The Order also directed Respondents to take a position on the matter within 15 days.

15. Respondents filed an Employer's First Report of Injury (FROI) on September 4, 2020 stating that the first notice of injury was the date of the Director's Order. Notably, the FROI provides that Claimant suffered cumulative trauma injuries to multiple body parts based on repetitive motion. Respondents filed a Notice of Contest on September 11, 2020. On September 14, 2020 the DOWC stated that the Director's Order had been satisfied.

16. Claimant continued to receive conservative treatment from Dr. Yamamoto. He assigned Claimant work restrictions on July 1, 2020, July 28, 2020, September 29, 2020, November 9, 2020 and January 20, 2021. Dr. Yamamoto most recently assigned temporary work restrictions with no expiration date on March 2, 2021. He has not placed Claimant at Maximum Medical Improvement (MMI) for her May 28, 2020 injuries.

17. On March 2, 2021 Claimant underwent an independent medical examination with F. Mark Paz, M.D. Claimant reported that she developed left upper extremity pain on May 27, 2020 while she was using a heavy vacuum at work. Specifically, after pushing and pulling the vacuum with her left arm she developed pain from her left

wrist to left shoulder. Claimant remarked that she subsequently experienced symptoms at the base of her neck. Dr. Paz considered whether it was medically probable that Claimant's left upper extremity symptoms were related to her work activities. He performed a causation analysis pursuant to the Colorado Division of Workers' Compensation *Medical Treatment Guidelines* (*Guidelines*). Dr. Paz explained that Claimant provided a direct history that her left upper extremity symptoms developed after using the vacuum for approximately one half hour. She did not report a traumatic event or mechanism of injury that correlated with the diagnosis of an extruded disc at the C4-C5 level. Furthermore, based on Claimant's text messages she developed symptoms prior to May 27, 2020. Based on Claimant's e direct history, the findings on physical examination and a review of Claimant's prior medical records, Dr. Paz concluded it was not medically probable that the "cervical spondylosis C4-5, with central disc extrusion with effacement of subarachnoid space and dorsal displacement of the cord in the spinal canal [was] causally related" to an industrial incident. He noted that the cervical spondylosis at the C4-5 level is a degenerative condition that preceded the work incident.

18. Ms. M[Redacted] testified at the hearing in this matter. She works for Employer as an Area Manager and was Claimant's direct supervisor on May 28, 2020. Ms. M[Redacted] noted that Employer trained employees and provided a handbook for reporting work-related injuries. The handbook addressed safety as well as attendance. Specifically, employees are trained to notify supervisors and then call a nurse line for direction regarding emergency medical assistance.

19. Ms. M[Redacted] explained that Claimant's work assignment on May 28, 2020 involved vacuuming floors and not lifting or carrying the vacuum up any stairs. She noted that on the date of the incident Claimant used an upright vacuum similar to one that would be used at home for small areas and entries. Ms. M[Redacted] commented that, in the area where Claimant was vacuuming on May 28, 2020, she would usually use a larger backpack vacuum. She thus remarked that the replacement vacuum Claimant was using on the date of injury was actually smaller than the one she would normally use and estimated it weighed less than 20 pounds.

20. Ms. M[Redacted] commented that Claimant did not inform her about any injury or need for medical treatment prior to June 8, 2020. Moreover, on June 8, 2020 Claimant did not communicate anything about an injury at work while using a vacuum. Ms. M[Redacted] remarked that after Claimant went to the emergency room on June 8, 2020 she never returned to work for Employer. Furthermore, Ms. M[Redacted] stated that she did not recall seeing Claimant's June 11, 2020 text message regarding "messing up" her arm, but sent Claimant a text message regarding the supply of vacuums based on an in-person conversation she had with Claimant and Esther about the availability of vacuums.

21. Ms. M[Redacted] explained that she attempted to contact Claimant on multiple occasions to have her return to work when her restrictions had expired. She also made several attempts through text message and phone calls for Claimant to complete a leave of absence form while she recovered. Ms. M[Redacted] commented that that she

was only aware Claimant was suffering personal health problems and not industrial injuries. She detailed that Employer's attendance policy permits an employee three no-call/no-shows. Ms. M[Redacted] thus terminated Claimant for violating Employer's attendance policy in September 2020 after not hearing from her for several months.

22. Dr. Paz testified at the hearing in this matter. He maintained that Claimant's left upper extremity symptoms were not related to her work activities for Employer. He explained that the June 8, 2020 MRI showed two herniated discs at C3-4 and C4-5 with extensive degenerative changes related to age and arthritis. The degenerative changes caused narrowing around the spinal cord or stenosis at multiple levels. Dr. Paz commented that Claimant suffers from cervical spondylosis with associated neurologic deficits resulting from myelopathy. Specifically, Claimant has a combination of arthritic changes and herniated discs causing displacement of the spinal cord. Dr. Paz explained that the herniations on the June 8, 2020 MRI cannot be characterized as acute, subacute or traced back to any particular time. He reasoned that there was no impact to any nerve that would cause symptoms in Claimant's left upper extremity. Accordingly, Claimant's condition is consistent with stenosis at the C4-5 level from the spinal cord rather than any particular nerve root.

23. Dr. Paz also explained that there was no mechanism of injury corresponding to Claimant's herniated discs or cervical spondylosis. The mechanism of injury for a herniated disc typically involves forceful pushing or carrying an object on the head or using the head as a lever. Dr. Paz commented that Claimant's two herniated discs would cause immediate pain, severe discomfort and weakness, instead of a slow evolution of symptoms. He summarized that Claimant's two herniated discs are degenerative in nature rather than the result of forceful traumatic extrusion of the discs. Specifically, it is not medically probable that the work activity reported by Claimant caused the MRI findings. Claimant thus did not suffer industrial injuries while working for Employer on May 28, 2020.

24. Claimant has failed to establish that it is more probably true than not that she suffered compensable industrial injuries on May 28, 2020 during the course and scope of her employment with Employer. Initially, on May 28, 2020 Claimant was vacuuming an office facility. She noted that the vacuum was much heavier than the device she regularly used. After about 30 minutes to two hours Claimant began to develop left arm pain. The pain was at a 10/10 level by the end of her work shift. Despite Claimant's testimony, the chronology of events and the medical records reflect that she did not likely suffer industrial injuries while performing her job duties for Employer on May 28, 2020.

25. On May 29, 2020 Claimant informed job site supervisor Ms. R[Redacted] that she was feeling pain in her neck and left arm. Claimant noted that using a different vacuum during her shift caused the pain. However, Claimant acknowledged that Ms. R[Redacted] is not her supervisor and did not work for Employer. She recognized that she is required to report any work injuries to her direct supervisor Ms. M[Redacted]. In fact, Ms. M[Redacted] remarked that Employer trained employees and provided a handbook for reporting a work-related injury. Specifically, employees are directed to notify

supervisors and then call a nurse line for instructions regarding emergency medical assistance.

26. Claimant did not seek medical treatment for the May 28, 2020 incident until June 8, 2020. Specifically, on June 8, 2020 Claimant sent Ms. M[Redacted] a text message specifying that she was going to the emergency room and would not make it to work. Claimant explained that she had not been feeling well for two or more weeks, her left arm had been falling asleep and she was having trouble breathing. She noted that, because she had "so many health problems am not sure what could be causing it." Throughout the correspondence Claimant did not mention any work incident or symptoms while using a vacuum on May 28, 2020. Notably, the correspondence reveals that Claimant suffered myriad symptoms that were not related to her work activities. Claimant presented to the emergency room on June 8, 2020 because of breathing difficulties and concerns about a possible COVID-19 infection. She denied any recent trauma and did not mention any specific work incident while using a vacuum cleaner. She had multiple complaints involving left arm paresthesias, neck pain, chest discomfort, lightheadedness, and shortness of breath. The medical record specifically provides that Claimant reported "ongoing left arm paresthesias ongoing for 3 weeks left paraspinal and left shoulder pain ongoing for 2 weeks, intermittent chest pressure for approximately 1 week, and shortness of breath with exertion for approximately 1 week." The time frames listed in the medical report reveal that Claimant's left arm symptoms likely preceded her May 28, 2020 work activities. Finally, a neck MRI showed a small central disc extrusion at C4-5 with slight dorsal displacement of the cord, a small right paracentral disc extrusion at C3-4 without canal or foraminal compromise, and degenerative spondylosis at C4-5 and C5-6. The report specified that displacement of the spinal cord at C4-5 was the likely cause of Claimant's symptoms.

27. On the evening of June 8, 2020 Claimant sent another text message to Ms. M[Redacted] and stated she would not make it to work the next day because she was undergoing tests. In response to Ms. M[Redacted]'s inquiry, Claimant noted she did not have any restrictions and would be able to work on Thursday, June 11, 2020. She commented that she could not use the backpack vacuum because "its my upper left arm & upper neck." Ms. M[Redacted] credibly commented that Claimant did not inform her about any injury or need for medical treatment. Claimant also did not communicate anything about an injury at work while using a vacuum cleaner. On the following day Claimant advised Ms. M[Redacted] that testing had revealed a herniated disc in her back. However, Claimant did not attribute the condition to her work activities on May 28, 2020. On Thursday morning, June 11, 2020 Claimant again texted Ms. M[Redacted] and remarked that she may have "messed up" her arm using a heavy vacuum. Importantly, Claimant attributed her left upper extremity symptoms to her vacuuming activities at work only after testing revealed a herniated disc. In fact, Claimant testified that on June 11, 2020 "when I found out that I had two herniated discs, that is when I did tell [Ms. M[Redacted]] what was really going on with me." On June 12, 2020 Claimant completed a Claim for Workers' Compensation. There is no certificate on the claim reflecting that the document was sent to Employer.

28. The persuasive medical opinion of Dr. Paz also reveals that Claimant did not likely suffer industrial injuries while working for Employer on May 28, 2020. Dr. Paz considered whether it was medically probable that Claimant's left upper extremity symptoms were related to her work activities. He performed a causation analysis pursuant to the *Guidelines*. Dr. Paz explained that Claimant developed left upper extremity symptoms after using a vacuum at work on May 28, 2020. She did not report a traumatic event or mechanism of injury that correlated with the diagnosis of an extruded disc at the C4-C5 level. Furthermore, based on Claimant's text messages she likely developed symptoms prior to the date of the incident. Dr. Paz explained that the herniations on the June 8, 2020 MRI could not be characterized as acute, subacute or traced back to any particular time. He reasoned that there was no impact to any nerve that would cause symptoms in Claimant's left upper extremity. Claimant's condition is thus consistent with stenosis at the C4-5 level from the spinal cord rather than any particular nerve root. Dr. Paz summarized that Claimant's two herniated discs are degenerative in nature rather than the result of forceful traumatic extrusion of the discs. Specifically, it is not medically probable that Claimant's reported work activity caused the MRI findings. Claimant thus did not suffer industrial injuries while working for Employer on May 28, 2020.

29. The preceding chronology of events, medical records, bulk of credible testimony and persuasive medical opinion of Dr, Paz reflect that Claimant did not likely suffer industrial injuries while performing her job duties for Employer on May 28, 2020. Although Claimant associated her left upper extremity symptoms with her work activities after she learned of two herniated discs, the medical records and preceding chronology do not reflect a causal relationship between Claimant's diffuse symptoms and her job duties. Claimant has failed to demonstrate that her work activities on May 28, 2020 aggravated, accelerated or combined with her pre-existing condition to produce a need for medical treatment. Accordingly, Claimant's claim for Workers' Compensation benefits is denied and dismissed. Therefore, Claimant's request for medical benefits, her choice of Dr. Yamamoto as her ATP and her appeal for TTD benefits are also denied and dismissed.

30. Claimant has failed to demonstrate that it is more probably true than not that she is entitled to recover penalties for Respondents' failure to report the injury to the DOWC within 10 days after notice or knowledge of the injury. The record reflects that Claimant provided Employer with insufficient notice of a work-related injury prior to August 26, 2020. Specifically, Ms. M[Redacted] credibly explained that Claimant sent her a text message on June 8, 2020 specifying that she was going to the emergency room and would make it to work. Claimant explained that she had been feeling badly for two or more weeks, her left arm had been falling asleep and she was having trouble breathing. Claimant noted that because she had "so many health problems am not sure what could be causing it." Throughout the correspondence Claimant did not mention any work incident or symptoms while using a vacuum on May 28, 2020. Notably, the correspondence reveals that Claimant suffered myriad symptoms that were not related to her work activities. Although Claimant mentioned to Ms. M[Redacted] in a June 11, 2020 text message that "I think I messed up my arm when I used Mary's heavy vacuum twice" she did not request medical treatment or otherwise detail a work-related injury. Based on

Claimant’s variety of symptoms, Ms. M[Redacted] was under the impression that Claimant was off work because of restrictions for non-work-related conditions. She thus requested Claimant to take medical leave. In the context of Claimant’s multiple symptoms and her uncertainty about their causes, Respondents’ failure to report an injury was predicated on a rational argument based in law or fact.

31. Moreover, the record reflects that Respondents did not receive notice of Claimant’s work-related injury until August 26, 2020. On August 26, 2020 Employer received a Director’s Order from the DOWC providing that Claimant had filed a claim for Workers’ Compensation. The Order specified that Claimant had filed a claim for compensation on June 15, 2020 and noted that Respondents’ were required to file a position statement admitting or contesting liability within 20 days. The Order also directed Respondents to take a position on the matter within 15 days. Upon receipt of the Order, the Employer filed a FROI within 10 days. Any violation was thus cured prior to Claimant’s Application for Hearing endorsing penalties. Claimant must therefore produce clear and convincing evidence that Employer had knowledge the conduct was unreasonable. Based on Claimant’s vague report of an injury, her failure to comply with Employer’s efforts to have her file a claim to elaborate on her condition, the lack of information regarding ongoing treatment through Dr. Yamamoto, and Employer’s immediate action once knowledge of the claim was received, Employer’s conduct was objectively reasonable. Accordingly, Claimant’s request for penalties based on the failure to report the injury to the DOWC within 10 days after notice or knowledge of the injury is denied and dismissed.

32. Claimant has failed to establish that it is more probably true than not that she is entitled to recover penalties for Respondents’ failure to admit or deny liability as required by §8-43-203(2)(a), C.R.S. Initially, §8-43-203(2)(a), C.R.S. specifically provides that the respondents “may become liable to the claimant, if successful on the claim for compensation, for up to one day’s compensation for each failure to so notify.” However, as determined in the preceding sections of this order, Claimant has failed to demonstrate that she suffered compensable injuries while working for Employer on May 28, 2020. Because Claimant was not successful on her claim for compensation, Respondents are not liable to penalties under §8-43-203, C.R.S. Accordingly, Claimant’s request for penalties for failure to timely admit or deny liability is denied and dismissed.

33. Claimant has failed to prove that it is more probably true than not that she is entitled to recover penalties for Respondents’ failure to provide a complete copy of their claim file within 15 days pursuant to §8-43-203(4), C.R.S. Claimant asserts that she requested a copy of the claim file from Insurer on June 12, 2020 but did not receive the claim file until November 17, 2020. However, Claimant has failed to produce any evidence regarding the production of the file. Specifically, Claimant has not provided evidence of a request or the late production of the claim file. The mere allegation of the failure to timely produce the claim file, absent supporting evidence, is insufficient to demonstrate that Insurer violated §8-43-203(4), C.R.S. Accordingly, Claimant’s request for penalties for failure to timely provide a copy of the claim file under §8-43-203(4), C.R.S. is denied and dismissed.

34. Respondents have failed to demonstrate that it is more probably true than not that they are permitted to recover penalties for Claimant's late reporting of her injury pursuant to §8-43-102(1)(a), C.R.S. As determined in the preceding sections of this order, Claimant has failed to demonstrate that she suffered a compensable injury while working for Employer on May 28, 2020. Because Claimant is not entitled to receive any compensation, she cannot lose compensation. Accordingly, Respondents' request for penalties pursuant to §8-43-102(1)(a), C.R.S. is denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

Compensability

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

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.,* W.C. No. 4-650-711 (ICAO, Feb. 15, 2007); *David Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

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

7. The provision of medical care based on a claimant's report of symptoms does not establish an injury but only demonstrates that the claimant claimed an injury. *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020). Moreover, a referral for medical care may be made so that the respondent would not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id.* Although a physician provides diagnostic testing, treatment, and work restrictions based on a claimant's reported symptoms. It does not follow that the claimant suffered a compensable injury. *Fay v. East Penn manufacturing Co., Inc.*, W.C. No. 5-108-430-001 (ICAO, Apr. 24, 2020); *cf. Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997) ("right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment"). While scientific evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory supporting compensability when making a determination. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020).

8. As found, Claimant has failed to establish by a preponderance of the evidence that she suffered compensable industrial injuries on May 28, 2020 during the course and scope of her employment with Employer. Initially, on May 28, 2020 Claimant was vacuuming an office facility. She noted that the vacuum was much heavier than the device she regularly used. After about 30 minutes to two hours Claimant began to develop left arm pain. The pain was at a 10/10 level by the end of her work shift. Despite Claimant's

testimony, the chronology of events and the medical records reflect that she did not likely suffer industrial injuries while performing her job duties for Employer on May 28, 2020.

9. As found, on May 29, 2020 Claimant informed job site supervisor Ms. R[Redacted] that she was feeling pain in her neck and left arm. Claimant noted that using a different vacuum during her shift caused the pain. However, Claimant acknowledged that Ms. R[Redacted] is not her supervisor and did not work for Employer. She recognized that she is required to report any work injuries to her direct supervisor Ms. M[Redacted]. In fact, Ms. M[Redacted] remarked that Employer trained employees and provided a handbook for reporting a work-related injury. Specifically, employees are directed to notify supervisors and then call a nurse line for instructions regarding emergency medical assistance.

10. As found, Claimant did not seek medical treatment for the May 28, 2020 incident until June 8, 2020. Specifically, on June 8, 2020 Claimant sent Ms. M[Redacted] a text message specifying that she was going to the emergency room and would not make it to work. Claimant explained that she had not been feeling well for two or more weeks, her left arm had been falling asleep and she was having trouble breathing. She noted that, because she had “so many health problems am not sure what could be causing it.” Throughout the correspondence Claimant did not mention any work incident or symptoms while using a vacuum on May 28, 2020. Notably, the correspondence reveals that Claimant suffered myriad symptoms that were not related to her work activities. Claimant presented to the emergency room on June 8, 2020 because of breathing difficulties and concerns about a possible COVID-19 infection. She denied any recent trauma and did not mention any specific work incident while using a vacuum cleaner. She had multiple complaints involving left arm paresthesias, neck pain, chest discomfort, lightheadedness, and shortness of breath. The medical record specifically provides that Claimant reported “ongoing left arm paresthesias ongoing for 3 weeks left paraspinal and left shoulder pain ongoing for 2 weeks, intermittent chest pressure for approximately 1 week, and shortness of breath with exertion for approximately 1 week.” The time frames listed in the medical report reveal that Claimant’s left arm symptoms likely preceded her May 28, 2020 work activities. Finally, a neck MRI showed a small central disc extrusion at C4-5 with slight dorsal displacement of the cord, a small right paracentral disc extrusion at C3-4 without canal or foraminal compromise, and degenerative spondylosis at C4-5 and C5-6. The report specified that displacement of the spinal cord at C4-5 was the likely cause of Claimant’s symptoms.

11. As found, on the evening of June 8, 2020 Claimant sent another text message to Ms. M[Redacted] and stated she would not make it to work the next day because she was undergoing tests. In response to Ms. M[Redacted]’s inquiry, Claimant noted she did not have any restrictions and would be able to work on Thursday, June 11, 2020. She commented that she could not use the backpack vacuum because “its my upper left arm & upper neck.” Ms. M[Redacted] credibly commented that Claimant did not inform her about any injury or need for medical treatment. Claimant also did not communicate anything about an injury at work while using a vacuum cleaner. On the following day Claimant advised Ms. M[Redacted] that testing had revealed a herniated disc in her back. However, Claimant did not attribute the condition to her work activities

on May 28, 2020. On Thursday morning, June 11, 2020 Claimant again texted Ms. M[Redacted] and remarked that she may have “messed up” her arm using a heavy vacuum. Importantly, Claimant attributed her left upper extremity symptoms to her vacuuming activities at work only after testing revealed a herniated disc. In fact, Claimant testified that on June 11, 2020 “when I found out that I had two herniated discs, that is when I did tell [Ms. M[Redacted]] what was really going on with me.” On June 12, 2020 Claimant completed a Claim for Workers’ Compensation. There is no certificate on the claim reflecting that the document was sent to Employer.

12. As found, the persuasive medical opinion of Dr. Paz also reveals that Claimant did not likely suffer industrial injuries while working for Employer on May 28, 2020. Dr. Paz considered whether it was medically probable that Claimant’s left upper extremity symptoms were related to her work activities. He performed a causation analysis pursuant to the *Guidelines*. Dr. Paz explained that Claimant developed left upper extremity symptoms after using a vacuum at work on May 28, 2020. She did not report a traumatic event or mechanism of injury that correlated with the diagnosis of an extruded disc at the C4-C5 level. Furthermore, based on Claimant’s text messages she likely developed symptoms prior to the date of the incident. Dr. Paz explained that the herniations on the June 8, 2020 MRI could not be characterized as acute, subacute or traced back to any particular time. He reasoned that there was no impact to any nerve that would cause symptoms in Claimant’s left upper extremity. Claimant’s condition is thus consistent with stenosis at the C4-5 level from the spinal cord rather than any particular nerve root. Dr. Paz summarized that Claimant’s two herniated discs are degenerative in nature rather than the result of forceful traumatic extrusion of the discs. Specifically, it is not medically probable that Claimant’s reported work activity caused the MRI findings. Claimant thus did not suffer industrial injuries while working for Employer on May 28, 2020.

13. As found, the preceding chronology of events, medical records, bulk of credible testimony and persuasive medical opinion of Dr, Paz reflect that Claimant did not likely suffer industrial injuries while performing her job duties for Employer on May 28, 2020. Although Claimant associated her left upper extremity symptoms with her work activities after she learned of two herniated discs, the medical records and preceding chronology do not reflect a causal relationship between Claimant’s diffuse symptoms and her job duties. Claimant has failed to demonstrate that her work activities on May 28, 2020 aggravated, accelerated or combined with her pre-existing condition to produce a need for medical treatment. Accordingly, Claimant’s claim for Workers’ Compensation benefits is denied and dismissed. *See Washburn v. City Market*, WC No. 5-109-470 (ICAO, June 3, 2020) (noting that the “claimant [might] be confusing causation for correlation” and declining to “blindly follow the common informal fallacy of "after this therefore because of this" (*post hoc ergo propter hoc*)). Therefore, Claimant’s request for medical benefits, her choice of Dr. Yamamoto as her ATP and her appeal for TTD benefits are also denied and dismissed.

Penalties

14. Whether statutory penalties may be imposed under §8-43-304(1) C.R.S. involves a two-step analysis. The statute provides for the imposition of penalties of up to $1000 per day where the insurer "violates any provision of article 40 to 47 of [title 8], or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or the panel, for which no penalty has been specifically provided, or fails, neglects or refuses to obey any lawful order made by the director or panel…" Thus, the ALJ must first determine whether the insurer's conduct constitutes a violation of the Act, a rule, or an order. Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational argument based in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* W.C. No. 4-187-261 (ICAO,. Aug. 2, 2006). There is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

15. The question of whether the insurer's conduct was objectively reasonable ordinarily presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97, 99 (Colo. App. 2005); *see also Pant Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). A party establishes a prima facie showing of unreasonable conduct by proving that an insurer violated a rule of procedure. *Pioneers Hospital,* 114 P.3d at 99. If the claimant makes a prima facie showing the burden of persuasion shifts to the respondents to demonstrate their conduct was reasonable under the circumstances. *Human Resource Co. v. Industrial Claim Appeals Office,* 984 P.2d 1194 (Colo. App. 1999).

16. Section 8-43-304(4), C.R.S. permits an alleged violator 20 days to cure the violation. If the violator cures the violation within the 20 day period "and the party seeking such penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation, no penalty shall be assessed." The cure statute adds an element of proof to a claim for penalties in cases where a cure is proven. Typically, it is not necessary for the party seeking penalties to prove that the violator knew or reasonably should have known they were in violation. The party seeking penalties must only prove the putative violator acted unreasonably under an objective standard. *See Jiminez v. Indus. Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003). Section 8-43-304(4), C.R.S. modifies the rule and adds an extra element of proof when a cure has been effected. Specifically, the party seeking penalties must prove the violator had actual or constructive knowledge that its conduct was unreasonable. *Diversified Veterans Corporate Center v. Hewuse*, 942 P.2d 1312 (Colo. App. 1997); *see In re Tadlock*, WC 4-200-716 (ICAO, May 16, 2007).

Failure to Report

17. Sections 8-43-101(1), C.R.S. and 8-43-103(1), C.R.S. as well as WCRP Rules 5-2 (A), (B)(1), and (B)(2) require the employer to notify the DOWC within 10 days of notice or knowledge that an employee sustained a permanently physically impairing or

lost-time injury. Because the preceding statutes and rules to not delineate specific penalties, Claimant seeks penalties pursuant to the general provision in §8-43-304(1) C.R.S.

18. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she is entitled to recover penalties for Respondents' failure to report the injury to the DOWC within 10 days after notice or knowledge of the injury. The record reflects that Claimant provided Employer with insufficient notice of a work-related injury prior to August 26, 2020. Specifically, Ms. M[Redacted] credibly explained that Claimant sent her a text message on June 8, 2020 specifying that she was going to the emergency room and would make it to work. Claimant explained that she had been feeling badly for two or more weeks, her left arm had been falling asleep and she was having trouble breathing. Claimant noted that because she had "so many health problems am not sure what could be causing it." Throughout the correspondence Claimant did not mention any work incident or symptoms while using a vacuum on May 28, 2020. Notably, the correspondence reveals that Claimant suffered myriad symptoms that were not related to her work activities. Although Claimant mentioned to Ms. M[Redacted] in a June 11, 2020 text message that "I think I messed up my arm when I used Mary's heavy vacuum twice" she did not request medical treatment or otherwise detail a work-related injury. Based on Claimant's variety of symptoms, Ms. M[Redacted] was under the impression that Claimant was off work because of restrictions for non-work-related conditions. She thus requested Claimant to take medical leave. In the context of Claimant's multiple symptoms and her uncertainty about their causes, Respondents' failure to report an injury was predicated on a rational argument based in law or fact.

19. As found, moreover, the record reflects that Respondents did not receive notice of Claimant's work-related injury until August 26, 2020. On August 26, 2020 Employer received a Director's Order from the DOWC providing that Claimant had filed a claim for Workers' Compensation. The Order specified that Claimant had filed a claim for compensation on June 15, 2020 and noted that Respondents' were required to file a position statement admitting or contesting liability within 20 days. The Order also directed Respondents to take a position on the matter within 15 days. Upon receipt of the Order, the Employer filed a FROI within 10 days. Any violation was thus cured prior to Claimant's Application for Hearing endorsing penalties. Claimant must therefore produce clear and convincing evidence that Employer had knowledge the conduct was unreasonable. Based on Claimant's vague report of an injury, her failure to comply with Employer's efforts to have her file a claim to elaborate on her condition, the lack of information regarding ongoing treatment through Dr. Yamamoto, and Employer's immediate action once knowledge of the claim was received, Employer's conduct was objectively reasonable. Accordingly, Claimant's request for penalties based on the failure to report the injury to the DOWC within 10 days after notice or knowledge of the injury is denied and dismissed.

Failure to Admit or Deny Liability

20. Section 8-43-203(1)(a), C.R.S. provides:

> The employer or, if insured, the employer's insurance carrier shall notify in writing the division and the injured employee . . . within twenty days after a report is, or should have been filed with the division pursuant to section 8-43-101, whether liability is admitted or contested; except that, for purpose of this section, any knowledge on the part of the employer, if insured, is not knowledge on the part of the insurance carrier.

21. Section 8-43-203(2)(a), C.R.S. specifies that if such notice is not filed, "the employer, or if insured, the employer's insurance carrier, may become liable to the claimant, if successful on the claim for compensation, for up to one day's compensation for each failure to so notify." Because the claimant seeks the imposition of a penalty for failure timely to admit or deny liability, the claimant bears the burden of proof to establish the circumstances justifying the imposition of the penalty. *See Pioneer Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005) (claimant seeking imposition of penalty under § 8-43-304(1) bore burden of proof to establish circumstances justifying a penalty).

22. Under the language of §8-43-203(1)(a), knowledge of an insured may not be imputed to the insurer. *See State Compensation Insurance Fund v. Wilson,* 736 P.2d 33 (Colo. 1987); *Campbell v. IBM Corp.,* 867 P.2d 77 (Colo. App. 1993). Thus, an insurer is not responsible for admitting or denying liability until 20 days after it has knowledge of information that would require the employer to file a first report of injury with the DOWC under §8-43-101, C.R.S. Those circumstances include injuries that result in "lost time from work for the injured employee in excess of three shifts or calendar days." The mere knowledge that the claimant sustained an injury and had restrictions resulting in a prescription for modified duty does not establish that the claimant missed work as a result of the injury or the number of days missed. *See Ralston Purina-Keystone v. Lowry,* 821 P.2d 910 (Colo. App. 1991); *Atencio v. Holiday Retirement Corp.,* W.C. No. 4-532-443 (ICAP Nov. 15, 2002).

23. As found, Claimant has failed to establish by a preponderance of the evidence that she is entitled to recover penalties for Respondents' failure to admit or deny liability as required by §8-43-203(2)(a), C.R.S. Initially, §8-43-203(2)(a), C.R.S. specifically provides that the respondents "may become liable to the claimant, if successful on the claim for compensation, for up to one day's compensation for each failure to so notify." However, as determined in the preceding sections of this order, Claimant has failed to demonstrate that she suffered compensable injuries while working for Employer on May 28, 2020. Because Claimant was not successful on her claim for compensation, Respondents are not liable to penalties under §8-43-203, C.R.S. Accordingly, Claimant's request for penalties for failure to timely admit or deny liability is denied and dismissed.

Failure to Timely Produce Claim File

24. Section 8-43-203(4), C.R.S. states that "[w]ithin fifteen days after the mailing of a written request for a copy of the claim file, the employer or, if insured, the

employer's insurance carrier or third-party administrator shall provide to the claimant or his or her representative a complete copy of the claim file." Because §8-43-203(4), C.R.S. does not delineate specific penalties, Claimant seeks penalties pursuant to the general provision in §8-43-304(1) C.R.S.

25. As found, Claimant has failed to prove by a preponderance of the evidence that she is entitled to recover penalties for Respondents' failure to provide a complete copy of their claim file within 15 days pursuant to §8-43-203(4), C.R.S. Claimant asserts that she requested a copy of the claim file from Insurer on June 12, 2020 but did not receive the claim file until November 17, 2020. However, Claimant has failed to produce any evidence regarding the production of the file. Specifically, Claimant has not provided evidence of a request or the late production of the claim file. The mere allegation of the failure to timely produce the claim file, absent supporting evidence, is insufficient to demonstrate that Insurer violated §8-43-203(4), C.R.S. Accordingly, Claimant's request for penalties for failure to timely provide a copy of the claim file under §8-43-203(4), C.R.S. is denied and dismissed.

Late Reporting of Injury

26. Section 8-43-102(1)(a), C.R.S. specifies that an employee who sustains an injury from an accident "shall notify the said employee's employer in writing of the injury within four days of the occurrence of the injury." If the employee fails to report the injury in writing "said employee may lose up to one day's compensation for each day's failure to so report." Because the statute uses the word "may," imposition of a penalty for late reporting is left to the discretion of the ALJ. *In re Johnson*, WC's 4-490-900 & 4-642-480 (ICAO, Dec. 7, 2006).

27. As found, Respondents have failed to demonstrate by a preponderance of the evidence that they are permitted to recover penalties for Claimant's late reporting of her injury pursuant to §8-43-102(1)(a), C.R.S. As determined in the preceding sections of this order, Claimant has failed to demonstrate that she suffered a compensable injury while working for Employer on May 28, 2020. Because Claimant is not entitled to receive any compensation, she cannot lose compensation. Accordingly, Respondents' request for penalties pursuant to §8-43-102(1)(a), C.R.S. is denied and dismissed.

ORDER

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

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

2. Claimant earned an AWW of $640.00.

3. Claimant's requests for penalties are denied and dismissed.

4. Respondents' request for penalties is denied and dismissed.

5. Any issues not resolved in this order are reserved for future determination.

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

DATED: June 24, 2021.

DIGITAL SIGNATURE:
Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-949-433-002

ISSUE

1. Whether Claimant established by a preponderance of the evidence that she is entitled to receive reasonable, necessary, and related medical maintenance benefits designed to relieve the effects of her work-related injury or to prevent further deterioration of her condition pursuant to Grover v. Industrial Comm'n, 795 P.2d 705 (Colo. App. 1988).

2. Whether Respondents established by a preponderance of the evidence that Claimant received an overpayment of medical benefits, and whether Respondents are entitled to repayment.

FINDINGS OF FACT

1. On January 15, 2014, Claimant sustained an admitted industrial injury to her left ankle. She received medical treatment through Roberta Anderson-Oeser, M.D., at Concentra Medical Centers as her authorized treating provider (ATP), and later underwent left ankle surgery. (Ex. B).

2. On September 27, 2016, Claimant underwent a Division Independent Medical Examination (DIME) with John Aschberger, M.D. Dr. Aschberger determined that Claimant reached MMI on July 5, 2016, and assigned a 6% left lower extremity impairment rating. Dr. Aschberger indicated that medical maintenance care was reasonable for intermittent pain medication, although he "expected tapering utilization." (Ex. F).

3. On December 9, 2016, Respondents filed an Amended Final Admission of Liability (FAL) consistent with the 6% lower extremity rating and acknowledged that Claimant was entitled to received medical maintenance benefits. (Ex. A).

4. Claimant subsequently received medical maintenance treatment from Dr. Anderson-Oeser about once every one to two months. Dr. Anderson-Oeser noted that Claimant suffered persistent left ankle pain, but her condition remained stable. From at least December 2016, Dr. Anderson-Oeser prescribed Claimant tramadol for left foot and ankle pain. Claimant was prescribed 50 mg tramadol, 1-2 pills to be taken every 6 hours. Claimant's prescription and usage instructions for tramadol were unchanged from at least February 1, 2017, until August 14, 2019. (Ex. G).

5. On June 24, 2019, Claimant sustained another injury to her left ankle while shopping. (Ex. B).

6. July 17, 2019, Claimant filed a Petition to Reopen her claim asserting that the June 24, 2019 left ankle injury constituted a worsening of her January 15, 2014 industrial injury,

and seeking temporary total disability (TTD) benefits related to the June 24, 2019 injury. (Ex. B).

7. On December 17, 2019, the parties participated in a hearing before ALJ Peter Cannici to adjudicate Claimant's July 17, 2019 Petition to Reopen. In the corresponding Findings of Fact, Conclusions of Law and Order, issued on February 3, 2020, ALJ Cannici denied Claimant's petition to reopen, finding that Claimant failed to establish that she suffered a worsening of her left ankle that was causally related to Claimant's January 2014 injury and that the June 24, 2019 injury "constituted an intervening injury that severed the causal connection to Claimant's original January 14, 2014 work-related incident." Based on this finding, ALJ Cannici denied Claimant's request for additional TTD benefits. (Ex. A).

8. Subsequently, Claimant continued to see Dr. Anderson-Oeser for treatment of her left ankle, and continued to receive regular prescriptions for 50 mg tramadol. In September 2019, Claimant's tramadol usage instructions were changed from 1-2 pills every 6 hours as needed for pain, to 1 pill every 4 hours as needed for pain. (Ex. G).

9. Respondents denied liability for Claimant's treatment, asserting that ALJ Cannici's February 3, 2020 Order terminated Respondents' liability for medical treatment to the Claimant related to her left ankle.

10. On November 20, 2020, Claimant filed the present Application for Hearing seeking medical maintenance treatment, including authorization of Tramadol prescribed by Dr. Anderson-Oeser.

11. On March 3, 2021, Claimant saw Dr. Anderson-Oeser. In her treatment note, Dr. Anderson-Oeser expressed her opinion regarding the Claimant's need for continued pain medication therapy, stating:

> "It is my opinion that her current symptoms are related to her initial injury of January 15, 2014. She had required ongoing treatment including surgery, therapy and medications since her initial injury. Even though she had another injury to her left ankle in 2019, this did not significantly alter her pain medication therapy. She required ongoing pain medications up to the date of her 2019 injury and continues to require the same medication to maintain her function. Even though the pain medication does not completely alleviate her symptoms she is able to work, perform her ADLs, her exercise and stretching program, household activities, and to interact with her family." (Ex. 6).

12. At hearing, Respondents' expert, Dr. Schwappach testified as an expert in orthopedic surgery. Dr. Schwappach examined Claimant on March 3, 2021, and also conducted a previous IME in October 2019. Dr. Schwappach also testified that in his opinion, the Claimant's ongoing pain is the result of her June 2019 injury and subsequent surgery, and not the result of her 2014 work injury. Dr. Schwappach testified that based on his examination and interview of Claimant in March 2021, Claimant's present

symptoms are in her calf, which was not an issue prior to her June 2019 injury. Dr. Schwappach did not dispute that the Claimant's pain is improved through the use of tramadol, and believes Dr. Anderson-Oeser should be the one to assess whether the amount or length of time Claimant has used tramadol is an issue. He also testified that if Claimant is going to continue tramadol, continued visits with Dr. Anderson-Oeser for monitoring and directing the use of the medication are reasonable.

13. Claimant testified at hearing that the only continuing symptoms she experiences as a result of the June 2019 injury is tenderness at the site of surgical scarring. Otherwise, she believes the pain in her left ankle is the same as it was prior to the June 2019 injury and the result of her 2014 injury, and that the post-2014 pain has not improved.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or

every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

MAINTENANCE MEDICAL BENEFITS

The need for medical treatment may extend beyond the point of MMI where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003); *Hobirk v. Colorado Springs School District #11,* W.C. No. 4-835-556-01 (ICAO, Nov. 15, 2012).

In cases where the respondents file a final admission of liability admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003); *Oldani v. Hartford Financial Services,* W.C. No. 4-614-319-07, (ICAO, Mar. 9, 2015). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School District No.11*, W.C. No. 3-979-487, (ICAO, Jan. 11, 2012); *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO, Feb. 12, 2009. The question of whether the claimant has proven that specific treatment is reasonable and necessary to maintain his condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Even where reasonable and necessary, medical maintenance care must be causally related to a claimant's industrial injury. In some cases, liability for treatment may be terminated by virtue of an intervening event. "Where the need for treatment results from an intervening injury unrelated to the industrial injury, treatment for the subsequent condition is not compensable*."* *Lancaster v. Arapahoe County Sheriff Dept*., WC. Nos. 4-744-646 and 4-746-515 (ICAO. May 12, 2010) *citing Owens v. Industrial Claim Appeals Office, 49 P.3d 1187 (Colo. App. 2002).* However, "[t]he determination of whether the need for medical treatment is the result of an independent intervening cause is a question of fact for resolution by the ALJ." *In re Vargas*, W.C. No. 4-325-149 (ICAO August 29, 2002), *citing Owens, supra*.

Claimant has established by a preponderance of the evidence that the tramadol prescribed by Dr. Anderson-Oeser, and the associated office visits with Dr. Anderson-Oeser are reasonably necessary to relieve the effects or prevent further deterioration of Claimant's industrial injury. As found, Claimant was taking tramadol for a significant period of time prior to her June 2019 injury. The tramadol dosage prescribed by Dr. Anderson-Oeser was unaffected by the June 2019 Although Dr. Anderson-Oeser modified Claimant's usage instructions in September 2019, the modification did not increase the dosage or the number of pills per day over what was previously described. Claimant's testimony, combined with Dr. Anderson-Oeser's March 3, 2021 report, credibly support that the Claimant’s use of tramadol is reasonably necessary to relieve the effects of her work injury.

ALJ Cannici’s determination that Claimant’s June 2019 injury was an intervening event does not lead to a different conclusion. Claimant’s July 17, 2019 Petition to Reopen sought to re-instate TTD benefits based on the allegation that the June 2019 injury constituted a worsening of Claimant’s industrial injury. ALJ Cannici found that Claimant’s June 2019 injury severed the causal connection between Claimant’s industrial injury and her then-existing disability. Accordingly, he denied Claimant’s petition to reopen to obtain TTD benefits. ALJ Cannici made no findings with respect to Claimant’s medical maintenance treatment or whether Claimant’s need for tramadol was related to the intervening injury. Claimant’s entitlement to medical maintenance benefits was unaffected by the denial of Claimant’s petition to reopen to obtain TTD benefits because Respondents admitted liability for post-MMI medical treatment in the Amended FAL. Thus, Claimant was not required to reopen her claim to obtain medical maintenance benefits.

OVERPAYMENT

At hearing, Respondents endorsed the issue of overpayment, asserting Claimant is obligated to repay medical benefits Respondents paid directly to health care providers after Claimant’s June 2019 injury.

Pursuant to § 8–43–303(1) C.R.S., upon a *prima facie* showing that the claimant received an overpayment in benefits, the award shall be reopened solely as to overpayments and repayment shall be ordered. No such reopening shall affect the earlier award as to moneys already paid except in cases of fraud or overpayment. *Id.* In 1997, The General Assembly amended subsections (1) and (2)(a) of § 8-43-303 to permit reopening of an award on grounds of fraud and overpayment, in addition to the already statutory reopening methods of error, mistake, or change in condition. *Haney v. Shaw, Stone, & Webster*, W.C. No. 4-796-763 (ICAO July 28, 2011), citing *Simpson v. Industrial Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009), *rev’d on other grounds Benchmark/Elite, Inc., v. Simpson*, 232 P.3d 777 (Colo. 2010).

The 1997 amendments also provide that no such reopening shall affect the earlier award as to moneys already paid except in cases of fraud or *overpayment*. *Haney*, at *1. The 1997 amendments added § 8-40-201(15.5) defining “overpayment” to mean:

> [M]oney received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable under said articles. For an overpayment to result, it is not necessary that the overpayment exist at the time the claimant received disability or death benefits under said articles.

There are thus three categories of possible overpayment pursuant to §8- 40-201(15.5). *In Re Grandestaff,* No. 4-717-644 (ICAP, Mar. 11, 2013). An overpayment may occur even if it did not exist at the time the claimant received disability or death benefits. *Simpson v. ICAO,* 219 P.3d 354, 358 (Colo. App. 2009). Therefore, retroactive recovery for an overpayment is permitted. *In Re Haney,* W.C. No. 4-796-763 (ICAP, July 28, 2011). Respondents bear the burden of proof on this issue. *See In re Claim of Jones*, W.C. No. 4-976-657-03 (ICAP August 18, 2017).

Respondents have failed to establish that Claimant received any overpayments or their own entitlement to repayment. Respondents' position statement is silent on the issue of recovery of purported overpayments and does not list overpayment as an issue for decision. Notwithstanding Respondents cite no authority, no facts and make no argument in support of their claim for the recovery of alleged overpayments. The ALJ concludes that Claimant has failed to meet their burden of proof and have not established a legal or factual basis for repayment.

ORDER

It is therefore ordered that:

1. The tramadol prescribed by Dr. Anderson-Oeser, and periodic visits with Dr. Anderson-Oeser to monitor Claimant's use of tramadol are reasonably necessary to relieve the effects of Claimant's January 15, 2014 industrial injury.

2. Respondents' request for repayment of alleged overpayments is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

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

DATED: June 22, 2021 ________________________________

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-111-050-004

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

[Redacted],
Claimant,

v.

[Redacted],
Employer,

and

[Redacted],
Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), o June 9, 2021 , in Denver, Colorado. The h 1:30 PM , an ending at 2:30 PM) .

The Claimant was present in person, virtually, and represented by [Redacted], Esq.. Respondents were represented by [Redacted], Esq.

Hereinafter [Redacted] shall be referred to as the “Claimant." [Redacted] shall be referred to as the “Employer.” All other parties shall be referred to by name.

Claimant’s Exhibits 1 through 7 were admitted into evidence, without objection. Respondents offered no exhibits into evidence.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Claimant, which was filed, electronically, on June 10, 2021. Respondents filed no timely objections as to form. After a consideration of the proposed decision, the ALJ has modified it and hereby issues the following decision.

ISSUE

The sole issue to be determined by this decision concerns whether the Claimant is entitled to post-maximum medical improvement (MMI) medical maintenance benefits after the agreed MMI date of June 28, 2020.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. The Claimant was employed by the Employer in the position of Team Leader.

2. On May 20, 2019, the Claimant injured his right foot while working for the Employer.

3. Ultimately, Respondent filed a Final Admission of Liability (FAL), admitting for medical benefits; an average weekly wage (AWW) of $838.72; an MMI date of June 28, 2020; and, 5% scheduled of the right foot below the ankle. Claimant filed a timely objection to the FAL. No position on the issue of post-MMI medical maintenance benefits (*Grover* meds) was stated on the FAL

4. The Claimant had to work while recovering from this injury, returning to full duty on August 5, 2019. The symptoms he experienced included severe pain in his right foot. The symptoms experienced, along with continuing complications from the injury, interfered with the Claimant's ability to work as effectively as he had before. Due to this, he has since been reassigned to a new position within the company.

5. Following the admitted injury, the Claimant first went to Urgent Care on May 22, 2020. The physicians at Urgent Care informed him that he had an infection and that if he felt poorly then he would need to visit the emergency room (ER).

6. After visiting the ER, the Claimant saw Greg Reichhardt, M.D., who did not recommend continued maintenance care, stating that it was unnecessary, and declared the Claimant at MMI for Claimant on June 18, 2020. The Claimant only met with Dr. Reichhardt this one time.

7. Despite using the medicine that he had been provided, the Claimant continued to experience symptoms in his right foot after MMI such as the steady continuation of pain. Dr. Reichardt had assured the Claimant that the pain would begin to decrease.

8. In response to the continued symptoms, the Claimant sought continued care for his right foot elsewhere.

9. From a previous foot injury in June 2016, the Claimant had gone to St. Anthony's and was eventually referred to Jessica Johnson, D.P.M., a podiatrist. He again sought out care from Dr. Johnson at St. Anthony's to address these continuing symptoms.

10. Dr. Johnson is connected with Concentra, where she has sent the Claimant to receive therapy to address the continued symptoms he is experiencing. At Concentra, the therapies that Claimant receives include massages, foot exercises, and electrical stimulation of the muscles in his foot.

11. Dr. Johnson formerly sent the Claimant elsewhere to receive foot therapies, but the Claimant has had to pay for these services out of his own pocket since his declaration of MMI. He ultimately chose to continue to go to Concentra because they are affordable. At Concentra, the Claimant is paying $85 per visit.

12. Respondent has noted that St Anthony's is not an authorized healthcare provider under the company insurance and that Dr. Johnson is not recognized as an authorized doctor under the, is an authorized treating provider (ATP) under the company insurance. Despite not being authorized by Respondent, Dr. Johnson is a licensed medical professional, with specialized expertise in the treatment of foot injuries. In fact, the ALJ hereby finds that Dr. Johnson's expertise in the treatment of foot inujries is greater than Dr. Reichhardt's expertise.

13. The Claimant feels that the continued treatment he has been receiving from Concentra and Dr. Johnson have helped alleviate the continued pain he has been experiencing from his injury. The Claimant believes that failing to continue this treatment could result in his condition worsening and this would have an effect on his ability to work. If Claimant's condition worsens, interfering with his ability to work, then another worker's compensation case may have to be initiated.

Ultimate Finding

14. The ALJ finds the opinions of podiatric physician, Dr. Johnson and the Claimant's lay opinion, more credible and persuasive on the issue of *Grover* meds than the opinions of Dr. Reichhardt, primarily on the basis of Dr. Johnson's greater foot expertise and the Claimant's credible actions and testimony..

15. Between conflicting medical and lay opinions, the ALJ makes a rational choice, based on substantial evidence, the accept the opinions of Dr. Johnson and the

Claimant on the issue of *Grove* meds, and to reject the opinions of Dr. Reichhardt on thereon.

16. Despite being declared at MMI by Dr. Reichhardt, effectively ending Claimant's worker's compensation benefits that he had been receiving, the Claimant has had persisting symptoms from his injury.

17. Without worker's compensation benefits, the Claimant privately sought ways to address his continuing symptoms, eventually finding Dr. Johnson and Concentra. His actions in this regard enhance the Claimant's credibility and cause the ALJ to infer and find that the Claimant's post-injury effects are real, work-related and in need of a remedy. Although not in the chain of authorized referrals, the continued treatment by Dr. Johnson and Concentra is causally related to the admitted right foot injury and reasonably necessary to cure and relive the effects thereof.

18. The services provided by both Dr. Johnson and Concentra have been beneficial to Claimant, improving his condition, and he believes that a discontinuation of these services would lead to a worsening of his condition. The ALJ infers and finds that the Claimant's continued treatment by Concentra and Dr. Johnson will maintain the Claimant at MMI and prevent a deterioration of his right foot condition.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinions of podiatric physician, Dr. Johnson and the Claimant's lay opinion, were more credible and persuasive on the issue of *Grover* meds than the opinions of Dr. Reichhardt, primarily on the basis of Dr. Johnson's greater foot expertise and the Claimant's credible actions and testimony.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting medical and lay opinions, the ALJ made a rational choice, based on substantial evidence, to accept the opinions of Dr. Johnson and the Claimant on the issue of *Grove* meds, and to reject the opinions of Dr. Reichhardt on thereon.

Post-MMI Medical Maintenance Benefits

c. An employee is entitled to continuing medical benefits after MMI if reasonably necessary to relieve the employee from the effects of an industrial injury. *See Grover v. Indus. Comm'n of Colorado*, 759 P.2d 705 (Colo. 1988). The record must contain substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve a claimant from the effects of an injury or to prevent further deterioration of his condition. *Stollmeyer v. Indus. Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995); *Grover v. Indus. Comm'n, supra*. At a minimum, such evidence may take the form of a prescription or recommendation for a course of medical treatment necessary to relieve a claimant from the effects of the injury or to prevent further deterioration. *Stollmeyer v. Indus. Claim Appeals Office, supra*. An injured worker is ordinarily entitled to a general award of future medical benefits, subject to an employer's right to contest causal relatedness and reasonable necessity thereof at any time. *See Hanna v. Print Expediters,* 77 P.3d 863 (Colo. App. 2003). Treatment to **improve** a claimant's condition does **not** fall under the purview of *Grover* benefits. *Shalinbarger v. Colorado Kenworth, Inc.,* W.C. No. 4-364-466 [Indus. Claim Appeals Office (ICAO), March 12, 2001]. As found, Claimant is entitled to maintenance medical care, which is reasonably necessary to maintain him at MMI and to prevent deterioration of his work-related condition.

Burden of Proof

d. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the entitlement to benefits beyond those admitted. As noted, the FAL was silent concerning *Grover* meds. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, Claimant has sustained his burden of proof.

ORDER

IT IS, THEREFORE, ORDERED THAT:

Respondents shall pay the costs of all authorized, causally related and reasonable necessary post-maximum medical improvement medical maintenance benefits, subject to the Division of Workers' Compensation Medical Fee Schedule.

DATED this 22nd day of June 2021.

DIGITAL SIGNATURE

EDWIN L. FELTER, JR.
Administrative Law Judge

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

ISSUES

- Did Claimant prove she suffered a compensable injury to her right knee on November 6, 2020?

- Did Claimant prove entitlement to reasonably necessary and related medical treatment for her right knee?

- What is Claimant's average weekly wage (AWW)?

STIPULATIONS

"Optum" is the primary ATP if the claim is compensable.

FINDINGS OF FACT

1. Claimant worked for employer as an RN charge nurse. She manages other staff and performs direct patient care. The job is fast-paced and physically demanding, including extensive walking on a daily basis.

2. Claimant believes she injured her right knee at work on November 6, 2020, while moving a patient. She had gone to the patient's room with a CNA. The patient had a bowel movement and needed to be changed. The patient had to be turned over one way and then the other way to be fully cleaned. Claimant planned to have the CNA move the patient, but discovered the CNA had a back injury and could not move the patient. The patient was a "larger" individual, which required Claimant to use "all my weight." Claimant braced her knees against the metal frame of the bed while maneuvering the patient. Her right knee felt "uncomfortable" while it was pressed against the metal bed frame moving the patient.

3. After she finished changing the patient, Claimant exited the room and began walking back to the nurse's station. After a short distance, she felt a "pop" in her right knee "behind the kneecap." She testified the pop felt "weird" but "there wasn't any pain associated with it at that time." A short time later, she felt a "catching" sensation "in the popliteal space . . . behind the kneecap." Claimant's right knee became increasingly painful as she attended to patients and walked around the unit the remainder of the shift.

4. Claimant texted her supervisor at the end of her shift and reported "the back of my leg popped in the popliteal area. It has been getting worse. I can bare [sic] weight but it is painful." When asked whether it was related to her work, Claimant replied, "Honestly I'm not sure. I had just finished changing a resident that was larger. I had to use all my weight to roll her bc the aide had a hurt back. It happened right after that."

5. Claimant saw Dr. Robi Baptist at Optum on November 7, 2020. The "chief complaint" section of the report states, "she was rolling a large pt over to the pt side. Holding the pt weight with her legs. When she was done, she heard a pop in her R leg behind her knee."[1] Examination of the right knee demonstrated a "moderate effusion," and Dr. Baptist suspected internal derangement "because of the amount of the effusion."[2] X-rays were normal with no evidence of bony or soft tissue pathology. Dr. Baptist restricted Claimant to sedentary duties, ordered an MRI, and referred her for an orthopedic evaluation.

6. The MRI was completed on November 19, 2020. It showed a 1 cm injury/fracture to the right paracentral patellar articular cartilage with possible associated chondral delamination, and a focal subchondral medullary injury/bone bruise. The remainder of the knee was normal, with no meniscal, ligamentous, tendinous, chondral, or osseous pathology.

7. Claimant saw Leann Murphy, an orthopedic PA-C, on December 9, 2020. Claimant explained her knee pain "started acutely" after "turning and pushing a larger pt on bed at work. Then afterwards, she felt popping at back of the knee and at kneecap." She states her knee went into the febrile [sic][3] of the bed. After which she experienced progressively worsening pain." Ms. Murphy reviewed the MRI images and noted "bone bruise of the patella in addition to chondral injury with potential fissuring." Claimant's pain at the time of evaluation was primarily behind and around the kneecap. The knee was tender to palpation with no effusion or instability. Ms. Murphy diagnosed a right patellar chondral defect. She gave Claimant an adjustable leg immobilizer and recommended she start physical therapy.

8. Claimant received no further treatment after December 9, 2020, because the claim was denied and she has no health insurance.

9. Claimant credibly testified she had no problems with or limitations from her right knee before November 6, 2020. Her testimony is corroborated by the lack of medical records reflecting any pre-injury knee issues, and her ability to work as a charge nurse and perform direct patient care without difficulty.

10. Dr. Timothy Hall performed an IME for Claimant on March 11, 2021. Dr. Hall documented that Claimant had some knee pain while she was pushing the patient, consistent with Claimant's testimony of knee "discomfort" because her knee was being pressed against the metal bed frame. Claimant finished moving the patient and was walking back to the nurses station when she felt a pop in her knee. Her knee became progressively more symptomatic during her shift. Dr. Hall diagnosed a chondral injury involving the right paracentral patellar hyaline articular cartilage with a bone bruise. He noted Claimant has given a consistent history since her first injury-related office visit with

[1] Another section of the report contains an inaccurate history indicating the pop occurred while moving the patient.

[2] This clinical finding is supported by a text message Claimant sent to her manager in November stating, "[my knee] was still swollen last week when [Dr. Baptist] saw me."

[3] Ms. Murphy probably meant "frame."

Dr. Baptist. Dr. Hall opined Claimant's described mechanism of injury was consistent with the trauma seen on the MRI and supported a work-related injury.

11. Dr. Timothy O'Brien performed an IME for Respondents on March 16, 2021. Dr. O'Brien opined it was "medically improbable that [Claimant's] occupational exposure and the work incident which she represents occurred on November 6, 2020 resulted in any type of right knee injury." Dr. O'Brien opined the activity Claimant described did not generate enough force to exceed the injury threshold and cause the pathology found in Claimant's knee. He concluded if Claimant had sustained the injuries found on the MRI while at work, she would have had "massive accumulation of fluid" in her knee, and the absence of any accumulation of fluid "proves" that the MRI findings were chronic, pre-existing, and not caused by pushing with her knees or walking. He also noted Claimant did not behave as he would expect if she acutely fractured the chondral surface, the x-rays demonstrated no post-traumatic effusion, and clinical findings demonstrated no objective evidence of an acute injury.

12. Dr. O'Brien issued a supplemental report on April 16, 2021, after reviewing additional records. He incorrectly stated Dr. Baptist performed no physical examination on November 7, 2020, even though a physical examination is documented in the report, including a finding of "moderate effusion" of the knee. Relying on this alleged lack of clinical examination findings, Dr. O'Brien opined Dr. Baptist's report supports his conclusion Claimant suffered no acute injury.[4] He further wrote, "If [Claimant] had fractured the chondral surface of her patellofemoral joint, there would have been excruciating pain, and she would have needed urgent or emergent medical attention, but in fact did not seek medical attention on November 6, 2020." Dr. O'Brien opined all findings on the MRI were chronic with no evidence of any acute injury.

13. Dr. Hall testified at hearing consistent with his report. Dr. Hall pointed to knee swelling documented by Dr. Baptist on November 7, 2020 as evidence of a recent injury. Dr. Hall explained Claimant did not "fracture" her patella but instead injured or fractured the articular cartilage on the underside of the patella. He explained an acute chondral injury would not necessarily produce copious swelling because of the limited blood supply to articular cartilage. Dr. Hall opined the chondral defect and bone bruise were caused by moving the patient with Claimant's knee braced against the frame of the bed. The injury subsequently became symptomatic a few moments later when she onloaded the patella and started walking. Dr. Hall was not particularly concerned about the exact details of the "pop" because "it's hard to be definitive about pops." Dr. Hall disagreed with Dr. O'Brien's opinion Claimant did not act as she "should" have if she sustained an acute injury. Dr. Hall assumed Respondents' counsel's repeated references to an "arthritic knee" were hypothetical because Claimant's knee is otherwise healthy aside from the isolated patellar pathology. He opined, "this would be a rather unusual chronic finding, because it's so localized. . . . This is a single, specific finding, in an otherwise normal study, which I think points more toward acuteness than chronicity."

[4] When questioned at hearing about Dr. Baptist's initial finding of "moderate effusion," Dr. O'Brien dismissed the finding as merely "historical." This is an incorrect reading of Dr. Baptist's report.

14. Dr. O'Brien testified it was "virtually impossible" for the incident Claimant described to cause her right knee condition. Dr. O'Brien was "nearly 100% certain" the event described by Claimant did not cause any of the findings seen on the MRI. The pathology reflects a pre-existing degenerative condition that would have been found by an MRI the day before the work accident. He believes had Claimant acutely fractured the chondral surface of her knee, she would have felt immediate and unrelenting pain immediately after the fracture and certainly upon weight-bearing seconds later. He did not believe Dr. Hall's explanation of "delayed" onset of pain was medically possible were the fracture acute. He reiterated with "100% certainty" an acute chondral injury would cause "massive amount of blood or synovial fluid" in the knee joint. Dr. O'Brien opined it was "virtually zero percent likely" the activity described by Claimant could have exceeded the energy threshold required to damage her patellar cartilage. Dr. O'Brien testified delamination of articular cartilage "does not" happen acutely and can only be a degenerative phenomenon. He doubted Claimant's testimony the knee was asymptomatic before the work injury and was confident he would have found the underlying pathology had he examined Claimant's knee before the accident. He further opined Claimant's work activities did not aggravate or accelerate the underlying condition and it was entirely coincidental Claimant's knee became symptomatic at work on November 6, 2020.

15. Claimant's testimony was credible and persuasive.

16. Dr. Hall's analysis and opinions are credible and more persuasive than the contrary opinions offered by Dr. O'Brien.

17. Claimant proved she suffered a compensable injury to her right knee on November 6, 2020.

18. Claimant is entitled to reasonably necessary treatment from authorized providers to cure and relieve the effects of her compensable injury. Optum is the ATP, per the parties' stipulation. The evaluations and treatment provided through Optum were reasonably necessary.

19. Claimant earned $8,409.83 in the three full pay periods (46 days) from September 16, 2020 through October 31, 2020. This equates to an AWW of $1,279.76.

CONCLUSIONS OF LAW

A. Compensability

To receive compensation or medical benefits, a claimant must prove she is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove an injury directly and proximately caused the condition for which she seek benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

A pre-existing condition does not disqualify a claim for compensation or medical benefits. If an industrial injury aggravates, accelerates, or combines with a pre-existing condition to produce disability or a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). But the mere fact that a claimant experiences symptoms after an incident or activity at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). In evaluating whether a claimant suffered a compensable aggravation, the ALJ must determine if the need for treatment was the proximate result of the claimant's work or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

As found, Claimant proved she suffered a compensable injury to her right knee on November 6, 2020. Claimant's testimony is credible and persuasive. Dr. Hall's opinions are credible and more persuasive than the contrary opinions offered by Dr. O'Brien. The absolutist rhetoric employed by Dr. O'Brien detracts from the persuasiveness of his opinions. The argument that Claimant's right knee symptoms merely reflect the natural progression of osteoarthritis and degeneration is unconvincing for several reasons. First, Claimant's right knee was asymptomatic and did not affect her ability to perform a demanding job as a charge nurse before November 6, 2020. Second, Dr. O'Brien emphasized the "100% certainty" of swelling after an acute injury but ignored the effusion observed by Dr. Baptist the day after the accident and mentioned in Claimant's text messages. Third, imaging studies show Claimant's knee is in generally good condition. X-rays showed no degenerative changes, and the MRI identified no abnormalities aside from the relatively focal patellar defects. As Dr. Hall opined, the isolated nature of the pathology in Claimant's knee is more consistent with a specific injury as opposed to a longstanding degenerative process. It is reasonably probable Claimant injured her patellar cartilage on November 6, 2020, as outlined by Dr. Hall. Alternatively, if Dr. O'Brien is correct that the pathology existed before the injury, Claimant probably aggravated a previously asymptomatic condition while moving the patient.[5] On the threshold question of compensability, whether Claimant's work caused new pathology or aggravated a pre-existing but asymptomatic condition is "six of one, half dozen of the other," and leads to the same outcome. The least likely scenario in this case is that a latent pre-existing condition spontaneously and coincidentally became symptomatic shortly after pressing her knee forcefully against a metal bed frame while maneuvering a heavy patient. When considered in combination, the probability Claimant suffered a new injury or aggravated a pre-existing condition is substantially greater than 51%. Accordingly, Claimant proved she suffered a compensable knee injury on November 6, 2020.

[5] Although Claimant did not specifically argue an aggravation theory, this hypothesis jumps out as fairly suggested by the evidence. Respondents clearly appreciated this issue too, as evidenced by the multiple questions Respondents' counsel asked Dr. O'Brien about whether Claimant's work aggravated or accelerated a pre-existing condition.

B. Medical benefits

The respondents are liable for medical treatment from authorized providers reasonably needed to cure and relieve the effects of an industrial injury. Section 8-42-101. As found, the evaluations and treatment Claimant has received from Optum were reasonably necessary. The parties stipulated Optum is Claimant's ATP.

C. Average weekly wage

Section 8-42-102(2) provides compensation shall be based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that seems most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993). As found, Claimant's AWW is $1,279.76. Claimant's proposed computational methodology using the three full pay periods (46 days) immediately preceding the work injury is reasonable and provides a fair approximation of her average earnings at the time of the injury.

ORDER

It is therefore ordered that:

1. Claimant's claim for a right knee injury on November 6, 2020 is compensable.

2. Insurer shall cover all treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's compensable injury, including but not limited to evaluations and treatment through Optum commencing November 7, 2020.

3. Claimant's average weekly wage is $1,279.76.

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

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email

address, it need not be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: June 22, 2021

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-134-036-001

ISSUE

1. Whether Respondents established by a preponderance of the evidence that Claimant received an overpayment of temporary total disability benefits during the year 2020 for which Respondents are entitled to repayment.

FINDINGS OF FACT

1. Claimant is a 48-year-old man who owns and operates Employer. Employer is a landscaping, snow removal and remodeling business. Claimant is Employer's sole employee, shareholder, officer, and director.

2. Claimant sustained an admitted low back injury on August 30, 2019, and received temporary total disability (TTD) benefits from December 23, 2019, through April 5, 2021. Claimant's admitted gross average weekly wage was $1,069.87 (adjusted to $713.25 per week for TTD benefits pursuant to § 8-42-105 (1), C.R.S.). For the year 2020, Insurer paid Claimant 52 weeks of TTD benefits totaling $37,089.00 (i.e., 52 weeks x $713.25 per week). (Ex. C). Claimant returned to work full time in April 2021.

3. Claimant has not reached maximum medical improvement.

4. During the year 2020, Claimant continued to operate his business (Employer) and perform labor, including landscaping projects. Snow removal projects were performed by family members whom Claimant did not pay for their services. Claimant received gross compensation from Employer in the amount of $7,500.00. Although Claimant reported these payments to Insurer, Claimant's TTD benefits were not reduced during 2020 to account for the compensation.

5. According to Claimant's 2020 Federal Tax Return, Employer's ordinary business income (i.e., profits) during 2020 was $678.00. Claimant credibly testified that he did not receive income from Employer in 2020 other than $7,500 in compensation, and that any corporate profits remained in Employer's bank account for the payment of business and operating expenses in 2021.

6. Claimant credibly testified that he currently earns $904.00 per week from Employer. Claimant also testified that he has approximately $130,000 in credit card debt and pays "thousands" of dollars per month to service the credit card debt. Claimant's Exhibit 5 demonstrates that, Claimant (and/or Employer) has credit card debt in excess of $93,000 and had made monthly payments of approximately $2,600 towards various credit cards, although some of the credit card debt appears to be debt of Employer, rather than Claimant's personal debt. For example, Ex. 5, page 00027 identifies an American Express card and another business credit card as expenses of Employer, with monthly payments of $1,000 and $300, respectively. These correlate with billing statements and

monthly payments for an American Express/Lowe's Business Rewards card and a Business Line Master Card in the name of Employer contained in Exhibit 5. Another card, a Wells Fargo Visa, shows charges for Pioneer Sand of $2,977.67, which the ALJ infers is an expense related to Employer, and not a personal expense of Claimant. Claimant testified that a repayment rate of $800.00 per month would not be feasible without incurring additional credit card debt.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

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

OVERPAYMENT

The Act defines "overpayment" as "money received by a claimant that exceeds the amount that should have been paid or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable under said articles." § 8-40-201 (15.5), C.R.S. Under § 8-42-105 (1), a claimant is entitled to receive temporary total disability (TTD) benefits equal to 66 2/3% of the claimant's average weekly wage "so long as such disability is total." TTD benefits continue until, *inter alia*, "the employee returns to regular or modified employment." § 8-42-105 (3)(b), C.R.S. Once a claimant returns to "regular or modified employment," a claimant may become entitled to temporary partial disability (TPD) benefits under § 8-42-106, C.R.S., which continue until such disability is removed or the claimant reaches maximum medical improvement. Where a claimant is entitled to TPD benefits, the employee shall receive sixty-six and two-thirds percent of the difference between the employee's average weekly wage at the time of the injury and the employee's average weekly wage during the continuance of the temporary partial disability." § 8-42-106 (1), C.R.S.

Respondents have established by a preponderance of the evidence that Claimant received an overpayment during the year 2020 and that Respondents are entitled to recover such overpayment. Claimant does not dispute he received $7,500.00 in wages from Employer during the calendar year 2020, and does not dispute that the receipt of wages constitutes an overpayment of temporary disability benefits. Claimant returned to work in some form in 2020 and received wages for that work. Accordingly, Claimant's entitlement to TTD benefits terminated, and he was, instead, entitled to TPD benefits to account for the diminution in wages. Because Claimant received TTD payments without reduction for the wages received during 2020, claimant received money that exceeded the amount that should have been paid, resulting in an overpayment under the Act.

The amount of overpayment is determined based on the difference between the TTD benefits Claimant received and the TPD benefits to which he was entitled in 2020. As found, Claimant received $37,089.00 in TTD benefits during 2020. Applying the TPD formula from § 8-42-106 (1), C.R.S., Claimant was entitled to $32,088.68 in TPD benefits, resulting in an overpayment of $5,000.32. The chart below sets forth the overpayment calculation.

TTD received for 2020 (See Findings of Fact, ¶2)		$ 37,089.00
TPD Benefits Calculation		
Admitted AWW at time of injury (See Ex. C)	$ 1,069.87	
LESS: AWW during 2020: (i.e., $7,500 ÷ 52 weeks)	$ (144.23)	
Weekly TPD AWW (i.e., $1,069.87 - $144.23)	$ 925.64	
Weekly TPD benefit under § 8-42-106 (1): (i.e., $925.64 x 66 2/3%)	$ 617.09	
TPD entitlement for 2020: ((i.e., $617.09 x 52 weeks)		$ (32,088.68)
Overpayment: TTD less TPD (i.e., $37,089.00 - $32,088.68)		**$ 5,000.32**

The ALJ notes that the overpayment calculation methods proposed by the parties in position statements yield substantially the same result (i.e., 66 2/3% of the wages Claimant received during 2020).

Respondents' contention that Employer's profits of $678.00 should constitute Claimant's "wages" under the Act is without merit. Section 8-42-102 (1), provides: "The average weekly wage of an injured employee shall be taken as the basis upon which to compute compensation payments." Section 8-40-201 (19)(a), C.R.S., defines "wages" as "the money rate at which the services rendered are recompensed under the contract of hire in force at the time of the injury, either express or implied." The term "recompense" is not defined in the Act, but means "[a] reward or payment for services, remuneration paid for goods or other property." 1272 BLACK'S LAW DICTIONARY (6th ed. 1990). The term does not include undisbursed corporate profits. As found, Claimant was not paid Employer's retained profits of $678.00, thus that sum was not "recompensed" to Claimant. Rather, the funds remained Employer's property. Although Claimant is the sole shareholder of Employer, in general "a corporation is treated as a legal entity separate from its shareholders, officers, and directors." *McCallum Family L.L.C. v. Winger*, 221 P.3d 69, 73 (Colo. App. 2009). Respondents have cited no legal authority for the proposition that Employer's profits constitute Claimant's wages under the Act.

OVERPAYMENT RECOVERY

Section 8-42-113.5, C.R.S. governs the recovery of overpayments. Where a claimant receives any payments from any source which requires the reduction of any disability benefit, § 8-42-113.5 provides for different methods of recovery for respondents. Under § 8-42-113.5 (a), a claimant is required to provide written notice of learning of such payment within twenty days, and any resulting overpayment "shall be recovered by the employer or insurer in installments at the same rate as, or at a lower rate than, the rate at which the overpayments were made." "Such recovery shall reduce the disability benefits … payable after all other applicable reductions have been made." *Id*. Where no written notice is provided, "the employer or insurer is authorized to cease all benefit payments immediately until the overpayments have been recovered in full." § 8-42-113.5(1)(b). If, however, recovery under § 8-42-113.5 (a) or (b) is "not practicable," respondents are authorized to seek an order for repayment. § 8-42-113.5(1)(c), C.R.S. The term "practicable" refers to a respondent's ability to recover the overpayment from ongoing or unpaid benefits." *In re Martin*, W. C. No. 4-453-804 (ICAO, Oct. 4, 2004).

When the parties are unable to agree upon a repayment schedule, the ALJ is empowered, pursuant to § 8-43-207(q), C.R.S., to conduct hearings to "[r]equire repayment of overpayments." In *Simpson v. Industrial Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009), *rev'd on other grounds*, *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010), the Colorado Court of Appeals held that with regard to overpayments, the ALJ has discretion to fashion a remedy. Further, the ALJ has the authority to determine the terms of repayment and the ALJ's schedule for recoupment will not be disturbed absent an abuse of discretion. *See Louisiana Pacific Corp. v. Smith*, 881P.2d 456 (Colo. App. 1994).

As Respondents note, the methods of repayment set forth in § 8-42-113.5 (1)(a) & (b), C.R.S., are not practicable because Claimant is not currently receiving disability benefits against which the overpayment may be offset. Respondents request a repayment schedule which would extinguish Claimant's overpayment within six payments. Claimant's request that any overpayment be offset against any future permanent partial impairment award.

While overpayment may be recovered by reduction of a permanent partial disability award, Claimant has not yet reached MMI or received a permanent impairment rating, and the evidence is insufficient to determine if any such award would be sufficient to satisfy Claimant's repayment obligation. Claimant testified that he currently earns $904 per week in wages, and could not repay at the rate of $800.00 per month without incurring additional credit card debt. Although Claimant has substantial credit card debt, the evidence indicates that a significant portion of that credit card debt is likely debt of Employer, and not Claimant individually.

Based on the evidence presented, the ALJ concludes that a repayment schedule of $288.47 per month will extinguish the overpayment in approximately eighteen months. Should Claimant become entitled to permanent partial disability benefits before the overpayment is satisfied, unpaid balance shall be offset against PPD payments, until the overpayment is extinguished. The ALJ concludes that this repayment schedule balances the rights of Respondents to timely recover the overpayment, while lessening the potential of creating an undue hardship on Claimant.

ORDER

It is therefore ordered that:

1. Claimant shall repay Respondents a total of $5,000.32 at a rate of $288.47/month. Claimant's first payment is due on the 15th day of the calendar month after this order becomes final and subsequent payments are due on the 15th day of each calendar month thereafter until the overpayment is satisfied. If prior to the satisfaction of the overpayment, Claimant becomes entitled to permanent partial disability benefits, the unpaid balance shall be offset against PPD payments until extinguished. Claimant's counsel shall contact Respondents' counsel to obtain the necessary details regarding where payments are to be remitted.

2. All matters not determined herein are reserved for future determination.

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

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

DATED: June 23, 2021

____
Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that he suffered a compensable occupational injury?

II. If compensable, has Claimant shown, by a preponderance of the evidence, that he is entitled to medical benefits to treat his occupational disease?

STIPULATIONS

The parties stipulated to an Average Weekly Wage of $2,092.05.

FINDINGS OF FACT

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

Background / Claimant Treats with Dr. Inman

1. Claimant was formerly employed as a firefighter/paramedic [Employer]. He was hired in May 2000 and retired as of March 31, 2021.

2. Claimant found Dr. Emily Inman, Psy.D, through Employer's peer support program. Claimant initially sought treatment with Dr. Inman in October 2014 for personal issues with the recent loss of his father, relationship issues with his girlfriend, as well as nightmares related to work. Dr. Inman's initial diagnoses were major depressive disorder and bereavement. (Ex. 1, p. 3).

3. Claimant first saw Dr. Inman on October 22, 2014. She noted his chief complaint was: "compounding grief and trauma. Client is a firefighter, recently lost his father to cancer, broke up with his girlfriend, and is having recurrent nightmares that include victims from his work." (Ex. 1, p. 4). She recommended he begin psychotherapy, and "bereavement and trauma therapy are recommended." Similarly, on November 20, 2014 Dr. Inman noted, "Paul discussed his employment and history as a firefighter and his concerns that he struggles with coping with some of the things he has seen. He also reported the recent death of his father/best friend and his struggle with grieving and how to handle it, as well as the recent breakup with girlfriend that was his support through the loss of his father." *Id* at 7. Dr. Inman's diagnosis was "bereavement" and "major depressive DO, single episode."

4. Dr. Inman administered a Trauma Symptom Inventory ("TSI") test on November 26, 2014. (Ex. 1, pp. 11-20). On December 4, 2014, she noted that Claimant's Mother had passed away over Thanksgiving. *Id* at 22. On December 17, 2014 Dr. Inman noted, "…Results from his TSI were also reviewed and it was noted that he had symptoms of stress, but did

not meet full criteria for PTSD and plans to address the specific symptoms were made." *Id* at 24. Dr. Inman removed the diagnosis of "major depressive disorder."

5. On January 29, 2015, Dr. Inman reported, "…Paul spent the session processing the struggle of the vicarious trauma he was collecting through his work. He revisited the nightmare he was having and related the elevated awareness of negative possibilities to his daily life, citing examples of feeling unsafe in a parking lot with his girlfriend's kids due to the presence of harassing individuals. Ways to balance the survival/planning for the worst case at work and not being as extreme in thought when at home was explored." *Id* at 30.

6. On February 18, 2015, Dr. Inman noted, "…He reported continuing to work on transition from work to home and was experiencing a lot less distress at work…" *Id* at 32. On March 17, 2015, Dr. Inman noted, "…Paul spent the majority of the session focusing on what was going well and the reduction he was noticing in his symptoms." *Id* at 38. On March 26, 2015, Dr. Inman reported, "…Paul continues to appear to be making progress toward his goals, with reports in reduction of symptoms and improved interpersonal functioning." *Id* at 40. A visit on April 22, 2015 appears to concern only Claimant's relationship with his partner and what he felt was a "constant roller coaster ride." *Id* at 42.

7. Claimant was not seen again until November 11, 2015, at which time Dr. Inman noted, "…Paul reported that he required a booster session to explore the recent changes in his significant relationship and the impact of the upcoming holidays on his bereavement. Paul stated that he was feeling better about the holidays as he 'knew what to expect' with the loss of both parents and shared that he was actively planning for the holidays to stay connected an engaged…" *Id* at 44.

8. Claimant was not seen again for over three years, until December 19, 2018. Then Dr. Inman noted, "…Reviewed recent thoughts and behaviors and discussed ways to address and challenge with maladaptive and distressing ones. Also reviewed healthy coping skills that have proven effective and explored ways to further set healthy boundaries with others." *Id* at 45. Dr. Inman's diagnosis once again was "bereavement."

9. On January 15, 2019, Dr. Inman reported, "…Reviewed with Paul the events of the last month and the successes and non of application (sic) from last session. Discussed what he would like to continue to improve and created a plan with goals to address that during the new year…Paul will call to schedule another session when he feels it is necessary." Diagnostic Impressions were 'Uncomplicated Bereavement'. *Id* at 46.

10. On August 7, 2020, Claimant presented to Dr. Inman after he had an intrusive thought or flashback when he was at his significant other's house for a barbeque and saw neighbor kids jumping on a trampoline that had a protective cage or netting around it. Claimant saw this and experienced a flashback to the scene of a call in which a young boy who had accidently been hung in such netting 8 -10 years earlier; "…I was talking to my girlfriend, saying why are those kids jumping on there? They're going to get killed." . He requested Dr. Inman complete FMLA paperwork for him. He explained he occasionally needed to take a little extra time off because he wasn't sleeping well.

11. This time Dr. Inman diagnosed Claimant with PTSD. *Id* at 47. Dr. Inman noted in the FMLA paperwork that she completed on August 14, 2020, that Claimant's "condition has intensified in the last four months." She indicated the probable duration of his condition was six months to a year with effective treatment. [The ALJ notes that Claimant submitted at hearing a list of "significant alarms," from September 2000 through December 2020. He testified he started preparing the list shortly after August 2020 as documentation of mental distress due to the job. (Ex. 8)].

12. In FMLA paperwork she filled out on August 14, 2020, Dr. Inman noted, "While the employee is physically capable of performing his job, he is experiencing worsening of PTSD symptoms that are negatively impacting his clarity of thinking and emotional responding. This worsening of symptoms has interfered with his daily functioning (i.e. his ability to sleep at night) and began impacting many aspects of his life. It is recommended that he participate in a trauma focused / trauma informed treatment protocol to reduce his symptoms and build effective coping skills to allow him to return to his baseline functioning for both his ability to function at home and work…" (Ex. W, p. 97). In response to the question, "Is it medically necessary for the employee to be absent from work during the flare-ups? Dr. Inman answered, "That will depend on the nature of the flare-ups." *Id* at 98. In response to the question of 'approximate date condition commenced?' Dr. Inman noted, "His condition has intensified in the last four months."

13. At hearing, Claimant attributed this to "the general stressors of working in that environment, I would say." Dr. Inman elaborated; "My belief, it was a cumulative experience and the lack of capacity to continue to manage. That he noted a lot of – increase in his nightmares, which had been under control, previously, avoidance of areas of town, isolating in his home, high levels of anxiety, hypervigilance." *Id* at 51.

14. On September 15, 2020, Dr. Inman reported, "…Reviewed anxiety and PTSD symptoms. Discussed at length a specific incident that has caused excessive stress and triggered PTSD sx [symptoms]…Explored antecedents and results. Reviewed coping/relaxation skills that are working and those that are not. Discussed new options, to include EMDR." *Id* at 54. At hearing, Dr. Inman testified she believes the incident she referenced was the trampoline incident in early August.

15. On October 2, 2020, Claimant was involved in a search and rescue and discovered the bodies of an older woman who had been shot and a man who had shot himself (the inference being a murder/suicide). At hearing, Claimant described:

> And right near -- right near the creek, we -- we saw an older lady who had been shot. And without being too graphic, was obvious signs of death. And the -- the other person apparently shot himself.
>
> And so we -- we responded back to the -- back to the command post that I had positively found them. That they're here, and what I didn't see is that one of their sons -- it was night. This is at approximately midnight when we found them. Their son had followed us down. And telling him that and with what we had seen, it was -- it was extremely difficult.

> And I went back to the fire station after we cleared that call and left it with the -- the police department. I just -- I couldn't sleep.
> It was pretty much the -- the straw that broke the camel's back for me with the -- the amount of trauma I'd been through before, then seeing this. It was really, kind of, what I felt, kind of, did me in.

16. Claimant compared his symptoms after the event in August versus that of October:

> Q. And then, did the symptoms change after the event in August versus the event in October?
>
> A. Yeah, they worsened. And -- but October was really the -- the breaking point for me. And that's -- that's what's, kind of, led us here today. That was, kind of, the game -- the game ender for me.

17. Claimant then testified that the October incident led to his decision to retire from the Fire Department:

> And after that, I started to increasingly take more and more time off from work. And then, Dr. Inman and I had talked about addressing the root cause of what my -- my issues were, instead of just dealing with the symptoms. And that, maybe, it was time for me to end my career as a firefighter and paramedic. And I made that decision. And -- because I was missing more work than I was really going to at that point in time. And made that decision and applied for retirement in February.

18. Claimant testified that, after the incident in October 2020, he and Dr. Inman talked about addressing the root cause of his issues, instead of just dealing with the symptoms, and that maybe it was time for him to end his career as a firefighter and paramedic. Dr. Inman testified that was a decision Claimant made. Claimant stated at hearing:

> After … the incident in October, and I saw how -- I was responding to that particular incident and how it was affecting those around me. And, after a good discussion with Dr. Inman, thought that maybe it was time to move on to something … we were no longer able to handle the symptoms and had to deal with the cause. And so, the cause of that was working as a firefighter and paramedic. And so, it was time to make the decision to move on to something else.

19. Dr. Inman then testified at hearing as an expert in the field of psychology. She testified that when she began seeing Claimant in 2014, “He was experiencing symptoms related to trauma, bereavement, and relationship issues.” She testified her initially diagnosis was “major depressive disorder, single episode,” but that this was changed to “bereavement” within a few weeks. Dr. Inman first diagnosed Claimant as suffering from PTSD on August 7, 2020.

20. Dr. Inman testified that, per the diagnostic statistical manual, fifth edition, PTSD is an exposure to a situation or series of situations where the individual felt threatened, witnessed death, was experiencing death, or severe bodily injury, or witnessing of these things. It requires symptoms such as avoidance, hypervigilance, intrusiveness. She noted the DSM specifically talks about avoidance of efforts of external reminders as well as distressing memories. She noted Claimant has exhibited avoidance behaviors; "He has showed examples of areas of town where he's been on calls. There's also people that remind him of certain incidences."

21. Dr. Inman testified about her treatment for the PTSD that she first diagnosed on August 7, 2020.

> Q. And how -- were you treating him for the PTSD?
>
> A. My treatment, from the beginning, has been cognitive behavioral therapy. It reached a level where I believed that it was no longer an effective treatment and was recommending other options with other providers.
>
> Q. Such as what?
> A. EMDR.
>
> Q. What is that?
> A. Movement desensitization and reprocessing. It is a type of trauma treatment protocol that was put into place specifically for traumas. I'm not trained in it, so I can't speak to it specifically. I just am aware that it exists and had recommended out. We also discussed the equine therapy, which is something that I've also been minimally educated about and talked about being a possibility as well.

22. Dr. Inman was asked about the significance of the October 2, 2020 event; "That was a - he was very disrupted for that session. It was upsetting. It also doesn't help that my new office is not very far from that location. We talked – we spent the entire session just re-going over the sensory perception he had of that, trying reality check, ground himself." She added, "That incident took up an extensive amount of conversation, as compared to other incidences, yes." Later she elaborated; "It was a very significant incident. A … very significant exposure that was very triggering and brought up a lot of maladapted behaviors and symptoms."

Dr. Kleinman conducts an IME

23. Dr. Robert Kleinman conducted a RIME and authored three reports. In the first, dated February 1, 2020, the doctor opined that, "[Claimant] does not have a psychiatric diagnosis related to the event of 10/02/2020." (Ex. HH, p. 136). Dr. Kleinman stated, "…a feature of PTSD is avoidance, which [Claimant] does not meet. Recall that he does not miss work. He goes to work despite anxiety." *Id* at 137. In the second report, dated

February 17, 2021, Dr. Kleinman conceded that Claimant "…does have some symptoms consistent with Posttraumatic Stress Disorder, but without avoidance he does not meet the full criteria…That [Claimant] does not have a permanent disability is evidenced by his continuing to work despite facing traumatic event." *Id* at 143. In his third report, Dr. Kleinman admitted Claimant "now meets full criteria for PTSD" but he opined the incident of October 2, 2020 did not cause the PTSD. *Id* at 156. Dr. Kleinman testified regarding the opinions of Drs. Moe, Shuman, and Casper (Claimant's Exhibits 2-4). Dr. Kleinman's testimony at hearing was largely consistent with his written reports.

24. At hearing, Dr. Kleinman (who is Level II accredited) noted that although Claimant indicated, in a checklist Dr. Inman gave Claimant at his initial appointment in 2014, there was no objective data, nor any subjective complaints in the narrative report to actually support that. He agreed with Dr. Inman that at that time, Claimant had some symptoms consistent with post-traumatic stress disorder, but he did not meet full criteria.

25. When Dr. Kleinman evaluated Claimant on January 29, 2021, he concluded Claimant did not have a psychiatric disorder related to the event of October 2, 2020. He noted there were multiple contributing factors to Claimant's initiating treatment with Dr. Inman in 2014 including traumatic work events. He stated Claimant continued to have symptoms that did not meet the full criteria for PTSD in that he did not avoid triggering situations. He concluded the predominant cause of Claimant's mental illness was relationship issues, even though he was exposed to trauma and had some symptoms consistent with PTSD. (Ex. HH, pp. 136–137).

26. Dr. Kleinman testified that, when he met with Claimant, Claimant discussed specific incidents at work, including the murder-suicide from 2020, without a change in his affect, "as if it was history." He didn't seem distressed. He was working and expressed his intention to continue to work. He said work was demanding, but he got along with the people and enjoyed the camaraderie. He specifically said that, although he was anxious at work, he still liked the work. He enjoyed helping people, and he planned on continuing it. Claimant didn't tell Dr. Kleinman he was missing work for FMLA. Based on Claimant's reported activities of daily living, Dr. Kleinman did not see enough evidence of avoidance to make the diagnosis of post-traumatic stress disorder at that time.

27. Based upon the information that Claimant began missing work or is not working at all since March of 2021, Dr. Kleinman opined Claimant now meets full criteria for a diagnosis of PTSD if he's missing work due to avoiding situations that would cause him to have recall of traumatic events. In his opinion, however, the event of October 2nd, 2020, was not the "signature event" that caused his PTSD. He noted Claimant is missing work related to the accumulation of traumas that started before 2014.

Claimant is Evaluated by Three other Mental Health Professionals

28. Claimant also saw psychiatrist Edmund Casper, MD in connection with a FPPA claim on March 11, 2021. Dr. Casper reported:

> …[Claimant] outlined over 50 calls of severe trauma where he responded to the victims during his duties. He stated that the onset of traumatic flashbacks started with the call in 2014 where he witnessed the strangulation of a young boy and has flashbacks of this event as well as other events throughout the years. He reported he applied for family leave in August 2020 but continued performing as many shifts *as he could tolerate.*
>
> [Claimant] reported he sought professional help in 2014 after he suffered severe anxiety, chronic nightmares, mood swings, feeling overwhelmed and panic. He reported he began to have more intrusive thoughts and memories of traumatic events that became worse in August 2020 when he had intrusive thoughts [of] the boy who was strangled while jumping on a jumper. Then when he witnessed the trauma of the elder couples' murder suicide in October 2020, he felt *he was forced to take more time off in order to recover and* *avoid* *being around people…*(Ex. 4, p. 85)(emphasis added).

29. Dr. Casper diagnosed "posttraumatic stress disorder, chronic, severe. Major depressive disorder chronic, severe." Dr. Casper recommended Claimant receive "intensive treatment" for both conditions. *Id* at 89. Dr. Casper recommended "permanent occupational disability," which means "an occupational disability caused by a condition that is permanent or degenerative, and for which there is no prognosis for improvement or recovery through surgical treatment, counseling, medication, therapy, or other means." As for the cause of the problems, Dr. Casper reported, "It is my professional opinion that exposure to repeated traumatic experience." *Id* at 89.

30. Claimant then saw Dr. Charles Shuman, MD in connection with the FPPA claim on March 17, 2021. Dr. Shuman reported:

> …[Claimant] reports that he first started experiencing symptoms of PTSD approximately 6 months prior to first seeking treatment in 2014. He states that when he started experiencing symptoms, he began having nightmares and intrusive thoughts related to trauma from the past. He states that the symptoms were tolerable until August of 2020, when he was at a barbecue. There was a trampoline in the back yard, and he had a flashback to a time in the past when a child had been hung from a trampoline. The [He] states that this triggered severe anxiety at the time, and he took time off from work and increased his therapy. He reported that he was having difficulty performing work due to difficulty handling stress and insomnia was causing difficulty the next day being able to function. After returning to work, In October he responded to a call, a murder-suicide scene. The graphic nature of the scene triggered intense symptoms of PTSD, including avoidance of trauma triggers, increased nightmares, physical reactivity to calls, intrusive thoughts, flashbacks, worsening nightmares, and self-isolation. *Since January of 2021 he has only been able to attend work intermittently.* He last worked in the

> beginning of March 2021, approximately 2 weeks ago. He says that he worked a partial shift, during which he experienced irritability, difficulty focusing, concentrating, and interacting with public and peers…(Ex. 3, p. 78) (emphasis added).

31. Dr. Shuman noted, “The cause of PTSD and depression are exposure to traumatic experiences during his work as a firefighter.” *Id* at 80. Dr. Shuman noted, “He is currently *unable* to perform job duties associated with work as a firefighter due to severe anxiety, severe insomnia when working, difficulty concentrating, *avoidance* symptoms, and difficulty interacting with others.” *Id* at 82 (emphasis added). The doctor made extensive treatment recommendations and noted that if Claimant was still experiencing symptoms or remains unable to return to work, then permanent occupational disability would be appropriate.

32. Claimant next saw psychiatrist Stephen Moe, MD in connection with the FPPA claim on March 22, 2021. The history of events prior to October 2, 2020 that Dr. Moe took is consistent with the history taken by Drs. Casper and Shuman, as is the significance of the October incident:

> …On 10/2/20, [Claimant] and a fellow firefighter were summoned to an incident involving a murder/suicide. In the session with me, the claimant broke down emotionally in reflecting on that call, and I therefore did not ask him to provide details about it. [Claimant] characterized that incident in a manner that brought to mind the adage "the straw that broke the camel's back," insofar as he reported that since that day, he has experienced a further, and much more debilitating, increase in his psychiatric symptoms. In contrast to his previous ability to function at work in the face of his symptoms for many years, since 10/2/20 he has found his functioning at work to be quite impaired. *He reported that whereas he has taken many days off work since 10/2/20, when he has attempted to work as a firefighter since that date he has experienced high anxiety while at the fire station in anticipation of the next call.* He stated that his sleep has been severely impaired, both at work and when not on duty. He said that at work, he is "not there mentally" to a sufficient degree that he can ensure the safety of his fellow crew members and the public at large. (Ex. 2, p. 70)(emphasis added).

33. Dr. Moe concluded; “…[Claimant]’s psychiatric difficulties map very well onto a typology of PTSD associated with exposure to disturbing experiences. As such, regardless of whether there is a contribution from ‘job burnout,’ his symptoms call for the diagnosis of PTSD.” *Id* at 74. Dr. Moe confirmed that, “Cumulative exposure to emotionally traumatic experiences in his job is responsible for [Claimant]’s PTSD.” *Id* at 76. Like Dr. Casper, Dr. Moe concluded the condition is permanent.

CONCLUSIONS OF LAW

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

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. §8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. §8-43-201, C.R.S.

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

C. Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). In this instance, the ALJ has heard from Claimant, and finds him to be sincere in recounting his symptoms at hearing, and in describing, to the best of his abilities, his symptoms to the various mental health professionals he has encountered.

D. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). In this instance, the ALJ has heard directly from two highly credentialed mental health professionals, and reviewed the reports from three others. Each of them are no doubt sincere in their interpretations of the data in rendering their opinions. Keeping in mind the burden of proof, the issue here is one of persuasiveness, but one cannot ignore the far greater access to Claimant that Dr. Inman has had through her numerous sessions through the years.

E. Further, courts are to be "mindful that the Workmen's Compensation Act is to be liberally construed to effectuate its humanitarian purpose of assisting injured workers." *James v. Irrigation Motor and Pump Co.*, 503 P.2d 1025 (Colo. 1972).

Occupational Disease, Generally

F. An "occupational disease" is defined in §8-40-201(14) C.R.S., as a disease that follows naturally from the conditions under which work was performed. The character of such an injury, as opposed to an 'accidental' injury, often makes difficult the act of locating the date to be assigned the injury. Nonetheless, the issue is significant because the "rights and liabilities for occupational diseases are governed by the law in effect at the onset of disability." *Henderson v. RSI, Inc*., 824 P.2d 91, 96 (Colo. App. 1991). The standard for measuring the onset of disability provides: "The onset of disability occurs when the occupational disease impairs the claimant's ability effectively and properly to perform his or her regular employment, or rendered the claimant incapable of returning to work except in a restricted capacity." *Ortiz v. Charles J. Murphy & Co.* 964 P.2d 595, 597 (Colo. App. 1998).

G. Prior to July 1, 2018, however, a compensable mental impairment was limited to a psychologically traumatic event that arose out of and in the course of employment when the accidental injury "consists of a psychologically traumatic event that is generally *outside* of a worker's usual experience ...." *See* §8-41-301(2)(a) C.R.S. Effective July 1, 2018, the section of the statute dealing with claims of mental impairment, §8-41-301, C.R.S., was amended by House Bill 17-1229. The amendments effective on that date broadened the category of compensable mental impairment injuries to include, at least potentially, PTSD arising from events "*within* a worker's usual experience"

H. Section 8-41-301(2)(a) and (b) now provides, as pertinent to this claim:

> (a) "Mental impairment" means a recognized, permanent disability *arising from* an accidental injury arising out of and in the course of employment when the accidental injury involves no physical injury and consists of a *psychologically traumatic event*. …
>
> …
>
> (b)(II) "Psychologically traumatic event" also includes an event that is within a worker's usual experience only when the worker is diagnosed with post-traumatic stress disorder by a licensed psychiatrist or psychologist after the worker experienced exposure to *one or more* of the following events:
>
> …
>
> (B) The worker *visually* or audibly, or both visually and audibly, *witnesses* a death, or *the immediate aftermath of the death*, of *one or more people as the result of a violent event;* **or**
>
> (C) The worker *repeatedly* and either visually or audibly, or both visually and audibly, *witnesses* the serious bodily injury, or *the immediate*

> *aftermath of the serious bodily injury,* of one or more people as the result of the intentional act of another person *or* an accident. (emphasis added).

Occupational Disease, as Applied

I. The record is clear in this case that Claimant was already psychologically fragile from various issues of bereavement and relationships. Claimant has now reproduced, via Exhibit 8, exactly 100 'Significant Alarms' dating to year 2000. The ALJ now notes that 84 of them predate the change in the statute, *supra*; thus they fell within Claimant's *usual experience* as a firefighter. While no doubt disturbing to the casual observer, most of these involved cardiac arrest, usually in older victims. Some were merely house fires, with no mention of fatalities. As such, these are neither the result of violent acts, or even accidents. Routine matters for a firefighter. However, thrown in were a few apparent suicides by firearm. [While the trampoline incident itself no doubt occurred sometime in the past, it cannot be identified from Exhibit 8]. Even the remaining events occurring after 7/1/2018 are mostly routine incidents not involving violence – save two gunshot deaths, which did not apparently manifest great trauma in their aftermath. Taken as a whole, while Exhibit 8 does not demonstrate any overt evidence of cumulative trauma, per se, it does serve as some evidence of Claimant's overall progressively weakening psyche, wrought in significant part by his work duties.

J. The 'signature event' in this case involves the 10/2/2020 murder/suicide. As such, it fits under 8-41-301(2)(b)(II)(B), supra. Claimant visually witnessed the immediate aftermath of the death of one or more people as a result of a violent event. A single exposure to such 'psychologically traumatic event' is sufficient to qualify, if it involves a *death.* In this instance, Claimant has been diagnosed with PTSD by a licensed psychologist, and three psychiatrists. In fact, even Dr. Kleinman now concurs that Claimant now has a PTSD diagnosis – assuming there is sufficient evidence of *avoidance* of situations which might cause Claimant to have recall of such traumatic event.

K. Claimant continued to work into 2021, but his attendance became sporadic, to the extent that it became untenable to maintain his position. He was avoiding placing himself into such a position, even if such avoidance was not total. The only way to totally avoid such situations was to retire from a job he otherwise apparently enjoyed. It is noted that Dr. Kleinman examined Claimant on 1/29/2021 (authoring his report on 2/1/2021) when Claimant was still employed, if sporadically. Claimant then retired on March 31, 2021, thus avoiding the situation entirely as best he could. The ALJ finds that there is sufficient evidence in the record to support a finding of such *avoidance* to merit the diagnosis of PTSD, as opined by Drs. Inman, Casper, Shuman, and Moe.

L. The remaining issue is whether Claimant's PTSD *arose from* this exposure to the *psychologically traumatic event* of 10/2/2020. As noted, Claimant was already psychologically fragile in the time leading up to this. In that sense, Claimant may well have had a 'preexisting condition' that had not yet become sufficiently symptomatic to merit a formal diagnosis requiring treatment through the Workers Comp system. Dr. Inman first diagnosed PTSD during the August 7, 2020 visit, and linked it to Claimant's work. Dr. Casper considered Claimant’s PTSD to be more cumulative in nature, but still attributed it to his work environment. Dr. Shuman found it to be work-related. Dr. Moe also considered it to have been cumulative in nature, due to his work environment. In no case did any of them – or Dr. Kleinman – link Claimant’s PTSD to any ‘psychologically traumatic events’ *outside of his work duties as a firefighter.* No such events are documented in his personal life, from the military, or anywhere else.

M. The ALJ finds that a sufficient causal link between Claimant’s work and his PTSD diagnosis. While perhaps not as dramatic as one might expect (in the form of hospitalization, or the like), there is sufficient evidence that the 10/2/2020 event was truly the ‘straw that broke the camel’s back,’ with the resultant PTSD diagnosis, *and need for treatment through the Workers Compensation system.*

Medical Benefits

N. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). Claimant must prove entitlement to benefits by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The ALJ concludes, based upon the opinions of Drs. Inman, Casper, Shuman, and Moe that Claimant has proved he requires additional treatment to cure and relieve the effects of his PTSD.

ORDER

It is therefore Ordered that:

1. Claimant has suffered a compensable occupational disease.

2. Respondents shall pay for all reasonable, necessary, and related medical treatment to relieve the effects of Claimant’s occupational disease.

3. Claimant’s Average Weekly Wage is $2,092.05

4. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

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

DATED: June 23, 2021

/s/ William G. Edie

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

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that on June 7, 2019, she sustained an injury arising out of and in the course and scope of her employment with the employer.

2. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that she is entitled to mileage reimbursement for travel to and from injury related medical appointment.

FINDINGS OF FACT

1. The claimant began working for the employer in May 2019 as a night stocker. The claimant's job duties involved unloading pallets of inventory from trucks, moving inventory from those pallets to empty pallets, and ultimately stocking the inventory onto the store shelves. These activities involved the use of a manual pallet jack, lifting heaving items, bending, and squatting. The claimant testified that she began to have pain in her left lower extremity on June 7, 2019. At that time, the claimant believed that her pain was emanating from her left groin.

2. The claimant and her coworker, Ms. C[Redacted], provided conflicting testimony regarding the claimant's initial report of her left lower extremity symptoms. On this issue, the ALJ finds the testimony of Ms. C[Redacted] to be credible and persuasive. Therefore, the ALJ finds that the claimant did not report that she believed she had suffered a work related injury until mid-July 2019.

3. On July 15, 2019, the claimant spoke with a representative in the employer's human resources department. Thereafter, the claimant was sent for medical treatment at PSMC[1]. The claimant was first seen at PSMC on July 17, 2019 by Aaron Singh, PA-C. At that time, the claimant reported left groin pain. PA Singh noted that an x-ray of the claimant's left hip showed no acute bony abnormalities. PA Singh diagnosed a muscle strain and opined that the claimant suffered a sports hernia or left groin strain. PA Singh took the claimant off of all work for four weeks.

4. On July 22, 2019, the claimant returned to PA Singh. In the medical record of that date, PA Singh noted that the claimant's left hip pain was worsening. As a result, he ordered magnetic resonance imaging (MRI) of the claimant's left hip. PA Singh also referred the claimant to Dr. William Webb for an orthopedic consultation.

[1] Pagosa Springs Medical Clinic.

5. On July 24, 2019, the claimant was first seen by Dr. Webb. On that date, Dr. Webb noted the claimant's job duties included "unloading tall pallets with manual pallet jacks and then breaking the pallets down to individual units". Dr. Webb also noted the claimant's report that PA Singh placed her on light duty. Dr. Webb opined that the claimant could have a stress fracture in her left hip. As a result, he recommended the claimant undergo a left hip MRI.

6. On July 30, 2019, a left hip MRI was performed. The MRI showed minimal degenerative changes in the left hip with an anterior superior labral tear.

7. On August 20, 2019 John Aucoin, CRNA, administered an injection to the claimant's left hip. Thereafter, the claimant was referred to physical therapy.

8. On October 3, 2019, the claimant returned to Dr. Webb. On that date, Dr. Webb noted that the claimant was not responding to physical therapy and the hip injection. As a result, he ordered a second MRI and also a lumbar spine MRI.

9. On October 14, 2019, a left hip MRI showed a "tiny" and chronic nondisplaced tear in the anterior labrum; grade 3 cartilage fissuring within the anterior superior aspect of the acetabulum; a small joint effusion and mild synovitis with perisynoval inflammation along the inferior aspect of the hip joint; and mild left trochanteric bursitis.

10. Following the October 2019 left hip MRI, Dr. Webb referred the claimant to Dr. Matthew Smith for a second opinion. The claimant was seen by Dr. Smith on January 22, 2020. Dr. Smith diagnosed the claimant with left hip osteoarthritis. He discussed various treatment options including activity modification, anti-inflammatory medications, injections and hip arthroplasty. At that time, the claimant opted to continue to treat with anti-inflammatories.

11. At the request of the respondent, on March 10, 2020, the claimant attended an independent medical examination (IME) with Dr. Tashof Bernton. In connection with the IME, Dr. Bernton reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his IME report, Dr. Bernton opined that the claimant has a left hip degenerative labral tear in association with osteoarthritis. Dr. Bernton also testified that the claimant does need to undergo arthroscopic surgery on her left hip. However, it is his opinion that the condition of the claimant's left hip and her need for left hip surgery are not work related.

12. Dr. Bernton also noted his opinion that the presence of extensive degenerative changes and a small labral tear, makes it most probable that the tear is degenerative. Dr. Bernton further opined that there is nothing about the claimant's work activities that would be expected to cause any type or substantial and, particularly, persistent aggravation of the osteoarthritis.

13. Dr. Bernton's testimony was consistent with his written report. During his testimony, Dr. Bernton identified the claimant's diagnoses as degenerative osteoarthritis of the left hip, with a degenerative labral tear. He further testified that the claimant does need left hip surgery, due to the osteoarthritis. Dr. Berton also testified that it is his opinion that the claimant's need for left hip surgery is solely due to her pre-existing osteoarthritis and not due to her work activities. Dr. Bernton does not believe that the claimant's work activities aggravated or accelerated her preexisting left hip condition. Dr. Bernton found it very relevant that at the IME, and during her testimony, the claimant stated that she was worse and her symptoms did not get better after she stopped working. Dr. Bernton noted that this is consistent with the process of osteoarthritis.

14. On March 13, 2020, the claimant returned to Dr. Webb. In the medical record of that date, Dr. Webb noted his opinion that because the claimant has failed conservative treatment, a left total hip arthroplasty is medically necessary. He also opined that the claimant's preexisting hip arthritis was asymptomatic prior to her injury at work. Therefore, the claimant's current left hip issues are related to a work injury.

15. On December 23, 2020, Dr. Smith authored a letter in which he stated his opinion that the claimant's work injury in June 2019 "exacerbated a chronic condition".

16. Dr. Smith testified that he diagnosed the claimant with left hip arthritis and continues to recommend a total left hip replacement. Dr. Smith also testified that it is his opinion that the claimant's left hip condition was aggravated by her work activities. Specifically, it is his opinion that the claimant's activity of moving heavy things at work aggravated her left hip arthritis.

17. The claimant testified that prior to June 7, 2019 her activities included working with her horses, chasing neighbor cows off her property, and taking care of her 35 acre property. The claimant also testified that since June 7, 2019, she has difficulty doing any of those prior activities. In addition, she has difficulty walking due to pain.

18. The claimant's friends, Ms. Barber and Ms. Garrett testified at the hearing. Both of these witnesses corroborated the claimant's testimony that she was active previously, and now is not.

19. The ALJ does not find the claimant's testimony regarding the nature and onset of her hip symptoms to be credible or persuasive. The ALJ credits the testimony of Ms. C[Redacted] over that of the claimant with regard to when and how the alleged injury was reported. The ALJ also credits the opinions of Dr. Bernton over the contrary opinions of Drs. Webb and Smith. The ALJ specifically credits Dr. Bernton's opinion that the claimant's need for left hip surgery is due to her pre-existing osteoarthritis and not due to her work activities. For all the foregoing reasons, the ALJ finds that the claimant has failed to demonstrate that it is more likely than not that she suffered an injury arising out of and in the course and scope of her employment with the employer. The ALJ further finds that the claimant has failed to demonstrate that it is more likely than not that the claimant's work activities aggravated or accelerated her left hip condition to necessitate medical treatment.

CONCLUSIONS OF LAW

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

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

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

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

5. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that she suffered an injury arising out of and in the course and scope of her employment with the employer. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that her pre-existing left hip osteoarthritis was aggravated or accelerated to necessitate medical treatment. The testimony of Ms. C[Redacted] and the opinions of Dr. Bernton are found to be credible and persuasive.

ORDER

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

Dated this 24th day of June 2021.

Cassandra M. Sidanycz
Administrative Law Judge
222 S. 6th Street, Suite 414
Grand Junction, CO 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-145-409

ISSUES

I. Whether Claimant proved by a preponderance of the evidence she suffered a compensable injury arising out of and in the course of her employment with Employer?

II. Whether Claimant proved by a preponderance of the evidence the left total shoulder replacement surgery was reasonable medical treatment necessary to cure and relieve Claimant from the effects of a March 9, 2020 industrial injury?

III. Whether Claimant proved by a preponderance of the evidence that she is entitled to temporary total disability (TTD) from July 2, 2020 to November 8, 2020 and temporary partial disability (TPD) from November 9, 2020 to January 6, 2021.

STIPULATIONS

The parties stipulated to an average weekly wage (AWW) of $817.20.

FINDINGS OF FACT

1. Claimant is 53 years of age. Claimant has worked for Employer since 2004 as a full-time building manager, performing custodial duties at an elementary school. Claimant's job duties include collecting and disposing of trash. Claimant estimates the trash typically weighs 15-20 pounds.

2. Claimant alleges she sustained an industrial injury on March 9, 2020. On March 9, 2020, Claimant felt a pop and pain in her left shoulder while lifting and throwing a bag of trash into a dumpster. Claimant testified that she initially thought she pulled a muscle. Claimant was able to continue performing her regular job duties relying more on her right upper extremity and completed her shift for the day. She subsequently went home, took some Tylenol and rested. Claimant continued to experience pain the next morning, at which time she reported the incident to Employer.

3. Claimant underwent evaluation and treatment at authorized provider Banner Occupational Health Clinic. On March 12, 2020 Claimant saw Douglas Drake, PA-C under the supervision of Marc Chimonas, M.D. Claimant reported feeling a pop in her left shoulder when lifting a large bag of trash. Claimant reported not having any prior similar problems. On examination of the left shoulder, PA-C Drake noted diminished range of motion and positive Neer/Hawkin's and empty can tests. He diagnosed Claimant with left shoulder pain, referred Claimant for physical therapy, and placed Claimant on work restrictions. Dr. Chimonas signed a WC 164 form indicating his objective findings were consistent with the history of a work-related mechanism of injury.

4. Claimant participated in a course of physical therapy with some reported improvement but continued discomfort and decreased range of motion. She continued on work restrictions.

5. On May 6, 2020, Claimant underwent x-rays of the left shoulder that were negative for acute abnormalities. The x-rays showed hydroxyapatite deposition within the rotator cuff in the region of the supraspinatus footprint.

6. Claimant underwent a left shoulder MRI on May 13, 2020. Radiologist Samuel Fuller M.D. noted multiple degenerative findings, including mild degenerative hypertrophy and undersurface irregularity of the AC joint with an associated mild mass effect on the underlying rotator cuff, and mild degree of articular surface partial tearing in various areas. There were moderately severe degenerative changes in the glenoid articular cartilage, with reactive subchondral edema and a subarticular cyst demonstrated in the glenoid. There were also degenerative changes in the opposing humeral articular cartilage. There was no significant joint effusion demonstrated. Regarding the labrum, the MRI report identified tearing that was "compatible with degenerative fraying and/or ill-defined degenerative tearing." (Ex. A, p.5). Dr. Fuller gave the following impression:

> 1. Superior labral tearing, inclusive of a SLAP type lesion of the biceps/labral complex.
> 2. Glenohumeral joint degenerative changes, with reactive subarticular cyst formation and minimal marrow edema subjacent to overlying moderate degeneration of glenoid articular cartilage. There is no evidence of acute appearing osseous or osteochondral pathology.
> 3. Partial rotator cuff tearing at various sites as above. No full-thickness rotator tear is present on this exam. (Id.)

7. Based on the results of the MRI and Claimant's continued symptoms, PA-C Drake referred Claimant for an orthopedic evaluation. Claimant presented to Daniel Heaston, M.D. on May 27, 2020. Regarding the mechanism of injury, Dr. Heaston documented that Claimant felt a pulling sensation while throwing away trash. Claimant denied having any prior shoulder problems. Dr. Heaston reviewed the MRI results, noting the MRI showed left glenohumeral arthritis with cartilage thinning, degenerative labral tearing, and multiple glenoid subchondral cysts with some rotator cuff thinning and slight degenerative change but no significant tearing. He noted that the rotator cuff appeared inflamed but intact without any significant tears. Dr. Heaston's assessment was arthritis of the left shoulder region. He noted that Claimant's exam, history and imaging were all consistent with left shoulder arthritis with multiple subchondral cysts formed in the glenoid. Dr. Heaston opined that the most reliable surgery for Claimant would be a shoulder replacement. He recommended Claimant exhaust all nonoperative treatment options prior to proceeding with surgery.

8. Claimant requested a second surgical opinion and was referred to David A. Beard, M.D. Claimant presented to Dr. Beard on June 9, 2020. Claimant reported experiencing shoulder pain when throwing trash into a dumpster. Dr. Beard documented, "[Claimant] states that even prior to this injury she was having some issues with her shoulder. She has modified her physical activities." (Ex. D, p. 21). Dr. Beard reviewed the May 13, 2020 MRI, which he noted revealed "some supraspinatus tendinosis with no evidence of high-grade partial or full-thickness cuff tearing. There is signal change within the superior labrum, which may represent age-related degeneration or degenerative type tearing. She has fairly significant loss of articular cartilage in the glenoid with areas of subchondral cystic change and some bone marrow edema. The biceps tendon remains intact." (Id.) Dr. Beard diagnosed Claimant with left shoulder supraspinatus tendinosis, possible superior labral tear, and left shoulder glenohumeral osteoarthritis. He discussed treatment options with Claimant, who wanted to avoid any type of steroid injection due to difficulties she experienced with prior injections. Dr. Beard remarked, "I would be concerned about shoulder arthroscopy not alleviating her symptoms given the amount of degenerative changes as Dr. Heaston was concerned about. While she certainly could consider glenohumeral arthroplasty, I am concerned given her younger age…and the fact she is still doing a manual labor type of job." (Ex. D, p.22).

9. Claimant returned to Dr. Heaston on June 17, 2020, who noted Claimant failed conservative treatment. Dr. Heaston requested authorization for a left total shoulder arthroplasty.

10. On June 20, 2020, Jon M. Erickson, M.D. performed a Physician Advisor review of Dr. Heaston's request for authorization of a total shoulder arthroplasty. Dr. Erickson agreed with Drs. Heaston and Beard that, based on Claimant's level of pathology and the MRI, an arthroscopic procedure would not likely cause any improvement and that a shoulder replacement was indicated. However, Dr. Erickson opined that Claimant's need for surgery was not caused by the March 9, 2020 work incident. Dr. Erickson noted that the amount of arthroplasty seen in Claimant's shoulder was pre-existing and not caused by throwing a bag of trash into a dumpster. He opined that there was no evidence of any acute trauma revealed on the MRI and thus no evidence the trash-throwing incident caused any aggravation or worsening of Claimant's pre-existing condition. Dr. Erickson concluded that Claimant likely sustained a minor sprain or strain and her problems were due to a pre-existing condition. Respondents denied the request for authorization of surgery.

11. Claimant elected to proceed with surgery and underwent a left total shoulder arthroplasty with biceps tenotomy, performed by Dr. Heaston on July 2, 2020. Dr. Heaston noted "advanced left shoulder glenohumeral degenerative joint disease" as the preoperative and postoperative diagnoses.

12. From the date of the work event until July 2, 2020, Claimant worked full-time with modified duties. From July 2, 2020 through November 8, 2020 Claimant did not work due to recovering from surgery. Claimant continued to receive her full wages

during this time period, using vacation and sick leave. Claimant returned to work on a part-time basis on November 9, 2020 working approximately four hours per day until being placed at maximum medical improvement (MMI) on January 7, 2021.

13. On December 16, 2020, Robert L. Messenbaugh, M.D. performed an Independent Medical Examination (“IME”) at the request of Respondents. Claimant reported to Dr. Messenbaugh experiencing a sudden pop and pain in her left shoulder when throwing a garbage bag into the dumpster. Dr. Messenbaugh concluded that Claimant’s x-rays and MRI revealed advanced degenerative arthritis and soft tissue tearing and pathology that was present prior to the March 9, 2020 work incident. He explained that the hydroxyapatite deposition noted on the May 6, 2020 x-rays indicated Claimant’s rotator cuff tissues had been degenerative prior to March 9, 2020. He further explained that the cysts revealed on the MRI developed over a long period of time, indicating the chronicity of Claimant’s left shoulder pathology, which predated the March 9, 2020 event.

14. Dr. Messenbaugh opined Claimant did not sustain an actual injury to her shoulder on March 9, 2020, noting there was no acute tearing of the rotator cuff, labrum, anterior shoulder capsule, or articular cartilage surfaces within the glenohumeral joint. He noted Dr. Beard’s June 9, 2020 documentation of reports of pre-existing shoulder issues and explained that the popping sensation Claimant reported was likely the glenohumeral bone-on-bone surfaces rubbing together. Dr. Messenbaugh opined that Claimant had extensive pre-existing degenerative osteoarthritis with cartilage wear resulting in exposed bone, along with associated rotator cuff and labral degenerative fraying, wearing and tearing. He concluded that Claimant’s need for a total shoulder replacement was due to the advanced degree of Claimant’s pre-existing degenerative pathology and not the work events of March 9, 2020.

15. On January 7, 2021, Douglas Scott, M.D. at Banner Health placed Claimant at MMI. Dr. Scott noted a 30% upper extremity impairment for the total shoulder arthroplasty, but remarked,

> In my opinion the need for the left shoulder total arthroplasty was to treat [Claimant’s] underlying and pre-existing severe osteoarthritis of the left shoulder. In my opinion the aggravation of her left shoulder condition did not require a left shoulder total arthroplasty, i.e. the mechanism of injury did not cause her severe osteoarthritis and did not cause a specific diagnosed acute traumatic injury to the left shoulder. In my opinion, although she has a 30% upper extremity rating for the total left shoulder arthroplasty, it is a rating for a treated condition not work related to the claimed injury.

(Ex. E, p. 73).

16. On January 12, 2021, John Hughes, M.D. performed an IME at the request of Claimant. He gave the following assessment, in pertinent part: occult left shoulder

degenerative arthritis with no documentation of prior symptoms; work-related left shoulder sprain/strain with multiple injury components; and left shoulder arthritis. Dr. Hughes agreed that Claimant's degenerative pathology predated March 9, 2020, but noted Claimant was not symptomatic with degenerative pathology prior to March 9, 2020. He opined that the degenerative process was truly "occult" and presented a vulnerability for a left shoulder injury. Dr. Hughes opined that the work-related event of throwing the trash into the dumpster set in motion a "degenerative cascade" that led to Claimant undergoing the replacement arthroplasty of the left shoulder. He opined Claimant's need for the shoulder replacement arthroplasty stemmed from the work injury, which aggravated a previously occult left shoulder.

17. Dr. Hughes testified by pre-hearing deposition as a Level II accredited expert in occupational medicine. Dr. Hughes testified that the work events of March 9, 2020 accelerated Claimant's previously asymptomatic degenerative pathology, as well as superimposed acute injuries of a labral tear and/or partial rotator cuff tear. Dr. Hughes testified he believes the labral and rotator cuff tears evidenced on MRI were acute based on Claimant's description of the injury and documentation of her symptoms. Dr. Hughes opined that the shoulder replacement was the best option to address Claimant's shoulder condition. Dr. Hughes opined that Claimant became symptomatic because of the March 9, 2020 event. On cross-examination, Dr. Hughes acknowledged that he had reviewed Dr. Beard's June 9, 2020 medical report which contained the statement that Claimant was having some shoulder issues prior to the incident. He stated he mistakenly omitted that from his own report and acknowledged that it was not clear Claimant was asymptomatic prior to the work event, in light of Dr. Beard's records. Nonetheless, Dr. Hughes remained of the opinion that the March 9, 2020 work event caused a substantial and permanent aggravation of Claimant's degenerative shoulder pathology, resulting in the need for surgery.

18. Dr. Messenbaugh testified by pre-hearing deposition as a Level II accredited expert in orthopedics and orthopedic surgery, with a specialty in shoulders. Dr. Messenbaugh testified consistent with his report and continued to opine that Claimant did not sustain a work injury on March 9, 2020. Dr. Messenbaugh disagreed with Dr. Hughes's conclusion that Claimant experienced a labral and/or partial rotator cuff tear as a result of the March 9, 2020 event. He explained the MRI showed degenerative changes with no evidence of an acute injury, including no evidence of an acute labral tear or rotator cuff tear. Dr. Messenbaugh testified that no effusion was seen on the MRI that would be indicative of an acute injury. Dr. Messenbaugh explained that the radiologist's described the appearance of the labrum as degenerative fraying and tearing. Dr. Messenbaugh testified that Claimant's history of finishing her shift after the alleged injury is inconsistent with experiencing an acute rotator cuff tear, which would likely result in severe and debilitating shoulder pain. He explained that Dr. Heaston's surgical report does not indicate the surgery was performed for any rotator cuff or labral tear. Dr. Messenbaugh agreed with Dr. Erickson that Claimant had advanced pre-existing degenerative arthritis and that the events of March 9, 2020 did not cause her need for a total shoulder arthroplasty.

19. Dr. Messenbaugh testified that the March 9, 2020 event did not aggravate or accelerate Claimant’s pre-existing shoulder condition, as there was no change of pathology as a result of the March 9, 2020 event. He testified it was unlikely Claimant’s shoulder was asymptomatic prior to March 9, 2020 based on the advanced nature of Claimant’s pre-existing degenerative changes.

20. Claimant testified she did not have any shoulder issues prior to the March 9, 2020 event. She stated that, prior to the March 9, 2020 event, she was never informed she had arthritis. Claimant testified that she does not recall telling Dr. Beard she had prior shoulder pain and is not sure why Dr. Beard included that in his medical note. She testified she told Dr. Beard that she experienced body aches in the winter when performing snow removal at work. Claimant testified that she would treat the body aches with rest and over-the-counter medication and the pain would resolve. Claimant testified that the pain from the March 9, 2020 incident did not resolve with rest and medication.

21. The ALJ finds the opinions of Drs. Scott, Heaston, Beard, Erickson and Messenbaugh, as supported by the medical records, more credible and persuasive than the opinion of Dr. Hughes and Claimant’s testimony.

22. The ALJ finds that Claimant failed to prove it is more likely than not the March 9, 2020 event resulted in an injury that caused disability or the need for medical treatment.

CONCLUSIONS OF LAW

Generally

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

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

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

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998).

A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v.* Americold D/B/A Atlas Logistics, WC 4-960-513-01, (ICAO, Oct. 2, 2015). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Atsepoyi v. Kohl's Department Stores*, W.C. No. 5-020-962-01, (ICAO, Oct. 30, 2017). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). *Fuller v. Marilyn Hickey Ministries, Inc., W.C. No. 4-588-675, (*ICAO, Sept. 1, 2006*).*

Claimant failed to prove it is more probable than not she sustained a compensable industrial injury to her left shoulder on March 9, 2020. Claimant is credible in her reports of feeling a pop and pain while throwing away trash at work on March 9, 2020. However, the preponderant evidence does not establish the event caused an acute injury or aggravated, accelerated or combined with Claimant's pre-existing condition creating disability or the need for medical treatment. Claimant suffered from significant, longstanding pre-existing degenerative changes in her left shoulder. While Claimant asserts she did not have any left shoulder issues leading up to the work incident, such assertion is contradicted by Dr. Beard's documentation of Claimant's reports of shoulder issues prior to the work incident. Claimant's explanation that she was referring solely to general aches and pains is unpersuasive. Additionally, Dr. Messenbaugh credibly explained that it is not likely Claimant experienced no shoulder symptoms prior to the injury given the severity of Claimant's pre-existing degenerative shoulder condition. Dr. Hughes' opinion was based, in part, on the belief that Claimant was asymptomatic prior to the work incident. He later acknowledged it was not clear if Claimant was, in fact, asymptomatic prior to March 9, 2020.

Claimant's IME physician, Dr. Hughes, is the only physician in this matter who opined that Claimant sustained acute tears of her rotator cuff and/or labrum as a result of the work event. Radiologist Dr. Fuller, ATPs Heaston and Beard, as well as Drs. Erickson and Messenbaugh, all refer to the MRI findings as degenerative. Dr. Messenbaugh and Dr. Erickson credibly opined that there was no evidence of any acute trauma demonstrated on the MRI. Dr. Erickson credibly testified that Claimant's ability to continue performing her regular job duties for the remainder of the shift was inconsistent with sustaining an acute tear of the rotator cuff or labrum. While Claimant's pre-existing condition does not preclude a determination that she sustained a work injury, the ALJ is not persuaded the occurrence of symptoms at work was the result of an injury as opposed to the natural progression of Claimant's severe, pre-existing degenerative condition.

As Claimant failed to prove it is more likely than not she sustained a compensable industrial injury, the remaining issues are moot.

ORDER

1. Claimant failed to prove she suffered a compensable industrial injury on March 9, 2020. Claimant's claim for benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

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

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

DATED: June 28, 2021

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that the right total knee arthroplasty, as recommended by Dr. Thomas Dwyer, is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted September 8, 2020 work injury.

The endorsed issues of average weekly wage (AWW), temporary total disability (TTD) benefits, and temporary partial disability (TPD) benefits are reserved for future determination.

FINDINGS OF FACT

1. The claimant has been employed with the employer since June 25, 2016. On September 8, 2020, the claimant was performing her normal job duties as a surgical cleaning technician. The claimant's job duties include cleaning all aspects of the operating room (OR) department. This includes mopping, sweeping, and wiping all surfaces, including ceilings, walls, and floors.

2. On September 8, 2020, the claimant was moving an operating table for cleaning and rotated on her right leg. While rotating in this way, the claimant felt a pop in her right knee and a burning sensation. Despite this pain, the claimant completed her shift on September 8, 2020. She also worked her normal shifts on September 9 and 10, 2020. On September 11, 2020, the claimant reported her right knee pain to the employer. The claimant testified that she continued working during this time because there was no one to replace her.

3. The claimant testified that prior to September 8, 2020, she was able to perform all of her normal job duties. She was also able to go on walks and hikes. The claimant also testified that since her September 8, 2020 injury, she is unable to walk on uneven ground.

4. On October 8, 2020, the respondents filed a General Admission of Liability (GAL).

5. On October 14, 2020, the claimant began working in a modified position as a "screener" for the employer. That position involved performing temperature checks of individuals entering the hospital.

6. The claimant's authorized treating provider (ATP) for this claim is Dr. Randal Shelton. The claimant was first seen by Dr. Shelton on September 16, 2020. On that date, the claimant reported right knee pain with standing and motion. In addition, the claimant reported her pain level as four to five out of 10. Dr. Shelton noted some swelling on exam and ordered a right knee magnetic resonance image (MRI).

7. On September 28, 2020, a right knee MRI was performed. The MRI showed degeneration of the medial meniscus; a small tear of the meniscus; and advanced medial compartment degenerative changes.

8. Subsequently, Dr. Shelton referred the claimant to Dr. Thomas Dwyer for an orthopedic consultation. The claimant was first seen by Dr. Dwyer on October 22, 2020. The claimant reported increasing right knee pain and intermittent sharp pain. On that same date, an x-ray of the claimant's right knee showed complete loss of articular cartilage in the medial femoral condyle and medial tibial plateau. Dr. Dwyer diagnosed unilateral primary arthritis in the claimant's right knee. He recommended and administered an injection to the claimant's right knee.

9. The claimant testified that she had a reaction to the injection and sought emergent treatment for elevated blood pressure. The claimant also testified that the right knee injection gave her three or four months of pain relief.

10. On November 19, 2020, the claimant returned to Dr. Dwyer and reported side effects from the injection. The claimant also reported continued right knee pain with weight bearing activities. Dr. Dwyer recommended the claimant undergo a total right knee arthroplasty.

11. Dr. Dwyer testified that the claimant has advanced osteoarthritis in her right knee. Dr. Dwyer also testified that he continues to recommend a total right knee arthroplasty. He further testified that if he were to only repair the claimant's torn meniscus, such an arthroscopic surgery would not address the claimant's knee arthritis. With regard to causation, Dr. Dwyer testified that the claimant's mechanism of injury was "a factor" in her need for a knee replacement. In support of this opinion, Dr. Dwyer noted that the claimant did not have symptoms or limitations prior to her work injury.

12. The respondents attempted to schedule an independent medical examination (IME) in this case. The claimant declined to attend an IME on the basis of COVID related restrictions and because she did not wish to travel in the winter. Based upon this, the respondents requested that Dr. Jon Erickson review the claimant's medical records and opine regarding whether the recommended right knee replacement was reasonable, necessary, and related to the claimant's work injury.

13. In his January 18, 2021 report, Dr. Erickson opined that the September 8, 2020 incident was a "relatively minor" twisting injury. Dr. Erickson noted that the claimant has pre-existing advanced tricompartmental osteoarthritis in her right knee. It is Dr. Erickson's opinion that the September 8, 2020 incident did not aggravate or accelerate the claimant's pre-existing right knee condition. In addition, Dr. Erickson opined that the

claimant reached maximum medical improvement (MMI) when she received the October 22, 2020 injection. In support of this opinion, Dr. Erickson noted that the injection was successful in relieving the claimant's pain. He further noted that the return of the claimant's right knee pain was secondary to the pre-existing osteoarthritis.

14. Based upon the opinions of Dr. Erickson, the respondents denied authorization for the right total knee arthroplasty.

15. Dr. Erickson's testimony was consistent with his written report. Dr. Erickson testified that he diagnosed the claimant with advanced bone-on-bone osteoarthritis of the knee. Dr. Erickson also testified that the claimant reached MMI for her knee twisting injury after the October 2020 injection. Dr. Erickson also testified that the claimant's need for surgery is not related to her work injury.

16. The claimant testified that she was cleared to return to her environmental services technician position by Dr. Shelton. The claimant did return to that position on March 10, 2021. The claimant testified that she attempted to work in that position and comply with her work restrictions. However, after five hours working in that position, the claimant experienced right knee pain. She was then returned to the screener position.

17. The ALJ credits the medical records and the opinions of Dr. Erickson over the contrary opinions of Dr. Dwyer. The ALJ specifically credits the opinion of Dr. Erickson that the three to four months of pain relief the claimant experienced (following the right knee injection), demonstrate that the claimant has reached MMI. The ALJ is persuaded that the claimant's current need for a right total knee replacement is due to her pre-existing osteoarthritis. The ALJ is further persuaded that the minor twisting injury at work on September 8, 2020 did not aggravate or accelerate the arthritic condition of the claimant's right knee to necessitate surgery. For all of the foregoing reasons, the ALJ finds that the claimant has failed to demonstrate that it is more likely than not that the right total knee arthroplasty, as recommended by Dr. Dwyer, is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted September 8, 2020 work injury.

CONCLUSIONS OF LAW

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

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

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

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

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

6. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that the right total knee arthroplasty recommended by Dr. Dwyer is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted September 8, 2020 work injury. As found, the claimant's September 9, 2020 injury was resolved following the October 2020 injection. As found, the claimant's current need for right total knee replacement is related to her pre-existing osteoarthritis and not her work injury. As found, the September 9, 2020 work injury did not aggravate or accelerate the pre-existing osteoarthritis to necessitate surgery. The medical records and the opinions of Dr. Erickson are found to be credible and persuasive.

ORDER

It is therefore ordered:

1. The claimant's request for a right total knee arthroplasty is denied and dismissed.

2. All matters not determined here are reserved for future determination.

Dated this 28th day of June 2021.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-089-386-002 & 5-105-392-001

CORRECTED FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

[Redacted]
Claimant,

v.

[Redacted]
Employer,

and

[Redacted]
Self-Insured Respondent.

No further hearings have been held. On June 24, 2021, both attorneys filed a “Joint” Stipulation, as opposed to a unilateral stipulation, for correction of the June 7, 2021 Full Findings of Fact, Conclusions of Law and Order. Although the Stipulation recites technical errors that are not necessarily outcome determinative, the parties seek a corrective order to allegedly avoid “a lengthy and costly appeal.” The undersigned ALJ hereby corrects the June 7, 2021 decision in accordance with the parties requested corrections.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on July 10, 2020 and March 12, 2021 in Denver, Colorado. The session of the virtual hearing by Google Meets on July 10, 2020 was recorded (reference: 7/10/20, Google Meets, beginning at 8:30 AM, and ending at 12:30 PM). There was no recording of the proceedings on March 12, 2021. Because of this, the ALJ ordered each side to submit their summaries of the testimony, allowing for objections by each party. Claimant’s Summary was submitted on March 19, 2021. Respondent filed objections to Claimant’s Summary on March 26, 2021. Respondent’s Summary was filed on March 19, 2021. On March 26, 2021, Claimant filed objections to paragraphs 15 and 24 of Respondent’s Summary of Dr. Burris’ testimony.

There were no objections to the rest of Respondent’s Summary. Consequently, the ALJ adopted all but paragraphs 15 and 24 of Respondent’s Summary and modified paragraphs 15 and 24 thereof, accordingly. Thereafter, on April 14, 2021, after considering the parties' proposed summaries of the testimony of March 12, 2021, the ALJ issued his Summary of the Testimony of March 12, 2021, giving the parties three (3) working days within which to file objections to the ALJ's Summary of the Testimony. As of April 21, 2021, no objections to the ALJ's Summary of the Testimony of March 12, 2021 had been filed and the matter was deemed ready for a briefing schedule. As of April 21, 2021, the matter was ripe for a briefing schedule as detailed herein below.

W.C. No. 5-089-386 -002 concerns an admitted single-event injury to the Claimant's right shoulder and abdomen (hernia). The Claimant also alleges a fully contested consequential injury to his left shoulder on January 17, 2019 (W.C. No. 5-105-393-001 after the Claimant returned to work at light duty for the Respondent and that the restrictions on his right shoulder, imposed by his authorized treating (ATP), allegedly caused the Claimant to overuse his left shoulder. W.C. No. 5-105-392-001 is a fully contested cumulative trauma case involving only the left shoulder. Claimant alleges he cumulatively injured his left shoulder doing his regular job duties in Respondent's warehouse. Over Respondent's objection, both cases were consolidated into W.C. No. 5-089-386-002 for purposes of hearing and decision.

The Claimant was present in person, virtually, and represented by [Redacted]
, Esq. Respondent was represented by [Redacted], Esq.

Hereinafter [Redacted]shall be referred to as the "Claimant." [Redacted] shall be referred to as the "Employer," and/or Respondent or "the District. All other parties shall be referred to by name.

Claimant's Exhibits 1 through 34 were admitted into evidence, with the following objections and rulings thereon: Exhibit 1, ruling reserved and ultimately sustained. Respondent's objection to Exhibit 18 was withdrawn and it was admitted. Also, Respondent's objections to Exhibits 20 through 29 were withdrawn and these exhibits were admitted into evidence. Respondents' Exhibits A through W were admitted into evidence, without objection.

Claimant's opening brief was timely filed on May 7, 2021. Respondent's answer brief was timely filed on May 14, 2021. Claimant was give three (3) working days within which to file a reply brief, if any, or no later than May 19, 2021. The matter was deemed ready for decision as of May 20, 2021.

ISSUES

The issues to be determined by this decision concern the compensability of the Claimant's left shoulder injury and medical benefits.

The Claimant bears the burden of proof by a preponderance of the evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. At the commencement of the hearing, the parties stipulated and the ALJ so finds that Claimant's average weekly wage (AWW) was $748.58, as of September 26, 2018. Respondent filed a Final Admission of Liability (FAL) in W.C. No. 5-089-386-002, admitting for medical benefits causally related to the admitted right shoulder and hernia injuries; an AWW of $748.58; a temporary total disability (TTD) rate of $499.05, through January 6, 2019; a maximum medical improvement (MMI) date of May 22, 2019, and zero permanent partial disability (PPD).

2. The parties further stipulated and the ALJ so finds that the Claimant was overpaid TTD benefits in the amount of $712.93 and Respondent is entitled to a credit in that amount.

W.C. No. 5-089-386-002

3. On September 26, 2018, the Claimant sustained an admitted abdominal hernia and injuries to his right shoulder when he was moving items from a freezer to a pallet while working as a warehouse delivery driver for the Respondent in the Food and Nutrition Services warehouse.

4. On December 12, 2018, the Claimant underwent surgical repair of his hernia and was taken off work duty. Following the hernia surgery, the Claimant returned to Annu Ramaswamy, M.D., on January 2, 2019 and was released to return to light duty work effective January 7, 2019 (**Respondent's Exhibit J, p.. 112).** The work restrictions were imposed to accommodate proper healing of Claimant's hernia repair. As of March 20, 2019, Dr. Ramaswamy imposed the following light duty work restrictions: no lifting, no repetitive lifting and no carrying 40 lbs. or more. As of April 30, 2019, Claimant's restrictions were increased to no lifting, no repetitive lifting and no carrying of 20 lbs. or more. These same restrictions were continued as of May 15, 2019; and, as of May 28, 2019, Dr. Ramaswamy indicated "no restrictions" **Respondent's Exhibit J).**

W.C. No. 5-105-392-001 Consolidated Into W.C. No. 5-089-386-002

5. On October 14, 2014, the Claimant commenced his employment relationship with Respondent. He continues to work for the school district as a

warehouse delivery driver at the Food and Nutrition Center. During his 6-year tenure with the school district, the Claimant has not worked at any position other than as a warehouse delivery driver for Respondent. There is no credible evidence Claimant has performed concurrent employment while employed with the Respondent.

6. The **job duties** of the position of Warehouse Delivery Driver (identified as Job Number 6186 by the District) include, but are not limited to, the following, as enumerated by District formal job descriptions (Claimant's Exhibit Nos. 17 & 19):

a. This employee provides support to the food and nutrition services warehouse operation. Responsibilities include delivering bakery, produce and warehouse products to the schools as well as loading, unloading and storing products at the warehouse.
b. May pull product and load trucks with items ordered by the food and nutrition service managers.
c. May pull product and bakery products for delivery to the schools with accuracy and in a timely manner.
d. May drive routes and deliver product to each kitchen.
e. Return bakery carts and produce containers from kitchens to student nutrition center.
f. Assists warehouse manager with receipt and storage of product into appropriate dry, cooler or freezer storage area.
g. Delivers equipment to school kitchens and picks up equipment from schools when directed to do so.

7. The **physical requirements** of the position of Warehouse Delivery Driver (identified as Job Number 6186 by the District) include, but are not limited to, the following, as enumerated by District formal job descriptions (Claimant's Exhibit Nos. 17 & 19):

h. Constant bending, reaching and climbing.
i. Extremely heavy physical effort (lifting over 50 pounds).
j. Overhead work.
k. Repetitive movements.
l. Constant lifting, pulling, and/or pushing.
m. Ability to stand, to walk, stoop, reach, kneel, and bend.
n. Ability to lift, to push, and/or pull objects from five (5) to (50) pounds frequently.
o. Ability to lift 70 to 90 pounds occasionally.
p. Ability to work in freezers up to 2 hours per day.
q. Ability to work in coolers up to 2 hours per day.

8. The District has provided the following estimates as to how often, in a given workday, employees like the Claimant would be performing assigned job

duties as a warehouse delivery driver (Claimant's Exhibit Nos. 17 & 19):

r. Receiving and stocking product in dry, cooler, and freezer storage—10%.
s. Pulling orders from dry, cooler, and freezer storage—40%.
t. Driving and unloading orders at schools—50%.

Medical in W.C. No. 5-089-386-002

9. On September 27, 2018, the Claimant presented to Annu Ramaswamy, M.D., complaining of an injury he sustained working for the District the day before. The doctor found evidence of both a left inguinal hernia as well as rotator cuff impingement within the Claimant's right shoulder. Dr. Ramaswamy recommended that the Claimant undergo an ultrasound to confirm the hernia injury (Claimant's Exhibit 31, pp. 276-278)

10. On October 3, 2018, the Claimant underwent the ultrasound recommended by Dr. Ramaswamy. The study showed that the Claimant was suffering from a "large direct internal hernia". (Claimant's Exhibit 32, p. 327)

11. Based upon the results of the ultrasound, Dr. Ramaswamy referred the Claimant to Robert T. Rowland, M.D.—a general surgeon. (Claimant's Exhibit 30, pp. 282-283) On November 20, 2018 Dr. Rowland recommended surgical repair of the hernia (Claimant's Exhibit 30, pp. 211-212).

12. On December 12, 2018 Claimant underwent surgery to repair his hernia. The surgeon was Dr. Rowland. (Claimant's Exhibit 31, p. 287)

13. The Claimant was paid TTD benefits by the District for the inclusive period from December 12, 2018 through January 6, 2019. (Respondent's Exhibit A, p. 2)

14. Dr. Ramaswamy recommended and the Claimant returned to light-duty work on January 7, 2019. (Claimant's Exhibit 30, pp. 287-288)

W.C. No. 5-105-392-001 Consolidated Into W.C. No. 5-089-386-002

15. On January 17, 2019 Claimant's restrictions were increased to 40 pounds (Claimant's Exhibit 30, pp. 289-290)

16. On February 14, 2019, Dr. Ramaswamy maintained the Claimant at his 40 lbs. lifting restriction but added that "he is working within his restrictions but states that whenever he has to lift, he tends to compensate for (*sic)* the right side". (Ex 30, p. 291-293)

17. Both at his February 17 and February 28, 2019 appointments, Dr. Ramaswamy kept THE Claimant on the same 40 lbs. lifting restriction.(Claimant's Exhibit 30, pp. 294 & 296)

18. The Claimant returned to Dr. Ramaswamy on March 20, 2019 at which time the doctor charted the following:

> "(Claimant) states that he has been working for the last few months (almost full duty). He states that with that work load, the left shoulder pain has returned and he has lost range of motion slowly over time,"

Dr. Ramaswamy recommended that the Claimant undergo an MRI (magnetic resonance imaging) study of his left shoulder "to rule out rotator cuff tear" Claimant's Exhibit. 30, pp. 297-299). Dr. Ramaswamy's implicit opinion is effectively that the Claimant's left shoulder condition is causally related to Claimant's job duties upon his return to light duty.

19. On March 22, 2019, the Claimant underwent the MRI scan of his left shoulder as recommended by Dr. Ramaswamy. That study was with the following findings (Exhibit 32, p. 328-329):

- **Supraspinatus tendon:** Full thickness tear measuring 2.3 cm associated with no muscle atrophy
- **Infraspinatus tendon:** Tear extending into the anterior aspect of the tendon

The reading radiologist's impression was: large full-thickness tear of both the supraspinatus and infraspinatus tendons.

20. The Claimant returned to see Dr. Ramaswamy on April 2, 2019 to go over the results of his recent MRI scan. On that date, Dr. Ramaswamy stated as follows:

> "(Claimant) states that he still notes left shoulder pain with range of motion loss. He did undergo MRI testing of the left shoulder and he was noted to have a large full-thickness tear within the supraspinatus and infraspinatus…in March the patient indicated that he returned to full duty status, he developed left shoulder pain. It appears that he did not mention a traumatic injury but instead was noticing a repetitive injury."

Dr. Ramaswamy increased the Claimant's lifting restriction to 10 lbs.and referred the Claimant to an orthopedic shoulder surgeon—Michael S. Hewitt, M.D.(Claimant's Exhibit 30, pp.300-302)

Michael S. Hewitt, M.D., Surgeon

21. On April 8, 2019, the Claimant presented himself to Dr. Hewitt on

referral from Dr. Ramaswamy-- for treatment of his left shoulder injury. Upon examination Dr. Hewitt noted that the Claimant was with positive impingement. Upon review of his MRI scan, Dr. Hewitt determined that the Claimant had a large full-thickness rotator cuff tear involving both the supraspinatus and infraspinatus tendons. Dr. Hewitt noted that both tendons were without any atrophy. Dr. Hewitt recommended surgery (Claimant's Exhibit 33, pp.. 331-335)

22. On April 10, 2019, the Claimant returned to his ATP, Dr. Ramaswamy, describing ongoing left shoulder pain and range of motion loss. On this date, Dr. Ramaswamy stated the following:

> "It appears that left shoulder pain started when the patient returned back to work (after recovery from the groin/hernia surgery). Therefore, the patient is apparently describing a repetitive injury…in regards to left shoulder, the patient will fill out a new claim-describing a repetitive injury. It will be helpful to review the patient's job description and a worksite analysis may be helpful to determine causality for the left rotator cuff tears" (Claimant's Exhibit 31, pp. 303-305)

23. On April 12, 2019, the Claimant received a written warning from his supervisor, Kim Kilgore, Director of Food and Nutrition Services, for the following infractions:

- Failure to report for duty while on-call
- Handling work comp appointments while on shift

Had the Claimant exceeded his 40-pound restriction at the time, Claimant could have been written up for doing so—he was not written up (Respondent's Exhibit R, pp. 254-256)

24. The Claimant returned to Dr. Ramaswamy on April 22, 2019, reporting ongoing left shoulder pain. On this date Dr. Ramaswamy charted as follows:

> "(Claimant) states that he injured his left shoulder when he returned back to work (after the hernia repair). [Claimant] describes a repetitive injury. As he was returning back to work (after a left hernia repair), he began to notice increasing discomfort in the left shoulder with range of motion loss.
>
> He describes his job as being physical. He states that he has to lift heavy weight at all levels. His job description

> notes that he does have to perform heavy work. He states that they were short staffed early in the year and the workload was quite heavy. He recently was diagnosed as having two rotator cuff tears in the left shoulder. Dr. Hewitt recommended surgical intervention. Impingement test positive. Causality needs to be determined at this point. I did review the patient's job description and it indicates that he does have to lift, push and pull objects from 5-50 pounds frequently and he does have to lift 70-90 pounds on occasion. The job is repetitive. For now, I am recommending a job analysis so that the patient's job can be quantified (amount of weight lifted and frequency of lifting at various levels—especially at shoulder and overhead levels). Once the job analysis is available, I can fully comment on causally" (Claimant's Exhibit 31, pp. 306-308)

25. On May 1, 2019, Kirstie Smith of Hellman & Associates conducted a worksite evaluation of the position of "Warehouse/Driver Employee – Food and Nutrition Services". This was pursuant to the recommendations from Dr. Ramaswamy. In her report, Smith provided the following **Observations:**

> "At the time of the assessment, warehouse employees were responsible for all facets of receiving, stocking, picking orders, and delivering individual orders to schools using box trucks. The position was intended to be fairly even split between picking orders and delivering to schools. At the time of the assessment however, the warehouse was significantly short staffed. Three employees working in the warehouse during the assessment had been working almost exclusively to receive orders, stock materials, and pick orders/prepare them for delivery. Remaining employees were mainly driving trucks and delivering orders to schools across the district. Drivers were running double routes in order to get all orders out to the schools."

26. The physical demands of the warehouse/driver position were summarized by Smith as:

- Continuous (67-100%) standing/walking and reaching.
- Max weight lifted in pounds: 90.
- Frequent weight lifted in pounds: 15-50.
- Empty wood pallets weighed approximately 40 pounds each and were handled frequently by individual workers—approximately ¼ of the pallets handled were

heavy duty construction and weighed closer to 70 pounds.

- Employees were trained to move the pallet jack to the area closest to the items being picked, and to place the heaviest items on the bottom of the pallet to ensure maximum stability for transport and unloading by kitchen staff.
- During the assessment, each pallet had approximately four to eight 40-pound items on the bottom of the pallet. Photo 6 showed “Heavy items on the bottom of an order”. Lighter items (15-38 pounds) were then stacked on the heavier items and stretch-wrapped together using an open roll of industrial stretch wrap while the employee walked backward around the pallet several times.
- New pallets of certain materials required reaching above shoulder height to remove the first layer or two of packages.

27. Delivery trucks were noted to be “typical box trucks.” In Smith’s report ,there was no mention of the amount and frequency that Claimant and other warehouse employees similarly situated would be required to lift and reach at or above shoulder height or overhead (Respondent’s Exhibit P, pp. 199-205)

28. On May 15, 2019, the Claimant returned to Dr. Ramaswamy’s office. The doctor described that the job site evaluation was deficient inasmuch as it did not describe the amount and frequency the Claimant would be required to reach and lift at shoulder height and above. Dr. Ramaswamy described in his report his

> “We discussed his job at length. We discussed that I did review the job site analysis and is looking to see whether or not overhead maneuvers were mentioned. We did contact the company that performed the evaluation and they indicated that all of the information that they gathered would be in their report. I asked the patient about his job: he believes that he lifts about 25% of the time at shoulder level and above shoulder level. He states that weight ranges from 10-50 pounds. Therefore, it appears that he is lifting occasionally at an overhead level. The main issue has to do with causality. I did contact the District so that the district can comment on the amount of overhead lifting that occurs on-the-job. It would also be helpful to note the amount of weight that Mr. [Redacted] is lifting overhead. Once I obtain this data, I can formally comment on causality. At the

> moment it does not appear that the patient does not lift repetitively/frequently in the overhead fashion."
>
> "The *Colorado Medical Treatment Guidelines* discussed that chronic repetitive overhead work/lifting would correlate with a work-related injury. Mister [Redacted] discussed his job hours and indicates that the repetitive work occurs on an occasional basis. Will await the data from the district but it appears that the rotator cuff tear would not be a work-related condition based on the patient's history."

(Exhibit 31, p. 312-315)

29. On May 15, 2019, the following E-mail exchange occurred by and between Kim Kilgore and Diane Howell, Risk Management Specialist for the Employer—the "Subject" being "RE: Additional information needed with regards to job site evaluation (Claimant's Exhibit 7, pp.. 36-38)

HOWELL: Hi Kim,

> We spoke with the doctor today regarding [Redacted]'s job site evaluation. He is requesting a little bit more information before he can make a determination regarding Gary's 01/17/19 injury. Please see attached note.
>
> With regards to over the shoulder lifting:
>
> - ♦ How frequently are employees lifting/reaching from shoulder level to above shoulder level per day? Occasionally (1/3 of the day), frequently (2/3 of the day) or constantly?
> - ♦ How heavy are the items that are being lifting or retrieved from shoulder level to above shoulder level?
>
> These items were not specifically stated in the job site evaluation report, and when the doctor called the company, they stated that they could only address what was in the written report. We are hoping that you can provide this information.

KILGORE: Hello Diane,

> The lifting/reaching from shoulder level to above shoulder level occurs 1/3 of the day I would say or occasionally.
> The majority of our products are in the 50# weight range per case—there are a few that may be up to 70#.

HOWELL: Just to clarify, would 70# boxes be stacked to shoulder height or above?

KILGORE: No—those would be put on the bottom of pallets and/or 2 wheelers when being delivered. They would not be stacked to shoulder and above shoulder height.

30. The Claimant returned to Dr. Ramaswamy on May 22, 2019 “to discuss the causality of this condition”. Regarding this ,Dr. Ramaswamy said:

> “I did receive documentation from his school district in regards to the amount of overhead work that is performed. It appears that [Claimant] would need to lift overhead on an occasional basis (less than 1/3 of the day). Lifting varies from a 10 to pound lift to a 50-pound lift and therefore during the overhead lifting, [Claimant] would not always be lifting very heavy material. This information is consistent with the information that [Claimant] gave me previously in regards to his job duties…”
>
> “We discussed causality at length. I did refer to the Colorado medical treatment guidelines and the AMA guides to the evaluation of disease and injury causation. In looking at work-related mechanisms of injury for a rotator cuff tear, typically prolonged/repetitive overhead lifting is required. In quantifying the workload, the overhead maneuvers occur occasionally and constant/repetitive overhead maneuvers do not occur. The amount of weight that is lifted overhead varies from 10 pounds to 50 pounds. We discussed that based on this data, I would not be able to opine that the rotator cuff tear relates to a work-related injury mechanism. We discussed that rotator cuff tears can occur from degeneration over time and do not always occur in the setting of trauma…we discussed that there is a chance that the tendon can retract over time making repair difficult at some point.”

31. On May 22, 2019, Dr. Ramaswamy released the Claimant from care and at MMI with no ratable impairment to both his admitted hernia and right shoulder injuries. (Claimant’s Exhibit 31, pp. 314-321)

32. The Claimant’s primary care physician is Christopher M. Hicks, M.D. at Kaiser Permanente. In his note, dated November 22, 2019, Dr. Hicks wrote:

> I called Jennifer Squire. Pt had signed consent to speak to her, HR at his work.
>
> He must be able to lift above shoulder 50 lbs repeatedly for his job
>
> I think in general most pts should not do that as it is difficult for the shoulder…Jennifer appreciated the phone call.
>
> I spent at least 3 minutes on the telephone with the Jennifer. (Claimant's Exhibit 30, p. 263)

33. Also, on November 22, 2019 Jennifer Squire wrote as follows:

> Dr. Hicks—Kaiser
>
> Notes by Jennifer Squire
>
> [Redacted] can lift 50 pounds over his shoulder repeatedly and may return to his position with no restrictions. (Claimant's Exhibit 14, p. 65).

The ALJ finds that Squire misinterpreted the total picture concerning the Claimant's restrictions on his return to "light duty."

John Soto

34. John Soto was the Claimant's direct supervisor at all times relevant to the issues in this case. He retired from the Employer on July 1, 2019. His job for the School District was Warehouse Manager, Food & Nutrition Services, Student Nutrition Center. Soto described the Claimant's job duties as follows: (1) pulling orders for school district (Tr. at 28.12); (2) taking products so pulled to the district schools; (Tr. at 26.48); and finally (3) once at the individual school he would deliver products to the school freezers.

35. According to Soto, boxes lifted by the Claimant would be in the 50-to-60-pound range (Tr. at 28.43) Frozen food products, however, would weigh over 60 pounds. (Tr. at 34.41).

36. According to Soto, the Claimant and other warehouse workers worked 8-hour shifts. (Tr. at 31.39) Claimant would spend approximately 2-3 hours per day driving a delivery truck (Tr. at 31.25)

When not driving the truck Claimant would be “pulling orders for next day” (Tr. at 31.52) Pallets would be built the day before scheduled delivery of the products to outlying schools (Tr. at 33.13) At times, more than one delivery would need to be made to an individual school because not all of the necessary items would fit in one delivery truck load (Tr. at 32.55)

37. According to Soto, the heavier boxes would necessarily be stacked at the bottom of the pallet (Tr. at 33.44) This would include the 50-60 lbs. items mentioned earlier (Tr. at 34.20) Lighter items, such as potato chips, would be stacked at the top of the pallet so “they wouldn’t get smashed”. (Tr. at 34.04). The Claimant would be required to load all these items by himself without any help from a co-worker and then the finished pallet would be shrink wrapped by [the Claimant] himself (Tr. at 34.59)

38. According to Soto, pallets were stacked to shoulder level & above when pulling orders for delivery to individual schools (Tr. at 46.10) The average height of stacks in the freezer was 7 foot (Tr. at 46.34) There were times when warehouse workers had to down stack pallets to get them to fit into the delivery trucks because they were built and stacked too high and as such would not fit into the delivery trucks (Tr. at 45.28)

39. Soto testified that the warehouse was short-staffed in the spring of 2019. The District called in temporary workers in an attempt to complete fulfillment requirements (Tr. at 41.58)

40. Until January 2019, Soto was not aware of any problems the Claimant was experiencing with his left shoulder (Tr. at 24.56) Nor was Soto made aware of any problems the Claimant had completing his job as a delivery driver because of a left shoulder problem before that date (Tr. 25.32) . Finally, [Claimant] did not get any assistance doing his job (Tr. at 26.15).

41. The Claimant reported to Soto that he injured his left shoulder lifting and pulling orders for the Employer (Tr. at 41.21).

42. The ALJ finds that Soto was in a better position than other Respondent witnesses to be aware of the Claimant’s job duties, however, Soto merely established that the Claimant did not complain about his **left** shoulder until the Claimant reported the **left** shoulder problems sometime after Claimant’s return to light duty. Soto’s testimony does not refute Dr. Ramaswamy’s causality opinion, which supports an “overuse syndrome” of the left shoulder.

The Claimant’s Testimony

43. The Claimant agreed that Soto accurately described his job requirements (Tr. at 1.12.51).

44. The Claimant stated that prior to January 2019 he had no medical problem, injury or condition affecting his left shoulder (Tr. at 1.13.18) and that prior to September of 2018 he had no problems doing the required duties of his job because of a chronic shoulder problem—nor did he ever need assistance doing his job before that date (Tr. at 1:44:44)

45. According to the Claimant, in January 2019 following his hernia surgery he returned back to work at light-duty (Tr. at 1.16.21) By January 17, 2019 he was on a 40-pound lifting restriction and at that point began working within that restriction lifting less than 40 pounds (Tr. at 1:16:56) In January, February and March of 2019, the Claimant was still "pulling orders" (Tr. at 1:52:49) According to the Claimant, he had no problem "pulling" dry goods ("aint as heavy as cases of canned goods were the only things heavier than dry goods (40-50 pounds) chips and other dry goods were within his restrictions and Claimant could readily work with these item weights (5 to 10 pounds) to stay within his given restrictions (Tr. at 1:18:36 & 1:48:36) Certainly—Claimant was not made to work outside his restrictions in the months of January, February and March of 2019. (tr. at 2:01:03)

46. The Claimant described his job tasks as follows:

a) Started in the morning loading up and delivering to schools pallets made the day before. (Tr. at 1:19:24) At the school, Claimant would then use a pallet jack to get each pallet as close to kitchen storage as possible—then he would break each pallet down and downstack the items onto a two-wheeled dolly which he would then use to deliver the items to either the freezer or dry good storage, as appropriate. (Tr. at 1:54:07)

b) He would be back at the warehouse around 8:30 to 9:00 in the morning at which time he would take a 15-minute break. (tr. at 1:19:33)

c) At 9:30 a.m. he would either start pulling orders for the next day's delivery to the schools or start putting away all US Food deliveries that had been brought in that day (between 1000 – 1,800 pieces consisting of both frozen and dry goods). (tr. at 1:19:47)

d) Once the US Food delivery items were "stacked away" then Claimant would start pulling orders together for the next day. (tr. at 1:20:02)

e) Out of his 8-hour work shift Claimant testified that 2-3 hours was spent delivery driving and delivering food products to the outlying schools. The rest of the time was spent pulling orders and stacking pallets, shrink wrapping the pallets and otherwise getting them ready for next day. (tr. at 1:20:30)

47. Concerning the up-stacking of a pallet, the Claimant confirmed, as did others, that the bulkier, heavier, larger items were placed on the bottom. This would specifically include 70-to-80-pound boxes of chicken (tr. at 1.21.13) Most other items in the freezer weighed between 50-60 pounds (Tr. 1:21.20)

48. The Claimant confirmed that he is “close to 6’” tall (Tr at 1:21:22) and that he built and up-stacked pallets “higher than his raised hand” (Tr. at 1:21:26).

49. The pallets were generally built 4 x 8’ and built “as square as can be” (Tr. at 1:21:40)

50. The Claimant took the photograph reflected in Claimant’s Exhibit 20, which was in the warehouse freezer showing stack items (Tr. at 1:22:26) This photograph represents the typical way the freezer looked while the Claimant worked there and specifically demonstrates, according to the Claimant, how he would necessarily have to reach up to grab an item “consistently lifting above his head” (Tr. at 1:23:23)

51. The Claimant verified that Claimant’s Exhibit 22 is a picture of him holding a pallet jack used to maneuver 400-500 pounds of food products on a built pallet (Tr. at 1:25:58) According to the Claimant ,the pallet shown in this picture is representative of the size of pallets he and other warehouse workers build and pull each time for delivery to outlying schools (Tr. at 1:26:03) To be more specific—Exhibit 22 is an average sized pallet in terms of its height. This pallet will also fit in the Employer’s delivery trucks (Tr.1:26:28). The Claimant agreed with Soto that many times he and others would try to take a shrunk wrapped pallet built the previous day into the truck for delivery and a couple of boxes or even a complete layer of boxes would have to come down off the top to make the stack fit into the door of the truck (Tr. at 1:26:58)

52. The Claimant testified that Exhibit 23 is a photograph of him reaching above his shoulders and rink wrapping a pallet—which has to be done every time the Claimant finishes building a pallet. (tr. at 1:27:26)

53. According to the Claimant, the warehouse was short-staffed in 2019 which caused him extra work which in turn contributed to his left shoulder pain. The warehouse being short-staffed was peculiar to 2019 (Tr. at 1:37:49) Although temporary workers were provided—turnover among the temps was high (Tr. at

1:37:53). Despite generalizations by Employer witnesses concerning temporary help, the ALJ finds the Claimant's testimony in this regard highly persuasive and credible.

54. The Claimant disagrees with the work site analysis (Respondent's Exhibit P) done by Kirstie Smith in two respects: (1) because it did not describe the extent of lifting done on his job overhead (Tr. at 2:04:00); (2) that at the time the job assessment was done in May of 2019, the warehouse was winding things down to start the summer vacation which resulted in the workers "pulling smaller pallets" (Tr. at 2:22:25).

55. The Claimant initiated primary care treatment at Kaiser Permanente on February 17, 2015, which treatment continued through and beyond his injury date in the current case (Claimant's Exhibit 30, p. 99-270). On June 5, 2017, the Claimant presented to his Kaiser doctor complaining of left shoulder pain. The Kaiser PA charted the following:

- ♦ Left shoulder pain
- ♦ Injury: No, but was lifting/doing yard work Friday and felt an ache and burning sensation
- ♦ Duration: 3 days
- ♦ Already feeling better

56. Both radicular symptoms and previous injury to the shoulder were denied. The PA (Physician's Assistant), Pelikan, noted that the Claimant on this occasion June 5, 2017) was with both full range of motion and strength. The Claimant was diagnosed as "suspect mild muscle strain, already sx resolving on own". No x-ray was run and no follow-up treatment was either recommended nor had (Claimant's Exhibit 30, p. 145-147). This is the one and only injury—if in fact it even was an injury, that Claimant reported to his left shoulder area at any time before January of 2019.

57. Kilgore testified that she heard the Claimant's testimony at the first portion of the hearing that the Claimant was continuing to load and down stack pallets in January and February 2019 and that was new information for her. The Claimant had not previously put her on notice of these alleged duties. The Claimant's light duty restrictions did not include performance of these duties other than moving lighter duty boxes of dry goods. Although Kilgore testified to this—she did not deny that the Claimant actually performed these activities as he described, just that she was not aware that he was doing these things. Her testimony in this regard does not detract from the Claimant's testimony.

58. Kilgore stated that Employer pallets are always loaded with the heavier items on the bottom and the light items on the top of the pallet. This is consistent with the Claimant's description of his job duties.

Respondent's Independent Medical Examination (IME) by John Burris, M.D.

59. Dr. Burris' testified at hearing regarding his evaluation of the Claimant on August 27, 2019. Dr. Burris testified that the Claimant has pre-existing bilateral shoulder injuries that are documented in his Kaiser medical records and that the Claimant did not disclose these relevant prior injuries to him at the IME. As found herein above, the Kaiser records disclose a temporary strain of the Claimant's left shoulder from which he fully recovered after three days. The ALJ infers and finds that Dr. Burris magnified the Kaiser left shoulder incident and attempted to parlay it into a significant pre-existing condition in order to support his opinion concerning lack of causality. The ALJ rejects Dr. Burris' take on the Kaiser record in this regard. Dr. Burris goes on to observe that the medical records from Dr. Ramaswamy do not indicate that Claimant reported these prior injuries to Dr. Ramaswamy either. This is understandable since the Kaiser record notes an insignificant left shoulder strain rom which the Claimant recovered in three days. Dr. Burris noted that the Claimant's Kaiser records further indicate that Claimant has played both football and basketball (Respondent's Exhibit G, p. 93). Grasping at potential rationalizations to support his IME opinion concerning lack of causality, Dr. Burris indicated that these sports are possible risk factors for rotator cuff tears. The ALJ infers and finds that these observations highlight the insubstantiality of Dr. Burris' ultimate opinion.

60. Dr. Burris stated the opinion that it is not medically probable that Claimant sustained a repetitive motion injury or aggravation of a pre-existing left shoulder condition as a result of performing his work duties in the warehouse or as a result of overcompensating with his left upper extremity due to pre-existing right shoulder injuries.

61. Concerning overcompensation as the cause of the Claimant's medically documented left shoulder injury, Dr. Burris stated the opinion that there is no medical evidence to support that commencing in January 2019 the Claimant would have needed to have adjusted his physical maneuvers involving the right arm by compensating with the left arm because Claimant's right shoulder. The ALJ infers and finds that Dr. Burris lacked a comprehensive appreciation of the Claimant's job duties after the return to light duty. Therefore, the ALJ rejects Dr. Burris' conclusion regarding Claimant's complaints.

62. Dr. Burris testified, without any supporting authority, that despite the common belief, the concept of an injury caused by overcompensation is not generally accepted by the medical community. In this regard, his testimony is contrary to the weight of opinions by the Claimant's treating physicians who have "no skin in the game." Despite Dr. Burris' apparent pronouncements *ex cathedra,* he offered no convincing support for his opinion that is contrary to the weight of the opinions of treating physicians. Dr. Burris further opined, without convincing support, that there is not adequate medical evidence to support the theory that when an individual sustains an injury to one extremity that there is a resulting mechanical burden placed on the other extremity sufficient to cause an injury. Mechanically one arm cannot perform the two handed tasks associated with job duties such as moving bulky cardboard boxes. This

observation defies lay reason and common sense and it is contrary to the weight of the rest of the medical evidence.

63. According to Dr. Burris, if the Claimant's work duties had caused a rotator cuff tear during the months of January through March 2019, Dr. Burris explained that there would have been a dramatic presentation of pain complaints and loss of function in the shoulder during this time period. According to Dr. Burris, the Claimant's continued ability to perform regular duty work since December 2019, despite his left shoulder MRI findings supports Dr. Burris' theory concerning a long standing pre-existing degenerative nature of the Claimant's shoulder complaints. There is no persuasive evidence to support this theory.

64. Dr. Burris was of the opinion that the duties set forth in the Job Site Analysis, and the job duties as described by the Claimant, did not provide sufficient risk factors for the development of an occupational disease repetitive motion injury.

Caroline Gellrick, M.D., Independent Medical Examiner (IME)

65. The Claimant was examined by Dr. Gellrick, on January 30, 2020 (Claimant's Exhibit 34, pp. 336-352) Dr. Gellrick rendered the following medical opinion:

> "The time under consideration of January/February/March of 2019, (Claimant) was doing double routes for short-staffed reasons and had to unload 2-wheel trucks anywhere from 4 to 6 schools, depending on the route. As he unloads the product, he does have to lift overhead again, put it onto the 2-wheel truck, and then push that into the school. In the school, he unloads again. The patient estimates this is actually 50% at this time handling the product, moving the boxes. Based on this narrative from the patient when they were short-staffed, **it would appear that the left shoulder injury of January 17, 2019 would have occurred on-the-job with greater than 50% medical probability this is compensable to WkComp."**

66. Dr. Gellrick did not think Claimant to be at maximum medical improvement for his left shoulder injury and felt that an orthopedic consult was in order.

Ultimate Findings

67. As found herein above, the ALJ finds the opinions of Dr. Ramaswamy concerning causal relatedness of the "overuse" syndrome of the left

shoulder more credible than the opinion of IME Dr. Burris that “overuse” syndrome probably does not exist. Also, the opinions of the Kaiser treating medical providers and Dr. Gellrick are more credible than the opinions of Dr. Burris. Concerning lay testimony, the ALJ finds the Claimant’s testimony more credible than the testimony of Kim Kilgore. Further, the testimony of the Claimant’s supervisor, John Soto, which essentially supports the Claimant’s testimony concerning job duties after the Claimant’s return to light duty is more credible than the testimony of Kim Kilgore, who did not have as extensive an opportunity as Soto to observe the Claimant’s work after his return to light duty. In sum, the ALJ does not find IME Dr. Burris’ opinions regarding lack of causality persuasive or credible.

68. Between conflicting medical opinions and lay testimony, the ALJ makes a rational choice, based on substantial evidence, to accept the opinions of all ATPs, including Dr. Ramaswamy, Dr. Hewitt and IME Dr. Gellrick, concerning work-related causality, and to reject the opinions of Dr. Burris on lack of work-related causality.

69. The Claimant sustained an occupational disease to his left shoulder, consisting of overuse because of his admitted right shoulder and hernia injury, and this occupational disease resulted directly from the conditions of his light duty work after his return, and is it is fairly traced to his light duty work as a proximate cause and it did **not** come from a hazard to which Claimant would have been equally exposed outside of work. This light duty exposure aggravated and accelerated any of the Claimant’s underlying left shoulder conditions. Therefore, the Claimant has proven, by preponderant evidence, that he sustained a compensable occupational disease, with a last injurious exposure date of January 17, 2019.

70. It was stipulated and the ALJ finds that the Claimant’s average weekly wage (AWW) was $748.58, during any periods of temporary disability after January 17, 2019.

71. It was stipulated and the ALJ finds that the Claimant was overpaid $712.93 in the admitted right shoulder/hernia injury of September 26, 2018 and Respondent is entitled to a credit against indemnity benefits in the present left shoulder occupational disease case.

72. All medical care and treatment for the Claimant’s left shoulder was, and is, authorized, causally related to the left shoulder occupational disease, and reasonably necessary to cure and relieve the effects thereof.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, 2012 COA 85. The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinions of Dr. Ramaswamy concerning causal relatedness of the "overuse" syndrome of the left shoulder are more credible than the opinion of IME Dr. Burris that "overuse" syndrome probably does not exist. Also, the opinions of Kaiser treating medical providers are more credible than the opinions of Dr. Burris. Concerning lay testimony, the Claimant's testimony is more credible than the testimony of Kim Kilgore. Further, the testimony of the Claimant's supervisor, John Soto, which essentially supports the Claimant's testimony concerning job duties after the Claimant's return to light duty, is more credible than the testimony of Kim Kilgore, who did not have as extensive an opportunity as Soto to observe the Claimant's work after his return to light duty. In sum, the ALJ finds IME Dr. Burris' opinions regarding lack of causality, lacking in persuasiveness and credibility.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting medical opinions, the ALJ made a rational choice, based on substantial evidence. As found, between conflicting medical opinions and lay testimony, the ALJ made a rational choice, based on substantial evidence to accept the opinions of Dr. Ramaswamy,Dr. Hewitt and Dr. Gellrick, concerning work-related causality, and to reject the opinions of Dr. Burris on lack of work-related causality.

O**ccupational Disease of Left Shoulder Overuse Syndrome/Aggravation/Acceleration of Potential Underlying Left Shoulder Condition**

c. An "occupational disease" means a disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment. § 8-40-201 (14), C.R.S. *See City of Colorado Springs v. Indus. Claim Appeals Office,* 89 P. 3d 504 (Colo. App. 2004). Occupational diseases typically involve long latency periods, sometimes produce symptoms at times remote from the last exposure, and yet may lead to disability or death. An occupational disease might be said to "occur" when the disease becomes **disabling.** *See Union Carbide Corporation v. Indus. Claim Appeals Office,* 128 P.3d 319 (Colo. App. 2005). As found, Claimant has proven an occupational disease with an onset date of January 17, 2019 and a last injurious exposure of January 17, 2019.

d. A compensable injury or occupational disease is one that arises out of and in the course of employment. Section 8-41-301(1) (b), C.R.S. The "arising out of" test is one of causation. If an industrial injury aggravates or accelerates a preexisting condition, the resulting disability and need for treatment is a compensable consequence of the industrial injury. Thus, a claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury **if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought.** § 8-41-301(1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). An injury resulting from the concurrence of a preexisting condition and a hazard of employment is compensable. *H & H Warehouse v. Vicory*, *supra*. *Duncan v. Indus. Claims App. Office*, 107 P.3d 999 (Colo. App. 2004). Even where the direct cause of an accident is the employee's preexisting disease or condition, the resulting disability is compensable where the conditions or circumstances of employment have contributed to the injuries sustained by the employee. *Ramsdell v. Horn*, 781 P.2d 150 (Colo.App. 1989). *Also see* § 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225-334 (ICAO, April 7, 1998). As found, the Claimant's overuse of his left shoulder to compensate for the restriction of "no use" of the right shoulder aggravated and accelerated any potential underlying left shoulder condition.

Medical Benefits

e. The employer's initial right to select the treating physician is triggered once the employer has some knowledge of the facts concerning the injury or occupational disease with the employment and indicating "**to a reasonably conscientious manager**" that a **potential** workers' compensation claim may be involved. *Bunch v. Indus. Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006). As found, The Employer referred the Claimant to authorized medical providers, who in turn referred the Claimant to Dr. Hewitt.

f. All referrals must remain within the chain of authorized referrals in the normal progression of authorized treatment. *See Mason Jar Restaurant v. Indus. Claim Appeals Office,* 862 P. 2d 1026 (Colo. App. 1993); *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P. 2d 501 (Colo. App. 1995); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). As found, all left shoulder related referrals emanated from Dr. Ramaswamy, the Claimant's principal ATP and were in the authorized chain of referrals.

g. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, all of Claimant's medical treatment for the left shoulder is causally related to his overuse in order to compensate for his right shoulder restrictions after his return to light duty, with a date of last injurious exposure of January 17, 2019. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment was and is reasonably necessary. to cure and relieve the effects of his left shoulder overuse –after January 17, 2019.

Average Weekly Wage / Indemnity Benefits and Overpayment

h. It was stipulated and found, the Claimant's AWW is $748.58.

i.. It was stipulated and found that the Claimant was overpaid $712.93 in the admitted right shoulder/hernia injury of September 26, 2018 and Respondent is entitled to a credit against indemnity benefits in the present left shoulder occupational disease case.

Burden of Proof

j. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury or occupational disease and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant has sustained his burden on all issues.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. **Claimant sustained a compensable occupational disease to his left shoulder in W.C. No. 5-105-392-001, with an onset date of January 17, 2019.**

B. Respondent shall pay all the costs of authorized, causally related and reasonably necessary medical care and treatment for the Claimant's left shoulder occupational disease, reflected in W.C. No. 5-105-392-001, subject to the Division of Workers' Compensation Medical Fee Schedule.

C. The Claimant's average weekly wage is $748.58, the establishment of which does not award or deny a benefit.

D. Respondent is entitled to a credit of $712.93 against any indemnity benefits awarded in W.C. No. 5-105-392-00

D. Any and all issues not determined herein are reserved for future decision.

DATED this 28th day of June 2021.

DIGITAL SIGNATURE

EDWIN L. FELTER, JR.
Administrative Law Judge

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

ISSUE

Whether Claimant has demonstrated by a preponderance of the evidence that she suffered an occupational disease to her right shoulder that began on December 26, 2019 during the course and scope of her employment with Employer.

FINDINGS OF FACT

1. Claimant is a 56 year-old female who worked for Employer as a shuttle bus driver for approximately eight months. Her job duties consisted of transporting passengers to the airport, communicating with passengers, cleaning her vehicle and assisting passengers with luggage. Claimant specified that she lifted and stacked luggage weighing between 20-50 pounds when assisting airport passengers.

2. Claimant testified that she was hired on July 18, 2019 and separated from Employer in mid-March 2020 due to Covid-19 closures. She generally worked between 27 and 40 hours per week.

3. Claimant asserts that she suffered a work-related right shoulder occupational disease that began on December 26, 2019. She attributed the condition to her repetitive job duties for Employer. Claimant contends she experienced pain in her right shoulder and eventually sought medical treatment for her symptoms in March 2020.

4. On March 2, 2020 Claimant visited her personal physician at the Salud Clinic for an examination. Claimant reported right arm pain that had persisted for several weeks. She worked as a shuttle driver at the airport. Her position involved frequent lifting for the past eight months. Claimant noted limited range of right arm motion. She lifted about 15-50 pound pieces of luggage throughout the day. Claimant noted periodic symptoms involving her right shoulder, elbow and forearm. She was diagnosed with right rotator cuff tendonitis and right tennis elbow. Claimant underwent physical therapy from March through May 2020.

5. On July 21, 2020 Claimant returned to the Salud Clinic for an evaluation. Claimant remarked that she continued to suffer right shoulder pain with yard work and lifting. She also experienced spontaneous right shoulder subluxation. The medical record also reflects that Claimant suffered a horse related injury to her right shoulder a few years earlier. Claimant continued physical therapy.

6. On July 23, 2020 Claimant underwent x-rays of the right shoulder. The imaging revealed mild degenerative changes to the glenohumeral and acromioclavicular joints.

7. On August 4, 2020 Claimant underwent a right shoulder MRI. The MRI revealed the following: (1) a remote appearing Hill-Sachs and non-displaced Bankart

lesion; (2) a small focal rim rent tear of the superior rotator cuff with mild bursal inflammation; (3) no delamination or full-thickness tear; (4) a low grade tear and tendinosis of the subscapularis tendon; and (5) mild osteoarthrosis and chondromalacia of the glenohumeral joint.

8. On August 6, 2020 Claimant returned to the Salud Clinic. Claimant reported that her right shoulder pain persisted with yard work and lifting. She was referred to an orthopedic surgeon for an evaluation.

9. On September 23, 2020 Claimant visited Sunil Jani, M.D. for an examination. Dr. Jani documented that Claimant presented with right superior, anterior shoulder pain since an injury at work in February 2020. Claimant specified that "she was unable to move her arm several days after finishing work – lifting luggage from 25-60 pounds up to 10 pieces per trip up to 3 trips per day." Dr. Jani remarked that Claimant attended physical therapy from February until July 2020 "that helped about 90%." He noted that her condition deteriorated between two courses of physical therapy and had steadily worsened since her last physical therapy treatment.

10. On October 9, 2020 Claimant reported her right upper extremity injuries to Employer. Employer prepared a First Report of Injury and provided Claimant with a list of four designated medical providers. Claimant chose Workwell Clinic as her Authorized Treating Physician (ATP).

11. On October 29, 2020 Claimant visited Workwell Clinic for an examination. Claimant reported that in January 2020 she developed right shoulder pain as a result of her work activities. She detailed that her job duties involved heavy, repetitive lifting of luggage. Despite several months of physical therapy, Claimant still exhibited discomfort and decreased range of motion. After conducting a physical examination, William Ford, ANP-C diagnosed Claimant with an unspecified sprain and impingement syndrome of the right shoulder. Based on Claimant's reported history, ANP-C Ford concluded "it does appear that this is a work-related injury."

12. On November 16, 2020 vocational evaluator Jill Adams of Genex visited Employer's job site and performed a Job Demands Analysis and Risk Factor Analysis for the position of Shuttle Driver. She quantified the force and repetition involved in Claimant's work activities. Ms. Adams extrapolated her findings based on an average eight hour workday. She applied her data to the Colorado Division of Workers' Compensation *Medical Treatment Guidelines* Rule 17, Cumulative Trauma Conditions (*Guidelines*). The purpose of her evaluation was to obtain the correct measurements and information necessary to determine whether Claimant's work activities met the delineated criteria in the *Guidelines*.

13. Because Claimant was no longer working for Employer when Ms. Adams completed the Job Demands Analysis, she observed one of Claimant's co-workers perform the job duties of shuttle driver and recorded the length of each activity. Notably, the Job Demands Analysis specified that Claimant spent about 1-2% of her workday performing a pre-driving vehicle inspection. She spent the majority of her time or about 65-70% of her workday driving passengers between Boulder and Denver International

Airport. Claimant spent another 10-15% of her workday handling luggage. She specifically handled/lifted luggage weighing between 20-80 pounds with the most frequent weight in the 20-50 pound range. Claimant used 2-4% of her time cleaning, wiping and vacuuming her vehicle. Finally, 2-5% of Claimant's workday involved communicating with dispatchers and other drivers through a two-way radio.

14. Ms. Adams noted that the *Guidelines* delineate the following risk factors for the development of shoulder pathology: (1) overhead work of 30 minutes per day for a minimum of five years; (2) shoulder movement at the rate of 15-36 repetitions per minute and no two second pauses for 80% of the work cycle; and (3) shoulder movement with force greater than 10% of maximum with no two second pauses for 80% of the work cycle. Moreover, jobs requiring heavy lifting in excess of 10 times per day over the years may contribute to shoulder disorders. After conducting time studies of job tasks Ms. Adams determined that Claimant's overhead reaching consisted of occasionally loading luggage but did not typically take place for 30 minutes per day and she had not worked for Employer for five years. Furthermore, Claimant did not engage in shoulder movement at 15-36 repetitions per minute without pauses. Ms. Adams also noted that there are also at least two second pauses for 80% of Claimant's work cycle. Finally, she commented that heavy lifting of greater than 44 pounds at least 10 times per day did not typically occur on a daily basis but could take place during some work shifts. Accordingly, Ms. Adams concluded that Claimant's overhead reaching, lifting and shoulder movement did not satisfy the Primary or Secondary Risk Factors detailed in the *Guidelines*.

15. On March 11, 2021 David Orgel, M.D. performed a Physician Advisor Review. He issued a report after reviewing Claimant's medical records and Job Demands Analysis. Respondents specifically inquired whether Claimant's complaints constituted a work-related cumulative trauma disorder. Dr. Orgel responded that "[t]he mechanism of injury is not supported by the Job Demands Analysis. There are no risk factors for a shoulder injury; therefore, her complaints are not work-related."

16. On March 29, 2021 Albert Hattem, M.D. performed an independent medical examination and issued a report. Dr. Hattem considered Claimant's medical records, the Job Demands Analysis and interrogatory responses. Dr. Hattem remarked that Claimant attributed her right shoulder pain to repetitively lifting luggage while working as a shuttle bus driver. However, relying on the *Guidelines*, he determined that Claimant's right shoulder condition was not related to her work activities for Employer.

17. In addressing causation as related to cumulative/repetitive-type shoulder disorders, Dr. Hattem referred to Rule 17, Exhibit 4 of the *Guidelines*. Specifically, the *Guidelines* delineate the following risk factors for the development of shoulder pathology: (1) overhead work of 30 minutes per day for a minimum of five years; (2) shoulder movement at the rate of 15-36 repetitions per minute and no two second pauses for 80% of the work cycle; and (3) shoulder movement with force greater than 10% of maximum with no two second pauses for 80% of the work cycle. Moreover, jobs requiring heavy lifting in excess of 10 times per day over the years may contribute to shoulder disorders. Finally, the *Guidelines* provide that, because of the lack of multiple, high quality studies, each case must be evaluated individually when addressing the likelihood of cumulative trauma contributing to shoulder pathology under Rule 17, Exhibit 4.

18. Dr. Hattem determined that Claimant's job duties did not meet any of the Primary or Secondary Risk Factors to satisfy the minimum thresholds in the *Guidelines* for developing a cumulative trauma shoulder disorder. He remarked that Ms. Adams determined that Claimant's overhead reaching, lifting and shoulder movement did not satisfy the Primary or Secondary Risk Factors detailed in the *Guidelines*. Dr. Hattem explained that "most significantly," Claimant had only worked for Employer for eight months before she visited the Salud Clinic on March 2, 2020 complaining of right shoulder pain. Claimant informed the Salud practitioner that she had been experiencing right shoulder pain periodically since the beginning of her employment. Dr. Hattem emphasized that Claimant's development of right shoulder symptoms after only months of employment "is clearly not consistent with the [*Guidelines*] requirement that the claimant be employed 'over years' before repetitive heavy lifting can be considered a risk factor for a repetitive type shoulder disorder." Finally, Dr. Hattem remarked that Claimant's degenerative joint disease noted by Dr. Jani constituted a preexisting age related condition that was not caused by her work activities as a shuttle bus driver.

19. Dr. Hattem testified at the hearing in this matter consistent with his report. He maintained that he was unable to establish a cumulative trauma disorder diagnosis based on the Job Demands Analysis. In order to perform a medical causation analysis for a cumulative trauma condition pursuant to the *Guidelines*, the first step is to make a diagnosis, the next step is to clearly define the job duties and the final step is to compare the job duties with the delineated Primary Risk Factors. The algorithm for establishing medical causation specifies that, if no Primary or Secondary Risk factors are present, then the injury is probably not work-related. Dr. Hattem determined that Claimant's job duties did not meet any of the Primary or Secondary Risk Factors to satisfy the minimum thresholds in the *Guidelines* for the development of a cumulative trauma disorder. Specifically, based on the Job Demands Analysis, there were no risk factors associated with a right shoulder injury.

20. Dr. Hattem emphasized the importance of conducting a causation analysis utilizing the *Guidelines* when assessing a cumulative trauma shoulder condition. He commented that, although the *Guidelines* are not perfect, they are reliable because they are based on empirical evidence and a consensus among experts in the field. Dr. Hattem remarked that, if Claimant told her treating physicians that she lifted heavy luggage at work throughout the day, her statements were inaccurate based on the Job Demands Analysis. Notably, ANP-C Ford and Dr. Jani did not have an opportunity to consider the Job Demands Analysis in reaching their conclusions. Importantly, ANP-C Ford relied exclusively on Claimant's subjective reporting and did not possess an accurate and detailed understanding of Claimant's specific job duties. ANP-C Ford thus did not complete a causation analysis pursuant to the *Guidelines*. Furthermore, Dr. Hattem reiterated that Claimant only worked for Employer for eight months, but the *Guidelines* provide that it takes years to develop a cumulative trauma shoulder condition. Finally, because Claimant only lifted luggage for about one hour each day, her job duties did not meet the minimum thresholds of force, repetition and duration to develop right shoulder pathology pursuant to Rule 17, Exhibit 4 of the *Guidelines*.

21. Claimant has failed to demonstrate that it is more probably true than not that she suffered an occupational disease to her right shoulder that began on December

26, 2019 during the course and scope of her employment with Employer. Although Claimant attributed her right upper extremity symptoms to her work activities, a review of her job duties reflects that they lacked the requisite force or repetition to cause a cumulative trauma disorder. Furthermore, Claimant engaged in a variety of activities throughout each shift. The record reflects that Claimant spent about 1-2% of her workday performing a pre-driving vehicle inspection. She spent the majority of her time or about 65-70% of her workday driving passengers between Boulder and Denver International Airport. Claimant spent another 10-15% of her workday handling luggage. She specifically handled/lifted luggage weighing between 20-80 pounds with the most frequent weight in the 20-50 pound range. Claimant used 2-4% of her time cleaning, wiping and vacuuming her vehicle. Finally, 2-5% of Claimant's workday involved communicating with dispatchers and other drivers through a two-way radio.

22. Relying on the *Guidelines* in conducting a Job Demands Analysis, Ms. Adams did not find evidence of any Primary or Secondary Risk Factors in Claimant's job duties. After conducting time studies of job tasks Ms. Adams determined that Claimant's overhead reaching consisted of occasionally loading luggage but did not typically occur for 30 minutes per day and she had not worked for Employer for at least five years. Furthermore, Claimant did not engage in shoulder movement at 15-36 repetitions per minute without pauses. Ms. Adams also noted that there are also at least two second pauses for 80% of Claimant's work cycle. Finally, she commented that heavy lifting of greater than 44 pounds at least 10 times per day did not typically occur on a daily basis but could take place during some work shifts. Accordingly, Ms. Adams concluded that Claimant's overhead reaching, lifting and shoulder movement did not satisfy the Primary or Secondary Risk Factors detailed in the *Guidelines*.

23. Dr. Hattem persuasively concluded that Claimant's work activities while employed as a shuttle driver for Employer did not meet any of the thresholds in the *Guidelines* for the development of a repetitive-type shoulder disorder. He recounted that Ms. Adams determined that Claimant's overhead reaching, lifting and shoulder movement did not satisfy the Primary or Secondary Risk Factors detailed in the *Guidelines*. Dr. Hattem explained that "most significantly," Claimant had only worked for Employer for eight months when she presented to the Salud Clinic on March 2, 2020 complaining of right shoulder pain. Claimant informed the Salud practitioner that she had been experiencing right shoulder pain periodically since the beginning of her employment. Dr. Hattem determined that Claimant's development of right shoulder symptoms after only months of employment "is clearly not consistent with the [*Guidelines*] requirement that the claimant be employed 'over years' before repetitive heavy lifting can be considered a risk factor for a repetitive type shoulder disorder." He emphasized the importance of conducting a causation analysis utilizing the *Guidelines* when assessing a cumulative trauma shoulder condition. He commented that, although the *Guidelines* are not perfect, they are reliable because they are based on empirical evidence and a consensus among experts in the field. Dr. Hattem concluded that, because Claimant only lifted luggage for about one hour each day, her job duties did not meet the minimum thresholds of force, repetition and duration to develop right shoulder pathology pursuant to Rule 17, Exhibit 4 of the *Guidelines*. Similarly, Dr. Orgel issued a report after reviewing the medical records and Job Demands Analysis. He concluded that "[t]he mechanism of injury is not supported

by the Job Demands Analysis. There are no risk factors for a shoulder injury; therefore, her complaints are not work-related."

24. In contrast, ANP-C Ford and Dr. Jani did not perform a causation analysis pursuant to the *Guidelines*. As noted by Dr. Hattem, ANP-C Ford and Dr. Jani did not have an opportunity to consider the Job Demands Analysis in reaching their conclusions. Importantly, ANP-C Ford relied exclusively on Claimant's subjective reporting and did not possess an accurate and detailed understanding of Claimant's specific job duties. The opinions of Dr. Jani and ANP-C Ford failed to consider the force or time periods necessary for the development of a cumulative trauma condition. In contrast, the *Guidelines* provide a detailed methodology and algorithm for evaluating the cause of cumulative trauma conditions. As Dr. Hattem commented, although the *Guidelines* are not perfect, they are reliable because they are based on empirical evidence and a consensus among experts in the field. Accordingly, based on the Job Demands Analysis, a review of the medical records and the persuasive opinions of Drs. Hattem and Orgel, Claimant did not engage in forceful and repetitive activities for a sufficient period of time to meet the threshold for the development of a cumulative trauma condition. Claimant's employment activities did not cause, intensify, or, to a reasonable degree, aggravate her condition to produce a need for medical treatment. Claimant's claim is thus denied and dismissed.

CONCLUSIONS OF LAW

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

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

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

4. The test for distinguishing between an accidental injury and an occupational disease is whether the injury can be traced to a particular time, place and cause. *Campbell v. IBM Corp.*, 867 P.2d 77, 81 (Colo. App. 1993). “Occupational disease” is defined by §8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

5. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, §8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the work place than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

6. Rule 17, Exhibit 5 provides an algorithm for evaluating Cumulative Trauma Conditions (CTC) pursuant to the *Guidelines*. In addressing applicability, the *Guidelines* note that “CTC’s of the upper extremity comprise a heterogeneous group of diagnoses which include numerous specific clinical entities including disorders of the muscles, tendons and tendon sheaths, nerves, joints and neurovascular structures.” W.C.R.P. Rule 17, Exhibit 5, p. 6. In determining a diagnosis when performing a cumulative trauma analysis the *Guidelines* delineate specific musculoskeletal conditions and peripheral nerve disorders. Nevertheless, the Guidelines provide that “[l]ess common cumulative trauma conditions not listed specifically in these Guidelines are still subject to medical causation assessment.” W.C.R.P. Rule 17, Exhibit 5, p. 21.

7. The *Guidelines* provide, in relevant part:

> Indirect evidence from a number of studies supports the conclusion that task repetition up to 6 hours per day unaccompanied by other risk factors is not causally associated with cumulative trauma conditions. Risk factors that are likely to be associated with specific CTC diagnostic categories include extreme wrist or elbow postures, force including regular work with hand tools greater than 1 kg or tasks requiring greater than 50% of an individual’s voluntary maximal strength, work with vibratory tools at least 2 hours per day; or cold environments.

W.C.R.P. Rule 17, Exhibit 5, p. 20.

8. The *Guidelines* include a Primary Risk Factor Definition Table for Force and Repetition/Duration. The Table requires six hours of two pounds pinch force or 10 pounds of hand force three or more times per minute. Other Primary Risk Factors involving Force and Repetition/Duration include six hours of lifting 10 pounds in excess of 60 times per hour and six hours of using hand tools weighing two pounds or more. An additional Primary Risk Factor category is Awkward Posture and Repetition/Duration. The factor requires four hours of wrist flexion greater than 45 degrees, extension greater than 30 degrees or ulnar deviation greater than 20 degrees, six hours of elbow flexion greater than 90 degrees, four hours of supination/pronation with task cycles 30 seconds or less or awkward posture for at least 50% of a task cycle. Secondary Risk Factors require three hours of two pounds pinch force or 10 pounds of hand force three or more times per minute. Other Secondary Risk Factors involving Force and Repetition/Duration include three hours of lifting 10 pounds greater than 60 times per hour and three hours of using hand tools weighing two pounds or more. Finally, Secondary Risk Factors for Awkward Posture and Repetition/Duration include three hours of elbow flexion greater than 90 degrees and three hours of supination/pronation with a power grip or lifting. W.C.R.P. Rule 17, Exhibit 5, pp. 26-27. If neither Primary nor Secondary Risk Factors are present, the *Guidelines* provide that “the case is probably not job related.” W.C.R.P. Rule 17, Exhibit 5, p. 24.

9. The *Guidelines* also specifically delineate factors for the development of shoulder pathology. They include the following: (1) overhead work of 30 minutes per day for a minimum of five years; (2) shoulder movement at the rate of 15-36 repetitions per minute and no two second pauses for 80% of the work cycle; and (3) shoulder movement with force greater than 10% of maximum with no two second pauses for 80% of the work cycle. Moreover, jobs requiring heavy lifting in excess of 10 times per day over the years may contribute to shoulder disorders. Notably, the *Guidelines* provide that, because of the lack of multiple, high quality studies, each case must be evaluated individually when addressing the likelihood of cumulative trauma contributing to shoulder pathology. W.C.R.P. Rule 17, Exhibit 4, p. 16.

10. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she suffered an occupational disease to her right shoulder that began on December 26, 2019 during the course and scope of her employment with Employer. Although Claimant attributed her right upper extremity symptoms to her work activities, a review of her job duties reflects that they lacked the requisite force or repetition to cause a cumulative trauma disorder. Furthermore, Claimant engaged in a variety of activities throughout each shift. The record reflects that Claimant spent about 1-2% of her workday performing a pre-driving vehicle inspection. She spent the majority of her time or about 65-70% of her workday driving passengers between Boulder and Denver International Airport. Claimant spent another 10-15% of her workday handling luggage. She specifically handled/lifted luggage weighing between 20-80 pounds with the most frequent weight in the 20-50 pound range. Claimant used 2-4% of her time cleaning, wiping and vacuuming her vehicle. Finally, 2-5% of Claimant’s workday involved communicating with dispatchers and other drivers through a two-way radio.

11. As found, relying on the *Guidelines* in conducting a Job Demands Analysis, Ms. Adams did not find evidence of any Primary or Secondary Risk Factors in Claimant's job duties. After conducting time studies of job tasks Ms. Adams determined that Claimant's overhead reaching consisted of occasionally loading luggage but did not typically occur for 30 minutes per day and she had not worked for Employer for at least five years. Furthermore, Claimant did not engage in shoulder movement at 15-36 repetitions per minute without pauses. Ms. Adams also noted that there are also at least two second pauses for 80% of Claimant's work cycle. Finally, she commented that heavy lifting of greater than 44 pounds at least 10 times per day did not typically occur on a daily basis but could take place during some work shifts. Accordingly, Ms. Adams concluded that Claimant's overhead reaching, lifting and shoulder movement did not satisfy the Primary or Secondary Risk Factors detailed in the *Guidelines*.

12. As found, Dr. Hattem persuasively concluded that Claimant's work activities while employed as a shuttle driver for Employer did not meet any of the thresholds in the *Guidelines* for the development of a repetitive-type shoulder disorder. He recounted that Ms. Adams determined that Claimant's overhead reaching, lifting and shoulder movement did not satisfy the Primary or Secondary Risk Factors detailed in the *Guidelines*. Dr. Hattem explained that "most significantly," Claimant had only worked for Employer for eight months when she presented to the Salud Clinic on March 2, 2020 complaining of right shoulder pain. Claimant informed the Salud practitioner that she had been experiencing right shoulder pain periodically since the beginning of her employment. Dr. Hattem determined that Claimant's development of right shoulder symptoms after only months of employment "is clearly not consistent with the [*Guidelines*] requirement that the claimant be employed 'over years' before repetitive heavy lifting can be considered a risk factor for a repetitive type shoulder disorder." He emphasized the importance of conducting a causation analysis utilizing the *Guidelines* when assessing a cumulative trauma shoulder condition. He commented that, although the *Guidelines* are not perfect, they are reliable because they are based on empirical evidence and a consensus among experts in the field. Dr. Hattem concluded that, because Claimant only lifted luggage for about one hour each day, her job duties did not meet the minimum thresholds of force, repetition and duration to develop right shoulder pathology pursuant to Rule 17, Exhibit 4 of the *Guidelines*. Similarly, Dr. Orgel issued a report after reviewing the medical records and Job Demands Analysis. He concluded that "[t]he mechanism of injury is not supported by the Job Demands Analysis. There are no risk factors for a shoulder injury; therefore, her complaints are not work-related."

13. As found, in contrast, ANP-C Ford and Dr. Jani did not perform a causation analysis pursuant to the *Guidelines*. As noted by Dr. Hattem, ANP-C Ford and Dr. Jani did not have an opportunity to consider the Job Demands Analysis in reaching their conclusions. Importantly, ANP-C Ford relied exclusively on Claimant's subjective reporting and did not possess an accurate and detailed understanding of Claimant's specific job duties. The opinions of Dr. Jani and ANP-C Ford failed to consider the force or time periods necessary for the development of a cumulative trauma condition. In contrast, the *Guidelines* provide a detailed methodology and algorithm for evaluating the cause of cumulative trauma conditions. As Dr. Hattem commented, although the *Guidelines* are not perfect, they are reliable because they are based on empirical

evidence and a consensus among experts in the field. Accordingly, based on the Job Demands Analysis, a review of the medical records and the persuasive opinions of Drs. Hattem and Orgel, Claimant did not engage in forceful and repetitive activities for a sufficient period of time to meet the threshold for the development of a cumulative trauma condition. Claimant's employment activities did not cause, intensify, or, to a reasonable degree, aggravate her condition to produce a need for medical treatment. Claimant's claim is thus denied and dismissed.

ORDER

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

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

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

DATED: June 29, 2021.

DIGITAL SIGNATURE:
Peter J. Cannici

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

ISSUES

I. Has Claimant shown, by clear and convincing evidence, that the DIME opinion of Dr. Watson should be overcome as it relates to his cervical spine?

II. Has Claimant shown, by clear and convincing evidence, that the DIME opinion of Dr. Watson should be overcome as it relates to his lumbar spine?

III. Has Claimant shown, by a preponderance of the evidence, that the L4-S1 surgery already performed by Dr. Stanley is reasonable, necessary, and related to his work injury, thus subject to reimbursement by Respondents?

STIPULATIONS

The parties agreed that the issue of Disfigurement shall be held in abeyance.

FINDINGS OF FACT

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

The Initial Work Injury / Subsequent Care

1. Claimant sustained an admitted on the job injury on August 8, 2018. The first report of injury states: "Employees were lifting a piece of equipment when a chain slipped. [Claimant] had to quickly move out of the way. He states his neck and shoulder are hurt." (Ex D., p. 14). Claimant did not seek treatment initially for his condition, but he subsequently went to his primary care physician to discuss the pain he had been having since August 8, 2018. (Ex. L, p. 424). The note from Claimant's PCP, Dr. Bryan Hynes, stated that Claimant did have chronic neck and back pain; however, the note documents a "recent exacerbation of neck pain with injury which has been discontinued [sic] worse over time." *Id.* "He also injured his left shoulder 4 weeks ago and he cannot move his shoulder." *Id.* Claimant was recommended to have an MRI of his neck and left shoulder.

2. Claimant did not see a Workers' Compensation provider until October 27, 2018, when he was evaluated by Dr. Eric Ritch with Emergicare. (Ex. M, p. 444). At this time, it was again documented that Claimant was injured at work, "Patient presents today for back/neck pain, left shoulder pain, left hand pain, and bilateral leg weakness following an incident at work almost 2 months ago." *Id.* Dr. Ritch was not sure if Claimant was there for an accepted claim or for evaluation of causation. It was reported that Claimant was helping to move a 3,000 to 4,000 pound metal object. One of the attachment points between the machinery moving the object and the object itself broke, causing the metal

object to begin to fall. Claimant ended up trying to deflect the object from himself and was "thrown backward, wrenching his low back, left shoulder, and neck." *Id.*

3. Claimant reported having pain in all of those places since then. (Ex. M, p. 444). He was reporting 7 out of 10 pain at this time. Claimant reported doing his best to keep working, but that the pain was worsening. It was also noted that Claimant had a posterior laminectomy the prior year from L3 to L5 for chronic back pain. Claimant felt he had recovered from that condition and surgery. *Id.*

4. Dr. Ritch's examination documented bilateral paraspinous muscle tenderness bilaterally, primarily in the low back, but also in the neck. *Id* at 445. He had decreased range of motion of his cervical spine, shoulder, and back. Dr. Ritch opined that Claimant sustained a work injury, that a lumbar spine x-ray performed documented shifting of the L4 vertebra, and he recommended a lumbar MRI when also factoring in Claimant's complaints of leg numbness. *Id.* at 446. He also diagnosed a cervical strain.

Claimant's Previous Lumbar Treatment

5. Claimant did have a prior lumbar surgery performed by Dr. Scott Stanley. A July 5, 2016 MRI of his lumbar spine had shown an L4-5 circumferential disc bulge with posterior central-broad based disc protraction, and with grade 1 retrolisthesis at L5-S1 with moderate circumferential disc bulging. (Ex. J, p. 211). Claimant was diagnosed with lumbar stenosis with neurogenic claudication. *Id.* Dr. Stanley opined it was best to move forward with surgery, given Claimant's lack of improvement with conservative care. *Id* at 212. He planned to perform laminectomies at L3, L4, and L5.

6. The surgery was performed, and Claimant followed up with Dr. Stanley one month status post L3, L4, and L5, laminectomies including partial facetectomies and foraminotomies. (Ex. J, p. 224). He reported his pain had been improving, his numbness and tingling had resolved, and he was only having mild discomfort climbing up and down stairs. Claimant had no sensory deficits per Dr. Stanley's examination on December 15, 2017. *Id.* at 225. Claimant followed up again on March 2, 2018, reporting that he was doing well, had only mild residual discomfort at the site of surgery, but his numbness and tingling was still gone and he was no longer inhibited in his activities of daily living. *Id.* at 231.

7. However, on May 4, 2018 Claimant reported to his provider at Kaiser Permanente that the surgery initially helped, but now his symptoms were returning. (Ex. K, p. 365). Claimant complained of lower back pain, neck pain, and numbness into his lower extremities. He had a return appointment scheduled with Dr. Stanley to discuss further treatment options. On June 18, 2018 he returned to Kaiser, with continued complaints of radiating neck pain. *Id* at 390. On July 17, 2018 he reported to Dr. Sanchez that he had residual numbness in his legs, which was persistent after his surgery and neck pain present since 2016. No back pain was noted at this visit. *Id* at 401.

8. On August 3, 2018, Claimant was establishing primary care, for among other things, chronic neck and back pain, with Dr. Bryan Hynes, MD. The intake notes state: "Patient currently being worked up for cervical spine arthritis and degenerative disc diseases with impingement seeing physician in Denver. *He has chronic neck and lower back pain radiating down his arms bilaterally."* (Ex. L, p. 421) (emphasis added). Claimant was tender to palpation in his cervical, thoracic, and lumbar spine during examination, with decreased range of motion. *Id* at 422.

Clamant Continues to treat his Cervical and Lumbar

9. Claimant followed up with Dr. Michael Dallenbach, also with Emergicare, on November 5, 2018. (Ex. M, p. 450). Dr. Dallenbach noted that Claimant had injured his left shoulder, back, and neck while pushing a falling beam away and turning while doing so. Regarding his back, Claimant was initially referred to physical therapy. Claimant was also referred for an MRI. *Id* at 453.

10. The MRI results obtained on November 21, 2018 showed interval posterior decompression from L3-4 through L5-S1 with a small residual or recurrent posterior central disc protrusion at L4-5, without evidence for significant residual or recurrent central spinal canal stenosis. (Ex. F, p. 24). Claimant had foraminal stenosis bilaterally at L3-S1, most pronounced at L4-5 bilaterally, and on the left at L5-S1. *Id. No evidence of acute injury was identified.*

11. When Claimant failed to improve with conservative care, on November 26, 2018, Dr. Dallenbach referred Claimant to Dr. Michael Sparr. (Ex. M, p. 456). Claimant was later referred back to his prior surgeon, Dr. Stanley, by Dr. Dallenbach.

12. Claimant was evaluated by Dr. Stanley's Physician Assistant, Kaitlyn Anglelett, PA-C at Centura Orthopedics on September 4, 2019. (Ex. J, p. 313). Claimant reported to Dr. Stanley that he was having low back pain with numbness, tingling, and a sensation into his bilateral lower extremities that he described as worsening for one year. Claimant reported that it worsened after the work injury in August of 2018. *Id.* Claimant reported that his prior preoperative complaints had resolved with surgery and he was returning for the new injury. Due to Claimant's reported change in symptoms, and the previous MRI being a year old, she requested a new MRI.

13. These MRI results obtained on October 28, 2019 showed posterior decompression from L3-L4 through L5-S1 with no evidence of significant residual or recurrent central spinal canal stenosis. (Ex. F, p. 34). Claimant had mild to moderate foraminal stenosis bilaterally, without significant central spinal canal or foraminal stenosis elsewhere. No acute injury was identified.

14. Claimant followed up with Dr. Stanley himself on February 26, 2020. (Ex. J, p. 329). The note documents Claimant already attended formal lumbar physical therapy and bilateral ESIs at L4-5. *Id.* Claimant now complained of muscles spasms in his bilateral lower extremities, worse at night. The MRI of October 28, 2019 showed posterior

decompression from L3-4 to L5-S1 with mild to moderate foraminal stenosis. *Id* at 331. Dr. Stanley diagnosed Claimant with L4-5 Spondylolisthesis and L4-5 foraminal stenosis and bilateral lumbar radiculopathy. *Id.* They discussed a possible fusion of L4-5, but Dr. Stanley wanted further workup done first, including an EMG and then a follow up.

15. However, Claimant reported to Pain Management of the Rockies on February 28, 2019 for his continuing neck pain. (Ex. N, p. 502). Dr. Ross believed Claimant's neck pain was emanating from his facet joints, and recommended that he undergo right-sided C2-3, C3-4, and C4-5 facet medial branch blocks with possible rhizotomy based on pain response. *Id.* Dr. Ross planned on first treating Claimant's neck pain, followed by possible ESI to his lumbar spine.

16. Medial branch blocks were administered by Dr. Ross on April 8, 2019. Claimant told Dr. Ross during this February 28, 2019 examination that his low back pain and leg pain resolved after surgery, and *he had no symptoms* until reoccurrence after the most recent work-related injury. *Id* at 502.

17. Claimant returned to Dr. Stanley on April 3, 2020 to review the EMG study. (Ex. J, p. 334). The EMG indicated chronic/stable lumbar radiculopathies affecting the bilateral L4 and L5 nerve roots. Dr. Stanley indicated that Claimant had not responded to conservative care to date. Dr. Stanley recommended an L4-5, L5-S1 fusion at that time. *Id* at 337.

Respondents Deny the Proposed Lumbar Surgery, but it still Proceeds

18. The surgery was denied, based on the April 13, 2020 physician advisor review report of Michael Janssen, D.O. (Resp. Ex. R). It was Dr. Janssen's opinion that Claimant's condition that warranted surgery was long-standing and age-related, but there was not any evidence of an anatomical condition clearly related to Claimant's work-injury. *Id* at 572. Dr. Janssen did state Claimant should have the surgery done under his private insurance, indicating he felt the surgery was reasonable, but unrelated. *Id.*

19. Dr. Stanley still felt it was necessary to perform the surgery, especially given Claimant's instability pattern at the time. Dr. Stanley stated, "Given the patient's refractory pain and neurologic issues, I do not recommend ongoing non-operative maintenance care. Without surgical intervention, the patient is at increased risk of chronic neurologic deficits." *Id.* at 342. They discussed having the surgery performed under Claimant's private insurance, due to the denial of the surgery by Respondents.

20. Despite the denial by Respondents, on June 8, 2020 Claimant underwent left L4-5, L5-S1 posterior lumbar interbody fusions with combined L4-5, L5-S1 posterolateral arthrodesis with bilateral L4-5, L5-S1 decompressions and bilateral L4 and L5 laminectomies including facetectomies and foraminotomies by Dr. Scott Stanley at Centura Orthopedics. (Resp. Ex. J, pp. 352-357).

21. After Claimant's fusion surgery, he began treating with Dr. Anthony Stanulonis at Concentra on July 6, 2020. (Ex. P, p. 552). The note documents Claimant's surgery was performed under his private insurance with resolution of the pain, weakness, and numbness in both of his legs, and that he had not returned to work since the spine surgery. Claimant was continuing to complain of neck pain as well. Claimant had full range of motion in his left shoulder and c-spine. Dr. Stanulonis placed Claimant at MMI on July 6, 2020. *Id* at 553. He provided no impairment rating, but recommended maintenance care with Dr. Stanley for one year for low back pain. Claimant was also given no restrictions. *Id* at 555.

IME by Dr. Reiss

22. Orthopedic spinal surgeon Brian Reiss, MD conducted an IME on September 16, 2020. (Ex. S). Dr. Reiss noted inconsistencies in Claimant's denials of pre-existing symptoms in his neck and low back and documented the numerous medical records in contradiction. Dr. Reiss found it significant that Claimant, just 5 days before the work injury, was complaining of chronic low back and neck pain with recurrence of his prior symptoms. However, Dr. Reiss had none of the actual imaging studies available for his review at the time. The return of Claimant's low back pain post-2017 surgery was not a surprise to Dr. Reiss, as most laminectomies fail to reduce lower back pain.

23. Claimant's mechanism of injury was noted by Dr. Reiss as unlikely to have injured his neck/back and Claimant had failed to seek treatment for over 1 month after the alleged injury; then only complained of neck and left shoulder pain. Dr. Reiss believed it more likely than not that Claimant injured his left shoulder during the incident, but likely did not injure his neck or lower back, as there was no objective evidence of injury and Claimant's subjective statements were in doubt.

DIME by Dr. Watson

24. Claimant then sought a Division Independent Medical Examination ("DIME"). The DIME with Dr. William Watson was performed on November 10, 2020. (Ex. T). Claimant again reported that they were moving heavy equipment when a chain broke and a multi-thousand pound object swung towards Claimant. He did his best to try to deflect the object, but it still knocked him to the ground onto his left side and back, reporting that it caused injury to his left shoulder, neck, and back. Claimant reported ongoing lower back pain, but he was only three months post fusion at the time. Claimant noted the left shoulder surgery was completely successful and that he currently had minimal discomfort in his neck and left shoulder. Physical examination of Claimant revealed inconsistent range of motion findings in his lumbar spine, full range of motion in his left wrist and shoulder, and no tenderness or muscle spasms noted in his c-spine.

25. Dr. Watson ultimately concluded that Claimant's shoulder condition was work-related, but that the neck and back were not. Dr. Watson mentioned a note from *June* 3, 2018 [*The ALJ notes that this is a typo in the DIME report - this appointment occurred on *August* 3, 2018 (Ex. L, p. 421)], five days prior to the accident, from his PCP,

Dr. Bryan Hynes. This [August 3] note indicated Claimant was having chronic neck and back pain radiating down both arms.

26. Dr. Watson concurred with Dr. Stanulonis regarding Claimant's MMI date of July 6, 2020 and opined that Claimant's lumbar, cervical, and thoracic spine were not related, since medical records confirmed these issues were pre-existing and a likely a continuation of previous problems Claimant was having prior to the work-injury. Dr. Watson disagreed with Claimant that he was asymptomatic prior to the August 8, 2018 work-incident, as prior records clearly showed a return of low back/lower extremity symptoms prior to his work incident. Claimant had already been referred for surgical consultation and evaluation of his low back prior to the work incident, and had complained of ongoing symptoms for at least 3 months prior to this work injury. Claimant's cervical spine complaints had resolved, his left shoulder complaints had resolved, and his left wrist complaints had resolved. Dr. Watson gave Claimant a 0% impairment rating for all work-related injuries and believed maintenance care was only appropriate for Claimant's left shoulder. Dr. Watson did provide Claimant with a provisional 22% impairment rating for Claimant's lumbar spine, in the event it was determined to be work related. (Ex. T, p. 609).

Claimant Testifies at Hearing

27. Claimant testified at hearing. He indicated that at the time of the incident, he did not feel any significant symptoms, but within days he started feeling pain in his neck and back. Claimant was treating under the claim and eventually Dr. Stanley requested authorization for surgery, which was denied. After it was denied, Claimant went forward with the fusion surgery with Dr. Stanley, paid for by his private insurance carrier, Anthem – Blue Cross Blue Shield.

28. Claimant testified that he had his prior back surgery in November of 2017 and clarified it was not a workers' compensation claim. Prior to that surgery, Claimant was having most of his pain in the back with his legs going numb pretty much every day if he sits longer than ten to fifteen minutes. Claimant underwent rehab after that surgery and testified that he felt he recovered 100% from the surgery itself.

Dr. Reiss Testifies at Hearing

29. Dr. Reiss testified at hearing held on May 27, 2021. Dr. Reiss explained why he did not believe Claimant's cervical spine and lumbar spine were related to the work-incident, and that he concurred with the conclusions reached by Dr. Watson. Dr. Reiss did not believe Claimant was forthright in his denial of low back and neck symptoms immediately prior to the incident. He did not believe there was any objective evidence of an acute injury to those areas, and noted that Claimant failed to complain of lower back injuries for over 1 month after the injury. He opined that all records supported the conclusion that Claimant had longstanding and chronic issues with his neck and lower back.

30. Dr. Reiss doubted the mechanism of injury aggravated or accelerated any of Claimant's prior conditions. Instead, he noted that Claimant was already seeking treatment prior to the incident, and continued to seek the same treatment post-incident. He was not surprised that Claimant had continued back pain before this work incident, as the laminectomy in 2017 was meant to address his lower extremity symptoms, and not lower back pain. After review of the medical records, Dr. Reiss concurred that no expert had opined that Claimant's lower back was related to the August 8, 2018 injury. He did not believe Dr. Watson had made any errors, and that Dr. Watson correctly came to the same conclusions as he did, based on the medical records.

CONCLUSIONS OF LAW

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

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. §8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. §8-43-201, C.R.S.

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

C. Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential*

Insurance Co. v. Cline, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). In this instance, the ALJ finds that Claimant has been an inconsistent and unreliable medical historian. There is ample evidence in the medical records to demonstrate that Claimant had not, in fact, maintained a full recovery from his first lumbar surgery. Instead, his condition was actually deteriorating.

D. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). The ALJ finds that each expert has rendered their opinions to the best of their ability, based upon the information they were provided. In this instance, the ATP, the reviewing physician, Respondents' IME, and the DIME physician each arrived at similar conclusions regarding causation. Claimant has not supplied, even through medical records or reports, even one expert opinion which supports Claimant's theory on causation. Here, there are no expert medical opinions to even weigh against one another, much less evidence of a *mistake* in the DIME process.

E. Further, courts are to be "mindful that the Workmen's Compensation Act is to be liberally construed to effectuate its humanitarian purpose of assisting injured workers." *James v. Irrigation Motor and Pump Co.*, 503 P.2d 1025 (Colo. 1972).

Overcoming the DIME Opinion on MMI, Generally

F. The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*; *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590, 592 (Colo. App. 1998); *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186, 189-190 (Colo. App. 2002); *Sholund v. John Elway Dodge Arapahoe,* W.C. No. 4-522-173 (ICAO October 22, 2004); *Kreps v. United Airlines,* W.C. Nos. 4-565-545 and 4-618-577 (ICAO January 13, 2005). The MMI determination requires the DIME physician to assess, as a matter of diagnosis, whether the various components of a claimant's medical condition are casually related to the injury. *Martinez v. ICAO*, No. 06CA2673 (Colo. App. July 26, 2007). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding the cause of a particular component of a claimant's overall medical impairment, MMI or the degree of whole person impairment, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc.*, W.C. No. 4-476-254 (ICAP, Oct. 4, 2001).

G. This enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.* Where the evidence is subject to conflicting inferences a mere difference of opinion between qualified medical experts does not necessarily rise to the level of clear and convincing evidence. Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries,* WC 4-712-812 (ICAO November 21, 2008).

H. As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

I. However, the mere fact that a Claimant suffers from a pre-existing condition does not disqualify a claim for compensation or medical benefits if the work-related activities aggravated, accelerated, or combined with the pre-existing condition to produce disability or a need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition, and the claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities and not the underlying pre-existing condition. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949). Moreover, an otherwise compensable injury does not cease to arise out of a worker's employment simply because it is partially attributable to the worker's pre-existing condition. *See Subsequent Injury Fund v. Thompson*, 793 P.2d 576, 579 (Colo. 1990); *Seifried v. Industrial Comm'n*, 736 P.2d 1262, 1263 (Colo. App, 1986) ("[I]f a disability were [ninety-five percent] attributable to a pre-existing, but stable, condition and [five-percent] attributable to an occupational injury, the resulting disability is still compensable if the injury has caused the dormant condition to become disabling.")

J. Generally, the Claimant must prove by a preponderance of the evidence that his symptoms were proximately caused by an industrial aggravation of a pre-existing condition rather than simply the natural progression of the condition. *Melendez v. Weld County School District #6*, W.C. No. 4-775-869 (ICAO, October 2, 2009). However, in this instance, the DIME physician has concluded that Claimant's current symptoms were not proximately caused by the work injury; instead, they were the inevitable, natural progression of his preexisting condition. Claimant must now overcome the DIME in this regard.

Overcoming the DIME, as Applied

K. As noted, Claimant has offered no medical opinions, even of an indirect nature, which contradict the findings of the DIME (and the ATP, the reviewing physician, and Respondents' IME). Even were this not the case, offering a mere contrary opinion on causation, however well informed, would not overcome the DIME's opinion. Here, Claimant has tendered essentially nothing, save his own statements to his medical providers, and his hearing testimony. Assuming, arguendo, that the ALJ finds Claimant to have been highly reliable (which the ALJ pointedly does *not* in this instance), Claimant has offered no case law in support of his proposition that a Claimant's cumulative statements would ever be sufficient to overcome a DIME opinion. Were it so easy, the entire statutory construct underlying the DIME process could easily be undermined. Faced with overwhelming medical evidence (and the statutorily enhanced burden of proof), Claimants would be encouraged to throw the 'Hail Mary', and hope to find a sympathetic ALJ - despite a dearth of medico-legal evidence that the original DIME process was fatally flawed in some fashion.

L. The ALJ in this case finds that Claimant has failed to carry his burden. Claimant's current medical condition (either lumbar or cervical) was not caused, aggravated, or accelerated by this work incident (such incident did, however, injure his shoulder). Claimant has not presented evidence that the DIME is 'highly probably incorrect,' much less, that such evidence is, 'unmistakable and free from serious or substantial doubt.' The DIME, therefore, is upheld.

Medical Benefits, Generally

M. Respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. § 8-42-101 (1)(a), C.R.S. (2009); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). Where a claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997). Whether the claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P .2d 496 (Colo. App. 1997).

Medical Benefits, as Applied

N. While the surgery already performed by Dr. Stanley may well have been *reasonable and necessary* to treat Claimant's condition, the DIME has found, with the ALJ's concurrence, that such surgery is not *causally related* to Claimant's work injury. No reimbursement for said surgery, therefore, will be ordered.

ORDER

It is therefore Ordered that:

1. The DIME opinion of Dr. Watson regarding Claimant's cervical condition is upheld.

2. The DIME opinion of Dr. Watson regarding Claimant's lumber condition is upheld.

3. Claimant's claim for reimbursement for the surgery by Dr. Stanley is denied and dismissed.

4. All matters not determined herein are reserved for future determination.

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

DATED: June 29, 2021

/s/ William G. Edie

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-123-197

ISSUES

I. Whether Claimant proved he is entitled to Temporary Total Disability (TTD) benefits from December 21, 2020, ongoing.

FINDINGS OF FACT

1. Claimant worked for Employer as a delivery driver.

2. On November 11, 2019, Claimant sustained an admitted industrial injury when he slipped on icy stairs.

3. Claimant treated at UC Health with authorized treating physician ("ATP") Rachel Frank, M.D., Diana Douleh, M.D. and Kevin Shinsako, PA-C. He was diagnosed with a patellar tendon rupture and underwent a patellar tendon repair on November 20, 2019.

4. Respondents admitted for ongoing TTD benefits beginning November 12, 2019.

5. Claimant attended follow-up appointments on December 2, 2019, February 3, 2020, February 20, 2020, March 16, 2020, and August 10, 2020. Claimant continued to report left knee pain and weakness. At follow-up evaluations with PA Shinsako and Tyler Freeman, M.D. on September 21, 2020, Claimant also reported significant back pain radiating down his right leg. He was referred Claimant to Venu Akulthota, M.D. for evaluation of his lumbar spine.

6. Dr. Akulthota evaluated Claimant on October 22, 2020 and referred Claimant for a lumbar spine MRI.

7. Respondents drafted a proposed modified duty offer for Claimant, which they sent to Dr. Frank on November 20, 2020 for her review. The proposed job offer consisted of the following:

> Work Schedule: Working 3-4 days with 25-30 hours per week.
>
> Description of Job Duties: Assistant Closing – Checking vans for gas, damages, and cleanliness. Checking vans' pouches for phones, gas cards, charger, and other items.

> Additional Details Regarding Job Duties: No lifting, mainly sitting, will have to walk to vans to check them in the warehouse.

(Ex. C, p. 6).

8. Respondents also emailed a copy of the proposed job offer to Claimant's counsel on November 20, 2020, and sent Claimant a copy of the proposed job offer via certified mail the same day.

9. Dr. Frank approved the modified duty offer on December 2, 2020. A copy of her response was sent to Claimant's counsel on December 3, 2020.

10. Respondents sent the modified job offer, with a copy of Dr. Frank's approval, to Claimant on December 14, 2020. The offer was sent to Claimant by certified mail and by email to an email address Claimant identified as his correct email address. Respondents also sent a copy of the modified job offer to Claimant's counsel by email on December 14, 2021.

11. The job offer was for an assistant closer position, working from 3:00 p.m. to approximately 8:30 p.m. - 10:00 p.m. at $17.00 per hour. The job offer complied with the position approved by Dr. Frank on December 2, 2020. The job offer asked Claimant to report to work on December 18, 2020.

12. Claimant did not report to work on December 18, 2020 or thereafter.

13. No evidence was offered indicating Claimant attended any medical evaluations between October 22, 2020 and December 21, 2020.

14. On December 21, 2020, Claimant saw PA Shinsako reporting continued left knee pain and buckling as well as continued right lower back pain and radicular symptoms. PA Shinsako advised Claimant to follow-up with Dr. Akulthota for his lumbar spine. He recommend Claimant undergo another knee MRI "due to persistent issues of the left knee, limitations in ADLs, continued buckling and giving way, weakness." (Ex. G, p. 61). In a section in the medical report titled "Attending Addendum" dated 12/21/2020, Dr. Frank stated, "The patient was seen, discussed and evaluated with Dr. Freeman and I agree with the findings and plan as documented. Any pertinent edits have been made directly to today's progress note." (Id.)

15. On December 21, 2020, PA-C Shinsako issued a letter stating Claimant continued to have significant limitations in his ability to perform activities of daily living without limitation. He removed Claimant from work until further evaluation.

16. Claimant has not returned to work since December 21, 2020.

17. On January 20, 2021, Respondents filed a General Admission of Liability admitting for medical benefits, temporary total disability from November 12, 2019 through December 17, 2020 and temporary partial disability from December 18, 2020, ongoing.

18. Claimant saw Dr. Frank on April 15, 2021 with continued complaints of knee pain and weakness and low back pain. Claimant reported significant pain with prolonged standing, stairs and lifting heavy items. Dr. Frank released Claimant to modified duty with temporary restrictions of sedentary work only. She recommended Claimant undergo a functional capacity evaluation.

19. Claimant credibly testified at hearing that he discussed the modified job offer with PA Shinsako on December 21, 2020 and informed PA Shinsako he was unable to perform some of the duties outline in the modified job offer.

20. Binyam A[Redacted], Owner of Employer, credibly testified that Claimant’s modified duty position mainly consisted of sitting down, with no lifting, climbing or walking outside. He testified that the modified job offer is no longer open to Claimant because he assumed Claimant abandoned his job when he did not appear for the modified employment.

21. The ALJ finds Claimant proved it is more probable than not he is entitled to TTD benefits from December 21, 2020 and ongoing. Claimant was removed from work due disability from his work injury, resulting in Claimant missing more than three work shifts and lost wages.

CONCLUSIONS OF LAW
Generally

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

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

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

Temporary Indemnity Benefits

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S. requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following§8-42-105(3)(a)-(d), C.R.S.

Respondents argue Claimant is not entitled to TTD benefits because his benefits terminated as a result of the December 14, 2020 modified job offer pursuant to WCRP

6-1(A)(4) and Section 8-42-105(3)(d)(I), C.R.S. Respondents' reliance on termination of benefits pursuant to WCRP Rule 6-1(A)(4) and Section 8-42-105(3)(d)(I), C.R.S. as it relates to Claimant's entitlement to benefits for the period beginning December 21, 2020 is misplaced. WCRP 6-1(A)(4) provides that an insurer may terminate temporary disability without a hearing by filing an admission of liability form with a letter to the claimant containing on offered of modified employment if certain other conditions are met. Section 8-42-105(3)(a)-(d), C.R.S. provides that temporary total disability benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment.

Respondents' argument effectively asks the ALJ to bar a claimant from receiving future TTD benefits if his or her benefits for a particular time period were properly terminated. As endorsed on Claimant's Application for Hearing, and stated by Claimant's counsel at hearing, Claimant is requesting TTD benefits for a period beginning December 21, 2020. Claimant does not dispute there was an offer of modified employment made prior to December 21, 2020, nor does Claimant dispute he did not appear for work on or after December 18, 2020. Whether the December 14, 2020 modified job offer effectively terminated Claimant's TTD prior to December 21, 2020 does not affect the determination of Claimant's entitlement to TTD benefits beginning December 21, 2020 based on the specific facts of this case, as Claimant was removed from all work on December 21, 2020. The relevant consideration here is whether, beginning December 21, 2020, Claimant missed more than three work shifts as a result of a disability caused by his industrial injury and suffered actual wage loss.

PA-C Shinsako's December 21, 2020 medical note and letter clearly indicate he removed Claimant from work due to Claimant's persistent left knee issues and significant ability to perform ADLs without limitation. He recommended Claimant undergo further evaluation and treatment as a result of the work injury. The record indicates the work injury resulted in disability as evidenced by Claimant's restricted bodily function and an inability of Claimant to resume his prior work. Claimant has not returned to work since December 21, 2020 as a result of the disability, resulting in actual wage loss. Accordingly, Claimant is entitled to TTD benefits beginning December 21, 2020.

The ALJ is not persuaded by Respondents' argument that there is a conflict in the record regarding Claimant's ability to perform the modified job or his release to return to work. Respondents rely on Dr. Frank's December 2, 2020 approval of the modified job offer and contend there is no evidence Dr. Frank was aware of or agreed with PA-C Shinsako's decision to later remove Claimant from work. As found, no evidence was offered indicating Dr. Frank or any other provider evaluated Claimant between October 22, 2020 and December 21, 2020. Dr. Frank's approval of the modified job offer on December 2, 2020 occurred almost three weeks prior to the PA

December 21, 2020 evaluation of Claimant. As stated by Dr. Frank in the December 21, 2020 medical record, she agreed with the findings and plan as documented. The ALJ thus infers Dr. Frank was aware of and agreed with PA Shinsako's removal of Claimant from all work as a result of the work injury. Dr. Frank subsequently evaluated Claimant on April 15, 2021 and released Claimant to sedentary work. There is no indication in the April 15, 2021 record or any other record that Dr. Frank disagreed with the restrictions imposed on December 21, 2020.

To the extent Respondents contend that the December 21, 2020 restrictions were based on Claimant's inaccurate representations to PA Shinsako regarding the modified job offer and his abilities, there is insufficient evidence to find and conclude that the restrictions imposed by PA Shinsako and agreed to by Dr. Frank were not the result of their independent professional judgment. The credible and persuasive evidence establishes Claimant was unable to resume work due to the effects of the work injury beginning December 21, 2020. The preponderant evidence establishes Claimant is entitled to TTD benefits beginning December 21, 2020, ongoing.

ORDER

1. Respondents shall pay Claimant TTD beginning December 21, 2020 and ongoing, until terminated by operation of law.

2. All matters not determined herein are reserved for future determination.

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

DATED: June 30, 2021

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-116-183-002

ISSUES

- Did Respondents prove by a preponderance of the evidence Claimant's follicular lymphoma did occur on the job with Employer?

- Did Claimant prove treatment he received through Rocky Mountain Cancer Centers was reasonably needed, injury-related, and authorized?

- Did Claimant prove his average weekly wage (AWW) is $1,192.31?

FINDINGS OF FACT

1. Claimant is a 54-year-old fire captain who has worked as a firefighter for Employer since May 2013.

2. Claimant was diagnosed with follicular lymphoma (FL) in July 2019.

3. Claimant reported the diagnosis to Employer on July 18, 2019, and stated it was related to exposures to carcinogenic materials during his work as a firefighter. Claimant was not referred for medical treatment but told he could see the doctors of his choice. He went to Rocky Mountain Cancer Centers where he underwent treatment, including chemotherapy for follicular B-cell lymphoma.

4. Claimant completed chemotherapy with a good response. The cancer is currently in remission, and he has returned to full duties.

5. Claimant's father was an oncology radiologist. He was diagnosed with non-Hodgkin's lymphoma (NHL) and recovered. He eventually died of Alzheimer's at age eighty-two. The record does not establish the precise dates or type of his NHL.

6. Claimant has an identical twin brother who is a firefighter with North Metro Fire Protection District. He has never been diagnosed with NHL/FL or any other cancer. Claimant also has three sisters, two of whom were diagnosed with breast cancer.

7. Claimant has been a firefighter for 25 years. His career began in 1996 at Cherryvale Fire Department in Boulder, Colorado. He started as a volunteer and became a paid firefighter in 2000. He worked for several fire departments in the years that followed, eventually coming to work for Employer on May 31, 2013.

8. Employer's department is much busier than the other fire departments in which Claimant worked. There were also significant differences in the frequency and types of fires, including more grass fires and structural fires. Claimant did not wear SCBA while working grass fires. Additionally, the Plymovent diesel exhaust system at the station did not function properly. Claimant testified five bays are out of service. Chief Ritter

testified he had not inspected the Plymovent systems but heard from another captain that only two of the systems were broken on the day of the hearing. Regardless of the specific number of bays with malfunctioning ventilation equipment as of the hearing, Claimant was probably exposed to excessive diesel exhaust regularly.

9. Dr. Annyce Mayer performed an IME and testified on behalf of Claimant. Dr. Mayer confirmed FL is a cancer of the hematological system and persuasively opined Claimant satisfies the threshold criteria to trigger the statutory presumption in § 8-41-209. Although Respondents declined to stipulate that Claimant satisfied the threshold criteria at hearing, they conceded the issue in their post-hearing brief.

10. Dr. Mayer acknowledged that a precise causation determination of NHL/FL is challenging due to the symbiotic nature of the disease. She opined the development of cancer is complex and often multi-factorial. It is difficult if not impossible to identify the specific materials to which any individual firefighter has been exposed because of the wide variety of combustible materials at fire scenes. Nevertheless, Claimant was probably exposed to and absorbed a wide variety of known carcinogens through his respiratory system and his skin. Dr. Mayer opined,

> It is my medical opinion to a reasonable degree of medical probability that [Claimant] was exposed to carcinogens capable of causing this cancer during his 23 years as a firefighter, and in particular during the approximately 8 years of service on [Employer's] Fire Department, where the fires were much more frequent, much more intense, and there was no use of respiratory protection at grass fires, where the grass was notably contaminated with roadside debris including plastics, located along railroad tracks and including agricultural land that had been sprayed with herbicides, pesticides, including widespread use of glyphosate-containing herbicides which itself has been linked to non-Hodgkin's lymphoma, making his exposure there very different from the other fire department on which he served.

11. Dr. Mayer also cited Claimant's repeated exposure to diesel exhaust as a significant risk factor.

12. Regarding the epidemiological evidence, Dr. Mayer opined, "four separate meta-analyses on risk of cancer in fire fighters showed statistically significant increased risk of NHL." She principally relied on the 2006 LeMasters meta-analysis, which found a "probable" relationship, and the 2010 IARC meta-analysis, which found a statistically significant increased risk of NHL among firefighters. She also cited two more recent meta-analyses—Soteraides (2019) and Jalilian (2019)—that found elevated incidence and mortality risk estimates for NHL in firefighters. She conceded she knew no study that found an increased risk of developing FL from being a firefighter but offered critiques of the only two studies that have specifically looked at FL rather than the umbrella diagnosis of NHL.

13. Dr. Mayer agreed genetic risks probably play a role in development of NHL/FL but are not necessarily the exclusive or even predominant cause. She referenced Claimant's twin brother and testified, "it's obviously not a matter of genetic risks, and it's because of different exposures. Even though they've both worked as firefighters, they've worked in different environments, different personal protective equipment, different types of fires, and different types of things present at those fires."

14. Dr. Mayer concluded Claimant's cancer was probably caused by his occupational exposures as a firefighter, "primarily" during his eight years working for Employer.

15. Dr. Sander Orent performed an IME and testified for Claimant. Dr. Orent has extensive experience providing safety instruction to multiple Colorado Fire Districts and treating firefighters as a designated provider. Dr. Orent previously evaluated Claimant while Claimant worked for Boulder Rural and North Metro. This experience gives Dr. Orent a unique perspective on the differences in occupational exposures experienced by Claimant and his brother. Dr. Orent explained,

> [Claimant's] identical twin is also a professional firefighter. This twin works at North Metro Fire where [Claimant] also worked for a short time. However, this twin has continued. I have direct and personal knowledge of the intensity of dedication of North Metro Fire Services to decontamination on scene and the proper use and cleaning of personal protective equipment. I have been intimately involved in assisting them with recommendations in this regard and have done many on-site visits to North Metro Fire Department, where I have examined every member of that department within the last 18 months. In addition, I have similar experiences with Boulder Rural Fire where I have direct and personal knowledge of their dedication to the use of personal protective equipment and have performed virtual evaluations of these firefighters as well, as well as in-person evaluations over the years. The difference between Sterling's environment, personal protective equipment utilization, and contamination and North Metro's use of personal equipment, dedication to contamination, and vigilance regarding carcinogenic exposure could not be more stark.

16. Dr. Orent noted, "these brothers have identical genetic footprints," which shows "in extraordinarily clear terms the fact that genetics is not the primary determinant of cancer in this patient." He agreed with Dr. Mayer that a synergistic process take place in the evolving development of cancer, including carcinogens exposures and familial predispositions. He noted Claimant "obviously" has a genetic propensity to develop a malignancy in the lymphatic system. But he emphasized the need for a "trigger," which he believed was provided by Claimant's occupational exposure to carcinogens over many years. He opined Claimant's exposure to carcinogens was probably causative of his NHL/FL.

17. Herman Gibb, Ph.D. performed a record review and testified for Respondents. Dr. Gibb explained that NHL encompasses a group of cancers of

lymphocytes or white blood cells. There are over 30 NHL subtypes; the two most common subtypes being diffuse large B-cell lymphoma (DLBCL) and follicular lymphoma (FL). Dr. Gibb identified risk factors for NHL as being male, being white, living in a developed country such as the United States, having a first degree relative with NHL, having a weakened immune system, having certain autoimmune diseases, and having certain infections. Based on his review of Claimant's medical records, occupational records, and various case studies, Dr. Gibb concluded Claimant's risk of FL was not increased by his work as a firefighter but was increased by having a first degree relative with NHL (his father).

18. Dr. Gibb discussed a large cohort study of firefighters (Glass 2014, 2017) which found no increased incidence of FL. He further testified that the InterLymph Consortium's analysis of pooled case-control studies did not find the occupation of firefighter to be a risk factor for FL. Dr. Gibb believes the LeMasters meta-analysis is outdated, flawed, and overestimated the association between firefighting and NHL. Dr. Gibb opined the firefighter cancer studies he considers to be the highest-quality studies have not showed increased incidence of NHL. Dr. Gibb opined risk factors vary among the various subtypes of NHL, but one risk factor common to both NHL and the FL subtype is having a first degree relative with NHL. Dr. Gibb noted claimant's father had NHL. He cited literature that reported family history of any hematologic malignancy in a first-degree relative was the most significant risk factor examined.

19. Based on his review of medical records and published literature, Dr. Gibb concluded Claimant's risk of FL was not increased by his work as a firefighter but was increased by his father having NHL. Dr. Gibb was unimpressed by the fact Claimant's brother has not been diagnosed with FL or NHL and opined it does not affect the causation analysis of Claimant's cancer.

20. Dr. Gibb's epidemiological opinions regarding a causal link between firefighting and FL were no more persuasive than the opinions offered by Dr. Mayer and Dr. Orent.

21. Dr. Mayer's and Dr. Orent's opinions regarding the role of familial history in the development of Claimant's cancer were more persuasive than Dr. Gibb's opinions.

22. Respondents failed to prove Claimant's work as a firefighter did not increase the risk of and cause FL.

23. Respondents failed to prove Claimant's familial history of NHL is a more likely cause of his FL than his employment.

24. Respondents failed to prove Claimant's FL did not occur on the job.

25. The treatment Claimant received at Rocky Mountain Cancer Centers was reasonably needed to cure and relieve the effects of his compensable cancer. Claimant had the right to select his own provider because Employer did not refer him to a physician.

26. Claimant's average weekly wage (AWW) is $1,192.31 based pre-injury earnings of earnings of $62,000 per year ($62,000 / 52 = $1,192.31).

CONCLUSIONS OF LAW

A. Compensability

Section 8-41-209 (the "firefighter cancer statute") provides:

> (1) Death, disability, or impairment of health of a firefighter of any political subdivision who has completed five or more years of employment as a firefighter, caused by cancer of the brain, skin, digestive system hematological system or genitourinary system and resulting from his or her employment as a firefighter, shall be considered an occupational disease.
>
> (2) Any condition or impairment of health described in subsection (1) of this section:
>
> (a) Shall be presumed to result from a firefighter's employment if, at the time of becoming a firefighter or thereafter, the firefighter underwent a physical examination that failed to reveal substantial evidence of such condition or impairment of health that preexisted his or her employment as a firefighter; and
>
> (b) Shall not be deemed to result from the firefighter's employment if the firefighter's employer or insurer shows by a preponderance of the medical evidence that such condition or impairment did not occur on the job.

Proof by a preponderance of the evidence requires the proponent to establish that the existence of a "contested fact is more probable than its nonexistence." *Page v. Clark*, 592 P.2d 792 (Colo. 1979). In general, "medical probability" or "more likely than not" means the existence of a contested fact is more than 50% likely.

Once a firefighter has met the threshold requirements of the firefighter cancer statute, the burden shifts to respondents to prove by a preponderance of the evidence that the firefighter's cancer was not caused by his or her employment. As found, Claimant satisfies the threshold statutory requirements, thereby shifting the burden to Employer.

The firefighter cancer statute has been the subject of significant litigation and appellate case law since its passage. The Supreme Court provided the definitive interpretation in *City of Littleton v. Industrial Claim Appeals Office*, 370 P.3d 157 (Colo. 2016) and the companion case *Industrial Claim Appeals Office v. Town of Castle Rock*, 370 P.3d 151 (Colo. 2016). *City of Littleton* held that the statutory presumption embodied by § 8-41-209(2) "is substantive in that it remains in the case as a substitute for evidence." *Id*. at 165. But the court emphasized that the statutory presumption "is not conclusive, or irrebuttable." *Id*. at 168. The employer can overcome the statutory presumption by proving, by a preponderance of the evidence, that the firefighter's cancer "did not occur on the job." *Id*. at 165. Nevertheless, the employer faces a "formidable" burden, "because the employer is tasked with proving a negative." *Id*. at 172.

City of Littleton clarified the types of evidence the employer can use to rebut the statutory presumption and prove a firefighter's cancer is probably not work-related. The employer can attempt to meet its burden either with evidence addressing "general causation" or evidence regarding "specific causation." The court stated "the employer may establish, by a preponderance of the medical evidence, either: (1) that a firefighter's known or typical occupational exposures are not capable of causing the type of cancer at issue; or (2) that the firefighter's employment did not cause the firefighter's particular cancer, where, for example, the claimant firefighter was not exposed to the cancer-causing agent, or where the medical evidence renders it more probable that the cause of the claimant's cancer was not job-related." *Id*. Additionally, an employer can rely on "particularized risk-factor evidence" to prove that a firefighter's cancer is not related to his employment, but "is not required to prove a specific alternate cause of the firefighter's cancer." *Industrial Claim Appeals Office v. Town of Castle Rock*, 370 P.3d 151, 157 (Colo. 2016).

The evidence presented by Employer addresses both general and specific causation. Dr. Gibb discounted the LeMasters and IARC studies upon which Claimant's experts relied and opined more current epidemiological evidence shows no increased risk or incidence of NHL or FL among firefighters. With respect to specific causation, Dr. Gibb noted Claimant had a significantly increased risk of FL because his father had NHL. Because Dr. Gibb believes the only valid risk factor was personal to Claimant and unrelated to his work, Dr. Gibb concluded Claimant's FL probably did not occur on the job.

Dr. Gibb raised some significant questions regarding the empirical basis for the presumed causal connection between FL and firefighting. This is a complex issue and Dr. Gibb's opinions would be quite challenging for Claimant were he tasked with proving general causation. But in this case, the traditional roles are reversed by virtue of § 8-41-209. The ALJ appreciates Dr. Gibb's insight on this issue, but finds the opinions of Dr. Mayer and Dr. Orent sufficiently persuasive to prevent Respondents from crossing the "more likely than not" threshold to prove firefighting does not increase the risk of NHL or FL. As Dr. Mayer explained, firefighters are exposed to a wide variety of established and suspected carcinogens, and several studies have shown firefighters have an increased risk of NHL. Dr. Gibb dismissed those studies in favor of studies focusing more narrowly on FL. But drilling down to more specific types of cancer amplifies the challenges associated with determining cancer risk factors in a relatively small percentage of the workforce.[1] Moreover, firefighters tend to be healthier and more physically robust that the average person, which has a natural tendency to decrease disease rates (the so-called "healthy worker effect"). Although researchers try to account for these factors with study designs and analytical methodology, they still impact the certainty that can be obtained

[1] This limitation is highlighted by the InterLymph study, which Dr. Mayer noted did not have a large enough sample size to evaluate FL risk by length of employment as a firefighter.

with increasingly granular epidemiological investigation. This, in turn, has significant implications for the party with the burden of proof—Employer in this case.

Additionally, the explanatory power of Claimant's family history is effectively neutralized by the fact his identical twin brother does not have cancer. As Dr. Mayer credibly opined, this fact makes family history "a possible but not probable cause" of Claimant's FL. Dr. Gibb's macro-level focus on population data and generalized familial risk data is ill-suited to account for micro-level factors that can explain the different disease outcomes of Claimant and his identical twin brother. By contrast, Dr. Orent persuasively described multiple differences between the environments in which Claimant and his brother worked which provide a reasonable explanation why Claimant's cancer could be considered work-related even though his brother does not have cancer.

Although this is a close case, Employer failed to prove by a preponderance of the evidence that Claimant's cancer did not occur on the job. Therefore, Claimant's FL is compensable under § 8-41-209.

B. Medical benefits

The respondents are liable for medical treatment reasonably needed to cure and relieve the effects of an industrial injury. Section 8-42-101. The claimant must prove entitlement to disputed medical benefits by a preponderance of the evidence. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). Besides proving treatment is reasonably necessary, the claimant must prove the provider is "authorized." *Bunch v. Industrial Claim Appeals Office*, 148 P.3d 381 (Colo. App. 2006). Under § 8-43-404(5)(a), the employer has the right to choose the treating physician in the first instance. If the employer does not tender medical treatment "forthwith" upon receiving notice of the injury, the right of selection passes to the claimant. *Rogers v. Industrial Claim Appeals Office*, 746 P.2d 565 (Colo. App. 1987).

As found, the treatment Claimant received through Rocky Mountain Cancer Centers was reasonably needed to cure and relieve the effects of his compensable FL. Rocky Mountain Cancer Centers is authorized because Employer never referred Claimant to a physician after receiving notice of his claim.

C. Average weekly wage

Section 8-42-102(2) provides compensation shall be based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that seems most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). As found, Claimant's average weekly wage (AWW) is $1,192.31. Respondents did not take a position on AWW. Claimant's proposed computational methodology based on annual earnings of $62,000 is reasonable and provides a fair approximation of his average earnings at the time of injury.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits related to follicular lymphoma is compensable.

2. Insurer shall cover all medical treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's compensable occupational disease, including but not limited to, treatment provided by Rocky Mountain Cancer Centers.

3. Claimant's average weekly wage is $1,192.31.

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

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

DATED: June 30, 2021

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-134-645-002

ISSUE

1. Whether Claimant established by a preponderance of the evidence that the left shoulder surgery requested by Armodios Hatzidakis, M.D., is reasonable, necessary, and causally related to his admitted industrial injury of February 17, 2020.

FINDINGS OF FACT

1. Claimant is a 37-year-old man who sustained an admitted industrial injury to his left shoulder arising out of the course of his employment with Employer on February 17, 2020.

2. On February 17, 2020, Claimant was assisting a coworker in transferring boxes of vinyl flooring from a pallet to a truck, when one of the boxes (weighing approximately 60 pounds) struck Claimant on the left shoulder. Claimant testified that he had no prior injuries to his left shoulder and had full use of his shoulder without pain prior to February 17, 2020.

3. Claimant immediately felt pain in his shoulder, but believed the pain would resolve and did not report the incident to his supervisor on February 17, 2020. The following day, Claimant's pain did not resolve and worsened, and Claimant reported the incident to Employer. For various reasons, including the onset of the 2020 coronavirus pandemic, Claimant did not see a medical provider until March 9, 2020, approximately three weeks following the date of injury.

4. On March 9, 2020, Claimant saw James D. Fox, M.D., at Concentra. Based on x-rays taken on that day, Dr. Fox diagnosed Claimant with a grade 2 acromioclavicular (AC) separation of the left shoulder, which Dr. Fox attributed to Claimant's work injury. He recommended that Claimant undergo physical therapy twice per week for three weeks and avoid heavy physical activity. (Ex. 2).

5. Claimant participated in physical therapy which helped increase Claimant's strength, but did not resolve his pain. By March 30, 2020, Claimant had been laid off by Employer due to a work slow-down caused by the pandemic. Dr. Fox recommended work restrictions to include no lifting, pushing, or pulling more than 30 pounds with the left upper extremity and no lifting greater than 15 pounds above shoulder level with the left arm. (Ex. 2).

6. By May 4, 2020, Claimant's shoulder pain condition had not resolved, and Dr. Fox referred Claimant for a left shoulder MRI and a referral with an orthopedic surgeon, Armodios Hatzidakis, M.D. Claimant remained under the same work restrictions and previously recommended. (Ex. 2).

7. On June 30, 2020, Claimant saw Rose Christensen, PA-C, at Dr. Hatzidakis' office for evaluation of his left shoulder. Ms. Christensen reviewed x-rays of Claimant's left shoulder and interpreted the x-ray as showing a type I/II AC joint separation when compared to the right side. Ms. Christensen diagnosed Claimant with a left shoulder and left AC joint strain with type I/II AC joint separation. She recommended additional physical therapy and a cortisone injection into the left AC joint for improvement of pain. The injection was performed by Dr. Hatzidakis on June 30, 2020. (Ex. 3).

8. Claimant saw Dr. Hatzidakis on September 29, 2020, Claimant reported relief from the June shoulder injection for 1 to 2 days. Dr. Hatzidakis testified that the Claimant's relief from the AC injection confirmed that Claimant's AC joint was the source of Claimant's shoulder pain. Dr. Hatzidakis testified that Claimant's AC joint separation was causally related to Claimant's work injury.[1] Claimant also reported some pain into his biceps and arm while twisting his wrist, and also exhibited scapular winging. An EMG study was performed to determine if Claimant had any nerve involvement due to scapular winging. The EMG was incomplete and did not evaluate Claimant's nerves, but Dr. Hatzidakis determined that it was appropriate to proceed with surgery because Claimant's scapular winging had improved, and the source of his pain was his AC joint. (Ex. 3 and Hatzidakis deposition).

9. On November 16, 2020, Dr. Hatzidakis submitted a request for authorization of surgery to Insurer. The proposed procedure was:

> "Left Shoulder: Arthroscopy shoulder debridement extensive, Arthroscopy shoulder decompression subacromial partial acromioplasty WITH coracoacromial release, Arthroscopy shoulder distal claviculectomy, Arthroscopy shoulder WITH bicep tenodesis, Arthroscopy shoulder repair slap lesion." (Ex. 3)

10. On December 8, 2020, Dr. Hatzidakis submitted a revised request for authorization to Insurer, requesting authorization of the following procedure:

> "Left Shoulder: Arthroscopy shoulder debridement extensive, Arthroscopy shoulder decompression subacromial partial acromioplasty WITH coracoacromial release, Arthroscopy shoulder distal claviculectomy."

11. On December 15, 2020, Insurer denied Dr. Hatzidakis' request for authorization pending the completion of a WCRP Rule 16-7 (e) Independent Medical Examination. (Ex. 3).

12. Dr. Hatzidakis testified the recommended surgery is to evaluate Claimant's shoulder, perform debridement as necessary for any partially-torn tissue in the shoulder and to remove the end of Claimant's collarbone (i.e., a distal clavicle resection or claviculectomy). Dr. Hatzidakis expressed that the only "certain" procedure was the distal clavicle resection, which is to address Claimant's work-related injuries. However, he also

[1] Dr. Hatzidakis was admitted as an expert in orthopedic surgery and his deposition was accepted in lieu of live testimony.

sought authorization for “possibles,” meaning evaluation and potential treatment of other areas of the shoulder if pathology was discovered during surgery in the joint subacromial space. In this case, the “possible” included potential repairs to Claimant’s biceps or labrum, if injuries to those structures are identified during surgery and debridement of any partially torn tissue.

13. Dr. Hatzidakis credibly testified evaluation and treatment of other structures to address pathology identified during surgery beyond the distal clavicle resection is the standard of care, and that it would be unreasonable to ignore other pathology if found. Dr. Hatzidakis indicated that Claimant does not have any obvious tear of the labrum or rotator cuff, and that it is probable that those areas would not need to be addressed during surgery. He also credibly testified that if no pathology is present, no surgery on these areas would be performed.

14. Nonetheless, Dr. Hatzidakis believes that evaluation of the labrum and biceps is appropriate because Claimant had some question of findings due to his biceps and because the labrum is often injured with the AC joint in injuries similar to Claimant’s. Similarly, he testified that the long-head of the biceps is attached to the labrum and it would be potentially repaired if it had sustained damage. Dr. Hatzidakis credibly testified that due to the mechanism of injury, it is not possible to know with certainty what structures within Claimant’s shoulder were damaged, and that while a small amount of fraying in the rotator cuff or labrum may be normal, tears or areas of significant finding may reasonably be assessed as due to Claimant’s work-injury. Dr. Hatzidakis also credibly testified that the mechanism of injury was also consistent with a rotator cuff injury. He expressed that Claimant would not be at maximum medical improvement until completing surgery and any follow-up rehabilitation associated with the surgery.

15. Mark Failinger, M.D., performed IMEs at Respondents’ request, and issued reports related to those examinations. Dr. Failinger was admitted as an expert in orthopedic surgery and his deposition was accepted in lieu of live testimony. As relevant to the issues in this hearing, Dr. Failinger agreed that Claimant sustained a work-related injury to his AC joint and testified that performance of an arthroscopic distal claviculectomy is a reasonable and necessary procedure related to Claimant’s industrial injury because the AC joint injection previously performed confirmed the AC joint as a pain generator.

16. Dr. Failinger expressed that the remaining procedures were not unreasonable, but were not related to Claimant’s industrial injury because pathology for which the other procedures would be performed was not likely present in Claimant’s shoulder. For example, when asked if debridement is a reasonable procedure, he indicated that the procedure would be reasonable to perform, but he did not believe that pathology requiring a debridement would be present. With respect to the decompression subacromial partial acromioplasty with coracoacromial release, Dr. Failinger opined that the procedure was brief 3–5-minute procedure that is performed where the surgeon believes the rotator cuff is irritated by bone in the acromion. However, he does not believe that there is MRI evidence of irritation at the rotator cuff. Dr. Failinger also agreed that post-surgical physical therapy would be reasonable.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

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

SPECIFIC MEDICAL BENEFITS AT ISSUE

The Act imposes upon respondents the duty to furnish medical treatment "as may reasonably be needed at the time of the injury … and thereafter during the disability to cure and relieve the employee from the effects of the injury." § 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Industrial Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO, May 31, 2006). In addition, the duty to furnish medical treatment includes furnishing treatment for conditions representing a natural development of the of the industrial injury, providing compensation for incidental services necessary to obtain the required medical care, and "paying for treatment of unrelated conditions when such treatment is necessary to achieve optimum treatment of the industrial injury." *In re Claim of Walling,* W.C. No. 4-760-050-02 (ICAO, Dec. 10, 2013) (internal citations omitted). Diagnostic procedures are also compensable if they are reasonably necessary to the provision of treatment designed to cure and relieve the effects of the injury*. Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949).

The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). The existence of evidence which, if credited, might permit a contrary result affords no basis for relief on appeal. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002)." *In the Matter of the Claim of Bud Forbes, Claimant*, No. W.C. No. 4-797-103, 2011 WL 5616888, at *3 (Colo. Ind. Cl. App. Off. Nov. 7, 2011). An "expert medical opinion is not needed to prove causation where circumstantial evidence supports an inference of a causal relationship between the injury and the claimant's condition." *In re Abeyta*, W.C. No. 4-669-654 (2008). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School District No.11*, W.C. No. 3-979-487, (ICAO, Jan. 11, 2012); *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO, Feb. 12, 2009).

Claimant has established by a preponderance of the evidence that the surgery requested by Dr. Hatzidakis is reasonably needed to cure or relieve the effects of his industrial injury. Specifically, the distal clavicle resection or claviculectomy is reasonably necessary to address Claimant's AC joint separation. Both Dr. Hatzidakis and Dr. Failinger agree that this surgery is reasonable, necessary, and related to his work injury, and the ALJ finds the testimony of both physicians credible on this issue.

The remaining potential portions of the requested surgery (i.e., debridement, decompression subacromial partial acromioplasty with coracoacromial release) present a different issue because the scope of the surgery cannot be determined until Claimant's shoulder joint is inspected during surgery. Similarly, whether Claimant requires intervention at his biceps, labrum or rotator cuff is also incapable of determination at this time. The ALJ credits Dr. Hatzidakis' testimony that the standard of care requires that Dr. Hatzidakis' evaluate the structures of the shoulder and treat pathology found during surgery, and that no surgery would be performed on undamaged structures. In that sense, the surgery requested by Dr. Hatzidakis is essentially a combination of compensable treatment and diagnostic procedures, which are intertwined. Moreover, the ALJ credits Dr. Hatzidakis' testimony that evaluation and repair of the Claimant's labrum and biceps tendon, if pathology exists, is reasonable because the labrum is often injured with the AC joint. Similarly, his testimony that partially-torn tissue is often found in a shoulder that has been injured was also credible. Given the totality of the evidence, including Claimant's testimony that his shoulder was asymptomatic prior to his injury, the

ALJ concludes that the full surgery recommended by Dr. Hatzidakis is reasonably necessary to cure or relieve the effects of Claimant’s industrial injury.

ORDER

It is therefore ordered that:

1. Respondents shall pay for the full right shoulder surgery recommended by Dr. Hatzidakis as described in Dr. Hatzidakis’ December 8, 2020, request for authorization.

2. All matters not determined herein are reserved for future determination.

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

DATED: July 1, 2021

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

1. Whether the claimant has demonstrated, by preponderance of the evidence, that the right total knee replacement recommended by Dr. Vineet Singh is related to the June 27, 2020 work injury.

2. At hearing, the parties stipulated that the recommended surgery is reasonable and necessary medical treatment of the condition of the claimant's right knee.

FINDINGS OF FACT

1. The claimant has worked for the employer for two years as a registered nurse and night supervisor. The claimant works at Valley Manor, a long-term care and rehabilitation center. In her position, the claimant has 30 residents assigned to her for purposes of administering medication and providing other treatment during the night shift.

2. During her shift on June 27, 2020, the claimant noted that a resident appeared to be vomiting blood, with symptoms indicative of internal bleeding. The claimant ran to get help for the resident. As she did so, she felt her right knee "give out" and she began limping.

3. After reporting the incident to the employer, the claimant was seen at Cedar Point Health for medical treatment. The claimant was first seen at that practice on July 6, 2020, by Chris Polsley, PA-C. On that date, the claimant reported right knee pain with stiffness, popping, and catching. The claimant also reported that she does not have a prior history of right knee issues. PA Polsley noted his concern for possible internal derangement of the claimant's right knee. As a result, he ordered a magnetic resonance image (MRI) of the claimant's right knee. PA Polsley also recommended the claimant use a hinged knee brace.

4. On July 20, 2020, a right knee MRI showed a radial tear of the posterior horn of the medial meniscus, advanced medial compartment degenerative changes, and mild to moderate patellofemoral compartment chondromalacia.

5. On July 27, 2020, the claimant returned to PA Polsley. Based upon the MRI results, PA Polsley referred the claimant for an orthopedic consultation.

6. On July 30, 2020, the respondents filed a General Admission of Liability (GAL) admitting for medical benefits and temporary total disability (TTD) benefits.

7. On August 20, 2020, the claimant was seen by orthopedic surgeon, Dr. Vineet Singh. On that date, Dr. Singh noted the claimant had pain on the inner aspect of her right knee that worsened with rotation. Dr. Singh recommended and administered a

corticosteroid injection to the claimant's right knee. Dr. Singh also referred the claimant to physical therapy.

8. On October 6, 2020, the claimant returned to Dr. Singh. At that time, the claimant reported that the knee injection did not relieve her symptoms. Dr. Singh recommended the claimant undergo a right knee arthroscopy and meniscus repair.

9. On October 23, 2020, Dr. Singh performed a right knee partial medial meniscectomy and loose body removal.

10. On November 12, 2020, the claimant was seen by Dr. Singh and reported slow improvement. In the medical record of that date, Dr. Singh noted that during the surgery he observed grade 4 chondromalacia on the femur, with a corresponding lesion on the tibia. Dr. Singh discussed possible additional treatment including another injection, the use of Synvisc, and potentially a unicompartmental or total knee arthroplasty.

11. The claimant credibility testified that following the meniscus repair, her symptoms worsened. She had increased pain, weakness and her limp worsened.

12. On December 8, 2020, the claimant reported to Dr. Singh that she had experienced daily right knee pain of seven to eight out of ten. Dr. Singh again referenced the grade 4 chondromalacia in the claimant's right knee and opined that the chondromalacia is unlikely work related. He further opined that the claimant's meniscus pathology is work related. On that same date, Dr. Signh administered an injection to the claimant's right knee.

13. On December 9, 2020, Dr. Singh requested authorization for a right total knee replacement.

14. On January 29, 2021, the claimant attended an independent medical examination (IME) with Dr. Mark Failinger. In connection with the IME, Dr. Failinger reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his IME report, Dr. Failinger identified that the claimant has exacerbation of a significant pre-existing right knee medial compartment degenerative joint disease. Dr. Failinger opined that it would be reasonable to treat the condition of the claimant's right knee with a knee replacement. He further opined that the claimant's need for a right knee replacement is not related to the June 27, 2020 work incident. In support of this opinion, Dr. Failinger noted that the claimant's mechanism of injury would not accelerate that pre-existing condition in her right knee. Dr. Failinger specifically noted that it is the grade 4 chondromalacia that is necessitating the knee replacement.

15. Based upon the opinions of Dr. Failinger, the respondents denied authorization for the requested right knee arthroplasty.

16. On March 19, 2021, the respondents filed a second GAL. This GAL reflected TTD and temporary partial disability (TPD) benefits.

17. The ALJ credits, the medical records and the opinions of Dr. Failinger. The ALJ also credits the opinion of Dr. Singh that although the claimant’s meniscus pathology is work related, the chondromalacia is unlikely to be work related. The ALJ is not persuaded that the claimant’s June 27, 2020 work injury aggravated, accelerated, or combined with her pre-existing right knee condition to necessitate a right knee replacement. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that her need for a right knee replacement is related to the admitted June 27, 2020 work injury.

CONCLUSIONS OF LAW

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

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

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

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

5. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury.

Section 8-42-101, C.R.S.; see Sims v. Industrial Claim Appeals Office, 797 P.2d 777 (Colo. App. 1990).

6. The Colorado Workers' Compensation Medical Treatment Guidelines (MTG) are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). The statement of purpose of the MTG is as follows: "In an effort to comply with its legislative charge to assure appropriate medical care at a reasonable cost, the director of the Division has promulgated these 'Medical Treatment Guidelines.' This rule provides a system of evaluation and treatment guidelines for high cost or high frequency categories of occupational injury or disease to assure appropriate medical care at a reasonable cost." WCRP 17-1(A). In addition, WCRP 17-5(C) provides that the MTG "set forth care that is generally considered reasonable for most injured workers. However, the Division recognizes that reasonable medical practice may include deviations from these guidelines, as individual cases dictate."

7. While it is appropriate for an ALJ to consider the MTG while weighing evidence, the MTG are not definitive. *See Jones v. T.T.C. Illinois*, Inc., W.C. No. 4-503-150 (May 5, 2006); *aff'd Jones v. Industrial Claim Appeals Office* No. 06CA1053 (Colo. App. March 1, 2007) (not selected for publication) (it is appropriate for the ALJ to consider the MTG on questions such as diagnosis, but the MTG are not definitive); *see also Burchard v. Preferred Machining*, W.C. No. 4-652-824 (July 23, 2008) (declining to require application of the MTG for carpal tunnel syndrome in determining issue of PTD); *see also Stamey v. C2 Utility Contractors et al*, W.C. No. 4-503-974 (August 21, 2008) (even if specific indications for a cervical surgery under the MTG were not shown to be present, ICAO was not persuaded that such a determination would be definitive).

8. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that the right total knee replacement recommended by Dr. Singh is related to the admitted June 27, 2020 work injury. The medical records and the opinions of Dr. Failinger are found to be credible and persuasive.

ORDER

It is therefore ordered that the claimant's request for right total knee arthroplasty is denied and dismissed.

Dated this 1st day of July 2021.

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

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that she suffered an occupational disease arising out of and in the course and scope of her employment with the employer.

2. If the claimant proves a compensable occupational disease, whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment of her right upper extremity, including surgery performed by Dr. James Treadwell, is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the occupational disease.

3. If the claimant proves a compensable occupational disease, whether the claimant is entitled to temporary total disability (TTD) benefits for the period of August 7, 2020 through November 4, 2020 and/or the period of January 6, 2021 and ongoing.

4. If the claimant proves a compensable occupational disease, what is her average weekly wage (AWW)?

FINDINGS OF FACT

1. The claimant has been employed with the employer for 23 years. For the last six years, she has worked for the employer as a pharmacy technician. The claimant's job duties include filling customer prescriptions, speaking with customers in person and over the phone, and computer work. The task of filling prescriptions involves a number of steps, including the use of a handheld device for scanning. The handheld divide weighs 1.2 pounds when in use.

2. With each prescription, the claimant would scan a bag with the handheld device. The device would inform her of what drug to obtain. The claimant would then find the appropriate drug bottle and scan it. She would also scan the printer to print labels and paperwork. The claimant would then open the twist bottle and pour out the pills. The claimant would hand count the pills and place them in a new bottle. She would twist on a cap and affix a label.

3. The claimant is right hand dominant. When using the handheld device, she held it in her right hand. To scan, she would press buttons on either side of the device, with her thumb and third finger.

4. The claimant testified that in April or May 2019, she began to experience numbness in her right hand. Due to these symptoms, the claimant sought treatment with a chiropractor, Dr. John Unger. On September 30, 2019, the claimant was seen by Dr. Unger. At that time, the claimant reported pain, numbness, stiffness, and tingling in her right hand and wrist. The claimant also reported to Dr. Unger that these symptoms had begun six months prior. However, in the medical record of that date, Dr. Unger noted that the claimant's symptoms "[o]ccurred after repetitive grasping on 9/20/2019."

5. The claimant testified that treatment with Dr. Unger did not resolve her symptoms. The claimant further testified that she would feel some symptom relief after a treatment with Dr. Unger. However, after working an eight hour shift, her symptoms would return as if she had never seen Dr. Unger.

6. As a result of her ongoing symptoms, on May 29, 2020, the claimant reported her right hand and wrist symptoms to the employer. Based upon the claimant's report, a workers' compensation claim was initiated. In an Employer's First Report of Injury dated May 29, 2020, the claimant's date of injury/illness was identified as April 26, 2020.

7. The claimant's authorized treating physician (ATP) for this claim is Dr. Craig Stagg. The claimant was first seen by Dr. Stagg on June 1, 2020. At that time, the claimant reported that over the last month she had pain and numbness in her right upper extremity and triggering of the third finger on both hands. Dr. Stagg recommended a job site analysis and causality assessment, pursuant to the Colorado Medical Treatment Guidelines (MTG). Dr. Stagg also recommended occupational therapy and a wrist x-ray.

8. On June 7, 2020, the claimant returned to Dr. Stagg. In the medical record of that date, Dr. Stagg listed the claimant's diagnoses as de Quervain's tenosynovitis and right finger triggering. Dr. Stagg recommended continued therapy.

9. On June 30, 2020, Torrey Kay Beil, Vocational Rehabilitation Counselor and Medical Case Manager, performed a job demands analysis (JDA) related to the claimant's job duties in the pharmacy. As part of the JDA, Ms. Beil observed the claimant performing her normal job duties. It is noted in Ms. Beil's report that the claimant used both hands during the JDA to perform her duties because she wore a wrist splint on her right wrist. Ms. Beil understood that although she observed the claimant using both hands during the JDA, the claimant normally would use her right hand to perform her job duties. Specifically, Ms. Beil noted that when the claimant typically used the handheld device, she would do so with her right hand. Ms. Beil concluded that the claimant uses both hands frequently for gripping, and constantly for handling. Ms. Beil found that a risk factor of "6 hours of bilateral elbow flexion at 90° is calculated and present."

10. Extensive video footage was entered into evidence that shows the pharmacy technicians performing their job duties. That video evidence is consistent with the physical activities and risk factor assessment outlined by Ms. Beil in her report.

11. Subsequently, Dr. Stagg referred the claimant for an orthopedic consultation. On July 29, 2020, the claimant was seen by orthopedic surgeon, Dr. James

Treadwell. On that date, the claimant reported that she had experienced right wrist pain and thumb pain for several months. The claimant also reported triggering in her right index and long fingers. Dr. Treadwell listed the claimant's diagnoses as right first dorsal compartment tenosynovitis (De Quervain's), right index finger trigger digit, and right long finger trigger digit. Dr. Treadwell recommended an injection, which the claimant declined at that time.

12. The claimant returned to Dr. Treadwell on September 28, 2020, and reported continued symptoms in her right wrist and fingers. Dr. Treadwell again recommended a wrist injection, which he administered on September 28, 2020. Dr. Treadwell noted that if the claimant did not experience improvement from the injection, surgical intervention would be discussed.

13. The claimant testified that because of her work restrictions, she was moved from her pharmacy position to that of a door greeter. The claimant worked as a door greeter from May 2020 to August 7, 2020. The claimant also testified that she received short term disability benefits from August 2020 through November 2020.

14. Based upon the records entered into evidence, on January 7, 2021, Dr. Treadwell performed surgery to the claimant's right wrist.

15. At the request of the respondents, on April 26, 2021, the claimant attended an independent medical examination (IME) with Dr. Carlos Cebrian. In connection with the IME, Dr. Cebrian reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In addition Dr. Cebrian reviewed the JDA report prepared by Ms. Beil. In his IME report, Dr. Cerian opined that the claimant's right de Quervain's tenosynovitis and trigger finger conditions are not work related. He further opined that the claimant's prior history of paresthesias in a medical nerve distribution is also not work related. In support of his opinions, Dr. Cebrian noted that Ms. Beil's JDA demonstrated that the claimant's work activities did not meet the MTG minimum threshold for forceful and repetitive activity. Dr. Cebrian noted that the claimant's work activities did not have any primary risk factors or secondary risk factors.

16. Dr. Cebrian's testimony was consistent with his IME report. Dr. Cebrian testified that the claimant's medical providers have not performed a formal causation analysis as provided for in theMTG for Cumulative Trauma Conditions. Dr. Cebrian also testified that the claimant did not engage in forceful and repetitive activity for an amount of time necessary to meet the minimum threshold in the MTG. Dr. Cebrian testified that, based on the information available, it is not medically probable that the claimant's right upper extremity complaints were directly, or indirectly, related to her work activities, nor were they the proximate result of her work activities.

17. Dr. Cebrian testified that although there was a finding by Ms. Beil that the claimant's job duties had a risk factor related to the claimant's elbow, that risk factor is unrelated to the claimant's wrist and hand symptoms.

18. The ALJ credits the medical records, the JDA, and the opinions of Dr. Cebrian over the contrary opinions of Dr. Treadwell. The ALJ does not find the claimant's

testimony regarding the nature, onset, and extent of her symptoms to be credible or persuasive. In addition, the ALJ is not persuaded by the claimant's assertion that the JDA is inconsistent or irrelevant. On the contrary, the ALJ credits the JDA and the opinions of Ms. Beil that the claimant's position did not pose any risk factors to support a finding of an occupational disease. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that she suffered an occupational disease that arose out of and in the course and scope of her employment.

CONCLUSIONS OF LAW

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

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

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

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

5. The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause.

Campbell v. IBM Corporation, 867 P.2d 77 (Colo. App. 1993). “Occupational disease” is defined by Section 8-40-201(14), C.R.S. as

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

6. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251, 252 (Colo. App. 1999). Moreover, Section 8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the workplace than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id.* Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id.*

7. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the “logical and recurrent consequence” of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, April 10, 2008). Simply because a claimant’s symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. See *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAP, October 27, 2008).

8. The Colorado Workers’ Compensation Medical Treatment Guidelines (MTG) are regarded as accepted professional standards for care under the Workers’ Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). The statement of purpose of the MTG is as follows: “In an effort to comply with its legislative charge to assure appropriate medical care at a reasonable cost, the director of the Division has promulgated these ‘Medical Treatment Guidelines.’ This rule provides a system of evaluation and treatment guidelines for high cost or high frequency categories of occupational injury or disease to assure appropriate medical care at a reasonable cost.” WCRP 17-1(A). In addition, WCRP 17-5(C) provides that the MTG “set forth care that is generally considered reasonable for most injured workers. However, the Division recognizes that reasonable medical practice may include deviations from these guidelines, as individual cases dictate.”

9. While it is appropriate for an ALJ to consider the MTG while weighing evidence, the MTG are not definitive. *See Jones v. T.T.C. Illinois*, Inc., W.C. No. 4-503-150 (May 5, 2006); *aff'd Jones v. Industrial Claim Appeals Office* No. 06CA1053 (Colo. App. March 1, 2007) (not selected for publication) (it is appropriate for the ALJ to consider the MTG on questions such as diagnosis, but the MTG are not definitive); *see also Burchard v. Preferred Machining*, W.C. No. 4-652-824 (July 23, 2008) (declining to require application of the MTG for carpal tunnel syndrome in determining issue of PTD); *see also Stamey v. C2 Utility Contractors et al*, W.C. No. 4-503-974 (August 21, 2008) (even if specific indications for a cervical surgery under the MTG were not shown to be present, ICAO was not persuaded that such a determination would be definitive).

10. Rule 17, Exhibit 5 of the MTG provides instructions for determining causation of cumulative trauma conditions, including a "Risk Factors Definitions Table". That table provides primary and secondary risk factors related to a claimant's job duties. The ALJ finds no persuasive evidence on the record that the claimant's duties as a pharmacy technician contributed primary or secondary risk factors in the development of her symptoms

11. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that she suffered an occupational disease arising out of and in the course and scope of her employment with the employer. As found, the medical records, th JDA, and the opinions of Dr. Cebrian are credible and persuasive.

12. All remaining endorsed issues are dismissed as moot.

ORDER

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

Dated this 1st day of July 2021.

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

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

ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-049-938-001

ISSUES

I. Whether Respondents proved by a preponderance of the evidence that they may withdraw their admissions of liability based on fraud and can recover from Claimant all medical and disability payments made under this claim.

II. Whether Claimant overcame by clear and convincing evidence the Division Independent Medical Examination (DIME) opinions of Jade E. Dillon, M.D. dated September 11, 2020, and September 14, 2020, regarding maximum medical improvement and permanent impairment.

III. Whether Respondents may recover from Claimant the overpayment of temporary disability benefits if Respondents cannot establish Claimant committed fraud and Claimant fails to overcome the Division Examiner's opinion on MMI and impairment.

IV. Whether Claimant proved by clear and convincing evidence that the DIME of Jade Dillon, M.D., was in error as to MMI and/or impairment and shall be overcome.

V. Whether laches and/or waiver precludes Respondents from withdrawing their admissions and recovering medical and disability benefits paid under this claim based on fraud.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. This case involves an admitted claim based on an alleged injury on May 4, 2017.
2. At the time of the alleged injury, Claimant was 39 years old.

Medical Treatment Before the Alleged Work Injury

Treatment in 2013

3. On October 12, 2013, Claimant presented to Emergency Department at Denver Health Medical Center due bilateral flank pain and low back pain that had been ongoing for one month. Claimant was diagnosed with a back strain and prescribed ibuprofen. Claimant was also provided a handout with instructions for managing his low back pain. Ex. Q, pp. 245-247.

4. On October 18, 2013, Claimant returned to Denver Health. At this appointment, he was again diagnosed with low back pain and had an x-ray taken of his back. The x-ray was normal. Ex. Q, pp. 250-252.

Treatment in April 2017

5. On April 22, 2017, Claimant presented to the Federico Pena Urgent Care Center at Denver Health because of pain in his right calf that radiated up to his hip that had been present for 5-7 days. Claimant told them he had a family history of DVT (deep vein thrombosis). The onset of pain occurred without a known injury. Based on Claimant's symptoms and family history of DVT, they evaluated Claimant for DVT. The DVT testing did not, however, reveal Claimant was suffering from DVT. In the end, the medical provider diagnosed Claimant with sciatica. Claimant was prescribed diclofenac and sciatica stretches. They also gave Claimant a handout that explained sciatica. Ex. Q, p. 255-256. (Ex. Q, p. 261 and deposition transcript of Dr. D'Angelo.)

6. On April 24, 2017, due to worsening symptoms, Claimant escalated his treatment by going to the Emergency Department at Denver Health. At this appointment, Claimant complained of leg pain and back pain. It was also noted that Claimant was limping as he walked to the examination room and that he rated his pain at 7/10. Ex. Q, p. 263-267. Claimant also provided the following history about the onset of his pain as well as the presence of back pain:

   > Patient is a 39 y/o male who presents with leg pain that radiates down from R buttock to calf x 5-6 days. Patient denies any trauma, joint swelling, or fever/chills. Was seen at Pena clinic a few days ago and given sciatica stretches and diclofenac, but this did not improve his pain. Pain is intermittent, sharp, occasionally shooting, and is 7/10 in severity.
   >
   > . . .
   >
   > Review of Systems
   > Musculoskeletal: ***Positive for Back Pain*** (Emphasis added)
   >
   > Ex. X, p. 265.

   The doctor did a physical examination and some provocative testing to assess Claimant's low back pain and leg pain that included a straight leg raise test. The straight let test was positive. Based on Claimant's back pain, they also performed x-rays of his lumbar spine. The x-rays showed degenerative changes. Ex. X, p. 265 and 272.

   Claimant was again diagnosed with sciatica. Based on the doctor's findings on physical exam – Claimant's back pain, positive straight leg test, and sciatica – Claimant was advised to schedule a follow up appointment "***as soon as possible for a visit in 1 week***." (Emphasis added) Ex. Q, pp. 263-279.

   Thus, before Claimant alleged that he injured his back at work, Claimant had a bout of back pain in 2013 that lasted a month. And, just 10 days before his claimed work injury, he had back pain and sciatica that was so bad the doctor directed him to make a follow up appointment for his back and sciatica as soon as possible and within a week. As a result, the ALJ finds that as of April 24, 2017, Claimant knew he had a back condition that was causing pain with sciatica and that his leg pain was not based on a DVT or some other condition and that he needed additional medical treatment. Put another way, on April 24, 2017, Claimant knew his back condition was causing his right leg pain and that he needed to seek additional medical treatment in one week.

Treatment for Alleged May 4, 2017, Injury

7. On May 4, 2017, just 10 days after his visit to the emergency room, Claimant alleged he injured his back at work. Claimant reported his injury and went to Advanced Urgent Care.

8. On May 4, 2017, Claimant presented to Advanced Urgent care and was seen by Dr. Julie Parson's. Just like the symptoms he reported 10 days earlier, Claimant reported having pain in his back and right leg. Claimant stated that his symptoms developed at work and while "replacing the breaker." According to the medical report, Claimant "felt a sharp pull in the whole back going into the right leg." Ex., 16, p. 71. Dr. Parson's reviewed Claimant's past medical history. Ex. 16, p.70. Despite Claimant having a history of back pain and right leg pain – the exact symptoms 10 days earlier – there is no indication in Dr. Parson's medical report that Claimant told her he had the same symptoms 10 days earlier. Moreover, Claimant was asked the duration of his back pain. And, instead of saying he had been having pain for about 3 weeks (5-7 days before his April 22, 2017, ER appointment), Claimant lied and stated that his back pain started on the "date of injury (05/4/2017)." Ex. 16, p. 71.

9. Claimant was diagnosed with a lumbar strain. He was instructed to use over the counter pain medication and to use a heating pad. Claimant was also advised to follow up on May 9, 2017. Ex. X, p. 72-73.

10. On May 6, 2017, instead of May 9, 2017, Claimant returned to Advanced Urgent Care for his ongoing back and leg pain. At this visit Claimant was evaluated by Christi Burge, FNP-C and she changed Claimant's treatment plan. Rather than have Claimant keep taking over the counter medications, she prescribed cyclobenzaprine, Norco, and prednisone. She also ordered an MRI - "ASAP" - of Claimant's lumbar spine and sacrum. Then, she directed Claimant to follow up with Dr. Parsons in two days. Again, there is no indication Claimant advised her at this visit that he had the same symptoms just 10 days before the claimed work injury. Ex. Q, p. 75-77.

11. On May 9, 2017, Claimant returned and saw Dr. Parsons and said that his symptoms were getting worse. At this visit, Claimant complained of worsening stabbing, throbbing, and sharp pain. He also complained of numbness in his toes and numbness going down his right leg. Thus, his symptoms worsened between May 6th and May 9th. Claimant did not, however, report an intervening injury between May 6th and May 9th. Ex. Q, 79. Claimant's back condition was just continuing to worsen on its own. At this visit, Dr. Parson's reviewed Claimant's MRI. She noted that the MRI showed a disc herniation with disc fragment and migration at the L4-5 level as well as the L5-S1 disc being on the nerve root. Because of the MRI findings – a disc rupture with fragment – she referred Claimant to a spine surgeon for possible surgery. Again, there is no indication Claimant advised Dr.

Parson's that he had back and right leg pain just 10 days before his claimed injury. Ex. Q, p. 78-81.

12. The ALJ finds Claimant intentionally omitted his prior back and leg pain history – which was material - from Dr. Parsons and his providers at Advanced Urgent Care.

Claimant's Written Statement and Adjuster's Investigation of Claim

13. On May 10, 2017, Claimant provided a written statement. The statement provides:

> I was trying to install the bull-prick attachment for the pneumatic accessory on a backhoe after removing the tamper attachment. The bull-prick is held in by a ½" by 6" pin, and the attachment is about 20", about 20-25 lbs. I lifted the bull-prick and felt a pain in my lower back on the right side, going all the way down to my right foot. I cannot stand still or sit for very long. Ex. F, p. 17.

14. Again, there is no indication in Claimant's written statement about his prior back and leg pain. Nor is there any indication in his written statement that the incident on May 4, 2017, may have worsened his preexisting back and leg pain. Thus, Claimant again omitted material information about his preexisting medical condition.

15. On May 15, 2017, the adjuster noted that she discussed the Claim with Employer, and they were questioning the claim. Ex. I, p. 139.

16. On May 18, 2017, the adjuster interviewed Claimant and obtained a recorded statement. During the interview, Claimant was asked whether he had any prior injuries to the same area. Despite having documented back and leg pain for about three weeks before his claimed work injury, Claimant stated that he had a back strain 20 years ago. Claimant, however, omitted the problems he was having just before his work injury as well as the month-long bout of back pain Claimant had in 2013.[1] Claimant was also asked to describe how the injury at work occurred. Claimant stated that he was lifting the breaker and felt a sharp pain in his back and pain that ran down his right leg and all the way down to his toe. He also stated that it was something that "had never happened before." Again, despite Claimant having pain in his back and leg just before his work injury – and seeking medical treatment for back and leg pain just 10 days before his claimed work injury – Claimant omitted material information about having back and leg pain just before the claimed work accident. Ex. U.

17. On May 22, 2017, the adjuster obtained information that Claimant was involved in a motor vehicle accident on April 5, 2007, while insured by Safeco. The adjuster also noted that Claimant denied being in a motor vehicle accident that required medical treatment. As a result, the adjuster indicated she would have to get a medical release and request the medical records associated with the 2007 claim to verify Claimant's statement. Ex. I, p.135.

[1] Although Claimant was specifically asked about injuries, and Claimant's back and leg pain just came on without an identifiable incident, Claimant did reference a back strain 20 years earlier. As a result, the ALJ infers that Claimant knew the adjuster was trying to determine whether Claimant's current complaints were related to his claimed injury or something else. As a result, the ALJ finds Claimant intentionally omitted material information about his back and leg pain that preceded his alleged work accident.

18. On May 22, 2017, the adjuster called Safeco Insurance to follow up on Claimant's 2007 motor vehicle accident. Safeco advised the adjuster that Claimant did not treat for any injuries and that no medical payments were made under the claim. Based on Claimant's recorded statement, and the information obtained from Safeco, the adjuster concluded "After further review, there is no other previous claims or reports that support the idea that the claimant's injury is preexisting." Ex. I, pp. 134-135.

19. Based on Claimant's recorded statement, material omissions, and the information obtained from Safeco, which led to the adjuster determining Claimant was not suffering from a preexisting back injury before the alleged work accident, the adjuster concluded the Claim was compensable. The adjuster's reasoning for admitting liability is as follows:

    > [Claimant] is a 39-year-old machine operator that was working on a machine that breaks solid ground. When he was working, he had a change the breaker on the machine. When he was lifting the breaker to attach to the machine, he felt a sharp pain in back that ran down his right leg and then down to his toe on his right foot. Claim was thought to be for a preexisting injury as the claimant had a prior claim with Safeco Insurance for a personal automobile accident where there was a injury reported of back pain. After investigation, the claimant did not seek any medical treatment for the previous injury so there was no evidence to support that the injury was preexisting and not related to the injury experienced on DOI.

    Ex. I, p. 134.

20. The ALJ finds that Claimant's omission of his prior back and leg pain was a material fact in the adjuster's decision to admit liability for Claimant's claim. This finding is based on the fact that the adjuster was diligently trying to determine whether Claimant's current back and leg complaints were due to a preexisting condition and not the incident at work as claimed by Claimant. To determine whether Claimant's current complaints were preexisting, the adjuster investigated a 10-year-old motor vehicle accident claim in which it was reported Claimant injured his back. However, upon further investigation, by calling Safeco, it was revealed that Claimant did not hurt his back in 2007. To continue to investigate whether Claimant's pain complaints were due to a preexisting condition, the adjuster also interviewed Claimant and obtained a recorded statement. Again, during the recorded statement the adjuster sought to find out if Claimant had any prior back injuries and wanted Claimant to clarify how the incident occurred. During Claimant's recorded interview, he knew the adjuster was trying to determine whether his condition was preexisting or whether it was caused by work. And it was during this recorded statement that Claimant omitted the material fact that he had back problems in 2013 and back and right leg pain just before he claimed his work injury.

21. On May 26, 2017, Claimant presented to Douglas C. Wong, M.D., an orthopedic surgeon, for a surgical evaluation. According to the notes from this appointment, Claimant told Dr. Wong that he first noticed his symptoms while he was putting the breaker on the backhoe at work. According to the notes, Claimant told Dr. Wong

that he has had severe leg pain and weakness since putting the breaker on the backhoe on May 4, 2017. Dr. Wong's notes also indicate Claimant did not report any relevant medical history. Absent from the notes is any indication Claimant told Dr. Wong that his back and right leg symptoms started 10-12 days before his alleged work injury. Based on the history provided by Claimant, and Dr. Wong's assessment, he recommended either an ESI or surgery. Based on his symptoms, Claimant wanted to proceed with surgery. As a result, Dr. Wong stated that he would work on getting the surgery approved. Consistent with his report, Dr. Wong "ordered" a hemilaminectomy with decompression and excision of a herniated disc. Ex. 18, pp. 93-96.

22. On June 1, 2017, Claimant returned to Dr. Parsons for a follow up evaluation after seeing Dr. Wong. At this appointment, they discussed Dr. Wong's surgical recommendations and Claimant's expectations. The appointment concluded with Dr. Parsons requesting Claimant to follow up and call her to let her know the surgery date. Ex. 16, pp. 82-84.

23. On July 3, 2017, Claimant underwent surgery with Dr. Wong. According to Dr. Wong, the indication for surgery was based on Claimant's contention that he developed "severe right leg pain and weakness since putting [on] a breaker on a backhoe on 5/4/2017." Based on Claimant's statements to Dr. Wong, Dr. Wong concluded that the "weakness and right leg pain" and the "right L4-5 and L5-S1 disk herniation is work related." Ex. 18, pp. 97-98.

General Admission of Liability filed based on Claimant's material omissions

24. On August 9, 2017, and based on Claimant's material omissions, Respondents filed a General Admission of Liability and admitted liability for the claim and for medical benefits. Ex. B, p. 7.

Claimant's Ongoing Medical Treatment and Omissions

25. On August 16, 2017, Claimant presented to Rehabilitation Services and completed a Past Medical History Form. Claimant was asked to check a box next to the problems for which he has been diagnosed or circle a condition for which he had had or has. Claimant did not circle "low back pain." He also denied having a significant past medical or injury history. Ex. 19, pp. 132,133, and 137.

26. On August 26, 2018, Kathleen D'Angelo, M.D., completed an IME report under an evaluation for ongoing complaints. Claimant was accompanied by a Spanish-speaking interpreter. Claimant reported right leg pain and low back pain after the reported injury and moved to his back, headaches, and neck. Ex. M, pp. 175-176. Claimant reported "immediate effects after the accident" to include "severe pain, unable to move, low back." Ex. M, p. 175. Delayed effects included right leg pain. *Id.* Claimant also completed a questionnaire before the examination that asked about "Similar Pre-Existing Issues." Ex. M, p. 224. Claimant denied similar previous problems. Ex. M, pp. 176, 224. Claimant denied being under a physician's care before the injury. *Id*. Claimant denied any other significant disabling problems or accidents. *Id*. A pain diagram completed by Claimant showed pain in the right hip region down the side and back of his right leg. Ex. M, pp. 177, 226. Dr. D'Angelo

questioned Claimant about the pain at the time of the first appointment with Dr. Parsons and Claimant responded, “I had some pain in my low back, but it was mainly in my leg,” confirming pain “only” in the right leg. Ex. M, p. 179.

27. Dr. D’Angelo was unaware of the preexisting treatment at Denver Health and did not have records from Denver Health available during her review. Ex. M, p. 200. Dr. D’Angelo did not have any records predating the May 4, 2017, claim available for her review. *Id*. Dr. D’Angelo concluded that Claimant was not at MMI and recommended an electrodiagnostic study to rule out any recurrent radiculopathy as well as a work hardening program. Ex. M, p. 197.

28. An MRI of the lumbar spine was performed on December 27, 2018, and compared to a November 8, 2017, MRI and reflected unchanged neuroforaminal stenosis with possible impingement on the lumbosacral nerve roots. There was no significant change between the two studies. Ex. N, p. 232.

29. On January 28, 2019, Claimant underwent evaluation with Dr. Elliott’s PA for recurrent postsurgical radiculopathy and back pain. An April 2018 EMG was normal. After that, Dr. Elliott recommended a lumbar decompression and revision procedure. Ex. N, p. 232.

30. Respondents submitted the request for repeat surgery to Allison Fall, M.D., for review. Dr. Fall performed an IME on February 28, 2019, and Claimant was accompanied by a Spanish translator. Ex. N, p. 231. Claimant reported that at first, he was not very painful but that after half-an-hour, he could not move. *Id*. Pain was primarily in the right leg and that was the only thing he could remember. *Id*. Again, Claimant denied prior similar symptoms and any past medical history. Ex. N, pp. 232, 236. Dr. Fall concluded that the complaints were consistent with a diagnosis of somatic symptom disorder. Ex. N, p. 237. Dr. Fall opined Claimant was a poor surgical candidate and recommended against further surgery. *Id*. Dr. Fall recommended psychological evaluation and treatment. Ex. N, p. 238.

Another Admission Filed Based on Claimant’s Omissions

31. On July 15, 2019, and based on Claimant’s false statements and material omissions, Respondents filed another General Admission of Liability. Based on Claimant’s condition and inability to work, Respondents also admitted for temporary total disability (TTD) benefits. Respondents started paying TTD as of June 26, 2019, at a weekly rate of $927.71. Ex. C.

Additional Treatment and Misrepresentations of Material Fact

32. Dr. Wong subsequently saw Claimant and could not determine whether additional surgery was required. Ex. L, p. 166. Dr. Wong instead performed a lumbar steroid injection on September 10, 2019, and Claimant reported more pain after the injection. Dr. Wong concluded that further surgery would not be helpful. *Id*. Yet Dr. Elliott again recommended a decompression surgery. *Id*.

33. On February 18, 2020, Claimant provided Respondents with answers to interrogatories. In Interrogatory No. 12, Claimant was asked to state the name of any doctor, physician, or medical practitioner for any injury, illness, or disability with whom Claimant had received treatment in the last 10 years. In Claimant’s answer,

he objected to the interrogatory in part, but answered it in part. He objected to providing any information going back more than 5 years and for body parts that were not part of this claim. And, in the part he answered, which should have included his treatment for his back just 10 and 12 days before his alleged work injury, Claimant did not disclose any of the treatment he obtained through The Federico Clinic and Denver Health. He also listed none of the physicians or providers who treated him for his back at The Federico Clinic and Denver Health just 10 and 12 days before his claimed work injury. Ex. V.

34. On March 11, 2020, Claimant was evaluated by Dr. Miller during a follow-up visit. Ex. S. In this record, it is revealed that Claimant's PCP had performed initial testing for urinary complaints and that Dr. Miller would be contacting this office for follow-up. *Id*. It is indicated that the PCP office was Federico Pena/Denver Health, previously undisclosed. *Id*. Respondents were not previously aware of this provider and requested records after Claimant's answers to discovery.

35. On April 1, 2020, Respondents initiated a 24-Month DIME. Dr. Jade Dillon was confirmed as the DIME physician.

36. Dr. William Miller saw Claimant on July 15, 2020 and concluded that Claimant was at MMI with a 27% whole person impairment for spine impairment plus mental impairment. Ex. S, p. 331. The report was rendered after initiation of the 24-Month DIME process and Dr. Miller did not review or incorporate any medical documentation of the preexisting conditions and treatment from April 2017.

37. On August 7, 2020, Dr. Fall completed a record review that included the newly obtained medical records from Federico Pena Clinic/Denver Health from April 22, 2017, documented above. Ex. N, p. 240. Dr. Fall also reviewed Claimant's prior interrogatory responses documenting Claimant's denial of prior injuries to his low back. Dr. Fall noted multiple instances in the medical records in which Claimant either denied prior symptoms or failed to disclose prior treatment. *Id*. Dr. Fall concluded that the April 2017 records changed her opinion on causation in that they reflected prior similar symptoms and preexisting radiculopathy without specific trauma noted. Ex. N, p. 241. Dr. Fall also noted that Claimant was obese, a risk factor for lumbar degeneration, and that causation of the condition with radiculopathy leading to surgery and subsequent treatment was not caused by a work-related injury on May 4, 2017. *Id*. Dr. Fall said that Claimant was not forthcoming and did not disclose prior symptoms. *Id*.

38. Dr. Dillon rendered a DIME opinion dated September 11, 2020 and amended opinion on October 2, 2020. Ex. L. Claimant was interviewed through a Spanish interpreter. Claimant said that his last day working was the date of injury, claiming that he tried to work but could not perform any work on light duties. Ex. L, p. 164. Dr. Dillon had documented an extensive review of the available medical records, which included records preexisting the May 4, 2017, injury. Dr. Dillon also documented her review of multiple diagnostic studies throughout the claim with included discussion. Dr. Dillon performed a physical examination and recorded loss of range of motion. Ex. L, p. 167. Dr. Dillon also included a separate section documenting Claimant's pertinent psychological issues. Ex. L, p. 168. Under

"Pertinent Medical Issues," Dr. Dillon specifically noted the April 22, 2017, record from Denver Health with a chief complaint of sciatica and documented complaints of radiating pain in the right leg and hip. Ex. L, p. 166.

39. Dr. Dillon concluded that "This is clearly a preexisting condition" and provided exhaustive rationale for her opinion. Ex. L, p. 169. Dr. Dillon explained that the degenerative changes seen on diagnostics do not arise quickly and were present early in treatment. *Id*. Dr. Dillon stated that "The same symptoms were present prior to the claimed occupational injury, as documented in multiple records." *Id*. Dr. Dillon noted Claimant's failure to disclose these symptoms or treatment as a great concern. *Id*. Dr. Dillon concluded that "the occupational injury even as described by [Claimant] was minor to trivial" and was "unlikely to have caused any significant problem other than a strain" or to "significantly exacerbate any underlying condition other than perhaps on a transient basis." *Id*. Dr. Dillon said that Claimant had symptoms out of proportion with objective findings seen on the diagnostics. *Id*.

40. Dr. Dillon said that Claimant was at MMI for his physical injuries effective February 28, 2019, and for his psychological condition effective June 17, 2019. *Id*. Dr. Dillon wrote: "This is stated with the knowledge that the condition is actually preexisting." *Id*.

41. Dr. Dillon provided a 25% whole person impairment based on Table 53 of the *AMA Guidelines, 3rd ed., rev*. and recorded loss of range of motion. *Id*. That said, Dr. Dillon stated that the rating was without consideration of causation. Under The Division of Workers' Compensation Impairment Rating Tips, which allow nullification of any work-related impairment based on assessment of causation, Dr. Dillon declared that the condition was unrelated to the work injury. *Id*. Dr. Dillon further said that because the psychological symptoms hinged on Claimant's physical status, with no applicable physical impairment there was also no applicable psychological impairment. *Id*. Dr. Dillon stated that excessive treatment had been provided and no further treatment was recommended. *Id*.

42. To the extent there is any ambiguity about Dr. Dillon's findings and conclusions, the ALJ finds that Dr. Dillon concluded Claimant did not suffer an occupational injury on May 4, 2017, that caused the need for medical treatment or caused any disability or impairment. What she found was that Claimant reached MMI for non-work-related conditions and that Claimant has permanent impairment which flow from his non-work-related conditions. Put another way, she found Claimant did not suffer a compensable injury on May 4, 2017, and the conditions for which she provided a date of MMI and impairment rating are unrelated to Claimant's alleged May 4, 2017, work accident.

43. Respondents filed a Final Admission of Liability (FAL) in accordance with Dr. Dillon's opinion on October 13, 2020. Ex. D. Respondents did not list any indemnity benefits in the benefits history and claimed an overpayment for $62,024.04 in TTD paid from June 26, 2019, through October 5, 2020. Respondents admitted for $69,408.97 in medical benefits and 0% permanent impairment. Respondents also denied maintenance medical treatment.

Testimony of Dr. Fall

44. Dr. Fall testified that when she saw Claimant for an IME on February 28, 2019, she asked about preexisting symptoms or treatment of the back or right leg and Claimant specifically denied these. Tr. at 93. Dr. Fall was unaware of any preexisting relevant history at the time of her IME. Tr. at 96. Dr. Fall testified that sciatica is nerve pain radiating down the back of the leg to below the knee. Tr. at 97. Dr. Fall testified that the most likely etiology of sciatica is compression of a nerve root. *Id*. Dr. Fall testified that the nerve root irritation comes from the lumbar spine down the back of the leg. Tr. at 98. Dr. Fall testified that the records preexisting the May 4, 2017, injury reflected a positive straight leg test, which is used to determine irritation from the low back. *Id*. If there is inflammation of a nerve in the spine, the test will reproduce pain shooting down the leg past the knee. *Id*. Dr. Fall testified the straight leg test can be indicative of a disc herniation. *Id*.

45. Dr. Fall testified that the x-ray study performed on April 24, 2017, showed signs of degeneration at the lower lumbar spine. Tr. at 99. Dr. Fall testified that an x-ray would not have reflected a disc protrusion and can only show the distance between bones indicating degeneration of the spine but would not show soft tissue disc structures, which would require an MRI. *Id*. Dr. Fall testified that the x-ray performed would not have been able to view central stenosis, which was present on the June 8, 2017, MRI. *Id*.

46. Dr. Fall testified that it was relevant that Claimant was limping at the April 24, 2017, visit as this points to a significant pain generator. Tr. at 103. Dr. Fall testified that a degenerative condition of the spine can result in loss of function of the legs. *Id*. Dr. Fall testified that there does not have to be trauma for the onset of radiculopathy and that a radicular condition may have an insidious onset, as in this case. *Id*. Dr. Fall testified that obesity is a risk factor for lumbar degeneration more so than physically carrying something for a period of time because the added weight is constantly present. Tr. at 103-104.

47. Dr. Fall testified that the symptoms in the weeks before May 4, 2017, were consistent with radiculopathy. Tr. at 104. Dr. Fall testified that lumbar radiculopathy would not typically resolve within a week and pain is typically the worst within the first six weeks due to inflammation of the nerve. *Id*. Dr. Fall testified that there was no evidence that the condition was resolving itself when Claimant left the clinic on April 24, 2017. Tr. at 105. Dr. Fall noted that the first visit from April 22, 2017, was to his regular clinic and the subsequent April 24, 2017, record was to the emergency department. *Id*.

48. Dr. Fall testified that the gabapentin prescribed on April 24, 2017, is a medication used to treat back pain and pain of a neuropathic origin. Tr. at 104. Dr. Fall testified that Claimant still would have had the prescribed gabapentin when he reported his work-related injury based on the dosage and recommended frequency. Tr. at 106.

49. Dr. Fall agreed with Dr. Dillon’s opinion that the symptoms preexisting the May 4, 2017, injury were the same as those after the claimed injury. Dr. Fall testified that the initial presentation was for leg, hip, and calf pain which is related to the first presentation of radiculopathy. Tr. at 107. Dr. Fall testified that the fact that the leg

was nontender to the touch was something associated with a radiculopathy rather than muscular origin. *Id*. Dr. Fall noted that on the first visit, sciatica was suggested and on the second visit this was confirmed as a diagnosis. *Id.* Medications and therapy were prescribed for this diagnosis. *Id*. Dr. Fall testified that it was not medically probable that Claimant aggravated a preexisting condition on May 4, 2017, as there did not appear to be any new processes but a progression of a prior condition. Tr. at 108. Dr. Fall testified that Claimant's failure to disclose a prior condition to his providers would have been an error of omission. Tr. at 113. Dr. Fall testified that she could not have come up with a scenario where Claimant would not have known that he was having the same issues before his reported work injury. Tr. at 114.

50. Dr. Fall testified credibly that Dr. Dillon's opinion on impairment and causation was consistent with the *AMA Guidelines* and Level II physician accreditation. Tr. at 108. Dr. Fall testified that there were no clear errors in the DIME report and that Dr. Dillon's opinion was supported by the facts. *Id*.

51. Dr. Fall's opinions are consistent with the underlying medical records and consistent with the conclusions of the DIME physician and Dr. D'Angelo. As a result, the ALJ finds Dr. Fall's ultimate opinions to be credible and highly persuasive.

Testimony of Dr. D'Angelo

52. Dr. D'Angelo testified that she gave Claimant the same questionnaire she gives to all of her patients to complete before examination and that this was submitted to her as Claimant's answers. Ex. T, pp. 340-341. Dr. D'Angelo testified that she used the answers to complete her IME report and specifically reviewed them with the translator. Ex. T, p. 341. Dr. D'Angelo testified that she took a verbal history directly from Claimant and he described the immediate effects after the injury as being primarily in the right leg. Ex. T, p. 343.

53. Dr. D'Angelo testified that the symptoms before the work injury appear to be similar to those documented by Dr. Parsons after the work injury. Ex. T, p. 349. Dr. D'Angelo testified that on April 22, 2017, when Claimant reported leg pain a DVT was ruled out and there was no swelling or tenderness in the leg. Ex. T, pp. 348-349. Dr. D'Angelo noted the pain documented by Dr. Parsons radiated to the tibia — the level of the calf muscle. Ex. T, p. 350. Dr. D'Angelo testified that patients report differing symptoms when they have radiculopathy and that pain going up the leg or down the leg is nonspecific and difficult to distinguish. Ex. T, p. 353. Dr. D'Angelo testified that the relevant issue is whether there is pain anywhere along the nerve root. *Id*. Dr. D'Angelo testified that there was clearly not a lot of difference between the pains Claimant reported before the injury and afterwards and were in the same regions. *Id*. Dr, D'Angelo testified that the preexisting symptoms were consistent with what Claimant was reporting as part of the work injury. Ex. T, p. 354. Dr. D'Angelo testified that the patient instructions were given to Claimant to explain what the doctor was concerned about and to augment the instructions to follow-up with the PCP. Ex. T, p. 355. Dr. D'Angelo testified as a former emergency room physician that the symptoms reported by Claimant would have given rise to radicular origin. *Id*.

54. Dr. D’Angelo reviewed the audio recording of the initial interview with the Insurer and testified it was significant to her opinion that Claimant did not disclose treatment for right leg issues and sciatica in the weeks before the reported injury. Ex. T, p. 356. Dr. D’Angelo testified that presentation to a clinic in the weeks before the reported injury was big deal that is not typical day for most working people. Ex. T, p. 357.

55. Dr. D’Angelo testified that she could not even state there was any medically probable aggravation of preexisting symptoms on May 4, 2017, and that the condition may have been constant since the preinjury issue based on the history. Ex. T, p. 359. Dr. D’Angelo testified that she agreed with Dr. Dillon and Dr. Fall that there was no work-related impairment in this claim as it does not appear the symptoms began when Claimant alleges and he did not appear to be truthful in respect to the onset of symptoms. Ex. T, p. 360. Dr. D’Angelo testified that she agreed with Dr. Dillon that Claimant was at both physical and psychological MMI. *Id*.

56. Dr. D’Angelo’s opinions are consistent with the underlying medical records and consistent with the conclusions of the DIME physician and Dr. Fall. As a result, the ALJ finds Dr. D’Angelo’s ultimate opinions to be credible and highly persuasive.

Testimony of Sandi G[Redacted]

57. Ms. G[Redacted] testified as the present claims adjuster for the Insurer. Ms. G[Redacted] testified that she filed the FAL and that the admitted figures were calculated based on the medical and indemnity payment logs, which reflected the extent of payments on the claim. Ms. G[Redacted] testified that Elijah C[Redacted] was the former adjuster on the claim and was the adjuster at the time of the initial interview with Claimant and investigation into compensability. Ms. G[Redacted] testified that Marie E[Redacted] is the Employer representative on the claim who discussed the initial investigation of the claim with Mr. C[Redacted]. Ms. G[Redacted] testified that whoever’s name was on the journal entry is the person who created that entry. Tr. at 133. She also provided an adequate foundation for the admission of the journal notes to be admitted as a record of a regularly conducted activity – a business record.

Testimony of Claimant

58. Claimant testified that on May 4, 2017, he was working on the backhoe and had to assemble a breaker, a pointy piece of metal between 25-30 pounds designed to break up asphalt. Tr. at 44, 48. Claimant had to bend to lift the breaker up to where the machine was. Tr. at 44. Claimant testified he was lifting the breaker and felt a “poking thing” in his back that went all the way from the back radiating through his calf. Tr. at 51. Claimant went to the doctor after reporting the injury and testified that he told the doctor his pain occurred “exactly in the moment that I bent and I got the breaker and I stood up.” Tr. at 54.

59. Claimant testified that on April 22, 2017, he went to the clinic for pain in his right leg and concern of a family history of blood clots. Tr. at 54. Claimant testified he experienced pain in the front of his leg that would radiate upward and finish on the side of the hip. *Id*. Claimant testified that the pain he experienced on May 4, 2017, was very different and would go down through his butt through his leg. Tr. at 55.

Claimant testified that "At no point, those two pains crossed with each other." *Id*. Claimant testified that when he went to the clinic, "there wasn't another date, like, another appointment or they didn't give me therapy. They didn't give me any other appointment with another doctor. They didn't tell me that I needed anything else." Tr. at 57.

60. Claimant testified that he had never had a back injury before May 4, 2017, and that the prior clinic visit was not, in any way, related to a low back injury. *Id*. Claimant testified that he did not intentionally mislead the insurer in relation to the work injury. Tr. at 60. Claimant testified that he gave all of his information to his attorney and never gave any false or misleading information. *Id*. Claimant testified that he was paid while on modified duty and subsequently went on temporary disability for wage loss and deposited all checks sent to him. Tr. at 83-84.

61. The ALJ, however, does not find Claimant's testimony to be credible. Claimant had back pain and severe leg symptoms right before his alleged work injury and after his alleged work injury. To state that that they were different is not credible based on the medical documentation to the contrary. The fact that Claimant did not tell his providers or evaluators that he had similar – if not the same – back and leg pain 10-12 days before his alleged work injury establishes Claimant's intent to deceive. Plus, Claimant's ongoing deceit continued with subsequent medical providers as well as his answers to discovery. Moreover, his contention that he was not provided a follow up appointment after his visit to the Emergency Room at Denver Health on May 24, 2017 is not true. The notes from that visit make clear Claimant was advised to follow up "ASAP" and within a week.

Ultimate Findings of Fact

62. Claimant's concealment of his prior back and leg symptoms was not an atypical mistake or inadvertent omission but was part of a consistent pattern of concealment of material facts. Claimant's omissions and false statements were made intentionally and with a reckless disregard of their truth or falsity. His omissions and concealment of material facts were also of the type that in equity and good conscience should have been disclosed.

63. Moreover, Claimant knowingly concealed the material facts from the adjuster and the medical providers which he knew should have been disclosed. Claimant did this with knowledge that they were false; utter indifference to their truth or falsity; and with knowledge that he was concealing material facts that in equity and good conscience should have been disclosed.

64. Based on Claimant's continuous omissions of material facts, the adjusters relied on such, and filed several admissions of liability that admitted for medical and temporary disability benefits.

65. The adjusters were also ignorant of the material facts concealed by Claimant.

66. The ALJ further finds that Claimant's omissions and false statements were made with the intention that they would be acted on by each adjuster so each adjuster would admit liability for his preexisting condition and provide ongoing medical and disability benefits.

67. The ALJ finds Claimant's omissions and false statements caused the adjuster to admit liability for the claim and caused damages in the form of the payment of medical benefits and disability payments to Claimant to which he was not entitled.

68. Furthermore, consistent with the above findings, the ALJ finds that Claimant did not suffer a compensable work injury. The condition for which Claimant received medical and disability benefits under this claim was a preexisting condition that was neither caused nor aggravated by his work activities on May 4, 2017.

69. The ALJ finds Claimant committed fraud and has been overpaid medical and disability benefits.

70. Claimant has been overpaid medical benefits in the amount of $69,408.97. Claimant has also been overpaid disability benefits in the amount of $62,024.04. Ex. D. As a result, Claimant shall reimburse Respondents for the total overpayment which equals $131,433.01. The rate at which the overpayment must be repaid was not fully developed at the hearing. As a result, such issue will be reserved.

71. Respondents timely filed their Application for Hearing to withdraw their admissions and seek an overpayment, and recovery of same, based on fraud. Upon finding out that Claimant's condition might be preexisting in 2020, which was done by obtaining Claimant's previously omitted medical records and getting a revised opinion from Dr. Fall and Dr. D'Angelo, Respondents timely filed an Application for Hearing to withdraw their admissions. Claimant failed to present credible and persuasive evidence that the time between when Respondents obtained the omitted medical records, plus the opinions from Dr. Fall and Dr. D'Angelo, and filed their application was unconscionable or that he was prejudiced by the time Respondents ultimately determined they could withdraw their admissions and filed their Application for Hearing. As a result, Respondents did not waive the issue and are not barred by laches.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

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

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or

every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Respondents proved by a preponderance of the evidence that they may withdraw their admissions of liability based on fraud and can recover from Claimant all medical and disability payments made under this claim.

The elements of fraud are set forth by the Colorado Supreme Court in *Morrison v. Goodspeed*, 100 Colo. 470, 68 P.2d 458 (1937). In that case, the Court stated:

> The constituents of fraud, though manifesting themselves in a multitude of forms, are so well recognized that they may be said to be elementary. They consist of the following:
>
> (1) A false representation of a material existing fact, or representation as to a material existing fact made with a reckless disregard of its truth or falsity; or concealment of a material existing fact, that in equity and good conscience should be disclosed.
>
> (2) Knowledge on the part of the one making the representation that it is false; or utter indifference to its truth or falsity; or knowledge that he is concealing a material fact that in equity and good conscience he should disclose.
>
> (3) Ignorance on the part of the one to whom representations are made or from whom such fact is concealed, of the falsity of the representation or the existence of the fact concealed.
>
> (4) The representation or concealment made or practiced with the intention that it shall be acted upon.

(5) Action on the representation or concealment resulting in damages.

As noted by ICAO in *Essien v. Metro Cab*, W.C. Number 3-853-693 (ICAO August 22, 1991), “[t]he existence of the elements is generally a question of fact for the determination of the ALJ”, and because proof of fraud is a factual issue, the ALJ may base his decision on inferences drawn from circumstantial or direct evidence. See *Essien*, supra, citing *Electric Mutual Liability Insurance Co. v. Industrial Commission*, 154 Colo. 491, 391 P.2d 677 (1964). As discussed below, the elements of fraud have been proven by Respondents in this matter.

The first element of fraud has been proven. As found, Claimant’s concealment of his prior back and leg symptoms was not an atypical mistake or inadvertent omission but was part of a consistent pattern of concealment of material facts. Claimant’s omissions and false statements were made intentionally and with a reckless disregard of their truth or falsity. Moreover, his omissions and concealment of material facts were also of the type that in equity and good conscience should have been disclosed.

The second element of fraud has been proven: As found, Claimant knowingly concealed material facts about his preexisting back condition from the adjuster and the medical providers which he knew should have been disclosed. Claimant did this with knowledge that they were false; utter indifference to their truth or falsity; and with knowledge that he was concealing material facts that in equity and good conscience should have been disclosed.

The third element of fraud has been proven. As found, based on Claimant’s continuous omissions of material facts, the adjusters relied on such, and filed several admissions of liability that admitted for medical and temporary disability benefits. Moreover, the adjusters were ignorant of the material facts concealed by Claimant.

The fourth element of fraud has been proven: As found, Claimant’s omissions and false statements were made with the intention that they would be acted on by the adjusters so the adjusters would admit liability for his preexisting condition and keep paying medical and disability benefits.

The fifth element has been proven: As found, Claimant’s omissions and false statements caused the adjusters to admit liability for the claim and caused damages in the form of the payment of medical and disability payments to Claimant to which he was not entitled.

It was found that Claimant, for self-gain, omitted material facts and willfully made false statements material to the claim for the purpose of obtaining medical and disability benefits under the Colorado Workers’ Compensation Act. Claimant knew that his back condition was preexisting and sought treatment for such by filing a false claim for a preexisting condition. And, based on Claimant’s omissions and false statements, Claimant obtained medical and disability benefits to which he was not entitled.

As a result, the ALJ finds Respondents established by a preponderance of the evidence that Claimant obtained his benefits through fraud.

To the extent that the GALs and FALs are an “award,” the ALJ concludes that Respondents have established by a preponderance of the evidence that the GALs and

FAL filed in this case shall be reopened based on fraud and overpayment. *See Meza v. BMC West Corp*. W.C. No. 4-651-065 (January 3, 2007) *citing Burke v. Industrial Claim Appeals Office*, 905 P.2d 1, 2 (Colo. App. 1994).

The ALJ also concludes that Respondents have established by a preponderance of the evidence that they can retroactively withdraw each General Admission of Liability and Final Admission of Liability that admitted for temporary total disability benefits and medical benefits for which Claimant had no right to receive and recover the overpayment.

Respondents have requested the reopening and withdrawal of the admissions of liability to recover the overpayment of temporary total disability benefits and medical benefits. Although a request to reopen and withdraw an admission of liability may be duplicative, since each remedy allows the same relief, the ALJ concludes that Respondents are entitled to both remedies to effectuate their ultimate request which is to obtain an order determining the amount of the overpayment that has occurred and an order to recover the overpayment.

The ALJ finds and concludes that Respondents have established by a preponderance of the evidence that they have overpaid Claimant $131,433.01. However, regarding the recovery of the overpayment, that issue was not fully developed at the hearing. As a result, the issue regarding the rate at which the overpayment is to be recovered is reserved.

II. Whether laches or waiver precludes Respondents from withdrawing their admissions and recovering medical and disability benefits paid under this claim based on fraud.

To prove laches, Claimant had to establish that Respondents' delay in asserting their right to withdraw their admissions and seek recovery of the overpayment was "unconscionable' and that, the delay was "prejudicial." *Bacon v. Industrial Claim Appeals Office*, 746 P.2d 74 (Colo. App. 1987).

As found, Respondents timely filed their Application for Hearing to withdraw their admissions and seek an overpayment, and recovery of same, based on fraud. Upon finding out that Claimant's condition might be preexisting in 2020, which was done by obtaining Claimant's previously omitted medical records and getting a revised opinion from Dr. Fall and Dr. D'Angelo, Respondents timely filed an Application for Hearing to withdraw their admissions. Claimant failed to present credible and persuasive evidence that the time between when Respondents obtained the omitted medical records, opinions from Dr. Fall and Dr. D'Angelo, and filed their application was unconscionable or that he was prejudiced by the time Respondents ultimately determined they could withdraw their admissions and filed their Application for Hearing. As a result, Respondents did not waive the issue and are not barred by laches.

Thus, the ALJ finds and concludes Claimant failed to establish by a preponderance of the evidence that Respondents are barred from asserting their claims due to waiver or laches.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents' admissions are withdrawn based on Claimant obtaining the admissions and resulting medical and disability benefits by fraud.

2. Claimant has been overpaid $131,433.01 in medical and disability benefits.

3. Claimant shall repay Respondents the $131,433.01 overpayment. However, the rate at which Claimant must repay the overpayment is reserved fur future determination.

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

DATED: July 2, 2021.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NOS. 5-130-718-002

ISSUES

The issues set for determination were:

- Did Claimant sustain a compensable injury on February 7, 2020?

- If Claimant sustained a compensable injury, is the treatment he received reasonable and necessary?

- Is Dr. Lackey an ATP?

- What was Claimant's AWW?

- If Claimant sustained a compensable injury, is he entitled to TTD benefits from February 7, 2020 and ongoing?

PROCEDURAL STATUS

The undersigned issued a Summary Order on May 28, 2021, which was served on June 1, 2021. Respondents filed a timely Request for Specific Findings of Fact and Conclusions of Law on June 14, 2021. Respondents filed (Amended) Findings of Fact, Conclusions of Law and Order on June 21, 2021. Claimant filed (Amended) Findings of Fact, Conclusions of Law and Order on July 1, 2021.

STIPULATION

The parties stipulated if the claim was found compensable CCOM and Dr. Centi would be authorized. This Stipulation is made part of this Order.

FINDINGS OF FACT

1. Claimant worked as a transit driver for Employer for fourteen years, nine months before he was terminated. He drove various sizes of vehicles in this position. Claimant testified his rate of pay was $23.64 per hour and he worked 40 hours per week.

2. Claimant's medical history was significant in that he had prior symptoms in his left shoulder, which began in February-March 2019. He received medical treatment for these symptoms.

3. On May 31, 2019, Claimant was evaluated by Charles Lackey, M.D. He mentioned shoulder pain and noted it began after long driving and rotating the wheel of the bus. The pain was aggravated by driving the bus. Claimant stated that his greatest pain was 10/10 and the least amount was 6/10. Dr. Lackey said Claimant had limited

abduction to 90°, forward flexion to 110°, external rotation to 45° and internal rotation to 50° in the left shoulder.

4. Dr. Lackey's assessment noted he suspected a rotator cuff injury, which was most likely due to work activity. Dr. Lackey refilled the prescription for cyclobenzaprine. He recommended getting plain X-rays first and then possibly an MRI.[1]

5. Claimant testified he filed a Worker's Claim for Compensation alleging cumulative trauma in 2019, which was denied. There was no hearing on that claim.

6. On October 24, 2019, Claimant underwent an Independent Medical Examination, which was performed by Nicholas Olsen, D.O., at the request of Respondents. At that time, he complained of left shoulder pain, which he said occurred "daily" in the patient questionnaire. Claimant took Advil, as needed and kept a prescription for Flexeril, which he filled when he needed it On examination, Dr. Olsen noted there was no atrophy in the left shoulder. Moderate tenderness was present in the suprascapular fossa with deep palpation. Scaption and external rotation were 4/5 and the drop test was negative. No crepitus was noted.

7. Dr. Olsen's assessment was: clinical signs of rotator cuff bursitis versus tear, left shoulder. Dr. Olsen said there was weakness in the left rotator cuff, which was indicative of rotator cuff inflammation, bursitis or possible rotator cuff degeneration. He noted Claimant continued to work at full duty and did not describe any modification to his job. He did not believe Claimant's job duties were highly repetitive or entailed high force trauma. Dr. Olsen did not provide any work restrictions for Claimant. Dr. Olsen agreed with Dr. Lackey that plain x-rays and an MRI would be the next step.

8. There was no evidence Claimant had work restrictions for his left shoulder before February 7, 2020.

9. Claimant testified his average workday was approximately 10 hours long, with a lunch break. As part of this job, he would conduct a pre-trip inspection of the bus and pick up passengers. He drove a regular route three days per week, picking up passengers throughout Summit County. On the fourth day per week, he provided door-to-door service to people with disabilities. Those duties require him to occasionally manually load riders in wheelchairs into the vehicle and this required heavy pushing.

10. On February 7, 2020 at approximately 9:30 a.m., Claimant testified he was driving a 12 seat paramountain mobility vehicle. It had snowed a "massive amount" the night before and he got stuck in deep snow in the middle of the street. After contacting the base, Claimant said that he crawled under the bus and used a dispatch clipboard and brush to try to brush the snow from underneath the tires.[2] Claimant said he heard a very loud pop and felt extreme pain in his left shoulder while reaching under the vehicle. He called for maintenance to assist him in freeing the vehicle.

[1] Claimant also returned to Dr. Lackey on June 5, 2019, however, it was for an unrelated condition.

[2] Hearing Transcript (Hrg. Tr.) p. 20:25-21:4.

11. Claimant reported the injury to Y[Redacted] once he returned to base. He was asked by Mr. Y[Redacted] if he needed medical attention, which he declined. Claimant thought his may have been a Saturday when this happened and said he was asked to fill out a workers' compensation claim when he returned to work on Tuesday. Claimant testified he performed a second passenger pickup and no further driving duties that day.

12. The ALJ took judicial notice that February 7, 2020 was a Friday.[3]

13. An incident report was prepared and signed that day. In the report, Claimant recounted how the injury occurred. He said in attempting to shovel out the S12, he aggravated the injury to his left shoulder.[4]

14. Mr. Y[Redacted] testified as witness for Respondent-Employer. He was the dispatcher, a position he has held for five years. He testified Claimant told him he might have injured his shoulder, but declined medical treatment. Mr. Y[Redacted] stated this was at approximately 8:45 a.m. and Claimant then went back to work. On cross-examination, Mr. Y[Redacted] said he did not recall seeing the written Notice of Injury to Employer, which was signed on February 11, 2020.

15. There was no evidence admitted at hearing which contradicted Claimant's testimony that he was performing those job duties on the date in question. Claimant's description of the injury was credible.

16. Claimant said the first treatment he received was the following week, as he already had an appointment scheduled with Charles Lackey, M.D. The appointment was to renew prescriptions and for an annual visit. There was no evidence that Employer referred Claimant to Dr. Lackey or authorized this evaluation. Dr. Lackey was not an ATP, as that term is defined under the Act. Claimant testified Dr. Lackey took him off work.

17. Claimant was evaluated on February 10, 2020 by Dr. Lackey. Dr. Lackey described the reason for the visit was because of an exacerbation of left shoulder pain which occurred when he slipped on the ice at work and injured the shoulder. On examination, there was subtle wasting of the supraspinatus muscle on the left side, as well as tenderness to palpation over the lateral deltoid muscle.

18. Dr. Lackey stated this was clearly a Worker's Compensation injury with an acute new exacerbation. He stated Claimant should not drive with the limitation of motion and pain in the shoulder. Dr. Lackey noted he was a DOT examiner and stated Claimant did not meet the qualifications of a driver at that point. The ALJ credited Dr.

[3] C.R.E. Rule 201(c).

[4] Exhibit 5.

Lackey’s opinion that this was an exacerbation of the underlying condition of the shoulder.

19. Claimant was referred by Employer to Centura Centers for Occupational Medicine (“CCOM”) for treatment and was evaluated by Taryn Barrette, PA-C on February 12, 2020. CCOM was the ATP for Employer. On examination, Claimant had tenderness to palpation over the anterior biceps tendon insertion, as well as pain over the superior trapezius and biceps muscles. Reduced range of motion (“ROM“) was also present.

20. PA-C Barrette‘s diagnosis was: strain of the muscles and tendons of the rotator cuff of the left shoulder, initial encounter. The treatment plan included X-rays of the left shoulder, continue with OTC ibuprofen; continue with heat and ice topically; gentle ROM exercises with left shoulder.

21. A WCM 164 was completed on February 12, 2020 by Thomas Centi, M.D. at CCOM, who concluded the objective findings were consistent with history and/or work-related mechanism of injury/illness. Claimant was placed on modified duty/restrictions of no driving CMV, no lifting or carrying with left arm, no pushing or pulling with left arm, no overhead lifting with left arm. This opinion that Claimant’s symptoms were work-related was persuasive.

22. On February 13, 2020, an Employer’s First Report of Injury (“E-1”) was completed on behalf of Employer by Geoff Guthrie. The E-1 listed Claimant’s AWW as $1,026.00. A CTSI Superviser’s Accident Incident Report was also completed that day.[5]

23. On February 14, 2020, Claimant returned to CCOM and was evaluated by PA-C Barrette. The diagnosis was: strain of muscle(s) and tendon(s) of the rotator cuff of left shoulder, subsequent encounter. At that time, an MRI of the left shoulder was ordered. Claimant was able to return to modified duty as follows: lifting maximum 2 pounds, repetitive lifting 0 pounds, carrying/pushing/pulling-2 pounds. Claimant was evaluated at CCOM on February 17 and February 21, 2020 and his work restrictions were continued.

24. Claimant was also evaluated by PA-C Barrette at CCOM on February 28, 2020. The diagnosis remained the same and Claimant’s work restrictions were changed to no lifting/carrying-left arm greater than 5 pounds; no pushing/pulling with left arm greater than 5 pounds; no overhead lifting with left arm. Dr. Centi signed the WCM 164, as well as PA-C Barrette‘s report.

25. On March 5, 2020, Claimant underwent an MRI of the right shoulder. The films were read by William Wahl, M.D. Dr. Wahl‘s impression was: supraspinatus tendinosis and there may be a focal, 2-3mm full-thickness defect of the insertional fibers of the supraspinatus; advanced degenerative arthritis of the glenohumeral joint; mild

[5] Exhibit 7.

degenerative changes of the acromioclavicular joint; joint effusion, as there appeared to be two, small, 5–6mm intra-articular osteochondral loose bodies.

26. On March 6, 2020, Claimant returned to CCOM. At that time, anterior tenderness was noted to the biceps tendon, along with limited ROM. Claimant was complaining of "aching, sharp pain" in the left shoulder. The diagnosis was: strain of muscle(s) and tendon(s) of the rotator cuff of left shoulder, subsequent encounter. PA-C Barrette stated the "cause of this problem was related to work activities". Claimant was to begin physical therapy ("PT"). The report was signed by Dr. Centi, who also signed the WCM 164. Claimant's work restrictions were no lifting/carrying-left arm greater than 8 pounds; no pushing/pulling with left arm greater than 8 pounds; no overhead lifting with left arm.

27. Dr. Centi extended Claimant's restrictions for March 31 through April 13, 2020.

28. Claimant returned to Dr. Lackey on April 3, 2020. Claimant was diagnosed with a strain of muscles and tendons of the rotator cuff of the left shoulder. Dr. Lackey noted Claimant had prior pain in the left shoulder and degenerative arthritis, but was able to perform his usual job duties. Dr. Lackey recommended physical therapy ("PT") and completed an FMLA form.

29. On or about April 10, 2020, Claimant completed a short term disability statement in which he stated that his left shoulder injury prevented him from driving. This form was signed by Claimant.

30. Claimant returned to CCOM and was evaluated by Caroline Whalen, PA on April 13, 2020. He reported continued pain in the shoulder. Claimant had not been to PT since Covid, but was doing home exercises. On examination, pain to palpation was not present, nor was there swelling. ROM was noted as normal, although there was no evidence that PA Whalen performed ROM measurements at that time. Claimant's shoulder strength was normal. The diagnosis it was the same and claimant was to continue with Tylenol and cyclobenzaprine. Claimant's work restrictions were continued. Dr. Centi also signed the report.

31. Claimant testified that the shoulder pain he experienced in 2019 was intermittent. The pain in 2020 was virtually constant. He was able to do his job with when he experienced the intermittent pain in 2019 and January 2020.

32. On July 2, 2020, Claimant underwent a follow-up IME, which was performed by Dr. Olsen, at the request of Respondents. At that time, Claimant estimated his pain level to be 8/10. He described the events of February 7, 2020, noting that he felt very sharp pain in the left shoulder while trying to get the bus unstuck. On examination, Dr. Olsen found no atrophy in the left shoulder. Moderate tenderness with palpation of the suprascapular and infrascapular fossas was present. The drop test was negative. ROM testing demonstrated 90° of forward flexion, 110° of

abduction, 50° of extension. External rotation was limited to 40° and internal rotation to 45°. These ROM findings were similar to those on October 24, 2019.

33. Dr. Olsen‘s diagnosis was: advanced degenerative changes in the glenohumeral joint, including superficial and full-thickness erosion of the articular cartilage. Dr. Olsen opined Claimant suffered a temporary aggravation on February 7, 2020 of long-standing degenerative glenohumeral arthritis that had been symptomatic for over a year. He believed Claimant was in need of an orthopedic consultation, which should be done under his commercial insurance for the glenohumeral arthritis.

34. Dr. Olsen testified as an expert in Physical Medicine and Rehabilitation at hearing. His testimony was consistent with the IME report and he reiterated his conclusion that Claimant's symptoms were the result of his pre-existing condition and that he suffered, at most, a temporary aggravation of that condition. Dr. Olsen testified:

> "Because Mr. [Claimant redacted] had indicated that he had extreme pain, but the pain following the February 7th, 2020, incident was the same as what he was experiencing on 10/24/2019. And do [sic] the degree that he had -- elevated pain -- pain levels for a week or two after the event, they were back to his baseline constant sharp, stabbing pain that he'd been reporting since February 2019".[6]

35. Dr. Olsen testified that the Claimant testified that his pain was intermittent prior to February 7, 2020, but constant after the injury. The ALJ found Claimant distinguished between his level of pain before versus after February 7, 2020.

36. Dr. Olsen also testified that the MRI showed the degenerative changes in Claimant's shoulder;

> "And, the MRI indicates no evidence of an acute injury, but a longstanding degenerative sources of his pain in the form of reformation of osteophytes in the humeral head, and a worn out labrum and a cartilage that is at – at its end of life. And these are chronic findings that had been present for over a year".

37. The ALJ noted the MRI showed the degenerative changes as identified by Dr. Olsen. However, the presence of effusion, potentially an acute finding, was not explained.

38. Claimant proved he suffered a compensable injury on February 7, 2020, namely an aggravation of the underlying condition of his left shoulder.

39. There was no evidence in the record that Claimant was placed at MMI by an ATP.

[6] Hrg. Tr. pp. 66:20-67:1.

40. Claimant was given work restrictions by the physicians at CCOM from February 12, 2020 through May 7, 2020.

41. The E-1 stated Claimant's AWW was $1,026.00 per week. However, no payroll records or checks stubs were submitted and the ALJ was unable to determine how this calculation was made. Claimant's testimony established his AWW was $945.60 per week, which gives a weekly TTD rate of $630.40.

42. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Compensability

Claimant argued that he was injured in a discreet traumatic event, which was an aggravation of an underlying pre-existing condition. Respondents argued Claimant's symptoms were the result of his underlying degenerative condition and that the event which occurred on February 7, 2020 was a temporary aggravation of this condition.

Claimant was required to prove by a preponderance of the evidence that, at the time of the injury, he was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Sections 8-41-301(1)(b) & (c), C.R.S. (2020). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). Although it was a close question, the ALJ determined Claimant suffered a traumatic injury while working for Employer that aggravated the degenerative changes in his shoulder.

As a starting point, there was no dispute that Claimant had degenerative changes in his left shoulder. As determined in Findings of Fact 2-4, Claimant's testimony and the medical records admitted into evidence confirmed that his left shoulder symptoms prompted him to seek treatment. Specifically, prior to February 7, 2020, Claimant was evaluated by Dr. Lackey, who recommended diagnostic testing in the form of x-rays and potentially an MRI. (Findings of Fact 3-4). The record showed Claimant continue to perform his job duties and had no documented work restrictions before February 7, 2020. (Finding of Fact 8).

As found, Claimant injured his left shoulder while working on February 7, 2020. Specifically, he was picking up a disabled passenger and the commercial vehicle he was driving became stuck in the street. (Finding of Fact 10). Claimant tried to free the vehicle and the evidence in the record and the ALJ credited his testimony when he described feeling pain and hearing a pop while he cleared snow from under the vehicle. (Finding of Fact 15). As found, there was no evidence which contradicted Claimant‘s testimony as to his activities that day. (Finding of Fact 15). In fact, the incident report prepared that day corroborated Claimant‘s testimony. (Finding of Fact 13).

When Claimant was evaluated by Dr. Lackey (with whom he had treated prior to February 7, 2020) on February 10, 2020, Dr. Lackey concluded this was a work-related injury. (Finding of Fact 18). When Claimant was referred to CCOM, Dr. Centi at that facility also concluded in the WCM164 the Claimant‘s symptoms were the result of a work-related injury. These opinions were persuasive to the ALJ. (Finding of Fact 21). Thus, the combination of Claimant's testimony and the medical records led the ALJ conclude Claimant suffered a compensable injury on February 7, 2020.

The ALJ considered Respondents‘ argument that had Claimant followed up to undergo x-rays and potentially an MRI, as recommended by Dr. Lackey, the findings would have been virtually identical to those after February 7, 2020. Respondent asserted Claimant probably would have had work restrictions after that time. However, the facts of the case established Claimant did not receive x-rays and continued to work full duty, even though he was evaluated by Dr. Lackey. It was the events on February 7, 2020 that caused the aggravation in his left shoulder and required treatment, as well as necessitating work restrictions. Claimant then was given work restrictions which continued through May 2020. (Finding of Fact 39).

The ALJ also considered Dr. Olsen‘s opinions, including his expert testimony. Dr. Olson focused on Claimant‘s subjective rating of his pain complaints to conclude that he suffered only a temporary aggravation of the underlying condition. He also postulated that because the MRI did not show evidence of recent trauma, Claimant's symptoms and need for treatment was a result of the underlying degenerative changes. However, Dr. Olsen did not explain the MRI finding of effusion, as shown on the MRI done right after the injury. (Finding of Fact 36). In addition, Claimant's testimony regarding the difference in his pain before February 7, 2020 (intermittent), versus after the injury (constant) was credible.

Based upon the totality of the evidence, the ALJ concluded it was more probable than not that the events of February 7, 2020 aggravated the underlying degenerative condition of Claimant's left shoulder while working for Employer. Therefore, the injury sustained on February 7, 2020 was compensable.

Medical Benefits

Given the finding on the issue of compensability, the ALJ concluded Claimant proved he was entitled to medical benefits to cure and relieve the effects of his industrial injury, which are to be provided by Respondents. § 8-42-101(1)(a), C.R.S. (2019). The treatment provided by Dr. Centi and the healthcare providers at CCOM were authorized, pursuant to the Stipulation of the parties. All referrals from CCOM were reasonable and necessary and Respondents are required to provide those benefits.

Respondents asserted that Dr. Lackey was not an ATP. The ALJ agreed with this contention. As found, Claimant treated with Dr. Lackey before the injury as well as after February 7, 2020. There was no evidence Respondents referred Claimant to Dr. Lackey after the injury. The ALJ found Dr. Lackey was not an ATP and not within the chain of referral. (Finding of Fact 16). There was also no evidence that Respondents agreed Dr. Lackey was an ATP. Accordingly, Claimant's request that the ALJ find Dr. Lackey is an ATP will be denied.

AWW/TTD

Claimant asserted that his average weekly wage was $945.60, based upon a 40-hour workweek and a rate of pay of $23.64 per hour. The ALJ noted the E-1 stated Claimant's AWW was $1,026.00 per week. (Finding of Fact 22). However, no payroll records or checks stubs were submitted and the ALJ was unable to determine how this calculation was made. The ALJ found Claimant's AWW was $945.60 per week, which gives a weekly TTD rate of $630.40. (Finding of Fact 41).

On the question of TTD benefits, the ALJ concluded Claimant was issued work restrictions when he was evaluated at CCOM on February 12, 2020. These restrictions continued throughout the time he was under the care of those healthcare providers. In addition, the ALJ noted no ATP concluded Claimant was at MMI. (Finding of Fact 39). Respondent argued that Claimant would have been given work restrictions had he followed up with diagnostic testing and further treatment with Dr. Lackey. However, this simply did not take place before the injury on February 7, 2020 and the ALJ concluded

Claimant proved he sustained a wage loss as a result of the injury. Therefore, Claimant was entitled to TTD benefits from February 12 and continuing, until terminated by law.

ORDER

It is therefore ordered:

1. Claimant established by a preponderance of the evidence that he sustained a work-injury on February 7, 2020 and is entitled to benefits under the Colorado Workers' Compensation Act.

2. Claimant has not proven by a preponderance of the evidence that Dr. Lackey should be considered an authorized treating physician.

3. The authorized treating providers are the physicians and other providers at Centura Centers for Occupational Medicine (CCOM) and all authorized referrals from CCOM. Respondents shall provide medical treatment to cure and relieve the effects of Claimant's injury.

4. Respondents shall TTD benefits to Claimant at the rate of $630.40 per week from February 12, 2020 and continuing, until terminated by law.

5. All matters not determined herein are reserved for future determination.

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

DATED: July 2, 2021

STATE OF COLORADO

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-131-725-001

ISSUE

1. Whether Claimant established by a preponderance of the evidence that she sustained a compensable injury to her right shoulder arising out of the course of her employment with Employer on January 30, 2020.

2. Whether Claimant established by a preponderance of the evidence an entitlement to reasonable and necessary medical benefits?

3. Whether Claimant established by a preponderance of the evidence that right shoulder surgery performed at Denver Health is reasonable, necessary, and related to an industrial injury?

4. Whether Claimant established by a preponderance of the evidence the right to select her own authorized treating provider (ATP)?

FINDINGS OF FACT

1. Claimant is a fifty-one-year-old woman who began employment with Employer in February 2019 as an order selector or "order picker." Employer distributes pet products such as animal feed, bones, and other products. Claimant's position required her to retrieved products from shelves in Employer's warehouse and place the products on a manual pallet jack to fill orders for shipment.

2. On February 18, 2020, Employer filed an Employer's First Report of Injury (FROI) indicating that Claimant had reported an injury to her shoulders which she indicated occurred on January 30, 2020. The FROI, completed by supervisor Tom Palmer, indicates Claimant stated she sustained a strain while performing her normal work activities. Claimant was sent to Concentra Medical Center for evaluation. (Ex. A).

3. On February 18, 2020, Claimant saw Jonathan Joslyn, PA-C at Concentra. Claimant reported pushing a pallet jack and feeling pain in her right shoulder on January 30, 2020. Claimant indicated she had not been seen elsewhere for the injury. Mr. Joslyn noted tenderness in the superior and posterior right shoulder, with pain on flexion and abduction. Rotator cuff testing was negative. Mr. Joslyn diagnosed Claimant with a right shoulder strain, referred her for physical therapy, and assigned work restrictions including lifting up to 10 pounds, pushing/pulling up to 20 pounds, and no reaching above shoulders with her right arm. (Ex. 1).

4. Claimant returned for a recheck with Mr. Joslyn on February 20, 2020. Claimant reported feeling better although she reported some pain with overhead lifting. Claimant had tenderness in the posterior and superior shoulder and pain with flexion and abduction, with full range of motion. Rotator cuff tests, including Hawkin's, Neer and arm

drop tests were negative, with an equivocal painful arc. Claimant's work restrictions were slightly modified to limit pushing and pulling to 10 pounds. (Ex. 1).

5. Between February 25, 2020, and March 13, 2020, Claimant attended six sessions of physical therapy at Concentra. At Claimant's initial physical therapy appointment, she reported that she injured her work lifting a box from waist level up to an overhead shelf and felt pain in the back of her shoulder. Initial range of motion testing showed restrictions in right shoulder abduction, internal and external rotation. At the March 13, 2020 visit, Claimant's shoulder range of motion had progressed with only deficits of right shoulder external rotation noted. (Ex. C).

6. On March 3, 2020, Darla Draper, M.D., evaluated Claimant at Concentra. Claimant reported increased shoulder pain at night with pain going into her right upper back. Claimant reported that her right upper back had hurt since her injury. On examination, Claimant's right shoulder had full range of motion with the exception of a mild decrease on internal rotation. Claimant's Hawkin's test was negative with a painful arc, and Neer, drop arm and empty can tests were negative. (Ex. 1).

7. On March 18, 2020, Claimant reported to Mr. Joslyn that her arm pain was unchanged with radiation into the neck and shoulder. Claimant had full range of motion of the right shoulder, no muscle weakness, and negative rotator cuff tests, with an equivocal painful arc. (Ex. B).

8. On April 1, 2020, Claimant saw Mr. Joslyn reporting she was working modified duty and that she was experiencing a burning pain in her right shoulder. Claimant reported pain in the anterior and lateral shoulder, and her right shoulder range of motion was noted to be limited in all planes with pain. (Ex. B).

9. On April 10, 2020, Claimant attended a physical therapy appointment with Concentra which the records denominate as visit 7 of 12 appointments. Claimant reported pain along the posterior portion of the upper shoulder and into the midline of the back. Claimant indicated she was scheduled for an MRI in two weeks, although the provider ordering the MRI was not indicated. The physical therapy record does not indicate Claimant was discharged or that therapy was discontinued, nonetheless, Claimant did not attend any further physical therapy appointments at Concentra. (Ex. C).

10. On May 11, 2020, Claimant was seen at the emergency department at UC Health. Claimant reported that she had right shoulder pain with an onset over the previous two days. Claimant reported that she had an injury in January that she re-exacerbated while at work. Claimant reported that her shoulder was injured in January 2020 resulting from a fall, and that she had not followed up with a primary care provider. Claimant also reported that she had received therapy through worker's compensation. Shoulder x-rays performed at UC Health were interpreted as showing osteoarthritis. The ER physician referred Claimant for physical therapy. (Ex. 2).

11. On June 17, 2020, Claimant underwent an MRI of the right shoulder at Denver Health Radiology. The MRI was interpreted as showing a "large near complete full-

thickness tear of the supraspinatus tendon with 1.2 cm of tendon retraction and mild muscular atrophy. This is on the background of mild rotator cuff degeneration"; and "degenerative appearing labral tear." (Ex. 3). The MRI report does not identify the referring provider.

12. On September 23, 2020, an unidentified physician assistant completed a "Health Care Provider Medical Certification" related to Claimant. Based on the address of the physician indicated on the form it appears the form was completed by someone at Denver Health. The form indicates Claimant underwent surgery on August 27, 2020, for a "traumatic complete tear of right rotator cuff," with subsequent physical therapy and follow up visits. However, no other documentation was provided to the ALJ to identify the nature of the surgery or whether the unidentified treating physician had offered any opinion as to whether the surgery had arisen out of the course of Claimant's employment with Employer. (Ex. 5).

13. On October 22, 2020, Shannon Ortell, RN of Denver Health, issued a letter addressed to "To Whom It May Concern" indicating that Claimant may return to light duty work with no pushing, pulling, reaching, lifting, or carrying with the right shoulder or arm. (Ex. 4).

14. On February 17, 2021, Anthony Beardmore, M.D., issued a letter addressed to "To Whom It May Concern" indicating that Claimant may return to light duty work immediately, with lifting, pushing, and pulling restrictions, and no overhead work with the right arm. Dr. Beardmore's letter also indicates that Claimant would be re-evaluated in 3 months with expected lifting of restrictions. (Ex. 4). No other records from Dr. Beardmore were offered or admitted into evidence, and no other substantive information regarding Dr. Beardmore's role in Claimant's treatment was presented to the ALJ.

15. On February 25, 2021, Claimant underwent an independent medical examination with Mark Failinger, M.D., at Respondents' request. Dr. Failinger was admitted to testify as an expert in orthopedic surgery. By the time of Claimant's IME with Dr. Failinger, she had already undergone surgery on her right shoulder, although the exact nature of the surgery is unclear. Claimant reported to Dr. Failinger that her symptoms began when bringing a box weighing between 5 and 10 pounds from overhead. Claimant reported that she dropped the box and did not attempt to catch it as it fell to the floor. Dr. Failinger opined that it was not medically probable that Claimant retrieving the box from overhead would create any new pathology in her shoulder or aggravate any existing pathology. Similarly, he opined that merely reaching up to retrieve the box would not likely cause an acceleration of pre-existing pathology. Dr. Failinger also opined that it would be unlikely that Claimant would sustain a permanent aggravation or acceleration of pre-existing disease by pushing or pulling a pallet jack with her arms.

16. Claimant's testimony at hearing was presented through a translator. Claimant testified that on January 30, 2020, while standing on a ladder, she raised her arms overhead to reach a box that was situated on a high level and sustained an injury to her right arm and shoulder. Claimant testified that she informed her supervisor, Ivan O[Redacted], that she had hurt her shoulder, but that she did not wish to see a health

care provider, and that she would continue to work. Claimant testified that she later pulled a pallet jack and experienced pain in her shoulder again, and she again reported the injury to Mr. O[Redacted]. Claimant testified that Mr. O[Redacted] reported the incident to his supervisor, and then returned with a piece of paper with instructions for Claimant to be seen at Concentra.

17. Claimant testified that she was seen at Concentra on January 30, 2020. However, no medical records exist for that date of treatment. Claimant testified that after going to Concentra, she received physical therapy and treatment from Concentra and was provided with work restrictions. Claimant continued to perform her job, but was in pain. Claimant testified that her providers informed her that her insurance was "cancelled" and so she applied for Medicaid and received subsequent treatment through providers at Denver Health, including right shoulder surgery in August 2020. Claimant did not work again for Employer after June 15, 2020.

18. With respect to Claimant's testimony that she was seen at Concentra on January 30, 2020, the ALJ does not find Claimant's testimony to be credible. However, based on the testimony of Mr. O[Redacted] and the totality of the evidence, the ALJ finds that Claimant either confused the dates of treatment or conflated the events of February 18, 2020, with the events of January 30, 2020.

19. Ivan O[Redacted] testified that he was Claimant's supervisor and that Claimant reported to him that she had injured her right shoulder. Mr. O[Redacted] did not specify a date of this report. He testified that he asked Claimant if she needed to be seen for medical care, Claimant declined and continued to work that day. Mr. O[Redacted] testified that Claimant did not offer an explanation as to how her shoulder was injured. Mr. O[Redacted] also testified that Claimant came to him a second time about her shoulder, and he reported the incident to his supervisor, and Claimant was sent to Concentra for evaluation. Again, Mr. O[Redacted] did not provide a date for the second report. Based on the date of the FROI, and the totality of the evidence, the ALJ infers that the second report occurred on or about February 18, 2020.

20. Mr. O[Redacted]'s testimony is consistent with Claimant's testimony that she sustained an injury to her right shoulder and reported that injury to Mr. O[Redacted] on or about January 30, 2020, that Claimant initially declined medical care, and later reported the injury in February 2020 and sought and received medical care at Concentra.

21. The parties stipulated that if Claimant were found to have a compensable injury, Concentra would be considered Claimant's authorized treating physician (ATP).

CONCLUSIONS OF LAW

Generally

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

§ 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

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

COMPENSABILITY

A claimant's right to recovery under the Workers Compensation Act is conditioned on a finding that the claimant sustained an injury while the claimant was "at the time of the injury, … performing service arising out of and in the course of the employee's employment." § 8-41-301(1)(b), C.R.S.; *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The Claimant must prove his injury arose out of the course and scope of his employment by a preponderance of the evidence. § 8-41-301(1)(b) & (c), C.R.S.; *see City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985).

"Arising out of" and "in the course of" employment comprise two separate requirements. *Triad Painting Co.*, 812 P.2d at 641. An injury occurs "in the course of" employment where the claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *See Triad Painting Co. v. Blair*, 812 P.2d at 641; *Hubbard v. City*

Market, W.C. No. 4-934-689-01 (ICAO, Nov. 21, 2014). The "arising out of" element is narrower and requires claimant to show a causal connection between the employment and the injury such that the injury "has its origin in an employee's work-related functions and is sufficiently related thereto as to be considered part of the employee's service to the employer in connection with the contract of employment." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *City of Brighton v. Rodriguez*, 318 P.3d 496, 502 (Colo. 2014). The mere fact that an injury occurs at work does not establish the requisite causal relationship to demonstrate that the injury arose out of the employment. *Finn v. Industrial Commission,* 437 P.2d 542 (Colo. 1968); *Sanchez v. Honnen Equipment Company,* W.C. No. 4-952-153-01 (ICAO, Aug. 10, 2015).

Claimant has established by a preponderance of the evidence that she sustained a compensable injury to her right shoulder arising out of the course of her employment with Employer on January 30, 2020. The evidence demonstrates that Claimant sustained a right shoulder strain on or about January 30, 2020, and reported the injury to her supervisor, Mr. O[Redacted], on that date. Although Claimant refused medical care on that date, she credibly testified that she had no prior issues with her shoulder and was able to perform her job duties prior to January 30, 2020, without pain. Claimant subsequently reported an aggravation or second incident causing pain in the right shoulder on February 18, 2020, and was seen by a health care provider on that date and diagnosed with a right shoulder strain. Although, Claimant described her mechanism of injury in various ways, a claimant is not required "to understand the exact mechanism of the injury to prove a compensable injury, nor is [a claimant] required to explain in the medical, physiological, or anatomical terms of an expert the way in which the accident resulted in the symptoms." *In Re Montoya*, W.C. No. 4-633-835 (ICAO, April 26, 2006). The ALJ concludes that Claimant has established that it is more likely than not that she sustained a right shoulder strain arising out of the course of her employment with Employer on January 30, 2020.

MEDICAL BENEFITS

Under section 8-42-101(1)(a), C.R.S., respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *See Owens v. Industrial Claim Appeals Office*, 49 P.3d 1187, 1188 (Colo. App. 2002). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). All results flowing proximately and naturally from an industrial injury are compensable. *Id., citing Standard Metals Corp. v. Ball*, 474 P.2d 622 (Colo. 1970).

Because Claimant has established a compensable injury, Claimant has established by a preponderance of the evidence that she is entitled to a general award of medical benefits.

SPECIFIC MEDICAL BENEFITS (RIGHT SHOUDLER SURGERY)

The Act imposes upon respondents the duty to furnish medical treatment "as may reasonably be needed at the time of the injury … and thereafter during the disability to cure and relieve the employee from the effects of the injury." § 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Industrial Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO, May 31, 2006). In addition, the duty to furnish medical treatment includes furnishing treatment for conditions representing a natural development of the of the industrial injury, providing compensation for incidental services necessary to obtain the required medical care, and "paying for treatment of unrelated conditions when such treatment is necessary to achieve optimum treatment of the industrial injury." *In re Claim of Walling,* W.C. No. 4-760-050-02 (ICAO, Dec. 10, 2013) (internal citations omitted). Diagnostic procedures are also compensable if they are reasonably necessary to the provision of treatment designed to cure and relieve the effects of the injury*. Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949).

The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). The existence of evidence which, if credited, might permit a contrary result affords no basis for relief on appeal. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002)." *In the Matter of the Claim of Bud Forbes, Claimant*, No. W.C. No. 4-797-103, 2011 WL 5616888, at *3 (Colo. Ind. Cl. App. Off. Nov. 7, 2011). An "expert medical opinion is not needed to prove causation where circumstantial evidence supports an inference of a causal relationship between the injury and the claimant's condition." *In re Abeyta*, W.C. No. 4-669-654 (2008). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School District No.11*, W.C. No. 3-979-487, (ICAO, Jan. 11, 2012); *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO, Feb. 12, 2009).

Claimant has failed to establish that her right shoulder surgery performed at Denver Health in August 2020 was reasonably necessary to cure or relieve the effects of her right shoulder strain. Claimant underwent an undetermined surgery on her right shoulder in August 2020 at Denver Health. Although an MRI demonstrated pathology in Claimant's right shoulder, Claimant offered no evidence as to the nature of the surgery performed, the rationale for the surgery and whether the surgery was reasonably necessary to address Claimant's shoulder strain, or whether the pathology demonstrated on the MRI was related to Claimant's employment. Claimant offered no medical records from Denver Health and no testimony from any health care provider to support a finding that the August 2020 surgery was reasonably necessary to cure or relieve the effects of the injury she sustained in January 2020 or that the pathology addressed during the surgery was work-related. The ALJ credits the testimony of Dr. Failinger that the mechanisms of injury described by Claimant would not be likely to cause the Claimant's shoulder pathology for which surgery was apparently performed. The ALJ concludes that Claimant has not established by a preponderance of the evidence that her right shoulder surgery was related to her January 2020 work injury.

AUTHORIZED TREATING PROVIDER

Section 8-43-404(5)(a), C.R.S. gives the respondents the right in the first instance to select the ATP. Authorization refers to a physician's legal status to treat the industrial injury at the respondents' expense. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *Popke v. Industrial Claim Appeals Office,* 944 P2d. 677 (Colo. App. 1997). Once an ATP has been designated the claimant may not ordinarily change physicians or employ additional physicians without obtaining permission from the insurer or an ALJ. If the claimant does so, the respondents are not liable for the unauthorized treatment. *Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228 (Colo. App. 1999).

However, respondents may by their conduct or acquiescence waive the right to object to a change of physician. A claimant "may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion." *Greager v. Industrial Commission,* 701 P.2d 168, 170 (Colo. App. 1985); *see also, Brickell v. Business Machines, Inc.,* 817 P.2d 536 (Colo. App. 1990). Thus, where an employer directed the claimant to file a PIP claim rather than a workers' compensation claim, the compensation carrier waived any subsequent right to object to a change of physician authorized by the PIP carrier. *McLaughlin-Kramer v. Capital Pacific Homes,* W.C. No. 4-491-883 (I.C.A.O. June 20, 2002); *aff'd., Capital Pacific Homes v. Industrial Claim Appeals Office,* (Colo. App. No. 02CA1367, May 15, 2003) (not selected for publication).

Claimant has failed to establish that Denver Health constitutes an authorized treatment physician. On February 18, 2020, Claimant was referred to Concentra and received treatment from Concentra. Claimant presented no persuasive evidence that she was discharged from Concentra or that treatment a Concentra was denied. Further, Claimant presented no persuasive evidence indicating that Respondents conveyed to her the impression that she was entitled to change physicians to Denver Health.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable injury to her right shoulder in the nature of a shoulder strain on or about January 30, 2020.

2. Respondent shall pay for medical benefits that are reasonably necessary to cure or relieve the effects of Claimant's January 30, 2020, shoulder strain.

3. Claimant has failed to prove by a preponderance of the evidence that shoulder surgery performed at Denver Health in August 2020 was reasonably necessary to cure or relieve the effects of her January 30, 2020 shoulder strain, and her

request that Respondents pay for the August 2020 shoulder surgery is denied and dismissed.

4. Denver Health is not an authorized treating health care provider.

5. All matters not determined herein are reserved for future determination.

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

DATED: July 5, 2021

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-125-130-001

ISSUES

The issues set for determination included:

- Is Claimant entitled to mileage reimbursement from August 29, 2019 to March 16, 2020?

STIPULATION

Respondent-Employer agreed to pay reimbursement for 1,109 miles in the sum of $587.77. Respondent agreed that this amount will be sent to the Claimant. The Court accepted this Stipulation and it is made part of this Order.

FINDINGS OF FACT

1. Claimant has worked for Employer since December 1, 1995.

2. On May 21, 2019, Claimant sustained an admitted industrial injury. The date of injury was before the amendment to W.C.R.P. 16-9(E). Claimant required medical treatment for this injury and these benefits were paid.

3. Claimant testified the adjuster assigned to his case was Tyler.

4. Claimant said he used his own vehicle to attend doctors appointments, which was the basis for his mileage request. There was no dispute that these appointments were with ATP-s providing treatment to cure and relieve the effects of Claimant's work injury.

5. The Worker's Compensation Rules of Procedure, specifically Rule 16-9(E) was amended, effective January 1, 2020. The new rule required mileage reimbursement requests to be submitted within 120 days.

6. Prior to January 1, 2020, Rule 16-9(E) imposed no such 120-day limitations period. See Rule 16-9(E), W.C.R.P. (2019).[1] The Director duly issued public notices of the proposed rule changes prior to their enactment. [2]

7. There was no evidence in the record which stated whether the Director intended for the amendment to Rule 16-9(E) was to be applied retroactively or prospectively.

[1] Exhibit B.

[2] *Id.*

8. The amendment to W.C.R.P. 16-9(E) affected Claimant's right to receive mileage reimbursement for trips to medical appointments with ATP-s.

9. Respondent did not send notification of the rule change to Claimant.

10. On or about July 16, 2020, Claimant sent a request for mileage reimbursement to Respondent-Employer.[3]

11. Claimant's request for mileage reimbursement was based upon his treatment with authorized medical providers.

12. Respondent sent Claimant a letter, dated August 12, 2020, notifying Claimant that it would reimburse Claimant only for that mileage incurred from March 16, 2020, and thereafter.

13. Claimant testified that he was not aware that the rule regarding submissions of mileage reimbursement requests was changed. He said the adjuster, Tyler, never informed him of any limitations on when mileage reimbursements could be submitted. Claimant also stated he was never informed that the time for submission had changed by the passage of the change of Rule 16-9 (E), W.C.R.P.

14. Good cause existed to excuse Claimant from the 120-day time limitation to submit mileage reimbursement in the new rule.

15. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

[3] Exhibits 1 and A- mileage reimbursement request.

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Mileage Reimbursement

In this case, Claimant argued he relied on the instruction by the adjuster for Respondent, which did not provide information that there was a time limitation for submission of mileage reimbursement. Claimant also asserted that a strict application of the 120-day limit in the revised rule was not consistent with the beneficent purpose of the Act.

Respondent argued that amended rule precluded submission of mileage reimbursement request beyond the 120 days. Respondent also asserted that the change to Rule 16-9 (E) was a change that was procedural in nature, as it did not "create, change, or eliminate vested rights or liabilities", but prescribed the means by which a Claimant pursued claims for mileage reimbursement. Respondent cited *Shell Western E&P, Inc. v. Dolores County Board of Commissioners*, 948 P.2d 1002, 1012 (Colo. 1997) and *Rosa v. Industrial Claim Appeals Office*, 885 P.2d 331, 334 (Colo. App. 1994). Finally, Respondent argued Claimant did not set forth sufficient facts to show good cause to excuse the untimely submission of the request for mileage reimbursement.

The ALJ concluded first that Claimant made a sufficient showing of good cause to allow reimbursement beyond the 120-day limit. Second, the ALJ found this situation was analogous to one where the Act was amended and it affected Claimant's right to receive benefits.

As a starting point, the right to mileage reimbursement is incidental to medical benefits a Claimant receives, pursuant to § 8-42-101, C.R.S. However, this section does not explicitly reference mileage reimbursement. The right to mileage reimbursement is codified in § 8-43-203(3)(c)(IV), C.R.S. (2019), which details what information a Respondent-Employer must provide to an injured worker, including a brochure which states:

"Description of the claimant's right to receive benefit payments, including the claimant's right to receive:

. . . Mileage expenses for travel to and from work-related medical care and to and from pharmacies to obtain medical prescriptions for work-related medical care; . . .."

As determined in Findings of Fact 5-6**,** W.C.R.P. Rule 16-9(E) was amended, effective January 1, 2020.[4] This provision governs the submission of mileage reimbursement requests and provides:

> "Injured workers shall submit requests for mileage reimbursement within 120 days of the date of service or reimbursement may be denied unless good cause exists."

The ALJ notes language of amendment to the rule is mandatory with the presence of the word "shall" in the requirement that a mileage reimbursement request be submitted with 120 days. This provision did not explicitly state whether it applied to injuries before or after the change to the rule. There was no evidence in the record which established what the Director's intent was on the subject. (Finding of Fact 7). "Good cause" is not defined by the rule and no Colorado appellate court has construed this provision. Neither Claimant nor Respondent cited an appellate case which defined what a proper "good cause" showing would be under these circumstances. Indeed, there is not clear authority as what constitutes "good cause" under the rule. When considering the evidence before the Court, the ALJ concluded that Claimant's testimony that he was in contact with the adjuster and was not informed of any change in the rule was a fact that supported finding that good cause was present not to apply the 120-day limitation. (Findings of Fact 13-14).

In addition, the ALJ reasoned that where the Act has the requirement that Respondent provide information to Claimant regarding his rights to receive mileage reimbursement, it follows that Claimant should have been informed of the rule change. As found, Claimant was not informed of the change to Rule 16-9(E). (Finding of Fact 9). Accordingly, the ALJ concluded Claimant had shown good cause to allow for submission of a mileage reimbursement request outside the 120-day time limit.

The second rationale supporting this decision was that this rule change was akin to a substantive amendment of the Act. In this regard, the ALJ concluded that the right to mileage reimbursement was inextricably linked to medical benefits. (Finding of Fact 4). On the question of whether the rule change should be applied prospectively or retrospectively, the ALJ noted the change in the rule did not specify whether the change was prospective or retrospective in nature. Therefore, the ALJ analyzed the rule changes using the same framework as when a provision of the Act was amended concerning benefits.

Absent legislative intent to the contrary, a statute is presumed to be prospective in its operation. § 2–4–202, C.R.S. (2009); *Ficarra v. Dep't of Regulatory Agencies*, 849 P.2d 6, 13 (Colo.1993). Unless a contrary intent is expressed, statutory changes in procedural law are applicable to existing claims while changes in substantive law generally apply only prospectively. *People in Interest of S.B.,* 742 P.2d 935 (Colo.App.1987). In *In Re Estate of DeWitt*, 54 P.3d 849, 854 (Colo.2002), the

[4] The current version of Rule 16-9(E), effective January 1, 2021, does not have the 120-day time limitation.

Colorado Supreme Court conducted an analysis of when a statute could be applied retrospectively and when that was constitutional. A vested right is one with an independent existence, which is no longer dependent for its assertion upon the common law or statute under which it was acquired. *Specialty Restaurants Corp. v.* Nelson, 231 P.3d 393, 399 (Colo. 2010).

"Determining whether a statute violates the prohibition on retrospective application of laws requires a two-step inquiry; the reviewing Court first must determine whether the General Assembly intended the challenged statute to operate retroactively, then, if retroactive application was intended, the Court must determine whether the challenged statute is unconstitutionally retrospective in that it takes away or impairs a vested right acquired under existing laws". *Div. of Child Support Enf't v. Indus. Claim Appeals Off. of State of Colo.*, 109 P.3d 1042, 1043 (Colo. App. 2004).

The promulgation of rules governing the WCA is a quasi-legislative function that the General Assembly has delegated to the DOWC. Thus, the DOWC's rulemaking is subject to the prohibition against retrospective legislation found in Colo. Const. art. II, § 11. See *Abromeit v. Denver Career Serv. Bd*., 140 P.3d 44, 50 (Colo. App. 2005). "For legislation to be given retroactive effect without being unconstitutional, it must clearly be the intent of the General Assembly to do so…" *Shell Western E & P, Inc. v. Dolores County Board of Commissioners*, 948 P.2d 1002 (Colo. 1997); *Villa at Greeley, Inc. v. Hopper*, 917 P.2d 350 (Colo.App.1996). Such principles also apply here to a change in the rules governing Claimant's right to mileage reimbursement made by the DOWC.

Courts generally presume that if the General Assembly or Rulemaking agency intended the statute to achieve a particular result, it would have employed terminology clearly expressing that intent. *See Colorado Consumer Health Initiative v. Colorado Bd. of Health*, 240 P.3d 525, 531 (Colo. App. 2010). In the present case, there is nothing in the four corners of the rule to indicate that Rule 16-9(E) was meant to be applied retrospectively. The only reference to time in the proposed rules is not in the language of the rule itself but on the proposed rule document itself which stated that the proposed rules were to become effective January 1st, 2020. *Ex. B*.

In *Lobato v. Industrial Claim Appeals Office*, 105 P.3d 220, 223–24 (Colo. 2005). the Colorado Supreme Court found that the General Assembly intended a statute of limitations to apply retrospectively when an amendment to the law in question explicitly stated it would apply to cases from prior to the effective date of the amendment and it used language describing the amendment as "remedial and procedural" in nature*. Lobato v. Industrial Claim Appeals Office*, *supra*, 105 P.3d at 227. Further, the Court also found legislative history which pointed to legislative intention for retrospective application of the statute of limitations. *Id.* Specifically, the bill's sponsors testified to the bills retrospective purpose as being to "get cases off the books." *Id.* Despite this clear legislative intent to apply the statute of limitations retrospectively, the Court declined to do so, indicating that it conflicted with the parallel legislative intent to provide adequate procedural notice to Claimants. *Id*. at 226.

In contrast to the current case, no language in Rule 16-9(E) expressly points to an intention by the DOWC to apply the rule retrospectively. Nor was there any evidence in the record which points to any findings or history in which the DOWC intended the rule to apply retrospectively. Instead, like *Lobato v. Industrial Claim Appeals Office*, there is statutory evidence that the General Assembly intended for workers' compensation Claimants to receive accurate notice of their rights to reimbursement provided by employers or insurers. See § 8-43-203(3)(c)(4), C.R.S. (2019). Further, as previously noted, the only codification of the right to mileage reimbursement is notice of the right, signaling the importance the General Assembly placed on notice of procedural rights. Therefore, because there is no clear intention for Rule 16-9(E) to apply retrospectively, it is unnecessary to continue to the second part of the retrospectivity analysis because both prongs of the test are required to defeat the presumption of prospective application of the law. See *Div. of Child Support Enf't* 109 P.3d at 1043.

Respondent relied on *People in Interest of S.L.H,* 736 P.2d 1226, 1228 (Colo.App.1986) to analogize to a situation in which the Court of Appeals held a statute of limitations ("SOL") applied to a cause of action which occurred prior to the passing of the SOL. As the Court of Appeals made clear, its decision was made primarily because of public policy concerns around protecting the family unit. The Court noted:

> "Such a time limitation is well within the General Assembly's power to enact… and furthers the public policy of maintaining stability in the family unit and providing children with a means of support by limiting the time within which challenges to the presumption of fatherhood must be brought".

Both the factual and legal context are different in the case at bench. The public policy concerns identified by the Court in *People in Interest of S.L.H, supra* are vastly different than those present in this case, which involves the payment of compensation for an already admitted injury, rather than the maintenance of a family unit. Further, *People in Interest of S.L.H* was decided prior to the Colorado Supreme Court announcing its review standard for retrospective statutes in *Ficarra* and, therefore, is not controlling. Finally, there was no evidence that Rule 16-9(E) was intended by the DOWC to be retrospective, which is the first part of the modern retrospectivity analysis. Many of the cases referenced by Respondent had some legislative intent to have the pertinent laws to apply retrospectively, whereas none is present here.

ORDER

It is therefore ordered:

1. Respondent shall pay mileage reimbursement from August 29, 2019 to March 16, 2020, as requested by Claimant.

2. All matters not determined herein are reserved for future determination.

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

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

DATED: July 6, 2021

STATE OF COLORADO

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-026-699-003

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

[Redacted],

Claimant,

v.

[Redacted],

Employer,

and

NON-INSURED,

Non-Insured Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on June 17, 2021, in Denver, Colorado. The hearing was recorded by Google Meets (reference: 6/17/21, Google Meets, beginning at 8:30 AM , an ending at 12:00 PM) .

The Claimant was present in person, virtually, and represented by [Redacted], Esq.. Respondent was represented by [Redacted], Esq.

Hereinafter [Redacted] shall be referred to as the “Claimant." [Redacted] shall be referred to as the “Employer.” All other parties shall be referred to by name.

Claimant’s Exhibits 1 through 19 were admitted into evidence, without objection. Respondents’ Exhibits A through E were admitted into evidence, without objection. There was sworn testimony by the Claimant and Marty Soudani, principal of the Employer.

At the conclusion of the hearing, the ALJ ruled from the bench and referred preparation of a proposed decision to counsel for the Respondent, which was filed, electronically, on June 24, 2021. On June 28, counsel for the Claimant filed objections to the proposed decision in the form of alternative proposed findings, etc., without specifically pinpointing his objections. Nonetheless, the ALJ will consider certain alternative fact findings proffered as objections. After a consideration of the proposed decision and Claimant's alternative findings, the ALJ has modified both items and hereby issues the following decision.

ISSUES

The issues to be determined by this decision concern the amount of penalties to be imposed on the Employer for not timely paying under the parties' Settlement Agreement (as defined below) and not timely paying those penalties, considering Employer's ability and/or inability to pay.

The Employer bears the burden of proof, by a preponderance of the evidence, on the issue of ability to pay. The Claimant bears the burden of proof, by preponderant evidence, on the issue of aggravating factors.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Procedural Posture/Findings

1. On September 28, 2016, the Claimant filed a Claim for Compensation related to an incident that occurred on August 31, 2016 (Claimant's Exhibit 1).

2. On October 24, 2017, the Division of Workers' Compensation (hereinafter DOWC) approved a Settlement Agreement between the parties (Claimant's Exhibit 2 -- the "Settlement Agreement").

3. Pursuant to the terms of the Settlement Agreement paragraph 9(A)(2), the Employer's payments to the Claimant "shall be delivered to the office of the Claimant's attorney by mail or hand delivery by no later than the 1st day of each month." The Employer failed to make any payments to the Claimant as provided in the Settlement Agreement (Claimant's Exhibit 2).

4. On June 29, 2018, the Claimant filed a Motion Regarding Enforcement of Settlement Agreement and Penalties (Claimant's Exhibit 3).

5. The Director of the DOWC entered a Director's Order, dated September 10, 2018. The Employer raised a constitutionality argument regarding the excessiveness of the penalties requested under *Colorado Department of Labor and Employment v. Dami Hospitality LLC and Indus. Claim Appeals Office,* 442 P. 3d 94 (Colo. 2019). The Director found Employer's actions reprehensible stating, "[e]ven accepting Respondent's contention that the financial difficulties arose spontaneously following approval of the agreement, the conduct in this matter was still reprehensible." The conduct of Employer demonstrated to the Director that it knew or should have known that it could not comply with the Settlement Agreement the parties entered. Claimant had twice withdrawn her applications for hearing on disputed benefits and that

Employer had unfairly deprived Claimant of her legal rights and needlessly burdened the workers' compensation system. The Director imposed various penalties totaling $71,940 based on the penalties outlined in paragraph 9(A)(2) of the Settlement Agreement (Claimant's Exhibit 8).

6. The Employer did not comply with the September 10, 2018 Director Order. On November 7, 2018, the Director, *sua sponte* entered a Director's Order directing the Employer to show caused why additional penalties should not be imposed due to non-payment of the penalties imposed on September 10, 2018 (Claimant's Exhibit 9).

7. On December 10, 2018, the Director imposed additional penalties of $71.94 per day. The Director found that Respondent had failed to timely appeal the Director's Order dated September 10, 2018. "Once Respondent failed to properly file the petition to review, the Industrial Claims Appeals Office was deprived of jurisdiction to review the order." The imposition of the $71,940 penalty became final and the Director ordered a daily penalty equal to one percent of the total penalties imposed until Employer complied with the September 10, 2018 order (Claimant's Exhibit 10)

8. Thereafter, the Employer filed a petition to review the December 10, 2018, Director's Order. The Director then issued a Director's Supplemental Order, dated March 8, 2019, rejecting the petition to review (Claimant's Exhibit 11).

9. The Employer then timely appealed to the Industrial Claim Appeals Office (ICAO), which, on June 14, 2019, affirmed in part and reversed the Director's orders, holding that the Director did not err in denying a retroactive extension of time to file a petition to review the Director's Order dated September 10, 2018, but erred in refusing to consider the Employer's ability to pay when assessing penalties under *Colorado Dep't of Labor & Empl. v. Dami Hospitality, LLC* (Claimant's Exhibit 12).

10. On February 6, 2020, the Director issued a Director's Order on Remand directing the Employer to file written materials concerning the penalties imposed on October 31, 2018 (Claimant's Exhibit 13).

11. On April 8, 2020, the Director entered the Director's Second Order on Remand, finding the imposition of a $71.94 per day penalty to be appropriate. The Director invited the Employer to submit evidence of its ability to pay. The Employer did not file an application for hearing, though it requested "an evidentiary hearing." In rejecting the Employer's argument over the excessiveness of the daily penalty, the Director stated,

> To accept Respondent's position that the validity of a penalty should be considered based on the aggregate would permit any party to merely ignore a daily penalty until the aggregate reached an excessive amount. At the time the initial order imposing this penalty was issued, the aggregate penalty was $2,949.54.
>
> (Claimant's Exhibit 15).

12. The Employer again timely filed a petition to review the Director's Second Order on Remand, and the Director then issued a Director's Supplemental Order on Remand, dated June 23, 2020. The Director did not hold an evidentiary hearing to determine whether daily penalties in the amount of $71.94 was unconstitutionally excessive (Claimant's Exhibit 16).

13. On September 11, 2020, ICAO remanded the matter, determining that the Director erred in refusing to hold an evidentiary hearing. The court noted that the *Dami Hospitality* decision had been reversed by the Colorado Supreme Court [*Colorado Department of Labor and Employment v. Dami Hospitalty LLC and Indus. Claim Appeals Office, supra*] and therefore the Director erred in failing to hold an evidentiary hearing on the Employer's ability to pay the $71.94 daily penalty imposed (Claimant's Exhibit 17).

14. The *Dami Hospitalty* Supreme Court concluded that the proper test to assess the constitutionality of government fines under the Eighth Amendment is that set forth by the U.S. Supreme Court in *United States v. Bajakajian*, 524 U.S. 321, 334, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998), which requires an assessment of whether the fine is grossly disproportional to the offense for which it is imposed. An analysis of the malfeasor's ability to pay is necessary to determine proportionality. To make such an analysis, an evidentiary hearing was necessary and it was held on June 17, 2021.

15. On November 17, 2020, the Director issued another Supplemental Order on Remand directing an evidentiary hearing be held on the Employer's ability to pay $71.94 per day in penalties, and with ultimate jurisdiction remaining with the Director. *See* Claimant's Exhibit 18).

Findings Concerning Employer's Situation, Based on Evidentiary Hearing

16. The Employer has paid all but $2,000.00 of the amounts due under the Settlement Agreement (Claimant's Exhibit 19).

17. Since at least 2015, the Employer has not realized a profit in all but 2 years (Employer's Exhibit A to E). Even in those years in which the Employer's balance sheet shows positive net income, those figures do not show an actual profit for the Employer's President and sole shareholder, Marty Soudani. Soudari extended substantial loans to the Employer to keep it afloat.

18. The COVID-19 pandemic and the stay-at-home orders, beginning in approximately March of 2020, caused the Employer to, for all intents and purposes, shut down its operations until just recently the past few months. During that time, the Employer was unable to take on new, revenue-generating work and was forced to outsource its existing work, at a loss, to business in states not affected by stay-at-home orders. With the easing of the COVID-19-related business restrictions, the Employer has realized only modest revenues that do not come close to meeting its overhead and

other company financial obligations, regardless of whether or not the penalties previously imposed by the Director are included.

19. Soudani has liquidated essentially all of his personal assets in order to keep the Employer operating and to make payroll (presently the Employer employs approximately 9 individuals). Indeed, Soudani does not own or rent a home, but instead resides in the commercial unit out of which the Employer operates. The ALJ finds Soudari credible in his exposition of the company's financial situation.

20. The Employer is insolvent and the Employer realizes negative net income without any profits. Any profits that may be realized are invested back into the company to keep it operating and to make payroll.

21. Soudani illustrated a new found sense of good faith in his stated intentions to complete the terms of the Settlement Agreement, despite the prolonged failure to make payments for ten months.

22. The first payment pursuant to the Settlement Agreement was to be delivered to the Claimant's attorney's office by the first of each month. The Claimant waited ten months and only after the Claimant filed a Motion Regarding Enforcement of Settlement Agreement and Penalties against the Employer was the first installment payment was made.

Findings Concerning Claimant's Situation

23. The Claimant has been unable to work while she awaited payment of the proceeds pursuant to the settlement agreement. The Claimant was forced to sell her vehicle and other belongings in order to survive. Out of financial necessity, the Claimant made an unplanned moved to South Dakota, where she currently resides near her family for support.

Ultimate Findings

24 The ALJ finds both Soudani and the Claimant credible. There is no dispute concerning the extreme financial situations of the Employer and the Claimant.

25. The ALJ infers and finds that Soudani could have chosen to take the Employer into Chapter 7 or Chapter 13 Bankruptcy, where everyone would lose, but Soudani chose to honor his obligation to the Claimant and to pay reasonable penalties within his ability to pay and to continue doing business..

26. Weighing the extreme situations of both the Employer and the Claimant, in terms of aggravation/mitigation, the ALJ finds that the Employer is capable of completing the Settlement Agreement by paying the remaining $2,000 within thirty (30 days of the date of this decision; plus, paying aggregate penalties of $9,200 in equal monthly installments of $2,300, the first payment to be made on or before August 19, 2021, and succeeding monthly payments of $2,300, continuing until the full sum of

$9,200 has been paid in full, 90% of penalties, or $8,200, apportioned to the Claimant and $1,000 apportioned to the Colorado Uninsured Employer Fund, pursuant to §8-43-304 (1), C.R..S, or $2,070 per month, payable to the Claimant ;and, $230 per month, payable to the Colorado Uninsured Employer Fund.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, both Soudani and the Claimant were credible. There is no dispute concerning the extreme financial situations of the Employer and the Claimant.

Excessive Fines and the Gross Disproportionality Test

b. In *Colorado Dep't of Labor & Empl. v. Dami Hospitality, LLC*, 442 P.3d 94 (Colo. 2019), the Colorado Supreme Court held that the excessive fines clause of the 8th amendment to the U.S. Constitution applies to administrative penalties, such as those in contention herein, and it protects corporations as well. The *Dami* court also adopted the "gross disproportionality" test to analyze whether a fine is unconstitutionally excessive. Under that test, the following factors should be considered: "whether the gravity of the offense is proportional to the severity of the penalty, considering whether the fine is harsher than fines for comparable offenses in this jurisdiction or than fines for the same offense in other jurisdictions", as well as the ability of the entity fined to pay. Based on these factors, the ALJ concludes that the penalties previously imposed by the Director in the Director's Orders dated September 10, 2018, and December 10, 2018 were unconstitutionally excessive. First and foremost, when considered based on the daily rate of the penalties, the penalties far exceed the Employer's ability to pay. Indeed, at the daily rate imposed, payment of the penalties could force Employer to shutter, in which case, no party will be better off—Claimant will not receive any further payments and Employer will have to lay off its workforce. Also, the Employer could be forced into Chapter 7 or 13 bankruptcy, in which case everyone loses.

c. The ALJ concludes that the gravity of the offense is not that substantial in relation to the rate of the penalties. As found, the testimony of Soudani that He/the Employer had every intention to make good on the Settlement Agreement but due to a series of errors and circumstances beyond his control, he was simply unable to do so. Further, as found, the Employer's non-payment of the penalties is not due to any willful flouting of the Director's Orders, but due to the Employer's dire financial situation at the time.

d. Although the Employer failed to timely appeal the Director's Order dated September 10, 2018, after an evidentiary hearing, the ALJ jurisdiction and authority to re-open the matter and vacate the Director's Order dated December 10, 2018, because it was properly on appeal and remand before the ALJ herein.. *See Wal-Mart Stores, Inc. v. Indus. Claim Appeals Office*, 24 P.3d 1, 2 (Colo. App. 2000). As such, the ALJ concludes the fines previously assessed were unconstitutionally excessive.

Burden of Proof

e. The burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). Unless clearly specified by statute, the burden is by a preponderance of the evidence. A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). In this case the burden is on the Employer to show the extenuating circumstances, as found herein above, establishing an inability to pay. The burden is on the Claimant to establish the harm caused by the delay in payment, as found herein above.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Employer shall completing the Settlement Agreement by paying the remaining $2,000 within thirty (30 days of the date of this decision to the Claimant; plus, paying aggregate penalties of $9,200 in equal monthly installments of $2,300, the first payment to be made on or before August 19, 2021, and succeeding monthly payments of $2,300, continuing until the full sum of $9,200 has been paid in full, 90% of penalties, or $8,200, apportioned to the Claimant and $1,000 apportioned to the Colorado Uninsured Employer Fund, pursuant to §8-43-304 (1), C.R..S, or $2,070 per month, payable to the Claimant and, $230 per month, payable to the Colorado Uninsured Employer Fund.

B. Any failure of the Employer to make timely payments, as specified herein above, shall result in additional penalties to be considered after an evidentiary hearing.

C. Respondent-Employer shall pay the Claimant, apportioned at 90%, to the Claimant and 10% to the Colorado Uninsured Employer Fund, statutory interest at the rate of eight percent (8%) per annum on all amounts due and not paid when due.

D. Any and all issues not determined herein are reserved for future decision.

DATED this 6th day of July 2021.

DIGITAL SIGNATURE

EDWIN L. FELTER, JR.
Administrative Law Judge

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-079-988-005

ISSUE

1. Whether Claimant established by a preponderance of the evidence an entitlement to temporary total disability (TTD) benefits from June 19, 2018, until December 23, 2018.

2. Determination of Claimant's average weekly wage.

FINDINGS OF FACT

PROCEDURAL HISTORY

The ALJ takes judicial notice of the following procedural history based on Office of Administrative Courts records and files. See *Habteghrgis v. Denver Marriott Hotel*, W.C. No. 4-528-385 (ICAP, March 31, 2006) ("A court can take judicial notice of its own records and files."):

1. On March 11, 2021, Claimant filed an Application for Hearing in WC 5-079-988-005. The Application for Hearing was mailed to Employer, at [Redacted], LLC, 5820 S. Parker Road, Aurora, CO 80015. Subsequently, Claimant's counsel sent a request to the Office of Administrative Courts (OAC) requesting that the OAC select a hearing date pursuant to OACRP Rule 8.I., because Respondents had not responded to the Application for Hearing.

2. On April 7, 2021, the Office of Administrative Courts (OAC) sent a Notice of Hearing to Claimant and to Respondent Claimant's counsel and to Respondent at [Redacted], LLC, 5820 S. Parker Road, Aurora, CO 80015 and [Redacted], LLC, 11133 S. Parker Road, Parker, CO 80134 providing notice that this matter that this matter was scheduled for hearing on June 10, 2021, at 8:30 a.m.

3. Respondent did not respond to the Notice of Hearing, and has not appeared or otherwise participated in this matter. Respondent did not appear for hearing on June 10, 2021.

4. A hearing was previously held in W.C. 5-079-988-002 on July 2, 2020, before ALJ Felter. In the Findings of Fact, Conclusions of Law and Order associated with that hearing, ALJ Felter found that Respondent received proper notice of hearing by virtue of mailing of the notice of the hearing to Respondent at [Redacted], LLC, 5820 South Parker Road, Aurora, Colorado 80015. The ALJ finds that the official Notice of Hearing for the present matter was sent to the same address, and the OAC has no record that the Notice of Hearing was returned as undeliverable or otherwise not delivered by the U.S. Postal Service. Therefore, there is a presumption of receipt which has not been overcome, and the ALJ finds that the Respondent received proper notice of the June 10, 2021 hearing and failed to attend or otherwise participate.

Relevant Facts

5. Claimant was employed as the general manager of Employer's restaurant. On June 17 and 18, 2018, Claimant sustained an injury to his back while moving supplies from a delivery truck into the restaurant.

6. On July 2, 2020, Claimant had a hearing before ALJ Felter regarding this matter. The ALJ takes judicial notice of the July 22, 2020 Findings of Fact, Conclusions of Law and Order ("FFCL") issued in that matter. In the July 22, 2020 FFCL, ALJ Felter found that Claimant sustained a compensable injury to his lower back on June 17 and 18, 2018. The injury arose out of and in the course of Claimant's employment with Employer and the injury was not intentionally self-inflected. ALJ Felter also found that Employer failed to insure its liability for workers' compensation.

7. At the time of Claimant's injury, Claimant earned $1,900.00 in wages, with an average weekly wage of $950.00. (Ex. A).

8. Between June 19, 2018, and December 24, 2018, Claimant did not work for any employer.

9. Claimant testified that he was informed by Employer that if he did not return to work after June 18, 2018, he would be deemed to have abandoned his job. Employer did not further communicate with Claimant, did not respond to phone calls, and did not provide Claimant with workers' compensation benefits.

10. The ALJ credits Claimant's testimony that he was seen by Dr. Oswald Grenado and also at Mountain Pain Clinic and was advised that if he were to return to work, he would be in danger of soiling himself. Claimant testified that Dr. Grenado took Claimant off work. The ALJ infers from Claimant's testimony that due to his work injury, he was unable to perform the functions of his position with Employer.

CONCLUSIONS OF LAW

Generally

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

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge.

University Park Care Center v. Industrial Claim Appeals Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

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

TEMPORARY TOTAL DISABILITY

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-103 (1)(g), 8-42-105(4); *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term “disability” connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant’s testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

The Workers' Compensation Act prohibits a claimant from receiving temporary disability benefits if the claimant is responsible for termination of the employment relationship. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, (Colo. App. 2008); §§ 8-42-103(1)(g), 8-42-105(4)(a), C.R.S. The termination statutes provide that where an employee is responsible for his termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAO, Apr. 24, 2006).

"Under the termination statutes, sections 8-42-103(1)(g) and 8-42-105(4), an employer bears the burden of establishing by a preponderance of the evidence that a claimant was terminated for cause or was responsible for the separation from employment." *Gilmore*, 187 P.3d at 1132. "Generally, the question of whether the claimant acted volitionally, and therefore is 'responsible' for a termination from employment, is a question of fact to be decided by the ALJ, based on consideration of the totality of the circumstances." *Gonzales v. Industrial Commission*, 740 P.2d 999 (Colo. 1987); *Windom v. Lawrence Construction Co.*, W.C. No. 4-487-966 (November 1, 2002). *In re Olaes*, WC. No. 4-782-977 (ICAP, April 12, 2011). Implicit in the termination statutes is a requirement that Respondents prove Claimant committed an "act" which formed the basis for his termination. Ultimately, the question of whether the claimant was responsible for the termination is one of fact for determination by the ALJ. *Apex Transportation, Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630, 632 (Colo. App. 2014).

Claimant has established by a preponderance of the evidence an entitlement to temporary total disability benefits for the period of June 19, 2018, to December 23, 2018. Claimant's testimony that he was unable to work was credible and unrebutted. When Claimant returned to work on December 24, 2018, the causal connection between Claimant's loss of earning capacity and his work injury was severed, and Claimant's entitlement to TTD benefits ended at that time. Claimant also established by a preponderance of the evidence that he was terminated from his position with Employer on or about June 19, 2018. No evidence was presented to establish that Claimant was responsible for his termination. Accordingly, that ALJ finds that Claimant has established entitlement to TTD benefits from June 19, 2018, to December 23, 2018.

AVERAGE WEEKLY WAGE

Section 8-42-102(2) requires the ALJ to base the claimant's Average Weekly Wage (AWW) on his or her earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.* Where the claimant's earnings increase periodically after the date of injury the ALJ may elect to apply § 8-42-102(3) and determine that fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability, not the earnings on the date of the injury. *Campbell v. IBM Corp.*, *supra*.

As found, Claimant's average weekly wage as of the date of his injury was $950.00 per week.

ORDER

It is therefore ordered that:

1. Claimant is entitled to temporary total disability benefits from June 19, 2018, to December 23, 2018.

2. Claimant's average weekly wage for the purpose of calculating temporary total disability benefits is $950.00.

3. All matters not determined herein are reserved for future determination.

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

DATED: July 7, 2021

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

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

2. If the claimant proves a compensable injury, whether the claimant has demonstrated, by a preponderance of the evidence, that treatment she has received from Mountain Family Health Centers is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.

3. If the claimant proves a compensable injury, whether the claimant has demonstrated, by a preponderance of the evidence, that recommended physical therapy is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.

4. At the hearing, the parties agreed that the remaining endorsed issues are reserved for future determination, if necessary. Those reserved issues are: average weekly wage (AWW), temporary total disability (TTD) benefits, temporary partial disability (TPD) benefits, and whether the claimant is responsible for the termination of her employment.

FINDINGS OF FACT

1. The claimant worked at the employer's hotel as a housekeeper. The claimant's job duties included all aspects of cleaning hotel rooms. Housekeepers are expected to take out the trash.

2. The claimant testified that she suffered an injury on August 22, 2020. The claimant testified that while placing bags of trash in a dumpster, she felt as though a "bone came disengaged from [her] back". The claimant further testified that she then felt pain in her right wrist while closing a window.

3. The claimant testified that on August 22, 2020, she told Mr. G[Redacted], Guest Services Manager, that she suffered an injury, but that Mr. G[Redacted] refused to write an accident report. The ALJ does not find this testimony to be credible or persuasive.

4. On August 22, 2020, the claimant was presented with a write-up for not taking out the trash. The claimant refused to sign the write-up. The claimant completed her shift on August 22, 2020. The claimant continued working for the employer until early October 2020.

5. On September 27, 2020, the employer presented the claimant with another write-up. The reason for the write-up was the claimant's failure to clean behind a bathroom door. This infraction was discovered because the hotel guest had left clothing behind the door. This write-up was identified as a "final warning". The claimant refused to sign this write-up.

6. Mr. G[Redacted] testified at the hearing. He testified that the claimant did not report an injury to him on August 22, 2020. Mr. G[Redacted] testified that on October 5, 2020, the claimant reported that she was having pain in her wrist and shoulder. In the October 5, 2020 incident report, the date of the claimant's injury was identified as October 2, 2020. In that same report, the nature, cause, and location of the injury/incident are identified as "unknown".

7. On October 7, 2020, the claimant received medical treatment at Valley View Hospital Association for her right upper extremity. At that time, the claimant was seen by Dr. Crystal Roney. The claimant reported right wrist and right finger pain. With regard to her wrist pain, the claimant reported that she first felt the pain after moving a heavy cart. Dr. Roney diagnosed the claimant with medial epicondylitis, neck muscle strain, and right wrist pain. Dr. Roney recommended the use of a wrist splint and physical therapy.

8. General Manager Dana Livings also testified at the hearing. Ms. Livings testified that the claimant did not report a work injury directly to her. Ms. Livings's testimony was consistent with Mr. G[Redacted]'s regarding the disciplinary actions provided to the claimant and her refusal to sign.

9. On May 4, 2021, the claimant attended an independent medical examination (IME) with Dr. John Raschbacher. In connection with the IME, Dr. Raschbacher reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his May 18, 2021 IME report, Dr. Raschbacher opined that the claimant did not suffer a right upper extremity injury at work. In support of this opinion, Dr. Raschbacher noted that the claimant did not have a discreet mechanism of injury. Dr. Raschbacher also noted that the claimant's "presentation was grossly non-physiologic and didn't make much sense medically and would not be consistent with a right wrist strain or sprain or ligamentous injury." Dr. Raschbacher's testimony was consistent with his IME report.

10. The ALJ credits the testimony of Ms. Livings and Mr. G[Redacted] regarding the disciplinary discussions with the claimant. The ALJ also credits the testimony of Ms. Livings and Mr. G[Redacted] regarding the timing of the claimant's report of a work injury. The ALJ credits the opinions of Dr. Raschbacher. The ALJ does not find the claimant's testimony to be credible or persuasive. Specifically, the ALJ is not persuaded by the claimant's testimony regarding the nature and onset of her symptoms. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that she suffered a right upper extremity injury while employed with the employer.

CONCLUSIONS OF LAW

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

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

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

4. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that she suffered an injury arising out of and in the course and scope of her employment with the employer. As found, the testimony of Ms. Livings and Mr. G[Redacted] is credible and persuasive. As found, the opinions of Dr. Raschbacher are credible and persuasive.

ORDER

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

Dated this 7th day of July 2021.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after

service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

ISSUES

1. Did Respondents overcome the DIME's 35% whole person impairment rating by clear and convincing evidence?

FINDINGS OF FACT

1. Claimant suffered an admitted industrial injury on October 25, 2014, while working for Employer as a maintenance technician. He was cleaning a large ice machine with a cleanser that contained phosphoric acid. The acid splashed onto his forearms above his protective gloves, causing chemical burns.

2. Claimant awoke the following morning with large, painful blisters on his forearms. He sought treatment at Premier Urgent Care and was given Silvadene cream to apply to his arms.

3. A few days after using the Silvadene cream, Claimant developed an itching, burning rash moving up from his arm to his neck and a portion of his back. He was initially diagnosed with allergic contact dermatitis.

4. Claimant then started taking Benadryl. Initially, the rash seemed to improve. But several days later he broke out in large hives on multiple areas of his body.

5. Claimant received two steroid injections which helped for approximately two days each time. He was also given a prednisone taper starting at 60 mg, which was not helpful.

6. Claimant began treating with Dr. Matthew Bowdish at the William Storms Allergy Clinic on January 12, 2015. Dr. Bowdish noted the onset of hives following the Silvadene and Benadryl treatment. Claimant showed Dr. Bowdish photographs of the lesions, and Dr. Bowdish stated: "they look like urticarial lesions." Dr. Bowdish noted that Claimant was still breaking out in hives approximately two to three times per week despite discontinuing the Silvadene and Benadryl. Dr. Bowdish diagnosed subacute-going-on-chronic urticaria. He opined that "either the Silvadene or the Benadryl cream promoted some sort of immunologic response that is still sputtering with urticarial lesions that are not very well controlled and not particularly responsive to systemic corticosteroids." Dr. Bowdish further documented Claimant was experiencing shortness of breath with these episodes, for which he prescribed a rescue inhaler.

7. On February 24, 2015, Dr. Bowdish noted several urticarial lesions on Claimant's hands, left arm, and chest. Dr. Bowdish diagnosed chronic idiopathic urticaria, which was resistant to multiple antihistamines, leukotriene inhibitors, and systemic steroids. He recommended omalizumab ("Xolair") therapy to hopefully modulate and suppress Claimant's immune response.

8. Insurer did not authorize the omalizumab.

9. Claimant underwent an Independent Medical Examination (IME) at Respondents' request with Dr. Tashof Bernton on June 1, 2015. Dr. Bernton opined the symptoms such as rashes, hives, swelling, and difficulty breathing represented different aspects of a "type 1" allergic reaction, which is characterized by histamine release and mediated by an IgE antibody. Dr. Bernton noted such allergic reactions are typically time-limited, particularly with treatment. But occasionally "allergic reactions such as this can go on to chronic urticarial reactions such as this patient had." Dr. Bernton noted there was no prior medical history to suggest an alternate cause of Claimant's symptoms. Dr. Bernton concluded:

> given the timing of the initial allergic reaction and the characteristics of the history, it is most probable that the chronic urticaria was precipitated by the patient's use of Silvadene cream to treat the work-related injury and the subsequent allergic reaction. I would, therefore, regard this problem as work-related.

10. Claimant was put at MMI on June 30, 2015, by Dr. Anjmun Sharma. Dr. Sharma diagnosed chemical dermatitis and urticaria. Dr. Sharma recommended Claimant receive the Xolair treatment as maintenance care.

11. Insurer still did not authorize omalizumab.

12. Claimant saw Dr. Jack Rook for a DIME on November 30, 2015. Dr. Rook noted that Claimant had broken out in hives within a few weeks of his MMI evaluation with Dr. Sharma and was having "full-blown hives" approximately once per month. He also reported difficulty breathing when the allergic symptoms flared. Dr. Rook noted Claimant had developed a DVT in his left leg in April 2015, which Claimant believed was related to the steroid injections and prednisone he received shortly after his accident.

13. Dr. Rook diagnosed a generalized allergic reaction "related to use of Silvadene cream after chemical burns." Dr. Rook agreed Claimant should try Xolair as recommended by Dr. Bowdish. Because Claimant continued to have allergic symptom and all medications recommended by the allergist had not yet been tried, Dr. Rook opined that Claimant was not at MMI. Dr. Rook estimated an impairment rating of 10-20% whole person for a Class 2 skin disorder.

14. Dr. Bernton reviewed Dr. Rook's DIME report and disagreed with the suggestion of a Class 2 skin disorder rating. Dr. Bernton opined Claimant should be rated as Class 1 because Dr. Rook noted no specific limitations in Claimant's performance of daily activities. He also opined there is no basis for concluding the DVT was related to the steroids Claimant received.

15. Claimant subsequently underwent an IME with Dr. Michael Volz on November 17, 2016. Dr. Volz described Claimant's case as "highly complex and involved with multiple factors to consider." Dr. Volz's diagnoses included chronic urticaria (CU) and angioedema (swelling). He indicated it was clearly histaminergic because histamine

blockers, montelukast and systemic steroids all helped reduce the manifestations. He opined it is challenging to determine why the episode began and why the manifestations are being perpetuated. But Dr. Volz concluded there is "a high degree of medical probability that the chemical exposure was involved in initiating the [disease] process." According to Dr. Volz, Silvadene has been available for many years and is typically well tolerated by most patients. Although rare, it is medically "plausible" that Silvadene triggered Claimant's reaction. Dr. Volz agreed that Xolair is a reasonable option and, in many cases, can lead to a full resolution, sometimes after a single dose.

16. The undersigned ALJ ordered Insurer to cover the Xolair in a final order dated March 9, 2017.

17. Claimant was evaluated by Dr. Christopher Webber, an allergy specialist, on April 16, 2018. Dr. Weber opined, "a lot" of Claimant's breathing issues appeared related to the chronic urticaria "either directly or due to medications." He planned to wind down respiratory medications once he got the urticaria under control. Dr. Webber ordered pulmonary function testing, which was normal.

18. Claimant started Xolair treatment in May 2018 under Dr. Webber's direction. The hives and pulmonary symptoms improved dramatically in less than a month. In October 2018, after six months without significant symptoms, Dr. Webber tried stopping Xolair. Unfortunately, the hives and pulmonary symptoms returned in full force within two months. Claimant restarted the medication in approximately February 2019, and the hives largely resolved. In mid-2020, the symptoms worsened despite monthly injections, so Dr. Webber increased the injections to every two weeks. After approximately six weeks, Claimant's condition stabilized, and he resumed injections at monthly intervals.

19. Claimant returned to Dr. Volz on July 13, 2020, for an MMI and impairment evaluation. He noted Claimant's excellent response to Xolair, followed by a quick regression when the medication was stopped. Dr. Volz stated after Xolair was restarted in February 2019, "all manifestations improved markedly and were well controlled without any effect on QOL or ADLs." However, Claimant was still using his recue inhaler approximately once per month for urticaria-related dyspnea. Dr. Volz opined Claimant would require "continual" Xolair treatment (every 4 weeks) "indefinitely," because "intermittent" injections had been ineffective.

20. Dr. Volz determined Claimant reached MMI on October 1, 2018.[1] Dr. Volz opined Claimant's injury-related impairments "are not limited to the skin or being cutaneous but are systemic." He assigned a Class 3 Impairment under Table 1, page 232 of the *AMA Guides*. The Class 3 category of impairment applies "when signs **and** symptoms of skin disorder are present **and** continuous treatment is required **and** there is limitation in the performance of many activities of daily living." (Emphasis in original). Class 3 provides a range of impairment from 25% to 50%, from which Dr. Volz selected 25%. He also assigned a 5% pulmonary rating under Table 8 on page 125 of the *AMA*

[1] Although it is unclear why Dr. Volz chose this MMI date, neither party is contesting MMI.

Guides for the ongoing dyspnea issues despite normal PFTs. The combined final rating was 29% whole person.

21. Claimant returned to Dr. Rook for a follow up DIME on December 14, 2020. Claimant's primary complaints at the time were ongoing hives, shortness of breath, and poor sleep. Dr. Rook referenced notes from Dr. Webber showing a "decrease" in Claimant's symptoms when on the Xolair as opposed to completely resolving all symptoms. He noted Claimant's recent flare despite receiving injections every four weeks. Claimant stated that with the Xolair, he generally does not get hives, but he continues to break out with "little bumps all over my body which are extremely itchy." Dr. Rook noted Claimant was "chronically fatigued" from years of "chronically poor" sleep. Claimant explained "his work-related condition has adversely affected numerous functional activities." Claimant had been unable to maintain full-time work because of poor endurance and stamina. He had difficulty with exertional activities could no longer exercise as he had before the injury. Claimant's concentration and cognition were impaired by the chronic fatigue.

22. Dr. Rook listed Claimant's injury-related diagnoses as:

(1) Chronic urticaria and angioedema,
(2) Chronic shortness of breath and cough worsened during exacerbations of number 1,
(3) Systemic symptoms associated with the chronic urticaria diagnosis, including:
Generalized fatigue
Reactive depression disorder
Weight gain due to steroid treatment and inactivity
Impaired concentration
Sleep apnea and reactive airway disease; and
Sleep disorder.

23. Claimant ascribed multiple other issues to the work injury, such as chronic diarrhea, headaches, diffuse body pain, G.I irritability, erectile dysfunction, and high blood pressure. However, Dr. Rook did not include these as injury-related diagnoses.

24. Dr. Rook agreed with Dr. Volz that Claimant was at MMI on October 1, 2018. He generally agreed with Dr. Volz's rating methodology and opined, "Certainly, this patient falls into this class III category based upon all of these criteria. Given the effect that this injury has had on his life, I would rate his impairment somewhere between 25% and 50%, and will give him a 35% whole person impairment rating." Dr. Rook disagreed that a separate pulmonary rating under Table 8 was warranted because PFTs and clinical oximetry were repeatedly normal. Dr. Rook noted the shortness of breath primarily seems to occur during exacerbations of his skin condition, and stated, "the 35% whole person rating provided for the chronic urticaria will incorporate the difficulties that he has systemically as well as from a pulmonary perspective." Although Dr. Rook believes the prior DVT was probably related to use of steroids after the injury, he did not attribute any

functional limitations to the condition. Accordingly, it does not appear the history of DVT played a role in Dr. Rook's determination of the 35% rating.

25. Dr. Bernton reviewed the DIME report and disagreed with Dr. Rook's determinations in multiple respects. Although chronic urticaria and itching are likely associated with the patient's work-related disorder, he thought Dr. Rook uncritically adopted the "catalog of conditions" that Claimant attributes to the work injury. Dr. Bernton opined diffuse body pain, GI irritability, erectile dysfunction, elevated blood pressure, and weight gain are not due to chronic urticaria.

26. Dr. Bernton disagreed with Dr. Volz's and Dr. Rook's assignment of Class 3 skin impairment. Dr. Bernton pointed to Dr. Volz's notation that when Claimant restarted Xolair in February 2019 "all manifestations improved markedly and were all well controlled without any effect on quality of life or activities of daily living." Dr. Bernton believes this notation "by definition" describes a Class 1 impairment. Dr. Bernton testified the rating physician has discretion to choose the appropriate rating from within the applicable range. Dr. Bernton concluded Claimant has a 5% whole person skin rating under Class 1.

27. Claimant's descriptions of constant itching, recurrent hives, associated dyspnea, and chronic fatigue are generally credible.

28. Respondents failed to overcome Dr. Rook's impairment rating by clear and convincing evidence. Dr. Bernton's opinions and analysis reflect mere differences of opinion with Dr. Rook and Dr. Volz regarding the applicability of Class 3 skin impairment.

CONCLUSIONS OF LAW

A DIME's determination regarding whole person impairment is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c). The clear and convincing burden also applies to the DIME's determination of which impairments were caused by the work accident. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1988). The party challenging a DIME rating must demonstrate it is "highly probable" the determination is incorrect. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). A party meets this burden if the evidence contradicting the DIME physician is "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). A "mere difference of medical opinion" does not constitute clear and convincing evidence. *E.g., Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (March 18, 2016).

As found, Respondents failed to overcome Dr. Rook's rating by clear and convincing evidence. The key disagreement here is about the extent to which Claimant's condition impacts the performance of ADLs. The description of a Class 3 impairment refers to "limitation in the performance of many activities of daily living" Although the provision requires that "many" ADLs be affected, it does not specify the degree of impact, such as, “mild,” “moderate,” or “severe.”[2] The relatively imprecise language appears to provide the rating physician a greater degree of discretion than exists in some other sections of the *Guides*. Here, the persuasive evidence shows chronic itching has disrupted Claimant’s sleep for years, which undoubtedly contributes to his fatigue. As Dr. Rook noted, the chronic fatigue affects Claimant’s ability to engage in a variety of ADLs, notwithstanding other limitations potentially caused by unrelated diagnoses. Additionally, Claimant had at least one “breakthrough” episode of urticaria lasting at least six weeks, which required injection every other week to bring it back under control. Given the apparently fragile nature of the symptom relief Claimant obtains from the injections, it is not unreasonable to conclude the condition is not 100% controlled and still causes limitations. Although Dr. Bernton’s arguments are well-presented, Dr. Rook and Dr. Volz performed thorough evaluations, and they both concluded Claimant has sufficient injury-related limitations to warrant a Class 3 impairment. In this context, Dr. Bernton’s opinions reflect “mere differences of opinion,” and do not rise to the level of “clear and convincing” evidence. The totality of persuasive evidence does not show Dr. Rook was “highly probably incorrect” to agree with Dr. Volz and assign a Class 3 skin rating.

ORDER

It is therefore ordered that:

1. Respondents request to overcome the DIME regarding permanent impairment is denied and dismissed.

2. Insurer shall pay Claimant PPD benefits based on Dr. Rook’s 35% whole person rating.

3. Insurer shall pay Claimant statutory interest of eight percent (8%) per annum on all benefits not paid when due.

4. All matters not decided herein are reserved for future determination.

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

[2] The description of a Class 5 impairment does reference “severe” limitation of ADLs, which suggest lesser impact on ADLs in the lower categories.

reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: July 8, 2021

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

ISSUE

Whether Respondents have proven by a preponderance of the evidence that continuing medical maintenance benefits are no longer causally related, reasonable or necessary to relieve the effects of Claimant's September 19, 2014 industrial injury or prevent further deterioration of his condition.

FINDINGS OF FACT

1. Claimant is 62 year old male who resides in Twain Harte, California. He has lived in California since July 16, 2017. Claimant previously lived in Denver, Colorado. Employer is a restaurant located in Sheridan, Colorado who hired Claimant as a Grill Cook on October 23, 2012.

2. On September 19, 2014 Claimant was injured while working for Employer. He specifically bent over to put away a grill scraper, stood up, twisted and felt a pop in his lower back. Claimant initially underwent medical treatment at Concentra Medical Centers. He received Percocet, physical therapy and a lumbar MRI. Claimant was subsequently referred to Authorized Treating Physician (ATP) John T. Sacha, M.D. for pain management.

3. Dr. Sacha is a Colorado licensed physician who is Board Certified in Physical Medicine and Rehabilitation, Electrodiagnostic Medicine, and Pain Management. He has been Level II accredited by the Colorado Division of Workers' Compensation (DOWC) for the past 25 years. Dr. Sacha is on the PDMP committee for opioids and the committee that develops guidelines for the safe use of opioids in the State of Colorado. He treats patients with acute and chronic complex spinal disorders and provides medication management as part of his regular practice.

4. Dr. Sacha first evaluated Claimant on November 21, 2014. He documented that Claimant's lumbar MRI revealed degenerative disc disease with facet spondylosis and bulging at L4-L5 and L5-S1 with left-sided foraminal narrowing. Dr. Sacha's initial plan included administration of left L5 and S1 transforaminal epidural steroid injections (TF ESIs)/spinal nerve blocks, immediate discontinuation of Percocet and utilization of Tramadol and Gabapentin.

5. Dr. Sacha subsequently administered left L5 and S1 TF ESIs/spinal nerve blocks. Claimant also underwent lower extremity EMG/NCV testing that confirmed S1 radiculopathy. Dr. Sacha referred Claimant to Andrew Castro, M.D., for a surgical consultation.

6. Dr. Castro evaluated Claimant on February 18, 2015 and recommended repeat ESIs prior to surgical consideration. Dr. Sacha administered repeat injections.

On March 27, 2015 Dr. Sacha reported that Claimant’s pain had worsened, the injections had not relieved his symptoms and the only remaining options were surgery or placing him at Maximum Medical Improvement (MMI).

7. On May 7, 2015 Claimant underwent lower back surgery with Dr. Castro. The specific procedure consisted of a bilateral laminectomy and discectomy at L4-5 and a left-sided laminectomy and discectomy at L5-S1.

8. Claimant received opioids immediately following surgery, but was quickly weaned from the medications. His condition improved slightly but his symptoms waxed and waned. Claimant suffered constant lower back pain and intermittent left leg symptoms.

9. On September 28, 2015 Dr. Sacha concluded that Claimant had reached MMI because his symptoms had plateaued. Dr. Sacha determined that Claimant required medical maintenance care in the form of a medication maintenance program, a gym pass, a couple of psychological visits and medications over the next 12–24 months. He explained that the preceding recommendation constituted a standard maintenance care plan for patients who have undergone spinal surgery. On October 5, 2015 Dr. Sacha assigned 13% lumbar spine and 2% mental permanent impairment ratings.

10. On November 13, 2015 Insurer filed a Final Admission of Liability (FAL) consistent with Dr. Sacha’s MMI and impairment determinations. The FAL also acknowledged medical maintenance care. Following the parties’ stipulation to resolve residual issues, Respondents filed an Amended FAL on January 21, 2016. Claimant did not challenge the Amended FAL and his claim closed by operation of law on all issues other than medical maintenance benefits.

11. Claimant continued to receive maintenance treatment with Dr. Sacha until he moved to California on July 16, 2017. His maintenance care during the period included non-opioid medications, utilization of a TENS unit, chiropractic treatment, acupuncture, an additional lumbar MRI, further sets of TF ESIs, another EMG and a surgical reevaluation.

12. On July 14, 2017 Claimant visited Dr. Sacha for the final time before moving to California. Dr. Sacha noted that Claimant’s condition remained unchanged, his symptoms were tolerable and he experienced good and bad days. His treatment involved continued medications for two months, a gym pass and a new ATP for maintenance management in California.

13. On November 8, 2017 Tariq Mirza, M.D. located in Modesto, California, began treating Claimant. He noted that Claimant’s symptoms included pain in his back and legs as well as reactive depression. Dr. Mirza immediately prescribed medications, including Duragesic (Fentanyl) patches of 50 micrograms (mcg)/hour, Soma and Neurontin.

14. On November 22, 2017 Dr. Mirza conducted a physical examination that revealed findings virtually identical to Claimant's previous visit. He continued to prescribe the same medications. Dr. Mirza recommended repeat lumbar ESIs, continued utilization of the TENS unit and physical therapy.

15. On February 14, 2018 Claimant returned to Dr. Mirza for an examination. He reported "as long as I have medications in my system I am functional, without medication pain in my lumbar spine is 8-9 or even 10, however with the help of medication it [decreases] to 3-4 and it is manageable." Dr. Mirza increased Claimant's Fentanyl patches to 100 mcg/hour and continued the other medications.

16. On April 11, 2018 Dr. Mirza noted that Claimant had completed therapy but had not noticed any improvement in flexibility. Claimant remarked that his lower back pain was 7-8 or sometimes 9, on a 0-10 scale, but with medication it diminished to 3-4/10. Dr. Mirza continued to prescribe the same medications at the same dosages.

17. On July 5, 2018 Claimant returned to Colorado for an evaluation with Dr. Sacha to determine whether his condition had worsened so that he was no longer at MMI. Dr. Sacha obtained an updated history from Claimant, reviewed Dr. Mirza's records and performed a physical examination. He was critical of Dr. Mirza's renewed prescription of opioids. Dr. Sacha detailed that Claimant "was opioid naïve and on non-opioid analgesics from this practitioner [and] is now on 100 mcg Fentanyl patches. As expected, the patient has had an increase in pain in all body parts including his neck, back, buttocks, and left leg and has not been compliant with his home exercise program."

18. Dr. Sacha explained that Dr. Mirza had prescribed Fentanyl patches far in excess of the standard of care in Colorado. He emphasized that Fentanyl is a particularly dangerous drug and the State of Colorado recommends never exceeding 50 Morphine Milligram Equivalents (MMEs) per day. Notably, on July 5, 2018 Claimant was taking 240 MMEs/day or five times the recommended limit. Dr. Sacha further explained that opioid medications were 100% contraindicated for patients like Claimant who suffer lung issues. When Dr. Sacha informed Claimant that his use of Fentanyl was wildly inappropriate, did not meet any medical treatment guidelines and was dangerous, their relationship deteriorated from excellent to antagonistic.

19. Dr. Sacha testified at the hearing in this matter that during his July 5, 2018 evaluation Claimant acknowledged that his functioning had decreased while taking opioids. He explained that opioids increase a patient's pain receptors. However, when opioids are discontinued, the increased pain receptors remain and only gradually decrease over time. Dr. Sacha thus outlined a maintenance care plan that included a change of physician and a supervised weaning from opioids followed by non-opioid analgesics for 12 months. He further recommended a gym pass for 12 months, one further ESI and one to three visits with a physical medicine or pain management specialist. Dr. Sacha emphasized that his maintenance care plan was not directed at a spinal issue, but at the problem of increased pain receptors caused by opioid analgesics.

20. On August 30, 2018 the parties conducted a hearing before ALJ Goldman. He issued an order dated October 1, 2018 denying Claimant's petition to reopen based on a worsening of condition.

21. After the hearing, Dr. Mirza began decreasing Claimant's opioid analgesics. He gradually reduced Claimant's Fentanyl from 100 mcg/hour patches to 75 mcg/hour patches on October 24, 2018, then to 50 mcg/hour patches on November 28, 2018 and finally to 25 mcg/hour patches on May 17, 2019. Dr. Mirza stated that his goal was to discontinue opioid analgesics "in a few months." However, over the next 22 months between May 17, 2019 and March 24, 2021 Dr. Mirza continued Claimant on 25 mcg/hour Fentanyl patches without providing any other maintenance medical care.

22. On February 5, 2021 Claimant returned to Colorado to visit Dr. Sacha for an evaluation. Dr. Sacha reviewed Claimant's medical records and conducted a physical examination. He noted that Claimant's continued use of Fentanyl was "surprising" because he was clearly not a candidate for opioids. Dr. Sacha explained that the 25 mcg/hour patch constituted 60 MMEs/day. The amount exceeded the State of Colorado recommended dosage of 50 MMEs/day. Dr. Sacha remarked that Claimant's continued Fentanyl usage placed him at high risk for opioid misuse and sudden respiratory depression. He proposed an updated maintenance treatment plan that included the following: (1) immediate discontinuation of Fentanyl; (2) three months of non-opioid analgesics; and (3) other treatment modalities including chiropractic care and acupuncture treatment for symptom control during the weaning period.

23. On February 25, 2021 Respondents applied for a hearing on the issue of medical benefits. Respondents specifically sought "an order compelling discontinuation of opioids (Fentanyl), with a weaning/tapering schedule, and then discontinuation of maintenance care under this claim as per Dr. Sacha."

24. On March 24, 2021 Dr. Mirza noted that he had a long discussion with Claimant about discontinuing Fentanyl patches and replacing them with Suboxone films. Claimant testified and the record reflects that he has not taken any Fentanyl since March 24, 2021.

25. On May 8, 2021 Dr. Sacha issued a report following his review of Dr. Mirza's March 24, 2021 report. He noted that Dr. Mirza had discontinued Fentanyl and started Claimant on Suboxone. Dr. Sacha commented that it was reasonable to provide Claimant with a one month supply of Suboxone before weaning him off the medication over a four-week timeframe. He explained that any further use of Suboxone and any other medical care after the weaning period should be performed under private insurance because it would not be related to Claimant's September 19, 2014 industrial injury.

26. Dr. Sacha updated his opinion and testified that it was acceptable for Claimant to continue Suboxone for a three-month time period and then discontinue the medication. At the conclusion of the three-month time frame Claimant would no longer require medical maintenance treatment. Dr. Sacha emphasized that three-months of post-Fentanyl care was the humane way to wean Claimant from pain medications.

27. Dr. Sacha remarked that, while Claimant had some residual spine pain before Dr. Mirza prescribed opioids, his ongoing symptoms and functional limitations were caused by the medications. Specifically, the opioid medications caused an increase in Claimant's pain receptors. Dr. Sacha summarized that allowing Claimant to receive additional medical maintenance care beyond the three-month weaning period will cause harm. Specifically, additional medical treatment will only worsen Claimant's condition even if he still has pain after the weaning period. Dr. Sacha explained that Claimant needs to cease receiving medical care after the weaning period, perform his home exercise program and move on with his life. He determined that Claimant will be better off functionally, mentally and from a pain standpoint if his care is discontinued and he stops visiting doctors.

28. Claimant testified at the hearing in this matter. He explained that he has suffered constant pain since his September 19, 2014 industrial injury. Although his symptoms have waxed and waned over time, they have persisted. Nothing other than opioid medications have decreased his severe pain and improved his function.

29. Respondents have proven that it is more probably true than not that continuing medical maintenance benefits are no longer causally related, reasonable or necessary to relieve the effects of Claimant's September 19, 2014 industrial injury or prevent further deterioration of his condition. On September 19, 2014 Claimant injured his lower back while working for Employer. Claimant initially received conservative treatment and was referred to ATP Dr. Sacha for pain management. Dr. Sacha administered left L5 and S1 TF ESIs/spinal nerve blocks. Claimant also underwent lower extremity EMG/NCV testing that confirmed S1 radiculopathy. On May 7, 2015 Claimant underwent lower back surgery consisting of a bilateral laminectomy and discectomy at L4-L5 and a left-sided laminectomy and discectomy at L5-S1. On September 28, 2015 Dr. Sacha concluded that Claimant reached MMI and required medical maintenance treatment including medications over the next 12–24 months. Claimant then received maintenance treatment with Dr. Sacha until he moved to California on July 16, 2017. His maintenance care during the period included non-opioid medications, utilization of a TENS unit, chiropractic treatment, acupuncture, an additional lumbar MRI, further sets of TF ESIs, another EMG and a surgical reevaluation. Ultimately, Dr. Sacha was Claimant's primary ATP for more than two and a half years and saw him approximately 40 times.

30. On November 8, 2017 Dr. Mirza began treating Claimant in California. He immediately prescribed opioid medications in the form of 50 mcg/hour Fentanyl patches. By February 14, 2018 Dr. Mirza increased Claimant's Fentanyl patches to 100 mcg/hour and continued other medications. On July 5, 2018 Claimant returned to Colorado for an evaluation with Dr. Sacha. Dr. Sacha was critical of the renewed prescription of opioids and explained that Dr. Mirza had prescribed Fentanyl patches far in excess of the standard of care in Colorado. He emphasized that Fentanyl is a particularly dangerous drug and the State of Colorado recommends never exceeding 50 MMEs per day. Notably, on July 5, 2018 Claimant was taking 240 MMEs/day or five times the recommended limit. Dr. Sacha explained that opioids increase a patient's pain receptors. However, when opioids are discontinued, the increased pain receptors remain and only gradually decrease over time. He thus outlined a maintenance plan that included a change of

physician and a supervised weaning from opioids followed by non-opioid analgesics for 12 months. Dr. Sacha emphasized that his maintenance care plan was not directed at Claimant's spinal issue, but at the increased pain receptors caused by opioid analgesics.

31. After an August 30, 2018 hearing before ALJ Goldman, Dr. Mirza began decreasing Claimant's opioid analgesics. He gradually reduced Claimant's Fentanyl from 100 mcg/hour patches to 75 mcg/hour patches on October 24, 2018, then to 50 mcg/hour patches on November 28, 2018 and finally to 25 mcg/hour patches on May 17, 2019. Over the ensuing 22 months between May 17, 2019 and March 24, 2021 Dr. Mirza continued Claimant on 25 mcg/hour Fentanyl patches without providing any other maintenance medical care. After a February 5, 2021 evaluation, Dr. Sacha explained that the 25 mcg/hour patch constituted 60 MMEs/day. The amount exceeded the State of Colorado recommended dosage of 50 MMEs/day. Dr. Sacha remarked that Claimant's continued Fentanyl usage placed him at high risk for opioid misuse and sudden respiratory depression. Furthermore, on May 8, 2021 Dr. Sacha issued a report following his review of Dr. Mirza's March 24, 2021 report. He noted that Dr. Mirza had discontinued Fentanyl and started Claimant on Suboxone. Dr. Sacha commented that it was reasonable to provide Claimant with a one month supply of Suboxone before weaning him off the medication over a four-week timeframe.

32. Dr. Sacha updated his opinion and testified that it was acceptable for Claimant to continue Suboxone for a three-month time period and then discontinue the medication. At the conclusion of the three-month time frame Claimant would no longer require medical maintenance treatment. Dr. Sacha emphasized that three-months of post-Fentanyl care was the humane way to wean Claimant from pain medications. He remarked that, while Claimant had some residual spine pain before Dr. Mirza prescribed opioids, his ongoing symptoms and functional limitations were caused by the medications. Specifically, the opioid medications caused an increase in Claimant's pain receptors. Dr. Sacha testified that Claimant's ongoing pain issues are not spine-related but instead caused by the excessive prescribing of opioid analgesics by Dr. Mirza over the past three and a half years. The opioid analgesics increased Claimant's pain receptors and decreased his functional ability.

33. The preceding chronology and persuasive opinion of ATP Dr. Sacha reflect that continuing medical maintenance benefits are no longer reasonable, necessary or causally related to Claimant's September 19, 2014 industrial injury. Instead, Claimant's continuing symptoms are attributable to his increased pain receptors from using Fentanyl for a prolonged time period. Because the three-months of Suboxone treatment began on March 24, 2021, the appropriate weaning period has now ended. Accordingly, Respondents request to terminate Claimant's medical maintenance benefits is granted.

CONCLUSIONS OF LAW

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

entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

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

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

4. Generally, to prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988). However, when respondents file a final admission of liability acknowledging medical maintenance benefits pursuant to *Grover* they can seek to terminate their liability for ongoing maintenance medical treatment. *See* §8-43-201(1), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). When the respondents contest liability for a particular benefit, the claimant must prove that the challenged treatment is reasonable, necessary and related to the industrial injury. *Id.* However, when respondents seek to terminate all post-MMI benefits, they shoulder the burden of proof to terminate liability for maintenance medical treatment. *In Re Claim of Arguello*, W.C. No. 4-762-736-04 (ICAO, May 3, 2016); *In Re Claim of Dunn*, W.C. No. 4-754-838 (ICAO, Oct. 1, 2013); *see* §8-43-201(1), C.R.S. (stating that "a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification." Specifically, respondents are not liable for future maintenance benefits when they no longer relate back to the industrial injury. *See In Re Claim of Salisbury*, W.C. No. 4-702-144 (ICAO, June 5, 2012).

5. Because Respondents seek to terminate all of Claimant's medical maintenance care, they bear the burden of demonstrating that continuing medical maintenance benefits are no longer causally related, reasonable or necessary to relieve the effects of Claimant's September 19, 2014 industrial injury or prevent further deterioration of his condition. Dr. Sacha's opinions regarding the need to wean Claimant from Fentanyl then terminate all further maintenance medical care is persuasive. Accordingly, based on a review of the medical records and the opinions of Dr. Sacha,

Respondents have established that additional medical maintenance care is no longer reasonable, necessary or causally related to Claimant's September 19, 2014 industrial injury.

6. As found, on September 19, 2014 Claimant injured his lower back while working for Employer. Claimant initially received conservative treatment and was referred to ATP Dr. Sacha for pain management. Dr. Sacha administered left L5 and S1 TF ESIs/spinal nerve blocks. Claimant also underwent lower extremity EMG/NCV testing that confirmed S1 radiculopathy. On May 7, 2015 Claimant underwent lower back surgery consisting of a bilateral laminectomy and discectomy at L4-L5 and a left-sided laminectomy and discectomy at L5-S1. On September 28, 2015 Dr. Sacha concluded that Claimant reached MMI and required medical maintenance treatment including medications over the next 12–24 months. Claimant then received maintenance treatment with Dr. Sacha until he moved to California on July 16, 2017. His maintenance care during the period included non-opioid medications, utilization of a TENS unit, chiropractic treatment, acupuncture, an additional lumbar MRI, further sets of TF ESIs, another EMG and a surgical reevaluation. Ultimately, Dr. Sacha was Claimant's primary ATP for more than two and a half years and saw him approximately 40 times.

7. As found, on November 8, 2017 Dr. Mirza began treating Claimant in California. He immediately prescribed opioid medications in the form of 50 mcg/hour Fentanyl patches. By February 14, 2018 Dr. Mirza increased Claimant's Fentanyl patches to 100 mcg/hour and continued other medications. On July 5, 2018 Claimant returned to Colorado for an evaluation with Dr. Sacha. Dr. Sacha was critical of the renewed prescription of opioids and explained that Dr. Mirza had prescribed Fentanyl patches far in excess of the standard of care in Colorado. He emphasized that Fentanyl is a particularly dangerous drug and the State of Colorado recommends never exceeding 50 MMEs per day. Notably, on July 5, 2018 Claimant was taking 240 MMEs/day or five times the recommended limit. Dr. Sacha explained that opioids increase a patient's pain receptors. However, when opioids are discontinued, the increased pain receptors remain and only gradually decrease over time. He thus outlined a maintenance plan that included a change of physician and a supervised weaning from opioids followed by non-opioid analgesics for 12 months. Dr. Sacha emphasized that his maintenance care plan was not directed at Claimant's spinal issue, but at the increased pain receptors caused by opioid analgesics.

8. As found, after an August 30, 2018 hearing before ALJ Goldman, Dr. Mirza began decreasing Claimant's opioid analgesics. He gradually reduced Claimant's Fentanyl from 100 mcg/hour patches to 75 mcg/hour patches on October 24, 2018, then to 50 mcg/hour patches on November 28, 2018 and finally to 25 mcg/hour patches on May 17, 2019. Over the ensuing 22 months between May 17, 2019 and March 24, 2021 Dr. Mirza continued Claimant on 25 mcg/hour Fentanyl patches without providing any other maintenance medical care. After a February 5, 2021 evaluation, Dr. Sacha explained that the 25 mcg/hour patch constituted 60 MMEs/day. The amount exceeded the State of Colorado recommended dosage of 50 MMEs/day. Dr. Sacha remarked that Claimant's continued Fentanyl usage placed him at high risk for opioid misuse and sudden respiratory depression. Furthermore, on May 8, 2021 Dr. Sacha issued a report

following his review of Dr. Mirza's March 24, 2021 report. He noted that Dr. Mirza had discontinued Fentanyl and started Claimant on Suboxone. Dr. Sacha commented that it was reasonable to provide Claimant with a one month supply of Suboxone before weaning him off the medication over a four-week timeframe.

9. As found, Dr. Sacha updated his opinion and testified that it was acceptable for Claimant to continue Suboxone for a three-month time period and then discontinue the medication. At the conclusion of the three-month time frame Claimant would no longer require medical maintenance treatment. Dr. Sacha emphasized that three-months of post-Fentanyl care was the humane way to wean Claimant from pain medications. He remarked that, while Claimant had some residual spine pain before Dr. Mirza prescribed opioids, his ongoing symptoms and functional limitations were caused by the medications. Specifically, the opioid medications caused an increase in Claimant's pain receptors. Dr. Sacha testified that Claimant's ongoing pain issues are not spine-related but instead caused by the excessive prescribing of opioid analgesics by Dr. Mirza over the past three and a half years. The opioid analgesics increased Claimant's pain receptors and decreased his functional ability.

10. As found, the preceding chronology and persuasive opinion of ATP Dr. Sacha reflect that continuing medical maintenance benefits are no longer reasonable, necessary or causally related to Claimant's September 19, 2014 industrial injury. Instead, Claimant's continuing symptoms are attributable to his increased pain receptors from using Fentanyl for a prolonged time period. Because the three-months of Suboxone treatment began on March 24, 2021, the appropriate weaning period has now ended. Accordingly, Respondents' request to terminate Claimant's medical maintenance benefits as a result of his September 19, 2014 industrial injury is granted.

ORDER

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

1. Respondents' request to terminate Claimant's medical maintenance benefits is granted.

2. Any issues not resolved in this order are reserved for future determination.

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

Rule 26, OACRP. You may access a form for a petition to review at https://oac.colorado.gov/resources/oac-forms.

DATED: July 8, 2021.

DIGITAL SIGNATURE:

Peter J. Cannici

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-143-218-001

ISSUES

I. Whether Claimant established by a preponderance of the evidence that he suffered a compensable injury.

II. Whether Respondent Employer established by a preponderance of the evidence that Claimant is an independent contractor and not an employee.

III. Whether Claimant established by a preponderance of the evidence that he is entitled to reasonable, necessary, and related medical benefits.

IV. Whether Claimant established by a preponderance of the evidence that he is entitled to temporary total disability benefits as of June 10, 2020, and continuing.

V. Determination of Claimant's average weekly wage.

VI. Whether Claimant violated a safety rule by not wearing a seatbelt and should have his disability benefits reduced by 50%.

VII. Whether Respondent-Employer is subject to penalties pursuant to 8-43-408 for failing to carry workers' compensation insurance.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. Cesar M[Redacted] operates [Redacted] (hereinafter Employer).

2. Employer is a trucking company that uses semitrucks to transport fruits and vegetables mainly in Denver and Texas.

3. At the time of Claimant's accident, Employer was operating and conducting its business with five semitrucks.[1]

4. Employer was operating without workers' compensation insurance.

[1] The employer did not own each semitruck. Instead, the employer was leasing each truck. The employer did not, however, lease Claimant the truck he was driving at the time of the accident under any type of lease agreement.

Terms of Employment

5. Employer hired Claimant in May 2019 to work as a semitruck driver. Claimant's primary job duties involved driving the Denver to Texas round trip route twice a week to deliver fruits and vegetables. Each round trip route took three days. As a result, Claimant usually worked for Employer six days a week.

6. Employer contends Claimant worked as an independent contractor. However, Claimant and Employer did not enter into any type of written lease agreement or written employment agreement. There was only an oral agreement in which Employer agreed to pay Claimant to drive one of his semitrucks and Claimant agreed to drive one of Employer's semitrucks. The weekly rate of pay Employer offered Claimant for driving two round trip routes from Denver to Texas, which took 6 days, was $1,800. Claimant accepted the offer and began driving mainly the Denver and Texas route – twice per week – for $1,800 per week.

7. Although Employer contends Claimant was an independent contractor, there was no credible or persuasive evidence submitted at hearing that established Claimant customarily maintained an independent business as a truck driver – or any other type of business. For example, Claimant did not have a business card, a business listing, or a business address. In addition, there was no evidence presented that established Claimant employed others to complete any work tasks for any business. Nor was there any credible evidence presented that established Claimant had a financial investment in a trucking business - such as a truck – or any other business. Lastly, there was no evidence submitted at hearing that established Claimant carried liability insurance for any type of business.

8. In addition, Employer directed Claimant when and where to pick up and deliver the fruits and vegetables. As a result, Claimant was not free to pick up and deliver the goods on his own time schedule.

9. Besides being paid $1,800.00 per week, Employer also paid Claimant's expenses to operate the truck, such as fuel, to drive the two roundtrip delivery trips from Denver to Texas and back to Denver. As a result, there was no indication Claimant could suffer a loss while working for Employer.

10. Claimant usually worked six days a week for Employer. Plus, there was no credible evidence submitted at hearing which established Claimant worked for anyone other than Employer between May 2019 and the June 10, 2020, work accident.

11. In addition, Employer provided Claimant the primary tool to perform his job - a semitruck.

12. Employer paid Claimant personally rather than making checks payable to a trade or business name.

13. Claimant was working for Employer for an indefinite time period. Thus, Claimant's employment with Employer was not limited to a finite time period by either party.

14. Claimant was not working for Employer under a lease agreement or contract pursuant to 40-11.5-102, C.R.S. When Claimant was hired by Employer, he was not offered workers' compensation insurance or other insurance with similar coverage as set forth in 40-11.5-102(5).

15. Employer did not establish a quality standard and did not oversee Claimant's work and instruct Claimant how to perform his job.

16. Employer did not pay Claimant a salary or an hourly rate. Instead, Employer paid Claimant a fixed rate for each roundtrip Claimant made from Denver to Texas. But Employer did reimburse Claimant for his expenses such as fuel and other expenses Claimant incurred while driving his route.

17. Employer did not terminate Claimant at any time for his failure to meet the employer's job requirements.

18. There is no indication Employer provided Claimant any training.

19. There is no indication Employer required Claimant to work exclusively for employer. On the other hand, Claimant did not have his own truck. Therefore, Claimant could not work as a truckdriver for someone else without them providing him a truck to drive.

20. As a result, the ALJ finds Claimant was an employee and not an independent contractor because Claimant was not free from the control and direction in the performance of the services, both under the contract for performance of service and was not customarily engaged in an independent business of any kind.

Accident

21. On June 10, 2020, Claimant was driving his Denver/Texas route and driving through New Mexico. While driving through New Mexico - in his Employer's truck - Claimant was blown off the road by strong winds. After being blown off the road, Claimant went through the median and was bounced around violently. After Claimant went through the median his truck crossed into the oncoming lanes of traffic and then rolled onto the driver's side. Ex. 1, pp. 1-5. As a result, Claimant suffered serious spinal injuries.

22. At the time of the accident, Claimant was restrained and using his seatbelt, but his seatbelt came undone during the accident.

23. As a result, Claimant's injury arose out of the course and scope of employment with his Employer.

Medical treatment due spinal cord injury

24. After the accident, Claimant was flown by helicopter to University Hospital in Albuquerque New Mexico. Ex. 1, p. 3 and Ex. 2, pp. 1-2. Due to his spinal cord injury, Claimant underwent spine surgery on June 11, 2020, and June 17, 2020. On June 29, 2020, Claimant was discharged to Craig Rehabilitation Hospital. To get Claimant to Craig Hospital, Claimant was flown from University Hospital in Albuquerque New Mexico to Craig Hospital in Englewood, Colorado. Ex. 2, pp. 1-2.

25. On June 29, 2020, Claimant was admitted to Craig Hospital and stayed until discharged on July 22, 2020. At the time of admission, Claimant was diagnosed as suffering from paraplegia. During his rehabilitation treatment at Craig Hospital, Claimant's paraplegia improved, but yet his final diagnosis at discharge was tetraplegia.

26. Due to his work injury, Claimant developed a neurogenic bladder. In September and October 2020, Claimant presented to the emergency department at Longmont United Hospital due to complications from his neurogenic bladder. Due to his neurogenic bladder, Claimant developed a urinary tract infection and treated for such condition at Longmont United Hospital.

27. Since his injury, Claimant has continued to require medical treatment to cure and relieve him from the effects of his work injury.

TTD

28. Since Claimant's accident of June 10, 2020, Claimant has been suffering from paraplegia and tetraplegia. As found above, Claimant was hospitalized from June 10, 2020, through July 22, 2020.

29. Claimant could not work while hospitalized and there is no indication Claimant has been released to full duty or placed at maximum medical improvement. As a result, Claimant continues to be disabled and has been unable to return to work as a semitruck driver since the accident.

30. After the accident, Employer continued paying Claimant for a short time period. Employer paid Claimant $1,800 one week and $900 for two subsequent weeks. Thus, Employer has paid Claimant $3,600 in lost wage benefits since June 10, 2020.

31. As a result, Claimant is entitled to TTD as of June 10, 2020. Employer, however, is entitled to a credit of $3,600.

AWW

32. As found above, Claimant typically drove two trips per week from Denver to Texas and back to Denver. Claimant was paid $1,800 per week to drive these two trips. As a result, Claimant's average weekly wage is $1,800.

Credibility Determinations

33. Claimant testified about the terms and conditions of his employment, how the accident occurred, that he was wearing a seatbelt at the time of the accident, the extent of his injuries, the need for medical treatment, and to his wages. The ALJ finds Claimant's testimony to be credible.

34. Mr. Cesar M[Redacted] testified on behalf of Employer. He testified that he hired Claimant as an independent contractor. That said, despite his testimony, he did not provide any documentation to support such assertion. Moreover, the facts as found establish Claimant was an employee of Employer and not an independent contractor. As a result, the ALJ does not find Mr. M[Redacted]'s testimony to be credible or persuasive regarding Claimant's status as an independent contractor.

Safety Rule Violation

35. Mr. M[Redacted] also asserted that Claimant was not wearing his seatbelt at the time of the accident. The ALJ, however, has credited Claimant's testimony that he was wearing his seatbelt at the time of the accident and that it came undone during the accident. Thus, to the extent Employer was asserting a safety rule violation, additional findings are unnecessary since it has been found that Claimant was wearing his seatbelt at the time of the accident. As a result, no safety rule violation can exist.

Lack of Workers' Compensation Insurance

36. Mr. M[Redacted] confirmed that [Redacted] does not carry workers' compensation insurance. The ALJ credits this portion of his testimony. Plus, there was no credible and persuasive evidence submitted that established Employer had a workers' compensation policy in place on the date of the accident.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence

is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant established by a preponderance of the evidence that he suffered a compensable injury.

II. Whether Respondent Employer established by a preponderance of the evidence that Claimant is an independent contractor and not an employee.

The claimant is required to prove by a preponderance of the evidence that at the time of the injury both he and the employer were subject to the provisions of the Workers' Compensation Act, he was performing service arising out of and in the course of his employment and the injury was proximately caused by the performance of such service. §§8-41-301(1)(a)-(c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The term “employer” is defined to include every person, firm, or corporation “who has one or more persons engaged in the same business or employment, except as expressly provided in articles 40 to 47 of this title, in service under any contract of hire, express or implied.” §8-40-203(1)(b), C.R.S. The term “employee” is defined as any person in the service of any person or corporation “under any contract of hire, express or implied.” §8-40-202(1)(b), C.R.S.

An employer-employee relationship is established when the parties enter into a "contract of hire." §8-40-202(1)(b), C.R.S.; *Younger v. City and County of Denver*, 810 P.2d 647 (Colo. 1991). A contract of hire may be express or implied, and it is subject to the same rules as other contracts. *Denver Truck Exchange v. Perryman*, 134 Colo. 586, 307 P.2d 805 (Colo. App. 1957). The essential elements of a contract are competent parties, subject matter, legal consideration, mutuality of agreement and mutuality of obligation. *Aspen Highlands Skiing Corp. v. Apostolou*, 866 P.2d 1384 (Colo. 1994); *Martinez Caldamez v. Schneider Farm*, WC 4-853-602 (ICAO, July 16, 2012). A contract of hire may be formed even in the absence of every formality attending commercial contracts. *Rocky Mountain Dairy Products v. Pease*, 161 Colo. 216, 422 P.2d 630 (1966); *In re Ritthaler*, WC 4-905-302-02 (ICAO, May 7, 2014).

Pursuant to §8-40-202(2)(a), C.R.S. “any individual who performs services for pay for another shall be deemed to be an employee*”* unless the person “is free from control and direction in the performance of the services, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent . . . business related to the service performed.” Moreover, pursuant to §8-40-202(2)(b)(I), C.R.S. independence may be demonstrated through a written document.

Section 8-40-202(2)(b)(II), C.R.S. enumerates nine factors to be considered in evaluating whether an individual is deemed an employee or independent contractor. However, the test considered by the Colorado Supreme Court in the unemployment insurance case of *Industrial Claim Appeals Office v. Softrock Geological Services*, 325 P.3d 560 (Colo. 2014) concerning whether a worker is an employee or an independent contractor applies to Workers’ Compensation claims. The test requires the analysis of not only the nine factors enumerated in §8-40-202(2)(b)(II), C.R.S. but also the nature of the working relationship and any other relevant factors. *Pella Windows & Doors, Inc. v. Industrial Claim Appeals Office*, 458 P.3d 128 (Colo. App. 2020). The *Softrock* decision noted indicia that would normally accompany the performance of an ongoing separate business in the field and included whether: the worker used an independent business card, listing, address, or telephone; had a financial investment such that there was a risk of suffering a loss on the project; used his or her own equipment on the project; set the price for performing the project; employed others to complete the project; and carried liability insurance. *Softrock Geological Services*, 325 P.3d 565.

It was found that:

- Employer hired Claimant in May 2019 as an employee to work as a semitruck driver. Claimant's primary job duties involved driving the Denver to Texas round trip route twice a week to deliver fruits and vegetables. Each round trip route took three days. As a result, Claimant usually worked for Employer six days a week.

- Claimant and Employer did not enter into any type of written lease agreement or written employment agreement. There was only an oral agreement in which Employer agreed to pay Claimant to drive one of his semitrucks and Claimant agreed to drive one of Employer's semitrucks. The weekly rate of pay Employer offered Claimant for driving two round trip routes from Denver to Texas, which took 6 days, was $1,800. Claimant accepted the offer and began driving mainly the Denver and Texas route – twice per week – for $1,800 per week.

Employer contends Claimant was an independent contractor. That said, the ALJ found that there was a lack of credible and persuasive evidence submitted at hearing establishing Claimant was an independent contractor.

It was found that:

- Claimant did not maintain an independent business as a truck driver – or any other type of business. For example, Claimant did not operate any independent business. He therefore did not have a business card, a business listing, or a business address. In addition, there was no evidence presented that established Claimant employed others to complete any work tasks for any business. Nor was there any evidence presented that established Claimant had a financial investment in a trucking business - such as a truck – or any other business. Lastly, there was no evidence submitted at hearing that established Claimant carried liability insurance for any type of business.

- Employer directed Claimant when and where to pick up and deliver the fruits and vegetables. As a result, Claimant was not free to pick up and deliver the goods on his own time schedule.

- Besides being paid $1,800.00 per week, Employer provided the truck and paid Claimant's expenses to operate the truck, such as fuel, to drive the two roundtrip delivery trips from Denver to Texas. As a result, there was no indication Claimant could suffer a loss while working for Employer.

- There was no credible evidence submitted at hearing which established Claimant worked for anyone other than Employer between May 2019 and the June 10, 2020, work accident.

- Employer provided Claimant the primary tool to perform his job - a semitruck.

- Employer paid Claimant personally rather than making checks payable to a trade or business name.

- Claimant was working for Employer for an indefinite time period. Thus, Claimant's employment with Employer was not limited to a finite time period by either party.

- Claimant was not working for Employer under a lease agreement or contract pursuant to 40-11.5-102, C.R.S. When Claimant was hired by Employer, he was not offered workers' compensation insurance or other insurance with similar coverage as set forth in 40-11.5-102(5).

It was also found that:

- Employer did not establish a quality standard and did not oversee Claimant's work and instruct Claimant how to perform his job. But Claimant was directed where to pick up his loads and when to deliver his loads. Nor is there any indication that any type of quality standard was required – other than Claimant delivering his loads on time.
- Employer did not pay Claimant a salary or an hourly rate. Instead, Employer paid Claimant a fixed rate for each roundtrip Claimant made from Denver to Texas. But Employer did reimburse Claimant for his expenses such as fuel and other expenses Claimant incurred while driving his routes.
- Employer did not terminate Claimant at any time for his failure to meet the employer's job requirements.
- Employer did not provide Claimant any training. On the other hand, many employees can be hired for their qualifications and expertise and not require any training. And this appears to be the case in this matter. There was no credible evidence submitted indicating Claimant required training to drive a semitruck.
- Employer did not require Claimant to work exclusively for Employer. On the other hand, Claimant did not have his own truck. Therefore, Claimant could not work as a truckdriver for someone else without them providing him a truck to drive.

Based on the totality of the evidence submitted at hearing and considering all of the factors set forth in Section 8-40-202(2)(b)(II), C.R.S., the ALJ finds and concludes that Claimant was not free from the control and direction in the performance of the services, both under the contract for performance of service and was not customarily engaged in an independent business of any kind. As a result, Claimant established by a preponderance of the evidence that he was an employee of Employer, and it was not established that Claimant was an independent contractor.

III. Whether Claimant established by a preponderance of the evidence that he is entitled to reasonable, necessary, and related medical benefits.

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve Claimant from the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

As found, Claimant suffered serious injuries that caused paraplegia and tetraplegia. As a result, Claimant has been provided medical treatment by several providers, including University Hospital in Albuquerque New Mexico and Craig Hospital in Englewood Colorado. As a result, the ALJ finds and concludes Claimant established by a preponderance of the evidence that he is entitled to a general award of medical benefits to cure and relieve Claimant from the effects of his work injury.

IV. Whether Claimant established by a preponderance of the evidence that he is entitled to temporary total disability benefits as of June 10, 2020, and continuing.

To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

The existence of disability presents a question of fact for the ALJ. There is no requirement that the claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

As found, Claimant suffered a severe spinal cord injury and was hospitalized from June 10, 2020, through July 22, 2020. As a result of his work injury, Claimant suffers from paraplegia/tetraplegia.

Claimant was unable to work while hospitalized and there is no indication Claimant has been released to full duty or placed at maximum medical improvement. As a result, Claimant has been totally disabled and unable to return to work as a semitruck driver since the accident. As a result, the ALJ finds and concludes Claimant established by a preponderance of the evidence that he is entitled to temporary total disability benefits as of June 10, 2020.

After the accident, Employer continued paying Claimant for a short time period. Employer paid Claimant $1,800 one week and $900 for two subsequent weeks. Thus, Employer has paid Claimant $3,600 in lost wage benefits since June 10, 2020. Employer is therefore entitled to a credit of $3,600 against Claimant's temporary total disability benefits.

Based on Claimant's average weekly wage of $1,800, his temporary total disability rate is the maximum rate of $1,022.56.[2] The amount of TTD owed from June 10, 2020, the date of injury, through the date of this order, July 12, 2021, is $58,139.84.[3] Employer is, however, entitled to a credit of $3,600. As a result, Employer owes Claimant $54,539.84 in TTD for that period.

V. Determination of Claimant's average weekly wage.

Section 8-42-102(2), C.R.S., requires the ALJ to calculate the claimant's AWW based on the earnings at the time of injury as measured by the claimant's monthly, weekly, daily, hourly or other earnings. This section establishes the so-called "default" method for calculating the AWW. However, if for any reason the ALJ determines the default method will not fairly calculate the AWW § 8-42-102(3), C.R.S., affords the ALJ discretion to determine the AWW in such other manner as will fairly determine the wage. Section 8-42-102(3) establishes the so-called "discretionary exception." *Benchmark/Elite, Inc. v. Simpson,* 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.*

As found, Claimant typically drove two trips per week from Denver to Texas and back to Denver. Claimant was paid $1,800 per week to drive these two trips. As a result, the ALJ finds and concludes Claimant established by a preponderance of the evidence that his average weekly wage is $1,800.

VI. Whether Claimant violated a safety rule by not wearing a seatbelt and should have his disability benefits reduced by 50%.

Employer asserted Claimant was not wearing his seatbelt at the time of the accident. The ALJ, however, credited Claimant's testimony that he was wearing his seatbelt at the time of the accident and that it came undone during the accident.

[2] See AWW calculation below.

[3] June 10, 2020, through July 12, 2021, is 56 weeks and 6 days – or 398 days - from June 10, 2020, through July 12, 2021.

Therefore, to the extent Employer was asserting a safety rule violation, additional findings and analysis are unnecessary since it has been found that Claimant was wearing his seatbelt at the time of the accident. As a result, the ALJ finds and concludes Employer has failed to establish a safety rule violation.

VII. Whether Respondent-Employer is subject to penalties pursuant to 8-43-408 for failing to carry workers' compensation insurance.

Section 8-43-408(5), C.R.S. (2018) provides,

> In addition to any compensation paid or ordered . . . an employer who is not in compliance with the insurance provisions of [the Act] at the time an employee suffers a compensable injury or occupational disease shall pay an amount equal to twenty-five percent of the compensation or benefits to which the employee is entitled to the Colorado uninsured employer fund created in section 8-67-105.

The penalty for failure to insure only applies to indemnity benefits; it does not apply to medical benefits. *Industrial Commission v. Hammond*, 77 Colo. 414, 236 P. 1006 (1925); *Jacobson v. Doan*, 319 P.2d 975 (Colo. 1957); *Wolford v. Support, Inc*., W.C. No. 4-155-231 (February 13, 1998).

As found, Employer is uninsured. Employer has been ordered to pay Claimant $54,539.84 in TTD benefits from June 10, 2020, through July 12, 2021. Twenty-five percent (25%) of the compensation awarded is $13,634.96.

VIII. Payment to Division trustee or a bond to secure payment of benefits

Employer was not insured for workers' compensation liability at the time of Claimant's injury. Under § 8-43-408(2), Employer must pay to the trustee of the Division of Workers' Compensation ("Division") an amount equal to the present value of all unpaid compensation or benefits, computed at 4% per annum. Although this Order awards ongoing TTD benefits, the end date is unknown, so the present value of ongoing TTD cannot be calculated. The total compensation and penalties Ordered herein is $68,174.80. In the alternative, Employer may file a bond with the Division signed by two or more responsible sureties approved by the Director or by some surety company authorized to do business in Colorado. Employer may contact the Division trustee for assistance with its obligations in this regard. The Division trustee may be contacted via telephone through the Division's customer service line at 303-318-8700, or via email to Gina Johannesman gina.johannesman@state.co.us. The Division can also help Employer calculate medical payments owed under the fee schedule.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's injury on June 10, 2020, is compensable.

2. Employer shall cover reasonably necessary medical treatment from authorized providers to cure and relieve the effects of Claimant's injury.

3. Claimant's average weekly wage is $1,800.

4. Employer shall pay Claimant $54,539.84 in TTD benefits from June 10, 2020, through July 12, 2021.

5. Employer shall pay Claimant $1,022.56 per week in TTD benefits commencing June 20, 2020, and continuing until terminated by law.

6. Employer shall pay $13,634.96 to the Colorado Uninsured Employer Fund. The check shall be payable to the Division of Workers' Compensation, 633 17th Street, 9th Floor, Denver, CO 80202, Attention Iliana Gallegos, Revenue Assessment Officer.

7. In lieu of payment of the above compensation and benefits to the Claimant, the Employer shall:

   a. Deposit $68,174.80 with the Division of Workers' Compensation, as trustee, to secure payment of all unpaid compensation and benefits awarded. The check shall be payable to and sent to the Division of Workers' Compensation, 633 17th Street, Suite 900, Denver, Colorado 80202, Attention: Gina Johannesman, Trustee Special Funds Unit; or

   b. File a surety bond in the amount of $68,174.80 with the Division of Workers' Compensation within ten (10) days of this order:

      (1) Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation; or

      (2) Issued by a surety company authorized to do business in Colorado.

      The bond shall guarantee payment of the compensation, penalties and benefits awarded.

8. Employer shall notify the Division of Workers' Compensation and Claimant's attorney of payments made pursuant to this order.

9. Filing any appeal, including a petition to review, shall not relieve Employer of the obligation to pay the designated sum to the Claimant, to the trustee or to file the

bond as required by paragraph 11(b) above. Section 8-43-408(2), C.R.S.

10. Any interest that may accrue on a cash deposit shall be paid to the parties receiving distribution of the principal of the deposit in the same proportion as the principal, unless an agreement or Order authorizing distribution provides otherwise.

11. If Employer fails to pay the Claimant indemnity and/or medical benefits as ordered herein, Employer shall pay an additional 25% penalty to the Colorado Uninsured Employer Fund of the Colorado Division of Workers' Compensation, pursuant to § 8-43-408 (6), C.R.S.

12. Pursuant to § 8-42-101(4), C.R.S., any medical provider or collection agency shall immediately and forthwith cease and desist from any further collection efforts from the Claimant because the Respondent-Employer is solely liable and responsible for the payment of all medical costs related to the Claimant's work injury.

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

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

DATED: 7/12/2021

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-146-527-001

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

[Redacted],

Claimant,

v.

[Redacted],

Employer,

and

SELF-INSURED,

Self-Insured Respondent.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on March 10, 2021 (Session 1) and June 1, 2021 (Session 2) , in Denver, Colorado. There was no audio recording of the first session of the hearing. Consequently, the ALJ requested counsel for the parties to submit their summaries of the testimony on that date. After receiving the parties' summaries of the testimony, the ALJ synthesized both summaries and issued the ALJ' summary of the testimony of March 10, 2021, giving the parties three (3) working days within to object to the ALJ's summary. No timely objections were filed and the ALJ issued his summary to serve in lieu of a verbatim transcript of Session 1 of the hearing. Session 2 on June 1, 2021 was recorded by Google Meets (reference: 6/1/21,, Google Meets, beginning at 8:30 AM , and ending at 9:30 AM) .

The Claimant was present in person, virtually, and represented by [Redacted], Esq. Respondent was represented by [Redacted], Esq., [Redacted].

Hereinafter Kristoffer Henshaw shall be referred to as the “Claimant."   City and County of Denver, Denver Fire Department,shall be referred to as the “Employer.” All other parties shall be referred to by name.

Claimant’s Exhibits 1 through 12 were admitted into evidence, without objection. Respondent’s Exhibits A through L were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ established a post-hearing briefing schedule. Claimant’s opening brief was submitted on June 11, 2021. Respondent’s answer brief v(labeled “Reply Brief’)c was submitted on June 18, 2021. Claimant did not submit a timely reply brief and the matter was deemed submitted for decision on June 23, 2021.

ISSUES

The issues to be determined by this decision concern compensability of an aggravating/accelerating event, medical benefits, authorized provider (ATP), temporary indemnity benefits and causal relatedness of treatment following an alleged intervening event.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Stipulation and Finding

1. At the commencement of the hearing, the parties stipulated, and the ALJ finds, that if the claim is compensable the Claimant’s average weekly wage (AWW) is $1,904.00.

The March 23, 2020 Event

2. The Claimant is a 32-year-old firefighter with the Employer, employed in this capacity since 2016.

3. On March 23, 2020, the Claimant was engaged in his usual duties as a fireman when he felt onset of left foot pain following stepping down from a fire truck. He estimated the step down was between 2 -3 feet, and that the onset of pain was immediate. Thereafter, the Claimant felt ongoing pain and had a limp for the remainder of his shift on March 23, 2020. He reported the incident to his supervisor, Captain Mike Morris, on March 23, 2020.

4. Captain Morris made a March 23, 2020 Run Log entry regarding the Claimant's report which stated, "FF [Redacted] reported a sudden onset pain in his foot about 3 pm on 3/23/20, which steadily worsened over the rest of the shift. OUCH Line was called the next morning (3/24/20) before going off shift and the FF injury reporting process was started" (**Respondent's Exhibit D) read into the record by Captain Morris at hearing.** Captain Morris testified that on reporting the incident, the Claimant had also mentioned his concerns over whether his significant running the weekend before could have been the cause of his left foot pain.

5. Reporting his condition to the Employer's OUCH Line on March 24, 2020, the Claimant stated, "I don't really know what happened. We had just left and when we were back I stepped off the rig and my left foot hurt" (**Respondent's Exhibit A p. 3).** The OUCH Line records also note that the Claimant selected Concentra from the list of designated providers to serve as the ATP.

6. Regarding his exercise regime leading up to the date of injury, the Claimant stated that he was training for the Colfax half marathon, which was scheduled for April 2020. According to the Claimant, his training consisted of running three times per week at lengths of 5-10 miles, and that his weekend run was the longest run, usually of 10 miles. He confirmed he had been on a 10-mile run the weekend before the Monday March 23, 2020 onset of symptoms. Based on the Claimant's undisputed testimony, the ALJ infers and finds that the Claimant was in good physical shape, thus, buttressing the injurious nature of the incident of March 23, 2020.

Medical

7. The Claimant was first seen by the ATPs at Concentra, on March 25, 2020. At this evaluation, Jonathan D. Joslyn, P.A. (Physician's Assistant) noted the that the Claimant reported "he stepped off a fire engine and began to feel pain in his left foot." There was tenderness in the plantar fascia noted by the PA and an initial assessment of a left ankle strain was given, along with a referral to podiatry. PA Joslyn also noted running was typical for the Claimant and he had been training (**Respondent's Exhibit E p. 19).** There is no persuasive evidence that the Claimant sustained any traumatic events while training/running.

8. The Claimant was seen by podiatrist Michael Zyzda, D.P.M. on April 1, 2020. The Claimant reported to Dr. Zyzda that he had had plantar fasciitis in the past[1], but stated that after the March 23, 2020 incident it was much worse. Dr. Zyzda noted, at the time of the injury, the Claimant was training for a half marathon. Most of the Claimant's left foot pain was in the arch towards the heel on the medial band of the plantar fascia. Dr. Zyzda found that the Claimant had a pes valgus foot type (flat footedness). His assessment was left foot plantar fascial strain versus small tear,

[1] At hearing, claimant testified his past plantar fasciitis was based on self-diagnosis through researching symptoms on the internet.

posterior tibial tendonitis, and/or peroneal tendonitis (**Respondent's Exhibit E pp. 26-7).** Dr. Zyzda referred the Claimant for continued physical therapy, orthotics and an MRI (magnetic resonance imaging) if the symptoms worsened. The ALJ infers and finds that the plantar facial strain was aggravated and accelerated by the March 23, 2020 incident.

9. On April 15, 2020, the Claimant reported to Dr. Zyzda that he was 60% improved with minimal pain of the arch at the medial band of the plantar fascia. There was no pain at the posterior tibial tendon and no pain at the peroneal tendons. The assessment was left foot plantar fascial strain versus small tear, with the posterior tibial and peroneal tendonitis improved (**Respondent's Exhibit E pp. 31-32).**

10. On May 15, 2020, the Claimant returned to Concentra where PA Joslyn noted that the Claimant had ongoing 2 out of 10 non-constant pain. The Claimant reported overall that he was 70% back to to baseline (**Respondent's Exhibit E pp. 36-38).** On June 5, 2020, the Claimant was seen by a Jeffrey Peterson, M.D., at Concentra, who also noted 2 of 10 non-constant pain and that the Claimant close to being able to complete the full duties of his job (**Respondent's Exhibit E pp. 39-41).** Because of ongoing pain, however, the Claimant was referred for an MRI.

11. On June 10, 2020, the Claimant underwent a left ankle MRI finding: 1) Soft-tissue edema superficial to the plantar fascia, possibly due to contusion. *There was no plantar fascial tear*. There was no calcaneal edema or fracture, and 2) Chronic tearing of the anterior talofibular and calcaneofibular ligaments (**Respondent's Exhibit H 78-79**).

Non Work-Related Intervening Event

12. The Claimant testified to an event at his home on June 10, 2020, which occurred after the MRI. He mis-stepped on the edge of his driveway and into his yard. The height difference between the driveway and yard caused the Claimant's left ankle to invert/twist inward with an immediate onset of pain. The Claimant later confided to PA Joslyn that the June 10, 2020 incident was "when I really took a turn downhill."

13. The Claimant saw Dr. Zyzda on June 18, 2020 to review the MRI results. Dr. Zyzda assessed the MRI as revealing possible soft-tissue contusion of the heel with no plantar fascial tear and chronic tear of the ATF and CFL. Dr. Zyzda felt he did not have much to go on to explain the Claimant's pain given the MRI had minimal findings. At the same evaluation, the Claimant also reported that he had rolled his ankle the prior Friday and, since then, he had more pain of his ankle and heel. Dr. Zyzda recommended crutches and instructed the Claimant to remain non-weight bearing for two weeks (**Respondent's Exhibit F pp. 63-64).** The Claimant was also given a cast boot to immobilize his left foot.

14. On June 25, 2020, the Claimant was again seen by PA Joslyn at Concentra. At this evaluation, the Claimant reported 3 to 4 out of 10 pain. He also reported that he stepped off a curb and rolled his ankle and had been feeling a lot of pain since (**Respondent's Exhibit E pp. 45-48).**

15. On July 2, 2020, Dr. Zyzda assessed possible findings of tarsal tunnel syndrome and performed a steroid injection into the tarsal tunnel. At a July 8, 2020 follow-up, the Claimant reported that he was much improved from the tarsal tunnel injection (**Respondent's Exhibit F pp. 65-68).** The first documentation of neurological complaints was at the July 2, 2020 evaluation by Dr. Zyzda when Dr. Zyzda documented that there was some tingling.

16. On July 15, 2020, Dr. Zyzda noted that the Claimant was doing much better with his cast boot on and Dr. Zyzda felt that the Claimant could do more activity (**Respondent's Exhibit F pp. 69-70).** On July 17, 2020, PA Joslyn noted that the Claimant reported some tingling and numbness in his left heel, and that the Claimant was wearing a boot on his left ankle (**Respondent's Exhibit E pp. 53-55).**

Kaiser Permanente

17. On July 22, 2020, the Claimant initiated care with his primary health care physician at Kaiser. According to the Claimant's testimony, this was two months prior to his being contacted by the workers' compensation claims adjuster and being advised that Respondent would be not provide further care under a Notice of Contest. According to the intake documentation, the Claimant was seen for complaints of chronic heel pain for four months. The Claimant was referred for an orthopedic evaluation, which was conducted by Edward C. Pino , M.D., on July 29, 2020.

18. At the initial evaluation, Dr. Pino had limited records available to review, but did have an MRI scan which the Claimant brought to the appointment. Dr. Pino noted that the MRI showed some mild changes consistent with insertional plantar fasciitis that was not dramatic. Based on the information available, Dr. Pino assessed left foot pain of unknown etiology. Differential diagnoses included plantar fasciitis, tarsal tunnel syndrome and reflex sympathetic dystrophy (**Respondent's Exhibit G pp. 73-75).** Dr. Pino referred the Claimant for a repeat MRI, which was conducted on July 30, 2020, and was compared to the previous MRI with "no new findings."

19. The Kaiser medical records contain a thorough workup for CRPS (chronic regional pain syndrome), including a triple phase bone scan as well as sympathetic nerve blocks. The Kaiser physicians ultimately ruled out CRPS as a diagnosis, which was also the conclusion of Carlos Cebrian,M.D. [Respondent's Independent Medical Examiner (IME)] and is discussed in Dr. Cebrian's report. The parties agreed at hearing that CRPS is not a condition for which the Claimant is seeking benefits (a discussion of

the CRPS workup from August to December 2020 is not relevant to the issues before the ALJ.

20. The Claimant returned to Dr. Zyzda on August 5, 2020 with unchanged findings on examination. Dr. Zyzda continued his clinical and diagnostic assessment of tarsal tunnel syndrome on the left. Dr. Zyzda also noted, if provided by Kaiser, the Claimant could utilize a cast to immobilize his left foot (**Respondent's Exhibit F p. 71).**

21. On August 14, 2020, the Claimant returned to Concentra for an evaluation with PA Joslyn. At this evaluation, the Claimant reported feeling a little better and with less tingling, but his heel pain remained, and he was unable to bear weight. The Claimant indicated to PA Joslyn that surgery might be offered by Kaiser, and he would pursue this outside of the workers' compensation system. This was the Claimant's last appointment with Concentra (**Respondent's Exhibit E pp. 56-58).**

22. On September 2, 2020, the Claimant was evaluated by Jeffrey R. Jockel , M.D., at Kaiser for a second orthopedic opinion on referral from Dr. Pino. At this evaluation, the Claimant's Patient Questionnaire indicated that Claimant was unsure if there was a specific injury. The ALJ infers that there is nothing unusual about the Claimant's statement that he was unsure. The Claimant stated that he noticed pain after getting off a fire truck and had a second injury two months later, where he sprained his ankle, and that brought about substantial heel pain for some reason. Dr. Jockel assessed work related neuritis with recommendations for ongoing medication use and acupuncture (**Respondent's Exhibit J pp. 224-228).**

23. The Claimant underwent a left foot EMG on September 25, 2020, which was normal. Subsequently, on September 28, 2020, Dr. Pino was of the opinion that while he still did not have a diagnosis for the Claimant but, by Claimant's history, he believed symptoms were directly related to the injury at work, whatever the diagnosis (**Respondent's Ex.hibit J pp. 98-99).**

24. On October 13, 2020, Dr. Pino again assessed left foot pain of unknown etiology. He recommended that the Claimant wear the cast for at least a month and then follow-up. A month later, on November 13, 2020, Dr. Pino found that the Claimant's use of a cast had not provided dramatic relief, and the Claimant had probably exhausted that type of treatment and cast removal was recommended.

25. On December 10, 2020, the Claimant underwent an ultrasound-guided tarsal tunnel injection with a good result. Thereafter, on January 18, 2021, because the Claimant's pain was relieved with injection of the tarsal tunnel, Dr. Pino recommended that it would be reasonable to proceed with a tarsal tunnel release (**Respondent's Exhibit J pp. 161-162).** The Claimant underwent a tarsal tunnel release on February 3, 2021 (records were not available at the time of the March 10, 2021 hearing).

Postoperatively, the Claimant testified at hearing to some improvement, but also ongoing pain and disability while he recovered from the surgery.

Temporary Disability

26. The Claimant had taken 24 hours of sick leave to recover from his tarsal tunnel release in February 2021 and sought to use another 12 hours of sick leave for his attendance at the March 10, 2021 hearing. Otherwise, the Claimant has been working full-time at modified duty in the Fire Department's Dispatch Center. The ALJ finds that the Claimant had less than three (3) days of work-related disability.

Respondent's IME, Carlos Cebiran, M.D.

27. Dr. Cebrian was accepted as an expert in occupational medicine. He was of the opinion that Claimant's diagnosis following the March 23, 2020 symptoms was plantar fasciitis. Dr. Cebrian explained that the Claimant was predisposed to having plantar fasciitis due to a pes valgus deformity (flat foot) and noted the preexisting diagnosis of plantar fasciitis in Dr. Zyzda's notes – or at least Claimant's reporting to Dr. Zyzda of his self-diagnosis based on similar preexisting symptoms. Dr. Cebrian explained that plantar fasciitis is a chronic micro-tearing and inflammation of the plantar facia, which runs along the bottom of the foot. He explained that it can be aggravated through repetitive use, especially in individuals with pes valgus. The chronic condition can flare up after a period of inactivity where the plantar facia are allowed to contract, which is why it is called the "first step" condition. Dr. Cebrian rendered the opinion concerning how the Claimant's description of the incident fit perfectly with the "first step" condition. Dr. Cebrian's opinion in this regard does not contra-indicate a temporary aggravation/acceleration of the Claimant's underlying condition of plantar fasciitis.

28. According to Dr. Cebrian, the medically probably cause of the Claimant's plantar fasciitis was his training for a marathon and not work. He explained that the Claimant's training the weekend before the incident was a 10-mile run, which would be a more likely mechanism causing plantar fasciitis than stepping down from a firetruck. He also explained that the onset after inactivity of riding in a fire truck would be an expected means for the Claimant to first experience his plantar fasciitis symptoms – and (on cross examination on June 4, 2021) *that claimant's symptoms would have occurred that Monday, regardless of whether he was at work.* He attempted to support this conclusion by noting the Claimant's prior similar symptoms, his predisposition due to flat footedness and his marathon training. Dr. Cebrian also discussed why the Claimant's diagnosis was not an acute tear of the plantar facia, and that this was later confirmed by an MRI. The ALJ infers and finds that the totality. The ALJ finds that a preponderance of the medical evidence supports the occurrence of a temporarily aggravating/accelerating event on March 23,, 2020.

29. Dr. Cebrian was of the opinion that the June 10, 2020 , non-work related ankle sprain led to the development of tarsal tunnel syndrome. Dr. Cebrian stated that the plantar fasciitis likely resolved on Cimmobilization following the June ankle sprain. Dr. Cebrian stated that tarsal tunnel syndrome was a separate condition and that an ankle twist/sprain is a medically probable cause of tarsal tunnel syndrome. Dr. Cebrian was of the opinion that the Claimant's treatment following the June 10, 2020 incident would not be related to his plantar fasciitis nor to his employment.

30. Dr. Cebrian's diagnosis was supported, in part, by the opinion of Dr. Zyzda, and also by observation of the Claimant's change in symptoms over time and considering the intervening event. The radiology and diagnostic injections also support his opinions on both plantar fasciitis and tarsal tunnel syndrome.

Ultimate Findings

31. The ALJ finds the aggregate medical opinions of the ATPs support a temporary foot strain caused by the Claimant stepping down 2 to 3 feet from a fire truck on March 23,2020 . The opinions of the podiatric doctors are more convincing and persuasive than the opinions of an occupational doctor such as Dr. Cebrian because of their specific expertise concerning feet. Also, the podiatric opinions are more convincing than those of Dr. Cebrian and they span a reasonable period of time, thus, furnishing them a greater opportunity to observe the Claimant than Dr. Cebrian's opportunity. Therefore, the ALJ finds the opinions of the podiatric doctors are more credible and persuasive than the opinions of Dr. Cebrian.

32. Between conflicting medical opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the opinions of the podiatric doctors and the Kaiser doctors and the reject the opinions of Dr. Cebrian's.

33. The totality of the evidence supports the fact that the March 23, 2020 "stepping off the fire truck" incident temporarily aggravated and accelerated the Claimant's underlying foot condition from the date of the incident through June 1, 2020, the date of the effective, intervening event.

34. During the period of the temporary aggravation, the Claimant did **not** sustain more than three days or shifts of temporary disability.

35. The Claimant has proven by a preponderance of the evidence that he sustained a compensable temporary aggravation/acceleration of his pre-existing foot condition between the date of the incident and the date of the effective, intervening event on June 1, 2020

36. The Claimant has proven, by preponderant evidence, that all of the medical care and treatment for his foot condition between March 23, 2020 and June 1, 2020, was attributable to the temporary aggravation/ acceleration of his pre-existing foot

condition was authorized (with the exception of Kaiser), within the chain of authorized referrals, causally related and reasonably necessary to cure and relive the effects of the temporary aggravation/acceleration.

37. The Claimant has failed to prove, by preponderant evidence, entitlement to temporary indemnity benefits during the period of the temporary aggravation/acceleration.

CONCLUSIONS OF LAW

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

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the aggregate medical opinions of the ATPs support a temporary foot strain caused by the Claimant stepping down 2 to 3 feet from a fire truck on March 23,2020 . The opinions of the podiatric doctors were more convincing and persuasive than the opinions of occupational Dr. Cebrian because of their specific expertise concerning feet. Also, the podiatric opinions were more convincing than those of Dr. Cebrian because they span a reasonable period of time, thus, furnishing these doctors and medical providers a greater opportunity to observe the Claimant than Dr. Cebrian's opportunity. Therefore, the opinions of the podiatric doctors are more credible and persuasive than the opinions of Dr. Cebrian.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting medical opinions, the ALJ made a rational choice, based on substantial evidence, , to accept the opinions of the podiatric doctors and the Kaiser doctors and the reject the opinions of Dr. Cebrian.

Temporary Compensable Aggravation/Acceleration of Underlying Foot Condition

c. A compensable injury is one that arises out of and in the course of employment. § 8-41-301(1) (b), C.R.S. The "arising out of" test is one of causation. If an industrial injury aggravates or accelerates a preexisting condition, the resulting disability and need for treatment is a compensable consequence of the industrial injury. Thus, a claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury **if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought.** § 8-41-301(1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993);

National Health Laboratories v. Indus. Claim Appeals Office, 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997)*.* An injury resulting from the concurrence of a preexisting condition and a hazard of employment is compensable. *H & H Warehouse v. Vicory*, *supra*. *Duncan v. Indus. Claims App. Office*, 107 P.3d 999 (Colo. App. 2004). Even where the direct cause of an accident is the employee's preexisting disease or condition, the resulting disability is compensable where the conditions or circumstances of employment have contributed to the injuries sustained by the employee. *Ramsdell v. Horn*, 781 P.2d 150 (Colo.App. 1989). *Also see* § 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225-334 (ICAO, April 7, 1998). As found, the totality of the evidence supported the fact that the March 23, 2020 “stepping off the fire truck” incident temporarily aggravated and accelerated the Claimant’s underlying foot condition from the date of the incident through June 1, 2020, the date of the effective, intervening event.

Effective, Intervening Event

d. An intervening event which severs the causal connection between the injury and a subsequent injury and causes subsequent disability is an “efficient, intervening cause,” which cuts off entitlement to benefits. *Schlage Locik v. Lahr,* 870 P.2d 615 (Colo. App. 1993). Where an employee had returned to work after a compensable injury and sustained a subsequent injury to the same body part and there was no proof that the previous injury contributed to the disability after the subsequent injury, the subsequent injury constituted “an efficient intervening injury.” *Post Printing & Publishing Co. v. Erickson,* 94 Colo. 382, 30 P.2d 327 (1934). As found, the June 1, 2020 non-work related fall was an efficient, intervening event which severed the causal relation to the March 23, 2020, aggravating injury.

Medical Benefits

e. To be authorized, all referrals must remain within the chain of authorized referrals in the normal progression of authorized treatment. *See Mason Jar Restaurant v. Indus. Claim Appeals Office,* 862 P. 2d 1026 (Colo. App. 1993); *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P. 2d 501 (Colo. App. 1995); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). As found, all of the medical care and treatment for his foot condition between March 23, 2020 and June 1, 2020, was attributable to the temporary aggravation/ acceleration of his pre-existing foot condition was authorized (with the exception of Kaiser) and within the chain of authorized referrals.

f. To be a compensable benefit, medical care and treatment must be causally related to an industrial injury or occupational disease. *Dependable Cleaners v. Vasquez,* 883 P. 2d 583 (Colo. App. 1994). As found, Claimant’s medical treatment is causally related to the aggravation /acceleration of his pre-existing foot condition condition of March 23, 2020.. Also, medical treatment must be reasonably necessary to cure and relieve the effects of the industrial occupational disease. § 8-42-101 (1) (a), C.R.S. *Morey Mercantile v. Flynt,* 97 Colo. 163, 47 P. 2d 864 (1935); *Sims v. Indus. Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). As found, the Claimant's medical care and treatment, attributable to the temporary aggravation/acceleration, was reasonably necessary. to cure and relieve the effects thereof.

Average Weekly Wage

g. As stipulated and found**,** the Claimant's average weekly wage (AWW) is $1,904.00, which is academic at the present time.

Temporary Indemnity Benefits

h. Section 8-42-103 (1) (a), C.R.S., provides that no disability benefits are recoverable if the disability is less than three days or here shifts. As found, the Claimant failed to prove entitlement to temporary indemnity benefits during the period of the temporary aggravation/acceleration.

Burden of Proof

i. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P. 2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant sustained his burden with respect to compensability of the temporary aggravation/acceleration of his foot condition, prior to the date of the effective, intervening event on June 1, 2020.

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The Claimant having sustained a temporary aggravation/acceleration of his underlying foot condition, Respondent shall pay the costs of all of the authorized, causally related and reasonably necessary medical care and treatment from March 23, 2020, through June 1, 2020, subject to the Division of Workers' Compensation Medical Fee Schedule.

B. The Claimant's average weekly wage is $1,904.00.

C. Any and all claims for temporary indemnity benefits from March 23, 2020, through June 1, 2020, are hereby denied and dismissed.

D. Any and all issues not determined herein are reserved for future decision.

DATED this 12th day of July 2021.

DIGITAL SIGNATURE

EDWIN L. FELTER, JR.
Administrative Law Judge

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

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-153-441-001

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that the right total shoulder arthroplasty recommended by Adam Seidl, M.D. is reasonably necessary and causally related to his admitted, August 7, 2020, industrial injury.

STIPULATIONS

- In their June 11, 2021, status report to the court, Respondents stipulated that Claimant suffered a compensable left shoulder injury. They did not, however, stipulate that the shoulder surgery recommended by Dr. Seidl is reasonable, necessary, and related to Claimant's work injury.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. In 2017, Claimant started working for the Employer as a master mechanic. Claimant's job duties involve heavy duty work on diesel and other trucks. Claimant's job duties are physical and require him to change/fix brakes, including removing a drum that weighs 150 pounds, and to replace hydraulic booms that weigh from 100 to 300 pounds, among other duties. *See Claimant's Exhibit 12, pages 138-144*. Before the work injury, Claimant he never had any problem doing his job for the Employer because of his right shoulder.

2. Over 30 years before his work injury, Claimant injured his right shoulder while working on an oil rig and underwent right shoulder surgery. Claimant was released to full duty and did not have any ongoing/persistent right shoulder issues. Claimant then worked as a firefighter for [Redacted] for 25 plus years. When Claimant started working for the fire department - and many times thereafter - he had to undergo training and testing. Claimant never had any problem completing the testing, training, or certification because of right shoulder issues.

3. On August 7, 2020, Claimant was replacing the breaks and rotors on a large truck. Claimant was using a 4-pound sledgehammer to ring the rotor and knock it loose. Claimant struck the 4-pound sledgehammer as hard as he could against the rotor and immediately felt significant right shoulder pain. It also felt like rubber bands snapping in his shoulder and pain like he had never felt before. Claimant yelled out, reported his claim immediately, and was taken to the ER. Claimant felt like he was being stabbed in the shoulder with a knife and that he could not move his arm. The pain was also sharp and burning.

4. That same day, Claimant treated at the University of Colorado ER and reported "he was swinging a hammer at work and hit something and felt like his shoulder was still

moving and heard a pop." Claimant reported he now has pain radiating down his right arm to his hand. Claimant reported he had shoulder surgery about 30 years before. *Claimant's Exhibit 6, pages 9-12*. A right shoulder x-ray revealed no fracture of dislocation. *Claimant's Exhibit 7, page 13*.

5. On August 12, 2020, the Employer filed a First Report of Injury, detailing the circumstances of Claimant's right shoulder injury. *Claimant's Exhibit 1, page 1*. On November 17, 2020, Claimant filed a Workers' Claim for Compensation. *Claimant's Exhibit 2, page 2*. On December 9, 2020, Respondents filed a Notice of Contest. *Claimant's Exhibit 3, page 3*. On January 13, 2021, Claimant applied for a hearing on reasonable and necessary medical benefits, specifically surgery authorization, along with other issues that are no longer ripe for determination. *Claimant's Exhibit 4, pages 4-5*. On February 2, 2021, Respondents filed a Response to Claimant's Application for Hearing. *Claimant's Exhibit 5, pages 6-8*.

6. On August 13, 2020, Claimant treated with Larry Vo, NP, nurse practitioner to Adam Seidl, M.D., an orthopedic surgeon. NP Vo documented Claimant's mechanism of injury and prior right shoulder injury, including that Claimant did not have any right shoulder issues preceding his August 7, 2020, industrial injury. NP Vo recommended a right shoulder MRI. *Claimant's Exhibit 8, pages 16-19*.

7. On August 17, 2020, Claimant underwent a right shoulder MRI. The radiologist noted "there are metallic suture anchors present, which generate susceptibility artifact degrading assessment of adjacent osseous and soft tissue detail." The radiologist noted Claimant's prior rotator cuff repair and that "the repair is thin with small regions of focal full-thickness/near full-thickness fluid signal, which could represent re-tear or areas of nonwatertight seal. There is no evidence for a complete re-tear or definitive retraction." The radiologist noted "there is evidence of degeneration and scarring of the repaired tendon," and that "there is moderate tendinosis without a definitive tear of the non-repaired portion of the infraspinatus." The radiologist also noted glenohumeral osteoarthritis with cartilage loss reaching full thickness along the posterior guard. *Claimant's Exhibit 8, pages 14-15*.

8. On August 27, 2020, Claimant treated with Dr. Seidl, who noted Claimant was wearing his right shoulder in a sling. Dr. Seidl diagnosed Claimant with right shoulder pseudoparalysis. Dr. Seidl noted while Claimant's right shoulder was asymptomatic before his industrial, he now has significant pain and dysfunction. Dr. Seidl reviewed Claimant's right shoulder MRI and opined the MRI revealed a re-tear in his rotator cuff, atrophy of the rotator cuff, thinning of the tendon, and osteoarthritis. Dr. Seidl noted Claimant's treatment options, including conservative care, arthroscopy, and a reverse total shoulder replacement. Dr. Seidl recommended PT and Claimant follow-up in four weeks. Dr. Seidl concluded that given the right shoulder MRI findings he would recommend a reverse total shoulder arthroplasty *Claimant's Exhibit 8, pages 20-24*.

9. From September 14, 2020, through December 1, 2020, Claimant underwent eight physical therapy sessions. *Claimant's Exhibit 11, pages 61-137*. At his first physical therapy session, the therapist noted Claimant's signs and symptoms are consistent with a right shoulder rotator cuff tear and impingement of the rotator cuff tendons.

Claimant also had positive objective testing consistent with a rotator cuff tear. Claimant also had *Claimant's Exhibit 11, page 61-63*. On October 19, 2020, Claimant reported he is unable to sleep anymore due to right shoulder pain. *Claimant's Exhibit 11, page 70*. On November 11, 2020, Claimant still had significantly decreased right shoulder range of motion and significant right shoulder pain with motion. *Claimant's Exhibit 11, page 104*. On December 1, 2020, Claimant reported persistent right shoulder pain and limitations and that his shoulder continues to catch often throughout the day. The therapist noted had the same right shoulder findings and issues with range of motion. Post treatment, the therapist noted Claimant had a positive drop arm test, indicating a potential rotator cuff tear. *Claimant's Exhibit 11, page 136*.

10. On September 24, 2020, Claimant treated with Dr. Seidl, who noted Claimant's right shoulder was still pseudoparalytic. Dr. Seidl noted Claimant still has significant right shoulder pain and loss of function. On physical examination, Dr. Seidl noted significantly decreased range of motion. Dr. Seidl reviewed the right shoulder MRI again and recommended proceeding with the right reverse total shoulder arthroplasty. *Claimant's Exhibit 11, page 25*.

11. On September 25, 2020, Dr. Seidl requested authorization for a right reverse total shoulder arthroplasty. *Claimant's Exhibit 9, pages 26-52*.

12. On October 9, 2020, Adam Farber, M.D., Respondents' retained expert witness, performed a records review regarding Dr. Seidl's surgery authorization request. Dr. Farber reviewed Claimant's medical records, including the MRI report. Dr. Farber did not review the actual MRI. He also did not physically evaluate Claimant or personally interview Claimant to obtain a detailed history. Dr. Farber opined Claimant's right shoulder MRI did not identify a rotator cuff tear based on the radiologist's interpretation of the MRI. Dr. Farber opined the recommended right reverse total shoulder arthroplasty is not reasonable, necessary, or causally related to Claimant's alleged industrial injury because there is no MRI evidence of a rotator cuff tear (as outlined in the Colorado Division of Workers' Compensation Medical Treatment Guidelines, Rule 17, Exhibit 5). *Respondents' Exhibit D, pages 6-11*.

13. On March 17, 2021, Claimant underwent an IME with William Ciccone II, M.D., Respondents' retained expert witness. Dr. Ciccone reviewed Claimant's medical history and mechanism of injury, as well as Claimant's medical records. Dr. Ciccone did not review Claimant's right shoulder MRI, just the radiologist's report. Dr. Ciccone opined that on August 7, 2020, Claimant sustained a right shoulder sprain or strain. Dr. Ciccone opined Claimant's persistent right shoulder pain and other symptoms are related to his preexisting right shoulder condition. Dr. Ciccone opined Claimant's August 7, 2020, industrial injury did not permanently aggravate his underlying degenerative changes in Claimant's right shoulder. Dr. Ciccone opined, "[g]iven the shoulder arthritis, the discussion of a shoulder replacement is not unreasonable, however the potential need for this procedure is not causally related to a work event." *Respondents' Exhibit E, pages 12-19*.

14. On May 18, 2021, Dr. Ciccone testified by deposition. Dr. Ciccone testified as an expert in orthopedic surgery. *Dr. Ciccone's May 18, 2021 Deposition Transcript,*

page 6, lines 6-8 (hereinafter Depo. Tr. 6:6-8). Dr. Ciccone testified the industrial injury caused Claimant a right shoulder sprain or strain. *Depo. Tr. 8:7-8*. Dr. Ciccone testified he did not review Claimant's right shoulder MRI, just the radiologist's report interpreting the MRI. *Depo. Tr.* 9:2-12. Dr. Ciccone testified Dr. Seidl's request for a right total shoulder arthroplasty is not indicated according to the Colorado Medical Treatment Guidelines because the MRI does not show a large rotator cuff tear. *Depo. Tr. 10:24-25; 11:1-2*. Dr. Ciccone testified Claimant's MRI findings are chronic and probably unrepairable, which is why Dr. Seidl is recommending a reverse total shoulder arthroplasty. *Depo. Tr. 11:3-7*. Dr. Ciccone testified Dr. Seidl's recommendation for a right reverse total shoulder arthroplasty is reasonable and necessary. *Depo. Tr. 15:13-14*.

15. On cross-examination, Dr. Ciccone testified no evidence exists that Claimant was having any right shoulder issues, including no pain, lack of function, inability to work, inability to do activity, such as fishing, hunting, daily hygiene, playing with is grandkids, etc., before his August 7, 2020 industrial injury. *Depo. Tr. 18:11-24; 21:9-23; 31:7-25; 32:1-7*. Dr. Ciccone testified that at the time of his IME, Claimant reported he was swinging a 4-pounds sledgehammer to break loose rotors when he felt a sensation like rubber bands popping and ripping in his shoulder when he struck the hammer against the metal rotors. *Depo. Tr. 19:1-12*. Dr. Ciccone testified that Claimant told him he yelled out and pain and had to be taken to the ED. *Depo. Tr. 19:21-15; 20:1-3*. Dr. Ciccone testified that following the August 7, 2020, industrial injury, Claimant had significant right shoulder pain, significantly decreased range of motion (only 30 degrees of flexion), and that he was really unable to do anything with his arm extended. *Depo. Tr. 20:4-15; 21-23.* Dr. Ciccone testified that when he performed the IME, Claimant had bad right shoulder range of motion. *Depo. Tr. 28:23-25; 29:1-22*

16. Dr. Ciccone testified the radiologist who reviewed Claimant's right shoulder MRI noted that the MRI was hard to read because there is a lot of stuff in there (metallic suture anchors present, which generates susceptibility artifact, degrading assessment of adjacent soft tissue osseous and soft tissue detail). *Depot Tr. 22:11-22*. Dr. Ciccone testified that only two people have reviewed Claimant's right shoulder MRI: the radiologist and Dr. Seidl. *Depo. Tr. 23: 11-25; 24:3-13*. Dr. Ciccone testified Dr. Seidl reviewed Claimant's right shoulder MRI and found a "massive rotator cuff tear." *Depo. Tr. 24:21-24*. Dr. Ciccone testified that he is an orthopedic and surgeon and that he does not rely on a radiologist's interpretation of an MRI. *Depo. Tr. 24:25; 25:1-8*. Dr. Ciccone testified that while he may take a radiologist's interpretation into consideration, he always, in every case, reviews his patients MRIs and makes his recommendations for treatment based on his review of an MRI. *Depo. Tr. 25:9-18*. But Dr. Ciccone testified that in Claimant's case, he did not review Claimant's right shoulder MRI. *Depo. Tr. 24:14-16*.

17. Dr. Ciccone testified that when determining whether a patient needs a shoulder arthroplasty, the patient must have both the pathology and the symptoms. *Depo. Tr. 25:21-25; 26:1*. Dr. Ciccone testified he would not perform a shoulder arthroplasty on a patient just because the patient has pathology. *Depo. Tr. 26:2-5*. Dr. Ciccone testified Claimant had the pathology for a reverse total shoulder arthroplasty before

his August 7, 2020 industrial injury, but not the symptoms. *Depo. Tr. 26:9-16*. Dr. Ciccone testified no evidence exists Claimant had the symptoms for a reverse total shoulder arthroplasty before August 7, 2020. *Depo. Tr. 26:25; 27:1-3*. Dr. Ciccone testified it was not until the August 7, 2020, industrial injury that Claimant had the right shoulder symptoms. *Depo. Tr. 27:4-9*. Dr. Ciccone testified that it wasn't until his August 7, 2020, industrial injury that Claimant had both the pathology and the symptoms to necessitate a reverse total shoulder arthroplasty. *Depo. Tr. 27:4-20*; 28:1-5. Dr. Ciccone testified Claimant's August 7, 2020, industrial injury caused his right shoulder symptoms. *Depo. Tr. 28:6-16*. Dr. Ciccone testified Dr. Seidl's recommendation for a right reverse total shoulder arthroplasty is reasonable. *Depo. Tr. 30:16-19*

18. Since his August 7, 2020, industrial injury, Claimant has been dealing with constant right shoulder pain, cannot sleep on his right side, cannot reach with his right arm, cannot play with his grandchildren, and cannot swim, ride his bike, fish, or hunt. Even the slightest wrong movement with his shoulder causes Claimant such significant pain that it will knock him to his knees. Claimant did not have any issues like this with his right shoulder before or leading up to his work injury. All of Claimant's current right shoulder issues started on August 7, 2020. Moreover, physical therapy has not helped his shoulder. Furthermore, from a functional standpoint, Claimant is nowhere near where he was in the days leading up to his work injury. Claimant's August 7, 2020, injury has changed his life in a bad way.

19. The issue in this case is whether the recommended right total shoulder arthroplasty is reasonably necessary and causally related to Claimant's now admitted industrial injury. Claimant's right shoulder was asymptomatic before the August 7, 2020, industrial injury. Before August 7, 2020, Claimant worked a heavy duty, physically demanding job without any right shoulder problems or limitations. On August 7, 2020, Claimant sustained a right shoulder industrial injury, which permanently aggravated his underlying, preexisting right shoulder condition. A dispute exists as to whether Claimant's right shoulder MRI revealed a rotator cuff tear. The radiologist who reviewed the MRI did not identify a rotator cuff tear. Dr. Seidl, Claimant's surgeon, identified a massive rotator cuff tear on the MRI. Neither Dr. Farber nor Dr. Ciccone reviewed the actual MRI. Dr. Farber opined that because the radiologist did not identify a rotator cuff tear on the MRI, Claimant does not meet the Colorado Medical Treatment Guidelines for a reverse total shoulder arthroplasty. Dr. Ciccone testified that as an orthopedic surgeon, he always reviews his patients MRIs to determine the proper course of treatment and does not rely on a radiologist's interpretation of an MRI. Dr. Ciccone concluded that regardless of the MRI findings and the Colorado Medical Treatment Guidelines, the right reverse total shoulder arthroplasty recommended by Dr. Seidl is reasonable and necessary.

20. Additionally, Dr. Ciccone testified that as a surgeon he would never recommend a shoulder arthroplasty unless a patient has both the pathology and symptoms to necessitate the surgery. Dr. Ciccone opined that while Claimant may have had the pathology for a shoulder arthroplasty before August 7, 2020, he did not have the symptoms. Dr. Ciccone opined Claimant did not have both the pathology and

symptoms necessitating the right reverse total shoulder arthroplasty until his August 7, 2020, industrial injury, which caused Claimant's right shoulder symptoms.

21. Claimant's testimony about the lack of shoulder symptoms before the work accident and the immediate development of severe shoulder symptoms at the time of - and after - the accident is supported by the underlying medical record. As a result, the ALJ finds Claimant's testimony to be credible and persuasive.

22. The ALJ finds portions of Dr. Ciccone's testimony to be credible and persuasive. The ALJ credits that portion of Dr. Ciccone's testimony that found the need for surgery to be reasonable and necessary. The ALJ finds that portion of his testimony to be credible and persuasive because it is consistent with Claimant's testimony and the underlying medical record. For example, Claimant was not having any right shoulder symptoms before the work accident. Since the accident, Claimant has had significant shoulder symptoms such as pain and limited range of motion which has caused significant functional impairment. Plus, since his work injury, Claimant has also undergone conservative treatment which has not improved his condition. Lastly, the primary recommendation to relieve Claimant's symptoms is the surgery recommended by Dr. Seidl.

23. On the other hand, in reading Dr. Ciccone's deposition – especially his answers during cross examination- it is hard to tell the basis for his opinion that the surgery is not causally related to Claimant's work injury. Thus, to the extent Dr. Ciccone does not think the need for surgery is causally related, the ALJ does not find that portion of Dr. Ciccone's opinion to be persuasive. For example, Dr. Ciccone agreed that Claimant was asymptomatic before the accident, suffered a work injury and became symptomatic, and that the surgery is reasonable and necessary to cure and relieve Claimant's symptoms. Based on that testimony, the missing link in his opinion is how he determined the surgery is unrelated, when in essence he concluded the surgery is reasonable and necessary to cure Claimant's symptoms that were caused by the work accident. In other words, his testimony during his cross examination supports a conclusion that the surgery is reasonable, necessary, and related to treat Claimant from the effects his work injury.

24. The ALJ also does not credit or find persuasive the opinion of Dr. Farber as set forth in his report. In this case, one of the primary issues raised by Dr. Farber is that the rotator cuff tear identified by Dr. Seidl after reviewing the actual MRI films is not identified in the MRI report. Despite this issue, Dr. Farber failed to obtain and review the actual MRI films. Instead, he was content with completing his report without reviewing critical information. Moreover, despite concluding the surgery is not reasonable, necessary, and related, he did not offer a reasonable treatment plan to cure and relieve Claimant from the effects of his work injury. As a result, the ALJ does not find his report to be credible or persuasive.

25. The ALJ finds Claimant's August 7, 2020, industrial injury caused a significant right shoulder injury, including significant pain, range of motion loss, and functional limitations, none of which Claimant had before the injury. Claimant's right shoulder was functioning fine and pain free before the August 7, 2020, event. Claimant did not

need the right shoulder arthroplasty before August 7, 2020. The August 7, 2020, industrial injury permanently aggravated Claimant's underlying right shoulder condition and is the proximate cause of his need for the reverse total shoulder arthroplasty. The ALJ finds Claimant's August 7, 2020, industrial injury aggravated, accelerated, and combined with his preexisting condition to cause an injury and need for treatment, including the right reverse total shoulder arthroplasty recommended by Dr. Seidl. The ALJ finds Claimant proved by a preponderance of the evidence the right reverse total shoulder arthroplasty recommended by Dr. Seidl is reasonable, necessary, and related to his compensable, August 7, 2020, industrial injury.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

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

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

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential*

Insurance Co. v. Cline, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant proved by a preponderance of the evidence that the right total shoulder arthroplasty recommended by Adam Seidl, M.D. is reasonably necessary and causally related to his admitted, August 7, 2020, industrial injury.

Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. § 8-42-101, C.R.S. Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Indus. Comm'n*, 491 P.2d 106 (Colo. App. 1971); *Indus. Comm'n v. Royal Indemnity Co.,* 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Indus. Comm'n v. Jones*, 688 P.2d 1116 (Colo. 1984); *Indus. Comm'n v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

An aggravation of a preexisting condition is compensable. *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. 1990). If a direct causal relationship exists between the mechanism of injury and resultant disability, the injury is compensable if it caused a preexisting condition to become disabling. *Duncan v. Indus. Claim Apps. Office*, 107 P.3d 999 (Colo. App. 2004). However, there must be some affirmative causal connection beyond a mere assumption that the asserted mechanism of injury was sufficient to have caused an aggravation. *Brown v. Indus. Comm'n*, 447 P.2d 694 (Colo. 1968). It is not sufficient to show that the asserted mechanism could have caused an aggravation, but rather Claimant must show that it is more likely than not that the mechanism of injury did, in fact, cause an aggravation. *Id*.

Pain is a typical symptom from the aggravation of a pre-existing condition, and if the pain triggers the claimant's need for medical treatment, the claimant has suffered a compensable injury. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (September 9, 2016). But the mere fact that a claimant experiences symptoms at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Indus, Comm'n*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). Rather, the ALJ must determine whether the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Const. v. Rinta,* 717 P.2d 965 (Colo.

App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

When determining the issue of whether proposed medical treatment is reasonable and necessary the ALJ may consider the provisions and treatment protocols of the MTG because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, evidence of compliance or non-compliance with the treatment criteria of the MTG is not dispositive of the question of whether medical treatment is reasonable and necessary. Rather the ALJ may give evidence regarding compliance with the MTG such weight as he determines it is entitled to considering the totality of the evidence. *See Adame v. SSC Berthoud Operating Co., LLC.*, WC 4-784-709 (ICAO January 25, 2012); *Thomas v. Four Corners Health Care*, WC 4-484-220 (ICAO April 27, 2009); *Stamey v. C2 Utility Contractors, Inc.*, WC 4-503-974 (ICAO August 21, 2008).

Claimant's August 7, 2020, industrial injury caused a significant right shoulder injury, including significant pain, range of motion loss, and functional limitations, none of which Claimant had before the injury. Claimant's right shoulder was functioning fine and pain free before the August 7, 2020, event.

Claimant did not need the right shoulder arthroplasty, which Dr. Ciccone concludes is reasonable and necessary, before August 7, 2020. The August 7, 2020, industrial injury permanently aggravated Claimant's underlying right shoulder condition and is the proximate cause of his need for the reverse total shoulder arthroplasty. Claimant's August 7, 2020, industrial injury aggravated, accelerated, and combined with his preexisting condition to cause an injury and need for treatment, including the right reverse total shoulder arthroplasty recommended by Dr. Seidl.

As a result, the ALJ finds and concludes Claimant proved by a preponderance of the evidence the right reverse total shoulder arthroplasty recommended by Dr. Seidl is reasonable, necessary, and causally related to his compensable, August 7, 2020, industrial injury.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

A. Claimant proved by a preponderance of the evidence that the right total shoulder arthroplasty recommended by Adam Seidl, M.D. is reasonably necessary and causally related to his August 7, 2020, industrial injury. Respondents shall pay for the right total shoulder arthroplasty subject to the Division of Workers' Compensation Medical Fee Schedule.

B. All matters not determined herein are reserved for future determination.

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

DATED: July 15, 2021.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether Respondent has produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Bruce Belleville, M.D. that Claimant suffered a 13% whole person impairment rating as a result of his September 25, 2019 industrial injury.

2. A determination of Claimant's Average Weekly Wage (AWW).

PROCEDURAL MATTER

1. Claimant failed to attend the June 4, 2021 video hearing in this matter. Therefore, prior to entering an order, the ALJ must consider whether Claimant had adequate notice of the proceedings.

2. Office of Administrative Courts Rules of Procedure for Workers' Compensation Hearings (OACRP) Rule 23 governs the entry of orders against non-appearing parties at hearings. Rule 23 provides, in relevant part:

> If a party fails to appear at a hearing after the OAC has sent notice of the hearing to that party, prior to entering any orders against the non-appearing party as a result of that hearing, the judge will consider:
>
> A. The addresses to which the notice of hearing was sent are the most recent addresses provided by the non-appearing party to either the OAC or the Division of Workers' Compensation; or
>
> …
>
> C. A copy of a record or other written statement from the OAC or the Division of Workers' Compensation containing the most recent address provided by the non-appearing party to either of those agencies shall be sufficient to create a rebuttable presumption that the non-appearing party received notice of the hearing.

3. On March 18, 2021 the OAC sent a Notice of Hearing and Status Conference to Claimant at his physical address on file with the Division of Workers' Compensation (DOWC) and the OAC, 930 Boltz Court, Fort Collins, CO 80525. The OAC also sent the Notice to Claimant's email address on file with both agencies: jim.[Redacted]@colostate.edu. Furthermore, at hearing Respondent's counsel remarked that his office also sent an email to Claimant on March 19, 2021 forwarding OAC's March 18 email and the Notice of Hearing and Status Conference.

4. On March 25, 2021 the parties participated in a pre-hearing conference before PALJ David W. Gallivan to discuss Respondent's motions (1) to depose the Division Independent Medical Examination (DIME) physician and (2) compel signed releases. On the same date PALJ Gallivan issued an order that was sent to Claimant at jim.[Redacted]@colostate.edu.

5. At hearing, Respondent's attorney represented that the email address used by the DOWC and the OAC was correct. He noted it was the same email address used by his office to correspond with Claimant. In fact, Claimant had acknowledged receipt of documents on April 28, 2021 and May 13, 2021 in replies to emails.

6. Claimant did not file a Case Information Sheet prior to the hearing in this matter as required by OACRP 20 and as instructed on the Notice of Hearing and Status Conference. He also did not appear at the telephone status conference held at 1:00 p.m. on June 2, 2021. The notice of the status conference provided the telephone number for the parties to call as well as the participant code.

7. On June 3, 2021 the OAC emailed the parties details of the virtual hearing to be conducted on June 4, 2021 through Google Meet. The parties were notified of the option to attend either by video (by clicking the hyperlink) or by telephone. The telephone number and access code were provided on the invitation.

8. Despite the preceding notice of the June 4, 2021 video hearing Claimant failed to appear. At the outset of the hearing, the ALJ reviewed the record to determine whether Claimant had received adequate and proper notice of the 1:00 p.m. hearing. Based on a review of the file and comments from Respondent's counsel, the ALJ was satisfied Claimant had proper and adequate notice of the matter. Because the case involved Respondent's Application for Hearing, the ALJ proceeded with the hearing.

9. On June 22, 2021 Claimant filed a motion "to have a hearing where I'm represented." He asserted that he did not receive timely notice of the June 4, 2021 hearing and had technical difficulties. After receiving a response from Respondent's counsel, the undersigned ALJ denied Claimant's motion in a written order dated June 24, 2021.

10. The preceding chronology reflects that Claimant had adequate notice of the June 4, 2021 hearing in this matter. The Notice of Hearing was sent to Claimant's email address on file with the OAC and the DOWC. Moreover, on June 3, 2021 the OAC emailed the parties details of the virtual hearing to be conducted on June 4, 2021 through Google Meet. The parties were notified of the option to attend either by video (by clicking the hyperlink) or by telephone. Furthermore, Respondent's corresponded with Claimant on multiple occasions through the same email address. The record thus demonstrates sufficient evidence to create a rebuttable presumption that Claimant received notice of the hearing. Claimant has failed to rebut the presumption. Because Claimant had adequate notice of the June 4, 2021 hearing but chose not to appear, entry of an order in this matter is appropriate.

FINDINGS OF FACT

1. Claimant worked for Employer as an Equipment Operator in Facilities Management. On September 25, 2019 Claimant suffered an admitted industrial injury to his left upper extremity during the course and scope of his employment with Employer. Claimant received medical treatment through Workwell Occupational Medicine.

2. Claimant's annual salary as of the date of injury was $31,632.00. Dividing $31,632.00 by 52 weeks yields an Average Weekly Wage of $608.31. An AWW of $608.31 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

3. On September 27, 2019 Claimant visited Elizabeth Otto, APN at Workwell for an evaluation. Claimant reported that he injured his left shoulder at work on September 25, 2019. He specifically experienced pain when he lifted his arm and reached back to close the door of his truck. Claimant noted numbness in his left forearm beginning on the date of injury. After conducting a physical examination, APN Otto diagnosed Claimant with the following: (1) cervicalgia; (2) an unspecified sprain of the left shoulder joint; (3) pain in the left wrist; and (4) paresthesia of the skin. She assigned work restrictions consisting of no lifting, pushing or pulling in excess of 10 pounds, no climbing or crawling, no lifting away from the body and no overhead work. APN Otto concluded that the objective findings were consistent with a work-related injury.

4. Claimant subsequently underwent conservative care while he continued to work full time for Employer. His treatment specifically included massage therapy, physical therapy, acupuncture and an epidural steroid injection to the cervical spine.

5. Logan Jones, D.O. of WorkWell referred Claimant to Authorized Treating Physician (ATP) Eric Shoemaker, D.O. in December 2019. Based on left forearm symptoms, Dr. Shoemaker originally felt Claimant stressed or injured the brachial plexus area. He also noted that "there [was] no evidence on exam of cervical etiology and no evidence of any injury to the shoulder itself, including the rotator cuff." Dr. Shoemaker described Claimant's overall presentation as "quite benign" and remarked that the prognosis was good for spontaneous recovery. He ordered an MRI of the brachial plexus and an EMG of the left upper extremity.

6. The January 6, 2020 MRI of the left brachial plexus was normal. A January 16, 2020 EMG of the left upper extremity showed no evidence of cervical radiculopathy.

7. Dr. Shoemaker subsequently ordered an MRI of the cervical spine. The January 29, 2020 MRI revealed discogenic degenerative changes most prominent in the mid-cervical spine. At C4-5 and C5-6 there was an annular disc bulge with bone spur formation. The MRI report also noted mild foraminal narrowing at C4-5 bilaterally with no central canal stenosis.

8. On January 30, 2020 Claimant returned to Dr. Shoemaker for an evaluation. Dr. Shoemaker reported that Claimant suffered localized pain from his neck through his left shoulder into his radial forearm and the base of his thumb at his radial wrist. After

reviewing Claimant's January 29, 2020 cervical spine MRI, Dr. Shoemaker assessed Claimant with right C6 radiculitis in the setting of severe foraminal stenosis due to disc osteophyte complex. He also noted severe bilateral foraminal stenosis at C4-5 and C5-6 as well as C6-7 on the left. The MRI also reflected at least moderate canal stenosis at C4-5 and to a lesser degree at C5-6. Dr. Shoemaker explained that Claimant's symptoms began when he was closing a door behind him with his shoulder in an abducted position at 90 degrees with slight extension and then rotating externally with his hand overhead. He also noted some chronic baseline axial neck pain "though the symptoms are superimposed." Dr. Shoemaker recommended a cervical epidural steroid injection because of Claimant's persistent "functionally limiting radicular pattern pain." He remarked that the injection was for diagnostic and therapeutic purposes.

9. On March 2, 2020 Dr. Shoemaker performed a left paramedian C7-T1 interlaminar epidural steroid injection. On March 18, 2020 Claimant informed Dr. Shoemaker that the injection slightly worsened his neck pain and he sustained 0% benefit. Nevertheless, Claimant noted that his pain was not significant enough to warrant surgical intervention. Dr. Shoemaker thus prescribed medications for Claimant's symptoms.

10. On May 19, 2020 Claimant explained to Dr. Shoemaker that he felt the sensation in his arm was returning and his arm was "waking up." After conducting a physical examination, Dr. Shoemaker determined Claimant had reached Maximum Medical Improvement (MMI). He recommended medical maintenance care in the form of medications for the following 12 months.

11. Claimant's physicians at WorkWell referred him to Robert Watson, M.D. for an impairment rating. At the August 13, 2020 visit, Claimant explained that he injured his left shoulder at work on September 25, 2019. He experienced numbness and tingling into the left radial forearm. The remaining numbness in the left forearm had "begun to resolve." Other than some intermittent shoulder discomfort, Claimant's left shoulder did not require any extensive treatment and his symptoms resolved. Dr. Watson explained that as Claimant's injury progressed, physicians determined that his symptoms were most likely originating from his cervical spine. An MRI of the cervical spine demonstrated nerve root Impingement in the C5-6 region with a probable left C6 radiculopathy as well as multilevel degenerative changes. Extensive physical therapy and an epidural steroid Injection did not provide substantial improvement.

12. After conducting a physical examination, Dr. Watson diagnosed Claimant with the following: 1) cervicalgia; (2) a strain of other muscles, fascia and tendons at shoulder and upper arm level of the left arm; (3) pain in the left wrist; (4) paresthesia of the skin; and (5) a strain of muscle, fascia and tendon at the neck level. Dr. Watson completed an impairment rating pursuant to the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised)* (*AMA Guides*). He noted that Claimant warranted a cervical spine impairment rating. Specifically, there was a left C6 nerve root impingement causing the C6 radiculopathy. Relying on Table 53 IIC of the *AMA Guides* he assigned a 6% cervical spine impairment rating. Dr. Watson also assigned an 8% rating based on range of motion deficits. He finally noted a neurological Impairment for

left C6 sensory loss. Based on Table 12 Claimant's sensory loss equaled 8% for C6 that rounded to a 1% whole person rating. Combining the ratings yielded a 15% whole person permanent impairment.

13. Respondent challenged Dr. Watson's impairment rating and sought a Division Independent Medical Examination (DIME). On January 11, 2021 Claimant underwent a DIME with Bruce R. Belleville, M.D. Dr. Belleville described that on September 25, 2019 Claimant was delivering products while working for Employer. He closed a van door with his left arm and immediately felt a "zinger" that traveled from his left shoulder down to the tips of his left hand fingers. Claimant noted he had experienced a sensation of numbness in his left radial forearm since September 25, 2019 that was especially noticeable on the day following the incident.

14. Dr. Belleville reviewed Claimant's medical records and performed a physical examination. He determined that Claimant had a residual paresthesia and decreased pinwheel sensation, but no motor deficits in his left radial forearm. Claimant also exhibited degenerative findings on his cervical spine MRI. Furthermore, Claimant had decreased cervical spine range of motion. Dr. Belleville also remarked that electro-diagnostic testing of the left upper extremity by Dr. Shoemaker on January 6, 2020 revealed changes that were consistent with left C6 radicular irritation.

15. Dr. Belleville agreed that Claimant reached MMI on May 19, 2020. He assigned Claimant a 6% cervical spine impairment pursuant to Table 53 of the *AMA Guides* and a 6% rating for range of motion deficits. Dr. Belleville also determined that Claimant warranted a 1% neurological impairment. He thus concluded that Claimant suffered a 13% whole person permanent impairment rating as a result of his September 25, 2019 injuries.

16. On October 13, 2020 Claimant underwent an independent medical examination with Frederick Scherr, M.D. In addition to his report of October 13, 2020, Dr. Scherr produced supplemental reports dated February 3, 2021 and April 29, 2021. Dr. Scherr also testified at the hearing in this matter. He concluded that Claimant did not sustain a permanent impairment to his cervical spine as a result of the September 25, 2019 incident. He reasoned that Dr. Belleville's DIME determination was thus clearly erroneous.

17. The *AMA Guides* require a Table 53 diagnosis and rating in order to assign a range of motion impairment. The Division of Workers' Compensation *Impairment Rating Tips* (*Rating Tips*) also provide for a range of motion impairment only in unusual cases when there is established severe shoulder pathology accompanied by treatment of the cervical musculature and the isolated cervical range of motion impairment is well justified by the clinician. The *Rating Tips* finally note that "otherwise, there are no exceptions to the requirement for a corresponding Table 53 rating."

18. Dr. Scherr maintained that Dr. Belleville erred in assigning Claimant a 6% Table 53 impairment for the cervical spine, a 6% impairment for range of motion deficits and a 1% rating for neurological deficits. He remarked that Claimant did not suffer a Table

53 cervical spine disorder injury on September 25, 2019. Dr. Scherr specifically explained that Dr. Belleville's impairment rating was predicated on Claimant's complaint of numbness in the forearm. However, Dr. Belleville did not perform a two-point discrimination test to confirm Claimant's subjective complaint. In contrast, Dr. Scherr performed a two-point discrimination test and found no evidence of numbness. Moreover, electrodiagnostic testing did not provide objective evidence of C6 nerve impairment.

19. Dr. Scherr concluded that there is no persuasive evidence that Claimant suffered a specific or discrete injury to the cervical spine while working for Employer on September 25, 2019. Furthermore, Dr. Shoemaker's examination of the cervical spine provided little evidence of a cervical etiology for Claimant's arm numbness. Notably, Claimant's negative diagnostic response to Dr. Shoemaker's March 2, 2020 epidural steroid injection reflected that the cervical spine was not the cause of Claimant's symptoms. The cervical spine MRI showed only foraminal stenosis but no actual nerve root impingement correlating to the C6 level. Dr. Scherr thus determined that Claimant did not warrant any permanent impairment rating as a result of closing the door to his truck with his left arm on September 25, 2019.

20. Respondent has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Belleville that Claimant suffered a 13% whole person impairment rating as a result of his September 25, 2019 industrial injury. Specifically, Respondent has not demonstrated that it is highly probable that Dr. Belleville's impairment determination was incorrect. Initially, on September 25, 2019 Claimant suffered left upper extremity symptoms when he lifted his arm and reached back to close the door of his truck. On September 27, 2019 Claimant was diagnosed with the following: (1) cervicalgia; (2) an unspecified sprain of the left shoulder joint; (3) pain in the left wrist; and (4) paresthesia of the skin. Claimant subsequently underwent conservative care while he continued to work full time for Employer. In January 2020 diagnostic testing of the left brachial plexus was normal and the left upper extremity showed no evidence of cervical radiculopathy.

21. On January 29, 2020 Claimant underwent a cervical spine MRI. After reviewing the MRI ATP Dr. Shoemaker assessed Claimant with right C6 radiculitis in the setting of severe foraminal stenosis due to disc osteophyte complex. Dr. Shoemaker explained that Claimant's symptoms began when he was closing a van door behind him at work on September 25, 2019. He also noted some chronic baseline axial neck pain "though the symptoms are superimposed." On May 19, 2020 Dr. Shoemaker determined Claimant had reached MMI. He recommended medical maintenance care in the form of medications for the following 12 months. After an impairment evaluation Dr. Watson assigned Claimant a 6% cervical spine rating based on Table 53 IIC of the *AMA Guides and* an 8% impairment based on range of motion deficits. Dr. Watson also assigned a neurological Impairment rating for left C6 sensory loss. Combining the ratings yielded a 15% whole person permanent impairment.

22. On January 11, 2021 Claimant underwent a DIME with Dr. Belleview. He determined that Claimant had a residual paresthesia and decreased pinwheel sensation, but no motor deficits in his left radial forearm. Claimant also exhibited degenerative

findings on his cervical spine MRI. Furthermore, Claimant had decreased cervical spine range of motion. Dr. Belleville also remarked that electro-diagnostic testing of the left upper extremity by Dr. Shoemaker on January 6, 2020 revealed changes that were consistent with left C6 radicular irritation. He agreed that Claimant reached MMI on May 19, 2020. Dr. Belleview assigned Claimant a 6% cervical spine impairment pursuant to Table 53 of the *AMA Guides* and a 6% rating for range of motion deficits. In conjunction with a 1% neurological impairment, Dr. Belleview concluded that Claimant suffered a 13% whole person permanent impairment rating as a result of his September 25, 2019 work injuries.

23. In contrast, Dr. Scherr commented that there is no persuasive evidence that Claimant suffered a specific or discrete injury to the cervical spine on September 25, 2019. Specifically, an examination of the cervical spine provided little evidence of a cervical etiology for Claimant's arm numbness. Notably, Claimant's negative diagnostic response to Dr. Shoemaker's March 2, 2020 epidural steroid injection reflected that the cervical spine was not the cause of Claimant's symptoms. Furthermore, the cervical spine MRI showed only foraminal stenosis but no actual nerve root impingement correlating to the C6 level. Dr. Scherr thus determined that Claimant did not warrant any permanent impairment rating as a result of closing the door to his truck with his left arm on September 25, 2019.

24. Although Dr. Scherr concluded that Claimant did not suffer a cervical spine injury while closing the door of his truck at work, he failed to identify Dr. Belleview's specific error or improper application of the *AMA Guides.* Dr. Belleview recognized that Claimant had degenerative findings on his cervical spine MRI, but remarked that electro-diagnostic testing of the left upper extremity revealed changes that were consistent with left C6 radicular irritation. Moreover, Dr. Shoemaker diagnosed Claimant with right C6 radiculitis in the setting of severe foraminal stenosis due to disc osteophyte complex. He also noted severe bilateral foraminal stenosis at C4-5 and C5-6 as well as C6-7 on the left. He explained that Claimant's symptoms began when he was closing his van door behind him at work. Although Dr. Shoemaker noted some chronic baseline axial neck pain Claimant's current "symptoms [were] superimposed." Finally, Dr. Watson explained that as Claimant's injury progressed, physicians determined that his symptoms were most likely originating from his cervical spine. He noted that Claimant warranted a cervical spine impairment rating based on a left C6 nerve root impingement that caused a C6 radiculopathy. The opinions of Drs. Shoemaker and Watson thus support DIME Dr. Belleview's opinion that Claimant suffered a cervical spine injury and warranted a 13% whole person permanent impairment rating as a result of his September 25, 2019 industrial incident. The contrary determination of Dr. Scherr is a mere difference of medical opinion that does not constitute clear and convincing evidence to overcome Dr. Belleview's DIME determination. Accordingly, Respondent has not produced unmistakable evidence free from serious or substantial doubt that Dr. Belleview's 13% whole person impairment rating is incorrect.

CONCLUSIONS OF LAW

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

2. The Judge’s factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Overcoming the DIME

4. In ascertaining a DIME physician’s opinion, the ALJ should consider all of the DIME physician’s written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician’s determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAO, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician is required to rate a claimant’s impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician’s impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAO, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician’s findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAO, Apr. 16, 2008).

6. A DIME physician’s opinions concerning MMI and impairment carry presumptive weight pursuant to §8-42-107(8)(b)(III), C.R.S.; *see Yeutter v. Industrial Claim Appeals Office*, No. 18CA0498 (Apr. 11, 2019) 2019 COA 53. The statute provides

that “[t]he finding regarding [MMI] and permanent medical impairment of an independent medical examiner in a dispute arising under subparagraph (II) of this paragraph (b) may be overcome only by clear and convincing evidence.” *Id.* Both determinations require the DIME physician to assess, as a matter of diagnosis, whether the various components of the claimant’s medical condition are causally related to the industrial injury. *See Eller v. Industrial Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). Consequently, when a party challenges a DIME physician's opinion regarding MMI or impairment rating, the determination on causation is also entitled to presumptive weight. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo.App. 1998).

7. “Clear and convincing evidence” is evidence that demonstrates that it is “highly probable” the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, “there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt.” *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAO, Nov. 17, 2000).

8. As found, Respondent has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Belleville that Claimant suffered a 13% whole person impairment rating as a result of his September 25, 2019 industrial injury. Specifically, Respondent has not demonstrated that it is highly probable that Dr. Belleville’s impairment determination was incorrect. Initially, on September 25, 2019 Claimant suffered left upper extremity symptoms when he lifted his arm and reached back to close the door of his truck. On September 27, 2019 Claimant was diagnosed with the following: (1) cervicalgia; (2) an unspecified sprain of the left shoulder joint; (3) pain in the left wrist; and (4) paresthesia of the skin. Claimant subsequently underwent conservative care while he continued to work full time for Employer. In January 2020 diagnostic testing of the left brachial plexus was normal and the left upper extremity showed no evidence of cervical radiculopathy.

9. As found, on January 29, 2020 Claimant underwent a cervical spine MRI. After reviewing the MRI ATP Dr. Shoemaker assessed Claimant with right C6 radiculitis in the setting of severe foraminal stenosis due to disc osteophyte complex. Dr. Shoemaker explained that Claimant’s symptoms began when he was closing a van door behind him at work on September 25, 2019. He also noted some chronic baseline axial neck pain “though the symptoms are superimposed.” On May 19, 2020 Dr. Shoemaker determined Claimant had reached MMI. He recommended medical maintenance care in the form of medications for the following 12 months. After an impairment evaluation Dr. Watson assigned Claimant a 6% cervical spine rating based on Table 53 IIC of the *AMA Guides and* an 8% impairment based on range of motion deficits. Dr. Watson also

assigned a neurological Impairment rating for left C6 sensory loss. Combining the ratings yielded a 15% whole person permanent impairment.

10. As found, on January 11, 2021 Claimant underwent a DIME with Dr. Belleview. He determined that Claimant had a residual paresthesia and decreased pinwheel sensation, but no motor deficits in his left radial forearm. Claimant also exhibited degenerative findings on his cervical spine MRI. Furthermore, Claimant had decreased cervical spine range of motion. Dr. Belleville also remarked that electro-diagnostic testing of the left upper extremity by Dr. Shoemaker on January 6, 2020 revealed changes that were consistent with left C6 radicular irritation. He agreed that Claimant reached MMI on May 19, 2020. Dr. Belleview assigned Claimant a 6% cervical spine impairment pursuant to Table 53 of the *AMA Guides* and a 6% rating for range of motion deficits. In conjunction with a 1% neurological impairment, Dr. Belleview concluded that Claimant suffered a 13% whole person permanent impairment rating as a result of his September 25, 2019 work injuries.

11. As found, in contrast, Dr. Scherr commented that there is no persuasive evidence that Claimant suffered a specific or discrete injury to the cervical spine on September 25, 2019. Specifically, an examination of the cervical spine provided little evidence of a cervical etiology for Claimant's arm numbness. Notably, Claimant's negative diagnostic response to Dr. Shoemaker's March 2, 2020 epidural steroid injection reflected that the cervical spine was not the cause of Claimant's symptoms. Furthermore, the cervical spine MRI showed only foraminal stenosis but no actual nerve root impingement correlating to the C6 level. Dr. Scherr thus determined that Claimant did not warrant any permanent impairment rating as a result of closing the door to his truck with his left arm on September 25, 2019.

12. As found, although Dr. Scherr concluded that Claimant did not suffer a cervical spine injury while closing the door of his truck at work, he failed to identify Dr. Belleview's specific error or improper application of the *AMA Guides.* Dr. Belleview recognized that Claimant had degenerative findings on his cervical spine MRI, but remarked that electro-diagnostic testing of the left upper extremity revealed changes that were consistent with left C6 radicular irritation. Moreover, Dr. Shoemaker diagnosed Claimant with right C6 radiculitis in the setting of severe foraminal stenosis due to disc osteophyte complex. He also noted severe bilateral foraminal stenosis at C4-5 and C5-6 as well as C6-7 on the left. He explained that Claimant's symptoms began when he was closing his van door behind him at work. Although Dr. Shoemaker noted some chronic baseline axial neck pain Claimant's current "symptoms [were] superimposed." Finally, Dr. Watson explained that as Claimant's injury progressed, physicians determined that his symptoms were most likely originating from his cervical spine. He noted that Claimant warranted a cervical spine impairment rating based on a left C6 nerve root impingement that caused a C6 radiculopathy. The opinions of Drs. Shoemaker and Watson thus support DIME Dr. Belleview's opinion that Claimant suffered a cervical spine injury and warranted a 13% whole person permanent impairment rating as a result of his September 25, 2019 industrial incident. The contrary determination of Dr. Scherr is a mere difference of medical opinion that does not constitute clear and convincing evidence to overcome

Dr. Belleview's DIME determination. Accordingly, Respondent has not produced unmistakable evidence free from serious or substantial doubt that Dr. Belleview's 13% whole person impairment rating is incorrect.

Average Weekly Wage

13. Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed method will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993); *see In re Broomfield,* W.C. No. 4-651-471 (ICAO, Mar. 5, 2007). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell,* 867 P.2d at 82. Where the claimant's earnings increase periodically after the date of injury the ALJ may elect to apply §8-42-102(3), C.R.S. and determine whether fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability instead of the earnings on the date of the injury. *Id.*

14. As found, Claimant's annual salary on his date of injury was $31,632.00. Dividing $31,632.00 by 52 weeks yields an AWW of $608.31. An AWW of $608.31 constitutes a fair approximation of Claimant's wage loss and diminished earning capacity.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered a 13% whole person permanent impairment rating as a result of his September 25, 2019 industrial injuries.

2. Claimant earned an AWW of $608.31.

3. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts.

For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at https://oac.colorado.gov/resources/oac-forms.

DATED: July 15, 2021.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-016-216-002

ISSUE

1. Whether Claimant established by a preponderance of the evidence that Botox injections for headaches are reasonable, necessary, and related medical maintenance benefits designed to relieve the effects of her work-related injury or to prevent further deterioration of her condition pursuant to *Grover v. Industrial Comm'n*, 795 P.2d 705 (Colo. App. 1988).

2. Whether Respondents established by a preponderance of the evidence that further maintenance medical treatment is not reasonable, necessary, or related to Claimant's industrial injury.

FINDINGS OF FACT

1. Claimant is a 50-year-old pharmacist who sustained an admitted injury arising out of the course of her employment with Employer on May 9, 2016, when a plastic tote weighing approximately four pounds fell from a shelf and struck the crown of her head.

2. Approximately six years prior to her industrial injury, in May 2010, Claimant was involved in a bicycling accident and sustained significant injuries resulting in her being in a coma for 18 days. As a result of the accident, Claimant sustained a significant head injury and multiple fractures. Claimant was hospitalized at Craig Hospital for approximately six weeks following the accident. Claimant underwent multidisciplinary rehabilitation, including physical therapy, occupational therapy, and speech therapy. Over approximately two years, Claimant progressed to the point where she was functional but continued to have higher level cognitive impairment and post-traumatic brain injury sequelae of slowed speed of processing, cognitive fatigue, balance and coordination difficulties, and vertigo. Claimant was off work for a significant period of time, and by at least 2016, had returned to work as a pharmacist on a limited schedule of 22 – 27 hours per week. Following this injury, Claimant continued to experience cognitive issues including cognitive fatigue and slow processing speed, as well as other issues. No medical records or other evidence was admitted at hearing indicating that Claimant complained of or received treatment for significant headaches related to her May 2010 injuries.

3. After her industrial injury on May 9, 2016, Claimant was initially seen at the St. Joseph Hospital Emergency Department on May 15, 2016, and reported intermittent headaches, associated with nausea, radiating from the crown of her head to her forehead. The clinical impression was non-intractable headache. (Ex. G).

4. Over the course of the next two to three years, Claimant saw numerous providers for treatment of headaches and cervical spine complaints. This treatment included

physical therapy, chiropractic care, various injections, medial branch blocks, occipital nerve blocks, medications (both prescribed and over-the-counter), massage, and biofeedback. Additionally, Claimant had consults, examinations and treatment including neurology, neuropsychology, psychology and physiatry. Throughout this time, Claimant continued to report headaches, and none of the treatments provided significant relief of Claimant's reported headaches. (Ex. B. and C).

5. Beginning in June 2016, Claimant saw providers at Concentra for her headaches and cervical spine complaints, initially being followed by Lynne Yancey, M.D., and later by Eric Tentori, D.O. Dr. Yancey indicated that Claimant's mechanism of injury could cause cervicogenic headaches. Claimant saw Concentra physiatrist, John Aschberger, M.D., approximately 19 times after September 2016. In October 2016, Dr. Aschberger described Claimant's headaches as multifactorial, with cervicogenic, myofascial, post-concussive and rebound components. He later opined that Claimant's headaches were facetogenic. On February 18, 2018, Dr. Aschberger placed Claimant at MMI and assigned Claimant a 13% whole person impairment based on a specific disorder impairment of the cervical spine and range of motion impairment. (Ex. B and C).

6. Claimant was also followed by neurologist Alexander Zimmer, M.D., who saw Claimant approximately ten times between June 22, 2016, and October 2017. Dr. Zimmer treated Claimant with various medications which did not provide lasting relief of her headaches. At his initial visit on June 22, 2016, Dr. Zimmer's assessment was that Claimant's presentation was consistent with a mild concussion and post-concussion headache syndrome, and that her symptoms would like resolve within a matter of months.

7. Claimant was also evaluated by Kevin Reilly, Psy.D., for several neuropsychological consults. Dr. Reilly opined that emotional and psychological factors contributed to Claimant's somatic and cognitive symptoms. Dr. Reilly did not believe Claimant's May 9, 2016-work injury resulted in a traumatic brain injury. He also opined that Claimant's testing indicated symptom magnification, and that Claimant's cognitive symptoms did not appear to be directly attributable to her work injury. Dr. Reilly did not express opinions regarding Claimant's headaches. (Ex. F).

8. On February 12, 2018, Carlos Cebrian, M.D., performed a medical examination of Claimant at Respondent's request. Dr. Cebrian conducted an extensive medical record review, interviewed Claimant, and issued a 56-page report. Based on his evaluation and review of records, Dr. Cebrian opined, *inter alia*, that as the result of her May 9, 2016-work injury, Claimant sustained a mild concussion with post-traumatic headaches. Dr. Cebrian indicated Claimant's cervical spine was not a contributing factor to Claimant's headaches. He opined Claimant was at maximum medical improvement and did not qualify for an impairment for ongoing headaches under Episodic Neurological Disorders, or for a cervical spine impairment rating. Dr. Cebrian concluded no further treatment was indicated for Claimant's work injury because Claimant had undergone extensive and varied medical treatments without improvement in her symptoms. Dr. Cebrian did not specifically address Botox treatment for Claimant's headaches. (Ex. B).

9. On September 11, 2018, Claimant underwent a Division Independent Medical Examination (DIME) performed by John Hughes, M.D. Dr. Hughes determined that Claimant did not sustain a traumatic brain injury but did sustain a cervical spine sprain/strain as a result of her industrial accident. He assigned Claimant an 11% cervical spine range of motion impairment which converts to a 15% whole person impairment. At the time of the DIME, Claimant continued to report constant, right-sided headaches. Dr. Hughes expressed no opinion on the need for medical maintenance care for Claimant's headaches, although he did state she had reached maximum therapeutic benefit with respect to her cervical spine, from which the ALJ infers that he did not believe further cervical spine treatment was reasonable or necessary. Dr. Hughes did not address Botox treatment for Claimant's headaches. (Ex. C).

10. On November 6, 2018, Respondents filed a Final Admission of Liability (FAL), which admitted for maintenance care, including ongoing medical benefits that are reasonable and necessary. (Ex. I).

11. Claimant apparently continued to treat with Dr. Aschberger after being placed at MMI. On December 13, 2018, Dr. Aschberger referred Claimant to Marc Treihaft, for right occipital headaches, and to evaluate Claimant for Botox treatment. (Ex. 11).

12. On February 18, 2019, Marc Treihaft, M.D., sought authorization for Claimant to undergo Botox treatment for her head and neck. Insurer denied Dr. Treihaft's request for authorization. (Ex. E).

13. Claimant apparently continued to see Dr. Zimmer after being placed at MMI. On March 28, 2019, Dr. Zimmer authored a letter addressed "To Whom It May Concern," in which he indicated that Claimant continued to suffer from intractable daily headaches and that he believed a trial of Botox injections to attempt to reduce headache frequency and severity would be medically indicated for her headaches. (Ex. 1).

14. At some undetermined point, Claimant began seeing neurologist Marc Wasserman, M.D., at Blue Sky Neurology. On April 9, 2020, Insurer denied a request from Marc Wasserman, M.D., for authorization of Botox treatment for "Cervicalgia – Chronic migraine without aura, not intractable …." (Ex. E).

15. On December 4, 2020, Claimant received a Botox injection through Blue Sky Neurology, which resulted in reduction of Claimant's headaches. (Ex. I).

16. On March 25, 2021, Dr. Wasserman authored a letter recommending Botox treatment for Claimant's headaches. Dr. Wasserman indicated that Claimant had been suffering from chronic migraines since 2016, and indicated that "[w]hile unusual, the specific timing of [her injury from the falling tote] does suggest that this injury most likely was the trigger of the onset of her chronic migraines." Dr. Wasserman indicated that Botox is the standard treatment for chronic migraines and Claimant appeared to be doing better with the treatment. (Ex. 3).

17. On March 4, 2021, John Raschbacher, M.D., conducted a medical record review of Claimant's medical records at Respondent's request and issued a report of the dame

date. At the time of the examination, Claimant reported experiencing headaches manifesting as pressure on the right side, with photophobia but no phonophobia. In his summary of medical records, Dr. Raschbacher notes that Dr. Aschberger and Dr. Treihaft discussed Botox injections with Claimant in July 2018 and January 2019, respectively. (Ex. A).

18. Based on his review, Dr. Raschbacher opined that Claimant sustained a significant brain injury in 2010, and that the mechanism of injury for her May 9, 2016-work injury "seems trivial." He opined that the mechanism of the May 9, 2016-injury "does not appear to be a mechanism of injury that would, medically, be anticipated to cause any brain injury or any cervical injury of significance." He further opined that he would not anticipate that Claimant would have any persistent symptoms from her May 9, 2016-injury. Dr. Raschbacher did not recommend any treatment for migraine headache, including Botox injection and recommended no further treatment of any kind for Claimant's May 9, 2016-work injury. When addressing the recommendation for Botox injections for cervicogenic headache, Dr. Raschbacher expressed that the Colorado Medical Treatment Guidelines do not recommend Botox for cervicogenic headaches. He further opined that it was not likely that migraine headache is a residual from the 2016 injury. Dr. Raschbacher is the only physician who specifically opined that Botox treatment for Claimant was not reasonable, necessary, or related to her work injury. (Ex. A).

19. On April 8, 2021, Claimant saw Marc Wasserman, M.D. Dr. Wasserman opined that the reason prior neck injections and massage had not relieved Claimant's headaches is that her headaches were not cervicogenic, but chronic migraines. He indicated Claimant had received Botox treatment, which reduced her headaches significantly. Consequently, he recommended that Claimant undergo Botox treatment. Dr. Wasserman indicated that Claimant had migraine headaches immediately after her injury that were not present before the injury. Only one treatment record from Dr. Wasserman, dated April 8, 2021, was offered, or admitted into evidence. Consequently, the ALJ is unable to determine when Claimant initiated treatment with Dr. Wasserman and whether Dr. Wasserman reviewed Claimant's prior medical record to arrive at the conclusion that Claimant had suffered from migraine headaches since 2016. Consequently, the ALJ does not credit any causation opinions from Dr. Wasserman, although his opinions regarding diagnosis, reasonableness and necessity of Botox treatment are credible. (Ex. 4).

20. On April 9, 2021, Claimant saw Ang Li, M.D., of Blue Sky Neurology. Dr. Li noted that Claimant received Botox injections to treat concussive chronic migraines on December 4, 2020, which provide relief. In a letter of the same date, Dr. Li noted that Botox was very effective, and medically reasonable and necessary in treating her chronic migraine. On April 13, 2021, Dr. Li performed a second set of Botox injections. (Ex. 7 and 8).

21. On April 12, 2021, Dr. Zimmer authored a second letter in which he indicated Claimant received Botox therapy on December 5, 2020, with an excellent response, lasting more than three months. He opined that it was medically probable that Claimant's headaches "fall into the category of chronic migraine and are secondary to the head injury experienced at work on May 9, 2016." Dr. Zimmer also opined that given the Claimant's

response to Botox treatment, the therapy was reasonable and necessary for treatment of the headaches. He recommended Botox injections once every 3-4 months, with clinical follow to determine the duration of the treatment. (Ex. 2).

22. On April 14, 2021, Dr. Aschberger authored a letter indicating that Claimant had undergone a full comprehensive course of conservative measures, without lasting benefit, until the administration of Botox injections. He indicated Claimant experienced excellent relief. Dr. Aschberger noted that Botox injections are not delineated under the Colorado Medical Treatment Guidelines, however, Claimant "has had a specific response to the injections with the procedure performed to correlating areas involved with the physical examination. This has been a consistent area of involvement since the original injury." Dr. Aschberger concluded that given Claimant's response to the original Botox injection, further treatment is medically reasonable, necessary, and related to her workers' compensation injury. (Ex. 9)

23. At hearing, Claimant testified that she did not have any treatment for headaches prior to her May 9, 2016-work injury. She testified that after her work injury, she tried multiple treatments and medications which did not effectively treat her headaches. She further testified that the Botox treatment she received has been effective in treating her headaches. Claimant's testimony was credible.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim*

Appeals Office, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

MAINTENANCE MEDICAL BENEFITS

The need for medical treatment may extend beyond the point of MMI where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003); *Hobirk v. Colorado Springs School District #11,* W.C. No. 4-835-556-01 (ICAO, Nov. 15, 2012).

In cases where the respondents file a final admission of liability admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003); *Oldani v. Hartford Financial Services,* W.C. No. 4-614-319-07, (ICAO, Mar. 9, 2015). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School District No.11*, W.C. No. 3-979-487, (ICAO, Jan. 11, 2012); *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO, Feb. 12, 2009. The question of whether the claimant has proven that specific treatment is reasonable and necessary to maintain his condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Claimant has established by a preponderance of the evidence that Botox treatments for headaches are reasonably necessary to relieve the effects or prevent further deterioration of Claimant's industrial injury. The evidence before the ALJ indicates that, although Claimant sustained a significant head injury in 2010, she did not experience ongoing headaches after recovery from that injury and was not experiencing headaches at the time of her May 9, 2016-industrial injury. Although there has been no consensus on the diagnoses of Claimant's headaches, which have been variously diagnosed as cervicogenic, facetogenic, myofascial, post-concussive, rebound and migraine, the evidence establishes that Claimant's headaches began after her May 9, 2016-injury, and continued essentially unabated until she received Botox treatment in December 2020. Multiple providers, including Dr. Yancey, Dr. Aschberger, Dr. Zimmer, and Dr. Cebrian, diagnosed Claimant with headaches related to her work injury. The ALJ does not credit causation opinions offered by Dr. Wasserman, Dr. Li, or Dr. Treihaft (to the extent such an opinion can be inferred from his request for authorization for Botox treatment), because there is insufficient evidence in the record to ascertain the bases for those opinions.

Notwithstanding, the ALJ does credit Dr. Wasserman's April 8, 2021-treatment note, in which he indicates that Claimant's headaches were not cervicogenic to start with, as indicating that the source of Claimant's headaches were fully appreciated. Dr. Wasserman's assessment is supported by Dr. Cebrian's conclusion that Claimant did not have cervicogenic headaches. The ALJ finds the opinions of Dr. Zimmer and Dr. Aschberger, both of whom followed Claimant for her injuries since June 2016, that Botox treatments are reasonable, necessary, and related to Claimant's May 9, 2016-work injury, to be more persuasive than those of Dr. Raschbacher, whose involvement was limited to a medical record review. Although Dr. Cebrian and Dr. Hughes opined that no further treatment was warranted, neither specifically addressed Botox treatment.

Claimant has established that it is more likely than not that Botox treatment for headaches is reasonably necessary to relieve the effects or prevent further deterioration of Claimant's May 9, 2016-injury.

MEDICAL MAINTENANCE BENEFITS – GENERALLY

Where the respondents attempt to modify an issue that previously has been determined by an admission, respondents bear the burden of proof for such modification. § 8-43-201(1), C.R.S. This includes the termination of previously admitted maintenance medical benefits. *Arguello v. State of Colorado*, W.C. No. 4-762-736-04 (ICAO, May 3, 2016); *Salisbury v. Prowers County School District*, W.C. No. 4-702-144 (ICAO, June 5, 2012); *Barker v. Poudre School District*, W.C. No. 4-750-735 (July 8, 2011). Accordingly, Respondents bear the burden of proving that maintenance medical treatment in general is no longer medically reasonable and necessary.

Respondents have failed to establish by a preponderance of the evidence that maintenance medical treatment is no longer medically reasonable and necessary. Because Claimant has established that Botox treatment is reasonably necessary to relieve the effects or prevent deterioration of her May 9, 2016-injury, grounds do not exist for terminating maintenance medical completely.

ORDER

It is therefore ordered that:

1. Botox treatment for Claimant's headaches is reasonably necessary to relieve the effects or prevent deterioration of Claimant's May 9, 2016- industrial injury.

2. Respondents' request to terminate all maintenance medical treatment is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 19, 2021

____
Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
W.C. No. 5-139-395-001

CORRECTED FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

[Redacted],

Claimant,

v.

[Redacted],

Employer,

and

[Redacted],

Insurer / Respondents.

No further hearings have been held. After the issuance of the decision, counsel for the Claimant filed a Motion to Correct the Full Findings, Conclusions of Law and Order, mailed July 2, 2021, requesting that Respondents' Petition to Terminate Benefits be denied. Respondents' Petition was granted in part and denied in part as herein below specified in the Order portion of this decision.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on May 11, 2021, in Denver, Colorado. The hearing was recorded by Google Meets (reference: 5/11/21, Google Meets, beginning at 1:30 PM , and ending at 5:30 PM).

The Claimant was present in person, virtually, and represented by [Redacted], Esq.. Respondents were represented by [Redacted], Esq.

Hereinafter [Redacted] shall be referred to as the "Claimant." [Redacted] shall be referred to as the "Employer." All other parties shall be referred to by name.

Claimant's Exhibits 1 through 13 were admitted into evidence, without objection. Respondents' Exhibits A through Q were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ established a post-hearing briefing schedule. Claimant's opening brief was filed on June 1, 2021. Respondents' answer brief was filed on June 22, 2021. On June 23, 2021, Claimant advised that a reply brief would not be filed. Consequently, the matter was submitted for decision on June 23, 2021.

ISSUES

The paramount issue to be determined by this decision concerns Respondents' Petition to Terminate Benefits, based on the allegation that Claimant's low back injury is not causally related to his admitted inguinal hernia of May 15, 2020. Temporary total disability benefits are ongoing, pursuant to a General Admission of Liability (GAL), dated March 11, 2021. Consequently, Respondents bear the burden of proof, by a preponderance of the evidence, to establish that a termination of benefits is warranted. A secondary issue concerns whether treatment for the Claimant's low back at the hands Haley Burke, M.D. and ACP Home Physical Therapy was authorized, causally related to the admitted hernia injury and reasonably necessary to cure and relieve the effects of injuries in the direct causal chain from the hernia injury of May 15, 2020. The Claimant bears the burden of proof by preponderant evidence on the latter issue.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. On May 15, 2020, the Claimant was tasked with collecting all the beer cases and 6-packs in the store to put them on pallets for transport and build a display [Hearing Transcript (hereinafter "Tr," followed by a page number, *i.e.,* Tr., p. 74). According to the Claimant, while building the display, he experienced a sharp, burning sensation in his front right side, hip, and lower back. *Id.* at p. 76. At the time of his injury, Claimant was on his knees moving beer cases from one side to another by twisting at the waist when he experienced an onset of low back pain. He informed his Employer of the injury the following day but continued to work over the next three days. His pain symptoms worsened each day. Ultimately, the Employer referred the Claimant to Troy Manchester, M.D., a physician at Concentra.

Procedural Findings

2. On March 12, 2021, Respondents filed a Petition to Terminate Temporary Indemnity benefits as of January 22, 2021, which was denied (Respondent's Exhibit E). Respondents relied on the August 22, 2020, report from Dr. Paz denying treatment of Claimant's low back issues (Respondent's Exhibit Q). Respondent relied on the medical records from Dr. Manchester documenting that Claimant's pain was primarily unrelated to the back issues following the hernia repair as of January 22, 2021 (Respondents' Exhibit L, p. 112).

3. Previously, Respondents filed a General Admission of Liability (GAL), dated March 11, 2021, concerning the right inguinal hernia sustained on May 15, 2020.

The GAL is open ended concerning temporary total disability (TTD) benefits—January 6, 2021 to “TBD.”

Troy Manchester, M.D.

4. On May 22, 2020, during his initial appointment with Troy Manchester, M.D., at Concentra, the Claimant reported that while he was lifting and organizing product, he felt a sharp pain in his right low back radiating towards his groin (Respondents’ Exhibit L, p. 100). The Claimant also reported that he continued to work on May 15, 2020, and returned to work on May 17, 2020 when he continued to work with organizing heavy product. *Id*. at pp.100-101. Dr. Manchester noted the Claimant’s complaints of pain and spasms in his right low back, with pain in his right groin during spasms. Dr. Manchester examined the Claimant, noting right low back spasms. Dr. Manchester initially diagnosed lumbar strain and lumbar spasms. The Claimant was then restricted from work activity by Dr. Manchester (Claimant’s Exhibit 1).

5. Dr. Manchester stated that the Claimant did not disclose a preexisting history of low back pain to him (Tr. p. 62). Dr. Manchester also testified that “eighty/ninety percent of people will have some level of back pain in life.” *Id*. at 59.

6. Ultimately, an MRI (magnetic resonance imaging) was obtained that demonstrated degenerative conditions at L4-L5 and L5-S1, along with a disc protrusion at L5-S1 (Claimant’s Exhibit 3). Dr. Manchester referred the Claimant to physiatrist, Robert Kawasaki, M.D.

Robert Kawaski, M.D.

7. Dr. Kawasaki’s first appointment with the Claimant was on July 2, 2021. Following a review of the MRI and examination of the Claimant, Dr. Kawasaki diagnosed the Claimant with a low back strain with “spondylitic changes with some facetogenic pain generation”, but also suggested the additional possibility of an inguinal hernia (Claimant’s Exhibit 2A).

8. Ultimately, Dr. Kawasaki diagnosed a right-sided inguinal hernia. Respondents do not contest the compensability of the right inguinal hernia. The Claimant saw Dr. Kawasaki again on August 20, 2020, and the doctor noted severe low back pain. Dr. Kawasaki recommended bilateral L4-L5 and L5-S1 medial branch blocks with the potential for a future rhyzotomy (Claimant’s Exhibit 2A).

Previous Low Back Treatment

9. The Claimant “had treatments for his lumbar spine condition in the past (Claimant’s Exhibit 8). He treated with Chiropractic Dr. Christopher Stull, D.C., for low back pain from July 15, 2014 to April 28, 2016. *Id*. On April 28, 2016, at Claimant’s final appointment with Dr. Stull, the Claimant reported “frequent tightness discomfort in the low back” with a pain level of 7 out of 10 on the visual analog pain scale occurring

“approximately 70% of the time” (Respondents’ Exhibit J, p. 94). The question concerns the consequences of Claimant’s admitted inguinal hernia of May 15, 2020, and whether it is causally related to an aggravation/acceleration of Claimant’s preexisting low back condition.

10. According to the Claimant, he stopped chiropractic care because he “was feeling better.” (Tr., p. 94). On April 7, 2016, prior to stopping chiropractic care, according to Chiropractic Dr. Stull, the Claimant reported that he was experiencing “frequent sharp and tightness discomfort in the low back” at an 8 out of 10 on the visual analog pain scale occurring “approximately 80% of the time” (Respondent’s Exhibit J, p. 92).

Haley Burke, M.D.

11. According to Dr. Burke, a low back history of pain from 2013 to 2019 would constitute a chronic low back history (Tr. pp. 34-35). Dr. Burke testified that the Claimant did not disclose a preexisting history of low back pain to her. *Id*. at 33. Dr. Burke stated that the MRI (magnetic resonance imaging) findings included degenerative bilateral foraminal stenosis. *Id*. at 32. Dr. Burke further indicated that the MRI findings did not include any acute findings, signal change, or swelling. *Id*. at 32-33. Dr. Burke was of the opinion, based on medical probability, that reports of back pain for the past seven to eight years could be related to the degenerative changes in the Claimant’s spine. *Id*. at 35. Dr. Burke also stated that she did not address any Waddell’s signs as part of her examination. *Id*. at 40.

F. Mark Paz, M.D., Respondents’ Independent Medical Examiner (IME)

12. In Dr. Paz’s April 20, 2021 supplemental report, he is of the opinion that Dr. Burke did not provide a medical opinion consistent with the State of Colorado, Department of Labor and Employment, Division of Workers’ Compensation, Level II Accreditation Curriculum (Respondent’s Exhibit Q, p. 205). Dr. Paz further stated in his supplemental report that the Waddell’s findings were 4/5 positive in the prior report and he stated the opinion that “Waddell’s findings are non-physiologic responses to physical examination, which support nonorganic low back pain.” *Id*. at 205. The ALJ infers and finds that Dr. Paz’s opinions that the Source of the Claimant’s present low back pain amounted to functional overlay, which is contrary to the opinions of the treating physicians in the case.

13. Dr. Paz testified that “there was not a pain generator which correlated clinically with the subjective symptoms reported by [Claimant]” (Tr. p.. 98). Dr. Paz further testified that “[Claimant] had findings which were consistent with nonorganic low-back pain.” *Id*. Dr. Paz stated that nonorganic pain was defined in response to physical examination and explained the importance of conducting alternate range of motion (ROM) assessments to objectively determine limitations based on pain. *Id*. at 101-102. Dr. Paz stated that he disagreed with the lumbar strain diagnosis because there were subjective symptoms not supported by objective findings. *Id*. at 99. Dr. Paz further testified that the Level II guidelines direct treating physicians to find a mechanism of

injury, a diagnosis, and a need for treatment; in this case, there was no diagnosis according to Dr. Paz, because L4-5 and L5-S1 levels have not been demonstrated to be a pain generator. *Id*. at 104. The ALJ infers and finds that Dr. Paz's opinions of the non-organic nature of the Claimant's complaints plus his disagreement with the lumber strain diagnosis is contrary to the diagnostic opinions of Dr. Kawasaki and Dr. Burke, *i.e.* "lumbar strain." The ultimate question is whether the Claimant suffered a consequential aggravation/acceleration of his low back condition as a result of the May 15, 2020 beer case handling incident in which the Claimant sustained an admitted inguinal hernia.

14. Dr. Paz's August 24, 2020 report documents that Claimant reported a history of chiropractic care for his low back and that he had historically experienced a sore back in the past (Respondent's Exhibit Q, pp. 188-189). In his report, Dr. Paz stated the opinion that the Claimant's low back pain was not supported by objective findings and that the MRI of the lumbar spine did not clinically correlate with the distribution of the subjective symptoms reported by the Claimant and were not supported by objective findings on physical examination. *Id*. at 193. In his report, Dr. Paz concluded that the chronic low back pain symptoms were "inconsistent with discogenic findings on physical examination." *Id*. at 194.

15. The opinions of Drs. Manchester, Kawasaki and Burke support a consequential temporary aggravation/acceleration of Claimant's pre-existing, incipient low back condition.

16. Based on the totality of the evidence, the ALJ makes a rational choice, based on substantial evidence, to accept the opinions of Drs. Manchester, Kawasaki and Burke, concerning the lumbar strain arising out of the May 15, 2020 "beer case handling" incident, and to reject the opinions of Dr. Paz pertaining thereto.

The Claimant

17. The Claimant testified that his treatment at the Little Clinic on February 1, 2019, was related to dehydration (Tr. pp. 72-73). Medical records from this visit document Claimant's report of left lower back pain with radiation down the leg with pain of 8 out of 10 (Claimant's Exhibit 10). The Claimant was ultimately assessed with "acute left-sided low back pain with left-sided sciatica" at this visit. *Id*. Medical records from this visit do not provide an assessment of dehydration. *Id*. The Claimant stated that he was advised to do stretches because his psoas muscles were so tight (Tr., p. 73)..

18. The Claimant testified that following the May 15, 2020 industrial injury, he was able to take the remaining beer back to storage (Tr., p. 86). The Claimant further testified that on May 15, 2020, he was able to drive home from work and drive back to work the following days. *Id*. at 86-87.

Ultimate Findings

19. In the face of aggregate medical opinions that the Claimant sustained a lumbar strain at the time he sustained an inguinal hernia on May 15, 2020, and Dr.

Paz's opinion that the Claimant did not sustain a lumbar strain but had a non-organic (functional overlay) source of his pain, the ALJ finds the opinions of Drs. Manchester, Burke and Kawasaki, concerning the diagnosis of lumbar strain, more credible than the opinions of Dr. Paz thereon. Dr. Paz categorically opined that Claimant's low back condition was pre-existing and he effectively, by implication, was of the opinion that Claimant's pain was psychosomatic. As found herein above and below, the ALJ rejects this opinion.

20. Between conflicting medical and lay opinions, the ALJ makes a rational choice, based on substantial evidence, to accept the opinions, concerning the diagnosis of lumbar strain arising out of the "beer box" incident of May 15, 2020, and to reject the opinions of Dr. Paz thereon.

21. The admitted inguinal hernia of May 15, 2020 aggravated or accelerated the Claimant's preexisting low back condition, temporarily, in the form of a low back strain and it resulted in disability and need for treatment as a compensable consequence of the "beer box" incident of May 15, 2020. The Claimant's personal susceptibility or predisposition to injury did not disqualify him from receiving benefits for the low back consequence of the admitted inguinal hernia. **The Claimant's employment-related activities aggravated and accelerated his low back condition, on a temporary basis before he returned to his pre-injury baseline, combining with his pre-existing condition to cause a need for medical treatment and produce the disability for which benefits are sought.**

22. Regardless of the fact that Respondents bear the burden of proof on "termination of benefits," the ALJ is obliged to examine the totality of the evidence to determine whether the Claimant's lumbar strain temporarily caused disability and the need for medical treatment. In fact, the Petition to Terminate benefits does not affect the GAL, dated March 11, 2021, concerning the admitted right inguinal hernia. Simply stated, the question is whether the consequences of the lumbar strain were of a finite duration whereupon the Claimant returned to his pre-injury low back baseline, or were the consequences thereof permanent. A determination of this question entails an analysis of the burden of proof. In this case, the evidence fails on the issue of a permanent aggravation and acceleration of the low back condition, however, Respondents have proven entitlement to a termination of benefits, attributable to the lumbar strain, for a finite period from the date of the Petition to Terminate, March 12, 2021, through the hearing date of May 11, 2021, which does not affect the admitted right inguinal hernia. Beyond the hearing date, the evidence of a permanent or continuing aggravation/acceleration fails.

23. Respondents has proven by a preponderance of the evidence that a termination of temporary disability benefits, attributable to the lumbar strain, form March 12, 2021 through May 11, 2021, is warranted.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, in the face of aggregate medical opinions that the Claimant sustained a lumbar strain at the time he sustained an inguinal hernia on May 15, 2020, and Dr. Paz's opinion that the Claimant did not sustain a lumbar strain but had a non-organic (functional overlay) source of his pain, the ALJ finds the opinions of Drs. Manchester, Burke and Kawasaki, concerning the diagnosis of lumbar strain, more credible than the opinions of Dr. Paz thereon. Dr. Paz categorically opined that Claimant's low back condition was pre-existing and he effectively, by implication, was of the opinion that Claimant's pain was psychosomatic. As found herein above and below, the ALJ rejects this opinion.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is “that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence.” *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ’s resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting medical opinions, the ALJ made a rational choice, based on substantial evidence, to accept the opinions of Dr. Manchester, Burke and Kawasaki and to reject the opinions of Dr. Paz.

Compensability of Low Back—Aggravation/Acceleration

c. A compensable injury is one that arises out of and in the course of employment. § 8-41-301(1) (b), C.R.S. The "arising out of" test is one of causation. If an industrial injury aggravates or accelerates a preexisting condition, the resulting disability and need for treatment is a compensable consequence of the industrial injury. Thus, a claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). An injured worker has a compensable new injury **if the employment-related activities aggravate, accelerate, or combine with the pre-existing condition to cause a need for medical treatment or produce the disability for which benefits are sought.** § 8-41-301(1) (c), C.R.S. *See Merriman v. Indus. Comm’n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals Office,* 844 P.2d 1259 (Colo. App. 1992); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). An injury resulting from the concurrence of a preexisting condition and a hazard of employment is compensable. *H & H Warehouse v. Vicory*, *supra*. *Duncan v. Indus. Claims App. Office*, 107 P.3d 999 (Colo. App. 2004). Even where the direct cause of an accident is the employee's preexisting disease or condition, the resulting disability is compensable where the conditions or circumstances of employment have contributed to the injuries sustained by the employee. *Ramsdell v. Horn*, 781 P.2d 150 (Colo.App. 1989). *Also see* § 8-41-301(1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998]; *Witt v. James J. Keil Jr.,* W.C. No. 4-225-334 (ICAO, April 7, 1998). As found, the admitted inguinal hernia of May 15, 2020 aggravated/ accelerated the Claimant’s preexisting low back condition, temporarily, in the form of a low back strain and it resulted in disability and need for treatment as a compensable consequence of the “beer box” incident of May 15, 2020. The Claimant's personal susceptibility or predisposition to injury did not disqualify him from receiving benefits for the low back consequence of the admitted inguinal hernia. **The Claimant’s employment-related activities aggravated and accelerlow back condition to cause a need for medical treatment and produce the disability before he returned to his pre-injury baseline.**

Burden of Proof

d. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and/or the causal relatedness of a consequential injury to the admitted injury; plus entitlement to benefits beyond those admitted.. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, The admitted inguinal hernia of May 15, 2020 temporarily aggravated/accelerated the Claimant's preexisting low back condition, in the form of a low back strain and it resulted in disability and need for treatment as a compensable consequence of the "beer box" incident of May 15, 2020. The Claimant's personal susceptibility or predisposition to injury did not disqualify him from receiving benefits for the low back consequence of the admitted inguinal hernia. **The Claimant's employment-related activities aggravated/ accelerated his low back condition, on a temporary basis, before he returned to his pre-injury baseline. The May 15, 2020 incident combined with his pre-existing condition to cause a need for medical treatment and to produce the disability.**

ORDER

IT IS, THEREFORE, ORDERED THAT:

A. The General Admission of Liability, dated March 11, 2021, remains in full force and effect insofar as it concerns the right inguinal hernia.

B. The Petition to Terminate Benefits is granted **in part and denied in part** from March 12, 2021, through the hearing date, May 11, 2021, insofar as it affects the Claimant's low back condition and **it is denied without prejudice for benefits from May 11, 2021 and thereafter.** It has no effect on the General Admission of Liability insofar as it concerns the right inguinal hernia.

C. Respondents shall pay the costs of authorized, causally related and reasonably necessary medical care and treatment for the temporary aggravation/acceleration of the Claimant's low back condition, through the hearing date of May 11, 2021, subject to the Division of Workers' Compensation Medical Fee Schedule.

D. Respondents shall pay the Claimant statutory interest at the rate of eight percent (8%) per annum on all indemnity benefits due and not paid when due.

E. Any and all issues not determined herein, including temporary disability after May 11, 2021, attributed to the low back, are reserved for future decision.

DATED this 19th day of July 2021.

DIGITAL SIGNATURE

EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm.*

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-156-087-001

ISSUES

I. Whether Claimant sustained a compensable injury to his left shoulder on November 19, 2020.

II. Whether Claimant is entitled to reasonable, necessary, and related medical benefits as it relates to his left shoulder.

III. Whether claimant is entitled to change authorized treating physicians.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. Claimant suffered a compensable injury on November 19, 2020.
2. Before his compensable injury Claimant never had any issues with his left shoulder.
3. On November 19, 2020, Claimant was working for Respondents on top of scaffolding that was 15-16 feet off of the ground. While walking on the scaffolding, Claimant fell through, hit the ground feet first, and then hit the ground with the rest of his body. Claimant is not sure whether he grabbed on to anything while falling, whether he tried to break his fall with his left hand and arm against the ground, whether his left shoulder hit the ground, or a combination thereof.
4. An ambulance was called. Upon arrival of the paramedics, Claimant's primary complaint was bilateral foot pain which he rated as 9/10. Claimant was taken by ambulance to the Saint Francis Medical Center Emergency Department. Although the paramedics noted abrasions on Claimant's back and head, they did not note any on his left shoulder. While at Saint Francis Medical Center, X-rays were taken of his feet, lumbar spine, and thoracic spine. Plus, CT scans were taken of his lumbar spine, thoracic spine, and head. Although the paramedics found abrasions, none are noted in the emergency room notes. In the end, Claimant was diagnosed with a closed nondisplaced calcaneus fracture.
5. For about the next four days, and based on falling 15-16 feet, Claimant's entire body hurt.
6. On November 30, 2020, Claimant followed up with UCHealth Orthopedic Foot and Ankle Clinic. At this appointment he was evaluated by PA, Lindsey Schultz. At this appointment Claimant stated both heels were painful. Claimant was taking Norco for pain. It was noted that he had moderate soft-tissue swelling through the right foot and ankle and mild soft-tissue swelling through the left foot. There was tenderness at the bilateral calcaneus. There was pain with manipulation of the subtalar joints and tenderness at the calcaneocuboid articulation on the right side. Radiology

studies were pertinent for comminuted intraarticular calcaneus fracture on the right side. There was not any acute bony pathology on the left foot or ankle radiographs. Assessment was closed displaced fracture of right calcaneus, left foot pain, and acute right and left ankle pain. Claimant was placed in a tall boot on the left side and a new splint on the right.

7. On November 30, 2020, Claimant also underwent x-rays of his left shoulder. Dr. Rachel Frank noted on a follow up appointment that: "four views of the left shoulder were obtained 11/30/2020 for indication of shoulder pain including anterior-posterior, Grashey axillary, and scapular-Y views. Exhibit 2, page 20-22. As a result, the ALJ finds that Claimant was reporting shoulder pain – and was being evaluated for shoulder pain – at his second doctor appointment following his fall.

8. On December 9, 2020, Claimant was seen by Dr. Gina Phillips at Sister Joanna Bruner Family Medicine Center for ongoing complaints because of his fall. Claimant complained of acute pain in his left shoulder. Dr. Philips noted "3 weeks of pain after work injury. No direct trauma to shoulder, unclear mechanism of shoulder injury. Exam consistent with impingement syndrome. ROM full with pain, not consistent with full rotator cuff tear. Fracture or AC separation also possible, though less likely." As result, Claimant reported having shoulder pain after the accident, which occurred 19 days earlier. An x-ray was ordered, as well as physical therapy. It was also noted that Claimant had no previous injury to his left shoulder.

9. On December 21, 2020, Claimant was referred for an MRI on his left shoulder, noting "shoulder pain, rotator cuff disorder suspected, x-ray done" and "left shoulder injury s/p fall." Exhibit 2, page 43.

10. On January 8, 2021, Claimant underwent a left shoulder MRI without contrast. The impression of this MRI was: "Focal partial-thickness, partial width this particular sided tear of the conjoined tendon of supraspinatus and infraspinatus with associated tendinosis. Nondisplaced tear of the superior glenoid labrum extending from anterior to posterior. Mild acromioclavicular joint osteoarthrosis." Exhibit 3, page 46-47.

11. On January 14, 2021, Claimant was seen by Dr. Rachel Frank at UCHealth Orthopedic Surgery Sports Medicine. It was noted Claimant fell 16 feet at work and had no prior history of issues with this shoulder. The MRI taken demonstrated "a focal partial thickness, partial width this particular sided tear of the conjoined tendon of supraspinatus and infraspinatus with associated tendinosis, a nondisplaced tear of the superior glenoid labrum extending from anterior to posterior and mild acromioclavicular joint osteoarthrosis." It was noted Claimant would like to try physical therapy for the shoulder first, prior to any injections. The diagnoses for this visit included "traumatic tear of left rotator cuff, unspecified tear extent, initial encounter." Exhibit 2, page 36-40.

12. On February 5, 2021, Claimant underwent an IME with Dr. Timothy Hall. Dr. Hall met with Claimant and Claimant's son, took a history from the two of them, reviewed the medical records, and performed a physical examination. It was Dr. Hall's opinion that Claimant's left shoulder injury was work related:

> The shoulder situation/injury had occurred as he was trying to break his fall by reaching out to these metal parts of the scaffolding or perhaps when he hit the ground. Even though he did land on his feet, he did end up on the ground. He may have tried to break his fall using his left arm. In either case, it is extremely unlikely that his left shoulder just happened to start hurting a very short time after this fall. It is very unlikely that it is an unrelated area of symptomatology. The left shoulder should be followed upper work comp.

13. Dr. Hall also testified at hearing and testified consistent with his report.

14. Dr. Hall employed a three-step process to determine the cause of Claimant's left shoulder injury. Dr. Hall evaluated:

    I. Whether the event – a fall from 15 to 16 feet – could plausibly cause Claimant's shoulder injury?

    II. Whether there is a temporal relation between the event and Claimant's shoulder injury?

    III. Whether there are other explanations for Claimant's shoulder injury that are more probable at the same point in time?

15. Dr. Hall concluded that a fall from 15 to 16 feet could plausibly cause Claimant's shoulder injury. Dr. Hall also concluded there is a temporal relationship between Claimant's fall and the injury to his shoulder. Lastly, he concluded that there were no other explanations for the injury that are more probable at that time.

16. The ALJ finds Dr. Hall's testimony to be consistent with Claimant's testimony as well as the underlying medical record. The ALJ also finds he performed a thorough causation analysis. As a result, the ALJ finds his testimony to be credible and persuasive.

17. On March 5, 2021, Claimant was seen by Dr. Frank at UCHealth Orthopaedic Surgery Sports Medicine. Dr. Frank commented on the shoulder x-rays that were taken on November 30, 2020. Dr. Frank noted in her Diagnostic Studies portion that "four views of the left shoulder were obtained 11/30/2020 for indication of shoulder pain including anterior-posterior, Grashey axillary, and scapular-Y views. I personally reviewed these films." She stated that Claimant "has continued left lateral and posterior lateral shoulder pain that is consistent with both rotator cuff partial-thickness tearing as identified by MRI and physical exam. He has many symptoms that likely overlap with cervical spine radiculopathy." She requested physical therapy for Claimant. Exhibit 2, page 20-22.

18. The MRI and physical exam findings support Claimant's left shoulder pain complaints.

19. On April 7, 2021, Claimant underwent an IME at Respondents' request with Dr. Allison Fall. Dr. Fall agreed that Claimant's left shoulder injury was work related. Dr. Fall then issued a one-page addendum report on April 21, 2021, changing her

opinion and now stating that Claimant's left shoulder is not work related. Part of her reasoning was that there was no mention or documentation of an abrasion on Claimant's left shoulder from the paramedics who took Claimant from the scene of the accident to the emergency department at Saint Francis Medical Center.

20. Dr. Fall also testified via deposition. Her deposition testimony is consistent with her addendum report. In essence, Dr. Fall concluded Claimant's shoulder condition is unrelated to his fall because the paramedics did not document abrasions on his left shoulder and because Claimant did not complain of shoulder pain on the day of the accident.

21. The ALJ does not, however, find Dr. Fall's opinions to be persuasive for several reasons. First, although the paramedics only identified abrasions on Claimant's back and head, the emergency room physicians did not identify Claimant as having any abrasions. The ALJ does not think that means Claimant did not have the abrasions noted by the paramedics. Thus, the lack of documented abrasions on Claimant's left shoulder by either the paramedics or emergency room physicians is not persuasive as to whether Claimant injured his left shoulder. Second, there was no credible and persuasive evidence submitted that indicated Claimant had to have abrasions in order to have a shoulder injury. In other words, an abrasion is not a prerequisite to a shoulder injury. Third, Dr. Fall failed to provide a reasonable explanation for why she discredited the December 9, 2020, medical report that indicated Claimant had had shoulder pain for about 3 weeks – which coincides with date of the accident – and that x-rays were taken on November 30th, which was Claimant's second medical appointment for his work injury. Fourth, Dr. Fall's opinion that Claimant's development of shoulder pain is just a coincidence is just not found to be credible on its face, considering the totality of the evidence. In support of her opinions, she appears to be saying that there is a lack of evidence that there was a traumatic event sufficient enough to cause Claimant's shoulder injury. That said, the facts do not support such a finding because although Claimant first hit his feet, he did not just land on his feet. His body and upper torso still hit the ground after falling 15 feet.

22. Claimant also testified at hearing. Claimant basically testified that he does not recall actually grabbing onto anything on the way down. He also testified that following the accident, his entire body hurt. It was only after the rest of his symptoms got better that his shoulder pain persisted. Claimant could have testified that he tried to break his fall by actually grabbing onto something or that he tried to break his fall with an outstretched arm before hitting the ground. But the fact that Claimant did not try to conform his testimony to some of the evidence supports a finding that Claimant's testimony was credible. In the end, Claimant does not know how he injured his shoulder during the accident. But he did note that he did not have shoulder pain before the accident and that he did have shoulder pain after the accident and that his shoulder pain has persisted.

23. Claimant also testified that he was not happy with the treatment he has received from his treating doctors. He complained of the time it took for them to start treating him after his incident and testified that he would like to see a different doctor if given the option. See Hearing transcript, page 66, line 19 – page 67, line 10.

24. There was no credible and persuasive evidence submitted that indicated Claimant was receiving substandard care from his medical providers. Nor does the ALJ find that Claimant has lost confidence in his treating physicians as it relates to the quality of care he has been provided. Again, the only complaint is that there was a delay in instituting treatment.

Ultimate findings of fact

25. Although Claimant did not report shoulder pain on the day of the accident, Claimant did develop shoulder pain within days of the accident. Based on the fall, Claimant injured, among other parts of his body, his left shoulder. Thus, Claimant's development of shoulder pain after falling 15 feet is not a mere coincidence. His shoulder pain was caused by the fall.

26. Claimant needs medical treatment to cure and relieve him from the effects of his shoulder injury.

27. Claimant is not receiving substandard care for his shoulder. Nor has Claimant lost confidence in his treating physicians as it relates to the quality of care he is receiving.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App.

2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant sustained a compensable injury to his left shoulder on November 19, 2020.

II. Whether Claimant is entitled to reasonable, necessary, and related medical benefits as it relates to his shoulder.

The Claimant is required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

As found, Claimant fell 15-16 feet and landed on his feet before the rest of his body hit the ground. While Claimant cannot explain the exact mechanism of injury to his shoulder in granular detail – was it due to grabbing something on the way down or was it due to the impact on the ground – Claimant was involved in a serious accident when he fell from a significant height. Moreover, shortly after the accident Claimant developed shoulder pain and underwent x-rays and an MRI. The MRI demonstrated various findings which support Claimant's pain complaints. And in light of the MRI findings and Claimant's pain complaints, treatment was recommended.

In order to assist in determining causation, Claimant underwent an IME with Dr. Hall. Dr. Hall employed a three-step process to determine the cause of Claimant's left shoulder injury. Dr. Hall evaluated:

I. Whether the event – a fall from 15 to 16 feet – could plausibly cause the injury?

II. Whether there is a temporal relation between the event and the injury?

III. Whether there are other explanations for the injury that are more probable at the same point in time?

Dr. Hall concluded that a fall from 15 to 16 feet could plausibly cause Claimant's shoulder injury. Dr. Hall also concluded there is a temporal relationship between Claimant's fall and the injury to his shoulder. Lastly, he concluded that there were no other explanations for the injury that are more probable at that time.

The ALJ found Dr. Hall's testimony to be consistent with Claimant's testimony as well as the underlying medical record. The ALJ also found Dr. Hall performed a thorough causation analysis. As a result, the ALJ found his testimony to be credible and persuasive.

Claimant was also evaluated by Dr. Fall in order to help address causation. Dr. Fall ultimately concluded that Claimant's shoulder condition is unrelated to the fall, but more likely a coincidental onset of shoulder pain that merely occurred after Claimant fell 15 feet. She based her opinion on the lack of documented abrasions on Claimant's left shoulder just after the fall. The ALJ, however, did not find her opinions to be credible for many reasons. First, although the paramedics only identified abrasions on Claimant's back and head, the emergency room physicians did not identify Claimant as having any abrasions. The ALJ does not think that means Claimant did not have the abrasions noted by the paramedics. Thus, the lack of documented abrasions on Claimant's left shoulder by either the paramedics or emergency room physicians is not persuasive as to whether Claimant injured his left shoulder. Second, there was no credible and persuasive evidence submitted that indicated Claimant had to have abrasions in order to have a shoulder injury. In other words, an abrasion is not a prerequisite to a shoulder injury. Third, Dr. Fall failed to provide a reasonable explanation for why she discredited the December 9, 2020, medical report that indicated Claimant had had shoulder pain for approximately 3 weeks – which coincides with date of the accident. Fourth, Dr. Fall's opinion that Claimant's development of shoulder pain is just a coincidence is just not found to be credible on its face, considering the totality of the evidence. In support of her opinions, she appears to be saying that there is a lack of evidence that there was a traumatic event sufficient enough to cause Claimant's shoulder injury. That said, the facts do not support such a finding because although Claimant first hit his feet, he did not just land on his feet. His body and upper torso still hit the ground after falling 15-16 feet.

Respondents also contend that just because Claimant developed symptoms after the accident, the timing does not establish causation. This argument was raised during Dr. Fall's deposition. To make the point, Respondents' counsel stated that just because a rooster crows in the morning does not mean the crow caused the sun to rise. While a classic rule of logic – a logical fallacy - the application of such rule may also yield inaccurate results, i.e., that sequence is not relevant to causation. In other words, the mere timing of events can be a strong indicator of causation, especially when a Claimant's symptoms occur nearly simultaneously and paired with other supporting evidence, such as MRI and physical findings of pathology, a lack of symptoms before the accident, plus credible testimony and medical records that document the onset of pain shortly after the accident.

Thus, the ALJ finds and concludes that Claimant established by a preponderance of the evidence that he suffered a compensable left shoulder injury on November 19, 2020, and that he needs medical treatment to cure and relieve him from the effects of his shoulder injury.

III. Whether claimant is entitled to change authorized treating physicians.

Upon a proper showing to the division, the employee may procure its permission at any time to have a physician of the employee's selection attend said employee. Section 8-43-404(5)(a)(VI), C.R.S*.* Because the statute does not contain a specific definition of a "proper showing," the ALJ has broad discretionary authority to determine whether the circumstances justify a change of physician. *Loza v. Ken's Welding,* WC 4-712-246 (ICAO January 7, 2009). The claimant may procure a change of physician where he/she has reasonably developed a mistrust of the treating physician. *See Carson v. Wal-Mart,* W.C. No. 3-964-07 (ICAO April 12, 1993). The ALJ may consider whether the employee and physician were unable to communicate such that the physician's treatment failed to prove effective in relieving the employee from the effects of his/her injury. *See Merrill v. Mulberry Inn, Inc.*, W.C. No. 3-949-781 (ICAO November 1995). But, where an employee has been receiving adequate medical treatment, courts need not allow a change in physician. *See Greenwalt-Beltmain v. Department of Regulatory Agencies*, W.C. No. 3-896-932 (ICAO December 5, 1995) (ICAO affirmed ALJ's refusal to order a change of physician when the ALJ found claimant receiving proper medical care); *Zimmerman v. United Parcel Service*, W.C. No. 4-018-264 (ICAO August 23, 1995) (ICAO affirmed ALJ's refusal to order a change of physician where physician could provide additional reasonable and necessary medical care claimant might require); and *Guynn v. Penkhus Motor Co.*, W.C. No. 3-851-012 (ICAO June 6, 1989) (ICAO affirmed ALJ's denial of change of physician where ALJ found claimant failed to prove inadequate treatment provided by claimant's authorized treating physician).

As found, there was no credible and persuasive evidence submitted that indicated Claimant was receiving substandard care from his medical providers. Moreover, the ALJ did not find that Claimant had lost confidence in his treating physicians as it relates to the quality of care he has been provided. The only complaint was that there was a delay in instituting treatment.

As a result, the ALJ finds and concludes Claimant has failed to establish by a preponderance of the evidence that he is entitled to a change of physician.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered a compensable injury to his left shoulder.

2. Respondents shall provide Claimant reasonable, necessary, and related treatment to cure Claimant from the effects of his work-related injury to his shoulder.

3. Claimant is not entitled to change physicians.

4. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 20, 2021.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant proved by a preponderance of the evidence additional medical treatment, including a neuropsychological evaluation by William Boyd, Ph.D., is reasonable, necessary and causally related to her industrial injury.

II. Whether Respondents proved by a preponderance of the evidence Claimant is responsible for her termination from employment and thus not entitled to temporary indemnity benefits.

STIPULATIONS

The ALJ approved the parties' stipulation that Eric Shoemaker, M.D. is Claimant's authorized treating physician in this matter.

FINDINGS OF FACT

1. Claimant is 51 years of age. Claimant worked for Employer as an egg packer.

2. Claimant suffered an admitted industrial injury on September 18, 2019 when a metal bar fell and struck Claimant on the top of her head while she was kneeling on the ground. It is estimated the bar fell anywhere from nine to five feet before striking Claimant. Claimant did not lose consciousness, but felt lightheaded and nauseous upon standing up. Claimant then developed a headache and bumps on her head. Claimant did not immediately seek medical attention, instead going to the breakroom and icing her head.

3. Claimant subsequently sought treatment at Advanced Urgent Care on September 19, 2019. Claimant presented to Sarah Owens, NP with complaints of nausea, pain, fatigue, fogginess, memory issues, blurry vision, headaches and dizziness after being struck in the head at work. On examination, NP Owens noted Claimant presented confused and agitated with an abnormal affect. NP Owens diagnosed Claimant with, *inter alia*, a blunt trauma closed head and neck injury. She referred Claimant to the emergency department for imaging. Claimant underwent a CT scan of the cervical spine at Platte Valley Hospital, which was negative for acute abnormalities.

4. NP Owens reexamined Claimant on September 24, 2019 and diagnosed Claimant with a Owens closed head injury, post-concussion syndrome and cervical

neck strain. She placed Claimant on 10-pound lifting/carrying/pushing/pulling restrictions.

5. On September 30, 2019, Claimant saw Julie Parsons, M.D. with complaints of headaches, photophobia, and muscle aches. Dr. Parsons continued Claimant's 10-pound lifting/carrying/pushing/pulling restrictions, also limiting Claimant's bending and twisting. She noted Claimant may wear sunglasses at work if needed. Dr. Parsons referred Claimant for a consultation with Roberta Anderson-Oeser, M.D. at Ascent Medical Consultants. Claimant's work restrictions continued on November 14, 2019.

6. On November 25, 2019, Respondents filed a General Admission of Liability (GAL) in this matter admitting for medical benefits.

7. Claimant presented to Dr. Anderson-Oeser on December 4, 2019 with complaints of headache, nausea, dizziness, and neck discomfort. Dr. Anderson-Oeser diagnosed Claimant with a concussion without loss of consciousness, headache, postconcussional syndrome, nausea, and neck strain. She referred Claimant for physical therapy (to include vestibular therapy for dizziness and balance), massage therapy, and a neuropsychological evaluation with William Boyd, Ph.D. for postconcussive symptoms. Dr. Anderson-Oeser subsequently submitted a request for authorization of the aforementioned treatment, which was denied by Respondents.

8. As of December 11, 2019, Claimant was removed from work restrictions other than wearing sunglasses and ear plugs as needed.

9. On January 16, 2020, Jeffrey Wunder, M.D. performed an Independent Medical Examination (IME) at the request of Respondents. Dr. Wunder opined that, if Claimant sustained a traumatic brain injury (TBI), it was mild because Claimant did not sustain any loss of consciousness. Referring to medical literature, Dr. Wunder explained that natural spontaneous healing of the brain was expected to occur within three weeks to three months after a mild TBI. He thus opined that ongoing or worsening symptoms over time are a result of psychosocial issues or litigation and are unrelated to the trauma involved. Dr. Wunder noted that the findings on his physical examination of Claimant were not supportive of cervicogenic headache. He opined that Claimant's pain ratings and pain behavior are extreme and that her subjective complaints cannot be taken at face value. Dr. Wunder further opined that the referrals for additional treatment, including vestibular therapy, massage therapy and neuropsychological evaluation were not reasonable or necessary. He pointed to a lack of objective physical findings and what he deemed nonphysiologic cognitive symptoms and complaints. Dr. Wunder concluded that symptom embellishment is a significant part of Claimant's presentation. He opined Claimant had reached maximum medical improvement (MMI) without permanent impairment or the need for restrictions.

10. Claimant returned to full-time, modified work for Employer after the September 18, 2019 injury and worked in such capacity until January 31, 2020. In her modified duty, Claimant made boxes and crates, transferred eggs to the conveyer belt, and

assisted with overwrap. The heaviest weight she lifted during this time was approximately five pounds.

11. On January 31, 2020, Vince R[Redacted], Claimant's supervisor, and Amada G[Redacted] met with Claimant to discuss a letter which advised Claimant that she had been released to full duty and that she was expected to return to her regular duties immediately. The letter stated,

> We have reviewed the restrictions you have on file for both of your work-related injuries and see no restrictions that would preclude your [sic] fully performing the duties of the job. We do understand that you are allowed to wear sunglasses and hearing protection as needed for the claim filed on September 18, 2019, and have no problem with that accommodation. Effective today, January 31, 2020, the expectation is that you will perform your normal work duties. (Rs' Ex. J, p. 253).

12. No medical records were attached to the letter. Claimant reviewed the essential functions listed in the job description, which included the ability to lift 25 pounds frequently, and advised Mr. R[Redacted] and Ms. G[Redacted] that she could not perform those duties. It was Claimant's understanding at the time of the meeting that she continued to have lifting restrictions of 10 pounds. At the time of the meeting, Claimant was unaware her restrictions had changed and she had not been provided any medical documentation indicating the lifting restrictions were removed as of December 11, 2019.

13. Soon after the meeting, Mr. R[Redacted] informed Claimant that work was no longer available for her if she did return to her full duty position. Claimant did not return to work with this understanding. She has not worked since January 31, 2020. Claimant has received unemployment insurance benefits.

14. Nita Nurmi is Employer's Senior Human Resources Manager. Ms. Nurmi was not present at the meeting between Claimant, Mr. R[Redacted] and Ms. G[Redacted]. Ms. Nurmi testified that Employer wanted Claimant to return to the pack line. She testified that if Claimant had issues lifting, she would be able to skip that position in the rotation. Per Employer policy, an employee missing work for three consecutive days without notifying a manager results in automatic termination. Employer considers Claimant to have abandoned her job as she has not worked since January 31, 2020. Claimant is no longer an active employee of Employer.

15. Claimant continued to undergo evaluation at Advanced Urgent Care with Laura McDonough, PA and Kevin Chicoine, M.D. and continued to report nausea, headaches, neck pain, photophobia, and dizziness. On May 6, 2020, Dr. Chicoine referred Claimant for a neuropsychological evaluation with Dr. Boyd for continued headaches, nausea and dizziness, x-rays of the cervical spine, and physical therapy for the neck. Requests for authorization were again denied by Respondents. On May 27, 2020, Dr. Chicoine noted, that Claimant has chronic pain and limitations from the September 2019 injury as

well as postconcussive syndrome, and other specialists agreed Dr. Boyd's evaluation will be helpful to move Claimant's case and treatment plan forward.

16. Claimant underwent a Functional Capacity Evaluation in August 2020. The FCE primarily focused on Claimant's bilateral lower extremities as related to a prior work injury Claimant sustained in September 2018.

17. Dr. Shoemaker began treating Claimant on January 5, 2021. Claimant continued to complain of headaches, nausea, dizziness, and diffuse neck pain. Dr. Shoemaker noted that the mechanism of impact on September 18, 2019 was not one which would be expected to cause a significant concussion given the lack of any coup contrecoup component. He further noted that the failure of Claimant's symptoms to improve over 18 months was inconsistent with the natural history of a concussion. Dr. Shoemaker reviewed the FCE and noted it was highly inconsistent, with Claimant failing numerous validity measures and demonstrating significant performance discrepancies. Dr. Shoemaker stated he wanted to review Claimant's cervical MRI and clinical notes. Dr. Shoemaker "strongly" agreed with Dr. Anderson-Oeser's recommendation for a neuropsychological evaluation to assess for objective evidence of postconcussive neurocognitive findings. He further agreed with Dr. Anderson-Oeser's recommendation for vestibular therapy. Dr. Shoemaker did not see the need for work restrictions, but deferred to Claimant's primary team. He noted a neuropsychological evaluation would help define the need for any cognitive restrictions.

18. On January 5, 2021, Claimant also saw Kristen Hinson, NP at Blue Sky Neurology. NP Hinson recommended Claimant proceed with a neuropsychological evaluation and MRI of the cervical spine.

19. At a follow-up evaluation on March 2, 2021, Dr. Shoemaker noted Claimant had undergone a cervical MRI, the results of which were normal. He opined some of Claimant's symptoms were consistent with a facet strain injury and were cervicogenic in nature. He continued to "strongly recommend" that Claimant undergo a neuropsychological evaluation as well as vestibular therapy.

20. Dr. Wunder performed a second IME on March 10, 2021. He reviewed additional records, including Claimant's August 2020 FCE. He opined that Claimant had persistently very high pain ratings yet no matching behavioral observations with subjective pain complaints. He further opined that Claimant did not have a cervicogenic source for her headaches, and noted that her cervical range of motion measurements were completely inconsistent and that there were no neurological abnormalities suggesting cervical radiculopathy. Dr. Wunder remarked that Claimant's chronic pain complaints needed to be based on a biopsychosocial model of evaluation rather than the strict biomedical evaluation system in light of Claimant's presentation. He continued to opine that additional medical treatment, including a neuropsychological evaluation and vestibular treatment, is not reasonable or necessary.

21. Dr. Wunder testified at hearing and by post-hearing deposition as a Level II accredited expert in physical medicine and rehabilitation. Dr. Wunder testified consistent with his IME reports. He testified that Claimant had extensive subjective pain complaints that he believes do not have much validity. Dr. Wunder commented that Claimant presented to multiple medical providers, including himself, with extremely high pain ratings but minimal objective and physical exam findings. Dr. Wunder testified that he could not find a cervical pain generator for Claimant's headaches and that there is no clear etiology to explain her headaches. He testified that Claimant's headaches are not related to the work incident.

22. Dr. Wunder testified that it was possible Claimant sustained a mild concussion as a result of the September 18, 2019 mechanism of injury. He reiterated that most mild traumatic brain injuries resolve within a matter of two to three months and again explained that studies demonstrate delayed concussion symptoms beyond two to three months is more related to psychosocial factors and litigation. Dr. Wunder testified that Claimant's symptom progression is not physiologic and that her ongoing symptoms are unrelated to the initial mechanism of injury. Regarding the August 2020 FCE, Dr. Wunder explained that Claimant was inconsistent on 13 of 22 validity tests and various observational inconsistencies were noted by the therapist. Dr. Wunder agreed with Dr. Shoemaker when Dr. Shoemaker stated he would not expect Claimant's mechanism of injury to cause a significant traumatic brain injury and her course of ongoing symptoms would not be expected and physiologic. Dr. Wunder did not agree with Dr. Shoemaker's recommendations for further treatment. Dr. Wunder testified that it did not make sense for Dr. Shoemaker to recommend a neuropsychological evaluation and facet injections when Dr. Shoemaker acknowledged consistency or validity issues in the FCE and the medical records did not support her subjective complaints. Dr. Wunder acknowledged that the FCE was primarily for Claimant's lumbar and knee complaints from a prior work injury, but stated it was significant for invalid and inconsistent findings.

23. Dr. Wunder stressed that the neuropsychological testing is based on Claimant's cooperation and effort. He testified that Claimant's issues of symptom magnification cause concern that a valid neuropsychological evaluation could occur. Dr. Wunder opined that Claimant is at MMI with no need for work restrictions or maintenance care.

24. Dr. Wunder acknowledged that symptom magnification does not necessarily mean there is no organic basis for a patient's complaints. Dr. Wunder initially testified that, if a neuropsychological evaluation is warranted, it should occur within the first three months of an injury. Dr. Wunder later acknowledged that the MTG do not place a limit on the time to administer a neuropsychological evaluation with respect to mild TBIs. Dr. Wunder disagreed with the MTG that in some cases of mild TBIs functional improvement can be made beyond one year.

25. Claimant testified at hearing that she continues to experience nausea, dizziness, headaches, short-term memory loss, "fuzzy thinking", neck pain, and unsteadiness when walking. She testified she also continues to experience some photophobia and phonophobia.

26. The ALJ finds the opinions of Drs. Anderson-Oeser, Shoemaker, Chicoine and NP Hinson, as supported by the medical records and Claimant's credible testimony, more credible and persuasive than the opinion of Dr. Wunder. Claimant proved it is more probable than not the recommended neuropsychological evaluation by Dr. Boyd is reasonable, necessary and causally related to her September 18, 2019 industrial injury.

27. Respondents failed to prove it is more probable than not Claimant is responsible for her termination from employment.

28. Evidence and inferences contrary to these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Medical Treatment

Respondents are liable for medical treatment that is causally related and reasonable and necessary to cure and relieve the effects of the industrial injury. §8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* WC 4-835-556-01 (ICAO, Nov. 15, 2012).

When determining the issue of whether proposed medical treatment is reasonable and necessary the ALJ may consider the provisions and treatment protocols of the MTG because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, evidence of compliance or non-compliance with the treatment criteria of the MTG is not dispositive of the question of whether medical treatment is reasonable and necessary. Rather the ALJ may give evidence regarding compliance with the MTG such weight as he determines it is entitled to considering the totality of the evidence. *See Adame v. SSC Berthoud Operating Co., LLC.*, WC 4-784-709 (ICAO January 25, 2012); *Thomas v. Four Corners Health Care*, WC 4-484-220 (ICAO April 27, 2009); *Stamey v. C2 Utility Contractors, Inc.*, WC 4-503-974 (ICAO August 21, 2008).

As found, Claimant met her burden to prove the recommended neuropsychological evaluation is reasonable, necessary and causally related to her September 18, 2019 industrial injury. Multiple providers have diagnosed Claimant with a mild traumatic brain injury and postconcussive syndrome. Claimant has consistently continued to report ongoing symptoms. Her treating physicians have credibly opined that a neuropsychological evaluation is reasonable and necessary to further evaluate and treat Claimant's condition as it relates to her September 18, 2019 work injury. Dr. Wunder's opinion that a neuropsychological evaluation is not indicated is heavily based on his opinion that Claimant is magnifying her symptoms. Dr. Wunder pointed to perceived inconsistencies in Claimant's FCE and on examination. Claimant's current ATP, Dr. Shoemaker, reviewed the August 2020 FCE, made note of certain inconsistencies, yet continues to "strongly" opine that Claimant is in need of a neuropsychological evaluation.

The recommendation for a neuropsychological evaluation is consistent with the MTG. Section B.12 of the MTG regarding delayed recovery states, in relevant part:

> For individuals with mild TBI (mTBI), strongly consider requesting a neuropsychological evaluation, if not previously provided. Interdisciplinary

> rehabilitation treatment and vocational goal setting may need to be initiated for those who are failing to make expected progress 6 to 12 weeks after an injury. In individuals with mTBI, neurological recovery is generally achieved within a range of weeks/months up to one year post-injury, but functional improvements may be made beyond one year. The Division recognizes that 3–10% of all industrially injured individuals will not recover within the timelines outlined in this document despite optimal care. Such individuals should have completed a full neuropsychological evaluation.
>
> (MTG, p. 8)

Section E.1.d. of the MTG discusses neuropsychological evaluations, noting they are "generally accepted and widely used as a valuable component of the diagnosis and management of individuals with TBI…Neuropsychological assessment assist in the differential diagnosis of neural behavioral disorders and the cumulative effect of multiple TBIs." (MTG, p. 34). The MTG provides that neuropsychological testing is not typically recommended prior to three months post-injury and that validity testing is required for all neuropsychological testing to assess performance and symptoms.

Claimant has experienced delayed recovery from what has consistently been diagnosed as a mild TBI. To the extent there are concerns of potential symptom magnification, validity tests are required as part of the neuropsychological testing. Here, the preponderant evidence establishes the neuropsychological testing recommended by Claimant's ATP is reasonable, necessary and related treatment.

Responsibility for Termination

Under the termination statutes in §§8-42-105(4) & 8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, WC 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act "volitionally" or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge,* WC 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for her termination, respondents must demonstrate by a preponderance of the evidence that the claimant committed a volitional act or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus "responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* WC 4-432-301 (ICAO, Sept. 27, 2001).

Violation of an employer's policy does not necessarily establish the claimant acted volitionally with respect to a discharge from employment. *Gonzales v. Industrial Commission,* 740 P.2d 999 (Colo. 1987). An "incidental violation" is not enough to show that the claimant acted volitionally. *Starr v. Industrial Claim Appeals Office*, 224 P.3d 1056, 1065 (Colo. App. 2009). However, a claimant may act volitionally, and therefore be "responsible" for the purposes of the termination statute, if he is aware of what the employer requires and deliberately fails to perform. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). This is true even if the claimant is not explicitly warned that failure to comply with the employer's expectations may result in termination. *See Pabst v. Industrial Claim Appeals Office,* 833 P.2d 64 (Colo. App. 1992). Ultimately, the question of whether the claimant was responsible for the termination is one of fact for determination by the ALJ. *Apex Transportation, Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630, 632 (Colo. App. 2014).

As found, Respondents failed to prove it is more probable than not Claimant is responsible for her termination of employment. Claimant's separation from employment occurred because Claimant did not return to her full duty work as required by Employer. Although the medical records indicate Claimant was, in fact, not subject to any lifting restrictions on January 31, 2020, Claimant credibly testified that at the time she was unaware she was no longer subject to those restrictions. Claimant credibly testified that, at the time of the meeting with Mr. R[Redacted] and Ms. G[Redacted], she had not seen any medical documentation indicating she was no longer subject to lifting restrictions. Although, per the medical records, Claimant's lifting restrictions had changed as of December 11, 2019, Claimant credibly testified that between the date of injury and until January 31, 2019, she had been performing modified work that did not require lifting more than five pounds. When Claimant informed Mr. R[Redacted] that she could not perform her regular job duties as a result of the work injury, Employer indicated there was no work available for Claimant. No testimony was offered from either Mr. R[Redacted] or Ms. G[Redacted] refuting Claimant's testimony. Claimant reasonably believed she remained under lifting restrictions and could not perform the regular duties requested by Employer. Claimant did not abandon her job. Accordingly, Claimant did not act volitionally or exercise control with respect to her termination.

ORDER

1. Claimant proved by a preponderance of the evidence the recommended neuropsychological evaluation by Dr. Boyd is reasonable, necessary and causally related to her September 18, 2019. Respondents shall authorize and pay for the recommended neuropsychological evaluation.

2. Respondents failed to prove by a preponderance of the evidence Claimant was responsible for termination from employment. Claimant remains entitled to TTD benefits until terminated by operation of law, subject to applicable offsets for unemployment insurance benefits.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 19, 2021

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Has Claimant shown that at the time of his injury, that he was an *employee* of [Alleged Employer], and not an *independent contractor*?

II. If Claimant was an employee of [Alleged Employer], has he shown, by a preponderance of the evidence, that he suffered a compensable work injury to his left arm while in the employ of [Alleged Employer]?

III. If Claimant did suffer a compensable injury as an employee of [Alleged Employer], can [General Contractor] and Landscaping be deemed a *statutory employer* of Claimant, despite the lack of an employer/employee relationship between those parties?

IV. If the injury is compensable, is Claimant entitled to all medical treatment, which is reasonable, necessary, and related to his work injury?

V. If the injury is compensable, is Claimant entitled to Temporary Total Disability and Temporary Partial Disability payments?

VI. If this injury is compensable, is Claimant entitled to the recovery of a 50% penalty against [Alleged Employer], and/or [General Contractor]?

VII. What is Claimant's Average Weekly Wage?

STIPULATIONS

All parties stipulated that Claimant, [Redacted], was not an *employee* of [General Contractor] at the time of his injury. However, Claimant wished to proceed under the theory that [General Contractor] was a *statutory employer* of Claimant.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant worked for [Alleged Employer] installing and repairing windows. [General Contractor Redacted] would contract with Lowes, apparently through Premier Services Group ("Premier") a large home improvement store, to install windows that customers purchased from Lowes. [It appears from the documents supplied that Premier is the authorized installation arm for Lowes]. Lowes would sell the windows, including installation costs, to its customers. [General Contractor] then subcontracted with [Alleged Employer] to perform the installations, and also to perform repairs connected with the installations.

2. Claimant started working for [Alleged Employer] in the early summer of 2020. [Alleged Employer] is owned by Kyler S[Redacted]. At hearing, S[Redacted] indicated that [Alleged Employer] was never set up as a separate business entity; instead, he used his own social security number for tax identification purposes.

3. While working for [Alleged Employer], Claimant's work hours were set by S[Redacted]. Claimant indicated – largely corroborated by S[Redacted] – that he was to report for work at S[Redacted]'s storage unit at 7:45 a.m., after which he would generally ride to the job site in S[Redacted]'s vehicle. He was paid $800 per week, based upon a 40-hour week, but if he exceeded that, he would sometimes be paid an 'incentive' bonus.

4. S[Redacted] supervised Claimant and inspected his work. S[Redacted] told Claimant what jobs to go to and when. S[Redacted] told Claimant what to do at the job sites. All materials for the jobs were provided by S[Redacted]. Almost all the tools to complete the jobs were supplied by S[Redacted]; however, Claimant did indicate that it was OK for him to use his own basic tools, such as his own hammer and drills, but other tools necessary for the job were supplied by [Alleged Employer]. S[Redacted] supplied the truck Claimant used for work. Claimant performed his tasks for no other business entities except [Alleged Employer] during his entire tenure there.

5. Claimant further indicated that if, for example, he or a co-worker were to break a window, that [Alleged Employer] would pay for it. He stated that he was originally hired by [Alleged Employer] as an 'apprentice', since he did not have the skills to install windows without training. [This was essentially corroborated by S[Redacted]].

6. Claimant had to ask for time off a week or two in advance, which had to be approved by S[Redacted] - but with sufficient notice, it usually would be approved. Claimant was effectively precluded from leaving this jobsite early on any given day, since S[Redacted] had the truck. Claimant's personal vehicle, a Toyota sedan, was not suitable to carry the equipment necessary to perform many of the window tasks. Sometimes Saturday work would be required.

7. Claimant was injured on September 19, 2020, when he fell from a ladder while repairing windows at a home east of Colorado Springs. It was estimated to be from a height of about 12 feet. Claimant injured his left elbow, and went to the Emergency Room.

8. Claimant later had surgery performed on his left elbow by Jeffrey Watson M.D. Claimant's treatment for his elbow injury (Exhibit 2), which shows total medical expenses of $107,395.71 of which Colorado Medicaid paid $14,122.60.

9. Claimant testified that he was told by S[Redacted] prior to his injury that S[Redacted], d/b/a [Alleged Employer], had Workers Compensation insurance.

Claimant was then informed by S[Redacted], after his injury, that S[Redacted] in fact did not have Workers Compensation insurance. At hearing, S[Redacted] testified he did not consult with any professional, other contractor or the division of labor in determining whether Claimant would be considered an employee or independent contractor for purposes of Workers Compensation. S[Redacted] did no other research, other than ask Mr. R[Redacted], the owner of [General Contractor]. [Claimant alleges that [General Contractor] also did not carry Workers Compensation insurance; it is unclear from the record if this is actually the case. However, as noted, the apparent owner of [General Contractor], Jason R[Redacted], was present during the hearing, and never stated a position on this issue. However, since no appearance of counsel was made on behalf of [General Contractor], the ALJ will infer – and find - that [General Contractor] was not insured at the time Claimant was injured.] There is nothing in the written record that [General Contractor] had a written subcontractor agreement with [Alleged Employer], although this fact is not in dispute by any party. [Alleged Employer], did, however, have a written subcontractor agreement, apparently with Premier (Respondent's Exhibit 2), but bearing only one signature. There are documents (Respondent's Exhibits 3, 4) wherein [General Contractor] is directing various parties to supply photos for ID badges, and the carrying of GL ("General Liability") Insurance. No mention is made in any of the documents in the record regarding Workers Compensation insurance.

10. Claimant missed two months' work after his injury. Claimant returned to work on November 10, 2020, for the Salvation Army earning $12.32 per hour for 20 hours per week, bell ringing. Claimant next worked for the Taste of Philly restaurant starting December 5, 2020 and was paid $13 per hour for 30 hours per week. Following this Claimant worked for Buckeye Gardener beginning on March 10, 2012, working 32 hours per week at $14 per hour. Claimant still works at Buckeye as a Landscaper. At hearing, Claimant indicated that [Alleged Employer] let him go, once it became apparent that he was no longer physically able to perform window installation.

11. Claimant was originally referred by Jason R[Redacted] of [General Contractor] to work for [Alleged Employer]. While working for [Alleged Employer], Claimant understood that all of the jobs he worked at were sub-contracted by [Alleged Employer] from [General Contractor]. However, he understood [as did S[Redacted]] that [General Contractor] also used other subcontractors, similar to [Alleged Employer], for some of its Lowes business.

12. Dean B[Redacted], Claimant's co-worker at [Alleged Employer], testified at hearing. B[Redacted] testified that he worked for [Alleged Employer] from March of 2020 to November of 2020. He was paid $650 per week, performing tasks such as trash cleanup, demo work, and washing. [Alleged Employer] set his work hours, where he would work, and what tasks he would perform. [Alleged Employer] supplied him with a vehicle for work, tools and all materials.

13. He testified he understood that he had been hired as an employee of S[Redacted] and [Alleged Employer]. B[Redacted] testified while with [Alleged Employer], he never performed work for any entity other than [Alleged Employer]. [The ALJ notes that B[Redacted] [unlike Claimant] did in fact sign an Acknowledgement and Release (Respondent's Exhibit 3), agreeing that he be designated a subcontractor of [Alleged Employer]]. However, B[Redacted] testified that he was never *told* by S[Redacted] that he was anything other than an employee.

14. Mr. B[Redacted] testified that he was present when Claimant was injured, and saw Claimant fall off the ladder and hit the ground. He saw Claimant leave the site to go to the hospital. B[Redacted] testified Claimant never returned to work for [Alleged Employer] or S[Redacted].

15. Mr. S[Redacted] testified at hearing. He was aware Claimant was injured when he fell off the ladder on September 19, 2020. He did not challenge the cause of Claimant's injuries being work-related and did not challenge the reasonableness and relatedness of the medical care received by Claimant. S[Redacted] also did not challenge Claimant's post injury employment and earnings. S[Redacted] stated his own belief that he did not act negligently in assigning the tasks to Claimant, and never assigned any work he felt would be beyond Claimant's ability to safely perform.

16. At hearing, S[Redacted] acknowledged that there is not a written document outlining Claimant's status as an independent contractor. [The ALJ notes that [Alleged Employer]'s Exhibit 1 (An 'Authorization and Release' appears to bear Claimant's signature, with a box to check whether said individual is considered to be an 'Employee' or a 'Subcontractor' of [Alleged Employer]. Neither box is actually checked. However, Claimant did acknowledge on this form that he was *not* an employee of *Lowes*]. S[Redacted] believed that this subcontractor relationship was a verbal understanding between Claimant and him. S[Redacted] stated that in support of his position, he sent a 1099 form to Claimant, and indicated that he did not withhold federal, state, or social security taxes from Claimant's paycheck. [The ALJ notes that the exhibits and testimony do corroborate this particular assertion].

17. The ALJ notes that [Alleged Employer]'s Exhibit 5 is self-labeled as "Payroll Records", and each check written to Claimant is called a "Paycheck" in the memo section. In one check, for example, Claimant is given a Paycheck for $640, it being duly noted in the memo line that this was for '4 days' of work that week. Another was written for $1440, it being noted that this was for '2 weeks -1 day off'. [In each instance, this equates to $800 per week - $160 per day- in a regular 5-day week].

18. Since Claimant was injured, and a claim filed, S[Redacted] has since researched the issue further, and acknowledged that he was naïve in this process, and did

not think it through. He has always acted as subcontractor himself while performing these tasks for others, and was always paid via a 1099. Now that he was starting his own business, he did not know to do anything any differently. He figured that since Jeremiah had Medicaid, then he would be adequately covered in the event of an injury. He did not, however, have any agreement with Claimant that he would be waiving Workers Compensation insurance.

19. S[Redacted] testified that he understood his own relationship with [General Contractor] was as a subcontractor. [The ALJ notes that [Alleged Employer]'s Exhibit 2 is the identical form, on letterhead of Premier, which Claimant had signed with [Alleged Employer]]. [Alleged Employer] did not pay anything to [General Contractor] (that he recalled) for receiving these jobs; however, [Alleged Employer] did *lease* a truck and trailer from [General Contractor], for which S[Redacted] paid [General Contractor] $350 per week.

20. A recording of a telephone conversation between S[Redacted] and Claimant was offered as Claimant's Exhibit 5. In this recording S[Redacted] appears to acknowledge that Claimant was his employee when the fall occurred and admits he does not have workers compensation insurance. S[Redacted] also tries to persuade Claimant.to advise Medicaid that this injury had occurred on "his" [Claimant's work] time, rather than [Alleged Employer]'s time.

21. Upon further review, the ALJ concludes that such phone conversation, however inartful, constituted an attempt by S[Redacted] to settle the claim without litigation. In fact, if S[Redacted] *believed* Claimant to have been a subcontractor, Claimant could indeed ask Medicaid to consider this accident to have occurred on Claimant's time, and not on an Employer's time. The ALJ does not infer that S[Redacted] intended to perpetuate a fraud; rather, it was an attempt to persuade Claimant of what his actual status was. The ALJ, therefore, gives no significant weight to this recording, beyond the factual admission that S[Redacted], d/b/a [Alleged Employer], was in fact not insured for Workers Compensation.

22. Mr. S[Redacted]'s sole defense is Claimant was an independent contractor.

23. Similarly, [General Contractor] does not challenge the cause of Claimant's injury being work related, his medical care being reasonable and related, his post injury employment or his post injury earnings. [General Contractor]'s apparent sole defense is it is not a statutory employer.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

1. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability

and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

2. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. Assessing the weight, credibility and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

4. In this instance, the ALJ finds Claimant, along with Dean B[Redacted], sufficiently credible to establish that this is a compensable claim, which occurred while in the employ of Respondent, [Alleged Employer]. In the final analysis, the ALJ finds Respondent's sole witness, Kyler S[Redacted], to have testified in a sincere manner, in his legally mistaken and misguided, but sincerely held belief that Claimant was an independent contractor, instead of an employee. Mr. S[Redacted] simply did not know any better, but it serves as no legal defense in these circumstances.

Compensability, Generally

5. To qualify for recovery under the Workers' Compensation Act of Colorado, a claimant must be performing services arising out of and in the course of her employment at the time of her injury. See§ 8-41-301(1)(b) C.R.S. 2007. For an injury to occur "in the course of" employment, the claimant must demonstrate that the injury occurred within the time and place limits of her employment and during an activity that had some connection with her work-related functions. See *Gregory v. Special Counsel, and Travelers Indemnity Co.,* W.C. 4-713-707 (2008); *Triad Painting Co. v. Blair,* 812 P.2d 638, 641 (Colo. 1991). The "arise out of" requirement is narrower than the "in the course of" requirement. *See id.* For an injury to arise out of employment, the claimant must show a

causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract. *See id.* at 64-1-42; *Industrial Comm'n v. Enyeart,* 81 Colo. 521, 524-25, 256 P. 314, 315 (1927) (denying recovery to claimant who was injured when his steering gave out while he was driving across a bridge on his employer's property on his way home from work). The claimant must prove these statutory requirements by a preponderance of the evidence. *See City of Boulder v. Streeb,* 706 P.2d 786, 789 (Colo.1985).

Compensability, as Applied

6. In this instance, there is no dispute that Claimant was injured by falling off a ladder while servicing windows on behalf of [Alleged Employer]. As such, the ALJ finds that Claimant's injuries occurred in the course of his employment (discussed supra) with [Alleged Employer], and such injuries also arose out of his employment relationship.

Was Claimant an Employee, or an Independent Contractor of [Alleged Employer]?

7. The claimant is required to prove by a preponderance of the evidence that at the time of the injury that both he and the employer were subject to the provisions of the Workers' Compensation Act, that he was performing service arising out of and in the course of his employment, and that the injury was proximately caused by the performance of such service. Section 8-41-301(1)(a) through (c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

8. The term "employer" is defined to include every person, firm or corporation "who has one or more persons engaged in the same business or employment, except as expressly provided in articles 40 to 47 of this title, in service under any contract of hire, express or implied." Section 8-40-203(1)(b), C.R.S. Similarly, the term "employee" is defined as including any person in the service of any person or corporation "under any contract of hire, express or implied." Section 8-40-202(1)(b), C.R.S.

9. For purposes of Colorado's Workers' Compensation Act, an employer-employee relationship is established when the parties enter into a "contract of hire." Section 8-40-202(1)(b), C.R.S.; *Younger v. City and County of Denver*, 810 P.2d 647 (Colo. 1991). A contract of hire may be express or implied, and it is subject to the same rules as other contracts. *Denver Truck Exchange v. Perryman*, 134 Colo. 586, 307 P.2d 805 (Colo. App. 1957). The essential elements of a contract are competent parties, subject matter, legal consideration, mutuality of agreement, and mutuality of obligation. *Aspen Highlands Skiing Corp. v. Apostolou*, 866 P.2d 1384 (Colo. 1994); *Martinez Caldamez v. Schneider Farm*, W.C. No. 4-853-602 (ICAO, July 16, 2012). A contract of hire may be formed even in the absence of every formality attending commercial contracts. *Rocky Mountain Dairy Products v. Pease*, 161 Colo. 216, 422 P.2d 630 (1966); *In re Ritthaler*, W.C. No. 4-905-302-02 (ICAO, May 7, 2014). Where there is conflicting

evidence the existence of a contract of hire presents a question of fact for the ALJ. *Rocky Mountain Dairy Products v. Pease,* 161 Colo. 216, 422 P.2d 630 (1966); *In re Huffman*, W.C. No. 4-876-455-03 (ICAO, Feb. 20, 2013).

10. Pursuant to §8-40-202(2)(a), C.R.S. "any individual who performs services for pay for another shall be deemed to be an employee" unless the person "is free from control and direction in the performance of the services, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent . . . business related to the service performed." Moreover, pursuant to §8-40-202(2)(b)(I), C.R.S. independence *may* be demonstrated through a written document.

11. A necessary element to establish that an individual is an independent contractor is that the individual is customarily engaged in an independent trade, occupation, profession or business related to the services performed. *Allen v. America's Best Carpet Cleaning Services,* W.C. No. 4-776-542 (ICAO, Dec. 1, 2009). The statutory requirement that the worker must be "customarily engaged" in an independent trade or business is designed to assure that the worker, whose income is almost wholly dependent upon continued employment with a single employer, is protected from the "vagaries of involuntary unemployment." *In Re Hamilton,* W.C. No. 4-790-767 (ICAO, Jan. 25, 2011).

12. The "employer" may also establish that the worker is an independent contractor by proving the presence of some or all of the nine criteria enumerated in §8-40-202(2)(b)(II), C.R.S. *See Nelson v. ICAO,* 981 P.2d 210, 212 (Colo. App. 1998). The factors in §8-40-202(2)(b)(II), C.R.S. suggesting that a person is not an independent contractor include whether the person is paid a salary or hourly wage rather than a fixed contract rate and is paid individually rather than under a trade or business name. Conversely, independence may be shown if the "employer" provides only minimal training for the worker, does not dictate the time of performance, does not establish a quality standard for the work performed, does not combine its business with the business of the worker, does not require the worker to work exclusively for a single entity, does not provide tools or benefits except materials and equipment, and is unable to terminate the worker's employment without liability. *In Re of Salgado-Nunez,* W.C. No. 4-632-020 (ICAO, June 23, 2006). Section 8-40-202(b)(II), C.R.S. creates a "balancing test" to ascertain whether an "employer" has overcome the presumption of employment in §8-40-202(2)(a), C.R.S. The question of whether the "employer" has presented sufficient proof to overcome the presumption is one of fact for the Judge. *Id.*

13. If the evidence establishes that the claimant was performing services for pay, and there is no written document establishing the claimant's independent contractor status, the burden of proof rests upon the respondents to rebut the presumption that the claimant was an employee. *Baker v. BV Properties, LLC,* W.C. No. 4-618-214 (ICAO, Aug. 25, 2006). The question of whether the respondents have overcome the presumption and established that the claimant was an independent contractor is one of fact for the ALJ. *Nelson v. Industrial Claim Appeals Office, supra*. *See Industrial Claim Appeals Office v. Softrock Geological Services, Inc*., 325 P.3d 560 (Colo. 2015) (whether an individual is customarily engaged in an independent trade, occupation, profession, or

business related to the service performed must be determined by applying a totality of circumstances test that evaluates the dynamics of the relationship between the individual and the putative employer). The analysis in *Softrock* reflects that tribunals must look not only at the nine factors to discern customary engagement in an independent business but must also examine other factors involving “the nature of the working relationship” is equally germane to that question in the context of a workers’ compensation matter. *See In re Claim of Pierce*, W.C. No. 4-950-181-02) (ICAO, Sept. 18, 2018).

Employee vs. Independent Contractor, as Applied

14. In this instance, [Alleged Employer] has not produced a written document that Claimant was serving as an Independent Contractor. However, it is crucial to note that under the facts of his case, *even had [Alleged Employer] produced such a document, the outcome would remain the same,* based upon the enumerated factors noted. Claimant was clearly paid a *daily rate of compensation* of $160 per day, based loosely upon an understanding that he was to be paid $20 per hour. Claimant was never paid at a *fixed contract rate* to perform discrete tasks. He was paid in his *individual capacity*, in the form of a ‘paycheck’, under ‘Payroll’. Claimant had no *trade or business name* to be paid under. Claimant was hired as an ‘apprentice’, and as such, he had to be *trained* in all facets of the job. [Alleged Employer] dictated the *times of performance*, established a *quality standard*, which was monitored on a nearly daily basis. While it was not explicitly discussed between Claimant and S[Redacted], as a practical matter, this was a full-time job of 40 hours per week, plus some Saturdays. As such, Claimant *could not accept other ‘contract’ work from any other business entity.* [Alleged Employer] provided the needed *tools* (although Claimant was permitted to use his own basic hand tools, if he chose) and transportation. The windows and installation *supplies* were apparently supplied by the customer, who had been billed by Lowes; Such windows and supplies were apparently stored at [Alleged Employer]’s storage unit prior to installation. Claimant never supplied them. If a window was broken, it was [Alleged Employer], and not Claimant, who replaced it, i.e., *Claimant assumed no risk of loss*, as might be expected of an independent contractor. Lastly, it is noted that [Alleged Employer] simply *terminated* Claimant from further employment, due to his inability to continue to install windows, and not due to any failure to live up to the terms of any written ‘contract’.

15. The only thing S[Redacted] can really point to is that [Alleged Employer], by all accounts, did not withhold income and social security taxes from the paycheck; instead, he issued a 1099 form to Claimant for tax year 2020. As such, this sole action, while perhaps indicative of S[Redacted]’s unilateral intent, is wholly inadequate to tip the balance back into [Alleged Employer]’s favor. Applying the balancing test under C.R.S. 8-42-202(2)(b)(II), this is not even a close call. Claimant was, at all times pertinent, [Alleged Employer]’s *employee*, and not an *independent contractor*.

Medical Benefits

16. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101. However, the right to workers' compensation benefits, including medical benefits, arises only when an

injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. C.R.S. § 8-41-301(1)(c); *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000). The evidence must establish the causal connection with reasonable probability, but it need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Industrial Commission*, 30 Colo. App. 224, 491 P.2d 106 (Colo. App. 1971); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Industrial Commission of Colorado v. Jones*, 688 P.2d 1116 (Colo. 1984); *Industrial Commission v. Royal Indemnity Co.,* 124 Colo. 210, 236 P.2d 293 (1951).

17. In this instance, Claimant has shown that all medical treatment to date has been reasonable, necessary, and related to his work injury as an employee of Respondent [Alleged Employer] . There is simply no evidence to the contrary. In the final analysis, any offsets due to Medicaid, or limitations due to the Fee Schedule, must be resolved between the affected entities.

Average Weekly Wage

18. The evidence shows that Claimant was being paid $800 per week at the time of his injury, and the ALJ so finds. In his brief, Claimant is actually claiming his AWW to be $533.33. The ALJ notes that this is actually two thirds of Claimant’s de facto AWW, which is in reality the TTD rate. The ALJ finds that this claim of a $533.33 AWW is in error, and in fact, the AWW is $800 per week.

Temporary and Partial Total Disability

19. To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term “disability” connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant’s testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the

employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

20. Section 8-42-106(1), C.R.S., provides for an award of Temporary Partial Disability (TPD) benefits based on the difference between the claimant's AWW at the time of injury and the earnings during the continuance of the temporary partial disability. In order to receive TPD benefits the claimant must establish that the injury has *caused* the disability and consequent partial wage loss. Section 8-42-103(1), C.R.S.; *Safeway Stores, Inc. v. Husson,* 732 P.2d 1244 (Colo. App. 1986) (temporary partial compensation benefits are designed as a partial substitute for lost wages or impaired earning capacity arising from a compensable injury).

21. In this instance, Claimant has shown uncontroverted evidence that he suffered, at the outset, from a temporary total disability. Later, due to his efforts and need for income, he took work at a rate less than his average weekly wage. Without the application of any potential penalties (addressed, *supra*), the ALJ finds that Claimant's TTD period ran for 7 weeks and one day. While at Salvation Army, Claimant worked for 3 weeks and 4 days. While with Taste of Philly, Claimant worked for 13 weeks and 2 days. Since March 10, and ongoing, Claimant has worked at Buckeye. Using the hours worked and hourly wage supplied by Claimant, the ALJ finds that *total* TTD should be paid in the amount of $3,840. *Total* TPD from Salvation Army comes to $1,403. *Total* TPD from Taste of Philly is $3,663. The *weekly* rate of TPD payments due, ongoing from 3/10/2021 with Buckeye is $234.68.

Statutory Employer

22. Liability for workers compensation benefits can arise in any contracting out situation. C.R.S. 8-41-401. This applies where a corporation is engaged in a business by subcontracting out its work. Under this situation the general contractor is required to provide workers compensation benefits for the sub-contractor and the sub-contractors' employees. C.R.S. 8-41-401(1). The purpose of this statute is to prevent employers from avoiding responsibility under the workers compensation act by interposing intermediate contractors between themselves and those performing the work. *Finlay v. Storage Technology Corp.* 764 P.2d 62 (Colo. 1984). In *Finlay*, the court held Storage Technology Corp was the statutory employer for the employees of its janitorial company as the cleaning of Storage Tech's bathrooms met the applicable test to establish statutory employment.

23. To determine when an employer which contracts out work is a statutory employer these factors must be considered: Is the work contracted out part of the regular business of the employer as part of its total business operations. In applying this test consideration must be given to the elements of routineness, regularity, and the importance of the contracted service to the regular business of the employer. See, *Meyer v Lakewood Country Club,* 220 P.2d 371 (Colo. 1950 and *M & M Management v. ICAP,*

979 P.2d 574 (Colo. App. 1988). See, also *Curtiss v. GSX Corp of Colorado,* 774 P.2d 873 (Colo. 1989). The Colorado Supreme Court in *Curtiss* held "" A company contracting out any part of its work is considered a statutory employer even though the contractor or sub-contractor to which work was contracted out is also insured for workers compensation benefits and actually provided these benefits to the injured worker." [General Contractor] meets this test. [General Contractor] obtained all its contracts from Lowes and sub-contracted all this work to others which included S[Redacted], d/b/a [Alleged Employer] . Thus, while Claimant was not an employee of [General Contractor], [General Contractor] must be deemed a statutory employer for the purposes of providing Workers Compensation coverage and benefits.

24. Claimant has alleged (and the ALJ so finds, by inference) that [General Contractor] was uninsured for Workers Compensation at the time of this injury. The next step for Claimant would, presumably, be to determine the next statutory employer "upstream" from [General Contractor], who might have had WC insurance in effect at the time of this injury. Whether this would be Premier Services Group, Lowes, some other entity, or nobody, remains unknown at this stage of the proceedings. All that can be stated is that [General Contractor] has now been found here to be a statutory employer.

Penalties against [Alleged Employer] and/or [General Contractor] for failure to have WC Insurance.

25. Claimant seeks a 50% penalty against [Alleged Employer] and/or [General Contractor], payable to Claimant, for failure to carry WC insurance on the date of injury. In support, Claimant cites C.R.S. 8-43-408, but cites no subsection. The ALJ finds such reliance misplaced, although such was indeed potentially the case, prior to the revision of this statute. Currently, the penalty provision is governed by 8-43-408(5), which imposes penalties of 25% of *compensation or benefits*, but payable only to the *Colorado Uninsured Employer Fund*, created by C.R.S. 8-67-105, et seq. Since neither the total compensation, nor the benefits can be ascertained at this point, the ALJ cannot assess a monetary penalty, but in no event would it be payable to Claimant. Claimant may only seek to collect penalties for noncompliance by an employer with the terms of C.R.S. 8-443-408(4). Such events have neither been alleged nor proven at this juncture. Claimant's claim to be paid 50% penalties from either employer must be denied.

Bond from Uninsured Employer

26. C.R.S 8-43-408(2) provides:

> In all cases where compensation is awarded under the terms of this section, the director or an administrative law judge of the division shall compute and require the employer to pay to a trustee designated by the director or administrative law judge an amount equal to the present value of all unpaid compensation or benefits computed at the rate of four percent per annum; or, in lieu thereof, such employer, within ten days after the date of such order, shall file

> a bond with the director or administrative law judge signed by two or more responsible sureties to be approved by the director or by some surety company authorized to do business within the state of Colorado. The bond shall be in such form and amount as prescribed and fixed by the director and shall guarantee the payment of the compensation or benefits as awarded. The filing of any appeal, including a petition for review, shall not relieve the employer of the obligation under this subsection (2) to pay the designated sum to a trustee or to file a bond with the director or administrative law judge.

27. There is no dispute that [Alleged Employer] was uninsured. Assuming that [General Contractor] was similarly uninsured (which the ALJ so finds) and that no further statutory employer can be identified who carried WC insurance to cover this claim, then said Respondents would have to pay a bond, which should be sufficient to cover anticipated benefits in the case, as well as a fifty percent increase for temporary disability benefits. *Miller v. United Insurance Group*, W.C. Nos. 4-940-803-01 & 4-940-803-02 (December 2, 2016); § 8-43-408(2), C.R.S. (2020).

ORDER

It is therefore Ordered that:

1. Claimant suffered a compensable injury as an employee of [Alleged Employer] .

2. Since [Alleged Employer] was not insured for Workers Compensation at the time of the compensable work injury, [General Contractor] is found to be a statutory employer, and thus also responsible for Claimant's Workers Compensation benefits.

3. Respondents shall pay for all of Claimant's medical treatment, which is reasonable, necessary, and related to his work injury.

4. Claimant's Average Weekly Wage is $800.

5 Respondents shall pay for Claimant's Temporary Total Disability and Temporary Partial Disability payments.

6. Claimant's claim for a 50% penalty against each Respondent is denied and dismissed; however, Respondents are Ordered to post a bond to cover anticipated WC benefits, pursuant to C.R.S. 8-43-408(2).

7. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

8. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. *In addition, in order to best assure prompt processing of your Petition, it is **highly recommended** that you send a copy of your Petition to Review to the Colorado Springs OAC via email at oac-csp@state.co.us.*

DATED: July 20, 2021

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 4-962-740-002

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

[Redacted],

Claimant,

v.

[Redacted],

Employer,

and

[Redacted],

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on June 14, 2021 , in Denver, Colorado. The hearing was recorded by Google Meets (reference: 6/14/21, Google Meets, beginning at 1:30 PM, and ending at 3:30 PM) .

The Claimant was present in person, virtually, and represented by [Redacted], Esq.. Respondents were represented by [Redacted], Esq.

Hereinafter [Redacted]shall be referred to as the "Claimant." [Redacted] shall be referred to as the "Employer." All other parties shall be referred to by name.

Claimant's Exhibits 1 through 16 were admitted into evidence, without objection. Respondents' Exhibits A through N and P and Q were admitted into evidence, without objection.

At the conclusion of the hearing, the ALJ established a post-hearing briefing schedule. Claimant's opening brief was filed on June 28, 2021. Respondents' answer brief was filed on July 13, 2021. Claimant's reply brief was filed on July 15, 2021, at which time the matter was submitted for decision.

ISSUES

The issues to be determined by this decision concern whether the Claimant has experienced a change of condition after June 28, 2016 which would entitle her to a reopening of her claim regarding her September 25, 2014 work injury; if reopened, whether the Claimant is entitled to temporary total disability (TTD) benefits beginning on July 7, 2016, ongoing; and, whether Respondents are entitled to repayment of an overpayment of $8,890.97 as asserted in the September 1, 2020, Final Admission of Liability (FAL).

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

Preliminary Facts

1. The Claimant was born on July 28, 1953, and was 67 years-old on the date of hearing. She worked for the Employer on September 25 and 26, 2014, when she sustained admitted work related injuries to her neck, right arm, and right shoulder (Respondents' (Respondents' Exhibits A-G).

2. After extensive treatment, the authorized treating physicians (ATPs) had not placed the Claimant at maximum medical improvement (MMI) and Respondents sought a 24-month Division independent medical examination (DIME), which was performed by Clarence Henke, M.D. (Respondents' Exhibit G) *.* Dr. Henke was of the opinion that the Claimant was not at MMI, and Respondents filed an Application for Hearing to overcome that opinion (Respondents' Exhibits G and H).

3. The hearing to overcome Dr. Henke's DIME opinion was held before ALJ Kimberly Turnbow on May 30, 2017. *Id.* The Claimant testified regarding Botox injections she received in June of 2016, that the injections caused the muscles of her shoulder and neck to freeze, and that she had ongoing pain and stiffness as a result of the Botox injections (*See Transcript of Proceedings W.C. No. 4-962-704-05 at 10-33, 102-107*). The Claimant did not testify that she experienced any grinding, snapping, cracking, or audible sounds from her shoulder following her Botox injections. *Id.* ALJ Turnbow found the Claimant not credible due to inconsistent presentation, exaggeration of her pain and symptoms, and the conflict between objective medical findings and the Claimant's subjective complaints (Respondents' Exhibit H, p. 176). ALJ Turnbow cited to medical records as recent as March 13, 2017 in her decision, including numerous records following the administration of Botox injections on June 6, 2016. Id at 172-173. ALJ Turnbow found that Dr. Henke's DIME opinion was unsupported by the facts and that the Respondents had overcome his DIME opinion by clear and convincing evidence. *Id.* ALJ Turnbow found the Claimant reached MMI as of June 28, 2016

without permanent impairment, and that the Claimant's cervical spine issues were not work related. *Id.*

4. The ALJ herein determines that ALJ Turnbow's fixing MMI as of June 28, 2016, is the law of the case and this ALJ finds that the Claimant's date of MMI was June 28, 2016.

5. Respondents filed a FAL on August 7, 2017, based on ALJ Turnbow's decision *(*Respondents' Exhibit I). ALJ Turnbow subsequently issued a supplemental order on November 22, 2017, which removed an order for the Claimant to undergo a psychologic evaluation (Respondents' Exhibit J).

6. The Claimant filed a Petition to Review and the Industrial Claim Appeals Office (ICAO) upheld ALJ Turnbow's decision (Respondents' Exhibit K). The Claimant appealed the ICAO order to the Colorado Court of Appeals, which ruled in favor of the Claimant. Respondents filed a Petition for a Writ of Certiorari with the Colorado Supreme Court, which overturned the Court of Appeals ruling and upheld ALJ Turnbow's decision (Respondents' Exhibit M).

The Petition to Reopen

7. During the pendency of the appeals, the Claimant filed a Petition to Reopen and endorsed "Change in Medical Condition" as the basis of the Petition (Respondents' Exhibit. L). The Claimant attached the reports from Michael N. Horner, D.O., and James T. Johnson, M.D.

8. Respondents filed a FAL on September 1, 2020, consistent with ALJ Turnbow's supplemental order. The admission addressed periods of TTD and TPD (temporary partial disability) designated the date of MMI as June 28, 2016, and asserting an overpayment of $8,890.97 (Respondents' Exhibit N, pp. 304, 311). The Claimant filed an Objection to this FAL and designated that an Application for Hearing would be filed on contested issues. The Claimant did not, however, file an Application for Hearing regarding the Objection to this FAL. The Claimant ultimately filed an Application for Hearing on the issues of her Petition to Reopen and TTD from "7/7/16 to ongoing" (Respondents' Exhibit O).

The Claimant

9. The Claimant testified at hearing that she disagreed with her medical records, that her cervical spine was not the source of her issues in March of 2016. The Claimant stated that she started hearing cracking from her right shoulder on June 7, 2016, the date of her Botox injections. She testified that the pain and grinding and snapping are still present and the same on the date of her testimony as when they began on June 7, 2016.

10. The Claimant testified that she had no injuries or problems with her right arm or shoulder before her admitted inguinal hernia injury and that the noise from her right shoulder blade did not exist until she got the Botox injections from Dr. Horner and that the grinding and popping noise from her right shoulder blade has not stopped since it began. Claimant stated that she did not work after her injury except for the one day in May 2016 when she went as directed to modified duty that was not modified enough for her to do the actual job requirements. Claimant also testified that the intense pain from the Botox injections from Dr. Horner did not subside until 4 months later.

11. The Claimant's husband, John [Redacted], also testified that he observed the Claimant exhibit signs of new pain on June 7, 2016, after the Botox injections. Mr. [Redacted] also testified that he heard snapping and cracking from the Claimant's right shoulder.

12. No medical records state that the Claimant reported grinding, snapping, or audible crepitation as a symptom throughout her treatment, including on dates that Dr. Johnson noted crepitation was present. No treatment notes support the Claimant's testimony that the snapping shoulder was the source of her pain. Allison Fall, M.D., who is the last physician to have examined the Claimant, included a detailed statement of the Claimant's symptoms in her report, none of which included any grinding or snapping in her right shoulder (Respondents' Exhibit A at bates 002). The Claimant stated in her initial answers to interrogatories that her condition worsened on July 7, 2016, due to the Botox injections (Respondents' Exhibit P). No allegation of snapping or grinding in her right shoulder was made. *Id.* After the Claimant took the deposition of Dr. Johnson, she submitted supplemental interrogatories which include a detailed statement regarding the development of snapping in her right shoulder.

13. Leading up to the Claimant's Botox injections, she reported 8-10/10 pain in her right shoulder area and that her symptoms were worsening (Respondents' Exhibit E, p. 115; D, p. 86).

Michael N. Horner, D.O.

14. Dr. Horner administered the Botox injections on June 7, 2016, and the Claimant reported her condition was worse on June 8, 2016, with 8/10 pain. *Id.* The Claimant's flexion was measured at 85 degrees on February 11 and June 8, 2016. *Id at 109, 115.* The Claimant's report of severe pain and negative symptoms continued through June 20, 2016. *Ex. E at 117, 120, 122, 124*. The Claimant did not report any snapping, grinding, or audible crepitation at any physical therapy session after the Botox injections, through February 2, 2017, though she complained of severe right shoulder pain throughout that time (Respondents' Exhibit E).

James T. Johnson, M.D.

15. Dr. Johnson testified that he has not examined or treated the Claimant since 2018 and he was not aware whether she was currently in paint (Transcript of

Deposition of Dr. Johnson, p. 26, l. 10). Dr. Johnson stated that the Botox injections improved the Claimant's neck and shoulder symptoms permitting her to increase her range of motion (ROM) of the shoulder to permit flexion up to 70 degrees, which permitted him to observe the snapping scapula. Id at p. 16, l. 1-17. Dr. Johnson recommended a treatment plan for the Claimant to have surgery for her cubital tunnel syndrome, but Dr. Johnson also testified that he does not know the cause of the Claimant's cubital tunnel syndrome. Id at p. 23, l. 4-8; p. 21, l. 17-19. Dr. Johnson stated that before any treatment, the Claimant needs a physical exam to determine the cause of her symptoms and then address if her shoulder blade continues snapping, only after this evaluation and work-up did Dr. Johnson state that surgery may be appropriate, depending on the findings. Id at p. 23, l. 4-22. Dr. Johnson testified that the snapping scapula was the only new claim related diagnosis he was aware of on or after July 11, 2016. Id at p. 45, l. 25 – p. 46, l. 15.

16. Dr. Johnson was of the opinion that the "snapping scapula,'" which can be quite painful, was the result of her on-the-job injury and that it was very common with injuries such as the Claimant suffered, with constant pain and deconditioning of the shoulder, to occur over time. Dr. Johnson was also of the opinion that the Botox injections might have allowed the condition to develop when it did, but he was not aware that Botox injections could cause the "snapping scapula." Dr. Johnson's proposed a treatment plan to surgically repair the cubital tunnel Claimant allegedly got from the injury, then slowly reduce pain and swelling and strengthen the area with PT so that surgery would not be necessary but if nothing else worked, surgery to "shave down'"the inflamed bursa would be reasonable and necessary. On July 11, 2016, Dr. Johnson placed work restrictions on the Claimant of no lifting over one pound, among others, and never took her off those work restrictions (Claimant's Exhibit 11, p. 20; Deposition Transcript).

Alison Fall, M.D.

17. Dr. Fall examined the Claimant in June of 2015, August of 2016, and October of 2020. She testified that the Claimant did not report any snapping, grinding, or sounds coming from her right shoulder in August of 2016, or October of 2020. Dr. Fall stated that the Claimant alleged the Botox had frozen her shoulder, causing it to lock up so she was unable to move it. Dr. Fall was of the opinion that the physical therapy (PT) recommended by Dr. Johnson will not cure or relieve the effects of the Claimant's current condition because she already engaged in significant PT for the right shoulder with little to no reported improvement. Dr. Fall indicated that the Claimant had ulnar neuritis which was claim related, but denied that her cubital tunnel syndrome was work related. Dr. Fall further testified that she disagreed with Dr. Johnson's recommendation for surgery. Dr. Fall stated that the Claimant reported resolution of her cubital tunnel symptoms when she was last examined in October of 2020. Dr. Fall was of the opinion that the Claimant's subjective complaints were out of proportion to the objective findings. She further stated that the Claimant's primary symptoms following the Botox injections, the burning pain and numbness across her back and neck, would not be

caused either by Botox or by a snapping scapula. Dr. Fall noted that the Claimant's subjective complaints have gone essentially unchanged and unimproved for five years despite extensive treatment. Dr. Fall is of the opinion that there is no objective evidence of a change of the Claimant's medical condition on or after June 28, 2016, that no treatment is likely to cure or relieve the effects of her work related injury, and that no maintenance treatment is reasonably necessary in the Claimant's case.

Analysis of the Evidence

18. The Claimant's testimony and arguments allege that her symptoms began on June 7, 2016, the date of her Botox injections. This was before the MMI date and during the pendency of appeals. Dr. Johnson's theory of his discovery of the crepitation for the first time on July 11, 2016 depends on an improvement in the Claimant's ROM as a result of the Botox injections. Dr. Johnson has not examined the Claimant for three years. The Claimant and her husband both testified that the Claimant's new symptoms of snapping, grinding, and cracking, which were audible to them, developed and have not changed since June 7, 2016. Dr. Johnson's opinion is based on the snapping scapula alone, and he testified that the Claimant had no other new diagnosis besides the snapping scapula since July 11, 2016. To the extent that the Claimant has had any worsening of condition, the worsening occurred prior to June 28, 2016 and prior to the MMI date and during the pendency of appeals.. The worsening did not occur after the date of MMI. The worsening testified to by the Claimant, her husband, and Dr. Johnson preceded the Claimant's MMI date.

19. Dr. Johnson's testimony and conclusions are insufficient to meet the Claimant's burden to prove entitlement to a reopening. Dr. Johnson admitted that he had not actually examined or evaluated the Claimant since March of 2018, more than three years before testifying in this matter. Dr. Johnson's theory of discovering the Claimant's crepitation is not consistent with the medical records. Dr. Johnson recorded that the Claimant exhibited 85 degrees of flexion on June 29, 2015, but Dr. Johnson testified that he had only ever observed the Claimant to flex her shoulder from 20-30 degrees previously (Respondents' Exhibit B, bates 032). Dr. Johnson did not record any ROM measurements on March 14, 2016, but the Claimant exhibited 85 degrees of flexion at PT appointments before and after March 14, 2016. The Claimant also testified at this hearing and before ALJ Turnbow that she experienced no relief from Botox injections, instead they had the opposite effect and increased her pain and numbness. Dr. Johnson stated that the Claimant must have been mistaken about the function level of her right shoulder, however, the contemporaneous medical records corroborate the increased pain without a change and a decrease in her ROM. Furthermore, Dr. Johnson was equivocal in his treatment recommendations. Dr. Johnson admitted that he is not aware of the Claimant's current condition and that she should be evaluated first to determine if she is in pain and if so, what is causing her pain. These are questions that could not be answered by numerous ATPs for three years due to the Claimant's inconsistency between her subjective complaints and the objective findings. Dr. Johnson's testimony amounts to speculation as to what treatment might be attempted if the Claimant's symptoms are continuing and depending on their causation.

20. Dr. Johnson's treatment plan opens with the recommendation for treatment of a condition for which Dr. Johnson was unable to determine the claim relatedness of cubital tunnel syndrome. Dr. Johnson stated that this was the "low hanging fruit" and should precede PT, which should be attempted before any surgery is recommended to address the snapping scapula. These recommendations are not supportable medical diagnoses or referrals on which a reopening due to change in medical condition should be based. The Claimant's application for hearing and initial answers to interrogatories request TTD benefits beginning on July 7, 2016.

21. The Claimant filed a copy of Dr. Horner's July 7, 2016, report in which he records her complaints of increased pain due to the Botox injections. The Claimant's answers to interrogatories indicate that she was seeking reopening of her claim for increased pain caused by the Botox injections. Before ALJ Turnbow, the Claimant testified to pain and numbness across her shoulders and neck. In the Claimant's medical records, she reported increased pain and numbness across her shoulders and neck following the Botox injections. In her initial of answers to interrogatories, the Claimant alleged an increase in pain and numbness in her shoulders and neck.

22. At hearing in this matter and in the Claimant's supplemental answers to interrogatories submitted after the testimony of Dr. Johnson's (in his deposition), the Claimant made new allegations of snapping in her right shoulder due to the snapping scapula. The Claimant's theory of the case and allegations of onset changed after Dr. Johnson testified that his July 11, 2016 report recorded a diagnosis of snapping scapula and that was the source of the Claimant's current alleged discomfort.

23. The Claimant's prior answers to interrogatories, testimony, and medical records are devoid of reports of audible crepitation. The Claimant reported extensive symptoms to Dr. Fall at three separate examinations which Dr. Fall incorporated into her reports. None of these reports include any mention of the symptoms of snapping scapula the Claimant and her husband testified to at hearing. The Claimant has not produced any documentation that she has obtained any medical care since 2018, which is inconsistent with the pain and immobility she alleges. These inconsistencies are the same as those cited to by ALJ Turnbow in her determination that the Claimant was not credible and are disputed by records and pleadings preceding Dr. Johnson's testimony.

24. In the records in which Dr. Johnson notes his observation of crepitation, there is no indication that the Claimant reported snapping symptoms or that those symptoms were the source of her pain. The Claimant's testimony is inconsistent with her prior testimony, answers to interrogatories, and the medical record.

25. Dr. Fall testified that the Claimant's claim-related symptoms have resolved. Dr. Fall did not observe any crepitation of the Claimant's shoulder, nor did the Claimant report any, on October 19, 2020. Dr. Fall's testimony and reports establish that the Claimant is and has been at MMI since 2016. The Claimant underwent substantial care for a wide range of complaints from the date of injury through the end of her care in

March of 2018. During that time, the Claimant did not report any significant relief of symptoms, while she did report that numerous treatment modalities, including the Botox injections, had negative effects or no benefits. Dr. Fall is of the opinion that the Claimant's pain reports are not consistent with the objective findings on examination or in the medical records.

26. Dr. Fall is also the only physician to have examined the Claimant during the pendency of the present Application for Hearing and she found no basis for a worsening of condition. Dr. Fall concluded, rather, that the effects of the Botox injections would have subsided after approximately three months after the injections were administered. Dr. Fall further noted that the Claimant's reported pain levels were lower during the 2020 evaluation as compared to her prior examinations.

Issue Preclusion Not Applicable

27. ALJ Turnbow possessed all the information that is available to the present ALJ regarding the alleged date of worsening. The Claimant's "back channel" attempt to overturn her MMI status by way of reopening because the issue for determination in the present hearing is identical to the issue which was previously resolved by ALJ Turnbow, *i.e.,* whether the Claimant was at MMI as of June 28, 2016. Nonetheless Indeed, both Dr. Fall and the DIME physician examined the Claimant and were of the opinion that she was at MMI after the Botox injections had already been performed, and ALJ Turnbow considered the effects of those injections in determining whether the Claimant was at MMI at the hearing held nearly one year after they were performed.

Timing of the Petition to Reopen

28. The Petition to Reopen herein, dated May 8, 2018, alleges a change of condition (worsening) that occurred before the finality of the FAL, dated August 7, 2017, after the Objection thereto, and after the Claimant failed to prevail on her appeals. Indeed, the Petition alleges a worsening beginning before the established MMI date, June 28, 2016.

Ultimate Findings

29. Based on the totality of the evidence, especially the fact that Dr. Johnson admitted that he is not aware of the Claimant's current condition and that she should be evaluated first to determine if she is in pain and if so, what is causing her pain. These are questions that could not be answered by several ATPs for three years due to the Claimant's inconsistency between her subjective complaints and the objective findings. Dr. Johnson's testimony is speculative as to what treatment might be attempted if the Claimant's symptoms are continuing and depending on their causation. Essentially, Dr. Johnson is recommending one more test to determine whether the Claimant's condition has worsened. and the cause thereof.

30. Between conflicting opinions and testimony, the ALJ makes a rational choice, based on substantial evidence, to accept the lack of causality opinion of Dr. Fall and to reject the inability to render causality opinions of Dr. Johnson, Dr. Horner, the Claimant and her husband, without further tests.

31. . The ALJ infers and finds that the Claimant is attempting to do an "end run" around the DIME determination of ALJ Turnbow and the appeals that ensued by filing a Petition to Reopen. The Claimant pursued her appeal, but it was unsuccessful. Following her unsuccessful appeal, the Claimant is now attempting to circumvent the appellate process which considered the facts that are relevant to the date of the alleged worsening. This is so although one may file successive petitions to reopen during the period of limitations.

32. The Claimant has failed to prove by a preponderance of the evidence that there is a causal connection between any change of condition and her original injury of September 25, 2014.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

a. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008);*Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, **2012 COA 85.** The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof).

See Young v. Burke, 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, based on the totality of the evidence, especially the fact that Dr. Johnson admitted that he is not aware of the Claimant's current condition and that she should be evaluated first to determine if she is in pain and if so, what is causing her pain. These are questions that could not be answered by several ATPs for three years due to the Claimant's inconsistency between her subjective complaints and the objective findings. Dr. Johnson's testimony is speculative as to what treatment might be attempted if the Claimant's symptoms are continuing and depending on their causation. Essentially, Dr. Johnson is recommending one more test to determine whether the Claimant's condition has worsened and the cause thereof.

Substantial Evidence

b. An ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting medical opinions, the ALJ made a rational choice, based on substantial evidence, Between conflicting opinions and testimony, the ALJ made a rational choice, based on substantial evidence, to accept the affirmative lack of causality opinion of Dr. Fall and to reject the inability to render causality opinions of Dr. Johnson, Dr. Horner, the Claimant and her husband., without further tests. Further tests to determine a change of condition in a causally related injury are an appropriate measure, however, further tests to determine causal relatedness of a worsening physical condition would amount to a re-litigation of the issue of compensability of an alleged related condition.

Petition to Reopen

c. Under § 8-43-303(1), C.R.S., after MMI and within six years of the date of injury, an ALJ may re-open a claim based on fraud, an overpayment, **an error, a mistake,** or a change in condition. See *El Paso County Department of Social Services* *v. Donn,* 865 P.2d 877 (Colo. App. 1993); *Burke v. Indus. Claim Appeals Office,* 905 P. 2d 1 (Colo. App. 1994); *Hanna v. Print Express, Inc.,* 77 P. 3d 863 (Colo. App. 2003); *Donohoe v. ENT Federal Credit Union,* W.C. No. 4-171-210 [Indus. Claim Appeals Office (ICAO) September 15, 1995]. This is so because MMI is the point in time when no further medical care is reasonably expected to improve the condition. § 8-40-101(11.5), C.R.S. (2009); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Where a claimant seeks to re-open based on a worsened condition, she must demonstrate a change in condition that is "causally connected to the original compensable injury." *Chavez v. Indus. Comm'n,* 714 P.2d 1328 (Colo. App. 1985). It is well established that if an industrial injury leaves the body in a weakened condition, and that weakened condition is a proximate cause of further injury to the injured worker, then the additional injury is a compensable consequence of the industrial injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970). As found, there is no credible medical opinion linking the Claimant's worsening condition to the original admitted injury.

d. Although there is no restriction as to the number of times a case may be re-opened and when based upon new or different evidence no such limitation may be imposed by the courts, that being a matter for legislative expression. *Graden Coal Co. v. Ytoarralde,* 137 Colo. 527, 328 P.2d 105 (1958). A Petition to Reopen, however, must be based on a proven causally related change of condition, which is not supported by the totality of the evidence herein.

Maximum Medical Improvement (MMI)—Law of the Case

e. An ALJ determined that a claimant's surgery was not work related. That ALJ has, therefore, established the "law of the case," and this ALJ is bound by that determination, absent a clear error or changed circumstance, regardless of whether this ALJ disagrees with that ALJ's determination in this regard. *See Buckley Powder Co. v. State,* 70 P.3d 547 (Colo. App. 2002); *Giampapa v. American Family Mut. Ins. Co.,* 64 P.3d 230 (Colo. 2003); *Arizona v. California,* 460 U.S. 605, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983). As found, ALJ Turnbow's determination of MMI as of June 28, 2016 and ultimately affirmed on appeal, established the law of the case and this ALJ may not alter that MMI date.

Change of Condition Must Occur After MMI

f. An ALJ may reopen a claim based on a worsening of condition, which refers to a worsening of a claimant's condition from the industrial injury after MMI. *See El Paso County Department of Social Services v. Donn,* 865 P.2d 877 (Colo. App. 1993); *Amin v. Schneider Nat'l Carriers*, W.C. No. 4-881-225-06 [Industrial Claim Appeals Office (ICAO), Nov. 9, 2017]; *Marsak v. Best W. Durango Inn,* W.C. 4-416-242 (ICAO, May 13, 2004); *Maher v. Afg Indus. Inc.,* W.C. No. 4-559-832 (ICAO, Jan. 26, 2004); *Canales v. Peak Contract Mfg. Inc.*, W.C. No. 4-348-069 (ICAO, Aug. 12, 2003); *Davis v. City and Cty. of Denver*, W.C. Nos. 4-371-397, 4-437-486 (ICAO, Oct. 1, 2003); *Lapean v. Aon Innovative Sols.,* W.C. Nos. 4-474-545, 4-540-403 (ICAO, July

21, 2003); *Maloney v. Swanson & Dad,* W.C. No. 4-298-382 (ICAO, Dec. 7, 2001); *Rhodes v. Pyramid Enterprises, Inc.*, W.C. No. 4-360-050 (ICAO, Sept. 16, 1999); *Donohoe v. ENT Federal Credit Union,* W.C. No. 4-171-210 (ICAO, September 15, 1995).

g. The change of medical condition must occur subsequent to MMI because MMI is the point in time when no further medical care is reasonably expected to improve the condition. *See* § 8-40-201(11.5), C.R.S. (2020); *City of Colorado Springs v. Industrial Claim Appeals Office*, 954 P.2d 637 (Colo. App. 1997); *Padilla v. Waste Mgmt./Bakers Rural Sanitation Inc.*, W.C. No. 4-443-129 (ICAO, Dec. 16, 2002); *See also Romey v. Golden Corral Littleton Englewood Inc.*, W.C. No. 4-9629098-001 (ICAO, Feb. 20, 2019); *Lara v, Accent Intermediary Servs.*, 4-768-911 (ICAO, June 28, 2011); *Michel v. Freedomroads Holding*, W.C. No. 4-747-473 (ICAO, Oct. 2, 2009); *Wix v. Pro Drivers*, W.C. No. 4-662-476 (ICAO, June 17, 2009); *Olson v. Acuff Homes, Inc.*, W.C. No. 4-505-094 (ICAO, July 12, 2004); *Plotner v. Boggs Trucking, Inc.*, W.C. No. 4-334-768 (ICAO, June 5, 2000); *Scriven v. City of Westminster*, W.C. No. 3-959-793 (ICAO, Nov. 21 1995). As found, the Claimant's testimony and arguments allege that her symptoms began on June 7, 2016, the date of her Botox injections. Dr. Johnson's theory of his discovery of the crepitation for the first time on July 11, 2016 depends on an improvement in the Claimant's ROM as a result of the Botox injections. But Dr. Johnson, as found, has not examined the Claimant for three years. As further found, the Claimant and her husband both testified that the Claimant's new symptoms of snapping, grinding, and cracking, which were audible to them, developed and have not changed since June 7, 2016. Dr. Johnson's opinion is based on the snapping scapula alone, and he testified that the Claimant had no other new diagnosis besides the snapping scapula since July 11, 2016. To the extent that the Claimant has had any worsening of condition, as found, the worsening occurred prior to June 28, 2016, the MMI date. As the worsening must occur after the date of MMI, the worsening testified to by the Claimant, her husband and Dr. Johnson is not an appropriate basis upon which to reopen the claim.

Burden of Proof

h. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012 A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistent, Claimant failed to meet her burden on reopening.

ORDER

IT IS, THEREFORE, ORDERED THAT:

Claimant's Petition to Reopen is hereby denied and dismissed.

DATED this 21st day of July 2021.

DIGITAL SIGNATURE

EDWIN L. FELTER, JR.
Administrative Law Judge

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts,**1525 Sherman Street, 4th Floor, Denver, CO 80203.** You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) that you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) that you mailed it to the above address for the Denver Office of Administrative Courts. **For statutory reference, *see* § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, *see* Rule 26, OACRP. You may access a form for a petition to review at** *http://www.colorado.gov/dpa/oac/forms-WC.htm*.

ISSUES

- Did Claimant prove QSART and thermographic testing on her left leg is reasonably necessary?

- Did Claimant prove the following medical benefits are reasonably needed to relieve the effects of her industrial injury:

  (1) modifications to her front door and/or outside ramp,

  (2) a walk-in bathtub,

  (3) 3-4 hours of daily home assistance.

STIPULATIONS

Respondents agreed to widen two doors to Claimant's laundry room and bedroom.

FINDINGS OF FACT

1. Claimant worked for Employer as a registered nurse. She fractured her right fibular head when she fell at work on May 29, 2017. The fracture eventually healed but she developed severe neuropathic pain in the right leg. She was ultimately diagnosed with CRPS based on QSART and thermographic testing performed by Dr. Tashof Bernton in January 2018. Dr. Bernton noted the large temperature asymmetry between Claimant's legs was "uncommon."

2. Claimant was put at MMI on May 30, 2018 and assigned a 34% whole person rating for CRPS and psychological sequelae of her injury. Claimant has been receiving maintenance care since MMI, primarily under the direction of Dr. Levi Miller.

3. Claimant has a relatively severe case of CRPS, which has resulted in substantial disability. At the time of MMI, she was using a 4-wheeled walker for all weight bearing activities. She progressively lost her ability to ambulate independently and became wheelchair-dependent. At present, she primarily relies on a motorized wheelchair for mobility, even inside her home. She supplements the motorized wheelchair with a manual wheelchair because some doorways in her home are too narrow. This includes the doorway to her bedroom, which in turn limits her access to the master bathroom.

4. An evaluation for home modifications was performed on April 4, 2018. At the time, Claimant could only ambulate short distances, and the evaluator determined a powered wheelchair was medically necessary to improve her mobility and allow ingress and egress from her home. Claimant already had a ramp to access the front door, although it is unclear when or how that was provided. The evaluator also recommended

installing a back entrance ramp, increasing the bathroom door width, installing a shower stall with a bench, grab bars, and handheld shower, and a raised toilet seat.

5. On August 23, 2018, Dr. Miller noted Claimant had recently received home modifications to make her home more accessible, including a walk-in shower and “improved access to her hot tub which provides benefit.” Claimant was performing a regular stretching program in her hot but and had received a gym membership with access aquatic therapy “which has been quite beneficial.”

6. On April 18, 2019, Dr. Miller documented “substantial diminishment in all ADLs, including difficulty dressing, bathing, cooking. She has difficulty climbing in and out of her hot tub, which does provide some benefit.”

7. Claimant periodically travels to South Padre Island in Texas to stay with her mother. The warmer climate lessens her pain, and Claimant’s mother has made several modifications to her condominium to improve accessibility. There is conflicting evidence regarding the exact frequency and duration of Claimant’s trips Texas. Claimant was in Texas approximately eight weeks from February 2019 to April 2019. Dr. Miller’s July 18, 2019 report indicates Claimant was planning to go to Texas until December 2019, but Claimant credibly testified she went there in mid-September and returned before Thanksgiving. She spent three months in Texas during 2020 despite COVID-related travel disruptions. Claimant testified she generally plans to spend the colder months in Texas. She wants to move there permanently, but such a move is not feasible for at least 1.5 years because of the family’s finances. Based on the evidence presented, the ALJ infers Claimant can be expected to spend at least 3-4 months per year staying with her mother in Texas, primarily during the colder part of the year.

8. At her December 19, 2019 appointment with Dr. Miller, Claimant asked about a walk-in bathtub because “she is able to control the temperature quite well and minimize her symptoms. She states she has a hot tub outside, however, access during cold weather is exceedingly challenging.” Claimant’s daily activities remained severely restricted, and she found that lying flat with her leg elevated provided the greatest relief. Significant examination findings included swelling and hypersensitivity to light touch in the right leg and vasomotor changes in the left leg. Dr. Miller ordered a walk-in bathtub “to help manage the patient’s lower extremity symptoms, particularly as related to temperature changes.”

9. On January 20, 2020, Dr. Miller wrote to Insurer and stated, “The patient struggles with temperature changes and argues that a walk-in bathtub would improve her symptoms and quality of life.”

10. Insurer denied the request for a walk-in tub based on a Rule 16 review by Dr. Jeffrey Raschbacher.

11. Dr. Miller evaluated Claimant on June 11, 2020 via telemedicine. Claimant complained the landing outside her front door was too small to maneuver. Dr. Miller requested an occupational therapy home evaluation.

12. A second DME home evaluation was conducted on August 10, 2020. Claimant described various mobility challenges and modifications she would like to have provided. The therapist opined, “Some of her concerns are warranted, however some are not.” The evaluator recommended installing a gate with self-closing hinges at the top of the staircase near the front door. The evaluator believed the ramps at the front and back door satisfied “the medical need for two accessible exits.” However, the configuration of the front entrance ramp prohibited Claimant from leaving her home independently, such that remodeling the front ramp to allow for safe powered wheelchair management was medically necessary. The evaluator also recommended widening the doors to the bedroom and laundry room to allow access with the powered wheelchair. Regarding basic ADLs, the therapist noted Claimant can stand independently for short periods but she is very unsteady. Her right knee gives out and “now her left knee is beginning to give out.” This was corroborated by a physical examination that showed “not functional” right leg strength and 4-/5 strength in the left leg. The therapist opined Claimant needs standby assistance to prevent falls. Claimant cannot shower independently, and neighbors come help her when her husband is not available. She can dress her upper body but has difficulty dressing her lower body. Some days Claimant just wears a bathrobe. She also has difficulty toileting because of transfer issues. Claimant is “bedbound” on many days because she cannot self-propel her manual wheelchair due to weakness and pain, and the motorized wheelchair cannot fit through the doorway to her bedroom. Because of Claimant’s severe limitations, the therapist recommended “3-4 hours of attendant care per day to assist with self-care and higher level activities.”

13. The therapist opined Claimant does not need a lift for her hot tub but would benefit from a session with an occupational therapist to learn techniques to transfer safely in and out of the hot tub. Photographs of the hot tub show it is accessed solely by small steps that appear to be approximately 30 inches wide. The present steps appear ill suited to an individual with severe disability. The hot tub is situated on a concrete patio with open area on all sides and no apparent structural impediments to installing more appropriate entry options.

14. Claimant had a telemedicine appointment with Dr. Miller on September 3, 2020. She could not access the heated pool because of the pandemic and was having “great difficulty” accessing her hot tub at home. Claimant reported ongoing severe right leg pain and reported she was now experiencing similar pain and coldness in the left leg. Dr. Miller noted, “The patient is concerned that her CRPS is spreading to the left lower extremity. She understands I cannot assess this remotely. She will return to the clinic for further evaluation.”

15. Claimant had an in-person appointment with Dr. Miller on December 3, 2020. Her condition had been worsening “for several months.” Claimant described 9/10 pain and “cries nightly.” The pain had expanded diffusely throughout her right leg, and she felt similar pain down the left leg. Dr. Miller noted Claimant was “frustrated with her home exercise program. She has not been able to go to the gym due to the Coronavirus pandemic, cannot access hot tubs. She has a hot tub at home however it is outside, she is unable to tolerate walking through the cold due to her condition, as well as climbing into the hot tub as she is at risk for fall. She would like a walk-in bathtub at home such that

she can do exercises." Examination of the left leg showed allodynia along the lateral calf. Dr. Miller also noted "no temperature or color asymmetries" between Claimant's legs[1] Dr. Miller saw no other potential pathology that could be responsible for the progressive symptoms into the left leg, such as radiculopathy, new trauma, or DVT. Dr. Miller stated, "As her condition appears to have a progressed to the left side, a QSART and thermogram will be ordered to further define her condition."

16. Dr. Miller also indicated he would write a separate letter addressing Claimant's continued request for a walk-in bathtub. However, his letter dated December 9, 2020, did not actually request a tub. Dr. Miller stated,

> [Claimant] has CRPS of the right lower extremity, now with concerning progression to the left lower extremity. She requests a walk-in bathtub for her home, which would require an extensive remodeling of her home. Workers' Compensation guidelines state, "large expensive purchases such as spas, whirlpools, and special mattresses are not necessary to maintain function." However, the patient has an outdoor hot tub. She described difficulty with safe access to this hot tub and describes the cold triggering worsening of her CRPS. As she has a hot tub, but struggles with access, an evaluation of accessibility for this hot tub is reasonable to improve safety to access the hot tub. She describes being able to do a home exercise program in the hot tub as the warm water improves her condition.

17. Dr. Miller also requested 3-4 hours per week of in-home assistance "to help with housekeeping." As justification, he cited Claimant's very limited tolerance for ambulation and other physical activities. Dr. Miller did not mention the attendant care services recommended by the DME evaluation.

18. Dr. Miller wrote to Insurer again on January 15, 2021 to address the recommendations made by the occupational therapist from the August 10, 2020 home evaluation. Dr. Miller agreed the following modifications are medically necessary: (1) remodeling the ramp to Claimant's front door to allow safe passage of a power wheelchair, (2) a gate with self-closing hinges to prevent Claimant from falling down the stairs when utilizing her front door; (3) widening the bedroom door and laundry room door to allow access for her wheelchair, and (4) use of a transportation company that allows for her powered wheelchair.

19. Dr. Kathy McCranie performed several Rule 16 peer reviews for Insurer. She recommended denial of the walk-in bathtub because she thought there were other ways Claimant could perform a home exercise program. She cited a provision in the MTGs stating large expense purchases a generally unnecessary to maintain function. Dr. McCranie was under the impression Claimant was moving to Texas was imminent, which further cemented her opinion regarding the tub. Dr. McCranie recommended denial of the

[1] This finding is interesting because one would typically expect appreciable differences between the affected and unaffected legs with single-limb CRPS. Given the documented abnormalities affecting Claimant's right leg throughout the record, this finding suggests new vasomotor abnormalities in the left leg.

CRPS testing because she concluded Claimant did not meet the Budapest Criteria. Dr. McCranie further opined that home care services were not reasonably necessary. Dr. McCranie recommended denial of ramp modifications. However, Respondents have reversed their position on that issue and their post-hearing brief states they are “offering to provide ramp modifications, as per Dr. Fillmore’s recent IME.”

20. Dr. Bernton evaluated Claimant on March 26, 2021. She reported intermittent pain in her left leg. Dr. Bernton noted global give-way weakness in both legs, making it difficult to assess strength. Dr. Bernton observed Claimant’s right leg was darker and palpably colder than the left leg. He provided no diagnosis related to the left leg. The primary treatment options Dr. Bernton considered reasonable were a spinal cord stimulator and/or intravenous ketamine infusion. He opined a walk-in bathtub was reasonable because he was under the impression Claimant could not access her hot tub. He also agreed Claimant needs in-home assistance of 3-4 hours per week “for cleaning” because of her “significant limitation with respect to her ADL’s.”

21. Claimant credibly testified she needs home assistance because she fears falling, and she falls once or twice per week. Claimant credibly testified she sometimes remains in bed for hours or all day because she cannot get up on her own. On those days, she restricts her fluid intake to avoid having to urinate. Because the doorway to her bedroom is too narrow to accommodate the motorized wheelchair, she uses a wheeled office-type chair to move around in the bedroom.

22. Claimant testified she had difficulty accessing her hot tub with the current steps. Claimant further testified she cannot access her hot tub when it rains because the powered wheelchair cannot be exposed to water. Claimant agreed her hot tub is in good working condition, is bigger than an indoor tub, and she can perform her leg exercises in it. Claimant testified she is ok with modifying access to the hot tub but she still wants the walk-in bathtub for those days when she is in Colorado and the weather is too cold or rainy to go outside.

23. Dr. Joseph Fillmore performed an IME for Respondents on April 12, 2021. Claimant reported left leg symptoms since 2018. She could sometimes get out her front door with her powered wheelchair. She had hired someone to help with cleaning every 2-3 weeks for 3-4 hours. She reported needing help to take a shower, cook, do laundry, and transfer to the toilet. Dr. Fillmore noted weakness in the right leg but normal strength in the other extremities He saw no swelling, color changes, temperature changes, or skin or nail changes in the left leg. Claimant had hypersensitivity in the left leg but no sensory deficits. Dr. Fillmore found she did not meet the Budapest Criteria for clinical CRPS and the testing recommended by Dr. Miller was not indicated. He recommended training by an occupational therapist to help Claimant learn to perform activities herself. He opined it would be more reasonable to explore ways to make her hot tub accessible, such as a lift, before installing a walk-in tub. Although Respondents previously declined a request for a hot tub lift, they are now willing to explore that option based on Dr. Fillmore’s opinions. Regarding the front door access issues, Dr. Fillmore recommended adjusting Claimant’s wheelchair footrest as recommended by the DME evaluator, modifying the ramp,

removing the threshold bump, and installing a gate at the top of the stairway before structural changes to the home would be considered reasonably necessary.

24. Dr. Fillmore discussed the criteria for diagnosing CRPS set forth in WCRP 17, Ex. 7, Section G.2. and G.3. of the MTGs. He testified a claimant must meet the Budapest Criteria before confirmatory tests listed in Section G.3 are considered appropriate. Dr. Fillmore testified he appreciated no significant color or temperature changes in Claimant's left leg at the IME. He conceded he measured the temperature in Claimant's legs by touch rather than with an infrared thermometer. He found Claimant had subjective symptoms in the left leg consistent with CRPS but did not have two or more objective signs referenced in the MTGs. As a result, he did not believe QSART and thermography were warranted. Dr. Fillmore opined in-home assistance is not reasonably needed at this time because Claimant has not yet worked with an occupational therapist to learn transfer and other self-care techniques. He also suggesting installing additional grab bars in Claimant's bathroom to help her transfer to the toilet and shower, with instruction from an occupational therapist regarding transfer techniques. He opined those measures may substantially reduce or eliminate the amount of attendant care Claimant might need. Dr. Fillmore opined removing the threshold bump, modifying her footrest, and working with an occupational therapist regarding how best to exit the front door would be reasonable to explore first before structurally modifying the front door. Dr. Fillmore also testified modifications to the outside hot tub, such as a lift, should first be explored in lieu of installing a walk-in tub.

25. Claimant proved the QSART and thermographic testing recommended by Dr. Miller to investigate possible spread of CRPS to her left leg is reasonably needed.

26. The findings and conclusions of the August 10, 2020 DME evaluation regarding Claimant's limitations and need for in-home attendant care are credible and persuasive. Claimant proved 3-4 hours per week of in-home attendant care is reasonably needed to relieve the effects of her injury and prevent further injury from falls.

27. Claimant proved modifications to the front entrance ramp and installation of a protective gate at the top of the stairway near the front entry are reasonably necessary.

28. Dr. Fillmore's opinions regarding the request for a walk-in bathtub and modification of Claimant's front door are credible and persuasive.

29. Claimant failed to prove a walk-in bathtub is reasonably necessary at this time.

30. Claimant failed to prove modifications to her front door are reasonably necessary at this time.

CONCLUSIONS OF LAW

A. QSART and thermography

The respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101(1)(a); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Medical benefits may extend beyond MMI if a claimant requires treatment to relieve symptoms or prevent deterioration of their condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Even where the respondents admit liability for medical benefits after MMI, they retain the right to challenge the compensability and reasonable necessity of specific treatment. *Hanna v. Print Expediters Inc*., 77 P.3d 863 (Colo. App. 2003). Where the respondents dispute the claimant's entitlement to medical benefits, the claimant must prove the requested treatment is reasonably necessary and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must prove entitlement to medical benefits by a preponderance of the evidence. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

Diagnostic testing is compensable if it has a reasonable prospect of diagnosing or defining the claimant's condition to suggest a course of further treatment. *Soto v. Corrections Corp*., W.C. No. 4-813-582 (February 23, 2012). As found, Claimant proved the QSART and thermographic testing recommended by Dr. Miller to investigate possible spread of CRPS to Claimant's left leg is reasonably needed. Respondents argue the testing is not reasonable because Claimant does not meet the "Budapest Criteria" regarding the left leg. For several reasons, the ALJ concludes slavish adherence to the Budapest Criteria is not appropriate in this case.

First, the ALJ does not interpret the MTGs to invariably require fulfillment of the Budapest Criteria as a prerequisite to diagnostic *testing*. The MTGs emphasize the importance of "objective testing" to avoid "over-diagnosing" CRPS. Meeting the Budapest Criteria allows the claimant to begin "*treatment* with oral steroids and/or tricyclics, physical therapy, a diagnostic sympathetic block, and other treatments." (Emphasis added). Second, significant temperature changes have been a consistent vasomotor marker of CRPS in Claimant's right leg. But the severity of CRPS in the right leg makes it difficult to assess the temperature of the left leg simply by touching both legs. Claimant's left leg may be warmer than the right, but still colder than would be expected in a healthy limb. Additionally, palpable temperature changes may not be detectable in early stages of CRPS. *See* CRPS MTGs, § E.1.f.ii. Third, Claimant has exhibited clinical signs consistent with the Budapest Criteria on various occasions. Multiple providers have noted allodynia in the left leg. Dr. Miller documented vasomotor changes in the left leg on December 19, 2019, and the occupational therapist found left leg weakness (4-/5) in August 2020. The ALJ is not persuaded by Dr. Fillmore's opinion that Claimant must exhibit sufficient signs to meet the Budapest Criteria simultaneously at a single evaluation merely to qualify for testing.

In any event, the MTGs are primarily intended to guide medical providers and facilitate quick and efficient delivery of medical benefits without litigation. The ALJ may consider the MTGs as an evidentiary tool but is not bound by them when determining if requested medical treatment is reasonably necessary. Section 8-43-201(3); *Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (January 25, 2011). Claimant has severe CRPS in the right leg. Dr. Miller has been treating Claimant for over three years, and was sufficiently concerned by Claimant's clinical presentation in December 2020 to request testing of the left leg. The ALJ sees no persuasive reason to deny Claimant's treating physician the additional data he believes he needs "to further define her condition" and evaluate treatment options.

B. In-home attendant care services

In her opening statement and post-hearing brief, Claimant indicated she is seeking an order for 3-4 hours of attendant care services as recommended by the August 2020 DME evaluation. Although Dr. Miller and Dr. Bernton recommended 3-4 hours per week of "housekeeping," Claimant has not requested an award of housekeeping services. As a result, this Order will only address attendant care.

Home health or attendant care services are a compensable medical benefit if they relieve the effects of the injury and are directly associated with the claimant's physical needs. *Bellone v. Industrial Claim Appeals Office*, 940 P.2d 1116 (Colo. App. 1997); *Atencio v. Quality Care, Inc*., 791 P.2d 7 (Colo. App. 1990). Such services may encompass assisting the claimant with activities of daily living, including personal hygiene. *Kraemer & Sons v. Downey*, 852 P.2d 1286 (Colo. App. 1992) (assistance with activities such as eating, bathing, preparing for bed, showering, and turning in bed to prevent bedsores); *Suetrack USA v. Industrial Claim Appeals Office*, 902 P.2d 854 (Colo. App. 1995) (assistance getting out of bed, walking, and maintaining hygiene).

As found, Claimant proved by a preponderance of the evidence the 3-4 hours per day of attendant care recommended by the August 10, 2020 DME evaluation is reasonably needed to relieve the effects of her injury. Claimant's ability to perform basic ADLs such as dressing, toileting, and bathing is severely limited by the effects of her injury. The limitations documented in the DME report are credible and the conclusions regarding Claimant's need for attendant care services are persuasive. The findings and conclusions of the DME evaluation are corroborated by Claimant's generally credible testimony. It is particularly troubling that Claimant avoids drinking liquids on many days because she has such difficulty toileting without assistance. Her repeated falls while attempting to stand or walk even short distances put Claimant at significant risk of additional injuries. Although training with an occupational therapist and some of the additional modifications recommended by Dr. Fillmore might lessen Claimant's need for assistance in the future, they do not to address her immediate needs. Nothing prohibits Respondents from seeking to modify the award of attendant care if circumstances change. In the meantime, Claimant requires the attendant care to satisfy her basic physical needs and minimize the risk of further injury.

C. Front ramp modifications and safety gate

The persuasive evidence shows such modifications are reasonably necessary to relieve the effects of Claimant's injury and prevent further injuries. Dr. Fillmore agreed with Dr. Miller and the DME evaluator about modifying the front ramp leading and installing a safety gate at the top of the staircase near the front door.

D. Walk-in bathtub

Claimant failed to prove a walk-in tub is reasonably necessary at this time. Although access to a hot water environment is reasonably necessary to allow Claimant to perform exercises and alleviate pain, it is not reasonable to jump immediately to a major bathroom remodel project without first exploring relative costs and feasibility of improving access to her existing hot tub. Claimant's trepidation about using the small steps into the hot tub is reasonable. But at a minimum that issue could be improved by installing a larger set of steps with a handrail. A hot tub lift is another potentially feasible option, as discussed by Dr. Fillmore. Dr. Miller also recommended improving access to the hot tub in his December 9, 2020 letter, and Claimant herself requested a hot tub lift in August 2020. Although Respondents previously denied the request to improve access to the hot tub, they have now abandoned that position based on Dr. Fillmore's recent recommendations. The weather-related access issues are mitigated by Claimant's frequent travels to Texas during "the colder months." The ALJ is also mindful that Claimant wants to relocate to Texas permanently. Although such a move is not imminent because of finances, it is a legitimate factor to consider when evaluating a request for major structural changes to her current home.

E. Front door modification

Claimant failed to prove modifications to her front door are reasonably necessary at this time. Claimant provided no contractor evaluations or quotes addressing the structural requirements/feasibility and/or relative costs of this work. Depending on the construction of Claimant's home, moving the front door may be a relatively minor undertaking, or may require major structural changes. These factors are significant to determining whether the modifications are reasonable. Additionally, no physician or evaluator has recommended such an accommodation. The DME evaluation recommended installing a gate at the basement stairs for safety, remodeling the ramp, and shortening the footrest of her wheelchair to allow better access. Dr. Miller agreed with the request for ramp modifications. Dr. Fillmore recommended ramp modification, gate installation, footrest shortening, and removal of the threshold bump to help Claimant access through her front door before structural change7s to the home would be considered reasonably necessary. Finally, Claimant can enter and exit the home through the back door, and no persuasive evidence was presented to explain why changes could not be made to allow exit from the back yard. Based on the evidence presented, Claimant has not proven structural changes to the front door are reasonably necessary at this time.

ORDER

It is therefore ordered that:

1. Insurer shall cover QSART and thermographic testing of Claimant's left leg as requested by Dr. Miller.

2. Insurer shall cover 3-4 hours per day of in-home attendant care, consistent with the recommendations of the August 10, 2020 DME report.

3. Insurer shall cover modifications to Claimant's bedroom door and laundry room door, per their stipulation at hearing.

4. Insurer shall provide modifications to Claimant's front door ramp and install a safety gate at the top of the staircase near the front door as recommended by Dr. Miller and the DME evaluation.

5. Claimant's request for a walk-in bathtub is denied and dismissed.

6. Claimant's request for modifications of the front door to her home is denied and dismissed.

7. All issues not decided herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: July 21, 2021

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-142-536-001

ISSUE

1. Whether Claimant established by a preponderance of the evidence that the Decedent sustained a compensable occupational disease arising out of the course of his employment with Employer, entitling Claimant and her children to death benefits.

FINDINGS OF FACT

1. Decedent was a procurement director for Employer and worked at Employer's Mineral Road office in Arapahoe County, Colorado (the "Mineral Facility"). Decedent passed away on May 2, 2020, due to complications resulting from COVID-19. (Ex. 9).

2. Claimant is the widow of Decedent. Claimant and Decedent had two children who were both minors at the time of Decedent's death. Claimant and the minor children are dependents of the Decedent pursuant to section 8-41-501 of the Act.

3. On March 6, 2020, Claimant and the children left for a vacation in Mexico. Decedent did not accompany Claimant and the children on the trip. As of March 6, 2020, Decedent, Claimant, and their children were in their normal states of health, and none were exhibiting signs of any acute illness. Claimant and the children returned from Mexico late at night on March 13, 2020, or early in the morning on March 14, 2020. Claimant testified that, while she was on vacation, Decedent reported to her that he was short of breath on March 10, 2020, when riding his bike.

4. Decedent had multiple sclerosis and was receiving semi-annual infusion treatments for this condition. He was scheduled to undergo an infusion treatment on March 20, 2020. As a result of his condition, Decedent was immunosuppressed and considered high-risk for COVID-19. (Ex. I).

5. On March 12, 2020, in anticipation of his upcoming infusion appointment, Decedent emailed his one of his physicians at UC Health inquiring whether he should postpone his infusion given the onset of COVID. Decedent indicated he was not sick at that time and had not been around anyone who had been sick to his knowledge. The following day, the provider responded that infusions were not being canceled or postponed unless the patient had a fever. (Ex. H).

6. Between March 14, 2020, and March 16, 2020, Decedent began experiencing symptoms consistent with COVID-19, including cough and runny nose.

7. When Claimant returned from Mexico on March 14, 2020, the Decedent was tired, with running nose, congestion, and sneezing. The Decedent's symptoms waxed and waned over the next few days.

8. On March 18, 2020, Decedent saw his primary care provider, Andy Fine, M.D., reporting a recent cough with pain. Dr. Fine's records are ambiguous as to whether Decedent had a fever. Dr. Fine diagnosed Decedent with a viral infection, but no COVID-19 test was performed. (Ex. I).

9. On March 20, 2020, Decedent underwent his scheduled infusion treatment at Immunoe Health Centers. The records from this date of treatment indicated Decedent's temperature was measured 13 times between 8:40 a.m. and 12:30 p.m., ranging between 96.7°F and 97.3° F. (Ex. J).

10. On March 22, 2020, Decedent was seen at UC Health and diagnosed with a viral upper respiratory infection. Decedent reported he had been experiencing cough and cold symptoms for approximately 7 days and that the symptoms had begun the previous Monday (i.e., March 16, 2020). Decedent reported he had not had a fever, chest pain or shortness of breath. Decedent was not tested for COVID-19 at this visit, but was advised to self-quarantine, and to follow up with his primary care provider if he developed a fever, shortness of breath or chest pain. (Ex. H).

11. On March 24, 2020, Decedent had a telehealth appointment with a nurse practitioner at Dr. Fine's office and reported nasal congestion, cough, nausea, and loss of taste and smell. Decedent reported he had no fever, and that the symptoms had begun approximately one week earlier. (Ex. I).

12. On March 25, 2020, Decedent was seen at the UC Health Highlands Ranch Hospital. Decedent reported he had been ill since March 16, 2020, with a dry cough, pain, and a fever to 99°F. He reported he felt much worse after his infusion on March 20, 2020. Decedent was admitted for observation, treatment, and COVID-19 testing. (Ex. I).

13. On March 26, 2020, Decedent was diagnosed with an acute lower respiratory tract infection due to SARS-Cov-2, with a positive COVID-19 test. Decedent remained hospitalized and his condition deteriorated until, on May 2, 2020, Decedent died due to acute renal failure and COVID-19 infection. (Ex. 2, 9).

14. The ALJ finds it more likely than not that Decedent began exhibiting symptoms consistent with COVID-19 between March 14, 2020, and March 16, 2020, and likely contracted the virus sometime between February 29, 2020, and March 14, 2020.

DECEDENT'S WORKPLACE AND EMPLOYMENT

15. Decedent typically worked nine hours per day, five days per week. On Mondays, Tuesdays, Thursdays and Fridays, Decedent worked at the Mineral Facility. On Wednesdays, Decedent typically worked at Employer's facility located in Broomfield, Colorado. On March 13, 2020, due to the onset of the coronavirus pandemic, Decedent began working remotely, and did not return to either the Mineral Facility or the Broomfield location after that date.

16. As the procurement director, Decedent supervised a team of ten or eleven individuals, five of whom worked at the Mineral Facility, and the remainder worked at

different locations. The Mineral Facility is a 407,526 square foot office building that is divided into different sections for Employer's different business units. Lisa H[Redacted], one of Decedent's co-workers and a member of his work team, testified that the Mineral Facility was capable of housing 5,000 employees, although the number of individuals actually working at the facility is unknown.

17. The Mineral Facility is divided into nine sectors (each designated with a state name) which house different business units. Decedent's business unit was housed in the "Iowa" sector, in the northwestern portion of the facility. The procurement department in which Decedent worked was located in an area generally known as "Russ's Place" located within the Iowa sector. Russ's Place is a 5,864 square foot area that is walled-off from the other departments with floor-to-ceiling walls, and accessible through two doors. Russ's Place contained approximately 54 cubicle spaces, approximately 55-60% of which were occupied. (Ex. O. and H[Redacted] Testimony). From this information, the ALJ infers that approximately thirty employees regularly worked in Russ's Place. Individuals who worked in Russ's Place generally used restrooms located outside Russ's Place in the Iowa sector.

18. Ms. H[Redacted] testified that employees from other business units rarely entered Russ's Place, and that Decedent would periodically hold meetings with his work team or vendors in a conference room. However, Ms. H[Redacted] was not sure if any such meetings took place in February or March 2020.

19. Ms. H[Redacted] described the ventilation system at the Mineral Facility as "not very good" based on inconsistent temperatures and a sewage-type smell often present in Russ's Place.

STATE OF THE COVID-19 PANDEMIC

20. In early March 2020, the COVID-19 pandemic was in its initial stages. Testing for COVID-19 in Colorado began on February 28, 2020. The first presumptive positive COVID-19 test in Colorado was confirmed on March 5, 2010. On March 10, 2020, Governor Polis verbally declared a disaster emergency due to the presence of COVID-19 in Colorado. As of March 11, 2020, the Colorado Department of Public Health and Environment (CDPHE) identified 33 presumptive-positive COVID-19 cases in the state, and one indeterminate test result. (Ex. B).

21. On March 12, 2020, CDPHE issued Public Health Order 20-20, which, among other things, restricted visitor access to certain health care facilities. In that Order, CDPHE indicated that there were 39 known presumptive positive cases of COVID-19 in Colorado as of March 12, 2020. (Ex. C).

22. On March 13, 2020, the President of the United States declared a National Emergency due to COVID-19. (Ex. D).

23. On March 16, 2020, CDPHE issued Updated Public Health Order 20-22, which closed bars, restaurants, and other facilities. On March 19, 2020, CDPHE revised Public Health Order 20-22 extending the closure requirements to other facilities. In that order,

CDPHE indicated that there were 131 known presumptive cases of COVID-19 in Colorado as of March 16, 2020. (Ex. D). As of March 18, 2020, there were 183 presumptive positive cases of COVID-19 in Colorado. (Ex. E).

INCIDENCE OF POTENTIAL COVID-19 IN WORKPLACE

24. Ms. H[Redacted] testified that other than Decedent, none of the individuals on Decedent's procurement team contracted, were hospitalized for, or died of COVID-19. Ms. H[Redacted] testified that one other employee at the Mineral Facility contracted COVID-19 and died, although she did not know the employee's identity or when the employee began exhibiting symptoms. She also testified that other employees contracted COVID-19, but was not aware of when they tested positive for COVID-19 or began exhibiting COVID-19 symptoms. No credible evidence was admitted indicating when these other employees contracted COVID-19.

25. Zubin I[Redacted] works for Employer at the Mineral Facility as a director of software engineering, and testified at hearing. Mr. I[Redacted] was not a part of Decedent's work team, worked in a different department. His cubicle was located in the Iowa sector near, but not in Russ's Place. Mr. I[Redacted] testified he would normally see Decedent in the hallway at the Mineral Facility, and that they typically used the same restroom facility. Mr. I[Redacted] contracted COVID-19 in late March 2020, and tested positive on March 24, 2020. Mr. I[Redacted] testified that at least one and possibly up to three of his subordinates also tested positive for COVID-19. Mr. I[Redacted] did not identify the individuals who tested positive for COVID-19, when they tested positive for COVID-19, or whether he was aware of any contact those individuals had with Decedent.

26. Mr. I[Redacted] testified that another employee returned from a trip to Japan on February 14, 2020, and after her return emailed Mr. I[Redacted] indicating she had a fever and aches. Mr. I[Redacted] advised the employee to stay home and not come to work. The employee apparently returned to work and during a conference room meeting at the Mineral Facility on March 2, 2020, coughed, and sneezed. Decedent was not present at the March 2, 2020-meeting. Mr. I[Redacted] did not know if the other employee tested positive for COVID-19 or contracted the virus. The other employee did not testify at hearing, and no credible evidence was offered to indicate that she contracted COVID-19 or transmitted the virus to any other individual.

27. Mr. I[Redacted] did not recall having any contact with the Decedent after the March 2, 2020-meeting. Mr. I[Redacted] did not work with Decedent in person during February or March 2020, and did not have any reason to work with the Decedent in Russ's Place during that time frame. He testified that during February and March 2020, if he had contact with Decedent, it would have been transient interactions passing each other in the hallway but did not recall any specific contact. Mr. I[Redacted] testified he began working from home toward the end of the week of March 2, 2020, after the March 2, 2020-meeting. The ALJ infers that Mr. I[Redacted] did not work in person at the Mineral Facility after Friday, March 6, 2020.

DECEDENT'S POTENTIAL COVID-19 EXPOSURES

28. Based on the expert testimony, discussed below, most individuals who become infected with COVID-19 develop symptoms between 2 and 14 days after becoming infected, although the incubation period may be longer. Given that Decedent developed symptoms consistent with COVID-19 between March 14 and March 16, 2020, the presumed date of infection was between February 29, 2020, and March 14, 2020. During this time, the general public was not observing later-established COVID-19 protocols such as social distancing and mask-wearing.

29. Between February 29, 2020, and March 14, 2020, Decedent engaged in the following activities:

a. On Saturday, February 29, 2020, Decedent made credit card purchases at Deseret Books Company, Chick-Fil-A, King Soopers, and Buffalo Wild Wings. (Ex. N).

b. On Sunday, March 1, 2020, Decedent made credit card purchases at Pet Supplies Plus and King Soopers. (Ex. N).

c. On Monday, March 2, 2020, Decedent worked at Employer's Mineral Facility, and had a chiropractic visit at Vitaly Chiropractic. (Ex. G).

d. On Tuesday, March 3, 2020, Decedent worked at Employer's Mineral Facility.

e. On Wednesday, March 4, 2020, Decedent worked at Employer's Broomfield facility and made a credit card purchase at a Wendy's restaurant. (Ex. N).

f. On Thursday, March 5, 2020, Decedent worked at Employer's Mineral Facility, and made credit card purchases at a Bahama Buck's restaurant and a Starbucks. (Ex. N).

g. On Friday, March 6, 2020, Decedent worked at Employer's Mineral Facility and made credit card purchases at a Rolling Smoke barbeque restaurant, a King Soopers grocery store and a Sam's Club. (Ex. N). Also on March 6, 2020, Decedent drove his family to the airport.

h. On Saturday, March 7, 2020, Decedent ate at a Snooze restaurant and made credit card purchases at Jesse's Smokin' Nola Restaurant, DSW Park Meadows, Best Buy, Starbucks and two different King Soopers grocery stores. (Ex. N).

i. On Sunday, March 8, 2020, Decedent made credit card purchases at a Yogurtland restaurant, a King Soopers and a RedBox DVD rental location. (Ex. N).

j. On Monday, March 9, 2020, Decedent worked at Employer's Mineral Facility.

k. On Tuesday, March 10, 2020, Decedent worked at Employer's Mineral Facility, and made a credit card purchase at a Chick Fil A restaurant. (Ex. N).

l. On Wednesday, March 11, 2020, Decedent worked at Employer's Broomfield facility, and made a credit card purchase at a Burger King restaurant and a McDonald's. (Ex. N).

m. On Thursday, March 12, 2020, Decedent worked at Employer's Mineral Facility, made credit card purchases at PetSmart, a King Soopers, and a McDonald's. Also on March 12, 2020, Decedent received chiropractic treatment at Vitaly Chiropractic. (Ex. N).

n. On Friday, March 13, 2020, Decedent began working remotely and was not physically present at any of Employer's facilities. Decedent made credit card purchases at two different King Soopers and a McDonald's. (Ex. N).

o. In the early morning of March 14, 2020, Claimant and the children returned from their trip to Mexico, and Decedent picked them up from the Denver airport.

p. On Saturday, March 14, 2020, Decedent made credit card purchases at King Soopers, Sam's Club and a Baskin Robbins. (Ex. N).

30. In discussing Exhibit N (Claimant and Decedent's joint credit card statements), Claimant testified that credit card charges associated with the card ending in 1961 were made using Decedent's credit card. Some charges on Exhibit N are automated, recurring, or online charges that were not made in person by Decedent. Other charges were made personally by Decedent. Claimant testified that Decedent "never" ate alone at restaurants, and did not always go into a grocery store when his card was charged, because they used "Click List" and other times people would pick things up for them. Claimant testified that Decedent did go to Snooze restaurant for brunch with an acquaintance from the National MS Society, and that the individual with whom he dined did not contract COVID-19. Because the general public was not observing COVID-19 protocols during this time frame and restaurants and other retail stores had not been closed, the ALJ finds that it is more likely than not that Decedent had contact with the general public between February 29, 2020, and March 14, 2020, at grocery stores, retail stores and restaurants. Although it is possible that some of the purchases were made through drive-throughs or utilizing "Click List," the evidence does not establish that all purchases were made without contact with others.

TESTIMONY OF SANDER ORENT, M.D.

31. Sander Orent, M.D., was admitted as an expert in occupational and environmental medicine and internal medicine, and testified at hearing. Dr. Orent testified that the presumed period of exposure prior to the onset of symptoms (i.e., the "incubation period"), was thought to be 2 to 14 days, but may be considerably longer, and averages between 4.6 to 5 days. However, no test exists which can identify the precise date of exposure. He testified that COVID-19 may be spread by breathing, speaking or other respiration, and does not require coughing, sneezing or other expectoration, especially in areas where the air is not moving well. Dr. Orent also testified coronavirus may be "aerosolized" after toilet flushing. Dr. Orent also expressed that COVID-19 may be transmitted by asymptomatic individuals when community spread is occurring. Dr. Orent agreed that in March 2020, COVID-19 testing was not yet readily available.

32. Dr. Orent opined that Decedent most likely contracted coronavirus in the course of his employment with Employer because, in his opinion, community spread was not occurring during the time in which Decedent was likely exposed to the virus, and it was more likely that Decedent contracted the virus from a coworker at the Mineral Facility. Dr. Orent stated that, although he did not know who was on Decedent's work "team" or what his team interactions were, "I do know that other people in his workplace with whom he had contact became ill." Dr. Orent further testified that it was unlikely that Decedent contracted COVID-19 in the community because Decedent's contacts with the general public during the relevant time frame were limited to a single trip to a grocery store and a trip to a Sam's Club.

33. Dr. Orent also testified that as of March 10, 2020, there were no reported cases of coronavirus in the state of Colorado, and that "community spread was not occurring at the time that [Decedent] was infected with the coronavirus." Dr. Orent acknowledged that there may have been COVID-19 in Colorado at that time, but asserted that there were no reported cases. Consequently, Dr. Orent reasoned, the probability that Decedent contracted coronavirus in the community was minimal.

34. The ALJ does not find Dr. Orent's opinion to be credible or persuasive because many of the fundamental assumptions upon which his opinion is based were not supported by the evidence or were speculative.

35. Contrary to Dr. Orent's assertion, no credible evidence was offered that Decedent was in contact with other employees who contracted COVID-19 during the period of February 29, 2020, through March 12, 2020 (Decedent's last date working in one of Employer's facilities).

36. The only individual positively identified as having contracted COVID-19 was Mr. I[Redacted]. However, no credible evidence was offered indicating he had any contact with Decedent in March 2020. Mr. I[Redacted] and Ms. H[Redacted] also testified that other unidentified employees contracted COVID-19. However, no credible evidence was admitted that showed when these individuals contracted COVID-19 or whether Decedent was in contact with these individuals during the period in which he is presumed to have

contracted COVID-19. No members of Decedent's immediate work team contracted COVID, and no credible evidence was presented from which it could be inferred that Decedent contracted COVID-19 directly from a COVID-positive co-worker.

37. Dr. Orent testified that the employee who traveled to Japan was an "index case," and indicated in his report that the individual "ended up in an intensive care unit on a ventilator but did survive." No credible evidence was admitted at hearing to establish that this employee contracted COVID-19 at any point in time, and the ALJ cannot infer based on the admitted evidence that the individual was COVID-19-positive. Moreover, no credible evidence was offered to indicate that Decedent was in contact with this individual at any point after her return from Japan in mid-February 2020.

38. Dr. Orent's assumption that there was no community spread and no reported cases in Colorado as of March 10, 2020, is also not supported by the evidence. Although there were a small number of reported cases (i.e., 33) as of March 11, 2020, because there was limited testing occurring at that time, which was limited to only symptomatic individuals, it is not possible to conclude with any degree of probability the level of transmission that was occurring between February 29, 2020, and March 14, 2020.

39. Dr. Orent assumed that during Decedent's presumed incubation period, his only excursions into the community were one trip to a grocery store and one trip to a Sam's Club. Dr. Orent wrote that Decedent "did not go anyplace else, would go to work, and then come home." As found, during this time frame, Decedent visited multiple grocery stores, retail stores and restaurants, during which the ALJ infers that he would have had some level of contact with members of the community other than fellow employees in the workplace.

40. Based primarily on an interview with Claimant, Dr. Orent opined that the Mineral Facility was a "cube farm" in which the ventilation was "very poor." Dr. Orent's assumptions regarding the ventilation in the Mineral Facility are speculative. Dr. Orent did not review any data regarding the Mineral facility's ventilation system, did not test the ventilation system, did not have any information regarding the filters, maintenance, or installation of the system and made no inspection of the system. Other than anecdotal statements regarding the temperature and odors at the Mineral Facility, Dr. Orent did not offer any evidence that the air flow at the Mineral Facility was diminished, or otherwise created conditions conducive to the transmission of the virus. While Dr. Orent did discuss the very small size of the coronavirus and testified its size "allows the virus to stay in the air," and that the virus may be transmitted in areas where the air is not moving well, he offered no cogent, persuasive explanation as to how the building ventilation system purportedly contributed Decedent contracting COVID-19. The ALJ does not find credible Dr. Orent's opinion that the Mineral Facility's ventilation system supports the proposition that Decedent contracted COVID-19 in the workplace.

TESTIMONY OF ROBERT WATSON, M.D.

41. Robert Watson, M.D., was admitted as an expert in public health, occupational medicine, and epidemiology, and testified at hearing. Dr. Watson testified that the primary

transmission method of COVID-19 is respiratory droplets. Dr. Watson testified that the presumed transmission period for COVID-19 is 2 to 14 days before the appearance of symptoms. Dr. Watson explained that the employee who traveled to Japan would not be considered an "index case" because she was not known to be COVID-19 positive.

42. Dr. Watson testified that Dr. Orent's statement that there was no community spread in Colorado on March 10, 2020, was inaccurate, because by March 11, 2020, there were already 33 cases of known COVID-19 in Colorado, and that at that time there were serious concerns related to transmission by asymptomatic and pre-symptomatic individuals. At the time, testing was only being performed on symptomatic individuals. Dr. Watson testified that COVID-positive asymptomatic individuals can remain positive and transmit the virus for up to 21 days, and that greater than 50% of COVID-19 cases are transmitted by asymptomatic individuals. Dr. Watson credibly testified that although there were 33 known cases, because of the presence of asymptomatic and pre-symptomatic cases, the sparsity of testing, and a high false-negative testing rate, the actual number of COVID-19 cases at that time was unknown.

43. Dr. Watson credibly testified that based on the information available, it is not possible to state with any degree of medical probability where or when Decedent contracted COVID. He indicated Decedent's risk of exposure of the coronavirus was equal in workplace and outside the workplace. Dr. Watson noted that the date of Decedent's positive COVID-19 test – March 25, 2020 – does not assist in determining the date on which he contracted the virus. He testified that in late February and early March 2020, prevention mechanisms, such as masks and social distancing were not in place.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

OCCUPATIONAL DISEASE

The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation,* 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by § 8-40-201(14), C.R.S., as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause, and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

This section imposes additional proof requirements beyond those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the workplace than in everyday life or in other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The onset of a disability occurs when the occupational disease impairs the claimant's ability to perform his regular employment effectively and properly or when it renders the claimant incapable of returning to work except in a restricted capacity. *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App.2002); *In re Leverenz*, W.C. No. 4-726-429 (ICAO, July 7, 2010). Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Anderson*, *supra*.

The claimant bears the burden to prove by a preponderance of the evidence that the hazards of the employment caused, intensified, or aggravated the disease for which compensation is sought. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000); *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). The question of whether the claimant has proven causation is one of fact for the ALJ. *Faulkner v. Industrial Claim Appeals Office, supra*. In this regard, the mere occurrence of symptoms in the workplace does not require the conclusion that the conditions of the employment were the cause of the symptoms or that such symptoms represent an aggravation of a preexisting condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO Aug. 18, 2005). Once claimant makes such a showing, the burden shifts to respondents to establish both the existence of a non-industrial cause and the extent of its contribution to the occupational disease. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

Claimant has failed to establish by a preponderance of the evidence that Decedent contracted an occupational disease arising out of the course and scope of his employment with Employer. As found, Decedent was likely positive for COVID-19 when he began exhibiting symptoms on March 14, 2020, or March 16, 2020, and likely contracted the virus between February 29, 2020, and March 14, 2020. Although at least one fellow employee contracted COVID-19 in March 2020, the evidence failed to credibly establish that Decedent's COVID-19 could be fairly traced to his employment as the proximate cause.

Assuming Decedent became symptomatic on March 14, 2020, Decedent had numerous opportunities to interact with not only co-workers but the general public during the 14 days prior to March 14, 2020, including trips to grocery stores, restaurants, and retail stores. The ALJ credits the testimony of Dr. Watson that, given the possibility of non-symptomatic transmission, it is impossible to know with any degree of probability where Decedent contracted the virus. Accordingly, Claimant has failed to establish by a preponderance of the evidence that Decedent contracted an occupational disease arising out of the course of his employment with Employer.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that Decedent contracted a compensable occupational disease arising out of the course of his employment with Employer. Claimant's claim is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the

Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 22, 2021

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

I. Determination of Claimant's AWW.

II. Whether Claimant proved by a preponderance of the evidence she is entitled to additional temporary partial disability ("TPD") benefits from 2/28/2020 to 4/28/2020 based on an increased AWW.

III. Whether Claimant proved by a preponderance of the evidence she is entitled to additional temporary total disability ("TTD") benefits from 04/29/2020 to 10/22/2020 based on an increased AWW.

IV. Whether Claimant proved by a preponderance of the evidence she is entitled to medical maintenance benefits.

V. Whether Claimant proved by a preponderance of the evidence she is entitled to an award of disfigurement benefits.

VI. Whether Claimant proved by a preponderance of the evidence penalties should be imposed pursuant to §8-43-304, C.R.S., §8-43-305, C.R.S., for alleged violations of §8-42-107, C.R.S., §8-42-105, C.R.S., WCRP Rule 5-5(E), WCRP Rule 6-2, and WCRP Rule 6-4.

FINDINGS OF FACT

1. Claimant worked for Employer as a nurse's aide.

2. Claimant sustained an industrial injury on February 27, 2020 when her right little finger was slammed in a fire door. Claimant immediately notified Employer of the injury and completed an incident report.

3. Employer filed its First Report of Injury on March 3, 2020.

4. Adjuster Colleen Kelly filed Insurer's first General Admission of Liability ("GAL") in this matter on May 13, 2020. The admitted AWW was $608.00.

5. As a result of the industrial injury, Claimant underwent finger surgery on April 29, 2020.

6. Insurer filed a second GAL on June 1, 2020 admitting for TTD benefits beginning April 29, 2020 and ongoing. The admitted AWW was $486.40. Respondents did not file

any supporting documentation regarding the lowered admitted AWW or any Petition to Modify.

7. Claimant earned $19.00/hour and $28.50/hour for overtime. The number of hours Claimant worked in a given week varied. Respondents paid Claimant on a weekly basis. Claimant earned a total of $5,927.50 between the pay periods ending 12/8/2019 and 2/9/2020, a total of 10 pay periods. Claimant worked but could not find the paystub for pay period 1/19/2020. $5,927.50 divided by nine weeks (pay periods) equals $658.61. Based on a review of the paystubs in Claimant's Exhibit 13, the ALJ finds an AWW of $658.61 is a fair approximation of Claimant's actual wage loss and diminished earning capacity. The TTD rate corresponding to an AWW of $658.61 is $439.09.

8. Claimant worked modified duty between 2/28/2020 and 4/28/2020. During the week of 2/24/2020 through 3/1/2020, Claimant's gross wages were $527.25. During the week of 3/9/ 2020 through 3/15/2020, Claimant's gross wages were $655.50. For the pay period 4/6/2020 through 4/12/2020 Claimant's gross wages were $641.25. The remainder of the weeks Claimant's earnings were equal to or greater than an AWW of $658.61 and no TPD benefits are owed. For the three weeks that Claimant earned less than her AWW of $658.61, $101.22 in TPD benefits are owed ($658.61 x 3 weeks = $1,975.83 less $1,824.00 paid = $151.83 x 2/3 = $101.22).

9. Claimant's authorized treating physician ("ATP"), Dr. Tomm VanderHorst, placed Claimant at maximum medical improvement ("MMI") on October 22, 2020. Her diagnosis included a crush injury of the right little finger; laceration of the right little finger; and neuroma digital nerve right little finger, status post radial nerve neurolysis with nerve wrapping. Dr. VanderHorst assigned 4% upper extremity impairment (2% whole person). Respondents have not filed a Final Admission of Liability or request for Division Independent Medical Examination ("DIME") in this matter.

10. The last TTD check Claimant received was check number 112169 dated October 2, 2020. This covered the TTD period of September 19, 2020 through October 2, 2020. As a result of the industrial injury, Claimant remained on work restrictions and did not work until after being placed at MMI by Dr. VanderHorst on October 22, 2020. On the date of MMI Dr. VanderHorst released Claimant to full duty.

11. The TTD benefits paid to Claimant after June 1, 2020 did not match either the first or second admitted AWW. Several TTD checks were paid to Claimant in the amount of $780.18 for a two-week period. This corresponds to a TTD rate of $390.09 that equates to an AWW of $585.13, which is neither of the admitted AWWs.

12. Based on an AWW of $658.61 and a TTD rate of $439.09, from April 29, 2020 through October 21, 2020 Claimant should have been paid $10,977.25 in TTD benefits. Claimant was paid $9,529.34 in TTD benefits, leaving a difference of $1,447.91 in TTD benefits owed.

13. Claimant filed an Application for Hearing ("AFH") on March 5, 2021, endorsing the issues of AWW, disfigurement, penalties, and other issues. Under penalties, Claimant wrote "Failure to timely file Final Admission of Liability and failure to pay PPD (WCRP 5-5E(1) and CRS 8-42-107." Under other issues Claimant wrote, "Adjust TTD/TPD paid on increased AWW; Interest on back due benefits; Grovers." (Exhibit 5, p. 11). Claimant did not attach additional documents further detailing the bases or dates of the alleged violations.

14. Claimant filed a Case Information Sheet ("CIS") on May 18, 2021 endorsing the following issues: Disfigurement; Penalties - Failure to timely file FAL; Failure to pay PPD; AWW; PPD; Interest on back due benefits; Adjust TTD/TPD for increased AWW; and Grovers. Claimant filed an Amended CIS on May 19, 2021 endorsing the same issues listed in the May 18, 2021 CIS. The CIS forms contain no reference to the rules or sections of the statute allegedly violated, or the dates of the alleged violations.

15. Hearing in this matter took place on May 25, 2021. Respondents did not appear for the hearing. At the start of the hearing, the ALJ found Respondents likely received notice of the hearing based on extensive evidence presented by Claimant. The ALJ thus proceeded with the hearing on the merits. The ALJ issued an Order to Show Cause on May 25, 2021 stating the ALJ would issue an order on the merits of the case unless Respondents, within 14 days of the date of the Order to Show Cause, showed good cause in writing for their failure to appear at the hearing. As of the date of this Findings of Fact, Conclusions of Law and Order, ("FFCL") no response had been filed by Respondents. The Order to Show Cause dated May 25, 2021 is incorporated herein by reference.

16. At the outset of the hearing, Claimant identified the following issues: AWW, disfigurement, adjustment of TTD and TPD based on an increased AWW, interest on back due benefits, PPD, failure to pay PPD, failure to file a FAL, unilateral decrease of AWW without any petition to modify, and unilateral termination of TTD without any petition to modify resulting in alleged penalties under §8-43-304, C.R.S., §8-43-305, C.R.S., §8-42-107, C.R.S., §8-42-105, C.R.S., WCRP Rule 5-5(E), WCRP Rule 6-2, and WCRP Rule 6-4.

17. Claimant submitted a post-hearing position statement in which she identified the following issues for determination, among others: whether Claimant proved penalties should be imposed pursuant to §8-43-304, C.R.S. and §8-43-305, C.R.S. for Respondents' alleged violations of:

a. WCRP Rules 6-2 and 6-4 due to Respondents unilateral decrease in the admitted AWW without filing a Petition to Modify;

b. Section 8-42-105(1), C.R.S for failing to pay TTD at the admitted rate.

c. Section 8-42-105(3), C.R.S for Respondents' unilateral termination TTD on 10/2/2020 without meeting the requirements of 8-42-105(3);

d. WCRP Rule 5-5(E) based on Respondents' failure to file a FAL within 30 days of receiving Claimant's MMI and impairment rating report; and

e. Section 8-42-107, C.R.S based on Respondents' failure to pay PPD benefits for Claimant's impairment rating.

18. Claimant credibly testified at hearing. Claimant testified that Respondents' failure to pay her PPD benefits as owed resulted in her borrowing money from her son and friends, seeking assistance from food banks and her church, falling behind on utility bill payments and asking for forbearance from her landlord for rent. Claimant was not able to give Christmas gifts to her family in 2020 because when she finally returned to work she had to work extra to pay off money borrowed. She continues to work overtime as well as extra 12 hour shifts when available in order to pay back the money she borrowed. Claimant testified became depressed having to borrow money from others, not being able to give Christmas gifts and having to work overtime and additional shifts to repay to others.

19. Claimant testified she continues to experience symptoms as a result of the industrial injury. Claimant wants to return to Dr. VanderHorst for further evaluation and possible consideration of physical therapy and injections.

20. Claimant proved by a preponderance of the evidence she is entitled to additional TPD and TTD benefits. Claimant's industrial injury resulted in disability and wage loss. Claimant is entitled to additional TPD based on an increase in her AWW. Claimant is entitled to additional TTD based on an increase in her AWW and TTD benefits owed yet not paid to Claimant for the period October 3, 2020 to October 22, 2020. There is no evidence indicating Claimant's TTD was properly terminated under §8-42-105(3)(a)-(d), C.R.S prior to Claimant being placed at MMI on October 22, 2020.

21. Claimant proved it is more probable than not she is entitled to a general award of maintenance medical benefits.

22. Claimant failed to plead the penalty allegations with specificity as required by Section 8-43-304(4), C.R.S.

23. Amidst discussion of preliminary matters, Claimant's presentation of evidence and discussion of other procedural matters, the ALJ did not observe Claimant's alleged disfigurement at hearing. As there is insufficient evidence regarding disfigurement, such issue, along with others not determined herein, is reserved for future determination.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

AWW

Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v.*

Vigil, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell*, 867 P.2d at 82. Where the claimant's earnings increase periodically after the date of injury the ALJ may elect to apply §8-42-102(3), C.R.S. and determine that fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability, not the earnings on the date of the injury. *Id.; see e.g. Burd v. Builder Services Group Inc*., WC 5-085-572 (ICAO, July 9, 2019) (determining that signing bonus claimant received when he began employment is not a "similar advantage or fringe benefit" specifically enumerated under §8-40-201(19)(b) and therefore cannot be added into claimant's AWW calculation); *Varela v. Umbrella Roofing, Inc.*, WC 5-090-272-001 (ICAO, May 8, 2020) (noting that a claimant is not entitled to have the cost or value of the employer's payment of health insurance included in the AWW until after the employment terminates and the employer's contributions end).

Claimant's hours and wages varied per week. As found, based on review of Claimant's paystubs, a fair approximation of Claimant's wage loss and diminished earning capacity is an AWW of $658.61.

TPD and TTD Benefits

To prove entitlement to TTD benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §§8-42-(1)(g) & 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S. requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

Section 8-42-106(1), C.R.S., provides for an award of TPD benefits based on the difference between the claimant's AWW at the time of injury and the earnings during the continuance of the temporary partial disability. In order to receive TPD benefits the claimant must establish that the injury caused the disability and consequent partial wage loss. §8-42-103(1), C.R.S.; *see Safeway Stores, Inc. v. Husson,* 732 P.2d 1244 (Colo. App. 1986) (temporary partial compensation benefits are designed as a partial substitute for lost wages or impaired earning capacity arising from a compensable injury).

As a result of her February 27, 2020 industrial injury, Claimant suffered disability and resultant wage loss. Claimant earned less than the AWW of $658.61 when working modified duty the weeks ending 3/1/202, 3/15/2020 and 4/12/2020. As found, Claimant is entitled to an additional $101.22 in TPD benefits for the three weeks Claimant earned less than her AWW of $658.61 ($658.61 x 3 weeks = $1,975.83 less $1,824.00 paid = $151.83 x 2/3 = $101.22).

Claimant is entitled to TTD benefits from April 29, 2020 to October 22, 2020, as she sustained a disability due to the industrial injuring, resulting in wage loss. Respondents have paid Claimant TTD from April 29, 2020 to October 2, 2020; however, certain payments of TTD were less than the AWW of $658.61.Additionally, Respondents ceased paying Claimant TTD benefits after October 2, 2020, when Claimant was not placed at MMI until October 22, 2020. There is no evidence in the record indicating the termination of TTD as of October 2, 2020 was pursuant to §8-42-105(3)(a)-(d), C.R.S. As found, based on an AWW of $658.61 and a TTD rate of $439.09, from April 29, 2020 through October 22, 2020 Claimant should have been paid $10,977.25 in TTD benefits. Claimant was paid $9,529.34 in TTD benefits, leaving a difference of $1,447.91 in TTD benefits owed.

Maintenance Medical Benefits

Section 8-42-101(1), C.R.S. requires the employer to provide medical benefits to cure or relieve the effects of the industrial injury, subject to the right to contest the reasonableness or necessity of any specific treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). The need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that the claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999); *Hastings v. Excel Electric*, WC 4-471-818 (ICAO, May 16, 2002).

To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App.

1995). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School District No.11*, WC No. 3-979-487, (ICAO, Jan. 11, 2012). Once a claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* WC 4-461-989 (ICAO, Aug. 8, 2003). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 919 P.2d 701, 704 (Colo. App. 1999).

Claimant proved it is more probable than not future medical treatment will be reasonably necessary to relieve the effects of her industrial injury or prevent further deterioration of her condition. Claimant continues to experience symptoms as a result of the industrial injury and a follow-up evaluation by Dr. VanderHorst would determine if physical therapy and/or injections are indicated.

Penalties

Section 8-43-304(1), C.R.S. provides that a daily monetary penalty may be imposed on any employer who violates articles 40 to 47 of title 8 if "no penalty has been specifically provided" for the violation. Section 8-43-304(1), C.R.S. is thus a residual penalty clause that subjects a party to penalties when it violates a specific statutory duty and the General Assembly has not otherwise specified a penalty for the violation. *See Associated Business Products v. Industrial Claim Appeals Office*, 126 P.3d 323 (Colo. App. 2005).

Whether statutory penalties may be imposed under §8-43-304(1) C.R.S. involves a two-step analysis. The ALJ must first determine whether the insurer's conduct constitutes a violation of the Act, a rule or an order. Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational argument in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* WC 4-187-261 (ICAO, Aug. 2, 2006). There is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

Section 8-43-305, C.R.S. provides that every day during which any employer or insurer fails to comply with any lawful order of an administrative law judge, the director, or the panel or fails to perform any duty imposed by articles 40 to 47 of title 8 shall constitute a separate and distinct violation.

As found, Claimant failed to plead her several penalty allegations with specificity as required by Section 8-43-304(4), C.R.S. Section 8-43-304(4), C.R.S., provides that in "any application for hearing for a penalty pursuant to subsection (1) of this section, the applicant shall state with specificity the grounds on which the penalty is being asserted." The failure to state the grounds for penalties with specificity may result in dismissal of the penalty claims. *In re Tidwell*, WC 4-917-514-03 (ICAO, Mar. 2, 2015).

The purposes of the specificity requirement are to both: (1) provide notice of the basis of the alleged violation so the putative violator can have an opportunity to cure the violation and (2) provide notice of the legal and factual bases of the claim for penalties so that the violator can prepare its defense. *See Major Medical Insurance Fund v. Industrial Claim Appeals Office*, 77 P.3d 867 (Colo. App. 2003); *Davis v. K Mart,* WC 4-493-641 (ICAO, Apr. 28, 2004). The notice aspect of the specificity requirement is designed to protect the fundamental due process rights of the alleged violator to be "apprised of the evidence to be considered, and afforded a reasonable opportunity to present evidence and argument in support of" its position. *In re Tidwell*, WC 4-917-514-03 (ICAO, Mar. 2, 2015). Nevertheless, the statute does not prescribe a precise form for pleading penalties and an ALJ may consider the circumstances of the individual case to ascertain whether the application for hearing was sufficiently precise to satisfy the statute. *See Davis v. K Mart*, WC 4-493-641 (ICAO Apr. 28, 2004).

The AFH form promulgated by the OAC instructs the party completing the form to "Describe with specificity the grounds on which a penalty is asserted, including the order, rule or section of the statute allegedly violated, and the dates on which you claim the violation began and ended."

In the section regarding penalties, Claimant's AFH solely states "Failure to timely file Final Admission of Liability and failure to pay PPD (WCRP 5-5E(1) and CRS 8-42-107." At hearing and in her post-hearing position statement, Claimant identified multiple penalties pursuant to Section 8-43-304, C.R.S. and Section 8-43-305, C.R.S. for Respondents' alleged violations of WCRP Rules 6-2 and 6-4 (a unilateral decrease in admitted AWW without filing a Petition to Modify); Section 8-42-105(1), C.R.S. (failing to pay TTD benefits at the admitted rate); Section 8-42-105(3), C.R.S. (unilateral termination of TTD); WCRP Rule 5-5(E) (failure to file a FAL within 30 days as required); and Section 8-42-107, C.R.S. (failure to pay PPD benefits for Claimant's impairment rating). As found, Claimant's AFH, CIS and Amended CIS contain no mention of Sections 8-43-304 and 305, C.R.S., Section 8-42-105(1), C.R.S, Section 8-42-105(3), C.R.S., or WCRP Rules 6-2 and 6-4. There is no mention in the AFH or CIS forms of an alleged unilateral decrease in the admitted AWW, failure to pay TTD at the admitted rate, or unilateral termination of TTD. Furthermore, there is no reference to any dates of the alleged violations.

While Claimant did include WCRP Rule 5-5(E)(1) and Section 8-42-107, C.R.S. in the AFH, she failed to identify Section 8-43-304(1), C.R.S. as the statutory penalty section for which she sought penalties. A similar situation was addressed by ICAO in *Jordan v. Rio Blanco Water Conservancy District,* W.C. No. 4-937-000 (ICAO, June 23, 2015). In *Jordan,* the claimant sought penalties pursuant to Section 8-43-304(1) for multiple alleged violations, including the employer's or insurer's failure to submit an injury report to the director within 10 days pursuant to Section 8-43-101 and Section 8-43-103. The ALJ resolved that penalties could not be assessed pursuant to Section 8-43-304(1), as that statute was not referenced by either the clamant or the respondents in the AFH, CIS or at the outset of the hearing. The Panel affirmed the ALJ, holding that the claimant's pleading regarding a penalty claim was deficient to the extent it did not identify Section 8-43-304(1) as the statutory penalty section for which she sought a penalty pertinent to the employer's or insurer's failure to submit an injury report to the director within 10 days pursuant to Section 8-43-101 and Section 8-43-103. The Panel noted that the Act includes a variety of penalty sections, some overlapping, that may be subject to different defenses and standards. The Panel reasoned, "[a] statement of the particular penalty remedy sought is a critical element of the grounds for the penalty claim. The direction that the specific grounds for the penalty be identified in the application would include a specification of the penalty sought to be applied." *Id*.

Here, Claimant's failure to identify the general penalty provision pursuant to which she is seeking penalties, the dates for the alleged violations, and multiple rules and sections of statutes of the alleged violations in the AFH renders the pleading deficient in terms of the required specificity. Claimant's general penalty allegations did not provide Respondents with adequate notice of both the factual and legal bases of the claims and defenses to be adjudicated. Moreover, as Respondents did not appear for hearing, it cannot be found Respondents tried the penalty issues by consent. Despite Respondents' failure to appear for hearing after likely receiving notice and failing to respond to the Order to Show Cause, the ALJ cannot disregard the due process considerations requiring sufficient notice of issues to be adjudicated in the first instance. Accordingly, Claimant's claim for penalties shall be dismissed, without prejudice.

ORDER

1. Claimant's AWW is $658.61.

2. Respondents shall pay Claimant past due TPD benefits totaling $101.22.

3. Respondents shall pay Claimant past due TTD benefits totaling $1,447.91.

4. Claimant is entitled to a general award of medical maintenance care.

5. Insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. Claimant's claim for penalties is denied, without prejudice.

7. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to

the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 22, 2021

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Whether Claimant proved by a preponderance of the evidence she is entitled to an increase in average weekly wage ("AWW") for purpose of determining her permanent partial disability ("PPD") award.

FINDINGS OF FACT

1. Claimant has worked for Respondent-Employer as a police officer since 2017.

2. Claimant sustained an admitted industrial injury on July 28, 2018 during a motor vehicle accident. Claimant sustained contusions to her chest, two rib fractures, and was ultimately diagnosed with cervical facet dysfunction. She underwent medial branch blocks and right C4-C7 radiofrequency neurotomies on August 19, 2020 and September 16, 2020.

3. Respondent-Employer filed a General Admission of Liability ("GAL") on December 6, 2019 admitting for medical benefits and an AWW of $1,266.85.

4. Respondent-Employer filed a second GAL on September 22, 2020 admitting for temporary total disability ("TTD") and an AWW of $1,266.85.

5. Claimant's was placed at maximum medical improvement ("MMI") on January 15, 2021 with 13% whole person impairment. The impairment report of Dr. Frederic Zimmerman dated January 12, 2021 notes Claimant rated herself as 75% pain fee and that Claimant was working full duty without difficulty. Claimant was not assigned any permanent work restrictions.

6. Respondent-Employer filed a Final Admission of Liability ("FAL") on February 8, 2021 admitting for 13% whole person impairment. The FAL reflected an AWW of $1,266.85 and a TTD rate of $844.56. The FAL noted the following calculation for permanent partial disability ("PPD") benefits: "400 weeks x $844.56 x 1.52 x 13% = $66,754.02."

7. Claimant credibly testified at hearing. Claimant regarding multiple promotions and salary increases she received between the date of injury and the date Claimant was placed at MMI. Claimant testified at hearing that her promotions were based on her length of service with the police department.

8. At the time of the industrial injury, Claimant was a Police Officer Grade 3. Claimant was promoted to a Police Officer Grade 2 in approximately July 2019 and to a Police Officer Grade 1 in approximately July 2020. Each promotion came with a salary

increase. Claimant was a Police Officer Grade 1 at the time she was placed at MMI and continued to work as a Police Officer Grade 1 as of the date of hearing.

9. Claimant testified she does not anticipate receiving any demotions and anticipates potentially further moving up the ranks in the police department.

10. During the course of Claimant's claim, Claimant had a little over two weeks of lost time in late August and early September 2020. At that time, she was working as a Police Office Grade 1. Respondent-Employer paid Claimant salary continuation during that period.

11. Claimant's earning capacity at the time of her injury was that of a police officer grade-two. Review of the wage records for the several pay periods after Claimant's promotion to Police Officer Grade 2 are consistent with weekly earnings of $1,267.47. As a Police Officer Grade 1, Claimant averaged weekly earnings of $1,850.73 from July 19, 2020 to January 30, 2021

12. The ALJ finds that an AWW based upon Claimant's earnings around time of injury, $1,267.47, is a fair approximation of Claimant's diminished earning capacity.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

AWW

Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell*, 867 P.2d at 82. Where the claimant’s earnings increase periodically after the date of injury the ALJ may elect to apply §8-42-102(3), C.R.S. and determine that fairness requires the AWW to be calculated based upon the claimant’s earnings during a given period of disability, not the earnings on the date of the injury. *Id.*

In *Campbell,* the claimant suffered an industrial injury in 1979 and sustained three periods of temporary disability. The claimant’s AWW was greater at the time of each subsequent period of disability. The Colorado Court of Appeals concluded that it would be manifestly unjust to calculate the claimant’s “disability benefits in 1986 and 1989 on her substantially lower earnings in 1979.” *Id*. at 82. The Colorado Court of Appeals reasoned that, to fairly compensate for the claimant’s loss of actual income, her AWW should be determined based on her earnings at the time of each period of disablement. *Campbell v. IBM Corp.*, *supra.*

In *Pizza Hut v. ICAO*, 18 P.3d 867 (Colo. App. 2001), the claimant was injured while earning $110 per week as a delivery driver. The claimant completed his education and assumed work as a nurse earning $458 per week. The Colorado Court of Appeals considered whether the claimant’s PPD should be calculated based on the claimant’s AWW on the date of injury, or his earnings as a nurse at the date of MMI. Relying on the ALJ's discretionary authority contained in § 8-42-102(3), the court concluded that because PPD benefits compensate for loss of future earning capacity, it was proper for the ALJ to consider "the potential impact that claimant's impairment and his physical restrictions may have on his future nursing career." *Id*. at 869. Because the record contained evidence of permanent physical restrictions and the claimant's testimony concerning "possible limitations" he might face, the court concluded the ALJ did not abuse his discretion "in determining that the higher wage earned at the time of MMI more fairly compensates claimant for his future loss of earnings." *Id*. at 870.

Unlike temporary indemnity benefits, which are meant to compensate a claimant for actual wage loss, PPD benefits are instead based on the potential loss of future earning capacity. *Duran v. Industrial Claim Appeals Office*, 883 P.2d 477 (Colo.1994); *see also Hussion v. Industrial Claim Appeals Office*, 991 P.2d 346 (Colo. App.1999) (TTD benefits compensate employee for lost wages, while PPD benefits compensate for the loss of future earning capacity). The Workers' Compensation system is premised on the assumption that the future earning capacity of a partially disabled worker will be less than that of a non-disabled worker. *Business Ins. Co. v. BFI Waste Systems of North America*, Inc. 23 P.3d 1261, 1265 (Colo. App. 2001).

Claimant contends an AWW calculated based on her earnings at the time of MMI will result in the most fair and appropriate PPD award. Respondents argue that Claimant’s post-injury wage increases alone are insufficient to warrant divergence from the default method of calculating AWW as of the date of injury. The ALJ agrees.

While the courts have upheld an ALJ’s increase of AWW for PPD purposes based on post-injury pay increases, this has generally occurred in the context of substantial evidence establishing potential limitations of the claimant’s future earning capacity. *See, e.g., Pizza Hut v. ICAO, supra*; *Phyllis Martinez v. City of Grand Junction*, W.C. No. 4-528-390 (ICAO Sept. 30, 2003) (affirming an ALJ’s increase of AWW based on two post-injury pay increases in light of substantial evidence that the industrial injury resulted in permanent physical restrictions and ongoing pain that interfered with the claimant’s performance of duties); *Dan Waalkes v. The Salvation Army*, W.C. No. 4-533-879 (ICAO, May 21, 2003) (affirming an increase in AWW for purposes of calculating PPD benefits when the ALJ found Claimant had permanent lifting restrictions that limited the performance of his current job and may require him to seek less demanding employment).

Here, Claimant did not offer any evidence as to potential future loss of earnings. Claimant is not subject to any permanent restrictions nor did she testify to any ongoing symptoms that could potentially limit Claimant’s future earning capacity. Claimant received salary continuation during the claim. She has continued working full duty as a police officer and has moved up the ranks in the department and anticipates continuing to do so. There is insufficient evidence that calculating Claimant’s AWW based on earnings on the date of injury does not result in a fair approximation of Claimant’s diminished earning capacity. As found, a fair approximation of Claimant’s diminished earning capacity is an AWW of $1,267.47.

ORDER

1. Respondent shall admit for PPD benefits consistent with an AWW of $1,267.47.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 23, 2021

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether Claimant has produced clear and convincing evidence to overcome the Division Independent Medical Examination (DIME) opinion of Linda Mitchell, M.D. that he reached Maximum Medical Improvement (MMI) on May 6, 2019 for his March 18, 2019 "B[Redacted]" injury.

2. If Claimant fails to overcome Dr. Mitchell's DIME opinion, a determination of the appropriate repayment schedule for an overpayment to Claimant by Respondents B[Redacted] and P[Redacted] in the amount of $32,750.79.

3. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period May 6, 2019 through March 21, 2021.

4. Whether Respondents H[Redacted] and Federated have established by a preponderance of the evidence that Claimant was responsible for his termination from employment under §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. (collectively "termination statutes") and is thus precluded from receiving indemnity benefits.

5. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Partial Disability (TPD) benefits for the period March 22, 2021 until terminated by statute.

STIPULATION

Respondents B[Redacted] and P[Redacted] agreed with Claimant that, if he fails to overcome Dr. Mitchell's DIME opinion, he received an overpayment of disability benefits in the amount of $32,750.79.

FINDINGS OF FACT

1. On April 18, 2018 Claimant suffered an admitted lower back injury while working as a plumber for H[Redacted] in WC No. 5-075-625-002. He received medical treatment at UC Health from Authorized Treating Physician (ATP) Melinda A. Gehrs, M.D.

2. Claimant underwent a lumbar spine MRI on May 15, 2018 that revealed multilevel spondylitic changes. The MRI specifically showed a posterior broad-based disc protrusion at L5-S1 with impingement upon the traversing left S1 nerve root and mild central canal stenosis and moderate bilateral neural foraminal narrowing. The imaging also reflected a posterior broad-based disc protrusion at L4-5 with a central annular tear, facet hypertrophic changes, and moderate bilateral neural foraminal narrowing with moderate canal stenosis. The findings were most significant at the L4-5 level.

3. On May 25, 2018 H[REDACTED] filed a General Admission of Liability (GAL) acknowledging an Average Weekly Wage (AWW) of $1,790.57 and a corresponding Temporary Total Disability (TTD) rate of $948.15. Claimant received TTD benefits for the period April 24, 2018 until May 20, 2018.

4. On May 21, 2018 Claimant returned to modified duty with H[Redacted] pursuant to an offer of modified employment signed by Dr. Gehrs. Claimant worked 40 hours per week and earned $12.00 per hour for a total of $480.00 each week. Dr. Gehrs assigned restrictions of one-pound lifting, no bending and frequent position breaks.

5. Claimant received Temporary Partial Disability (TPD) benefits for the period May 21, 2018 until June 19, 2018.

6. On June 19, 2018 Claimant resigned his employment with H[Redacted]. He began working for B[Redacted] as an Inspector on July 2, 2018.

7. On June 27, 2018 H[Redacted] filed a Petition to Modify, Terminate, or Suspend Compensation on the basis that Claimant voluntarily terminated his employment effective June 19, 2018. The Petition to Terminate noted Claimant was receiving TPD at the rate of $948.15 per week. H[Redacted] requested termination of benefits as of June 20, 2018.

8. Claimant did not respond to the Petition to Terminate. On July 23, 2018 the Division of Workers' Compensation (DOWC) approved H[Redacted]'s Petition to Terminate as of the date of the Petition. H[Redacted] filed a General Admission of Liability (GAL) on July 30, 2018 terminating TPD benefits.

9. On October 23, 2018 Claimant experienced the sudden onset of increased lower back pain after getting up for work and using the bathroom at home. Claimant was transported to the emergency room at UC Health. He underwent a repeat lumbar spine MRI that revealed worsened disc extrusions at L5-S1 with increased spinal canal stenosis, most severely affecting the left lateral recess with possible impingement of the left S1 nerve root.

10. Allan Nanney III, M.D. reviewed Claimant's lumbar MRIs and noted they demonstrated a "significant amount of stenosis to the descending S1 nerve on the left from a disc herniation." He recommended a microdiscectomy on the left at L5-S1. On October 26, 2018 Claimant underwent a left L5-S1 hemilaminotomy, medial facetectomy, and microdiscectomy with Dr. Nanney as a result of his April 18, 2018 H[Redacted] injury.

11. After a period of recovery and modified duty, Claimant resumed full-time field work in November 2018 as an inspector with B[Redacted]. His work restrictions included no lifting in excess of 15 pounds and no bending, twisting or use of ladders.

12. Claimant reported increased pain to Dr. Gehrs at his January 9, 2019 and February 20, 2019 appointments. Nevertheless, he continued to work full duty with restrictions of no ladder use and no crawling.

13. On February 1, 2019 Claimant underwent another lumbar MRI. On February 6, 2019 Richard Skurla, M.D. noted the imaging revealed a recurrent L5-S1 disc herniation compressing the S1 nerve root that was less severe than prior to the October 26, 2018 surgery.

14. On March 18, 2019 Claimant suffered a lower back injury while working for B[Redacted] in WC No. 5-103-884-002. He specifically fell through loose floorboards and his left leg dropped about 18-24 inches to the dirt below. The incident jarred Claimant's leg and back.

15. Claimant's pay records reflect that at the time of the March 18, 2019 incident he earned $28.28 per hour and worked 40 hours each week for B[Redacted].

16. Claimant subsequently received medical treatment through ATP Concentra Medical Centers. On March 20, 2019 Nancy Strain, M.D. remarked that Claimant suffered a large jolting action on March 18, 2019, but did not fall down. She concluded that Claimant aggravated his prior back condition. Claimant was unable to work because of pain and required a cane to walk.

17. After the March 18, 2019 incident at B[Redacted] Claimant underwent another lumbar MRI. The MRI did not reflect any significant changes from the February 1, 2019 MRI.

18. On March 26, 2019 Claimant visited ATP for the H[Redacted] claim Dr. Gehrs at UC Health for an examination. Dr. Gehrs noted that Claimant would follow-up with Concentra regarding the March 18, 2019 incident. She detailed that Claimant's pain was not in a new location and was somewhat worse. However, even prior to the March 18, 2019 incident he needed an epidural injection. Dr. Gehrs subsequently explained that Claimant had two "insurance companies dealing with the injury but I think most of his issues are really related to his first injury and this should be taken care of through that one. MRI did not worsen after the second injury."

19. On April 19, 2019 Claimant presented to Bryan A. Castro, M.D. Claimant reported that prior to the March 18, 2019 incident his pain level was 4-6/10 and he was able to work. However, after the B[Redacted] incident Claimant's pain level increased to 6-8/10 and he was unable to work. Dr. Castro reviewed the February 1, 2019 and March 21, 2019 MRIs and noted a small recurrence of a disc herniation on both, but there was no substantial worsening revealed on the March 21, 2019 MRI. He noted microdiscectomy decompression revision surgery could be a consideration, but recommended obtaining a repeat MRI with contrast to determine if the possible recurrent disc herniation actually constituted scar tissue.

20. Respondent H[Redacted] retained Jeffrey J. Sabin, M.D. for an independent medical examination. Dr. Sabin provided three reports, including a record review dated February 28, 2019, an evaluation dated April 1, 2019 and an additional record review dated April 26, 2019. In his first report, Dr. Sabin concluded, "it would appear that the patient's low back condition and need for further treatment are necessary and related to the April 2018 incident." He stated that if the MRIs revealed recurrent disc herniation at L5-S1, then epidural steroid injections would be reasonable. If the injections did not benefit Claimant, then a re-exploration and repeat hemilaminotomy and partial discectomy should be performed. After his final record review Dr. Sabin explained that "there is no medical record evidence of any intervening or new injury and therefore worsening of the disc herniation would be a naturally occurring event related back to the 04/18/18 alleged lifting incident."

21. On May 6, 2019 Claimant returned to Dr. Gehrs for an evaluation. She remarked that Claimant "has considerable pain issues limiting his ability to work which started after a second accident. Currently he is working through Concentra to try to bring him down to his pain level prior to this second accident." Dr. Gehrs commented that Claimant required surgical intervention under the April 18, 2018 H[Redacted] claim that was necessary even prior to his March 18, 2019 B[Redacted] injury.

22. Katherine F. McCranie, M.D. provided physiatry treatment through Concentra. After reviewing the medical records she issued a report dated August 30, 2019 and determined that recommendations for surgical evaluation and injections would have been the same without the B[Redacted] incident. Dr. McCranie commented that chiropractic care, massage and acupuncture had been recommended by Concentra under the March 18, 2019 B[Redacted] claim. She described the B[Redacted] incident as a temporary aggravation and noted that Claimant's pain ratings had been essentially unchanged compared to his visits just prior to the March 18, 2019 event. Dr. McCranie did not anticipate permanent impairment for the March 18, 2019 injury because it was a temporary aggravation. She summarized that Claimant's symptoms, medical recommendations and additional restrictions resulted from the expected progression of the admitted April 18, 2018 H[Redacted] claim.

23. On September 5, 2019 Allison M. Fall, M.D. performed an independent medical examination at the request of B[Redacted]. Dr. Fall noted that, although Claimant reported increased pain after the March 18, 2019 incident, his area of pain remain unchanged. Furthermore, the March 2019 MRI did not reveal any changes compared to the February 2019 MRI. Dr. Fall determined that, while Claimant may have had a temporary exacerbation of his symptoms on March 18, 2019, the event did not constitute a substantial intervening injury and the need for treatment was related to the April 18, 2018 H[Redacted] work injury. She noted that, although Claimant was taken off work after the March 18, 2019 incident, there was no objective evidence of a substantial worsening of his condition.

24. On September 13, 2019 Gretchen L. Brunworth, M.D. performed a medical record review at the request of H[Redacted]. She noted that Claimant's symptoms

worsened after the March 18, 2019 incident but an MRI did not reflect any change in pathology. Dr. Brunworth determined that surgery and injections were contemplated prior to the March 18, 2019 incident and it was “most reasonable” to perform the injections and surgery under the 2018 H[Redacted] claim.

25. As a result of the March 18, 2019 B[Redacted] injury Claimant attended 11 appointments with his authorized treating physicians at Concentra through February 12, 2020. Medical records from Concentra for the period March 18, 2019 through February 12, 2020 reveal that Claimant’s condition remained unchanged.

26. On February 11, 2020 Dr. Gehrs issued a report stating that Claimant had been unable to work since his March 18, 2019 B[Redacted] incident. She remarked that his status was unlikely to change until additional treatment pending a Workers’ Compensation hearing could be provided.

27. On April 27, 2020 Claimant’s ATP for the B[Redacted] claim Troy Manchester, M.D. determined that he had reached MMI as of February 12, 2020. Dr. Manchester noted that Claimant did not warrant any permanent impairment as a result of his March 18, 2019 B[Redacted] injury and released him to full duty employment. Respondents B[Redacted] and P[Redacted] filed an initial Final Admission of Liability (FAL) on May 8, 2020 consistent with Dr. Manchester’s MMI and permanent impairment determinations.

28. Between July 7, 2020 and September 9, 2020 Claimant returned to Boulder Neurological and Spine Associates for evaluation on three occasions with Physician’s Assistant Brian Bixler. PA Bixler recommended conservative treatment including injections, physical therapy and possibly a repeat EMG.

29. On September 23, 2020 Claimant visited John Dorman, M.D. at Boulder Neurological and Spine Associates for a surgical evaluation. Dr. Dorman recommended surgery in the form of a multi-level fusion and repeat discectomy.

30. Claimant objected to the May 8, 2020 FAL and sought a Division Independent Medical Examination (DIME). On November 11, 2020 Linda Mitchell, M.D. performed the DIME. In her December 1, 2020 report Dr. Mitchell concluded that Claimant reached MMI for the B[Redacted] claim on May 6, 2019. Dr. Mitchell also reasoned that Claimant did not suffer any permanent impairment as a result of the March 18, 2019 B[Redacted] claim.

31. Dr. Mitchell detailed the rationale for her MMI determination. She recounted that Claimant developed a left S1 radiculopathy following his April 18, 2018 H[Redacted] work injury. She noted that the injury resulted in an emergent L5-S1 microdiscectomy on October 26, 2018. Dr. Mitchell explained that Claimant’s condition did not change as a result of the March 18, 2019 B[Redacted] injury. She detailed:

> The distribution of [Claimant's] symptoms, examination findings, and MRI findings did not change after the injury of 03/18/19. His treatment plan has not changed because of the injury of 03/18/19. He does require further evaluation and treatment for the injury of 04/18/18, and the injury of 03/18/19 has not changed that. His permanent impairment has not changed due to the injury of 03/18/19.

32. Claimant received TTD benefits under the B[Redacted] claim until Dr. Manchester determined that Claimant reached MMI on February 12, 2020. However, DIME Dr. Mitchell concluded that Claimant had reached MMI several months earlier on May 6, 2019. Claimant received TTD benefits in the amount of $32,750.79 during the period May 6, 2019 through February 12, 2020.

33. Respondents B[Redacted] and P[Redacted] filed an amended FAL on November 24, 2020 consistent with Dr. Mitchell's MMI and impairment determinations. The B[Redacted] Respondents also asserted an overpayment of $32,750.79 for TTD benefits paid to Claimant after the MMI date of May 6, 2019.

34. On December 28, 2020 Claimant underwent a lumbar discectomy at L5-S1 in an attempt to remedy the radiculopathy he was experiencing in his lower back and left leg. The surgery was authorized by H[Redacted].

35. On March 17, 2021 Claimant returned to ATP Dr. Gehrs for an evaluation for his April 18, 2018 H[Redacted] injury. Dr. Gehrs recounted that Claimant had been receiving treatment for his H[Redacted] claim when he fell about 18-24 inches through a floor on March 18, 2019 while working for B[Redacted]. He suffered an immediate increase in lower back pain and had been unable to work since the incident. Claimant received treatment through Concentra for the injury. Because of the December 28, 2020 lumbar discectomy Claimant received medications and underwent physical therapy. Dr. Gehrs noted that Claimant's surgeon liberalized his work restrictions but did not want him to lift more than 20 pounds.

36. Claimant testified at the hearing in this matter. He explained that after he recovered from his December 28, 2020 repeat discectomy surgery, he was released with sufficient restrictions that allowed him to return to work. On March 22, 2021 Claimant began working as a city inspector for the Town of F[Redacted]. Claimant remarked that he earned an hourly wage of $28.85 and worked 40 hours per week. He had work restrictions of no climbing and no lifting in excess of 20 pounds.

37. Claimant continues to receive medical treatment as a result of his April 18, 2018 H[Redacted] lower back injury. On May 7, 2021 Claimant underwent a lumbar MRI that revealed "increased facet arthropathy related listhesis at L5-S1, unchanged multilevel degenerative changes with foraminal impingement at L4-L5 and L5-S1 levels, and unchanged spinal stenosis at L4-L5 level."

38. Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Mitchell that he reached MMI on May 6, 2019 for his March 18,

2019 B[Redacted] injury. Specifically, the record reflects that Claimant has failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Mitchell's MMI determination is incorrect. Claimant has failed to demonstrate that Dr. Mitchell improperly applied the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides*) or otherwise clearly erred in concluding that he reached MMI on May 6, 2019.

39. Initially, on March 18, 2019 Claimant suffered a lower back injury while working for B[Redacted] in WC No. 5-103-884-002. He specifically fell through loose floorboards and his left leg dropped about 18-24 inches to the dirt below. Claimant attended 11 appointments with his authorized treating physicians at Concentra through February 12, 2020. Medical records from Concentra for the period March 18, 2019 through February 12, 2020 reveal that Claimant's condition remained unchanged. On April 27, 2020 Claimant's ATP Dr. Manchester determined that he had reached MMI for the B[Redacted] claim as of February 12, 2020. Dr. Manchester noted that Claimant did not warrant any permanent impairment as a result of his March 18, 2019 injury and released him to full duty employment.

40. On November 11, 2020 DIME Dr. Mitchell concluded that Claimant had reached MMI for the B[Redacted] claim on May 6, 2019 with no permanent impairment. She summarized that the distribution of Claimant's symptoms, physical examination findings, and MRI results did not change after his March 18, 2019 injury. Although Claimant still required further evaluation and treatment for the April 18, 2018 H[Redacted] claim, he did not require additional medical care related to the March 18, 2019 incident.

41. The opinions of multiple physicians support Dr. Mitchell's determination that Claimant's condition did not change after the March 18, 2019 incident and he reached MMI on May 6, 2019. ATP for the H[Redacted] claim Dr. Gehrs detailed that Claimant's pain was not in a new location and was somewhat worse. By May 6, 2019 Dr. Gehrs explained that Claimant would require surgical intervention under the April 18, 2018 H[Redacted] claim because surgery was necessary even prior to his B[Redacted] injury. Furthermore, Dr. Fall determined that, while Claimant may have had a temporary exacerbation of his symptoms, there was no substantial intervening injury on March 18, 2019 and the need for medical treatment was related to the April 18, 2018 H[Redacted] work injury. Finally, Dr. Brunworth determined that surgery and injections were contemplated prior to the March 18, 2019 B[Redacted] incident and it was "most reasonable" to perform the injections and surgery under the 2018 H[Redacted] claim.

42. DIME Dr. Mitchell concluded that Claimant reached MMI on May 6, 2019 for the March 18, 2019 B[Redacted] claim. Claimant has failed to produce sufficient evidence that Dr. Mitchell's determination was clearly erroneous. Moreover, the medical records and persuasive opinions of multiple physicians support Dr. Mitchell's MMI determination. Accordingly, Claimant reached MMI on May 6, 2019 for the B[Redacted] claim.

43. Respondents B[Redacted] and P[Redacted] agreed with Claimant that, if he failed to overcome Dr. Mitchell's MMI determinations, he received an overpayment in the

amount of $32,750.79 in disability benefits. Claimant's rate of TTD under his H[Redacted] claim of April 18, 2018 is $948.15 per week or $3,792.60 every four weeks. Moreover, on March 22, 2021 Claimant began working as a city inspector for F[Redacted]. Claimant testified that he earns $28.85 per hour and works 40 hours each week. Claimant thus earns weekly wages of about $1154.00 or $4616.00 every four weeks before taxes.

44. Although Respondents B[Redacted] and P[Redacted] seek recovery of the overpayment in the amount of at least $500.00 per month, the record reveals the requested amount would be excessive. Therefore, based on Claimant's current earnings, a monthly payment of $300.00 is appropriate. Claimant has not presented evidence that $300.00 per month would be unreasonable, unaffordable, or injurious. Accordingly, Claimant shall repay Respondent $300.00 per month in overpaid TTD benefits until recovered in full.

45. Nevertheless, Claimant will also likely receive a permanent impairment payout from the H[Redacted] claim of approximately $4,705.56 for each 1% whole person impairment. Moreover, if Claimant reaches a settlement with H[Redacted] or permanent impairment is due under that claim, he will receive, or be entitled to request, a lump sum award. If Claimant receives a lump sum award pursuant to the H[Redacted] claim, he shall pay Respondent P[Redacted] the equivalent of the lump sum or the remainder due of $32,750.79 in a lump sum, whichever is less, within 30 days of receipt of payment from Respondents H[Redacted] and I[Redacted]. If there remains an amount due following payment of this lump sum to P[Redacted], then Claimant shall continue to pay a monthly amount of $250.00 in reimbursement for the $32,750.79 overpayment until paid in full.

46. Claimant has demonstrated that it is more probably true than not that he is entitled to receive TTD benefits for the period May 6, 2019 through March 21, 2021. Initially, the persuasive evidence demonstrates that Claimant was responsible for his termination when he resigned from H[Redacted] on June 19, 2018. However, Claimant suffered a worsening of condition subsequent to his termination that caused a wage loss. Specifically, the record reveals that Claimant's condition continued to worsen after his termination of employment and prevented him from earning wages.

47. Initially, Claimant was responsible for his termination from employment with H[Redacted]. On June 19, 2018 Claimant resigned from his position as an plumber with H[Redacted]. He began working for B[Redacted] as an inspector on July 2, 2018. On June 27, 2018 H[Redacted] filed a Petition to Modify, Terminate, or Suspend Compensation on the basis that Claimant voluntarily terminated his employment as of June 19, 2018. Claimant did not respond to the Petition to Terminate. On July 23, 2018 the DOWC approved H[Redacted]'s Petition to Terminate as of the date of the Petition. Claimant has not asserted that his resignation was involuntary or otherwise improper. The record reflects that Claimant was thus responsible for his termination. He precipitated the employment termination by a volitional act that he would reasonably expect to cause the loss of employment.

48. However, even if Claimant was responsible for his termination from employment with H[Redacted], he would nevertheless be entitled to receive TTD benefits

if he suffered a worsening of condition. Claimant has presented sufficient evidence that his lower back condition, as related to the H[Redacted] claim, worsened and caused increased physical limitations or restrictions. Initially, the medical records demonstrate that Claimant suffered a disabling exacerbation of his condition when he fell through floorboards while working for B[Redacted] on March 18, 2019. However, as determined by DIME Dr. Mitchell, Claimant reached MMI for the B[Redacted] incident on May 6, 2019.

49. The record reveals that for the period May 6, 2019 until March 21, 2021 Claimant was unable to perform his job duties because his condition related to his H[Redacted] claim continued to worsen. Claimant's condition worsened until he returned to his pre-March 2019 baseline level of function when he was released to 20 pound lifting restrictions as noted by Dr. Gehrs in her March 17, 2021 report. Claimant remarked that by March 22, 2021 he returned to full-time work as an inspector with the City of F[Redacted].

50. The persuasive opinions of multiple physicians reflect that Claimant's condition continued to worsen after the B[Redacted] incident and his need for treatment was related to the H[Redacted] claim. Dr. Fall explained that, although Claimant reported increased pain after the March 2019 B[Redacted] incident, his pain remained in the same area and the March 2019 MRI did not reveal any changes compared to the February 2019 MRI. She determined that, while Claimant may have had a temporary exacerbation of his symptoms, he did not suffer a substantial intervening injury on March 18, 2019 and the need for treatment was related to his April 18, 2018 H[Redacted] work injury. Similarly, Dr. Brunworth remarked that surgery and injections were contemplated prior to the March 2019 incident and it was "most reasonable" to perform the procedures under the 2018 H[Redacted] claim. Furthermore, Dr. Sabin explained that, because Claimant did not suffer an intervening or new injury on March 18, 2019, the worsening of his disc herniation "would be a naturally occurring event related back to the 04/18/18 alleged lifting incident." Moreover, Dr. McCranie summarized that Claimant's symptoms, medical recommendations and additional restrictions resulted from the expected progression of the admitted April 18, 2018 H[Redacted] claim. Finally, ATP Dr. Gehrs remarked that Claimant required surgical intervention under the April 18, 2018 H[Redacted] claim that was necessary even prior to his March 18, 2019 B[Redacted] injury. In fact, on December 28, 2020 Claimant underwent a lumbar discectomy at L5-S1 in an attempt to remedy the radiculopathy he was experiencing in his lower back and left leg. The surgery was authorized by H[Redacted].

51. The preceding persuasive medical opinions reveal that, although Claimant experienced an exacerbation of symptoms related to the March 18, 2019 B[Redacted] injury, he suffered a worsening of condition related to his H[Redacted] claim that required treatment, surgical intervention and recovery. Claimant credibly explained that after he recovered from his December 28, 2020 repeat discectomy surgery, he was released with sufficient restrictions that allowed him to return to work. Because Claimant suffered a worsening of condition subsequent to his resignation of employment with H[Redacted] that caused a wage loss, his request for TTD benefits is granted. Claimant is thus entitled to receive TTD benefits related to the H[Redacted] claim for the period May 6, 2019 through March 21, 2021.

52. Claimant has failed to establish that it is more probably true than not that he is entitled to receive TPD benefits for the period March 22, 2021 until terminated by statute. On June 27, 2018 H[Redacted] filed a Petition to Modify, Terminate, or Suspend Compensation on the basis that Claimant voluntarily terminated his employment effective June 19, 2018. The Petition to Terminate noted Claimant was receiving TPD at the rate of $948.15 per week. H[Redacted] requested the termination of benefits as of June 20, 2018. On July 23, 2018 the DOWC approved H[Redacted]'s Petition to Terminate as of the date of the Petition. H[Redacted] filed a GAL on July 30, 2018 terminating TPD benefits. Although Claimant suffered an intervening injury while working for B[Redacted], he has since returned to his role as a municipal code inspector working full-time for F[Redacted]. Importantly, Claimant's pay records while working for B[Redacted] reflect that at the time of the March 18, 2019 incident he was earning $28.28 per hour and worked 40 hours each week. On March 22, 2021 Claimant began working as a city inspector for F[Redacted]. Claimant testified that he earned an hourly wage of $28.85 and worked 40 hours per week. He is thus earning higher wages while working for F[Redacted] than while he was employed by B[Redacted]. Based on Claimant's resignation of employment from H[Redacted] and higher earnings, he has failed to demonstrate that he suffered any wage loss subsequent to March 22, 2021 that was caused by his April 18, 2018 H[Redacted] injury. Accordingly, Claimant's request for TPD benefits is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Overcoming the DIME

4. In ascertaining a DIME physician's opinion, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office,* 984 P.2d 656, 659 (Colo. App. 1998). A DIME physician's determination regarding MMI and permanent impairment consists of his initial report and any subsequent opinions. *In Re Dazzio,* W.C. No. 4-660-149 (ICAO, June 30, 2008); *see Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005).

5. A DIME physician is required to rate a claimant's impairment in accordance with the *AMA Guides*. §8-42-107(8)(c), C.R.S.; *Wilson v. Industrial Claim Appeals Office,* 81 P.3d 1117, 1118 (Colo. App. 2003). However, deviations from the *AMA Guides* do not mandate that the DIME physician's impairment rating was incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAO, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician's findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAO, Apr. 16, 2008).

6. A DIME physician's opinions concerning MMI and impairment carry presumptive weight pursuant to §8-42-107(8)(b)(III), C.R.S.; *see Yeutter v. Industrial Claim Appeals Office*, No. 18CA0498 (Apr. 11, 2019) 2019 COA 53. The statute provides that "[t]he finding regarding [MMI] and permanent medical impairment of an independent medical examiner in a dispute arising under subparagraph (II) of this paragraph (b) may be overcome only by clear and convincing evidence." *Id.* Both determinations require the DIME physician to assess, as a matter of diagnosis, whether the various components of the claimant's medical condition are causally related to the industrial injury. *See Eller v. Indus. Claim Appeals Office*, 224 P.3d 397 (Colo. App. 2009); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo.App. 1998). Consequently, when a party challenges a DIME physician's determination of MMI or impairment rating, the finding on causation is also entitled to presumptive weight. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo.App. 1998).

7. "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAO, Nov. 17, 2000).

8. As found, Claimant has failed to produce clear and convincing evidence to overcome the DIME opinion of Dr. Mitchell that he reached MMI on May 6, 2019 for his March 18, 2019 B[Redacted] injury. Specifically, the record reflects that Claimant has

failed to produce unmistakable evidence free from serious or substantial doubt that Dr. Mitchell's MMI determination is incorrect. Claimant has failed to demonstrate that Dr. Mitchell improperly applied the *AMA Guides for the Evaluation of Permanent Impairment Third Edition (Revised) (AMA Guides*) or otherwise clearly erred in concluding that he reached MMI on May 6, 2019.

9. As found, initially, on March 18, 2019 Claimant suffered a lower back injury while working for B[Redacted] in WC No. 5-103-884-002. He specifically fell through loose floorboards and his left leg dropped about 18-24 inches to the dirt below. Claimant attended 11 appointments with his authorized treating physicians at Concentra through February 12, 2020. Medical records from Concentra for the period March 18, 2019 through February 12, 2020 reveal that Claimant's condition remained unchanged. On April 27, 2020 Claimant's ATP Dr. Manchester determined that he had reached MMI for the B[Redacted] claim as of February 12, 2020. Dr. Manchester noted that Claimant did not warrant any permanent impairment as a result of his March 18, 2019 injury and released him to full duty employment.

10. As found, on November 11, 2020 DIME Dr. Mitchell concluded that Claimant had reached MMI for the B[Redacted] claim on May 6, 2019 with no permanent impairment. She summarized that the distribution of Claimant's symptoms, physical examination findings, and MRI results did not change after his March 18, 2019 injury. Although Claimant still required further evaluation and treatment for the April 18, 2018 H[Redacted] claim, he did not require additional medical care related to the March 18, 2019 incident.

11. As found, the opinions of multiple physicians support Dr. Mitchell's determination that Claimant's condition did not change after the March 18, 2019 incident and he reached MMI on May 6, 2019. ATP for the H[Redacted] claim Dr. Gehrs detailed that Claimant's pain was not in a new location and was somewhat worse. By May 6, 2019 Dr. Gehrs explained that Claimant would require surgical intervention under the April 18, 2018 H[Redacted] claim because surgery was necessary even prior to his B[Redacted] injury. Furthermore, Dr. Fall determined that, while Claimant may have had a temporary exacerbation of his symptoms, there was no substantial intervening injury on March 18, 2019 and the need for medical treatment was related to the April 18, 2018 H[Redacted] work injury. Finally, Dr. Brunworth determined that surgery and injections were contemplated prior to the March 18, 2019 B[Redacted] incident and it was "most reasonable" to perform the injections and surgery under the 2018 H[Redacted] claim.

12. As found, DIME Dr. Mitchell concluded that Claimant reached MMI on May 6, 2019 for the March 18, 2019 B[Redacted] claim. Claimant has failed to produce sufficient evidence that Dr. Mitchell's determination was clearly erroneous. Moreover, the medical records and persuasive opinions of multiple physicians support Dr. Mitchell's MMI determination. Accordingly, Claimant reached MMI on May 6, 2019 for the B[Redacted] claim.

Overpayment

13. Section 8-40-201(15.5), C.R.S, defines “overpayment” as “money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable under said articles.” There are thus three categories of possible overpayment pursuant to §8-40-201(15.5). *In Re Grandestaff,* W.C. No. 4-717-644 (ICAO Mar. 11, 2013). An overpayment may occur even if it did not exist at the time the claimant received disability or death benefits. *Simpson v. ICAO,* 219 P.3d 354, 358 (Colo. App. 2009). The language of the overpayment definition found in §8-40-201(15.5), C.R.S. necessarily contemplates that overpayments may result from a subsequent determination that claimant was not entitled to benefits at the time they were paid. *Wheeler v. The Evangelical Lutheran Good Samaritan Society,* W.C. No. 4-995-488-004 (ICAO, Apr. 23, 2018); *Turner v. Chipotle Mexican Grill*, W.C. No. 4-893-631-07 (ICAO, February 8, 2018). Therefore, retroactive recovery for an overpayment is permitted. *In Re Haney,* W.C. No. 4-796-763 (ICAO, July 28, 2011).

14. When the parties are unable to agree upon a repayment schedule, the ALJ is empowered by §8-43-207(q), C.R.S. to conduct hearings to "[r]equire repayment of overpayments." In *Simpson v. Industrial Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009), *rev’d on other grounds*, the Colorado Court of Appeals determined that the ALJ has discretion to fashion a remedy with regard to overpayments. Further, the ALJ has the authority to decide the terms of repayment and the ALJ's schedule for recoupment will not be disturbed absent an abuse of discretion. *See Louisiana Pacific Corp. v. Smith*, 881 P.2d 456 (Colo. App. 1994).

15. As found, Respondents B[Redacted] and P[Redacted] agreed with Claimant that, if he failed to overcome Dr. Mitchell’s MMI determinations, he received an overpayment in the amount of $32,750.79 in disability benefits. Claimant’s rate of TTD under his H[Redacted] claim of April 18, 2018 is $948.15 per week or $3,792.60 every four weeks. Moreover, on March 22, 2021 Claimant began working as a city inspector for F[Redacted]. Claimant testified that he earns $28.85 per hour and works 40 hours each week. Claimant thus earns weekly wages of about $1154.00 or $4616.00 every four weeks before taxes.

16. As found, although Respondents B[Redacted] and P[Redacted] seek recovery of the overpayment in the amount of at least $500.00 per month, the record reveals the requested amount would be excessive. Therefore, based on Claimant’s current earnings, a monthly payment of $300.00 is appropriate. Claimant has not presented evidence that $300.00 per month would be unreasonable, unaffordable, or injurious. Accordingly, Claimant shall repay Respondent $300.00 per month in overpaid TTD benefits until recovered in full.

17. As found, nevertheless, Claimant will also likely receive a permanent impairment payout from the H[Redacted] claim of approximately $4,705.56 for each 1% whole person impairment. Moreover, if Claimant reaches a settlement with H[Redacted] or permanent impairment is due under that claim, he will receive, or be entitled to request, a lump sum award. If Claimant receives a lump sum award pursuant to the H[Redacted] claim, he shall pay Respondent P[Redacted] the equivalent of the lump sum or the

remainder due of $32,750.79 in a lump sum, whichever is less, within 30 days of receipt of payment from Respondents H[Redacted] and I[Redacted]. If there remains an amount due following payment of this lump sum to P[Redacted], then Claimant shall continue to pay a monthly amount of $250.00 in reimbursement for the $32,750.79 overpayment until paid in full.

Temporary Total Disability Benefits

18. To prove entitlement to Temporary Total Disability (TTD) benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §8-42-105, C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term “disability” connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (*citing Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant’s testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

19. Under the termination statutes in §8-42-105(4) C.R.S and §8-42-103(1)(g) C.R.S. a claimant who is responsible for his or her termination from regular or modified employment is not entitled to TTD benefits absent a worsening of condition that reestablishes the causal connection between the industrial injury and wage loss. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1131 (Colo. App. 2008). The termination statutes provide that, in cases where an employee is responsible for her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAO, Apr. 24, 2006). A claimant does not act “volitionally” or exercise control over the circumstances leading to her termination if the effects of the injury prevent her from performing her assigned duties and cause the termination. *In re of Eskridge,* W.C. No. 4-651-260 (ICAO, Apr. 21, 2006). Therefore, to establish that Claimant was responsible for her termination, respondents must demonstrate by a preponderance of the evidence that Claimant committed a volitional act, or exercised some control over her termination under the totality of the circumstances. *See Padilla v. Digital Equipment*, 902 P.2d 414, 416 (Colo. App. 1994). An employee is thus

"responsible" if she precipitated the employment termination by a volitional act that she would reasonably expect to cause the loss of employment. *Patchek v. Dep't of Public Safety,* W.C. No. 4-432-301 (ICAP, Sept. 27, 2001).

20. Section 8-42-105(4), C.R.S. does not bar TTD wage loss claims after a termination for which the employee was responsible when the worsening of a work-related injury incurred during that employment causes a subsequent wage loss. *Anderson v. Longmont Toyota, Inc.*, 102 P.3d 323, 326 (Colo. 2004). This is limited to cases in which the "claimant's condition worsens after the termination of employment and prevents or diminishes the claimant's ability to work," rather than where the wage loss is the result of the voluntary or for-cause termination of the regular or modified employment. *Id.* at 326; *Grisbaum v. Indus. Claim Appeals Office*, 109 P.3d 1054, 1056 (Colo. App. 2005). A subsequent increase in work restrictions is not per se evidence of a worsening condition and whether a worsened condition caused the claimant's wage loss is a factual question for the ALJ. *See Apex Transportation, Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630, 632 (Colo.App.2014); *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186, 191 (Colo.App.2002). An ALJ may consider several factors in determining that a worsened condition, and not an intervening termination of employment, caused the claimant's wage loss. *Apex Transportation, Inc.*, 321 P.3d at 633.

21. As found, Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive TTD benefits for the period May 6, 2019 through March 21, 2021. Initially, the persuasive evidence demonstrates that Claimant was responsible for his termination when he resigned from H[Redacted] on June 19, 2018. However, Claimant suffered a worsening of condition subsequent to his termination that caused a wage loss. Specifically, the record reveals that Claimant's condition continued to worsen after his termination of employment and prevented him from earning wages.

22. As found, initially, Claimant was responsible for his termination from employment with H[Redacted]. On June 19, 2018 Claimant resigned from his position as an plumber with H[Redacted]. He began working for B[Redacted] as an inspector on July 2, 2018. On June 27, 2018 H[Redacted] filed a Petition to Modify, Terminate, or Suspend Compensation on the basis that Claimant voluntarily terminated his employment as of June 19, 2018. Claimant did not respond to the Petition to Terminate. On July 23, 2018 the DOWC approved H[Redacted]'s Petition to Terminate as of the date of the Petition. Claimant has not asserted that his resignation was involuntary or otherwise improper. The record reflects that Claimant was thus responsible for his termination. He precipitated the employment termination by a volitional act that he would reasonably expect to cause the loss of employment.

23. As found, however, even if Claimant was responsible for his termination from employment with H[Redacted], he would nevertheless be entitled to receive TTD benefits if he suffered a worsening of condition. Claimant has presented sufficient evidence that his lower back condition, as related to the H[Redacted] claim, worsened and caused increased physical limitations or restrictions. Initially, the medical records demonstrate that Claimant suffered a disabling exacerbation of his condition when he fell through floorboards while working for B[Redacted] on March 18, 2019. However, as

determined by DIME Dr. Mitchell, Claimant reached MMI for the B[Redacted] incident on May 6, 2019.

24. As found, the record reveals that for the period May 6, 2019 until March 21, 2021 Claimant was unable to perform his job duties because his condition related to his H[Redacted] claim continued to worsen. Claimant's condition worsened until he returned to his pre-March 2019 baseline level of function when he was released to 20 pound lifting restrictions as noted by Dr. Gehrs in her March 17, 2021 report. Claimant remarked that by March 22, 2021 he returned to full-time work as an inspector with the City of F[Redacted].

25. As found, the persuasive opinions of multiple physicians reflect that Claimant's condition continued to worsen after the B[Redacted] incident and his need for treatment was related to the H[Redacted] claim. Dr. Fall explained that, although Claimant reported increased pain after the March 2019 B[Redacted] incident, his pain remained in the same area and the March 2019 MRI did not reveal any changes compared to the February 2019 MRI. She determined that, while Claimant may have had a temporary exacerbation of his symptoms, he did not suffer a substantial intervening injury on March 18, 2019 and the need for treatment was related to his April 18, 2018 H[Redacted] work injury. Similarly, Dr. Brunworth remarked that surgery and injections were contemplated prior to the March 2019 incident and it was "most reasonable" to perform the procedures under the 2018 H[Redacted] claim. Furthermore, Dr. Sabin explained that, because Claimant did not suffer an intervening or new injury on March 18, 2019, the worsening of his disc herniation "would be a naturally occurring event related back to the 04/18/18 alleged lifting incident." Moreover, Dr. McCranie summarized that Claimant's symptoms, medical recommendations and additional restrictions resulted from the expected progression of the admitted April 18, 2018 H[Redacted] claim. Finally, ATP Dr. Gehrs remarked that Claimant required surgical intervention under the April 18, 2018 H[Redacted] claim that was necessary even prior to his March 18, 2019 B[Redacted] injury. In fact, on December 28, 2020 Claimant underwent a lumbar discectomy at L5-S1 in an attempt to remedy the radiculopathy he was experiencing in his lower back and left leg. The surgery was authorized by H[Redacted].

26. As found, the preceding persuasive medical opinions reveal that, although Claimant experienced an exacerbation of symptoms related to the March 18, 2019 B[Redacted] injury, he suffered a worsening of condition related to his H[Redacted] claim that required treatment, surgical intervention and recovery. Claimant credibly explained that after he recovered from his December 28, 2020 repeat discectomy surgery, he was released with sufficient restrictions that allowed him to return to work. Because Claimant suffered a worsening of condition subsequent to his resignation of employment with H[Redacted] that caused a wage loss, his request for TTD benefits is granted. Claimant is thus entitled to receive TTD benefits related to the H[Redacted] claim for the period May 6, 2019 through March 21, 2021.

Temporary Partial Disability Benefits

27. Section 8-42-106(1), C.R.S., provides for an award of Temporary Partial Disability (TPD) benefits based on the difference between the claimant's Average Weekly Wage (AWW) at the time of injury and the earnings during the continuance of the temporary partial disability. In order to receive TPD benefits the claimant must establish that the injury has caused the disability and consequent partial wage loss. §8-42-103(1), C.R.S.; *Safeway Stores, Inc. v. Husson,* 732 P.2d 1244 (Colo. App. 1986) (temporary partial compensation benefits are designed as a partial substitute for lost wages or impaired earning capacity arising from a compensable injury). A claimant suffers from an impairment of earning capacity when he has a complete inability to work or there are restrictions that impair his ability to effectively and properly perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997).

28. As found, Claimant has failed to establish by a preponderance of the evidence that he is entitled to receive TPD benefits for the period March 22, 2021 until terminated by statute. On June 27, 2018 H[Redacted] filed a Petition to Modify, Terminate, or Suspend Compensation on the basis that Claimant voluntarily terminated his employment effective June 19, 2018. The Petition to Terminate noted Claimant was receiving TPD at the rate of $948.15 per week. H[Redacted] requested the termination of benefits as of June 20, 2018. On July 23, 2018 the DOWC approved H[Redacted]'s Petition to Terminate as of the date of the Petition. H[Redacted] filed a GAL on July 30, 2018 terminating TPD benefits. Although Claimant suffered an intervening injury while working for B[Redacted], he has since returned to his role as a municipal code inspector working full-time for F[Redacted]. Importantly, Claimant's pay records while working for B[Redacted] reflect that at the time of the March 18, 2019 incident he was earning $28.28 per hour and worked 40 hours each week. On March 22, 2021 Claimant began working as a city inspector for F[Redacted]. Claimant testified that he earned an hourly wage of $28.85 and worked 40 hours per week. He is thus earning higher wages while working for F[Redacted] than while he was employed by B[Redacted]. Based on Claimant's resignation of employment from H[Redacted] and higher earnings, he has failed to demonstrate that he suffered any wage loss subsequent to March 22, 2021 that was caused by his April 18, 2018 H[Redacted] injury. Accordingly, Claimant's request for TPD benefits is denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant has failed to overcome Dr. Mitchell's DIME opinion that he reached MMI on May 6, 2019 with no permanent impairment.

2. Claimant shall repay Respondents $300.00 per month in overpaid TTD benefits until recovered in full. If Claimant receives a lump sum award pursuant to the H[Redacted] claim, he shall pay Respondent P[Redacted] the equivalent of the lump sum

or the remainder due of $32,750.79 in a lump sum, whichever is less, within 30 days of receipt of payment from Respondents H[Redacted] and I. If there remains an amount due following payment of this lump sum to P[Redacted], then Claimant shall continue to pay a monthly amount of $300.00 in reimbursement for the $32,750.79 overpayment until the amount is paid in full. Claimant shall notify Respondent P[Redacted] of the date of receipt of a lump sum settlement or disability payments under WC 5-075-625-002 within 20 days of receipt of those payments.

3. Claimant shall receive TTD benefits for the period May 6, 2019 through March 21, 2021 as a result of his April 18, 2018 H[Redacted] claim.

4. Claimant's request for TPD benefits for the period March 22, 2021 until terminated by statute is denied and dismissed.

5. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at https://oac.colorado.gov/resources/oac-forms*.

DATED: July 23, 2021.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-164-262-001

ISSUE

1. Determination of Decedent's average weekly wage for the purposes of determining Claimant's dependent death benefits.

FINDINGS OF FACT

1. Decedent was a firefighter employed by Respondent who developed lymphoma arising out of the course of his employment in January 2018. Beginning on February 7, 2018, Respondent paid Decedent temporary total disability (TTD) benefits due to his occupational disease based on an admitted average weekly wage (AWW) of $1,634.64. (Ex. 1 and 2).

2. During his employment, Decedent was enrolled in the Deferred Retirement Option Plan (DROP) offered through the Fire and Police Pension Association (FPPA) which permitted firefighters eligible for retirement to continue to work for a maximum of five years before reaching mandatory retirement. Decedent's mandatory retirement date under DROP, was July 12, 2019. (Ex. C). Decedent retired from his employment as a firefighter on July 12, 2019, and his retirement was unrelated to his occupational disease.

3. On July 9, 2019, and July 24, 2019, Respondent filed General Admissions of Liability (GAL) admitting for TTD benefits based on an AWW of $1,634.64. (Ex. 2).

4. Decedent's TTD benefits continued from February 7, 2018, through August 27, 2019, at which point Decedent's ATP Alisa Koval, M.D., removed Decedent's work restrictions. (Ex. H). Although Decedent's work restrictions were removed, Decedent remained retired, did not work, and did not earn any wages from Respondent or any other employer after his retirement.

5. On September 16, 2019, Respondents filed a GAL admitting for TTD benefits through August 27, 2019, based on an admitted AWW of $1,634.64. (Ex. G).

6. Decedent passed away from his admitted occupational disease on November 27, 2020, at the age of 72. Claimant is the surviving spouse of Decedent and is entitled to dependent death benefits pursuant to § 8-42-114, C.R.S. (2020). The parties stipulated that, at the time of his death, Decedent was not receiving temporary disability benefits.

7. On March 11, 2021, Respondent filed a Fatal Case General Admission admitting for death benefits for Claimant beginning November 27, 2020. Respondent admitted for an AWW of $.0.00, which, if accurate, would entitle Claimant to death benefits of $268.56 per week (i.e., 25% of the applicable maximum per week under § 8-42-114, C.R.S.), less applicable offsets. Respondent asserted an offset of $176.94 based on an estimate of the Social Security survivor benefits to which Claimant would be entitled, resulting in an

admitted death benefit of $91.62 (Ex. A). Respondent's claimed offset was based on an October 16, 2019-letter from the Social Security Administration which estimated Decedent's monthly Social Security benefits at $1,533.50.

8. After Decedent's death, Decedent's Social Security benefits terminated, and Claimant became entitled to Social Security survivor's benefits in the amount of $1,198.00 per month. The parties stipulated that Claimant receives surviving spouse benefits from Social Security which are to be offset against any dependent death benefits at the rate of $138.23 per week (rather than $176.94), beginning November 28, 2020.

9. Upon Decedent's death, Claimant also became entitled to receive Decedent's FPPA pension benefits in full in the amount of $3,235.80 per month. (Ex. C). There was no reduction in the amount of FPPA benefits resulting from Decedent's death.

10. As of November 27, 2020, the Colorado Division of Worker's Compensation established the maximum rate for temporary disability benefits to be $1,074.22 per week.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

AVERAGE WEEKLY WAGE FOR PURPOSES OF DEATH BENEFITS

The Colorado Worker's Compensation Act provides death benefits for the dependents of deceased workers. Specifically, section § 8-42-114 provides:

> In case of death, the dependents of the deceased entitled thereto shall receive as compensation or death benefits sixty-six and two-thirds percent of the deceased employee's average weekly wages, not to exceed a maximum of ninety-one percent of the state average weekly wage per week for accidents occurring on or after July 1, 1989, and not less than a minimum of twenty-five percent of the applicable maximum per week. In cases where it is determined that periodic death benefits granted by the federal old age, survivors, and disability insurance act or a workers' compensation act of another state or of the federal government are payable to an individual and the individual's dependents, the aggregate benefits payable for death pursuant to this section shall be reduced, but not below zero, by an amount equal to fifty percent of such periodic benefits.

The Act "does not prescribe the date or period of time to be used in determining the decedent's AWW," for the purpose of calculating dependent death benefits. *In re Pettigrew*, WC No. 4-422-345 (ICAO, October 30, 2000). "However, applying the 'rule of independence,' the courts have interpreted the predecessor to § 8-42-114 to require that death benefits be based on the deceased worker's AWW at the time of death." *Id., citing Hoffman v. Hoffman,* 872 P.2d 1367, 1370 (Colo. App.1994); and *Richards v. Richards and Richards*, 664 P.2d 254 (Colo. App. 1983).

"Under the 'rule of independence,' disability benefits awarded an employee and death benefits awarded an employee's dependents are independent of one another. *Hoffman*, 872 P.2d 1367 (Colo. App.1994), *citing State Compensation Ins. Fund v. Industrial Comm'n*, 724 P.2d 679 (Colo. App. 1986). Consequently, "there are two distinct rights, one for the benefit of the worker, the other for the benefit of his or her dependents." *Id.* (citation omitted). Under this principle, the rights, and liabilities of the parties to a workers' compensation claim for death benefits accrue or vest at the time of death, to be determined by the statutes in effect at that time. *Subsequent Injury Fund v. King*, 961 P.2d 575, 577 (Colo. App. 1998); *see also* Ragan v. Metal Stud Forming Corp., W.C. No. 4-920-457-02, at *4 (July 9, 2014). Consequently, Claimant's claim for dependent death benefits is a separate and distinct claim from Decedent's, and Claimant's dependent death benefits should be calculated based on Decedent's AWW at the time of death.

Section 8-42-102(2), C.R.S., requires the ALJ to calculate a claimant's average weekly wage (AWW) based a claimant's monthly, weekly, daily, hourly, or other earnings. This section establishes the default method for calculating AWW. However, if for any reason, the ALJ determines the default method will not fairly calculate the AWW, § 8-42-102(3), C.R.S., establishes the so-called "discretionary exception," which affords the ALJ discretion to determine the AWW in such other manner as will fairly determine the wage. *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp*., *supra*; *Avalanche Industries v. ICAO*, 166 P.3d 147 (Colo. App. 2007). Where a claimant's AWW at the time of injury is not a fair approximation of Claimant's later wage loss and diminished earning capacity, the ALJ is vested with the discretionary authority to use an alternative method of determining a fair wage. *See id*. The discretionary exception also applies when calculating dependent death benefits. *See Kittleson v. City and County of Denver*, W.C. No. 4-923-057-01 (ICAO, Feb. 24, 2015).

The evidence established that as of the date of Decedent's death, his monthly income was comprised of FPPA pension benefits of $3,235.80 and Social Security benefits of $1,533.50. Neither Decedent's FPPA pension nor his Social Security benefits constitute "wages" under the Act, and neither party in this matter contends otherwise. At the time of Decedent's death, he had retired, and his work restrictions had been removed for approximately 14 months. During that time, Decedent did not earn an income and was not employed. Moreover, Decedent's retirement was mandatory and unrelated to his occupational disease. The ALJ concludes that Decedent's AWW at the time of death was $0.00. Given the fact that Claimant continues to receive Decedent's FPPA pension benefits without reduction, the ALJ finds no basis for exercising the discretionary exception under § 8-42-102 (3), C.R.S.

The ALJ finds Claimant contention that her death benefit should be based on the AWW admitted in the September 16, 2019-GAL to lack merit. Claimant contends that Respondent's failure to modify the September 16, 2019-GAL pursuant to § 8-43-201, C.R.S., binds Respondent to pay Claimant's dependent death benefits based on the AWW admitted therein. Claimant cites no authority for this proposition, which disregards the well-settled "rule of independence," under which Claimant's claim for dependent death benefits is separate and distinct from Decedent's TTD claim. Consequently, the September 16, 2019-GAL filed for Decedent's then-existing TTD claim is inapplicable to Claimant's dependent death benefit claim. Moreover, the September 16, 2019-GAL was filed approximately two months before Decedent's death and does not purport to admit Decedent's AWW at the time of death. In its Fatal Case General Admission, Respondent correctly calculated Decedent's AWW at the time of death as $0.00.

However, the admitted dependent death benefits in the Fatal Case General Admission must be recalculated to reflect the parties' stipulated Social Security offset of $138.23 per week. Under § 8-42-114, C.R.S., Claimant is entitled to dependent death benefits equal to 25% of state's maximum average weekly wage per week, less $138.23

per week beginning November 28, 2020. At the time of Decedent's death, the maximum rate for temporary disability benefits was $1,074.22. Claimant's dependent death benefit is, therefore, $130.33 per week (i.e., $1,074.22 x .25 = $ 268.56 less $138.23 = $130.33).

ORDER

It is therefore ordered that:

1. Respondent shall pay Claimant dependent death benefits in the amount of $130.33 per week, commencing on November 28, 2020, and continuing until terminated by law.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 26, 2021

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-132-135-001

ISSUE

1. Calculation of Claimant's average weekly wage.

2. Whether Claimant established by a preponderance of the evidence an entitlement to a disfigurement award pursuant to § 8-42-108, C.R.S.

FINDINGS OF FACT

1. Claimant sustained an admitted industrial injury to her hand arising out of the course of her employment with Employer on January 23, 2020. (Ex. C). Based on the "year-to-date" totals of hours and wages contained in Claimant's payroll records, the ALJ infers that Claimant began working for Employer on or about September 30, 2019. (Ex. I).

2. Claimant worked full-time for Employer earning $16.44 per hour for regular time, and $24.66 per hour for overtime. Claimant also received a $.75 per hour "shift differential" for each hour worked, holiday pay, personal time off (PTO) and sick pay. (Ex. I). Between September 30, 2019, and January 19, 2020 (the pay period immediately preceding Claimant's injury), Claimant worked 15 weeks. She did not work and was not paid for the week of October 28, 2019 – November 3, 2019. During the 15 weeks she worked, Claimant frequently worked overtime and averaged 42.29 hours worked per week and was paid for an average of 44.43 hours per week, including holiday pay, sick pay, and PTO. (Ex. I).

3. Claimant's gross wages between September 30, 2019 and January 19, 2020 were as follows (Ex. I).:

Pay Period		Gross Wages
9/30/2019	10/6/2019	$ 676.95
10/7/2019	10/13/2019	$ 975.89
10/14/2019	10/20/2019	$ 974.59
10/21/2019	10/27/2019	$ 676.78
10/28/2019	11/3/2019	$ 0.00
11/4/2019	11/10/2019	$ 937.72
11/11/2019	11/17/2019	$ 982.85
11/18/2019	11/24/2019	$ 1,067.94
11/25/2019	12/1/2019	$ 830.20
12/2/2019	12/8/2019	$ 992.65
12/9/2019	12/15/2019	$ 753.36
12/16/2019	12/22/2019	$ 786.37

12/23/2019	12/29/2019	$	529.81
12/30/2019	1/5/2020	$	816.28
1/6/2020	1/12/2020	$	830.63
1/13/2020	1/19/2020	$	846.60
TOTAL		**$**	**12,678.62**

4. Respondents paid Claimant temporary partial disability (TPD) benefits for the period of January 24, 2020, through May 20, 2020, and temporary total disability benefits (TTD) for the period of May 21, 2020, through September 9, 2020. On September 10, 2020, Claimant was placed at maximum medical improvement with an 18% upper extremity rating. (Ex. C.) Claimant's TPD and TTD benefits were paid based on an admitted average weekly wage (AWW) of $760.51. (Ex. C).

5. On October 22, 2020, Respondents filed a Final Admission of Liability (FAL), admitting for temporary disability benefits based on an AWW of $760.51. (Ex. C). Respondents' calculation of AWW is the average of Claimant's gross wages earned during the six-weeks prior to her work injury (i.e., from December 9, 2019, through January 19, 2020). This calculation includes the week of Christmas 2019, during which Claimant was paid for 30.82 hours of work, and earned $529.81, the lowest weekly gross wage during the applicable time period.

6. For the 15 weeks Claimant worked between September 30, 2019, and January 19, 2020, her gross earnings were $12,678.62; an average of $845.24. (i.e., $12,678.62 ÷ 15 = $845.24). The ALJ finds that Claimant's AWW at the time of injury was $845.24.

7. As a result of Claimant's industrial injury, Claimant had surgery on her right thumb. Claimant has a visible disfigurement of the body consisting of a surgical scar on the outside of her right thumb and wrist measuring approximately 1½ inches. The scar is visibly distinct from the surrounding skin. The ALJ finds that Claimant should be awarded $300.00 for disfigurement.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

AVERAGE WEEKLY WAGE

Section 8-42-102(2), C.R.S., requires the ALJ to calculate a claimant's average weekly wage (AWW) based a claimant’s monthly, weekly, daily, hourly, or other earnings. This section establishes the default method for calculating AWW. However, if for any reason, the ALJ determines the default method will not fairly calculate the AWW, § 8-42-102(3), C.R.S., establishes the so-called “discretionary exception,” which affords the ALJ discretion to determine the AWW in such other manner as will fairly determine the wage. *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp*., *supra*; *Avalanche Industries v. ICAO*, 166 P.3d 147 (Colo. App. 2007). Where a claimant’s AWW at the time of injury is not a fair approximation of Claimant’s later wage loss and diminished earning capacity, the ALJ is vested with the discretionary authority to use an alternative method of determining a fair wage. *See id*. The discretionary exception also applies when calculating dependent death benefits.

Respondents contend that calculating Claimant’s AWW based on the six weeks preceding her injury is appropriate, while Claimant contends her AWW should be calculated based on the ten weeks preceding her injury. Neither party has offered a persuasive argument for arbitrarily calculating Claimant’s AWW based on less than her entire tenure with Employer prior to her injury. Respondent’s calculation results in an artificially deflated AWW because Claimant’s lowest week of gross wages (i.e., the week of Christmas 2019) accounts for 1/6 of the total wages used to calculate AWW, when it actually constitutes 1/15 Claimant's total wages during the applicable time frame. At the same time, Respondents' omission of the first nine weeks of Claimant's employment excludes from the AWW calculation the six weeks in which Claimant earned her highest gross wages. Claimant's position that her hourly wage should be calculated based on the ten weeks preceding her injury is no less arbitrary, although it results in an AWW that is closer to Claimant's actual AWW.

Claimant has proven, by a preponderance of the evidence, that her average weekly wage at the time of her injury was $845.24. This the average of Claimant's gross wages for the 15 weeks actually worked between her start date and the pay period immediately preceding her date of injury. The ALJ concludes that $845.24 is a fair approximation of Claimant's wages and diminished earning capacity as the result of her industrial injury, as it does not give disproportionate weight to any week during which Claimant actually worked and earned wages, and accounts for all wages earned.

Disfigurement

Section 8-42-108(1) provides that a claimant is entitled to additional compensation if he is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." As found, Claimant has sustained disfigurement as a direct and proximate result of her January 23, 2020-injury. Claimant is awarded $300.00 for disfigurement.

ORDER

It is therefore ordered that:

1. Claimant's average weekly wage at the time of her January 23, 2020, work injury was $845.24.

2. Respondents shall pay Claimant $300.00 for disfigurement.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow

when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 26, 2021

____
Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-136-561-001

ISSUES

- Did Respondents' prove by clear and convincing evidence that the Division of Workers' Compensation Independent Medical Examination (DIME) physician was incorrect in his findings with regard to maximum medical improvement (MMI)?

FINDINGS OF FACT

1. Claimant worked for Employer as a licensed certified nurses' assistant providing assistance to her niece (patient) to complete her activities of daily living (ADLs) for four hours a day. Claimant has custody of the patient, who is disabled and requires assistance with her ADLs.

2. Claimant stated that the patient is 14 year old, who has been diagnosed with multiple developmental disabilities, including bipolar disorder, oppositional defiance and sensory processing disorder, and moderate intellectual disability. The patient is 5 foot 5 inches in height and weighs approximately 160 lbs. Claimant stated that she is frequently belligerent and hard to handle as she does not respond to coaching to perform her most basic ADLs, such as brushing her teeth and combing her hair. Claimant also assists the patient with activities such as cutting her food, She has acted out in the past, including kicking her care giver, smacking her in the face, slamming her against items, throwing items and even jumping out of a moving vehicle. While living in Colorado Springs, the police were called to the house on thirteen different occasions. Claimant is found to be credible.

3. On March 26, 2020 Claimant was evaluated for left hip pain at American Family Care by John Vermilyeu, N.P. They obtained x-rays of the hip, which were read as negative for any acute bony abnormality. NP Vermilyeau recommended conservative care. On the same day, Dr. Julie Farrell reviewed the x-rays and found that "the proximal femur, acetabulum and pubic rami show no evidence for acute fracture or focal bone lesion. There is good preservation of the joint space. No soft tissue abnormality is identified." Her impression was that Claimant had a normal left hip.

4. On April 18, 2020, Claimant was assisting the patient with her hygiene, when the patient acted out, body slamming Claimant and snapping her left small finger in a struggle for the phone. Claimant was left with a broken left small finger and increasing problems with her left hip that required medical attention. Claimant testified that she heard and felt a tearing in her hip. Claimant reported the incident to Employer and was advised to complete a written statement. Pages 4-7 of Exhibit 1 were properly identified by Claimant as her handwriting and the report she turned in to Employer. The patient was removed from Claimant's home and placed with Children's Hospital.

5. On April 18, 2020 Claimant was evaluated at Centura Health Lakewood Urgent Care Unit by Dr. Mark Warner Stanford. She was diagnosed a left fifth digit nondisplaced fracture of the proximal phalanx of left little finger, and a contusion of the left hip. They ordered both x-rays of the left-hand digits and the hip. She was instructed to keep the hand elevated above the elbow to minimize swelling, to follow up with the primary healthcare clinic and to call the hand surgeon the following Monday. She was prescribed both morphine and naloxone. She was also advised to take ibuprofen or Tylenol for pain.

6. On April 24, 2020 Claimant was examined by Dr. John Ogrodnick, the occupational medicine physician. He commented that Claimant had been treated at Centura Health for X-rays of the finger and was splinted. He also provides a history that Claimant had had ongoing hip problems from multiple assaults from the patient prior to this injury. He diagnosed a left fifth digit nondisplaced fracture of the distal phalanx of left little finger and a contusion of the left hip. He referred Claimant for an orthopedic evaluation of the upper extremity and an MRI of the left hip. He stated that Claimant's objective findings were consistent with the work-related mechanism of the injury (repeated on M-164 forms for multiple dates), that Claimant was unable to work and that the exam suggested that the left hip had internal derangement which might require surgical repair. (Note: the left hand issues and medical care will not be further addressed in this order as they are not relevant to the ultimate issue to be decided.)

7. On May 1, 2021 an MRI of the left hip revealed that Claimant had moderate chondral degeneration within the anterior and central weightbearing portion of the left hip; mild effusion, mild to moderate undersurface and interstititial tearing of the left common hamstring tendon origin on the ischial tuberosity; mild fraying and irregularity of the anterosuperior and superolateral labrum although no definite displaced labral tears are identified; mild tendinosis with mild to moderate undersurface and interstitial tearing of the left common hamstring tendon origin on the ischial tuberosity.

8. On May 6, 2020 she was evaluated at SCLHealth Medical Group by physical therapist Deborah Wendt for the left hip contusion pursuant to a referral by Dr. Ogrodnick. The history provided by Claimant states that "Daughter ran at patient; broke 5th digit and hit patient on hip. States that daughter has repeatedly run at patient and patient states that she had hip soreness from previous hits but is much worse now than had been. She is unable to walk without pain. Prior to 4/18/2020 was walking Sloans Lake and walking in pool but was aggravated. Since injury she has had difficulty bearing weight on left lower extremity and states that it feels like it will give out on her. Feels like something is out of place in her hip." Ms. Wendt's assessment was that Claimant demonstrated antalgic gait with decreased hip ROM, and impingement symptoms of her hip. She may benefit from use of an assistive device to decrease compensatory pattern and would be a good candidate for skilled physical therapy intervention. Multiple subsequent physical therapy reports state that Claimant's compliance with therapy was good and that Claimant was improved overall.

9. On May 27, 2020 Claimant was evaluated by physician assistant Andrew Hildner of Dr. Ogrodnick's office as a walk-in patient due to increased pain and limitations

of the left hip, including worsening without interval injury, a 9/10 pain at rest, 10/10 with weight-bearing (though later revised to 6/10 when compared to a burst appendix), walking and standing, a "tearing" pain with movement, localized to the inferior buttocks and lateral groin, affecting ADLs and feeling that "a bone's out of place."

10. Dr. Ogrodnick provided a history of present illness on June 27, 2020 listing that Claimant had temporary relief with massage therapy, the TENS unit, which was approved for home use, had a 7/10 lateral left hip pain at rest which increases with walking just to trash and back to house causing limping; that she walked around in a pool and noticed her hip felt better, prompting her to request pool therapy. Dr. Ogrodnick confirmed for Claimant that the appointment with Dr. White on July 8, 2020 will be her first with him.

11. Claimant was evaluated by Dr. Brian J. White of Western Orthopaedics on July 8, 2020. Dr. White's examination showed Claimant had limited arc of rotation on the left side with significant pain with rotational motion and the anterior impingement maneuver, and this does recreate the pain she typically feels. Dr. White diagnosed Claimant with an underlying degenerative osteoarthritis with joint space narrowing, CAM morphology of the femoral neck, consistent with femoroacetabular impingement and labral tear as supported by objective diagnostic x-rays and MRI. Dr. White assessed that her "significant left hip pain coming from her labral tear in the presence of moderate arthritis in the anterosuperior aspect of the joint," requires a total hip arthroplasty because her hip degeneration is too advanced for an arthroscopy.

12. Dr. John Schwappach wrote a letter dated August 5, 2020 that states "As my July 15, 2020 letter states, I concur with Dr. White that Ms. [Claimant Redacted] is not a candidate for left hip arthroscopic labral repair. She does have underlying left hip arthritis. This, however, is not related to the April 18,2020 industrial accident. Her pain was more dramatic at rest. She presented for evaluation of hip pain less than a month prior to her April 18, 2020 industrial accident, as such, her hip complaints clearly predated the April 18, 2020 industrial accident. Even if her hip arthritis was related to the April 18, 2020 industrial accident, she does not meet the medical treatment guidelines for left total hip arthroplasty. She has had only one month of physical therapy, no documented NSAID use and she declined a left hip steroid injection."

13. On August 17, 2020, Dr. Ogrodnick noted that Claimant could not lift her left leg into a straight leg raise, had pain when rising from a chair, and had additional pain on exam that created pain in the sciatic notch. The following day she again saw Dr. Ogrodnick who commented that "it is extremely unlikely she would be acutely unable to walk unless she had infection from the steroid injection which is why she needs to contact Dr. White this morning to relay her concerns that the injection has worsened her pain. I repeatedly agreed that her pain was real, just did not equate to disability. She was advised I cannot substantiate continued time off work. This prompted tearfulness and she stated, "I am done with you"."

14. On August 24, 2020 Claimant reported to Dr. Ogrodnick some relief from the pain, potentially from the cortisone injection finally kicking in, which Claimant estimated was approximately by 70%, and pain free at rest. He returned Claimant

to work with the same limitations of walking/standing up to 30 minutes per hour and sitting for other 30 minutes of the hour, hoping that the injection would last, and stated Claimant was to continue with physical therapy at Western Ortho per Dr. White.

15. On September 25, 2020, Dr. Ogrodnick placed Claimant at maximum medical improvement (MMI) with an impairment rating of 16% for left lower extremity, and the of 31% the left small finger, recommending maintenance care of pool therapy and work restrictions of standing/walking less or equal to 30 minutes per hour and must be seated for the other 30 minutes. He documented that Claimant "is very tired of the W/C hassle and just wants to get her hip fixed and move on with her life. She plans to pursue further hip treatment through Medicaid. Therefore, she wishes to be placed at MMI today with permanent restrictions.

16. Respondents filed a Final Admission of Liability on October 8, 2020 admitting to Dr. Ogrodnick's determination of MMI and impairment rating.

17. On November 25, 2020 Claimant was again evaluated by Dr. White, who stated that Claimant does show moderate osteoarthrosis with degenerative change on her left hip. He stated that Claimant had a steroid injection approximately 3 months ago, which did not help long-term. He assessed that Claimant has moderate osteoarthrosis with degenerative change on her left hip and degenerative labral tear. Dr. White stated that at this point it is too far gone for hip arthroscopy and much better fit for total hip replacement.

18. On February 17, 2021 Dr. White opined that Claimant "did have a tingling sensation around her left hip and numbness and some baseline discomfort on this left hip. However, she was able to work, function, and do pretty much everything that she wanted to do without any restriction. With the assault, that is when everything changed. At that point she had significant tearing sensations and deep discomfort in the groin and in the hip. She is to the point now where she is extremely dysfunctional, in chronic pain, and needs to be fixed. Again, it is clear that she had a significant change in her symptoms as a result of the assault, and this is what took her from a high functioning person with minor symptoms that did not interfere with her activities of daily living, now to a completely dysfunctional person with significant pain and inability to work, function and has pain on a daily basis. At this point, my recommendation continues to be total hip replacement if and when we get the final clearance."

19. Dr. John Hughes conducted a Claimant-requested Division of Workers' Compensation Independent Medical Examination (DIME). The DIME physician issued a report on March 2, 2021. Dr. Hughes points out that significant diagnostic testing began with an x-ray obtained on March 26, 2020, where Dr. Parrrall documented normal left hip with no joint space narrowing. The left hip MRI of May 1, 2020 showed findings consistent with an acute superimposed injury to Claimant's left hip. Dr Hughes stated there is left hip effusion as well as mild to moderate tearing to Claimants' left common hamstring tendon origin and moderate chondral degeneration within the anterior and central weight bearing potion of the left hip which probably preexisted April 18, 2020. Subsequent x-rays of Claimant's left hip by Dr. White documented narrowing of the joint space not seen

on the initial x-rays of March 26, 20220. Dr. Hughes opined that this is consistent with a substantial and permanent aggravation of Claimant's left hip osteoarthritis. Dr. Hughes concluded that, based on this analysis, that Claimant was not at MMI as she was pending left total hip arthroplasty, that is reasonably necessary and related to Claimant's work-related injuries of April 18, 2020. The ALJ credited Dr. Hughes opinions on MMI and causation, particularly on the question of what caused Claimant's need for the total hip arthroplasty.

20. Dr. Hughes testified at a deposition on June 29, 2021 at Respondents' request. Dr. Hughes was questioned about records that existed prior to the April 18, 2020 date of injury, specifically with regard to records documenting that Claimant sought treatment for her left hip complaining of a history of left hip pain for three months prior to the injury, and if that would change his opinion with regard to MMI. Dr. Hughes stated that he "I would have to review the medical record, review again what Ms. M… [Claimant] told me directly on March 2nd, 2021, determine if there was a discrepancy and take that into account in my [his] causation analysis."

21. Dr. Hughes goes on to testify as follows:

> Q Okay. Dr. Hughes, is there anything in the record that would lead you to believe that she was nearing the need for a total hip arthroplasty prior to her injury?
>
> A No. And I'm going to refer back to Dr. Schwappach's report of July 15th, 2020 because apparently he was privy to some information that I did not have. So it's fair to all parties that I review this carefully.
>
> It looks like he was referencing an acute onset of left hip pain on March 25th, 2020 and that would have been shortly before the work-related injury of April 18th, 2020 and that these X-rays showed no acute injury.
>
> I think that based on the information in his report and the information contained in Dr. White's report that I've already testified to, it is my opinion that Ms. M… [Claimant] sustained a substantial aggravation of her underlying and pre-existing osteoarthritis meriting indication for replacement arthroplasty as recommended by Dr. White.

22. Respondents failed to overcome Dr. Hughes' opinions on MMI and causation.

CONCLUSIONS OF LAW

Based on these findings of fact, the Judge draws these conclusions of law:

A. General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office (ICAO)*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

B. Whether Respondents overcame the DIME physician's opinion by clear and convincing evidence that that Claimant is not at MMI.

"Maximum Medical Improvement" (MMI) is defined as the point when any medically determinable physical or mental impairment because of the industrial injury has become stable and when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5), C.R.S.

A DIME physician's findings of MMI, causation, and impairment are binding on the parties unless overcome by "clear and convincing evidence." §8-42-107(8)(b)(III), C.R.S.; A DIME's determination regarding MMI is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c), C.R.S. The party challenging a DIME physician's conclusions must demonstrate it is "highly probable" the determination is incorrect. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. ICAO*, 961 P.2d 590 (Colo. App. 1998). Clear and convincing evidence means evidence which is stronger than a mere preponderance. It is evidence that is highly probable and free from serious or substantial doubt. *Metro Moving Storage Co. v. Gussert*, 914 P.2d 411

(Colo. App. 1995). A party meets this burden if the evidence contradicting the DIME physician is “unmistakable and free from serious or substantial doubt.” *Leming v. ICAO,* 62 P.3d 1015 (Colo. App. 2002). A “mere difference of medical opinion” does not constitute clear and convincing evidence. E.g., *Gutierrez v. Startek USA, Inc.,* W.C. No. 4-842-550-01, *ICAO,* (March 18, 2016).

If the DIME physician offers ambiguous or conflicting opinions concerning MMI it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, *supra*, (if DIME physician offers ambiguous or conflicting opinions on MMI, it is for ALJ to resolve such ambiguity and conflicts and determine the DIME physician's true opinion). A DIME physician's finding of MMI consists not only of the initial report, but also any subsequent opinion given by the physician. See *Andrade v. ICAO*, 121 P.3d 328 (Colo. App. 2005). Thus, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. ICAO*, 984 P.2d 656, 659 (Colo. App. 1998); *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *Andrade v. Industrial Claim Appeals Office,* 121 P.3d 328 (Colo. App. 2005). Once the ALJ determines the DIME physician's true opinion, if supported by substantial evidence, then the party seeking to overcome that opinion bears the burden of proof by clear and convincing evidence to overcome that finding of the DIME physician’s true opinion regarding MMI. Section 8-42-107(8)(b), C.R.S.; see *Leprino Foods Co. v. ICAO*, *134 P.3d 475 (Colo. App. 2005), In re Claim of Licata*, W.C. No. 4-863-323-04, ICAO, (July 26, 2016) and *Magnetic Engineering, Inc. v*. ICAO, *supra*.

In *Fera v. Resources One, LLC, D/B/A Terra Firma,* W. C. No. 4-589-175, ICAO, (May 25, 2005) [aff'd, *Resources One, LLC v. Industrial Claim Appeals Office* 148 P.3d 287 (Colo. App. 2006)] the panel found that when the ALJ determined the DIME physician's true opinion on MMI, the ALJ did not err in assigning the respondents the burden of proof to overcome by clear and convincing evidence the DIME physician's finding that MMI had not been attained. See also *Viloch v. Opus Northwest, LLC*, W. C. No. 4-514-339, ICAO, (June 17, 2005); *Gurule v. Western Forge*, W. C. No. 4-351-883, ICAO, (December 26, 2001).

In other words, to overcome a DIME physician's opinion, “there must be evidence establishing that the DIME physician's determination [and true opinion] is incorrect and this evidence must be unmistakable and free from serious or substantial doubt.” *Adams v. Sealy, Inc.,* W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097, ICAO, (July 19, 2004); *Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAP, Nov. 17, 2000).

In the case at bench, Respondents’ had the burden of proof to overcome Dr. Hughes’ opinions on MMI and causation. Respondents relied on the opinion of Dr. Schwappach to support their contentions. The ALJ found Dr. Schwappach was unpersuasive in his opinion, especially as it concerns the citation with regard to the Medical Treatment Guidelines (MTGs) and his reference to Claimant’s having more pain at rest. The Medical Treatment Guidelines are developed by the Director pursuant to legislative direction in § 8-42-101(3.5) (a). The statute directs in § 8-42-101(3)(b) that the Guidelines “shall be used by health care practitioners.” The MTGs themselves provide in Rule 17-2 (A) that “all health care providers shall use the medical treatment guidelines.” Accordingly, compliance with the Guidelines is mandatory for medical providers. However, Rule 17-4 (A) acknowledges that “reasonable medical care may include deviations from the Guidelines in individual cases.” The provider is therefore allowed to “request prior authorization” in that situation.

When the treatment is outside the Guidelines, the provider is directed to Rule 16-9 (F) to make the request to the insurance carrier and then to Rule 16-10 (C) (3) to have any unresolved dispute determined by an ALJ. Because an ALJ is designated an arbiter for disputes pertinent to treatment requested outside of the Guidelines, § 8-43-201(3) (amended effective July 1, 2014) provides that an ALJ is “not required” to use the Guidelines as the sole basis for a determination that a medical treatment is reasonable or necessary. Were it otherwise, there would be no purpose to a hearing. See *In re Claim of Chrysler*, 4-951-475-002, ICAO, (July 15, 0202).

With regard to Claimant’s symptoms when she is at rest, there are multiple medical records form Dr. Ogrodnick as well as the physical therapist that document that Claimant has increased symptoms with walking, which is found more purpusasive. As found, Dr. Hughes’ true opinion is that Claimant is not at MMI and requires surgery as recommended by Dr. White. Dr. Hughes is found to be credible. Respondents have failed to produce clear and convincing evidence to overcome the DIME physician’s true opinion that Claimant has not reached MMI as a result of her April 18, 2020 industrial injuries and requires further treatment.

ORDER

IT IS THEREFORE ORDERED THAT:

1. Respondents failed to overcome the DIME’s determination of not at MMI. Thus, Claimant is not at MMI.

2. All issues not decided herein are reserved for future determination.

If you are dissatisfied with the Judge’s order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. The Petition to Review shall be accompanied by a brief in support thereof. You may file the Petition to Review and brief by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not be mailed to the Denver Office of Administrative Courts. If a Petition to Review is filed, the opposing party shall have twenty days after the date of the certificate of service of the Petition to file a brief in opposition to the Petition. For statutory reference, see Section 8-43-301(6), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: July 27, 2021.

Elsa Martinez Tenreiro
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant prove he suffered a compensable injury on April 4, 2008?

- Did Claimant prove entitlement to reasonably necessary medical treatment before MMI?

- If the case is compensable, Claimant seeks to continue treating with ATP Dr. Delos Carrier, who is apparently no longer employed with Respondent. At hearing the parties agreed that if the case is compensable, they will attempt to resolve the issue of whether Claimant will locate Dr. Carrier and return to him for treatment, or instead treat with a different provider.

- Did Claimant prove entitlement to medical benefits after MMI?

- Did Respondent prove Claimant's claim barred by the statute of limitations?

- Did Respondent prove the claims should be precluded by the doctrine of laches?

- The parties agreed to hold average weekly wage in abeyance.

FINDINGS OF FACT

1. Claimant is a Captain with Employer's Fire Department. He has been employed with the Department for 23 years. He injured his right shoulder on April 4, 2008, while working a structure fire. He described the fire as "large," and "heavily involved." He was using a "roof hook" to pull down ceilings to access the fire and extinguish it. He engaged in this activity for several hours, and felt soreness in his shoulder afterwards. He thought little of it at the time.

2. In early May 2008, Claimant was reassigned to a staff position as a recruiter, where he was not using his shoulder as much.[1] He still had some soreness but "didn't really piece it all together." After a few weeks he suspected something was wrong with the shoulder and sought medical attention.

3. Claimant filled out a "standard injury reporting form" and followed the appropriate procedures to obtain care.

4. Claimant saw Dr. Delos Carrier at Respondent's Occupational Health Clinic on May 29, 2008. On a pain diagram he wrote, "First thought pain was muscle soreness. Progressed to pain with movement." Dr. Carrier reported, "he was on a fire on 04/04/2008 and he was pulling ceiling tiles down to inspect for a fire afterwards. He states that since

[1] Claimant credibly testified the reassignment had nothing to do with his shoulder injury.

that time he has had right shoulder ache and a couple of weeks later the pain was worse. . . . He says he first thought that he had just sprained his muscles of his shoulder, but it is getting worse and he thinks there is something internally wrong with it. Dr. Carrier diagnosed right shoulder impingement, with possible rotator cuff strain. He recommended an MRI.

5. Also on May 29, 2008, Respondent’s adjuster Joanie B[Redacted] wrote to the Clinic and advised that “We are investigating this claim and have not determined compensability. We will authorize in-house medical and physical therapy treatment only, and the MRI only.” Ms. B[Redacted] notified Claimant that Respondent designated its Clinic as the designated treating provider.

6. On May 30, 2008, Ms. B[Redacted]emailed BC Jim Schanel, asking “Hi Jim, can you please tell me how [Claimant’s] right shoulder injury occurred on 4/4/08? Were you aware a Work. Comp. claim was filed? Were there any safety violations or contributing factors that may have caused the injury? Please contact me by email or call me.” Later that day, Ms. B[Redacted] noted; “R/C from BC Schanel. Jim advised that he was not aware of the emp’s injury until after the fact. He was not aware that a WC claim was filed until just the other day. Jim did, however, confirm that the emp was pulling ceiling at the fire on the DOI and could verify the tasks performed. Jim also confirmed he was unaware of any shoulder complaints prior to this injury.”

7. Claimant had the shoulder MRI on June 2, 2008. Claimant followed up with Dr. Carrier on June 12, 2008, who reported, “[the MRI] shows mild to moderate tendinitis, tendinopathy involving the rotator cuff tendons, particularly the infraspinatus and supraspinatus tendons. There is a large partial thickness tear involving the anterior insertion of the supraspinatus tendon. There is no definite MRI evidence of full thickness tear. He has a type 2 acromion with inferior angulation and probable mild impingement syndrome. His physical examination is unchanged from last visit.” Dr. Carrier diagnosed right shoulder impingement, with partial rotator cuff tear. He recommended physical therapy for two weeks. After that, a possible injection and if no benefit then orthopedic surgery referral.

8. On July 7, 2008, Dr. Carrier noted, “He states overall he is about 85% to 90% better. He says it only aches occasionally about three times per week. He has started lifting more and feels that the lifting has not aggravated his pain much at all. He states that occasionally has an achy sensation in his right shoulder but does not have it presently.” Dr. Carrier recommended one more session of physical therapy.

9. On July 11, 2008, Dr. Carrier reported, “He states his right shoulder is overall about 90 to 95% better. He is pleased with his progress, and he has been discharged from physical therapy today. He states he is safely able to perform his duties as a firefighter and feels he can be discharged from care. He understands that he can return if his symptoms do not continue to improve or if they worsen. He just would need to talk to his claims adjustor first.” Dr. Carrier placed Claimant at MMI with no permanent impairment and no work restrictions. In a WC164 form, Dr. Carrier checked “no” to question of whether maintenance care was required, but in his narrative, he stated, “[Claimant] will follow up as desired.”

10. On July 15, 2008, Ms. B[Redacted] wrote to the Clinic and advised that, “This claim has been closed on a medical report. Please do not schedule any medical appointments after MMI until the claim adjuster has met with the employee and has provided authorization for further care.”

11. Claimant he never had the injection mentioned by Dr. Carrier, nor further workup. He confirmed that he felt 90 to 95% better when discharged by Dr. Carrier. Claimant credibly testified that his shoulder pain never completely resolved, but he was able to “self-manage” it over the ensuing years with exercise and relative rest when needed.

12. At approximately the end of July or beginning of August 2008, he left the recruiting position and returned to his regular job as a firefighter. Claimant’s shoulder did not impede his ability to perform his physically demanding job.

13. Claimant missed no time from work because of the shoulder injury. He was able to self-manage his symptoms over the years as noted. However, in the summer of 2020 Claimant’s self-management lost its effectiveness. He began having difficulty putting his bunker coat on without experiencing significant pain. The pain was interfering with his sleep. Claimant testified that he “had to do things differently” and “modify my activities” because of his shoulder pain. He gave examples of trying to put on a jacket or shirt, and the pain would become severe. When required to lift heavy equipment at work, Claimant used his left arm instead of his right. He described taking ibuprofen “like candy, almost, just to try to get through the pain.” Claimant was only able to throw a football with his son “a couple times” before pain prevented him from continuing. Claimant’s wife suggested he get his shoulder checked out.

14. Claimant tried to return to the Clinic for follow-up care. He wanted to know whether something could be done for his shoulder, or whether he would “just have to live with it.” He was referred to adjuster Stephen F[Redacted]. Mr. F[Redacted] told Claimant Respondent would not reopen his claim. At this point, Claimant simply wants to be evaluated so he can find out whether anything can be done for his shoulder.

15. Claimant filed a Worker’s Claim for Compensation form on December 22, 2020. The ALJ finds that Claimant did not realize the probable compensable nature of his injury until the summer of 2020.

16. Claimant has sustained no other injuries to his right shoulder, though he has injured other parts of his body on the job. For instance, he injured his right knee “while performing a high angle rescue on Blodgett Peak…” on August 26, 2011. In the a “New Patient Questionnaire” dated August 31, 2011, in response to the question “When were you last seen and what type of treatment have you been given?” Claimant responded, “P.T. due to shoulder injury – 2008.”

17. Claimant injured his left knee while performing high angle rescue training at Garden of the Gods on October 8, 2014. He completed a questionnaire that inquired about various body parts but mentioned no shoulder issues. In another questionnaire, Claimant disclosed a finger injury sustained when he was 6 years old but did not endorse

the 2008 shoulder injury. He explained at hearing that he “figured they [Respondent] already had the records about his shoulder.

18. Claimant injured his right elbow on April 28, 2018, while pulling down ceilings at the scene of a fire. He presented to the Clinic on May 17, 2018, where Paula Homberger, PA-C, noted; “He demonstrates full ROM of the shoulders, elbows, wrists, & fingers without guarding. There is no visible bony abnormality or erythema, edema, or ecchymosis. There is tenderness of the R lateral epicondyle and into the proximal forearm. There is mild tenderness of the medial epicondyle” Ms. Homberger diagnosed right medial and lateral epicondylitis. The ALJ does not find the lack of findings or discussion of Claimant’s shoulder surprising, because he was being treated for an elbow injury. Additionally, Claimant’s shoulder symptoms were well-controlled at that time and easily managed with exercise and OTC medications.

19. In a physical therapy note apparently pertaining to a June 15, 2018 visit for the right elbow injury, Claimant checked the space for “shoulders” and “arms” in response to the question “Have you ever hurt, broken or sprained” various body parts. He added, “R shoulder tear 2008. L lateral meniscus.”

20. When asked about the lack of documentation of ongoing shoulder problems in later treatment records regarding his other injuries, Claimant credibly testified that; “I wasn’t there for my shoulder,” rather, he was being seen for whatever the new injury was, whether the knee, elbow, etc., and his shoulder was not “the overwhelming pain” at the time.

21. Dr. Nicholas Olsen conducted an IME for Respondents on March 4, 2021. Dr. Olsen opined his examination was “most consistent with bicipital tendinitis of the right shoulder.” Dr. Olsen opined that Claimant’s shoulder problems “are not causally related to his 5/30/08 [sic] incident.” Dr. Olsen elaborated,

> It is improbable that if [Claimant] had continued difficulty from the 5/30/08 incident, certainly, this would have been discussed with Paula Homberger in 2018 when he injured his elbow. She noted full range of motion in his shoulders and reported no difficulty. The medical records would clearly indicate that Mr. Adams had recovered from the 5/30/08 incident certainly by April 2018.

22. Towards the end of the audio recording, Claimant expressed his desire to avoid shoulder surgery. He appeared to wonder if the problems were not from the work injury. Dr. Olsen responded, “Maybe the old injury is a piece of this, but I think a new piece is your biceps tendon. Seems to be pretty inflamed. It’s possible that ache that you felt is that old injury, and you have to decide whether that ache is enough to justify surgery.”

23. Dr. Olsen testified as an expert at hearing and his testimony was largely consistent with his written report. Dr. Olsen opined Claimant’s injury-related shoulder problems fully resolved and any problems he experiences now are not related to the work accident. Dr. Olsen’s opinion was based on his belief that medical records generated for

other injuries showed "no ongoing problems of any kind" regarding the shoulder. Dr. Olsen discounted Claimant statements and testimony regarding ongoing shoulder symptoms in favor of the medical records.

24. Claimant's testimony was generally credible and persuasive. Claimant proved he suffered a compensable injury to his right shoulder on April 4, 2008.

25. Claimant proved the treatment he received from Employer's occupational health clinic in 2008 was reasonably needed to cure and relieve the effects of his work injury.

26. Respondents failed to prove Claimant's claim is barred by the statute of limitations. Claimant did not reasonably appreciate the nature, seriousness, and probable compensable character of his injury until the summer of 2020. Claimant's claim was filed in December 2020, well within the two-year statutory period.

27. Claimant proved entitlement to medical benefits after MMI.

28. Respondents failed to prove the claim should be barred by laches.

CONCLUSIONS OF LAW

A. Claimant proved a compensable injury.

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which he seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). A pre-existing condition does not disqualify a claim for compensation if a work accident aggravates, accelerates, or combines with the underlying condition to cause disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). A compensable injury is one that requires medical treatment or causes a disability. *E.g., Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (August 17, 2016).

As found, Claimant proved he suffered a compensable injury on April 4, 2008 that caused a need for medical treatment. Claimant's description of the accident is credible and persuasive. Claimant's testimony is consistent with the description of injury he gave at the initial appointment with Dr. Carrier. Although BC Schanel could not confirm the injury, he corroborated Claimant's account of the activities he was performing on the date of injury.

B. Treatment rendered by Respondent's Clinic, and its referrals, was reasonably necessary to diagnose, cure, and relieve the effects of Claimant's compensable injury.

The respondents are liable for medical treatment from authorized providers that is reasonably necessary to cure or relieve the employee from the effects of the industrial injury. Section 8-42-101(1)(a); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Where the Respondent disputes the claimant's entitlement to medical benefits, the claimant must prove the treatment is recently necessary and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The claimant must prove entitlement to disputed medical benefits by a preponderance of the evidence. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

As found, the preponderance of persuasive evidence shows Claimant injured his right shoulder performing activities arising out of and in the course of his employment. Claimant required, and received, treatment for that injury from Dr. Carrier at Respondent's occupational health clinic.

C. Claimant's claim is not barred by the statute of limitations.

Section 8-43-103(2) requires a claimant to file a formal claim for workers' compensation benefits within two years after an injury, or within three years if a reasonable excuse exists and the late filing will not prejudice the employer's rights. The statute of limitations does not begin to run until the claimant, as a reasonable person, knows or should have known the "nature, seriousness and probable compensable character" of the injury. *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967).

The concept of "injury" for statute of limitations purposes is narrower than required for a threshold showing of "compensability" as discussed in Section A, *supra*. Although so-called "medical only" claims are commonly referred to as "compensable," the term "injury" as used in the statute of limitations refers is disabling and entitles the claimant to compensation in the form of disability benefits. *City of Boulder, supra*, at 197; *see also Romero v. Indus. Comm'n*, 632 P.2d 1052, 1053 (Colo. App. 1981).

This reflects the longstanding distinction under the Act between medical benefits and "compensation." *See* § 8-43-103(2). A worker's need for medical treatment does not necessarily coincide with the period when the worker is disabled or entitled to disability benefits. *Wal-Mart Stores, Inc. v. Indus. Claims Office*, 989 P.2d 251, 253 (Colo. App. 1999). To be eligible for temporary disability benefits, a claimant must miss more than three work shifts or work days because of the injury. §§ 8-42-103(1)(a); 8-43-101(1); *City of Englewood v. Indus. Claim Appeals Office*, 954 P.2d 640, 643 (Colo. App. 1998) (the threshold period of disability triggers employer's notice obligations.). Permanent disability benefits become available only when a claimant's injury has caused a permanent physical impairment or is fatal. *See* §§ 8-42-107, 8-43-101(1), 8-43-203(1)(a). It follows, therefore, that claimants will realize the "probable compensable character" of an injury when they become aware that it is causally related to the employment and that it may be disabling and entitle them to temporary or permanent disability benefits. *See Intermountain Rubber Indus., Inc. v. Valdez*, 688 P.2d 1133, 1137 (Colo. App. 1984); *see also City of Colorado Springs v. Indus. Claim Appeals Office*, 89 P.3d 504, 506 (Colo. App. 2004).

Here, Claimant did not miss work or otherwise become eligible for temporary disability benefits. Dr. Carrier placed Claimant at MMI in 2008 with no impairment and no restrictions. Claimant did not dispute the MMI determination because, as Dr. Carrier noted, "his right shoulder is overall about 90 to 95% better. He is pleased with his progress, and he has been discharged from physical therapy today. He states he is safely able to perform his duties as a firefighter and feels he can be discharged from care."

The ALJ concludes Claimant reasonably should have appreciated the probable compensable character of his injury in the summer of 2020. At that time, Clamant was forced to modify his physical activities, both on and off the job, because of the effects of the injury. Claimant's self-management techniques lost their effectiveness, and he decided he needed to seek more medical treatment. Claimant realized his injury may be disabling in the summer of 2020. Thus, the Worker's Claim for Compensation form he filed on December 22, 2020 was timely.

D. Post-MMI medical treatment.

Medical benefits may extend beyond MMI if a claimant requires treatment to relieve symptoms or prevent deterioration of their condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). If the claimant establishes the probability of a need for future treatment, he is entitled to a general award of medical benefits after MMI, subject to the respondents' right to dispute causation or reasonable necessity of any particular treatment. *Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003). A claimant need not be receiving treatment at the time of MMI or prove a particular course of treatment has been prescribed to obtain a general award of *Grover* medical benefits. *Miller v. Saint Thomas Moore Hospital*, W.C. No. 4-218-075 (September 1, 2000). Proof of a current or future need for "any" form of treatment will suffice for an award of post-MMI benefits. *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). The claimant must prove entitlement to post-MMI medical benefits by a preponderance of the evidence. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997).

As found, Claimant proved he requires additional evaluation and treatment to relieve the effects of his injury or prevent further deterioration. Claimant credibly testified his condition got worse in the summer of 2020. His self-treatment modalities lost their effectiveness, he was forced to modify his physical activities, and it became necessary to take more ibuprofen and Tylenol to manage his pain. He sought, and was denied, permission to return to Respondent's Clinic for evaluation. Claimant's request is reasonable and appropriate to determine what, if any, additional treatment options are available. Coupled with his continued need for OTC analgesics,[2] Claimant has proved the probable need for treatment after MMI.

[2] *E.g.*, *Guillotte v. Pinnacle Glass Company*, W.C. No. 4-443-875 (November 20, 2001) ("the fact [a] medication is available without a prescription does not vitiate its compensability or nullify the award of *Grover*-style medical benefits."); *Mann v. Ridge Erection Company*, W.C. No. 4-225-122 (April 4, 1996) (no distinction between "over the counter" medications and prescribed medications for *Grover* benefits); *Ashton-Moore v. Nextel Communications, Inc*., W.C. No. 4-431-951 (September 12, 2002) (recommendation for OTC anti-inflammatories "as necessary for pain" can support a *Grover* award).

Dr. Olsen correctly points out ongoing shoulder complaints are not documented in Claimant's medical records since he was released by Dr. Carrier. But Claimant provided reasonable explanations for not mentioning the shoulder at appointments for various other conditions. Ultimately, Dr. Olsen dismissed Claimant's explanations. However, because the ALJ finds Claimant credible, arguments predicated on disbelieving his statements are not persuasive.

E. Claimant's claim is not precluded by the doctrine of laches.

The equitable doctrine of laches may be used to deny relief to a party whose unconscionable delay in enforcing his rights has prejudiced the party against whom enforcement is sought. *Burke v. Industrial Claim Appeals Office*, 905 P. 2d 1 (Colo. App. 1994); *Bacon v. Industrial Claim Appeals Office*, 746 P.2d 74 (Colo. App. 1987). Thus, application of the doctrine of laches requires both proof of a delay and prejudice. Further, laches is an affirmative defense. *Cowin & Co. v. Medina*, 860 P.2d 535 (Colo. App. 1992).

Respondent failed to establish the claim should be barred by laches. Respondent's counsel stated in opening arguments that "some relevant people are no longer available," but did not identify such people or show how their absence resulted in prejudice. The threshold determination of compensability in this Order is primarily based on information Respondent had in 2008. After learning of the injury in 2008, Respondent conducted an investigation sufficient to verify an injury occurred. Respondent failed to prove it was prejudiced by claimant's filing his Worker's Claim for Compensation in 2020. And Claimant did not realize the probable compensable nature of his injury until the summer of 2020. The fact that he filed a claim in December of 2020 does not constitute the required "unconscionable delay." Because Respondent did not present evidence to prove delay or prejudice, the doctrine of laches is inapplicable and does preclude Claimant's claim.

ORDER

1. Claimant's claim for workers' compensation benefits based on injuries sustained on April 4, 2008 is compensable.

2. Insurer shall cover all medical treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's compensable injury, including but not limited to, Respondent's occupational health clinic.

3. Respondent shall cover all medical treatment after MMI from authorized providers reasonably needed to relieve the effects of Claimant's injury or prevent deterioration of his condition, including an evaluation with an ATP regarding further treatment options, if any.

4. Respondent's statute of limitations defense is denied and dismissed.

5. Respondent's laches defense is denied and dismissed.

6. All issues not decided herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: July 28, 2021

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION No. 5-123-320-001

ISSUES

- Did Claimant overcome the DIME's determination of MMI by clear and convincing evidence?

- If Claimant is at MMI, did he prove by a preponderance of the evidence the admitted extremity ratings should be converted to whole-person ratings?

- If Claimant is at MMI, did he prove by a preponderance of the evidence he is entitled to medical benefits after MMI?

- Did Claimant prove entitlement to a change of physician?

- The parties agreed to reserve the issue of disfigurement.

FINDINGS OF FACT

1. Claimant worked as a Correctional Officer at Respondent's Zebulon Pike Youth Services Center. He suffered admitted injuries to his left knee and right shoulder when involved in an altercation with a youth on October 18, 2019.

2. Claimant was referred to CCOM for authorized treatment. At his initial visit, Dr. Centi documented, "employee was dealing with an assaultive child and had to perform a takedown today, during the process he twisted his left knee and sprained his right shoulder, c/o pain weakness and difficulty with moving the shoulder, no numbness or tingling." Dr. Centi diagnosed unspecified sprains of the right shoulder and left knee. He ordered x-rays, prescribed medications, and imposed work restrictions.

3. An MRI of the right shoulder on October 25, 2019 revealed "partial thickness undersurface insertional tears of the supraspinatus tendon. No full thickness rotator cuff tears."

4. On October 28, 2019, Dr. Centi noted, "shoulder is not improving, hurts with any motion, no numbness or tingling, knee is still sore, now buckling." Dr. Centi recommended physical therapy and an MRI of the left knee.

5. The MRI was performed on November 2, 2019. It showed degenerative changes, effusion with a small Baker's cyst, and multiple loose bodies. Dr. Centi referred Claimant to Dr. David Walden, and orthopedic surgeon.

6. Claimant saw Dr. Walden's PA-C, Rachel Cerchia, on November 12, 2019. Ms. Cerchia reported, "The patient has a symptomatic description of the loose body within the knee and MRI evidence of that as well. I am setting him up for surgical intervention and further evaluation and review of these findings by Dr. Walden next Thursday. We will

begin the scheduling process for left knee arthroscopic loose body removal and chondroplasty."

7. Dr. Walden evaluated Claimant on November 21, 2019 and noted, "His knee is very inflamed and continues to lock. There is evidence on x-ray of a possible loose body. He also has some osteoarthritic changes of the patellofemoral joint. I talked to him about operative and non-operative options, and he chooses to pursue an arthroscopic evaluation of the knee with a probable loose body removal."

8. Dr. Walden performed left knee surgery on November 25, 2019. He described removing multiple small loose bodies from the knee. He also noted, "There were grade III and IV changes noted on the femoral trochlea with one area completely denuded of cartilage with large fragments of cartilage breaking off from this location. This was thought to be likely site of the loose body formation. Cartilage was cleaned free from this area stabilizing the residual cartilage and microfracture technique was now utilized with a microfracture pick in this area."

9. Claimant saw Dr. Walden for his right shoulder on January 30, 2020. Dr. Walden reported, "He has had pain in the right shoulder since [the accident] despite physical therapy. He actually improved a bit but then plateaued. He still [has] difficulty reaching out and away from his body predominantly out to the side. He is having difficulty with sleep as well. . . . At this point, the patient may have maximized his benefit from physical therapy, according to the therapist that he is seeing. He does not feel as though his shoulder is strong enough to do the regular activities and demands of his job at Zebulon Pike Detention Center." Dr. Walden administered a steroid injection to the shoulder.

10. On February 6, 2020, Ms. Cerchia noted Claimant's left knee was improving and that he would be sent for "what may likely be a final round of physical therapy for him.

11. Claimant's final visit with Ms. Cerchia was on February 27, 2020. He reported his shoulder "is doing extremely well and is having no problems or concerns. He states he had full strength return to the shoulder without pain or difficulties". Examination showed "full forward flexion, abduction, internal and external rotation without any problems or deficits. Good strength is noted with regard to supraspinatus position as well as internal and external rotation testing. Significant resistance was applied to him today and he has no difficulties." There was some pain noted with palpation on the anterior aspect of the shoulder. There is no indication of any proximal issues such as pectoral, scapular, trapezius, upper back, or neck pain.

12. Ms. Cerchia also documented Claimant had recently aggravated the left knee from prolonged sitting, standing, and possibly twisting it. There was no mention of low back or hip pain. Ms. Cerchia aspirated the knee and administered a steroid injection. She released Claimant to follow up "as needed." Claimant credibly testified the injection provided relief initially but eventually wore off.

13. At his March 20, 2020 physical therapy session, Claimant reported 0/10 shoulder pain and said his shoulder was "great." He was still having knee pain and

described the knee as “temperamental.” Claimant’s final PT appointment was on March 26, 2020.

14. Claimant attended a total of 24 PT sessions for his knee and shoulder. The PT records document no low back or hip symptoms because of altered gait.

15. On March 23, 2020, Claimant told Dr. Centi “[his] shoulder is much improved, has been released by orthopedics, no numbness of tingling, continues to progress. He considers it to be almost gone.” The shoulder was nontender to palpation with “nearly complete” ROM and good strength. Examination of Claimant’s neck showed no pain and full range of motion. Dr. Centi placed Claimant at MMI with a 16% lower extremity rating for the left knee, and a 4% upper extremity rating for the right shoulder. He opined Claimant required no maintenance and no work restrictions. Respondent filed FALs consistent with Dr. Centi’s findings on May 8 and June 3, 2020.

16. Claimant completed multiple pain diagrams during his treatment at CCOM. He consistently marked his left knee and right shoulder. He never indicated symptoms in his low back or hips.

17. Despite being released with no restrictions, Claimant believed he could not adequately perform the physical requirements of his job. He did not want to be unable to assist should a “code be called.” Respondent “administratively separated” Claimant on July 23, 2020.

18. Dr. Frank Polanco performed a DIME at Claimant’s request on September 8, 2020. Claimant described “constant, dull, knee pain, 2-3 out of 10. The pain becomes sharp when attempting to squat. He reports the knee ‘gave out’ 2-3 times last month. He states he is unable to run. Additionally, he experiences right shoulder pain when attempting a ‘throwing’ motion, 6-7 out of 10.” Palpation around the shoulder showed no soft tissue pain. Impingement tests were normal. Dr. Polanco also examined Claimant’s neck and back and found “full and fluid” range of motion with no soft tissue tenderness, trigger points, or spasms. Claimant testified Dr. Polanco’s examination was thorough. Dr. Polanco assessed “1. Status post arthroscopic chondroplasty and microfracture technique of femoral trochlea, loose body removal, extensive synovectomy left knee. 2. Right shoulder strain/partial thickness undersurface insertional tears of the supraspinatus.” Dr. Polanco agreed Claimant had reached MMI on March 23, 2020. He assigned a 14% lower extremity rating for the left knee (6% whole-person), and an 11% upper extremity rating for the right shoulder (7% whole-person). He summarized, “[Claimant] sustained a rotator cuff tear with residual symptoms and thus I provided a crepitus impairment. He has residual range of motion deficit in his knee resulting in a range of motion impairment but there is no Table 40 diagnosis upon which to give an impairment.” Dr. Polanco opined Claimant could work without restrictions and required no maintenance treatment.

19. Dr. Timothy Hall performed an IME at Claimant’s request on February 18, 2021. Dr. Hall noted, “What he wants is more treatment regarding his knee and more treatment regarding his shoulder if indeed that is reasonable.” Examination of the right shoulder showed tenderness around the long head of the biceps tendon and reduced

range of motion. Neck range of motion was full and there were "no significant findings through the soft tissues of the periscapular area." Examination of the knee showed joint line tenderness and limited flexion. Dr. Hall observed a "slight limp" favoring the left knee. Dr. Hall documented no exam findings of low back or hip pain. Dr. Hall had no quarrel with Dr. Polanco's impairment ratings. However, he recommended additional treatment for the knee:

> One level of intervention that has not been tried which could certainly be done under maintenance care but should have been done before he was put at MMI was trying viscosupplementation. As per the treatment guidelines, there is strong evidence to the effectiveness of these interventions. There may also be a role for steroid injections controlling in his pain. [Claimant] had done well with previous knee injury doing aquatic exercises and therapy, which is an option per the guidelines. These should have been provided in combination with the land-based therapies and would be appropriate under maintenance care as well as pre-MMI treatment.

20. Regarding the shoulder, Dr. Hall opined,

> I do not think he is at maximum medical improvement. All that has been done is one injection. He has clinical presentation consistent with biceps tendinitis and may well have rotator cuff pathology as evidenced on the MRI. Therapies regarding the biceps tendon would be appropriate. Even potential injection involving the biceps tendon. Generally, he needs more workup, more treatment regarding the shoulder. There was a time after the injection that things improved but he has lost what temporary relief he had from the injection and now has fairly significant symptoms regarding the right shoulder requiring at least maintenance care if not being taken off MMI and further investigated/treated.

21. Dr. Hall disagreed Claimant should have been released to full duties, citing difficulty with standing, walking, and concerns about engaging in "take downs."

22. Dr. Hall also opined, "He does report low back pain and problems with his gait involving the knee, which would render conversion regarding the knee to whole person appropriate."

23. Claimant experiences consistent pain in his knee, which becomes "sharp" if he tries to squat. Ascending stairs is painful, and he has difficulty running. Claimant can walk but has trouble with longer distances and can experience a "locking" of the knee, which sometimes "gives out." Claimant testified the knee pain has caused him to alter his gait, which has let do pain and discomfort in his low back and hip. Claimant testified he experiences spasms in his low back about once per week due to this altered gait.

24. No examining or treating provider documented low back or hip pain, except Dr. Hall.

25. Claimant testified his shoulder is “fine until I either go above my head and that’s when that pain starts, and if I catch myself in any way making any kind of a throwing motion, that’s when I have extreme pain. It’s a very sharp pain.” Claimant pointed to and indicated the pain is in the front of his shoulder joint. Claimant can reach overhead, but “I do have pain when I go straight above me.”

26. Before his injury, Claimant enjoyed sporting activities such as basketball, and was “big into the outdoors.” He enjoyed backcountry camping, hunting, and fishing. Claimant continues to engage in outdoor activities, although he has had to reduce their distance and duration because of his ongoing knee and shoulder issues. Claimant belongs to “Planet Fitness” and participates in strength building exercises for his knee and shoulder.

27. Claimant wants a change of physician because he feels there was not an effective doctor-patient relationship with Dr. Centi. He felt he was “kind of a number” and got the impression Dr. Centi was not interested in hearing about his concerns. Dr. Centi performed only three physical examinations. Claimant believes Dr. Centi was not invested in his care and recovery. Claimant tried to contact Dr. Centi about one week after being released because he continued to have difficulty squatting and running, but received no response.

28. Dr. Hall testified at hearing consistent with his report. Dr. Hall opined the work injury exacerbated Claimant’s underlying knee osteoarthritis, and believes viscosupplementation is a reasonable option to manage ongoing arthritic pain. If viscosupplementation does not work, Claimant is a candidate for steroid injections. Dr. Hall testified these options would be considered maintenance treatment, versus treatment necessary to reach MMI, because they are designed to manage symptoms and not change Claimant’s underlying condition.

29. Dr. Hall believes Claimant’s shoulder pain is probably related to impingement, bicipital tendonitis, and/or the partial supraspinatus tear shown on the MRI. Dr. Hall testified, “There are exercises and other things you can do to try to keep that humeral head down in its more appropriate position. . . . A therapist can teach patients specific exercises to avoid [the humeral head getting out of position].” Dr. Hall opined Claimant should be allowed to return to Dr. Walden or another orthopedic specialist for further evaluation.

30. Dr. Hall opined Claimant is not at MMI for the shoulder injury. He testified the recurrence of shoulder symptoms warrants additional work-up. Dr. Hall opined Dr. Polanco should have determined Claimant was no longer at MMI because his symptoms appeared worse at the DIME than when Dr. Centi initially put Claimant at MMI. He testified, “the benefit of the injection had worn [off] and more treatment would be appropriate. . . . [H]e was no longer as good as he was when placed at MMI, which by definition makes you not at MMI anymore.”

31. Claimant failed to overcome the DIME’s MMI determination by clear and convincing evidence.

32. Claimant failed to prove his scheduled shoulder or knee ratings should be converted to their whole person equivalents.

33. Claimant proved he requires medical benefits after MMI to relieve the effects of his injury or prevent deterioration of his condition.

34. Claimant failed to make a proper showing for a change of physician.

CONCLUSIONS OF LAW

A. MMI

A DIME's determination regarding MMI is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c). The party challenging a DIME physician's conclusions must demonstrate it is "highly probable" the determination is incorrect. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). A party meets this burden if the evidence contradicting the DIME physician is "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). A "mere difference of medical opinion" does not constitute clear and convincing evidence. *E.g., Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (March 18, 2016).

"Maximum Medical Improvement" (MMI) is defined as the point when any medically determinable physical or mental impairment because of the industrial injury has become stable and when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5), C.R.S. Diagnostic procedures constitute a compensable medical benefit that must be provided before MMI if such procedures have a reasonable prospect of diagnosing the claimant's condition and suggesting further treatment. *E.g.*, *Watier-Yerkman v. Da Vita, Inc*., W.C. No. 4-882-517-02 (January 12, 2015); *Soto v. Corrections Corp. of America*, W.C. No. 4-813-582 (February 23, 2012).

As found, Claimant failed to overcome the DIME regarding MMI by clear and convincing evidence. Dr. Hall agreed Claimant's knee is at MMI, so the primary dispute relates to the shoulder. Dr. Polanco's determination of MMI as of March 23, 2020 is consistent with Dr. Centi's examination findings, and the reports of multiple other providers showing the shoulder symptoms had largely resolved. Although it appears Claimant's shoulder has worsened since March 23, 2020, that does not persuasively call the original MMI date into question. Dr. Hall's opinion Clamant is "not at MMI *anymore*" is essentially a concession he was at MMI in March 2020. Additionally, Dr. Hall did not describe specific treatment needed to improve the condition of Claimant's shoulder, and primarily recommends a return to Dr. Walden for further "work up." Although such investigations might lead to additional treatment recommendations, the existence of such a mere possibility does not persuade the ALJ Dr. Polanco was "highly probably incorrect" in finding Claimant at MMI as of March 23, 2020.

B. Whole person conversion

When evaluating whether a claimant has sustained scheduled or whole person impairment, the ALJ must determine “the situs of the functional impairment.” This refers to the “part or parts of the body which have been impaired or disabled as a result of the industrial accident,” and is not necessarily the site of the injury itself. *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366, 368 (Colo. App. 1996). The schedule of disabilities refers to the loss of “an arm at the shoulder.” Section 8-42-107(2)(a). If the claimant has a functional impairment to part(s) of his body other than the “arm,” he has sustained a whole person impairment and must be compensated under § 8-42-107(8).

There is no requirement that functional impairment take any particular form, and “pain and discomfort which interferes with the claimant’s ability to use a portion of the body may be considered ‘impairment’ for purposes of assigning a whole person impairment rating.” *Martinez v. Albertson’s LLC*, W.C. No. 4-692-947 (June 30, 2008). Referred pain from the primary situs of the initial injury may establish proof of functional impairment to the whole person. *E.g., Latshaw v. Baker Hughes, Inc*., W.C. No. 4-842-705 (December 17, 2013); *Mader v. Popejoy Construction Co., Inc*., W.C. No. 4-198-489 (August 9, 1996). Although the opinions of physicians can be considered when determining this issue, the ALJ can also consider lay evidence such as the claimant’s testimony regarding pain and reduced function. *Olson v. Foley’s*, W.C. No. 4-326-898 (September 12, 2000).

Pain and limitations in the trapezius, scapular area, or neck can functionally impair an individual beyond the arm. *E.g. Steinhauser v. Azco, Inc.*, W.C. No. 4-808-991 (January 11, 2012); *Franks v. Gordon Sign Co.*, W.C. No. 4-180-076 (March 27, 1996); *Martinez v. Albertson’s LLC*, W.C. No. 4-692-947 (ICAO, June 30, 2008). Similarly, back pain and associated functional limitations caused by altered gait can result in a whole person impairment. *E.g*., Abeyta v. Wackenhut Services, W.C. No. 4-519-399 (September 16, 2004). However, the mere presence of pain in a part of the body beyond the schedule does not automatically represent a functional impairment or require a whole person conversion. *Newton v. Broadcom, Inc*., W.C. No. 5-095-589-002 (July 8, 2021).

Claimant described multiple ways his shoulder and knee injuries limit his ability to perform various vocational, personal, and recreational activities. In that regard, his injuries have clearly caused some level of “disability.” *See AMA Guides, Third Edition (Rev.)* § 1.1 (“disability is the gap between what the individual *can* do and what the individual *needs* or *wants* to do.”). But to support conversion to whole person, the disability must arise from functional impairment in parts of the body beyond the arm or leg. *Strauch v. PSL Swedish Healthcare System*, *supra*, at 368.

The persuasive evidence demonstrates Claimant’s knee-related functional impairment is limited to his leg. The ALJ does not doubt that Claimant has difficulty with ambulation that affects his ability to perform routine activities. But those limitations are a function of his lower extremity impairment and not caused by any functional impairment to parts of the body beyond the leg. Claimant’s other main argument for whole person impairment is he developed low back and hip pain because of altered gait. But there is no persuasive corroborating evidence in the medical records to support that allegation.

Claimant did not indicate back or hip pain on any of his pain diagrams at CCOM. He did not report back or hip symptoms at the DIME, and Dr. Polanco's examination showed no evidence of back or hip issues. Although Claimant may experience transient low back or hip pain, the ALJ is not persuaded that any such symptoms represent a functional impairment that would justify a finding of whole person impairment.

There is even less support in the record for conversion of Claimant's shoulder impairment. Dr. Hall does not advocate conversion of the shoulder and, more important, does not identify factors that would justify conversion. As with the knee, the disability Claimant described is because of limitation in the use his arm, as opposed to any part(s) of his body beyond the arm.

C. Medical benefits after MMI

The respondent is liable for medical treatment after MMI reasonably necessary to relieve the effects of the injury or prevent deterioration of the claimant's condition. Section 8-42-101; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Proof of a current or future need for "any" form of treatment will suffice for an award of post-MMI benefits. *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). There is no requirement that a particular course of treatment be articulated or that the claimant actually be receiving treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999). If the claimant establishes the probability of a need for future treatment, he is entitled to a general award of medical benefits after MMI, subject to the employer's right to dispute causation or reasonable necessity of any particular treatment. *Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003).

As found, Claimant proved a probable need for future treatment to relieve the effects of his injuries and prevent deterioration of his condition. Claimant's knee remains symptomatic, and his shoulder appears to have worsened since MMI. Although Dr. Hall cannot order treatment as an IME, his opinions regarding the types of modalities that could be employed to relieve Claimant's symptoms are persuasive. Even if Claimant's symptoms could be managed equally effectively with OTC analgesics and NSAIDs (as argued by Respondent), such medications would still support an award of *Grover* benefits. *E.g., Guillotte v. Pinnacle Glass Company*, W.C. No. 4-443-875 (November 20, 2001) ("the fact [a] medication is available without a prescription does not vitiate its compensability or nullify the award of *Grover*-style medical benefits."); *Mann v. Ridge Erection Company*, W.C. No. 4-225-122 (April 4, 1996) (no distinction between "over the counter" medications and prescribed medications for *Grover* benefits); *Ashton-Moore v. Nextel Communications, Inc.*, W.C. No. 4-431-951 (September 12, 2002) (recommendation for OTC anti-inflammatories "as necessary for pain" can support a *Grover* award). Finally, Claimant's desire to follow up to Dr. Walden for to explore his options is reasonable in light of his ongoing symptoms.

D. Change of Physician

A claimant can obtain a change of physician "upon the proper showing to the division." Section 8-43-404(5)(a)(VI)(A); *Gianetto Oil Co. v. Industrial Claim Appeals Office*, 931 P.2d 570 (Colo. App. 1996). Section 8-43-404(5)(a)(VI)(A) does not define a "proper showing," and the ALJ has broad discretion to decide if the circumstances justify a change of physician. *Jones v. T.T.C. Illinois, Inc*., W.C. No. 4-503-150 (May 5, 2006). The ALJ should exercise this discretion with an eye toward ensuring the claimant receives reasonably necessary treatment while protecting the respondents' legitimate interest in being apprised of treatment for which they may ultimately be held liable. *Yeck v. Industrial Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999); *Landeros v. CF & I Steel*, W.C. No. 4-395-315 (October 26, 2000). The ALJ may consider many factors including whether the claimant has received adequate treatment, whether the claimant trusts the ATP, the level of communication between the claimant and the ATP, the ATP's expertise and skill at managing a condition, and the ATP's willingness to provide additional treatment. *E.g*., *Carson v. Wal-Mart*, W.C. No. 3-964-07 (April 12, 1993); *Merrill v. Mulberry Inn, Inc*., W.C. No. 3-949-781 (November 1995); *Greenwalt-Beltmain v. Department of Regulatory Agencies*, W.C. No. 3-896-932 (December 5, 1995); *Zimmerman v. United Parcel Service*, W.C. No. 4-018-264 (August 23, 1995). An ALJ need not approve a change of physician because of a claimant's personal reasons, including mere dissatisfaction with the ATP. *McCormick v. Exempla Healthcare*, W.C. No. 4-594-683 (November 27, 2007). On the other hand, the ALJ is not precluded from considering the claimant's subjective perception of his relationship with the physician. *Gutierrez v. Denver Public Schools*, W.C. No. 4-688-075 (December 18, 2008).

As found, Claimant failed to establish a basis for a change of physician. Dr. Centi provided appropriate referrals and oversaw a course of treatment that resulted in substantial improvement. There is no persuasive evidence he dismissed Claimant's concerns or treated him with disrespect. Dr. Centi's declaration of MMI in March 2020 was reasonable because Claimant had stabilized and required no further active care. The ALJ has no reason to assume Dr. Centi will refuse to oversee the maintenance care being awarded herein. Finally, as Respondent pointed out, Claimant has another ATP (*i.e.*, Dr. Walden) he can see for treatment of his knee or shoulder.

ORDER

It is therefore ordered that:

1. Claimant's request to overcome the DIME regarding MMI is denied and dismissed.

2. Claimant's request to convert the admitted scheduled impairment ratings to the equivalent whole person ratings is denied and dismissed.

3. Respondent shall cover all medical treatment from authorized providers reasonably needed to relieve the effects of Claimant's injuries and prevent deterioration of his condition.

4. Claimant's request for a change of physician is denied and dismissed.

5. The issue of disfigurement is reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: July 29, 2021

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Did Claimant prove by a preponderance of the evidence that he sustained a compensable injury or occupational disease arising out of and in the course of his employment on or about January 13, 2021?

2. If Claimant proved compensability of the claim, did Claimant prove by a preponderance of the evidence that the medical treatment provided by medical providers after the work injury was reasonable, necessary, and related to his injury?

3. If Claimant proved compensability of the claim, did Claimant prove by a preponderance of the evidence which medical provider(s) are considered authorized treating providers?

4. If Claimant proved compensability of the claim, did Claimant prove by a preponderance of the evidence that he is entitled to an award of TTD benefits from February 4, 2021 through March 23, 2021?

5. If Claimant proved compensability of the claim, did Claimant prove by a preponderance of the evidence that he is entitled to an award of TPD benefits from March 1, 2021 and continuing until terminated by law?

6. Did Respondents prove by a preponderance of the evidence that Claimant voluntarily resigned his employment and, but for his resignation, Employer would have accommodated modified duty restrictions?

7. Did Respondents prove by a preponderance of the evidence that a penalty of up to one day's TTD benefits should be imposed from January 20 through February 3, 2021, for claimant's late reporting of the injury?

STIPULATIONS

The parties stipulated to an average weekly wage (AWW) of $850.00 at the commencement of the hearing.

FINDINGS OF FACT

1. Claimant worked as a warehouse associate for Employer. Claimant began this position in January 2019 as a temporary worker. Employer then hired him full time in June 2019, and Claimant worked for Employer through January 27, 2021.

2. Claimant's position generally involved support of the warehouse and customer service department, operating a forklift, moving and handling of tile and stone, working in hot and cold weather conditions, and working outside for certain periods of time. The warehouse was not heated, and Claimant was required perform his work despite weather conditions and extreme temperatures. He would work up to 8 or 9 hours in the cold conditions.

3. On both January 12 and January 13, 2021 the weather was extremely cold, reaching approximately minus five degrees Fahrenheit. Claimant stated that the cold weather was affecting his hands.

4. On January 13, 2020 Claimant's hands were swollen, burned and in pain. His hands were also cracked, discolored, and described them as being on fire. Claimant texted a photo of his right hand to his supervisor, who advised him to see his physician regarding the problems with his hands. Claimant testified, which his supervisor confirmed, that he sent the supervisor pictures of his hands after seeing his medical provider as well. Claimant stated that he was evaluated at the clinic, provided with pain medication, cream and he purchased gloves with warmers so that he may endure the colder temperatures. Claimant also testified that he did not know his condition was being diagnosed as frostbite until after the first visit and that he did not know what frostbite was.

5. Claimant's supervisor testified that on January 13, 2021, he received various texts from Claimant and also spoke with him over the phone with regard to Claimant's complaints of swollen and painful hands. He recommended to Claimant that he go to his personal physician to be evaluated.

6. Claimant was evaluated by Nurse Practitioner (NP) Tara Anne Taylor on January 13, 2021. Claimant complained of cracked dry skin, with swelling and pain in both hands due to exposure to cold the day before for up to 8 hours. Claimant advised that he was wearing gloves but got cold inside the gloves. Nurse Taylor documented that "He denies his hands every (sic.) becoming numb, pale, or full inability to move them. This has happened last year as well so he got new gloves and it is better than last year." Nurse Taylor examined Claimant's hands and found that there was mild swelling of the bilateral hands, with mild erythema over the knuckles, which was tender to the touch. She assessed that Claimant had bilateral hand pain.

7. Nurse Taylor evaluated Claimant next on January 21, 2021 reporting that Claimant was "post frostbite to B/L [bilateral] hands moderate without significant compromise or open wounds except for the dry cracked skin on knuckles. No areas that seemed in danger of loss of fingers. He was discharged home with supportive care APAP/IBU for swelling and pain, cerave BID, aquaphor nightly." Nurse Taylor describe Claimants hands as much better than the prior visit but assessed Claimant with a history of frostbite.

8. On February 3, 2021 Ms. Taylor again examined Claimant stating that Claimant continued to have problems with flexing his digits, but that the pain, redness,

paleness of the nails, shooting pain and ROM [range of motion] were all improving. He complained of shooting nerve pain in the right hand. In the left hand he had slight stiffness with movement. Claimant requested that Nurse Taylor write a note for his work to explain what happened to him. The assessments states that Claimant suffered from frostbite of both hands and "that after moderate frostbite such as he had it can take 1-6 months to determine if full recovery is possible of if there will be long term side effects such as chronic pain, neuropathic pain, decreased ROM, flushing and sweating as he is having some of these signs and symptoms now." He was advised not to work in the cold, continue off work for now and use warm packs and thick gloves when any cold exposure is expected. He was also advised to file a workers' compensation claim for this injury. Nurse Taylor did not order any further diagnostic testing.

9. On January 25, 2021 Claimant sent in an emailed to his supervisor stating that he would be taking personal time off from January 27, 2021 through February 3, 2021 and that his last day with Employer would be February 11, 2021. Claimant stated that the swelling after this did resolve but the pain and stiffness continued and that he felt that he could no longer work in an environment where he was constantly exposed to extreme cold temperatures. Claimant also stated that he spoke with his supervisor on various occasions about what was happening to his hands but that he did not know exactly what his diagnosis was until he obtained the notes from his provider on February 3, 2021. He contacted HR and provided the medical report and the restrictions that he could not work in cold temperatures. As of February 4, 2021 he was terminated, instead of being allowed to continue to work until his last day.

10. As of March 1, 2021 he started working for another employer as an auto parts delivery driver, part-time, earning $600.00 per week. Claimant stated that he believed he had permanent nerve damage because he could not work in either cold or air-conditioned areas for extended periods of time, that changes of weather and temperatures affected him and could not resume his regular activities.

11. Dr. Alexander Jacobs issued a report stating that he examined Claimant on May 21, 2021 and Claimant did not have any symptoms of frostbite. In fact he stated that Claimant has a history of multiple other conditions, including diabetes mellitus, depression, diabetic ketoacidosis, CVA/TIA once or possibly twice, pancreatitis and diverticulosis, incidences of elevated blood pressure, and a history of nephrolithiasis. He stated that "If he had frostnip, by now all of his symptoms should certainly have resolved. The symptom he does demonstrate is not a symptom of frostbite or frostnip. Frostnip causes no permanent tissue damage. If his symptoms don't continue to resolve, perhaps doing electromyographic testing and nerve conduction velocities, checking for Reynaud's phenomenon, and checking for other causes for vasculopathy should be pursued."

12. Dr. Jacobs testified at hearing that the history Claimant provided and was documented during the January 13, 2021 evaluations is not consistent with either frostbite or frostnip as he was evaluated for dry skin over the knuckles and swelling of the hands. Frostbite occurs when exposure to cold is severe and long enough for ice crystals to form in the water in the cells. This typically occurs in the toes, where the

blood vessels are smallest. If Claimant had frostbite, Claimant would have had symptoms the day he was exposed to the extreme cold on January 12, 2021, not when he woke up on January 13, 2021 and noticed the swelling of his hands. He also stated that it is very rare for someone to have frostbite on his fingers and not other exposed body parts such as the tip of his nose or his ears, which were not covered like his hands were with gloves. Further, the provider would have documented the diagnosis of frostbite on the first visit, which she did not.

13. Dr. Jacobs stated that the limitations of motion of Claimant's right long finger is more consistent with a trauma, transection of a tendon or other injury, not frostbite as it iss limited to the one digit. He also stated that Claimant was able to use the digit when distracted but not with active range of motion or during examination. Dr. Jacobs stated that, if Claimant had frostbite, it would have resolved by the time of his examination and certainly by the time of the hearing, yet Claimant is still complaining of symptoms into the right hand, including pain and stiffness of the right pointer finger. Lastly, Dr. Jacobs stated that Claimant's symptoms are more likely caused by Raynaud's phenomenon, which is triggered by vasospasm restriction of the vessels, caused by any cold exposure, even non-malignant cold exposure such as reaching into a freezer, and the work conditions did not aggravate or exacerbate the condition. Dr. Jacobs was persuasive and convincing in his testimony.

CONCLUSIONS OF LAW

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2020).

A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with "a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

A compensable injury is one which arises out of and in the course of employment. Section 8-41-301(1)(b), C.R.S. (2017). The "arising out of" test is one of causation. It requires that the injury have its origin in an employee's work-related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. In this regard, there is no presumption that injuries which occur in the course of a worker's employment arise out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968); Rather, it is the claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. Section 8-43-201, C.R.S. 2002; *Ramsdell v, Horn*, 781 P.2d 150 (Colo. App. 1989).

As found, claimant has failed to establish by a preponderance of the evidence that he sustained an injury arising out of and in the course of his employment with employer. As found, the mere fact that claimant began to experience pain and swelling in his bilateral hands following exposure to cold the day prior to first seeing a medical provider is insufficient under the facts of this case to establish that he sustained an injury arising out of and in the course of his employment with employer. As found, claimant has failed to establish that his injury had it's origin in claimant's work related functions. Instead, the facts establish only that claimant began experiencing pain and swelling in his bilateral hands while returning to work on January 13, 2021, but fail to establish that the cause of that pain and swelling was related to claimant's work for employer. While the ALJ recognizes that Claimant was later diagnosed with frostbite by the nurse practitioner, Dr. Jacobs' testimony is more persuasive that Claimant did not have frostbite or frostnip, and in fact was likely suffering from conditions not related to working conditions.

Due to the fact that Claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury arising out of and in the course of his employment with employer, all other issues are moot and Claimant's claims for benefits must be denied.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant has failed to prove by a preponderance of the evidence that he sustained a compensable injury. Claimant's claim for benefits is denied and dismissed.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 30th day of July, 2021.

DIGITAL SIGNATURE

By: Elsa Martinez Tenreiro
Administrative Law Judge

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she suffered a compensable chemical exposure on February 28, 2020 during the course and scope of her employment with Employer.

2. Whether Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive reasonable, necessary and causally related medical benefits for her industrial injuries.

3. Whether Claimant has established by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits for the period March 5, 2020 through March 17, 2020.

4. Whether Claimant has proven by a preponderance of the evidence that she is entitled to a disfigurement award for facial scarring as a result of her February 28, 2020 chemical exposure pursuant to §8-42-108, C.R.S.

STIPULATION

The parties agreed that, if the claim is deemed compensable, Claimant is entitled to receive TTD benefits for the period March 5, 2020 through March 17, 2020.

FINDINGS OF FACT

1. Claimant is a 37-year-old female Deputy who has worked for Employer's Sheriff Department since 2005. Her specific job duties involved working at Employer's County Jail supervising inmates. Claimant asserts that she suffered a workplace chemical exposure during her overnight shift on February 28, 2020 that caused a severe rash and lingering facial scaring.

2. Claimant testified that on February 28, 2020 she worked an overnight shift in the County Jail. On the following day she noticed two bumps on her face. Claimant was off work for the following three days and her facial condition progressively worsened. She also began to feel ill. Claimant remarked that when she returned to work on March 4, 2020 her symptoms continued to increase. Claimant presented pictures of her skin condition at hearing that showed red swollen areas on her cheeks and forehead with crusting and some possible drainage.

3. Claimant explained that a cleaning chemical in the Jail may have caused her skin condition. Although Claimant was unaware of a specific chemical exposure, she noted that new chemicals were introduced at the facility to address COVID-19 at the time her symptoms developed. Claimant commented that, on February 28, 2020, there were multiple inmates who were positive for COVID-19 and she worked in a COVID-19 positive

pod. She also remarked that staff wore masks and a deputy had passed due to COVID-19. She detailed that, because of the COVID-19 pandemic, she and others were cleaning and disinfecting cells, phones and seats more frequently than ever before. Although Claimant acknowledged that she had received prior medical treatment for acne, she commented that her condition was well-controlled by February 28, 2020 and her new symptoms differed from prior acne outbreaks.

4. On March 5, 2020 Claimant visited her primary care physician Tanya Michelle Kern, M.D. and reported an acne flare. The condition involved a deep painful area on her skin with oozing that began several days before her evaluation. Dr. Kern reviewed pictures of the rash taken several days earlier that showed two large areas of bright red swelling and maceration. There was also a picture showing red skin peeling with clear fluid on the surface. Dr. Kern remarked Claimant "used to have problems like this in the past but doxycycline did help them improve. She stopped the doxy over a year ago bc the acne has improved." She diagnosed Claimant with acne vulgaris and possible cellulitis and/or possible MRSA. Dr. Kern restarted doxycycline and also prescribed Bactrim for possible MRSA.

5. On March 5, 2020 Claimant also reported her skin condition to Employer through the OUCH Line. The OUCH Line is a telephone service staffed by nurses designed to receive reports of workplace injuries and provide initial triage advice. Claimant told the OUCH Line provider that, following an overnight shift on Friday February 28, 2020, she began to feel poorly the next day. She specifically noted headaches and painful facial bumps. By Sunday Claimant reported the bumps were larger and started oozing. Her condition then continued to worsen. Although Claimant provided detailed information on possible disease outbreaks in the jail, including a small outbreak of shingles in the female unit and a hepatitis outbreak several months earlier, she did not mention COVID-19 or new cleaning protocols at the County Jail.

6. Following her call to the OUCH Line Claimant selected Concentra Medical Centers as her authorized provider. On March 6, 2020 Claimant visited Authorized Treating Physician (ATP) Amanda Cava, M.D. Claimant had a cyst on her face that had been swollen for the last four days and worsened with purulent drainage for the preceding two days. Dr. Cava noted that Claimant was already taking doxycycline and Bactrim as prescribed by her personal care provider and her condition was improving. She diagnosed Claimant with cellulitis of the face and released her to regular duty work.

7. On March 17, 2020 Claimant returned to Concentra for an examination. Nurse Practitioner Allison Hedien noted that, although Claimant's face was still red and tender, her condition was improving. NP Heiden continued to assess Claimant with diffuse cellulitis of the face. Because Claimant had achieved her functional goals, she was placed at Maximum Medical Improvement (MMI) without impairment.

8. Claimant returned to Concentra on March 26, 2020 for an evaluation. She reported a new, mildly painful, itchy rash on the left side of her neck that began on March 25, 2020. Claimant recounted that the rash was a recurrence of the symptoms she

experienced in late February and early March but had migrated to the left side of her neck. Lisa S. Grimaldi, PA-C diagnosed Claimant with a rash of the neck. She prescribed Mupirocin and Sulfamethoxazole and referred Claimant to a dermatologist. PA-C Grimaldi could not identify a causal relationship between Claimant's described mechanism of injury and presenting symptoms.

9. On May 12, 2020 Claimant visited dermatologist James R. DeVito at Dermatology Clinics for an evaluation. She reported a facial rash that had been present for one month. Dr. DeVito characterized the rash as itchy, bumpy and red. Based on pictures from several weeks earlier Dr. DeVito diagnosed Claimant with an eczematous reaction triggered by an aerosolized contact dermatitis. Although Claimant's face was clear at the time, lesions of the face, cheeks and neck as depicted in photographs supported his diagnosis. Dr. Devito explained that the most likely trigger was an aerosol in the form of a possible a cleaning solution used at work. However, he was uncertain which compound was the "culprit."

10. The medical records reveal that Claimant had previously visited Dr. DeVito and other physicians at Dermatology Clinics/Denver Dermatology Consultants a number of times prior to her February 28, 2020 alleged work exposure:

a. On July 1, 2010 Claimant was seen for worsening acne on her face and received several prescription medications including Doxycycline and topical creams. Claimant returned on September 30, 2012 reporting her acne had improved with prescriptions. She also received advice regarding treatment of her acne scars.

b. On March 31, 2011 Claimant was seen for ongoing acne treatment. On July 6, 2011 Claimant returned to Denver Dermatology Consultants reporting that "she went to the ER 3 days ago due to a large pimple like growth on the left medial cheek near the nose." Claimant was feeling fatigued and somewhat ill and the lesion had a strange sensation.

c. On February 22, 2019 and April 22, 2019 Claimant returned to Dermatology Clinics reporting, "acne, located on the face. The acne consists of cysts/nodules and scarring, is moderate in severity and has been persistent for years." Diagnoses included inflammatory papules and pustules and comedonal papules. Claimant received a prescription for Doxycycline.

d. On February 11, 2020, or shortly before her alleged work exposure, Claimant was evaluated by dermatologist, Tyler Vukmer, DO. Claimant had been taking spironolactone and using topical Epiduo. She reported her acne had been "interfering with personal relationships," and Dr. Vukmer noted it was "inadequately controlled" with an examination showing "papules pustules, cysts, comedonal papules, scars on face." He prescribed topical medications Aczone and Soolantra. Dr. Vukmer ceased spironolactone and

Epiduo. Claimant declined oral antibiotics that had been effective for past acne flares.

11. On September 14, 2020 Claimant visited dermatologist Leon S. Greos, M.D. at Colorado Allergy and Asthma. Dr. Greos authored a letter to Dr. Devito to provide an update on Claimant's condition. Dr. Greos considered the cause for Claimant's development of a facial rash. Claimant reported that her rash began when the County Jail began using new cleaning supplies at the start of the COVID-19 pandemic. She provided Dr. Greos with pictures of her skin irritation and safety data sheets for the cleaning supplies including: EnviroCide, ZEP DZ-7, Clorox wipes, and Oxivir TB wipes. Claimant also noted she was wearing a mask at work at the time of onset. Based on the information provided, Dr. Greos concluded that "[g]iven the transient nature of this rash, as well as its irregular distribution sparing her face where her face mask covered her skin, and without further recurrence, I think allergic contact dermatitis is unlikely. I therefore suspect she had an irritant chemical reaction to one of the above cleaning materials that she may have come into contact with at work."

12. Dermatologist Michael Contreras, M.D. performed an independent medical examination of Claimant and issued a report dated January 21, 2021. Dr. Contreras recounted that Claimant had a long history of acne and had been followed regularly over several years for acne flares by a dermatologist. Based on his review of the records, Dr. Contreras concluded the February 28, 2020 work event was likely the second or third documented incident of Claimant presenting for medical care with similar signs and symptoms. He reasoned that Claimant's skin condition was not due to any type of workplace exposure. Notably, a chemical exposure was unlikely because no new chemicals were introduced into the facility prior to onset of the rash.

13. On June 11, 2021 the parties conducted the pre-hearing evidentiary deposition of Dr. Contreras. He maintained that Claimant's skin condition was not caused by a chemical exposure while working at the County Jail on February 28, 2020. Dr. Contreras explained several findings based on Claimant's physical appearance on examination and photographs. He remarked that Claimant had exhibited dark red ill-defined nodules. Dr. Contreras noted that Claimant had common acne rolled scars on her cheeks, forehead and glabella. She also had two more noticeable scars in a linear pattern on her left cheek. Dr. Contreras explained that Claimant's rash started with acne cysts that appeared as tender nodules and evolved over the course of two or three days to what was shown in the photographs as the weeping areas. He commented the weeping was most likely due to either something applied to the nodules in an attempt to treat them or physical manipulation that injured the epidermis and caused a discharge. In addressing the well-demarcated edge of Claimant's rash, Dr. Contreras remarked there was likely something external applied to treat the acne.

14. Dr. Contreras addressed the causation analyses from dermatologists Drs. DeVito and Greos. He noted that Dr. Devito diagnosed an eczematous reaction triggered by an aerosolized contact dermatitis. However, Dr. Contreras explained the pattern of Claimant's skin condition did not fit a diagnosis of allergic contact dermatitis. Aerosolized

contact would present differently because there is an allergen in the air that contacts the face. In contrast, allergic contact dermatitis would not cause isolated spots asymmetrically and it would commonly involve sensitive eyelids. However, Claimant had asymmetrical isolated spots and her eyelids were not affected. Alternatively, irritant contact dermatitis diagnosed by Dr. Greos was consistent with Claimant's course of symptoms. Dr. Contreras explained the temporal significance of irritant contact dermatitis. Although Claimant described a condition that evolved and worsened over 3-4 days, irritant dermatitis with a single exposure should occur rapidly within the course of hours or a day. Moreover, irritant contact dermatitis typically requires the direct exposure of a caustic substance to the skin. However, Claimant did not describe a direct skin exposure.

15. Captain James testified at the hearing in this matter. Captain J[Redacted] is the supervisor of the Sheriff Department's Logistics Unit. He oversees multiple aspects of the County Jail and Detention Center including laundry, grounds maintenance, fire and safety, commissary, work crews, mail screenings, warehouses, cleaning and supply requisition/distribution. Captain J[Redacted] was responsible for ordering cleaning supplies before and after the COVID-19 outbreak. He remarked that the Denver Sheriff did not have any specific COVID-19 cleaning protocols and no new cleaning chemicals were obtained before March 11, 2020. Specifically, ZEP DZ-7 was not present in the County Jail prior to March 26, 2020. Captain J[Redacted] explained that the "Pass on to Staff" memo dated March 26, 2020 that advised of new chemical ZEP DZ-7 and its safety data sheet was published before the chemical was introduced into the facility. Finally, he testified that Employer did not require deputies to wear face masks prior to March 27, 2020.

16. Claimant has failed to establish that it is more probably true than not that she suffered a compensable chemical exposure on February 28, 2020 during the course and scope of her employment with Employer. Initially, Claimant asserts that she suffered a workplace chemical exposure during her overnight shift on February 28, 2020 that caused a severe rash and lingering facial scaring. She detailed that, because of the COVID-19 pandemic, she and others were cleaning and disinfecting cells, phones and seats more frequently than ever before. Despite Claimant's contention, the credible testimony, medical records and persuasive medical opinions reflect that she did not likely suffer a chemical exposure while working the overnight shift for Employer on February 28, 2020.

17. Although Claimant's testimony regarding the Sheriff Department's COVID-19 protocols may have been accurate for measures during the pandemic in 2020-2021 her contention that increased chemical use and cleaning occurred as of February 28, 2020 is inconsistent with the bulk of the evidence. Notably, as Claimant acknowledged on cross-examination, she could not be certain of the timing of new protocols and chemicals. Moreover, Claimant's initial report to Employer's OUCH Line was detailed and discussed both shingles and hepatitis outbreaks, but did not mention COVID-19. Finally, Captain J[Redacted] credibly testified that the Denver Sheriff did not have any specific COVID-19 cleaning protocols and no new cleaning chemicals were obtained before March 11, 2020. Specifically, ZEP DZ-7 was not present in the County Jail prior to March 26, 2020. Captain J[Redacted] explained that the "Pass on to Staff" memo dated March

26, 2020 that advised of new chemical ZEP DZ-7 and its safety data sheet was published before the chemical was introduced into the facility. The record thus reflects that the County Jail had no specific COVID-19 safety or cleaning procedures in effect on February 28, 2020 and no new cleaning products had been introduced into the facility by February 28, 2020.

18. Although Claimant commented that her acne was well-controlled as of February 28, 2020 the medical records reflect that Claimant continued to suffer from a long history of acne flares. Notably, on February 11, 2020 Claimant sought medical treatment from dermatologist Dr. Vukmer. He recorded that Claimant’s acne had been "interfering with personal relationships" and it was "inadequately controlled" with an examination showing "papules pustules, cysts, comedonal papules, scars on face." Similarly, on February 22, 2019 and April 22, 2019 Claimant visited Dermatology Clinics reporting acne on her face that consisted of cysts/nodules and scarring that had persisted for years. Diagnoses included inflammatory papules and pustules and comedonal papules. Finally, on March 5, 2020 Claimant’s primary care physician Dr. Kern remarked Claimant “used to have problems like this in the past but doxycycline did help them improve.” The record thus reveals that Claimant had a history of recurrent acne that persisted throughout the years.

19. The persuasive medical opinions also reflect that Claimant did not likely suffer a chemical exposure and develop a facial rash while working the overnight shift for Employer on February 28, 2020. Dr. Contreras maintained that Claimant’s skin condition was not caused by a chemical exposure while working at the County Jail on February 28, 2020. He diagnosed acne cysts appearing on February 29, 2020 that evolved over the course of two or three days into a severe condition. Dr. Contreras’ diagnosis is supported by the opinion of Dr. Kern who assessed Claimant with acne vulgaris on March 5, 2020 as well as records from over a decade of medical treatment for acne prior to the alleged work incident. Dr. Contreras also explained that the progression of Claimant’s acne over several days would not occur with a chemical exposure at work. In fact, the condition resolved with the common acne treatment of doxycycline and Bactrim.

20. In contrast, Dr. DeVito diagnosed Claimant with an eczematous reaction triggered by an aerosolized contact dermatitis. He reasoned that the most likely trigger was an aerosol in the form of a possible cleaning solution used at work. However, he was uncertain which compound was the “culprit.” Moreover, Dr. Greos suspected Claimant had an irritant chemical reaction to one of the cleaning materials she may have come into contact with at work. However, the opinions of Drs. DeVito and Greos are not persuasive in ascertaining the cause of Claimant’s skin rash. Initially, the opinions of Drs. DeVito and Greos are inconsistent. Dr. DeVito determined that Claimant sustained allergic contact dermatitis and Dr. Greos diagnosed irritant contact dermatitis. Moreover, Dr. DeVito’s opinion failed to consider that the pattern of Claimant’s skin condition did not fit a diagnosis of allergic contact dermatitis. Dr. Greos also failed to consider the inconsistency between Claimant’s increased symptoms over several days with the diagnosis of irritant contact dermatitis. Furthermore, neither Dr. DeVito nor Dr. Greos identified a specific chemical irritant despite receiving safety data sheets from Claimant. The preceding

opinions are thus speculative regarding Claimant's development of a skin rash as a result of her work activities for Employer.

21. Based on the persuasive testimony of Dr. Contreras, Claimant suffered an acne flare following her February 28, 2020 shift at the County Jail that was unrelated to her employment or any chemicals in the facility. Considering Claimant's long history of treatment for acne, including past similar conditions, the record reveals that the symptoms she developed after February 28, 2020 were not caused by her work for Employer. Claimant's work activities also did not aggravate, accelerate or combine with her pre-existing condition to produce a need for medical treatment. Accordingly, Claimant's claim for Workers' Compensation benefits is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App.

1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.,* W.C. No. 4-650-711 (ICAO, Feb. 15, 2007); *David Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. The provision of medical care based on a claimant's report of symptoms does not establish an injury but only demonstrates that the claimant claimed an injury. *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020). Moreover, a referral for medical care may be made so that the respondent would not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id.* Although a physician provides diagnostic testing, treatment, and work restrictions based on a claimant's reported symptoms. It does not follow that the claimant suffered a compensable injury. *Fay v. East Penn manufacturing Co., Inc.*, W.C. No. 5-108-430-001 (ICAO, Apr. 24, 2020); *cf. Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997) ("right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment"). While scientific evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory supporting compensability when making a determination. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020).

8. As found, Claimant has failed to establish by a preponderance of the evidence that she suffered a compensable chemical exposure on February 28, 2020 during the course and scope of her employment with Employer. Initially, Claimant asserts that she suffered a workplace chemical exposure during her overnight shift on February

28, 2020 that caused a severe rash and lingering facial scaring. She detailed that, because of the COVID-19 pandemic, she and others were cleaning and disinfecting cells, phones and seats more frequently than ever before. Despite Claimant's contention, the credible testimony, medical records and persuasive medical opinions reflect that she did not likely suffer a chemical exposure while working the overnight shift for Employer on February 28, 2020.

9. As found, although Claimant's testimony regarding the Sheriff Department's COVID-19 protocols may have been accurate for measures during the pandemic in 2020-2021 her contention that increased chemical use and cleaning occurred as of February 28, 2020 is inconsistent with the bulk of the evidence. Notably, as Claimant acknowledged on cross-examination, she could not be certain of the timing of new protocols and chemicals. Moreover, Claimant's initial report to Employer's OUCH Line was detailed and discussed both shingles and hepatitis outbreaks, but did not mention COVID-19. Finally, Captain J[Redacted] credibly testified that the Denver Sheriff did not have any specific COVID-19 cleaning protocols and no new cleaning chemicals were obtained before March 11, 2020. Specifically, ZEP DZ-7 was not present in the County Jail prior to March 26, 2020. Captain J[Redacted] explained that the "Pass on to Staff" memo dated March 26, 2020 that advised of new chemical ZEP DZ-7 and its safety data sheet was published before the chemical was introduced into the facility. The record thus reflects that the County Jail had no specific COVID-19 safety or cleaning procedures in effect on February 28, 2020 and no new cleaning products had been introduced into the facility by February 28, 2020.

10. As found, although Claimant commented that her acne was well-controlled as of February 28, 2020 the medical records reflect that Claimant continued to suffer from a long history of acne flares. Notably, on February 11, 2020 Claimant sought medical treatment from dermatologist Dr. Vukmer. He recorded that Claimant's acne had been "interfering with personal relationships" and it was "inadequately controlled" with an examination showing "papules pustules, cysts, comedonal papules, scars on face." Similarly, on February 22, 2019 and April 22, 2019 Claimant visited Dermatology Clinics reporting acne on her face that consisted of cysts/nodules and scarring that had persisted for years. Diagnoses included inflammatory papules and pustules and comedonal papules. Finally, on March 5, 2020 Claimant's primary care physician Dr. Kern remarked Claimant "used to have problems like this in the past but doxycycline did help them improve." The record thus reveals that Claimant had a history of recurrent acne that persisted throughout the years.

11. As found, the persuasive medical opinions also reflect that Claimant did not likely suffer a chemical exposure and develop a facial rash while working the overnight shift for Employer on February 28, 2020. Dr. Contreras maintained that Claimant's skin condition was not caused by a chemical exposure while working at the County Jail on February 28, 2020. He diagnosed acne cysts appearing on February 29, 2020 that evolved over the course of two or three days into a severe condition. Dr. Contreras' diagnosis is supported by the opinion of Dr. Kern who assessed Claimant with acne vulgaris on March 5, 2020 as well as records from over a decade of medical treatment for acne prior to the alleged work incident. Dr. Contreras also explained that the progression

of Claimant’s acne over several days would not occur with a chemical exposure at work. In fact, the condition resolved with the common acne treatment of doxycycline and Bactrim.

12. As found, in contrast, Dr. DeVito diagnosed Claimant with an eczematous reaction triggered by an aerosolized contact dermatitis. He reasoned that the most likely trigger was an aerosol in the form of a possible cleaning solution used at work. However, he was uncertain which compound was the “culprit.” Moreover, Dr. Greos suspected Claimant had an irritant chemical reaction to one of the cleaning materials she may have come into contact with at work. However, the opinions of Drs. DeVito and Greos are not persuasive in ascertaining the cause of Claimant’s skin rash. Initially, the opinions of Drs. DeVito and Greos are inconsistent. Dr. DeVito determined that Claimant sustained allergic contact dermatitis and Dr. Greos diagnosed irritant contact dermatitis. Moreover, Dr. DeVito’s opinion failed to consider that the pattern of Claimant’s skin condition did not fit a diagnosis of allergic contract dermatitis. Dr. Greos also failed to consider the inconsistency between Claimant’s increased symptoms over several days with the diagnosis of irritant contact dermatitis. Furthermore, neither Dr. DeVito nor Dr. Greos identified a specific chemical irritant despite receiving safety data sheets from Claimant. The preceding opinions are thus speculative regarding Claimant’s development of a skin rash as a result of her work activities for Employer.

13. As found, based on the persuasive testimony of Dr. Contreras, Claimant suffered an acne flare following her February 28, 2020 shift at the County Jail that was unrelated to her employment or any chemicals in the facility. Considering Claimant’s long history of treatment for acne, including past similar conditions, the record reveals that the symptoms she developed after February 28, 2020 were not caused by her work for Employer. Claimant’s work activities also did not aggravate, accelerate or combine with her pre-existing condition to produce a need for medical treatment. Accordingly, Claimant’s claim for Workers’ Compensation benefits is denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant’s request for Workers’ Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge’s order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge’s order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see*

Rule 26, OACRP. You may access a form for a petition to review at https://oac.colorado.gov/resources/oac-forms.

DATED: July 30, 2021.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Have Respondents, by clear and convincing evidence, overcome the DIME opinion of Dr. Castrejon on the issue of MMI? In this instance, stated differently, what is the actual DIME opinion of Dr. Castrejon?

II. Have Respondents shown, by a preponderance of the evidence, that Claimant obtained Workers Compensation benefits, including medical treatment and TTD payments, as a result of fraud?

III. If fraud is shown, can Respondents withdraw all Admissions of Liability filed in this case?

IV. If such Admissions are withdrawn, may Respondents seek retroactive, and not merely prospective, relief, for all benefits fraudulently obtained?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

Background / Initial Treatment

1. Claimant was a bus driver for Employer. On February 18, 2019, he alleged in the *Employee Incident Report* that he was injured at "15:00" (3:00 pm) on February 15, 2019 when the lumbar pad on the driver's seat of the bus he was operating inflated and stayed inflated through his shift. He reported that the constant pressure on his lower back caused constant pain making it hard to stand, walk, and drive. (Ex. J, p. 65).

2. Clamant then presented to Concentra on February 18, 2019. The intake narrative stated that the inflated seat "caused increased pain in his low back *starting on 2/14* but worsened a lot on 2/15. He reports that *on the next day* he coughed and his back gave out on him and he fell and landed on the *bathroom floor*." (Ex. K, p. 73)(emphasis added). Claimant revealed a prior history of a broken lumbar vertebra, not surgically repaired, when he was 19, resulting in chronic low back pain, last seen for this 2 year prior.

3. The only issue addressed at this visit was the back pain, with no additional complaints of head pain. Head, face, and eyes were "reviewed and found to be negative" (Ex. P, p. 122). Tenderness in lumbosacral spine was noted, with limited range of motion, pain upon flexion and extension, but normal palpation. *Id* at 123. Claimant marked his lumbar area on the pain chart; nothing marked on his head. *Id.*

4. Claimant followed up with Dr. Daniel Peterson, MD on February 22, 2019, complaining now of light headedness, raccoon eyes, and HA (headache). Claimant restated the

mechanism of injury which exacerbated his back pain, but Dr. Peterson then notes: "He states that this happened on 2/15 and then on *2/17* he was in the bathroom at home and had a cough that led to marked sudden back pain then made him fall and hit his head *on the sink."* (Ex. K, p. 78)(emphasis added). At this visit, Dr. Peterson observed that: "He is a bit swollen around his eyes." *Id* at 79.

5. Given the new symptoms described, Claimant was referred for a CT scan, which occurred the same day. Dr. Peterson's narrative continued: "Later in the afternoon [radiologist] Dr. Sherman called to say CT scan showed bilateral *parieto-occipital* skull fractures, with hemorrhagic changes at R *frontal* cortex but not clear subdural hematoma. At this time, the report indicates that Claimant was to be transferred to Memorial Hospital for further evaluation. *Id* at 80. Lifting restrictions went into place, along with *No Commercial Driving. Id.*

Events never Disclosed by Claimant

6. Amy F[Redacted] is a friend of Claimant. She gave a statement dated July 16, 2020, to Amy B[Redacted], an investigator for Respondents. She states that on February 16, 2019 (the same day Claimant called off work), she, her boyfriend, James E[Redacted], and [Claimant]' roommate (who is Claimant) went out for the evening at Frankie's Bar on Powers Blvd, to celebrate Claimant's birthday. It was only the three of them. Claimant drove, and they arrived around 8:30 pm. Claimant was apparently drinking at their table, but behaving appropriately. Everything was fine, until she had an altercation with James, who was poking her repeatedly. She then loudly accused James of hurting her. James then left the bar for the parking lot. She thinks some other patrons apparently thought that Claimant, and not James, had hurt her.

7. Amy then stated:

> there was three of 'em, the guy in the middle had really long hair. And I remember, um, the guy with the long hair confronting Doug, and then came at him, punched him so hard that it knocked him *backwards* in his chair, he [Claimant] *hit his head on the chair behind him*. (Ex. U, p. 258)(emphasis added).
>
> 8. When asked about what happened with Claimant's head, she stated:
>
> It…hit the chair behind him, on his way down. Um, there is a good, high probability that his head could've hit the floor after that, once he was on the ground. *Id at 261.*

Ms. F[Redacted] was finally able to break up the fight, but indicated that Claimant really did not have a chance to defend himself. She was not certain how much Claimant had to drink that evening, but stated sometimes Claimant would drink Bud Light, and "just drink and drink and drink and drink". *Id* at 261.

9. She next saw Claimant 'easily a couple weeks later.' When asked about his appearance at that time, she noted that "he had black eyes...both eyes were black…his face was

swollen up." Claimant then described to her having difficulty getting out of bed, that going up and down stairs would make him sick…like he was going to pass out…. *Id* at 262. Ms. F[Redacted] reiterated all the above events, essentially verbatim, at a telephone deposition on January 7, 2021.

Claimant's DUI

10. After the altercation, Claimant attempted to drive himself home by himself. However, he was subsequently pulled over by the Colorado Springs Police Department at 12:04 a.m. [Now February 17] for failing to stay in his lane of traffic. In his report, Officer Christopher D[Redacted] observed that Claimant had a strong odor of alcohol coming from the cab of his truck. Officer D[Redacted] requested a DUI unit. Officer Cody Jergens responded. In his report, Officer Jergens noted that Claimant was "unsteady on his feet while walking and standing." Officer Jergens offered Claimant the voluntary roadside tests, which Claimant refused.

11. Officer J[Redacted] placed Claimant under arrest for Driving Under the Influence of alcohol on February 17th, 2019 at 1:33 a.m. Officer J[Redacted] informed Claimant that he would need to submit to breath or blood chemical testing. Claimant chose to submit to a blood test. Claimant was transported to Memorial Hospital Central. The blood draw was completed, without incident, in Officer Jergen's presence at 2:15 a.m. Subsequent lab testing indicated a blood alcohol content of 0.268, [noted to be more than three times the legal limit of 0.08 under C.R.S. §42-4-1301(2)(a)]. (Ex. Z). The test results were reported on 2/28/2019. *Id* at 307.

12. Claimant was charged by the Office of the District Attorney of El Paso County with Driving Under the Influence in violation of §42-4-1301(1)(a) in El Paso County District Court Case 2019T003075 on February 26th. 2019. Claimant subsequently pled guilty to the charge on October 10, 2019, and was sentenced to 18 months of probation on March 12, 2021. (Ex. HH).

Treatment Continues Unabated

13. The next medical entry is from Dr. Peterson, dated February 25, 2019. Dr. Peterson first notes that, based on the CT scan, he had arranged for Claimant to travel by ambulance to the ER; however, *Claimant never went*. New details began to emerge from Claimant at this visit:

> Sat 2/16 early Sunday morning got pulled over by a cop and cited with a DUI. He was taken to Memorial Hosp for a blood draw for blood ETOH level and then taken by the cop to the bus stop. He says he called his buddy to come pick him up and when his buddy got there he was supposedly lying on the sidewalk with a guy leaning over him who called to his ride "This guy needs help" and then ran off. Instead of taking him to the ER the friend took him home. But then claims he fell in the bathroom. This is his explanation for how he could have two skull fractures….GF [girlfriend, name unknown] says he has been trembling and been unsteady on his feet since the

> episode last Sunday 2/17. She denies seeing him this way before but they have been dating only 4 months. (Ex. P, p. 141).

14. On February 26, 2019, Claimant was again seen by Dr. Peterson to review the MRI report. Dr. Peterson this time notes:

> He [Claimant] does feel his LBP is back to baseline…. [then, after the sudden onset of back pain] …He stated he then fell and hit his forehead hard *whether on the sink or on the ground* is unclear. …Later he went out to have dinner and drinks late about 10 pm. Claims he went to a bar/restaurant **with his GF. His GF** says he was not himself Sat night and seemed confused and uptight and not his normal self Sat after the fall and head injury. ….Sunday morning he noticed a knot with bloody spot on the occipital area. He has no account of how he ended up lying on the ground being awoken by his roommate at the bus stop. Then this Sunday 2/24/19 he was tripped up by his dog and knocked down. *He fell and hit his temporal skull R side.* He has no explanation for what appear to be older bilateral parietal comminuted depressed skull fractures which are not at all tender and have no brain surface changes, edema, or bleeding…..*At this point, he denies any significant HA, confusion, disorientation, brain fogginess, irritability, fatigue, dizziness, visual or gait disturbance, N/V, trouble with multitasking, word finding, or other symptom of concussion*….He says he believes his blood alcohol level will come back normal as he had had food and *only split a pitcher of beer*. (Ex. P, pp. 145-146)(emphasis added).

15. Dr. Peterson later noted:

> His fall this past weekend hitting the R side of his head getting caught in his dogs leash is consistent with R temporal small subdural seen on MRI…It does not appear more plausible that an acute exacerbation of his back pain that started with his malfunctioning bus seat the two days before the fall, led to his sudden fall and blow to the forehead and the corroborating abnormalities seen is his frontal lobes on MRI and the bilateral ecchymosis. His R temporal subdural cannot be blamed on his back injury or his older parietal skull fractures. (Id at 148).

Record Review IME by Dr. Fall

16. On March 1, 2019, Allison Fall, M.D. reviewed Claimant's medical records pursuant to a Rule 16 Review. In her review, she summarized Claimant's medical history and his various stories regarding his falls. She reported that although his referral to *neurology would be appropriate for the significant head injuries he sustained as a result of his fall(s), this would not be related to the minimal lumbar injury he initially reported. She noted that, "…it sounds as if there are other issues regarding falling and remote and recent head injuries, which are completely unrelated to the work-related injury." He went on to note that, "…his low back was back to baseline reportedly on February 26, 2019, which was 11 days after the date of injury."* (Ex. L).

Continued Treatment with ATP

17. Claimant followed up with Dr. Peterson on 3/14/19, 4/17/19 and 5/17/19. His back pain had still long since resolved, but he began complaining increasingly about headaches, indicating at the May 17 visit that his headaches were increasingly frequent-now daily-and severe. A follow up brain MRI actually showed considerable improvement. Claimant was cleared for modified duty, but was not to drive a commercial vehicle until his symptoms resolved. *Id* at 169. A follow-up on 6/11/19 showed continued headaches, and with a change in proposed medication. Id at 175. A follow-up on 6/25/19 with Dr. Peterson reported little improvement with headaches, now occurring about every three days. *Id* at 184. On a 4/2/2019 visit to Peak Neurology, Claimant stated he was not able to exercise much, due to the ongoing *back pain* and the headaches. (Ex. R. p. 229).

18. On 7/9/2019, Claimant reported some improvement with the medication, but it was again noted that per DOT guidelines, Claimant could not operate a commercial vehicle within 12 months of what is now noted to have been a possible 'seizure'. *Id* at 195. A follow-up on 8/6/2019 revealed no major changes, but it was noted that Claimant's DUI court date had been moved back *again.* *Id* at 214.

19. On September 6, 2019, Claimant presented to Dr. Peterson for a recheck on his headaches and dizziness. Claimant advised he was scheduled for an IME on September 11, 2019. Dr. Peterson advised that Claimant would be released, with the understanding that if the IME decides more treatment is needed, treatment would start back up. Dr. Peterson noted that the *accepted* injury to Claimant's low back had resolved long ago. In the meantime, the Claimant was placed at MMI, with no impairment rating, for his back injury. (Ex. P, p. 214).

Dr. Lesnak's IME

20. Due to his ongoing complaints, Clamant underwent an Independent Medical Evaluation by Lawrence A. Lesnak, DO, on September 11, 2019. From the record review, Dr. Lesnak reported that Claimant reported a fall at home on February 16, 2019, now with at least *three* falls between February 16 and 17, 2019. In this visit, Claimant told Dr. Lesnak specifically: "He [Claimant] states that he fell forward and struck his *forehead* on the nearby bathroom *sink*." (Ex. M, p. 88). However, Claimant only mentioned this fall to Dr. Lesnak, and not the other two, during the IME history. Claimant further reported that he was charged with a DUI during that time, and had a syncopal episode while at the bus stop after being charged with his DUI.

21. Dr. Lesnak opined that the falls were not related to the Claimant's alleged low back pain. He further opined that the Claimant was drinking excessively during this period, and leading up to this evaluation. He further agreed with Dr. Peterson's documentation that the Claimant had reached MMI by February 26, 2019, regarding any temporary aggravation of his low back pain. (Ex. M).

22. Also on September 11, 2019, Claimant completed a Computerized Outcome Assessment as part of the IME. The resultant numerical values placed Claimant at the "distressed

somatic" category for psychosocial functioning. (Ex. M, p. 86). "An extremely high level of reported somatic pain complaints strongly suggests the presence of an underlying symptom somatic disorder/somatoform disorder. Patients who have these types of diagnoses frequently embellish/exaggerate their symptoms, thus causing their reported subjective complaints to be unreliable at best" *Id.*

23. Respondents filed a Final Admission of Liability on September 25, 2019. Claimant, by counsel, then timely filed an Objection to the Final Admission and Application for Hearing on October 24, 2019. (Ex. C-F).

Dr. Castrejon's DIME

24. Claimant then underwent a Division IME on January 9, 2020 with Miguel Castrejon, MD. Dr. Castrejon's report repeated Claimant's bathroom story that he felt a shock like pain to his back on February 16, 2019, causing him to fall in the shower, hitting his head. Claimant did share with Dr. Castrejon that he went out that evening, and got pulled over for a "DUI." Claimant made no mention of the assault incident at the bar, nor did he mention the BAC results, which had now been completed for almost a year, [and after Claimant's court dates had been moved back on more than one occasion].

25. Claimant admitted that he had been back to baseline for the next couple weeks for his lumbar complaints, but experienced headaches, memory difficulties, dizziness and poor balance since. Dr. Castrejon opined that *as a result* of the exacerbation of his low back pain, this resulted in the fall, that in turn, resulted in the head injury. He opined that the "bus stop event" was directly related to the effects of the initial head injury. Dr. Castrejon, in fact, stated: "This examiner proposes that at the time the claimant was pulled over for a DUI it is *medically probable* that whatever driving changes were observed by the detaining officer were *more likely secondary to the effects of the head injury*. (Ex. N, pp. 106-107)(emphasis added). As a result of these opinions, Claimant was found by the DIME to be not at MMI. *Id.*

Due Diligence by Respondents

26. Respondents continued investigating the claim, and submitted newly discovered information about Claimant's activities on the evening of February 16, 2019 to Dr. Lesnak. Dr. Lesnak then provided a supplemental/addendum IME report. He noted that the Claimant volitionally withheld pertinent information regarding the physical alternation of February 16, 2019, wherein he was repeatedly punched in the face on numerous occasions, knocked off a bar chair, falling backwards, and striking the back of his head. Dr. Lesnak reported that not only did Claimant withhold this information from him, but he had also withheld if from his ATP, as well as Dr. Castrejon.

27. With this new information, Dr. Lesnak opined that all of Claimant's symptoms are completely unrelated to any alleged incident that may have occurred during his work activities on February 14 or 15 of 2019. Dr. Lesnak opined:

> Mr. Dixon has clearly attempted to withhold very important information regarding his medical history to all of his healthcare providers who have

> evaluated him after February 18, 2019 (apparently in an attempt to "cover up" the fact that all of his symptoms and injuries were related to his involvement in a "bar fight" that occurred on February 16, 2019, two days prior to his initial occupational medicine evaluation. (Ex. O).

28. Dr. Lesnak noted that Claimant's original version of events, as related to Dr. Peterson, Dr. Castrejon, and himself, [now]:

> …appears to be *medically improbable* as well. Clearly, the patient has withheld information that he was apparently repeatedly punched in the face while at a local bar on 2/16/2019, by three men. Multiple blows to the face clearly would be *much more medically probable* to cause the diagnostic imaging on his head CT scam performed on 2/22/2019, as well as the brain MRI scan performed on 2/25/2019, as compared to him potentially falling at home and hitting his face. Additionally, the bilateral posterior parietal comminuted fractures would be consistent with being knocked off a bar chair, striking another chair, then landing on a floor, striking his head, *as compared to falling at home.* Additionally, the right orbital fracture identified on the brain MRI would clearly be consistent with a blow to the face, such as being punched by someone, *as compared to striking one's face when falling in a bathroom. Id* at 116. (emphasis added).

Dr. Lesnak opined that since there appears to have been no occupational injury whatsoever pertaining to work activities, a status of MMI is not applicable, as there was no injury. *Id.*

29. Further investigation of the claim revealed an internal email, from Kimberly T[Redacted], HR manager for Employer, directed to Claimant's work supervisor, Andrew C[Redacted]. The email is dated Monday, February 18, 2019 at 12:30 pm. In its entirety, it reads:

> [Claimant] came in to the office to seek treatment at CCOM for his bus injury that he sustained on 2/16/2019. He claims the lumbar adjustment on the seat hurt his back. He said yesterday he coughed just right in the shower and it made his injury flare up resulting in a fall. *He reports that he fell and hit the back of his head on the toilet. Both of his eyes were bruised/black and the whites of his eyes are red/blood vessels ruptured….* We sent him to the doctor for a workman's comp appointment. (Ex. T, pp. 254-255)(emphasis added).

30. A deposition was also taken on January 8, 2021 of Andrew C[Redacted], general manager of Employer, with supervisory authority over Claimant. Mr. C[Redacted] also assists with the filing of Workers Comp claims. Claimant came in to report this injury on 2/18/2019 at approximately 11:00 am. During this encounter, Claimant only mentioned his back issues, and did not say anything about injuring his head as a result. The following exchange also took place:

> Q What did [Claimant] look like? Could you describe it, please?
>
> A Oh, he had two severe black eyes, and my thoughts were he looked like he had just come out of a prize fight. I had never quite seen eyes like that before.
>
> Q Were they swollen?
>
> A Yeah, they were swollen, very dark, very black eyes, and even the whites of his eyes were bloodied. (Ex.BB, p. 315 {page 8 of the deposition transcript})

31. On June 23, 2020, Claimant, through counsel, answered Interrogatories in connection with this case. (Ex. FF). In response to #7, when asked about any injuries occurring after his alleged work injury, Claimant replied, in pertinent part:

> To the best of my recollection: The original back injury was reported on February 15, 2019. The next morning February 16, 2019 at *approximately 7:00 am* while I was getting ready to get in the shower, I coughed which caused a spasm a severe spasm in my back and I "doubled-up" and fell forward *hitting my forehead on the counter*. I had a *lump on my forehead* and both of my eyes started turning black *later that day*. …We were there for an hour ½ maybe two hours when James and his girlfriend got into an argument and left Frankie's walking. I waited about 5 minutes and then left to go home…. [no mention of the assault].
>
> About two weeks later my girlfriend was dropping stuff off at my house and I was getting my dog Tugger (Maleniois) out of the truck and his leash somehow got tangled around my legs and I tripped and fell. ***I landed on my right-arm and shoulder but was not hurt.*** I got up and went into the house to bed.
>
> In December of 2019 while in the VA Hospital in Sheridan, Wyoming I fell probably due to a seizure (*which I feel is related to my work related injury*) and hit my head near my left-eyebrow. I did have I believe 3 butterfly stitches put over the wound.
>
> I still continue to have seizures up to two times a week…. (Ex. FF, pp. 407-408)(emphasis added).

[The ALJ notes that neither this alleged fall, nor the dog leash fall were mentioned to the DIME examiner].

32. The ALJ takes administrative notice that a hearing was set for September 15, 2020, on Respondent's Application for Hearing, dated 2/20/2020, seeking to overcome the DIME of Dr. Castrejon. On 6/24/2020, the undersigned ALJ signed an Order permitting the deposition of the DIME physician, Dr. Castrejon.

33. There were no further court filings in connection with this case until 4 weeks, after the Interrogatories were completed. A Motion to Withdraw from Representation was then filed by Claimant's Counsel, [Redacted, on July 21, 2020. The sole reason for withdrawing cited was that "The undersigned [attorney] wishes to withdraw as Attorney of record from this claim." When Claimant filed no Response thereto, the undersigned ALJ signed the Order on August 4, 2020. The September 15 hearing was vacated.

DIME Revisited

34. DIME physician Dr. Castrejon was deposed on April 9, 2021. Claimant did not participate. (Ex. GG). During this deposition, Dr. Castrejon was supplied new information discovered since his original DIME report of January 9, 2020. When asked if he had *originally* found Claimant's recitation of the work injury to his back, and the subsequent fall in the bathroom to be truthful, he replied in the affirmative.

35. The transcript of Amy F[Redacted]'s statement was then read to Dr. Castrejon. Upon completion of this recitation, this exchange followed:

> Q ...are you still of the opinion that there was a back injury?
>
> A My opinion is still that he experienced a straining injury *to his back.* I certainly—with this information, there is question with regard to the head injury that he described as being directly related to a coughing episode.
>
> It would appear that there are inconsistencies that make me think that the coughing incident that he reported may not have occurred and *actually the head injuries he sustained were as a direct result of what was pretty vividly described by Ame (sic)[F[Redacted]].*

Hearing Testimony

36. Claimant testified at hearing. He also offered his sole exhibit (Ex. 1), which is a copy of one page of his cell phone records for February 10 through 16 of 2019. Claimant explained that there are entries for an incoming call (from a supervisor at work, he indicated, returning Claimant's call) on 2/15/19 at 6:58 pm. A voicemail was left, but then Claimant called him back at 7:01 am the following morning on 2/16/2019 to discuss his sore back. The ALJ found - and still finds - this document to be sufficiently corroborative of Claimant's timelines regarding reporting his *back injury* from the bus seat, and admitted Ex. 1, despite any corroboration from said supervisor.

37. At hearing, Claimant's testimony was essentially void of specifics. He persisted in his belief that the bus seat malfunction led to his fall in the bathroom, but otherwise was vague whenever a direct question was asked. [There is no transcript]. Claimant insists that he has no recall of any of the assaultive events at Frankie's Bar, even to this day; therefore, he provided the best information he could at all times pertinent.

38. However, Claimant did acknowledge recalling the DUI blood test occurring later in the evening. He could not recall that he had apparently been placed onto probation for his

performance issues at his job with Employer. When asked whether he ever provided any information to any medical provider, including Dr. Castrejon, about the bar incident, Claimant would not provide a cogent answer. He "could not recall" what he originally told the adjuster when the claim was filed.

Other Pertinent Evidence

39. Respondents also offered body cam footage from Claimants DUI arrest. The ALJ has viewed it in its entirely, but emphasizes only a few pertinent points: 1) While Claimant certainly appeared to be impaired, he was quiet and cooperative with the arresting officers {although he declined to submit to voluntary roadside maneuvers, he did submit to the required chemical test, and chose blood}. 2) Claimant appeared to understand what was going on around him, and could respond appropriately to the officers' inquiries and commands. 3) Claimant had no visible injuries to his face, did not complain of same, nor did the officers take any verbal or written note of any. 4) However, one officer noticed blood on Claimant's shirt, which Claimant originally attributed to his dog; however, when asked if he had actually been in 'a scrap', Claimant acknowledged that he had, but indicated he was OK, and the matter was then dropped.

40. An investigative report was prepared in connection with this case. (Ex. DD). Pertinent findings were that Claimant's girlfriend, Holly O[Redacted], did not go out with Claimant on the night of his birthday. She did, however, see him after the fact, and took him to his initial visit to his workers comp visit. A social media review showed Claimant's LinkedIn page stated that he had worked as a deputy sheriff for Elbert County from 2006-2013. *Id* at 341.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. §8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. §8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals*

Office, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). There was but one live witness in this hearing; Claimant.

The ALJ has reviewed the statements and depositions of all participants in this matter. The statements from each of the witnesses tendered by Respondents are internally consistent, and are not significantly contradicted by other extrinsic evidence. None of said witnesses have any apparent motives for secondary gain.

While it can be argued in any given case that the Claimant has a secondary motive, the facts of this case are considerably more compelling than is typical. Further, in light of other extrinsic evidence available, Claimant's various statements throughout the proceedings do not withstand scrutiny. Lastly, Claimant's explanation at hearing for his actions throughout revealed a level of evasiveness that cannot be ignored.

D. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). The ALJ finds that each expert has rendered their opinions to the best of their ability, *based upon the information they were provided-and at the time it was provided.* What is clear from all of this is that, for various reasons, no two of the medical providers has had access to the exact same material, at the time they rendered their opinions. And, it is duly noted that as new information comes in, the target starts moving once again. Opinions can be revised or refined, or perhaps nothing changes. The real issue here is one of *persuasiveness,* in the context of the legal arena. However, in the end, once all the reports are reviewed, and all witnesses are deposed, in sequence, and all witnesses testify, it is the ALJ who has everything there is to be had in each case.

E. Further, courts are to be "mindful that the Workmen's Compensation Act is to be liberally construed to effectuate its humanitarian purpose of assisting injured workers." *James v. Irrigation Motor and Pump Co.*, 503 P.2d 1025 (Colo. 1972).

Overcoming the DIME Opinion on MMI, Generally

F. The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*; *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590, 592 (Colo. App. 1998); *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186, 189-190 (Colo. App. 2002); *Sholund v. John Elway Dodge Arapahoe,* W.C. No. 4-522-173 (ICAO October 22, 2004); *Kreps v. United Airlines,* W.C. Nos. 4-565-545 and 4-618-577 (ICAO January 13, 2005). The MMI determination requires the DIME physician to assess, as a matter of diagnosis, whether the various components of a claimant's medical condition are casually related to the injury. *Martinez v. ICAO*, No. 06CA2673 (Colo. App. July 26, 2007). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding the cause of a particular component of a claimant's overall medical impairment, MMI or the degree of whole person impairment, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001).

G. This enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.* Where the evidence is subject to conflicting inferences a mere difference of opinion between qualified medical experts does not necessarily rise to the level of clear and convincing evidence. Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries,* WC 4-712-812 (ICAO November 21, 2008).

H. As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

Overcoming the DIME, as Applied

I. In this case, Dr. Castrejon originally opined that Claimant suffered a minor, compensable back strain, which resolved within a very short period of time, with no impairment, and no further need for treatment. However, he also originally opined that there was a causal link between the back strain and Claimant's alleged fall in the bathroom. This fall led to the brain injuries noted by the ATP. These injuries, in turn, may have led to other falls, which cumulatively have resulted in ongoing, and ever intensifying, TBI symptoms. Thus, he opined Claimant was not at MMI for the TBI complaints, and issued his DIME report. Based upon said DIME report, Respondents then requested a hearing to overcome the DIME, and continued to investigate this claim.

J. As a result of this investigation, newly discovered evidence was obtained, most notably in the form of Amy F[Redacted]'s statement, and subsequent deposition. At no point prior had Dr. Castrejon been aware that Claimant had suffered a beating to his head and face the very same day he alleged he had fallen in the bathroom. This changed Dr. Castrejon's mind on the causal link between Claimant's back aggravation and his ongoing complaints of TBI; in fact, it was instead the bar fight at Frankie's. In effect, Dr. Castrejon overcame his own earlier DIME opinion of "not at MMI", for the TBI complaints, finding no causal link to the work injury. In effect, this evidence was sufficiently 'clear and convincing' to change the DIME's mind. The ALJ concurs. The ALJ now finds that Dr. Castrejon's current DIME opinion is that Claimant is now at MMI for all work-related injuries. Such injuries are limited to Claimant's back only, which resolved to pre-injury status within 10 days, with minimal treatment. While Dr. Lesnak questions even the back injury, the ALJ finds that this is insufficient to overcome Dr. Castrejon's conclusion that Claimant did in fact suffer a minor compensable injury to his back. There is other corroborative evidence in the record in support as well.

Did Claimant Fraudulently Obtain Workers Compensation Benefits?

K. The elements of fraud in Colorado were set forth by the Colorado Supreme Court in *Morrison v. Goodspeed*, 100 Colo. 470, 68 P.2d 458 (1937). In that case, the Court stated: "The constituents of fraud, though manifesting themselves in a multitude of forms, are so well recognized that they may be said to be elementary. They consist of the following:

> (1) A false representation of a material existing fact, or representation as to a material existing fact made with a reckless disregard of its truth or falsity; or concealment of a material existing fact, that in equity and good conscience should be disclosed.
>
> (2) Knowledge on the part of the one making the representation that it is false; or utter indifference to its truth or falsity; or knowledge that he is concealing a material fact that in equity and good conscience he should disclose.

> (3) Ignorance on the part of the one to whom representations are made or from whom such fact is concealed, of the falsity of the representation or the existence of the fact concealed.
>
> (4) The representation or concealment made or practiced with the intention that it shall be acted upon.
>
> (5) Action on the representation or concealment resulting in damages."

L. As noted, there is sufficient evidence in the record to support that Claimant's inflatable seat cushion indeed malfunctioned shortly before he complained of back pain. Given Claimant's apparent preexisting lumbar injuries, it is conceivable that he might well have temporarily aggravated his low back sufficiently to report it and seek treatment. Claimant did so. In the process, he initially only sought treatment for his back, but mentioned to HR that he had also struck the *back* of his head on the *toilet.* In hindsight, this is perhaps not surprising, since Claimant then knew he had some blood on the *back* of his head – ostensibly discovered upon being awakened at the bus stop – and thus this original mechanism of injury would be more consistent with the evidence he was aware of *at the time*. However, Employer's HR and supervisory employee both noticed how bad Claimant's face and eyes looked on February 18.

M. Claimant then changed *what* he struck (from the toilet, to the bathroom floor, then the sink, and at one point, the counter), but apparently never clarified on *what part of his head* (front or back) he originally hit against those stationary objects. Dr. Peterson noted some swelling about Claimant's eyes on February 22, and combined with his account of striking his head, ordered imaging studies. When those came back with two notable findings (one to the front, one to the rear) on February 25, Claimant then offered that he was then found on the pavement at the bus stop after a DUI, and then recalled hitting the *front* of his head on the sink. Thus, now two falls (both unwitnessed and uncorroborated), correlating with two injuries on imaging studies. Based on the CT scan, Dr. Peterson advised Claimant to travel to Memorial Hospital ER; however, Claimant never went.

N. However, he returned on the next day, February 26, to discuss the imaging studies. At that visit, Claimant offered up a third fall, from February 24, involving his dog. Claimant stated *he hit his temporal skull, R side.* However, Claimant still denied any significant *symptoms* of TBI at this visit. However, Dr. Peterson then correlated Claimant's objective findings with his provided history of falls, and concluded that the fall to his temporal R side actually correlated far better with the imaging than did his alleged fall in the bathroom. However, the ALJ notes that since Claimant blamed his *dog* for this one, rather than back pain or some syncopal episode, such injury would not be work-related. There goes the WC claim, ***except that,*** Claimant then denied even striking his head during his interrogatories over a year later. Now he landed on his arm and shoulder, and was unharmed. Back in the game. But then his attorney withdraws shortly thereafter.

O. All the while, Claimant's reported TBI symptoms are intensifying, out of proportion to the imaging studies. His psychological testing in September, 2019 showed serious somatic issues. By the time Claimant answered his interrogatories, he was blaming seizures in Wyoming on his fall in the bathroom, and wanted to be compensated. Despite self-reporting that he was back to baseline for his back in late February, 2019, in April, he was now complaining that his back pain, combined with headaches, prevented him from exercising. Being unable to work as a bus driver, due his own self-reported TBI complaints, corroborated with imaging, Claimant continued to collect TTD payments, which ended on 9/11/2019, when he was placed at MMI by the IME.

P. Claimant describes pain so sudden and intense on 2/16/19 from a cough that he doubles over and strikes a stationary object (toilet, floor, sink, counter) with his head. Yet, later that day, he agrees to **drive** the three of them for a night out to celebrate his birthday. And the three of them did not include his **girlfriend**, as he reported on numerous instances to his medical providers. It was his roommate's girlfriend. And his roommate's girlfriend witnessed the assault (admittedly, unprovoked by Claimant) whereby he struck the back of his head on a bar chair behind him, and quite possibly then on the floor. He was then beaten about his face by three assailants. However, he never lost consciousness in this episode, and had the wherewithal, however ill-advised, to drive himself most of the way home. He recalled the DUI blood test, but could not recall how he wound up on the ground at the bus stop (if he did, since this remains uncorroborated by any extrinsic evidence), nor can he even recall being beat up. Although, in passing, he admitted to the DUI officer to being in a 'scrap'.

Q. Assuming arguendo, that Claimant truly did not recall the assault (but which this ALJ pointedly finds otherwise), *he certainly would have been told about it afterwards.* His bilateral facial injuries were also much more consistent with a beating than bouncing off a sink. And despite that, he 'neglected' to mention this to any of the medical providers, even days, weeks, or months after the fact. And, as a former law enforcement officer for at least seven years, he would know his very high BAC test results would be available shortly after their completion in late February. He then had several court dates after that, but never mentioned his BAC to any of his medical providers- and such information could have materially affected the treatment he received, regardless of its compensability. However, once Claimant became aware of the consequences of a TBI diagnosis, he could not go back to work as a bus driver for at least a year. The disability horse now had to be ridden to the finish.

R. The ALJ finds that each element of Fraud has been established by Respondents by a preponderance of the evidence. Claimant knew he was concealing material evidence, which he knew in good conscience should have been disclosed. Claimant intended that such concealment be acted upon by medical and insurance personnel to his benefit, and to the detriment of Employer and Insurer. Medical and insurance personnel did, in fact, act upon this concealed evidence, resulting in damages. One can easily connect the dots to see why Claimant's former counsel declined to participate further in pursuing this claim, despite a potentially large payout. Such damages include all medical treatment rendered beyond treatment for Claimant's lower back strain, which resolved days later, with no need for treatment of follow-up. Such damages also include any indemnification benefits paid by Insurer.

Withdrawal of Admissions of Liability, Generally

S. In *Vargo v. Industrial Commission*, 626 P.2d 1164 (Colo. App. 1981) the Court noted that there were no provisions in the Act authorizing “retroactive withdrawals of an admission of liability.” Nevertheless, the Court stated that the “beneficial intent” of the Act was predicated on claimant’s providing accurate information. In *Stroman v. Southway Services, Inc.*, W.C. No. 4-366-989 (August 31, 1999), ICAO interpreted *Vargo v. Industrial Commission*, and subsequent statutory amendments to permit retroactive withdrawal of admissions, and ICAO construed those authorities as permitting the ALJ to order repayment of compensation and benefits, including medical benefits. Specifically, in *Stroman*, ICAO stated that “[a]lthough the *Vargo* decision does not expressly state that a claimant may be ordered to repay the insurer for benefits obtained prior to withdrawal of the fraudulently induced admission, the court's reference to “retroactive withdrawal” of the admission indicates that repayment is the intended remedy. *Cf. HLJ Management Group, Inc. v. Kim*, 804 P.2d 250 (Colo. App. 1990) (holding that admission may not be withdrawn retroactively unless procured by fraud, but permitting prospective withdrawal of an erroneous admission). Similarly, in *West v. Lab Corp.*, W.C. No. 4-684-982 (ICAO February 27, 2009), ICAO reiterated that in a circumstance of fraud, the ALJ did not err in ordering the withdrawal of the respondents' admissions and repayment of compensation and medical benefits. In *West*, ICAO further indicated that “[w]e perceive nothing in the language of [section] 8-43-304(2) indicating that the legislature intended the respondents’ only recourse to be an offset against future payments in cases where the claim was fraudulently filed and there will therefore be no future payments.” *Id.* C.R.S. §8-42-101(6)(a) states that “[a]n employer, insurer, carrier, or provider may not recover the cost of care from a claimant where the employer or carrier has furnished medical treatment except in the case of fraud.”

Withdrawal of Admissions of Liability, and Remedy, as Applied

T. The ALJ has found that Claimant’s fraudulent actions resulted in benefits being paid on his behalf by Respondents. In this case, Respondent Insurer filed several General Admissions of Liability, as well as Final Admission of Liability. Were it not for Claimant’s willful misrepresentations, as noted supra, none of said Admissions would have been filed. Therefore, the ALJ Orders that each Admission of Liability filed in this case may be withdrawn by Respondents, and replaced with a Notice of Contest, at Respondents’ discretion. Further, due to the fraudulent nature of Claimant’s actions, such relief will, in fact, include retrospective relief for all benefits extended on Claimant’s behalf. The ALJ is unable at this time to conclude that the case law cited, supra, authorizes the award of attorney’s fees or costs.

ORDER

It is therefore Ordered that:

1. The DIME opinion of Dr. Castrejon on MMI has been overcome. Claimant was at MMI for his back injury (only) when declared by his ATP.

2. Claimant obtained Workers Compensation benefits as a result of fraud.

3. Based upon said fraud, Respondents may withdraw all Admissions of Liability filed in this case, and replace with a Notice of Contest.

4. Claimant must repay all fraudulently obtained Workers Compensation benefits, including all TBI medical diagnosis and treatment, and TTD payments.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. *In addition, it is recommended that you send a copy of your Petition to Review to the Colorado Springs OAC via email at oac-csp@state.co.us.*

DATED: July 30, 2021

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

I. Whether Claimant proved by a preponderance of the evidence he sustained a compensable industrial injury arising out of and in the course of his employment for Employer on May 8, 2017.

II. If Claimant proved he sustained a compensable injury, whether Claimant proved by a preponderance of the evidence he is entitled to reasonably necessary and causally-related medical benefits and temporary disability benefits.

III. Whether Respondents proved Claimant's claim is barred by the statute of limitations pursuant to C.R.S. 8-43-103(2).

IV. Whether Claimant proved Respondents are subject to a penalty for a willful violation of C.R.S. 8-43-103(1) for the Employer's alleged failure to report an injury to the Division.

FINDINGS OF FACT

1. Employer is in the cannabis industry. Claimant worked for Employer as an outside salesman. His primary job duty consisted of making sales calls. At the time of Claimant's hire and around the date of the [alleged] injury, Employer was in its beginning stages and in the process of formally opening its business. Claimant generally worked remotely. Greg M[Redacted] and Dennis M[Redacted] are owners of Employer.

2. Claimant has a history of pre-existing and ongoing back, neck and right arm complaints. On August 30-31, 2014, Claimant sought evaluation at Lake Norman Regional Medical Center and Novant Health Emergency Department with complaints of back, neck and right arm pain after throwing a Frisbee. Claimant reported that his right arm was numb three times/week. A CT scan of the cervical spine revealed a right foraminal disc protrusion at C6-7 and mild cervical spondylosis. Claimant was diagnosed with cervical radiculopathy.

3. Claimant notified Employer of his prior injury and condition.

4. Claimant alleges he sustained an industrial injury while lifting an industrial oven on May 8, 2017. Claimant testified that he, Greg M[Redacted], Matt O[Redacted] and Jordan S[Redacted] participated in carrying an oven up a staircase. Claimant testified that something slipped, causing the weight of the oven to come down on him. Claimant testified he felt a pop in his back and severe pain. He initially testified that the sensation

was “a little different” than his previous injury and that, at the time, he was unsure if he aggravated his prior injury or if he sustained a new injury. Claimant was able to finish assisting moving the oven. He testified he went back to his work station and attempted to continue working, but that he was in significant pain. Claimant testified he subsequently notified Greg M[Redacted] that he was in pain and needed to go home.

5. Greg M[Redacted] and Mr. S[Redacted] testified they did not recall any incident in which Claimant assisted in carrying an oven or any work incident in which Claimant was injured. Greg M[Redacted] testified that based on Claimant’s reports, he believed Claimant’s symptoms were a manifestation of his prior injury.

6. Claimant went home and emailed Bob T[Redacted]. Mr. T[Redacted] is responsible for human resources and payroll functions for Employer. On May 8, 2017, Claimant wrote to Mr. T[Redacted], “Greg mentioned you might know of a place that gives decent service for people without health insurance. I was waiting until commission started to sign up for the company insurance, but I re-injured it when we were moving the ovens and I’m in constant pain.” (Ex. A, p. 2). Mr. T[Redacted] responded to Claimant via email the same day stating, “Sorry to hear you re-injured your back. I don’t really know for sure. I have heard some people in the back have gone to Denver General. Dennis thought the Colorado’s CPIC program might be an option.” (Id.) Mr. T[Redacted] copied Greg M[Redacted] and Dennis M[Redacted], Owner, on the email.

7. On May 12, 2017, Dennis M[Redacted] emailed all employees of Employer, including Claimant, and copied Mr. T[Redacted]. Mr. M[Redacted] addressed the office setup. He also stated, “I know you have all been doing a lot of work that is physical in nature. I really don’t want any of you getting hurt, so if something is just too physical, then don’t do it. If we have to hire someone else temporarily to help, that is fine with me. Worker’s Comp claims can raise the premiums so I am serious about not getting hurt so be cautious.” (Exhibit C, p. 17).

8. On May 15, 2017, Claimant sent an email to Dennis M[Redacted] and Greg M[Redacted] stating,

> I’m still in pain with my neck, but it’s manageable if I avoid lifting super heavy objects. I’m still able to make sales calls without issue. This is pre-existing issue that I just aggravated when we moved that oven, so I would not file a worker’s comp claim. I’ve known I needed to have a minor neck surgery procedure to correct a pinched nerve, I was just waiting until I could afford it.
>
> (Exhibit C, pp.17-18.)

9. On June 2, 2017, Claimant presented to Douglas Wong, M.D. with neck pain and right arm tingling and numbness. Dr. Wong noted Claimant’s symptoms had been present since a traumatic incident in 2015. Claimant reported experiencing constant symptoms aggravated by driving and using the computer. Claimant reported having undergone a

cervical spine MRI and epidural steroid injection in September 2016. There is no reference in the medical record of mid to low back pain or findings, the May 8, 2017 incident, or any alleged work injury. Dr. Wong referred Claimant for a cervical spine MRI, which Claimant underwent the same day. The MRI report notes the indication for the cervical spine MRI as a whiplash injury of the neck and right arm pain. The MRI revealed degenerative diseases at C3-4, C4-5, C5-6 and C6-7 without herniated disc fragment; mild stenosis of the central canal at C4-5 and borderline stenosis at C5-5; and bilateral foraminal narrowing due to uncinate spurs at C3-4, C4-5 and C6-7.

10. On June 2, 2017, Claimant emailed Dennis and Greg M[Redacted] "I saw the Dr. Wong (*sic*) at Panorama this morning and am supposed to get a call about scheduling an MRI today or Monday, then back to Panorama to see what the best course of action is. I hopefully know something definitive next week. Thanks again for your understanding. I hope everyone has a good weekend." (Exhibit C, p.20).

11. Dr. Wong reexamined Claimant on June 6, 2017, noting the cervical MRI showed some foraminal narrowing at C4-5 and C6-7. He noted Claimant was reporting neck pain, and had severe neck pain in the past, along with some past swelling in his right elbow and symptoms in his right fingers. The medical record contains no reference to mid to low back complaints or findings, the May 8, 2017 incident, or any alleged work injury. Dr. Wong referred Claimant for an EMG of the right upper extremity.

12. On June 27, 2017, Claimant underwent an evaluation and EMG with Michael Horner, D.O. Claimant reported having cervical spine pain, numbness and weakness that began two years prior while playing Frisbee. Claimant reported that his symptoms occurred constantly and had worsened with sharp and aching pain located in the neck and right elbow into his hand. The medical record contains no reference to low back complaints or findings, the May 8, 2017 incident, or any alleged work injury. Dr. Horner noted the EMG conducted produced normal findings. He opined that Claimant's reported symptoms could not be clinically explained by the findings. He assessed Claimant with cervical spine pain, right arm numbness, and right medial epicondylitis.

13. Dr. Wong spoke to Claimant by telephone on July 11, 2017. He opined that neck surgery was not necessary and referred Claimant for physical therapy for his right elbow.

14. Claimant was not placed on any work restrictions.

15. Claimant initially testified he did not return to work for Employer after the May 8, 2017 incident. He testified he was unable to work at all after the incident because of his severe pain. He testified he was not performing any of his job duties because he was in a lot of pain and lying in bed for most of the day. He later testified that after the injury he did continue to work remotely as scheduled for Employer, sending some work emails, and that he continued to receive his salary as scheduled until resigning in August 2017.

16. Due to continued delays with the opening of Employer's business, Claimant was not yet earning commissions as anticipated in his sales position. Accordingly, in approximately July 2017, Claimant and Greg M[Redacted] agreed that Claimant would work reduced hours for Employer so he could supplement his income by driving for Uber. Claimant did not make any indication to Greg M[Redacted] that he was unable to perform his job duties for Employer. Claimant proceeded to work as a driver for Uber while continuing to work remotely for Employer.

17. Claimant resigned from his employment with Employer on August 3, 2017. On August 3, 2017, Greg M[Redacted] emailed Claimant asking if he was done working for Employer, as Claimant had not signed in remotely from work. Claimant replied via email stating that he was "worn out and broke." (Exhibit J, p. 37). He stated that his position and financial situation were a source of stress and that he needed to find a way to move out of his financial struggles and start paying his debt. Claimant stated that maybe an inside sales person would be a better fit for the company. Claimant did not make any reference to an alleged work injury, his physical condition, or any inability to perform the job.

18. In an August 23, 2017 email to Greg M[Redacted] and Dennis M[Redacted], Claimant again pointed to his financial struggles as his reason for resigning. Claimant wrote, "As you know, [Employer's] opening delays caused great hardship for me financially. It was not my choice to resign. I simply couldn't afford to continue waiting 'another month' after over a year of delays." (Exhibit J, p. 39). Claimant again made no mention of a work injury, his health, or any inability to perform the work.

19. Claimant testified he did not resign for the reasons stated in his emails. He testified that he did not want to resign from his employment with Employer, but did so because his pain had become so severe he could no longer perform his job duties and there were several days he could not get out of bed. He then testified that the real reason for his resignation was that he was "afraid" and because Employer owed him money.

20. Claimant testified that after resigning from Employer, he took a few weeks off from driving for Uber. He testified that his condition improved when he rested his right arm, but the pain returned with any repetitive motions or driving. Claimant testified he continued working, but frequently switched jobs due to his condition. He testified that, over time, the pain and numbness increased and became worse than with his previous injury. Claimant testified he experiences pain emanating from his back to his arm, weakness, as well as numbness and pain in his fingers and arm similar to the symptoms from his previous injury. Claimant attempted to get medical care through Medicaid, to no avail. Claimant testified that he does not believe any need for neck surgery is related to the alleged work injury. On cross-examination, Claimant testified that the work injury is a separate issue that resulted in symptoms lower down his back than his prior injury. Claimant testified that at the time of work incident he did not think he had injured himself that badly and it was not until later that the situation worsened.

21. The record reflects Claimant earned income from multiple employers after he voluntarily resigned from his employment with Employer. Claimant continued working for

Uber. Claimant also worked at dispensaries and hemp farms, as well as performing landscaping and other odd jobs. Claimant was employed at a hemp farm, Haleigh's Hope, from October 2017 through December 2017, when work was no longer available for Claimant. Between December 2017 and June 2018, Claimant worked at a dispensary. Claimant was rehired by Haleigh's Hope in June 2018 and worked there until July 2020, when he was terminated for reasons unrelated to his physical condition or ability to perform his job duties.

22. Subsequent to his termination from Haleigh's Hope in July 2020, Claimant performed jobs such as landscaping and grill repair. In August 2020, Claimant posted on Reddit that he had "plenty of hourly work" and was working 50-60 hours per week. Claimant testified he was working in a commercial nursey at the time and that he exaggerated the amount of hours he was working.

23. Jason Cranford, owner of Haleigh's Hope, testified at hearing that Claimant worked 30-40 hours per week for Haleigh's Hope in various positions, including hemp trimmer, farm manager and extraction machine runner. Mr. Cranford testified that all of these positions involved physical labor including planting, watering, putting up trellis, spraying pesticides, farm work, installing underground irrigation, and harvesting hemp. Mr. Cranford testified that Claimant was able to perform manual labor during his entire employment, and that Claimant never complained about a prior work injury. Mr. Cranford testified that he never observed Claimant appearing to be in pain, Claimant never complained to him about being in pain, and Claimant never requested help from other employees to perform his tasks.

24. Claimant alleges that his son assisted him in performing some of his job duties. Mr. Cranford testified that when Claimant and his son worked together at other facilities, they worked as a team and performed the same tasks.

25. On May 3, 2020, Claimant filed a claim for workers' compensation, citing May 8, 2017 as the date of injury. Regarding the delay in filing a claim, Claimant testified he was trying to make a decision about what to do because he was afraid filing a claim would affect his employment with Employer and that he would be fired by Employer. Claimant further testified he waited so long to file a claim because he was afraid it would create a bad reputation and affect future employment opportunities in his industry. He testified that as his condition worsened he "just simply assumed it had been too long" to file a claim. He subsequently went back through his emails and thought about everything more and decided to file a claim.

26. Claimant further cites housing insecurity and limited internet access as reasons for his delay in filing a claim. Claimant testified that he lived so far outside of the Denver area that there was barely any internet service, and that he only had internet access on his cellular phone. Claimant testified that he had no printer and would go to the library to perform critical tasks; however, he could not do so at some point due to the libraries being closed as a result of the COVID-19 pandemic.

27. The ALJ takes administrative notice of Governor Jared Polis' Executive Order D 2020 017 dated March 25, 2020 and Public Health Order 20-24 issued by the Colorado Department of Public Health and Environment on March 27, 2020. The orders, issued in response to the COVID-19 pandemic, were the first ordering all Coloradans to stay at home, subject to limited exceptions, and directing all non-critical businesses (including public libraries) to temporarily close.

28. The record reflects Claimant made multiple posts on various social media outlets in 2017, 2018, and 2020.

29. Respondents filed a Notice of Contest on June 9, 2020.

30. Due to multiple inconsistencies in Claimant's testimony, the ALJ does not find Claimant credible overall. While the ALJ finds Claimant did experience pain at work on May 8, 2017 and notify Employer of the incident, the ALJ does not find Claimant's description of the nature and severity of his symptoms, his reported inability to work, his purported actual reason for resigning from employment, and his explanation for waiting to file a workers' compensation claim credible. Claimant failed to prove it is more probable than not he sustained a compensable industrial injury on May 8, 2017.

31. Respondents proved it is more probable than not Claimant's claim is barred by the statute of limitations, as Claimant failed to provide a reasonable excuse for his delay in filing a claim almost three years after the commencement of the limitation period.

32. Evidence and inferences contrary to these findings were not credible and persuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Statute of Limitations

Section 8-43-103(2), C.R.S. requires a claimant to file a notice claiming compensation within two years of discovery of the work-related nature of an injury or within three years if a reasonable excuse exists and no prejudice results to respondents. The notice must apprise the Division and respondents of the claimant's intent to seek compensation. The preceding requirement is not satisfied by the employer filing a first report of injury, the Division's assignment of a claim number, claimant's counsel's entry of appearance or the claimant's service of interrogatories. *Packard v. Industrial Claim Appeals Office and City and County of Denver,* 456 P.3d 473 (Colo. App. 2019). The limitation period commences when "the claimant, as a reasonable [person], should recognize the nature, seriousness, and probable compensable character of [the] injury." *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *City of Colorado Springs v. Industrial Claim Appeals Office*, 89 P.3d 504 (Colo. App. 2004). For a claimant to appreciate an injury's seriousness and probable compensable nature, the injury must be "to some extent" disabling. *City of Colorado Springs*, 89 P.3d at 506. The "seriousness" of the injury refers to the claimant's recognition of the "gravity of the medical condition." *Burnes v. United Airlines*, WC 4-725-046 (ICAO, Apr. 17, 2008). The claimant must recognize all three of the preceding factors to trigger the running of the statute of limitations. *Id.* The question of when the claimant recognized the nature, seriousness, and probable compensable character of the injury is one of fact for determination by the ALJ. *Id.*

In the event an employer has been given notice of an injury and fails, neglects, or refuses to report said injury to the Division as required, the statute of limitations does not begin to run until the required report has been filed with the Division. Section 8-43-103(2), C.R.S. An employer's duty to "report said injury" to the Division as stated in §8-43-103(2), C.R.S. refers to the employer's statutory duties under §8-43-101, C.R.S. *Grant v.*

Industrial Claim Appeals Office, 740 P.2d 530 (Colo. App. 1987). Section 8-43-101(1), C.R.S. requires that "[w]ithin ten days after notice or knowledge which an employee has contracted such an occupational disease, or the occurrence of a permanently physically impairing injury, or lost-time injury to an employee," the employer must report the injury to the Division. A "lost time injury" is defined as one that causes the claimant to miss more than three work shifts or three calendar days of work. *Grant v. Industrial Claim Appeals Office, supra*. An employer is deemed to have "notice" of an injury when the employer has "some knowledge of accompanying facts connecting the injury or illness with the employment and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Jones v. Adolph Coors Co*., 689 P.2d 681, 684 (Colo. App. 1984). The use of the word "shall" creates a presumption that the reporting requirement is mandatory. *City of Englewood v. Indus. Claim Appeals Office*, 954 P.2d 640, 641 (Colo. App. 1998).

Claimant argues that the statute of limitations did not begin to run until Respondents filed a Notice of Contest, as Employer failed to report his injury to the Division after he notified Employer of his injury on May 8, 2017. The ALJ disagrees.

Here Respondents did not fail to report Claimant's injury to the Division as required. The "injury" Claimant reported to Employer on May 8, 2017 was not an injury that required reporting to the Division at that time. Claimant alleges he sustained an industrial injury, not an occupational disease. There is no evidence Claimant's alleged injury has been deemed permanently physically impairing. Furthermore, there is no evidence Respondents were on notice of a lost-time injury prior to Claimant filing his claim for workers' compensation. While Claimant purports that, due to his alleged injury, there were days he was unable to work for Employer, Claimant also acknowledge he did continue to work as scheduled for Employer and continued to earn his full salary from Employer up to his resignation on August 3, 2017. There is no indication that, prior to filing a claim, Respondents were aware Claimant alleged any lost time from other work due to the May 8, 2017 incident. Additionally, there is insufficient credible evidence Claimant did, in fact, lose more than three days of work due to the work incident, as Claimant's own testimony regarding his ability to work was inconsistent and contradicted by various social media posts.

As Respondents were not required to file a report with the Division under such circumstances, their failure to do so does not toll the statute of limitations in this matter. Additionally, in mid-May 2017, Claimant specifically represented to Employer he would not file a workers' compensation claim for the incident, stating his need for surgery was pre-existing. Such statement is not dispositive of compensability or preclude Claimant from later filing a claim for workers' compensation; however, it is relevant to the analysis of whether Respondents had notice of a potentially compensable injury. The record is devoid of evidence indicating Claimant subsequently notified Employer that he, in fact, deemed the injury a work injury and wished to pursue a claim prior to filing an actual claim in May 2020.

As the statute of limitations did not toll in this matter, the ALJ next addresses when the limitation period commenced. The preponderant evidence establishes Claimant recognized the nature, seriousness and probable compensable character of his alleged injury on May 8, 2017. Claimant testified he felt a pop and severe pain while moving an oven at work on that date. He testified that the pain was so severe he was unable to complete his work shift and went home. He notified Employer of the incident on the day of the incident and began seeking medical treatment shortly thereafter. Claimant's description of the incident and his subsequent actions indicate he recognized the seriousness of the injury on or shortly after May 8, 2017. To the extent Claimant wishes to rely on his contradictory testimony in which he stated he did not initially think he had injured himself that badly and it was not until later his condition worsened, the ALJ is not persuaded.

The ALJ is persuaded Claimant was also aware of the probable compensable character of the alleged injury on the same date. Claimant was aware the alleged injury occurred at work while performing his work duties. Claimant testified he waited to file a claim because he was afraid he would be fired and that doing so would affect future employment opportunities in the cannabis industry. Such testimony indicates Claimant was, in fact, aware of the probable compensable character of the injury and elected to wait to file a workers' compensation claim. Finally, per Claimant's testimony, the alleged injury became to some extent disabling shortly after the alleged injury occurred. Claimant testified that for at least some time after the alleged injury he was unable to work because of the pain and that he spent most of his day in bed in pain. Based on the foregoing, the statute of limitations for Claimant to file a workers' compensation claim began running on May 8, 2017.

Claimant did not file his workers' compensation claim until May 3, 2020, well past the two-year statute of limitations, but prior to the three-year statute of limitations. Claimant did not provide a reasonable excuse for his almost three-year delay in filing a claim for workers' compensation. As discussed, Claimant offered conflicting testimony at various points, testifying that he did not think the injury was that bad at the time of the injury, but also testifying he experienced immediate and disabling pain to the point he could no longer work at times. Claimant also offered conflicting testimony regarding his symptoms. Claimant's testimony on cross-examination regarding a new condition lower down his back was inconsistent with his testimony on direct examination that his symptoms included numbness and pain in his fingers and arm, that are similar to the neck symptoms he reported having from his previous injury.

Claimant's assertion that he sustained an injury on May 8, 2017 that immediately or soon thereafter resulted in severe and disabling symptoms that necessitated medical treatment does not comport with Claimant's subsequent action of waiting almost three years to file a claim for compensation. Claimant points to limited internet access and limited access to public libraries due to the COVID pandemic as additional reasons for his delay in filing a claim. As found, the closing of certain institutions in Colorado, including libraries, did not begin until approximately late March 2020. Thus, Claimant had access to the computers in public libraries from May 2017 to at least March 2020. Claimant's claims that he did not have viable internet access is undermined by evidence of social media posts made by Claimant in 2017, 2018 and 2020. Claimant’s limited access to certain resources for certain periods of time does not reasonably justify a three-year delay in filing a claim in these circumstances.

Additionally, there is no evidence of any mental or physical inability preventing Claimant from filing a claim prior to May 3, 2020. Claimant continued to work for periods of time after May 8, 2017. Moreover, Claimant’s own testimony establishes he willingly delayed filing a claim, stating that he was afraid doing so would affect future employment opportunities and that, after some point, he merely assumed too much time had passed. Claimant did not provide any persuasive evidence that it was plausible future employment opportunities would, in fact, be jeopardized by filing a claim. A claimant's mistake or ignorance concerning the time period for filing his claim is not an excuse for the failure to file within the applicable statute of limitations. A claimant is presumed to know his legal rights, and a mistake in this regard does not constitute an excuse for filing a claim after the statute of limitations has run. *See Paul v. Industrial Commission*, 632 P.2d 638 (Colo. App. 1981)(parties are presumed to know the law); *Ramos v. Sears Roebuck Co*., W.C. No. 4-156-827 (February 10, 1994). Here, it was Claimant’s duty to timely file a claim for benefits.

Based on the totality of the evidence, Claimant failed to provide a reasonable excuse for his failure to file a workers’ compensation claim in the required time frame. Accordingly, Claimant’s claim is barred by the statute of limitations.

Compensability

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its “origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee’s service to the employer.” *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v.* Americold D/B/A Atlas Logistics, WC 4-960-513-01, (ICAO, Oct. 2, 2015).

A compensable aggravation can take the form of a worsened preexisting condition, a trigger of symptoms from a dormant condition, an acceleration of the natural course of the preexisting condition or a combination with the condition to produce disability. The compensability of an aggravation turns on whether work activities worsened the preexisting condition or demonstrate the natural progression of the preexisting condition. *Bryant v. Mesa County Valley School District #51*, WC 5-102-109-001 (ICAO, Mar. 18, 2020).

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms or the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Atsepoyi v. Kohl's Department Stores*, WC 5-020-962-01, (ICAO, Oct. 30, 2017). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Assuming, *arguendo*, Claimant's claim was not barred by the statute of limitations, Claimant failed to prove it is more probable than not he sustained a compensable industrial injury on May 8, 2017. Claimant's testimony regarding his symptoms and ability to function was inconsistent. Claimant purported to experience symptoms similar to those he experienced as a result of his prior neck injury, which included numbness and weakness in his right upper extremity. Claimant later alleged the work injury was lower down his back. The medical records subsequent to May 8, 2017 do not contain any mid or low back complaints or findings. Claimant's reports to his providers subsequent to the May 8, 2017 incident solely refer to continuing symptoms dating back to a frisbee incident two years prior. The cervical MRI obtained in June 2017 did not reveal any acute injuries, nor did the right upper extremity EMG. There are no medical records in which Claimant's providers addressed a purported work injury. Absent objective evidence of an injury, the ALJ is left to rely on Claimant's subjective reports of his symptoms and function, which are incredible and unpersuasive in light of the aforementioned inconsistencies. Thus, while Claimant felt pain at work on May 8, 2017, the preponderant evidence does not establish that Claimant's work activities caused a compensable injury, including compensable aggravation of a pre-existing condition. As Claimant's claim is barred by the statute of limitations and Claimant failed to prove a compensable injury, the issues of medical benefits and penalties are moot.

ORDER

1. Claimant's claim for benefits is denied and dismissed, as it is barred by the statute of limitations pursuant to §8-43-103(2), C.R.S.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 2, 2021

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-119-927-001

ISSUES

- Did Respondents prove Claimant's temporary total disability ("TTD") benefits should be terminated pursuant to § 8-42-105(3) and WCRP Rule 6-4(D) based on a return to work?

STIPULATIONS

- The parties stipulated Claimant returned to work on November 22, 2019.

- The parties stipulated Insurer would cease payment of additional TTD benefits as of August 3, 2021, and cancel all unnegotiated TTD checks issued since November 22, 2019.

FINDINGS OF FACT

1. Claimant suffered an admitted injury on July 19, 2019. Insurer filed a General Admission of Liability (GAL) on October 25, 2019. Insurer commenced payment of TTD benefits effective October 11, 2019 at a rate of $487.53 per week. TTD benefits have been ongoing since the initial GAL.

2. On May 5, 2021, respondents filed a petition to terminate TTD benefits. The petition alleged that claimant had returned to work, and that she had not complied with an order to provide an employment release. The petition noted Respondents had no documentation of the actual wages being earned.

3. Claimant replied saying, "I sent in this paperwork last February (2020), I have never cashed a single check that has been sent to me. I spoke with Josh on the phone regarding my work. I am not trying to be difficult but I don't even understand what I have not done correctly here." The claims representative explained what needed to be done to adjust benefits, and explained that documentation regarding employment status and wages had not been received. She apologized if it had been sent previously and asked for the material needed. These emails were sent to the Division of Workers' Compensation at the request of the Division clerk, and the Division did not approve the Petition to Terminate.

4. Respondents requested an expedited hearing on the issue of termination of TTD, pursuant to WCRP Rule 6-4.

5. On July 27, 2021, claimant provided a statement that she returned to work as of November 22, 2019. Claimant stipulated to the accuracy of this statement at hearing.

6. Insurer initially paid TTD benefits via electronic funds transfer/direct deposit. Since October 23, 2020, the payments have been in the form of paper checks. Claimant has held those paper checks and has not negotiated them.

7. Respondents requested an order allowing them to cancel the outstanding checks that have been sent to Claimant since October 23, 2020. Respondents explained this request is in an effort to reduce the amount of any overpayment. After a discussion on the record, Claimant stipulated and agreed that the checks should be cancelled. ("Please.").

8. A hearing is currently scheduled for September 28, 2021 on Respondents' separate application for hearing on the issues of overpayment and reimbursement.

CONCLUSIONS OF LAW

By filing an admission of liability, the respondents have admitted that the claimant has sustained the burden of proving entitlement to temporary disability benefits. Thereafter, the insurer is bound by that admission and must pay accordingly. The insurer may not unilaterally terminate benefits without complying with the statute and with rules governing the termination of such benefits. *Colo. Comp. Ins. Auth. v. Indus. Claim Appeals Office*, 18 P.3d 790 (Colo. App. 2000). Section 8-42-105(3) C.R.S. lists the circumstances under which termination of TTD can occur. These include when an employee returns to regular or modified employment. Section 8-42-105(3)(b).

WCRP Rule 6-1 allows respondents to terminate temporary disability benefits without a hearing by filing and admission of liability under certain circumstances, when supported by documentation listed in the Rule. In the case of return to work, to file an admission terminating temporary disability benefits without a hearing, the admission must include both a written report from an employer or claimant stating the claimant has returned to work and documentation of the wages paid. WCRP Rule 6-1(A)(3). In the absence of the required documentation under Rule 6-1, respondents may file a petition for termination of temporary total disability benefits. WCRP Rule 6-4. If there is an objection to that petition, then respondent "shall continue temporary disability benefits at the previously admitted rate until an application for hearing is filed with the Office of Administrative Courts, and the matter is resolved by order." WCRP Rule 6-4(D). If termination is ordered, it is as of the date of the petition. WCRP Rule 6-4(C).

Once commenced, TTD benefits "shall continue" until one of the terminating events set forth in § 8-42-105(3). One of the enumerated bases for termination of TTD is a claimant's return to regular or modified work. Section 8-42-105(3)(b). As found, the parties stipulated that Claimant returned to work effective November 22, 2019. Termination of TTD benefits is therefore proper. *Burns v. Robinson Dairy, Inc*., 911 P.2d 661 (Colo. App. 1995); *Laurel Manor v. Indus. Claim Appeals Office*, 964 P.2d 589 (Colo. App. 1998).

Pursuant to § 8-40-201(15.5), C.R.S., "overpayment" means money received by a claimant that exceed the amount that should have been paid or which the claimant was not entitled to receive. Payment of TTD benefits under an admission of liability does not bar a party from seeking to recover the TTD benefits as an overpayment. *Grandestaff v. United Airlines*, W.C. No. 4-717-644 (December 12, 2013). In an effort to reduce any overpayment, the parties stipulated that the TTD checks Claimant has not negotiated should be cancelled by Insurer. This ALJ is not making a determination regarding the amount of overpayment resulting from claimant's return to work. However, the ALJ agrees that it is in the best interest of the parties to reduce the amount of overpayment that could be due because of claimant's return to work. The ALJ therefore approves this stipulation.

The ALJ issued a bench order during the hearing allowing Insurer to cease payment of ongoing TTD benefits immediately.

ORDER

It is therefore ordered that:

1. Respondents' petition to terminate TTD is GRANTED. Claimant's TTD benefits are terminated as of May 5, 2021.

2. Insurer may cancel all checks not yet negotiated by Claimant for TTD benefits paid since November 22, 2019, the date Claimant agrees she returned to work.

3. All issues not decided herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: August 3, 2021

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-156-657-001

ISSUE

1. Whether Respondents have established ground for modifying Claimant's admitted average weekly wage (AWW), and determination of Claimant's AWW.

FINDINGS OF FACT

1. Claimant is a 23-year-old man who sustained an admitted injury arising out of the course of his employment with Employer on December 14, 2020. Employer is a staffing agency that placed Claimant in a position with a construction company where Claimant worked on construction sites doing various tasks. Claimant was hired at a rate of $17.00 per hour, with no guarantee of a set number of hours per week. Due to the nature of the construction industry, the number of hours available for Claimant to work during a given week may be affected by weather, season, and other factors. In the course of his employment, Claimant was struck in the face by a piece of plywood, sustaining injuries to his face.

2. On December 18, 2020, Respondents filed a General Admission of Liability (GAL), admitting for temporary total disability (TTD) benefits beginning December 15, 2020. (Ex. B). In the GAL, Respondents' calculated Claimant's AWW as $1,204.25, and paid TTD benefits at the rate of $682.83, beginning December 15, 2020, and continuing until at least July 2, 2021. (Ex. H). Insurer, however, miscalculated Claimant's AWW by averaging Claimant's aggregate year-to-date gross wages from each pay stub, rather than the gross wages from each pay period.

3. On March 2, 2021, Insurer filed a Petition to Modify, Terminate, or Suspend Compensation with the Division seeking to modify the admitted average weekly wage pursuant to W.C.R.P. Rule 6-4 (A). (Ex. C). On March 17, 2021, Claimant filed an Objection to the Petition, indicating that a hearing was required to determine Claimant's AWW. (Ex. 1). On March 19, 2021, the Division issued a letter informing Insurer that its Petition was not approved, and indicating if Insurer wished to pursue the issue "you will need to apply for a hearing." (Ex. D). On March 30, 2021, Respondents filed the Application for Hearing seeking to modify Claimant's AWW as of March 2, 2021, the date the Petition was filed.

4. Claimant began employment with Employer on November 16, 2020, and earned $17.00 per hour. Between November 16 and December 14, 2020, Claimant worked during five pay periods and worked between 8 and 31 hours per week. During the week of November 23, 2020, Employer was closed for Thanksgiving and the following day. Claimant did not work on and was not paid for either of those days. Although no pay stubs were submitted for the week of December 14, 2020, Claimant worked and was paid for 8 hours of wages on the date of injury, December 14, 2020, and did not work for

Employer after that date. Claimant credibly testified that he was injured at the end of his shift on December 14, 2020.

5. Claimant's gross wages between November 16 December 14, 2020, were as follows:

Pay Period Start Date	Pay Period End Date	Gross Wages
11/16/20	11/22/20	$323.00
11/23/20	11/29/20	$527.00
11/30/20	12/6/20	$365.50
12/7/20	12/13/20	$493.00
12/14/20	12/20/20	$136.00
TOTAL		$1,844.50

6. Insurer contends Claimant's AWW is $427.13, which is Claimant's total gross wages from November 16, 2020, through December 13, 2020, divided by four weeks (i.e., $1,708.50 ÷ 4 = $427.13). Insurer's proposed calculation fails to account for the fact that the Thursday and Friday of the week of Thanksgiving 2020 were not workdays, and Claimant was not paid for work on those days. Insurer also failed to account for Claimant's work and pay on December 14, 2020. By failing to account for these factors, Respondent's proposed AWW does not accurately reflect Claimant's AWW at the time of injury.

7. Claimant contends his AWW should be $680.00, which presumes a 40-hour work week at $17.00 per hour. Claimant testified at hearing that he was paid weekly and that he was not guaranteed any set number of hours per week when he was hired. Claimant also acknowledged the variability of hours in the construction industry due to weather conditions. Claimant's proposed AWW is based on the speculation that Claimant would have worked 40 hours per week at some indeterminant point in the future, and does not accurately reflect Claimant's AWW at the time of injury.

8. Prior to his injury, Claimant worked three full weeks, and two partial weeks. The week of November 23, 2020 was not a full work week, but 5/7 of a week due to the Thanksgiving holiday. Because Claimant's injury occurred on the first day of the pay period, the week of December 14, 2020, was 1/7 of a week. Thus, Claimant's AWW should be based on the 3 6/7 (or 3.85714) weeks actually worked between November 16, 2020, and December 14, 2020. During this time, Claimant's gross wages were $1,844.50. The ALJ finds that Claimant's average weekly wage at the time of his injury was, therefore, $478.20 (i.e., $1,844.50 ÷ 3.85714 = $478.20).

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

AVERAGE WEEKLY WAGE

Section 8-42-102(2), C.R.S., requires the ALJ to calculate a claimant's average weekly wage (AWW) based a claimant's monthly, weekly, daily, hourly, or other earnings. This section establishes the default method for calculating AWW. However, if for any reason, the ALJ determines the default method will not fairly calculate the AWW, § 8-42-102(3), C.R.S., establishes the so-called "discretionary exception," which affords the ALJ discretion to determine the AWW in such other manner as will fairly determine the wage. *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010); *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of a claimant's wage loss and diminished earning capacity.

Campbell v. IBM Corp., *supra*; *Avalanche Industries v. ICAO*, 166 P.3d 147 (Colo. App. 2007). Where a claimant's AWW at the time of injury is not a fair approximation of Claimant's later wage loss and diminished earning capacity, the ALJ is vested with the discretionary authority to use an alternative method of determining a fair wage. *See id*. .

Respondents have established a basis for modifying Claimant's admitted AWW. As found, Claimant's average weekly wage at the time of his injury was $478.20. This calculation accounts for all of Claimant's gross wages during the 3 6/7 weeks actually worked between his start date and the date of injury. Claimant has not established credible grounds for the ALJ to exercise discretion to calculate his AWW differently. The ALJ concludes that $478.20 is a fair approximation of Claimant's wages and diminished earning capacity as the result of his industrial injury. Respondents' request to modify Claimant's AWW effective March 2, 2021, to reflect an AWW of $478.20 is granted.

ORDER

It is therefore ordered that:

1. Claimant's average weekly wage is $478.20, effective March 2, 2021.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 4, 2021

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-159-881-001

ISSUES

- Did Claimant prove he suffered a compensable injury to his left knee on January 9, 2021?

- If the claim is compensable, is Claimant entitled to reasonably necessary medical treatment from authorized providers, including treatment received at Concentra Medical Centers?

- The parties stipulated to an average weekly wage (AWW) of $1,275.56.

- Respondents presented evidence at hearing of an alleged safety rule violation relating to Claimant's failure to wear traction aids on his shoes. Respondents did not endorse a safety rule violation in their February 26, 2021 Response to Application for Hearing, but listed the defense on their Case Information Sheet. Claimant did not object to the safety rule issue at the start of hearing but has objected in his post-hearing brief. Claimant argues the defense was waived, whereas Respondents presumably believe the issue was tried by consent. Although an affirmative defense can be waived if not timely pled, the piecemeal nature of litigation inherent to workers' compensation claims means a party is only obligated to plead defenses pertinent to the benefits under consideration at the time. At this point in the claim, a safety rule violation is largely academic because Claimant is not currently seeking any indemnity benefits. Thus, whether Claimant violated a safety rule is not a defense to any benefits Claimant is asking the ALJ to award. On the other hand, Claimant's actions are not so unequivocal to indicate he consented to adding the issue. *E.g., Crist v. Booth Land & Livestock*, W.C. No. 4-357-502 (April 9, 1999). The present circumstances are insufficient to support a finding of "waiver" by either party. The safety rule defense will be reserved.

FINDINGS OF FACT

1. Claimant worked as a truck driver for Employer since November 2020.

2. On November 16, 2020, Claimant underwent a U.S. DOT pre-employment medical evaluation. Claimant was 6 feet tall and weighed 438 pounds. Aside from "obesity," the physical examination identified no physical abnormalities. Notably, Claimant's "extremities/joints" were normal, with no indication of any left knee problems.

3. Claimant typically begins each shift by reporting to Employer's dispatch center to receive his assignment. Employer maintains continuous video surveillance of the parking lot at the dispatch center. Surveillance footage from January 9, 2021 shows Claimant arrived in his personal vehicle at approximately 7:11 PM. It was actively

snowing, and the ALJ estimates 2-3 inches of snow had accumulated. Claimant exited his vehicle and began walking across the snow-covered parking lot. Shortly thereafter, he slipped and fell to the ground. The exact manner in which he fell is not visible because the view is blocked by cars. Claimant remained on the ground for over a minute, then arose and resumed walking into the building. After the fall, Claimant appears to walk gingerly on his left leg and more slowly than before the fall.

4. Respondents argue the video shows Claimant limping before the fall. The low contrast and resolution of the video makes it difficult to draw definitive conclusions. After viewing the video several times, the ALJ concludes Claimant's pre-fall gait pattern is more consistent with his large body habitus and walking on snowy ground. But regardless of whether Claimant may have had a slight limp or "hitch" in his gait before the fall, his gait is much more impaired after the fall.

5. After the accident, Claimant went inside and spoke with an unnamed individual in dispatch. He stated he fell while walking into the building and his left knee was very painful. This individual "did not know what to do," so Claimant simply collected his assignment paperwork and went to get his load for the day. Respondents presented no witness to dispute Claimant's account of the events after the accident.

6. Claimant worked for another week despite left knee pain. He did not see a physician until January 18, 2021. When asked at hearing why he did not see a doctor sooner, Claimant explained there was "a lot of confusion" regarding the entire incident. After reporting the incident, Claimant testified he was awaiting instruction as to what he needed to do next, such as take a drug test or whatever was required by Employer's policy. Claimant was subsequently contacted and told (erroneously) that workers' compensation coverage was not available because he was not "on the clock" when he fell, even though the accident occurred on Employer's premises. Claimant tried to see his PCP but was turned away and advised to follow up with "Work Comp." He was eventually referred to Employer's designated provider, Concentra. Claimant's explanation for the delay in treatment is credible.

7. Claimant saw Dr. J. Douglas Bradley at Concentra on January 18, 2021 for "left knee pain after slip and fall on 01/13/2021 [sic]." Dr. Bradley documented Claimant's knee pain had been worsening since the fall. The pain was described as 7/10 burning and throbbing. Examination of the left knee showed grade 2 effusion with erythema, limited range of motion in all planes, and reduced strength. X-rays showed no dislocation or fracture and no effusion. Dr. Bradley diagnosed a left knee contusion. He started Claimant on medications for swelling and pain, provided a knee brace wrap, and referred Claimant for physical therapy. He opined Claimant's symptoms and exam findings were consistent with the described mechanism of injury.

8. Dr. Bradley ordered an MRI of the knee on February 8, 2021, because Claimant had not significantly improved.

9. Claimant underwent the MRI on February 22, 2021. It showed (1) mild osteoarthritis with patellar chondromalacia and small joint effusion, (2) a grade-I MCL strain without tear, (3) a horizontal lateral meniscus tear extending into the anterior horn, (4) a small peripheral tear in the posterior horn of the medial meniscus, and (5) prepatellar and pretibial edema, and bone contusion versus reactive osteoedema in the lateral tibial plateau.

10. Kimberly B[Redacted], Employer's Safety and Training Manager on January 9, 2021, performed Claimant’s onboarding in November 2020. She testified she noticed a "slight hitch" in Claimant's gait when he started with Employer. Ms. B[Redacted] did not testify to any known knee symptoms or injuries before January 9, 2021.

11. Dr. Allison Fall performed an IME for Respondents on April 21, 2021. Dr. Fall reviewed the video surveillance and opined that Claimant appeared to have a slight limp favoring the left leg with decreased stance time and stiff-legged gait, both before and after the fall. Dr. Fall opined the lack of effusion shown on the initial x-rays was inconsistent with an acute meniscal injury. She opined the MRI findings were consistent with degenerative changes and Claimant’s obesity, and unrelated to the fall.

12. Dr. Timothy Hall performed an IME for Claimant on May 17, 2021. Claimant reported his knee had improved since the original accident, but he continued to have some symptoms and problems. Dr. Hall reviewed the surveillance footage and opined that “it is clear that he is limping, taking weight off his leg” after he got up. Dr. Hall disagreed with Dr. Fall’s assessment and saw an “obvious” change in Claimant’s gait after the accident. Dr. Hall opined the confusion over workers’ compensation coverage because the accident occurred in the parking lot was a reasonable explanation for the delay in seeking treatment. Dr. Hall opined the meniscal tears might be degenerative but are probably acute because there are no other significant degenerative findings in the knee. He noted Claimant had had only mild osteoarthritis, but a significantly injured meniscus, suggesting the meniscal damage was the result of trauma. Dr. Hall opined Claimant’s obesity “does not help” but is not dispositive because Claimant’s knee was asymptomatic before the fall. Dr. Hall opined Claimant’s history, exam, MRI, and video were all consistent with a work-related left knee injury.

13. Dr. Hall testified in deposition consistent with his report. Dr. Hall explained the bone contusion and MCL strain shown on MRI were good evidence of acute trauma “in the not-too-distant past.” Dr. Hall reiterated he saw a “significant” change in Claimant’s gait on the video after the accident. Dr. Hall did not consider the lack of effusion documented on the initial x-rays to be significant because effusion had been documented by Dr. Bradley and the MRI. Furthermore, he explained meniscal tears do not necessarily cause significant joint effusion because the meniscus “is not a terribly vascularized structure.” Dr. Hall agreed meniscal tears can be asymptomatic, but opined if they were preexistent in this case, the fall caused them to become symptomatic.

14. Dr. Fall testified at hearing consistent with her report. She opined one cannot determine whether a tear is acute or degenerative based on MRI images alone

but must also consider the mechanism of injury and symptoms. Dr. Fall opined Claimant's description of the fall was not a probable mechanism for meniscal tears. Dr. Fall testified Claimant did not complain of meniscal pain and presented no meniscal signs on examination at the IME. Dr. Fall testified Claimant's knee pain was "diffuse," and not specifically over the MCL. Dr. Fall saw no change in Claimant's gait after his fall when she reviewed the video. She also emphasized the delay in pursuing treatment and the fact Claimant continued working after the accident. Dr. Fall concluded Claimant suffered a contusion that did not require medical care and would resolve with time. She opined Claimant was at MMI with no impairment.

15. Dr. Hall's opinions and conclusions are credible and more persuasive than the contrary opinions offered by Dr. Fall.

16. There is no persuasive evidence Claimant's left knee required any medical treatment or caused any functional limitations before January 9, 2021.

17. Claimant credibly testified to ongoing knee pain and associated functional limitations despite improvement since the accident.

18. Claimant proved by a preponderance of the evidence he suffered a compensable injury to his left knee on January 9, 2021.

19. Claimant proved the treatment he received from Dr. Bradley and Concentra was reasonably needed to cure and relieve the effects of his compensable left knee injury.

CONCLUSIONS OF LAW

A. Compensability

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The claimant must prove that an injury directly and proximately caused the condition for which he seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). A pre-existing condition does not disqualify a claim for compensation if a work accident aggravates, accelerates, or combines with the underlying condition to cause disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). The mere fact a claimant is involved in an "accident" does not necessarily give rise to a compensable "injury." A compensable injury is one that requires medical treatment or causes a disability. *E.g., Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (August 17, 2016).

As found, Claimant proved he suffered a compensable injury to his left knee on January 9, 2021. Given the video surveillance, there can be no dispute he slipped and fell in Employer's parking lot while walking into work. The fall depicted in the video appears sufficient to cause a knee injury, and the ALJ is unpersuaded by hair-splitting arguments about the precise “way” Claimant fell. Whether or not Claimant had a “slight hitch” in his gait before the accident, his gait “obviously” changed immediately after he fell. Claimant’s explanation for why he waited nine days to see a physician was credible. Claimant has provided consistent accounts of the accident and the associated symptoms and functional limitations to multiple providers, and at hearing. Dr. Bradley opined the exam findings at the initial visit were consistent with the accident Claimant described. Dr. Hall persuasively opined the accident probably caused most of the MRI findings. But even if some (or all) of the pathology was pre-existing, it was asymptomatic, non-disabling, and required no treatment before January 9, 2021. Either scenario is sufficient to establish a compensable claim.

B. Medical benefits

Because he proved a compensable injury, Claimant is entitled to medical treatment reasonably necessary to cure and relieve the effects of his injury. Section 8-42-101. As found, the evaluations and treatment provided by Dr. Bradley were reasonably needed to diagnose and treat Claimant’s compensable injury. Dr. Fall’s argument that Claimant’s knee injury would resolve on its own without treatment is belied by his remaining symptomatic six months later at the hearing.

ORDER

It is therefore ordered that:

1. Claimant’s claim for a left knee injury on January 9, 2021 is compensable.

2. Insurer shall cover all medical treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant’s compensable left knee injury, including but not limited to treatment provided by and on referral from Dr. Bradley and Concentra.

3. All issues not decided herein are reserved for future determination.

If you are dissatisfied with the Judge’s order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email

address, it need not be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: August 5, 2021

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that she suffered compensable injuries on October 27, 2019 during the course and scope of her employment with Employer.

2. Whether Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive reasonable, necessary and causally related medical benefits for her industrial injuries.

3. Whether Claimant has proven by a preponderance of the evidence that David W. Yamamoto, M.D. is her Authorized Treating Physician (ATP).

4. Whether Claimant has established by a preponderance of the evidence that she is entitled to receive Temporary Total Disability (TTD) benefits for the period October 27, 2019 until terminated by statute.

STIPULATION

The parties agreed to hold the issue of Average Weekly Wage (AWW) in abeyance.

FINDINGS OF FACT

1. Claimant worked full-time simultaneously as a cook at two D[Redacted]'s Restaurant locations. One of the D[Redacted]'s locations was on 104th Avenue in Thornton, Colorado. Claimant typically began her shift at the Thornton location at 10 p.m. and finished at 6 a.m.

2. On Sunday, October 27, 2019 Claimant was working at Employer's Thornton location. At about 2:00 a.m. Claimant bent over to retrieve items from a small refrigerator underneath a cook top surface. While bending over, Claimant felt a pop in her back and immediately experienced pain in her lower back and lumbar spine. Claimant reported her injury to her supervisor. Her supervisor prepared a report and instructed her to visit the emergency room at North Suburban Hospital.

3. At North Suburban Hospital on October 27, 2019 Claimant reported a history of osteoarthritis and the recent onset of stabbing lower back pain that traveled into her legs. Claimant reported that her lower back pain began when she felt a pop while bending over at work. She was diagnosed with a lumbar strain and discharged with prescription medications. The emergency room physician excused Claimant from work until she obtained clearance from a physician.

4. Claimant testified she gave the documents she received from North Suburban Hospital to her supervisor. Her manager instructed her to go to Denver Health for treatment.

5. On October 28, 2019 Claimant visited Denver Health for an evaluation. Claimant reported a three-day history of lower back pain after bending over and feeling a pop while working in a kitchen. She remarked that her pain had progressively worsened since the injury. The pain was located in the midline lumbar area radiating to both sides of Claimant's back. Claimant denied any lower extremity weakness or numbness. On physical examination, Claimant exhibited tenderness to palpation in her lumbar spine. X-rays revealed degenerative disc disease at the L1-L2 and L2-L3 levels but were negative for acute injuries. Charlotte S. Withers, P.A. diagnosed Claimant with lower back pain and discharged her with additional medications. Claimant also received a note removing her from work for two weeks until November 11, 2019. The note restricted her from job duties that would aggravate her injury or until she was cleared by a specialist.

6. Employer's November 5, 2019 Injury Report states that Claimant's manager sent her to the nearest hospital on October 27, 2019. The Report also specifies Employer was not aware of the paperwork that needed to be completed for Claimant's injuries. Furthermore, the Workers' Claim for Compensation filed with the Division of Workers' Compensation on November 6, 2019 provides that on October 27, 2019 Claimant leaned over to pick up about half a box of eggs and felt a crack in her lower back. She received medical treatment at North Suburban Hospital and Denver Health.

7. Claimant testified that she took the documents she received from Denver Health to her manager. She remarked that she subsequently requested medical care from the store manager and called her every day for about a month and a half. The manager told Claimant she could not help because she had been unable to obtain instructions from management about visiting a doctor. Claimant commented that her supervisor told her she could not return to work until she saw a specialist.

8. Claimant explained that, because Respondents refused to provide medical care, she sought treatment on January 23, 2020 with David W. Yamamoto, M.D. She remarked to Dr. Yamamoto that her manager first told her to wait for insurance to respond, but then noted she was unable to help. Dr. Yamamoto noted that Claimant was "bending down to pick up an ingredient when she felt a sharp pain and heard a pop in her lower back." On physical examination, Claimant reported pain across the lumbar spine that radiated up her back to her neck and down into both legs. The pain caused a tingling and numbness sensation. Dr. Yamamoto diagnosed Claimant with a strain of her lumbar region, radiculopathy, neck pain and depression. He noted that her personal physician had treated her for depression caused by the accident. Dr. Yamamoto prescribed Meloxicam, recommended an MRI of the lumbar spine, and suggested physical therapy. He assigned restrictions of lifting not to exceed five pounds, no repetitive lifting or carrying more than two pounds, pushing/pulling limited to five pounds, no bending at the waist, combined walking and standing of less than one hour and sitting for seven to eight hours.

9. Claimant returned to Dr. Yamamoto on February 26, 2020. He noted that prior to her work injury Claimant did not have any preexisting lower back injuries or receive treatment for depression. She had attended eight physical therapy visits, but they had not been beneficial. He refilled Claimant's Meloxicam prescription, added medications for depression and sleeping, recommended an MRI and referred her to Amar Patel, M.D., at Premier Spine and Pain Institute. Dr. Yamamoto maintained the same restrictions he assigned during Claimant's January 23, 2020 visit.

10. Claimant continued to receive treatment from Dr. Yamamoto on March 25, 2020, April 27, 2020, May 27, 2020, June 24, 2020, August 4, 2020, September 2, 2020, September 30, 2020, and October 30, 2020. At each of the preceding visits Claimant's condition remained essentially unchanged, with ongoing lumbar spine pain. Dr. Yamamoto reiterated that Claimant's lower back pain began when she was bending down to pick up an ingredient at work.

11. On November 10, 2020 Claimant underwent an independent medical examination with John Raschbacher, M.D. Dr. Raschbacher recounted that while Claimant was working for Employer on October 27, 2019 she bent over to retrieve eggs from a refrigerator underneath a cook top surface. When she bent over she heard a crack in her back before grabbing the eggs. Claimant specified that the symptoms began while she was bending over but before picking up anything. She denied any prior back injuries or treatment. Claimant recounted that, after visiting Denver Health Medical Center she did not improve. Claimant did not receive any additional medical treatment until her lawyer sent her to Dr. Yamamoto.

12. After reviewing medical records and performing a physical examination, Dr. Raschbacher determined there were no objective findings to support a work-related injury or that correlated with any of Claimant's subjective pain reports. Specifically, Dr. Raschbacher determined that Claimant's mechanism of injury was relatively trivial and would not cause chronic neck and back pain that persisted for over a year. He commented that it is likely Claimant would have experienced pain in her lower back when bending over even if she had not been at work.

13. On November 30, 2020 Claimant returned to Dr. Yamamoto for an examination. Dr. Yamamoto strongly disagreed with Dr. Raschbacher's opinion that the mechanism of injury was trivial and her injury should not be considered work-related. He agreed with Dr. Raschbacher that Claimant crouched down to reach into a refrigerator under the grill at work. However, Dr. Yamamoto disagreed with Dr. Raschbacher that, because Claimant made the same movement outside of work, it rendered the accident non-work related. He remarked that it was unfortunate Claimant had not improved, but noted his referrals to spine specialist Dr. Patel and for an MRI had not been authorized.

14. Claimant continued to receive medical treatment with Dr. Yamamoto. Her most recent visit prior to hearing occurred on April 7, 2021. Claimant's condition remained unchanged with pain levels of 8/10 in the lumbar spine.

15. Claimant testified at the hearing in this matter. She recounted that she was cooking omelets and crouched down to grab eggs when her back popped while working for Employer on October 27, 2019. She commented she has stabbing pain in her lower back with numbness in her legs. Claimant noted Dr. Yamamoto placed her on five pound lifting, pushing and pulling restrictions.

16. Dr. Yamamoto also testified at the hearing in this matter. He explained that Claimant's diagnoses were a lumbar strain, myofascial neck pain that developed a few weeks after her injury due to her inability to rest in bed from her lumbar spine injury, as well as depression. He prescribed medications for pain and depression. Claimant's work restrictions included a maximum of ten pounds lifting and eight pounds of repetitive lifting. Dr. Yamamoto noted that he had referred Claimant for an MRI, a physical medicine consultation with Dr. Patel and a psychological evaluation with Dr. Ledezma.

17. Dr. Yamamoto disagreed with Dr. Raschbacher's opinion that Claimant did not suffer a work-related injury because she was engaged in the activity of bending that was not unique to work. He explained that Claimant was injured while performing the job task of crouching down to get eggs from under a grill. He reasoned that, because Claimant suffered symptoms while performing her job duties, her injuries were work related.

18. Dr. Yamamoto further disagreed with Dr. Raschbacher's claims that there were no objective findings to support a work-related injury. He documented consistent range of motion throughout his treatment and disagreed with Dr. Raschbacher's physical examination that showed very limited and inconsistent range of motion. Dr. Yamamoto commented that the note in Dr. Raschbacher's report that Claimant was shifting positions during his examination clearly demonstrated she was experiencing pain in her lower back. Finally, he commented that "bending down" or "bending over" to retrieve eggs was sufficient to cause Claimant's lower back symptoms.

19. Dr. Raschbacher testified at the hearing in this matter. He maintained that Claimant did not suffer an industrial injury to her lumbar spine while working for Employer on October 27, 2019. He commented that Claimant described her mechanism of injury as bending down or forward but never mentioned there was anything special or unique about the way she was bending over at the time of her injury. Dr. Raschbacher emphasized that Claimant likely would have sustained the injury whether or not she was working for Employer because there was nothing unique about the way she was bending, lifting or reaching.

20. Claimant has established that it is more probably true than not that she suffered compensable injuries on October 27, 2019 during the course and scope of her employment with Employer. Initially, on October 27, 2019 Claimant was working for Employer at the Thornton location. At about 2:00 a.m. she bent over to retrieve eggs from a small refrigerator underneath a cook top surface. While bending over, Claimant felt a pop in her back and immediately suffered pain in her lower back and lumbar spine. Claimant reported her injury to her supervisor and was instructed to visit the emergency room at North Suburban Hospital.

21. The record consistently reveals that Claimant injured her lower back while performing her job duties for Employer on October 27, 2019. At North Suburban Hospital on the day of the injury Claimant reported lower back pain after she felt a pop while bending over at work. On the following day Claimant sought medical treatment from Denver Health. Claimant reported a three-day history of lower back pain after bending over and feeling a pop in her back while working in a kitchen. She remarked her pain had progressively worsened since the injury. The Workers' Claim for Compensation filed with the Division of Workers' Compensation on November 6, 2019 specifies that on October 27, 2019 Claimant leaned over to pick up about half a box of eggs and felt a crack in her lower back. Moreover, in her first visit to Dr. Yamamoto on January 23, 2020 Claimant remarked she was "bending down to pick up an ingredient when she felt a sharp pain and heard a pop in her lower back." Finally, Claimant reported to Dr. Raschbacher that, while she was working for Employer on October 27, 2019, she bent over to retrieve eggs from a refrigerator underneath a cook top surface and heard a crack in her back. The preceding medical records reflect that Claimant consistently maintained she developed lower back pain while bending over in Employer's kitchen on October 27, 2019 while performing her job duties.

22. The persuasive medical opinion of Dr. Yamamoto reflects that Claimant's work activities for Employer on October 27, 2019 caused her injuries. Dr. Yamamoto diagnosed Claimant with a strain of her lumbar region, radiculopathy, neck pain and depression. He detailed that Claimant's myofascial neck pain developed a few weeks after her injury due to her inability to rest in bed from her lumbar spine injury and noted that her personal physician had treated her for depression caused by the accident. Dr. Yamamoto explained that Claimant was injured while crouching down to retrieve eggs from under a grill while performing her job duties. He reasoned that, because Claimant developed symptoms while performing her job duties, her injuries were work-related. In contrast, Dr. Raschbacher determined there were no objective findings to support a work-related injury. Specifically, Dr. Raschbacher commented that Claimant's mechanism of injury was relatively trivial and would not cause chronic neck or back pain for over a year. Notably, Claimant never mentioned there was anything special or unique about the way she was bending over at the time of her injury. Dr. Raschbacher emphasized that Claimant likely would have sustained the injury whether or not she was at work because that there was nothing unique about the way she was bending, lifting or reaching on October 27, 2019.

23. Despite Dr. Raschbacher's contention that there were no objective findings to support Claimant's work-related injury, Dr. Yamamoto persuasively explained that "bending down" or "bending over" to retrieve eggs was sufficient to cause Claimant's lower back symptoms. The record reflects a direct causal connection or nexus between the conditions and obligations of Claimant's employment and her injuries. Because Claimant was performing a service arising out of and in the course of her employment when she developed symptoms, her injuries were proximately caused by her work activities for Employer. Accordingly, Claimant's work activities aggravated, accelerated or combined with her pre-existing condition to produce a need for medical treatment.

24. Claimant has demonstrated that it is more probably true than not that she is entitled to receive reasonable, necessary and causally related medical benefits for her industrial injuries. At North Suburban Hospital on October 27, 2019 Claimant reported the recent onset of stabbing lower back pain that traveled into her legs after she felt a pop while bending over at work. She was diagnosed with a lumbar strain and discharged with prescription medications. On the following day at Denver Health Claimant underwent diagnostic testing, received physical therapy and obtained medications for her lower back symptoms. On January 23, 2020 Claimant began receiving treatment and medications from Dr. Yamamoto. He diagnosed Claimant with a strain of her lumbar region, radiculopathy, neck pain and depression. Dr. Yamamoto also recommended an MRI, a physical medicine consultation with Dr. Patel and a psychological evaluation with Dr. Ledezma. All of the preceding treatment was designed to address Claimant's lower back symptoms and associated conditions as a result of her October 27, 2019 work accident. Moreover, Dr. Yamamoto's treatment recommendations and referrals constitute reasonable, necessary and causally related medical benefits for her industrial injuries.

25. Claimant has proven that it is more probably true than not that Dr. Yamamoto is her ATP. Initially, on October 27, 2019 Claimant reported her injury to her supervisor. Her supervisor prepared a report and instructed her to visit the emergency room at North Suburban Hospital. Claimant explained she gave her documents from North Suburban Hospital to her supervisor. Her manager instructed her to go to Denver Health for treatment. After Claimant visited Denver Health on October 28, 2019 and gave more documents to her manager she requested additional medical care. Claimant specified that she called her store manager every day for about a month and a half. The manager told Claimant she could not help because she had been unable to obtain instructions from management about visiting a doctor. Notably, Employer's November 5, 2019 Injury Report provides that Employer was not aware of paperwork to be completed and Claimant's manager sent her to the nearest hospital on October 27, 2019. The preceding chronology reveals that Employer had some knowledge of the accompanying facts connecting Claimant's injury with her employment and the matter might involve a compensable claim. However, Employer only instructed Claimant to obtain emergency care and did not provide her with a written list of four designated providers despite Claimant's repeated requests for treatment. The right to select a physician thus passed to Claimant.

26. Claimant chose Dr. Yamamoto as her ATP and began treatment on January 23, 2020. Dr. Yamamoto thus had legal authority to furnish medical care to Claimant with the expectation that he would be compensated by Insurer for treatment. He recommended an MRI, a physical medicine consultation with Dr. Patel and a psychological evaluation with Dr. Ledezma. Dr. Yamamoto's referrals are also authorized because they occurred in the normal progression of authorized treatment. His treatment recommendations and referrals constitute reasonable and necessary treatment designed to address Claimant's October 27, 2019 industrial injuries.

27. Claimant has established that it is more probably true than not that she is entitled to receive TTD benefits for the period October 27, 2019 until terminated by statute. Claimant received medical treatment at North Suburban Medical Center on

October 27, 2019. The emergency room physician excused Claimant from work until she obtained clearance from a physician. On the following day Claimant received a note from Denver Health removing her from work for two weeks until November 11, 2019. The note restricted her from work that would aggravate her injury or until she was cleared by a specialist. Claimant subsequently did not obtain medical treatment until she visited Dr. Yamamoto on January 23, 2020. Dr. Yamamoto diagnosed Claimant with a strain of her lumbar region, radiculopathy, neck pain and depression. He assigned restrictions of lifting not to exceed five pounds, no repetitive lifting or carrying more than two pounds, pushing/pulling limited to five pounds, no bending at the waist, combined walking and standing of less than one hour and sitting for seven to eight hours. Dr. Yamamoto continued to assign Claimant work restrictions throughout treatment. At the hearing Dr. Yamamoto testified Claimant's current work restrictions include a maximum of ten pounds lifting and eight pounds of repetitive lifting.

28. Claimant's October 27, 2019 industrial injury caused a disability lasting more than three work shifts, she left work as a result of the disability and the disability resulted in an actual wage loss. The record reveals that Claimant has established a causal connection between her work-related injuries and subsequent wage loss Specifically, Claimant suffered a complete inability to work or work restrictions impaired her ability to effectively and properly perform her regular employment. Claimant has been unable to work since October 27, 2019 and has not reached Maximum Medical Improvement (MMI). Accordingly, Claimant is entitled to receive TTD benefits for the period October 27, 2019 until terminated by statute.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and

actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that she suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *David Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

6. The mere fact a claimant experiences symptoms while performing work activities does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO, Aug. 18, 2005). Rather, the symptoms could represent the “logical and recurrent consequence” of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant’s symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that “correlation is not causation,” and merely because a coincidental correlation exists between the claimant’s work and his symptoms does not mean there is a causal connection between the claimant’s injury and work activities.

7. The provision of medical care based on a claimant’s report of symptoms does not establish an injury but only demonstrates that the claimant claimed an injury. *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020). Moreover, a referral for medical care may be made so that the respondent would not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id.* Although a physician provides diagnostic testing, treatment, and work restrictions based on a claimant’s reported symptoms. It does not follow that the claimant suffered a compensable injury. *Fay v. East Penn manufacturing Co., Inc.*, W.C. No. 5-108-430-001 (ICAO, Apr. 24, 2020). While scientific evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory supporting

compensability when making a determination. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020).

8. In *City of Brighton v. Rodriguez,* 318 P.3d 496 (Colo. 2014) the Supreme Court addressed whether an unexplained fall while at work satisfies the "arising out of" employment requirement of the Workers' Compensation Act and is thus compensable. The Court identified the following three categories of risks that cause injuries to employees: (1) employment risks directly tied to the work; (2) personal risks; and (3) neutral risks that are neither employment related nor personal. The Court determined that the first category encompasses risks inherent to the work environment and are compensable while the second category is not compensable unless an exception applies. *Id.* at 502-03. The Court further defined the second category of personal risks to encompass those referred to as idiopathic injuries. These are "self-originated" injuries that spring from a personal risk of the claimant, such as heart disease, epilepsy, and similar conditions. *Id.* at 503. The third category of neutral risks would be compensable if the application of a but-for test revealed that the simple fact of being at work would have caused any employee to be injured. *Id.* at 504-05.

9. As found, Claimant has established by a preponderance of the evidence that she suffered compensable injuries on October 27, 2019 during the course and scope of her employment with Employer. Initially, on October 27, 2019 Claimant was working for Employer at the Thornton location. At about 2:00 a.m. she bent over to retrieve eggs from a small refrigerator underneath a cook top surface. While bending over, Claimant felt a pop in her back and immediately suffered pain in her lower back and lumbar spine. Claimant reported her injury to her supervisor and was instructed to visit the emergency room at North Suburban Hospital.

10. As found, the record consistently reveals that Claimant injured her lower back while performing her job duties for Employer on October 27, 2019. At North Suburban Hospital on the day of the injury Claimant reported lower back pain after she felt a pop while bending over at work. On the following day Claimant sought medical treatment from Denver Health. Claimant reported a three-day history of lower back pain after bending over and feeling a pop in her back while working in a kitchen. She remarked her pain had progressively worsened since the injury. The Workers' Claim for Compensation filed with the Division of Workers' Compensation on November 6, 2019 specifies that on October 27, 2019 Claimant leaned over to pick up about half a box of eggs and felt a crack in her lower back. Moreover, in her first visit to Dr. Yamamoto on January 23, 2020 Claimant remarked she was "bending down to pick up an ingredient when she felt a sharp pain and heard a pop in her lower back." Finally, Claimant reported to Dr. Raschbacher that, while she was working for Employer on October 27, 2019, she bent over to retrieve eggs from a refrigerator underneath a cook top surface and heard a crack in her back. The preceding medical records reflect that Claimant consistently maintained she developed lower back pain while bending over in Employer's kitchen on October 27, 2019 while performing her job duties.

11. As found, the persuasive medical opinion of Dr. Yamamoto reflects that Claimant's work activities for Employer on October 27, 2019 caused her injuries. Dr.

Yamamoto diagnosed Claimant with a strain of her lumbar region, radiculopathy, neck pain and depression. He detailed that Claimant's myofascial neck pain developed a few weeks after her injury due to her inability to rest in bed from her lumbar spine injury and noted that her personal physician had treated her for depression caused by the accident. Dr. Yamamoto explained that Claimant was injured while crouching down to retrieve eggs from under a grill while performing her job duties. He reasoned that, because Claimant developed symptoms while performing her job duties, her injuries were work-related. In contrast, Dr. Raschbacher determined there were no objective findings to support a work-related injury. Specifically, Dr. Raschbacher commented that Claimant's mechanism of injury was relatively trivial and would not cause chronic neck or back pain for over a year. Notably, Claimant never mentioned there was anything special or unique about the way she was bending over at the time of her injury. Dr. Raschbacher emphasized that Claimant likely would have sustained the injury whether or not she was at work because that there was nothing unique about the way she was bending, lifting or reaching on October 27, 2019.

12. As found, despite Dr. Raschbacher's contention that there were no objective findings to support Claimant's work-related injury, Dr. Yamamoto persuasively explained that "bending down" or "bending over" to retrieve eggs was sufficient to cause Claimant's lower back symptoms. The record reflects a direct causal connection or nexus between the conditions and obligations of Claimant's employment and her injuries. Because Claimant was performing a service arising out of and in the course of her employment when she developed symptoms, her injuries were proximately caused by her work activities for Employer. Accordingly, Claimant's work activities aggravated, accelerated or combined with her pre-existing condition to produce a need for medical treatment. *See Enriquez v. Americold d/b/a/ Atlas Logistics*, W.C. No. 4-960-513-01 (ICAO, Oct. 2, 2015 (where claimant was in a position to suffer a right knee injury because of his work, his claim was compensable under the first category of risks described in *City of Brighton* because those employment risks are "universally considered to arise out of employment under the Act").

Medical Benefits

13. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The claimant bears the burden of demonstrating a causal connection between his industrial injuries and the need for additional medical treatment. *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re of Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

14. As found, Claimant has demonstrated by a preponderance of the evidence that she is entitled to receive reasonable, necessary and causally related medical benefits for her industrial injuries. At North Suburban Hospital on October 27, 2019 Claimant reported the recent onset of stabbing lower back pain that traveled into her legs after she felt a pop while bending over at work. She was diagnosed with a lumbar strain and discharged with prescription medications. On the following day at Denver Health Claimant underwent diagnostic testing, received physical therapy and obtained medications for her lower back symptoms. On January 23, 2020 Claimant began receiving treatment and medications from Dr. Yamamoto. He diagnosed Claimant with a strain of her lumbar region, radiculopathy, neck pain and depression. Dr. Yamamoto also recommended an MRI, a physical medicine consultation with Dr. Patel and a psychological evaluation with Dr. Ledezma. All of the preceding treatment was designed to address Claimant's lower back symptoms and associated conditions as a result of her October 27, 2019 work accident. Moreover, Dr. Yamamoto's treatment recommendations and referrals constitute reasonable, necessary and causally related medical benefits for her industrial injuries.

Authorized Treating Physician

15. Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires that respondents must provide injured workers with a list of at least four designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. Section 8-43-404(5)(a)(I)(A), C.R.S. states that, if the employer or insurer fails to provide an injured worker with a list of at least four physicians or corporate medical providers, "the employee shall have the right to select a physician." W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, "the employer shall provide the injured worker with a written list of designated providers." W.C.R.P. Rule 8-2(E) additionally provides that the remedy for failure to comply with the preceding requirement is that "the injured worker may select an authorized treating physician of the worker's choosing." An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. industrial Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006). Furthermore, W.C.R.P. 8-3(A) specifies that "[w]hen emergency care is no longer required the provisions of section 8-2 of this rule apply."

16. Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the provider will be compensated by the insurer for treatment. *Bunch v. Industrial Claim Appeals Office,* 148 P.3d 381 (Colo. App. 2006); *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Kilwein v.*

Indus. Claim Appeals Office, 198 P.3d 1274, 1276 (Colo. App. 2008); *In re Bell*, WC 5-044-948-01 (ICAO, Oct. 16, 2018). If the claimant obtains unauthorized medical treatment, the respondents are not required to pay for it. *In Re Patton*, WC's 4-793-307 & 4-794-075 (ICAO, June 18, 2010); *see Jewett v. Air Methods Corporation,* WC 5-073-549-001 (ICAO, Mar. 2, 2020).

17. As found, Claimant has proven by a preponderance of the evidence that Dr. Yamamoto is her ATP. Initially, on October 27, 2019 Claimant reported her injury to her supervisor. Her supervisor prepared a report and instructed her to visit the emergency room at North Suburban Hospital. Claimant explained she gave her documents from North Suburban Hospital to her supervisor. Her manager instructed her to go to Denver Health for treatment. After Claimant visited Denver Health on October 28, 2019 and gave more documents to her manager she requested additional medical care. Claimant specified that she called her store manager every day for about a month and a half. The manager told Claimant she could not help because she had been unable to obtain instructions from management about visiting a doctor. Notably, Employer's November 5, 2019 Injury Report provides that Employer was not aware of paperwork to be completed and Claimant's manager sent her to the nearest hospital on October 27, 2019. The preceding chronology reveals that Employer had some knowledge of the accompanying facts connecting Claimant's injury with her employment and the matter might involve a compensable claim. However, Employer only instructed Claimant to obtain emergency care and did not provide her with a written list of four designated providers despite Claimant's repeated requests for treatment. The right to select a physician thus passed to Claimant.

18. As found, Claimant chose Dr. Yamamoto as her ATP and began treatment on January 23, 2020. Dr. Yamamoto thus had legal authority to furnish medical care to Claimant with the expectation that he would be compensated by Insurer for treatment. He recommended an MRI, a physical medicine consultation with Dr. Patel and a psychological evaluation with Dr. Ledezma. Dr. Yamamoto's referrals are also authorized because they occurred in the normal progression of authorized treatment. His treatment recommendations and referrals constitute reasonable and necessary treatment designed to address Claimant's October 27, 2019 industrial injuries.

Temporary Total Disability Benefits

19. To prove entitlement to Temporary Total Disability (TTD) benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, she left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §8-42-105, C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be

evidenced by a complete inability to work, or by restrictions that impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (*citing Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

20. As found, Claimant has established by a preponderance of the evidence that she is entitled to receive TTD benefits for the period October 27, 2019 until terminated by statute. Claimant received medical treatment at North Suburban Medical Center on October 27, 2019. The emergency room physician excused Claimant from work until she obtained clearance from a physician. On the following day Claimant received a note from Denver Health removing her from work for two weeks until November 11, 2019. The note restricted her from work that would aggravate her injury or until she was cleared by a specialist. Claimant subsequently did not obtain medical treatment until she visited Dr. Yamamoto on January 23, 2020. Dr. Yamamoto diagnosed Claimant with a strain of her lumbar region, radiculopathy, neck pain and depression. He assigned restrictions of lifting not to exceed five pounds, no repetitive lifting or carrying more than two pounds, pushing/pulling limited to five pounds, no bending at the waist, combined walking and standing of less than one hour and sitting for seven to eight hours. Dr. Yamamoto continued to assign Claimant work restrictions throughout treatment. At the hearing Dr. Yamamoto testified Claimant's current work restrictions include a maximum of ten pounds lifting and eight pounds of repetitive lifting.

21. As found, Claimant's October 27, 2019 industrial injury caused a disability lasting more than three work shifts, she left work as a result of the disability and the disability resulted in an actual wage loss. The record reveals that Claimant has established a causal connection between her work-related injuries and subsequent wage loss Specifically, Claimant suffered a complete inability to work or work restrictions impaired her ability to effectively and properly perform her regular employment. Claimant has been unable to work since October 27, 2019 and has not reached Maximum Medical Improvement (MMI). Accordingly, Claimant is entitled to receive TTD benefits for the period October 27, 2019 until terminated by statute.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered compensable injuries to her lumbar spine, neck and depression while working for Employer on October 27, 2019.

2. Claimant shall receive reasonable, necessary and causally related medical benefits for her October 27, 2019 industrial injuries.

3. Dr. Yamamoto is Claimant's ATP.

4. Claimant shall receive TTD benefits for the period October 27, 2019 until terminated by statute.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at https://oac.colorado.gov/resources/oac-forms*.

DATED: August 5, 2021.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-154-497-001

ISSUE

1. Whether Claimant established by a preponderance of the evidence a basis for reopening his worker's compensation claim.

2. If Claimant established a basis for reopening his claim, whether Claimant proved by a preponderance of the evidence an entitlement to additional medical benefits.

FINDINGS OF FACT

1. Claimant sustained an admitted work injury to his left shoulder on April 10, 2019, while emptying recycling bins in the course of his employment with Employer.

2. Claimant received medical treatment through authorized treating physicians (ATPs) at Concentra for approximately six months until October 16, 2019. Claimant's treatment included physical therapy, massage therapy, and injections. He also had evaluations with an orthopedic surgeon and a physiatrist.

3. On October 16, 2019, Claimant's ATP, Theodore Villavicencio, M.D., released Claimant from care and found that Claimant had no permanent impairment. Dr. Villavicencio completed a Physician's Report of Worker's Compensation Injury on October 23, 2019, in which he indicated Claimant reached maximum medical improvement (MMI) on October 16, 2019, without permanent impairment and that maintenance care was not required.

4. On January 15, 2020, Respondent mailed a Final Admission of Liability (FAL) to Claimant and the Division. In the FAL, Respondent denied liability for maintenance care, and permanent partial disability benefits, consistent with Dr. Villavicencio's October 16, 2019 report. (Ex. A). No evidence was admitted indicating that Claimant requested a division independent medical examination or otherwise challenged Dr. Villavicencio's determination that he was at MMI on October 16, 2019.

5. No credible evidence was admitted indicating that Claimant has had any medical treatment or evaluation since October 16, 2019.

6. On February 13, 2021, Claimant filed an Application for Hearing (AFH) which endorsed multiple issues, including a petition to reopen. In his AFH, Claimant stated "the injury to my shoulder (torn muscle) was never properly treated, has never healed and is still causing pain & discomfort."

7. At hearing, Claimant testified that he did not believe his shoulder was properly treated following his work-injury, and that providers focused on his neck complaints rather than his shoulder. Claimant also testified that his left shoulder has "healed" but he does

not believe that it healed completely. He also testified that he continues to experience pain and difficulty moving his left arm.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

REOPENING CLAIM

Claimant seeks to reopen his claim for the purpose of obtaining additional medical benefits. The power to reopen is permissive, and is therefore committed to the ALJ's sound discretion. The party seeking to reopen bears the burden of proof to establish grounds for reopening. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Barker v. Poudre School Dist.*, W.C. No. 4-750-735 (ICAO, Mar. 7, 2012). An otherwise final award of benefits may be reopened under § 8-43-303, C.R.S., which provides, in relevant part:

> At any time within six years after the date of injury, the director or an administrative law judge may, after notice to all parties, review and reopen any award on the ground of fraud, an overpayment, an error, a mistake, or a change in condition ….

Claimant does not assert that his claim should be reopened for any of the bases set forth in § 8-43-303, and no credible evidence was admitted upon which a finding that these factors exist could be reasonably based. The ALJ finds no basis for reopening Claimant's claim under § 8-43-303, C.R.S., because no credible evidence was admitted demonstrating grounds for reopening.

Claimant argues his claim should be reopened to allow him to receive additional medical treatment based on the assertion that the medical treatment he received prior to being placed at MMI was insufficient or ineffective. In substance, Claimant's claim seeks to challenge Dr. Villavicencio's determination that he was at MMI on October 16, 2019, for his work-related injury.

Under § 8-42-107 (8)(b)(I), an authorized treating physician makes the initial determination as to whether a Claimant has reached MMI. If a party disputes the ATP's MMI determination, the party may request an division independent medical examination ("DIME") in accordance with § 8-42-107.2, C.R.S., to resolve that dispute. Section 8-42-107.2 (2)(a)(I)(A), provides that when a claimant initiates an MMI dispute, the time for selection of a DIME commences with the date of mailing of an FAL that includes an impairment rating. Section 8-42-107.2 (2)(b) provides that the party seeking an IME to dispute an ATP's determination must provide written notice and propose candidates to perform the IME within thirty days after the date of mailing of the FAL. If no notice is submitted within 30 days, the "authorized treating physician's findings and determinations shall be binding on all parties and on the division." *Id*. "A DIME is a prerequisite to any hearing concerning the validity of an authorized treating physician's finding of MMI, and, absent such a DIME, an ALJ lacks jurisdiction to resolve a dispute concerning that determination." *Town of Ignacio v. Indus. Claim Appeals Office*, 70 P.3d 513, 515 (Colo. App. 2002), *citing Story v. Indus. Claim Appeals Office*, 910 P.2d 80, 82 (Colo. App. 1995).

Respondent mailed its FAL on January 15, 2020. To challenge the FAL and the finding of MMI, Claimant was obligated to request a DIME on or before February 14, 2020. No evidence was admitted indicating that Claimant requested a DIME within 30 days of the mailing of the FAL or thereafter. Consequently, pursuant to § 8-42-107.2 (2)(b), C.R.S., Dr. Villavicencio's MMI determination is binding on the parties, and the ALJ lacks jurisdiction to resolve any dispute concerning that determination. The ALJ finds that

Claimant has failed to establish by a preponderance of the evidence grounds for reopening his claim.

ORDER

It is therefore ordered that:

1. Claimant’s petition to reopen is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 6, 2021

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

I. Whether Respondents proved Claimant received an overpayment of medical and indemnity benefits to which they are entitled to recover.

II. If Respondents proved Claimant received an overpayment of benefits, determination of a repayment schedule.

FINDINGS OF FACT

1. On November 28, 2014, Claimant was involved in an altercation in which he was attacked by several men and sustained injuries. Claimant alleged the injuries occurred during the course and scope of his employment while he was taking out the trash.

2. Respondents filed a General Admission of Liability ("GAL"), pursuant to which Claimant received medical and indemnity benefits.

3. Claimant was placed at maximum medical improvement ("MMI") on February 22, 2017. At that time, his diagnoses included, *inter alia*, traumatic brain injury, cognitive disorder, vertigo, cephalgia, visual acuity, right hip contusion with labral tear, post traumatic stress disorder, anxiety and depression.

4. Respondents filed a Final Admission of Liability ("FAL") admitting for the permanent impairment rating issued by Dr. Gellrick. Respondents paid permanent partial disability ("PPD") benefits pursuant to the FAL.

5. Allison Fall, M.D. conducted an Independent Medical Examination ("IME") of Claimant on September 27, 2017 and issued supplemental IME reports on November 2 and November 9, 2017. She opined, in relevant part, Claimant would be able to work in the same capacity as he worked prior to the work injury. She noted Claimant had longstanding psychiatric issues unrelated to the assault.

6. In a report dated November 15, 2017, vocational expert Doris Shriver opined that Claimant's combined physical, cognitive and psychological limitations as a result of his assault preclude Claimant from work in his previous fields of employment. Ms. Shriver indicated that Claimant's pre-existing Bipolar disorder, Asperger's and Osgood Schlatter's Disease and limited academic skills further reduced Claimant's work possibilities.

7. Respondents subsequently became aware of information suggesting the admitted injury was not work-related.

8. The matter subsequently proceeded to hearing before ALJ Turnbow on December 20, 2017, March 12, 2018 and April 23, 2018 on the issues of whether the November 28, 2014 injury was a compensable work injury and withdrawal of Respondents' admissions of liability.

9. ALJ Turnbow issued Findings of Fact, Conclusion of Law and Order ("FFCLO") on August 14, 2018. ALJ Turnbow found that no compensable injury occurred on November 28, 2014. ALJ Turnbow determined that Claimant personally knew the assailants and was not taking out the trash as alleged when the assault occurred. ALJ Turnbow found that the altercation in which Claimant was involved was personal in nature and not work-related. She concluded that the admission filed by Respondents was based upon materially false information provided by Claimant. As such, ALJ Turnbow concluded the June 16, 2017 FAL was void *ab initio* and ordered the claim denied and dismissed with prejudice.

10. On August 28, 2018, Respondents filed a FAL terminating Claimant's benefits and claiming an overpayment of $219,364.93 for benefits paid to date on the claim based on ALJ Turnbow's August 14, 2018 FFCLO.

11. On August 31, 2018, Claimant filed a timely Petition to Review, appealing ALJ Turnbow's August 14, 2018 FFCLO.

12. On September 18, 2018, Claimant filed an Application for Hearing ("AFH") to strike the August 23, 2018 FAL, asserting that the August 23, 2018 FAL was not ripe because ALJ Turnbow's FFCLO was not a final order. Respondents filed a Response to Application for Hearing endorsing the issue of overpayment. Respondents subsequently filed a Motion for Summary Judgment and Claimant filed a Cross Motion for Summary Judgment.

13. A hearing was held before ALJ Nemechek on February 6, 2019. At the hearing, Respondents were given the opportunity to argue and submit evidence concerning Respondents' Motion for Summary Judgment and Claimant's Response to Motion for Summary Judgment, and Claimant's Motion to Strike the FAL. At the time of the February 6, 2019 hearing, ALJ Turnbow's FFCLO was not final, as it was on appeal. ALJ Nemechek left the record open to allow counsel for Claimant and Respondents to submit any authority on the legal issues present.

14. On March 15, 2019, the Industrial Claim Appeals Office ("ICAO") issued a Final Order affirming ALJ Turnbow's August 14, 2018 FFCLO.

15. On July 1, 2019, ALJ Nemechek issued a Procedural Order requesting a status update from the parties regarding whether ICAO's July 9, 2019 Final Order was appealed. Nothing was filed by either party in response after July 2, 2019.

16. Claimant appealed ICAO's Final Order to the Colorado Court of Appeals.

17. On April 9, 2020, the Court of Appeals issued an order affirming ICAO's March 15, 2019 Final Order. The matter was not further appealed.

18. On June 15, 2020, Respondents filed an AFH on the issue of reimbursement of all benefits paid out on the claim due to ALJ Turnbow's FFCLO, including a repayment schedule. Claimant filed a Response to Application for Hearing endorsing the issues of jurisdiction, res judicata, collateral estoppel, issue preclusion and closed claim.

19. The matter went to hearing before ALJ Cayce on October 13, 2020 on the issues of overpayment and repayment schedule. At the time of the October 2020 hearing, ALJ Nemechek had not issued an order and there was argument by Claimant that no order on the issue of overpayment or repayment could be issued as long as ALJ Nemechek's order was outstanding.

20. Janine A[Redacted] testified at hearing on behalf of Respondents. Ms. A[Redacted] works for a third-party administrator and is the current resolution associate on Claimant's claim. Ms. A[Redacted] testified that, to date, Respondents paid Claimant $160,452.94 in medical benefits and $58,911.99 in indemnity benefits on the claim.

21. Claimant does not dispute the amount of benefits he received on the claim.

22. Claimant testified at hearing that he receives $802.00 per month in Social Security Insurance ("SSI") benefits and has no other income. Claimant testified he has only worked for approximately 30 days total subsequent to November 28, 2014. Claimant testified he worked for 7-11 for approximately 30 days before having a mental breakdown. He testified he applied for work at Good Times but was not hired after divulging that he had a traumatic brain injury.

23. Claimant lives with his mother, father, wife, daughter, sister, sister's fiancé, and sister-in-law. Claimant testified he pays $775 a month in rent, which includes utilities and that he assists in paying for food and clothing. He testified he relies on different resources, including his family and food banks, for assistance. Claimant testified that he had prior head trauma and preexisting mental health issues before the November 28, 2014 assault and continues to experience issues, including the development of seizures within the last two years.

24. On July 9, 2021, ALJ Nemechek issued a Procedural Order denying Respondents' Motion for Summary Judgment and Claimant's Cross Motion for Summary Judgment and Motion to strike the FAL. He noted the lack of a final order at the time of the February 6, 2019 hearing precluded a full evidentiary hearing. On August 5, 2019, the parties submitted a status report to ALJ Cayce agreeing that, with the issuance of ALJ Nemechek's Order, there was no longer any arguable impediment to ALJ Cayce issuing an order on the issues of overpayment and repayment.

25. The ALJ finds Claimant was overpaid a total of $219,364.93, the amount of benefits he received to which it was ultimately determined he was not entitled. Respondent are entitled to recover the overpaid amount.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Overpayment

Section 8-40-201(15.5), C.R.S. defines overpayment as:

> [M]oney received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable under said articles. For an overpayment to result, it is not necessary that the overpayment exist at the time the claimant received disability or death benefits under said articles.

ICAO and the Colorado Court of Appeals have previously allowed for recovery of overpayments of benefits resulting from retroactive withdraws of admissions of liability based on fraud. *See Stroman v. Southway Services, Inc.,* W.C. No. 4-366-989 (ICAO August 31,1999); *Vargo v. Industrial Commission*, 626 P.2d 1164 (Colo. App. 1981).

Section 8-43-207(1)(q), C.R.S. grants an ALJ authority to order repayment of workers' compensation benefits. The ALJ has authority to fashion a remedy with regard to overpayments. *Simpson v. Industrial Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009), rev'd on other grounds, *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010). The ALJ has the authority to determine the terms of repayment and the recoupment schedule determined by the ALJ will not be disturbed absent an abuse of discretion. *Louisiana Pacific Corp. v. Smith*, 881 P.2d 456 (Colo. App. 1994).

As found, Respondents paid Claimant medical and indemnity benefits pursuant to an admission in the claim that was later determined by ALJ Turnbow to be *void ab initio*. Accordingly, Claimant received an overpayment of benefits, as he received benefits to which he was not entitled. In such circumstances, Respondents are entitled to recover the overpayment. ALJ Turnbow's FFCLO was upheld by ICAO and the Court of Appeals and not further appealed, rendering the order final.

Respondents request a repayment rate of $250 per month, arguing that because this is a case of fraud, Claimant should repay the benefits at a rate commensurate with his receipt of benefits. Respondents contend that Claimant receives over $800 per month in SSI benefits and is able to return to work if he chooses. Claimant requests a repayment schedule of $25 per month, based on his income and purported impaired ability to earn wages due to physical, cognitive and psychological injuries.

Claimant received a substantial amount of benefits to which he was not entitled due to his own material misrepresentations regarding the assault. Claimant testified he receives $802 per month in SSI income ow which he contributes $775.00 per month for rent. Claimant lives with multiple other adult individuals who provide financial assistance. The ALJ infers that Claimant's income is not the sole income and source of monetary support for the household such that paying more than $25 per month would be unduly burdensome. Claimant alleges he is effectively unable to earn wages through gainful employment as a result of his physical, cognitive and psychological issues. Claimant has worked a total of 30 days for one employer within the last six years and only sought employment on one other occasion. Although Claimant's condition may present some difficulties in obtaining employment, the ALJ is persuaded Claimant is able to work in some capacity if he so chooses. Thus, the ALJ concludes that a repayment schedule of $100.00 per month is reasonable.

ORDER

1. Claimant shall repay $219,364.93 to Respondents at a rate of $100.00 per month until the overpayment is extinguished. The first payment shall be made the month after this Order becomes final.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 6, 2021

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-149-963-001

ISSUE

1. Whether Claimant proved by a preponderance of the evidence that she sustained a compensable injury arising out of the course of her employment with Employer.

2. Whether Claimant proved by a preponderance of the evidence an entitlement to reasonable and necessary medical care to cure or relieve the effects of an industrial injury.

FINDINGS OF FACT

1. Claimant was employed by Employer as a job compliance analyst beginning in 2018, and worked for Employer until sometime in early 2021. Claimant's job duties consisted primarily of using a keyboard and mouse to conduct quality control audits of mortgage applications.

2. In July 2020, Employer implemented a new software system, which by Claimant's account, greatly increased the number of keystrokes she was required to use to perform her job duties and required her to use a mouse to scroll through up to 1000 pages of documents per audit. Claimant testified that as a result of the repetitive movements associated with the new software, she sustained an injury to the ulnar nerve in her elbow. Claimant's Application for Hearing indicates that the date of injury was September 21, 2020.

3. Claimant testified that the ulnar nerve in her elbow was "pinched," and that she contacted Insurer for medical attention and was sent to a "virtual doctor." Later, Claimant was seen in person at a Concentra clinic located on 6th Avenue where she was seen by a provider named Chelsea Rasis. Claimant credibly testified that she did not see any male physicians at Concentra. Claimant testified that she also saw a physical therapist at Concentra until her treatment was denied by Respondents, and that she has not seen any providers other than Concentra providers for her condition.

4. Neither Claimant nor Respondents offered or admitted credible evidence establishing the date of Claimant's first report of injury or any denial or contest of her claim by Respondents. Additionally, Claimant's treatment records were not offered or admitted into evidence, and no credible evidence was offered to establish Claimant's diagnosis, or whether any treating provider initially determined that Claimant's condition was related to her job duties.

5. In March 2021, Respondents engaged Jill A[Redacted], a vocational evaluator, to conduct a physical demands analysis and risk factor assessment of Claimant's work conditions. At the time of the initial assessment, Claimant was no longer working for

Employer. However, Ms. A[Redacted] interviewed Claimant, and evaluated the ergonomics of Claimant's home office on March 25, 2021. During the course of the interview, Claimant reported to Ms. A[Redacted] she felt that due to the frequency of mouse use she began to experience pain in her right wrist and elbow in August or September 2020. On April 12, 2021, Ms. A[Redacted] observed a different employee performing Claimant's job duties at that employee's home office workstation. Ms. A[Redacted] testified that the employee she observed used the same computer program as Claimant, but she was not aware of whether the other employee did the same work as Claimant. Ms. A[Redacted] also testified that the employee she observed used the keyboard arrow keys, rather than the mouse to navigate documents. As part of her evaluation, Ms. A[Redacted] documented her analysis of the proxy employee's mouse usage over an 8-hour work shift, and used that data in forming her conclusions. Based on her interview with Claimant and her observation the proxy employee, Ms. A[Redacted] concluded that none of the risk factors set forth in the Colorado Medical Treatment Guidelines Exhibits were present in Claimant's position. (Ex. B).

6. Because Ms. A[Redacted]' analysis was performed using a proxy employee who did not perform Claimant's job duties in the same manner as Claimant, and performed them at a different workstation, the ALJ does not find Ms. A[Redacted]' assessment to be a credible assessment of Claimant's performance of her job duties.

7. After completion of Ms. A[Redacted]' assessment, her report was sent to Ted Villavicencio, M.D., a provider at Concentra whom Claimant had not personally seen. On April 20, 2021, Dr. Villavicencio responded to a letter, presumably from Respondents, which asked the following: "In light of the fact the JSA [job site analysis] found no risk factors, per the Colorado Medical Treatment Guidelines Rule 17 Exhibit 5, are the Claimant's complaints causally related or not?" Dr. Villavicencio responded by checking the "NO" option, and stating "does not meet criteria." (Ex. A). Because the ALJ does not find the job site analysis to be credible, Dr. Villavicencio's opinion, based on that analysis is not persuasive.

8. Outside of work, Claimant is a participant in the sport of disc golf, and has been a member of the Professional Disc Golf Association (PDGA) since 2015. Claimant has competed in PDGA tournaments several times per year, including participating in 53 career PDGA events, winning 31 events between 2015 and 2021. No credible evidence was admitted indicating that participation in disc golf has caused Claimant any injury. Claimant testified that her disc golf activities did not cause her symptoms and that she was not advised by her health care providers to curtail her activities. She also testified that she was advised to limit her keyboarding activities.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See*

§ 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

COMPENSABILITY

To establish a compensable injury an employee must prove by a preponderance of the evidence that her injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v.* Americold *d/b/a Atlas Logistics*, W.C. No. 4-960-513-01, (ICAO, Oct. 2, 2015)

The mere occurrence of symptoms at work, however, does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Atsepoyi v. Kohl's Department Stores*, W.C. No. 5-020-962-01 (ICAO, Oct. 30, 2017). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). *Fuller v. Marilyn Hickey Ministries, Inc., W.C. No. 4-588-675, (*ICAO, Sept. 1, 2006*).*

Claimant bears the burden of establishing that it is more likely than not that her claimed injury arose out of the course of her employment. Claimant has failed to meet this burden. Although Claimant testified that she suffered a "pinched" ulnar nerve, the evidence does not reflect a diagnosis assigned by any health care provider. Similarly, no credible evidence was admitted indicating any causation analysis was performed by any health care provider, or that any health care provider attributed Claimant's symptoms to her work activities with Employer. Although causation may be established without a medical opinion, Claimant did not offer credible evidence to indicate how the conditions of her employment caused an injury. No credible evidence was presented to establish that Claimant's participation in disc golf caused her condition. Despite the fact that neither Ms. A[Redacted] report nor Dr. Villavicencio's report are persuasive, Respondents are not required to disprove causation or to establish an alternative cause. Claimant bears the burden of proof to establish that it is more likely than not that her claimed injury arose out of the course of her employment with Employer. The ALJ finds that Claimant failed meet her burden to establish by a preponderance of the evidence that she sustained a compensable injury arising out of the course of her employment with Employer.

MEDICAL BENEFITS

Under section 8-42-101(1)(a), C.R.S., respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *See Owens v. Industrial Claim Appeals Office*, 49 P.3d 1187, 1188 (Colo. App. 2002). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). All results flowing proximately and naturally from an industrial injury are compensable. *Id., citing Standard Metals Corp. v. Ball*, 474 P.2d 622 (Colo. 1970).

Because Claimant has failed to establish a compensable injury, Claimant has not established by a preponderance of the evidence that she is entitled to an award of medical benefits.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish that she sustained a compensable injury arising out of the course of her employment with Employer, and has failed to establish an entitlement to medical benefits. Claimant's claim is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 9, 2021

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that she suffered a compensable work injury to her lower back on December 31, 2020? Stated differently, is Claimant's medical condition merely the natural progression of a preexisting condition?

II. Has Claimant shown, by a preponderance of the evidence, that she is entitled to medical benefits for her lower back condition?

III. Is Claimant's lower back condition the result of a (non-work-related) intervening event, to wit: A fall exiting a motor vehicle occurring on February 9, 2021?

IV. Has Claimant shown, by a preponderance of the evidence, that she is entitled to Temporary Total Disability ("TTD") payments from the date of injury, and ongoing?

STIPULATIONS

At hearing, the parties stipulated to an Average Weekly Wage ("AWW") of $352.35, with a TTD rate of $234.90.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

Background

1. Claimant alleges a work related injury on December 31, 2021 while working as a clerk at the Phillips 66 gas station convenience store while stocking automotive products. She worked as a cashier and her duties included stocking, cleaning the showers and bathrooms, emptying the outside trashcans, and sweeping and washing the windows, along with her cashiering duties.

2. Claimant had been working the job for approximately four months and was paid $13.00 per hour. Her workweek would vary between 20 and 36 hours per week.

3. Claimant filed for Workers Compensation benefits on 1/20/2021. A Notice of Contest was filed by Respondents on 1/25/2021. This Expedited Hearing follows.

Initial Treatment

4. Claimant was transported by ambulance to St. Francis Hospital on January 3, 2021. Upon being received at St. Francis Medical Center, Claimant provided the following: "Patient reports she was attempting to stack heavy boxes full of diesel fuel on a

shelf when it fell off the shelf. As she tried to catch it she fell to the ground onto her lower back. She did not lose any consciousness. She complains of [moderate] lower back pain on the right lumbar region….Initially she complained of some *intermittent* tingling to her right foot." (Ex. D, p. 25)(emphasis added). During the PT evaluation, Claimant reported that she heard a "pop in her back and her legs buckled" on December 31. Claimant remained overnight.

5. An MRI was performed on January 4, 2021. Mild disc bulges were noted at L1/L2 through L5/S1. There was evidence of *edema* at L1/L2. Also noted: "Moderate to considerable thecal sac effacement due to *minor subluxation disc bulging and facet hypertrophic changes at L4/L5*. (Ex. E, p. 48)(emphasis added).

6. Claimant was then seen on 1/4/2021 by a neurosurgeon, Dr. Boone. He recommended maximizing medical therapy, back brace, and follow-up as an outpatient in the neurosurgery clinic. He determined Claimant was non-operative at this point. At that time, Claimant expressed interest in physical therapy and epidural injections. Claimant was then released on 1/5/2021, with lifting, bending, and twisting restrictions. (Ex. D, p. 26).

7. Claimant returned for the outpatient neurosurgery appointment on January 27, 2021. She was seen by PA-C Catherine Marie Pierce, who noted the following: "Patient states her symptoms really have not alleviated much since hospitalization [of Jan 3-5] however she is not interested in any type of surgical intervention at this time. She would like to know about any nonsurgical options that she may have. (Ex. F, p. 52).

8. PA-C Pierce's narrative continues:

> We discussed patient's imaging at length. She does have a *fairly significant L4-5 spinal canal stenosis* with anterolisthesis and mildly associated redundancy of the cauda equina nerve roots….The goal of surgical intervention would be to prevent progression of any neurologic symptoms which *patient does have some intermittent **numbness*** but denies weakness….Additionally she denies any bladder or bowel incontinence. Her only complaint is *severe pain down her right leg in the L5 distribution that has been persistent for the last several weeks but she never had prior to that.* Id at 56. (emphasis added).

Claimant Suffers a Fall

9. Claimant returned to the emergency room on February 9 at St. Francis. Intake notes state:

> This is a 61 y.o. female….who presents to the emergency department complaining of right hip pain and worsening low back pain after a mechanical ground-level fall. Patient states she has *intermittent numbness* of her right foot *since an injury to her lower back on 12-31-*

> *2020.* Today patient was trying to get out of her vehicle *stepped on her numb foot* and her leg gave out on her. ….She denies ***new*** *weakness or numbness* to the right lower extremity. Denies bowel or bladder incontinence, urinary retention, saddle anesthesia….Denies other injury from the fall. (Ex. G, p. 59)(emphasis added).

10. Imaging conducted that day was *"not significantly changed from 1/4/2021 MRI." Id* at 62. Upon exam it was noted: "*Decreased sensation* to the lateral aspect of the *right lower leg*, lateral aspect of the *foot* and over the dorsum of the distal *foot*. Id. Denies IVDA or previous back surgery. *Presentation consistent with soft tissue contusion and exacerbation of chronic back pain.* Patient given prescription for tramadol and lidocaine patches. *She is stable for discharge home.* Patient given strict return precautions and verbalized understanding. *Id* at 64.(emphasis added).

Claimant's Ongoing Condition

11. Claimant's condition continued to deteriorate. She was seen by a Concentra PA on 2/12/2021. A mild right foot drop was noted. Claimant was now walking hunched over, walking with a mild limp.(Ex. 10, p 112). The patient's history and mechanism of injury were noted to be consistent with presenting symptoms and physical exam. *Id* at 114.

12. Claimant was seen again by the Concentra PA on 2/15/2021, at which time the PA noted that the Claimant was hunched over and requiring assistance to walk. PA Peterson urged Claimant to use a cane or walker and recommended ESI. A cane with a foam handle and walker were ordered.

13. Claimant saw Dr. Johnson with Concentra on February 22, 2021. Dr. Johnson thought the Claimant needed surgery, made the referral and indicated that in his opinion the Claimant's findings were consistent with the on-the-job injury. He estimated MMI to be Aug 1, 2021. (Ex. 10, p. 129).

Referral to Dr. Rauzzino

14. Dr. Michael Rauzzino then saw Claimant, for the first time on 2/23/2021. After taking a history [noted to not be materially inconsistent with previous histories in the records], he noted:

> *Since the injury* [which Claimant reported to him as occurring 12/31/2020], *the patient has had new complaints of pain radiating down the right leg.* She is also noting signs and symptoms were (sic) for cauda equina, where she is a pastor in a church, she got up to speak and she had loss of bladder, where she urinated on herself, that has never happened to her before. She describes her current symptoms as lower back pain with a shooting pain down both legs with *numbness* in both feet. She pain is worse on the *right* side than the left. The numbness is worse on the *right* side than left. She has

> difficultly walking. …*She was not being treated for any sort of symptoms in the period immediately prior to this*…..She has weakness in her legs, right greater than left…..(Ex. J, p. 75)(emphasis added).

At this visit, he recommended urgent surgical decompression, and Claimant concurred.

15. Dr. Rauzzino performed the emergent surgery on Claimant on 2/25/2021. Claimant had a surgical complication of a dural sac leak. Claimant remained in the hospital until 3/25/2021, when she was released. Dr. Rauzzino later performed an extension of the surgery performed on 2/25/2021, by extending the fusion with an L3-L4 TLIF surgery in April of 2021.

Claimant's Hearing Testimony

16. Claimant testified at hearing. On December 31, 2021, the 'DEF' [Diesel Exhaust Fluid] was running low and it needed to be restocked. She stated that the DEF came with two, 15–20-pound containers in a box. She requested help, but Stan the manager indicated that she should ask the maintenance man for assistance. He was busy, so she proceeded to get two boxes out of the back room and stock them. She used a two-wheel dolly to take them to the shelf where she was going to stock them. She lifted the two boxes onto a dolly, rolled the dolly out to where she needed to stack the product. As she was stocking the product, she felt a pop in her lower back.

17. This event happened sometime between 11:00 a.m. and 1:00 p.m. Claimant, however, finished her shift that ended at 7:00 p.m. She testified that she was hurting, but had some Advil in her locker and took some of those. She went home and put a heating pad on her back. She went to work the next day, January 1, 2021, but took some Norco that she already had at home. It had been prescribed by Dr. Bird, for a previous wrist injury.

18. Claimant testified that there were no supervisors on the job when she got there the next day, but she told "Heather" about the injury. Claimant testified that she was in a lot of pain performing her duties that day. Claimant went home after work, showered and went to bed. On Sunday, January 2, 2021, the pain was getting progressively worse, and Claimant used ice and heat to attempt to control the pain, but it was not helping. She took some additional Norco along with Advil without relief and she was taken by ambulance to St. Francis Hospital on Monday morning, January 3, 2021.

19. Claimant testified that she was not having any low back complaints before the injury of December 31, 2020. She had not received any type of medical treatment for any low back complaints in the three to four months prior to the injury. Further, she had never had any type of ongoing treatment for a low back issue prior to this injury.

20. At hearing, Claimant testified that she had never had low back surgery prior to the surgery performed by Dr. Rauzzino on 2/25/2021. She testified that in the past, she has had multiple surgeries on her wrist, and many hospitalizations for pneumonia.

21. Claimant denied ever having any type of treatment for a low back condition other than being seen in the emergency room for a couple of slip and falls in the past. She denied any type of previous chiropractic treatment or MRIs being performed on her low back. Her prior medical treatment had been primarily for her wrist and pneumonia as well as having had previous colon surgery.

22. Claimant stated that the surgery that Dr. Rauzzino performed got rid of the incontinence, but she still has the numbness in her legs off and on along with ongoing back pain.

23. Claimant was asked about various inconsistencies in the medical records regarding how the injury happened. The Claimant clarified that as she was lifting the DEF up on the shelf, she was not quite tall enough and strong enough and the product started teetering and that was when she felt the pop in her back. She told Heather, another store employee, about her injury on January 1, 2021, but she did not recall seeing or talking to Stanley L[Redacted] on January 1, as it was his day off.

24. Claimant testified that she had a fractured tailbone in a tubing accident in 2008. The doctor gave her a doughnut to sit on, and she had had a few minor “owies” to her low back over the years, but nothing that ever needed any type of ongoing medical treatment. She acknowledged prior treatment for removal of a portion of her small intestine but again denied any prior surgery or treatment for any type of ongoing low back condition.

Video Evidence

25. By all accounts, video surveillance of the convenience store on December 31, 2020 including various angles does not reveal any of the described mechanisms of injury. No witnesses testified that they observed Claimant’s injury at work. Further, it is simply not possible to infer from the available footage that Claimant was displaying significant injury behaviors after the fact. [This is not entirely unexpected, as the primary purpose of such video is for security purposes, and not detecting subtleties of pain symptoms].

Stanley L[Redacted]’s Hearing Testimony

26. Stanley L[Redacted], Claimant’s supervisor, testified that Claimant initially reported that she was in the hospital due to pneumonia. He testified that the Claimant asked for FMLA leave, and did not qualify, as she was a part time employee. Claimant reported a low back injury to Mr. L[Redacted] five days after she reported being in the hospital for pneumonia. Mr. L[Redacted] testified he

personally reviewed the video of December 31, 2020 and January 1, 2021 and did not witness Ms. Roberts sustaining a work injury. He testified he saw Claimant on December 31, 2020 and January 1, 2021 and she did not report a back injury to him on either date.

27. Noting that while Claimant had said that she reported her injury to “Heather,” Mr. L[Redacted] testified “Heather” is not a supervisor, and that he did not learn of any injury from her. He testified he first learned of the alleged back injury from his District Manager Christine Hess.

Dr. Fall’s Hearing Testimony

28. Dr. Allison Fall testified at hearing. She reviewed several banker’s boxes of medical records in order to prepare a causation analysis including review of many pre-existing records concerning numerous complaints requiring opioid medications, non-compliance with treatment with opioids, and low back injuries and bowel issues. Dr. Fall testified that previously on December 7, 2020, Claimant was seen at UC Health Memorial for potential COVID, pneumonia and or pulmonary embolism. Dr. Fall testified that she reviewed text messages that the Claimant was in the hospital with pneumonia, and requested FMLA for that condition. She testified that there was then mention of a low back injury five days later. Dr. Fall testified this review raised questions for her as a physician.

29. Dr. Fall testified that there was no discernable mechanism of injury. She testified that the Claimant initially reported to the emergency room on January 3, 2021, not on December 31, 2021 as Claimant reported to Dr. Rauzzino. Dr. Rauzzino confirmed that the report of emergent treatment on December 31, 2021 was an error. Claimant was questioned about and reported no incontinence at the time. Nor did Claimant report incontinence on January 4, 2021 to Dr. Boone. Further, incontinence was denied on January 27, 2021to Dr. Boone’s PA-C.

30. Claimant was then seen on February 9, 2021 when she alleged falling out of her car. She denied incontinence on that date as well. Claimant was next seen on February 12, 2021 by Mendy Petersen at Concentra and no incontinence was described. Consequently. Dr. Fall testified that there was no objective findings of incontinence without rectal exams, or nerve testing.

31. The ALJ notes the following from Dr. Fall’s testimony:

> Q So, next the Claimant reported to the emergency room at St Francis on January 3rd of 2021. From your review, was incontinence, either urinary or bowel, reported on January 3, 2021?
>
> A I did look through the records on my review to try to pinpoint when that [incontinence] was first noted. And in those initial records where they say no bowel or bladder incontinence, even into the first visits at Concentra, which was even after the hospitalization. ***So it wasn’t until the end of***

January or early February that it was noted that there was incontinence. (Transcript, p. 135, ll. 10-20)(emphasis added).

32. Dr. Fall testified that after Claimant fell getting out of her car on February 9, 2021, She testified there were no prior reports of leg numbness in the record. In fact, this exchange occurred:

Q Okay. In your review of the records between January 3 and February 9, 2021, were there reports of leg *numbness* associated with this alleged injury?

A ***No.*** *And I didn't see on exam that they found any, like, loss of sensation.* Mainly what they were describing is severe pain.in the notes….

Q. Well, what was the treatment she received on that date [February 9, 2021]?

A They referred her to – ***let me make sure I'm still on the right report.***

They referred her to pain medicine **and neurosurgery.** (Transcript, p. 139, l. 22, through p. 140, l. 15 (emphasis added).

33. She testified that the symptoms of incontinence were more temporally related to the February 9, 2021 fall from the car, and the need for surgery, than from the alleged work injury. She testified incontinence would be expected sooner than 3 weeks from the alleged lifting/falling/reaching incident.

34. Dr. Fall testified Claimant had a long history of prior back complaints including but not limited to known degeneration, known stenosis, and known anterolisthesis. She testified that these complaints are more than just minor falls, including an ER visit in September of 2019, as well as back pain complaints on December 7, 2020 when Claimant left the hospital against medical advice for pneumonia/ potential pulmonary thrombosis complaints.

35. Dr. Fall opined that the MRI of February 23, 2021 is consistent with the natural progression of a pre-existing condition. Dr. Fall and Dr. Castro agreed that there were no acute findings on that MRI. She testified there was no large fragment in the spinal canal outside of the bulging disc. She had never heard of a surgeon describe an internal herniated disc because the definition of a herniated disc is one that goes outside the margins of the disc.

36. Dr. Fall testified that she could not relate Claimant's injury to a specific work-related incident. Rather, she attributes the need for surgery to a natural progression of a pre-existing condition. She stated:

Q ..Leaving aside a natural progression of a preexisting condition, ….what *medical evidence* supports that there is a causal relationship between the [2/25/2021] surgery and the alleged incident on December 31, 2020?

A **None.** (Transcript, p. 148, ll. 5-10)(emphasis added).

37. Dr. Fall noted that Claimant denied prior back surgery, however there is radiographic evidence that perhaps she did. Dr. Fall testified that Claimant reported that her back pain "felt like" when she had surgery. Dr. Fall testified that she reviewed the MRIs between January 4 and February 23, 2021.

Dr. Rauzzino's Hearing Testimony

38. Dr. Michael Rauzzino testified as a Board-certified fellowship trained neurosurgeon, having been Board certified for 15 years and having practiced in his specialty in the State of Colorado for 18 years. Hi is level II certified with the Director of the Division of Workers Compensation for 15 years and was accepted as an expert herein.

39. Dr. Rauzzino testified that he had reviewed the medical reports on causation authored by Dr. Fall and Dr. Castro as well as the other medical records in the matter including the MRI, his surgical records and disagreed with Dr. Fall. He thought that Dr. Castro agreed with him that the Claimant sustained a compensable on the job injury. In explaining his analysis of causation, he stated he first looks at the claimant's condition pre-injury and then he looks at the mechanism of injury to see if it is consistent with the injury and he looks at how the claimant is post-injury. He also looks at the medical records from the emergency room, the radiographic findings and his own physical examination.

40. Dr. Rauzzino was the treating neurosurgeon for Claimant. He stated that he treated her for lumbar spinal stenosis and back and radicular complaints of cauda equina, which were secondary to an acute disc herniation at L4-5 superimposed on chronic degenerative changes. While Dr. Rauzzino noted that Claimant had an extensive medical history, there was no indication to him that she was being actively treated for any prior back symptoms in the period immediately prior to her reported injury.

41. Dr. Rauzzino noted that it did not appear that the Claimant had had a lot of back issues in the past; therefore, it would not be unusual for a 61-year-old lady to have degenerative disc disease. In this situation, she had been seen at the hospital for evaluation for COVID shortly before the injury date, but there was no indication of any complaints or treatment for a back condition. Dr. Rauzzino disagreed with Dr. Fall that simply because she said she hurt all over in that hospitalization, that she was having the type of back pain that results from a herniation of the L4-5 disc. Dr. Rauzzino testified that the mechanism of injury was consistent with the disc herniation and that with her slight body frame was enough to produce a disc herniation to her back.

42. Dr. Rauzzino acknowledged that Claimant was predisposed to this type of injury, due to the pre-existing spinal stenosis and degenerative changes, so it did not take much to produce this type of injury and need for surgical intervention. Dr. Rauzzino also looked at the temporal relationship between the event and medical treatment. He stated that being taken by ambulance to the hospital, that she was indeed in intense pain, as this was an abnormal event for her, given her previous medical treatment for her other conditions.

43. Finally, Dr. Rauzzino testified that when he performed the surgery on February 25, 2021, that there was evidence of an acute injury:

> The other thing that I would say in terms of causation is that there's an *acute* structural injury to her spine that you can see. While we've talked about chronic degenerative changes, when I did the surgery... I exposed the spinal sac and pulled it to the side, there was a large disc bulge pressing up, and as soon as I cut into the disc, large fragments of the disc material under pressure came out. This was the disc herniation that she sustained, and that is an *acute* injury." (Transcript, p. 31).

44. Dr. Rauzzino continues to treat the Claimant and is unsure of when she will reach MMI for her low back condition, saying that it will be quite some time.

45. Dr. Rauzzino maintained that the condition for which he performed surgery on the Claimant was not a chronic condition, but instead one that had occurred acutely, and due to the event that occurred on December 31, 2020. Although the Claimant had pre-existing spinal stenosis and degenerative disc disease that predisposed her to injuring her back, the surgery was necessitated by the acute herniation that occurred.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the

rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

B. In accordance with *Section 8-43-215, C.R.S.,* this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. In deciding whether a party has met their burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensecki v. ICAO*, 183 P.3d 684 (Colo.App. *2008).* In short, the ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo.App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo.App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo.App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

D. In this instance, the ALJ finds that Claimant has been an imperfect historian – but perfection is not where the bar is set. Claimant has fundamentally recounted what occurred in a reasonably consistent manner. When a patient is in such distress that they must self-admit to the ER, histories don't always translate cleanly. ER personnel are looking for a mechanism of injury to help identify and treat the injury, but not to determine causation. And while Dr. Castro, and Dr. Fall state there are *several* versions of events from Claimant, neither of the physicians point to specific citations in the medical records in support. The ALJ has not identified *multiple* mechanisms of injury in the records-although they might exist. In the end, the most reliable articulation of a mechanism of injury is forged in the crucible of cross-examination, or in the calmer confines of a Level II physician's office.

E. What Claimant testified to at hearing is consistent with her symptoms, and according to Dr. Rauzzino, is easily sufficient to bring about the disc issues Claimant suffered from. Further, the ALJ is not persuaded that Claimant was driven by secondary gain issues-any more than any similarly situated person. Lastly, there is insufficient evidence that Claimant was driven by a drug-seeking motive, prior concerns by other providers notwithstanding. Were that so, one would not expect such a desperate individual to have the discipline to maintain a 'rainy day' reserve of such medication. (*see*

Finding of Fact #17, supra). The ALJ notes that Mr. Lathan testified sincerely enough about what he saw and heard, but compensability here does not pivot upon precisely who Claimant reported her injury to at the onset of symptoms. It is not uncommon for individuals to try to 'shake it off', before coming to terms with how bad things really are.

Compensability, Generally

F According to C.R.S. § 8-43-201, "a claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer, and a workers' compensation case shall be decided on its merits." *Also see Qual-Med, Inc. v. Indus. Claim Appeals Off.,* 961 P.2d 590, 592 (Colo. App. 1998) ("The Claimant has the burden of proving an entitlement to benefits by a preponderance of the evidence."); *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915, 918 (Colo. App. 1993) ("The burden is on the claimant to prove his entitlement to benefits by a preponderance of the evidence.").

G. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.,*104 P.3d 273, 275 (Colo. App. 2004).

H. For an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Off.,* 919 P.2d 207, 210, 210 (Colo. 1996); *Schepker v. Daewoo North*, W.C. No. 4-528-434 (ICAO April 22, 2003). An injury "arises out of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions as part of the employee's services to the employer. *See Schepker, supra.* "In the course of" employment refers to the time, place, and circumstances of the injury. *Id.* There is no presumption that an injury arises out of employment merely because an unexplained injury occurs during the course of employment. *Finn v. Indus. Comm'n,* 165 Colo. 106, 108-09, 4437 P.2d 542 (1968).

I, Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1)(c) C.R.S.*; Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for the determination by the ALJ. *Faulkner,* 12 P.3d at 846.

J. Colorado's Workers' Compensation Act creates a distinction between the terms "accident" and "injury". The term "accident" refers to an "unexpected, unusual, or undesigned occurrence." *See* §8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident. In other words, an "accident" is the cause and an "injury" is the result. *City of Boulder v. Payne,* 426 P.2 194 (1967). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." A compensable injury is one which requires medical treatment or causes a disability.

K. It is the claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between her employment and her injuries. An ALJ might reasonably conclude the evidence is so conflicting and unreliable that the claimant has failed to meet the burden of proof with respect to causation. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186, 191 (Colo. App. 2002) (weight to be accorded evidence on question of causation is issue of fact for ALJ). *See also, In the Matter of the Claim of Tammy Manzanares, Claimant*, W. C. Nos. 4-517-883 and 4-614-430, 2005 WL 1031384 (Colo. Ind. Cl. App. Off. Apr. 25, 2005).

Preexisting Condition, Generally

L. The mere fact that a Claimant suffers from a pre-existing condition does not disqualify a claim for compensation or medical benefits if the work-related activities aggravated, accelerated, or combined with the preexisting condition to produce disability or a need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a preexisting condition, and the claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities and not the underlying preexisting condition. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949). The claimant must prove by a preponderance of the evidence that his symptoms were proximately caused by an industrial aggravation of a preexisting condition rather than simply the natural progression of the condition. *Melendez v. Weld County School District #6*, W.C. No. 4-775-869 (ICAO, October 2, 2009).

Intervening Cause, Generally

M. However, no compensability exists if the disability and need for treatment was caused as the direct result of an independent intervening cause. *Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187 (Colo. App. 2002); *Merrill v. Pulte Mortgage Corporation,* W.C. No. 4-635-705-02, (ICAO May 10, 2013). The question of whether the claimant met the burden of proof to establish a compensable injury is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). Similarly, the question of whether the disability and need for treatment was caused by the industrial injury or an intervening cause is a question of fact. *Owens v. Industrial Claim Appeals Office, supra; Merrill v. Pulte Mortgage Corporation, supra.*

Compensability, as Applied

N. As noted, Claimant has supplied a sufficient mechanism of injury to being about this result. Clearly her longstanding lumbar stenosis was 'an accident waiting to happen.' But in this case, such 'accident' (actually her *injury*) arose from her duties at this convenience store, and while she was in the course and scope of said work. There is no reliable evidence that is occurred anywhere else but on the date, approximate time, and at the location as described. And there is certainly insufficient evidence that Claimant's fall while exiting the car on February 9 was an *intervening cause* of her symptomology.

The MRI was largely unchanged from a month ago, and her complaints were more about hitting her hip. She was treated and released. And the apparent cause of this fall was from stepping onto her *numb* right foot, which gave out on her.

O. Claimant's condition, in fact, gradually worsened, in a progression entirely consistent with her mechanism of injury, and the desperate straits she was in by the time she saw Dr. Rauzzino. And what Dr. Rauzzino observed during the surgery is entirely consistent with an *acutely* herniated disc (wrought by the lifting incident as described) fragmenting under considerable pressure, prior to being decompressed by the surgery itself. Dr. Rauzzino's analysis is persuasive, in that Claimant had never had such severe symptoms requiring this level of treatment, prior to this work incident. It is duly noted that the treating physicians prior to Claimant seeing Dr. Rauzzino felt similarly.

P. Respondents rely upon the records review of Dr. Castro, and the IME by Dr. Fall. As noted, due to the lack of citations by either physician in their records reviews, the ALJ cannot identify *several*, materially different mechanisms of injury from the records. In one version at the ER, she strained her back and fell, in another, she strained her back without falling. Of greater concern to this ALJ is the hearing testimony from Dr. Fall. Apparently, Dr. Fall was wishing to demonstrate that there was too long of a time between the DOI and the reporting of incontinence to establish a causal connection. In support, Dr. Fall said that the incontinence was not first reported until 'the end of January or early February.' In fact, it was even longer than that; Claimant first reported the incontinence to Dr. Rauzzino on February 23, whereby she was scheduled for emergent cauda equina surgery. An accurate rendition of the records would have served better. Better, but still not persuasive.

Q. Simply stated, Claimant herniated her disc at work, but her symptoms continued to worsen as the weeks went on. Her pain got progressively worse. Her intermittent numbness became more prevalent. Initial denials of weakness no longer held. Her ability to walk upright regressed. She then began to experience incontinence for the first time, and the ALJ finds that she reported this to a physician at the first opportunity, apparently not realizing its urgent significance. No such severe symptoms had ever befallen Claimant prior to December 31. Claimant's current condition is not the result of a natural progression of her (admittedly) preexisting condition.

R. Dr. Fall stated, in no uncertain terms, that there had been **no** complaints of *numbness* by Claimant prior to her fall on February 9. A review of Exhibit F (*see* Finding of Fact #7, 8, *supra*) shows otherwise. Claimant had reported *intermittent numbness* two weeks prior. Not only that, Claimant had also reported on February 9 that she had suffered *intermittent numbness* *prior* *to that date*. Then, after this same visit on February 9, Dr. Fall (making sure she was on the right report), stated that Claimant was then *referred* to pain medicine *and* *neurosurgery.* The 2/9/2021 reports show that Claimant was released with pain medication; there is no reference in the medical records that the St. Francis ER referred Claimant to *neurosurgery.* This 2/9/2021 fall was no intervening event.

S. Dr. Fall's answers throughout emphasized Claimant's lack of *objective* evidence in supporting a finding of causation. Even Claimant's verbal complaints of urinary incontinence were dismissed, absent a rectal exam or nerve testing. Had Dr. Rauzzino insisted upon some sort of ‘objective’ testing prior to a cauda equine diagnosis, precious, critical time could have been lost. Of course, one would always desire the subjective complaints of a patient not to be inconsistent with available objective data. That does not mean that *subjective* complaints are to be disregarded entirely, unless they are *objectively* corroborated in some fashion. Otherwise, why ever ask a patient how they are feeling? Because of the possibility that they could exaggerate their pain, feign numbness, fake a limp, provide poor strength testing effort, or make up a report of incontinence? The ALJ finds Respondents’ theory of compensability and relatedness to be unpersuasive, especially in light of the records review that was conducted.

Medical Benefits, Generally

T. A claimant is entitled to medical benefits that are reasonably necessary to cure or relieve the effects of the industrial injury. *See* § 8-42-101(1), C.R.S. 2003; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office, supra*. Similarly, the question of whether medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003).

Medical Benefits, as Applied

U. Dr. Fall does not dispute that the emergent surgery by Dr. Rauzzino was reasonable and necessary at the time it was performed. Nor does any expert retained by Respondents. Having found Claimant’s lumbar disc injury to be compensable, the ALJ will not belabor that said surgery was, in fact, *related* to the work injury. Respondents are therefore responsible for this surgery, as well as all aftercare to bring Claimant to MMI.

TTD, Generally

V. C.R.S. § 8-42-103(1)(a), requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The term “disability” as used in workers’ compensation connotes two distinct elements. The first element is “medical incapacity” evidenced by loss or restriction of bodily function. The second element is loss of wage-earning capacity as demonstrated by the claimant’s inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999) *Hendricks v. Keebler Co.,* W.C. No. 4-373-392 (June 11, 1999).

TTD, as Applied

W. The ALJ has found that Claimant's injury to her lower back was compensable, and that the 2/25/2021 surgery by Dr. Rauzzino was related to said work injury. At hearing, Dr. Rauzzino stated that Claimant remains under his care, and he does not anticipate her reaching MMI for 'quite some time'. The ALJ finds this persuasive, given this injury, and the lack of evidence to the contrary. Claimant continues to suffer a wage loss due to this work injury, and is entitled to TTD payments until terminated by operation of law.

ORDER

It is therefore Ordered that:

1. Claimant suffered a compensable injury to her low back on or about December 31, 2020.

2. Respondents shall pay for all reasonable, necessary, and related medical treatment to cure her of said injury. Such treatment shall include, but is not limited to, the surgery performed by Dr. Rauzzino on 2/25/2021. All services not previously paid by Respondents are subject to reimbursement at rates set by the Fee Schedule of the Division.

3. Claimant is entitled to TTD payments from the date of injury and ongoing, until terminated by operation of law.

4. Claimant's Average Weekly Wage is $352.35.

5. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. *In addition, in order to best assure prompt processing of your Petition, it is* ***highly recommended*** *that you send a copy of your Petition to Review to the Colorado Springs OAC via email at oac-csp@state.co.us.*

DATED: August 9, 2021

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NOS. 5-044-996-002 & 5-106-253

ISSUES

The issues set for determination included:

- Did Claimant prove by clear and convincing evidence to overcome the opinion of Douglas Scott, M.D. who performed the Division of Workers' Compensation Independent Medical Examination ("DIME") on the question of MMI and the determination Claimant had no impairment?

- Whether Claimant proved by a preponderance of the evidence that she sustained a worsening of her condition casually related to the March 4, 2019 slip and fall that warrants payment of medical benefits.

- Did Claimant prove by a preponderance of the evidence that the right knee arthroscopy and partial medial meniscectomy proposed by Nirav Shah, M.D. is reasonable, necessary, and related to the work injury of May 19, 2016 or the subsequent exacerbation on March 4, 2019?

PROCEDURAL STATUS

The undersigned issued a Summary Order on March 4, 2021, which was served on March 5, 2021. After a Request for Specific Findings of Fact and Conclusions of Law was filed, Claimant filed (Amended) proposed Findings of Fact, Conclusions of Law and Order on March 25, 2021. Respondent filed (Amended) proposed Findings of Fact, Conclusions of Law and Order on March 29, 2021. A Status Conference was held on July 22, 2021.

STIPULATION

The parties entered into a Stipulation in W.C. No. 5-044-996 in which they agreed that the DIME placed Claimant at maximum medical improvement ("MMI") for her May 19, 2016 injuries on May 22, 2016, with no permanent impairment and Claimant retained the right to challenge the DIME's opinion by clear and convincing evidence. The Stipulation was accepted by the Court and is incorporated by reference in this Order.

FINDINGS OF FACT

1. Claimant has worked as a teacher for Employer since February 2012.

2. There was no evidence in the record that Claimant injured her right knee or right hip prior to 2016, including requiring treatment for those areas of the body.

3. On May 19, 2016, Claimant suffered a compensable injury when she fell at work while walking from the main office to her classroom. Water on the ground caused her to fall.

4. J[Redacted], a teacher at Jefferson Junior/Senior High School, testified at hearing. He was a witness to the May 19, 2016 fall and described it as horrendous; as "bad as anything he had seen in sports". He testified that he saw Claimant fall on her right side and her feet went up about as high as her head. Mr. J[Redacted] said Claimant landed awkwardly with her right leg bent underneath her. He testified Claimant was a truthful person.[1] Mr. J[Redacted] was a credible witness.

5. Claimant reported the injury on May 19, 2016 and the Employer's First Report of Injury indicated Claimant hurt her right ankle, leg and the right side of her back.

6. The ALJ concluded the fall on May 19, 2016 injured Claimant's right leg including the knee and hip.

7. Claimant testified she was able to return to work and suffered intermittent pain, including pain in her right hip and leg. Claimant continued working through the end of the school year and thought her pain would go away. Claimant was a credible witness.

8. Claimant was evaluated by Braden Thomas Meason, M.D. at Lutheran Medical Center on June 19, 2016 for heavy vaginal bleeding. An ultrasound performed at that time revealed an ovarian cyst. Dr. Meason's impression was: vaginal bleeding; iron deficiency anemia due to chronic blood loss.

9. Claimant travelled to California on vacation during June and was there approximately one month. Claimant said she felt pain, which she associated with either menstrual issues or her leg. Claimant did not receive treatment for her knee and hip during the months of June and July 2016, which was significant to the ALJ. The ALJ inferred Claimant's symptoms were not of the degree that caused her to seek medical treatment.

10. On July 26, 2016, Claimant was also evaluated by Michael Johnson, M.D. at Red Rocks Ob/Gyn for gynecological problems. Claimant testified she told Dr. Johnson about her fall in May and the report contained a reference to a fall "two weeks ago".[2] The ALJ inferred that the focus of this evaluation was on bleeding/pelvic

[1] The ALJ allowed this testimony under CRE 608, as the DIME report, as well as Dr. Ciccone's report (which were already admitted into evidence) attacked Claimant's credibility with respect to the delayed report of pain complaints. *People v. Serra*, 361 P.3d 1122, 1134-1135 (Colo. App. 2015).

[2] This may have been a typographical error, as none of the other medical records in evidence referenced a fall in July 2016.

problems and Claimant's explanation that she was focused on her bleeding issues was credible.

11. On August 8, 2016, Claimant was evaluated by John Ogrodnick, M.D., the ATP for Employer, for the work injury. At that time, Claimant described 5/10 right lateral hip pain, as well as thigh and calf pain. Claimant's pain diagram noted stabbing pain both on the front and back part of her right leg, from the knee up to the low back area. Claimant said she was sore for two weeks and got better, but the pain returned. The ALJ found this description of symptoms to be credible.

12. On examination, Dr. Ogrodnick noted tenderness at the bony edges of lateral right superior iliac crest and lateral thigh. Claimant was tender over the right psoas. Dr. Ogrodnick concluded that the exam's objective findings were consistent with history and/or work at related mechanism of injury/illness. The ALJ credited this opinion. Dr. Ogrodnick's assessment was: contusion of right hip. He referred Claimant for chiropractic treatment and Claimant treated with Keith Graves, D.C. pursuant to this referral. The ALJ inferred Dr. Ogrodnick believed Claimant was not at MMI during this period of time, which prompted the referrals for evaluations and further treatment.

13. Dr. Ogrodnick oversaw Claimant's treatment and saw her for follow-up evaluations on September 15, 2016. November 29, 2016, and January 19, 2017. Dr. Ogrodnick's diagnosis remained the same after these evaluations. Claimant referenced knee pain (both lateral and medial) in the pain diagrams for these appointments. In the September 15, 2016 note, Claimant advised Dr. Ogrodnick that she had knee pain, but thought she would be fine. She also reported the prolonged menses and associated intermittent pain with gynecological issues. Dr. Ogrodnick documented restrictions in range of motion ("ROM") and noted the FABER was positive in that it recreated the right buttock and groin pain.

14. At the January 19, 2017 evaluation, Dr. Ogrodnick noted chiropractic treatment raised the issue of whether she had a SI joint dysfunction. The report reflected continued symptoms in Claimant's right hip and right knee, which were also documented in Claimant's pain diagram. Claimant was returned to work full duty.

15. On March 14, 2017, Dr. Ogrodnick opined the right SI joint could be the pain generator. Right knee pain was also noted in this evaluation and Dr. Ogrodnick noted the SI joint did not account for knee pain. Tenderness was documented laterally on the right knee and Dr. Ogrodnick noted a positive McMurray sign at the time of this evaluation.

16. On March 20, 2017, Claimant underwent an MRI of the lumbar spine. The films were read by John Gilbert III, M.D., whose impression was: normal MRI of the lumbar spine without contrast, except for mild facet hypertrophy on the right at L5-S1. No central canal or foraminal stenosis was found.

17. Claimant also underwent a right knee MRI on the same day. The films were read by Virginia Scroggins, M.D. There was a free-edge tearing of the medial meniscal body. Mild cartilage loss along the weight-bearing surfaces of the medial femoral condyle and tibial plateau were seen. No fracture or joint effusion was found.

18. Claimant was evaluated by orthopedic surgeon, Nirav Shah, M.D. on April 6, 2017. She described pain located in the lateral knee, which had been occurring intermittently for months. On examination, Dr. Shah found painful ROM in the right knee, with tenderness to palpation to the medial joint line of the right knee. Claimant was having laterally-based pain in the region of her distal IT band. Dr. Shah recommended the surgery based upon the MRI findings and physical examinations. He noted Claimant had pain predominately laterally, but also medially, with provocation and a positive McMurray's test. Dr. Shah opined that her knee symptoms were emanating from her medial compartment, specifically her medial meniscus. The recommended surgery was a right knee arthroscopy and partial medial meniscectomy.

19. In a follow-up evaluation on April 25, 2017, Dr. Ogrodnick noted Claimant's presentation was atypical, as she had consulted her gynecologist early on. On examination, subtle right knee swelling was noted anteriorly. Tenderness was present on both the medial and lateral joint line. There was a positive McMurray's test. Claimant was not limping today, but had been limping last week.

20. Dr. Ogrodnick stated if Claimant's right leg was bent during the fall, this mechanism would be consistent with the pathology on the MRI. He said Claimant consistently reported right knee pain, which was reflected in pain diagrams and it was more likely than not this was related to her date of injury. He opined the proposed knee surgery would be appropriate and necessary at this time. Dr. Ogrodnick's opinion was persuasive to the ALJ.

21. On June 5, 2017, Claimant returned to Dr. Ogrodnick and had right knee and hip symptoms. Claimant was receiving chiropractic treatment and massage therapy to address her hip imbalance. Dr. Shah was to submit an appeal of the denial of the knee surgery. The record of the July 25, 2017 evaluation reflected Claimant had the same symptoms. Additional chiropractic and massage therapy treatment was to be ordered.

22. On August 5, 2017, a letter was sent from Dr. Shah regarding the denial of the proposed knee surgery. He noted Claimant continued to have knee pain from the date of injury, which waxed and waned. Dr. Shah opined Claimant was having pain for the medial compartment, specifically the meniscus. Dr. Shah reiterated his opinion that Claimant required surgery. The ALJ credited Dr. Shah's opinion that the proposed surgery was necessary.

23. Claimant underwent an MRI of the right hip on October 3, 2017. The films were read by Charles Wells, M.D., whose impression was: non-attached tear of the right anterior and superolateral acetabular labrum. Mild right hip osteoarthritis was present,

as well as mild STIR hyper intense bone marrow signal about the pubic symphysis. This was a non-specific finding and incompletely imaged.

24. Dr. Ogrodnick placed Claimant at MMI on April 19, 2018. She reported continued pain in her right hip and knee when standing. Pain was noted in the right buttocks, hip and knee. The external logroll test produced right knee pain. The FABER and FADIR produced right hip pain. The ALJ found these were objective signs of pathology in these areas of the body. Dr. Ogrodnick noted that it did not make sense to continue prescribing palliative treatment beyond DOWC Guidelines. He assigned a 29% medical impairment to the right lower extremity. Maintenance care was to include continued chiropractic and massages.

25. On June 13, 2018, Claimant underwent an Independent Medical Evaluation with William Ciccone, M.D., at the request of Respondent. Claimant reported right knee popping, along with occasional swelling in the knee. Claimant also said her right hip had pain over its lateral aspect which radiated posteriorly and occasionally into the groin area.

26. Dr. Ciccone noted in his report that Claimant ambulated with a normal-appearing gait. She had pain over the posterior aspect of the hip, with some pain on palpation both anteriorly and posteriorly. On examination, Claimant had hip flexion of approximately 120°, extension of 20°, with internal rotation of about 40°, with no groin pain; external rotation of 50° with posterior pain. Claimant had abduction to 30°, with pain with palpation along the greater trochanter. Examination of the right knee showed range of motion of 120° flexion, -0° of full extension, flexion somewhat limited by the size of the thigh. Claimant had mild pain with circumduction maneuvers, with a negative McMurray's sign.

27. Dr. Ciccone said he did not believe Claimant suffered an injury to the right hip as a result of the fall at work on May 19, 2016. Although she reported the fall the same day, she did not present to occupational medicine for three months after the injury. Dr. Ciccone said if Claimant had suffered a significant right hip injury, one would have expected an earlier medical evaluation either with the gynecologist or occupational medicine. Further, her pain was located in the posterior portion of the hip, which was not the common location for hip pain. He did not believe the October 2017 MRI findings, which showed a labral tear, were acute and opined these were unrelated to the fall at work.

28. With regard to the right knee Dr. Ciccone noted Claimant had no real complaints of knee pain until March 20.[3] She did not have medial joint line pain at that time and individuals with symptoms meniscal pathology have pain in the compartment where the meniscal tear was. He disagreed with Dr. Shah's opinion that patients with medial meniscus tears commonly had lateral joint symptoms. In conclusion, he did not

[3] This was erroneous as Claimant completed pain diagrams on August 8, 2016, September 15, 2016. November 29, 2016, and January 19, 2017 referencing knee pain.

believe Claimant suffered a work related injury. If it was determined that Claimant suffered a compensable right hip injury, he believed Dr. Ogrodnick‘s impairment rating was accurate. He disagreed with Dr. Ogrodnick‘s medical impairment rating for the right knee.

29. On August 31, 2018, Claimant underwent the DIME, which was performed by Dr. Scott.[4] At that time, Claimant complained of pain down her right leg to her right knee, which was elicited by touching her right buttocks. He noted Claimant did not seek medical treatment right away after the fall but experienced soreness over the right hip and lateral thigh. Later in the summer, she experienced sharp pain in the right groin. Dr. Scott noted Claimant was diagnosed with: right hip labral tear and right medial meniscus tear.

30. Dr. Scott said he could not state with certainty that “the May 19, 2016 slip and fall injury cased either her right hip or right knee condition or caused the need for further treatment of those conditions”. This was because it was not temporally supported by the medical record or by the absence of receiving timely medical attention or treatment for an acute injury to the right hip or right knee. Dr. Scott opined that a slip and fall onto a right side “could possibly cause” an acute right labral tear or right near medial meniscus tear, but he expected such injuries would require fairly immediate medical attention.

31. Dr. Scott concluded Claimant was not at MMI because her right knee and/or her right hip condition were “probably” not stable and further treatment could reasonably be expected to improve her condition. He provided a provisional impairment rating of 23% for the right lower extremity. The ALJ found Dr. Scott did not explain the potential internal contradictions within the DIME report, including why the provisional rating was issued, if he believed the knee and hip conditions were not caused by Claimant’s injury.

32. In his deposition testimony, Dr. Scott noted he lacked information/documentation when he performed the DIME, including the Employer‘s First Report of Injury, the Workers’ Claim for Compensation and the report from Claimant’s personal physician. Dr. Scott testified he couldn’t say with certainty there was a causal relationship between her claim and the conditions.[5]

33. Dr. Scott testified that if what Claimant said about her fall was true, she could have not only injured her right hip, but also the right knee.[6] He said if the she had an injury, she was not at MMI. Dr. Scott then said if the injuries to the right lower extremity were not aggravated as a result of the May 19, 2016 fall, there would be no

[4] The DIME report is dated November 7, 2018.

[5] Deposition of Dr. Scott, page 9:23–10:6.

[6] Deposition of Dr. Scott, page 17:8-18.

MMI. He noted he requested additional information, but was not provided it. Dr. Scott went on to testify that Claimant required additional treatment for her right knee and right hip.[7]

34. Dr. Scott concluded Claimant reached MMI three days after the injury. Dr. Scott was asked a series of leading questions, which were punctuated by his agreement to the question, with no explanation.[8] Dr. Scott did not provide details as to his reasoning, nor did he explain the contradictions in his report noted *supra*. In this regard, the ALJ noted Dr. Scott did not provide a detailed explanation as to Claimant's need for treatment, nor was there an analysis of the treatment she had received. Dr. Scott's testimony was not persuasive to the ALJ on the question of whether Claimant was at MMI.

35. Dr. Ciccone testified as an expert in Orthopedic Surgery at hearing. He disagreed with Dr. Ogrodnick's opinion that the May 2016 fall caused traumatic labral and meniscal tears. Dr. Ciccone opined the findings in the hip, including osteoarthritis were chronic. Dr. Ciccone believed the labral tear and meniscus tear were chronic and preexisting. Dr. Ciccone believed Claimant would have had difficulty walking if she had suffered the tears as a result of the fall.

36. Dr. Ciccone reviewed both the DIME report and Dr. Scott's deposition transcript. Dr. Ciccone testified it was very difficult to ascertain what Dr. Scott's thought process was.[9] He agreed Claimant reached MMI three days after the injury. Dr. Ciccone stated it was unlikely that the Claimant would benefit from the right knee surgery recommended by Dr. Shah and did not believe the need for the surgery was reasonable and necessary or causally related to the May 19, 2016 slip and fall event.

37. On March 4, 2019, Claimant slipped and fell on ice while walking to her classroom. She testified that she felt pain in her right hip and right knee.

38. Claimant was seen by Dr. Ogrodnick that same day. Claimant reported 4/10 right knee pain and right hip/buttock pain on a daily basis since the time of his last evaluation December 16, 2018. Claimant noted she had an increase in pain on the inside and outside of her knee, but this had calmed down. Claimant had medial and lateral right knee pain on examination, along with joint line tenderness. Dr. Ogrodnick diagnosed a contusion of the hip; strain of the right knee and said it was hoped that this fall caused a temporary aggravation of her condition. Dr. Ogrodnick administered a Toradol injection and referred Claimant for chiropractic treatment and massage therapy.

39. The ALJ found the March 4, 2019 fall arose out of and was in the course of Claimant's employment.

[7] Deposition of Dr. Scott, page 12:2-6.

[8] Deposition of Dr. Scott, page 21:12-23:23.

[9] Hrg. Tr., p. 165:4-10.

40. When Claimant returned to Dr. Ogrodnick on March 18, 2019, she walked with a limp. Dr. Ogrodnick noted a tender right SI joint, sciatic notch and trochanteric bursa. Claimant‘s right knee joint line was tender both immediately and laterally. She had a positive McMurray’s test. Dr. Ogrodnick recommended a right SI joint injection to confirm the pain generator.

41. In the follow-up evaluation on April 4, 2019, Claimant‘s right knee was pain-free while seated, but medial pain was present while walking. Dr. Ogrodnick noted the knee also catches. Dr. Ogrodnick‘s diagnoses were the same as the prior appointment. Claimant was to see Dr. Chan and follow-up after the MRI.

42. On April 18, 2019, Claimant underwent a lumbar MRI. The films were read by Summit Mehta, M.D. Dr. Mehta concluded that there was no change since the March 20, 2017 MRI. Mild right facet hypertrophic change was found, but no disc herniation was present. There was no central canal or neuroforaminal stenosis.

43. On May 3, 2019, Employer filed a Notice of Contest, disputing liability for the March 4, 2019 injury. The reason the claim was contested/denied was “further investigation“.

44. Dr. Ogrodnick evaluated Claimant on June 21, 219. Claimant described her pain levels as 3/10 in the low back and right hip and 2/10 in the right knee. She said she tended to limp at the end of the day. On examination, Claimant was tender over the right SI joint, upper glutes and lumbar spine. Right SLR to 35° actively, with more upon passive assistance. The FADIR and logroll produced ride buttock/hip pain, with the right FABER causing buttock/hip pain, as well as right groin pain.

45. Dr. Ogrodnick indicated a knee MRI would be ordered, as recommended by Dr. Shah. He also stated that it appeared the second fall was a temporary and minor aggravation of the original claim. Dr. Ogrodnick placed Claimant at MMI on June 21, 2019 and stated she sustained no permanent impairment. No maintenance care after MMI was recommended.

46. On July 2, 2019, Dr. Ogrodnick responded to a denial of Claimant‘s knee MRI and stated the requested MRI was related, reasonable and necessary for the right knee injury. Dr. Ogrodnick cited DOWC’s Lower Extremity Injury Medical Treatment Guidelines, specifically Rule 17 Exhibit 6, page 13.

47. Claimant was evaluated by Dr. Ogrodnick on July 30, 2019, at which time it was noted the right knee surgery was pending authorization. Claimant was returning a weeks and if nothing had been done, would be placed at MMI.

48. When Claimant returned to Dr. Ogrodnick on September 30, 2019, he confirmed she was at MMI. Dr. Ogrodnick assigned a 36% right lower extremity impairment, which was equivalent to a 14% whole person impairment. Dr. Ogrodnick stated this represented a worsening since she was rated in April 2018. Maintenance

treatment in the form of pain management and chiropractic intervention were recommended.

49. Respondent filed a Final Admission of Liability ("FAL") on September 11, 2019. The FAL was filed based upon Dr. Scott's DIME report and admitted for 0% medical impairment.

50. Claimant was released at MMI by Dr. Ogrodnick on September 30, 2019 and was assigned a 36% lower extremity impairment.

51. Dr. Ogrodnick testified as an expert in Occupational Medicine at hearing. He evaluated Claimant 25 times over the course of almost 3 years. He expanded upon the opinions expressed in his reports. He stated Claimant's knee and hip objective abnormalities were the cause of her symptoms and were directly related to the fall in May 2016.[10] Dr. Ogrodnick stated the fall caused the labral tear in the hip and the medial meniscal tear in the knee. The ALJ found Dr. Ogrodnick's opinion to be persuasive.

52. Dr. Ogrodnick placed Claimant at MMI (for the 2016 injury) because he felt his hands were tied on the question of additional treatment-knee surgery. He believed Claimant required surgery. Dr. Ogrodnick reiterated his expert opinion that Claimant's May 19, 2016 fall caused injuries to her knee and hip. Dr. Ogrodnick testified that there was not another injury to right side of Claimant's body. His opinion that she injured her knee and hip was based an assumption that Claimant and accurate reported what happened when she fell in May 2016. Dr. Ogrodnick stated the March 4, 2019 was a temporary aggravation of Claimant's original injury.[11]

53. The ALJ found Dr. Scott's opinions on MMI were overcome by clear and convincing evidence.

54. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

[10] Hearing Transcript ("Hrg. Tr."), p. 50:10-16.

[11] Hrg. Tr., p. 86:14-20.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance* Claimant had the burden of proof in this case.

Overcoming the DIME

The question of whether Claimant met this burden and overcame Dr. Scott's opinion is governed by §§ 8-42-107(8)(b)(III) and (c), C.R.S. *Peregoy v. Indus. Claim Apps. Office*, 87 P.3d 261, 263 (Colo. App. 2004). These sections provide that the finding of a DIME physician selected through the Division of Workers' Compensation shall only be overcome by clear and convincing evidence. *Leprino Foods Co. v. Indus. Claim Appeals Office*, 134 16 P.3d 475, 482-83 (Colo. App. 2005); *accord Martinez v. Indus. Claim Appeals Office*, 176 P.3d 826, 827 (Colo. App. 2007).

Clear and convincing evidence is highly probable and free from serious or substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Based upon the evidence admitted at hearing, the ALJ was persuaded Claimant overcame Dr. Scott's DIME opinion on MMI.

As a starting point, the ALJ concluded Claimant was injured in the May 19, 2016 fall. (Finding of Fact 6). The ALJ found Claimant to be credible, particularly in her description that the symptoms initially improved and then worsened. (Finding of Fact 7). The ALJ found Claimant's explanation for her delay in seeking treatment to be credible. *Id*.

In this regard, the ALJ also relied upon Dr. Ogrodnick's reports of the treatment of Claimant, as well as his expert testimony. Specifically, Dr. Ogrodnick, while noting the Claimant's course of treatment was unusual, stated his opinion that she injured both her knee and hip as a result of the May 19, 2016 fall. (Findings of Fact 19-20). Dr. Ogrodnick noted Claimant's symptoms waxed and waned. The ALJ also determined that Dr. Ogrodnick followed Claimant during her entire course of treatment and concluded Claimant required treatment as a result of the fall, including the referral to orthopedic surgeon, Dr. Shah. As found, Dr. Shah recommended surgery, however, authorization was denied for the surgical procedure. (Finding of Fact 22). Dr. Ogrodnick placed Claimant at MMI on April 19, 2018. Dr. Ogrodnick explained his rationale for this determination, as he did not think it made sense to continue providing palliative treatment to Claimant in the absence of a surgical authorization. (Finding of Fact 24).

The ALJ determined Claimant introduced sufficient evidence to overcome Dr. Scott‘s opinions. As determined in findings of Fact 30-34, Dr. Scott’s opinion on MMI was, at times unclear, at others, equivocal. In this regard, Dr. Scott indicated he could not state conclusively that Claimant‘s May 19, 2016 slip and fall caused an injury to the right knee and right hip or the need for treatment. (Findings of Fact 30, 32). He then said such a fall could possibly cause the tears in the knee and hip, but Claimant would have felt immediate pain. *Id.* He also testified that if Claimant‘s description of the fall was accurate, Claimant “could” have injured her knee and hip. (Finding of Fact 33). Dr. Scott then went on to conclude Claimant was not an MMI and stated additional treatment could help her condition. He noted he was not provided information he had requested.

Dr. Scott then provided a provisional medical impairment rating. (Finding of Fact 31). This was despite his initial expressed conclusion that he could not state that the slip and fall caused Claimant to injure her hip and knee. While being questioned, Dr. Scott concluded Claimant reached MMI after three days and the ALJ concluded he did not provide an explanation or rationale of this conclusion. As found, Dr. Scott did not fully explain his conclusions, including one in which he said he could not conclude that the fall caused her knee and hip condition; said Claimant needed the treatment and then provided a provisional impairment rating (which presumes causation). (Finding of Fact 34). Even Respondent’s expert, Dr. Ciccone noted he could not explain Dr. Scott’s reasoning. (Finding of Fact 36).

Dr. Ogrodnick’s opinions (including those on MMI) were more persuasive to the ALJ. He evaluated Claimant on twenty-five occasions and oversaw her treatment since 2016. (Finding of Fact 51). The ALJ credited the opinion of Dr. Ogrodnick on the question of whether the fall caused Claimant’s injuries to the right hip and right knee. *Id.* The ALJ credited Dr. Ogrodnick’s opinion as to what treatment Claimant required, including the surgery recommended by Dr. Shah. (Finding of Fact 20).

Based upon the totality of the evidence, including the fact that Dr. Scott’s conclusions were equivocal, as well as the lack of explanation for his rationale and decision making process, the ALJ concluded Dr. Scott’s opinion on MMI was incorrect. (Finding of Fact 33). *Metro Moving and Storage Co. v. Gussert,* 914 P.2d at 415.

Medical Benefits

Respondent is liable for medical treatment that is reasonably necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S; *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The question of whether medical treatment is reasonable and necessary is one of fact for determination by the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002); *Wal-Mart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo.

App. 1999). Claimant bears the burden of proof to establish the right to specific medical benefits. *Wal-Mart Stores, Inc. v. Industrial Claims Office, supra*.

In the case at bar, the ALJ credited the opinions of Dr. Ogrodnick and Dr. Shah that Claimant required surgery for her knee. (Findings of Fact 18, 20 and 22). Claimant's need for the surgery was related to the May 19, 2016 slip and fall. Respondent will be ordered to provide this treatment to Claimant.

March 4, 2019 Fall

As found, Claimant suffered compensable injuries on March 4, 2019 when she fell while walking into school. (Finding of Fact 39). The ALJ determined these compensable injuries required medical treatment and Claimant treated with Dr. Ogrodnick as the ATP. (Finding of Fact 38). Respondent is liable for medical benefits to cure and relieve the effects of this work injury. Section 8-42-101(1)(a), C.R.S

Based upon the Findings of Fact and discussions with counsel for the parties at the time of the July 29, 2021 Status Conference, the ALJ has determined Respondent is liable for the medical treatment as provided by Dr. Ogrodnick, but that further benefits for this injury will be denied and dismissed.

ORDER

It is therefore ordered:

1. Claimant met her burden of proof and overcame Dr. Scott's opinion on whether she is at MMI. Claimant is not at MMI for the injuries suffered on May 19, 2016.

2. Respondent shall pay for Claimant's medical benefits (pursuant to the Colorado Workers' Compensation Fee Schedule) to cure and relieve the effects of her May 19, 2016 injury, including the surgery proposed for her knee.

3. Respondent shall pay for Claimant's medical benefits for Claimant's treatment for the March 4, 2019 injury up to September 30, 2019. Claimant's claim for additional benefits under WC 5-106-253 after that date is denied and dismissed.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's Order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 10, 2021

STATE OF COLORADO

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of administrative Courts

ISSUES

I. Have Respondents shown, by a preponderance of the evidence, that Claimant's medical maintenance benefits, in this instance antidepressants and pain medication, are no longer reasonable, necessary, and related to his 1/11/2021 work injury?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. Claimant sustained a compensable injury to his low back on or about January 11, 2011. He was working as a deputy Sheriff in the Chaffee County Detention Center. While escorting an inmate to a cell, the inmate abruptly turned during a struggle, and Claimant fell backwards down a flight of steel steps, suffering injuries, most notably to his lower back. Since that incident, he has not secured employment.

Claimant's History of Pre-Existing Low Back Problems

2. In a Respondents' IME report dated September 2, 2015, Dr. Barry Ogin stated the following:

> To begin with, patient [Claimant] offers that while he had pre-existing back pain, it was not severe and that he saw a chiropractor only one or two times a year. This was frequently cited in the provider records, indicating that his back pain was not severe or functionally limiting prior to the work incident. However, a review of the medical records demonstrate that this a fallacy. The patient, in fact, was receiving chiropractic care with Dr. Dickerson on a frequent basis, essentially on a monthly basis in the years prior to the accident. (Ex. B, p. 99).

3. Dr. Elizabeth Bisgard, MD testified at hearing. She had performed a Respondents' IME of Claimant on May 16, 2020. She agrees with Dr. Ogin's assessment. Based on her review of the medical records, the treating providers that Claimant saw for this work injury documented a history from Claimant in which he minimized the extent of his pre-existing condition and that the information that Claimant was providing these providers was essentially wrong (Hrg. Tr. p. 24).

4. Dr. Bisgard noted in her May 4, 2020, report that Claimant, in 2010, had seen his chiropractor (Dr. Dickerson) nine times, the last time being on November 10, 2010. Claimant also had eight physical therapy treatments for his low back between August 23, 2020, and September 29, 2020. Claimant also had an MRI

performed on August 11, 2020, for his lumbar pain complaints. According to Dr. Bisgard's reading of the MRI, this MRI showed mild disc bulges (Hrg. Tr. p. 18).

5. Dr. Bisgard testified that, as a physician, she would not be ordering an MRI of someone's low back unless that patient was having low back pain for six months and had failed conservative treatment (Hrg. Tr. p. 26). In her view, MRIs are not ordered 'out of the blue'; rather, the fact that an individual had an MRI to the low back strongly suggests that individual was having ongoing low back pain for quite some time.

6. As noted *infra*, Claimant saw Dr. Dickerson for his ongoing low back pain on November 20, 2010, two months before the work injury (Ex. P, p. 709). At that visit, Claimant was reporting low back pain of 5/10. Dr. Bisgard testified that Claimant reported the same level of low back pain to her at the time of her evaluation (Hrg. Tr. p. 26).

Pre-Existing Depression

7. Claimant was evaluated for a Respondents' IME by Dr. Robert Kleinman, a psychiatrist, the first being on April 21, 2011 (Ex. I). During that evaluation, Claimant told Dr. Kleinman that he had treated for depression since his early 20s *Id* at 261. As a result, Claimant was prescribed Prozac since his early 20s. Any time his providers attempted to have him stop taking Prozac, his depression worsened. At the time of the work injury, Claimant continued with Prozac.

Treatment for His Work Injury

8. Claimant had an MRI performed on January 17, 2011 (Ex. O). Dr. Bisgard, after comparing this January 17, 2011, MRI with the August 9, 2010, MRI, noted that the only difference was a slight worsening of left disc bulges at the L2-3 level impacting the left L3 nerve root.

9. Claimant had an epidural injection performed at the left-side L2-3 level by Dr. Ross Dickstein on March 23, 2011 (Ex. K). At hearing, Dr. Bisgard testified that the purpose of performing the epidural steroid injection at the left L2-3 level was to determine whether the disc impinging on the L3 nerve root was the "pain generator." (Hrg. Tr. p. 19). Dr. Bisgard stated that a pain generator is pain as a result of some specific, pathophysiological process (Hrg. Tr. p. 24).

10. As part of the March 23, 2011, epidural injection, Claimant reported that his pain levels before the procedure was a 6/10, and after the procedure was a 4/10. *Id* at 383. Dr. Bisgard noted that this small amount of change in pain levels before and after the procedure indicated that the Claimant did not have a diagnostic response to the injection (Hrg. Tr. p. 20). According to Dr. Bisgard's testimony, in order for an epidural steroid injection to be diagnostic, there must be at least an 80% reduction in pain. *Id* at 21.

11. On May 11, 2011, Claimant then underwent another left-side epidural injection by Dr. Dickstein, this time at the L3-4 level (Ex. K, pp. 366-367). Dr. Bisgard believed that performing an epidural at a different level was reasonable in the attempts by Dr. Dickstein to determine if the pain generator could actually be at a different level. (Hrg. Tr. p. 20). Claimant completed a pain diagram to indicate that his pain level before the injection was a 5-6/10, and his pain level after the injection was a 4-5/10 (Ex. K, p. 369). Dr. Bisgard again noted that Claimant did not have a diagnostic response to this epidural, indicating that the disc space between the left L3-4 levels was again, not a pain generator.

12. Dr. Bisgard testified that there was a worsening of Claimant's disc bulges at the L2-3 level between the August 2010 MRI and the January 17, 2011 MRI; however, this worsening noted on the MRI was not an explanation of Claimant's ongoing pain complaints (Hrg. Tr. p. 21).

13. Claimant also had EMGs performed throughout the course of his treatment. The first EMG that Claimant had occurred on April 18, 2011 (Ex. F). Dr. Steven Gulevich performed the EMG. One of his primary diagnoses was peripheral neuropathy. Dr. Bisgard testified that peripheral neuropathy is a metabolic condition that causes nerve damage starting at the most distal part of a limb and then progressive nerve damage moving up towards the trunk (Hrg. Tr. p. 22). She opined that Claimant's peripheral neuropathy should not be considered related to his work injury.

14. Claimant then had a repeat EMG on June 19, 2013, once again performed by Dr. Gulevich (Ex. F, pp. 167-170). At this time, Dr. Gulevich diagnosed Claimant with a previous left S1 radiculopathy *Id* at 170. Dr. Bisgard stated that, despite this finding, this MRI was not consistent with any kind of pathology at the L5-S1 level (Hrg. Tr. p. 23). Claimant, at some point in the past, did have a left S1 radiculopathy, but it was no longer present.

15. Dr. Bisgard testified that there has not been any kind of diagnostic testing or imaging that corroborates Claimant's subjective reports of pain (Hrg. Tr. pp. 23-24).

16. Dr. Robert Kleinman, MD has performed several psychiatric IMEs of Claimant throughout the course of his treatment. The first evaluation was performed on April 21, 2011 (Ex. I, pp. 259-268). Following his evaluation, Dr. Kleinman diagnosed Claimant with the following, for AXIS I:

    1. Pain disorder associated with psychological factors and a medical condition

    2. Dysthymic disorder, chronic

    3. Adjustment disorder with anxious mood

Id at 267. At that time, Dr. Kleinman stated the following:

> It is possible that [Claimant's] *fears* are getting *converted into physical symptoms* that are not in proportion to the objective findings. It could be that his pain complaints and symptoms are getting magnified and possibly converted due to his *denial of the emotional impact* of what happened and *fear* about what could happen to him in jail in the future. *Id* at 266. (emphasis added).

Dr. Kleinman also stated that the discrepancy between objective findings and subjective complaints could be explained as a conversion disorder *Id* at 267.

17. Claimant returned to see Dr. Kleinman for a repeat IME, performed on November 22, 2012 (Ex. I, pp. 238-255). Again, Dr. Kleinman diagnosed Claimant on AXIS I with:

    1. Pain disorder associated with psychological factors and a medical condition

    2. Dysthymic disorder, chronic

    3. Major depressive disorder recurrent, moderate, recent episode resolved.

    Dr. Kleinman noted: "The need for ongoing psychiatric medications pre-existed this injury. Currently, they are not being provided under workers' compensation. The continued use of antidepressants is beyond the scope of the occupational injury." *Id* at 252.

18. Claimant underwent the first DIME on August 2, 2013, performed by Dr. Karen Knight (Ex. E). At that time, Dr. Knight indicated that for Claimant's spinal complaints (lumbar and radicular symptoms into leg), he would be appropriately placed at maximum medical improvement, effective 12/21/2011. *Id* at 161. She did not believe his neck complaints were related to the work injury. However, Dr. Knight diagnosed Claimant's ongoing pain complaints as a result of a chronic pain syndrome *Id* at 162. In her report, Dr. Knight quoted from the Chronic Pain Syndrome Medical Treatment Guidelines as follows:

    > The presence of a chronic pain syndrome should be strongly suspected if a patient does not respond to appropriate medical care within a reasonable period of time, or if the patient's verbal or nonverbal pain behaviors transcend the expected response given the noxious stimulus. Patients suspected of having a chronic pain syndrome should be promptly referred for evaluation and treatment to physician specializing in chronic pain medicine. *Id* at 162.

    Regarding Claimant's chronic pain syndrome, Dr. Knight stated the following:

> With respect to his chronic pain syndrome, I recommend a detailed evaluation by a comprehensive pain team to offer *specific recommendations* for maintenance care, *with the goal of independence in self care in one year.* **I do not agree with ongoing passive modalities for Mr. Glenn. He needs to assume autonomy in his self care in order to leave the sick role.** *Id* at 163. (emphasis added).

19. Claimant was re-evaluated by Dr. Barry Ogin on September 2, 2015 (Ex. B, pp. 83-103). Following his evaluation, Dr. Ogin also diagnosed Claimant with probable somatization disorder, as well as depression. *Id* at 99. In largely agreeing with the DIME conclusions, Dr. Ogin also believed that there was a significant discrepancy between Claimant's objective complaints and any objective pathology supporting this objective complaint. Dr. Ogin was not able to identify any objective findings. *Id* at 101.

20. Dr. Ogin believed it was important to consider the outside factors, such as psychological confounders that might be playing a role in Claimant's condition. Dr. Ogin noted that this has been validated by the patient's long history of depression and anxiety, as well as the records from not only Dr. Kleinman, but also Claimant's treating psychologist, Dr. Evans. Both had found that there was a large psychosocial component to the Claimant's complaints of pain. Therefore, Dr. Ogin opined that Claimant's current condition was much better explained as a somatization disorder, rather than on true objective pathology. Dr. Ogin also opined that Claimant should be *weaned off* his narcotic medications. *Id* at 102.

21. Claimant saw Dr. Kleinman for a final IME on May 5, 2015 (Ex. I, Kleinman, Knight, pp. 207-229). Again, Dr. Kleinman diagnosed Claimant with a pain disorder, a persistent depressive disorder (Dysthymia in remission) and a major depressive disorder, which had fully resolved. Dr. Kleinman noted that a hallmark of major depression is a "depressed mood most of the day, nearly every day." *Id* at 226. A hallmark of a Dysthymia is a "depressed mood for most of the day, for more days than not." Dr. Kleinman believed that Claimant had depression, which remained in remission with his need for ongoing medications. Although Dr. Kleinman noted that the recommended treatment for Claimant's chronic level depression would be the indefinite use of anti-depressants, the use of anti-depressants was no longer within the scope of his work injury. *Id* at 226.

22. At hearing, Dr. Bisgard agreed with Dr. Kleinman's opinion (Hrg. Tr. p. 34). Dr. Bisgard noted that Claimant had pre-existing depression that, at the time that he was placed at MMI, had not worsened. Someone with a longstanding history of depression will need lifetime treatment for that depression. Dr. Bisgard also opined that the work injury did not change Claimant's need for anti-depressants, which he was using before the injury.

23. Dr. Bisgard testified that, at the present time, the appropriate standard of medical care is not using narcotic pain medications for the complaints of pain that is unsubstantiated with objective findings. At the present time, pain medications are typically given for acute episodes of pain over the shortest period of time, with the goal to reduce the pain levels and to increase function (Hrg. Tr. p. 28). Dr. Bisgard stated that it was inappropriate to provide pain medications in the absence of some physiological generated pain:

> The purpose of a pain medication is to address a specific pathology or a physiological problem for a temporary period of time. So, if there is no anatomic, pathologic, physiologic process going on, we don't use pain medication because it is not going to take care of the pain. (Hrg. Tr. p. 29).

Dr. Bisgard noted that the reason why the United States is struggling with narcotic addiction is because of the overutilization of pain medication under inappropriate circumstances. *Id.*

24. Dr. Bisgard agreed with the other physicians that have treated and evaluated Claimant over the years that Claimant does have a conversion disorder as well as somatization: (Hrg. Tr. pp. 29-30).

> There have been multiple incidents in the medical records where Mr. Glenn described something happening. For instance, he described his legs giving out on him on multiple occasions and falling, but there is no medical basis for it. There is nothing on any diagnostic test or examination to explain why his legs would give out. He came in, initially presented after the injury with some hip pain and, within a short period of time, he was in a wheelchair or required a walker. Again, no explanation for the deterioration. He presented to the emergency room on several occasions with severe pain, but there was no etiology or basis for the pain. So, those are just some examples of why he meets the criteria of conversion disorder. *The somatization issue is he has been given very high levels of powerful narcotics, and his pain levels did not change*. *Id* at 30. (emphasis added).

25. As a result, Dr. Bisgard opined that the pain that Claimant is experiencing at this present time is psychologically driven, as opposed to pathologically. She stated that when somebody is having psychologically driven pain, no amounts of narcotics are going to affect that pain, which is exactly what is happening in this case.

26. Based on her review of the voluminous medical records documenting the treatment that Claimant has received for this work injury, it is Dr. Bisgard's opinion that

Claimant's consumption of pain medications has not resulted in a meaningful reduction in Claimant's pain reports (Hrg. Tr. p. 32). In addition, based on her review of the extensive medical records documenting the treatment that Claimant has received for his work injury, she is of the opinion that Claimant's consumption of pain medications has not resulted in a significant and meaningful increase in function. *Id*

27. Finally, Dr. Bisgard opined that, because of her understanding [based upon reports] of Claimant's current level of narcotic consumption, he does not need to go through any kind of formal detoxification (either in-patient or out-patient). Rather, Claimant would be capable of simply stopping his pain medications, with minimal discomfort for a short period. She acknowledged, however, that she has not seen him for over a year, and is not aware of his current consumption.

28. Dr. Daniel Lombardo, MD, is a physician with the First Street Family Health clinic in Salida, CO. Claimant has been a patient with that practice since at least 2002; however, Dr. Lombardo only began treating Claimant on 8/5/2015, with a total of eight visits, ending on 10/5/2016. The details of these visits is unclear, although it appears from the narratives that First Street has served as Claimant's ATP since the onset of treatment. Dr. Lombardo's predecessor in treating Claimant was Dr. Mary Reeves. Upon inquiry by Respondents, in a report dated 12/2/2020 (Ex. 1, pp. 6, 7, 8), Dr. Lombardo clarifies that his current knowledge of Claimant as a patient is based largely upon his review of Claimant's prior records.

29. When asked if Claimant's current condition is *not related* to the 1/11/2011 work injury, he replied, in pertinent part:

> *This is difficult to say*….In the ensuing weeks and follow up visits Dr. Reeves tried tramadol, hydromorphone, celecoxib, gabapentin, and eventually oxycodone and the OxyContin (first prescribed on 4/27/2011 by Dr. Reeves) to manage his back pain….Ultimately, regardless of the nature of the patient's pain, I believe that *it is a stretch to say that patient's current pain issues are "not related" to his injury on 01/11/2011* as this was from my review of his medical record *clearly a turning point* prior to which the majority of his healthcare interactions were for sinus and upper respiratory infections and *after which every visit was related to his chronic pain* and associated mood issues. *Id* at 6. (emphasis added).

30. When asked if Claimant no longer requires medical maintenance treatment under workers compensation claim and pain medications are outside the scope of with work injury, Dr. Lombardo replied, in pertinent part:

> ***No,*** *patient's ongoing need for medical maintenance care including pain medication while not following a typical pattern of an organic injury to the back do seem directly precipitated by his injury and*

> *therefore under the scope of work comp….*[lengthy discussion of interplay of antidepressants, and his opinion that Claimant is not a classic drug seeker, per se]…While I fully concur that chronic narcotic medication would not have been my preference for treatment of this type of injury especially in light of his lack of discernable pathology on imaging, *it is also not unusual* with the limited therapies and medications currently available for back pain *for a person to end up utilizing chronic narcotic pain medication to* *remain functional* *in the face of disabling chronic pain*……*If I were to continue to be in charge of this patient's chronic pain it would be my goal to* *wean him off of the narcotics* and look for other means of controlling his symptoms, though without obvious insight this would take a significant amount of relationship building and trust which seemed out of scope of a work comp claim where the claimant had already reached MMI so not attempts were made on my part to change patient's regimen. *Id* at 7 (emphasis added).

31. In a letter referencing this WC case, dated April 22, 2022 (sic), (Ex. 2, p. 9) Dr. Stephanie Earhart, MD, states that she is Claimant's PCP, but is not involved - not does she wish to become involved - as Claimant's ATP. She states:

> ….I have been prescribing medications to help manage his [Claimant's] pain that was related to his [work] injury. Previously his work comp related medications had been provided by Dr. Daniel Lombardo and Dr. Mary Reeves, who had served as his work comp providers. *Mr. Glenn's OxyContin was abruptly stopped last fall* placing him at risk for serious health consequences. *This forced me to change him to a short acting form to avoid withdrawal* (he could not afford the cash price of OxyContin). I had no notice or warning.
>
> *….Mr. Glenn definitely requires* *ongoing medication* *and deserves at minimum a* *new evaluation* *to best determine a treatment plan for the future,* *to include medication management*….I am not comfortable providing that evaluation as his ongoing primary care physician. *Id.*(emphasis added).

32. Claimant testified briefly at hearing. He could not recall whether he had been on pain medications prior to the work injury. He described his current pain level as being worse than previously. When his OxyContin was stopped last fall, he could no longer afford it, so his PCP changed it to oxycodone. It is not as effective as the OxyContin, but it is better than nothing. Claimant reports being less able to perform activities of daily living now compared to last year.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Act, Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). In this case, the ALJ finds Claimant to have been sincere and credible in describing his symptoms to the ALJ, and his medical providers. Further, the ALJ finds that Claimant has been appropriately motivated in attending his medical appointments and taking proper ownership of his own ongoing rehabilitation in a sincere effort to maintain his health.

D. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). In this instance, as is not uncommon, the various medical professionals (as expressed through their reports), hold contrasting views on certain points. The ALJ will determine the merits of their positions based upon the *persuasiveness* of their views, as opposed to *credibility* per se. With a couple of exceptions, as noted *infra*, the ALJ finds that Dr. Bisgard's expert testimony was quite helpful in deciding this matter.

E. Further, courts are to be "mindful that the Workmen's Compensation Act is to be liberally construed to effectuate its humanitarian purpose of assisting injured workers." *James v. Irrigation Motor and Pump Co.*, 503 P.2d 1025 (Colo. 1972).

Medical Maintenance Benefits, Generally

F. Generally, to prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988). However, when respondents file a final admission of liability acknowledging medical maintenance benefits pursuant to Grover they can seek to terminate their liability for ongoing maintenance medical treatment. See §8-43-201(1), C.R.S.; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). When the respondents contest the liability for a particular benefit, the claimant must prove that the challenged treatment is reasonable, necessary and related to the industrial injury. Id. However, when respondents seek to terminate all post-MMI benefits, they shoulder the burden of proof to terminate liability for maintenance medical treatment. *In Re Claim of Arguello*, W.C. No. 4-762-736-04 (ICAO, May 3, 2016); *In Re Claim of Dunn,* W.C. No. 4-754-838 (ICAO, Oct. 1, 2013). Specifically, respondents are not liable for future maintenance benefits when they no longer relate back to the industrial injury. See *In Re Claim of Salisbury*, W.C. No. 4-702-144 (ICAO, June 5, 2012).

Claimant's Continuing Claim for Antidepressants, as Applied

G. The record in this case is clear, and free from serious doubt. Claimant has long suffered from depression, predating this work injury by many years. His depression, unfortunately, is of such severity that it will likely require treatment and medication for his lifetime. The ALJ finds that continued treatment for depression, including medication, is *reasonable and necessary* to help Claimant maintain function, and for the indefinite future. However, the ALJ is also persuaded by the expert testimony and reports that such continuing treatment for depression is no longer *related* to the work injury – assuming it ever was. Respondents have met their burden on the issue of *relatedness.* While it is certainly hoped that Claimant's treatment for depression will continue unabated, he must henceforth obtain it outside the Workers Compensation system.

Claimant's Continuing Claim for Pain Medication - Related to Work Injury

H. Respondents seek a finding that Claimant's ongoing pain complaints are not related to his 2/11/2011 work injury. The ALJ is not persuaded. As noted by Dr. Lombardo, acting however briefly as his ATP, while Claimant certainly had ongoing back issues prior to the work injury, the need for treatment post-injury accelerated dramatically and remained constant. While Claimant was clearly of the 'eggshell' variety going into this job, Employer 'took him as he found him'. This unfortunate event led to a constellation of symptoms, which one would not ordinarily anticipate for a deputy sheriff falling down some stairs. But Claimant is a medical outlier, sitting way out there on the bell curve. No doubt his pre-existing depression rendered him susceptible to this domino effect. He is not malingering intentionally; his complaints of pain continue to be very real to him. Nonetheless, his ongoing pain complaints are *related* to the work injury.

Claimant's Continuing Claim for Pain Medication – Reasonable and Necessary

I. However, the inquiry does end here. The ALJ duly notes that Claimant's rare convergence of severe depression with a traumatic and frightening injury has led to a system ill-equipped to deal with him. Resources are limited. Distractions abound. Waiting rooms are full. Sometimes the line gets blurred - as was the case here – between the obligations of the Workers Comp system and private health care. To her credit, Dr. Earhart wishes to re-draw that bright line. Without casting aspersions on any of Claimant's well-intentioned providers, *the system(s)* let Claimant fall through the cracks. He is now effectively being 'warehoused' with opiates, and will never leave 'the sick role' [credit to Dr. Knight] without a new, and clear, path towards regaining as much function as can be afforded. This path means *pain medications must terminate, and* ***as soon as is practicable.*** They are no longer helping him; indeed, they have now made his life worse. In that sense, the ALJ concurs with Drs. Bisgard, Kleinman, Ogin, Knight, Lombardo, and Earhart.

J. Dr. Bisgard feels that Claimant can just go cold turkey, with a minimum of temporary discomfort. The ALJ is not persuaded. She has not seen him in over a year, and does not know his current dosage. She is basing her opinions on what his records say about dosage (from a year ago or better), and what one might expect from a typical patient. Fair enough, but this Claimant is far from typical. He has been highly dependent on pain medications for years, but which are not helping his symptoms. The other physicians, in varying degrees, argue for a ***managed plan for removal*** and addressing his somatoform disorder. The ALJ concurs. The ALJ finds that such managed plan is reasonable and necessary to prevent a deterioration of his current condition as he withdraws from the pain medication. As such, it is the final step in Claimant's medical maintenance care.

K. The Workers Comp system is at least partially responsible for getting him into this; it is now responsible for exercising all good faith efforts to get him out of it. This should ideally be done in conjunction with the private treatment for antidepressants. Claimant is also responsible for doing his part. It might be painful, but so is, for example, physical therapy. And if Claimant does not comply, Respondents may apply for termination of the plan. Unless the parties agree otherwise, the First Street Family Health Clinic, or their designee, is Claimant's ATP.

ORDER

It is therefore Ordered that:

1. Effective immediately, Respondents are no longer responsible for paying for antidepressants for Claimant.

2. As soon as feasible, Claimant's ATP, or its designee, must formulate a managed plan to wean Claimant off his pain medication as soon as practicable. Respondents' obligation for medical maintenance care will end at the conclusion of this plan.

3. Claimant must cooperate in the administration of this managed plan, which is being created solely for his own benefit.

4. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. *In addition, in order to best assure prompt processing of your Petition, it is **highly recommended** that you send a copy of your Petition to Review to the Colorado Springs OAC via email at oac-csp@state.co.us.*

DATED: August 11, 2021

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-164-662-001

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that he suffered compensable injuries during the course and scope of his employment with Employer on February 16, 2021.

2. Whether Claimant has demonstrated by a preponderance of the evidence that he is entitled to receive reasonable, necessary and causally related medical benefits for his industrial injuries.

3. Whether Claimant has established by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period between February 16, 2021 and February 18, 2021, as well as February 24, 2021, for a total of four days.

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW) of $1,141.55.

FINDINGS OF FACT

1. Claimant is a 58 year-old male who has worked for the Employer as a Journeyman Pressman for approximately 28 years. He specifically performed maintenance duties to fix printing presses. Claimant's schedule is Monday through Friday from 7:00 a.m. to 2:00 p.m.

2. On February 9, 2021 Claimant was evaluated at the Kaiser Permanente Emergency Department for hearing issues. Claimant remarked that on the previous night his left ear became plugged and he experienced ringing. He noted that his symptoms began quickly. Claimant was diagnosed with left tinnitus (decreased hearing) and left otalgia (likely eustachian tube dysfunction). He underwent ear irrigation to remove cerumen in the left ear. However, there was no improvement with cerumen removal. There was no sign of infection or effusion. Valerie A. Bain, M.D. diagnosed Claimant with likely eustachian tube dysfunction. She recommended Sudafed and Flonase to help open Claimant's eustachian tube.

3. On February 16, 2021 Claimant arrived at work and parked in his normal spot on the west side of Employer's building at about 6:00 a.m. On his morning break, Claimant went to the police impound lot for an automobile auction. He then visited an auto parts store to purchase transmission fluid for his vehicle. Claimant testified that when he returned from his break, he parked on the south side of the building because the City and County of Denver was working on the intersection at 58th and Washington Street. The

construction did not permit him to enter on the west side of Employer's premises. He thus parked on the south side of Employer's facility.

4. Claimant remarked that there was snow on the ground on the south side of Employer's building, but he was unaware there was ice beneath the snow. He commented that, after parking his car, he popped the hood from inside but did not lift it in order to remind himself to add transmission fluid when he left at the end of the day. As he opened his door and exited the vehicle, he immediately fell to the ground and struck the back of his head.

5. Respondents produced surveillance video of the south side of Employer's parking lot from February 16, 2021. The lot was visibly icy and shady, and there were no other cars parked in the area. Claimant pulled alongside an ink tanker and then backed up onto ice and snow. Notably, despite dry spots in the parking lot, Claimant chose to back his car onto ice and snow. He waited for the ink tanker to back out of a parking spot then angled his vehicle in front of the video camera. Claimant opened his car door, exited the vehicle, straightened his shirt, walked around the open door, looked directly into the camera, kept walking and fell forward. Claimant was so far away from the car door that when he fell he tried to grab the left side of the hood where it meets the driver side door. The video reflects that Claimant was going around the car door and not trying to shut it.

6. On February 16, 2021 Claimant visited Kaiser Permanente and underwent an examination with Mark Foster, D.O. Claimant reported that he slipped on ice while getting out of his car at work. He specified that he fell flat on his back and struck his head on the ice. Claimant's diagnoses included a scalp contusion and left posterior thorax contusion. He did not have any loss of consciousness. Claimant had a normal neurological examination and did not report any hearing loss. He was taken off work for the following two days from February 17, 2021 through February 18, 2021.

7. On February 17, 2021 Claimant completed a Worker's Compensation Incident Report. The Report specified that he slipped on the south side parking lot of Employer's building and to "look at your cameras." Claimant stated that he injured his head, shoulder, back and neck. He also lost hearing in his left ear. Claimant gave the report to Employer's now retired Associate Production Manager Tim A[Redacted] on February 19, 2021.

8. Mr. A[Redacted] explained that his job duties involved supervising the production of newspapers and working with the maintenance crew. He testified that on February 16, 2021 Claimant stated he was out checking the oil or transmission fluid in his car. Claimant was holding the top of his head and commented "the hood got him." Mr. A[Redacted] asked Claimant what he meant, and Claimant showed him a lump and small cut on the top of his head. He specified that Claimant tipped his head down and the lump was on the top of his head, a little towards the back, with a small cut. Mr. A[Redacted] remarked that Claimant did not mention he had slipped and fallen. Mr. A[Redacted] then received a call from Employer's production manager and Claimant went in the back of the office to get an ice pack. He later learned that Claimant left Employer's facility to visit his personal physician.

9. Mr. A[Redacted] explained that Claimant always parked on the west side of the building, there was no maintenance work being performed on Employer’s parking lot and there was no reason why Claimant could not have parked in his normal parking area when he returned from his break on February 16, 2021. He remarked that an individual can drive around Employer’s entire building without entering a side street. Furthermore, Mr. A[Redacted] noted that Claimant gave him a written injury report on Friday, February 19, 2021. The report stated he slipped on ice on the south side of the building. Mr. A[Redacted] questioned the report because Claimant initially told him that he struck his head on the hood of his vehicle. He noted that he reports whatever an injured worker writes down.

10. On February 23, 2021 Claimant commenced treatment with Employer’s designated medical provider Occupational Medicine of the Rockies, where he was evaluated by Authorized Treating Physician (ATP) F. Mark Paz, M.D. Claimant reported that he slipped and fell in a parking lot at work. He remarked that he visited personal primary care provider Kaiser on February 16, 2021 and noticed hearing loss when he arrived home from the appointment. Claimant acknowledged that he had suffered ringing in the ears prior to the slip and fall. Dr. Paz diagnosed Claimant with a closed head injury without loss of consciousness, a headache, left-sided hearing loss, neck pain and back pain. On the Physician’s Report of Worker’s Compensation Injury he checked a box reflecting that Claimant’s objective findings were consistent with a history of a work-related mechanism of injury. Dr. Paz took Claimant off work from February 23, 2021 to February 24, 2021. He referred Claimant to Alan F. Lipkin, M.D. for evaluation of left-sided hearing loss.

11. On February 24, 2021 Claimant provided a recorded statement to Insurer’s adjuster. Claimant testified at the hearing that he has previously parked on the south side of Employer’s lot numerous times. However, in his recorded statement, Claimant commented that he rarely parked in Employer’s south side lot and acknowledged there was often ice in the area. He remarked that “in wintertime there’s nothing but ice. I said, ‘[inaudible] put signs out there say ice on it.” Claimant knew there was ice on the south side of the parking lot, but parked there anyway even if he could have driven around the building and parked in his normal spot on the west side.

12. Claimant’s recorded statement further discussed purchasing transmission fluid and putting it into his vehicle. Claimant detailed that he went to lunch, and “we got to the auto part store to get some transmission fluid for my car. I came back and came back to work, parked in the parking lot, unlocked, popped the hood of my car. I was gonna put the transmission fluid in. As soon I got out of my car there was [inaudible] ice. I slipped, fell backwards. And, basically, that’s it.” The adjuster asked Claimant whether he was going to pour the transmission fluid into the vehicle in the parking lot and he responded affirmatively. He further commented that he popped his hood, but did not open it because he did not get that far. Claimant intended to put transmission fluid in his vehicle when he returned from break.

13. On March 11, 2021 Claimant visited ATP Alan F. Lipkin at Harvard Park Hearing for an examination. Claimant remarked that he worked for Employer as a

Journeyman Pressman. Dr. Lipkin noted that Claimant slipped on ice as he was getting out of his truck at work and fell primarily on his occipital area. Claimant reported hearing loss that began two days after the incident. He also stated that he suffered constant buzzing in his left ear. Notably, the tinnitus began the same day as the hearing loss.

14. On March 24, 2021 Employer filed a Workers' Compensation First Report of Injury or Illness form providing that Claimant suffered a cut on his head when he "slipped on ice on the side of the building in the parking lot. Injuring his head with a cut, unspecified shoulder, back, neck, loss of hearing in left ear."

15. On May 3, 2021 Claimant returned to Dr. Lipkin after he had undergone a brain MRI. Dr. Lipkin commented that Claimant last visited his office on March 11, 2021 for left-sided hearing loss attributed to a work related accident that occurred on February 16, 2021. After a 21-day Prednisone taper Claimant noted slight improvement in hearing. Dr. Lipkin explained that Claimant had normal hearing in the right ear but exhibited severe left-sided hearing loss.

16. On May 10, 2021 Claimant returned to Dr. Lipkin for an examination. Dr. Lipkin injected his left tympan membrane in three locations with cortisone. On May 12, 2021 Claimant underwent the same procedure.

17. On May 27, 2021 Dr. Lipkin reported that Claimant's "left-sided tinnitus that sounds like constant TV static" has continued since the May procedures. He was presenting for "continued care for severe post traumatic left sided hearing loss on tinnitus following labyrinthine perfusions on 5/10, 5/12 and 5/14/2021." Dr. Lipkin referred Claimant for a hearing aid evaluation.

18. On June 22, 2021 Claimant visited Emilia Kirbo, Au.D., at Harvard Park Hearing for a hearing aid evaluation. After reviewing Claimant's audiologic test results and consulting with Claimant about his communication needs Au.D. Kirbo recommended a "digital premium-level hearing aid for the left ear."

19. Claimant testified at the hearing in this matter that he missed work after his fall on February 16, 2021 through February 18, 2021 because he was taken off work by Kaiser. He also did not work on February 24, 2021 following his visit with Dr. Paz Claimant thus did not work for Employer for a total period of four days. Claimant also emphasized that the ringing in his ears as a result of his slip and fall sounds like "static from a TV" and is different in duration and type from the ringing he described to Kaiser on February 9, 2021. He commented that he has undergone physical therapy but is still experiencing hearing loss on the left side. Claimant explained that he has not yet received the recommended hearing aids but would like them if they would address his hearing loss and tinnitus.

20. Claimant has failed to establish that it is more probably true than not that he suffered compensable injuries during the course and scope of his employment with Employer on February 16, 2021. Initially, Claimant explained that on February 16, 2021 he parked in Employer's south parking lot after purchasing transmission fluid for his

vehicle during a morning break from his shift. As he exited his vehicle, he slipped and fell on ice. Claimant stated that he injured his head, shoulder, back and neck. He also lost hearing in his left ear as a result of the accident. Despite Claimant's testimony, the record reflects that the February 16, 2021 incident did not likely cause any compensable injuries. Specifically, Claimant's pre-existing left-sided hearing loss, video footage of the fall, Claimant's inconsistent descriptions, the credible testimony of Mr. A[Redacted] and medical records predicated on Claimant's subjective account, reflect that Claimant did not likely suffer industrial injuries during the course and scope of his employment on February 16, 2021.

21. On February 9, 2021 Claimant visited personal medical provider Kaiser for hearing issues. Claimant reported that on the previous night his left ear became plugged and he experienced ringing. He noted that his symptoms began quickly. Claimant was diagnosed with left tinnitus (decreased hearing) and left otalgia (likely eustachian tube dysfunction). He underwent irrigation to remove cerumen in the left ear with no improvement. On March 11, 2021 Claimant reported to Dr. Lipkin that he experienced hearing loss two days after his work accident. However, on his February 23, 2021 visit with Dr. Paz Claimant remarked that he noticed hearing loss when he arrived home from his appointment with Kaiser on February 16, 2021. Moreover, on his February 17, 2021 Worker's Compensation Incident Report Claimant stated that he suffered hearing loss. The inconsistencies in Claimant's account of when he developed hearing loss, in conjunction with the similarity between his symptoms on February 9, 2021 and his current complaints, suggests that it is speculative to attribute Claimant's hearing loss to his February 16, 2021 slip and fall.

22. Video of the south side of Employer's parking lot from February 16, 2021 reveals the lot was visibly icy and shady. There were also no other cars parked in the area. Claimant pulled alongside an ink tanker and then backed up onto ice and snow. Notably, despite dry spots in the parking lot, Claimant chose to back his car onto ice and snow. He waited for the ink tanker to back out of a parking spot then angled his vehicle in front of the video camera. Claimant opened his car door, exited the vehicle, straightened his shirt, walked around the open door, looked directly into the camera, kept walking and fell forward. The record reveals that Claimant parked in a spot where he rarely parks when he knew the parking area was icy in the winter and his normal spot on the west side was available. There was no impediment to parking in his regular spot. Furthermore, Claimant knew where the cameras were located, pulled his car back at an angle and looked directly into the camera before he slipped and fell. Claimant's actions in the video suggest that he anticipated a potential fall.

23. The credible testimony of Mr. A[Redacted] also suggests that Claimant did not suffer any work-related injuries. Mr. A[Redacted] testified that on February 16, 2021 Claimant stated he was out checking the oil or transmission fluid in his car. Claimant was holding the top of his head and commented "the hood got him." Mr. A[Redacted] asked Claimant what he meant and Claimant showed him a lump and small cut on the top of his head. Claimant did not mention he had slipped and fallen. However, Claimant gave Mr. A[Redacted] a written injury report on February 19, 2021 that stated he slipped on ice on the south side of the building. Mr. A[Redacted] questioned the report because Claimant

initially told him that he struck his head on the hood of his vehicle. Claimant's initial and contemporaneous report to Mr. A[Redacted] that the hood fell on his head is also consistent with his recorded statement to Insurer's adjuster. The adjuster asked Claimant whether he was going to pour the transmission fluid into the vehicle in the parking lot and Claimant responded affirmatively. He further commented that he popped his hood but did not open it because he did not get that far before slipping. The preceding chronology reflects that Claimant planned to put transmission fluid into his vehicle after purchasing it during a morning break and was likely struck on the head by the hood of his car. Any injuries were thus not caused by a slip and fall.

24. Dr. Paz diagnosed Claimant with a closed head injury without loss of consciousness, a headache, left-sided hearing loss, neck pain and back pain. On the Physician's Report of Worker's Compensation Injury he checked a box reflecting that Claimant's objective findings were consistent with a history of a work-related mechanism of injury. Furthermore, Dr. Lipkin noted that Claimant slipped on ice as he was getting out of his truck at work and fell primarily on his occipital area. Claimant reported hearing loss and tinnitus that began two days after the incident. Although the reports of Drs. Paz and Lipkin attribute Claimant's hearing loss to his work activities on February 16, 2021 they were predicated on Claimant's subjective account and reporting of a slip and fall. The physicians' reports did not include a causation analysis connecting Claimant's symptoms to his job duties. The preceding opinions are thus speculative regarding Claimant's injuries as a result of his work activities for Employer. Instead, the bulk of the persuasive evidence reflects that Claimant did not likely suffer industrial injuries while working for Employer on February 16, 2021. Considering Claimant's previous recent history of hearing loss and tinnitus, video footage and Claimant's inconsistent accounts of the accident, the record reveals that his injuries were not likely caused by his job duties for Employer. Claimant's work activities also did not aggravate, accelerate or combine with his pre-existing condition to produce a need for medical treatment. Accordingly, Claimant's claim for Workers' Compensation benefits is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as

unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

6. An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The “time” limits of employment include a reasonable interval before and after working hours while the employee is on the employer’s property. *In Re Eslinger v. Kit Carson Hospital,* W.C. No. 4-638-306 (ICAO, Jan. 10, 2006). The “place” limits of employment include parking lots controlled or operated by the employer that are considered part of employer’s premises. *Id.*

7. The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its “origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee’s service to the employer.” *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). Nevertheless, the employee’s activity need not constitute a strict duty of employment or confer a specific benefit on the employer if it is incidental to the conditions under which the employee typically performs the job. *In Re Swanson,* W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). It is sufficient “if the injury arises out of a risk which is reasonably incidental to the conditions and circumstances of the particular employment.” *Phillips Contracting, Inc. v. Hirst,* 905 P.2d 9, 12 (Colo. App. 1995). Incidental activities include those that are “devoid

of any duty component, and are unrelated to any specific benefit to the employer." *In Re Rodriguez,* W.C. 4-705-673 (ICAO, Apr. 30, 2008). Whether a particular activity has some connection with the employee's job-related functions as to be "incidental" to the employment is dependent on whether the activity is a common, customary and accepted part of the employment as opposed to an isolated incident. *See Lori's Family Dining, Inc. v. Industrial Claim Appeals Office,* 907 P.2d 715 (Colo. App. 1995).

8. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

9. As found, Claimant has failed to establish by a preponderance of the evidence that he suffered compensable injuries during the course and scope of his employment with Employer on February 16, 2021. Initially, Claimant explained that on February 16, 2021 he parked in Employer's south parking lot after purchasing transmission fluid for his vehicle during a morning break from his shift. As he exited his vehicle, he slipped and fell on ice. Claimant stated that he injured his head, shoulder, back and neck. He also lost hearing in his left ear as a result of the accident. Despite Claimant's testimony, the record reflects that the February 16, 2021 incident did not likely cause any compensable injuries. Specifically, Claimant's pre-existing left-sided hearing loss, video footage of the fall, Claimant's inconsistent descriptions, the credible testimony of Mr. A[Redacted] and medical records predicated on Claimant's subjective account, reflect that Claimant did not likely suffer industrial injuries during the course and scope of his employment on February 16, 2021.

10. As found, on February 9, 2021 Claimant visited personal medical provider Kaiser for hearing issues. Claimant reported that on the previous night his left ear became plugged and he experienced ringing. He noted that his symptoms began quickly. Claimant was diagnosed with left tinnitus (decreased hearing) and left otalgia (likely eustachian tube dysfunction). He underwent irrigation to remove cerumen in the left ear with no improvement. On March 11, 2021 Claimant reported to Dr. Lipkin that he experienced hearing loss two days after his work accident. However, on his February 23, 2021 visit with Dr. Paz Claimant remarked that he noticed hearing loss when he arrived home from his appointment with Kaiser on February 16, 2021. Moreover, on his February 17, 2021 Worker's Compensation Incident Report Claimant stated that he suffered hearing loss. The inconsistencies in Claimant's account of when he developed hearing loss, in conjunction with the similarity between his symptoms on February 9, 2021 and his current

complaints, suggests that it is speculative to attribute Claimant's hearing loss to his February 16, 2021 slip and fall.

11. As found, video of the south side of Employer's parking lot from February 16, 2021 reveals the lot was visibly icy and shady. There were also no other cars parked in the area. Claimant pulled alongside an ink tanker and then backed up onto ice and snow. Notably, despite dry spots in the parking lot, Claimant chose to back his car onto ice and snow. He waited for the ink tanker to back out of a parking spot then angled his vehicle in front of the video camera. Claimant opened his car door, exited the vehicle, straightened his shirt, walked around the open door, looked directly into the camera, kept walking and fell forward. The record reveals that Claimant parked in a spot where he rarely parks when he knew the parking area was icy in the winter and his normal spot on the west side was available. There was no impediment to parking in his regular spot. Furthermore, Claimant knew where the cameras were located, pulled his car back at an angle and looked directly into the camera before he slipped and fell. Claimant's actions in the video suggest that he anticipated a potential fall.

12. As found, the credible testimony of Mr. A[Redacted] also suggests that Claimant did not suffer any work-related injuries. Mr. A[Redacted] testified that on February 16, 2021 Claimant stated he was out checking the oil or transmission fluid in his car. Claimant was holding the top of his head and commented "the hood got him." Mr. A[Redacted] asked Claimant what he meant and Claimant showed him a lump and small cut on the top of his head. Claimant did not mention he had slipped and fallen. However, Claimant gave Mr. A[Redacted] a written injury report on February 19, 2021 that stated he slipped on ice on the south side of the building. Mr. A[Redacted] questioned the report because Claimant initially told him that he struck his head on the hood of his vehicle. Claimant's initial and contemporaneous report to Mr. A[Redacted] that the hood fell on his head is also consistent with his recorded statement to Insurer's adjuster. The adjuster asked Claimant whether he was going to pour the transmission fluid into the vehicle in the parking lot and Claimant responded affirmatively. He further commented that he popped his hood but did not open it because he did not get that far before slipping. The preceding chronology reflects that Claimant planned to put transmission fluid into his vehicle after purchasing it during a morning break and was likely struck on the head by the hood of his car. Any injuries were thus not caused by a slip and fall.

13. As found, Dr. Paz diagnosed Claimant with a closed head injury without loss of consciousness, a headache, left-sided hearing loss, neck pain and back pain. On the Physician's Report of Worker's Compensation Injury he checked a box reflecting that Claimant's objective findings were consistent with a history of a work-related mechanism of injury. Furthermore, Dr. Lipkin noted that Claimant slipped on ice as he was getting out of his truck at work and fell primarily on his occipital area. Claimant reported hearing loss and tinnitus that began two days after the incident. Although the reports of Drs. Paz and Lipkin attribute Claimant's hearing loss to his work activities on February 16, 2021 they were predicated on Claimant's subjective account and reporting of a slip and fall. The physicians' reports did not include a causation analysis connecting Claimant's symptoms to his job duties. The preceding opinions are thus speculative regarding Claimant's injuries as a result of his work activities for Employer. Instead, the bulk of the persuasive

evidence reflects that Claimant did not likely suffer industrial injuries while working for Employer on February 16, 2021. Considering Claimant’s previous recent history of hearing loss and tinnitus, video footage and Claimant’s inconsistent accounts of the accident, the record reveals that his injuries were not likely caused by his job duties for Employer. Claimant’s work activities also did not aggravate, accelerate or combine with his pre-existing condition to produce a need for medical treatment. Accordingly, Claimant’s claim for Workers’ Compensation benefits is denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant’s request for Workers’ Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge’s order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge’s order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at https://oac.colorado.gov/resources/oac-forms*.

DATED: August 12, 2021.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that on March 2, 2021, he suffered an injury arising out of and in the course and scope of his employment with the employer.

2. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that he is entitled to reasonable, necessary and related medical treatment, including all treatment provided by St. Mary's Occupational Health.

3. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that surgery performed on June 30, 2021, constitutes reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.

4. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that he is entitled to temporary total disability (TTD) benefits beginning March 2, 2021 and ongoing.

STIPULATION

The parties stipulated that if the claimant's claim is found compensable, his average weekly wage (AWW) is $744.80.

FINDINGS OF FACT

1. The employer operates a company that trims and removes trees. The claimant began working for the employer in May 2020. The claimant's job duties included trimming trees, tree removal, and clean up of all cuttings.

2. On March 2, 2021, the claimant was working at a job site for the employer. The assignment was to trim and remove large elm trees. The claimant testified that while he was bent over picking up branches to place in the chipper, a large log fell and struck him between the shoulders, his neck, and head. The claimant also testified that as the log struck him, he fell to the left and landed on the ground.

3. The log at issue is estimated to weigh between 150 and 200 pounds.

4. The claimant's coworker Mr. S[Redacted] was present at the time of the log incident. Mr. S[Redacted] testified that he cut the log that fell. He also testified that when he noticed that the claimant was in the line of the falling log, he yelled for the claimant to

move. Mr. S[Redacted] then observed that the claimant was seated on his buttocks on the ground. Mr. S[Redacted] did not see whether the log did not did not strike the claimant.

5. Initially, the claimant sat on the ground. The claimant testified that when he turned his head, he could hear “clicking” in his neck. Mr. S[Redacted] called emergency services and an ambulance arrived to transport the claimant to the emergency department (ED) at St. Mary’s Hospital.

6. The claimant also testified that emergency services personnel had to lift and carry him to a gurney.

7. The records of the emergency services personnel identify that upon their arrival the claimant reported neck pain with any neck or arm movement. The claimant declined the use of a cervical collar as he reported it caused additional pain. Emergency services personnel assisted the claimant to a standing position and onto a gurney.

Symptoms and Medical treatment prior to March 2, 2021

8. Prior to the March 2, 2021 incident, the claimant sought treatment for shoulder pain. On October 20, 2020, the claimant was seen by his primary care physician, Dr. Michael Gorman. At that time, the claimant reported bilateral shoulder pain that he had experienced “for ‘at least a few months now’ ”. The claimant also reported that he was unable to raise his arms more than 90 degrees, and occasionally experienced shooting pain down both arms. Dr. Gorman recommended x-rays of the claimant’s bilateral shoulders.

9. The claimant returned to Dr. Gorman on October 26, 2020. At that time, Dr. Gorman noted that the shoulder x-rays showed degenerative joint disease in the AC joints, with possible rotator cuff pathology. Dr. Gorman recommended shoulder MRIs, physical therapy, and possible injections. The claimant did not pursue any of Dr. Gorman’s recommendations. The claimant did not return to Dr. Gorman regarding these symptoms.

10. The claimant testified that his shoulder issues began in 2020 after a different incident at work with the employer. However, that incident was not pursued as a workers’ compensation claim.

11. Mr. S[Redacted] testified that during his time working with the claimant, the claimant would complain of pain in his shoulders, arms, and hands. These complaints were prior to the March 2, 2021 incident.

12. The employer owner, Mr. H[Redacted], also testified regarding the claimant’s prior pain complaints. His testimony was consistent with that of Mr. S[Redacted] on this issue.

Medical Treatment Beginning March 2, 2021

13. In the ED on March 2, 2021, the claimant reported numbness and tingling in his bilateral upper extremities, with pain in his neck, upper back, and left hip. No abraisionis, swelling, or bruising was recorded at that time.

14. Computed tomography (CT) scans were taken of the claimant's head, cervical spine, and thoracic spine. All of the CT scans were normal without fractures or abnormalities. An x-ray of the claimant's left hip showed chronic changes without acute fracture. Magnetic resonance imaging (MRI) of the claimant's cervical spine was recommended.

15. On March 3, 2021, a cervical spine MRI showed severe left neural foraminal narrowing at the C4-5 and C6-7 levels; facet arthropathy; a left sided synovial cyst; and moderate right neural foraminal narrowing at the C4-C5 level.

16. On March 4, 2021, the cervical spine MRI was reviewed again. At that time, it was noted that there was "contour abnormality of the upper thoracic cord at T3-4, with slight swelling of the cord and high T2 signal in the cord at T3 and ventral displacement of the cord at T3-4." These findings were identified as being related to a dorsal thoracic arachnoid web. A neurosurgical consultation was recommended.

17. On March 15, 2021, the claimant was seen by neurosurgeon, Dr. Eric Momin. At that time, the claimant reported a numb sensation radiating down all five of his fingers. The claimant denied lower extremity pain, weakness, or numbness. The claimant also denied trouble with balance or walking. Dr. Momin noted that the thoracic spine MRI showed a dorsal arachnoid web at the T3-T4 level.

18. In that same medical record, Dr. Momin noted that the cause of the bilateral limb paresthesia was unclear, and could be caused by claimant's neck, or carpal tunnel syndrome, or cubital tunnel syndromes. Dr. Momin opined that an anterior cervical discectomy and fusion could be indicated, following the results of an EMG referral. With regard to the thoracic spine, Dr. Momin recommended T3-T5 laminectomies pending further imaging studies. He remarked that there was "ongoing cord compression from a likely arachnoid cyst; it is likely that there was chronic cord compression at this level which was suddenly worsened in the injury."

19. On March 16, 2021, the claimant began physical therapy at Fyzical Therapy & Balance Centers. On that date, the claimant reported bilateral radicular numbness encompassing the entire hand.

20. On March 25, 2021, Dr. Albert Hattem authored a staffing review and noted that he questioned whether the claimant sustained an injury sufficient to aggravate his pre-existing conditions. Dr. Hattem recommended authorization of the diagnostic studies requested by Dr. Momin to rule out dural tear and determine the cause of the upper extremity numbness. In addition, Dr. Hattem requested prior records to further assess the compensability issue.

21. On March 26, 2021, the claimant filed a claim for compensation regarding the March 2, 2021 incident. In that document, the claimant listed the impacted body parts as “neck, shoulder blades, mid-back, left hip, bilateral arms.”

22. On April 12, 2021, the claimant was seen by Dr. Lawrence Frazho and continued to report bilateral hand numbness. Dr. Frazho recommended an EMG and possible cervical facet injections.

23. On April 15, 2021, the claimant returned to Dr. Momin and reported numbness radiating into all five of his fingers, with no weakness. The claimant also reported that his balance was off and he had been walking slowly. Dr. Momin recommended T3-T5 and T9-T11 laminectomies for resection of the arachnoid web and possible biopsy. Dr. Momin also recommended possible injections to treat the claimant’s neck symptoms.

24. On April 21, 2021, Dr. Hattem reviewed Dr. Momin’s surgical recommendation. In his report, Dr. Hattem noted that a dorsal thoracic web is a rare condition that can become symptomatic, but that the finding is usually not associated with an acute injury to the spine. Dr. Hattem recommended that any treatment of the arachnoid web condition be pursued outside the workers’ compensation system.

25. After speaking with Dr. Momin, on April 28, 2021, Dr. Hattem issued another report. In that report, Dr. Hattem noted that Dr. Momin agreed that causation was a difficult issue to determine in this case, but it was Dr. Momin’s opinion that the claimant’s cervical spine complaints were likely worsened by the March 2, 2021 event. Dr. Hattem reported that Dr. Momin was under the impression that the pain, numbness and other symptoms began after March 2, 2021. Dr. Hattem recommended that the matter be reviewed by another neurosurgeon.

26. On May 20, 2021, the claimant returned to Dr. Stagg and reported occipital headaches and nausea. The claimant also reported that physical therapy was making him dizzy. Dr. Stagg reviewed the claimant’s history and noted that the claimant was “not sure whether he got hit in the head or not.” Dr. Stagg recommended a CT scan of the head.

27. On June 3, 2021, the claimant was seen at Red Rock Physical Medicine by Nikos Hollis, NP. In the medical record of that date, NP Hollis noted that EMG testing by Jonathan Belk showed mild right carpal tunnel syndrome with bilateral sensory ulnar neuropathies and some evidence for chronic left C5 and right C7 mild radiculopathies.

28. At the request of the respondents, Dr. Michael Rauzzino reviewed the claimant’s medical records. Dr. Rauzzino testified via deposition. Dr. Rauzzino testified that an arachnoid web, such as the one discovered in the claimant’s thoracic spine, is a layer of tissue that covers the spinal cord. The cause of this condition is typically idiopathic, though there are webs that can form after surgery or trauma. Dr. Rauzzino opined that the claimant’s arachnoid web was not caused by the March 2, 2021, work

incident, as the web would not have had sufficient time to form and thicken at the time of diagnosis.

29. Dr. Rauzzino further testified that the claimant's symptoms were not caused by his arachnoid web because these symptoms are in the wrong place. Injury to the nerves in the thoracic spine would not be indicated by numbness, tingling, or weakness in the hands. Dr. Rauzzino stated that if the claimant had sustained an exacerbation in his thoracic spine or the arachnoid web, he would have expected the claimant to complain of lower extremity symptoms immediately after the injury.

30. It is Dr. Rauzzino's testimony that there are no surgical issues in the thoracic spine, other than the arachnoid web. It is also Dr. Rauzzino's opinion that the surgery recommended by Dr. Momin would not address the claimant's upper extremity symptoms. With regard to the claimant's cervical spine, Dr. Rauzzino testified that the claimant's subjective complaints did not correlate with the objective findings. Dr. Rauzzino noted that there was no large contusion, and no evidence of any significant injury to the spinal cord, the bones, the discs, or the nerves. Despite this, the claimant reported severe pain with worsening and expanding symptoms.

31. The claimant provided testimony regarding his understanding of the surgery recommended by Dr. Momin. The claimant understood that he needed thoracic surgery because the arachnoid web was agitated and constricting his spine. The claimant also believed that if he did not undergo the surgery, he would lose control of his entire left side.

32. On June 30, 2021, Dr. Momin performed the recommended surgery. The surgery was paid for by Medicaid.

33. The claimant testified that before the surgery, he had numbness in his left leg and left arm. The claimant also testified that since the surgery, his left leg numbness has improved. He is able to walk 10 to 15 steps before becoming weak. The claimant further testified that his current symptoms include left arm numbness, neck pain, headaches, loss of range of motion in his neck, and loss of strength. The claimant also testified that he did not have any of these symptoms prior to the March 2, 2021 incident.

34. With regard to the March 2, 2021 incident, the ALJ does not credit the claimant's testimony and finds that the claimant was not stuck between the shoulders by the falling tree limb/log. The ALJ notes that the claimant was bent over at the waist when he claims the log struck him between the shoulder blades and he then fell to the ground. The ALJ finds that it is unlikely that this mechanism of injury would result in the claimant falling backwards and onto his buttocks. The ALJ credits the medical records and further finds that the lack of abrasions and bruising on the claimant's neck and upper back support a finding that the log did not strike the claimant. Furthermore, the ALJ is not persuaded that the claimant's pre-existing neck and back conditions were in any way impacted by the alleged work injury. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that he was injured while at work on March 2, 2021.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a pre-existing medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *See H & H Warehouse v. Vicory, supra.*

5. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that on March 2, 2021 he suffered an injury arising out of and in the course and scope of his employment with the employer. As found, the medical records are found to be credible and persuasive.

6. All remaining endorsed issues are dismissed as moot

ORDER

It is therefore ordered that the claimant's claim regarding an alleged March 2, 2021 injury is denied and dismissed. All remaining endorsed issues are dismissed as moot

Dated this 13th day of August 2021.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. **In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

ISSUES

I. Whether Claimant proved by a preponderance of the evidence the repeat transforaminal epidural steroid injections requested by Brian Siegel, M.D. are reasonable, necessary and related to Claimant's October 19, 2007 industrial injury.

FINDINGS OF FACT

1. Per the parties stipulation at hearing, the Court adopted and relied on, in part, previous findings of fact in three previous Orders issued by ALJs in this claim, as found in Claimant's Exhibits 10, 11 and 12.

2. Claimant is a 38-year-old male who worked for Employer as a truck driver.

3. Claimant sustained an admitted industrial injury on October 19, 2007 when he twisted his left ankle. Damage to the sural nerve required surgery and resulted in chronic neuropathic pain, diagnosed as Chronic Regional Pain Syndrome ("CRPS"). ATP Jeffrey A. Wunder, M.D. placed Claimant at maximum medical improvement ("MMI") on April 13, 2011. Dr. Wunder assigned an impairment rating of 22% of the lower extremity and 10% for a diagnosis of CRPS. Dr. Wunder's final impression was: (1) chronic left sural neuropathy, (2) status post multiple sural neuroma excisions, and (3) left lower extremity CRPS, significantly improved. As maintenance treatment, Dr. Wunder recommended lumbar sympathetic blocks 3-4 times per year, if necessary, and maintenance medication on a permanent basis.

4. Respondents filed a Final Admission of Liability ("FAL") on July 7, 2011 admitting for reasonable, necessary and related medical treatment and/or medications post-MMI. Claimant did not seek a Division Independent Medical Examination or hearing following the FAL. Claimant has since received maintenance care.

5. Claimant was subsequently diagnosed with venous insufficiency, for which he treated with Timothy Quickert M.D. Dr. Quickert noted "varicose veins of left leg with inflammation." On February 8, 2019, Claimant reported a many year history of several symptoms, including discoloration, pain, aching, throbbing, itching, burning, cramping, restless legs and swelling of the left lower extremity. On February 18, 2019, Claimant underwent endovenous ablation of the left greater saphenous vein. He continued to report left leg pain and swelling. ALJ Edwin Felter, in a December 11, 2019 order, found that Claimant's venous insufficiency was not related to the work injury.

6. On March 20, 2019, Claimant suffered a self-inflicted wound which required his hospitalization at the Sidney Regional Medical Center. Thereafter, Rebecca Allard, M.D., located in Sidney, Nebraska, took over Claimant's care as his ATP. Since taking

over care for Claimant, Dr. Allard has provided treatment to Claimant for his work-related condition as well as for several conditions that are unrelated to the work injury, including foot fungus, ingrown toenails, high blood pressure and restless legs. In an April 7, 2020 order, this ALJ determined that medications for high blood pressure and restless legs were not reasonable, necessary or related to the October 19, 2007 work injury.

7. On July 27, 2019, Claimant reported to Dr. Allard that he was experiencing back pain that radiated to his left hip that varied in intensity from day to day with no specific triggers. He indicated he was taking Lyrica for the back pain. It was noted, "Dr. Allard explained cryoablation as a possibility to help relieve his back pain. He will be referred to Dr. Siegel to be evaluated for this." R. Ex. F, p. 101. Subsequent evaluations by Dr. Allard on September 5, 2019 and May 28, 2020 indicate Claimant continued to experience back pain and continued to be referred to Dr. Siegel for consideration of cryoablation.

8. Dr. Siegel first evaluated Claimant on July 20, 2020. Claimant complained of left lower extremity pain described as aching, throbbing, shooting, stabbing, sharp, tiring, nagging and miserable. Dr. Allard noted Claimant was involved in an accident on October 19, 2007 in which he sustained a left lower extremity injury and was diagnosed with CRPS. Claimant reported that he underwent placement of a spinal cord stimulator which had provided some relief, but that he continued to experience low back, left hip and leg pain rated 6/10. Claimant further reported undergoing a prior MRI and prior transforaminal epidural steroid injections, facet injections and radiofrequency ablation. Dr. Siegel noted a normal examination of the left lower extremity, with the exception of some sensory changes in the lateral aspect of the left leg. Examination of the back was normal other than bilateral lumbosacral tenderness, left greater than right.

9. Dr. Siegel's impression was: 1) CRPS, currently being treated somewhat with a spinal cord stimulator; 2) left lower extremity radiculitis/radiculopathy; and 3) lumbosacral spondylosis. Regarding a treatment plan, Dr. Siegel wrote,

> There is nothing further to do as far as his complex regional pain syndrome. I told him that we could attempt reprogramming to maybe get some better coverage. I also told him that if we could get his MRI I could adjust just his low back with possible repeat facet injections and or radiofrequency procedures. With regard to the hip and some of the distal lower extremity pain, it looks like he has responded favorably to transforaminal injections in the past. I just need to see where to inject when I get his MRI.

(Cl. Ex. 7, p. 28)

10. An MRI of the lumbar spine was obtained on September 16, 2020. The impression was multilevel spondylitic changes, with potentially the most significant at

L4-L5 with mild canal stenosis moderate bilateral neural foraminal narrowing and bilateral lateral recess stenosis.

11. Upon reviewing the September 16, 2020 MRI, Dr. Siegel recommended transforaminal injections at L3, L4 and L5 for back, hip and leg pain. Dr. Siegel administered the transforaminal injections at L3, L4 and L5 on October 20, 2020. Dr. Siegel's medical note from October 20, 2020 notes the clinical impression/reason for procedure as low back and left hip pain. Indications listed were: degenerative disc disease/herniated nucleus pulposus lumbar spine, stenosis, and left lower extremity radiculitis. Immediately after the procedure, Claimant reported a reduction in pain from 7/10 to 0/10.

12. Claimant saw Dr. Allard on November 2, 2020 for an unrelated chest wall contusion. Dr. Allard's assessment listed (1) Chest wall contusion; (2) Hypertension; (3) Neuropathy; (4) Anxiety; (5) Restless leg syndrome; and (6) Spinal stenosis of the lumbar region with neurogenic claudication. Under spinal stenosis, Dr. Allard noted "Encourage to lose more weight before considering surgery. Will continue injections with Dr. Siegal (*sic*)." (Cl. Ex. 6, p. 22).

13. On February 26, 2021, Claimant contacted Dr. Siegel's office reporting that his back and leg pain had returned. Claimant requested another injection. Dr. Siegel recommended repeat injections, which have been denied by Respondents as not related to the industrial injury.

14. At the request of Respondents, Katherine F. McCranie, M.D. performed an independent records review of Claimant and issued a report dated May 22, 2021. Dr. McCranie previously performed an Independent Medical Examination ("IME") of Claimant on March 5, 2019 and performed additional records reviews on July 14, 2019 and February 3, 2020 in connection with prior hearings/issues on this claim. Dr. McCranie has reviewed Claimant's records dating back to 2002.

15. Dr. McCranie opined that the transforaminal injections recommended by Dr. Siegel are not related to Claimant's October 19, 2007 work injury. Dr. McCranie explained that there is no subjective or objective connection between Claimant's work injury and his current lumbar spine complaints. She testified that Claimant's low back was not a condition included in his work-related diagnoses when he was placed at MMI on April 13, 2011 and that, at the time of the work injury and throughout the course of treatment up to MMI, there were no complaints of low back pain. Dr. McCranie testified that the medical records documented a lumbar injury in March 2006 prior to the work injury, for which Claimant treated with chiropractic care through late March 2006. Subsequent to being placed at MMI for the October 19, 2007 work injury but prior to Claimant's reports of back pain to Dr. Allard in June 2019, Dr. McCranie noted three references to lumbar symptomatology: (1) A July 27, 2011 complaint to Dr. Wunder of a knot in his back after undergoing a lumbar sympathetic block. The knot was noted to be improving; (2) May 18, 2015 complaints Dr. Thayer of back pain and abdominal pain related to a postoperative visit after an appendectomy and (3) a July 2, 2018 complaint

of back pain to PA-C Ford secondary to a recent non work-related lifting incident. Dr. McCranie noted complaints of left hip pain between 2014 and 2019.

16. Dr. McCranie explained that, although Claimant reported to Dr. Siegel and Dr. Fillmore undergoing prior epidural steroid injections, facet procedures, and medial branch blocks, the records did not contain any documentation that such procedures were actually performed, other than the transforaminal epidural steroid injections administered by Dr. Siegel in October 2020. Dr. McCranie concluded that the injection performed by Dr. Siegel did provide a diagnostic and therapeutic response, but that the response was for a condition unrelated to the work injury.

17. Claimant testified at hearing that he has undergone transforaminal epidural steroid injections, facet injections, and radiofrequency ablation in the past, as he reported to Dr. Siegel on July 20, 2020. The evidence offered at hearing does not document such procedures were performed, other than the transforaminal epidural steroid injection performed by Dr. Siegel on October 20, 2020. Claimant testified that the spinal cord stimulator did not completely address swelling or tenderness in his left lower extremity, nor did it provide relief from numbness in his left foot. Claimant testified that the October 20, 2020 was in the same location as prior injections and provided similar relief to the relief he experienced from prior injections.

18. Claimant's Exhibit 3 consists of two photographs of Claimant's left foot taken by Claimant on June 14, 2021. Claimant's left foot appears swollen and discolored. He testified that the swelling and discoloration appearance of his foot was because of the denial of the transforaminal epidural steroid injections. He further testified that the injections permit him to do perform his work as a truck driver and makes the activities of daily living more functional. Claimant desires the second injection recommended by Dr. Siegel and believes the injections are related to his work injury.

19. Dr. McCranie testified by deposition as a Level II accredited expert in physical medicine and rehabilitation and pain medicine. Dr. McCranie testified consistent with her report and continued to opine that the recommended transforaminal epidural steroid injections are not related to Claimant's work injury. She testified that Claimant did not sustain an injury to the lumbar spine, the injury did not cause the pathology seen on Claimant's MRI, and, throughout the claim, the lumbar spine has not been considered a part of Claimant's work injury. She reiterated that she did not see any evidence in the medical records of any epidural steroid injections, facet injections or radiofrequency ablations prior to October 20, 2020. Dr. McCranie testified that Claimant did previously undergo lumbar sympathetic blocks to treat his CRPS. She explained that a lumbar sympathetic block is completely different from a lumbar epidural steroid injection, noting the former is administered to the lumbar sympathetic chain outside of the vertebrae to treat sympathetically mediated pain and CRPS, while the latter is injected in between the vertebrae into the epidural space to decrease inflammation and treat radicular-type pain. The last lumbar epidural steroid injection Claimant received was in 2013.

20. Dr. McCranie testified that Claimant’s “excellent” diagnostic and therapeutic response to the October 20, 2020 transforaminal epidural steroid injection meant that Claimant does have lumbar radicular symptoms, but that those symptoms are due to a completely separate medical issue unrelated to Claimant’s October 19, 2007 work-related ankle injury. She explained that there is no mention in Dr. Siegel’s records that he recommended the injections for the purpose of treating Claimant’s CRPS, and that Claimant would not get any relief for his CRPS from the recommended lumbar transforaminal epidural steroid injection, as the injection is not performed to treat CRPS. Regarding the June 14, 2021 photographs, Dr. McCranie explained that the photos showed venous insufficiency and possibly some mottling due to CRPS. She testified that there is no causal link between the requested injections and the appearance of Claimant’s foot.

21. The ALJ finds the testimony of Dr. McCranie, as supported by the medical records, more credible and persuasive than Claimant’s testimony.

22. Claimant failed to prove it is more likely than not the transforaminal epidural steroid injections recommended by Dr. Siegel are causally related to the October 19, 2007 work injury.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers’ Compensation Act of Colorado (the “Act”), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness’ testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Medical Treatment

A claimant is required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. See § 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The need for medical treatment may extend beyond the point of MMI where claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003); *Hobirk v. Colorado Springs School District #11,* W.C. No. 4-835-556-01 (ICAO, Nov. 15, 2012).

In cases where the respondents file a FAL admitting for ongoing medical benefits after MMI they retain the right to challenge the compensability, reasonableness, and necessity of specific treatments. *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003); *Oldani v. Hartford Financial Services,* W.C. No. 4-614-319-07, (ICAO, Mar. 9, 2015). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School District No.11*, W.C. No. 3-979-487, (ICAO, Jan. 11, 2012); *Ford v. Regional Transportation District,* W.C. No. 4-309-217 (ICAO, Feb. 12, 2009. The question of whether the claimant has proven that specific treatment is reasonable and necessary to maintain her condition after MMI or relieve ongoing symptoms is one of fact for the ALJ. *See Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

Claimant argues that the repeat requested transforaminal epidural injection at L3, L4 and L5 are causally related to his work injury, contending that the injections are being used to treat the numbness, swelling and pain related to his CRPS diagnosis. The preponderant credible and persuasive evidence does not support Claimant's contention.

The records indicate Dr. Allard referred Claimant to Dr. Siegel for back pain and radicular symptoms associated with Claimant's low back, which have not been diagnosed or treated at part of this claim. In her June 27, 2019 medical note, Dr. Allard specifically stated she was referring Claimant to Dr. Siegel for evaluation of possible cryotherapy for Claimant's back pain. When Dr. Allard noted on November 2, 2020 that Claimant would continue injections with Dr. Siegel, this was in reference to Claimant's lumbar spinal stenosis with neurogenic claudication.

At his initial evaluation, Dr. Siegel diagnosed Claimant with CRPS, left lower extremity radiculitis/radiculopathy, and lumbosacral spondylosis. He specifically stated that there was "nothing further to do" as far as Claimant's CRPS, which contradicts Claimant's assertion that Dr. Siegel's recommendation for transforaminal epidural steroid injections is to treat Claimant's CRPS. In his July 20, 2020 medical note, Dr. Siegel suggested transforaminal injections in reference to Claimant's hip and distal lower extremity pain. His recommendation was based, at least in part, on Claimant's reports that he had undergone transforaminal injections previously and responded favorably. Dr. McCranie performed a comprehensive review of Claimant's medical records dating back to 2002 and saw no documentation of prior transforaminal injections. No other records were offered into evidence to the contrary. The indications listed for the transforaminal injections performed on October 20, 2020 were degenerative disc disease/herniated nucleus pulposus lumbar spine, stenosis, and left lower extremity radiculitis. Dr. McCranie credibly testified that those conditions are not related to the October 19, 2007 work injury.

Dr. McCranie further credibly explained that the recommended transforaminal injection is completely different from the lumbar sympathetic blocks Claimant had previously received under this claim to treat his CRPS. She credibly explained that the recommended transforaminal injection is to treat radicular-type pain, which is unrelated to the work injury. Claimant last received a lumbar sympathetic block in 2013. To the extent Claimant suffers from multiple symptoms of his left lower extremity as the result of multiple conditions, it is understandable Claimant would associate relief he received from the transforaminal injection to that from the lumbar sympathetic block. Nonetheless, the preponderant evidence does not establish that the recommended transforaminal epidural steroid injections are reasonably necessary to maintain or relieve ongoing symptoms that are causally related to the October 19, 2007 work injury.

ORDER

1. Claimant failed to prove by a preponderance of the evidence the transforaminal epidural steroid injections at L3, L4 and L5 recommended by Dr. Siegel, M.D. are reasonable, necessary and related to Claimant's October 19, 2007 industrial injury. Claimant's claim for benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 13, 2021

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Are Respondents entitled to an offset for net LTD benefits referenced in the December 10, 2020 letter from Employer's LTD carrier?

- At hearing, Claimant requested an increase in the AWW based on the COBRA cost to continue Claimant's heath insurance. In his post-hearing brief, Claimant agrees the issue is "moot" because Respondents already increased the AWW and Claimant cannot receive TTD benefits in excess of the maximum compensation rate.

FINDINGS OF FACT

1. Claimant suffered an admitted low back injury on May 5, 2020.

2. Insurer filed a General Admission of Liability (GAL) dated August 31, 2020, admitting to an average weekly wage (AWW) of $2,000, and a closed period of temporary total disability (TTD) benefits at the maximum TTD rate of $1,022.56.

3. Employer provides long-term disability (LTD) insurance for its employees through Reliance Standard Life Insurance Company (Reliance). Employer paid 100% of the premiums for the LTD policy.

4. The LTD policy has a dollar-for-dollar offset if Claimant becomes eligible for workers' compensation benefits. Specifically, the LTD benefit amount is calculated by "subtact[ing] . . . all benefits (except medical or death benefits) . . . an insured is eligible to receive because of his/her Total Disability under . . . Workers' Compensation Laws."

5. On December 10, 2020, Reliance sent Claimant a letter stating he was approved for LTD benefits. Because of his high pre-injury wage, Claimant qualified for the maximum monthly LTD benefit of $5,000. However, his benefits were subject to deductions, including an offset for workers' compensation benefits. The letter calculated Claimant's net LTD benefits as $2,162.24:

Maximum monthly benefit:	$5,000.00
Social Security Tax:	-$145.16
Medicare Tax:	-$33.95
Workers' Compensation Offset:	-$2,658.65
Monthly benefit:	$2,162.24
Net Benefit Payable for the period from 11/29/20 to 12/29/20	**$2,162.24**

6. The December 10 letter did not explain how the “Workers’ Compensation Offset” of $2,658.65 was calculated, or why it was less than the $4,431.09 that would otherwise be expected based on the policy language mandating an offset for “all” TTD benefits ($1,022.56 x 52 / 12 = $4,431.09).

7. Insurer filed a revised GAL reducing Claimant’s TTD befits to $523.58 per week effective December 11, 2020 based on Claimant’s receipt of $498.88 per week in LTD benefits. The reduction was based the following calculation: $2,162.24 LTD x 12 months / 52 weeks = $498.98; $1,022.56 TDD - $498.98 LTD = $523.58. Respondents reasoned that because Reliance was only taking a partial offset for TTD, they could offset the remaining balance of LTD benefits.

8. On May 12, 2021, Insurer filed a new GAL increasing Claimant’s AWW to $2,683.80, effective April 1, 2020, to account for the COBRA cost of continuing Claimant’s health insurance. The GAL did not increase the TTD benefit rate because “Claimant’s disability rate [is] already capped at maximum so no additional payment due.”

9. The preponderance of persuasive evidence shows the Reliance policy “terms” preclude LTD benefits on a dollar-for-dollar basis to the extent Claimant is eligible for TTD benefits.

CONCLUSIONS OF LAW

Section 8-42-103(1)(d)(I) provides:

> (d)(I) In cases where it is determined that periodic disability benefits are payable to an employee under a pension or disability plan financed in whole or in part by the employer, . . . the aggregate benefits payable for temporary total disability, temporary partial disability, and permanent total disability pursuant to this section shall be reduced, but not below zero, by an amount equal as nearly as practical to the employer pension or disability plan benefits, with the following limitations:
>
>> (A) Where the employee has contributed to the employer pension or disability plan, benefits shall be reduced under this section only in an amount proportional to the employer’s percentage of total contributions to the employer pension or disability plan.
>>
>> (B) Where the employer pension or disability plan provides by its terms that benefits are precluded thereunder in whole or in part if benefits are awarded under articles 40 to 47 of this title, the reduction provided in this paragraph (d) shall not be applicable to the extent of the amount so precluded.

Here, there is no dispute Employer provided a disability plan and paid 100% of the premiums. The only issue involves the applicability of subsection (B).

The statutory offset provision is intended to prevent a claimant from receiving a “double recovery” where the employer has purchased both a disability plan and workers' compensation insurance to compensate for a work-related injury. *Spanish Peaks Mental*

Health Center v. Huffaker, 928 P.2d 741 (Colo. App. 1996). Benefits are coordinated by allowing an offset where a claimant is concurrently eligible for benefits under both policies. However, the General Assembly made workers' compensation benefits the "primary" coverage and allowed disability plans the first opportunity to take an offset. To that end, a workers' compensation carrier is not entitled to "any" offset where the LTD policy provides a dollar-for-dollar offset against workers' compensation benefits. *E.g., Madsin v. Gardner-Denver-Cooper Industries, Inc*., 689 P.2d 714 (Colo. App. 1984); *Gonzales v. City of Fort Collins*, W.C. No. 4-365-220 (August 5, 2004).

Respondents' position in this case is based on the December 10, 2020 letter from Reliance that ostensibly takes only a partial offset for Claimant's TTD benefits. Respondents acknowledge the LTD policy provides a dollar-for-dollar offset, and they concede there is no evidence to explain "why Reliance is offsetting only $2,658.65 in workers' compensation benefits." But Respondents argue the LTD policy language is "irrelevant because the statute permits Respondent an offset in 'an amount equal as nearly as practical to the employer pension or disability plan benefits.'"

The problem with Respondents' argument is that the exception in subsection (B) overrides the general offset provision in subsection (d)(I). And the applicability of subsection (B) explicitly hinges on the "terms" of the LTD plan ("where the employer pension or disability plan ***provides by its terms*** . . . .") (Emphasis added). Black's Law Dictionary (7th Ed.) defines the word "terms" as "provisions that define an agreement's scope, conditions or stipulations." This definition comports with the ALJ's general understanding of the word. The policy "terms" are the sole touchstone for applicability of the subsection (B) exception, with no reference to the amount a claimant receives from the LTD plan. Thus, the *policy language* is dispositive.

The only persuasive evidence in the record regarding the "terms" of the LTD policy is in Exhibit 12. The policy unequivocally states the monthly LTD benefit is calculated by "subtract[ing] . . . all benefits . . . under Workers' Compensation Laws." There is no persuasive evidence of any endorsement, rider, or other "terms" that modify or limit the workers' compensation offset provision of the policy. The December 10, 2020 letter is merely an explanation of benefits and cannot reasonably be considered part of the "terms" of the policy.

Moreover, there is no discernible relationship between the $2,658.65 "workers' compensation offset" outlined in the December 10 letter and the TTD benefits for which Claimant is eligible. The parties offered no evidence or theory to explain Reliance's calculation, and the ALJ cannot "reverse engineer" the stated offset using any other data in the evidentiary record. Given the clear policy language requiring a dollar-for-dollar offset, and absent any persuasive evidence to reconcile the partial offset reflected in the December 10 letter, the most probable inference this ALJ can draw is that Reliance simply made a mistake.

By paying Claimant $2,162.24 per month in LTD benefits, Reliance appears to be creating an overpayment under the express terms of its policy. But Respondents cannot take an offset based on an overpayment of LTD. *Gonzales v. City of Fort Collins*, *supra* ("the mere fact that the claimant received LTD benefits in excess of what he was entitled to receive under the policy does not mean [the respondent] is entitled to claim those payments as an offset again liability for workers' compensation"). Nor are Respondents entitled to an offset for any amounts Reliance paid in excess of workers' compensation benefits. *Gonzales v. City of Fort Collins*, *supra*.

As found, the preponderance of persuasive evidence shows the Reliance policy "terms" preclude LTD benefits on a dollar-for-dollar basis "to the extent" Claimant is eligible for TTD benefits. Accordingly, Respondents are not entitled to an offset.

ORDER

It is therefore ordered that:

1. Insurer shall pay Claimant TTD benefits at the rate of $1,022.56 per week, without offset for LTD benefits, commencing December 11, 2020 and continuing until terminated by law. Insurer may take credit for TTD benefits already paid commencing December 11, 2020.

2. Insurer shall pay Claimant statutory interest of eight percent (8%) per annum on all benefits not paid when due.

3. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: August 16, 2021

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that on August 20, 2020, he suffered an injury arising out of and in the course and scope of his employment with the employer.

If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that he is entitled to authorized, reasonable, necessary, and related medical benefits.

If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that he is entitled to temporary total disability (TTD) benefits for the period of August 20, 2020 through April 10, 2021.

If the claim is found compensable, what is the claimant's average weekly wage (AWW)?

FINDINGS OF FACT

1. The employer operates a restaurant. On August 5, 2020, the claimant began working for the employer as a server and bartender. The claimant testified that he arrived before the restaurant opened and worked after the restaurant closed. His job duties included morning prep work, stocking the bar area, cleaning the restaurant tables and chairs, taking customer orders (both by telephone and in person), preparing customer drinks, and serving food. The claimant also testified that the restaurant opened at 11:00 a.m. and closed around 10:00 or 10:30 p.m.

2. At the end of his work day on March 20,2020, the claimant was taking trash outside to the dumpster. When the claimant re-entered the restaurant, the door slammed on his left hand, smashing his left third finger.

3. The claimant immediately told the manager, Mr. L[Redacted], that he had injured his left hand. Mr. L[Redacted] assisted in bandaging the claimant's hand at the restaurant. Mr. L[Redacted] then drove the claimant for medical treatment at an emergency room in Steamboat Springs, Colorado.

4. The claimant testified that while in the emergency department he received stitches on his left middle finger and injections to his left hand. The claimant understood that he was to keep his left hand out of water, and not shake that hand. The claimant understood that he was to return to have the stitches removed in three to four weeks.

5. A WC-164 form was entered into evidence related to the treatment the claimant received on August 20, 2020. That form indicates that the claimant underwent

an x-ray, removal of the nail on his left third finger, bandaging, and a splint. The medical provider listed the claimant's work restrictions as "must wear gloves on [left] hand". These work restrictions were in effect from August 20, 2020 until August 20, 2020. The medical provider opined that the claimant would reach maximum medical improvement (MMI) on August 30, 2020.

6. The claimant provided receipts for prescriptions filled at a Walgreens in Steamboat Springs, Colorado. The total amount paid for the prescriptions was $51.42.

7. The claimant also provided a receipt for $200.00 paid to Wellness and Care Medical, Inc. on August 28, 2020. The ALJ notes that the address for Wellness and Care Medical, Inc. is located in City of Industry, California.

8. Medical records entered into evidence show that on August 28, 2020, the claimant sought treatment at Wellness and Care Medical, Inc. for his left middle finger. That same record indicates that there was no visible swelling and the claimant was to return for a new dressing in two weeks.

9. The claimant testified that he has not worked for the employer since August 20, 2020. In addition, he had not worked for any other employer between August 20, 2020 and April 10, 2021. The claimant also testified that he was unable to work during that time because he could not touch water with his left hand, he could not perform bartender duties, and he was unable to engage in cleaning duties.

10. Mr. L[Redacted] testified that the doctor instructed the claimant not to work for one week. After one week, the claimant did not return to work because he traveled to California.

11. The claimant is left hand dominant. He testified that his current left hand symptoms include difficulty with chopsticks, forks, and scissors. In addition, he is unable to hold heavy objects with his left hand.

12. The claimant asserts that his average weekly wage (AWW) while working for the employer was $1,290.00. The claimant provided testimony regarding his calculations. The claimant estimates that he worked 85 hours per week for the employer. In 2020, Colorado's minimum wage was $12.00 per hour for the first 40 hours, and $18.00 per hour for the remaining 45 hours of overtime (hours over 40 hours at time and one-half).

13. The claimant also testified that he received a check for $1,000.00 from the employer for his earnings. That is the only payment the claimant has received from the employer.

14. The employer provided conflicting testimony regarding the claimant's job duties, wages, and hours. Mr. L[Redacted] testified that the claimant was hired on a trial basis for one month. The employer agreed to pay the claimant $2,000.00 per month, plus 10 percent of tips. In addition, the employer provided the claimant with a place to live. The employer also provided the claimant with three free meals per day, even on the claimant's day off.

15. Mr. L[Redacted] testified that the claimant worked at the restaurant for 13 days. Mr. L[Redacted] also testified that the building where the claimant lived has a monthly rent (plus utilities) of $4,800. In addition, six people live in that building.

16. Mr. L[Redacted] testified that the meals the claimant was provided have a value of between $15.00 and $20.00 each. Mr. L[Redacted] testified that the claimant was paid his share of the tips at the end of each shift. Mr. L[Redacted] estimated that while the claimant worked for the employer, the claimant received tips totaling between $500.00 and $800.00.

17. Based upon documents entered into evidence, on August 20, 2020, the employer had a General Liability Insurance policy. That policy did not include workers' compensation coverage.

18. The ALJ credits the claimant's testimony regarding work duties and his mechanism of injury. The ALJ also credits the medical records. The ALJ finds that the claimant has demonstrated that it is more likely than not that on August 20, 2020 he injured his left middle finger while working for the employer.

19. With regard to medical treatment, the ALJ credits the claimant's testimony and the medical records. The ALJ finds that the claimant has demonstrated that it is more likely than not that treatment the claimant received at the emergency department on August 20, 2020 and the prescriptions filled at Walgreens constitutes reasonable medical treatment necessary to cure and relieve the effects of the work injury.

20. The ALJ finds that the claimant has failed to demonstrate that the medical treatment he received from Wellness and Care Medical, Inc. in California was authorized medical treatment. The authorized medical provider was the emergency department on August 20, 2020. On that date, the respondent, through Mr. L[Redacted], provided the claimant with medical treatment. The claimant's decision to travel to seek additional treatment in California was outside any chain of authorization. Therefore, even if the treatment in California was reasonable and necessary, the ALJ finds that it was not authorized medical treatment.

21. With regard to temporary total disability (TTD) benefits, the ALJ credits the medical records and the testimony of Mr. L[Redacted] on this issue. The ALJ finds that the claimant has demonstrated that it is more likely than not that, as a result of his work injury, he was unable to work from August 20, 2020 through August 30, 2020. The claimant is entitled to TTD benefits during that time. The ALJ is not persuaded that the claimant's August 20, 2020 injury resulted in an inability to work between August 31, 2020 and April 9, 2021.

22. The ALJ credits the testimony of Mr. L[Redacted] regarding the claimant's wages and fringe benefits. The ALJ finds while employed with the employer, the claimant had earnings, tips, and fringe benefits of housing and meals. Based upon the information provided, the ALJ calculates the claimant's AWW to be $1,286.14. This calculation was reached as follows:

a. $2,000.00 per month, times 12 months is equal to annual wages of $24,000.00 divided by 52 weeks in a year for a weekly average of $461.54;

b. Housing costs of $4,800.00 per month divided among six people equals a monthly “rental” value of $800.00 times 12 months in a year and divided by 52 weeks for a weekly average of $184.62;

c. 21 meals per week valued at $15.00 per meal equals a value of $315.00;

d. Tips of $650.00[1] over a two week period (13 days) results in weekly tips of $325.00;

e. $461.54 + $184.62 + 315.00 + 325.00 equals an AWW of $1,286.14.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers’ Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers’ Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers’ Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ’s factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness’s testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a pre-existing medical condition

[1] The ALJ notes that the tipped amount is estimated to have been between $500.00 and $800.00. The ALJ averages these numbers and uses $650.00 in these calculations.

does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *See H & H Warehouse v. Vicory, supra.*

5. As found, the claimant has demonstrated, by a preponderance of the evidence, that on August 20, 2020, he suffered an injury arising out of and in the course and scope of his employment with the employer. As found, the medical records and the claimant's testimony are credible and persuasive on this issue.

6. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

7. As found, the claimant has demonstrated by a preponderance of the evidence, that the medical treatment he received on August 20, 2020 and prescription he filled at Walgreens were reasonable, necessary, and related medical treatment. As found, the medical records and the claimant's testimony are credible and persuasive on this issue.

8. Section 8-43-404(5)(a), C.R.S. grants employers the initial authority to select the claimant's authorized treating physician (ATP). However, in a medical emergency a claimant need not seek authorization from her employer or insurer before seeking medical treatment from an unauthorized medical provider. *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777, 781 (Colo. App. 1990). A medical emergency affords an injured worker the right to obtain immediate treatment without the delay of notifying the employer to obtain a referral or approval. Once the emergency is over the employer retains the right to designate the first "non-emergency" physician. *Bunch v. Indus. Claim Appeals Office of State of Colorado*, 148 P.3d 381, 384 (Colo. App. 2006); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

9. As found, the claimant has failed to demonstrate, by a preponderance of the evide, that the medical treatment he received in California was authorized medical treatment. As found, even if that treatment was reasonable and necessary, the ALJ finds that it was not authorized medical treatment.

10. To prove entitlement to temporary total disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a) C.R.S., *supra*, requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage

earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that the claimant establish physical disability through a medical opinion of an attending physician. Claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

11. As found, the claimant has demonstrated, by a preponderance of the evidence, that as a result of his work injury, he was unable to work from August 20, 2020 through August 30, 2020. As found, the claimant is entitled to TTD benefits during that time. As found, the medical records and the testimony of Mr. L[Redacted] are credible and persuasive on this issue.

12. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that as a result of his work injury, he was unable to work between August 31, 2020 and April 10, 2021. As found, the claimant is not entitled to TTD benefits during that time. As found, the medical records and the testimony of Mr. L[Redacted] are credible on this issue.

13. The ALJ must determine an employee's AWW by calculating the monetary rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office*, 916 P.2d 539 (Colo. App. 1995).

14. Section 8-42-102(2), C.R.S. requires the ALJ to base claimant's AWW on his earnings at the time of the injury. Under some circumstances, the ALJ may determine the claimant's TTD rate based upon his AWW on a date other than the date of the injury. *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). Section 8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a fair approximation of claimant's wage loss and diminished earning capacity. *Ebersbach v. United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO, May 7, 2007).

15. As found, the claimant's average weekly wage (AWW) for this claim is $1,286.14 (resulting in a TTD rate of $977.47). As found, Mr. L[Redacted]'s testimony on this issue is credible and persuasive.

ORDER

It is therefore ordered:

1. On August 20, 2020, the claimant suffered an injury arising out of and in the course and scope of his employment with the employer.

2. The respondent shall pay for the medical treatment the claimant received at the emergency department on August 20, 2020.

3. The respondent shall reimburse the claimant’s out-of-pocket expense of $51.42 for prescriptions.

4. The claimant’s request for reimbursement for payment made to an unauthorized medical provider (Wellness and Care Medical, Inc.) is denied and dismissed.

5. The respondents shall pay the claimant temporary total disability (TTD) benefits for the period of August 21, 2020 through August 30, 2020.

6. The claimant’s request for TTD benefits from August 31, 2020 through April 10, 2021 is denied and dismissed.

7. The claimant’s average weekly wage (AWW) for this claim is $1,286.14 (resulting in a TTD rate of $977.47).

8. The respondents shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

9. In lieu of payment of the above compensation and benefits to the claimant, the respondent shall:

> a. Within ten (10) days of the date of service of this order, deposit the sum of $1,028.89 with the Division of Workers' Compensation, as trustee, to secure the payment of all unpaid compensation and benefits awarded. The check shall be payable to: Division of Workers' Compensation/Trustee. The check shall be mailed to the Division of Workers' Compensation, 633 17th Street, Suite 400, Denver, Colorado 80202, Attention: Gina Johannesman, Trustee; **OR**
>
> b. Within ten (10) days of the date of service of this order, file a bond in the sum of $1,028.89 with the Division of Workers' Compensation:
>
> i. Signed by two or more responsible sureties who have received prior approval of the Division of Workers' Compensation; or
>
> ii. Issued by a surety company authorized to do business in Colorado.
>
> iii. The bond shall guarantee payment of the compensation and benefits awarded.

10. The respondents shall notify the Division of Workers' Compensation of payments made pursuant to this order.

11. The filing of any appeal, including a petition to review, shall not relieve the respondents of the obligation to pay the designated sum to the trustee or to file the bond. Section 8-43-408(2), C.R.S.

Dated this 17th day of August 2021.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

ISSUES

I. Has Clamant shown, by a preponderance of the evidence, that she suffered a compensable work injury on or about January 3, 2018?

II. If such injury is compensable, has Claimant shown that the right of selection passed to her, due to Respondents' failure to timely provide a Designated Provider list?

III. If such injury is compensable, what medical treatment has Claimant shown she is entitled to receive?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

Background

1. Claimant was employed with Employer for approximately 11½ years as a bookkeeper. On January 3, 2018, Claimant reported to work a few minutes late due to a pre-scheduled doctor's appointment for right hip pain. When Claimant reported to work after her appointment, she was notified by her employer, Anthony T[Redacted], that her position was moving to Denver and that she was being laid off, effective immediately. She was advised she could box up her personal belongings and put them in her car. According to Anthony T[Redacted], Employer's business manager, she was paid for that day, plus a severance.

2. Less than an hour after being notified of her separation from the company, Claimant states she fell while walking in the parking lot while carrying the second of '6 or 7' boxes to her car. This incident was not reported to Employer when it occurred. A *First Report of Injury* was filed by Claimant's attorney on January 28, 2018. A *Notice of Contest* was filed by Respondents on February 27, 2018. Claimant filed an initial *Application for Hearing* on April 12, 2018. (Ex. A).

Initial Treatment at St. Francis Emergency Room

3. On January 5, 2018, Claimant reported to the Emergency Room at St. Francis Medical Center, complaining of pain in her "left foot, right hip, right side of her neck and shoulder" as a result of a "fall forward onto her left side and then backwards onto her right side." (Ex. I, p. 47). She had not reported her alleged injury to her employer at the time, and went to the ER on her own accord. (At hearing, Claimant admitted to chronic right hip pain with ongoing treatment and that she initially felt fine after the fall).

4. Claimant told the ER physicians "that when she fell *she did not hit her head* and denies any loss of consciousness. She has not had any ongoing neurological symptoms." (Ex. I, p. 47)(emphasis added). Claimant denied eye pain, back pain, headache, or other joint pain. *Id.* Physical examination failed to reveal any evidence of outward trauma (bruising/edema/abrasions, bleeding, etc...) to Claimant's right knee, hip, or shoulders, her head was noted as atraumatic, her neck was supple with no tenderness, and her back showed "no signs of trauma." *Id* at 47-49.

5. Imaging showed no evidence of acute trauma to Claimant's left foot or right hip. *Id* at 49. Claimant was recommended to attend her pre-scheduled right hip MRI, and noted feeling much better after a short course of pain medications. *Id* at 50. She was discharged home with a "final diagnosis" of right hip and left foot pain, without recommending further treatment or therapy related to her alleged fall. *Id*

Claimant Returns for Pain Treatment for her Hip

6. Claimant reported to her pain management specialists at Pain Management of the Rockies on January 11, 2018 for review of her complaints. (Ex. F, p. 30). Claimant complained of a subjective increase in her right pain complaints since a fall at work. *Id* Physical examination during this visit revealed no outward signs of acute trauma, Claimant's neck demonstrated normal ranges of motion, and "no acute injury" was noted after review of Claimant's right hip MRI. *Id.* She was advised to contact her employer for continuity of care.

Claimant Initially Bypasses Occupational Medicine

7. Claimant did not contact her employer; instead she sought treatment again at St. Francis ER. On January 29, 2018, (one day **after** the *First Report of Injury* was filed) Claimant presented to the St. Francis Emergency Room, with complaints of ongoing right neck and right hip pain after mechanical fall. (Exhibit I, p. 52). Neurological examination confirmed Claimant had no ongoing neurological symptoms. A review of her neurological symptoms revealed "No headache." *Id.* At this visit, again *no mention was made by Claimant of hitting her head.*

8. Further imaging (of Claimant's neck, not her head) showed no evidence of acute injury, and only early degenerative disc disease at Claimant's C4-5. *Id* at 55. Dr. Nichols believed Claimant's ongoing complaints originated from her trapezius muscles as she had no signs of a spinal injury and improved significantly with muscles relaxers. *Id.* Claimant was discharged with pain medications and recommended to continue conservative treatment with her primary care physician. *Id.*

9. On March 14, 2018, Claimant returned to the St. Francis Emergency Room, this time complaining of significant headache after a fall backwards while at work. Claimant, for the first time to St. Francis, now alleged that she struck the back of her head on asphalt but did not lose consciousness. According to the intake notes of Dr. Hakkenen, Claimant now "presents to the ED with a persistent headaches(s) since January 3rd, worse since

last night." (Ex. I, p. 57). The ER physicians immediately conducted a CT scan of Claimant's head; however, the CT scan was negative for acute abnormalities. She was prescribed medication for her headache and was released from care. *Id.*

Claimant also Treats at Concentra

10. Records show, however, that Claimant had also begun to visit Concentra, prior to her 3/14/2018 visit to St. Francis ER, *supra.* (It is also noted that neither her visits to Concentra, nor her diagnoses or treatment plan, were mentioned to the treating ER physician on 3/14/2018). The initial visit to Concentra occurred on 2/23/2018. At this visit, Claimant first indicated to any medical provider that she had hit the back of her head during this fall. (Ex. J, p. 63). It was noted by Concentra that there had been no CT during her ER trip on 1/3/2018, and ER had ruled out a concussion.

11. In the original Concentra 2/23/2018 intake notes to Fernando Ortiz, MD,[which the ALJ observes had not been carried over from some other prior record, i.e., such notes were generated on that date], under *Occupational History,* it states: "Not scheduled to work today", "Patient is satisfied with her job", and "There is support on the job" *Id.* Her *Assessment* included (only) 1. Shoulder pain, right, 2. Hip pain, right. She was to begin prescription medications and physical therapy. *Id* at 64.

12. Claimant also attended physical therapy with Concentra, on 2/23/2018, 2/27/2018, 3/1/2018, 3/2/2018, and 3/5/2018. (Ex. J). During these visits, Claimant complains of a constellation of symptoms, each time varying from the previous visit. On 2/23/2018, she reports her ankle pain is now at a 10/10. On 2/27/2018, her right hip bothers her the most. She complains in varying amounts about right sided headaches. PT notes indicate exaggerated pain symptoms, with no correlating anatomic structures. *Id* at 77.

13. Claimant attended her second, and final visit to a Concentra physician on 3/6/2018. (Ex. J, p. 67). Notes from Chad Davis, MD, indicate no change in any of her pain locations since her original fall of 1/3/2018. There were no findings on exam to suggest anything other than muscular or ligamentous injuries. *Id* at 68. She was then referred to delayed recovery.

14. On March 21, 2018, Dr. Kurz evaluated Claimant for her continued complaints of pain. (Ex. L). Claimant was observed to enter and exit the office and climb up and down from the exam table without difficulty. *Id* at 86. Dr. Kurz noted Claimant complained of "chronic, pre-existing, congenital issues resulting in reduced range of motion at bilateral shoulders, and chronic, pre-existing right hip pain, also unrelated to this claim." *Id* at 84. Physical examination revealed normal range of motion in her bilateral hips, knee, and ankles with normal sensation and strength throughout, "specifically normal exam of left foot and ankle and toes." *Id* at 86.

15. It was Dr. Kurz' opinion that Claimant had not sustained a work-injury but if she had, she had been appropriately treated and brought back to her baseline status. It was his opinion that Claimant had attained MMI (if compensable) without impairment or restriction, as she

had a normal physical exam without qualifying or ratable impairments noted. *Id* at 87.

Claimant Stops Treating at Concentra; Seeks Treatment Privately

16. Claimant subsequently withdrew her workers' compensation claim, while then attempting to pursue litigation against the policyholder for premises liability. (Ex. B). Claimant continued to seek out and receive extensive treatments from non-authorized providers starting in March 2018 and extending through April of 2021. None of this had been reported to Respondents. (Ex. E-Q).

IME by Dr. Raschbacher

17. Dr. Jeffrey Raschbacher M.D., a physician in occupational medicine, completed an IME of Claimant on June 1, 2021 and issued a report. (Ex. Q). He noted Claimant had not worked since being laid off on January 3, 2018. Claimant also advised him that her husband is disabled from a back injury and is not working. *Id* at 401. On that day, Claimant claimed her left ankle twisted on crumbled asphalt which caused her right knee to go forward and the rest of her body backward. Claimant told Dr. Raschbacher that she has experienced 18 different symptoms at one time or another as a result of the alleged fall and that all of her conditions were getting worse even now over 3.5 years later. *Id* at 400-401. She admitted to previously having 8-9/10 pain in right hip, but claimed the pain went away after an injection despite having being recommended to undergo an MRI of her right hip due to a lack of improvement. *Id.* Dr. Raschbacher noted Claimant had no issues ambulating around the examination room and gesticulating with her extremities during his IME exam.

18. After review of the medical records and physical examination and interview of Claimant he opined that it was reasonable to conclude that she had chronic pain prior to her injury claim date as she complained of low back pain, shoulder area pain, had a shoulder myofascial pain diagnosis, had several injections at the low back and hips on each side. *Id* at 409. He wrote that Claimant had complaints of numerous body part injuries since her claim over 3.5 years ago without any clear substantiating objective findings except some arthritis in the foot, which was pre-existing and not work related. *Id*. Dr. Raschbacher thought it was remarkable to note that she claimed an unwitnessed and unreported workers' compensation injury just after being laid off, but was able to continue packing numerous boxes through the same parking lot without issue.

19. Dr. Raschbacher did not believe that Claimant's report of hitting her head to him and other providers was accurate, since the ER physicians' notes during multiple visits clearly contradicted her later claims. *Id* at 409-410. He did not believe that there was any medical reason or objective support as to why she would still have the subjective degree of continually increasing symptomatology and dysfunction 3-3.5 years after an alleged fall which caused no outward signs of trauma. He concluded that he believed no such incident had occurred at all.

Dr. Raschbacher Testifies at Hearing

20. Dr. Raschbacher testified at hearing, and consistently with his IME report. He stated that if Claimant's current head complaints and symptoms were in fact due to a head injury on January 3, 2018, all medical literature and studies indicate that her symptoms would be getting better, and not worse as Claimant claimed. He believed the initial Emergency Room Visit was significant, in that it noted Claimant denied having hit her head, a neurological examination noted no headache or neurological symptoms, and physical examination failed to reveal an iota of evidence of physical trauma having occurred. He had no doubt that if Claimant mentioned having struck the back of her head on asphalt and that she had 9/10 pain in her head, she would have received a full ER work-up including CT scan.

21. Dr. Raschbacher reiterated how important it was to attempt to corroborate Claimant's subjective statements with objective findings. However, he testified that there was no objective evidence which could substantiate the conclusion that an injury occurred. However, even if the mechanism of injury as described by Claimant did occur, medically there is no explanation why her symptoms continue to get worse.

22. Dr. Raschbacher did not believe there was any evidence to support the conclusion that any of Claimant's pain complaints or conditions were aggravated or accelerated by an incident on January 3, 2018. He believed Claimant's complaints of pain after January 3, 2018 were a continuation of her pain complaints which were pre-existing to her alleged fall on January 3, 2018. He did not ultimately believe that there was a fall experienced by Claimant on January 3, 2018.

Claimant Testifies at Hearing

23. Claimant testified at hearing. Claimant alleged that as her left foot twisted in the parking lot, she was able to throw the box she was carrying into the trunk before grabbing onto her bumper but then claimed she fell backward hitting the back of her head on asphalt. Claimant stated that she had her husband take a picture of the asphalt parking lot within 3-4 days of being laid off (Ex. 13). Despite claiming to have just experienced a fall that is now producing worsening symptoms 3.5 years later, Claimant denied having experienced any pain immediately after the fall, but alleged she was bleeding from her right knee. Claimant alleged she was unable to report her alleged injury to her employer Anthony T[Redacted]; however, she admitted to shaking his hand and briefly speaking with him while he was off the phone and as she was leaving. She also indicated that she told "Ralph" that she had fallen, and thinks she told him she was bleeding. She has not worked since January 3, 2018, and is not now seeking employment. She is aware that her health insurance from Employer is no longer in effect.

24. Claimant initially stated that she first felt a headache the night after the fall. It was a 9/10. She has had right-sided headaches every day since, and they are now 'even worse'. She reported that her initial left foot pain was '6 or 7/10', but now she cannot not even walk on her left foot. Her neck pain was 9/10. It is even worse now. She had never experienced neck pain before this incident. She acknowledged some preexisting shoulder pain, but now cannot complete basic activities of daily living. Injections, physical therapy, and

muscle relaxers have not helped. Her low back now hurts constantly, and it is hard to walk down stairs. While acknowledging some preexisting hip pain, it used to be ‘every 3 or 4 months’ now, it is constant.

25. On cross-examination, Claimant stated it was ‘possible’ that her (already scheduled) 1/8/2018 MRI was to address existing hip pain. (*see* Ex. F, pp. 25-29). She could ‘not recall’ if her orthopedist had scheduled an MRI for her shoulders at a visit on 12/17/2018, since injections were not helping. (*see* Ex H, pp. 41-46). She does not remember if she had difficulty finishing up loading the rest of the boxes into her car. Claimant indicated that she first saw her PCP on January 5, 2018, who then directed her to the Emergency Room. [The ALJ is unable to identify any such report of referral from Claimant’s PCP in the records in evidence]. When asked about prior complaints of neck pain from 2016, Claimant could ‘not recall’.

26. Claimant insisted that she told the ER staff that she had 9/10 head pain on 1/3/2018 due to the fall. If they failed to address that in her treatment, then it was the ER’s mistake. She returned to the ER on 1/29/2018, whereupon she “had to have mentioned” her head pain at that visit, but could not recall specifically. She could not recall if Dr. Kurz had placed her at MMI with no further treatment; nonetheless, she never went back to him to seek any more treatment.

27. Despite successfully navigating the parking lot multiple times each work-day for 11 years without incident, Claimant acknowledged she had an unwitnessed and unreported fall within 60 minutes of being laid off from her position. She eventually admitted to undergoing active treatment for her low back, right hip, and bilateral shoulders prior to her alleged injury. Claimant claimed she hit the back of her head, which has now caused a diagnosis of a concussion, but did not even sustain a bump on her head from doing so. She denied having any immediate head pain from the fall, but then complained of having 9/10 head pain thereafter.

28. A Review of Claimant’s prior medical records show Claimant had numerous chronic and pre-existing complaints of pain and dysfunction. Starting as far back as January 2013 with right shoulder rotator cuff surgery, Claimant progressively developed pain and dysfunction, which extended into her neck, low back, right hip, and bilateral shoulders. So much so, that Claimant had a pain management specialist following her, had already attended an appointment the morning of her alleged fall, had received numerous injections less than 1 year prior, and was already recommended and scheduled to undergo an MRI of her right hip due to a failure to improve. (Ex. E, F, H).

Anthony T[Redacted] Testifies at Hearing

29. Anthony T[Redacted] testified at hearing. Mr. T[Redacted] confirmed Claimant arrived just after 8:00 am, and that he immediately notified her, along with his assistant, that she was going to be laid off. Mr. T[Redacted] explained how serious he took the responsibility of laying someone off, and denied having being on the phone while Claimant was removing her personal items. He stated he remained in the conference room. Mr.

T[Redacted] denied having observed any indication that Claimant had sustained a fall in the parking lot. He then walked Claimant out the back door and had a conversation with her. He was never notified by Claimant that she sustained a work-injury but was instead told by his insurance provider.

Nancy A[Redacted] Testifies at Hearing

30. Nancy A[Redacted] testified at hearing. She testified that Respondents appropriately provided Claimant a designated provider list pursuant to C.R.S. 8-43-404(5)(a)(I)(A) and WCRP 8-2. Claimant was initially given a designated provider list in Denver, since that is where Employer's main offices are. (*see* Ex. R). However, after discussion with Claimant's attorney, Claimant agreed on Concentra in Colorado Springs as her authorized provider. Ms. A[Redacted] testified that the last bill and request for treatment received under Claimant's workers compensation claim was on March 21, 2018. She testified that she received no further requests for treatment, or referrals to other providers, and that all treatment received after March 21, 2018 was from unauthorized providers

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002).

D. In this instance, the ALJ finds Anthony T[Redacted] and Nancy A[Redacted] to be credible and reliable in recounting what they recalled, and reasonable in the actions they took. The ALJ also finds Dr. Raschbacher's examination and conclusions, however harsh at first glance, to be compelling. As will be discussed, infra, whether for self-serving reasons, or a severe somatoform disorder, Claimant's version of events is simply not credible – not to the various medical providers, nor in her testimony.

Compensability, Generally

E. Claimant must prove by a preponderance of the evidence that he is a covered employee who suffered an injury arising out of and in the course of employment. C.R.S. § 8-41-301(1); *See*, *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett, 33 P.3d 1230* (Colo. App. 2001). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 592 P.2d 792 (Colo. 1979).

F. An injury occurs "in the course of" employment where Claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" requirement is narrower and requires claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract.

Preliminary Observation Number One

G. Assuming the falling incident as described by Claimant had occurred, and resulted in injury, it would have indeed been compensable. It occurred on Employer's parking lot, in an authorized employee parking area. As noted by Claimant, case law indicates that leaving employment under these circumstances has a sufficient nexus to the employment relationship that it would have occurred in the course and scope of employment. However, if Respondents were ever pursuing that as a defense, they are not doing so now.

Preliminary Observation Number Two

H. Once Claimant's *First Report of Injury* was actually received, there was a brief administrative error by Employer in providing a Designated Provider list. The ALJ concludes such error occurred in good faith, and for understandable reasons. The error was promptly rectified when called to Employer's attention. Even if this claim were compensable, Claimant could not show any prejudice by this brief administrative issue, and could in no way have claimed in good faith that she was somehow not bound to select from the corrected list of Colorado Springs Authorized Providers. In fact, she chose the local Concentra office anyway. And that issue is now moot.

Preliminary Observation Number Three

I. While this fall as alleged by Claimant was unwitnessed, such events often are, and through no fault of the injured worker. Either a claimant is fortunate enough to have someone standing nearby (or a video, for example) to corroborate it, or they must rely upon corroborating evidence. Such corroborating evidence, however, is usually not hard to come by. But such corroboration is totally absent here. Secondly, although Claimant was presumably familiar with the general disrepair of the parking lot, it is understandable that she still might have missed seeing the pothole, since 1) she had a box in front of her, obscuring the view of her feet, and 2) she was in a state of understandable distress, thus distracted.

Compensability, as Applied

J. Nonetheless, Claimant's credibility is severely lacking. To the extent that her version of events on scene differ from those of Mr. T[Redacted], the ALJ finds Mr. T[Redacted] to be more reliable. Claimant had a series of preexisting conditions prior to this alleged fall. She either denied them outright, or minimized them in order to pursue this claim. Her motives were fairly transparent; she was out of work, would soon lose her health insurance, is still not seeking work, and her husband is apparently on disability himself. She rolled the dice.

K. Claimant now complains that she struck her head in this incident, resulting in severe headaches. She insists that she told ER personnel about it both times, and that the ER got it wrong in failing to note it. The ALJ finds this claim to be not merely uncorroborated, but outrageous. Dr. Raschbacher's analysis is persuasive. There is no way the ER would allow this allegation of a head injury to go untreated. Twice. They would also not fail to note blood on her knee from this alleged fall. And the ALJ also finds, in accordance with Dr. Raschbacher, that if Claimant's injuries occurred as she described, her symptoms would get better over time. Instead, she alleges that they got *worse* – not merely one symptom, but *all of them.* This is simply highly medically improbable.

L. For reasons not entirely clear, when Claimant first presented to Concentra, she cited an ongoing, satisfactory, and supportive work environment. It is possible Claimant believed she needed to remain employed to maintain coverage. However, when it became apparent that Claimant was not going to get any traction in the Workers Compensation arena, she went back to St. Francis *emergency room,* yet again, for the same allegation, now ten weeks after the fact. And this time, for an alleged head injury, now being reported to the ER for the first time. Following protocol, St. Francis dutifully imaged her, and found nothing to corroborate her complaints. However, (and without the benefit of being advised by Claimant of her Concentra visits), subsequent medical providers have now referenced a possible concussion. Such references were made solely on Claimant's self-reporting of same. Now such references are being touted by Claimant as proof that such a diagnosis was made. As Dr. Raschbacher put it: "Garbage in, Garbage out." The ALJ concurs.

M. The ALJ does not find that Claimant fell in the parking lot, suffered minor injuries, was treated, and reached MMI in short order. Instead, the ALJ finds that Claimant never fell at all, as she has alleged. This claim is not compensable.

Medical Benefits

N. There being no nexus whatsoever between Claimant's medical complaints and a work injury, Claimant's claim for medical benefits is denied and dismissed.

ORDER

It is therefore Ordered that:

1. This claim is not compensable. Claimant's claim for Workers Compensation benefits is denied and dismissed.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. *In addition, in order to best assure prompt processing of your Petition, it is* ***highly recommended*** *that you send a copy of your Petition to Review to the Colorado Springs OAC via email at oac-csp@state.co.us.*

DATED: August 17, 2021

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that the L3-L4 and L4-L5 decompression and fusion surgery recommended by Bryan Andrew Castro, M.D. is reasonable, necessary and causally related to his August 15, 2019 industrial injury.

2. Whether Respondents have proven by a preponderance of the evidence that they are entitled to recover costs for three missed independent medical examination appointments with Brian Reiss, M.D. that were scheduled for November 4, 2020, February 3, 2021 and March 10, 2021.

FINDINGS OF FACT

1. Claimant worked for Employer as a Ramp Agent. His job duties involved loading and unloading passenger luggage and other cargo from commercial aircraft. Claimant typically moved between 60 and 90 pieces of luggage and 25 pieces of cargo per plane during his workday. He worked eight hours per day for five days each week.

2. While loading and unloading aircraft Claimant was typically inside the cargo-hold to either take luggage/cargo from the conveyor belt and stack it in the hold or remove the luggage from the hold and place it on the conveyor belt. Claimant was often on his knees while lifting and twisting during the loading and unloading process.

3. On August 15, 2019 Claimant suffered an admitted industrial injury during the course and scope of his employment with Employer. He explained that, while he was in the process of loading bags into the plane, his feet went out from under him and he landed on concrete on his back.

4. Claimant has previously experienced lower back symptoms. On August 10, 2015 Claimant was involved in a motor vehicle accident and suffered lower back pain. His symptoms continued to increase for several months.

5. By April 19, 2016 Claimant's medical providers, David Whatmore, PA-C, and Chad Prusmack, M.D. determined that he had suffered a "permanent injury to his lumbar spine as a direct result of his motor vehicle accident dated 8/10/2015." Dr. Prusmack recommended Claimant as a candidate for a surgical decompression at L3-L4 with possible non-segmental instrumentation.

6. On June 13, 2016 Dr. Prusmack determined that Claimant "had significant neurogenic claudication and a disc protrusion with stenosis at L3-L4 causing severe central canal stenosis as well as bilateral foraminal stenosis." Neurogenic claudication for Claimant involves decreased blood supply to the nerves in his lower back. The lack of

oxygen to the nerves causes pain and weakness in the legs. Dr. Prusmack recommended an L3-L4 “minimally invasive decompression” and possible non-segmental instrumentation.

7. Claimant acknowledged that, if he suffered from the same symptoms and limitations in 2016 as he does today, he would have had no choice but to undergo the surgery recommended by Dr. Prusmack. However, he emphasized that his lumbar condition was not significant enough to proceed with any type of surgery in 2016.

8. Claimant detailed that, after injection therapy for the August 10, 2015 motor vehicle accident, he returned to his normal level of function and activities. His activities included working out in the gym up to twice per day, cycling, lifting weights, hiking, attending concerts at Red Rocks Amphitheater, helping a disabled friend with moving heavy items, assisting in building a concrete patio that required lifting bags of cement weighting 100 pounds, and walking four to five hours at a time. Claimant remarked that he performed the preceding activities between June 2016 and his August 15, 2019 industrial accident.

9. Sander Orent, M.D. testified that pain diagrams completed in 2016 reflected that Claimant was experiencing radicular symptoms down his lower extremities that were “quite telling.” He reasoned that any claudication Claimant was experiencing in 2016 was transient and resolved with injection therapy. Dr. Orent also noted that Claimant did not undergo medical treatment for his lower back between June 2016 and his work injury on August 15, 2019.

10. On September 10, 2019 Claimant underwent a lumbar MRI for his August 15, 2019 industrial injury. The MRI revealed disc bulging at the L3-L4 and L4-L5 levels of Claimant’s lumbar spine. The L4-L5 herniation included extruded disc material. The imaging also showed severe stenosis at the L3-L4 and L4-L5 levels.

11. On September 12, 2019 Claimant was evaluated by Stephen F. Pehler, M.D. for his August 15, 2019 industrial injury. Claimant reported severe lower back pain, bilateral buttock, and lower extremity pain. He also noted that his symptoms were worsening with increasing numbness and lower extremity weakness. Dr. Pehler remarked that Claimant’s lumbar MRI demonstrated a disc herniation as well as severe stenosis at L4-L5 and moderate stenosis at L3-L4. He diagnosed Claimant with: 1) lumbar spondylosis with myelopathy; 2) lumbar spondylolisthesis; 3) intervertebral disc stenosis of the neural canal of lumbar region; and 4) lower back pain. Due to the objective diagnostic findings and Claimant’s symptoms, Dr. Pehler discussed lumbar surgery in the form of a decompression at the L3-L5 levels with a fusion at the L4-L5 level.

12. Following his evaluation with Dr. Pehler, Claimant began treatment with Authorized Treating Physician (ATP) Bryan Andrew Castro, M.D. on October 18, 2019. Dr. Castro reviewed Claimant’s medical records and performed a physical examination. He assessed Claimant with lumbar spine pain that required further evaluation. Dr. Castro determined that Claimant had a large disc herniation “resulting in congenital narrowing resulting in severe central canal impingement at L4-L5 and to a lesser extent at L3-L4.”

Dr. Castro recommended conservative treatment with lumbar injections, but he considered surgical intervention based on Claimant’s severe stenosis. However, the injections only provided short-term benefit before Claimant’s symptoms returned.

13. Dr. Castro ultimately recommended a lumbar decompression at the L3-L4 and L4-L5 levels with a fusion at the L4-L5 level. He remarked that the decompression at L3-L4 and L4-L5 was required because of the disc herniation.

14. On June 4, 2020 Claimant underwent another lumbar spine MRI. The MRI revealed severe central canal narrowing at L3-L4 and a two mm disc protrusion. At the L4-L5 level there was moderate central canal narrowing and a three mm disc protrusion.

15. Respondents denied the surgical request after three peer reviews by Sean L. Lager, M.D. Dr. Lager reviewed Claimant’s medical records and on September 4, 2020 determined that he did not exhibit any neurological deficits on examination. He reasoned that the lack of neurological deficits rendered the surgery proposed by Dr. Castro not medically necessary.

16. After Claimant filed an Application for Hearing challenging the denied surgical request, he underwent an independent medical examination with Brian Reiss, M.D. on May 19, 2021 after he initially missed three appointments. Dr. Reiss issued reports on May 19, 2021 and June 9, 2021. The second report was completed after Dr. Reiss reviewed additional records from Claimant’s motor vehicle accident in 2015.

17. Dr. Reiss discussed Claimant’s disc herniation in his June 9, 2021 report. While both he and Dr. Castro agreed that the disc herniation was a new injury to Claimant’s lumbar spine, their differences emerged regarding whether the problem had resolved and required surgery. Dr. Reiss testified that the disc herniations at the L3-L4 and L4-L5 levels had resolved.

18. Dr. Reiss explained that the June 4, 2020 MRI demonstrated that Claimant’s extruded fragments at the L3-L4 and L4-L5 levels had resolved. Specifically, the MRI did not show the disc herniations at the L3-L4 and L4-L5 levels that had been present on the September 10, 2019 MRI. Dr. Reiss reasoned that, because the disc herniation had resolved, surgical treatment was not necessary. He explained that generally disc herniations do not usually require surgical intervention because 95% of the time they resolve non-operatively.

19. In both his June 9, 2020 report and during his testimony at hearing Dr. Reiss acknowledged that Claimant likely suffered some residual nerve pain to the left lower extremity as a result of his disc herniations. However he explained that residual nerve damage is not a surgical problem. Instead, nerve damage could be treated with neuroactive medications and Claimant’s lingering back pain could be treated through a therapy program directed at core strengthening, aerobic conditioning and stretching.

20. In contrast, Dr. Castro explained that Claimant’s presentation and symptoms following the August 5, 2019 work injury were different than after his 2015

motor vehicle accident. Dr. Castro reasoned that Claimant's current symptoms are more related to nerve impingement. In 2015 and 2016 Claimant's primary issue involved lower back pain. His symptoms resolved and there was then a lack of medical treatment for Claimant's lower back until August 15, 2019. Dr. Castro summarized that "by definition, [Claimant] got better" following his brief lower back treatment through June 2016. However, Claimant currently suffers from radicular symptoms that were not present in his lower extremities in 2015 or 2016. The lack of radicular symptoms in 2015-16 reveals that Claimant had a "distinctly different presentation" following his work injury.

21. In addition to suffering from neurogenic claudication as discussed by Dr. Orent, Dr. Castro also remarked that Claimant suffers from lumbar radiculopathy. Radiculopathy is the result of nerve root impingement and causes numbness, tingling, shooting pains and weakness down one or both legs. Claimant's radicular symptoms were confirmed by an EMG nerve conduction study.

22. Dr. Castro detailed that Claimant's pain down his legs and claudication is a lot worse now that prior to his industrial injury. He remarked that claudication substantially diminished Claimant's function because he cannot walk very far. In contrast, Claimant's previous symptoms were limited to lower back pain. Dr. Castro emphasized that the proposed decompression and fusion surgery is designed to address Claimant's neurogenic claudication, radiculopathy and structural instability that is likely to result from the L3-L4 and L4-L5 decompression. The surgery is not intended to address Claimant's generalized back pain. Dr. Castro concluded that Claimant's work injury has caused a permanent aggravation and exacerbation of his underlying, pre-existing pathology. He confirmed that Claimant satisfies all pre-surgical requirements specified in Rule 17, Exhibit 1, §G(4)(e) of the Workers' Compensation *Medical Treatment Guidelines* (*Guidelines*).

23. Dr. Castro testified the first lumbar MRI on September 10, 2019 revealed a disc herniation that constituted a new injury as a result of Claimant's August 15, 2019 work event. Claimant's large disc herniation and compression was not present in 2015. The large disc herniation compressing his nerves caused the sudden onset of Claimant's symptoms after his industrial injury. Although Claimant's second lumbar MRI on June 4, 2020 revealed that the disc herniation had become smaller, it still caused some nerve compression and symptoms. Dr. Castro thus concluded that the proposed surgery is reasonably and necessary for Claimant's August 15, 2019 industrial injury.

24. Dr. Orent testified consistently with Dr. Castro's recommendation for surgical intervention. Considering Claimant's medical records, the development of new signs and symptoms since the work injury and Claimant's high level of functionality between June 2016 and August 2019, Dr. Orent reasoned that it is more medically probable that the lumbar decompression and fusion surgery recommended by Dr. Castro is reasonable, necessary and causally related to Claimant's August 15, 2019, work injury. Notably, Claimant's work injury caused a permanent aggravation and acceleration of his underlying asymptomatic lumbar pathology.

25. Claimant has demonstrated that it is more probably true than not that the L3-L4 and L4-L5 decompression and fusion surgery recommended by Dr. Castro is reasonable, necessary and causally related to his August 15, 2019 industrial injury. Initially, on August 15, 2019 Claimant suffered an admitted industrial injury during the course and scope of his employment with Employer. He explained that, while he was loading bags onto a plane, his feet slipped out from under him and he landed on his back on concrete. In an evaluation with Dr. Pehler Claimant reported severe lower back pain, bilateral buttock, and lower extremity pain. He also noted that his symptoms were worsening with increasing numbness and lower extremity weakness. Dr. Pehler remarked that Claimant's September 10, 2019 lumbar MRI demonstrated a disc herniation and severe stenosis at L4-L5 with moderate stenosis at L3-L4. He diagnosed Claimant with: 1) lumbar spondylosis with myelopathy; 2) lumbar spondylolisthesis; 3) intervertebral disc stenosis of the neural canal of lumbar region; and 4) lower back pain. Due to the objective diagnostic findings and Claimant's symptoms, Dr. Pehler discussed lumbar surgery in the form of a decompression at the L3-L5 levels with a fusion at the L4-L5 level.

26. Claimant was involved in a motor vehicle accident in 2015 and suffered lower back pain. His symptoms were limited to his lower back and did not include radicular symptoms down his lower extremities. Claimant's condition ultimately resolved following lower back injections. Furthermore, Claimant was able to return to a high level of function following his 2016 lumbar injections that included working out in the gym up to twice per day, cycling, lifting weights, hiking, attending concerts at Red Rocks Amphitheater, helping a disabled friend with moving heavy items, assisting in building a concrete patio that required lifting bags of cement weighting 100 pounds, and walking four to five hours at a time. Claimant was capable of performing the preceding physical activities, as well as his demanding occupational activities until his August 15, 2019 work injury.

27. Dr. Castro determined that Claimant had suffered a large disc herniation "resulting in congenital narrowing resulting in severe central canal impingement at L4-L5 and to a lesser extent at L3-L4" as a result of his August 15, 2019 industrial accident. After initially recommending conservative treatment with lumbar injections, Dr. Castro proposed surgical intervention in the form of a lumbar decompression at the L3-L4 and L4-L5 levels with a fusion at the L4-L5 level. Dr. Castro testified the first lumbar MRI on September 10, 2019 revealed a disc herniation that constituted a new injury as a result of Claimant's work injury. Claimant's large disc herniation and compression was not present in 2015. The large disc herniation compressing his nerves caused the sudden onset of Claimant's symptoms after his industrial injury. Although Claimant's second lumbar MRI on June 4, 2020 revealed that the disc herniation had become smaller, it still caused some nerve compression and symptoms. Dr. Castro further detailed that Claimant's pain down his legs and claudication is much worse than prior to his industrial injury. He remarked that claudication substantially diminished Claimant's function.

28. Dr. Castro explained that the proposed surgery is reasonable and necessary medical treatment for Claimant's August 15, 2019 industrial injury. He summarized that the proposed decompression and fusion surgery is designed to address Claimant's neurogenic claudication, radiculopathy and structural instability that is likely to result from the L3-L4 and L4-L5 decompression. Dr. Castro determined that Claimant's

work injury caused a permanent aggravation and exacerbation of his underlying, pre-existing pathology. He also confirmed that Claimant satisfies all pre-surgical requirements specified in Rule 17, Exhibit 1, §G(4)(e) of the *Guidelines*. Dr. Orent testified consistently with Dr. Castro's recommendation for surgical intervention. Considering Claimant's medical records, the development of new signs and symptoms since the August 2019 work injury and Claimant's high level of functionality between June 2016 and August 2019, Dr. Orent reasoned that it is medically probable that the lumbar decompression and fusion surgery recommended by Dr. Castro is reasonable, necessary and causally related to Claimant's August 15, 2019, work injury. Notably, Claimant's work injury caused a permanent aggravation and acceleration of his underlying asymptomatic lumbar pathology.

29. In contrast, Dr. Reiss explained that the June 4, 2020 MRI demonstrated that Claimant's extruded fragments at the L3-L4 and L4-L5 levels had resolved. Specifically, the MRI did not reveal the presence of the disc herniations at the L3-L4 and L4-L5 levels that had been existed on the September 10, 2019 MRI. Dr. Reiss reasoned that, because the disc herniations had resolved, surgical treatment was not necessary. Nevertheless, although he acknowledged that Claimant likely suffered some residual nerve pain to the left lower extremity as a result of his disc herniations, his symptoms could be treated conservatively. Despite Dr. Reiss' opinion, the medical records and persuasive opinions of Drs. Castro and Orent reveal that Claimant's August 15, 2019 work injury caused a permanent aggravation and exacerbation of his underlying, pre-existing lower back pathology. Specifically, Claimant's ability to return to a high level of function prior to his August 15, 2019 industrial accident and a new disc herniation causing compression and radicular symptoms reveal that the surgery proposed by Dr. Castro is reasonable and necessary to cure or relieve the effects of Claimant's industrial injury. Notably, although Claimant's second lumbar MRI on June 4, 2020 reflected that the disc herniation had become smaller, it still caused some nerve compression and symptoms. Accordingly, Claimant has demonstrated that it is more probably true than not that his employment aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment in the form of L3-L4 and L4-L5 decompression and fusion surgery recommended by Dr. Castro.

30. Respondents have failed to prove that it is more probably true than not that they are entitled to recover costs for three missed independent medical examination appointments with Dr. Reiss. Specifically, Claimant missed three appointments with Dr. Reiss on the following dates: November 4, 2020; February 3, 2021; and finally March 10, 2021. Claimant selected Dr. Orent to accompany him to the preceding appointments. However, Claimant rescheduled the three appointments because Dr. Orent had conflicting obligations. Respondents argue they are entitled to recover the cost of three missed appointments against future indemnity payments to Claimant.

31. Claimant remarked that he did not complete the first appointment on November 4, 2020 because he and Dr. Orent had been waiting for at least 45 minutes for Dr. Reiss. However, Dr. Orent had to leave for his own appointment. Claimant explained that Dr. Orent called his attorney before leaving, and after speaking to the attorney, they ultimately left Dr. Reiss' office. Regarding the second independent medical examination

scheduled with Dr. Reiss for February 3, 2021 Claimant testified that he received a call from his attorney stating that Dr. Orent was unavailable to attend. Consequently, the appointment had to be rescheduled. Similarly, for the independent medical examination appointment scheduled with Dr. Reiss for March 10, 2021, Claimant commented that he was again instructed by his attorney that Dr. Orent was unable to attend. The appointment had to be rescheduled.

32. Respondents essentially assert that §8-43-404(1)(b)(II), C.R.S. does not limit the definition of "estimated expenses" to only those enumerated as evidenced by the word "including" in the language of the statute. Despite Respondents assertion, §8-43-404(1)(b)(II), C.R.S. does not require Claimant to reimburse them for any cancellation fees associated with missed independent medical examination appointments. To interpret §8-43-404(1)(b)(II), C.R.S. as Respondents propose would require reading words into the statute. However, courts are precluded from reading nonexistent provisions into the Act. *See Archuletta v. Industrial Claim Appeals Office*, 381 P.3d 374, 377 (Colo.App. 2016). Respondents argument fails because §8-43-404(1)(b)(II), C.R.S. is limited to recovery of lodging, travel, and hotel costs associated with attending an independent medical examination when the claimant misses the appointment. Accordingly, Respondents request to recover the cost of three missed independent medical examination appointments against future indemnity payments to Claimant is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge’s factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Proposed Lumbar Surgery

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The question of whether a particular disability is the result of the natural progression of a preexisting condition, or the subsequent aggravation or acceleration of that condition, is itself a question of fact. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Finally, the determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

5. Section 8-41-301(1)(c), C.R.S. requires that an injury be "proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment." Thus, the claimant is required to prove a direct causal relationship between the injury and the disability and need for treatment. However, the industrial injury need not be the sole cause of the disability if the injury is a significant, direct, and consequential factor in the disability. *See Subsequent Injury Fund v. Industrial Claim Appeals Office,* 131 P.3d 1224 (Colo. App. 2006); *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001).

6. As found, Claimant has demonstrated by a preponderance of the evidence that the L3-L4 and L4-L5 decompression and fusion surgery recommended by Dr. Castro is reasonable, necessary and causally related to his August 15, 2019 industrial injury. Initially, on August 15, 2019 Claimant suffered an admitted industrial injury during the course and scope of his employment with Employer. He explained that, while he was loading bags onto a plane, his feet slipped out from under him and he landed on his back on concrete. In an evaluation with Dr. Pehler Claimant reported severe lower back pain, bilateral buttock, and lower extremity pain. He also noted that his symptoms were worsening with increasing numbness and lower extremity weakness. Dr. Pehler remarked that Claimant's September 10, 2019 lumbar MRI demonstrated a disc herniation and severe stenosis at L4-L5 with moderate stenosis at L3-L4. He diagnosed Claimant with: 1) lumbar spondylosis with myelopathy; 2) lumbar spondylolisthesis; 3) intervertebral disc stenosis of the neural canal of lumbar region; and 4) lower back pain. Due to the objective diagnostic findings and Claimant's symptoms, Dr. Pehler discussed lumbar surgery in the form of a decompression at the L3-L5 levels with a fusion at the L4-L5 level.

7. As found, Claimant was involved in a motor vehicle accident in 2015 and suffered lower back pain. His symptoms were limited to his lower back and did not include radicular symptoms down his lower extremities. Claimant's condition ultimately resolved

following lower back injections. Furthermore, Claimant was able to return to a high level of function following his 2016 lumbar injections that included working out in the gym up to twice per day, cycling, lifting weights, hiking, attending concerts at Red Rocks Amphitheater, helping a disabled friend with moving heavy items, assisting in building a concrete patio that required lifting bags of cement weighting 100 pounds, and walking four to five hours at a time. Claimant was capable of performing the preceding physical activities, as well as his demanding occupational activities until his August 15, 2019 work injury.

8. As found, Dr. Castro determined that Claimant had suffered a large disc herniation "resulting in congenital narrowing resulting in severe central canal impingement at L4-L5 and to a lesser extent at L3-L4" as a result of his August 15, 2019 industrial accident. After initially recommending conservative treatment with lumbar injections, Dr. Castro proposed surgical intervention in the form of a lumbar decompression at the L3-L4 and L4-L5 levels with a fusion at the L4-L5 level. Dr. Castro testified the first lumbar MRI on September 10, 2019 revealed a disc herniation that constituted a new injury as a result of Claimant's work injury. Claimant's large disc herniation and compression was not present in 2015. The large disc herniation compressing his nerves caused the sudden onset of Claimant's symptoms after his industrial injury. Although Claimant's second lumbar MRI on June 4, 2020 revealed that the disc herniation had become smaller, it still caused some nerve compression and symptoms. Dr. Castro further detailed that Claimant's pain down his legs and claudication is much worse than prior to his industrial injury. He remarked that claudication substantially diminished Claimant's function.

9. As found, Dr. Castro explained that the proposed surgery is reasonable and necessary medical treatment for Claimant's August 15, 2019 industrial injury. He summarized that the proposed decompression and fusion surgery is designed to address Claimant's neurogenic claudication, radiculopathy and structural instability that is likely to result from the L3-L4 and L4-L5 decompression. Dr. Castro determined that Claimant's work injury caused a permanent aggravation and exacerbation of his underlying, pre-existing pathology. He also confirmed that Claimant satisfies all pre-surgical requirements specified in Rule 17, Exhibit 1, §G(4)(e) of the *Guidelines*. Dr. Orent testified consistently with Dr. Castro's recommendation for surgical intervention. Considering Claimant's medical records, the development of new signs and symptoms since the August 2019 work injury and Claimant's high level of functionality between June 2016 and August 2019, Dr. Orent reasoned that it is medically probable that the lumbar decompression and fusion surgery recommended by Dr. Castro is reasonable, necessary and causally related to Claimant's August 15, 2019, work injury. Notably, Claimant's work injury caused a permanent aggravation and acceleration of his underlying asymptomatic lumbar pathology.

10. As found, in contrast, Dr. Reiss explained that the June 4, 2020 MRI demonstrated that Claimant's extruded fragments at the L3-L4 and L4-L5 levels had

resolved. Specifically, the MRI did not reveal the presence of the disc herniations at the L3-L4 and L4-L5 levels that had been existed on the September 10, 2019 MRI. Dr. Reiss reasoned that, because the disc herniations had resolved, surgical treatment was not necessary. Nevertheless, although he acknowledged that Claimant likely suffered some residual nerve pain to the left lower extremity as a result of his disc herniations, his symptoms could be treated conservatively. Despite Dr. Reiss' opinion, the medical records and persuasive opinions of Drs. Castro and Orent reveal that Claimant's August 15, 2019 work injury caused a permanent aggravation and exacerbation of his underlying, pre-existing lower back pathology. Specifically, Claimant's ability to return to a high level of function prior to his August 15, 2019 industrial accident and a new disc herniation causing compression and radicular symptoms reveal that the surgery proposed by Dr. Castro is reasonable and necessary to cure or relieve the effects of Claimant's industrial injury. Notably, although Claimant's second lumbar MRI on June 4, 2020 reflected that the disc herniation had become smaller, it still caused some nerve compression and symptoms. Accordingly, Claimant has demonstrated that it is more probably true than not that his employment aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment in the form of L3-L4 and L4-L5 decompression and fusion surgery recommended by Dr. Castro.

Recovery of Costs

11. Section 8-43-404(1)(b)(II), C.R.S. permits the employer or insurer to recover the advanced expenses paid to the claimant for his or her lodging, travel, and hotel costs associated with attending an independent medical examination when the claimant misses the independent medical examination. There is no specific Workers' Compensation Rule of Procedure that requires the claimant to reimburse the respondents for the costs of a missed independent medical examination. *See* W.C. Rule of Procedure 8-8, 7 CCR 1101-3 (addressing independent medical examinations); *see also* W.C. Rule of Procedure 18-7(B), 7 CCR 1101-3 (addressing cancellation fees for payer-made appointments); *Safeway, Inc. v. Industrial Claim Appeals Office*, 186 P.3d 103, 105 (Colo.App. 2008) (the same rules of statutory construction apply when construing an administrative rule or regulation).

12. As found, Respondents have failed to prove by a preponderance of the evidence that they are entitled to recover costs for three missed independent medical examination appointments with Dr. Reiss. Specifically, Claimant missed three appointments with Dr. Reiss on the following dates: November 4, 2020; February 3, 2021; and finally March 10, 2021. Claimant selected Dr. Orent to accompany him to the preceding appointments. However, Claimant rescheduled the three appointments because Dr. Orent had conflicting obligations. Respondents argue they are entitled to recover the cost of three missed appointments against future indemnity payments to Claimant.

13. As found, Claimant remarked that he did not complete the first appointment on November 4, 2020 because he and Dr. Orent had been waiting for at least 45 minutes for Dr. Reiss. However, Dr. Orent had to leave for his own appointment. Claimant explained that Dr. Orent called his attorney before leaving, and after speaking to the attorney, they ultimately left Dr. Reiss' office. Regarding the second independent medical examination scheduled with Dr. Reiss for February 3, 2021 Claimant testified that he received a call from his attorney stating that Dr. Orent was unavailable to attend. Consequently, the appointment had to be rescheduled. Similarly, for the independent medical examination appointment scheduled with Dr. Reiss for March 10, 2021, Claimant commented that he was again instructed by his attorney that Dr. Orent was unable to attend. The appointment had to be rescheduled.

14. As found, Respondents essentially assert that §8-43-404(1)(b)(II), C.R.S. does not limit the definition of "estimated expenses" to only those enumerated as evidenced by the word "including" in the language of the statute. Despite Respondents assertion, §8-43-404(1)(b)(II), C.R.S. does not require Claimant to reimburse them for any cancellation fees associated with missed independent medical examination appointments. To interpret §8-43-404(1)(b)(II), C.R.S. as Respondents propose would require reading words into the statute. However, courts are precluded from reading nonexistent provisions into the Act. *See Archuletta v. Industrial Claim Appeals Office*, 381 P.3d 374, 377 (Colo.App. 2016). Respondents argument fails because §8-43-404(1)(b)(II), C.R.S. is limited to recovery of lodging, travel, and hotel costs associated with attending an independent medical examination when the claimant misses the appointment. Accordingly, Respondents request to recover the cost of three missed independent medical examination appointments against future indemnity payments to Claimant is denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for L3-L4 and L4-L5 decompression and fusion surgery as recommended by Dr. Castro is granted.

2. Respondents' request to recover the cost of three missed independent medical examination appointments against future indemnity payments to Claimant is denied and dismissed.

3. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty

(20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at https://oac.colorado.gov/resources/oac-forms*.

DATED: August 19, 2021.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Are the Widow and both Minor Children wholly or partially dependent for purposes of death benefits under the Act?

II. Did Respondents prove by a preponderance of the evidence that they are entitled to an offset for Social Security Administration (SSA) Survivors Benefits that were awarded in the amount of $1,462.00 per month to each of the Minor Dependent Children, and if so, what is the effective date of that offset.

III. Did Respondents prove by a preponderance of the evidence that they are entitled to an offset for survivor benefits awarded to the Widow of the deceased Claimant in the amount of $4,640.87 per month from the Statewide Death & Disability Plan (SWD&D) through the Fire & Police Pension Association (FPPA), and if so, what is the effective date of that offset.

PROCEDURAL HISTORY

Respondents filed an Application for Hearing on January 18, 2021 to address an adjustment of death benefits and assert any applicable offsets in light of the benefits that were subsequently awarded from other sources. In the remarks section of the Application, Respondents noted:

> "Decedent was involved in a fatal motor vehicle accident on 10/16/20 within the course and scope of his employment. Dependents have been identified .... Death benefits are currently being paid at maximum rate, per GAL filed on 10/30/20. Since the filing of GAL, additional benefits have been awarded to dependents from the Fire & Police Pension Association of Colorado (FPPA) and from SSA. Respondents are applying for hearing to obtain an order confirming the status of dependents; the offset(s) for each dependent; the calculation of benefits payable to dependents after offsets are asserted; and a recoupment schedule for any resulting overpayment. §8-41-501; § 8-41-503; § 8-42-113.5; §8-42-114; § 8-42-115; § 8-42-120; § 8-42-121; § 8-42-122."

A hearing was scheduled for May 18, 2021. The Administrative Law Judge issued a bench order allowing the hearing to be continued for up to 75 days for Claimant to obtain counsel. Respondents were to reset the case for a hearing within either 14 or 15 days from May 18, 2021.

Claimant's counsel entered his appearance on May 24, 2021.

The hearing was convened on July 16, 2021. At that time the parties agreed that they would not address the issue of the calculation of offsets, if any, and the recoupment schedule of any overpayment as that would be agreed upon by the parties.

STIPULATIONS

The parties reached multiple factual stipulations, which were read into the record as follows:

1. The deceased Claimant was employed with Employer on October 16, 2020. Claimant was a detective for Employer when he was involved in a fatal motor vehicle accident on October 16, 2020. Claimant was in the course and scope of his employment.

2. Claimant was legally married to the Dependent Widowed Claimant at the time of death and living together at their home in Commerce City with their two minor children.

3. The date of birth for the Dependent Widow is September 30, 1987. The date of birth of the Older Minor Dependent is December 10, 2016 and of the Younger Minor Dependent is February 10, 2020.

4. The parties agree that all three surviving Claimants were wholly dependent upon the deceased at the time of his death on October 16, 2020.

5. Respondents filed a General Admission of Liability (GAL) on October 30, 2020 recognizing the three dependent Claimants, and commencing death benefits at the maximum rate of $1,074.22 per week.

6. Since the filing of the GAL Respondents learned of other multiple sources of income received by Dependents including:

   a. SSA Survivors Benefits for the Older Minor Dependent Claimant in the amount of $1,462.00 per month beginning as of October 2020.

   b. SSA Survivors Benefits for the Younger Minor Dependent Claimant in the amount of $1,462.00 per month beginning as of October 2020.

   c. The Widowed Dependent was awarded Survivors Benefits by the Statewide Death and Disability Plan through the Fire and Police Pension Association of Colorado, a non-taxable benefit, as of October 17, 2020 in the amount of $4,640.87 per month.

7. The parties agree that the SSA benefits paid to the Minor Dependents is offsettable under the Act and any death benefits shall be reduced pursuant to § 8-42-114. C.R.S.

8. The parties agree that, if the Widowed Dependent Claimant remarries, this would trigger termination of benefits to the Widowed Dependent Claimant at the time of the remarriage pursuant to § 8-42-120, C.R.S.

9. The parties further agree that any benefits being paid to the Minor Dependents shall be terminated upon reaching 18 years of age unless they continue studies at an accredited school, in which case any benefits being paid shall be terminated at the age of 21 or at death, whichever is reached first, pursuant to § 8-41-501(C), C.R.S.

10. The parties agree that they will work together to calculate the amount of any overpayment, reach a mutually agreeable repayment schedule or recoupment plan, and that benefits will not be terminated outright, in order to recoup any overpayment caused by the SSA benefits payments to the Minor Dependent Claimants.

FINDINGS OF FACT

1. The deceased Claimant was employed with Employer as a detective assigned to the Investigations Bureau and normally worked from 7 a.m. to 5 p.m. He was initially hired as a recruit on June 27, 2016 but later hired, after his swearing in, on December 27, 2016 as an officer.

2. The deceased was involved in a fatal motor vehicle accident on October 16, 2020 as he was travelling home. Claimant had finished his normal duties at 5 p.m. but had begun his “on call” status as a trainee detective. Pursuant to Employer’s Policies, detectives are allowed to travel home during their time while “on call,” subject to being immediately recalled. Claimant was paid for his “on call” status in accordance with the Collective Bargaining Agreement (CBA) for one hour of straight time from 5 to 6 p.m.

3. The October 16, 2020 accident occurred at approximately 5:20 p.m. while the decedent was travelling northbound on Highway 2. A Ford F350, that was travelling southbound, crossed the median and struck Claimant’s police cruiser head on. Claimant was in the course and scope of his employment at the time of his death.

4. The Division of Workers’ Compensation issued a letter on October 21, 2020, to determine whether the decedent had dependents that may be entitled to workers’ compensation benefits, including spouses, any child under the age of 18, any child under the age of 21 if they were full-time students; or other relatives who were financially dependent upon the deceased Claimant.

5. Claimant was legally married to the Dependent Widowed Claimant at the time of death. They were living together at their home in Commerce City with their two minor children, also Dependent Claimants in this matter. The date of birth for the Dependent Widow is September 30, 1987.

6. The date of birth of the Older Minor Dependent is December 10, 2016 and of the Younger Minor Dependent is February 10, 2020.

7. It is found that the Widowed spouse and both Minor Children were wholly dependent upon the decedent at the time of his death on October 16, 2020.

8. Respondents filed a General Admission of Liability (GAL) on October 30, 2020 recognizing the three Dependent Claimants. Benefits are being paid to the Widowed Dependent at the maximum rate from October 17, 2020 through an undetermined date at the maximum rate of $1,074.22 per week, which is 100% of any death benefits due.

9. The GAL filed on October 30, 2020 lists both Minor Children as wholly dependent but, as found, no payments have been specifically apportioned or paid to the Minor Dependent Claimants.

10. A Notice of Award dated December 12, 2020 was issued to each Minor Child by the Social Security Administration (SSA). The notices specified the Minor Dependent Children were to receive monthly Survivors Benefits in the amount of $1,462.00 each.

11. As found, there was no evidence in the record that the Dependent Widowed Claimant is receiving Social Security Survivors Benefits.

12. On December 28, 2020, a Notification of Survivor Benefit was issued by the Fire & Police Pension Association of Colorado (FPPA) to the Widowed Dependent informing her that she was awarded survivor benefits by the Statewide Death and Disability (SWD&D) Plan through the FPPA, a non-taxable benefit, as of October 17, 2020 (retroactively) in the amount of $4,640.87 per month.

13. The FPPA award letter explained that the money purchase retirement account funds of the decedent were offset from the SWD&D benefits the survivor was to receive for herself and any dependent children. This was approved, pursuant to the Dependent Widow's Application filed on November 30, 2020, by the Disability Review Committee (DDRC). They determined the decedent's death was the result of an accident while performing official duties arising out of, and in the course and scope of his employment as a member. The DDRC issued a Decision Sheet initially on December 11, 2020 granting Survivor Benefits. The FPPA member plan is fully funded by Employer.

14. The Claims Representative testified at hearing. She works for Insurer as a Complex Claims Representative and has been working for Insurer for 14 years. She has been involved in the adjusting of this claim from the inception of the claim.

15. The Claims Representative testified she filed the GAL on October 30, 2020 and commenced payments to the dependent Claimants as of that time, which have continued to date. She determined the correct names and dates of birth from the

Dependent Widow directly, during a phone call on October 28, 2020. She also received copies of the marriage certificate and both birth certificates for the Minor Children from the Widowed Dependent.

16. The Claims Representative stated that the indemnity logs show payments through June 25, 2021 in the amount of $45,671.92 plus an additional amount of $2,148.44 paid on July 9, 2021 which covers indemnity through July 23, 2021. This brings the total indemnity payments to the amount of $47,820.36 through July 23, 2021. After payments were started under the Workers' Compensation Act, the Claims Representative learned that payments were made under the SWD&D Plan and for Social Security Survivors Benefits to the two Minor Children. She confirmed these benefits directly with the Widowed Dependent, and received the letters of award via email from the Widowed Dependent as well.

17. The Claims Representative explained to the Widowed Claimant the impact both of the sources of benefits (SSA and SWD&D) may have on the workers' compensation benefits being paid by Respondents. She further explained that there may be an offset and a significant overpayment that would have to be repaid to Respondents, indicating that Respondents would rely on the SSA Award letters to the dependent children in calculating the offset related to the SSA payments to the Minor Dependent Claimants.

CONCLUSIONS OF LAW

A. General Principles

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability benefits to Claimants at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2020. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of Claimants or the rights of Employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives, bias, prejudice, or interest of the witness, whether the testimony has been contradicted or not. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2020).

B. Dependents for Purposes of Death Benefits

Respondents seek a determination of the status of the dependents in this matter. Pursuant to § 8-41-501(1),C.R.S. the following persons shall be presumed to be wholly dependent (however, such presumption may be rebutted by competent evidence):

> "(a) Widow or widower, unless it is shown that she or he was voluntarily separated and living apart from the spouse at the time of the injury or death or was not dependent in whole or in part on the deceased for support…
>
> (b) Minor children of the deceased under the age of eighteen years, including posthumous or legally adopted children;
>
> (c) Minor children of the deceased who are eighteen years or over and under the age of twenty-one years if it is shown that:
>
> > (I) At the time of the decedent's death they were actually dependent upon the deceased for support; and
> >
> > (II) Either at the time of the decedent's death or at the time they attained the age of eighteen years they were engaged in courses of study as full-time students at any accredited school. The period of presumed dependency shall continue until they attain the age of twenty-one years or until they cease to be engaged in courses of study as full-time students at an accredited school, whichever occurs first.

As found, both Minor Children and the Widowed Spouse are wholly dependent upon the deceased Claimant at the time of death. This is established by the stipulated agreement of the parties, which states that "all three surviving Claimants were wholly dependent upon the deceased at the time of his death on October 16, 2020." Further, the General Admission filed on October 30, 2020 lists the Widowed Claimant, the Older Minor Dependent and the Younger Minor Dependent as wholly dependents in this matter. Lastly, pursuant to the statute cited above, the Widowed Claimant and both Minor Children (under age 18 as their birth years are 2016 and 2020 respectively) are presumed dependents as they were living in Commerce City with the decedent at the time of his death. What has not been established is the proportion of benefits that each of the Dependent Claimants is to receive and neither party requested that this ALJ issue an order in this regard.

C. Offset of Social Security Survivors Benefits

Respondents seek an offset for benefits received by both Minor Dependents in this matter. Section 8-42-114, C.R.S. lays out what death benefits dependents may receive and states designates what reductions may be asserted against those death benefits as follows:

> In case of death, the dependents of the deceased entitled thereto shall receive as compensation or death benefits sixty-six and two-thirds percent of the deceased employee's average weekly wages, not to exceed a maximum of ninety-one percent of the state average weekly wage per week for accidents occurring on or after July 1, 1989, and not less than a minimum of twenty-five percent of the applicable maximum per week. In cases where it is determined that periodic death benefits granted by the federal old age, survivors, and disability insurance act or a workers' compensation act of another state or of the federal government are payable to an individual and the individual's dependents, the aggregate benefits payable for death pursuant to this section shall be reduced, but not below zero, by an amount equal to fifty percent of such periodic benefits.

The GAL specifies that the Dependent Widow is receiving 100% of the death benefits and no benefits are being paid to the wholly Dependent Children. This means that any offsets may only be deducted from the Dependent Widows' benefits from any SSA benefits received by the Dependent Widow. The evidence does not support that the Widow Dependent is receiving any SSA benefits at this time. Therefore, Respondents are not entitled to offset Dependent Widow's benefits for social security benefits received.

Respondents cite to § 8-42-122, C.R.S. for purposes of suggesting that the Dependent Widow, who is receiving death benefits, is doing so on behalf of the Minor Children. The ALJ is unable to determine this, as it was not part of the parties' stipulations and there was no persuasive evidence in this regard. This particular statutory provision references that a surviving spouse may make application or claim on behalf of the Minor Dependents, not that the surviving spouse may be paid the benefits on the dependents' behalf. In fact, this statutory provision states that any portion of benefits paid to minors must be deposited in an account for the purpose of safeguarding the minors' interests.

The SSA benefits received by the Dependent Minors may be offset if workers' compensation death benefits were to be paid to the Dependent Minors. At this time, that is not the case, and the statute states that any death benefits may not be reduced below zero. Since the Dependent Minors are receiving zero death benefits, no offset is due at this time and the parties may readdress this at a later time, if a proportion of the workers compensation benefit is paid to the Minor Dependents pursuant to § 8-42-121, C.R.S., which states:

> Death benefits shall be paid to such one or more of the dependents of the decedent, for the benefit of all the dependents entitled to such compensation, as may be determined by the director, who may apportion the benefits among such dependents in such manner as the director may deem just and equitable. Payment to a dependent subsequent in right may be made, if the director deems it proper, which payment shall operate to discharge all other claims therefor. The dependents or persons to whom benefits are paid shall apply the same to the use of the several beneficiaries thereof according to their respective claims upon the decedent for support in compliance with the finding and direction of the director.

Therefore, Respondents may take an offset of those benefits paid to the Minor Dependents from death benefits Respondents are paying to the Dependent Minors. This is not taking place at this time, so Respondents cannot assert a right to an offset from the SSA death benefits currently being paid to the Dependent Minors. The issue of apportionment of the death benefits is reserved for future determination.

D. Offset of FPPA Survivor Benefits

In this matter, the Widowed Dependent was awarded survivor benefits by the Fire & Police Pension Association of Colorado (FPPA) under the Statewide Death and Disability plan. Respondents are requesting leave to reduce the workers' compensation death benefits by the amount the Widowed Dependent is receiving from FPPA. Section 8-42-114, C.R.S. (cited above) lays out what death benefits dependents may receive and what may be reduced from the death benefits. The statute only allows for offset for "the federal old age, survivors, and disability insurance act or a workers' compensation act of another state or of the federal government."

The statute specifically states that federal benefits, such as social security survivors benefits, and other states' workers' compensation benefits, must be offset. Nothing in the statute states that other survivor benefits paid under other sections of the Acts or other statutes should be reduced or offset under § 8-42-114.

Further, § 31-30.5-301 provides the legislative declaration regarding the SWD&D plan. It states:

> The general assembly finds and declares that the establishment of statewide actuarial standards regarding funded and unfunded liabilities of state-assisted old hire police officers' and firefighters' pension funds established pursuant to this article is a matter of statewide concern affected with a public interest, and the provisions of this part 3 are enacted in the exercise of the police powers of this state for the purpose of protecting the health, peace, safety, and general welfare of the people of this state. The general assembly further declares that state moneys provided to municipalities, fire protection districts, and county improvement districts do not constitute an obligation of the state to participate in the costs of pension plan benefits but are provided in recognition that said local governments are currently burdened with financial obligations relating to pensions in excess of their present financial capacities. It is the intent of the general assembly in providing state moneys to assist said local governments that state participation decrease annually, terminating at the earliest possible date.

The legislative intent is laid out in § 31-30.5-305, C.R.S. that states as follows:

> It is the intention of the general assembly that the minimum funding standards established by this part 3 shall not enlarge nor diminish the obligation of municipalities and fire protection districts to their employees for pension benefits provided pursuant to this article.

Title 31, which establishes the funding of the Statewide Death and Disability plan or "old hire pension plan" fails to state that the funds may be offset by other benefits or that other benefits would be offset by this plan other than those established under the statutory directives.

In reading the statutory language of both the Workers' Compensation Act and the Fire and Police Old Hire Pension Plans Act, neither provides for statutory offsets. Therefore, no offset are appropriate in this matter for the FPPA benefits received by the three dependent Claimants for the benefits approved by the FPPA Death and Disability Review Committee (DDRC) pursuant to the dependents' application. The DDRC has determined that the detective's death was the result of an accident while performing official duties arising out of and in the course of his employment as a member and that the dependents are entitled to full benefits from the plan.

Recovery of overpayments on death benefits cases is discussed in § 8-42-113.5:

> If a claimant has received an award for payment of disability benefits or a death benefit under articles 40 to 47 of this title and also receives any payment, award, or entitlement to benefits under the federal old-age, survivors, and disability insurance act, an employer-paid retirement plan, or any other plan, program or source for which the original disability benefit or death benefit is required to be reduced pursuant to said articles but which were not reflected in the calculation of such disability benefits or death benefits:

This statute only allows for offset of benefits "which the original disability benefit or death benefit is required to be reduced pursuant to said articles." The words "said articles" references the WC Act and the only reductions allowed for death benefits is clearly delineated in § 8-42-114, C.R.S., specifying that the original benefits shall be reduced only for SSA benefits and workers' compensation benefits paid by other states or the federal government. The statute, § 8-42-113.5, only controls the method of recovery of any benefits other statutes under the Act allows to be offset It does not establish any other separate statutory rights or entitlement to offset or reduce death benefits. This is simply a notice provision regarding those benefits created elsewhere in the Act.

When the court interprets a provision of the Workers' Compensation Act, we must give it its "plain and ordinary meaning" if the statutory language is clear. *Davison v. Indus. Claim Appeals Office*, 84 P.3d 1023, 1029 (Colo. 2004). The Supreme Court stated that "[W]hen examining a statute's plain language, we give effect to every word and render none superfluous because "[w]e do not presume that the legislature used language "idly and with no intent that meaning should be given to its language[.]""" *Colo. Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist.,* 109 P.3d 585, 597 (Colo. 2005)(citation omitted)(quoting *Carlson v. Ferris*, 85 P.3d 504, 509 (Colo. 2003), superseded in part by statute on other grounds as recognized by *St. Jude's Co. v. Roaring Fork Club*, LLC, 2015 CO 51 ¶ 17, 351 P.3d 442); also see *Keel v. Industrial Claim Appeals Office of the State*, 2016 COA 8, 369 P.3d 807, 811, (Colo. App. Division 6, 2016).

If courts can give effect to the ordinary meaning of words used by the legislature, the statute should be construed as written, giving full effect to the words chosen, as it is presumed that the General Assembly meant what it clearly said. See Askew v. Industrial

Claim Appeals Office, 927 P.2d 1333, 1337 (Colo. 1996); PDM Molding, Inc. v. Stanberg, 898 P.2d 542, 545 (Colo. 1995). The Supreme Court in *State v. Nieto*, 993 P.2d 493, 500 (Colo. 2000) stated that we "must refrain from rendering judgments that are inconsistent with that intent." [Citing *Farmers Ins. Exch. v. Bill Boom, Inc.,* 961 P.2d 465, 469 (Colo. 1998)]. Pursuant to § 2-4-101, C.R.S. "[W]ords and phrases shall be read in context and construed according to the rules of grammar and common usage." If the statutory language is clear and unambiguous, courts need not look further at statutory construction. See *Town of Superior v. Midcities Co.,* 933 P.2d 596, 600 (Colo. 1997); *Boulder County Bd. of Equalization v. M.D.C. Constr. Co.,* 830 P.2d 975, 980 (Colo. 1992). Because we can readily give the words that the legislature used in § 8-42-114, C.R.S. full effect, it is necessary to apply only reductions as the legislature wrote it. See *Keel v. Industrial Claim Appeals Office of the State*, *supra*.

Lastly, while this ALJ is not bound by panel decisions (see *United Airlines v. Industrial Claim Appeals Office,* 213 COA 48, 312 P.3d 235), *Thielsen v. Rockwell International Co.,* W.C. No. 4-263-037, ICAO, (May 28 1997) is instructive, holding that § 8-42-114 limits any offsets Respondents may assert against death benefits. Here, the Widowed Dependent is receiving survivor benefits form FPPA, not social security survivors benefits or other benefits designated by § 8-42-114, C.R.S. Therefore, Respondents are not entitled to reduce her death benefits by Dependent Widow's survivor benefits paid by FPPA as they are not a listed benefit that may be reduced under the statute. Respondents' request to offset the FPPA survivor benefits is denied.

ORDER

IT IS THEREFORE ORDERED:

1. The Widow and both Minor Children were wholly dependent upon the decedent at the time of his death for purposes of death benefits

2. Respondents failed to meet their burden of proof that they are entitled to offset social security benefits awarded to Minor Dependent Claimants, as neither is receiving workers' compensation death benefits at this time ,and benefits may not be reduced below zero pursuant to § 8-42-114, C.R.S. The issue of apportionment of the death benefits is reserved for future determination pursuant to § 8-42-121, C.R.S. Respondents are entitled to terminate pursuant to § 8-42-120, C.R.S. and under § 8-41-501(c)(II), C.R.S., if benefits are apportioned.

3. Respondents failed to prove they are entitled to reduce the Widowed Dependent Claimant's death benefits by her receipt of survivor benefits awarded under the Statewide Death & Disability Plan through the Fire & Police Pension Association (FPPA).

4. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

Dated this 19th day of August, 2020.

By: Elsa Martinez Tenreiro
Administrative Law Judge

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-136-714-001

ISSUES

I. Did Respondents prove by a preponderance of the evidence that the General Admission of Liability (GAL) filed by Respondents on July 17, 2020 may be withdrawn.

II. Did Claimant prove by a preponderance of the evidence that the left total knee arthroplasty (TKA) surgery is automatically authorized; in the alternative, is the left knee TKA surgery is reasonable, necessary and related to the admitted work injury of March 28, 2020.

III. Did Respondents prove by a preponderance of the evidence that Claimant is responsible for his termination of employment, and if so, may TTD be terminated.

PROCEDURAL HISTORY

Respondents filed an Application for Hearing on March 3, 2020 on issues of compensability, medical benefits that are reasonably necessary and related to the injury, causation of the injury, withdrawal of the admission and that Claimant is responsible for termination entitling Respondents to terminate admitted temporary disability benefits.

Claimant filed a Response to the March 3, 2021 Application for Hearing on April 9, 2021, citing issues of reasonably necessary medical benefits which are related to the admitted injury of March 28, 2020 (TKA). Claimant also seeks penalties for failure to deny or approve the surgery recommended by Dr. Phillip Stull within 7 business days of the request dated December 7, 2020, specifically whether the surgery is automatically approved pursuant to the rules.

Both Dr. Timothy O'Brien and Claimant testified in this matter at the hearing.

STIPULATIONS

The parties reached the following stipulations:

1. The parties stipulated that the December 7, 2020 request for prior authorization for surgery sent by Dr. Phillip Stull's office was received by Respondents and Respondents failed to issue a denial of the prior authorization request within the required time period established by the rules.

2. Dr. Phillip Stull is an authorized treating physician (ATP).

These stipulations are approved and accepted by the ALJ.

FINDINGS OF FACT

Based upon the evidence presented at hearing the facts are as follows:

1. Claimant was a flight attendant and purser for Employer on March 28, 2020. He worked for Employer for a period of approximately 47 years. Claimant is 72 years old.

2. Claimant had a prior admitted work-related right knee injury on January 20, 2017 while working for Employer. This occurred while performing his duties as a flight attendant when there was turbulence on the plane and Claimant twisted his right knee while trying to secure a beverage cart. Claimant underwent a right knee total knee arthroplasty (total knee replacement) of the performed by Dr. Phillip Stull. Claimant returned to full time work for Employer of injury, without restrictions or limitations.

3. As found, prior to March 28, 2020, Claimant had no medical care for the left knee, only the right knee.

4. On March 28, 2020, Claimant was positioning a full beverage cart back into its slot when the plane hit turbulence. The beverage cart weighs approximately 250 pound when full, which it was on this occasion. Claimant's left knee buckled and twisted. Claimant felt his left knee pop. Claimant also felt immediate pain and thereafter his left knee was swollen and stiff. Claimant found that use of the stairs was excruciating. Claimant stated he had no prior trouble performing his duties as a flight attendant prior to the claimed injury of March 28, 2020. Claimant's testimony is found to be credible.

5. Claimant had a consultation on March 30, 2020 with a nursed through Employer (Brandy M. – LNU). The report documents a three-inch swelling of the left knee, with pain of 8-9/10, and limited ability to walk due to the pain. Claimant was referred to proceed with telemedicine for follow-up medical care. The report documented that Claimant reported the injury within 24 hours, on March 29, 2020. This was also documented on the Employers' First Report of Injury, which stated that Claimant had swelling of the left knee.

6. Claimant was evaluated on April 2, 2020, through telemedicine (video) by a medical provider with Concentra, Shauna Stupart, M.D. Dr. Stupart diagnosed a sprain of the left knee and documented a mechanism of injury similar to that reported by Claimant to Employer. The report also documents Claimant's years with Employer and states that he was assisting passengers including food and beverage service and preparing food and beverage carts, lifting bags occasionally, frequently reaching overhead, pushing, pulling, standing, walking, twisting, bending, and squatting. Dr. Stupart assessed that objective findings were consistent with the history and/or the work-related mechanism of injury.

7. Claimant continued to be evaluated by telemedicine at Concentra, including by Dr. Aharon Wolf on April 7, 2020, who also diagnosed Claimant with a sprain of the left knee. He provided sitting restrictions of 80% of the time, referred Claimant to physical therapy and continued visits through telemedicine.

8. Claimant disclosed that he was not evaluated in person by any provider at Concentra. Only during one of the telemedicine visits was he asked by his provider to show his left knee with his telephone. Claimant's testimony is credible.

9. On April 21, 2020 Claimant was initially seen by Andrea Guevara, P.T. at Select Physical Therapy for his left knee pain. The history documented is consistent with the prior documented history. Claimant reported he twisted his left knee while working on March 28, 2020. When the plane hit turbulence, he was holding on to a 250-pound cart and while trying to stabilize himself, he planted his foot and felt a pop in his left knee when trying to hold on to the cart. Pain immediately ensued. It further states that Claimant's job duties included twisting, reaching both overhead and below waist, bending, squatting, grasping, climbing stairs, sitting, standing, and walking. Claimant is required to lift up to 40 pounds overhead, frequently lift overhead approximately 20 pounds and push/pull a 250-pound cart on wheels. Ms. Guevara reported Claimant had not tried to perform job-related duties, however, was experiencing pain with functional movement such as squatting, walking, and lifting activities. She noted that Claimant had mild-moderate pain in the MCL (Medial Collateral Ligament), decreased quad endurance and strength, mild hip strength deficits, moderate guarding and difficulty with single leg activities. Claimant continued with physical therapy through June 9, 2020, without relief of his symptoms.

10. On April 24, 2020 Dr. Wolf documented, in the review of systems, Claimant had joint pain, muscle pain, joint stiffness, muscle weakness and night pain. On May 4, 2020 Dr. Wolf stated that Claimant continued to have constant sharp pain in his left knee, Claimant was limping and ordered an MRI of the left knee. On May 14, 2020 he documented that the MRI showed both chronic and acute pathology of the left knee and referred Claimant to an orthopedic specialist due to left knee pain and swelling.

11. The MRI was performed on May 11, 2020 and showed the MCL was distended medially by an extruded body segment, the medial meniscus was markedly macerated with complex degenerative tearing of the posterior horn and body segment to the anterior horn body junction, and extruded into the medial gutter 6 mm. There was advanced subcondral edema of the medial femoral condyle and medial tibial plateau. There was also knee joint effusion and edema. Dr. Scot Campbell's impressions were of advanced medial compartment osteoarthritis, associated marked maceration and degenerative tearing of the medial meniscus and joint effusion.

12. Claimant was evaluated on May 19, 2020 by Dr. Phillip Stull of Colorado Orthopedic Consultants pursuant to a referral from Concentra. In the report he thanks Dr. Aharon [Wolf] for the referral of a patient that had been previously treated by him two years before. He documented that Claimant reported his left knee had become uncomfortable in February 2020, with vigorous activities, but that he injured his knee while working on March 28, 2020. It also documents that Claimant had been furloughed due to the economic environment.

13. Dr. Stull performed an in-person physical exam of Claimant. He found a mild varus alignment, minimal effusion, medial and patellofemoral compartment

tenderness and crepitation, antalgic gait, and favoring of the left knee. His impressions and diagnosis included advanced arthritis and work-related trauma of the left knee. Dr. Stull injected the knee with cortisone but stated that, if steroid injections were unsuccessful in controlling Claimant's symptoms, a knee replacement would be indicated and recommended.

14. Claimant testified that there is a difference between vigorous activities and his job duties. He was able to perform his job duties without difficulty prior to March 28, 2020. Claimant is credible.

15. On May 24, 2020 Claimant was seen through telemedicine by Dr. Michael Chiang from Concentra. He transferred care to Dr. Stull for continuing orthopedic care. Dr. Chiang kept Claimant on work restrictions of sitting duty for the majority of the day (80%) with no squatting or kneeling.

16. On June 30, 2020 Dr. Stull again examined Claimant and recommended continued conservative care. He stated that Claimant was to continue with restrictions in accordance with his referring provider.

17. On July 17, 2020 Respondents filed a General Admission of Liability accepting Claimant's left knee injury as work related. Respondents admitted to temporary total disability (TTD) benefits as of April 7, 2020. As inferred from the evidence, and as found, Respondents filed the admission because Claimant was placed on temporary work restrictions by Dr. Wolf at that time and was not provided work within his temporary work restrictions by Employer.

18. Claimant testified that, as of August 1, 2020, while still under restrictions and receiving TTD benefits, Claimant accepted a retirement package offered by Employer to eligible employees given the reduction in flights due to Covid-19 as they had approximately four thousand flight attendants on the books. Claimant stated he continued to have knee pain. Given his knee pain, his age and the fact that he was not working, Employer offered Claimant a buyout for him to retire. Claimant was not offered any work within his restrictions at any time between April 7, 2020 through the official date of his retirement as none was available within his sedentary restrictions. It is inferred from the evidence that he was unlikely to be able to perform his job as a flight attendant thereafter. Claimant is found credible.

19. Timothy O'Brien, M.D. conducted a medical record review on August 14, 2020 on behalf of Respondents. Dr. O'Brien documents Claimant's prior injury in 2017 to the right knee, the subsequent total knee arthroplasty (TKA) performed by Dr. Stull and the treatment he received at Concentra. He also documents the telemedicine care with Drs. Shauna Stupart and Aharon Wolf related to the March 28, 2020 incident. In his report, Dr. O'Brien opines that neither the 2016 [sic.] nor the 2017 mechanisms of injuries could have cause the need for TKAs for either the right or the left knee, as the incidents were "innocuous" and not significantly traumatic. He also stated, "the absence of medical record documentation proving that those joints were asymptomatic prior to the time when an examinee is ready to consider a total joint arthroplasty is hardly proof positive that the

joints were not symptomatic." Dr. O'Brien is not credible with regard to his opinion that the Claimant's work-related accidents were "innocuous" or insignificantly traumatic, nor his opinions with regard to causality.

20. Dr. Stull repeated a cortisone injection on August 25, 2020 and acknowledged he received a copy of Dr. Timothy O'Brien's independent medical evaluation.

21. On December 4, 2020 Dr. Stull requested prior authorization for the left knee replacement, specifying that the surgery was to take place on February 19, 2021 at the Surgery Center at Cherry Creek, including arthroplasty, total left knee. He also injected Claimant's left knee with steroids again.

22. On the Physician's Report of December 4, 2020, Dr. Stull stated that Claimant was unable to work at that time. (He crossed off the typed in "work restrictions per referring doctor" and marked unable to work.).

23. The official request for prior authorization was faxed to Respondents on December 7, 2020 by Dr. Stull's office with a copy of the medical records as required by the Division rules.

24. Pursuant to the stipulation of the parties, Respondents acknowledged that they received the request for prior authorization but never responded to the request. It is found that Respondents failed to either deny or authorize the surgery pursuant to the request for prior authorization by an ATP, in accordance with the Division rules.

25. Dr. O'Brien testified at hearing that a knee can turn and twist, and it is only when there is significant force that an injury can occur. Dr. O'Brien testified that the MRI findings with effusion and edema do not represent an injury and the swelling is because arthritic knees cause inflammation and effusion. However, he also confirmed that joint effusion occurs with trauma. He explained that edema represents in the joint because the excessive calor or heat of the synovial lining caused by friction and starts to excessively create synovial fluid, a watery substance, and deposit at the knee cap to lubricate the joint. He also stated that, as of the May 11, 2020 MRI, Claimant had swelling in the knee. He further opined that the surgery recommended by ATP Stull was reasonable and necessary in parlance of the workers' compensation system, to cure and relieve the Claimant of his injury, though not caused by the events of March 28, 2020. Dr. O'Brien stated different physicians could reach different conclusions.

26. Claimant continues to be off work, has not been released from care and has not been returned to modified duty. He stated that he knows what is involved in the surgery he is requesting, as he had the experience of undergoing the right TKA with good results and was able to return to work. He also stated that he had good results every time he had steroid injections with Dr. Stull, but the problems always come back and continues to wish to proceed with the TKA for the left knee. Claimant's testimony is credible.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. (Cum. Supp. 2020). A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. *supra*. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ need not address every piece of evidence that might lead to a conflicting conclusion and has specifically rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2020). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ resolves the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

B. Withdrawal of the General Admission of Liability

Respondents seek to withdraw the General Admission of Liability file on July 17, 2020. Respondents argue, given Dr. O'Brien's opinion that Claimant did not sustain any significant injury or disability as a result of any incident on March 28, 2020, Respondents have shown there is good cause to withdraw the admission.

Section 8-43-201, C.R.S. generally establishes the burden of proof in disputes arising under the Workers' Compensation Act. It provides, in pertinent part "a party seeking to modify an issue determined by a general or final admission, a summary order, or a full order shall bear the burden of proof for any such modification." Therefore, it is Respondents' burden of proof by a preponderance of the evidence to establish that withdrawal of the GAL is justified.

By filing an admission of liability, the employer or insurer has "admitted that the claimant has sustained the burden of proving entitlement to benefits." *City of Brighton v. Rodriguez*, 318 P.3d 496, 507 (Colo. 2014). Thus, to withdraw a GAL, the respondents must prove the claimant suffered no compensable injury in the first instance.

As found, Claimant was a flight attendant who handled a very heavy beverage cart each day he worked. It is not an insignificant matter that Claimant had to maneuver and control the heavy cart when there was turbulence on the plane. Claimant testified that on March 28, 2020 he was trying to control the cart during turbulence and his left leg buckled, it is inferred under the weight of the cart, and he felt a pop of his left knee after twisting it, feeling immediate pain. The incident is specifically found to be significantly traumatic to cause injury and Claimant is found credible.

Respondents' argument that this is a similar incident than that which occurred in 2017 is not relevant in this ALJ's mind. Claimant was a flight attendant, which necessarily involves handling the heavy cart each time he worked, and turbulence is common on flights, placing Claimant at increased risk of injuring himself in this manner. Dr. Stupart at Concentra diagnosed a sprain of the left knee and documented that objective findings were consistent with history and/or work related mechanism of injury. Her opinion is found credible. Dr. Wolf diagnosed claimant with a sprain of the left knee and referred Claimant for an MRI and for further care to an orthopedic surgeon. His opinion is found persuasive and credible. The MRI showed that Claimant had edema (swelling) on May 11, 2020. Dr. Stull diagnosed Claimant with a significant condition that required the need for a left knee total knee arthroplasty related to the work-related trauma. Dr. Stull is credible. Claimant's testimony that he was able to perform his regular duties and was not under any limitations just prior to his work-related injury is credible as well. Claimant had an accident that he immediately reported within 24 hours and requested medical attention. He reported to the nurse that he had a swollen knee, had immediate pain, an, it is specifically found that it proximately caused him to seek treatment he would not otherwise have pursued. The persuasive evidence shows Claimant suffered a compensable injury on March 28, 2020.

While the opinions of Dr. O'Brien differ from those of other providers and point to evidence that might support a different outcome, it is found that his opinion in this regard is not credible and does not rise to the level required in order to allow the withdrawal of the admission of liability in this matter by a preponderance of the evidence. This ALJ finds persuasive the fact that, while Claimant has a preexisting condition, the condition was not one that caused impairment or disability. A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). As found, Claimant aggravated his preexisting condition on March 28, 2020 to such an extent that it caused the need for medical care and surgery. Therefore, Respondents' request to withdraw the GAL is denied.

C. Medical Benefits

Claimant requests a determination with regard to authorization of the total knee arthroplasty recommended by Dr. Stull, an authorized treating provider. Claimant reasons, first, that the surgery is automatically authorized under the Division rules as Respondents failed to deny or authorize the surgery. Secondly, Claimant argues that the surgery is reasonably necessary and related to the work injury of March 28, 2020.

The parties agree that Dr. Phillip Stull is an authorized treating physician. On December 7, 2020, Dr. Stull requested prior authorization to proceed with a total left knee arthroplasty, as reasonably necessary and related to the March 28, 2020 work-related trauma. Dr. Stull provided Respondents with the proposed date of surgery programed for February 19, 2021 at the Surgery Center at Cherry Creek. Respondents acknowledged that they received the request and took no action to either approve the surgery or follow the denial process as laid out in the rules. The question here is whether the surgery was automatically approved by Respondents' failure to respond or whether Claimant must prove by a preponderance of the evidence that the surgery is reasonably necessary and related to the injury.

W.C.R.P. Rule 16-7(B), in effect as of the request for prior authorization on December 7, 2020, states that Respondent have seven (7) business days to comply with certain provisions. (As of January 1, 2021 this rule changed to 10 days of receipt of the complete request.)

W.C.R.P. Rule 16-7 (2020) states, in pertinent part:

(A) If an ATP requests prior authorization and indicates in writing, including reasoning and relevant documentation, that he or she believes the requested treatment is related to the admitted workers' compensation claim, the insurer cannot deny solely for relatedness without a medical opinion as required by section 16-7(B). The medical review, IME report, or report from an ATP that addresses the relatedness of the requested treatment to the admitted claim may precede the prior authorization request, unless the requesting physician presents new evidence as to why this treatment is now related.

(B) The payer may deny a request for prior authorization for medical or non-medical reasons. Examples of non-medical reasons are listed in section 16-11(B)(1). If the payer is denying a request for prior authorization for medical reasons, the payer shall, within seven (7) business days of the completed request:

(1) Have all the submitted documentation under section 16-6(E) reviewed by a "physician provider" as defined in section 16-3(A)(1)(a), who holds a license and is in the same or similar specialty as would typically manage the medical condition, procedures, or treatment under review. The physician providers performing this review shall be Level I or Level II accredited. In addition, a clinical pharmacist (Pharm.D.) as defined by section 16-3(A)(1)(b)(xvi) may review prior authorization requests for medications without having received Level I or Level II accreditation.

(2) After reviewing all the submitted documentation and other documentation referenced in the prior authorization request and available to the payer, the

> reviewing provider may call the requesting provider to expedite communication and processing of prior authorization requests. However, the written denial or approval still needs to be completed within the seven (7) business days specified under this section.
>
> (3) Furnish the provider and the parties with a written denial that sets forth the following information:
>
> (a) An explanation of the specific medical reasons for the denial, including the name and professional credentials of the person performing the medical review and a copy of the medical reviewer's opinion.
>
> (b) The specific cite from the Medical Treatment Guidelines, when applicable;
>
> (c) Identification of the information deemed most likely to influence the reconsideration of the denial when applicable; and
>
> (d) Documentation of response to the provider and parties.

As found, Claimant was injured in the course and scope of his employment, Respondents admitted to the claim and the authorized treating physician requested prior authorization for the TKA surgery. From the start of Claimant's treatment with Dr. Stull on May 19, 2020, Dr. Stull anticipated that the advanced arthritis of the left knee, which was aggravated by the work-related trauma, would probably require a total knee replacement, if conservative care measures were unsuccessful. Yet Respondents filed a GAL on July 17, 2020 admitting to the compensable work-related injury. Once this admission was filed, Respondents were obligated to comply with the rules.

If Respondents intended to deny the request for prior authorization, they were required to provide notice of the denial and obtain a medical review of the request for prior authorization, which did not occur in this claim. The parties specifically stipulated that the December 7, 2020 request for prior authorization for surgery sent by Dr. Phillip Stull's office was received by Respondents and Respondents failed to issue a denial of the prior authorization request within the required time period established by the rules.

W.C.R.P. Rule 16-7(E) (2020), in effect as of the request for prior authorization on December 7, 2020, states as follows:

> Failure of the payer to timely comply in full with section 16-7(A), (B), or (C) shall be deemed authorization for payment of the requested treatment unless the payer has scheduled an independent medical examination (IME) and notified the requesting provider of the IME within the time prescribed for responding set forth in section 16-7(B).

W.C.R.P. Rule 16-7(C) does not apply as that portion of the rule concerns the appeal process when there is a denial of the request for prior authorization pursuant to the rules. Here, it is found that Respondents failed to follow the process as laid out in Rule 16-7 and therefore, the surgery proposed by Dr. Stull is automatically authorized as reasonably necessary and related to the admitted claim pursuant to W.C.R.P. Rule 16-7(E). Respondents are required to pay for the procedure in accordance with the fee schedule under W.C.R. P. Rule 18.

Employer is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42101(1)(a), C.R.S. *Colorado Compensation Insurance Authority v. Nofio*, 886 P.2d 714 (Colo. 1994). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *See generally Stamey v. C2 Utility Contractors, Inc., et. al.*, W.C.No. 4-503-974 , ICAO (August 21, 2008); *Parker v. Iowa Tanklines, Inc.*, W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002). Even if this was not the case, Claimant has proven that the surgery, as recommended by Dr. Stull, is reasonably necessary and related to the admitted work injury of March 28, 2020. Nothing in Dr. O'Brien's report or testimony persuades this ALJ that this is not the case. While Dr. O'Brien opined that that the work injury was innocuous, this ALJ does not find that credible. Claimant had previously had an admitted work-related injury in 2017 to the right knee, which was surgically treated. Claimant returned to work without limitations and was able to accomplish his normal work duties as a flight attendant. This required Claimant to perform activities such as pushing and pulling a full beverage cart, which weighed approximately 250 pounds, up and down the isle of the plane, twisting, reaching both overhead and below waist, bending, squatting, grasping, climbing stairs, sitting, standing, walking, lifting up to 40 pounds overhead and frequently lifting overhead approximately 20 pounds. On March 28, 2020, Claimant twisted his left knee while trying to control the beverage cart during turbulence on the plane. Claimant felt a pop in his knee and immediate pain. The injury caused pain, stiffness, intermittent swelling, effusion, and edema. As found, his is clearly an aggravation of the underlying disease and is the cause for the need for treatment, including the TKA of the left knee as recommended by Dr. Stull. The surgery is found to be reasonably necessary and related to the admitted work-related trauma. Therefore, the surgery is not only reasonably necessary and related to the injury but is found to be authorized. Respondents shall pay for the TKA surgery pursuant to the fee schedule.

D. Affirmative Defense of Responsible for Termination of Employment

Respondents assert that Claimant's acceptance of the offer to retire tendered by Employer is proof by a preponderance of the evidence that Claimant is responsible for his termination from employment justifying termination of temporary disability benefits. Respondents argue the affirmative defense of Claimant's responsibility for termination as a defense to continued TTD benefits pursuant to Sections 8-42-105(4), C.R.S. and 8-42-103(1)(g), C.R.S. (referred to as the termination statutes). These statutes contain identical language stating that in cases "where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury."

In *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061, 1064 (Colo. App. 2002), the Colorado Court of Appeals held that the term "responsible" reintroduced into the Workers' Compensation Act the concept of "fault." Hence, the concept of "fault" as it is used in the unemployment insurance context is instructive for purposes of the termination statutes. In that context, "fault" requires that the claimant must have performed some volitional act or exercised a degree of control over the circumstances resulting in the termination. See *Gonzales v. Industrial Commission*, 740 P.2d 999 (Colo. 1987). Whether the claimant is responsible for the termination of his employment must be based upon an examination of the totality of circumstances. *Id.* The burden to show that the claimant was responsible for his discharge is on the Respondents. See *Gilmore v. Indus. Claim Appeals Office*, 187 P.3d 1129 (Colo. App. 2008). Therefore, Respondents bear the burden of proof to establish the applicability of these provisions. *Witherspoon v. Metropolitan Club,* W. C. No. 4-509-612 (Dec. 16, 2004). Respondents aver that Claimant's acceptance of the retirement package offered by the employer is a volitional act that merits termination of temporary disability benefits.
The question of whether the claimant acted volitionally or exercised a degree of control over the circumstances of the termination is one of fact for the ALJ. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004).

Claimant started receiving temporary disability benefits pursuant to the General Admission of July 17, 2020, beginning as of April 7, 2020 when Claimant was placed on work restrictions by Dr. Aharon Wolf. The work restrictions continued for the time Claimant was under the care of the Concentra providers. When Claimant was released from Concentra, by Dr. Michael Chiang on May 24, 2020, he continued to have restrictions of sitting duty for 80% of the day with no squatting or kneeling. Dr. Chiang transferred care to Dr. Phillip Stull for continuing orthopedic care. Dr. Stull had already documented on May 19, 2020 that Claimant had been furloughed due to the economic environment related to Covid-19 and the lack of work. Claimant testified that he did not receive an offer of modified duty, in fact he was offered a package deal to retire as there were approximately four thousand flight attendants on the books and Employer had a severely reduced flight schedule due to the Covid-19 pandemic.

The relevant consideration is whether the totality of the circumstances establishes that Claimant was at fault for the termination of his employment. Claimant in this case was receiving temporary total disability benefits at the time of he accepted his formal retirement on August 1, 2021 but neither party raised issues with regard to offset applicable under Section 8-42-105(3)(a)-(d), C.R.S. This ALJ is required to resolve the case under Section 8-42-103(1)(g), and Section 8-42-105(4)(a), C.R.S. If an injured worker is responsible for his termination from employment, the injured worker is not entitled to continue receiving benefits compensating him for the wage loss after the date of termination. A claimant does not act "volitionally" or exercise control over the circumstances leading to a claimant's termination if the effects of the injury prevent a claimant from performing assigned duties and cause the termination of employment. *In re of Eskridge*, W.C. No. 4-651-260 (ICAO April 21, 2006). This ALJ finds that Claimant was not at fault for his termination. This case is distinguished from the underlying factual case in *Gilmore*, *supra*. In that case, the court reasoned that "employer is precluded by the job termination from the opportunity to make an offer of modified duty." Here, as is found, Respondents did not avail themselves of the opportunity to make an offer to place Claimant in a modified job position. This ALJ infers that they had no intention of doing so due to the economic climate and given the Claimant's age and medical restrictions.

On June 30, 2020 Dr. Stull continued Claimant on restrictions in accordance with the referring provider and on December 4, 2020 Dr. Stull took Claimant off of work completely, according to the Physician's Report. When Claimant was offered a retirement package, which he accepted as of August 1, 2020 just two weeks later, there was still no work available under Claimant's limitations and he continued having pain in his left knee, which resulted in Dr. Stull taking him off work ahead of his scheduled surgery.

Here, the Court is asked to infer that Claimant was aware of the effects the offered retirement package would have on Claimant's entitlement to temporary total disability benefits. Claimant was receiving TTD because the employer was unable to offer employment from April 7, 2020 through July, 2020, within Claimant's sedentary work restrictions as shown by the filing of the admission on July 17, 2020. This ALJ infers that Employer offered the retirement package because Claimant was unable to work due to both the economic circumstances cause by the Covid-19 pandemic, and Claimant's lack of job offers from his employer caused by his ongoing symptoms related to the work injury, as credibly established by Claimant's testimony. As found the evidence does not show that Claimant was offered sedentary work by Respondents or tend to show that Employer offered the retirement package in order to terminate temporary disability benefits. In fact, Respondents did not file the application for hearing to terminated benefits until March 3, 2021, over seven months later. Further, Claimant was taken off all work by Dr. Stull on December 4, 2020, which is further evidence that Employer would have been unlikely to have offered any employment within Claimant's limitations. Respondents have not met their burden of establishing by a preponderance of the evidence that Claimant was at fault or responsible for his termination. The totality of persuasive evidence shows Claimant did not perform a volitional act or otherwise exercise a degree of control over the circumstances leading to his separation from employment. Claimant continues to be temporarily and totally disabled until he is released to return to work at full duty; until he actually returns to work; or, until he reaches MMI. Therefore, Respondents request to terminated temporary disability benefits is denied.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant's March 28, 2020 claim is compensable and Respondents' request to withdraw the admission of liability is denied.

2. Claimant proved by a preponderance of the evidence that the left total knee arthroplasty (TKA) surgery recommended by Dr. Phillip Stull is automatically authorized

pursuant to W.C.R.P. Rule 16-7(E). Respondents shall pay for the reasonably necessary and related medical care subject to the fee schedule.

3. Respondents' defense that Claimant was responsible for termination of his employment is denied and dismissed.

4. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

Dated this 23rd day of August, 2021.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

Whether the claimant has shown by a preponderance of the evidence that he is permanently and totally disabled as a result of the May 24, 2017 work injury.

The endorsed issue of disfigurement is reserved for future determination.

FINDINGS OF FACT

1. The claimant worked for the employer as a truck driver. The claimant's job duties included delivering items for the employer. This would entail loading and unloading trucks at the employer's loading dock.

2. On May 24, 2017, the claimant was working on the loading dock moving a crate with a coworker. The claimant testified that the weight of the crate was about 1,800 pounds. The claimant's coworker was operating a forklift and the claimant was on the ground, when the crate fell and caught the claimant's right foot. The claimant was able to remove his foot from under the crate and received medical treatment that same day.

3. The claimant was diagnosed with a complete tear of the anterior talofibular ligament (ATFL); sprain of the deltoid; fracture of the first metatarsal; and a distal tibial fracture at the tibiotalar joint.

4. Beginning on July 24, 2017, the claimant returned to light duty work for the employer. The claimant worked in that capacity through September 13, 2017, which was the claimant's last day working for the employer. The claimant has not worked for any other employer since that date.

5. On November 2, 2017, the claimant was seen by Dr. Adam Cota. On that date, Dr. Cota noted that the claimant had pain over the right ATFL, and significant pain over the posterior lateral aspect of the hind foot. Dr. Cota also noted discoloration in the right foot. Dr. Cota opined that the claimant could have complex regional pain syndrome (CRPS) and referred the claimant to Dr. Ellen Price for evaluation.

6. The claimant was first seen by Dr. Price on January 17, 2018. On exam, Dr. Price noted that the claimant had significant right ankle swelling, with pitting edema. She also noted allodynia, hyperpathia, and color changes. In a list of diagnoses, Dr. Price included possible CRPS. Dr. Price recommended a number of treatment modalities including psychological counselling, lumbar sympathetic blocks, acupuncture, and physical therapy.

7. On February 6, 2018, Dr. Price administered electromyography (EMG) testing of the claimant's right lower extremity. Dr. Price identified it as an abnormal study

with evidence of partial moderate right tibial and sural nerve injury (secondary to severe edema), evidence of reinervation potentials noted, and possible CRPS.

8. On February 21, 2018, the claimant was seen by Dr. David Reinhard for diagnostic testing related to CRPS. Specifically, Dr. Reinhard performed stress thermography testing and an autonomic testing battery. At the conclusion of the testing, Dr. Reinhard noted that the testing was "strongly positive for evidence of [CRPS]". He further noted that two positive tests is considered confirmation of CRPS under the Colorado Medical Treatment Guidelines (MTG).

9. On June 13, 2018, the claimant attended a functional capacity evaluation (FCE) with Pat Riley, PT. In a written report, PT Riley opined that the claimant was capable of working in a light duty position, up to four hours per day and five days per week. PT Riley also noted positional tolerances for sitting, standing or walking up to 30 minutes. PT Riley recommended that the claimant change positions frequently and elevate his right leg. PT Riley opined that the claimant's limitations did not match the requirements of his position with the employer.

10. On June 18, 2018, Dr. McLaughlin placed the claimant at maximum medical improvement (MMI) and assigned a permanent impairment rating of 30 percent, whole person. This included 25 percent for the CRPS diagnosis and seven percent for the claimant's right lower extremity. Dr. McLaughlin also imposed permanent work restrictions of no lifting more than 50 pounds, no repetitive lifting of more than 25 pounds, change positions as needed, no ladders, no crawling, no kneeling, no squatting, no climbing, and limit standing/walking to 30 minutes at time. With regard to maintenance medical treatment, Dr. McLaughlin recommended gabapentin, ketamine cream, additional physical therapy, and follow-up with him, as needed. Dr. McLaughlin noted that Dr. Cota determined that the claimant was not a surgical candidate.

11. On November 20, 2018, the claimant attended an Division-sponsored independent medical examination (IME) with Dr. Stanley Ginsburg. In connection with the DIME, Dr. Ginsburg reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. Dr. Ginsburg agreed with Dr. McLaughlin that the claimant reached MMI on June 18, 2018. With regard to permanent impairment, Dr. Ginsberg assessed a whole person impairment of 35 percent. This rating was based on the CRPS diagnosis. Dr. Ginsburg did not include a lower extremity rating because the claimant would not allow him to complete range of motion measurements. Dr. Ginsberg did not opine with regard to maintenance medical treatment or permanent work restrictions.

12. At the request of the respondents, on April 2, 2019, the claimant attended an independent medical examination (IME) with Dr. John Raschbacher. Prior to issuing his written report, Dr. Raschbacher reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. Dr. Raschbacher opined that the claimant's impairment rating for CRPS should be 15 percent.

13. On August 27, 2019, the respondents filed a Final Admission of Liability (FAL) reflecting the MMI date of June 18, 2018 and Dr. Ginsberg's impairment rating of 35 percent, whole person.

14. On March 5, 2019, Dr. McLaughlin completed a medical source statement. In completing that form, Dr. McLaughlin noted that the claimant could lift up to 50 pounds, occasionally, and 20 pounds frequently. Dr. McLaughlin also indicated that the claimant could walk between up to one hour at a time, and up to one to two hours total per day. With regard to sitting, the claimant could sit three hours at a time, with a total of three to four hours per day. Dr. McLaughlin also opined that the claimant could work up to four hours per day, with 15 minutes of sustained work activity. He also noted that the claimant would miss between four and seven days per month.

15. On October 15, 2019, the claimant returned to Dr. McLaughlin. On that date, Dr. McLaughlin completed a medical source statement. Dr. McLaughlin marked that the claimant was unable to sit or stand for more than 10 minutes at a time; that in an eight hour period he could sit for less than two hours total; stand/walk for less than two hours total; lift 10 pounds occasionally, and 20 pounds rarely; and would miss more than four days a month.

16. A second IME was performed by Dr. Raschbacher on November 8, 2019. As with the prior IME, Dr. Raschbacher reviewed the claimant's medical records, obtained history from the claimant, and completed a physical examination. At that time, the claimant reported that over the prior three to four months he was no better and no worse. Dr. Raschbacher noted the claimant's assertion that he was totally disabled. However, it was Dr. Raschbacher's opinion that the claimant was not totally disabled. Dr. Raschbacher noted that, based upon his exam, there was no clear objective evidence of persistent or worsening CRPS. He recommended repeat CPRS testing (including x-ray, bone scan, QSART, and thermography) to determine whether the claimant still had CRPS. In addition, Dr. Raschbacher recommended that following such testing, the claimant should undergo an FCE.

17. On December 3, 2019, Dr. Raschbacher authored an addendum to his November 2019 IME report. In the addendum, Dr. Raschbacher clarified that if repeat CRPS testing is negative, the claimant would not have any work restrictions. If, however, the testing is positive for CRPS, the claimant would be restricted to sedentary work.

18. On December 13, 2019, the claimant was seen by Dr. McLaughlin. At that time, Dr. McLaughlin recommended that the claimant see a physical medicine and rehabilitation specialist to address whether additional CRPS testing was warranted. Also on that date, Dr. McLaughlin identified the claimant's work restrictions as lifting up to 20 pounds, repetitive lifting up to 10 pounds, standing/walking for 10 minutes at a time, sit-down duty only, and no driving.

19. The claimant was seen in the emergency department (ED) for two incidents unrelated to his work injury. Those ED visits occurred on March 5, 2020 and April 27,

2020, respectively. These medical records do not reflect the claimant's diagnosis of CRPS. Nor do those records indicate that the claimant was exhibiting any pain behaviors related to his right lower extremity.

20. Thereafter, the claimant was seen in the ED at Community Hospital on October 1, 2020 after a motorcycle accident. On October 1, 2020, the claimant reported to ED providers that he was in a motorcycle accident two days prior. The claimant also reported that he was traveling without a helmet at approximately 25 miles per hour, when he fell to the right and lost consciousness.

21. The claimant testified regarding the motorcycle accident. The claimant describes driving between five and ten miles per hour in a parking lot when he hit some gravel and fell to the right. The claimant also testified that he broke his leg and hit his head. The claimant also testified that the injuries he sustained as a result of the 2020 motorcycle accident did not change his CRPS symptoms.

22. The medical record of October 1, 2020 identified the claimant's diagnoses as a right minimally displaced tibial plateau fracture; right sided rib fractures; a right distal radius fracture; and a right scaphoid fracture. Dr. Duwayne Carlson opined that the claimant did not need surgery. In that same record, Dr. Carlson referenced the claimant's crush injury "several years ago" and the claimant's report that "he has been evaluated by multiple doctors with no diagnosis or treatment".

23. On January 12, 2021, Dr. McLaughlin completed a medical source statement. In this statement, he opined that as of December 13, 2019, the claimant was capable of occasionally lifting up to 20 pounds and frequently and continuously lifting 10 pounds. In addition, the claimant was capable of standing 10 minutes at time (for up to four hours per day), and was able to sit for up to eight hours per day. Dr. McLaughlin also stated that the claimant's maximum work tolerance was 8 hours per day and that he would miss one to three days of work per month. He did not believe that the claimant's work injury impaired his ability to concentrate. In addition, Dr. McLaughlin opined that vocational rehabilitation and training would likely assist the claimant in returning to work.

24. On January 25, 2021, the claimant was seen by Dr. McLaughlin. At that time, the claimant reported the recent motorcycle accident and worsening symptoms. The claimant reported to Dr. McLauglin that at the time of his motorcycle accident he was going ten miles per hour when the motorcycle fell. It was the claimant's belief that the motorcycle accident did not change his CRPS symptoms. Despite that statement, the claimant asked about leg amputation. Dr. McLaughlin noted that although he had previously provided work restrictions for modified duty, he "did not see how [the claimant] could even get to work or do any work."

25. On January 29, 2021, the claimant returned to Dr. Raschbacher for an additional IME. In connection with this IME, Dr. Raschbaher performed a physical examination and reviewed additional medical records, including those related to the 2020 motorcycle accident. Dr. Rachbacher also reviewed a social media investigative report. The claimant reported to Dr. Raschbacher that at the time of the motorcycle accident, he was going approximately five miles per hour when the motorcycle slipped on gravel. The

claimant also denied any change to his CRPS symptoms following the motorcycle accident.

26. In his IME report, Dr. Raschbacher questioned the degree of symptomatology the claimant was reporting in light of his ability to operate a motorcycle and kayak (as depicted in the social media pictures). In addition, Dr. Raschbaher opined that it was unlikely that the claimant's report of the motorcycle accident was accurate given that the claimant was knocked unconscious and sustained fractures to his right leg, right wrist, and right ribs. Dr. Raschbaher reiterated his prior recommendations for repeat testing to confirm CRPS. Dr. Rashbaher concluded that the recent worsening of the claimant's symptoms was due to the motorcycle accident.

27. On March 3, 2021, the claimant was seen by Dr. McLaughlin. On that date, Dr. McLaughlin declined to refer the claimant for any repeat CRPS testing.

28. On March 19, 2021, the claimant was seen by Dr. Price. This was the first time the claimant was seen by Dr. Price since April 2018. On that date, Dr. Price completed a medical source statement in which she listed the claimant's restrictions as lifting up to 20 pounds; standing and walking up to one hour per day; and sitting up to three hours per day. Dr. Price identified the claimant's maximum work tolerance as three hours per day. In addition, Dr. Price opined that the claimant would miss between one and three days per month.

29. On March 23, 2021, Dr. Price issued a second form outlining work restrictions in which she opined that the claimant could only sit or stand for 10 minutes at a time, and for up to one hour per day. She also opined that the claimant would miss more than four days of work per month, and he would be off task during ten percent of his work day.

30. On March 29, 2021, Dr. Price authored a response to a letter from the respondents' counsel. In her reply, Dr. Price noted that she was aware that prior to the motorcycle accident, the claimant did not undergo any medical treatment for his work injury. Dr. Price opined that the injuries the claimant sustained in the motorcycle accident were not contributing to his current presentation or disability.

31. Dr. McLaughlin's testimony was consistent with his written reports. Dr. McLaughlin testified that the claimant continues to have CRPS and remains at MMI. With regard to the various work restrictions he has issued, Dr. McLaughlin testified that the work restrictions at the time he placed the claimant at MMI and in the January 12, 2021 medical source statement are reflective of his attempt at optimism regarding the claimant's level of function. Dr. McLaughlin also testified that it is his opinion that the claimant has worsened since the date of MMI and was not capable of returning to work.

32. Dr. Price's testimony via deposition was consistent with her written reports. Dr. Price testified that the claimant's condition has worsened, but he remains at MMI. During her testimony, Dr. Price acknowledged that prior to her March 19, 2021 examination of the claimant, she had not seen him for three years. Dr. Price reiterated

her opinion that the 2020 motorcycle accident had no impact on the claimant’s current complaints.

33. Dr. Raschbacher’s testimony was consistent with his written reports. Dr. Raschbacher reiterated his opinion that repeat CRPS testing would assist in determining whether the claimant is or is not at MMI. Dr. Raschbacher also testified that the work restrictions assigned by Dr. McLaughlin at the time of MMI were reasonable at that time. He also noted that the claimant’s reported change of function since MMI is inconsistent with maintaining MMI. Dr. Raschbacher testified that the interval between MMI and the April 2019 evaluation with Dr. McLaughlin demonstrates that the claimant’s CRPS was stable. In addition, the additional work restrictions assigned in April 2019 were based solely on the claimant’s subjective report and not any objective testing.

34. Dr. Raschbacher also testified that he recommended repeat testing in November 2019 to determine whether the claimant continued to have CRPS. He reiterated that if repeat testing confirmed CRPS, he would agree that sedentary work restrictions would be appropriate. However, Dr. Raschbacher also testified that the claimant’s ability to ride a motorcycle in September 2020 was not consistent with the symptoms he reported to Drs. McLaughlin and Price. Dr. Raschbacher testified that the injuries the claimant sustained as a result of the 2020 motorcycle accident are relevant to the claimant’s current presentation. Specifically, the right leg fracture caused additional trauma to the same body part in which the claimant has been diagnosed with CRPS. Dr. Raschbacher noted that additional trauma to the same extremity can worsen symptoms of CRPS. He further testified that it was not medically probable for the fracture sustained on September 30, 2020 to have completely healed and be asymptomatic by the time of Dr. McLaughlin’s evaluation in January 2021.

35. The claimant testified that his current right foot/leg symptoms include pain with walking, showering, and wearing a shoe. The claimant uses heat and/or ice two to three times each day. He will have the heat or ice on his right foot as long as he “can stand it”. When walking he uses a cane because walking feels like stepping on 1,000 needles.

Education and Work History

36. The claimant is a high school graduate. His work experience includes waiting tables, sales positions, and working on a frac crew in the oil and gas industry. The claimant began working as a delivery driver for the employer’s predecessor, Conway Freight. In 2011, the employer in this case purchased Conway Freight and the claimant began his employment with the employer.

Vocational Evaluations

37. On November 4, 2019, Bob Van Iderstine issued a vocational evaluation report regarding the claimant. In connection with his report, Mr. Van Iderstine interviewed the claimant on February 28, 2019, reviewed the claimant’s medical records, and conducted a review of the labor market. In his report, Mr. Van Iderstine opined that the claimant would be unable to earn wages in competitive employment in the Grand

Junction/Mesa County area. In support of this opinion, Mr. Van Iderstine relied on a medical source statement prepared by Dr. McLaughlin on October 15, 2019. Therefore, Mr. Van Iderstine opined that the claimant would be off task for up to 25 percent of his work day. Mr. Van Iderstine also noted that Dr. McLaughlin estimated that the claimant would miss four or more work days per month. It is Mr. Van Iderstine's opinion that the claimant would be unable to obtain and retain competitive employment because employers would not tolerate the number of breaks, off-task time, and missed work days identified by Dr. McLaughlin.

38. Mr. Van Iderstine's testimony was consistent with his written report. Mr. Van Iderstine testified that the changes made by Dr. McLaughlin to the claimant's work restrictions since MMI would result in the claimant being unemployable. In support of this opinion, Mr. Van Iderstine noted that Dr. McLaughlin identified that the claimant would miss between one and two days per month. Mr. Van Iderstine explained that this level of unplanned absences would not be tolerated by an employer. Mr. Van Iderstine also noted that the claimant's need to recline would preclude him from working. Mr. Van Iderstine reiterated his opinion that the claimant would be unable to earn wages in competitive employment in the Grand Junction/Mesa County area.

39. Following an interview with the claimant, on January 3, 2020, Katie Montoya, Vocational Consultant, issued an initial vocational assessment report. In connection with that report, Ms. Montoya interviewed the claimant, reviewed the claimant's medical records, and conducted vocational research. However, Ms. Montoya did not state an opinion regarding the claimant's ability to return to work.

40. On March 26, 2021, Ms. Montoya issued a subsequent report in which she expressed opinions regarding the claimant's ability to return to work. In her report, Ms. Montoya opined that the claimant is able to return to work. In support of this opinion, Ms. Montoya referred to the January 12, 2021 medical source statement in which Dr. McLaughlin released the claimant to work eight hours per day, with the ability to lift up to 20 pounds. Ms. Montoya noted the claimant's prior experience in customer service and sales. In addition, Ms. Montoya referenced the inconsistent opinions expressed by Drs. McLaughlin and Price regarding the claimant's work restrictions.

41. Ms. Montoya's testimony was consistent with her written reports. Ms. Montoya reiterated her opinion that the claimant is capable of earning wages in the Mesa County/Grand Junction, Colorado area. Ms. Montoya testified that she has worked with individuals with CRPS who returned to regular gainful employment. In her testimony, Ms. Montoya noted the changing work restrictions in this case. With regard to the initial restrictions assessed by Dr. McLaughlin at MMI, the claimant was employable within those restrictions in a "modified medium" category. Given the changing and inconsistent work restrictions, Ms. Montoya also testified that it is her practice to to use the restrictions that made the most sense given all of the factors in the case. In this case, she determined that sedentary work in customer service or sales positions would be viable employment options for the claimant.

42. The ALJ does not find the claimant's testimony regarding the 2020 motorcycle accident or his current symptoms to be credible or persuasive. The ALJ credits

the medical records, and opinions of Dr. Raschbacher and Ms. Montoya over the contrary opinions of Drs. McLaughin and Price, and Mr. Van Iderstine. The ALJ specifically credits the opinion of Dr. Raschbacher that there is no clear objective evidence of persistent or worsening CRPS. The ALJ also credits Dr. Raschbacher's opinion that the break in medical treatment from MMI on June 18, 2018 to the follow up appointment with Dr. McLaughlin in April 2019 indicates that the claimant's condition had stabilized. The ALJ is also persuaded that the claimant's 2020 motorcycle accident is more likely the cause of the claimant's current right lower extremity symptoms. The ALJ credits Ms. Montoya's opinion that the claimant is employable in sedentary jobs including customer service and sales. For all of the foregoing reasons, the ALJ finds that the claimant has failed to demonstrate that it is more likely than not that he is permanently and totally disabled as a result of the May 24, 2017 work injury.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

4. In order to prove permanent total disability, claimant must show by a preponderance of the evidence that he is incapable of earning any wages in the same or other employment. Section 8-40-201(16.5)(a), C.R.S. (2016). A claimant therefore cannot receive PTD benefits if he is capable of earning wages in any amount. *Weld County School Dist. RE-12 v. Bymer*, 955 P.2d 550, 556 (Colo. 1998). The term "any wages" means more than zero wages. *Lobb v. ICAO*, 948 P.2d 115 (Colo. App. 1997); *McKinney v. ICAO*, 894 P.2d 42 (Colo. App. 1995). In weighing whether claimant is able

to earn any wages, the ALJ may consider various human factors, including claimant's physical condition, mental ability, age, employment history, education, and availability of work that the claimant could perform. *Weld County School Dist. R.E. 12 v. Bymer*, 955 P.2d at 550, 556, 557 (Colo. 1998). The critical test is whether employment exists that is reasonably available to claimant under his particular circumstances.

5. The respondents are not required to prove the existence of a job offer to refute a claim for permanent total disability benefits. *Black v. City of La Junta Housing Authority*, W.C. No. 4-210-925 (ICAO, December 1998) (claimant is not permanently totally disabled even though respondents' vocational expert was unable to identify a single job opening available to claimant); *Beavers v. Liberty Mutual Fire Ins. Co.*, (Colo. App. No. 96 CA0275, September 5, 1996) (not selected for publication); *Gomez v. Mei Regis*, W.C. No. 4-199-007 (September 21, 1998). Rather, the claimant fails to prove permanent total disability if the evidence establishes that it is more probable than not that the claimant is capable of earning wages. *Duran v. MG Concrete Inc.*, W.C. No. 4-222-069 (September 17, 1998).

6. As found, the claimant has failed to demonstrate by a preponderance of the evidence that he is incapable of earning wages in the same or other employment in his commutable labor market. As found, the claimant is able to work in sedentary to light duty work. As found, the medical records and the opinions of Dr. Raschbaher and Ms. Montoya are credible and persuasive. In reaching this conclusion, the ALJ has considered "human factors" including the claimant's age, physical condition, work restrictions, educational background, and employment history. Therefore, the claimant has failed to demonstrate, by a preponderance of the evidence, that he is permanently and totally disabled as a result of the May 24, 2017 work injury. The ALJ concludes that the claimant is not entitled to PTD benefits.

ORDER

It is therefore ordered:

1. The claimant's request for permanent total disability (PTD) benefits is denied and dismissed.

2. The issue of disfigurement is reserved for future determination.

Dated this 24th day of August 2021.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. **In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

ISSUES

- Did Claimant prove the settlement in his claim should be reopened on the grounds of fraud or mutual mistake of material fact?

FINDINGS OF FACT

1. Claimant suffered compensable injuries on January 9, 2009. He tripped over an air hose at work and injured his neck, back, and left shoulder.

2. Claimant had a previous neck injury and underwent a two-level cervical fusion in 2007. He received Social Security Disability benefits for an unclear length of time[1] but had returned to work 18 months before the work accident.

3. Claimant received medical treatment and was put at MMI by his ATP in on December 28, 2010.

4. Dr. Kathy McCranie performed a Division IME in July 2011. Dr. McCranie agreed with the MMI date assigned by the ATP. She concluded Claimant's ongoing neck and back issues were not caused by the work accident. Dr. McCranie assigned a small rating for the left shoulder, although she opined, "I would question whether even this impairment would be related to the 01/09/09 accident." Dr. McCranie also opined Claimant required no medical treatment after MMI causally related to the work accident.

5. Respondents filed a Final Admission of Liability (FAL) based on Dr. McCranie's DIME report. Claimant requested a hearing, and ALJ Walsh ultimately found he failed to overcome the DIME. This determination was upheld by the Industrial Claim Appeals Office (ICAO) and the Court of Appeals. As a result of this litigation, the claim was closed.

6. Claimant was diagnosed with a right hip labral tear in 2014. He filed a petition to reopen in August 2014 because "the hip was not included" in his claim previously. Claimant requested a hearing on reopening and permanent total disability "because I was not able to walk." Claimant also asserted the DIME's prior findings of causation and apportionment were a "mistake."

7. ALJ Felter initially granted summary judgment and dismissed the petition to reopen on the theory that causation had already been fully litigated and decided against Claimant. Claimant appealed *pro se* to the ICAO, which reversed the entry of summary judgment. The ICAO noted that § 8-43-303(1) allows reopening based on "mistake." The Panel held, "the question of whether the DIME physician made an erroneous conclusion that the claimant was at MMI, that the claimant's condition of disability was not related to

[1] Conflicting information in the record indicates Claimant was on SSDI for one year or 20 years.

the work injury, or that the claimant would [not] need any future medical treatment caused by his work is one of fact for determination by the ALJ." The ICAO remanded the claim for a hearing on the merits of the petition to reopen.

8. Claimant retained Roger Fraley, Esq. to represent him at the hearing. On October 17, 2017, Judge Felter determined Claimant's left shoulder had worsened and reopened the claim. Judge Felter's Order was not submitted into evidence, so it is unknown what, if any, specific benefits were awarded in conjunction with the reopening. Claimant testified Judge Felter did not address his claim for permanent total disability.

9. In November 2018, the parties participated in a binding arbitration before PALJ Eley pursuant to § 8-43-206.5. Judge Eley credited Dr. McCranie's opinion that MRIs performed before and after the 2009 work accident showed no significant changes to the left shoulder. Judge Eley found, "Claimant's left shoulder suffered no permanent injury in the 2009 accident," and any treatment for Claimant's left shoulder was instead related to the "significant history of left shoulder problems suffered by Claimant prior to the 2009 accident." Accordingly, Judge Eley denied all treatment for the left shoulder as unrelated to the January 2009 work accident.

10. In March 2019, Claimant agreed to settle his claim on a full and final basis for $24,899.00. The parties used the standard form settlement documents as required by the Division. Claimant admitted he read the settlement documents before signing them, including the provision that states, "Claimant rejects, waives, and forever gives up the right to all compensation and benefits to which Claimant might be entitled . . . including but not limited to . . . [p]ermanent total disability benefits." Claimant testified he "did not understand" the provision regarding waiver of PTD benefits, but admitted Mr. Fraley explained the documents and gave him the opportunity to ask questions about anything he did not understand. Claimant admitted he signed the documents in Mr. Fraley's office and verified the authenticity of his signatures on Exhibit B. The documents were notarized on March 15, 2019. The Division accepted the documents and entered an Order approving the settlement on March 18, 2019.

11. Claimant testified he later emailed Mr. Fraley regarding his objection to the settlement, but no such emails were offered or admitted into evidence.

12. Claimant received his share of the settlement proceeds, minus attorney fees and costs, on April 2, 2019.

13. Claimant testified he did not sign the settlement documents before the notary on March 15, 2019, despite the attestation on the documents. Claimant testified he drove through a major snowstorm to sign the documents in Mr. Fraley's office. He testified by the time he arrived, Mr. Fraley had "sent the notary home" because of the storm. He testified Mr. Fraley said, "he would take and get my signature notarized before his notary."

14. Claimant's testimony regarding the notarization is not supported by any other persuasive evidence in the record. Mr. Fraley contradicted this allegation and stated

Claimant signed the documents on March 15, 2019, as attested by the notary. In his post-hearing brief, Claimant described his testimony as “new evidence,” and the ALJ infers Claimant said nothing about any alleged problems with the notarization before the hearing.

15. Claimant testified he received poor representation from Mr. Fraley and has filed a grievance against Mr. Fraley for nonspecific “professional misconduct and dishonesty.” Claimant presented no persuasive evidence to substantiate his allegations. On June 6, 2021, Mr. Fraley sent a detailed letter to the Attorney Regulation Counsel regarding his representation of Claimant. The letter was offered into evidence by Claimant. Mr. Fraley’s statements regarding the course of the claim and the circumstances surrounding execution of the settlement are credible and more persuasive than the contrary allegations offered by Claimant.

16. Claimant testified he thinks Mr. Fraley should have pursued a claim for permanent total disability on his behalf and “that was left out of the whole settlement. That’s why I’m asking the Court to reconsider it, set the judgment aside, and allow me to have my permanent total disability and my day in court.” Claimant admitted he believed he was permanently totally disabled as of at least November 2014, more than four years before he settled his claim.

17. Claimant testified his left hip has worsened and “my doctor, Brian White with Western Orthopedics, says it has worsened too.” Claimant believes the left hip is related to the 2009 work accident. He testified, “I did not know it was both hips up until just after the settlement.” No medical records from Dr. White were offered into evidence. There is no persuasive evidence that any issue with Claimant’s left or right hip is causally related to the work accident.

18. X-rays of his cervical spine were taken on May 17, 2021. The radiologist noted postoperative changes from the prior multilevel cervical fusion. Although there was no evidence of mature bone formation at the fusion site, the hardware was intact with no obvious mechanical failure or loosening. Flexion-extension views showed no evidence of segmental instability. Degenerative spondylosis at C5-6 and C6-7 appeared “stable” compared to prior June 28, 2000 films, but there was some interval progression of “degenerative disc disease and osteophyte formation at C3-4.” There is no persuasive evidence any of the visualized pathology or associated symptoms are causally related to the 2009 work accident.

19. On May 26, 2021, Claimant saw Lauren Eller, PA-C at the Vascular Institute of the Rockies. Ms. Eller noted Claimant’s neck and back pain had gotten worse since his last office visit. He also reported significant right shoulder pain “secondary to his neck. He is hoping to get this repaired in the next couple of months pending clearance.” The report states Claimant was scheduled for a total hip replacement the following week. Ms. Eller opined Claimant was cleared to proceed with low back surgery “if required in consultation with his spine surgeon.” Her report contains no discussion of causation and offers no opinion that any of Claimant’s musculoskeletal complaints were related to the 2009 work accident.

20. Claimant testified he was recently diagnosed with an unspecified “problem” at C3, which he apparently believes is related to the original work accident. He testified he was “going to see Dr. William Choi about [that] tomorrow, because there’s no sense in . . . redoing surgery—cervical C4 and C5 and not dealing with C3. I had neck surgery May 28th of 2018, prior to this settlement that was negotiated between the Respondents and Mr. Fraley.” No records from Dr. Choi were offered into evidence. Based on the radiologist’s reading of the May 17, 2021 x-rays, any “new” problem at C3 probably reflects the natural progression of underlying multilevel degenerative changes.

21. Respondents proved Claimant entered into a valid agreement to settle his claim on a full and final basis. The settlement was approved by the Division

22. Claimant failed to prove any fraud or mutual mistake of material fact relating to his settlement or any other aspect of his claim. Although Claimant has made multiple *arguments* regarding his request to reopen the settlement, he has provided very little *evidence* to support his claim. Even though many of Claimant’s arguments relate to his medical condition, he submitted only four pages of medical records. Claimant testified his PCP (Dr. Fine) and his orthopedic surgeon (Dr. Brian White) have offered opinions regarding his level of disability and need for treatment. But no records from Dr. Fine or Dr. White were tendered at hearing. There is no persuasive evidence to show any of Claimant’s ongoing medical issues are related to the 2009 work accident. Mr. Fraley’s June 6, 2021 letter persuasively refutes many of Claimant’s allegations regarding the process leading up to the settlement. Mr. Fraley’s letter also persuasively shows Claimant has mischaracterized and/or misinterpreted many circumstances and events regarding his claim, which casts substantial doubt on the reliability of his testimony in general.

CONCLUSIONS OF LAW

A. Validity of the settlement agreement

The Workers’ Compensation Act allows injured workers to settle all or part of their claim. Section 8-43-204(1), C.R.S. (2009). Claimant initially appears to challenge the validity of the settlement based on alleged irregularities regarding the notarization of his signature. But Claimant’s allegations about the notarization are not substantiated by any other persuasive evidence. Mr. Fraley contradicted Claimant’s testimony he did not sign the documents on March 15, 2019. There is no persuasive evidence Claimant told anyone about the allegedly improper notarization before the June 23, 2021 hearing, and it appears to be a recent addition to his narrative. The notarization appears valid on its face, Claimant conceded he personally signed the documents, and the documents were accepted by the Division. Under the circumstances, the ALJ is not inclined to accept Claimant's bare assertions regarding potential notarial irregularities absent other corroborative evidence. The preponderance of persuasive evidence shows the settlement is valid under § 8-43-204.

B. Fraud

All final settlements are subject to reopening "on the ground of fraud or mutual mistake of material fact." Section 8-43-204(1). The party seeking to reopen a settlement bears the burden of proof by a preponderance of the evidence. Section 8-43-303(4).

To prove fraud, it must be shown that (1) the party misrepresented or concealed a material existing fact that in equity and good conscience should be disclosed; (2) the party knew they were making a false representation or concealing a material fact; (3) the other party was ignorant of the existence of the true facts; (4) the party making the representation or concealing a fact did so with the intent to induce action on the part of the other party; and (5) the misrepresentation or concealment caused damage to the other party. *Morrison v. Goodspeed*, 60 P.2d 458 (Colo. 1937); *Ingels v. Ingels*, 487 P.2d 812, 815 (Colo. App. 1971); *Beeson v. Albertson's, Inc*., W.C. No. 3-968-056 (April 30, 1996). To succeed on a claim for fraudulent concealment or nondisclosure, a party must show the other party had a duty to disclose material information. *Poly Trucking, Inc. v. Concentra Health Servs., Inc*., 93 P.3d 561, 563–64 (Colo. App. 2004).

As found, Claimant failed to prove fraud relating to the settlement or any other aspect of his claim. There is no persuasive evidence of any intent on Respondents' part to deceive, misrepresent, or conceal material information. Claimant's primary argument regarding fraud relates to notarization of the settlement documents. This argument is unpersuasive for several reasons. As previously discussed, the ALJ does not credit Claimant's account of the notarization.[2] In any event, Claimant admitted he signed the documents and verified his signatures. Claimant's assertion he "was never in agreement with this settlement" and "objected to the settlement since I first heard about it" is inconsistent with the undisputed evidence that he signed the agreement and accepted the funds. Claimant agreed to the settlement of his own free will, without force, pressure, or coercion from anyone.

Nor is the ALJ persuaded Claimant was confused or misunderstood the settlement agreement when he signed it. The Workers' Compensation system contains unique procedural safeguards to ensure claimants understand the ramifications of a full and final settlement. The Division requires parties use a standard form settlement agreement, which has been drafted to convey settlement terms using as understandable language as possible. WCRP 9-9(A). Additionally, injured workers must receive an advisement before any settlement can be approved by the Division. Section 8-43-204(3). Where, as here, the claimant is represented by counsel, the Division allows the attorney to provide the advisement. Claimant conceded he reviewed and discussed the settlement with Mr. Fraley before he signed it, and there is no persuasive evidence he was misinformed in any way. Claimant's allegation he did not understand he was waiving any claim for permanent total disability benefits is not credible considering his demonstrated ability to

[2] Moreover, even if Claimant's testimony regarding the notary were credited, it would not show any fraud. Claimant testified Mr. Fraley sent the notary home early because of a major snowstorm. Claimant further testified Mr. Fraley explained the situation to him before he signed the settlement documents. Thus, Claimant's own version of events shows he was fully aware of the circumstances, which conclusively refutes his claim of deception, concealment, or material misrepresentation.

prosecute a successful *pro se* appeal and marshal legal authority and arguments in support of his petition to reopen the settlement.

C. Mutual mistake of material fact

Besides fraud, the only other statutory basis to reopen a final settlement is "mutual mistake of material fact." Section 8-43-204(1). A mistake is "mutual" if it is reciprocal and common to both parties. *Maryland Casualty Co. v. Buckeye Gas Products Co*., 797 P.2d 11 (Colo. 1990); *Cary v. Chevron U.S.A., Inc*., 867 P. 2d 117 (Colo. App. 1993). A mistake is "material" when it goes to "the very basis of the contract." *England v. Amerigas Propane*, 395 P.3d 766, 771 (Colo. 2017). "In other words, the mistake of fact must relate to a material aspect of the contract such that, but for the mistake, the party seeking rescission would not have entered the contract." *Id*. The mistake must pertain to a past or present fact not an opinion or prophecy about the future. *Gleason v. Guzman*, 623 P.2d 378 (1981). A mistake may be found where parties settle a claim without being fully informed concerning the "extent, severity and likely duration" of the injury. *Id*. The mistake must not relate to a fact regarding which the party seeking relief bears the risk.

As found, Claimant failed to establish any mutual mistake of material fact relating to his claim or the settlement. Claimant submitted minimal documentary evidence to substantiate his testimony and support his allegations. To be sure, a Claimant is not required to present expert testimony or opinion evidence to prove causation and can attempt to support his claim with any competent evidence, including lay testimony. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983). But the lack of supporting medical evidence is a legitimate factor to consider when determining if a claimant has met his burden of proof. Judge Eley conclusively determined Claimant's left shoulder condition is unrelated to the work accident, and there is no persuasive evidence any right shoulder issues are work-related. Nor is there any persuasive evidence of a causal connection between the work accident and any hip pathology. As for his argument about permanent total disability benefits, Claimant admitted he thought he was permanently totally disabled well before the settlement was consummated. Therefore, even if there were a "mistake" about this aspect of the claim, it was not "mutual."

ORDER

It is therefore ordered that:

1. Claimant's request to reopen his settlement is denied and dismissed.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: August 24, 2021

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Has Claimant, by clear and convincing evidence, overcome the DIME opinion of Dr. Bissell on the issue of Maximum Medical Improvement?

II. If Claimant has not overcome the DIME opinion, has he shown, by a preponderance of the evidence, that his 7% extremity impairment rating should be converted to that of the Whole Person?

III. If Claimant has not overcome the DIME opinion, has he shown, by a preponderance of the evidence, that substantial evidence exists to make a general award of medical maintenance care?

IV. Have Respondents shown, by a preponderance of the evidence, that they are entitled to recovery of an overpayment for benefits received by Claimant?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

Background

1. This is an admitted claim. Claimant injured his left shoulder while working as a probation officer for Employer on February 26, 2019. He was required to undergo safety training in Golden, Colorado as part of his employment. His training group was practicing rear chokeholds at the time of the incident. Claimant stated he felt a 'pop', along with immediate and severe pain in the left shoulder. By that evening, Claimant reported an intense aching in his shoulder blade area, "kind of in the whole region."

2. [ALJ note*] The first medical reports admitted into evidence are dated 4/5/2019. It was clarified at hearing by Claimant that he reported his injury the next day, was referred to Centura Health, received some physical therapy, and had his care transferred to Lamar, Colorado, near Claimant's place of residence. The medical record for the first 5½ weeks is, therefore silent.

Treatment begins at Prowers Medical Clinic

3. The Prowers Medical Clinic began treating as Claimant's ATP on April 5, 2019. In his intake notes, Dr. Scott Cameron, DO, noted that even he could not access the medical records, except for the initial visit on 2/27/19. Dr. Cameron stated that Claimant had received conservative care only for 5½ weeks. Claimant reported that his progress had

plateaued for several weeks, and was experiencing zingers and an aching throb into the hand, popping and aching at night, and pain lifting overhead. Weakness or consistent numbness was denied. (Ex. 1, p. 3).

4. Based upon the history and physical exam, Dr. Cameron felt that Claimant should have progressed more than he had. He ordered an MRI, PT, and pain medications. *Id* at 4, 5. He also placed Claimant onto modified duty for 10 days, with certain restrictions on shoulder usage. *Id* at 2.

5. Claimant returned to Dr. Cameron on 4/16/19. (Ex. 1, p. 7). Pain remained the same. Range of Motion ("ROM") was essentially 'full', but limited by pain. The MRI had not been completed. Claimant was continued on modified duty. Id at 9.

6. The MRI was then completed on 4/23/2019. The significant *Findings* were:

> There is *no full-thickness [rotator cuff] tear.* There is *no large partial-thickness tear.* There is a *small* area of increased signal intensity in the distal supraspinatus tendon [which could be due to a *tiny* interstitial tear ***or*** administration variation]. (Ex. 10, p.10)(emphasis added).

7. Claimant returned to Dr. Cameron on 4/30/2019. He reported similar complaints ongoing. Dr. Cameron noted: "Reviewed the MRI results with pt, showing possible small tear of rotator cuff tendon, but *nothing that requires surgical intervention as this time nor anything to explain the nature of his pain. Pt states that he believes the MRI is wrong* and believes he has significant problems with his shoulder." *Id* at 16. (emphasis added). If Claimant did not improve with continued PT, Dr. Cameron mentioned the possibility of further testing and an orthopedic referral. *Id* at 18.

8. After physical therapy had achieved little benefit, Claimant returned to Dr. Cameron on 6/11/2019. Dr. Cameron noted:

> Has seen ortho, has received *shoulder injections, have helped somewhat,* but pain is returning. *[Patient] States the plan is to get a repeat MRI, does not like a shoulder MRI but looking now at thorax;* has not heard back about scheduling this yet….Anything involving retraction of L shoulder blade is the worst pain…(Ex. 1, p. 41)(emphasis added).

9. On 6/18/2019, the thoracic MRI was performed. Every facet of the examination was normal and unremarkable. (Ex. 1, p. 46).

10. Dr. Hilton Ray, also with Prowers Medical Group, first treated Claimant on 7/11/2019. (Ex. 1, p. 48). Reported symptoms persisted, and a diagnosis remained elusive. While other testing was considered, Dr. Ray decided on a second orthopedic referral.

Claimant is referred to Dr. Meinig

11. Based upon Dr. Cameron's initial referral, and after the first MRI, Claimant presented to Dr. Richard Meinig for orthopedic evaluation. (Ex. 2). Dr. Meinig diagnosed Claimant on May 24, 2019 with bursitis/tendonitis of the shoulder, and rotator cuff impingement syndrome of the left shoulder. *Id.* at 63. Physical examination by Dr. Meinig revealed "markedly positive Hawkins and impingement sign…. Very marked tenderness along the scapulothoracic medial border of the scapula. *Id.* at 65. Claimant reported ongoing 8 or 9 out of 10 level pain since the work incident. He reported occasional catching and popping in the shoulder and that physical therapy had provided him no relief. *Id.* at 64. Dr. Meinig suspected a possible impingement, and scapulothroacic bursitis.

12. Two injections, each containing bupivacaine and lidocaine, were performed at this visit: one into the medial inferior aspect of the scapulothoracic bursa and an injection into the subacromial space *Id* at 63.

13. Claimant reported at his follow-up visit on June 5, 2019 that the injections reduced his anterior shoulder pain "by perhaps 80%," though he was continuing to have 'about 5 of 10' pain in the shoulder blade area that radiates to the base of the neck. *Id.* at 67. Dr. Meinig then administered another similar injection, this time only to the subscapular bursa. Claimant was also fitted with a clavicle support on 6/28/2019 to address his impingement complaints. Id at 69.

Claimant is referred to Colorado Springs Orthopedic Group

14. Claimant's reported symptoms failed to progress, so he was then referred to Dr. Richard Stockelman with Colorado Springs Orthopedic group for a second opinion. Dr. Stockelman first examined Claimant on August 28, 2019. (Ex. 3, pp. 72-74). Physical examination revealed an inability to perform forward flexion due to pain. Dr. Stockelman diagnosed Claimant with possible left shoulder bursitis, cervical muscle spasms, left carpal tunnel syndrome, and cervical radiculopathy, since Claimant was now reporting numbness and tingling into his ring and middle fingers.

15. Dr. Stockelman noted the 4/23/2019 MRI results. The physical exam was mostly normal, except pain reported with forward flexion, markedly positive Tinel's test, and a positive near test for impingement. *Id* at 73. Claimant also received a Medrol dosepak. Dr. Stockelman then referred Claimant for an EMG/NCS.

16. The EMG was performed by Dr. Katherine Leppard on October 14, 2019. (Ex. 4). In the interim, Dr. Stockelman had performed another subacromial injection of Claimant's left shoulder on September 11, 2019, this time with Marcaine and Depo-medrol. (Ex. 3, p. 77).

17. Claimant returned to Dr. Stockelman on October 23, 2019 stating that the subacromial injection did "give him 'some' relief." (Ex. 3, p. 78). After noting that the EMG was also

normal, Dr. Stockelman felt the next appropriate step would be to perform surgery on the shoulder; however, he did have concern that Claimant could possibly have complex regional pain syndrome (CRPS) and wanted to rule that out prior to any surgery. *Id.* at 80. Dr. Stockelman noted that if Claimant in fact had CRPS, "surgery could make this worse." *Id* at 80.

18. Claimant followed up at Colorado Springs Orthopedic Group, this time being evaluated by Dr. Dale Cassidy for his more distal extremity symptoms. *Id.* at 84-86. During the physical exam, Claimant showed signs of carpal tunnel syndrome, but Dr. Cassidy then noted:

> He had sudden and significant pain involving his left shoulder during my examination. *There was not necessarily distinct provocative maneuver that led to his pain other than general shoulder range of motion*….we essentially stopped the examination due to his pain level. Id at 85 (emphasis added).

19. Dr. Cassidy opined, "While his nerve studies were negative, He [sic] clearly has positive provocative symptoms radiating to both the median and ulnar nerve distribution testing." Dr. Cassidy opined he would be "hesitant" to perform surgery at that time and he and Claimant agreed to try splinting to see if this helps his symptoms in the interim. *Id.*

20. Pain management physician Christopher Malinky evaluated Claimant for CRPS on November 19, 2019. (Ex. 7). Claimant was reporting pain in the posterolateral neck (trapezius area) on the left, left lateral neck, left anterior chest, left lateral chest, upper back overlying the left shoulder blade, and upper back below the level of the shoulder blades of the left arm. *Id.* at 113. Dr. Malinky opined that he did not feel Claimant has CRPS, and that he would be fine to proceed with orthopedic surgery, if so advised. *Id.* at 118.

21. Claimant returned to Dr. Cassidy on December 3, 2019. (Ex. 3, pp. 87-89). Claimant indicated that there was less numbness and tingling, but the shoulder remained painful. Dr. Cassidy stated that he recommended continued observation of Claimant's cubital and carpal tunnel symptoms, but no surgery, given the benefit received from splinting. However, Dr. Cassidy stated, "He will continue seeing Dr. Stockelman for his shoulder issues." *Id.*

22. Claimant saw Dr. Stockelman again on January 15, 2020. (Ex. 3, pp. 90-93). Dr. Stockelman opined, "The next step for his shoulder is an SAD. [Claimant] would like to do this as soon as possible." *Id* at 92. Dr. Stockelman explained that since nonoperative measures had not given lasting relief, that arthroscopy with decompression of the subacromial space with partial acromioplasty was advised. However, he noted *"This surgery could potentially inflame his shoulder more*. He could live with what he has and do PT and pain management **or** go through the surgery." *Id.* (emphasis added).

Records Review IME by Dr. Failinger

23. Orthopedist Mark Failinger performed a record review IME on January 27, 2020 regarding Dr. Stockelman's request for surgery, and whether said request was reasonably necessary. (Ex. 8). Dr. Failinger opined that it does not "appear" at this point that a left shoulder surgery would be reasonable and would not be necessary given the lack of focal pain identification. Dr. Failinger opined that Claimant had a constellation of symptoms that did not point clearly to a "single source" of Claimant's pain. *Id* at 122. Dr. Failinger noted that he had not seen any of the imaging films involved in the claim.

24. Dr. Failinger noted: …"his diffuse pain patterns, with the expanding list of symptoms, are a major negative prognostic indicator for a successful outcome should a decompression shoulder surgery be improved (sic) [approved]. Id at 122. He felt it would be reasonable only if the subacromial injection were performed and Claimant was checked within 15 minutes and report at least 70% to 80% improvement of his symptoms. Respondents denied the request for surgery.

Claimant returns to Prowers Medical Clinic

25. Claimant returned to Prowers Medical Clinic on April 24, 2020, this time being seen by Dr. Ray. (Ex. 1, pp. 57-59). Claimant stated that he was so frustrated with his condition and his surgery being denied that he sought a second orthopedics opinion on his own. Dr. Ray noted that Prowers did not have that report from [orthopedist] Dr. Porter, but are requesting them through the patient, since it was felt that such reports *"need to be reviewed to see what is the most appropriate next step for [Claimant Redacted]" Id* at 58.

26. Claimant did indeed have a March 11, 2020 appointment with Parkview Orthopedics. (Ex. 9). Claimant reported to them that he was still having left shoulder pain from his work injury. Claimant "states that he just wants to know what else can possibly be done with his shoulder. He has a complaint of pain, scapular pain, and every now and then painted[sic] in his fingers." *Id* at 125. In a *Treatment* note prepared by Alan Garcia, PA-C, he stated:

> I discussed with the patient after reviewing all his previous paperwork and diagnostic studies that *there was not any clearcut issues. We discussed a possible rheumatoid panel, other reasons for his potential pain*. Based on this, *we discussed the case with Dr. Porter. Also discussed the case with Dr. King.* If he is appropriate consultation at that time, we will order that. He can result can be diagnostic arthroscopy, possibly indicated view the failure of nonoperative management….*He will now follow up as needed. Id* (sic)(emphasis added).

27. [The ALJ notes that there are no medical reports in evidence regarding any follow-up by Claimant on a rheumatoid panel, other reasons for his potential pain, nor are there any reports from either Dr. Porter or Dr. King. The ALJ further notes that the DIME examiner does not reference any such reports in his record review, nor does the IME physician Dr. Ciccone, IME physician Dr. Rook, nor Dr. Weinstein].

28. Prowers filed a WC164 on 6/5/2020, stating simply that "Patient's appointment was rescheduled due to Dr. Ray not being in. Patient rescheduled to July 2nd @ 8:15 am." (Ex. 1, p. 60).

29. In a new WC164, Dr. Ray placed Claimant at MMI on July 2, 2020 with permanent restrictions and a referral for impairment. (Ex. 1, p. 61). No narrative reports accompany this document indicating that anything had changed, or noting whether Dr. Porter's reports had ever been tendered by Claimant.

Dr. Ciccone's IME

30. Claimant underwent an IME with Dr. William Ciccone on August 26, 2020 at the request of Respondents. (Ex. 10). Dr. Ciccone opined that Claimant sustained nothing more than a minor sprain/strain of the left shoulder from the work event. He noted the MRI studies not documenting any "acute" pathology, but without stating whether any underlying pathology was permanently aggravated. He noted that Claimant's shoulder was "quite sensitive beyond what would be expected" *Id* at 138.

31. Although Claimant reported 80% relief following his first injection, the second injection on September 12, 2019 was performed and only gave "some" relief. Dr. Ciccone concluded that Claimant received no lasting benefit from the injections; therefore, surgery should not be performed, and may only make symptoms worse. *Id.* Dr. Ciccone opined that Claimant was at MMI (no effective MMI date was actually designated, but the report itself is dated 8/26/2020). He also recommended home exercises.

32. A Final Admission of Liability was filed by Respondents on September 30, 2020. Respondents used the MMI date of 8/26/2020, instead of the ATP, Dr. Ray's MMI date of 7/2/2020. (Ex. G). Dr. Ray's WC164 sheet was silent on maintenance care. Respondents admitted to an 11% scheduled rating worth $7,092.80. [At hearing, Claimant testified that he did not have any reason to dispute that he received $7,092.80 in permanent partial disability benefits based upon that FAL].

Dr. Bissell's DIME Report

33. Claimant disagreed with his MMI determination and sought a DIME. The DIME exam occurred with Dr. John Bissell on January 13, 2021. (Ex. 11). In his report issued 1/15/2021, Dr. Bissell documented Claimant's history as having "about 5 injections in different areas of the shoulder" to which he had variable responses. At the time of the examination, Claimant continued to report aching, burning, and stabbing in his left shoulder.

34. Under *Date and Discussion of MMI*, Dr. Bissell states, "He received reasonable, appropriate, and necessary conservative management and reached maximum medial improvement on August 26, 2020." *Id* at 144. . Dr. Bissell stated "None" on the final page of his report whether Claimant needed *Work Restrictions, Maintenance Medication*, or

Future Testing. For *Maintenance Care*, that line is simply left blank. . *Id.* at 145. Dr. Bissell also recalculated Claimant’s impairment rating to that of a 7% scheduled, convertible to 4% whole person*. Id.* [From reading this DIME report in its entirety, the ALJ infers that Dr. Bissell also intended to state “None” regarding *Maintenance Care*].

35. A new Final Admission of Liability was filed on February 3, 2021, admitting to the 7% upper extremity impairment rating assigned by Dr. Bissell. (Ex. H). That 7% upper extremity impairment rating was worth $4,513.60 in permanent partial disability benefits. *Id.*

Claimant consults Dr. Weinstein

36. Claimant sought yet another opinion on his own. He was evaluated by Dr. David Weinstein on October 28, 2020. (Ex. 5). Dr. Weinstein’s history states: “The patient has tried rest, activity modification and local ice over the left shoulder. He has had physical therapy which he states made his symptoms worse. *He has had a number of cortisone injections, six in total, which* ***he*** *states were minimally helpful.”* *Id* at 103. (emphasis added). At this visit, Claimant’s complaints now centered more on his subacromial complaints rather than subscapular. Dr. Weinstein makes no mention of any visits with Dr. Porter or Dr. King.

37. Dr. Weinstein discussed performing (yet another) diagnostic subacromial injection to help distinguish between myofascial and shoulder complaints. *Id.* at 106. Dr. Weinstein does not reference Claimant’s reported prior 80% relief from one of those injections. [This is not surprising, since Claimant apparently did not supply Dr. Weinstein his existing records, and had just reported to him at this sole visit that all six injections had been ‘minimally helpful’. Further, while Claimant mentioned cortisone, he did not mention that Drs. Meinig and Stockelman specifically had also used anesthetics with their injections]. Dr. Weinstein opined that surgery might be warranted, if in fact Claimant did have a diagnostic response to the injection. *Id.*

Dr. Rook’s IME

38. Claimant also sought an IME of his own. Dr. Jack Rook performed this IME of Claimant on May 18, 2021. (Ex. 12). Dr. Rook provides a summary of the medical records. Dr. Rook noted that the injections from Dr. Meinig did not provide any long-term benefit. After Dr. Stockelman performed another injection, Dr. Rook stated that Claimant had *“noticeable less pain.” Id.* at 149. [The ALJ notes that Dr. Stockelman’s report actually states that this injection did *“give him some relief.”* (*see* Finding of Fact #17, *supra*). Dr. Rook also referenced Dr. Weinstein’s report, noting that Dr. Weinstein had documented, from Claimant, “He has had a number of cortisone injections, six in total, which he [Claimant] states *were minimally helpful”. Id* at 158. (emphasis added).

39. Claimant reported to Dr. Rook that he continued to struggle with his severe left shoulder pain. He described the pain as being constant, “being most severe in the anterior shoulder

and also involving the left shoulder blade including underneath the shoulder blade." *Id.* at 150. This causes pain in his left-sided upper back that frequently extends to his neck and can even trigger headaches. Dr. Rook diagnosed Claimant with chronic left shoulder pain with a clinical examination consistent with tendinitis and impingement, along with surrounding myofascial pain involving the left-sided pectoral, scalene, scapular, upper trapezius, parathoracic, and paracervical muscles. *Id.* at 160.

40. Dr. Rook opined that Claimant's intermittent left upper extremity paresthesias were likely a reflection of myogenic thoracic outlet syndrome associated with exacerbations of left shoulder myofascial pain. *Id.* at 160. Dr. Rook opined that some of Claimant's pain is coming from the shoulder joint and agreed with performing a subacromial injection. *Id.* Dr. Rook points out that Dr. Failinger himself stated on January 27, 2020 that the surgery would be reasonable if Claimant had a 70% to 80% relief in symptoms within 15 minutes of a subacromial injection. *Id.* at 161. Dr. Rook noted that the record does not reflect that Claimant underwent such an injection after Dr. Failinger's review. Such an injection could lead to a reasonably necessary surgery that could improve Claimant's chronic pain. Dr. Rook makes no mention in his report of any contact Claimant may have had with Dr. Porter or Dr. King.

41. Dr. Rook further opines in his report that Claimant is not at MMI for his severe myofascial pain. *Id* at 161. He discusses Claimant's symptoms in the context of the Medical Treatment Guidelines ("Guidelines") and the other modalities available for continuing to treat Claimant. *Id.* at 161-62. Dr. Rook lists nine different treatments and medications that could still be used to improve Claimant's ongoing condition to bring him to MMI. *Id.* at 162. Dr. Rook did not find any errors in Dr. Bissell's impairment rating, but he opined that Claimant's extremity rating should be converted to a whole person rating, given the amount of symptoms and functional loss Claimant is experiencing beyond his shoulder.

Claimant Testifies at Hearing

42. Claimant testified at hearing. Claimant recalled undergoing physical therapy and testified that it was okay for a little while, but as it continued, the pain got worse. Claimant was sent to Dr. Richard Meinig for injections. Claimant recalled the injections being in his back and shoulder area, with the shots in his back being 'extremely painful'. He recalled five injections at different times. Claimant was then asked:

> Q …And what relief, if any, did you receive from those injections?
>
> A *Momentary, at best*. It was very…it didn't last long.
>
> Q. …..How much of a percentage of relief would you estimate that you got from *any* of the injections?

> A That was such a long time ago. It's hard to remember exactly…I would say *20 to 30 percent*, maybe, something like that. (Transcript, pp. 22-23)(emphasis added).

43. Claimant stated that he continues to have ongoing symptoms in the shoulder including audible popping and cracking, tightness in the shoulder blade, pain in the armpit and chest area, along with pain up into his neck. Claimant described the simple act of reaching across his body as being "awful."

Dr. Rook Testifies at Hearing

44. Dr. Jack Rook testified at hearing as an expert in the fields of physical medicine and rehabilitation, and pain management. He is level II accredited. Dr. Rook performs approximately 50 DIMEs per year, though it had recently decreased due to the pandemic. When asked about Dr. Bissell's DIME opinion that Claimant was at MMI as of the date of Dr. Ciccone's IME, Dr. Rook opined that Claimant was not at MMI. He opined that Claimant not only did not receive full and appropriate treatment; he also did not get a complete and appropriate workup for his condition. Moreover, his treaters did not follow the Guidelines with regard to treatment for individuals with Claimant's symptoms.

45. Dr. Rook testified that the DIME's report was based on erroneous information and conclusions. He explained that Claimant's MRIs were performed without contrast, which is recommended when you need more differentiation of the intra-articular space. Dr. Stockelman had recommended surgery because Claimant did not have a neurological disorder, he continued to have intra-articular pain, and he felt that Claimant had an appropriate clinical response to the injection. Moreover, the record shows that Claimant received 80% relief with said injection, and it was the injections in the posterior shoulder that did not help.

46. Dr. Rook reiterated that Dr. Failinger recommended getting a better assessment on the results of a subacromial injection immediately after the injections are in the anesthetic phase. This was never accomplished, because the ATP placed Claimant at MMI after Dr. Ciccone opined that Claimant's surgery was not reasonably necessary. Dr. Rook ultimately testified that he was not of the opinion that the surgery was presently reasonably necessary; however, Dr. Rook did state that additional workup is necessary to determine whether Claimant is at MMI or if he is a surgical candidate, which would mean he is not at MMI.

47. Dr. Rook further opined Claimant's injury was more appropriately rated as a whole person injury rather than a scheduled injury, since Claimant has had extensive treatment proximal to the glenohumeral joint, injections into his shoulder blade/back, and ongoing repeated complaints of neck pain and upper back pain. Dr. Rook did state that the subacromial injection could be performed as maintenance care, though a positive diagnostic response would mean Claimant needs surgery and was never truly at MMI.

Dr. Ciccone Testifies by Deposition

48. Dr. Ciccone II testified via deposition on June 30, 2021 as a Level II accredited expert in the fields of orthopedic surgery and sports medicine. Dr. Ciccone reiterated that he felt Claimant's injury was "minor" and that he had been appropriately treated and brought to MMI for his work condition. Dr. Ciccone testified that Claimant had six different injections, and that none of them gave any long-lasting relief. Dr. Ciccone also states that what Dr. Weinstein recommended was the same injection as the other six already performed.

49. Dr. Ciccone also stated his disagreement with Dr. Rook's opinion that an MRI with contrast should have been performed.

> A Well, *we use contrast examinations to better evaluate interarticular structures. The reality of all this is, is the claimant's myofascial pain is his main complaint.* So anything within the shoulder really would be unrelated to the myofascial symptoms. ..I would also say that *very rarely* do we see a whole lot of differences between an MR arthrogram and a standard MRI scan. (Ciccone Depo, pp. 9-10)(emphasis added).

50. Dr. Ciccone felt Claimant needed no additional treatment for his myofascial symptoms addressed by Dr. Rook, because of his opinion that Claimant had a minor injury. The chronic pain Claimant has continued to experience would not be related to such a minor event. Dr. Ciccone essentially agreed with Dr. Rook that Claimant's reported symptoms could justify a conversion, but stated:

> A Well, I mean, the answer to that is , yes, I agree with it *if the claimant has an injury that would be consistent with his complaints.*
>
> In this situation, I think he may have suffered a minor sprain to the shoulder, but clearly did not suffer a significant injury to the chest wall and all the other pain he is complaining of.
>
> So in this situation, I do not agree with it because I do not think the symptoms that he is complaining of at this time are *causally related* to the work event. (Transcript, pp. 10-11)(emphasis added).

51. Dr. Ciccone was asked about Claimant's six prior injections, after his report had referenced three injections. When asked, he was unable to state what or when they were, indicating he saw that number in Dr. Weinstein's and Dr. Rook's notes.

Dr. Bissell Testifies by Deposition

52. Dr. John Bissell testified via deposition on July 21, 2021 in his capacity as the DIME. He was qualified as an expert in the field of physical medicine and rehabilitation. Dr. Bissell testified he determined Claimant was at MMI because he felt Claimant's condition was "stable and stationary with a very low chance of deriving improvement with additional

treatments." (Bissell Depo, pp. 5-6). Dr. Bissell testified he reviewed Dr. Rook's report, and felt Claimant was still at MMI. He acknowledges that not all treatment was exhausted, as Dr. Rook stated, but he was of the opinion such treatments would be redundant or not useful.

53. When asked about the reasonableness of performing yet another injection, as suggested in Dr. Weinstein's report, he clarified:

> A Well, yes, but it has already been done. He has had I think five or six injections in the shoulder, *all of which included local anesthetic,* in addition to steroid, and none of them resulted in any significant improvement in this man's condition. …He had pain after these injections—which were *combination injections; that is, they were both, diagnostic and therapeutic.* …There is no point in doing another one. It's going to be the seventh one. (Bissell Depo, pp. 9-10)(emphasis added).

54. Dr. Bissell was asked, hypothetically, if a seventh injection yielded a positive response, would Claimant then be a surgical candidate, he replied:

> A ….I think the likelihood of it [surgical success] is extremely low because *he has pain everywhere around his shoulder.* He has *myofascial pain*, and *that almost never responds to single, one-area injections*….His MRI demonstrates there is *no identifiable surgical pathology.* (Bissell Depo, p. 12)(emphasis added).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. §8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. §8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals*

Office, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). In this instance, Claimant's hearing testimony poses a dilemma. While Claimant appears sincere, his complaints of pain have not only been migratory, they have been, according to numerous providers, far out of proportion to any anatomical findings. While not addressed by any party herein, Claimant's reported symptoms suggest an overlay of a psychological component, and perhaps a considerable one.

D. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). In this instance, there are numerous medical records, IME reports, depositions, and hearing testimony. The ALJ finds that each expert has rendered their opinions to the best of their ability, *based upon the information they were provided*. The real issue here is one of *persuasiveness,* keeping in mind the burden of proof in this matter.

E. Further, courts are to be "mindful that the Workmen's Compensation Act is to be liberally construed to effectuate its humanitarian purpose of assisting injured workers." *James v. Irrigation Motor and Pump Co.*, 503 P.2d 1025 (Colo. 1972).

Overcoming the DIME Opinion on MMI, Generally

F. The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*; *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590, 592 (Colo. App. 1998); *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186, 189-190 (Colo. App. 2002); *Sholund v. John Elway Dodge Arapahoe,* W.C. No. 4-522-173 (ICAO October 22, 2004); *Kreps v. United Airlines,* W.C. Nos. 4-565-545

and 4-618-577 (ICAO January 13, 2005). The MMI determination requires the DIME physician to assess, as a matter of diagnosis, whether the various components of a claimant's medical condition are casually related to the injury. *Martinez v. ICAO*, No. 06CA2673 (Colo. App. July 26, 2007). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding the cause of a particular component of a claimant's overall medical impairment, MMI or the degree of whole person impairment, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001).

G. The decisions of a DIME physician are only to be given presumptive effect when provided by the statute. Maximum Medical Improvement is defined at 8-40-201(11.5), C.R.S. as: "a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." When a course of treatment has a reasonable prospect of success and a claimant willingly submits to such treatment, a finding of MMI is premature. *See, Reynolds v. ICAO,* 794 P.2d 1080 (Colo. App.1990). The definition of MMI found in the above section contains two components or requirements for a finding of MMI; first, that the condition resulting from the injury be stable and secondly, that no further treatment is reasonably expected to improve the condition. The use of the conjunctive "and" in the definition of MMI connotes that both stability of the condition and the absence of further treatment reasonably expected to improve the condition must be present in order for MMI to exist.

H. This enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.* Where the evidence is subject to conflicting inferences a mere difference of opinion between qualified medical experts does not necessarily rise to the level of clear and convincing evidence. Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries,* WC 4-712-812 (ICAO November 21, 2008).

I. As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

Overcoming the DIME on MMI, as Applied

J. The ALJ has reviewed the DIME report, and incorporated by reference the deposition testimony of the DIME physician. The unambiguous conclusion of Dr. Bissell requires no interpretation: Claimant suffered a minor work injury, and has recovered from it. This was a shoulder strain/sprain, and is now at MMI for it, effective 8/26/2020. Claimant's ongoing complaints, however sincerely rendered, bear no relation to this original work injury. He has been assigned an extremity rating based upon what is causally related to the work injury, in this case, slightly limited range of motion. Claimant can return to work full-time, with no restrictions, and needs no further testing, referrals, maintenance care or medications.

K. Claimant now alleges that Dr. Bissell failed to explicitly address what was originally reported to Dr. Meinig as an 80% improvement following the first shoulder injection. The ALJ makes the following observations. Had Claimant harbored such concerns, Dr. Bissell sat right across the table (figuratively speaking now, of course) from counsel during his deposition. What better opportunity exists but to *ask that question directly*, and await the DIME's response? Based upon Claimant's failure to ask the obvious, the ALJ will not now presume that such response would favor Claimant – especially given the burden of proof. In fact, Dr. Bissell stated that he reviewed all the medical reports provided. There is no proof to the contrary. He is a specialist in physical medicine and rehabilitation, and is fully aware of the values and limitations of injections. He pointed out that of the numerous injections that Claimant has received, they were in fact diagnostic, containing anesthetics as well as steroids. A seventh one would not tell us anything new. The ALJ concurs.

L. Claimant's own testimony at hearing was that the five 'extremely painful' injections he recalled receiving provided "momentary, at best" relief, providing maybe '20 to 30 percent' relief. He told Dr. Weinstein that the six cortisone injections had been 'minimally helpful.' Dr. Bissell had access to Dr. Rook's IME report, which in turn referenced Dr. Weinstein's feedback from Claimant on the efficacy of the injections. In fact, what is clear to the ALJ is that Dr. Bissell has a far better handle on which injections were already diagnostic – instead of purely therapeutic – than several of the other players involved. Not surprising, since he had access to the pertinent records, and knew how to interpret them.

M. At hearing, Dr. Rook stated that the ATP placed Claimant at MMI after Dr. Ciccone had opined that such surgery was not necessary, thus depriving Claimant of the diagnostic injection. This assertion is simply incorrect. The ATP, Dr. Ray, placed Claimant at MMI on 7/2/2020 – eight weeks before Dr. Ciccone ever became involved. While not explicitly stated in the 7/2/2020 WC164, one can infer from previous narratives why Dr. Ray did so. Claimant told Dr. Ray on 4/24/2020 that he had seen Dr. Porter (which in fact, he had on 3/11/2020) for an orthopedic consult. Dr. Ray, not having access to said consult, told Claimant it was important to see, so he could make treatment recommendations. It is clear that Claimant never did so, nor did he provide such records for this hearing beyond the PA-C note. Dr. Ray was out of viable treatment options, so he placed Claimant at MMI. Whether Claimant actually followed through with the suggested plan by Dr. Porter (rheumatoid screening, other pain screening) will remain known only to Claimant.

N. Dr. Bissell has noted that the MRIs (which the ALJ finds were reasonably performed, contrast or not) show a “tiny” interstitial tear, or perhaps nothing at all, due to test administration. He has observed that Claimant’s reported pain complaints have been a moving target, at best, being myofascial pain not readily addressed with a subacromial decompression. CRPS has been eliminated through testing. Considerable efforts have been expended on Claimant’s behalf (even after he didn’t ‘trust’ the first MRI), and a treatable pain generator has still not been identified – much less a pain generator *causally related to this work injury.* No further testing is likely to help treat the *work injury*. Dr. Ciccone concurs with the DIME. Dr. Ray has not changed his MMI determination. Dr. Rook feels otherwise, Dr. Weinstein had limited information, as did Dr. Failinger. We will never know about Drs. Porter and King. In the end, there is a difference in medical opinions, but nothing more. The ALJ cannot conclude that Dr. Bissell erred in any fashion. Claimant has not overcome the DIME opinion on MMI, nor on the scheduled impairment rating assigned.

Conversion to Whole Person, Generally

O. Whether the Claimant sustained a "loss of an arm at the shoulder" within the meaning of § 8-42-107 (2) (a), C.R.S., or a whole person medical impairment compensable under § 8-42-107 (8), C.R.S. is one of fact for determination by the ALJ. In resolving this question, the ALJ must determine the situs of the Claimant’s "functional impairment," and the situs of the functional impairment is not necessarily the location of the injury itself. Langton v. Rocky Mountain Health Care Corp., supra; Strauch v. PSL Swedish HealthcaSystem, supra. Because the issue is factual in nature, we must uphold the ALJ’s determination if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; Walker v. Jim Fuoco Motor Co., 942 P.2d 1390 (Colo. App. 1997). This standard of review requires us to defer to the ALJ’s resolution of conflicts in the evidence, credibility determinations, and plausible inferences drawn from the record. Metro Moving and Storage Co. v. Gussert, 914 P.2d 411 (Colo. App. 1995).

P. Whether the Claimant has sustained an “injury” which is on or off the schedule of impairment depends on whether the claimant has sustained a “functional impairment” to a part of the body that is not contained on the schedule. *Strauch v. PSL Swedish Health Care System*, 917 P.2d 366 (Colo. App. 1996). Functional impairment need not take any particular impairment. Discomfort which interferes with the claimant’s ability to use a portion of his body may be considered “impairment.” *Mader v. Popejoy Construction Company, Inc.*, W.C. No. 4-198-489, (ICAO August 9, 1996). Pain and discomfort which limits a claimant’s ability to use a portion of his body may be considered a “functional impairment” for determining whether an injury is on or off the schedule. *See, e.g., Beck v. Mile Hi Express Inc.*, W.C. No. 4- 238-483 (ICAO February 11, 1997).

Conversion, as Applied

Q. While the ALJ need not afford any presumption to the DIME's opinion on conversion, the ALJ nonetheless finds Dr. Bissell's diagnosis persuasive; Claimant has recovered from a left shoulder sprain/strain, with resultant minor limits on his range of motion. Nothing more. Dr. Rook has noted the numerous limitations as reported by Claimant involving his pectoral, scalene, trapezius, parathoracic and paracervical muscles; therefore, there is a case for conversion to whole person. The ALJ cannot concur in this reasoning. Claimant's ongoing constellation of complaints, accurately reported or not, cannot be attributed to the work injury. His diffuse, migratory, myofascial pain in these areas has not been shown to be causally related to his shoulder sprain/strain. The only situs of Claimant's functional impairment is in his shoulder. Claimant's extremity rating will remain on the schedule.

Medical Maintenance Care, Generally

R. To prove entitlement to medical maintenance benefits, the Claimant must present *substantial evidence* to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Industrial Comm'n.,* 759 P.2d 705, 710- 13 (Colo. 1988); *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995)*.* Once a claimant establishes the probable need for future medical treatment [s]he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* W.C. No. 4-461-989 (ICAP, Aug. 8, 2003). An award for *Grover*-type medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that a claimant is actually receiving medical treatment. *Holly Nursing Care Center v. ICAO,* 992 P.2d 701 (Colo. App. 1999); *Stollmeyer v. ICAO*, 916 P.2d 609 (Colo. App. 1995). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the ALJ. *Holly Nursing Care Center v. Industrial Claim Appeals Office,* 919 P.2d 701, 704 (Colo. App. 1999).

Medical Maintenance Care, as Applied

S. Once again, while the ALJ need not provide deference to the DIME opinion of this issue, the ALJ once again finds Dr. Bissell's reasoning persuasive. Claimant has recovered from his work injury. There is no further treatment or medication that will help him stay at MMI. Claimant himself indicates that physical therapy makes things worse. In fact, no conservative care was of any real value to him. While Claimant's self-reported condition has deteriorated since the work injury, he has not shown a causal nexus between his condition and the actual work injury. His ongoing complaints should be addressed outside the Workers Compensation system. There is no substantial evidence in the record that any future medical treatment will be needed to provide further relief, or prevent any deterioration of Claimant's condition, which is attributable to the work injury.

Overpayment

T. Section 8-43-207(q), C.R.S. gives an Administrative Law Judge the authority to order repayment of overpayments. Section 8-40-201(15.5), C.R.S. defines an overpayment as follows:

> 'Overpayment' means money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable under said articles. For an overpayment to result, it is not necessary that the overpayment exist at the time the claimant received disability or death benefits under said articles.

U. It is undisputed that Respondent previously admitted for, and paid out, permanent partial disability benefits in the amount of $7,092.80, based upon the 11% upper extremity impairment rating assigned by Dr. Ciccone. Claimant then requested a DIME, and such requests are seldom risk-free. Dr. Bissell then assigned a 7% extremity rating for this injury, which the ALJ finds has not been overcome by Claimant, even by a preponderance of the evidence. Actual PPD benefits owing are now $4,513.60. Claimant has been overpaid $2,579.20 in permanent partial disability benefits. Respondents assert that such overpayment should be repaid in $200 monthly installments. The ALJ has not heard sufficient evidence to concur. If the parties are unable to reach a reasonable repayment accommodation on their own, they may then seek specific relief through the administrative process.

ORDER

It is therefore Ordered that:

1. The DIME of Dr. Bissell has not been overcome. Claimant reached MMI on 8/26/2020.

2. Claimant's 7% left extremity rating will remain on the schedule.

3. Claimant's claim for Medical Maintenance benefits is denied and dismissed.

4. Respondents may recover an overpayment of $2,579.20 from Claimant, as authorized by law.

5. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. *In addition, in order to best assure prompt processing of your Petition, it is* ***highly recommended*** *that you send a copy of your Petition to Review to the Colorado Springs OAC via email at oac-csp@state.co.us.*

DATED: August 24, 2021

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 4-977-958-005

ISSUES

I. Whether Claimant's left shoulder and biceps condition has worsened and whether his case should be reopened based on a change of condition and need for medical treatment.

II. Whether the surgery recommended by Dr. Hatzidakis is reasonable, necessary, and related to Claimant's December 5, 2014, workers' compensation injury.

STIPULATIONS

The following stipulations were entered into at the beginning of the hearing and via Respondents' post hearing proposed order:

1. Respondents received the July 23, 2020, Petition to Reopen on W.C. No. 4-886-857 on July 27, 2021.
2. The surveillance footage from February 5, 2021, taken between 1:52 p.m. and 2:55 p.m. is edited as to time.
3. Respondents withdraw the appeal of PALJ Tenreiro's January 29, 2021, Prehearing Conference Order.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. Claimant is a 60-year-old CDL delivery driver/patient service technician who sustained an admitted injury to his left shoulder on December 5, 2014. Claimant injured himself while pulling a dolly with a full oxygen tank upstairs. Respondents' Hearing Exhibits (RHE) at 37. Claimant suffered an extensive left rotator cuff tear and a torn biceps tendon. *See* Hatzidakis Deposition (HD) at 9., RHE at 46.; Dr. Failinger's Deposition (FD) at 10. Claimant also sustained a right shoulder injury in the months before the left shoulder injury and received treatment for both through the same medical providers.
2. Claimant first treated on December 8, 2014, at Concentra. An MRI from December 18, 2014, showed a biceps tendon tear. RHE at 37. After Claimant did not improve with conservative treatment, a repeat MRI was performed on May 9, 2015, at the request of Mark Failinger, M.D. *Id*. The MRI revealed a full-thickness tear of the supraspinatus tendon, probable tear of the infraspinatus tendon, subscapularis tendinosis, a retracted biceps tendon, degenerative changes in the glenohumeral and acromioclavicular joints, a condition predisposing impingement, and a joint effusion in the subacromial subdeltoid bursa. RHE at 40.

3. Cary Motz, M.D., performed a left shoulder arthroscopy with debridement of the rotator cuff, biceps tendon and subacromial space. Claimant's Hearing Exhibits (CHE) at 145. It was noted that the rotator cuff tear was massive and retracted, stiff, and with poor tendon quality. *Id*.

4. Dr. Motz referred Claimant to Dr. Papillion for evaluation of a shoulder replacement. RHE at 38. Claimant reported that Dr. Motz told him he was too young for this procedure and that "they do not last." *Id*. Dr. Papillion said that there were less invasive procedures that could be performed instead of a total shoulder replacement. *Id*. Claimant continued with post-operative therapy and had continued complaints.

5. A repeat MRI of the left shoulder showed similarity to the prior study. There was a complete supraspinatus tear with a full-thickness tear of the infraspinatus, rotator cuff muscle atrophy, retraction of the torn long head of the bicep, and moderate glenohumeral acromioclavicular degenerative joint disease with acromioclavicular joint effusion and degenerative labral tearing. RHE at 44.

6. On February 24, 2016, Dr. Papillion recommended a reverse total shoulder arthroplasty. This was denied by Respondents. On February 25, 2016, Claimant was referred for a second opinion through Armodios Hatzidakis, M.D.

7. On March 15, 2016, Carlos Cebrian, M.D., for an IME. Dr. Cebrian indicated a diagnosis of left biceps tendon tear secondary to the December 5, 2014, injury. (RHE at 46.) Dr. Cebrian suggested that Claimant did not meet the criteria for eligibility for a reverse total shoulder arthroplasty according to the Colorado DOWC Medical Treatment Guidelines (MTG). RHE at 47. Dr. Cebrian noted that this procedure was generally considered a salvage procedure according to the MTG for patients over 70 with severe osteoarthritis, massive rotator cuff tears and pseudo paralysis with integrity of the deltoid. *Id*. It is also noted that the procedure is generally limited to patients over 65 and that patient satisfaction was higher if pre-operative flexion was less than 90 degrees. It was also noted that, where patients have massive rotator cuff tears but can still elevate the shoulder, nonoperative treatment is preferable to surgery. It was last noted that smokers had delayed healing and higher post-operative costs, and that Claimant was a smoker. *Id*.

8. Based on the criteria in the MTG, Dr. Cebrian concluded that Claimant was not a candidate for a reverse total shoulder arthroplasty. Dr. Cebrian noted that Claimant had documented flexion range of motion at that time between 120 and 150 degrees by multiple examiners. RHE at 48. Dr. Cebrian suggested that Claimant would lose range of motion after a total shoulder procedure and would further limit his function. *Id*. Dr. Cebrian also noted that Claimant was too young for the procedure. *Id*. Last, Dr. Cebrian noted that Claimant was a smoker, which would inhibit his recovery. *Id*. Dr. Cebrian, however, has not re-evaluated Claimant since he filed his petition to reopen and alleged a worsening of condition. As a result, the ALJ does not find his opinion to be persuasive for three reasons. First, Dr. Cebrian has not evaluated Claimant since 2016. Second, Claimant's symptoms have worsened since 2016 and there are radiographic findings showing a change in condition that have arisen after his evaluation in 2016. Third, Claimant underwent another surgery that was performed by Dr.

Hatzidakis to help salvage Claimant's shoulder joint and instead of a reverse shoulder replacement surgery.

9. An MRI of the left shoulder performed on April 23, 2016, showed severe supraspinatus and infraspinatus muscular volume loss. RHE at 75-76. The noted tears in the rotator cuff were similar to prior studies. *Id*.

10. On September 13, 2016, Claimant saw Dr. Hatzidakis for a second opinion and surgical evaluation. CHE at 152. The assessment was traumatic left shoulder pain with likely irreparable rotator cuff tear and possible low-grade infection. CHE at 153. Forward flexion was noted as 150 degrees on range of motion measurements. *Id*. Dr. Hatzidakis recommended further diagnostics and recommended that Claimant quit smoking. *Id*.

11. On October 14, 2016, Claimant returned to Dr. Hatzidakis as he felt he was failing conservative treatment and wanted to discuss surgical options. CHE at 157. Pain was indicated as 6/10. *Id*. The assessment was painful left shoulder with ruptured biceps tendon, muscle spasms, extensive rotator cuff tear, subacromial impingement, and possible low-grade infection. CHE at 158. Dr. Hatzidakis recommended a second surgery involving arthroscopic rotator cuff repair with likely superior capsular reconstruction. *Id*.

12. Claimant underwent revision surgery with capsular reconstruction with Dr. Hatzidakis on November 1, 2016. It was noted that Claimant had limited range of motion post-surgically and could not do active range of motion but could advance to 130 degrees of flexion after physical therapy. CHE at 160.

13. On December 13, 2016, it was noted that post-operative P. acnes infection test was successfully treated with antibiotics. CHE at 162.

14. Claimant underwent post-operative therapy for the rest of 2016 and throughout 2017. Claimant completed 90 post-operative physical therapy visits. RHE at 90. Dr. Hatzidakis regularly measured improvements in range of motion throughout this time. CHE at 163-172.

15. On November 8, 2017, Dr. Hatzidakis concluded that Claimant had reached MMI and was ready for an impairment rating. RHE at 104. Dr. Hatzidakis noted complaints of intermittent numbness and tingling bilaterally to all fingers. *Id*. Dr. Hatzidakis measured active range of motion to include forward flexion 150 degrees; abduction 160 degrees; external rotation 40 degrees; and internal rotation to L1. *Id*. Dr. Hatzidakis said that Claimant could be seen on an as-needed basis for the left shoulder.

16. On January 31, 2018, Claimant was referred to Shimon Blau, M.D., for an impairment rating as he was thought to be at MMI. RHE at 92.

17. On February 15, 2018, post MMI, x-rays showed a well centered glenohumeral joint with no migration (CHE 15, p. 174). And on November 12, 2018, x-rays show a well centered glenohumeral joint with adequate glenohumeral joint space. There was no superior migration of the humeral head. (CHE 15, p. 178).

18. On February 21, 2018, Dr. Blau examined Claimant and performed an impairment rating. Claimant stated his pain was between 4.5 and 6/10 on a pain scale. RHE at 99. Dr. Blau measured active range of motion as: flexion 115 degrees; abduction 110 degrees; external rotation 56 degrees. RHE at 100. Dr. Blau gave Claimant a 22% scheduled impairment rating of the left upper extremity. *Id*.

19. On April 23, 2018, Claimant underwent a Functional Capacity Evaluation (FCE) at Select Physical Therapy. RHE at 93. The FCE results showed that Claimant was in the medium to heavy physical demand category between 20 and 50 pounds. *Id*. The testing appeared valid. *Id*.

20. Claimant pursued a DIME, which was performed by Anjmun Sharma, M.D., on July 25, 2018. RHE at 55. Dr. Sharma agreed with MMI on January 31, 2018 and noted that "the patient is at MMI by all physician's accounts" in a medical report from Dr. Failinger reviewed (this was performed on the right shoulder but included some commentary on the left). RHE at 94. Dr. Sharma noted that Dr. Hatzidakis had indicated Claimant would need minimal medical care moving forward for the left shoulder. *Id*. Dr. Sharma noted that, while Claimant reported ongoing pain in the shoulder, he was still at MMI. *Id*. Dr. Sharma measured active range of motion as: flexion 83 degrees; abduction 84 degrees; and external rotation at 12 degrees. *Id*. Dr. Sharma indicated that the Claimant could return to work with maximum lifting, repetitive lifting, carrying, pushing, and pulling no more than 30 pounds. RHE at 95. Overhead lifting was limited to 10 pounds and restrictions were imposed pursuant to the FCE indicating capacity between 20 and 50 pounds. *Id*. Pushing/pulling was also indicated up to 90 pounds. RHE at 96. The final combined left upper extremity impairment was 30% on the schedule of injuries. RHE at 95.

21. Respondents filed an Amended Final Admission of Liability (FAL) on September 6, 2018, admitting in accordance with the DIME. RHE at 4.

22. On November 12, 2018, Claimant returned to Dr. Hatzidakis for a follow-up maintenance visit. Claimant complained of continued shoulder pain mostly localized to the biceps area. RHE at 106. Claimant noted that the shoulder was exceptionally bothered by cold weather. *Id*. Dr. Hatzidakis took active range of motion measurements: forward flexion 140 degrees; abduction 120 degrees; external rotation to 35 degrees; internal rotation to the waist. *Id*. Dr. Hatzidakis recommended continuation of normal maintenance routine including a home stretching and exercise plan. RHE at 107.

23. On December 5, 2019, Claimant presented to Dr. Hatzidakis with complaints of pain ranging between 4 to 5/10. CHE at 182. Measured active range of motion was: 140 degrees forward flexion; 135 degrees of abduction; and 50 degrees of external rotation. *Id*. X-rays taken on this date reflected superior humeral migration with moderately progressive glenohumeral osteoarthritis. *Id*. This was indicated by Dr. Hatzidakis as "mildly progressive superior rotator cuff deficiency with mild to moderate glenohumeral osteoarthritis." *Id*. Dr. Hatzidakis reviewed options with Claimant and recommended physical therapy and strengthening of the bilateral shoulders. RHE at 183.

24. On April 6, 2020, Claimant returned to Dr. Hatzidakis and was seen per a telemedicine visit. RHE at 108. Claimant had significant symptoms in the long head of the biceps with pain and spasm. *Id*. This was noted as his main complaint. *Id.* It is noted that "the left shoulder is overall doing well also." *Id*. Claimant reported maximum pain between 3.5 and 4/10. *Id*. Measurements for active and passive range of motion included: forward flexion 140 degrees; abduction 160 degrees; external rotation 50 degrees. *Id*. It is noted that Claimant wanted to proceed with surgery, proposed by Dr. Hatzidakis as re-tensioning tenodesis. RHE at 109. Dr. Hatzidakis explained that there may be a reasonable chance of improvement with surgery but that he could not guarantee results and also said that there may be insufficient biceps to retention. *Id*.

25. On May 13, 2020, Dr. Failinger performed an IME evaluating the Claimant's bilateral shoulder injuries, specifically addressing the left shoulder complaints and the procedure requested by Dr. Hatzidakis. Claimant was evaluated in-person and physically examined. Claimant reported pain in the left shoulder as 3/10 with pain up to 10/10 at worst, which was experienced while driving and doing activities such as vacuuming and sweeping. RHE at 20. It is noted that "[Claimant] thinks about activities before performing them, as he does not want to cause increase pain." *Id*. Claimant reported that the left shoulder procedure performed by Dr. Hatzidakis in 2016 "helped him quite a bit." *Id*. Claimant reported left biceps pain in the medial upper arm and denied any other areas of discomfort except for the inner arm. *Id*. Claimant desired improvement of the left biceps "like he did on the right." *Id*. Claimant stated he will drop things for unknown reasons. *Id*. It was noted that Claimant recently quit smoking but had been a smoker on and off for 30 years. RHE at 21. Dr. Failinger measured Claimant's range of motion as: forward flexion 100 degrees; abduction 88 degrees; and extension as 35 degrees. *Id*.

26. Dr. Failinger contended that the proposed re-tensioning surgery for the bicep was not reasonably necessary or related. Dr. Failinger stated that it was not medically probable that the procedure would help significantly. RHE at 34. Dr. Failinger noted that the location of the reported pain was in the neurovascular bundle and not the long head of the biceps or medial head and that surgery would not make sense or be expected to improve pain because the area of pain would not be re-tensioned. RHE 34-35. Dr. Failinger noted that an EMG showed no abnormalities in the left arm and that any neurologic symptoms, especially in a person who was not performing aggressive physical therapy, would more likely relate to ongoing degeneration not related to the work injury. RHE at 35.

27. Respondents denied the requested surgery for biceps re-tensioning pursuant to W.C.R.P. 16 pursuant to Dr. Failinger's opinion. RHE at 123-126.

28. On July 23, 2020, Claimant filed a Petition to Reopen on claim W.C. No. 4-866-857 with attachments pertaining to the proposed re-tensioning surgery. There was no Petition to Reopen filed on W.C. No. 4-977-958, the relevant claim.

29. On January 29, 2021, PALJ Elsa Martinez Tenreiro issued a Prehearing Order (PHO) granting Claimant's Motion to substitute the correct W.C. No. on the Petition to Reopen. CHE at 134. Claimant was permitted to withdraw and re-file the Application for Hearing under the correct claim number.

30. Surveillance footage from January 27, 2021, and February 5, 2021, shows Claimant on his driveway shoveling snow. The footage from January 27, 2021, reflects Claimant shoveling several inches of snow. The footage from February 5, 2021, shows Claimant shoveling more snow from his driveway. Claimant is observed shoveling his driveway and the area on the sidewalk and street around his car with no apparent distress, using his left arm to hoist shovelfuls of snow at and sometimes above chest height.

31. On June 3, 2021, Dr. Hatzidakis issued a medical note reflecting that he had a conference with Claimant's attorney on that date to discuss an upcoming deposition and the case. RHE at 112. It was noted that he had not seen Claimant in over a year and that it would be useful to have a physical examination. *Id*. Dr. Hatzidakis said that prior to the deposition it was appropriate to have a follow-up visit and obtain repeat radiographs. *Id*.

32. On June 8, 2021, Dr. Hatzidakis physically examined Claimant. At that time Claimant was complaining of left shoulder and biceps pain indicating that the left shoulder had become more symptomatic over time particularly over the last year or so. He rated the left shoulder at 50% of normal. He was complaining of spasms in the biceps that occur daily with activities in addition to the burning pain in the short head of the biceps. (CHE 15, p. 191) Claimant was reporting pain in various areas of the shoulder and the bicep area.

33. Physical examination of Claimant's left shoulder as compared to his right showed more limited active range of motion when compared to the right side. Claimant had pain at the end range of motion in all planes. Claimant had weakness and minimal tenderness over the ac joint and the short head of the biceps. There was significant tenderness over the proximal long head of the biceps anteriorly and the long head of the biceps with strength testing was somewhat prominent without a true Popeye sign. It was difficult to access because of the size of his arms. Active range of motion was measured as: 130 degrees forward flexion; 105 degrees abduction; and 35 degrees of external rotation, which was worse than that measured by Dr. Hatzidakis when he placed Claimant at MMI. (CHE 15, p. 192.)

34. Dr. Hatzidakis performed repeat X-rays of the left shoulder which revealed acromial humeral head abutment with the weight bearing view, moderate glenohumeral joint osteoarthritis, mild anterior subluxation on the axillary view consistent with the patient's weak subscapularis on examination. (CHE 15, p. 192.) The X-rays showed that the left shoulder arthritis was progressing and the deficiency, the inability of the rotator cuff to function properly had progressed since Claimant's X-rays on December 5, 2019, and the last examination. (HD pg. 17.) Dr. Hatzidakis assessed Claimant with left shoulder pain and osteoarthritis status post arthroscopic superior capsular reconstruction/allograft augmentation with rotator cuff repair of an extensive tear, long head of biceps symptomatology with significant likelihood of pain due to long head of biceps detensioning and a new finding of anterior–superior rotator cuff deficiency.

35. Dr. Hatzidakis stated in his report that Claimant's left shoulder discomfort, function and radiographic appearance had deteriorated slowly over time. Claimant had evidence of rotator cuff deficiency which is likely responsible for his weakness and inability to perform everyday activities on the left side. Dr. Hatzidakis was of the opinion that the

video of Claimant shoveling snow was not a contradiction of the current condition of his left shoulder. Dr. Hatzidakis was of the opinion that a patient with Claimant's condition could perform a certain amount of upper extremity activity and the video showed very little if any overhead activities. He also noted in his report that Claimant could lift his arms as part of his examination and did not exhibit any signs of symptom magnification or falsification. (CHE 15, p. 193)

36. Because of Claimant's persistent worsening symptoms, Dr. Hatzidakis indicated Claimant was a candidate for revision surgery of the left shoulder with reverse total shoulder arthroplasty and an associated surgery that includes retensioning the long head of the biceps.

37. On June 29, 2021, Dr. Failinger issued a brief report, answering four questions posed by Respondents. RHE at 16. Dr. Failinger said that Claimant's objective findings had not significantly worsened since MMI and noted that his range of motion measurements documented on June 8, 2021, were significantly improved when compared to those at the time of MMI. Dr. Failinger stated that any worsening of condition would most reasonably be based on ongoing degeneration rather than pathology caused by the work injury. Dr. Failinger stated that "if in fact the left shoulder claim is accepted," the proposed surgery would be related. Dr. Failinger reviewed surveillance footage from February 5, 2021, of Claimant shoveling snow. Dr. Failinger noted no significant withdrawal or pain behaviors from Claimant while performing what appeared to be relatively heavy physical use of the upper extremities. Dr. Failinger stated that, at least on the date of the snow shoveling, there was not a significant degree of shoulder dysfunction.

Deposition of Dr. Hatzidakis (6/17/2021)

38. Claimant deposed Dr. Hatzidakis on June 17, 2021. Dr. Hatzidakis testified that there was evidence of arthritis of the shoulder in the more recent x-rays from 2021. CHE at 211. Dr. Hatzidakis also testified that the shoulder did not center well in the joint and that the subscapularis was not functioning properly because the ball slipped forward. *Id*. Dr. Hatzidakis explained that this occurs over time in patients with poor rotator cuff tissue and that the slippage is a failure of the front rotator cuff, which isn't part of the repair. *Id*. But he also testified the top portion of the rotator cuff, which was part of the prior repair, is also not functioning properly. (HD, p. 16.)

39. Dr. Hatzidakis credibly testified that the surgery is really the definitive option to cure and relieve Claimant from the effects of his work injury. (HD, p. 18.) He also credibly testified to the following regarding why the surgery is reasonable and necessary to cure Claimant from the effects of his work injury. As for the reverse shoulder replacement Dr. Hatzidakis stated:

> [Claimant] had a significant work injury in which he sustained a large rotator cuff tear. He did not have much arthritis at the time of surgery. He had a surgery to fix that rotator cuff. Rotator cuff did not heal.
>
> He had a 2nd surgery, one we performed, to reconstruct the rotator cuff. He at least healed that partially for some period of time. But once again, the shoulder showed signs of rotator cuff failure in developing osteoarthritis,

> worsening of arthritis in the shoulder, which is a consequence of the shoulder decentering as a result of the rotator cuff not holding it properly, articulating with the glenoid any longer.
>
> So that it is a well-known long-term complication of an extensive rotator cuff tear.
>
> (HD, p. 19.)

Regarding the biceps retensioning, Dr. Hatzidakis credibly and persuasively testified that:

> The patient had the surgery on the right and he didn't have a complete resolution of symptoms. But symptoms did get better.
>
> So, when I see patients for this sort of thing, I tell them, listen, I cannot guarantee that this will cure your problem. I can't guarantee even it will help.
>
> I've seen patients who have the symptoms for years who do have the procedure and it does help them.
>
> Now, do I know how much it will help him? No, I have no idea of predicting the future, I think it is a reasonable option for him to have done in an attempt to improve his symptomatology.
>
> I don't think it carries a lot of risk. So, him what I think about is risk-benefit ratio. So, the risk of him having an untoward complication from a retention of his biceps is very low. The chance of improving his symptoms is more than the risk. So, I think it is a reasonable option to consider.
>
> (HD, p. 20.)

40. The ALJ finds Dr. Hatzidakis' testimony to be credible and persuasive because it is consistent with Claimant's statements in his medical records - and some of his testimony about his condition worsening - and is supported by objective findings. The objective findings include the x-rays that show Claimant has advancing arthritis in his shoulder and that his shoulder is not sitting in the joint properly, both of which are consequences of, and related to, his initial work injury and subsequent surgeries, and support Claimant's complaints of increasing pain and decreasing function.

41. Dr. Hatzidakis also testified about the surveillance video. After watching the video, he concluded Claimant was not violating his restrictions – which included a 20-pound lifting restriction - while shoveling. After reviewing the surveillance video, the ALJ finds Dr. Hatzidakis' testimony related to the shoveling to be credible and persuasive. As a result, the ALJ does not find that Claimant's actions of shoveling exceeded his restrictions. The ALJ further finds that Claimant did not aggravate his preexisting shoulder condition while shoveling.

42. Based on the credible and persuasive testimony of Dr. Hatzidakis, that ALJ finds that Claimant's condition has worsened and the surgery is reasonable and necessary to cure Claimant from the effects of his work injury.

Deposition of Dr. Failinger (7/1/2021)

43. Respondents deposed Dr. Failinger on July 1, 2021. RHE H. Dr. Failinger's testimony and his opinions are contradictory. Dr. Failinger believes that the original incident in 2014 did not cause Claimant's rotator cuff tear, therefore, the need for treatment is unrelated. (FD, p 10.) Moreover, Dr. Failinger testified in one portion of his deposition that any worsening of Claimant's condition would be due to non-related degenerative pathology. (FD, p. 10, 11.) Dr. Failinger further testified that Claimant had a preexisting rotator cuff tear before December 5, 2014, and that the MRI studies do not show that the preexisting rotator cuff was accelerated or made significantly worse by the injury. (FD, p. 10.) Dr. Failinger testified that the degeneration of the rotator cuff was an ongoing process that did not stop and noted that Dr. Hatzidakis acknowledged the quality of the tendon was poor, which was a genetic issue rather than a result of a tear. RHE H at 11. Dr. Failinger testified that ongoing degeneration of the cuff was part of the natural course of the preexisting pathology and would be expected to progress regardless of the repair. RHE H at 11-12.

44. On the other hand, in another portion of his deposition, Dr. Failinger testified and agreed that Claimant suffered an aggravation of his preexisting rotator cuff condition in 2014. Dr. Failinger agreed that:

> [I]n this particular case then, this would have been an aggravation of [Claimant's] preexisting condition based upon the December of 2014 occupational injury.
>
> (FD, p. 38.)

45. Dr. Failinger also reviewed the February 5, 2021, surveillance footage and testified that there was lifting up to the chest level. RHE H at 20. Dr. Failinger testified that there was involvement of the rotator cuff with the movements at chest level or above observed on the footage. *Id*. Dr. Failinger testified that the primary force to lift the snow was the left arm. *Id*. Dr. Failinger testified that at no point did he perceive that Claimant was having any difficulty or pain lifting the snow shovel. RHE H at 22. Dr. Failinger testified that the video evidenced Claimant's ability to perform activities of daily living. *Id*.

46. Dr. Failinger testified that the allograft procedure performed by Dr. Hatzidakis was to prevent a reverse total shoulder procedure and that absent some event that created further worsening of the rotator cuff tear, the need for the procedure was unrelated to the injury. RHE H at 27. Dr. Failinger testified that, just because a patient is dissatisfied with a surgical outcome does not necessarily mean that their condition is worse. RHE H at 30. Dr. Failinger testified that based on Claimant's observed degree of function in surveillance, it did not appear that the reverse total shoulder procedure was the most reasonable thing to perform. RHE H at 33.

47. To the extent Dr. Failinger does not think the shoulder surgery is reasonable, necessary, and related, the ALJ does not find his opinion to be persuasive for several reasons. First, Dr. Failinger admitted that Claimant suffered an aggravation of his preexisting rotator cuff in 2014. Second, many of Dr. Failinger's opinions are based on assumptions that are inconsistent with the ALJ's findings. For example, Dr. Failinger

testified that a reverse shoulder replacement would not be necessary if Claimant's condition is the same as it was when he was placed at MMI. (FD, pp. 31-33.) As found, Claimant's condition has worsened, and he is not the same as when he was placed at MMI. Third, Dr. Failinger further testified that he was the first orthopedic surgeon to see Claimant when he first injured his shoulder. Dr. Failinger stated that Claimant had a "massive tear" and it is "likely irreparable." (FD, p. 38.) Thus, since he initially concluded that the tear was massive and irreparable, the only surgery left to perform is a shoulder joint replacement. Thus, to now say it is not reasonable and necessary is not persuasive.

Testimony of Claimant

48. Claimant credibly testified that he now gets pain in his left shoulder when:

- Waking up in the morning or when trying to get to sleep. As a result, he now has to take over-the-counter pain medication to get to sleep.
- Getting dressed.
- When performing household chores like sweeping and performing light duty activities. See page Hearing Transcript, (HT) at 33.

49. He also credibly testified that he has the recurrence of spasms and cramping in his biceps when doing light duty activities. For example, Claimant credibly testified that he now gets spasms and cramping in his left biceps when:

- Taking a shower and washing his hair.
- Drying off after showering.
- Brushing his teeth.
- Shaving.

50. Moreover, Claimant's contention that his condition is worse is substantiated by objective findings. For example, Claimant has an increase in the arthritis in his shoulder – which is due to his work injury. Claimant has also developed some additional weakness in his left shoulder – consistent with his rotator cuff injury – and the new findings that the ball of his shoulder joint is not positioned correctly – which is also due to his compensable shoulder injury. Plus, Claimant has a slight decrease in range of motion – as measured by Dr. Hatzidakis – compared to when Claimant was placed at MMI and his range of motion was measured by Dr. Hatzidakis.

51. As a result, the ALJ finds that Claimant's condition has worsened to the point that he now gets pain in his left shoulder as well as recurrence of cramping and spasms in his left biceps when performing activities that did not cause pain when he was placed at MMI.

52. Claimant also testified that he did not have any change in condition since he was placed at MMI in 2018. (HT at 43.) But, the ALJ finds that such testimony is inconsistent with his medical records, statements in the medical records, the objective findings that show that his condition has worsened, as well as the reports and testimony of Dr. Hatzidakis. Plus, it is inconsistent with his other testimony that demonstrates he now has pain when

performing activities that did not cause pain at the time he was placed at MMI. As a result, the ALJ resolves these conflicts in the evidence and finds that Claimant's condition has worsened since being placed at MMI and that he is in need of medical treatment to cure him from the effects of his work injury.

ULTIMATE FINDINGS OF FACT

53. Claimant suffered a compensable injury to his left shoulder in December 2014. Claimant's compensable injury includes his rotator cuff and his biceps tendon.

54. Since Claimant was placed at MMI, his condition has worsened, and he is in need of additional medical treatment to cure him from the effects of the work injury.

55. The surgery recommended by Dr. Hatzidakis is reasonable and necessary to cure Claimant from the effects of his work injury. As a result, it is also related to his December 2014 work injury.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant's left shoulder and biceps condition has worsened, and his case reopened based on a change of condition.

Section 8-43-303(1), C.R.S., provides that an award may be reopened on the ground of, *inter alia*, change in condition. The claimant shoulders the burden of proving his condition has changed and his entitlement to benefits by a preponderance of the evidence. Section 8-43-201; *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Osborne v. Industrial Commission*, 725 P.2d 63 (Colo. App. 1986). A change in condition refers either to change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). Reopening is warranted if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Industrial Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Construction Co.,* 765 P.2d 1033 (Colo. App. 1988).

Colorado recognizes the "chain of causation" analysis holding that results flowing proximately and naturally from an industrial injury are considered to be compensable consequences of the injury. Thus, if the industrial injury leaves the body in a weakened condition and the weakened condition plays a causative role in producing additional disability or the need for additional treatment such disability and need for treatment represent compensable consequences of the industrial injury. *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970); *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082 (Colo. App. 2002); *City of Durango v. Dunagan*, 939 P.2d 496 (Colo. App. 1997). However, no compensability exists if the disability and need for treatment were caused as a direct result of an independent intervening cause. *Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187 (Colo. App. 2002).

The question of whether the claimant met the burden of proof to establish a causal relationship between the industrial injury and the worsened condition is one of fact for determination by the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *City of Durango v. Dunagan, supra.* Similarly, the question of whether the disability and need for treatment were caused by the industrial injury or by an intervening cause is a question of fact. *Owens v. Industrial Claim Appeals Office, supra.*

A worsening of condition can take a number of forms. Thus, a worsening of condition does not have to be based on an increase in pain levels. For example, a worsening of condition can be based on an increase or change in the type of activities that causes pain. For example, in this case, Claimant credibly testified that he now gets pain in his left shoulder when:

- Waking up in the morning or when trying to get to sleep. As a result, he now has to take over-the-counter pain medication to get to sleep.
- Getting dressed.
- When performing household chores like sweeping and performing light duty activities.

He also credibly testified that he has the recurrence of spasms and cramping in his biceps when doing light duty activities. For example, Claimant credibly testified that he now gets spasms and cramping in his left biceps when:

- Taking a shower and washing his hair.
- Drying off after showering.
- Brushing his teeth.
- Shaving.

As found, there are some inconsistencies in Claimant's testimony. However, it must be borne in mind that inconsistencies are not uncommon to the adversary process which, of necessity, must rely upon the sometimes contradictory and often incomplete testimony of witnesses who are attempting to reconstruct historical facts and reconcile them with current facts. *See People v. Brassfield*, 652 P.2d 588, (Colo. 1982).

As found, Claimant's condition has worsened to the point that he now gets pain in his left shoulder as well as recurrence of cramping and spasms in his left biceps when performing activities that did not cause pain when he was placed at MMI.

Moreover, Claimant's contention that his condition is worse is substantiated by objective findings. For example, Claimant has an increase in the arthritis in his shoulder – which is due to his work injury. Claimant has also developed some additional weakness in his left shoulder – consistent with his rotator cuff injury. Plus, Claimant has a slight decrease in range of motion – as measured by Dr. Hatzidakis – compared to when Claimant was placed at MMI. Lastly, due to his work injury and subsequent surgery, the ball of Claimant's shoulder joint is no longer positioned properly.

The ALJ also credits the opinions of Dr. Hatzidakis who concluded Claimant's condition has worsened since being placed at MMI. On the other hand, the ALJ did not credit the opinion of Dr. Failinger to the extent he does not think Claimant's condition has worsened and the surgery is not reasonable, necessary, and related to Claimant's December 2014 work accident.

As a result, the ALJ finds and concludes that Claimant has established by a preponderance of the evidence that his condition has worsened and that he needs additional medical treatment to cure him from the effects of his work injury.

II. Whether the surgery recommended by Dr. Hatzidakis is reasonable, necessary, and related to Claimant's December 5, 2014, workers' compensation injury.

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

When determining the issue of whether proposed medical treatment is reasonable and necessary the ALJ may consider the provisions and treatment protocols of the MTG because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, evidence of compliance or non-compliance with the treatment criteria of the MTG is not dispositive of the question of whether medical treatment is reasonable and necessary. Rather the ALJ may give evidence regarding compliance with the MTG such weight as he determines it is entitled to considering the totality of the evidence. *See Adame v. SSC Berthoud Operating Co., LLC.*, WC 4-784-709 (ICAO January 25, 2012); *Thomas v. Four Corners Health Care*, WC 4-484-220 (ICAO April 27, 2009); *Stamey v. C2 Utility Contractors, Inc.*, WC 4-503-974 (ICAO August 21, 2008).

As found, Dr. Hatzidakis has recommended a reverse shoulder replacement and biceps retensioning surgery to cure Claimant from the effects of his work injury. The ALJ credits Dr. Hatzidakis' testimony and finds it persuasive. Moreover, no other physician has offered another type of treatment to cure Claimant from the effects of his work injury. Under Respondents contention, Claimant should merely live with his pain and dysfunction – despite the fact that there is a reasonable surgery that has a reasonable chance to cure him from the effects of his work injury.

Moreover, the ALJ has considered, but rejected the opinions of Dr. Failinger and Dr. Cebrian as to whether the surgery recommended by Dr. Hatzidakis is reasonable, necessary, and related.

As a result, the ALJ finds and concludes that Claimant has established by a preponderance of the evidence that the surgery recommended by Dr. Hatzidakis is reasonable, necessary, and related to treat Claimant from the effects of his work injury.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's condition has worsened and his case is reopened.

2. Respondents shall pay for the surgery recommended by Dr. Hatzidakis, pursuant to the Colorado Workers' Compensation Fee Schedule.

3. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 25, 2021.

/s/ Glen B. Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether the claimant has overcome, by clear and convincing evidence, the Division-sponsored independent medical examination (DIME) physician's opinion regarding maximum medical improvement (MMI).

2. Whether the claimant has demonstrated, by a preponderance of the evidence, that treatment with Dr. Kevin Borchard is authorized.

3. Whether the claimant has demonstrated, by a preponderance of the evidence, that the right knee surgery performed by Dr. Borchard on June 20, 2021, is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the admitted work injury.

FINDINGS OF FACT

1. The claimant has been employed with the employer for 22 years. On January 2, 2020, the claimant suffered an injury to her right knee, when she was shoveling snow at work. The claimant testified that while shoveling, she slipped on some ice and twisted her right knee, but did not fall.

2. The claimant's authorized treating physician (ATP) for this claim is Dr. Frederick Scherr. Since the January 2, 2020 incident, the claimant has undergone treatment including physical therapy, pain medications, right knee surgery, and injections.

3. During the course of the claim, Dr. Scherr referred the claimant to orthopedic surgeon, Dr. Michael Sisk. On May 12, 2020, Dr. Sisk performed a right knee arthroscopy, partial medial meniscectomy, chondroplasty of the medial femoral condyle and patellofemoral joint and partial lateral meniscectomy.

4. On October 20, 2020, a magnetic resonance image (MRI) of the claimant's right knee was performed. The MRI showed, *inter alia*, post-surgical changes. The MRI also showed that the degenerative condition of the claimant's right knee was unchanged when compared to a January 2020 MRI.

5. On October 29, 2020, the claimant was seen by Dr. Scherr. In the medical record of that date, Dr. Scherr noted that the claimant's physical therapist had advised that the claimant was ready to transition from formal physical therapy to a home exercise program (HEP). Dr. Scherr also noted that the claimant did not exhibit an antalgic gait and was able to perform a deep squat without difficulty or pain. On that date, Dr. Scherr determined that the claimant had reached maximum medical improvement (MMI). In addition, Dr. Scherr assigned a scheduled permanent impairment rating of 12 percent for the claimant's right lower extremity. Dr. Scherr assigned permanent work restrictions of

no kneeling or crawling. Dr. Scherr also recommended maintenance medical treatment of six visits of physical therapy, and one pool therapy visit.

6. During that same October 29, 2020 appointment, the claimant reported issues with her right hip, right foot, and back. In the medical record of that date, Dr. Scherr noted that these were new symptoms. Dr. Scherr credibly opined that the claimant's right hip, right foot, and back were not causally related to the admitted work injury.

7. On October 30, 2020, the respondents filed a Final Admission of Liability (FAL), reflecting the MMI date of October 29, 2020, and the impairment rating assessed by Dr. Scherr.

8. The claimant contested the FAL and requested a Division-sponsored independent medical examination (DIME).

9. On February 21, 2021, the claimant attended a DIME with Dr. John Hughes. In connection with the DIME, Dr. Hughes reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his DIME report, Dr. Hughes noted that he was asked to evaluate a number of body parts/conditions. That list included "digestive as well as psychological conditions", the claimant's lumbar spine, pelvis, bilateral lower extremities (including feet, knees, and hips), and complex regional pain syndrome (CRPS). Dr. Hughes agreed with the MMI date of October 29, 2020, as determined by Dr. Scherr. Dr. Hughes assessed a scheduled impairment rating of 21 percent for the claimant's right lower extremity. Dr. Hughes did not recommend any maintenance medical treatment.

10. On March 5, 2021, the respondents filed an FAL reflecting the MMI date and impairment rating in Dr. Hughes' DIME report.

11. The claimant testified that after being placed at MMI, she continued to have right knee symptoms. As a result, she sought out a second opinion with Dr. Kevin Borchard. The claimant was first seen by Dr. Borchard on April 13, 2021. On that date, the claimant reported continued right knee pain, catching, and popping. Dr. Borchard opined that the claimant had developed adhesions in her right knee following the May 12, 2020 surgery. Dr. Borchard recommended a right knee scope to remove that scar tissue.

12. On April 14, 2021, Dr. Sisk's office generated a referral to Dr. Borchard for consultation regarding the claimant's right knee. The claimant testified that she contacted Dr. Sisk's practice and requested a referral to Dr. Borchard. The claimant did not speak with Dr. Sisk, nor was she seen in his office regarding her referral request.

13. On June 20, 2021, Dr. Borchard performed the recommended right knee procedure.

14. The claimant testified that since the June 20, 2021 surgery her right knee is pain-free. the claimant underwent the right knee scope recommended

15. Dr. Scherr's testimony was consistent with the October 29, 2020 medical record. During his testimony, Dr. Scherr reiterated his opinion that the claimant's right knee is the only body part causally related to the claimant's January 2, 2020 work injury.

16. The ALJ credits the medical records and the opinions of Drs. Hughes and Scherr that the claimant reached MMI on October 29, 2020.

17. The ALJ further credits the medical records and the opinion of Dr. Hughes that the claimant did not require additional medical treatment after she was placed at MMI.

18. With regard to treatment the claimant received from Dr. Bourchard, the ALJ credits the medical records and the opinion of Dr. Scherr that the surgery was not reasonable and necessary medical treatment. Additionally, the ALJ finds that treatment provided by Dr. Bourchard was not authorized by the respondents. Although there was an attempt by the claimant to obtain a referral from Dr. Sisk's office, the ALJ is not persuaded that this treatment was authorized, nor was it within the chain of referral.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

4. Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the DIME physician's finding of MMI and permanent medical impairment is binding unless overcome

by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it is highly probable that the DIME physician is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving & Storage, supra.* A mere difference of opinion between physicians fails to constitute error. See *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-356 (March 22, 2000). The ALJ may consider a variety of factors in determining whether a DIME physician erred in his opinions, including whether the DIME appropriately utilized the Medical Treatment Guidelines and the AMA Guides in his opinions.

5. As found, the claimant has failed to overcome, by clear and convincing evidence, the opinion of the DIME physician on the issue of MMI. As found, the medical records and the opinions of Drs. Scherr and Hughes are credible and persuasive on this issue.

6. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). The need for medical treatment may extend beyond the point of maximum medical improvement where the claimant requires periodic maintenance care to prevent further deterioration of his physical condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that the claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999); *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). Section 8-42-101, C.R.S., thus authorizes the ALJ to enter an order for future treatment if supported by substantial evidence of the need for such treatment. *Grover v. Industrial Commission*, *supra.*

7. As found, the claimant has failed to demonstrate, by a preponderance of the evidence that medical treatment provided by Dr. Bourchard, including the June 20, 2021 surgery, was reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury. As found, treatment with Dr. Bourchard was not authorized by the respondents, nor was it within the chain of referral. As found, the medical records and the opinions of Dr. Scherr are credible and persuasive on this issue.

8.

ORDER

It is therefore ordered:

1. The claimant has failed to overcome the DIME physician's opinion on the issue of MMI.

2. The claimant's request for treatment with Dr. Bourchard, including the surgery performed on June 20, 2021, is denied and dismissed.

3. All matters not determined here are reserved for future determination.

Dated this 25th day of August 2021.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. **In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

ISSUES

- Did Claimant prove his claim should be reopened because his condition changed and he was no longer at MMI?

FINDINGS OF FACT

1. Claimant works for Employers as a custody control officer. He suffered an admitted injury to his right hip on February 22, 2019, when he slipped on ice and fell.

2. The fall caused a right intertrochanteric fracture. He underwent an open reduction/internal fixation with cephalomedullary nail the next morning.

3. Claimant was referred to CCOM in Pueblo for authorized treatment. Dr. Daniel Olsen has been Claimant's primary ATP. Claimant participated in physical therapy with gradual improvement of the hip pain. He also had a right hip steroid injection in July 2019, which was helpful.

4. Dr. Olson put Claimant at MMI on September 25, 2019. Claimant reported difficulty running and that prolonged sitting made his hip "stiff." Claimant reported a pain level of 3/10. Dr. Olson noted a "slight hitch" in Claimant's gait and fairly substantial range of motion deficits. Dr. Olson assigned a 16% lower extremity rating. He released Claimant with no restrictions and no need for further care.

5. It quickly became apparent Dr. Olson had been mistaken to release Claimant with no provision for maintenance care. Claimant returned to Dr. Olson on October 22, 2019 and expressed "a lot of frustration and some depression over the fact that he cannot do a lot of the activities that he normally could do before his injury." Claimant also reported increased pain in the groin and right hip. Dr. Olson referred Claimant for counseling with Amy Alsum to address the depression. Dr. Olson also ordered an MRI of the hip and recommended Claimant follow up with his surgeon, Dr. Porter, after receiving the MRI results.

6. On December 12, 2019, Dr. Olson documented Claimant had seen Dr. Porter who thought the ongoing hip pain was probably related to scar tissue. He mentioned possibly removing the hardware but gave Claimant no assurance that would alleviate his pain. Dr. Porter "had no other suggestions." Dr. Olson noted Claimant had been working with Ms. Alsum but "he does not feel like he's getting a great deal out of that."

7. By January 2, 2020, Claimant had finished his sessions with Ms. Alsum and reiterated he "did not find them helpful." Claimant reported 7/10 right hip pain.

8. On January 22, 2020, Claimant was still reporting 7/10 hip pain and aching and burning in the right upper thigh. Dr. Olson referred Claimant to physical therapy and

prescribed Lidoderm patches. Although it appears the physical therapy was primarily directed at an unrelated shoulder condition, Dr. Olson stated, “I will also have the physical therapist work on some of his leg tightness and stretches.”

9. At his next appointment on February 19, 2020, Claimant informed Dr. Olson the Lidoderm patches were helpful. He noticed cold weather and “working a lot of hours in a row” bothered his hip. He had some pain to palpation of the posterior piriformis and gluteus muscles on the right. Dr. Olson noted Claimant “has just started physical therapy for the shoulder.” No specific treatment was recommended for the hip.

10. On March 9, 2020, Claimant reported reducing his work shifts to 10 hours “has helped his hip pain.”

11. Claimant received a refill of the Lidoderm patches on July 9, 2020. He reported “the patches make his pain ‘manageable.’” His pain level that day was 4/10.

12. Claimant attended a hearing before ALJ Edie on October 15, 2020. Judge Edie found Claimant was entitled to a general award of medical benefits. No specific medical benefits related to the hip were awarded.

13. Respondents admitted liability for medical benefits after MMI based on Judge Edie’s order. Claimant’s medical benefits are not “closed.”

14. Dr. Thomas Centi took over as Claimant’s primary ATP in on November 23, 2020. He recommended no specific treatment for the right hip.

15. Claimant next saw Dr. Centi on January 13, 2021. He described the pain as “moderate” but “feels it is stable.” Dr. Centi ordered x-rays of the right hip.

16. Claimant followed up with Dr. Centi on January 21, 2020. He again reported his hip condition was “stable.” Claimant requested work restrictions, specifically he asked for limitations on running and to work no more than 12-hour shifts. Dr. Centi reviewed with x-rays and noted the fracture had healed. There was some moderate osteopenia but no acute findings. Dr. Centi referred Claimant for an orthopedic evaluation “for maintenance, follow-ups and/or complications.” Dr. Centi did not impose any work restrictions.

17. Claimant saw Dr. Robert Thomas at Parkview Orthopedics on February 3, 2021, because Dr. Porter had retired. Claimant explained he had a good response from the steroid injection in 2019, but his pain returned within several months. The report indicates Dr. Porter administered a greater trochanteric injection in November 2020, although there are no corresponding records of that appointment in evidence. Claimant stated the most recent injection was not helpful. Claimant reported lateral right hip pain radiating over the anterior aspect of his thigh. His pain increased with ambulation. Examination showed tenderness over the greater trochanter. He complained of some soreness with internal and external rotation but demonstrated full hip range of motion and full strength. Dr. Thomas reviewed the x-ray and saw the TFN nail was well-positioned. The intertrochanteric fracture was healed, and the hardware was not particularly prominent. There was some loss of the intraarticular joint space consistent with arthritis.

Dr. Thomas diagnosed trochanteric tendinitis and recommended physical therapy. He opined,

> I believe this pain is more related to greater trochanteric tendinitis as Dr. Porter treated back in November. I then talked about repeating an injection, though it did not seem to work. I would be willing to try at once more. Second thing is to try and work with physical therapy. Beyond that, I really do not have much more to offer. I do not think removal of the hardware will do much since the hardware is very well-positioned, not prominent at all. Replacing the hip joint [I] also do not think [is] probably going to help since his pain seems to be more over the greater trochanter and less intra-articular. He decided how it may [sic] just work with physical therapy for now. He does not really want to repeat the greater trochanter injection and will follow up with us as needed.

18. No subsequent medical records were submitted at hearing, and there is no persuasive evidence Claimant pursued any additional treatment for the hip.

19. Claimant failed to prove his condition changed and he was not at MMI at any time after September 25, 2019.

CONCLUSIONS OF LAW

Section 8-43-303 authorizes an ALJ to reopen any award on the grounds of error, mistake, or a change in condition. A "change in condition" refers either to a change in the condition of the original compensable injury, or a change in the claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). The authority to reopen a claim is permissive, and whether to reopen a claim if the statutory criteria have been met is left to the ALJ's discretion. *Renz v. Larimer County School District Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996). The party requesting reopening bears the burden of proof. Section 8-43-304(4).

The respondents are liable for medical treatment after MMI reasonably necessary to relieve the effects of the injury or prevent deterioration of the claimant's condition. Section 8-42-101; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). If the claimant establishes the probability of a need for future treatment, he is entitled to a general award of medical benefits after MMI, subject to the employer's right to dispute causation or reasonable necessity of any particular treatment. *Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003).

Claimant's claim remains open for medical benefits after MMI pursuant to Judge Edie's order and Respondent's admission. Accordingly, there is no need to "reopen" the claim to obtain additional *"Grover"*-type care. But Claimant argues the claim should be reopened because he is no longer at MMI and the treatment he received had been intended "to bring the Claimant back to MMI."

MMI is defined at the point where the injury has become stable, and no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5). The type of treatment provided is not determinative whether it should be considered pre- or post-MMI treatment. The dispositive question is the ***purpose*** for which treatment is provided rather than the "nature" of the treatment. *Milco Construction v. Cowan*, 860 P.2d 539, 542 (Colo. App. 1992).

As found, Claimant failed to prove he was no longer at MMI at any time since September 25, 2019. Claimant's authorized providers have consistently indicated he remained at MMI. Claimant has been described on more than one occasion as "stable." Although Claimant's pain level may fluctuate depending on the weather and his activity level, some waxing and waning of symptoms is reasonably expected given the nature of Claimant's injury, his age, and his physically demanding job. But the mere fact a claimant experiences periodic flares does not necessarily mean they come off MMI. The key question is whether any recommended treatment is intended to improve Claimant's condition instead of simply managing his symptoms. The treatment Claimant has received since being put at MMI has been intended to relieve symptoms and is appropriately considered "maintenance care." There is no persuasive evidence that claimant requires any treatment reasonably expected to "cure" or improve his condition. The preponderance of persuasive evidence shows Claimant has remained at MMI since September 25, 2019.

ORDER

It is therefore ordered that:

1. Claimant's petition to reopen his claim is denied and dismissed.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: August 26, 2021

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that she suffered a compensable work injury in her home office on June 30, 2020?

II. If the claim is compensable, is Claimant entitled to a general award of medical benefits in connection with this claim?

STIPULATIONS

The parties agreed that the issue they wished to be decided is compensability. It was agreed that a general award or denial of medical benefits was all that was being sought, in order to render this case appealable. Claimant also withdrew her claim for Penalties.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

Claimant's Work Arrangement

1. Claimant serves as an analyst for Employer [Redacted]. This job entails setting up health benefit plans when [Employer] gets a contract with a client/employer, and involves setting up benefit plans for new client/employer to offer their own employees. Her official job title is "Benefit Engine Architect."

2. Claimant has been doing this type of work for [Employer] for approximately eight years. She previously worked for Anthem in a similar position. At the time of the reported work injury, Claimant was salaried at approximately $72,000 per year. Claimant was assigned a 'regular' work schedule of eight hours per day, five days per week (*see* Ex. C, p. 12); however, no start or end times of her 8-hour day are noted, nor are lunch hours or breaks addressed at all. While Claimant and her supervisor vary in their understanding of the extent of overtime needed to perform the job, it is undisputed that Claimant would sometimes work overtime as needed, and without further compensation.

3. Until approximately November, 2016, Claimant would commute to the office of [Employer], located in Denver. When she moved to Colorado Springs, however, she started working from home, as [Employer] allowed certain employees to work from home, if they lived more than 50 miles from [Employer]'s Denver office.

The Telecommuting Agreement

4. However, as a condition precedent to be permitted to work from home, Claimant (presumably like all those similarly situated) had to enter into a *Telecommuting Agreement ("Agreement")* with [Employer]. (Ex. C, pp. 11-16).

5. In pertinent part, this *Agreement* states:

●Telecommuting is considered a legitimate management option *when it is cost effective and supportive* *of [Employer]'s* *business objectives. Id* at 12 (emphasis added).

●Claimant was designated as an employee spending "nearly 100%' of her work time at the *telecommuting site*, which is her home address. *Id* at 12.

●There is a separate section of the *Agreement* applicable to hourly employees only. This ***Telecommuting Schedule*** expressly forbids such employees from working overtime without express permission. No such language addresses exempt employees. *Id* at 13.

●Employees were required to remain accessible during "designated work hours", to attend to duties, including, for example, to check email every hour.

●Under the ***Liability*** section: "Telecommuter's at-home or telecommuting work space will be considered an *extension of [Employer]'s work space* for Telecommuter only. If Telecommuter incurs a work-related injury or illness in the course and scope of employment and arising out of such employment *during his/her telecommuting work hours,* Telecommuter's claim will be processed…[for Workers Compensation-otherwise [Employer] is not liable]." *Id* at 14 (emphasis added).

●The *telecommuting work hours* will conform to a schedule agreed upon by Telecommuter and his/her manager. *Id* (emphasis added) [NOTE* this ***Liability*** section makes no distinction between hourly and exempt employees, unlike the ***Telecommuting Schedule.***

●Under ***Home Office: Set-Up, Security, Safety and Ergonomics***, it notes: "Telecommuter will take the necessary steps to ensure that the alternative *worksite* is safe", referencing furniture, lighting and ventilation, trip and fall hazards, and distractions. *Id* at 14 (emphasis added).

●"Telecommuters will be provided equipment, assets, and supplies that are *reasonably needed* to perform their job. [Employer] then specifies which equipment (laptop, monitors, etc.) will be supplied to Claimant, but notes further: "Miscellaneous supplies such as paper clips, file folders, pencils, pens, etc. will be provided *to Telecommuter*. *Telecommuter* *will obtain these supplies through [Employer] and not purchase them from an outside vendor".* *Id* at 15 (emphasis added).

6. Pursuant to the *Agreement*, it was Claimant's understanding that she was required to have a home office that was separate and apart from the common areas of the house to avoid interruptions. It also had to be secure, since she would handle confidential information. Claimant testified that she had a door installed at her residence with a lock, so that her office and an adjacent bathroom were separate from the rest of the house. Claimant testified that she only used the office for her [Employer] work, and that it remained locked the rest of the time.

7. Claimant purchased a desk, bookcases, a file cabinet and a printer stand for the office, for which she was not reimbursed by [Employer]. [Employer] provided the computer, two monitors, and router along with computer supplies and ink for the printer. (*see also* Ex. 12, p. 15). At hearing, Claimant also indicated that there were some boxes in the office on the floor, "but everything was in its place and was working properly" (Transcript, p. 19). [Employer] had previously provided Claimant with an ergonomic chair, as a result of neck surgery in 2013. When Claimant moved into her home office, [Employer] permitted her to take this chair with her.

8. Claimant testified that for about a year before April, 2020, she was required to go into the office in Denver on Wednesdays. However, when the Covid pandemic hit, [Employer] had her return to five days per week in her home office.

The Wall Clock

9. Claimant testified that she had been under stress for failing to meet deadlines, and had met with her supervisor, Ms. M[Redacted], about setting priorities and spending a more appropriate amount of time on certain projects. She wanted to be more productive, so she purchased a wall clock to place on the wall in front of her desk. She bought it from the ARC (thrift store), paying "around $3", and described it as having a mauve background, with rhinestones. She actually bought it about two months prior to attempting to hang it.

10. Claimant noted: "Well, I was keeping track of my time, and also it as much easier for me to see something large right in front of my face in terms of my time. Rather than find my phone or look at the tiny little square on the screen, I wanted to be able to see it and read it quickly." (Transcript, p. 22). When asked if the clock would confer a personal benefit to her, Clamant advised: "No, I couldn't see it from anywhere else. I didn't hang out in my office when work was over." *Id* at 23.

Claimant Falls from her Work Chair

11. Claimant testified that on June 30, 2020, she had worked a regular workday, which was typically 6:00 am to 2:30 pm, or 6:30 am to 3:00 pm. However, there was a (virtual) group meeting scheduled for 3:00 pm that day. Having some time before this meeting, she decided to hang the clock. Prior to doing so, she left the home office to get a hammer and nail.

12. Claimant testified that she took some boxes that were filled with books and binders, and braced the bottom of her work chair, so the wheels on the bottom would not move. When she stood up on the seat of the chair to hang the clock, the seat of the chair started turning. She had nothing to hang onto, so she fell backwards and to the floor.

13. Claimant stated:

> …I hit my bottom first, mostly on my left side, my knee got caught in the…armrest…of the chair, so that got injured, and then when I fell, I started to free fall. I hit my neck on the magazine rack, and then, of course, my hip, and my back, and my lower back, and my upper back had abrasions on it, and my head…(Transcript, p. 24).

Claimant Reports this Incident to her Supervisor/ Seeks Treatment

14. Claimant testified that she let Ms. M[Redacted] know about the fall during a call with her team a few days later, but she did not make the call at 3:00 on the June 30th because of the fall.

15. Based on her conversation with Ms. M[Redacted], she thought HR was going to advise her what medical providers to see. However, by 'Friday' [July 3, 2020], having heard nothing from Ms. M[Redacted], she sent her a message, stating she was going to the ER. Ms. M[Redacted] then said, "I hope you find someone." (Transcript, p. 25).

16. Claimant testified she went to the UCHealth ER, and the ER doctor told her to follow up with her primary care doctor, who is Dr. Stefani. UCHealth records indicate that on 7/7/2020, Claimant reported to ER staff that she had injured her back 'onset 5 days ago', by falling off a chair with wheels to hang stuff on the wall. (Ex. A, p. 1). [The ALJ notes that '5 days ago' from 7/7/2020 would have been 7/2/2020].

17. On 7/21/2020, Claimant had a video visit with Dr. Stefani at [Employer]. His notes indicate that Claimant had reported to him, "Pt reports that she suffered a fall while at work on 7/7/2020. Went to the ED where imaging was conducted. Imaging was largely unremarkable…We agreed to repeat the imaging…She states that workers comp is pending." (Ex. B, p. 2). [The ALJ notes that UCHealth ER did perform xrays on 7/7/2020].

18. Thereafter, she testified that Dr. Stefani referred her to Dr. Malinky, whom the Claimant had seen before for pain management for her neck surgery. Dr. Malinky then referred her to Dr. Hammers, who performed surgery on her low back on November 18, 2020. Claimant then developed sepsis following this low back surgery, and she stated that she has not been placed at MMI by Dr. Malinky.

Brenda M[Redacted] Testifies

19. Brenda M[Redacted], the Claimant's supervisor, testified at hearing. She testified that since the alleged injury, Claimant has complained of both neck and low back pain. Prior to the alleged injury, Claimant had never complained to her about not being able to see clocks, nor was she late for meetings.

20. Ms. M[Redacted] testified that the first time she knew about the Claimant's injury was on [Tuesday] July 7, 2020. At that time, Claimant only told her that she had fallen about a week before, but did not tell her it was an on the job injury. Claimant did tell her that she had fallen off a swivel chair while trying to hang a clock.

21. Ms. M[Redacted] testified that with the Outlook software [Employer] uses, there are reminder sounds for meetings that are on the calendar. Claimant did not request any type of prior approval for the purchase of this clock, nor did Claimant seek reimbursement after the fact. Claimant never sought any help in hanging this clock. Further, she did not believe that Claimant needed another clock in her home office. She has never, however, visited Claimant's home office.

22. Ms. M[Redacted] opined that Claimant hanging this clock did not benefit [Employer] in any way. She also opined that Claimant did not comply with her obligation under the Agreement to maintain a safe worksite, when she used the wheeled swiveling chair to hang the clock. She did agree that she told Claimant that her injuries might be covered by Workers Compensation.

23. Ms. M[Redacted] has been the Claimant's supervisor since August of 2018. Claimant did have earlier performance issues that had been corrected, but by April, 2020, she was having performance issues again, with missed deadlines. However, such missed deadlines were based on dates, rather than just missing deadlines by hours or minutes.

24. Ms. M[Redacted] estimated that about 95% of the Claimant's daily work activities are dedicated to getting her daily work done and meeting deadlines, with little time spent in meetings herself. She acknowledged that as a salaried employee, Claimant would work overtime if needed to meet her deadlines, but felt that such would be a rare occasion. However, she never tracked Claimant's hours to know how much overtime she actually worked.

25. Ms. M[Redacted] also agreed that, although the computer software advises of planned meetings, it does not keep track of the time spent on separate files. Claimant was having issues with missing deadlines, which Ms. M[Redacted] agreed was a time management issue. She agreed that the Claimant knew as of June 30, 2020 that she was not meeting expectations.

26. Ms. M[Redacted] further acknowledged that even prior to the work incident, she and her manager, Andrew May, were already planning on giving Claimant a 'final warning'

about her performance. This was more than a mere 'performance improvement plan'; however, such 'final notice' was not scheduled to actually occur until July 17, 2020. (Transcript, p. 47).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201(1), C.R.S.. A preponderance of the evidence is that which leads the trier of fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. (8-43-201, C.R.S.).

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

D. In this instance, the ALJ finds that both Claimant and Ms. M[Redacted] have testified sincerely, and to the best of their memories. There are occasional conflicts in their respective positions, most notably on when this incident was reported, and what was said during such discussions. Further, while the medical reports - limited though they are - appear to reference 7/2 ('5 days ago' from 7/7) as a date of injury, such 'guesstimates' by injured parties are not uncommon at an ER intake. Similarly, while the [Employer] records state that the injury occurred on 7/7, clearly something got lost in that translation. 7/7 was the date that Claimant went to the UCHealth ER in the first instance, and she had been injured days before that initial visit. While Ms. M[Redacted] is no doubt sincere in her interpretations of Claimant's obligations to the *Agreement*, such interpretations are to be weighed against applicable law. In the final analysis, the ALJ does find that Claimant did fall from this office chair, in the manner she described, and for the reasons she described, and this incident occurred on or about June 30, 2020. The parties have essentially put the reasonableness, necessity, and relatedness of Claimant's subsequent medical treatment on hold, seeking only a determination of compensability, and a general award of medical treatment.

E. An ALJ's Order must be supported by substantial evidence. *See Newman v. McKinley Oil Field Service*, 711 P.2d 697 (Colo. App. 1985). Substantial evidence is any evidence that is convincing to the ALJ as the sole arbiter of fact. An ALJ's Order may only be vacated when "the great weight of the evidence or even the overwhelming evidence supports a contrary decision." *Wecker v. TBL Excavating, Inc.,* 9058 P.2d 1186 (Col. App. 1995). The evidence may be direct or that which is drawn by the ALJ's reasonable inferences. *Univ. of Denver v. Nemeth*, 127 Colo. 385, 257 P.2d 423 (1953). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

Compensability, Generally

F. A compensable injury is one that arises out of and in the course of employment. Section 8-41-301(1)(b), C.R.S. *In re question submitted by U.S. Court of Appeals,* 759 P.2d 17,20 (Colo. 1988). The course of employment requirement is satisfied when the claimant shows that the injury occurred within the time and place limits of the employment. *Popovich v. Irlando,* 811 P2d 379 (Colo.1991). The "time" limits of the employment can embrace a reasonable interval before and after official working hours when the employee is on the employer's property. *Industrial Commission v. Hayden Coal Co.,* 113 Colo. 62, 155 P.2d 158 (1944) (allowing for arrival and departure from work).

G. The "arising out of" element is narrower than the "course" element, and requires the claimant to prove that the injury had its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich, supra.* The "arising out of" test is one of causation, and generally requires that the injury have its origin in an employee's work-related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Rodriguez v. Exempla Healthcare, Inc,* WC No. 4-705-673, (ICAO, 2008).

H. The injured worker has the burden of proof by a preponderance of the evidence of establishing the compensability of an industrial injury and entitlement to benefits. 8-43-201 and 8-430210, C.R.S. *See City of Boulder v. Steeb,* 706 P.2d 786 (Colo. 1985). *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App, 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000); *Kieckhafer v. Indus. Claim Appeals Office*, 284 P.3d 202 (Colo. App. 2012).

Greater considerations on "The New Normal", and why they matter

This is but one case, the result of which, of necessity, will be confined to its own facts. Interestingly, Claimant's home office arrangement predates the pandemic. However, in Covid's aftermath, the American workplace will never be the same. 2020 brought the unprecedented, emergent need for many in the 'nonessential' workforce to work from home, dovetailed with the cost-effective technological abilities to facilitate it. Long after Delta variant, et al, becomes a memory, there will remain the paradigm cultural shift towards telecommuting, with the specific terms varying with each corporate culture. With the swelling ranks of telecommuters will come the swelling ranks of persons injured while doing so. This will sometimes occur across state lines; occasionally across continents. And while each case must still rest on its own unique facts, it will be critical to articulate certain key factors that this jurisprudence can point to, to provide some measure of predictability to the process. Case law on home office injuries is scant; it is important that it now be built carefully, and in tandem with existing principles.

Thousands of 'nonessential' Colorado State employees provide but one example of the 'new normal'. Almost overnight, this workforce went from *"You shall come in to work Monday through Friday,"* to *"Here's your laptop. Go home, find a spot to work, and you shall not come in until further notice."* Currently, it's *"We want some of you back, some of the time, but not all of the time, unless you really want to. Even then, make sure there aren't too many of you at work at any one time. Some of you can even work from home full-time, provided others are willing to come in more often; however, we might reallocate your office. See you all at the Christmas party."* Unless, of course, Delta starts breaking through, in which case all bets are off. This is not to say that all of this is without justification, or an isolated example. We must all adapt with the times.

Home office parameters can range from rather formalized (as herein) to almost nonexistent. The availability of a dedicated home office room will be largely dictated by income and household size. Single persons of modest means, sharing an apartment, might have only their own bedroom to double as their home office – with their dresser doubling as their work desk. The physical and functional lines between personal and work functions will be blurry indeed. If a telecommuter leaves their 'workspace' to answer the doorbell, then falls down the stairs, did such fall "arise out of" the employment relationship? If it's a neighbor at the door bearing a six-pack of Dos Equis, maybe not; if it's UPS needing a signature for a critical component for the work laptop, probably yes. So then,…what if you don't know who's down there ringing the doorbell?

What results when a telecommuter falls down stairs while letting his dog out - in large part, because that's what dogs need, but in small part, because that dog *might* disrupt an important Zoom meeting? If, as here, there is a fairly bright line where the home office sits, is the worker merely "commuting" to work until he gets to the office doorway? If he takes lunch in the kitchen for personal comfort, can he 'detour' to go turn off the sprinkler? Will it matter whether it's an exempt vs. an hourly employee? Could it sometimes matter whether telecommuting is mandated, optional, or 'sick-time only'? If it's 'anything goes', with Wi-Fi and a laptop, is the entire house now the workspace?

If a (highly allergic) telecommuter is stung by a wasp while at their home workstation, it sounds compensable. Or falls off *[someone's]* swiveling chair in an attempt to swat it. So query, would fixing the screen (and cutting one's hand in the process) in the home office to prevent such intrusions inure to the employer's benefit? How about fixing the screen in an adjoining room, lest a wasp enter the office anyway, and run up a big medical bill? Will it matter if such repair is undertaken during (or outside of) set work hours by an hourly worker, versus an exempt employee who notices this problem at the end of his 'customary' shift? Might it matter if he repairs it from the outside, rather than staying indoors? Could it matter if the house is a *rental*, such repair thus more benefitting a *third party*, instead of the owner?

Ironically, this advent of telecommuting could now permit a person under quarantine to maintain their schedule unabated. It can also facilitate the early return to full-time duties of Mr. Type A, mere days removed from ACL surgery, wholly dependent upon crutches, yet still weeks away from MMI. Perhaps his surgery was not work-related. In any event, simple trip hazards like electrical cords near the stairs become PTD magnets for Mr. Type A. What happens when he gets the urge on Saturday to put up that glass-framed, 16x20 poster of The Company's mission statement? There's really only one chair handy, which has five wheels, and a tilt function lever that sometimes needs jiggling. (Who owns that chair, by the way?) Anyway, well within his 'fall radius', still leaning against the wall and also awaiting installation, is the glass-framed, 16x20 family vacation picture from Cancun. Better yet, let's make him an hourly employee doing this after hours. If he reports it as a work injury, maybe it's compensable, but then he gets written up for working overtime. Decisions, decisions.

Perhaps such situational hairsplitting is inevitable, since despite their appeal, litmus tests often prove simplistic and unworkable. However, the ALJ suggests that developing a weighted list of enumerated factors - not unlike the method for distinguishing employee from independent contractor - could greatly assist the process. But we digress. Now back into my lane I go.

Did this injury occur in the Course and Scope of Employment?

I. In this case, there is a clearly delineated home office, dedicated solely to the business of [Employer]. According to [Employer]'s own terms (which the ALJ acknowledges are not legally binding on the parties), Claimant's home office served as *an extension of [Employer] work space.* The ALJ finds that Claimant was injured on premises *made available by Employer for Claimant's use.*

J. Regardless of whether there was actually a 3:00 pm group meeting scheduled for that day, the ALJ finds that Claimant *believed* there was. She therefore *intended to remain at work,* continuously, between ending her customary stop time of 2:30 pm, and starting the meeting at 3:00 pm. Claimant was salaried, and had to remain on the job until all tasks were completed. In this instance, this would include attending a group meeting. In the meantime, she decided to do something else useful. Even though Claimant arguably left the 'workspace' for a few minutes to retrieve a hammer and nail, she returned without incident. So in this instance, there is no need to delve into the rather more dicey hypothetical of Claimant falling in her basement while retrieving the hammer, or being a non-exempt employee, whose shift had formally ended, thus explicitly precluding her from working past her set hours. The ALJ finds that this injury occurred during work hours, or alternatively, it occurred during a reasonable interval after (customary) work hours, while still on premises made available for Claimant's use to perform work. Combined with the location of the occurrence, the ALJ now finds that this fall occurred in the course and scope of employment.

Did this injury 'Arise out of' the Employment Relationship?

K. A few facts are duly found for the record in this case, although none are pivotal to deciding compensability. [Employer] supplied the chair from which Claimant fell. [Employer] did not supply the hammer or nails to put up the clock, nor did Claimant request them. Claimant purchased this wall clock with her own funds, and of her own initiative. Claimant intended this clock to remain her personal property. (Claimant also supplied her own desk, bookcases, printer stand, and file cabinet). Claimant could have requested that [Employer] buy a wall clock for her to use, then await their decision, but she did not do so. While this clock was not, therefore, an explicitly authorized purchase, neither was its purchase forbidden – nor was its placement into the home office. It was her money, and neither the clock, hammer, nor chair, was inherently dangerous. [Employer] was never even aware of the existence of this clock until Claimant reported her injury. Claimant could have still performed the essential functions of her job without buying a wall clock at all. She indeed had other options to tell the time, including the computer monitor, landline, cellphone, or a simple wristwatch. It remains unproven whether this clock would have materially, measurably, enhanced Claimant's productivity. Lastly, Claimant exercised poor judgment in using this chair to stand on – although near-identical poor judgment is commonly deployed throughout office suites from coast to coast. There was just nobody standing there to warn her, or at least hold her chair still.

"Importing the Danger"

L. Respondents argue that Claimant effectively 'imported the danger' to the workplace, citing *ICAO v. Enyeart*, from 1927. The ALJ is not persuaded. The underlying premise of the *Enyeart* Court was that Claimant, purely for his own purposes (as interpreted during the Coolidge Administration; questionable logic in 2021 in any event) had 'imported' the instrumentality of his own injury onto his employer's premises. This was likened to bringing your own poisoned lunch to work, eating it there, and getting sick. This case is distinguishable. It simply cannot be said here that Claimant "imported the danger" by (unwisely) moving the chair a couple feet and standing on it, any more than she would "import the danger" by slamming her finger in the desk drawer – even though she bought that desk herself. One cannot conflate a mere moment's lapse of judgment with bringing a *dangerous instrumentality* into the workplace. Just remember: "Desk drawers don't crush people's fingers – people do."

M. Along similar lines, [Employer] now argues that Claimant somehow violated the terms of the *Agreement*, thus accentuating the egregiousness of her deviation from the terms of employment. The terms of any such agreement cannot supersede Workers Compensation law, but this mere lapse in judgment did not, in any event, constitute a failure to maintain a safe workspace – any more than slamming her finger in the desk drawer would. Contemplated by this *Agreement* would be matters such as ongoing trip hazards, exposed wires, sharp edges, precarious placement of heavy objects, and perhaps poor ergonomic practices. Even material deviations from those defined norms would not insulate [Employer] from a Workers Compensation claim; it could, of course revoke telecommuting privileges.

Was Claimant Acting for her Sole Benefit?

N. Respondents cite *Kater* and *Callahan* in support of their position. Dancing on a break, or fixing a personal car constituted a substantial deviation from the mandatory or incidental functions of employment, conferring *no benefit whatsoever* to employer; such activities were found to be *solely* for the Claimant's personal benefit. Claimant cites *Hagestad Porsche Audi, Pueblo County v. ICAO,* and *Brogger v. Keezer,* in citing the *dual purpose doctrine.* The dual purpose doctrine holds that an injury sustained while the claimant is performing an act for the mutual benefit of the employer *and* the employee is compensable. Even painting the back side of one's personal residence, with the concurrent intent to spruce it up to impress the occasional business guest, met this test.

O. At a minimum, Claimant satisfied a dual purpose. She wanted to be more productive *for the benefit of her employer*, and this was her modest way of trying. Ms. M[Redacted] has sincerely opined that a wall clock is not a great way to get there, but that is not controlling; at most, it moves the needle just a bit. Relevant, but not pivotal either, is that alternatives existed to tell the time. Certainly, a [Employer]-bought clock might have changed [Employer]'s compensability stance, but that does not change the *purpose* for which it was bought - and the subsequent *act* of installation. Arguably, Claimant could posit that this clock was for the *sole benefit of employer* – although she need not prove such an element. Why else would anybody making $72,000 a year buy a $3 mauve wall clock from a thrift store, festooned with rhinestones, to enhance their personal home décor? Perhaps fortunately for Claimant, she couldn't even see the thing from elsewhere in the house. It certainly would not take much enhanced productivity to pay for itself. This case is really no different than an office worker putting up their own wall calendar to glance at dates, or placing plants around the office to make clients - or her - feel more comfortable, or installing blinds in a home office to keep glare off the computer screen. Maybe The Company will pay for those things, maybe they won't. But if the *activity* is *incidental* to the terms of employment, and benefits employer in some fashion, that will also meet the *personal comfort* standard. Claimant has established this as well. The ALJ concludes that this is a compensable injury.

Medical Benefits

P. As noted, the parties have agreed that they only seek a finding on Compensability, after which the conferred or denied benefit would consist of a general award of medical benefits. Such medical benefits are hereby awarded.

ORDER

It is therefore Ordered that:

1. Claimant's injury of June 30, 2020 is compensable.

2. Claimant is entitled to a General Award of Medical Benefits in connection with her work injury.

3. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a Petition to Review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. *In addition, to help ensure that your Petition is timely processed, it is recommended that you send a copy of your Petition to Review to the Colorado Springs OAC via email at oac-csp@state.co.us.*

DATED: August 30, 2021

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
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Colorado Springs, Colorado 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-158-967-001

ISSUES

I. Whether Claimant suffered a compensable injury on September 15, 2020 and is entitled to reasonable and necessary medical treatment.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. Claimant works for [Redacted], Department of [Redacted].
2. Claimant alleges a work injury to her right forearm/arm on September 15, 2020, at which time she alleges she was bit by either a bug or spider while she was working for Respondent.
3. On September 15, 2020, Claimant was observing hygiene/morning routine in the Horizon Pod and leaned against a railing when she felt a "pinch" to her right forearm.
4. Claimant looked at her arm and noticed what she described as a mosquito bite. She stated she was wearing a long sleeve shirt at the time of the alleged incident but could not recall whether she had her sleeves down or pushed up.
5. Claimant did not see any bug or spider at the time of the alleged incident.
6. Claimant continued to work her regular duties following the alleged incident and did not seek medical attention immediately after the pinching sensation.
7. About 2 - 2 ½ hours later she felt a burning sensation on her forearm and noticed a red line going up her arm. She reported the incident to her immediate supervisor who advised Claimant to go see medical to examine it.
8. Medical told her to complete an injury report and provided her with a list of authorized treating providers and recommended she see the closest provider on the list.
9. Claimant chose Front Range Occupational Medicine from the list provided as they were the closest. She presented for examination there at around Noon and was evaluated by Dr. Matt Miller that same day.
10. The reason Claimant sought medical treatment was because of the infection/red line moving up her right arm.
11. According to Dr. Miller's September 15, 2020 office visit report, Claimant felt a pinch in the right forearm and thought she had a mosquito/bug bite. (Ex. A, p. 10). A few hours later she felt a tingling and burning in the forearm, which came on within a few hours of noticing the pinch. (*Id*.). Claimant was assessed with "bite/stung by non-venom insect & orth nonvenom arthropods, init. Possible lymphangitis?" (*Id*. at 11).

Dr. Miller opined “causality unclear. She reports a possible insect bite at work, but unclear.” (*Id*. at 12). Dr. Miller instructed Claimant to watch the red line closely and go to the ER for any worsening. (*Id*.).

12. The red line on her arm continued to progress and Claimant decided to go to Urgent Care; despite Dr. Miller’s instruction to present to the ER (emergency room) for any worsening.

13. Claimant was at Urgent Care for about 2 minutes before they sent her to St. Anthony’s ER.

14. Claimant presented to the ER at St. Anthony’s on September 15, 2020, at about 5:57 p.m. According to St. Anthony’s records, Claimant reported she “woke this morning with some pain, redness to the distal forearm on the right side. She had spreading of the erythema, streaking lymphangitis throughout the day.” (Ex. C, p. 27). Differential diagnoses for the infection/red line included cellulitis, necrotizing fasciitis, thrombophlebitis, DVT; however, after labs and evaluation Claimant’s primary diagnosis was cellulitis. (*Id*. at 31, 24). Claimant did not report that she had been bitten by a bug/spider/mosquito at work.

15. Claimant was provided IV antibiotics and her condition stabilized at approximately 9:30 p.m. on September 15th; however, St. Anthony’s admitted her overnight anyway for continued observation. Claimant was discharged on September 16, 2020.

16. Claimant was placed at maximum medical improvement (MMI) by the ATP, Dr. Matt Miller, on October 1, 2020, without impairment or the need for maintenance care. (Ex. A, p. 4).

17. On October 9, 2020, Broadspire, the third-party administrator of the claim, sent a letter to Dr. Miller to address causation of her cellulitis. (Ex. 3). Dr. Miller opined he did not believe it was medically probable for cellulitis to have developed within 1-2 hours of the alleged bite. (*Id*.).

18. The ALJ reasonably infers Dr. Miller’s opinion is that he does not believe Claimant’s cellulitis was a proximate result of an alleged bug/spider bite that occurred at around 8:00 a.m. at work on September 15, 2020.

19. Respondent also obtained a record review with Dr. Nicholas Kurz for a causation opinion on Claimant’s cellulitis and need for medical treatment. (Ex. B). Dr. Kurz is a board certified and Level II Accredited physician. (*Id*. at p. 16). Dr. Kurz reviewed the medical records in this claim, including the records from Front Range Occupational Medicine and St. Anthony’s Hospital. (*Id.* at 16-17).

20. Dr. Kurz concluded that Claimant did not meet criteria to be hospitalized. (*Id*. at 17). Additionally, Dr. Kurz explained that cellulitis is a common bacterial skin infection. (*Id*.). He explained that cellulitis caused by *Pasteurella multocido* a type of bacteria found in the oral cavities of animals and passed via bites can present less than 24 hours after the bite has occurred. (*Id*.). He explained these infections are accelerated by the larger and deeper soft tissue damage, puncture wounds, and skin tears. (*Id*.). He also explained the most common types of bacteria usually have an incubation period of several days, as it takes time for the small inoculation amount of tiny bacteria to multiply enough to overwhelm your immune defenses and cause

symptoms, taking days to progress into cellulitis. (*Id*.). He explained the most common types of bacteria, Streptococcus, and *Staphylococcus* that live on the surface of your skin can enter small puncture points, such as those from mosquitos, bees, and ants, again, have an incubation period of several days before developing into an infection. (*Id*.). He then explained that only a few types of spiders have fangs long enough to penetrate human skin and venom strong enough to hurt humans. (*Id*.). He also explained that cellulitis is usually treated with an oral antibiotic and resolves after a few days. (*Id*.).

21. Dr. Kurz noted that there were inconsistencies in Claimant's report of the red spot, or alleged bite, on her arm – she reported to Dr. Miller that she came in within a few hours of noticing the pinch/bite but reported to the ER that she woke that morning with some pain, redness to the distal forearm on the right side. (*Id*.) He concluded that the event may not have occurred at work "and certainly not within a few hours of presenting at 1:30 p.m. to see Dr. Miller." (Ex. B, p. 18). Dr. Kurz concluded that a bite or skin disruption that occurred the night or day before September 15, 2020 "would more correlate with the natural evolution and progression of an infection resulting in cellulitis." (*Id*.). Dr. Kurz concluded that, to a greater than 51% medical probability, Claimant's wound, be it an abrasion, a puncture, or an insect bite, occurred hours before beginning her workday and was not causally related to an alleged bite that occurred at work on September 15, 2020, based on the known rate of bacterial growth rate. (Ex. B, p. 19).

22. The ALJ credits and finds persuasive the medical opinions of Drs. Miller and Kurz that, the cellulitis for which Claimant sought and obtained medical treatment was not medically probable to have resulted from any bug/spider bite that may have occurred while Claimant was working for Respondent on September 15, 2020, over any opinion to the contrary.

23. The ALJ also credits and is persuaded by the September 15, 2020, ER report which documents that Claimant reported she woke up that morning with pain and a red spot on her right forearm. The ALJ finds it more likely than not that the bite or abrasion on Claimant's right upper extremity existed before Claimant even presented to work on September 15, 2020.

24. The ALJ finds that Claimant has failed to meet her burden to prove she sustained a compensable work-related injury on September 15, 2020.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence

is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant suffered a compensable injury on September 15, 2020 and is entitled to reasonable and necessary medical treatment.

The claimant was required to prove by a preponderance of the evidence that the conditions for which she seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC

4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Here, Claimant alleges a bug/spider bite occurred at work on September 15, 2020. Claimant testified she felt a "pinch," at around 8:00 a.m. but did not see a bug or spider at that time. Claimant also testified that she had a long sleeve shirt on at the time of the alleged incident and could not recall if she had her sleeves down or up. Claimant did not seek medical treatment following the described "pinch." Claimant testified that around 2-2 ½ hours later she experienced a burning sensation in her right forearm and noticed an infection/red line traveling up her arm. It was for this infection/red line, which was later diagnosed as cellulitis, that she sought and obtained medical treatment, first with Dr. Miller at Front Range Occupational Medicine (the ATP), then with Urgent Care, followed by St. Anthony's Hospital. Both Drs. Miller (the ATP) and Kurz (Respondent's IME) agreed Claimant's cellulitis was not causally related to any bug/spider bite that may have occurred around 8:00 a.m. on September 15, 2020. Furthermore, St. Anthony's records document that Claimant reported she woke up the morning of September 15, 2020, with pain and a red spot on her right forearm. This establishes and supports a timeline of a bite that had to have occurred before Claimant even went to work.

The ALJ credits and finds persuasive the opinions of Drs. Miller and Kurz regarding causation. These physicians opined that the infection/red line/cellulitis on Claimant's right arm - which was the basis for her seeking medical treatment - was not caused by any bug/spider bite that may have occurred at work on September 15, 2020.

Based on the above, Claimant has failed to prove by a preponderance of the evidence that she suffered a compensable work-related injury on September 15, 2020. As a result, Respondent is not liable for any medical treatment Claimant received at either Front Range Occupational Medicine, Urgent Care, or St. Anthony's Hospital.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant has failed to prove by a preponderance of the evidence that she sustained a compensable injury on September 15, 2020. Claimant's claim for workers' compensation benefits, including medical benefits, is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: August 31, 2021.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Did Claimant prove by a preponderance of the evidence that she sustained a compensable injury to her left knee on or about October 9, 2020?

II. If Claimant proved compensability of her left knee, is she entitled to medical benefits that are authorized, reasonably necessary, and related to the injury, including for care with SCLHealth Salud Family Health Clinic and Health Images?

STIPULATIONS

The parties stipulated to only address compensability and authorized medical benefits, including whether SCL Health Salud Family Health was authorized, reasonably necessary and related to the injury. The parties also stipulated that, if the claim is found compensable, the MRI bill of $250.00 is authorized. All other issues are reserved by the parties, including the issues of temporary disability benefits and average weekly wage.

FINDINGS OF FACT

1. Claimant worked for Employer as a temporary staffing worker for approximately three years. Employer is a staffing agency. In October 2020 Claimant was assigned to a project located at Sheridan and 10th Avenue in Lakewood, CO. She was assigned by Employer to perform cleaning, sweeping and a variety of general labor duties.

2. On or about October 9, 2020, Claimant was assigned additional duties on the project by the project's superintendent, not an employee of Employer. He demanded Claimant lay down plastic over the new carpeting to protect the new installations. Claimant also testified that she was forced to take the stairs up and down the seven flights of stairs throughout the day, as the elevator was not in working order. Claimant testified that subsequent to having to perform these activities she started having problems with her knees. On October 9, 2020 she began the day without any knee problems but as the day progressed, she started having serious problems with her left knee. Claimant stated that the extended kneeling and stair climbing caused her pain and injury to her left knee.

3. On April 29, 2016 Claimant presented for treatment at Salud Family Health Centers. She complained of bilateral knee pain, noting that she had been having such pain for three years, taking advil once a day with relief. On exam, Dr. Jason Heine found full range of motion, no crepitus with movement, no tenderness on the bilateral knees, and documented that all tests were negative. There was no history of specific injury or surgery. X-rays showed no acute abnormality. Claimant was prescribed ibuprofen three times a day.

4. Claimant was seen by Dr. Michael Noonan at the SCL Salud Famly Health Centers on November 19, 2020. Dr. Noonan documented that Claimant had left leg pain for three months. The records show that on examination Claimant had the greatest pain in posterior medial left knee, tenderness to palpation over both medial and lateral tibial plateau of left knee, no effusion or swelling of knee, no calf tenderness or swelling, no edema, pulses were equal bilaterally, with normal pulses, normal color, and normal temperature. Claimant was diagnosed with left knee pain and osteoarthritis. Imaging showed mild osteophyte formation. Claimant was provided with medication and a topical regimen.

5. On February 3, 2021 Claimant had a telehealth visit with SCL Salud Family Health. She was evaluated by Dr. Layne Bracy for left knee pain. Claimant reported that she had left knee pain for six months and it hurt to walk. Dr. Bracy noted that prior x-rays were unremarkable, but she did order an MRI of the left knee.

6. On February 10, 2021, Claimant had an MRI of her left knee that showed a near full-thickness radial tear of the posterior horn of the medial meniscus as well as moderate to full thickness cartilage loss in the medial compartment. Claimant also showed a grade 3-4 patellofemoral chondromalacia and joint effusion.

7. Claimant was evaluated by Matthew Edwards, PA-C at Midtown Occupational Health on February 22, 2021. There is some confusion in this report as it discusses both a male patient and a female patient. Mr. Edwards documented that Claimant had preexisting left knee osteoarthritis, which was not work-related, and recommended that Claimant return to her primary care physician for continued care.

8. On March 8, 2021 Claimant was evaluated by Dr. Daniel Hamman of SCL Orthopedics. Dr. Hamman documented that Claimant's pain is mostly medial and worse with lifting and exercise, and is better with resting. He documented that Clamant was seen by her PCP and an MRI was obtained which revealed avulsion/root tear of the medial meniscus with advanced chondral loss of the medial and patellofemoral compartments. On exam of the left meniscus, there was effusion, stable varus/valgus testing, showed Claimant had pain with McMurray's maneuver, which was positive, medial joint line tenderness, range of motion of 0-135 and 5/5 strength. Dr. Hamman diagnosed left knee pain, with joint effusion of left knee, and tear of medial meniscus of left knee, with primary osteoarthritis of the left knee. Dr. Hamman injected the left knee with cortisone and prescribed anti-inflammatories.

9. Dr. Hamman explained that her meniscal root tear is part of the arthritic process. She and her daughter agreed. They discussed the natural history of osteoarthritis, including the waxing and waning course that it can take. They also discussed the treatment options, including oral nonsteroidal anti-inflammatory medications, unloader bracing, weight loss, and low impact exercise. They discussed joint injections of both corticosteroid and occasionally hyaluronic acid and discussed surgical treatments including arthroscopy and total joint replacement.

10. On April 8, 2021 Claimant return to the orthopedic clinic with persistent left knee pain, stated that the injection only helped for two to three days and had mostly medial and retropatellar pain. Claimant was limping at that time. Dr. Hamman recommended arthroplasty (total knee replacement).

11. Claimant presented at Rose Medical Center Emergency Room on June 10, 2021. She stated that she had sustained a knee injury in November of 2020. Claimant's daughter reported that Claimant was initially told that she had an overuse injury but that her knee had continued to swell without improvement. Claimant had undergone several injections without relief. Dr. Ryan Bradley ordered new x-rays and prescribed limited narcotic medication. Dr. Dipti Nevrekar, M.D. read the x-rays to show moderate degenerative findings, normal worsening of the medial compartment and possible small effusion.

12. Claimant testified at hearing that after the events of October 9, 2020 she decided to wait to see if the pain would go away on its own before making an official report to her Employer. She stated that she commented she was having problems to Laura H, an Employer representative, approximately two weeks after the project on Sheridan ended, but they both decided she was probably just tired. In approximately January 2021 Claimant contacted Juan Carlos H., a supervisor for Employer, and requested that she be sent to a medical provider. Claimant testified that the Employer did not send Claimant to a doctor, so she went on her own, since Employer failed to tender a provider list.

13. The Regional Manager (Ms. Claudia F.R) for Employer, a 20 year veteran of the company, testified that she knew about the Claimant's knee problems and that Claimant had mentioned that she had knee problems for some time prior to October 2020. She specifically testified that Claimant had told her she had arthritis in her knees and had requested lighter duty, which she accommodated several times before October 2020. The manager stated that Claimant was specifically given training at the time Claimant was hired that Claimant was required to immediately report any work related injuries in writing, as demonstrated by the documents in the Employment file, which were signed and initialed on May 22, 2018 by Claimant. The employment file is in Spanish and, while this ALJ is able to read and understand it, the content cannot be considered in this matter as there is no official English translation. However, as found, the date of the Application for Employment of May 22, 2018 is noted.

14. The Claimant's prior direct supervisor (Ms. Laura H) also testified at hearing that she had been employed by Employer for 8 years. She stated that she went from office to office as needed. She testified that Claimant started working in landscaping in 2018 and had requested a change in jobs because her knees were achy. In fact, Ms. H testified that Claimant left the company for a short period in 2018 and 2019 because of her knee complaints, in order to take a job that was not so hard on her knees. She stated that she did not see or speak with Claimant after March 2020, as Ms. H had transferred to another of Employer's branches. She denies that Claimant ever reported a work injury to her.

15. A third Employer witness (Mr. Juan Carlos H) also testified that he would normally make job assignments for Claimant. He testified that he assigned Claimant the Sheridan site job. He further stated that Claimant did not report any injuries to him but that, in approximately February 2021, Claimant contacted him and requested that the company help her with her medical expenses, as she required surgery. He was in charge of filling out any First Report of Injury forms generally, but denied Claimant reported any injury. He testified that he did not fill out any First Report of Injury on Employer's behalf in this matter. It is found, that Claimant's request for medical care is, in fact, a report of injury.

CONCLUSIONS OF LAW

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S., 2020. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000). When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2017).

A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it aggravates, accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment. *See H & H Warehouse v. Vicory, supra.*

A compensable injury is one which arises out of and in the course of employment. Section 8-41-301(1)(b), C.R.S. (2017). The "arising out of" test is one of causation. It requires that the injury have its origin in an employee's work-related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. In this regard, there is no presumption that injuries which occur in the course of a worker's employment arise out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968); Rather, it is the claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. Section 8-43-201, C.R.S. 2002; *Ramsdell v, Horn*, 781 P.2d 150 (Colo. App. 1989).

There is no presumption that an injury, which occurs in the course of employment, also arises out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). The determination of whether there is a sufficient nexus or causal relationship between a Claimant's employment and the injury is one of fact and one that the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle*, 934 P.2d 861 (Colo. App. 1996). When a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. See *Cotts v. Exempla, Inc.*, W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. See *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.,* W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and her symptoms does not mean there is a causal connection between the claimant's injury and work activities.

In this case, the ALJ finds that Claimant's pain resurged while conducting work activities on October 9, 2020. As found, the ALJ credits the medical records over Claimant's testimony to establish this factual finding. However, there is no credible evidence that the pain in this case was related to the activities or to any other action Claimant was performing on behalf of employer on October 9, 2020. As found, Claimant had a pre-existing condition involving her left knee and there is a lack of evidence to establish that the manifestation of Claimant's left knee symptoms was related to her employment with Employer.

The ALJ would further note that this does not involve a case where some unexplained event occurred causing an injury, such as an unexplained fall. The ALJ recognizes that unexplained falls are compensable under the Colorado Workers' Compensation Act pursuant to *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). Under the unexplained falls line of cases, the unexplained fall is a "neutral risk" that results in a compensable injury.

In this case, there is no “neutral risk” that resulted in claimant’s onset of symptoms related to Claimant’s employment with Employer. Claimant’s symptoms were related to the underlying condition of her left knee arthritis and degenerative condition and simply became symptomatic on October 9, 2020. As found, there is insufficient evidence to establish that any work duties Claimant performed on October 9, 2020 caused the degenerative condition leading to the need for medical care.

The Act imposes additional requirements for compensability of a claim based on an occupational disease. A compensable occupational disease must meet each element of the four-part test mandated by § 8-40-201(14), which defines an occupational disease as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

The “equal exposure” element effectuates the “peculiar risk” test for occupational diseases and requires that the injurious hazards associated with the employment be more prevalent in the workplace than in everyday life or other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The employment must have exposed Claimant to the risk causing the disease “in a measurably greater degree and in a substantially different manner than are persons in employment generally.” *Id.* at 824. The conditions of employment need not be the sole cause of the disease, but must cause, intensify, or aggravate the condition “to some reasonable degree.” *Id*. *Id*. at 824.

There is no persuasive independent corroborative evidence to shows Claimant suffered a specific injury such as video surveillance, eyewitness testimony, or contemporaneous documentation. As a result, proof of an injury or occupational disease rests entirely on Claimant’s statements. The witness testimony was highly conflicting and impossible for this ALJ to reconcile. Claimant’s testimony appeared credible and her story is plausible. But Employer’s witnesses also appeared credible. The testimony of the Regional Manager, the prior supervisor and the supervisor who designated the alleged job of injury also provided plausible stories. All three stated that Claimant had commented that she was having problems with her knees prior to October 2020. This is particularly challenging for Claimant case, because there is no persuasive evidence of any animosity, bias, or other motivation on any of their part to fabricate testimony. Based on the evidence presented, Respondent’s version of events is at least as likely as Claimant’s version.

Additionally, Dr. Hammon persuasively explained in his report that the left knee symptoms, like those experienced by Claimant, are frequently with no precipitating event or identifiable cause other than age-related degeneration. Dr. Hamman diagnosed left knee pain, with joint effusion of left knee, and tear of the medial meniscus of left knee, with primary osteoarthritis of the left knee. Dr. Hamman explained that Claimant’s meniscal root tear is part of the arthritic process. Claimant and her daughter particularly agreed with Dr. Hammon. They discussed the natural history of osteoarthritis, including the waxing and waning of symptoms that the osteoarthritis course can take. Dr. Haine stated that Claimant had a history of three years of problems in 2016 and Dr. Noonan documented on November 19, 2020 that Claimant had a history of three months of left knee pain, which would place the Claimant's initial complaints at sometime in August, not October, 2020. This is confirmed by the report issued by Dr. Bracy of February 3, 2021, which documented a history of six months of problems, which would also bring the initial complaints to around the same August date. Although a causal nexus between Claimant's work and her left knee symptoms is possible, Claimant failed to prove such a relationship is more probable than not. As found, based on the totality of the evidence presented, including the medical opinions and the lay witnesses' testimony, Claimant's claim for benefits must be denied. All other issues are moot in light of this findng.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant's claim for benefits is denied and dismissed.

Dated this 31st day of August, 2021.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-075-517-005

ISSUES

I. Whether Claimant proved by a preponderance of the evidence the left knee surgery recommended by Jason Dragoo, M.D. is reasonably necessary and causally related to his admitted, April 9, 2018, industrial injury.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. This claim involves an admitted April 9, 2018, left knee injury. On December 18, 2018, and due to his work injury, Claimant underwent left knee surgery with Michael Hewitt, M.D., who performed an ACL reconstruction, partial lateral meniscectomy (anterior mid to posterior horn, 50%), and an examination under anesthesia. *Claimant's Exhibit 8, page 90*. On March 27, 2019, Claimant treated with Dr. Hewitt and reported increasing anterior left knee pain and intermittent popping and catching. Claimant reported he has had to cut his work hours due to his left knee pain. *Claimant's Exhibit 8, pages 92-94*. On April 5, 2019, Claimant underwent a left knee MRI, which revealed a joint effusion, synovitis, which was not present on the prior MRI, scarring from the prior surgery, increased quadriceps patellar tendinosis, evidence of the prior lateral meniscectomy, and worsened lateral compartment chondromalacia or mild arthritis. *Claimant's Exhibit 9, pages 96-97*. On April 12, 2019, Claimant treated with Dr. Hewitt, who noted Claimant reported persistent left knee pain and instability. *Claimant's Exhibit 8, page 95*.
2. On June 10, 2019, and due to his work injury, Claimant underwent a second left knee surgery with Dr. Noonan, who performed an arthroscopy and lysis of adhesions with anterior interval release. In his operative report, Dr. Noonan noted, "About 50% of the posterior horn and body of the [lateral] meniscus remained intact following previous partial meniscectomy." *Claimant's Exhibit 7, pages 79-82*.
3. On October 3, 2019, Lori Rossi, M.D., Claimant's authorized treating provider, placed Claimant at MMI with an impairment rating and maintenance medical treatment. Claimant continued to report sharp left knee pain, stiffness, clicking, and increased pain with squatting, kneeling, stairs, and direct pressure. *Claimant's Exhibit 6, pages 74-78*.
4. On January 9, 2020, Claimant treated with Dr. Noonan and reported worsening knee pain after going down an escalator at work and twisting his knee. Claimant reported he has been experiencing lateral-sided pain and popping. On physical exam, Dr. Noonan noted lateral tenderness and popping and pain with McMurray's maneuver. Dr. Noonan recommended a left knee MRI and ongoing work restrictions (no working more than 5 hours) *Claimant's Exhibit 4, pages 47-50*.

5. On January 17, 2020, Claimant had a repeat left knee MRI, which revealed "[A]ttenuation of lateral meniscus which may be from partial meniscectomy and repair. Irregularity of the small peripheral remnant of the meniscus body and posterior horn which may be postoperative and degeneration fraying, and areas of degenerative tearing could be present." *Claimant's Exhibit 9, pages 98-99*.
6. On February 6, 2020, Claimant treated with Dr. Noonan and reported persistent left knee pain and laterally popping. Dr. Noonan recommend a steroid injection and physical therapy. *Claimant's Exhibit 4, pages 43-46*.
7. On February 25, 2020, Claimant underwent a Division IME, at Respondent's request, with Linda Mitchell, M.D. who determined Claimant is not at MMI because of his persistent left knee issues. Dr. Mitchell recommended Claimant continue treatment with Dr. Noonan. *Claimant's Exhibit 5, pages 61-73*.
8. On March 3, 2020, Claimant treated with Dr. Noonan, who noted Claimant had only minimal relief from the steroid injection and physical therapy. Dr. Noonan recommended HA injections. *Claimant's Exhibit 4, pages 40-43*.
9. On April 1, 2020, Respondents filed a General Admission of Liability reopening the claim based on the Division IME. *Claimant's Exhibit 1, page 1*.
10. On June 11, 2020, Claimant underwent his first left knee superolateral Euflexxa injection. *Claimant's Exhibit 4, pages 37-39*. On June 18, 2020, Claimant underwent his second left knee superolateral Euflexxa injection. *Claimant's Exhibit 4, pages 34-36*. On June 25, 2020, Claimant underwent his third left knee superolateral Euflexxa injection. *Claimant's Exhibit 4, pages 33-34*
11. On August 25, 2020, Claimant treated with Dr. Noonan and reported he did get some improvement following the HA injections but that he still had intermittent painful lateral-sided left knee popping when sitting cross-legged or with varus stress. On physical exam, Dr. Noonan noted some mild lateral left knee tenderness. Dr. Noonan advised Claimant that he has very little meniscal tissue remaining and referred Claimant to Dr. Jason Dragoo for a second opinion for consideration of a lateral meniscus allograft. *Claimant's Exhibit 4, pages 28-32*.
12. On August 26, 2020, Claimant treated with Jason Dragoo, M.D., and reported persistent left knee pain and functional issues and lateral-sided popping after he sits cross-legged for some time or with varus stress on his knee. Clamant also reported mechanical-based symptoms on the lateral side of his left knee and locking and catching of his left knee. On physical exam, Dr. Dragoo noted a pop toward the lateral posterior aspect of Claimant's left knee after sitting cross-legged. Dr. Dragoo also noted pain over the lateral join line and positive Steinmann's and McMurray's tests to the lateral joint line. Dr. Dragoo reviewed Claimant's left knee MRI. Dr. Dragoo opined:

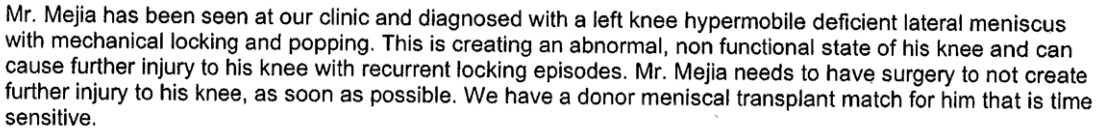
> Based on the patient's physical exam, lateral popping as well as the patient's mechanical symptoms and MRI of a deficient lateral meniscus not sufficient for repair, we recommend a left knee arthroscopy, synovectomy in al three compartments and lateral meniscus transplant. Due to the fact that the

> patient had a prior meniscectomy, there is not enough tissue for repair which is why we are recommending lateral meniscus transplant.

Dr. Dragoo placed Claimant on work restrictions, including no squatting.

Claimant's Exhibit 4, pages 24-28.

13. On October 2, 2020, Dr. Dragoo stated:



Mr. Mejia has been seen at our clinic and diagnosed with a left knee hypermobile deficient lateral meniscus with mechanical locking and popping. This is creating an abnormal, non functional state of his knee and can cause further injury to his knee with recurrent locking episodes. Mr. Mejia needs to have surgery to not create further injury to his knee, as soon as possible. We have a donor meniscal transplant match for him that is time sensitive.

Claimant's Exhibit 4, page 22.

14. On October 27, 2020, Claimant underwent an IME with Adam Farber, M.D., Respondent's retained expert witness. After reviewing Claimant's medical records and performing a physical exam, Dr. Farber opined there is no evidence of any additional left knee structural pathology. Dr. Farber opined the lateral meniscal transplant surgery recommended by Dr. Dragoo is not reasonably necessary or related to Claimant's industrial injury because: a) Claimant does not have any lateral knee complaints; and b) meniscal transplant surgery is typically indicated following a subtotal or total meniscectomy surgery, and Clamant has not undergone a subtotal or total meniscectomy. Citing the Colorado Medical Treatment Guidelines, Dr. Farber noted that meniscal transplant surgery should only be performed when 2/3 of the meniscus is removed, and Claimant has not had 2/3 of his lateral meniscus removed. *Respondent's Exhibit D, pages 12-33*. On November 10, 2020, Dr. Dragoo issued a second report after reviewing Claimant's January 17, 2020 left knee MRI radiology report. Dr. Farber's opinions did not change. *Respondent's Exhibit D, pages 34-35*.

15. On November 11, 2020, Respondent denied Dr. Dragoo's surgery request. *Respondent's Exhibit E, pages 39-40*.

16. On January 25, 2021, Claimant treated with Dr. Dragoo and had painful, intermittent lateral-sided popping and mechanical locking of his left knee. Claimant also had increased left knee pain when sitting cross-legged or with varus stress on his knee. Claimant was also gradually getting weaker, which was causing more pain and dysfunction. Moreover, Claimant was having left knee mechanical locking and functionally limiting pain. On physical exam, Dr. Dragoo noted positive Steinmann's and McMurray's to the lateral knee, pain over the lateral joint line, and trace effusion. Dr. Dragoo noted he felt a pop toward the lateral posterior aspect of his knee. Dr. Dragoo reviewed Claimant's left knee MRI and noted it revealed attenuation of the remaining lateral meniscus and deficient lateral meniscus from prior resection of the posterior horn completely. *Respondent's Exhibit H, page 66*. That same day, Claimant underwent a left knee MRI, which revealed attenuation of the lateral meniscus, irregularity, and possible fraying of margins of the small remaining body to posterior horn extending toward notch and posterior root, relative uncovering of weightbearing aspect of lateral compartment,

and areas of chondral thinning partial thickness grade 2-3 along lateral and possibly patellofemoral compartments. *Claimant's Exhibit 9, pages 100-101*.

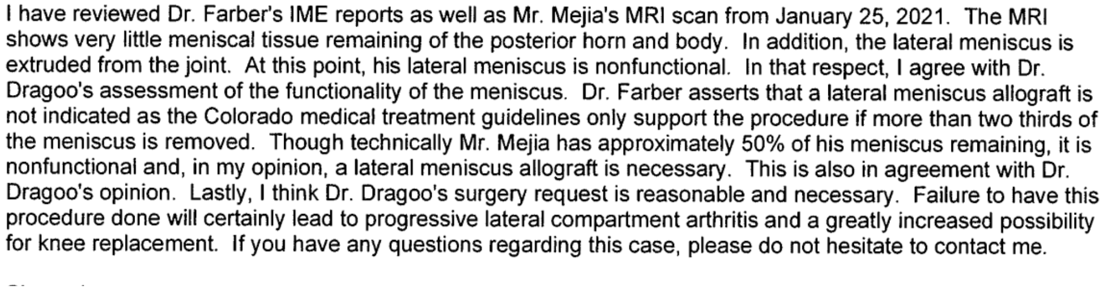
17. On February 5, 2021, Dr. Dragoo visualized Claimant's January 25, 2021 left knee MRI and opined "there has been previous segmental removal of portions of his meniscus which has made it diminutive and nonfunctional from a mechanical perspective." Dr. Dragoo also noted synovitis in all three knee compartments. Dr. Dragoo diagnosed Claimant with a hypermobile and deficient lateral meniscus. Dr. Dragoo recommended proceeding with a left knee arthroscopy, synovectomy, anterior interval release, and allograft lateral meniscal transplant. *Claimant's Exhibit 4, page 17*.

18. On February 26, 2021, Dr. Farber issued a third report after his review of Dr. Dragoo's February 5, 2021 report. Dr. Farber's opinions did not change. *Respondent's Exhibit D, pages 36-37*.

19. On March 1, 2021, Respondent denied Dr. Dragoo's surgery request. *Respondent's Exhibit F, pages 42-45*.

20. On May 5, 2021, Claimant applied for a hearing on reasonable and necessary medical benefits, specifically surgery authorization. *Claimant's Exhibit 2, pages 11-13*. On June 4, 2021, Respondent filed a Response to Claimant's Application for Hearing. *Claimant's Exhibit 3, pages 14-15*.

21. On July 6, 2021, Dr. Noonan issued a report regarding Claimant's left knee and his need for surgery. Dr. Noonan noted:



> I have reviewed Dr. Farber's IME reports as well as Mr. Mejia's MRI scan from January 25, 2021. The MRI shows very little meniscal tissue remaining of the posterior horn and body. In addition, the lateral meniscus is extruded from the joint. At this point, his lateral meniscus is nonfunctional. In that respect, I agree with Dr. Dragoo's assessment of the functionality of the meniscus. Dr. Farber asserts that a lateral meniscus allograft is not indicated as the Colorado medical treatment guidelines only support the procedure if more than two thirds of the meniscus is removed. Though technically Mr. Mejia has approximately 50% of his meniscus remaining, it is nonfunctional and, in my opinion, a lateral meniscus allograft is necessary. This is also in agreement with Dr. Dragoo's opinion. Lastly, I think Dr. Dragoo's surgery request is reasonable and necessary. Failure to have this procedure done will certainly lead to progressive lateral compartment arthritis and a greatly increased possibility for knee replacement. If you have any questions regarding this case, please do not hesitate to contact me.

Claimant's Exhibit 4, page 16.

22. On March 1, 2021, Respondent denied Dr. Dragoo's surgery request. *Respondent's Exhibit F, pages 41-45*.

23. At hearing, Dr. Farber testified as an expert in orthopedic surgery. Dr. Farber testified consistently with his IME reports. On cross-exam, Dr. Farber testified he did not actually review Claimant's MRI scans, just the radiologist's reports, despite testifying multiple times on direct examination that he did review the diagnostic studies. Dr. Farber testified the McMurray's test is an objective test a doctor performs to determine whether a patient has a meniscus issue. Dr. Farber testified the McMurray's test is objective if the doctor can feel popping in the knee. Dr. Farber testified that in Claimant's case, Dr. Dragoo performed a McMurray's test, which was positive and that Dr. Dragoo could feel a pop. Dr. Farber testified that Dr. Dragoo and Dr. Noonan have concluded that Claimant's left knee lateral meniscus is functioning as though a subtotal or total meniscectomy has been performed on his left knee. Dr. Farber testified he does not

understand how these surgeons can reach that conclusion because Claimant has not had a subtotal or total meniscectomy.

24. The issue here is whether the recommended left knee surgery is reasonably necessary and causally related to Claimant's admitted industrial injury – which involved a meniscal injury. More pointedly, the issue is whether Claimant needs a lateral meniscus transplant surgery despite not having 2/3 of his lateral meniscus removed during the prior surgeries. The Guidelines state that a meniscal allograft procedure should be performed only if the patient has had 2/3 of his meniscus removed, among other factors, which are not relevant here. Dr. Farber stated that because Claimant has not had 2/3 of his lateral meniscus removed, he does not meet the Guidelines criteria for a meniscal allograft, thus the recommended surgery is not reasonably necessary.

25. Drs. Dragoo and Noonan, Claimant's treating surgeons, credibly and persuasively concluded that while Claimant's has not had 2/3 of his meniscus removed (as required by the Guidelines), Claimant needs the recommended surgery because his lateral meniscus is equivalent to a person who has had 2/3 of his meniscus removed. Based on Claimant's left knee MRI scans and physical exam of Claimant's left knee, Drs. Dragoo and Noonan credibly and persuasively opined Claimant's lateral meniscus is extruded from the joint, nonfunctional, and diminutive from a mechanical standpoint. Drs. Dragoo and Noonan's opinion are supported by the medical records, including Claimant's MRI scans, Claimant's subjective reports of pain, symptoms, and functional issues, as well as the objective testing, including Drs. Dragoo and Noonan's findings on physical examination of Claimant's left knee. Drs. Dragoo and Noonan have both documented lateral-sided knee pain and tenderness, as well as positive objective testing, including McMurray's and Steinman's tests. Further, Drs. Dragoo and Noonan opined the recommend surgery is reasonable and necessary to treat Claimant's work injury and that failure to do the surgery will lead to progressive lateral compartment arthritis and a greater likelihood Claimant will need a knee replacement. The ALJ finds Drs. Dragoo and Noonan's opinions credible and persuasive. Despite the fact Claimant has not had 2/3 of his lateral meniscus removed, the ALJ finds sufficient evidence justifies deviation from the Guidelines. The ALJ finds that due to his work injury and subsequent surgeries, Claimant's left knee lateral meniscus is nonfunctional, diminutive, hypermobile, and deficient and equivalent to a person who has had 2/3 of his lateral meniscus removed. As a result, the ALJ finds Claimant proved by a preponderance of the evidence the left knee surgery recommended by Dr. Dragoo is reasonable, necessary, and causally related to his admitted industrial injury

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant proved by a preponderance of the evidence the left knee surgery recommended by Jason Dragoo, M.D. is reasonably necessary and causally related to his admitted, April 9, 2018, industrial injury.

Respondent is liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. § 8-42-101, C.R.S. Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim Apps. Office,* 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Indus. Comm'n*, 491 P.2d 106 (Colo. App. 1971); *Indus. Comm'n v. Royal Indemnity Co.,* 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Indus. Comm'n v. Jones*, 688 P.2d 1116 (Colo. 1984); *Indus. Comm'n v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970).

The Colorado Medical Treatment Guidelines (hereinafter Guidelines) are contained in Workers' Compensation Rule of Procedure 17, 7 CCR 1101-3, and provide that health care providers shall use the Guidelines adopted by the Director of the Division of Workers' Compensation. See § 8-42-101(3)(b), C.R.S. (medical treatment guidelines shall be used by health care practitioners for compliance with section). In *Hall v. Indus. Claim Apps. Office*, 74 P.3d 459 (Colo. App. 2003), the Colorado Court of Appeals noted that the Guidelines are to be used by health care practitioners when furnishing medical aid under the Workers' Compensation Act.

The Guidelines are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Indus. Claim Apps. Office*, 111 P.3d 549 (Colo. App. 2005). C.R.S. section 8-43-201(3) provides that when deciding whether certain medical treatment is reasonable, necessary, and related, "[t]he director or administrative law judge is not required to utilize the medical treatment guidelines as the sole basis for such determinations." It is appropriate for an ALJ to consider the Guidelines in deciding whether a certain medical treatment is reasonable and necessary for the claimant's condition. *See Deets v. Multimedia Audio Visual*, W. C. No. 4-327-591 (March 18, 2005) (Guidelines are a reasonable source for identifying the diagnostic criteria). The ALJ's consideration of the Guidelines may include deviations from them where there is evidence justifying the deviations. *Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (Jan. 25, 2011). The Guidelines, however, do not constitute evidentiary rules, and an expert's compliance with them does not dictate whether the expert's opinions are admissible, or whether they may constitute substantial evidence supporting a fact finder's determinations. Rather, compliance with the Guidelines may affect the weight given the ALJ to any particular medical opinion. *See Cahill v. Patty Jewett Golf Course*, W.C. No. 4-729-518 (February 23, 2009); *see also Thomas v. Four Corners Health Care*, W.C. No. 4-484-220 (April 27, 2009) (noting ALJ not required to award or deny medical benefits based on the Guidelines). The Guidelines are not definitive, but merely guidelines, and the ALJ has the discretion to make findings and orders which follow or deviate from the Medical Treatment Guidelines depending upon the evidence presented in a particular case. *Jones v. T.T.C. Illinois, Inc.*, W.C. 4-503-150 (ICAO May 5, 2006), *aff'd Jones v. Indus. Claim Apps. Office*, N. 06CA1053 (Colo. App. March 1, 2007) (not selected for official publication); *Nunn v. United Airlines*, W.C. 4-785-790 (ICAO September 9, 2011).

Additionally, the ICAO has previously noted the lack of authority mandating that an ALJ award or deny medical benefits based on the Guidelines. *See Thomas v. Four Corners Health Care*, supra (noting ALJ not required to award or deny medical benefits based on the Guidelines); *see also Andregg v. Arch Coal, Inc.*, W.C. No. 4-629-269-07 (Jan. 24, 2017) (noting ALJ not required to award maintenance medical benefits based on Guidelines); *see also Tafoya v. Associations*, Inc., W.C. No. 4-931-088-03 (Jan. 13, 2017) (although ALJ evaluated need for surgery in context of medical issues tied to Guidelines, she was not bound by Guidelines when awarding medical benefits). The

ALJ may appropriately consider the Medical Treatment Guidelines as an evidentiary tool. *Logiudice v. Siemans Westinghouse*, W.C. 4-665-873 (ICAO January 25, 2011).

According to the Code of Colorado Regulations Department of Labor and Employment Division of Workers' Compensation Rule 17, Exhibit 6, Lower Extremity Injury Medical Treatment Guidelines. Section E.2.f.H): "Meniscal allograft should only be performed on patients with a stable knee, previous meniscectomy with 2/3 removed, lack of function despite active therapy, BMI less than 30, and sufficient joint surface to support repair."

As found, Claimant proved by a preponderance of the evidence that the left knee surgery recommended by Dr. Dragoo is reasonably necessary and causally related to his admitted industrial injury. While Claimant may not have had 2/3 of his meniscus removed during the prior surgeries as required by the Guidelines, Drs. Dragoo and Noonan opined credibly and persuasively that Claimant's left knee lateral meniscus is hypermobile, deficient, and nonfunctional and operating as though he has had 2/3 of his meniscus removed. As a result, sufficient evidence justifies deviation from the Guidelines. Thus, the ALJ finds and concludes that the surgery recommended by Dr. Dragoo is reasonable and necessary to treat Claimant from the effects of his work injury. Therefore, the need for surgery is also causally related to Claimant's work injury.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant proved by a preponderance of the evidence that the left knee surgery recommended by Jason Dragoo, M.D. is reasonably necessary and causally related to his industrial injury. Respondent shall pay for the left knee surgery subject to the Division of Workers' Compensation Medical Fee Schedule.
2. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S.

For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 1, 2021.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant prove the 2% extremity rating assigned by the TIME should be converted to one percent whole person?

- The parties agreed to reserve the issues of average weekly wage, the potential adjustment of other admitted benefits if the average weekly wage is changed, and overpayment.

FINDINGS OF FACT

1. Claimant worked for Employer as an assistant manager. She suffered an admitted injury to her left shoulder on March 8, 2019, while moving a pallet.

2. Employer referred Claimant to the UC Health occupational medicine clinic. At her initial appointment with Dr. Autumn Dean, Claimant reported pain and tightness in her shoulder and neck. Examination showed tenderness of the posterior left shoulder and spasm in the left trapezius. Shoulder and cervical ranges of motion were normal. Dr. Dean diagnosed left shoulder and left trapezius strains. She recommended NSAIDs, and gave Claimant work restrictions of no lifting over 10 pounds and no use of the left arm.

3. Claimant followed up with Dr. Dean on March 21, 2019. She was still having pain in the left shoulder and trapezius. The physical examination again showed left trapezius tenderness and spasm. Dr. Dean continued Claimant's work restrictions and referred her to physical therapy.

4. Claimant started physical therapy on April 5, 2019. She was experiencing left thoracic pain with limited cervical and thoracic range of motion. There was also muscle tightness in her left scapular thoracic regions coupled with difficulty using her left arm. On examination, there was muscle tightness throughout the left upper trapezius/levator scapular muscles as well as the cervical and thoracic paraspinals. Significant tenderness was found in the thoracic spine, left scapular region, upper trapezius, and rhomboids. Therapy was provided to the upper trapezius, scapular muscles, and thoracic paraspinals.

5. A PT note dated April 8, 2019 documented decreased active range of motion in the cervical spine and left shoulder secondary to hypertonicity in the left upper trapezius. Subsequent PT notes from reveal ongoing pain with stiffness in the left trapezius, scapular musculature, and cervical spine. These records reflect treatment was directed toward the same areas.

6. On May 16, 2019, the therapist documented that Claimant's symptoms worsened with activities such as vacuuming, picking up laundry, and reaching.

7. Claimant had a CT scan of her left shoulder on June 28, 2019. It showed no acute bony abnormality.

8. Claimant saw PA-C Ryan Japp at UC Health on July 2, 2019. Claimant was frustrated with her ongoing symptoms and lack of progress with physical therapy. She reported 8/10 pain radiating to her left scapular area and occasional numbness and tingling in the left upper extremity. Mr. Japp ordered cervical x-rays, which showed no abnormalities. He referred Claimant to Dr. Javernick for an orthopedic evaluation.

9. Claimant saw Dr. Javernick on July 23, 2019. She described burning and numbness at the base of her neck with some radiation to the collarbone area. She also reported shoulder pain with activities such as reaching overhead. Physical examination was "limited as all maneuvers because pain." Dr. Javernick assessed, "left acute shoulder pain of unclear etiology with excessive pain. At this point it is unclear as to the cause of her level of pain. My first recommendation would be for MRI of the shoulder. . . . Even with an MRI her level of pain is disconcerting for success with any structural treatment."

10. Claimant followed up with Dr. Javernick on August 20, 2019. She had not had the MRI because she had surgery many years ago for an aneurysm and did not know what type of surgical clips were used. Dr. Javernick's working diagnosis was "left rotator cuff tendinopathy" and administered a subacromial injection. The injection provided significant relief for several weeks.

11. Claimant saw Dr. Emily Burns at UC Health on October 2, 2019. She was improved but still having left-sided neck and shoulder girdle pain. Dr. Burns noted, "her shoulder pain had essentially resolved after a previous injection but her back pain remained." Claimant reported a sharp pain in her left upper trapezius when she reached down to pull up her socks. She had restarted physical therapy the day before. On examination, Dr. Burns appreciated a "substantial left upper trap trigger point that reproduces her symptoms." She ordered thoracic x-rays, which were normal. Dr. Burns opined Claimant had "primarily myofascial pain remaining, certainly in the left upper trap."

12. Claimant was evaluated by Brian Polvi, D.C. on December 19, 2019. Dr. Polvi documented ongoing pain in the left paracervical, parathoracic, superior trapezius, parascapular, shoulder, and brachial regions. Similar symptoms were noted in Dr. Polvi's subsequent treatment notes.

13. Claimant saw Dr. Kenneth Finn on February 24, 2020 for electrodiagnostic testing. She reported pain along the trapezial ridge, radiating to the scapula, shoulder, and neck. She also described diffuse left arm pain, numbness, and tingling that did not follow any specific dermatomes. Her symptoms were aggravated by moving her neck, static postures, and work and household activities. Physical examination showed tenderness and spasm of the left upper quadrant and paraspinal musculature. The EMG was normal with no evidence of cervical radiculopathy, plexopathy, or peripheral nerve entrapment.

14. On May 18, 2020, Dr. Burns opined Claimant was approaching MMI. She was still having pain in her thoracic spine and upper trapezius. Claimant was advised to schedule an impairment rating appointment.

15. Dr. Burns put Claimant at MMI on June 16, 2020, with a 10% extremity rating, which converts to 6% whole person. She was also given permanent restrictions work restrictions to include no overhead lifting.

16. Dr. William Ciccone II performed an IME for Respondents on June 24, 2020. Claimant explained most of her ongoing pain was in the trapezius up into the neck and posteriorly down into the scapula. She also reported some residual left shoulder pain. Dr. Ciccone opined Claimant suffered a minor "sprain/strain" to the left trapezius and scapular musculature. He did not believe there was any injury to the glenohumeral joint itself. He noted, "my examination confirmed no specific shoulder pathology related to the shoulder joint but significant pain along the scapula." He opined Claimant had received appropriate treatment and agreed she was at MMI.

17. Claimant saw Dr. Dwight Caughfield for a DIME on December 15, 2020. Claimant was frustrated with her ongoing upper back, scapular and shoulder pain. Dr. Caughfield noted Claimant was independent with ADLs but was paying her teenage daughter to mop floors because that activity increased her pain. She was working for a new employer performing a sedentary job. Claimant's shoulder range of motion was "initially very guarded . . . but with encouragement [gave] consistent effort in range that [was] reproducible on repeat measurements." Dr. Caughfield observed a palpable upper trapezius trigger point. Cervical range of motion was symmetric in all planes with minimal pain complaints if the trapezius was not involved. Dr. Caughfield diagnosed "myofascial findings and pain behaviors but no established glenohumeral joint pathology." He opined Claimant suffered no specific injury to the cervical and thoracic spine, and thought her symptoms were "most consistent with myofascial pain of the shoulder girdle." He agreed that Claimant had reached MMI on June 16, 2020. He assigned a 2% extremity (1% whole person) shoulder rating based on range of motion. Dr. Caughfield noted the differences between his rating and that provided by Dr. Burns were higher flexion measurements and normalization to the uninjured right shoulder.

18. On February 10, 2021, Claimant saw Dr. Aparna Komatineni on referral from her PCP. Claimant reported pain in her neck, left shoulder, and left pectoralis. She was noted to have atrophy in her left trapezius, weakness with raising her left arm above shoulder level, tenderness to palpation, and reduced range of motion. Dr. Komatineni diagnosed cervical dystonia, left upper extremity weakness, and neck pain.

19. Dr. Caughfield testified Claimant's left shoulder pain was toward the edge of the shoulder and diffusely in the scapular area. Dr. Caughfield explained that even though Claimant demonstrated some pain behaviors, she gave good effort with encouragement. He also testified that Claimant's positive diagnostic to a trigger point injection confirmed there was pain coming from the left shoulder girdle muscles. He agreed that scapular dysfunction can cause issues with neck movement and twisting the

upper back. He opined Claimant had no neck injury, and her neck pain was coming from her shoulder. Dr. Caughfield had no opinion regarding conversion to whole person.

20. Claimant credibly testified she continues to experience pain and stiffness in her left shoulder and trapezius area. She further testified her pain worsened while performing modified duty and she felt pain in her neck and shoulder blade. Claimant described difficulty with activities such as mopping, vacuuming, and laundry because of her injury. She stated that these activities cause pain in her neck and left shoulder that radiates into her arm. Claimant has difficulty cooking or sleeping on her side because of pain on the left side of her neck and into her shoulder. She testified she did most of the cooking and cleaning, including vacuuming and mopping before her injury but now requires assistance from family members to complete these tasks.

21. Claimant proved by a preponderance of the evidence she suffered a functional impairment beyond her arm.

CONCLUSIONS OF LAW

When evaluating whether a claimant has sustained scheduled or whole person impairment, the ALJ must determine "the situs of the functional impairment." This refers to the "part or parts of the body which have been impaired or disabled as a result of the industrial accident," and is not necessarily the site of the injury itself. *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366, 368 (Colo. App. 1996). The schedule of disabilities refers to the loss of "an arm at the shoulder." Section 8-42-107(2)(a). If the claimant has a functional impairment to part(s) of his body other than the "arm," she has sustained a whole person impairment and must be compensated under § 8-42-107(8).

There is no requirement that functional impairment take any particular form, and "pain and discomfort which interferes with the claimant's ability to use a portion of the body may be considered 'impairment' for purposes of assigning a whole person impairment rating." *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (June 30, 2008). Referred pain from the primary situs of the initial injury may establish proof of functional impairment to the whole person. *E.g., Latshaw v. Baker Hughes, Inc*., W.C. No. 4-842-705 (December 17, 2013); *Mader v. Popejoy Construction Co., Inc*., W.C. No. 4-198-489 (August 9, 1996). Although the opinions of physicians can be considered when determining this issue, the ALJ can also consider lay evidence such as the claimant's testimony regarding pain and reduced function. *Olson v. Foley's*, W.C. No. 4-326-898 (September 12, 2000).

Pain and limitation in the trapezius and scapular area can functionally impair an individual beyond the arm. *E.g. Steinhauser v. Azco, Inc.*, W.C. No. 4-808-991 (January 11, 2012) (pain and muscle spasm in scapular and trapezial musculature warranted whole person impairment); *Franks v. Gordon Sign Co.*, W.C. No. 4-180-076 (March 27, 1996) (supraspinatus attaches to the scapula, and is therefore properly considered part of the "torso," rather than the "arm"); *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (ICAO, June 30, 2008) (pain affecting the trapezius and difficulty sleeping on injured side supported ALJ’s finding of whole person impairment). Limitations on overhead reaching can also consitute functional impairment beyond the arm in appropriate cases. *E.g.*, *Brown v. City of Auror*a, W.C. No. 4-452-408 (October 9, 2002); *Heredia v. Marriott*, W.C. No. 4-508-205 (September 17, 2004). However, the mere presence of pain in a part of the body beyond the schedule does not automatically represent a functional impairment or require a whole person conversion. *Newton v. Broadcom, Inc*., W.C. No. 5-095-589-002 (July 8, 2021).

As found, Claimant proved she suffered functional impairment not listed on the schedule. Claimant suffered no injury to her “arm” or to the shoulder joint *per se*. Rather, she has myofascial pain affecting the left trapezius and scapular area. Although the anatomic location of the original injury is not dispositive, it is a legitimate factor to consider when determining whether a claimant has a scheduled or whole person impairment. *See, e.g., Martinez v. Albertson’s LLC*, W.C. No. 4-692-947 (June 30, 2008) (“The [claimant’s] subacromial decompression was done at the acromion and the coracoacromial ligament in order to relieve the impingement, which is all related to the scapular structures above the level of the glenohumeral joint”). Multiple treating and examining providers have documented symptoms proximal to Claimant’s arm, and associated functional limitations. The medical records also document trigger points and muscle spasms in the trapezius, which objectively substantiates Claimant’s reported symptoms. Claimant’s testimony regarding the impact the injury has had on her ability to perform activities at work and home was credible. The preponderance of persuasive evidence shows Claimant has functional impairment to parts of her body beyond her “arm.”

ORDER

It is therefore ordered that:

1. Insurer shall pay Claimant PPD based on the DIME’s 1% whole person impairment rating. Insurer may take credit for any PPD benefits previously paid to Claimant.

2. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ’s order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ’s order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: September 1, 2021

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that he suffered an injury arising out of and in the course and scope of his employment with the employer. Specifically, was the claimant exposed to the COVID-19 virus[1] at work, resulting in the need for medical treatment.

If the claimant proves a compensable injury, whether the claimant has demonstrated, by a preponderance of the evidence, that treatment he received from Valley View Hospital was reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.

RESERVED ISSUES

At hearing, the parties agreed to reserve the remaining endorsed issues for future determination, if necessary. Those reserved issues are: average weekly wage (AWW); temporary total disability (TTD) benefits; temporary partial disability (TPD) benefits; change of physician; and safety rule violation.

FINDINGS OF FACT

1. The employer provides public transportation in the Rifle, Glenwood Springs, and Aspen, Colorado corridor. The claimant is employed with the employer as a bus driver.

2. The claimant resides with his daughter and granddaughter[2]. The claimant's daughter is employed at City Market, a local grocery store. The claimant testified that his daughter does all of the grocery shopping for the home. He also testified that he and his daughter do not eat together and are "like roommates".

3. In addition, the claimant rents out a second residence on his property. At all times material to this case, the claimant had tenants in that other residence. The claimant testified that when he interacted with those tenants, he did so outside.

[1] The ALJ recognizes that some of the medical records entered into evidence identify the claimant contracting SARS-CoV-2, or some other similar name. The ALJ further recognizes that SARS-CoV-2 is the virus identified by the World Health Organization (WHO) that causes COVID-19. For consistency and clarity, the ALJ refers to the virus at issue as "COVID-19".

[2] Other than the disclosure that she resides in the claimant's home, there was no evidence or testimony presented with regard to the nature of the claimant's interaction with his granddaughter.

4. In late October 2020, the claimant traveled by airplane to visit family in Arizona. The claimant returned to Colorado, by airplane, on November 3, 2020. The claimant asserts that during that trip he did not come in contact with any sick individuals.

5. While driving for the employer, the claimant typically works a split shift. He will work for approximately five hours in the morning, have the next five hours off, and then return in the afternoon/evening to work an additional five hours.

6. The claimant provided testimony regarding a November 15, 2020 incident in which a bus passenger coughed and sneezed on him. On that date, the claimant was driving the route between Rifle and Glenwood Springs. The claimant testified that he was wearing a face mask as required by the employer. In addition, the driver area had a moveable barrier (like a shower curtain) that the claimant was to close when passengers were entering and exiting the bus.

7. It is the claimant's testimony that on November 15, 2020, a homeless man boarded the claimant's bus in Rifle. This individual was wearing a face mask. However, the individual removed the mask and began coughing and sneezing. The claimant testified that he asked the individual to put on his mask. When the passenger did not comply, the claimant stopped the bus, walked from the driver area to the back of the bus to confront the customer. The claimant testified that he was within three feet of the individual and coughed and sneezed. It was the claimant's testimony that he felt droplets on his face. The claimant also testified that there were approximately four other passengers on the bus at this time.

8. The claimant did not report this incident to the employer on November 15, 2020.

9. However, on November 15, 2020, the claimant did report concerns to a supervisor regarding the "fogger" that was used to sanitize all surfaces in the bus interior.

10. The claimant testified that he did not report his potential COVID-19 exposure to the employer because at that time he did not believe he had been exposed to anything. The claimant also testified that if he had made such a report he would have been taken off of work for two weeks.

11. The claimant completed his morning runs on November 15, 2020. The claimant returned for his afternoon shift on that date and completed that shift. The claimant also worked his full schedule on November 16, 2020.

12. On November 18, 2020, the claimant attended an appointment at a "lung clinic" to receive an injection. The claimant testified that all individuals present at the clinic wore masks.

13. The claimant testified that approximately eight hours after his appointment at the lung clinic, he began sneezing. The following morning, the claimant had a fever of 102 degrees.

14. At that time, the claimant believed he had a cold. He contacted the lung center regarding his symptoms. It was the claimant's understanding that the injection he received on November 18, 2020, did not cause his symptoms.

15. On Saturday, November 21, 2020, the claimant contacted the employer and reported that he was ill and would not be at work on Sunday, November 22, 2020. The claimant did not report that he was having COVID-like symptoms. The claimant did not report to the employer that he had an interaction with a sneezing/coughing passenger.

16. The claimant testified that he continued to run a fever, and experienced shortness of breath. On Monday, November 23, 2020, the claimant was tested for COVID-19. The claimant was notified on November 24, 2020 that his COVID-19 test was positive.

17. On November 24, 2020, the claimant was hospitalized at Valley Valley Hospital after a computed tomography (CT) angiogram showed evidence of COVID-19 pneumonia. The claimant was discharged from the hospital on November 25, 2020.

18. The claimant returned to Vail Valley Hospital on November 28, 2020, because he was having difficulty breathing and his oxygen levels were low. The claimant was admitted to the hospital and was not discharged until December 18, 2020.

19. Jason S[Redacted], Safety and Training Manager with the employer testified regarding the safety measures taken by the employer to address COVID-19. This included installing barriers between bus drivers and passengers. Mr. S[Redacted] also testified that all employees were instructed that if they believed they had been exposed to COVID-19, they were to leave work immediately. Additionally, at the beginning of each shift all employees are required to complete a COVID-19 questionnaire. If an employee worked a split shift, like the claimant, these forms were completed at the start of each shift. Therefore, the claimant would have completed such a form when he returned for his afternoon shift on November 15, 2020 and again the following morning of November 16, 2020.

20. Mr. S[Redacted] testified that he was notified by human resources that the claimant believed he was exposed to COVID-19 at work. The claimant did not make any such report to Mr. S[Redacted].

21. Maria V[Redacted] is the employer's Human Resources and Risk Management Analyst. Ms. V[Redacted] testified that she spoke with the claimant at various times during his hospitalizations. Despite this somewhat regular communication, it was not until December 16, 2020 that the claimant first mentioned a possible work exposure to the employer. On that date, Ms. V[Redacted] called the claimant to check on the state of his health. During that December 16, 2020 telephone conversation, Ms. V[Redacted] asked the claimant if he had been exposed to COVID-19 at work. After this query by Ms. V[Redacted], the claimant first told a version of the story regarding the November 15, 2020 interaction.

22. Also on December 16, 2020, the claimant contacted the employer's CEO and reported COVID-19 exposure at work. As a result of these December 16, 2020 communications, the employer filed a First Report of Injury or Illness.

23. On May 27, 2021, the claimant virtually attended an independent medical examination (IME) with Dr. John Hughes. In connection with the IME, Dr. Hughes reviewed the claimant's medical records and obtained a history from the claimant. Dr. Hughes did not physically examine the claimant due to the nature of the virtual meeting. In his report, Dr. Hughes noted that the exam was "limited to [the claimant's] seated appearance in a Zoom conference." In his IME report, Dr. Hughes stated that he could not state that it was medically probable that the claimant sustained COVID-19 during the passenger interaction on November 15, 2020. In support of this opinion, Dr. Hughes noted his understanding that the claimant's symptoms began on November 19, 2020. In addition, he noted that the Center for Disease Control (CDC) accepts a timeline of exposure to development of symptoms as 14 days. Based upon the information available to him at the time of the IME, Dr. Hughes opined that the claimant was likely exposed to COVID-19 in the 14 day period prior to the commencement of symptoms; specifically between November 4, 2020 and November 19, 2020. Finally, Dr. Hughes indicated in his IME report that he would need additional information regarding the claimant's trip to Arizona, the claimant's interactions with his daughter, and the November 18, 2020 medical appointment.

24. Based upon the opinions of Dr. Hughes, the respondent denied the claimant's claim for workers' compensation benefits.

25. Dr. Hughes's testimony was consistent with his written report. Dr. Hughes testified that it is possible that the claimant was exposed to COVID-19 during his trip to Arizona, at the November 18, 2020 lung clinic appointment, and when interacting with his tenants. Dr. Hughes also testified that although claimant returned from Arizona on November 3, 2020 (which is 15 days from the date his symptoms began), there is a possibility that the claimant was exposed to COVID-19 at that time. Dr. Hughes clarified that the 14-day guidance from the CDC is not absolute. Dr. Hughes further testified that while it is possible that the claimant was exposed to COVID-19 on November 15, 2020, it is not probable that was the date and time of exposure.

26. The ALJ credits the medical records, the testimony of Ms. V[Redacted] and Mr. S[Redacted]. The ALJ also credits the opinions of Dr. Hughes. The ALJ does not find the claimant's testimony regarding the alleged November 15, 2020 passenger interaction to be credible or persuasive. The claimant did not raise any concern related to workplace exposure until his second hospital stay in December 2020. At that time, it was only after questions from Ms. V[Redacted] that the claimant began to allege the passenger interaction. Since that time, the claimant's description of that interaction has become more and more detailed.

27. The ALJ also finds that the claimant had a number of other possible COVID-19 exposures close in time to the development of his COVID-19 symptoms. Those other possible exposures include the November 15, 2020 lung clinic appointment; interactions with his tenants; and his plane travel to and from Arizona. Additionally, the claimant lives

with his daughter and granddaughter. Although no information was included in the record regarding the claimant's granddaughter, the ALJ notes that the claimant's daughter works at a grocery store. The ALJ finds that the claimant could have been exposed to COVID-19 through interactions with either his daughter or granddaughter. Based upon all of the foregoing, the ALJ finds that the claimant has failed to demonstrate that it is more likely than not that he was exposed to COVID-19 at work, resulting in his need for medical treatment.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a pre-existing medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *See H & H Warehouse v. Vicory, supra.*

5. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that he was exposed to COVID-19 at work. Therefore, the claimant has failed to demonstrate, by a preponderance of the evidence, that he suffered an injury

arising out of and in the course and scope of his employment with the employer. As found, the medical records, the testimony of Ms. V[Redacted] and Mr. S[Redacted], and the opinions of Dr. Hughes are credible and persuasive. All remaining endorsed issues are dismissed as moot.

ORDER

It is therefore ordered that the claimant's claim for workers' compensation related to an alleged exposure to COVID-19 is denied and dismissed. All remaining endorsed issues are dismissed as moot.

Dated this 3rd day of September 2021.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he is entitled to a change in authorized treating provider.

II. Whether Claimant has proven by a preponderance of the evidence that he is entitled to multiple penalties to be paid pursuant to Sections 8-43-304(1), C.R.S. and 8-43-305, C.R.S., as follows:

a. Respondents' alleged violation of W.C.R.P. Rule 5-2(a) and Sec. 8-43-203(1)(a) for failing to timely admit or deny liability from January 12, 2021.

b. Respondents' alleged failure to pay temporary disability benefits pursuant W.C.R.P. Rule 5-6 from March 11, 2021 through the present and pursuant to W.C.R.P. Rule 6-8 from July 22, 2021 to the present, including interest under Section 8-43-10, C.R.S.

c. Respondents' alleged failure to timely authorize medical treatment per W.C.R.P. Rule 16-6(C), Rule 16(D) and Rule 16-6(G from January 12, 2021 to the present including a nerve conduction study (EMG/NCV) and physical therapy.

d. Respondents' alleged failure to issue mileage reimbursement consistent with W.C.R.P. Rule 16-l0(G).

FINDINGS OF FACT

1. Claimant worked as a bike mechanic or parts mechanic for Employer. He started working for Employer as of June 15, 2020. He stated that when he was originally contracted by Employer, they were to provide him housing. The housing was a trailer in the back of Employers' property. Claimant stated that he lived there for a few weeks then moved out. Claimant provided his current address in Oregon at the time of the hearing.

2. Claimant stated that his job involved tearing down bikes and/or motorcycles for parts. Claimant was not allowed to leave the parts on the ground and they had to be stored on the shelves or in bins on the shelves. Claimant stated that the lift was out of service and advised his Employer of that fact.

3. On November 28, 2020, Claimant was twisting on a ladder placing a very heavy bin of parts onto a shelf overhead when he felt a pop in his shoulder, experiencing immediate pain in the shoulder and extending all the way down his arm. Claimant stated that he reported the incident to Employer and was sent home. The next Monday, Claimant contacted Employer, who advised him to seek medical care for the injury.

Claimant stated that Employer failed to provide him with a list of providers. As found, because Employer failed to provide a list of providers pursuant to the Act and the rules, the right of selection passed to Claimant.

4. Claimant went to North Suburban Medical Center emergency room on December 1, 2020.[1] He reported the history above to Physician Assistant Caitlin Trierweiler. The providers suspected a rotator cuff injury and stated that Claimant may need further diagnostic evaluations such as an MRI. They provided Claimant with a sling and recommended he practice gentle range of motion exercises in order to avoid a frozen shoulder. The also recommended he be examined by an orthopedic specialist.

5. Claimant presented to Dr. Kareem Sobky of Health One Colorado Limb Consultants on December 9, 2020. In the history, Dr. Sobky documented that Claimant was a 27 year old right hand dominant patient that on or about November 28, 2020 Claimant was lifting up a motorcycle bin weighing approximately 120 pounds, getting up on a ladder and twisting using both arms to put this heavy bin onto a shelving unit. In the twisting motions he felt a pop in the left shoulder, shoulder blade and neck area. Dr. Sobky diagnosed left cervical spine radiculopathy, derangement of the left shoulder joint, scapulalgia, paresthesia, and acute pain of left shoulder. Dr. Sobky noted that Claimant "sustained a work-related injury, while lifting and twisting a heavy item." The report was faxed to the Insurer's adjuster on December 10, 2020, and received by their counsel on or before February 11, 2021.[2]

6. Dr. Sobky had concerns for cervical disc herniation as well as internal derangement of the left shoulder as he has combined symptoms. Given that he has had minimal improvement in the prior week and a half he recommended a Medrol Dosepak as well as naproxen. Dr. Sobky stated he was not entirely sure what was going on mechanically in the left shoulder with catching and popping and a positive O'Brien's test as well as a positive Spurling sign, with numbness and tingling down the arm. He ordered an MRI of the left shoulder and an MRI of the C-spine.

7. The shoulder MRI took place on December 16, 2020.[3] It showed a small linear interstitial tear of the cranial subscapularis insertion with mild underlying tendinosis. There was mild medial subluxation of the adjacent long head biceps at the proximal bicipital groove with mild rotator Interval tendinosis. Dr. Vincent Herlihy was concerned that the findings raised concern for dysfunction of the biceps pulley mechanism. He also found a small focal area of non-displaced partial detachment of the posterior inferior glenoid labrum with mild diffuse underlying labral fraying as well as mild to moderate supraspinatus and mild infraspinatus tendinosis.

[1] Exhibit 8, bates 39-44.
[2] Exhibit 10, bate 62.
[3] Exhibit 5, bates 13-14.

8. The cervical spine MRI, also performed on December 16, 2020, showed mild multilevel degenerative changes with bilateral foraminal stenosis at the C3-4 level, and a small midline disc protrusion at the C4-5 level.[4]

9. On December 21, 2020 Dr. Sobky opined that Claimant's shoulder damage warranted surgery to include arthroscopic evaluation, biceps tenodesis, subscapularis repair, possible labral repair, and subacromial decompression. Dr. Sobky state that Claimant's "C-spine MRI shows more significant C4-5 a annular fissure with a small central disc herniation. However his symptoms are significant enough with burning down the entire arm into the thumb and index finger I would recommend evaluation and recommendations with DISC." He referred Claimant to Denver International Spine Center.

10. Dr. Sobky's December 22, 2020 Work Status and Progress Report states "Patient off work status from December 22, 2020 until TBD, patient having surgery."[5]

11. The Authorization Request for surgery was submitted to Respondents on December 30, 2020, which specified the diagnosis and documented the multiple tears to be repaired. On the right side of both the request for prior authorization and the telephone encounter form, it shows an electronic stamp dated December 30, 2020 that it was received by Respondent Insurer.[6] The Authorization Request specifically notes that medical records were attached and the electronic confirmation shows that eleven pages were sent to Respondent Insurer.

12. Claimant proceeded with surgery of the left shoulder on January 7, 2021 with Dr. Sobky. As reasonably inferred from this information, the request for surgery was not denied by Respondents.

13. On January 12, 2021 Claimant filed a Request for Change of Physician, selecting Dr. Rafer Leach.[7] Claimant testified that Dr. Sobky was treating only his shoulder complaints and Dr. Kuklo was only treating his cervical spine problems. Claimant requests that Dr. Leach be the provider to address all his problems related to the claim. Claimant testified that Respondents sent a letter to Claimant's counsel on February 15, 2021 denying the request for a change of physician. Claimant also filed a Workers' Claim for Compensation on January 12, 2021 with the Division. As Claimant's admitted injury occurred on October 22, 2020 the January 12, 2021 Request for a Change of physician is within the 90 days. As found, Claimant is entitled to a change of physician to Dr. Leach as Respondents failed to comply with the 20 day deadline to respond to the request, which is deemed waiver of any objection.

[4] MRI documented by multiple provider in Exhibit 7, bates 21 & 23; Exhibit 10, bate 70; Exhibit 11, bate 80, all consistent with each other and the reports are found reliable.

[5] Exhibit 10, bate 71.

[6] Exhibit 10, bates 70 and 72.

[7] Exhibit 3, bate 11.

14. Claimant returned to Dr. Sobky's office on January 20, 2021 and was evaluated by his PA-C, Ms. Bridget Van Boxtel. She stated that Claimant was seen two weeks "status post a left shoulder arthroscopic subscapularis repair, rotator cuff repair, subacromial decompression with acromioplasty and CA ligament release, bursectomy, and biceps tenodesis," and that he was doing well overall, but had not yet started physical therapy. Ms. Van Boxtell also saw Claimant on February 17, 2021, six weeks post op and reported that he had tightness over the anterior aspect of the shoulder with end range of motion and some paresthesia of his first three digits of the left hand. By that time he had started physical therapy at Premier Physical Therapy.

15. Claimant started physical therapy on January 22, 2021 according to the reports from Premier Physical Therapy.[8] The therapist, Blake Giles, documented that:

> Patient presents with normal heal s/p L rotator cuff repair, subacromial decompression/debridement, bicep tenodesis and labrum repair on 1-7-21. Patient will benefit from Physical Therapy plan of care in coordination with Surgeon's protocol to achieve normal healing and return patient to his prior level of function.

16. Claimant was evaluated for his cervical spine by Dr. Timothy Kuklo of Denver International Spine Center on February 16, 2021. Dr. Kuklo ordered an EMG of the left upper extremity to assess the paresthesia going into his left hand.[9] He reported that Claimant had 3 months' worth of neck and arm pain that started in November 2020 when working for Employer. Dr. Kuklo assessed acute cervical radiculopathy and median nerve compression. He recommended an "EMG of bilateral upper extremities to compare contralateral side and establish patient norm. Assess for median nerve entrapment or carpal tunnel compression test due to thumb and index finger having loss of sharp versus dull sensation." Dr. Kuklo also personally reviewed the cervical spine MRI and viewed a "C5-6 loss of disc height with shallow disc osteophyte and bilateral UCVJ spurs and small joint effusions." He referred Claimant to a neurologist, Dr. Alexander Feldman for the NVC/EMG.

17. On February 23, 2021 Claimant was first evaluated by Rafer Leach, M.D. of MSK Medical, LLC. Dr. Leach issued several diagnosis including cervicalgia, cervicobrachial syndrome, thoracic pain, rotator cuff and left labrum injury, adjustment disorder and facet injury. He also referred Claimant for an NCV/EMG (nerve conduction study).[10]

18. Claimant testified that the NCV/EMG was denied by Respondents. Claimant stated that Respondents scheduled an appointment for him to be seen by Dr. John Burris for an Independent Medical Examination (IME). The IME took place on April 6, 2021.[11] Dr. Burris documented that Claimant's complaints were of left shoulder pain

[8] Exhibit I, Bates 40-70.
[9] Exhibit 11, bates 79-81.
[10] Exhibit 9, bates 55-59 and Exhibit J, bates 80-82.
[11] Exhibit 7, bates 17-26.

and left thumb and index finger numbness. When asked whether the NCV/EMG was reasonably necessary and related, Dr. Burris stated as follows:

> [Claimant] is reporting numbness in his left thumb and index finger. The cervical spine MRI and his examination are unrevealing for cervical radiculopathy. However, the described mechanism of injury could have caused a brachial plexus or nerve traction type injury. Dr. Sobky, Dr. Kuklo, and Dr. Leach have all recommended a left upper extremity NCV/EMG for diagnostic clarity. Therefore, the left upper extremity NCV/EMG appears reasonable and related to the 11/28/2020 workplace event.

19. Respondents filed a General Admission of Liability (GAL) on March 2, 2021 admitting to temporary partial disability (TPD) from November 28, 2020 through December 14, 2020 and temporary total disability benefits (TTD) from December 15, 2020 forward.[12] The GAL is addressed to Claimant in care of Employer's address. The Certificate of Mail shows that it was neither sent to Claimant nor to Claimant's counsel, just to Employer, Respondents' counsel, and the Division.[13] This did not comply with the rules and the General Admission of Liability' validity is suspect.

20. Premier Physical Therapy documented on March 3, 2021 that the patient had made good progress, had achieved mostly full range with passive motion performed by therapist and was able to progress to performing exercises and activities prescribed by his surgeon's protocol. They documented that Claimant was tolerating active exercises well despite expected muscle weakness and fatigue. Mr. Guiles stated that Claimant continued to benefit from further progression of physical therapy care in order to achieve normal healing and patient's maximum functional potential.[14]

21. Claimant testified that his first indemnity check was not issued until March 11, 2021 and it was sent to his employer. He received it the middle of March from Employer. Respondents continued to send the temporary disability benefits to Employer, which paid through July 22, 2021. The last check he received, Employer held it and eventually forwarded to his old address, which had to be forwarded from there. Then benefits stopped altogether and Claimant stated that he had not received any indemnity benefits for the last two weeks of July or for August, 2021. He has not ever had any TTD checks go directly to him to his address directly from Insurer. As found, Respondents violated the requirement that Respondents send any benefits checks to the Claimant as a payee; violated the requirement that the first indemnity benefits check be paid when the General Admission is filed and violated the rule that benefits may not be stopped unless some condition precedent takes place pursuant to the statute and rules.

22. Claimant indicated that his nerve conduction study (NVC/EMG) was not performed after Dr. Burris made the recommendation with regard to the test, for some

[12] Exhibit 12, bates 82-83.

[13] Pursuant to W.C.R.P. Rule 1-4(A), "Whenever a document is filed with the Division, a copy of the document shall be mailed to each party to the claim and attorney(s) of record, if any."

[14] Exhibit I, bate 67.

time thereafter. He did not recall the specific date. However, he was sent a copy of the denial of authorization of the NVC/EMG by Respondents' counsel dated March 5, 2021.

23. Claimant also stated that he had to wait for physical therapy for several weeks after his surgery. Then after several weeks, the physical therapy was stopped for about one- and one-half months, from sometime in March, because the adjuster would not authorize the treatment. Claimant spoke with his doctor and was concerned that his shoulder was very tight, He was concerned about frozen shoulder due to the interruption and the delay in receiving physical therapy. He stated that eventually the therapy office contacted and advised they would continue with his therapy without the required authorization as they did not wish him to have any further delay in care.

24. Claimant testified that he had submitted mileage requests for reimbursement. Respondents conceded, in their position statement, that Claimant submitted mileage reimbursement requests on April 14, 2021 for $98.58 and May 25, 2021 for $47.70.[15] Claimant testified that he never received any mileage reimbursement checks. Claimant asserted that he looked at every check he has received to the date of the hearing, and none were for the amounts indicated or for mileage reimbursement. Respondents allege the check for $98.58 for mileage reimbursement was issued on May 5, 2021, though no proof of payment was provided by Respondents.

25. On May 27, 2021 Prehearing Administrative Law Judge (PALJ) Marcus Zarlengo issued an order granting Claimant's motion to add penalty allegations including failure to authorize medical care and failure to reimburse mileage.[16] Claimant filed an Amended Application for Hearing on the same day, including the additional issues.

26. PALJ Judge Laura Broniak issued at Prehearing Order on July 2, 2021 allowing Claimant to add additional issues to the scheduled hearing to commence on August 6, 2021, which included specific penalties.[17]

> Claimant alleges that Respondents filed a general admission liability on March 2, 2021, but did not start issuing temporary total disability (TTD) checks until late April 2021 and sent the check to the Employer rather than to Claimant directly. Claimant alleges Respondents' conduct violates W.C.R.P. Rule 5-6(B) and Section 8-43-410, C.R.S. 1 2. Claimant alleges that Respondents unilaterally ceased issuance of TTD checks; and that despite requests to send checks directly to Claimant, the last check was sent to the Employer. Claimant alleges a violation of W.C.R.P. Rule 6-8.

27. Claimant moved to compel Respondents to produce an updated copy of the claim file on July 22, 2021 before PALJ Susan Phillips. The Prehearing Order granted the motion, ordering Respondents to produce the updated file no later than August 2,

[15] See Respondents' Position Statement, p. 11, paragraph 29.
[16] Exhibit 2, bates 8-10.
[17] Pleading filed with OAC to add the issues for hearing.

2021.[18] Respondents conceded that they were late in producing the file. Claimant argued that the updated claim file was necessary to determine what payments were made, when and where they were sent. Since Claimant did not have this confirmatory information, despite the PALJ's order to produce it, Claimant was prejudiced in this matter. As found, Respondents disregard for the order showed a pattern of behavior that justified Claimant's requests for penalties in this matter.

28. Claimant stated he recently had to move to Oregon, to live with family, approximately three weeks prior to the hearing. He testified that he was unable to afford to live in Colorado since he had no family here or any other resources. He has not received any medical care since moving, has not been released by his providers and is extremely worried whether he is going to get the care he needs. He continues to have significant tightness in his shoulder and stated that his range of motion is not quite what it should be. As found, Claimant's financial hardships caused by Respondents' failure to appropriately and timely make payments directly to Claimant as a payee and for their violation of the rules in terminating Claimant's temporary disability benefits justifies an award of penalties in this matter related to his work injury.

CONCLUSIONS OF LAW

A. Generally

1. The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well.

[18] Exhibit 16, bates 275-277.

See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008).

4. The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

B. Authorized Provider and Change of Physician:

1. Claimant seeks a determination of whether Claimant is entitled to a change of physician to Dr. Rafer Leach and weather other specialists that have treated Claimant are authorized providers. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S., 2008. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). A change of physician is permitted under several circumstances. Here Claimant filed a Change of Physician form on January 12, 2021. (Claimant's Exhibit 3), which was sent to Respondents. No evidence shows or was submitted to dispute that the address it was sent to was incorrect.

2. Section 8-43-404(5)(a)(VI)(A), C.R.S. states:

> In addition to the one-time change of physician allowed in subparagraph (III) of this paragraph (a), upon written request to the insurance carrier or to the employer's authorized representative if self-insured, an injured employee may procure written permission to have a personal physician or chiropractor treat the employee. The written request must be completed on a form that is prescribed by the director. If permission is neither granted nor refused within twenty days after the date of the certificate of service of the request form, the employer or insurance carrier shall be deemed to have waived any objection to the employee's request. Objection shall be in writing on a form prescribed by the director and shall be served on the employee or, if represented, the employee's authorized representative within twenty days after the date of the certificate of service of the request form.

3. W.C.R.P. Rule 8-7 lays out the requirements for a change of physician under §8-43-404(5)(a)(VI)(A). The Rule states as follows:

> (A) In addition and separately from all the other provisions of this Rule 8, an injured worker may submit a written request to change physicians to the insurer or employer's authorized representative if self-insured. Such a request must be on the form prescribed by the division of workers' compensation.

> (B) The insurer or employer's authorized representative if self-insured shall have twenty (20) days from the date of the certificate of service of the request form to either grant permission for the requested change of physician or object in writing on the form prescribed by the division of workers' compensation. Failure to timely object shall be deemed a waiver of objection.

4. Twenty days from the request dated January 12, 2021 was February 1, 2021. Respondents sent Claimant a denial of a change of physician on February 15, 2021. It was in the form of a letter and not a response on the form prescribed by the Division. As found, Respondents failed to timely respond to Claimant's request for a change of physician. Failure to timely object is deemed a waiver of Respondents' right to object to the change of physician under the rule. Respondents did not object in writing on the form prescribed in a timely manner. Therefore, it is found that Dr. Rafer Leach is an authorized treating physician.

5. Section 8-43-404(a)(VI)(B), C.R.S. states:

> If an injured employee is permitted to change physicians under sub-subparagraph (A) of this subparagraph (VI) resulting in a new authorized treating physician who will provide primary care for the injury, then the previously authorized treating physician providing primary care shall continue as the authorized treating physician providing primary care for the injured employee until the injured employee's initial visit with the newly authorized treating physician, at which time the treatment relationship with the previously authorized treating physician providing primary care is terminated.

6. In this case, it is found and concluded, there were no authorized treating physicians that were providing primary care. Dr. Sobky is the lower extremity or limb consultant and Dr. Kuklo is the spine specialist. Neither provided the required forms such as M-164 Physician Report of Worker's Compensation Injury forms, needed to establish a patient's status and work restrictions. Claimant was first evaluated by Dr. Leach on February 23, 2021 and he provided a status report. As such, Claimant was entitled to designate Dr. Rafer Leach as his authorized treating physician.

7. Pursuant to Section 8-43-404(5) (a) (I) (A) the employer or insurer must provide "a list of at least four physicians or four corporate medical providers …in the first instance, from which list an injured employee may select the physician who attends the injured employee."

8. Pursuant to W.C.R.P. Rule 8-2(E) "If the employer fails to supply the required designated provider list in accordance with this rule, the injured worker may select an authorized treating physician or chiropractor of their choosing."

9. In this case, Claimant was attended by Dr. Sobky to evaluate his knee and Dr. Sobky referred Claimant to Dr. Kuklo, the spine specialist. Both of these specialists are authorized providers as Claimant credibly testified that he was not provided with a designated provider list by Employer, and Respondents did not provide evidence to the

contrary. Therefore, Dr. Leach, Dr. Sobky and Dr. Kuklo are all authorized treating physicians.

C. Penalties

Failure to Admit or Deny

10. Claimant is seeking multiple penalties. The first is a penalty for failure to admit or deny the claim in a timely manner. Claimant points to Section 8-43-203(1), C.R.S. as requiring an insurer to notify the Division in writing, whether a claim is admitted or denied, within 20 days after a report of an injury is filed as required by § 8-43-101, C.R.S. Claimant notes that W.C.R.P. Rule 5-2(D) directs the insurer to submit such a document within 20 days after the Division sends to the insurer a Worker's Claim for Compensation. The record shows Claimant filed a Claim for Compensation on January 12, 2021.

11. W.C.R.P. Rule 5-2 states in pertinent part:

> (B) A First Report of Injury shall be filed with the Division in a timely manner whenever any of the following apply. The insurer or third-party administrator may file the First Report of Injury on behalf of the employer.
>
> …
>
> (2) Within ten days after notice or knowledge by an employer that an employee has contracted an occupational disease listed below, or the occurrence of a permanently physically impairing injury, or that an injury or occupational disease has resulted in lost time from work for the injured employee in excess of three shifts or calendar days….
>
> (C) The insurer shall state whether liability is admitted or contested within 20 days after the date the employer's First Report of Injury is filed with the Division. If an Employer's First Report of Injury should have been filed with the Division, but wasn't, the insurer's statement concerning liability is considered to be due within 20 days from the date the Employer's First Report of Injury should have been filed. The date a First Report of Injury should have been filed with the Division is the last day it could have been timely filed in compliance with paragraph (B) above.
>
> (D) The insurer shall state whether liability is admitted or contested within 20 days after the date the Division mails to the insurer a Worker's Claim for Compensation or Dependent's Notice and Claim for Compensation.
>
> (E) A statement regarding liability is required for any claim in which a division-issued workers' compensation claim number is assigned or a First Report of Injury should have been filed pursuant to paragraph (B) of this rule. A statement regarding liability shall not be filed without a First Report of Injury, Worker's Claim for Compensation, or Dependents Notice and claim having been successfully filed and assigned a workers' compensation claim number. A first report of injury must be filed prior to a notice of contest being accepted by the division.

12. Section 8-43-304, C.R.S. provides that Respondents may be subject to penalties up to one thousand dollars per day for a statutory violation or rule violation

(where Respondents fail or refuses to perform any duty lawfully enjoined within the time prescribed by the director). The amount of the penalty awarded at hearing is within the discretion of the administrative law judge (ALJ). Section 8-43-305, C.R.S. states that each day is a separate violation.

13. Whether statutory penalties may be imposed under §8-43-304(1) C.R.S. involves a two-step analysis. The ALJ must first determine whether the insurer's conduct constitutes a violation of the Act, a rule, or an order. Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational argument in law or fact. *Jiminez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* WC 4-187-261 (ICAO, Aug. 2, 2006). There is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth*, 924 P.2d 1094 (Colo. App. 1996). The question of whether the insurer's conduct was objectively unreasonable presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005); see *Pant Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). A party establishes a prima facie showing of unreasonable conduct by proving that an insurer violated a rule of procedure. See *Pioneers Hospital* 114 P.2d at 99. If the claimant makes a prima facie showing the burden of persuasion shifts to the respondents to prove their conduct was reasonable under the circumstances. *Id.*

14. Further Section 8-43-304(4), C.R.S. states that after the date of mailing of an application for hearing, "an alleged violator shall have twenty days to cure the violation. If the violator cures the violation within such twenty-day period, and the party seeking such penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation, no penalty shall be assessed."

15. As found, Claimant filed a Workers' Claim for Compensation and a Change of Physician form on January 12, 2021. The Change of Physician form was received by Respondents. It was mailed to Insurer and Respondents' counsel sent a letter responding to the request on February 15, 2021. This is an indication that Respondent Insurer received the mailed form, forwarded it to counsel, and knew or should have known that Claimant filed a claim with the Division as the form included Workers' Compensation No. 5-155-282. This in and of itself is clear and convincing evidence that Insurer should have reasonably known that they had to take some action in the claim, whether to admit or deny the claim. The rule is very clear that a statement regarding liability is required for any claim in which a "division-issued workers' compensation claim number" is assigned pursuant to W.C.R.P. Rule 5-2(E) and Respondents had 20 days from that date to file the appropriate admission or denial. Therefore, the admission or denial filing deadline was February 1, 2021.

16. Neither party provided a copy of a Notice of Contest in this matter so this ALJ will infer that Respondents failed to file such a notice. A rule is an order of the director pursuant to Section 8-40-201(15), C.R.S. and compliance may be ensured through the

application of Section 8-43-304(1), C.R.S. *Diversified Veterans Corporate Center v. Hewuse*, 942 p.2d 1312, 1313 (Colo. App. 1997).

17. In their defense, Respondents are relying on the cure statute. The cure statute adds an element of proof to a claim for penalties in cases where a cure is proven. Typically, it is not necessary for the party seeking penalties to prove that the violator knew or reasonably should have known they were in violation. The party seeking penalties must only prove the putative violator acted unreasonably under an objective standard. See *Jiminez v. Indus. Claim Appeals Office*, *supra*.

18. As found, Claimant has proven by clear and convincing evidence that Respondents knew or reasonably should have known that Respondents were in violation of the rules by failing to admit or deny the claim within 20 days of January 12, 2021, which in this case is February 1, 2021. An Application for Hearing is not needed in order to make a determination that Respondents violated the rule and may be subject to the penalties. In this case, Claimant testified that after multiple attempts at communications with Respondents, they were not responding. Respondents were paying for medical care. Dr. Sobky sent both the Authorization Request form and the Telephone Encounter form, which Respondent insurer received, as shown by the receipt stamps. Claimant proceeded with surgery on January 7, 2021. All of these are indications that Respondents reasonably knew that they should take action and comply with the rules. Cleary Claimant was off work pursuant to Dr. Sobky's December 22, 2020 Work Status and Progress Report, which stated "Patient off work status from December 22, 2020 until TBD, patient having surgery." and Respondents had a duty to comply with W.C.R.P. Rule 5-2(E) by no later than February 1, 2021. The requirement to act upon receipt of documents that put Respondents on notice that a Claimant is off work and that there is a workers' compensation claim with the Division are part of a statutory scheme designed to promote, encourage, and ensure prompt payment of compensation without the necessity of a formal administrative determination in cases not presenting a legitimate controversy. *Olivas-Soto v. Indus. Claim Appeals Office,* 143 P.3d 1178, 1179 (Colo.App.2006). In light of that intent, one purpose of the requirement is to give notice to the Respondents to actively take steps to avoid any situation that would involve a penalty and put Claimant on notice of the exact basis of the denied liability, so that Claimant can make an informed decision whether to take steps to dispute the Respondents' position. *See Smith v. Myron Stratton Home,* 676 P.2d 1196, 1200 (Colo.1984). It is specifically found that Respondents objectively acted unreasonably in light of the above facts. Therefore, Claimant is entitled to a penalty.

19. An ALJ may consider a "wide variety of factors" in determining an appropriate penalty. *Adakai v. St. Mary Corwin Hospital*, WC 4-619-954 (ICAO, May 5, 2006). However, any penalty assessed should not be excessive in the sense that it is grossly disproportionate to the conduct in question. *Associated Business Products v. Industrial Claim Appeals Office,* 126 P.3d 323 (Colo. App. 2005); *Espinoza v. Baker Concrete Construction*, WC 5-066-313 (ICAO, Jan. 31, 2020); *CDLE vs. Dami Hospitality, LLC*., 442 P.3d 94 (Colo. 2019) [A court should consider whether the gravity of the offense is proportional to the severity of the penalty, considering whether the fine is harsher than

fines for comparable offenses in this jurisdiction or than fines for the same offense in other jurisdictions. In considering the severity of the penalty, the ability of the regulated individual or entity to pay is a relevant consideration. And the proportionality analysis should be conducted in reference to the amount of the fine imposed for each offense, not the aggregated total of fines for many offenses.]

20. When determining the penalty the ALJ may consider factors including the "degree of reprehensibility" of the violator's conduct, the disparity between the actual or potential harm suffered by the claimant and the award of penalties, and the difference between the penalties awarded and penalties assessed in comparable cases. *Associated Business Products*, 126 P.3d at 324, *supra*. When an ALJ assesses a penalty, the Excessive Fines Clause of the Eighth Amendment to the U.S. Constitution requires the ALJ to consider whether the gravity of the offense is proportional to the severity of the penalty, whether the fine is harsher than fines for comparable offenses in this or other jurisdictions and the ability of the offender to pay the fines. The proportionality analysis applies to the fine for each offense rather than the total of fines for all offenses. *Conger v. Johnson Controls Inc*., WC 4-981-806 (ICAO, July 1, 2019).

21. In this case, there is significant harm caused to Claimant as he was without wages for a period between December 22, 2020 and mid March 2021. Claimant was forced to move to Oregon to live with family and abandon his authorized provider care for the duration of over three months. The violation is also significant as any insurer is required to comply with the rules of procedure in handling workers' compensation claims in the State of Colorado. Respondents failed to act in a reasonable manner by failing to state a position, despite knowing that Claimant was undergoing surgery. Respondents simply took no actions as required by the Rule, other than to deny a change of physician late in the claim. Then Respondents sent benefits to Claimant's employer, not to Claimant directly despite the fact that Claimant's correct address was on the Workers' Claim for Compensation. Respondents continued to deny benefits, even after the General Admission of Liability was filed by failing to authorize physical therapy and ATP recommended evaluations (NCV/EMG); and continuing to send Claimant's temporary disability checks directly to the employer, not to Claimant. Respondents terminated benefits in July 2021, without notice, in contravention to the rules. Lastly, Claimant was forced to seek multiple orders from PALJs to compel Respondents to provide information that they were statutorily bound to provide upon request, violating the order. This shows an objectively unreasonable pattern of misconduct. Respondents shall pay a penalty of $150.00 per day for each day Respondents failed to admit or deny the claim from February 1, 2021 through the date of the admission filed on March 2, 2021.[19]

Payment of Temporary Disability per the Admission

[19] This ALJ considered penalties from the time Respondents actually knew of the Claimant's lost time from work, the date of the electronic stamp of December 30, 2020 on Dr. Subky's medical records, but determined that there was insufficient persuasive evidence to enlarge the time period for the failure to admit or deny.

22. The next penalty sought by Claimant is for violation of W.C.R.P. Rule 5-6 from March 11, 2021 through the present and pursuant to W.C.R.P. Rule 6-8 from July 22, 2021 to the present. Section 8-42-105(2)(a), C.R.S. states, in pertinent part, as follows:

> The first installment of compensation shall be paid no later than the date that liability for the claim is admitted by the insurance carrier or self-insured employer. …. Compensation shall be paid at least once every two weeks, except where the director determines that payment in installments should be made at some other interval. The director may by rule convert monthly benefit schedules to weekly or other periodic schedules.

23. W.C.R.P. Rule 5-6(B) states:

> Temporary disability benefits awarded by admission are due on the date of the admission and the initial payment shall be paid so that the claimant receives the benefits not later than five (5) calendar days after the date of the admission. Temporary total disability benefits are payable at least once every two weeks thereafter from the date of the admission. In some instances an Employer's First Report of Injury and admission can be timely filed, but the first installment of compensation benefits will be paid more than 20 days after the insurer has notice or knowledge of the injury. So long as the filings are timely and benefits timely paid and for the entire period owed as of the date of the admission, the insurer will be considered in compliance. When benefits are continuing, the payment shall include all benefits which are due as of the date payment is actually issued.

24. Section 8-42-126, C.R.S. states in pertinent part that for the purposes of Act and "any orders of the division and office of administrative courts, monetary benefits or penalties required to be paid to an injured worker are deemed paid on the date the payment is received by or delivered to the intended payee…" This means that any payment that Claimant failed to receive personally is in violation of both the act and the rules.

25. W.C.R.P. Rule 6-1(A) lays out the conditions for terminating temporary disability benefits. The evidence submitted by the parties fails to show that an authorized medical provider returned Claimant to regular work or placed Claimant at maximum medical improvement, nor that Claimant was offered modified work, rejected an offer of modified work, or that Claimant failed to attend a demand medical appointment. W.C.R.P. Rule 6-8 addresses the failure to comply with the requirements of Rule 6 and states in pertinent part:

> (A) Temporary disability benefits may not be suspended, modified or terminated except pursuant to the provisions of this rule; pursuant to an order from the Director; or pursuant to an order of the Office of Administrative Courts.

26. Claimant asserted that he never received a disability benefits check directly, that they were mailed to his employer and that he would later get them from his employer. Claimant stated that he did not receive his first disability benefits check until mid March, 2021. Based on the evidence presented, this ALJ will infer that took place on or about March 16, 2021. Claimant stated that he is currently missing disability benefits payments, with the last check paid through July 22, 2021. Claimant also argued that Respondent failed to comply with the July 22, 2021 Prehearing Order to produce an updated claim file by no later than August 2, 2021, so Claimant did not have an indemnity ledger available to better detail the missing benefit payments owed to Claimant. During the hearing, counsel conceded that the claim file was not produced in time in accordance with the order, though argued that it had been produced just before the hearing. Claimant's counsel asserted that he had not seen the updated file at the time of the hearing.

27. The failure to comply with both the rules and an order shows flagrant disregard for both the requirements of the rules and a judge's order, meriting penalties in this matter. The analysis for the penalties here is the same as stated above. Claimant has shown by clear and convincing evidence that Respondents knew or should have known that compliance with the rules is mandatory, not merely a suggestion. Respondents acted objectively unreasonably in this matter by not sending Claimant the first installment of compensation to Claimant no later than the date that liability for the claim was admitted on March 2, 2021.[20] It is found and concluded that Claimant is entitled to 14 days of penalties in the amount of $200.00 per day for each day that Respondents failed to make the payment directly to Claimant for the first installment of indemnity as required by statute from March 3, 2021 through March 16, 2021. It is found that Respondents failed to send the check directly to Claimant as the rule requires that Claimant be paid so that the "claimant receives the benefits."

Termination of Temporary Disability

28. Claimant also seeks penalties for the violation of the rules for termination of temporary disability benefits. This analysis is also the same as above. It is also found that Respondents terminated temporary disability benefits improperly and improvidently. Claimant has met the clear and convincing standard here as well. He has been significantly harmed by the termination of benefits, the duration of the termination has caused him to take actions he may not have otherwise taken, by moving away to Oregon, where he no longer has access to his authorized medical providers. The termination violates both the rules and the statutory mandate. Respondents have shown a flagrant disregard for the rules and orders in this matter, and Respondents' counsel failed to respond to the allegation of misconduct for the termination of benefits or provided evidence that Respondents have corrected the problem. Claimant is found credible that his temporary disability benefits were terminated as of July 22, 2021 and that Respondents failed to meet the requirements of W.C.R.P. Rule 6-1(A) in order to terminate benefits.

[20] Though this ALJ is not certain that the GAL is quite valid since the certificate of mail is not complete pursuant to W.C.R.P. Rule 1-4(A).

29. None of the requirements of Section 8-42-105(3) in order to terminate benefits were met. It is found that Claimant has not been placed at maximum medical improvement by any treating provider or been released to full duty employment. Claimant has not return to work or been offered work within his restrictions. He has not rejected work and there was no showing that he was terminated for cause pursuant to Section 8-42-105(4)(a), C.R.S. As found, Claimant continues to be under restrictions by ATPs Drs. Leach and Sobky. Claimant is also found credible that no provider has released him from care. In fact, the failure to continue indemnity payments caused Claimant to have to move from Colorado to Oregon with his family as Claimant has no resources or funds to pay bills at this time. Claimant is extremely worried whether he is going to get the care he needs since the move. He continues to have a very tight shoulder and stated that his range of motion is not quite what it should be. Claimant is found to be credible. Claimant is entitled to penalties for Respondents' termination of temporary total disability benefits from July 22, 2021 until Respondents resumes indemnity payments sent to Claimant's address in Oregon, and many not rely on Employer to send the payments on to Claimant. These facts show by clear and convincing evidence that Respondents were objectively unreasonable in their behavior and acts. Respondents shall pay a penalty of $250.00 for each day temporary total disability benefits payments are late.

Authorization of physical therapy

30. Claimant demanded penalties for failure to timely authorize medical benefits alleging that Respondents failed to timely authorize medical treatment per W.C.R.P. Rule 16-6(C), Rule 16(D) and Rule 16-6(G) from January 12, 2021 to the present including nerve conduction studies (EMG/NCV) and physical therapy. Section 8-42-101(1)(a), C.R.S. states that Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the work injury. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). "Authorization" generally refers to the legal authority to treat and is distinct from whether treatment is "reasonable and necessary" within the meaning of Section 8-42-101(1)(a). *Braun v. Foley's Department Stores,* W. C. No. 4-603-819 (February 28, 2005); *Wladyslaw Galica v. Pietraszek Enterprises*, W.C. 4-640-668 (May 9, 2008). *See also, One Hour Cleaners v. Industrial Claim Appeals Office*, 914 P.2d 501, 504 (Colo. App. 1995) ("authorized medical benefits" refers to legal authority of provider to deliver care).

31. Claimant states that his request for physical therapy following surgery was delayed. Here, Claimant testified that he had surgery on January 7, 2021 and that therapy was to start three weeks following the surgery. Claimant commenced his physical therapy as of January 22, 2021, which is less than three weeks. Further, Respondents were not obliged to comply with the rules with regard to prior authorization until after they had filed a General Admission of Liability, which occurred on March 2, 2021. Next, Claimant states that his physical therapy was not authorized and was interrupted for a period of approximately one and one half month. The physical therapy notes provide no indication that therapy was terminated for failure to authorize. All of the Premier Physical Therapy notes were not included in Claimant's case in chief and the reports provided by

Respondents in Exhibit I do not indicate anything other than therapy was to continue. There is insufficient evidence of the timeline for which physical therapy was terminated and resumed in order to address a penalty with regard to the failure to authorize physical therapy in this matter. The request for penalties for failure to authorized physical therapy is reserved for future determination.

Authorization of NVC/EMG

32. With regard to the failure to authorize the EMG/NCV, this matter is considered separately. In this case, Claimant's authorized treating physician, Dr. Kuklo requested authorization for the EMG/NCV on February 16, 2021. He made a referral to Dr. Alexander Feldman, a neurologist, to conduct the NVC/EMG. Claimant testified that he received a copy of the March 5, 2021 denial of the request for prior authorization for the NCV/EMG as not being reasonably necessary and related to Claimant's work related injury of November 28, 2020. Respondents scheduled an IME with Dr. Burris for April 6, 2021. Dr. Burris provided a report of the same date recommending the NCV/EMG. He specifically stated that "Dr. Sobky, Dr. Kuklo, and Dr. Leach have all recommended a left upper extremity NCV/EMG for diagnostic clarity. Therefore, the left upper extremity NCV/EMG appears reasonable and related to the 11/28/2020 workplace event."

33. By March 5, 2021, when Claimant received the denial, Respondents had already admitted to the claim. Therefore, they were obliged to comply with the Workers' Compensation Rules of Procedure for requests for prior authorization under W.C.R.P. Rule 16. Respondents correctly state that Claimant failed to show that prior authorization was denied in this matter. In looking at W.C.R.P. Rule 16-6(C), Rule 16(D) and Rule 16-6(G), Claimant has failed to show that the provider requested written confirmation of authorization in accordance with W.C.R.P. Rule 16-6(C), or that the provider denied the proposed treatment without the written authorization in accordance with Rule 16-6(D). Claimant did not properly argue that there was any issue with incorrectly applied Medical Treatment Guidelines. As found, Respondents followed the rules in this matter and once the report of Dr. Burris was provided to Claimant, Claimant was free to obtain the NVC/EMG from Dr. Feldman at any time in accordance with W.C.R.P. Rules 16-6(A) and 16-7-2(E), as the treatment was deemed authorized. Claimant failed to show that there was any denial of the authorized medical care for the NVC/EMG following the completion of the IME process. While Claimant testified that it took a long time from April 6, 2021 IME report to the time he had the testing performed, no persuasive evidence was provided that the delay in performing the testing was due to any acts or omission performed by Respondents in this matter. Claimant's request for penalties for failure to authorize the NCV/EMG treatment is denied and dismissed.

Mileage reimbursement

34. Claimant alleges Respondents failed to issue mileage reimbursement consistent with W.C.R.P. Rule 16-l0(G). Claimant seeks penalties to be determined for violation of the Rules from May 13, 2021 through the present, under §8-43-305, C.R.S. Claimant seeks penalties of up to $1,000 a day for violation of the Rules under the

general penalties statute. See §8-43-304(1), C.R.S. Claimant testified that he had submitted mileage requests for reimbursement. Respondents conceded that Claimant submitted mileage reimbursement requests on April 14, 2021 for $98.58 and May 25, 2021 for $47.70. Claimant testified that he never received any mileage reimbursement checks. Respondents allege the $98.58 in mileage was issued on May 5, 2021, though no proof of payment was provided by Respondents.

35. W.C.R.P. Rule 16-10(G) states "Payers shall reimburse injured workers for mileage expenses as required by statute or provide written notice of the reason(s) for denying reimbursement within 30 days of receipt." This ALJ interprets this rule to state that the payment for any reimbursement to Claimant should be made directly to Claimant. The evidence presented is that Claimant never received a check directly from the Insurer, and if they were sent, they were sent to Employer. However, Claimant asserted that he looked at every check he has received to the date of the hearing, and none were for the amounts indicated or for mileage reimbursement. As found, Claimant is credible in this matter.

36. Pursuant to Sec. 8-43-304(4), C.R.S. Respondents have 20 days to cure the alleged violation. Claimant's Amended Application for Hearing, was permitted by PALJ Zarlengo's Prehearing Order of May 27, 2021, so the deadline to cure started as of that date. As there is no persuasive evidence that shows that the matter was cured by June 16, 2021, Claimant is entitled to a penalty for failure to comply with the rule. Respondents argue that there is a specific penalty for failure to pay mileage as mileage is a quasi-medical benefit and should be treated as a medical benefit for purposes of determining any penalty. Section 8-43-401(2)(a), C.R.S. States as follows:

> If any insurer … knowingly delays payment of medical benefits for more than thirty days … such insurer … shall pay a penalty of eight percent of the amount of wrongfully withheld benefits; except that no penalty is due if the insurer or self-insured employer proves that the delay was the result of excusable neglect.

37. This ALJ is persuaded by Respondents' arguments and citation of *Jack Richardson v. Pizza Hut,* W.C. No. 4-560-586 (Feb. 7, 2014); *Sigman Meat Co. v. Indus. Claim Appeals Office,* 761 P.2d 265 (Colo. App. 1988), which stand for the proposition that mileage expenses for travel to attend medical appointments are recoverable as incidental to medical treatment under the Workers' Compensation Act. Therefore, while Claimant is entitled to a penalty, that penalty is limited to the eight percent listed in the statute. Penalties begin as of 30 days following each mileage reimbursement request until Respondents send the mileage reimbursement check to Claimant directly. Claimant filed the first mileage reimbursement request on April 14, 2021 for $98.58. Mileage penalties shall be calculated for this amount at 8% interest from May 14, 2021 through the date Respondents paid Claimant mileage, or to the date the $98.58 mileage check was cashed by Claimant, if it was already issued. The second mileage reimbursement request was sent to Respondents on May 25, 2021 for the amount of $47.70. Respondents shall further pay 8% interest on the second request beginning as

of June 24, 2021 through the date Respondents paid Claimant for the mileage reimbursement, or to the date the $47.70 mileage check was cashed by Claimant, if it was already issued.

Apportionment of penalties

38. When considering penalties under Section 8-43-304(1), C.R.S., which are being granted in this matter, the ALJ must consider apportionment of the penalties and/or payment of penalties to the Colorado Uninsured Employer fund. Pursuant to Section 8-43-304(1) the statute specifies that penalties shall be "apportioned, in whole or part, at the discretion of the director or administrative law judge, between the aggrieved party and the Colorado uninsured employer fund created in section 8-67-105; except that the amount apportioned to the aggrieved party shall be a minimum of twenty-five percent of any penalty assessed."

39. As found, Claimant in this matter was substantially affected by the acts or failure to act by Respondents in this matter as stated above. In this regard the majority of the funds should be proportioned to the aggrieved party. Therefore, it is determined that seventy-five percent of the penalties awarded for failure to admit or deny, failure to timely pay and termination of temporary disability benefits shall be awarded to Claimant as the aggrieved party. Twenty-five percent of all penalties award and paid pursuant to this order shall be paid to the CUE Fund. Penalties paid for failure to reimburse quasi-medical benefits, in this case mileage, shall be paid solely to Claimant.

ORDER

IT IS THEREFORE ORDERED:

1. Dr. Leach is an authorized treating physician. Nothing in this Order changes the fact that Dr. Sobky and Dr. Kuklo are also authorized treating physicians.

2. Respondents shall pay penalties directly to Claimant at his Oregon address as follows:

a. From February 1, 2021 to the date the admission was filed on March 2, 2021 in the amount of $150.00 per day for each day Respondents failed to admit or deny the claim, for the 28 days, a total of $4,200.00.

b. From March 2, 2021 to March 16, 2021 Claimant is entitled to 14 days of penalties in the amount of $200.00 per day for each day that Respondents failed to make the payment directly to Claimant for the first installment of indemnity, as required by statute, for the total amount of $2,800.00.

c. From July 23, 2021, for inappropriate termination of benefits, for each day temporary total disability benefits payments are late until

Respondents resumes indemnity payments sent to Claimant's address in Oregon in the amount of a $250.00 per day. This amounts to 15 days through the August 6, 2021 hearing for an amount of $3,750.00 and should continue at the daily rate until benefits are delivered to the Claimant.

d. Eight percent on all mileage reimbursements that were not paid directly to Claimant when due pursuant to Sections 8-42-126 and 8-43-404(2)(a), C.R.S.

3. The penalties shall be apportioned at seventy five percent to Claimant and twenty five percent paid to the Colorado Uninsured Employer Fund pursuant to Sec. 8-43-304(1), C.R.S.

4. Respondents shall pay interest at the rate of 8% per annum on all amounts of compensation not paid to Claimant directly when due.

5. All matters not determined here are reserved for future determination.

6. If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm

Dated this 9th Day of September, 2021.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-150-743-002

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that she suffered a compensable injury on December 18, 2019.

II. Whether Claimant established, by a preponderance of the evidence, that she is entitled to reasonable and necessary medical treatment, as prescribed by the providers at Aurora COMP.

III. Whether the Respondents established, by a preponderance of the evidence, that the Claimant was responsible for the termination of her employment.

STIPULATIONS

At the time of hearing, the Respondents stipulated and agreed as follows:

- If the claim is deemed compensable, the medical treatment provided by Aurora COMP is reasonable, necessary, and related to the work injury.

Respondents further stipulated in their proposed order that:

- The claimant's average weekly wage is $437.11, with a corresponding benefit rate of $291.41.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. The claimant is a 56-year-old woman with a January 9, 1965, date of birth. The claimant was hired by the Respondent Employer on April 7, 2015, to work as a deli associate. **Exhibit A.**
2. After being hired by the Employer, the claimant underwent orientation and safety training. The claimant was also required to complete computer-based learning modules on an at least an annual basis. The Employer's computer-based learning modules also included safety training. The safety training the Employer provided to the claimant included training on its policy that any incident, or accident, no matter how minor, be reported to a member of management immediately. The Employer training provided to the claimant distinguished between an incident, as a work event from which the employee was not requesting medical treatment, and an accident, a work event for which the employee was requesting medical treatment.

3. The claimant testified she suffered a December 18, 2019, injury to her left shoulder in the course and scope of her employment with [Redacted] while lifting frozen chickens. The claimant initially testified that, at the time of the injury, she was lifting boxes of frozen chicken above shoulder level, "all the way to the ceiling". The claimant later clarified the injury occurred when she was lifting boxes of frozen chicken, with the top of the box being chest level.

4. On December 18, 2019, the claimant completed an "Associate Incident Report. In the report, it is specifically noted that she was not requesting medical care at that time. **RHE F, Bates 85**.

5. On December 19, 2019, Employer Associate, Elizabeth Reilly, completed a witness statement, indicating the claimant "reported that two months ago she had hurt her arm lifting a box of chickens off the shelf. She did not report it sooner because the pain went away but then came back." **RHE F, Bates 87**. Employer associate, Brittany Welch also completed a Witness Statement indicating the claimant came to her stating, "she hurt her arm while racking chickens" . . . two months ago, and she was not getting any better. **RHE F, Bates 88.** Aliyah K[Redacted] also completed a Witness Statement indicating the claimant approached him stating she had hurt her arm two months ago, but it wasn't at work. When the claimant approached the witness again, she reported the injury did occur at work. **RHE F, Bates 89.** On December 19, 2019, Employer associate, Elizabeth Campbell, reported the claimant told her she hurt her arm and shoulder "about two months ago" and she decided to report it because it started to hurt again. **RHE F, Bates 90.** Neither the Associate Incident Report, nor any of the five employer witness statements, describe the claimant's alleged December 18, 2019, left shoulder injury. Moreover, the witness statements describe the claimant's alleged injury as occurring in October 2019.

6. The claimant testified to her work duties at the Employer as constantly lifting "everything that was heavy, everything was heavy". On March 27, 2019, the claimant presented to her primary care provider, Kaiser Permanente, with complaints of shortness of breath. The claimant reported to the Kaiser Permanente providers that "She is relatively sedentary. Her most activity she does is walking on a flat surface and cleaning her house." **RHE C, Bates 5.**

7. In the period from December 18, 2019, through September 24, 2020, the claimant continued working her regular job with the Employer, without restrictions. The claimant testified that although she was working full duty, she was overcompensating with her right arm, which then began to hurt.

8. On August 31, 2020, more than eight months after her alleged work injury, Claimant first sought treatment for left shoulder complaints from Kaiser Permanente. She also presented with complaints of GERD and headache. **RHE C, Bates 9.** Despite alleging an injury 8 months earlier, Claimant gave a history of greater than a year of left shoulder pain when attempting to lift it above shoulder level. Claimant also denied having an injury and reported that her shoulder felt fine while at rest. **RHE C, Bates 12.** The Kaiser provider referred Claimant for left shoulder x-rays and physical therapy. X-rays of the left shoulder were taken on September 1, 2020. The x-ray technician report

reveals Claimant complained of chronic left shoulder pain without a reported mechanism of injury. **RHE C, Bates 14.**

9. On September 11, 2020, Claimant participated in physical therapy through Kaiser. At this appointment, the date of injury is noted as "several weeks" and the mechanism of injury is noted as "unknown." **RHE C, Bates 16.** When Claimant returned to physical therapy, she presented with left sided neck pain, difficulty picking up objects, numbness in the shoulder and top of arm, and pain on the side of her thumb. Despite alleging a work injury, the reported mechanism of injury remained "unknown". **RHE C, Bates 21.**

10. On September 24, 2020, the Kaiser provider restricted Claimant from lifting in excess of five pounds. **RHE C, Bates 26.** Shortly after her work activities were restricted, Claimant requested medical treatment from Employer for her left shoulder.

11. On September 25, 2020, Employer provided Claimant a Rule 8, W.C.R.P., list of providers and Claimant selected Colorado Occupational Medicine as the provider designated to treat her injury. **RHE C, Bates 93.**

12. On September 29, 2020, Employer offered Claimant modified employment, within the Kaiser provider's restrictions, which the claimant accepted. **RHE F, Bates 94.**

13. On October 28, 2020, Claimant presented to Colorado Occupational Medicine. For the first time, the medical records reflect a mechanism of injury. In this report, the mechanism of injury is noted as "moving heavy boxes, approximately 50 pounds" for an injury that occurred "back in November 2019". The record also reflects that Claimant stated the injury "occurred while lifting a heavy box and felt a sudden pull/strain pain in her LEFT shoulder." **RHE D, Bates 31.** Based on Claimant's presentation, Claimant was placed on restricted duty which consisted of no lifting in excess of five pounds. **RHE D, Bates 36.**

14. On February 5, 2021, Claimant's employment with the Employer was terminated for two days of no call, no show, in violation of the Employer's attendance policy.

15. Diane S[Redacted], Employer's People Lead, credibly testified she left one or more phone messages for Claimant about her failure to appear for her scheduled shifts, without response.

16. On April 14, 2021, Dr. William Ciccone evaluated Claimant at Respondents' request. The claimant gave Dr. Ciccone a history of injuring her left shoulder when she was pulling a cart with 50-pound boxes of frozen chicken. **RHE E, Bates 78.** On Dr. Ciccone's physical examination, Claimant demonstrated significantly limited left shoulder motion, with diffuse shoulder pain involving the whole thorax and clavicle. **RHE E, Bates 80.** Based on his review of the medical records, and examination of Claimant, Dr. Ciccone credibly opined Claimant did not suffer a left shoulder injury in the course and scope of her employment with the Employer. Dr. Ciccone testified that one would expect an early medical evaluation if Claimant suffered a significant acute injury. Dr. Ciccone credibly testified that it is not medically probable that Claimant would remain at full work duties for the eight to nine months between the alleged December 18, 2019, incident and August 31, 2020, the date Claimant first sought medical treatment. **RHE E, Bates 82.** Dr. Ciccone credibly testified that Claimant's findings on physical examination are not consistent with an acute injury. In Dr. Ciccone's

evaluation, Clamant had significant pain in the shoulder with any type of motion, but in the earlier evaluations on September 11, 2020, September 22, 2020, October 30, 2020, and December 3, 2020, Claimant had near full range of left shoulder motion. One would expect a consistent loss of shoulder motion if one had suffered an acute shoulder injury. **RHE E, Bates 83.** Since Dr. Ciccone's opinions are consistent with the underlying record, the ALJ finds his opinions to be credible and persuasive.

17. There are many inconsistencies in Claimant's testimony when compared with the underlying medical and employment records. As a result, the ALJ does not find Claimant credible. These inconsistencies include:

    - Claimant alleges she suffered a compensable injury on December 18, 2019. However, on that same day, Claimant completed an Associate Incident Report and specifically noted that she was not seeking medical care. Claimant then did not seek medical treatment until eight months later.
    - When Claimant did seek medical treatment eight months latter on August 31, 2020, the medical record from that visit indicates Claimant has had chronic left shoulder pain for over one year. This puts the onset of her pain much earlier than the date she contends she injured her shoulder. Moreover, the report from this visit notes that Claimant denied any injury to her left shoulder.
    - When Claimant obtained x-rays on September 1, 2020, for her left shoulder, the history she provided at that time indicates she has had chronic left shoulder pain and has problems raising her arm into the air. Absent from the report is any indication that her left shoulder pain is because of an injury.
    - On September 11, 2020, when Claimant sought additional medical treatment, she started to complain of additional symptoms such as left sided neck pain, difficulty picking up objects, numbness around her shoulder and the top of her arm, as well as pain on the side of her thumb. And despite reporting additional symptoms, the mechanism of injury is listed as "unknown."
    - Claimant testified that when she reported the incident in December 2019 she assumed they would refer her to a doctor. However, such testimony is inconsistent with the Associate Incident Report in which Claimant specifically noted that she was not requesting medical care at that time. (**RHE F, Bates 85.**)
    - During her testimony, Claimant denied telling the Kaiser provider(s) that she had more than one year of left shoulder pain. She also denied telling them that she did not suffer an injury. The ALJ does not find it credible that Kaiser just came up with that information without input from Claimant.

18. As a result of the many inconsistencies in Claimant's testimony, when compared to the documents submitted into evidence at the hearing, the ALJ cannot credit Claimant's testimony.

19. The ALJ finds insufficient evidence to establish that it is more likely than not Claimant suffered a left shoulder injury requiring medical treatment, resulting in disability or permanent physical impairment, arising out of, and in the course and scope of her employment with the Respondent Employer on December 18, 2019.

20. Claimant failed to prove by a preponderance of the evidence that she suffered a left shoulder injury in the course and scope of her employment.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant established, by a preponderance of the evidence, that she suffered a compensable injury on December 18, 2019.

The claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

In this claim, the claimant alleges a left shoulder injury on December 18, 2019. The claimant, and the co-workers' statements indicate the claimant's alleged left shoulder injury occurred sometime in October 2019 but was not timely reported as the pain "went away", but subsequently returned. The claimant's own Incident Report references only the December 2019 incident, with no reference to lifting boxes of chicken on December 18, 2019, as a cause of the new shoulder pain. Plus, Claimant denied requiring medical treatment in the form.

The claimant testified she worked full duty in the period December 18, 2019, through August 31, 2020, but she was "overcompensating with the right arm", which then began hurting. The medical records in evidence contain no credible or persuasive evidence of overcompensation with the right arm or right arm pain developing in the period between December 18, 2019, and August 31, 2020. Similarly, the claimant did not include right shoulder or arm pain in the diagram completed for Dr. Ciccone.

Plus, as found, there are additional inconsistencies in Claimant's testimony when compared with the underlying medical and employment records. These inconsistencies include:

- Claimant alleges she suffered a compensable injury on December 18, 2019. However, on that same day, Claimant completed an Associate Incident Report and specifically noted that she was not seeking medical care. Then Claimant did not seek medical treatment until eight months later.

- When Claimant did seek medical treatment eight months later on August 31, 2020, the medical record from that visit indicates Claimant has had chronic left shoulder pain for over one year. This puts the onset of her pain earlier than the date she contends she injured her shoulder. Moreover, the report from this visit notes that Claimant denied any injury to her left shoulder.
- When Claimant obtained x-rays on September 1, 2020, for her left shoulder, the history she provided at that time indicates she has had chronic left shoulder pain and has problems raising her arm into the air. Absent from the report is any indication that her left shoulder pain is because of an injury.
- On September 11, 2020, when Claimant sought additional medical treatment, she started to complain of additional symptoms such as left sided neck pain, difficulty picking up objects, numbness around her shoulder and the top of her arm, as well as pain on the side of her thumb. And despite reporting additional symptoms, the mechanism of injury is listed as “unknown.”
- Claimant testified that when she reported the incident in December 2019, she assumed they would refer her to a doctor. However, such testimony conflicts with the Associate Incident Report in which Claimant specifically noted that she was not requesting medical care at that time.
- During her testimony, Claimant denied telling the Kaiser provider(s) that she had more than one year of left shoulder pain. She also denied telling them that she did not suffer an injury. The ALJ does not find it credible that Kaiser just came up with that information on their own and put it in her medical records without input from Claimant.

As a result of all the inconsistencies, the ALJ does not find Claimant to be credible. The ALJ does, however, credit Dr. Ciccone’s opinions. His opinions are consistent with the underlying record regarding the inconsistencies in the records he reviewed. Plus, his opinion about Claimant working full duty for about 8 months after the alleged work injury before seeking medical treatment is inconsistent with an injury occurring on December 18, 2019, is also found to be credible and persuasive.

Thus, the ALJ finds and concludes that claimant has failed to prove, by a preponderance of the evidence, that she suffered an injury requiring medical treatment, resulting in disability or permanent physical impairment in the course and scope of her employment with the respondent employer. As a result, Claimant failed to establish that she suffered a compensable injury.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant’s claim for compensation and benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 10, 2021.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant overcome the DIME's whole person rating by clear and convincing evidence?

- Did Claimant prove by a preponderance his left shoulder extremity rating should be converted to whole person?

- Did Claimant prove entitlement to a general award of medical benefits after MMI?

FINDINGS OF FACT

1. Claimant worked for Employer as a delivery truck driver, primarily delivering food items to restaurants. On February 23, 2018, he was unloading heavy product using a hand truck. The loading ramp became dislodged from the back of the truck, and the product fell to the ground. This forcibly jerked Claimant forward and caused injuries to his left shoulder and neck.

2. Dr. Daniel Olson has been Claimant's primary ATP during the claim. Dr. Olson initially diagnosed neck and left rotator cuff strains, and a possible grade-1 AC joint separation. Claimant was initially treated with physical therapy, acupuncture, and massage, with minimal improvement.

3. Claimant had a left shoulder MRI on March 20, 2018. The radiologist noted mild impingement with arthrosis of the AC joint and calcific tendinitis in the supraspinatus tendon, but no rotator cuff tears.

4. Claimant was evaluated by Dr. Michael Sparr on May 3, 2018. Significant exam findings included a positive Spurling's maneuver and a positive cervical facet loading test. Claimant was scheduled for a left AC joint intra-articular injection to be followed by additional massage therapy and a course of trigger point injections. Dr. Sparr also ordered an EMG and an MRI of the cervical spine.

5. The cervical MRI was performed on June 6, 2018. It showed disc bulging at multiple levels but no surgical lesion. Dr. Sparr opined Claimant's neck pain was related to persistent cervical and parascapular "myofasciitis" and cervical facet dysfunction.

6. EMG testing on June 27, 2018 revealed moderate to severe right carpal tunnel syndrome but no evidence of cervical radiculopathy or brachial plexopathy.

7. Dr. Sparr administered multiple trigger point injections to claimant's neck and paracervical area during 2018. He also provided facet injections and at multiple levels. These injections provided temporary relief but no lasting benefit. Claimant also received a platelet rich plasma injection to his left shoulder from Dr. Leggett.

8. Claimant saw Dr. Karl Larsen, an orthopedic surgeon specializing in upper extremity conditions in August 2018. Dr. Larson diagnosed severe acute CTS secondary to the work injury. He recommended carpal tunnel release surgery.

9. Dr. John Raschbacher performed a medical record review for Respondents on September 4, 2018. Dr. Raschbacher opined the CTS surgery was reasonably needed but was unrelated to the work accident. Claimant eventually had the CTS surgery done under health insurance.

10. Dr. Olson referred Claimant to Dr. Alex Romero, an orthopedic surgeon, to evaluate his persistent shoulder symptoms. Dr. Romero reviewed Claimant's imaging and saw supraspinatus tendinosis and a questionable labral tear. He gave Claimant an injection and ordered an MR arthrogram.

11. Claimant had the MR arthrogram on December 18, 2018. The radiologist saw no evidence of a labral tear and no findings consistent with internal derangement in the left shoulder.

12. On January 2, 2019, Dr. Romero recommended a diagnostic arthroscopy because of persistent symptoms and lack of sustained benefit from the injection.

13. Dr. Raschbacher performed a second record review on January 25, 2019, regarding the proposed shoulder surgery. He thought it unlikely Claimant had suffered an AC joint separation. He opined the calcific tendinitis was neither acute nor work-related. Dr. Raschbacher noted the left shoulder MRI showed no clear tears and opined there was no pathology that was likely to respond to surgery. He recommended the surgery be denied.

14. In early 2019, Dr. Sparr recommended multi-level cervical rhizotomies because of recurrent cervical facet dysfunction and myofascial pain.

15. Dr. Raschbacher reviewed the request for pre-authorization of cervical rhizotomies at Respondents' request. He saw no clear evidence of facet involvement and opined the rhizotomies were not reasonably necessary or related to the work accident. Nevertheless, Claimant underwent left C2, C3, C4, and C5 rhizotomies on April 2, 2019.

16. Dr. Raschbacher performed an in-person IME on August 2, 2019. He noted "a paucity of objective findings" regarding Claimant's shoulder, including an unremarkable MR arthrogram. Similarly, he opined the cervical imaging pointed to no specific pain generator. He saw no evidence that Claimant's complaints were related to his work for Employer. He thought it "likely" Claimant was seeking secondary gain and probably would not improve while his claim was in litigation. Because he believed Claimant's complaints were unsubstantiated by any objective findings or pathology, he saw no reason for any further treatment. Dr. Raschbacher concluded Claimant had been at MMI for almost a year and recommended "no further care, no further limitation of physical activity, and no further diagnostic tests or application of medical resources of any kind." He opined Claimant had no ratable, work-related permanent impairment for his shoulder or neck.

17. Dr. Olson placed Claimant at MMI on September 23, 2019. However, Dr. Olson's report makes clear that his determination of MMI was primarily based on administrative issues as opposed to the medical factors. He opined, "[Dr. Raschbacher's conclusion] that there was nothing wrong with [Claimant] is in stark disagreement with those taking care of him. Since no further treatment is going to be authorized, he was placed at maximum medical improvement." Dr. Olson assigned a 29% whole person rating for Claimant's neck and left shoulder. Dr. Olson's cervical rating included 7% under Table 53 for the three-level rhizotomy.

18. Respondents requested a DIME, which was performed by Dr. Thomas Higginbotham on January 20, 2020. Dr. Higginbotham noted the case was "quite complicated," but concluded it was "biologically plausible" Claimant injured his left shoulder and neck on February 23, 2018. He found no evidence of pre-injury functional limitations or any need for treatment related to the neck or shoulder. Claimant appeared frustrated and became tearful when discussing Dr. Raschbacher's assessment. Dr. Higginbotham reviewed a recent left shoulder MRI (completed on November 21, 2019), which showed a probable AC joint separation and labral tear, and suspected partial supraspinatus tendon tear. He noted Claimant was scheduled for left shoulder surgery soon with Dr. Romero. Dr. Higginbotham determined Claimant was not at MMI pending the shoulder surgery. He also assigned an advisory impairment rating of 20% whole person for the shoulder and neck.

19. Claimant underwent the shoulder surgery on February 13, 2020. Dr. Romero found partial tears of the supraspinatus and subscapularis tendons, a type IIc SLAP tear, and severe inflammation of the subacromial and sub-deltoid bursas. He performed a biceps tenodesis and extensive debridement.

20. Claimant suffered severe complications after the surgery. He developed a systemic staph infection that required treatment with IV antibiotics and two additional surgical cleanout procedures. He also developed a DVT in the left arm. Anticoagulants prescribed to treat the DVT caused a large hematoma in the left shoulder, which had to be surgically drained and evacuated. All told, Claimant underwent four surgeries to his left shoulder, including the original surgery on February 13.

21. The surgery and ancillary treatment were covered by Medicaid. Claimant credibly testified his rehabilitation and long-term recovery was hampered by limitations imposed by Medicaid regarding the number and frequency of physical therapy sessions he was able to attend.

22. Dr. Raschbacher performed a follow-up IME on June 23, 2020. His opinions and conclusions were "unchanged" from the previous IME. He opined the February 13, 2020 arthroscopic surgery "should not have been done," but in any event, it was unrelated to the work accident. He thought the additional surgeries "were appropriate for an infected joint, but not on a work-related basis." He also maintained Claimant did not qualify for a cervical rating because he had no objective pathology.

23. Respondents requested a hearing to challenge Dr. Higginbotham's determination Claimant was not at MMI. Respondents disputed that the shoulder surgery was reasonably necessary or related to Claimant's admitted injuries. A hearing was held before Administrative Law Judge Lamphere on August 13, 2020. Judge Lamphere found Claimant proved the initial February 13 shoulder surgery was reasonably necessary and causally related to Claimant's February 23, 2018 industrial injury. He further concluded the subsequent surgeries were needed to address complications from the first surgery. Judge Lamphere found Respondents failed to overcome the DIME's determination of MMI by clear and convincing evidence. Finally, Judge Lamphere ordered that Claimant be returned to Dr. Higginbotham for a follow-up DIME to assess MMI and impairment.

24. Claimant saw Dr. Higginbotham for the follow-up DIME on December 17, 2020. Dr. Higginbotham opined Claimant was at MMI as of the date of the appointment. He assigned a 14% whole person cervical rating, comprised of 7% for the 3-level rhizotomies and 8% for range of motion. He also assigned an 11% scheduled shoulder rating based on range of motion deficits. The final combined rating was 20% whole person. Claimant's shoulder measurements were generally improved from the first DIME. There is a discrepancy between Dr. Higginbotham's shoulder ROM worksheet and his report regarding Claimant's adduction. His rating worksheet lists 40 degrees of adduction, whereas the report lists 32 degrees of adduction, with a "norm" of 40 degrees. This difference is substantive because it changes the rating by 1%.

25. Dr. Higginbotham recommended no specific post-MMI treatment and opined any further treatment "is primarily in the form of self-care," such as stretching and home exercise, appropriate breathing techniques, and auto-massage with a foam roller. There is no indication Dr. Higginbotham inquired about or knew Claimant was still taking Tramadol daily for pain and aspirin as a prophylactic for future blood clot issues.

26. Insurer filed a Final Admission of Liability on January 20, 2021, based on Dr. Higginbotham's DIME report. The FAL admitted for 14% whole person cervical impairment and 11% scheduled impairment for the shoulder. The FAL invoked the statutory benefit "cap" of $87,470.18 because the combined whole person rating was less than 26%. The FAL denied medical benefits after MMI. Claimant timely objected to the FAL and requested a hearing.

27. Claimant saw Dr. Gary Zuehlsdorff for an IME at his counsel's request on June 21, 2021. Claimant reported 4-7/10 shoulder pain and estimated he had achieved roughly 40-50% recovery from the shoulder injury. He felt popping and increased shoulder pain with use of his arm, and it fatigued easily. Regarding the neck, Claimant felt only approximately 20% improved, with constant 4-7/10 pain. He initially received significant benefit from the rhizotomy, but it has since "worn off." Claimant described "dramatic reduction and ADLs because he cannot really turn his head hard to the left or right significantly impacting his ability to drive, especially a truck." Claimant explained he had lost his CDL "secondary to primarily use of his left arm and decreased range of motion of his neck." Claimant was taking Ultram (tramadol) three times a day for pain control. Examination of the shoulder showed significant range of motion loss and positive impingement signs, including Hawkins, Neer's, and Speed's tests. Dr. Zuehlsdorff did not

elicit any clear crepitus from the shoulder. With respect to the neck, Claimant had tenderness and increased spasm in the left lateral trapezius region and posterolateral paravertebral musculature. Cervical range of motion was "dramatically" diminished. Dr. Zuehlsdorff assigned a 15% extremity rating for shoulder, which converts to 9% whole person. He also calculated a 20% whole person cervical rating, including 8% for the 3-level rhizotomy and 13% for range of motion. Dr. Zuehlsdorff's final combined rating was 27% whole person.

28. Dr. Zuehlsdorff testified at hearing to elaborate on the opinions expressed in his report. Citing the Division's Impairment Rating "Tips," he opined Dr. Higginbotham erred by assigning 7% for the cervical rhizotomies. According to Dr. Zuehlsdorff, the correct Table 53 rating is "seven plus one from [sections] II(C) and II(F) that is recommended for a three- or four-level rhizotomy." He testified different range of motion measurements account for the lion's share of the difference between his overall rating and Dr. Higginbotham's rating. He acknowledged range of motion measurements will vary from day to day, based on factors such as "the patient's emotional status, how he slept, and the weather." He opined, "[Claimant's] range of motion probably falls [] sometimes as high as I'm doing, potentially sometimes worse. And then, some days, where Dr. Higginbotham puts it. That's the reality . . . ." Dr. Zuehlsdorff testified he is not arguing Dr. Higginbotham performed the measurements improperly.

29. Dr. Zuehlsdorff opined Claimant's shoulder impairment should be converted to whole person because "the severity of the injury . . . resulting in four total surgeries, resulting in much less rehab that he should have gotten . . . it would be most unexpected do not have some referred pain from the shoulder impacting the neck." He also cited limitations on Claimant's ability to perform routine activities.

30. Dr. Zuehlsdorff was "surprised" that Dr. Higginbotham recommended no maintenance care given Claimant's "moderately severe" injuries, postoperative complications, and significant ongoing symptoms. He opined Claimant should have, "at least . . . medication management." He also thought Claimant should be able to follow-up with Dr. Olson, Dr. Romero, and with Dr. Sparr for consideration of possible repeat rhizotomies. Dr. Zuehlsdorff opined Claimant's current dose of tramadol was reasonable and below the level commonly prescribed in other cases. He opined Claimant's limited post-operative physical therapy was "not . . . even close to the amount he was supposed to get" had he not been required to use Medicaid.

31. Dr. Raschbacher testified at hearing consistent with his reports. He disagreed that the shoulder rating should be converted, opining this would be duplicative of the cervical rating. Dr. Raschbacher opined maintenance care is not necessary, as there is nothing more to do for the shoulder, with no further defects to address. In particular, the interventions have not led to improved function, so no further interventions such as injections or physical therapy are needed or indicated. Dr. Raschbacher did not recommend ongoing medication maintenance because the small dose Claimant is taking would not have any ongoing efficacy given the tolerance effects, and the proper dose of an anti-inflammatory medication should have equal pain-relieving effects. He Dr. Olson had previously recommended a year of Tramadol as maintenance care, which had

already passed. Dr. Raschbacher disagreed that Dr. Higginbotham should have given 8% for the three-level rhizotomy. He opined 7% was the correct rating under Table 53.

32. Claimant credibly testified Dr. Olson referred him to Dr. James Pollack for ongoing pain management. Dr. Pollack is prescribing tramadol 50mg three times per day. Claimant displayed a prescription bottle to corroborate his testimony. Claimant also testified he takes one aspirin daily to protect against further blood clots.

33. Claimant failed to overcome the DIME's whole person rating by clear and convincing evidence. The 7% Table 53 rating assigned by Dr. Higginbotham is the correct rating under the AMA Guides and the Impairment Rating Tips. There is no credible evidence to suggest Dr. Higginbotham erred with respect to his range of motion measurements. The differences between Dr. Higginbotham and Dr. Zuehlsdorff's range of motion ratings merely reflect expected day-to-day variability.

34. Because Claimant failed to overcome the DIME's 14% cervical rating, issues relating to the shoulder rating are moot. Even if Dr. Zuehlsdorff's shoulder rating were adopted, the overall whole person rating would be only 22% (14% combined with 9% = 22%). Claimant's overall rating is less than 26%, and he is barred from receiving any additional PPD benefits by the indemnity benefit "cap."

35. Claimant proved he requires future medical treatment to relieve the effects of his injury and prevent deterioration. Claimant's testimony regarding ongoing symptoms and limitations related to his neck and shoulder was credible. Dr. Zuehlsdorff's opinions regarding medical treatment after MMI are credible and more persuasive than the contrary opinions offered by Dr. Raschbacher.

CONCLUSIONS OF LAW

A. Overcoming the DIME regarding impairment

A DIME's determination regarding whole person impairment is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c). The clear and convincing burden also applies to the DIME's determination of which impairments were caused by the work accident. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1988). The party challenging a DIME rating must demonstrate it is "highly probable" the determination is incorrect. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). A party meets this burden if the evidence contradicting the DIME physician is "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). A "mere difference of medical opinion" does not constitute clear and convincing evidence. *E.g., Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (March 18, 2016).

Deviations from rating protocols outlined in the *AMA Guides* are relevant but not dispositive in determining whether the DIME rating has been overcome. *Corley v. Bridgestone Americas, Inc*., W.C. No. 4-993-719-004 (February 26, 2020). Similarly, the ALJ may consider but is not bound by the Division's Impairment Rating Tips or the Level

II accreditation curriculum. *Vuksic v. Lockheed Martin Corporation*, W.C. No. 4-956-741-02 (August 4, 2016) (rating “Tips” are not “merely guidance” and “not binding rules”).

As found, Claimant failed to overcome the DIME’s whole person cervical rating by clear and convincing evidence. Dr. Zuehlsdorff was mistaken that Claimant should receive an 8% whole person rating under Table 53. The Impairment Rating Tips state,

> To rate rhizotomies, the total number of levels at which a rhizotomy is performed should be divided by 2. A two-level bilateral or unilateral rhizotomy receives a rating of II(C) because II(C) accounts for the initial two levels. ***Three or four-level rhizotomies receive a II(C) plus II(F) 1% for the additional levels***. (Emphasis added).

The applicable rating for the cervical spine under Table 53 II(C) is 6% whole person, not 7% as Dr. Zuehlsdorff opined.[1]

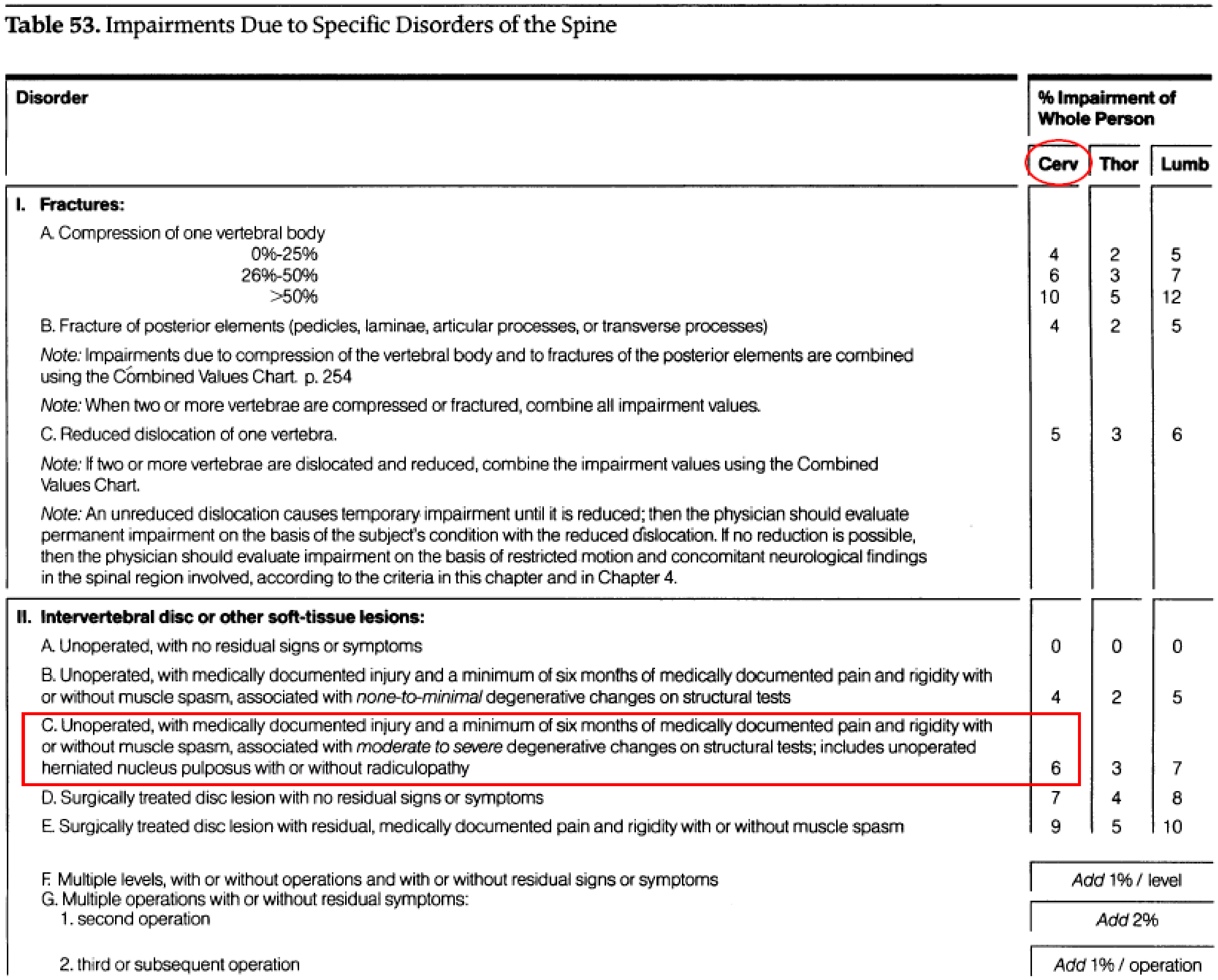


Table 53. Impairments Due to Specific Disorders of the Spine

Disorder	% Impairment of Whole Person		
	Cerv	Thor	Lumb
I. Fractures:			
A. Compression of one vertebral body			
0%-25%	4	2	5
26%-50%	6	3	7
>50%	10	5	12
B. Fracture of posterior elements (pedicles, laminae, articular processes, or transverse processes)	4	2	5
Note: Impairments due to compression of the vertebral body and to fractures of the posterior elements are combined using the Combined Values Chart. p. 254			
Note: When two or more vertebrae are compressed or fractured, combine all impairment values.			
C. Reduced dislocation of one vertebra.	5	3	6
Note: If two or more vertebrae are dislocated and reduced, combine the impairment values using the Combined Values Chart.			
Note: An unreduced dislocation causes temporary impairment until it is reduced; then the physician should evaluate permanent impairment on the basis of the subject’s condition with the reduced dislocation. If no reduction is possible, then the physician should evaluate impairment on the basis of restricted motion and concomitant neurological findings in the spinal region involved, according to the criteria in this chapter and in Chapter 4.			
II. Intervertebral disc or other soft-tissue lesions:			
A. Unoperated, with no residual signs or symptoms	0	0	0
B. Unoperated, with medically documented injury and a minimum of six months of medically documented pain and rigidity with or without muscle spasm, associated with *none-to-minimal* degenerative changes on structural tests	4	2	5
C. Unoperated, with medically documented injury and a minimum of six months of medically documented pain and rigidity with or without muscle spasm, associated with *moderate to severe* degenerative changes on structural tests; includes unoperated herniated nucleus pulposus with or without radiculopathy	6	3	7
D. Surgically treated disc lesion with no residual signs or symptoms	7	4	8
E. Surgically treated disc lesion with residual, medically documented pain and rigidity with or without muscle spasm	9	5	10
F. Multiple levels, with or without operations and with or without residual signs or symptoms	*Add* 1% / level		
G. Multiple operations with or without residual symptoms:			
1. second operation	*Add* 2%		
2. third or subsequent operation	*Add* 1% / operation		

[1] It appears Dr. Zuehlsdorff inadvertently referenced the II(C) lumbar rating of 7%.

Everyone agrees an additional 1% is required for Claimant's 3-level procedure, which produces a final Table 53 rating of 7%. Dr. Higginbotham's rating is correct.

B. Shoulder impairment is moot

Section 8-42-107.5 limits the combined total of temporary disability and permanent partial disability benefits a claimant may receive based on their final impairment rating. For Claimant's date of injury, the applicable cap is $87,470.18 for a whole person rating less than 26%. Claimant's overall final whole person rating is less than 26%. Even if we were to analyze Claimant's shoulder impairment under the more lenient preponderance standard and adopt Dr. Zuehlsdorff's 15% extremity rating, the overall combined whole person rating would still be less than 26%. The 15% extremity rating converts to 9% whole person, which combines with Dr. Higginbotham's binding 14% cervical rating to produce an overall rating of 22% whole person.

Respondent has already admitted for $87,470.18 in temporary and permanent partial disability benefits. Because Claimant failed to prove he has impairment greater than 25% whole person, a determination of whether his shoulder rating represents a scheduled or whole person impairment will have no impact on his compensation. Accordingly, Claimant's request to convert the shoulder is moot and will not be addressed.

C. Medical benefits after MMI

The respondent is liable for medical treatment after MMI reasonably necessary to relieve the effects of the injury or prevent deterioration of the claimant's condition. Section 8-42-101; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Proof of a current or future need for "any" form of treatment will suffice for an award of post-MMI benefits. *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). There is no requirement that a particular course of treatment be articulated or that the claimant actually be receiving treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999). If the claimant establishes the probability of a need for future treatment, he is entitled to a general award of medical benefits after MMI, subject to the employer's right to dispute causation or reasonable necessity of any particular treatment. *Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003).

As found, Claimant proved he is entitled to a general award of medical benefits after MMI. Claimant had a significant injury and extensive complications related to his shoulder surgery. Additionally, he received less physical therapy than he should have because he had to use Medicaid. Claimant credibly described ongoing symptoms and associated functional limitations caused by his injuries. The low dose of tramadol Claimant is taking is reasonable, with no persuasive suggestion in the record of misuse. Dr. Zuehlsdorff's opinions regarding medical treatment after MMI are persuasive. Even if Claimant's symptoms could be managed equally as well with OTC analgesics and NSAIDs (as argued by Dr. Raschbacher), such medications would still support an award of *Grover* benefits. *E.g., Guillotte v. Pinnacle Glass Company*, W.C. No. 4-443-875 (November 20, 2001) ("the fact [a] medication is available without a prescription does not vitiate its compensability or nullify the award of *Grover*-style medical benefits."); *Mann v.*

Ridge Erection Company, W.C. No. 4-225-122 (April 4, 1996) (no distinction between "over the counter" medications and prescribed medications for *Grover* benefits); *Ashton-Moore v. Nextel Communications, Inc*., W.C. No. 4-431-951 (September 12, 2002) (recommendation for OTC anti-inflammatories "as necessary for pain" can support a *Grover* award).

ORDER

It is therefore ordered that:

1. Claimant's request to overcome the DIME's whole person impairment rating is denied and dismissed.

2. Claimant's request to convert the admitted scheduled impairment ratings to the equivalent whole person ratings and/or increase his scheduled rating is denied and dismissed as moot.

3. Insurer shall cover all medical treatment from authorized providers reasonably needed to relieve the effects of Claimant's injuries and prevent deterioration of his condition.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: September 13, 2021

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-113-756-004

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that the left carpal tunnel release surgery, as recommended by Dr. Karl Larsen, is reasonable, necessary, and related to her 4/29/2019 work injury?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

1. The parties have stipulated that any injuries which occurred on April 29, are compensable, and ultimately stem from Claimant losing her balance while wearing a boot, which had been issued in connection with a separate admitted claim for Claimant's right ankle. Therefore, independent of the above, the course and scope of this 4/29/2019 incident need not be proven for compensability purposes. (Ex M, and discussion during hearing).

2. Claimant has worked as a massage therapist for 16 years. She began working for this Employer as a massage therapist on November 22, 2018.

3. Before this incident in question, Claimant had earlier reported that she tripped on a cord at work around February 19, 2019, and caught her fall with her outstretched arms**.** The associated diagnosis was acute pain of both wrists (Ex. B, p.5).

4. After regular visits and conservative therapy, Claimant's symptoms for the February 19, 2019 fall resolved. On 4/29/2019, Claimant had her final visit with Dr. George Johnson at Concentra for this 2/19/2019 fall. (Ex. B, p. 22). In his report (signed at 3:13 pm on 4/29/2019), he noted "At MMI. No impairment. Full Work. No permanent restrictions. No maintenance care. No medications." *Id.* At no point in his report does he note that Claimant ever mentioned to him that she had fallen (now for a second time) on her wrists [for this claim] on that very same day of her final visit. Nor does he mention that Claimant was now in a walking boot for her ankle.

5. In a visit to Champions Family Medical on 5/17/2019 for "left ankle swelling", Claimant reported to Kayla Previdi, NP, "**She was given a soft boot** [for her right ankle, on the admitted claim] **on April 29, 2019** and one week later her left ankle started to swell and become painful." (Ex. A, p. 3)(emphasis added). NP Previdi's report makes no mention of a *fall* which had also occurred on 4/29/19; just the *boot. Id.*

6. At hearing, Claimant testified that on April 29, 2019, she again tripped and fell, this time due to wearing a boot on her ankle, which had been injured due to an admitted claim involving this Employer.

Q Now then, you've alleged that as a result of your ankle injuries, you tripped and fell on – I have it down as April 29th, 2019. Is that correct?

A Yes

Q Okay. And you landed on your hands when that happened?

A Well yes. I fell into a chair. Yes.

Q And so, so that's when you believe that you injured your left upper extremity, your hand, your wrist on 4/29/2019?

A That's when I know I did.

Q Okay. Now you've not worked with your employer since that fall on, on *February* 29, 2019. Correct? [Note*presumably intended to state *April* 29].

A Correct. (Transcript, pp. 25-26).

7. Later in the hearing, Claimant was asked:

Q [Claimant Redacted], before you started work for this employer on November 22, 2018, were you having any problems with your left wrist?

A None

Q Were you seeing *any* medical doctors for *any* treatment for your left wrist before November 22 2018?

A No. (Transcript, p. 27).

Claimant also stated at hearing that she is not working currently, and that *it is due to this injury.* (Transcript, p. 20).

8. However, the first medical report referencing a 4/29/2019 injury is dated November 6, 2019. (Ex. E, p. 112), wherein Claimant was seen by Stephanie Noble PA-C, who noted: "She sustained another injury at work in April. She states this was due to the boot. She tripped and fell landing on outstretched arms injuring both wrists both elbows and her right shoulder. **Due to the ankle injury *she has blown off the wrist and elbow pain*** but she did declare it at the time of the injury." *Id*. MRIs were ordered, with *Impression* of *Bilateral wrist chronic pain. Id* at 113.(emphasis added).

9. The left wrist MRI was conducted on 12/20/2019. (Ex. K). Under *Clinical*, it noted: "Pain in bilateral wrists after a fall in April 2019. **History of left scapholunate ligament tear.**

Bilateral *carpal tunnel surgery 2006.* Besides noting possible cysts or erosions, the *Impression* noted: **Arthritic** change in carpal bone. Id. (emphasis added).

10. Claimant saw Orthopedist Karl Larsen, MD on 1/13/2020. (Ex. E, p. 118). At this visit, Claimant was complaining more of right lateral elbow pain than right wrist today. Her left side continues to have discomfort more in the ulnar and dorsal part of the wrist especially with weightbearing activities." Id. *Mild* tenderness was noted with left wrist extension. He noted the left MRI had subtle findings of ulnar carpal abutment with mild edema in the ulnar lunate and some mild cystic changes throughout the carpus, and believed she had symptoms of ulnocarpal abutment. *Id.* An injection was performed that day.

11. On January 15, 2020, Dr. Johnson at Concentra diagnosed left wrist sprain and noted as follows "I am not sure that is work related. She has not worked for over 8 months. She states that despite this the condition is NOT improving" (Ex. B, p. 26).

12. Dr. Larsen reevaluated Claimant on March 2, 2020 at which he stated, in part, as follows:

> [Claimant] has multiple foci of arm pain. I have discussed that she does not have anything that is dangerous. The things we have been able to identify include lateral epicondylitis in the right elbow, general degenerative changes in the right wrist and ulnocarpal abutment in the left wrist. None of these are so severe that they rise to the need of aggressive intervention, though she feels like she has nowhere else to go" (Ex. E, p. 122).

13. Claimant next saw PA-C Noble on 1/6/2021 (Ex. E, p. 124). "She complains of bilateral arm pain and hand numbness and tingling. Her left is much worse than her right. *She has pain at the wrists and elbow**s***…She appears quite miserable today on exam as both arms are quite painful, but the left seems to be much worse." (emphasis added). PA-C Noble put under her *Impression*: bilateral carpal and cubital tunnel syndrome. *Id*.

14. Claimant returned to Dr. Larsen on 2/22/2021, wherein he noted that "She continues to complain of ***multiple foci of diffuse arm pain*** and intermittent numbness and tingling now in the hands she has aching discomfort that radiates into her forearms it is present on both sides despite previous carpal tunnel release in the remote past on the right side. (Ex. E, p. 126)(emphasis added). He noted that the carpal tunnel release surgery under consideration "may not alleviate all her symptomology." *Id* at 127.

15. On March 2, 2021, Dr. Lars**e**n requested authorization for left carpal tunnel release surgery (Ex. E, p. 129). Respondents denied prior authorization, and scheduled an IME with Wallace Lars**o**n, MD. (Ex. F).

16. On March 25, 2021, Claimant attended the IME with Dr. Larson. In his report, (Ex. I) Dr. Larson opined that left carpal tunnel surgery recommended by Karl Larsen, MD was not a reasonable and necessary treatment for Claimant's left wrist symptoms. He also opined that the proposed surgery was not related to Claimant's work injury.

17. Dr. Larson also responded if his record review supported a new injury from 4/29/2019, by noting: "medical records do not support the allegation of any new injuries related to a 4/29/2019 fall. A note of 11/6/2019 reports the patient's [first reported] statement of a fall 4/29/2019. *Multiple notes prior to that do not indicate any history* of any upper extremity injuries relative to a 4/29/2019 fall. (Ex. I, p. 163)(emphasis added).

18. Dr. Larson testified at hearing, consistently with his written IME report. He is a board-certified orthopedic surgeon whose sub-specialty is hand surgery. At hearing, Dr. Larson estimated that he performs 300 hand surgeries per year.

19. Dr. Larson testified that his understanding of how Claimant allegedly injured her left arm on April 29, 2019 as follows: falling forward into or toward a chair and the right arm was up on the chair and the left hand went down toward the floor.

20. Carpal tunnel syndrome ("CTS") is the result of pressure on the median nerve going through the wrist with a distribution of numbness, typically, in the thumb, index, long, and part of the ring finger. CTS is a constellation of symptoms and not "just an electrical finding or abnormality on EMGs." (Transcript, p. 39).

21. Dr. Larson noted that *associating* certain activities with CTS is different than *causation.* He testified:

> That the *only activities* that really seem to be a causation factor in CTS is *repetitive impact or vibration,* such as jackhammer and that sort of thing that have seen to be associated with CTS as a cause, as a true causation.
>
> There is probably some suspicion, although not…medically established that…*persistent strong gripping and abnormal or…awkward positions can*…cause some CTS...[but not typing or computer usage]. (Transcript, p. 40).
>
> [Can acute trauma cause CTS?]
>
> There...really is not literature *showing CTS associated with …trauma…except* for…very rare reports and even some of those are a bit questionable in terms of whether it's a true causation. There's very rare reports of…a single traumatic event causing CTS. Those are in the range of kind of rare and unconfirmed type of events.
>
> But the things that...are really talked about with orthopedic literature in CTS and trauma really related to things with fairly severe trauma, especially just radius fractures. Transcript, pp. 42-43)(emphasis added).
>
> [CTS caused by acute traumatic event, also is…] really secondary more to the radius fracture that is not only out of place and puts pressure basically is the nerve has to be pulled around the corner of a fracture that's

> out of place, but also quite a bit of swelling in the area of the carpal tunnel because there's bleeding around the fracture. Id.

22. In his own practice, Dr. Larson could not recall a case of CTS caused by trauma requiring surgery, unless that CTS was also accompanied by a wrist fracture or dislocation. At most, Claimant suffered at most a very mild trauma. *Id* at 44.

23. Claimant's reported fall on April 29, 2019 did not involve a fracture or other identifiable anatomic injury (Transcript p. 44; *also see* Ex. E, p. 113).

24. When Dr. Larson examined Claimant on March 25, 2021, he found no evidence of muscle atrophy at the base of Claimant's thumbs. In cases of traumatic carpal tunnel syndrome, muscle atrophy would, likely, begin within a couple of months of the trauma (Transcript pp. 47-48).

25. Semmes-Weinstein testing is testing that utilizes various thicknesses of monofilament fiber to test sensation in body structures that might be neurologically compromised. The smallest fiber exerts .07 grams of force. The next smallest fiber is the 3.61 fiber that exerts .04 grams of force. These fibers of various sizes are pressed against the skin exerting forces of as little as .07 grams to as much as 300 grams (Transcript pp. 51-52).

26. Regarding Semmes-Weinstein testing, virtually everyone with an intact nerve can sense fiber exerting 0.4 grams of force. Only a person with a completely severed nerve---not just a damaged or bruised nerve---would be unable to feel the largest fiber that that exerts 300 grams of force. *Id.*

27. Dr. Larson testified that he conducted Semmes-Weinstein testing at the March 25, 2021 IME. During this testing on the left upper-extremity, Claimant reported that she could not feel any of the monofilament fibers, even those fibers that involved the strongest forces, except when the force of the fiber moved Claimant's arm. *Id* at 53. When Dr. Larson applied the filaments to Claimant's upper-extremities, Claimant was looking away, and not able to see while these fibers were applied to her skin. *Id* at 54.

28. During the Semmes-Weinstein testing, Dr. Larson observed that when he applied fiber to Claimant's arm, Claimant's arm "jumped" or moved at times when Claimant said that she could not feel the fiber. *Id.* (*Note: when asked about this on rebuttal, Claimant was 100% sure that every time Dr. Larson touched her arm, she told him "yes", and that her right arm jerked one time, but her left arm never did so) (Transcript, pp. 110-111).

29. Dr. Larson testified that when he examined Claimant, her reported upper-extremity numbness was consistent with 'glove-and-stocking' anesthesia, which is a circumferential lack of feeling through the entire hand, wrist, and forearm. As such, that implicates all nerve distributions through the upper extremity**.** *Id* at 56.

30. Glove-and-stocking anesthesia is a classic non-physiologic report from a patient that cannot be explained based on any physical problem or combination of physical problems**.** *Id.* Glove-and-stocking anesthesia is not consistent with any known physical disorder and, especially, not with CTS**.** *Id.*

31. Claimant's left upper-extremity studies evidenced mild electrical abnormalities. EMG testing of Claimant's left upper extremity showed that the distal motor latency testing was 4.6 which was slightly slower than expected (4.2 or lower). The amplitude testing was normal where Claimant's was measured at 6.5 and anything above 5.0 is considered normal. EMG testing of sensory fibers was, slightly, abnormal at 3.7 where the normal reading is less than 3.5-3.6. *Id* at 60.

32. Dr. Larson noted that as many as 50% of people who have borderline abnormal EMG testing results are asymptomatic. *Id* at 62.

33. Claimant's left upper-extremity EMG studies were "borderline" abnormal, and unless EMG studies are extremely abnormal, EMG studies, without further clinical correlation, does not establish a diagnosis of CTS. *Id.*

34. Clinical correlation of CTS means numbness restricted to the median nerve distribution (thumb, index, and long fingers) and, possibly, muscle atrophy. *Id* at 64. The glove-and-stocking distribution of Claimant's left upper-extremity symptoms is not consistent with CTS. *Id* at 65. Claimant's reported glove-and-stocking anesthesia cannot be explained by reference to damaged or compressed nerves, and it is a classic non-physiologic finding absent diabetic neuropathy**.** *Id.*

35. Dr. Larson did acknowledge that a number of reports from Claimant's various medical providers did not note any non-physiologic symptoms or behaviors. He did not perform a Phalen's test, due to pain behaviors exhibited by Claimant. He also questioned the reliability of that test. He could not recall performing a Tinel's sign, believing that such a test was not a good predictor of CTS, even though it is commonly used. He further acknowledged that Claimant's complaint of increase pain from driving longer distances [which Claimant did complain of] is a possible indicator of CTS.

36. When asked about Claimant's reported response to the injection into her left wrist, Dr. Larson noted:

> A It would be suggestive that it was *coming from her wrist rather than her CTS*, but I don't think it would be truly diagnostic, especially put in into the context of the multiple non-physiological symptoms.
>
> But *it would be suggestive the pain was coming from her wrist joint rather than her carpal tunnel area.* (Transcript, pp. 99-100)(emphasis added).

37. Dr. Larson was asked if he was in agreement with *WCRP 17 Exhibit 5 (G)(1)(d)* of the Medical Treatment Guidelines, which states:

> **"**[n]o one test is predictive of carpal tunnel syndrome. Multiple tests should be recorded with the patient's exact response. Final diagnosis is dependent on a correlation of symptoms, physical exam findings, and nerve conduction velocity (NCV) testing as any of these alone may have a false positive or false negative result."

A I think I would agree that's a reasonable statement. (Transcript, pp 104-105)

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1).* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion).

C. The ALJ finds that each medical expert offering opinions has done so in good faith, and with a sincere effort to provide the ALJ valuable expert information. It is also noted that as a treating physician, Dr. (Karl) Larsen has recommended treatment (with reservations as noted) that he sincerely believes might help Claimant address her symptoms. As such, the ALJ will determine these issues on the basis of *persuasiveness*, and not *credibility* per se.

D. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Medical Benefits, Reasonable and Necessary, Generally

E. Claimant bears the burden of establishing entitlement to any specific medical treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S*.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

Reasonable and Necessary, as Applied

F. As noted, Dr. (Karl) Larsen has ultimately opined that treating Claimants symptoms with a left carpal tunnel release is a *reasonable* approach to take. He appears to equivocate himself on whether such procedure is actually *necessary.* He noted multiple foci of diffuse arm pain as reported by Claimant. The pain was reported on both sides, despite a prior right CTS release in Claimant's remote past. He noted that this CTS release "may not alleviate all her symptomology." One year prior, he had noted that none of Claimant's symptoms were "so severe that they rise to the need of aggressive intervention."

G. By contrast, Dr. Larson has opined that there is no anatomic correlation, nor test results, to confirm what Claimant describes. He has gone into far greater detail on this issue than has Dr. Larsen. (In all fairness to Dr. Larsen, it was not necessarily his role as an ATP to 'disprove' or aggressively question Claimant's need for such treatment). Nonetheless, the Semmes-Weinstein testing raises serious issues regarding Claimant's alleged pain generator. Dr. Larsen never addressed this issue after the fact to dispel any misconceptions that Dr. Larson might harbor. The glove-in-stocking anesthesia raises issues, not addressed by Claimant, about identifying a surgical target. The EMG testing, while *consistent* with possible CTS, fell short of *compelling* such a conclusion. Dr. Larson opined that Claimant's response to the injection was suggestive of an issue with her *wrist,* especially with an apparent history of a scapholunate ligament tear (not otherwise disclosed) noted in the MRI, with findings of *arthritic* changes to the carpal bone. And a review of Claimant's reported symptoms throughout her treatment reveals migratory and varying pain complaints.

H. The ALJ concludes that while Claimant may have shown that a left CTS release might be a *reasonable* surgical option, she has not shown that such procedure is medically *necessary* to relieve her of her symptoms.

Medical Benefits, Related to Work Injury, Generally

I. Further, a Claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949). Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability were caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those that flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (October 27, 2008), simply because a Claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted, "[C]orrelation is not causation." Whether Claimant met the burden of proof to establish the requisite causal connection between the industrial injury and the need for medical treatment is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Related to Work Injury, as Applied

J. Regardless of the wisdom of proceeding with the CTS release, Claimant has not shown that such procedure (even if it might later be shown to have helped considerably) is *causally related* to her fall at work. If anything, Claimant has not shown herself to hold back on her pain complaints, or to note deficiencies in her treatment. Claimant testified that *after this fall of* 4/29/2019, she has not returned to work. Yet (and as noted by Dr. Larson in his report) Claimant never mentioned this fall to any medical provider until five months had elapsed, despite numerous orthopedic visits for her ankle. The ALJ is skeptical of her claim (made on 11/6/19) that she "blew off" the wrist and elbow pain due to the ankle injury for 5 months, *if she had never returned to work since this 4/29/2019 incident.* While she apparently reported this 4/29/19 *incident* itself to Employer, more pain complaints would have surfaced before November. Claimant's answer at hearing seemingly implies that it was this 4/29/19 incident that rendered her disabled.

K. Dr. Larson addressed the possible causation issues of CTS, noting that the most likely culprit for a CTS diagnosis is repetitive impact or vibration. Less likely, but still possible, is persistent strong gripping or awkward positions. Only rarely would acute trauma result in such diagnosis; in such unlikely event, it would have been accompanied by some other acute, and serious, trauma, such as a dislocation or radius fracture. At most, Claimant's 4/29/2019 incident was mild trauma, with no identifiable anatomic injury. Muscle atrophy, to be expected with longstanding CTS, was absent upon his exam. As noted previously, as the ATP, Dr. Larsen might have focused less on causation issues, since his emphasis was rightfully on treatment; nonetheless, Dr. Larson’s opinions on causation remain unrebutted. Indeed, Dr. Larsen does not appear to address causation/relatedness issues in his reports much at all.

L. Taking all the evidence into account, Claimant has not shown, by a preponderance of the evidence, that the condition she now complains of (whatever that might be) was proximately caused by her work incident of 4/29/2019. The proposed CTS release is therefore *not related* to her work injury.

ORDER

It is therefore Ordered that:

1. Claimant’s request for left carpal tunnel release surgery is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. *In addition, in order to best assure prompt processing of your Petition, it is* ***highly recommended*** *that you send a copy of your Petition to Review to the Colorado Springs OAC via email at oac-csp@state.co.us.*

DATED: September 13, 2021

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-161-225-001

ISSUES

1. Determination of Claimant's authorized treating physician (ATP).

2. Whether Respondents proved by a preponderance of the evidence that Respondents are entitled to suspend or terminate Claimant's temporary disability benefits pursuant to § 8-42-105(2)(c), C.R.S., due to Claimant's failure to attend a demand appointment with Kathryn Buikema, D.O.

FINDINGS OF FACT

1. Claimant is an auto mechanic who sustained an admitted injury to his back arising out of the course of his employment with Employer.

2. On December 30, 2020, Claimant was changing the axle seals on a car using a breaker bar to remove bolts from the vehicle. While doing so, Claimant felt a sharp pain in his lumbar spine. Claimant immediately notified his supervisor, Travis D[Redacted], of the injury. Claimant testified he told Mr. D[Redacted] he would like to wait to see if the pain would resolve. After a few minutes, Claimant told Mr. D[Redacted] he needed to go to the emergency room. Mr. D[Redacted] did not provide Claimant with a list of designated providers.

3. At approximately 10:00 a.m. on December 30, 2020, Claimant was seen at the emergency department (ED) at Good Samaritan Medical Center, in Lafayette, Colorado, where he was diagnosed with acute right-sided low back pain without sciatica. The ED physician recommended that Claimant see his primary care provider as soon as possible for advanced imaging and pain control. (Ex. 1)

4. Claimant credibly testified that later in the day on December 30, 2020, Victor R[Redacted], owner of Employer, texted Claimant to ask how he was doing and asking him to keep Employer informed. Mr. R[Redacted] did not provide Claimant with a list of designated providers.

5. Due to the New Years' holiday, Claimant was not able to immediately see a specialist or his primary care provider. On January 5, 2021, Claimant saw Michael Tracy, D.O., and Daniel Manilla, PA-C, of Integrated Sports & Spine (IS&S) for his work-related injury. Claimant had a previous or then-existing physician-patient with Dr. Tracy and had seen him for non-work-related issues prior to his December 30, 2020 injury. The examination performed by Dr. Tracy and/or Mr. Manilla on January 5, 2021, was directed to Claimant's lower back pain. Claimant was prescribed oxycodone and diazepam. Dr. Tracy ordered a lumbar MRI and scheduled Claimant for a return appointment after the

MRI was completed. On January 7, 2021, Mr. Manilla authored a letter recommending that Claimant avoid working for the next 15 days due to his injury. (Ex. 2).

6. On January 6, 2021, Respondents filed an Employer's First Report of Injury (EFROI) regarding Claimant's December 30, 2020 injury. The EFROI indicates Employer was notified of Claimant's injury on January 4, 2021. (Ex. A).

7. Insurer prepared a letter to Claimant which included information concerning workers' compensation claims and a Designated Provider List (DPL) compliant with § 8-43-404 (5)(a)(I)(A), C.R.S. The letter indicates it was "prepared" on January 6, 2021, but does not indicate whether the DPL was provided to Claimant through mail or another way, or the date the DPL was provided. (Ex. 6).

8. On January 7, 2021, Insurer sent correspondence to IS&S requesting copies of office notes, a Doctor's First Report of Occupational Injury or Illness Form 5021, and medical records related to Claimant's treatment. (Ex. 7).

9. On January 11, 2021, Claimant underwent the lumbar MRI ordered by Dr. Tracy. (Ex. 3).

10. Claimant returned to Dr. Tracy's office on January 14, 2021, for a consultation regarding the outcome of his MRI. Dr. Tracy scheduled Claimant for a bilateral epidural steroid injection with Dr. Feldman the following week and indicated that following the epidural he would be provided with a referral for physical therapy. In addition, Dr. Tracy prescribed oxycodone and morphine for pain. (Ex. 2).

11. On January 14, 2021, Claimant receive the DPL which listed the following providers: Concentra Medical Center; Sandra Mason, D.O. - SCH Health Medical Group-Denver; Nextcare Urgent Care; and Lucina Kidd – Family Medical Associates. (Ex. E).

12. On January 18, 2021, Claimant sent an email to Insurer attaching a signed copy of the designated provider list and indicating that he "received the Designated Provider List on January 14, 2021." (Ex. 8).

13. Claimant credibly testified that in a telephone call with Insurer's adjuster, he was advised that he was required to see one of the physicians identified on the DPL. Consequently, Claimant scheduled an appointment with SCL Health Medical Group, and saw Kathryn Buikema, D.O., on January 25, 2021, believing that the appointment was mandatory.

14. On January 22, 2021, Respondents filed a General Admission of Liability, admitting for medical benefits, and temporary total disability benefits. (Ex. B).

15. Following the January 25, 2021 appointment with Dr. Buikema, Claimant was scheduled for a follow-up appointment for February 2, 2021. Claimant did not attend the February 2, 2021 appointment. Claimant testified that, after consultation with his attorney, he did not believe that he was required to attend the appointment with Dr. Buikema because he did not believe she was a "valid" authorized treating physician.

16. On February 3, 2021, Claimant was again seen at Dr. Tracy's office. The February 3, 2021 treatment note indicates that Claimant was to continue "his physical therapy guided home exercise program as tolerated." (Ex. 2).

17. On February 9, 2021, Claimant's counsel wrote to Insurer indicating that Claimant "was not presented with a choice of four providers at the time of injury," and requesting that Respondents provide written verification of acceptance of IS&S/Dr. Tracy as Claimant's ATP. (Ex. 9). Claimant continued to seek treatment through IS&S, and had follow-up visits on March 3, 2021, March 31, 2021, April 22, 2021, May 24, 2021, June 23, 2021, and July 20, 2021. (Ex. 2).

18. On March 29, 2021, Trina Castillo, a Case Manager for SCL Health, wrote to Claimant advising him that he missed the February 2, 2021 appointment with Dr. Buikema, and requested that he contact the office to reschedule the appointment. (Ex. F).

19. Also on March 29, 2021, Respondents, through counsel, sent Claimant a letter advising that Respondents had, pursuant to W.C.R.P. Rule 6-1(A)(5), set up a "demand appointment with Kathryn Buikema, D.O., for April 16, 2021, at 11:30 p.m." The letter further stated: "If you do not attend this demand appointment, please note that your temporary disability benefits may be suspended for failure to appear at that appointment per Workers Compensation Rules of Procedure Rule 6-1(A)(5)." (Ex. G).

20. On April 8, 2021, Claimant's counsel wrote to Respondents' counsel indicating that "Claimant does not consider Dr. Buikema to be a valid ATP and will not attend an appointment with her in this capacity." (Ex. 11).

21. Claimant did not attend the appointment with Dr. Buikema on April 16, 2021, or any time thereafter. On April 26, 2021, Ms. Castillo sent another letter to Claimant advising that he had missed the April 16, 2021 appointment. (Ex. H).

22. Beginning December 31, 2020, Respondents paid Claimant temporary total disability (TTD) benefits based on an average weekly wage of $724.40 per week. (Ex. B). Respondents continued to pay Claimant's TTD benefits through hearing, and did not suspend payment of TTD after Claimant did not attend the April 16, 2021 appointment Insurer scheduled with Dr. Buikema.

23. In May 2021, Respondents filed a Petition to Modify, Terminate, or Suspend Compensation with the Division, seeking to terminate Claimant's temporary disability benefits beginning December 31, 2021. (Ex. C).

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See*

§ 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Indus. Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

AUTHORIZED TREATING PROVIDER

Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires that respondents must provide injured workers with a list of at least four designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. Rule 8-2 (A)(2) clarifies that, "[a] copy of the written designated provider list must be given to the injured worker in a verifiable manner within seven (7) business days following the date the employer has notice of the injury." The term "business days" refers to any day other than a Saturday, Sunday, or legal holiday. W.C.R.P. 1-2 (C).

An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. Indus. Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006). If upon notice of the injury the employer does not timely designate an ATP, the right of selection passes to the claimant. *Rogers v. Indus. Claim Appeals Office,* 746 P.2d 565 (Colo. App. 1987), *see also* W.C.R.P. 8-2 (E) ("If the employer fails to supply the required designated provider list in accordance with this rule, the injured worker may select an authorized treating physician or chiropractor of their choosing.")

Employer had knowledge of Claimant's injuries on December 30, 2020, when Claimant notified his supervisor that he sustained an injury and needed to be seen by a physician. Accordingly, Employer was obligated to provide Claimant with a designated provider list within seven business days of December 30, 2020. The ALJ takes judicial notice that January 1, 2021, was a holiday, January 2, 3, 9, and 10, 2021 were Saturdays and Sundays, and thus not considered "business days." Employer was, therefore, obligated to provide Claimant with written notice on or before January 11, 2021.

The evidence demonstrates that Insurer prepared a letter containing the DPL on January 6, 2021. However, no credible evidence was presented to indicate the date the DPL was given to Claimant. Given Claimant's testimony and his contemporaneous email of January 18, 2021, in which Claimant acknowledged receiving the list on January 14, 2021, the ALJ finds credible Claimant's testimony that he did not receive the DPL until January 14, 2021. Because Claimant was not provided a DPL before January 11, 2021 (i.e., within seven business days after receiving notice of his injury), the right of selection of his ATP passed to Claimant.

Once the right of selection passed to Claimant, his actions below indicate Claimant selected Dr. Tracy and IS&S as his ATP. Where a claimant has signified "by words or conduct that he has chosen a physician to treat the industrial injury," he has made physician "selection." *In re Claim of Murphy-Tafoya*, W.C. No. 5-153-600-001 (ICAO, Sept. 1, 2021). Claimant sought treatment from Dr. Tracy on January 5, 2021, underwent an MRI ordered by Dr. Tracy on January 11, 2021 and returned to Dr. Tracy's office on January 14, 2021, for treatment of his industrial injury. Claimant continued to see Dr. Tracy for his industrial injury, and only saw Dr. Buikema because he was under the impression that it was mandatory based on his conversation with Insurer.

Respondents' reliance on *Williams v. Halliburton Energy Servs.*, W.C. No. 4-995-888-01 (ICAO, Oct. 28, 2016), does not lead to a different conclusion. In *Williams*, the claimant began treatment with Injury Care of Colorado, and was later provided with an untimely DPL which included Injury Care of Colorado. The claimant then later sought to change his ATP. The ICAO found that claimant, through his words and actions had selected Injury Care of Colorado as his ATP, and that the untimely DPL did not afford him the right to change ATPs once he made his selection. *Williams* is not analogous to the present case. Here, Claimant sought and accepted treatment and referrals from Dr. Tracy and IS&S for his work-related injury, both before and after the right of selection passed to him on January 11, 2021. That the Claimant later provided an untimely DPL and Claimant saw Dr. Buikema after being instructed he was required to see a physician on the list does not alter the fact that Claimant had already selected Dr. Tracy as his ATP.

The ALJ finds and concludes Dr. Buikema is not Claimant's ATP, instead the right of selection of ATP passed to Claimant on January 11, 2021, and Claimant, through his actions, selected Dr. Tracy, and IS&S as his ATP.

DEMAND APPOINTMENT

Respondents have failed to establish by a preponderance of the evidence a basis to suspend or terminate Claimant's temporary disability benefits pursuant to § 8-42-105(2)(c), C.R.S., due to Claimant's failure to attend a demand appointment with Dr. Buikema. The statutory authority permitting an insurer to suspend a claimant' temporary disability benefits is contained in section 8-42-105(2)(c), C.R.S., which provides:

> If an employee fails to appear at an appointment with the employee's attending physician, the insurer or self-insured employer shall notify the employee by certified mail that temporary disability benefits may be suspended after the employee fails to appear at a rescheduled appointment. If the employee fails to appear at a rescheduled appointment, the insurer or self-insured employer may, without a prior hearing, suspend payment of temporary disability benefits to the employee until the employee appears at a subsequent rescheduled appointment.

Rule 6-1(A)(5) of the Workers' Compensation Rules of Procedure, provides the procedure for suspension of temporary disability benefits without a hearing. The Rule makes clear the "attending physician" referenced in § 8-42-105(2)(c) means the ATP. As found, Dr. Buikema is not Claimant's ATP. Consequently, Claimant's refusal to attend an appointment with Dr. Buikema did not trigger Insurer's ability to suspend his temporary disability benefits. The ALJ finds and concludes that Respondents failed to establish a basis for suspension of Claimant' temporary disability benefits under § 8-42-105(2)(c), C.R.S.

ORDER

It is therefore ordered that:

1. Claimant's authorized treating provider is Michael Tracy, D.O.

2. Respondents request to suspend or terminate Claimant's temporary disability benefits for failure to attend a demand appointment with Kathryn Buikema, D.O., is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the

certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 16, 2021

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-114-698-001

ISSUES

1. Whether Claimant established by a preponderance of the evidence that her scheduled impairment rating for her left shoulder should be converted to a whole person impairment rating.

PROCEDURAL ORDERS

Claimant endorsed the issue of disfigurement on her Application for Hearing and Case Information Sheet. Because Claimant did not have video capability at the time of hearing, Claimant moved for leave to withdraw the issue of disfigurement without prejudice and with leave to refile an application for hearing on the issue of disfigurement. Respondents did not object, and Claimant's motion was granted.

FINDINGS OF FACT

1. Claimant is employed by Employer as a store manager. On August 8, 2019, Claimant sustained admitted injuries to her left shoulder and pelvis when she fell from a ladder while moving boxes on a shelf.

2. As the result of her work-related injuries, Claimant underwent two surgeries on her left shoulder. Initially, Claimant underwent an open reduction internal fixation (ORIF) surgery on her left shoulder to address a humeral fracture which did not adequately address Claimant's injuries and failed within a short amount of time. Consequently, on September 4, 2019, Claimant underwent a second shoulder surgery consisting of a reverse total shoulder arthroplasty. Reverse total shoulder arthroplasty is a procedure in which the upper head of the humerus is removed and replaced with an artificial "socket" and the natural "socket" of the glenoid is replaced with an artificial ball. The result of the surgery is that the natural ball and socket of the shoulder joint are reversed.

3. Claimant underwent post-surgical therapy and was placed at maximum medical improvement by her authorized treating physician (ATP) on March 2, 2021. Claimant was then referred to Ethan Moses, M.D., for the assessment of an impairment rating. Dr. Moses assigned Claimant a 40% scheduled left upper extremity impairment rating under the AMA Guides. The 40% scheduled left upper extremity impairment corresponds to a 24% whole person impairment. Dr. Moses noted that Claimant "is physically incapable of raising the right arm above shoulder level. As such, her single remaining restriction is no[] overhead use of the left arm." (The ALJ infers that Dr. Moses' reference to Claimant's "right" arm is a mistake, and the statement is a reference to Claimant's injured left arm.) (Ex. A).

4. Claimant credibly testified that she experiences significant difficulties with her left shoulder and arm. Claimant cannot raise her left arm above shoulder level in any plane, and experiences pain in from the top of her left shoulder to her elbow; left side of her chest; upper back above her left shoulder blade; and left trapezius area when attempting to use her left arm in many capacities. Claimant credibly testified that she experiences difficulty with many activities, including lifting and pushing with her left arm, bathing, and sleeping. Prior to her work-related injury, Claimant participated in activities such as running, swimming, walking her dog, and bicycling. Claimant testified that although she is able to engage in these activities, they require substantial modification, such as swimming with a kickboard, holding her left arm static in front of her body when running, holding a dog leash with only her right hand, and using only her right arm when bicycling. In her employment activities, Claimant limits her lifting significantly, and relies on fellow employees to lift and move boxes and products when necessary. Claimant credibly testified that prior to her work-injury, she could perform each of these activities without modification.

5. Timothy O'Brien, M.D., was admitted as an expert in orthopedic surgery and testified at hearing. Dr. O'Brien testified that he agreed that Dr. Moses' impairment rating was properly calculated and appropriate. Dr. O'Brien opined that he did not believe any foundation existed to convert Claimant's schedule impairment rating to a whole person impairment because she did not experience any adverse "systemic effects" from her shoulder injury or surgery. He testified that he was unable to identify any peer reviewed medical literature indicating that a reverse shoulder total arthroplasty can cause "systemic effects" and that none of his patients over the past 15-20 years who have undergone the procedure have developed "systemic effects" as the result of the surgery. Dr. O'Brien further opined that it was "not logical" that an injury to a discrete joint, such as the shoulder, could result in impairment to the whole body. Dr. O'Brien's testimony was neither credible nor persuasive because conversion from a scheduled impairment to a whole person impairment does not require proof of a "systemic" dysfunction throughout the body, but that an injured worker sustained an impairment not listed on the schedule of impairments in § 8-42-107(2)(a), C.R.S.

6. John Hughes, M.D., performed an independent medical examination at Claimant's request on July 20, 2021. Dr. Hughes opined that Claimant has sustained functional impairment extending proximal to her left shoulder into the region of her left thoracic and cervical spine regions. He indicated that Claimant has hypertonicity of the left posterior trapezius that measurably inhibits right lateral flection of her cervical spine, as well as atrophy of her left pectoralis muscles extending into the left anterior thorax. He opined that Claimant has sustained a loss of function beyond her shoulder and into the cervical and thoracic spine. (Ex. 2).

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Conversion of Scheduled Impairment to Whole Person Impairment

When an injury results in a permanent medical impairment not set forth on a schedule of impairments, an employee is entitled to medical impairment benefits paid as a whole person. *See* §8-42-107(8)(c), C.R.S. Whether a claimant has suffered the loss of an arm at the shoulder under §8-42-107(2)(a), C.R.S., or a whole-person medical impairment compensable under §8-42-107(8)(c), C.R.S., is determined on a case-by-case basis. *See DeLaney v. Industrial Claim Appeals Office*, 30 P.3d 691, 693 (Colo. App. 2000).

The ALJ must thus determine the situs of a claimant's "functional impairment." *Velasquez v. UPS,* W.C. No. 4-573-459 (ICAO Apr. 13, 2006). The situs of the functional impairment is not necessarily the site of the injury. *See In re Hamrick*, W.C. No. 4-868-996-01 (ICAO, Feb. 1, 2016); *In re Zimdars,* W.C. No. 4-922-066-04 (ICAO, Feb. 4, 2015).

Pain and discomfort that limit a claimant's ability to use a portion of the body is considered functional impairment for purposes of determining whether an injury is off the schedule of impairments. *In re Johnson –Wood*, W.C. No. 4-536-198 (ICAO, June 20, 2005); *Vargas v. Excel Corp.,* W.C. 4-551-161 (ICAO, Apr. 21, 2005). However, the mere presence of pain in a portion of the body beyond the schedule does not require a finding that the pain represents a functional impairment. *Lovett v. Big Lots,* WC 4-657-285 (ICAO, Nov. 16, 2007); *O'Connell v. Don's Masonry,* W.C. 4-609-719 (ICAO, Dec. 28, 2006).

In the case of a shoulder injury, the question is whether the injury has affected physiological structures beyond the arm at the shoulder. Brown v. City of Aurora, W.C. 4-452-408 (ICAP Oct. 9, 2002.) Claimant bears the burden of proof by a preponderance of the evidence to establish functional impairment beyond the arm at the shoulder and the consequent right to PPD benefits awarded under § 8-42-107(8)(c), C.R.S. Whether Claimant met the burden of proof presents an issue of fact for determination by the ALJ. *Delaney v. Industrial Claim Appeals Office,* 30 P.3d 691 (Colo. App. 2001); *Johnson-Wood v. City of Colorado Springs,* W.C. No. 4-536-198 (ICAO June 20, 2005). In re Claim of Barnes, 042420 COWC, 5-063-493 (ICAO, April 24, 2020).

Claimant has established by a preponderance of the evidence that she has sustained an impairment of anatomical structures beyond the arm at the shoulder. Although the reverse total shoulder arthroplasty did result in anatomical changes to the Claimant's humerus (i.e., replacing the distal end of the bone with an artificial "cup"), the surgery extended beyond the humerus to the glenoid, where an artificial "ball" was placed, thereby altering the anatomy of Claimant's shoulder joint beyond the arm. It is undisputed that Claimant has significant limitations in the range of motion of her left shoulder. The ALJ concludes the Claimant's functional limitations, as found in this Order, are more probable than not, manifestations of a functional impairment of her shoulder joint, beyond the arm. Accordingly, Claimant's left upper extremity impairment rating is converted from a 40% scheduled impairment to a 24% whole person impairment.

ORDER

It is therefore ordered that:

1. Claimant's 40% scheduled impairment rating for her left upper extremity related to her August 8, 2019 work injury is converted to a 24% whole person impairment.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the

certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 20, 2021

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

- Did Claimant prove he suffered functional impairment not listed on the schedule of disabilities, therefore entitling him to PPD benefits based on the DIME's 5% whole person rating?

- Disfigurement.

FINDINGS OF FACT

1. Claimant has worked for Employer as a police officer since 2013. He suffered an admitted injury to his left shoulder on March 29, 2018 while apprehending a suspect.

2. Claimant was referred to Dr. David Weinstein, an orthopedic surgeon. Dr. Weinstein diagnosed a large labral tear causing significant anterior-inferior instability.

3. On May 16, 2018, Dr. Weinstein performed an arthroscopic subacromial decompression, anterior-inferior capsular shift with a labral repair, and a superior labral repair.

4. Claimant completed several months of postoperative physical therapy. On October 24, 2018, Dr. Weinstein noted he was making steady progress and having minimal pain. Dr. Weinstein released Claimant from care on December 17, 2018.

5. Claimant's ATP, Dr. Nicholas Kurz, placed Claimant at MMI on February 19, 2019, with a 7% scheduled / 4% whole person rating. At the time of MMI, Claimant's shoulder still felt "loose" and painful with certain activities.

6. Claimant attended a DIME with Dr. William Watson on June 18, 2019. His primary concern was ongoing pain and instability in the shoulder, which was interfering with his ability to perform various exercises and wrestle with suspects. Impingement and labral tests were positive. Dr. Watson agreed with the February 19, 2019 MMI date, but was concerned that Claimant still had evidence of instability and possible re-tear of the labrum. He recommended an MR arthrogram and an evaluation with a shoulder surgeon as part of the "maintenance care." Dr. Watson opined if the surgeon recommended further intervention, Claimant would not be at MMI. He assigned a 15% scheduled / 9% whole person rating.

7. Dr. John Hughes performed a record review for Respondent on September 17, 2019. He did not think the scheduled rating should be converted the whole person because he saw no evidence of loss of function beyond the shoulder into the cervical and thoracic region. However, he acknowledged that "this is more of a legal than a medical

determination." Dr. Hughes opined it was reasonable for Claimant to be re-evaluated by Dr. Weinstein.

8. Claimant followed up with Dr. Weinstein on December 20, 2019. He explained his shoulder symptoms never completely resolved and become progressively worse over time. Dr. Weinstein diagnosed left shoulder adhesive capsulitis and rotator cuff tendinitis. He gave Claimant a cortisone injection and referred him for physical therapy.

9. Claimant continued to have problems with the shoulder, and on June 24, 2020, Dr. Weinstein gave him three options: observation, a repeat cortisone injection followed by more therapy, or surgery. Claimant chose the surgical option.

10. Claimant saw Dr. Hughes for an in-person IME on July 30, 2020. Dr. Hughes noted crepitus with left shoulder motion, limited range of motion, and a mildly positive empty can test. He appreciated no abnormalities on examination of Claimant's neck. Dr. Hughes opined Claimant's clinical findings were consistent with hypertrophic synovitis and rotator cuff tendinitis. He agreed the proposed surgery was reasonably necessary.

11. On August 20, 2020, Dr. Weinstein performed a left arthroscopic subacromial decompression and extensive glenohumeral debridement with capsular release and lysis of adhesions. He noted the previous labral repair remained intact.

12. Claimant had a good result from the second surgery. On December 14, 2020, Dr. Weinstein documented Claimant was doing great with no pain. Examination of the neck showed no tenderness over the cervical spinous process, facets, or paracervical musculature. Dr. Weinstein opined Claimant could return to regular duty "as he feels comfortable." He recommended Claimant complete his work hardening program and anticipated MMI in approximately six weeks.

13. Claimant had a follow-up DIME with Dr. Watson on April 6, 2021. Claimant told Dr. Watson his pain and function were significantly improved and he was pleased with the outcome of the second surgery. He still had some pain with end range of motion with flexion and abduction. He was working the day shift, which required fewer physical altercations than the night shift. He described some ongoing difficulty with weightlifting exercises, particularly anything overhead. Physical examination showed marked improvement in shoulder range of motion, with no evidence of impingement. The shoulder was more stable than at the first DIME, although he still had mild anterior laxity. Dr. Watson determined Claimant reached MMI on January 19, 2021. He provided an 8% upper extremity rating, which converts to 5% whole person.

14. Respondent filed a Final Admission of Liability on May 5, 2021 admitting for Dr. Watson's 8% scheduled rating. Claimant timely objected to the FAL and requested a hearing on whole person conversion.

15. Dr. Hughes issued an additional report on August 16, 2021 based on a record review. He did not meet with or examine Claimant at that time. He agreed with the

MMI date and extremity rating assigned by Dr. Watson. He indicated he did not see objective clinical findings showing loss of function proximal to the shoulder joint at his prior in-person IME. He also noted he found normal cervical range of motion, as had Dr. Watson and Dr. Weinstein. Dr. Hughes concluded there was no medical basis for conversion to a whole person rating.

16. Claimant testified at hearing regarding his ongoing symptoms and limitations. Claimant agreed he improved after the second surgery but said he still has pain in various parts of his body with exertion. Claimant described pain primarily in the scapular area and to a lesser degree the trapezius/neck and pectoralis. He works out regularly to maintain the strength and fitness necessary for his job. Exercises that elicit proximal symptoms include bench press, pull-ups, military press, running, and other cardio training. He also experiences scapular, trapezial, and neck pain during or after altercations, which are a routine part of his job.

17. Claimant's testimony was credible and persuasive.

18. Dr. Hughes testified at hearing to elaborate on the opinions expressed in his reports. He explained he found no objective clinical evidence of functional impairment beyond the arm, such as muscle spasm, hypertonicity, or adhesions affecting the cervicothoracic tissues, or scapular dyskinesis. He noted other providers had also failed to document such findings. Accordingly, he saw no medical basis to convert Claimant's extremity rating to whole person. He conceded he had not examined Claimant since the July 2020 IME, but noted the medical records showed a significant improvement in Claimant's condition after the second surgery. Dr. Hughes agreed the injury could reasonably produce the proximal symptoms Claimant described at hearing. But he opined the determination of whether purely subjective reports would support conversion "requires a legal conclusion, because at that point it extends beyond medicine into what you all have determined to be the legal criteria for conversion." Dr. Hughes agreed that the surgeries performed by Dr. Weinstein were directed to anatomical structures proximal to the humeral head.

19. The ALJ appreciates Dr. Hughes' thoughtful discussion, but disagrees with his ultimate conclusion regarding conversion.

20. Claimant proved he suffered functional impairment not listed on the schedule and should therefore receive PPD benefits based on the DIME's 5% whole person rating.

21. Claimant has seven arthroscopic surgery portal scars about the left shoulder. The scars are approximately ½ inch long and ⅛ to ¼ inch wide and discolored when compared to the surrounding skin. At least one scar is indented. The ALJ finds Claimant shall be awarded $1,400 for disfigurement.

CONCLUSIONS OF LAW

A. Whole person impairment

When evaluating whether a claimant has sustained scheduled or whole person impairment, the ALJ must determine “the situs of the functional impairment.” This refers to the “part or parts of the body which have been impaired or disabled as a result of the industrial accident,” and is not necessarily the site of the injury itself. *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366, 368 (Colo. App. 1996). The schedule of disabilities refers to the loss of “an arm at the shoulder.” Section 8-42-107(2)(a). If the claimant has a functional impairment to part(s) of his body other than the “arm,” they have suffered a whole person impairment and must be compensated under § 8-42-107(8).

There is no requirement that functional impairment take any particular form, and “pain and discomfort which interferes with the claimant’s ability to use a portion of the body may be considered ‘impairment’ for purposes of assigning a whole person impairment rating.” *Martinez v. Albertson’s LLC*, W.C. No. 4-692-947 (June 30, 2008). Referred pain from the primary situs of the initial injury may establish proof of functional impairment to the whole person. *E.g., Latshaw v. Baker Hughes, Inc*., W.C. No. 4-842-705 (December 17, 2013); *Mader v. Popejoy Construction Co., Inc*., W.C. No. 4-198-489 (August 9, 1996). Although the opinions of physicians can be considered when determining this issue, the ALJ can also consider lay evidence such as the claimant’s testimony regarding pain and reduced function. *Olson v. Foley’s*, W.C. No. 4-326-898 (September 12, 2000).

Pain and limitation in the trapezius or scapular area can functionally impair an individual beyond the arm. *E.g. Steinhauser v. Azco, Inc.*, W.C. No. 4-808-991 (January 11, 2012) (pain and muscle spasm in scapular and trapezial musculature warranted whole person impairment); *Franks v. Gordon Sign Co.*, W.C. No. 4-180-076 (March 27, 1996) (supraspinatus attaches to the scapula, and is therefore properly considered part of the “torso,” rather than the “arm”); *Martinez v. Albertson’s LLC*, W.C. No. 4-692-947 (ICAO, June 30, 2008) (pain affecting the trapezius and difficulty sleeping on injured side supported ALJ’s finding of whole person impairment). Limitations on overhead reaching can also consitute functional impairment beyond the arm in appropriate cases. *E.g*., *Brown v. City of Auror*a, W.C. No. 4-452-408 (October 9, 2002); *Heredia v. Marriott*, W.C. No. 4-508-205 (September 17, 2004). However, the mere presence of pain in a part of the body beyond the schedule does not automatically represent a functional impairment or require a whole person conversion. *Newton v. Broadcom, Inc*., W.C. No. 5-095-589-002 (July 8, 2021).

As found, Claimant proved he suffered functional impairment not listed on the schedule. The surgeries performed by Dr. Weinstein were directed to anatomical structures proximal to the “arm,” including a subacromial decompression with acromioplasty, bursal resection, and debridement of rotator cuff tendons. Although the anatomic location of the injury is not dispositive, it is a legitimate factor to consider when determining whether a claimant has a scheduled or whole person impairment. *See, e.g., Martinez v. Albertson’s LLC*, W.C. No. 4-692-947 (June 30, 2008) (“The [claimant’s] subacromial decompression was done at the acromion and the coracoacromial ligament in order to relieve the impingement, which is all related to the scapular structures above the level of the glenohumeral joint”). Additionally, Claimant credibly described intermittent pain in areas proximal to his arm such as his scapula, trapezius, and pectoral muscle. This pain affects his ability to engage in various activities related to his job. He also has difficulty with overhead reaching. Admittedly, Claimant has undergone several examinations that showed no proximal symptoms or abnormalities. Certainly, the absence of objective clinical findings on examination or documented in the longitudinal record are pertinent considerations when evaluating the veracity of a claimant’s testimony regarding pain and associated limitations. But Claimant was a credible witness and the ALJ credits his testimony. Notably, Claimant’s proximal symptoms are typically associated with physical activities but are not noticeable at rest. So it is not necessarily unexpected that such findings would fail to manifest on examinations in clinical settings. The preponderance of persuasive evidence shows Claimant has functional impairment in parts of his body beyond the arm at the shoulder.

B. Disfigurement

Section 8-42-108(1) provides that a claimant is entitled to additional compensation if she is “seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view.” As found, Claimant has observable disfigurement because of his admitted work injury. The ALJ concludes Claimant should be awarded $1,400 for disfigurement.

ORDER

It is therefore ordered that:

1. Respondent shall pay Claimant PPD benefits based on the DIME’s 5% whole person impairment rating. Respondent may take credit for any PPD benefits previously paid in this claim.

2. Respondent shall pay Claimant statutory interest of 8% per annum on all benefits not paid when due.

3. Respondent shall pay Claimant $1,400 for disfigurement.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ’s order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: November 10, 2021

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-092-210-002

ISSUES

The issues set for determination included:

- Did Claimant waive his right to contest his medical impairment rating by failing to endorse Region 4 or Region 1 on the DIME application and not paying the required DIME fee?
- Did Claimant prove by clear and convincing evidence that the DIME physician's impairment rating is incorrect?

PROCEDURAL HISTORY

The undersigned issued a Summary Order on August 27, 2021. Claimant requested a full order on September 9, 2021, which was received on September 13, 2021. This Order follows.

FINDINGS OF FACT

1. Claimant worked for Employer as a bus driver.

2. Claimant suffered an admitted industrial injury on November 5, 2018 while working for Employer. The injury occurred when he was assaulted by passengers who had been riding on the bus he was driving. Claimant was struck in the face, head and back.

3. On November 6, 2018, Claimant was evaluated by Brendan Matus, M.D. at Workwell, the ATP for Employer. In the initial evaluation, Claimant complained of a headache, stiffness in the neck, radiating back pain into his left shoulder, and a facial laceration.

4. Dr. Matus diagnosed: contusion of the other part of head; contusion of left back wall of thorax; sprain of ligaments of cervical spine; concussion without loss of consciousness; laceration without foreign body of lip; unspecified sprain of left shoulder joint. Dr. Matus noted Claimant showed mild symptoms of head injury and some early signs of emotional trauma. Dr. Matus opined Claimant did not meet the criteria for imaging.

5. Dr. Matus noted Claimant had continued symptoms in the follow-up appointment on November 12, 2018. The diagnoses remained the same and Dr. Matus referred Claimant for massage therapy and physical therapy ("PT"), as well as referring Claimant to Ronald Carbaugh, Psy.D. for PTSD.

6. Claimant received a total of seventeen (17) massage therapy treatments at Workwell and Medical Massage of the Rockies from November 14-December 26, 2018 and January 2-31, 2019 and April 11-July 18, 2019. This treatment included petrissage, myofascial release, NMT, kneading, skin rolling, efflourage and was applied to the head, neck an, shoulders, upper and lower back and pecs. He also received physical therapy (“PT“) at Workwell from November 16-December 14, 2018.

7. Claimant also treated with Dr. Carbaugh beginning on November 19, 2018 for psychological issues arising out of the injury. Dr. Carbaugh noted Claimant’s physical symptoms included: left arm pain; left-sided neck pain; headaches; numbness in his left band; mid back pain; and low back pain. Dr. Carbaugh said Claimant was anxious and frustrated during the interview. Dr. Carbaugh diagnosed Claimant as suffering an adjustment disorder with anxiety, which arose as a result of the workplace assault. Dr. Carbaugh opined Claimant would benefit from psychological intervention specifically as it related to the November 5, 20 18, assault. The goals of this intervention were to provide him with cognitive and behavioral strategies for anxiety management.

8. Claimant treated with Dr. Carbaugh, which included cognitive behavioral therapy. He met with Dr. Carbaugh on November 29, December 7, 14, 31, 2018,

9. Dr. Matus continued to oversee Claimant’s treatment, which included making referrals. Dr. Matus’ diagnoses remained: contusion of the other part of head; contusion of left back wall of thorax; sprain of ligaments of cervical spine; concussion without loss of consciousness; laceration without foreign body of lip; unspecified sprain of left shoulder joint. He released Claimant to return to work from a physical standpoint on January 16, 2019. Claimant remained on restrictions of no commercial vehicle driving due to his psychological care.

10. Claimant also received chiropractic treatment from Robert Sundquist, D.C. Dr. Sundquist diagnosed Claimant with contusions and sprains to his head, thorax, cervical spine, and left shoulder joint. Claimant’s treatment included sixteen (16) sessions of chiropractic adjustments and manipulation of the cervical and thoracic spine, as well as TENS unit therapy.

11. Claimant returned to Dr. Carbaugh on January 11, 18, February 7, 18, March 8, 27, 2019. As of this last appointment, Claimant was scheduled for a follow-up with Dr. Carbaugh.

12. Dr. Matus concluded Claimant could return to regular duty for a trial period on April 23, 2019, while noting he was still seeing Dr. Carbaugh, receiving massage therapy and was scheduled for chiropractic treatment.

13. Dr. Matus concluded Claimant reached MMI on May 10, 2019 and determined Claimant suffered no permanent medical impairment as a result of the work injury. Dr. Matus ordered maintenance care that included massage therapy, psychological counseling and chiropractic care.

14. On June 4, 2019, Claimant filed a timely Notice and Proposal and Application for a Division Independent Medical Examination ("Notice and Proposal"). This form was the form adopted by DOWC. The Notice and Proposal specified (on page 2) that the DIME physician will consider the issues of MMI, permanent impairment and apportionment [section a)], as well as the following:

> "b) Check specific Region(s) and part(s) of the body and/or conditions to be evaluated. The report will be deemed incomplete unless all of the checked areas are addressed".[1]

15. Claimant checked the following regions and parts of the body to be evaluated:

> "Region 3-psychological; Region five: ear, nose and throat (ENT)–face".

16. No other specific regions and parts of the body and/or conditions were checked. More particularly, Claimant did not endorse Region 4: Spine or Region 1: Upper Extremity. The ALJ inferred Claimant's choice not to endorse Regions 1 and 4 was volitional.

17. Claimant's failure to endorse Regions 1 and 4 and pay the required fee for additional parts of his body constituted a waiver.

18. On September 23, 2019, Claimant was evaluated by Khoi Pham, M.D. for the DIME. At that time, Claimant reported neck, left shoulder pain, as well as left arm numbness and weakness. Claimant also advised Dr. Pham that he expected those areas of the body to be evaluated.

19. Dr. Pham confirmed Claimant was at MMI, was released by Dr. Carbaugh and had returned to work satisfactorily. Dr. Pham concluded Claimant sustained a 5% psychological impairment and utilized the worksheet for permanent mental impairment, as required by the W.C.R.P. Dr. Pham found no impairment for Claimant's ENT (face). The ALJ found Dr. Pham's evaluation comported with the request made by Claimant.

20. There was no evidence in the record which established that Dr. Pham's impairment rating was erroneous.

21. A Final Admission of Liability ("FAL") was filed on behalf of Respondent on October 15, 2019 based upon Dr. Pham's rating.

22. Claimant did not introduce evidence that Dr. Pham's conclusions at the DIME were more probably wrong.

23. The DOWC adopted rules to govern Independent Medical Examinations. W.C.R.P. Rule 11 was changed in 2019. DOWC had the authority to adopt these

[1] Exhibit B, p. 20.

rules. Rule 11 provides in pertinent part:

> "11-5 PAYMENTS/FEES
>
> (A) The DIME fee will be determined based upon the length of time elapsed between the date of injury and the filing of the notice and proposal as well as body regions identified on the DIME application in accordance with the following schedule:
>
> (1) Less than two years after the date of injury and/or less than three body regions: $1,000;
>
> (2) Two or more years but less than five years after the date of injury and/or three or four body regions: $1,400;
>
> (3) Five or more years after the date of injury and/or five or more body regions: $2,000."

24. The Director of DOWC has authority to promulgate rules governing the DIME process. The DOWC had statutory authority to modify and adopt an amended Rule 11 in 2019. There was no evidence in the record that DOWC failed to follow its procedures when adopting the amended rule.

25. Claimant did not introduce any evidence to suggest that the adoption of the amended rule ran counter to any regulation or legal standard.

26. On June 10, 2020, Claimant was evaluated by Carlos Cebrian, M.D., at the request of Respondent. At that time, Claimant complained of headaches, left arm numbness, pain in his left side and back pain. On examination, Dr. Cebrian found no spasms, trigger points or atrophy in Claimant's cervical spine. Full range of motion ("ROM") was present with flexion of 60°, extension of 75°, right lateral flexion of 45°, left lateral flexion of 45°, rotation of 80° and left rotation of 80°.

27. Claimant's left shoulder was diffusely tender to palpation, but no spasms, trigger points or atrophy was present. ROM testing showed flexion of 180°, extension of 50°, abduction of 180°, abduction of 50° internal rotation of 90° and external rotation of it 90°. no impingement was present. The examination of the right shoulder revealed identical ROM measurements. On examination, Claimant's thoracic and lumbar spine had no spasms, trigger points or atrophy.

28. Dr. Cebrian's assessment was: adjustment disorder with anxiety; multiple contusions/strains of the left shoulder, cervical spine and thoracic spine; contusions of the scalp.

29. Dr. Cebrian agreed with the finding that Claimant reached MMI as of May 10, 2019. Dr. Cebrian opined that there was no objective basis to assign a permanent

impairment for physical injuries. He noted Claimant's widespread discomfort did not lead to the conclusion that there was a permanent medical impairment pursuant to the AMA Guides to the Evaluation of Permanent Impairment (Third edition revised) [”AMA Guides”]. More particularly, Dr. Cebrian stated Claimant did not have a disorder of the cervical, thoracic or lumbar spine that would warrant a Table 53 diagnosis. Claimant had myofacial pain. In addition, there was no permanent impairment of the left shoulder. Dr. Cebrian concluded Dr. Pham did not make any errors when he rated Claimant's mental impairment at 5%. Dr. Cebrian found that the impairment rating for Claimant’s mental impairment was appropriate. Dr. Cebrian’s opinion was credible.

30. The ALJ found Dr. Cebrian’s opinions supported Dr. Pham’s conclusions regarding Claimant’s medical impairment.

31. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers’ Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Waiver

As determined in Findings of Fact 2-6, Claimant suffered an admitted industrial injury and receive treatment that was overseen by his ATP, Dr. Matus. That treatment included care for his physical and psychological conditions. *Id.* Dr. Matus concluded

Claimant reached MMI on May 10, 2019 and determined Claimant suffered no permanent medical impairment as a result of the work injury. (Finding of Fact 13).

Claimant then requested a DIME and utilized the notice and proposal form prescribed by the Colorado division of Worker's Compensation. (Finding of Fact 14). This form was adopted by the DOWC and Rule 11, which governs DOWC Independent Medical Examinations was amended in 2019. (Findings of Fact 14, 23). Claimant checked the following regions and parts of the body to be evaluated: "Region 3-psychological; Region five: ear, nose and throat (ENT)–face". Claimant chose no other regions of his body to be evaluated. *Id.* Specifically, Claimant did not endorse Region 4: Spine or Region 1: Upper Extremity. (Findings of Fact 15-16).

Based upon the evidence presented at hearing, the ALJ concluded Claimant waived his right to have the body areas in Region 4 and Region 1 evaluated. (Finding of Fact 17). Claimant, of his own volition, selected the areas of his body he was requesting the DIME physician to examine. Waiver is the intentional relinquishment of a known right. *Ross v. Republic In. Co.*, 134 P.3d 505, 510 (Colo. App. 2006). Waiver may be express, as when a party states its intent to abandon an existing right, or may be implied, as when a party engages in conduct that manifests its intent to relinquish the right or that is inconsistent with its assertion. *Leprino Foods Co. v. Indus. Claim Appeals Office*, 134 P.3d 475, 479 (Colo. App. 2005); *In re Marriage of Robbins*, 8 P.3d 625 (Colo. App. 2000). As found, Claimant's waiver occurred when he did not select Region 4: Spine or Region 1: Upper Extremity as areas for the DIME physician to evaluate and did not pay the required fee. Claimant waived his substantive right to an examination by the DIME physician by not requesting an evaluation of those areas of the body.

When coming to this conclusion, the ALJ considered Claimant's argument that he was not required to check the box for every potentially related condition. Claimant also asserted Rule 11-5 conflicted with the substantive right to a workers' compensation DIME and ran counter to the substantive rights afforded under the Act, which established the DIME process. The ALJ found DOWC was within its statutory authority to adopt, as well as modify the rules governing DIME-s. (Findings of Fact 23-24). The authority to adopt and modify regulations specifically in regards to the DIME process was upheld in *Lobato v. Industrial Claim Appeals Office,* 105 P.3d 220, 227 (Colo. 2005), in which the Court noted the Division and the Director "have consistently taken administrative steps to implement this legislative purpose" concerning DOWC IME-s. The ALJ reasoned the modification of WCRP Rule 11 was within the authority of Director to adopt reasonable and proper rules.

It follows that DOWC had the authority to promulgate the forms on which the request for DIME was based. Claimant offered no authority to rebut the conclusion that Rule 11-5 was adopted in the normal course of DOWC's function and this rule governed the DIME conducted in the case at bar. (Finding of Fact 24). In this regard, the ALJ concluded the Director/DOWC had the authority and responsibility to adopt regulations to administer the Act. *Id.* Colorado courts have consistently upheld this authority. *Cruz-Cesario v. Don Carlos Mexican Foods*, 122 P.3d 1078, 1081 (Colo. App. 2005). [Director of DOWC is an indispensable party to a challenge to WC rules “because the director is the very party charged with promulgating those rules and administering the Act.”] In *Cruz-Cesario v. Don Carlos Mexican Foods, supra*, the Court of Appeals cited *Pena v. Indus. Claim Appeals Office*, 117 P.3d 84 (Colo. App. 2004) and § 8-47-107, C.R.S. to affirm that the Director has the power to adopt reasonable rules and regulations to administer the Act.

The ALJ’s determination that Claimant waived his right resolves the question of whether Dr. Pham should be ordered to conduct a follow-up evaluation on additional parts of his body. Even assuming, *arguendo,* that Claimant did not waive his right when completing the Notice and Proposal, insufficient evidence was introduced to support the conclusion that Dr. Pham‘s opinions regarding Claimant’s impairment rating were more probably wrong.

Overcoming the DIME

Section 8-42-107(8)(c), C.R.S. provides that the DIME physician’s finding regarding impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician’s finding must produce evidence showing it is highly probable the DIME physician is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 414 (Colo. App. 1995). A fact or proposition has been proved by clear and convincing evidence if, considering all of the evidence, the trier-of-fact finds it to be highly probable and free from substantial doubt. *Metro Moving & Storage, supra.*

Claimant did not adduce sufficient evidence to meet his burden of proof to overcome Dr. Pham’s opinions by clear and convincing evidence. Claimant’s argument was premised on the fact that Dr. Pham did not evaluate all of the injured parts of his body and therefore was incomplete. However, the ALJ found Dr. Pham’s opinions were supported by Respondent’s expert and there was no evidence supporting the conclusion that Claimant was entitled to additional impairment admitted at hearing. (Findings of Fact 20, 30). Dr. Cebrian opined Claimant did not qualify for an impairment of his cervical, thoracic or lumbar spine pursuant to the AMA Guides. (Finding of Fact 29). The ALJ credited this opinion. Accordingly, there was insufficient evidence introduced to meet the clear and convincing evidentiary standard.

ORDER

It is therefore ordered:

1. Claimant’s request that Dr. Pham issue a supplemental opinion regarding the relatedness and impairment rating, if any, suffered by Claimant for cervical spine and arm conditions is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's Order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 22, 2021

STATE OF COLORADO

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-097-540-001

ISSUES

- Did Claimant prove by a preponderance of the evidence his claim should be reopened based on a change in condition?

- Did Claimant prove entitlement to TTD benefits from June 26, 2020 through January 31, 2021?

- Did Claimant prove a lumbar surgery performed by Dr. Roger Sung was reasonably necessary, causally related, and authorized treatment for his admitted work injury?

- Did Claimant prove treatment for his low back provided by and through Dr. Sandell's office after June 25 2020 was reasonably necessary and causally related to his admitted injury?

FINDINGS OF FACT

1. Claimant works for Employer as an installation and repair technician. The job is physically demanding and requires frequent heavy lifting and awkward postures.

2. Claimant suffered an admitted low back injury on January 12, 2019 while moving an appliance that was stuck to the floor.

3. Claimant was referred to Concentra, where he came under the care of Dr. Daniel Peterson. Claimant's initial symptoms were primarily localized to his low back, with no significant lower extremity symptoms or neurological findings. He was diagnosed with a lumbar strain and referred to physical therapy.

4. Claimant subsequently reported some radiation of pain to his left thigh, so Dr. Peterson ordered an MRI.

5. Claimant underwent a lumbar MRI on February 26, 2019 at Southwest Diagnostic Centers. It was interpreted as showing minimal soft-tissue edema around L4-5 and L5-S1, consistent with "strain." There was mild facet arthropathy at L4-5 and L5-S1, but no evidence of any foraminal or canal stenosis, or any disc-based pathology.

6. Claimant followed up with Dr. Peterson on March 5, 2019. Dr. Peterson noted the MRI was "normal." Claimant's primary problem continued to be low back pain, although he was having radiating pain to his thigh. Physical examination showed facet tenderness. Lower extremity strength and sensation were normal bilaterally, and straight leg raise testing was normal. Dr. Peterson referred Claimant for chiropractic treatment.

7. On May 21, 2019, Dr. Peterson referred Claimant to Dr. Timothy Sandell because PT and chiropractic were not helping. Claimant reported experiencing “numbness in L foot yesterday at end of a long day of standing.” Lower extremity neurological testing remained normal.

8. Claimant saw Dr. Sandell on June 17, 2019. He described left-sided low back pain and radiating pain into his legs. Lifting and sitting aggravated his back pain. Dr. Sandell noted the MRI report indicated only mild facet arthropathy with no evidence of neural foraminal or spinal canal stenosis. Claimant expressed reservations about the accuracy of the MRI because he did not believe Southwest Diagnostics obtained “clear enough imaging.” Physical examination suggested left sacroiliac joint dysfunction and facetogenic pain. Lower extremity strength and sensation were intact and straight leg raise test was negative bilaterally. Dr. Sandell opined, “In reviewing his current presentation, I was primarily concerned with pain emanating from the left SI joint or lower facet joints. His physical exam is more suggestive of SI joint involvement. Although he is experiencing some radicular symptoms, the MRI scan is relatively unremarkable and there is no suggestion of nerve root impingement or disc pathology.” Dr. Sandell recommended an SI joint injection.

9. Dr. Sandell performed a left SI joint injection on July 12, 2019.

10. Claimant followed up with Dr. Sandell’s PA-C, Jamie Case, on July 26, 2019. The SI injection had provided no benefit. Facet loading was positive at L4-5 and L5-S1. Ms. Case recommended facet injections, but Dr. Sandell later changed the recommendation to medial branch blocks at L4-5 and L5-S1.

11. Claimant had a good response to the medial branch blocks, and Dr. Sandell recommended rhizotomies.

12. Dr. Sandell performed left L4-5 and L5-S1 rhizotomies on September 25, 2019. The rhizotomies were very helpful, and provided excellent pain relief. He saw Dr. Peterson the next day and reported “the pain he was feeling is gone.”

13. On October 16, 2019, Dr. Peterson noted Claimant was feeling “much better. He has no pain with full ROM now.” Dr. Sandell had released him to follow up “prn.” Claimant was released to full duty, which he tolerated without difficulty.

14. Claimant was put at MMI on December 5, 2019 by Dr. Peterson. Claimant said his pain “seems to be getting worse again but only slightly. . . . He has nothing like he did before but occasionally bending over he gets a sharp jolt of pain.” Examination showed facet joint tenderness but no pain over the lumbar spine. The neurological examination was normal, including bilateral straight leg raise testing. Dr. Peterson opined Claimant may need additional rhizotomies in the future, and recommended 24 months of follow up with Dr. Sandell. He assigned a 15% whole person lumbar spine rating. Claimant was cleared to continue working with no restrictions.

15. Insurer filed a Final Admission of Liability dated January 13, 2020, admitting for Dr. Peterson’s rating. The admitted average weekly wage is $647.74,

which corresponds to a TTD rate of $431.83. The FAL also admitted for medical benefits after MMI Claimant did not object to the FAL and the claim closed (except for post-MMI medical benefits).

16. In early 2020, Claimant experienced recurrent low back pain, along with numbness in his bilateral buttocks and posterior thighs. The pain was so severe he had difficulty walking.

17. Claimant contacted Dr. Sandell's office in April 2020 and asked for repeat rhizotomies. Dr. Sandell's office requested authorization, and Insurer approved the procedure.

18. Dr. Sandell performed repeat L4-5 and L5-S1 rhizotomies on June 8, 2020.

19. Claimant followed up with Ms. Case on June 25, 2020. He described shooting pain across to the right side of his back and down both legs to his calves. Claimant stated "his right leg is unusable because of shooting pain down the back of his leg. Since Saturday, June 20, when he lies on his back both legs go numb." His symptoms were worse on the right side. Ms. Case stated, "this is a new description of pain and a new experience of pain for him. He denies having any specific traumatic or inciting event." There were new physical examination findings, including an antalgic gait favoring the right leg, and positive straight leg raise. Ms. Case opined,

> It appears he has lower extremity radicular pain without a specific inciting incident. I cannot attribute this directly to the current Workmen's Compensation claim that brought him here today following the radiofrequency rhizotomy. I am going to refer him out for a lumbar MRI as soon as possible. We will see him in follow-up after imaging under different insurance.

20. Ms. Case prescribed Tramadol and a Medrol Dosepak, and took Claimant off work.

21. Claimant testified Ms. Case advised him the treatment was "not going to be covered by workers' comp," and she would see him in follow-up under his health insurance. This testimony is corroborated by notations in Dr. Sandell's records beginning June 25 that showed Claimant's insurance as "UNITED HEALTH CARE." However, Dr. Sandell's office continued sending records to Insurer at least through Claimant's July 22, 2020 appointment.

22. Claimant believed his back problems were related to the work accident but he accepted Ms. Case's assessment because he has no medical expertise or training. He used his health insurance because he had been advised to proceed in that fashion by his treating doctor.

23. The lumbar MRI was performed on June 27, 2020 at PENRAD. It showed a large central-left paracentral L4-5 disc herniation at effacing the CSF spaces with

mass effect on the nerve roots. But it also showed lesser pathology at multiple levels, including: mild canal stenosis and moderate narrowing of the thecal sac at L2-3 and L3-4, moderate facet arthropathy at L3-4, and diffuse bulging and mild hypertrophy at L5-S1.

24. Claimant saw Ms. Case again on June 29, 2020 to review the MRI report. She compared it to the February 26, 2019 MRI report which "only revealed mild facet changes at L4-5 and L5-S1. There was no neural foraminal or central canal stenosis noted on that image." Ms. Case opined, "The disc degeneration at the L4-5 level noted on the recent MRI would not be related to his Workmen's Compensation claim because the February 2019 image revealed only mild changes that would not have anticipated to progress to the degeneration noted on the recent image."

25. Ms. Case recommended an L4-5 epidural steroid injection. Dr. Sandell's office initially requested authorization from Insurer, but shortly thereafter sent a fax stating "CANCEL THIS REQUEST PLEASE! SORRY."

26. After his appointment with Ms. Case on June 29, Claimant emailed Employer's "Leaves" department and explained,

> I was informed on follow-up from a work comp injury that I have some issues with my discs in my lower back. I have been sent to an emergency MRI and it was discovered I have 2 badly compressed discs. The doctor wants to do an operation but does not want me to work until after said operation. I have given a first copy of my return to work from the doctor for July 3rd to my office and now it is extended to July 10 at the earliest. I am going to drop this new paper off at my office today as well as attached to this email.

27. The next day, Claimant discussed his case with Barton Reese, Employer's Workers' Compensation Liability Coordinator. Mr. Reese made notes documenting the following:

> Called EE, EE said that the WC doc sent ee to get emergency MRI, ee said that nerve damage was from injury, but no one has said whether or not the disc is related/doc doesn't know if it's related. EE said to the L4-L5 area is compressed. EE said he filed all this under his own health insurance. EE said he was advised to notify leaves of his absence since he was off work, but leaves thought it was WC. EE said this was just a courtesy to make everyone aware of what was going on. Let EE know I would call him back.
>
> Called EE back – Let him know if he felt this was WC he would need to get with TPA Lori on all this, EE did not feel that this was WC, let EE know if that was the case I would let leaves no that this would be a personal leaves. EE said he just want to make sure everyone knew that he was off of work.

28. Claimant was put on unpaid leave effective June 26, 2020. Although Employer routinely offers modified duty to injured workers, it has no similar policy regarding nonwork-related leave. Employer did not offer Claimant modified duty because his leave was classified as related to a personal medical condition.

29. Dr. Sandell performed the ESI on July 6, 2020. It was not helpful. Dr. Sandell and/or Ms. Case referred Claimant to Dr. Roger Sung for a surgical evaluation.

30. Claimant tried to schedule an appointment with Dr. Sung, but Dr. Sung's office staff advised they could not see him under health insurance without documentation that the treatment was not being covered under his workers' compensation claim. Claimant called Ms. Singmaster on July 29, 2020 and asked her to provide the requested documentation. After the call, Ms. Singmaster faxed a letter to Dr. Sung's office stating, "[Claimant] has a workers' compensation claim with [Employer] for date of loss 1/12/19. [Claimant's] current treatment is not related to this injury and is not covered under this claim. Please bill his current treatment directly to his personal health insurance."

31. Claimant saw Dr. Sung on August 20, 2020. He explained his back injury improved after a rhizotomy in November 2019, but the pain recurred in March 2020. He had a second rhizotomy with no benefit. Claimant described bilateral leg pain, worse on the right. Dr. Sung reviewed the June 2020 MRI and noted severe stenosis and a central disc herniation at L4-5. He recommended an L4-5 decompression with microdiscectomy.

32. Claimant contacted Ms. Singmaster again on September 4, 2020 and requested a PPD lump sum so he would have funds for the co-payments and deductibles associated with the pending back surgery. Ms. Singmaster issued the lump sum shortly thereafter.

33. Dr. Sung performed an L4-5 decompression surgery on October 27, 2020.

34. On December 9, 2020, Dr. Sung stated he would continue to restrict Claimant from working "until the beginning of February to give him additional time to heal as his job is very physical."

35. Claimant steadily improved over the next few months. He returned to full-duty work on February 1, 2021.

36. Claimant retained counsel in March 2021 and filed a petition to reopen his claim on March 5, 2021. Respondents denied the petition on March 8, 2021.

37. On June 13, 2021, Claimant saw Dr. Robert Messenbaugh, an orthopedic surgeon, for an IME at Respondents' request. Dr. Messenbaugh discussed the history with Claimant in detail. Dr. Messenbaugh reviewed the February 26, 2019 MRI and noted "the exceedingly minimal findings." Claimant explained he distrusts MRIs from Southwest Diagnostic based on a prior bad experience relating to his shoulder. He previously had a shoulder MRI at Southwest Diagnostics that was read as normal. But a

later MRI at PENRAD showed significant pathology, for which he required surgery. Claimant believes the MRI machine at Southwest Diagnostics is outdated and produces inadequate images.

38. Dr. Messenbaugh noted the repeat rhizotomies in June 2020 "provided no improvement and in fact, in many ways seems to have made him worse." Dr. Messenbaugh reviewed the June 27, 2020 MRI from PENRAD and opined it was "exceedingly improbable" that Claimant developed "such extensive lumbar pathology" between February 2019 and June 27, 2020. The most probable explanation is that the February 2019 MRI was simply inaccurate. Dr. Messenbaugh diagnosed lumbar soft tissue myofascial strain and sprain, and aggravation of pre-existing lumbar degenerative disc disease and spinal stenosis. He disagreed with Ms. Case's causation assessment and opined "the treatment recommendations made by Dr. Sandell should be recognized as a continuation of [Claimant's] treatments for events originating on January 12, 2019, and not be considered as being a separate and unrelated issue." He also noted, "the best [Claimant] understood it, he was following the recommendations of physician's assistant, Jamie Case, in that he did see at her request, Dr. Sung, and at Dr. Sung's request he did have the lumbar surgical procedure." Dr. Messenbaugh opined Claimant did "exceedingly well" after surgery and reached MMI on February 1, 2020, when he returned to full-duty work.

39. Dr. Messenbaugh's analysis and conclusions are credible and more persuasive than the contrary causation assessment offered by Ms. Case.

40. Claimant's testimony was generally credible.

41. Claimant proved by a preponderance of the evidence his case should be reopened based on a change in condition. Claimant's injury-related condition worsened in 2020 and he required additional treatment, including surgery. Claimant was no longer at MMI when he was taken off work on June 25, 2020.

42. Claimant proved he suffered increased disability related to his worsened condition, which proximately caused a wage loss from June 26, 2020 through January 31, 2021.

43. Claimant proved the surgery performed by Dr. Sung was reasonably needed to cure and relieve the effects of his compensable injury.

44. Claimant proved Dr. Sung is authorized. He was referred to Dr. Sung by an authorized provider to treat a condition that has been found related to his admitted accident. The fact that Ms. Case was mistaken about the causal relationship and instructed Claimant to use his personal health insurance instead of his workers' compensation claim does not render Dr. Sung "unauthorized."

CONCLUSIONS OF LAW

A. This claim should be reopened based on a change in condition.

Section 8-43-303 allows an ALJ to reopen any award on the grounds of error, mistake, or a change in condition. The reopening statute reflects a "strong legislative policy" that the goal of achieving a fair and just result overrides the interests of litigants in obtaining final resolution of their dispute. *Padilla v. Industrial Commission*, 696 P.2d 273, 278 (Colo. 1985). The authority to reopen a claim is permissive, and whether to reopen a claim if the statutory criteria have been met is left to the ALJ's discretion. *Id*. The party requesting reopening bears the burden of proof. Section 8-43-304(4).

A "change in condition" refers either to a change in the condition of the original compensable injury, or a change in the claimant's physical or mental condition that can be causally related to the original injury. *Heinicke v. Industrial Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Chavez v. Industrial Commission,* 714 P.2d 1328 (Colo. App. 1985). If a claimant's condition is shown to have changed, the ALJ should consider whether the change represents the natural progression of the industrial injury, or results from an intervening cause. *Goble v. Sam's Wholesale Club*, W.C. No. 4-297-675 (May 3, 2001).

As found, Claimant proved his case should be reopened based on a change in condition. His condition clearly worsened and 2020, and the only difficult question is whether the worsening was causally related to the original injury. Dr. Messenbaugh's causation opinions are credible and persuasive. Ms. Case's contrary conclusion was predicated on the mistaken assumption that the February 2019 MRI was accurate. The ALJ gives greater weight to the opinions of an orthopedic surgeon over those of a physician's assistant regarding the interpretation and relative significance of the MRI results. The worsening of Claimant's condition reflected the natural progression of the underlying injury, without contribution from any nonindustrial factor.

B. Claimant is entitled to TTD benefits from June 26, 2020 through January 31, 2021.

A change in condition after MMI does not automatically entitle a claimant to additional TTD benefits, unless the worsened condition causes a "greater impact upon [the] claimant's temporary work capability." *City of Colorado Springs Disposal v. Industrial Claim Appeals Office*, 954 P.2d 677 (Colo. App. 1997). The dispositive question is whether the claimant proves "increased disability, as measured by [their] capacity to earn wages." *Friesz v. Wal-Mart Stores, Inc*., W.C. No. 4-823-944-01 (July 26, 2012).

Claimant proved his worsened condition caused greater impact on his work capacity and proximately caused a wage loss from June 26, 2020 through January 31, 2021. Claimant improved after the initial rhizotomies in 2019 and was appropriately placed at MMI in December 2019. He returned to physically demanding work without restrictions. By June 2020, his symptoms were severe enough to interfere with his ability to perform his regular job. He was appropriately taken off work on June 25, 2020 by Ms. Case, and remained off work until February 1, 2021 per Dr. Sung's recommendation. Claimant is entitled to TTD benefits from June 26, 2020 through January 31, 2021.

C. The surgery performed by Dr. Sung was reasonably needed and causally related to the work accident.

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Even if the respondents admit liability and pay for some treatment, they retain the right to dispute the reasonable necessity or relatedness of any other treatment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). Where the respondents dispute the claimant's entitlement to medical benefits, the claimant must prove the treatment is reasonably necessary and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

The existence of a pre-existing condition does not preclude a claim for medical benefits if an industrial injury aggravates, accelerates, or combines with the pre-existing condition to produce the need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). The ultimate question is whether the need for treatment was proximately caused by an industrial aggravation or merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

Claimant proved the October 27, 2020 surgery was reasonably needed and causally related to the work accident. Dr. Sung's reports are persuasive regarding the indications for surgery, including Claimant's progressive symptomology and the herniated disc at L4-5. Although Dr. Messenbaugh did not explicitly address reasonable necessity, the ALJ infers he agreed the surgery was appropriate. Claimant had a good outcome and returned to a demanding job within three months after surgery.

D. Dr. Sung is an authorized provider

Besides proving medical treatment was reasonably necessary and causally related, a claimant must prove the treatment was "authorized." "Authorization" refers to a physician's legal authority to treat the injury at the respondents' expense. *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997). A physician who treats a claimant on referral from an ATP in the "normal progression of authorized treatment" becomes authorized. *Bestway Concrete v. Industrial Claim Appeals Office*, 984 P.2d 680 (Colo. App. 1999); *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985).

Respondents argue that even if this claim is reopened, they are not liable for the L4-5 surgery because Dr. Sung was not authorized. Specifically, Respondents argue Claimant was referred to Dr. Sung "outside of the workers' compensation claim" when Ms. Case determined the condition was not injury-related. The ALJ disagrees with this argument, based on the holding in *Cabela v. Industrial Claim Appeals Office*, 198 P.3d 1277 (Colo. App. 2008). In *Cabela*, the Court of Appeals held that if an ATP determines a claimant's condition is not work-related and instructs the claimant to pursue treatment with personal physicians, the treatment will be deemed authorized if it is later determined the condition was compensable. The court held that "the risk of mistake by an ATP in concluding that an injury is noncompensable lies with the employer" rather than the claimant.

There is no question Dr. Sandell and Ms. Case are authorized providers. Dr. Sandell and/or Ms. Case referred Claimant to Dr. Sung for consideration of surgery. Although Ms. Case advised Claimant to proceed under his health insurance because she believed the condition was unrelated to the original injury, her mistaken impression about causation is not dispositive of the authorization issue. The persuasive evidence shows Claimant was referred to Dr. Sung by an authorized provider to treat a condition related to his admitted injury. Those facts are sufficient to render Dr. Sung "authorized."

E. Respondents are liable for treatment of Claimant's low back provided after June 25, 2020.

Respondents argue more broadly they are not liable for any care Claimant received after June 25, 2020 because they had "no notice" Claimant would seek to have the treatment covered under his claim. Respondents also raise an ancillary argument that none of Claimant's providers requested preauthorization for treatment after June 25, including the surgery. These arguments are unconvincing for several reasons. Claimant advised Employer of the new developments regarding his medical situation in June 2020, including the potential for "an operation." Insurer received copies of Dr. Sandell's records at least through the July 22, 2020 visit, which outlined the treatment being recommended. Claimant told Ms. Singmaster he had been referred to Dr. Sung for a surgical evaluation in July, before his initial appointment. He subsequently advised Ms. Singmaster of the pending surgery more than six weeks before the scheduled date. Respondents were privy to essentially the same information Claimant had during the period in question. Under the circumstances, it is difficult to imagine what more Claimant could have done to keep Respondents "in the loop."

Moreover, the fact that neither Dr. Sandell's office nor Dr. Sung's office requested preauthorization does not preclude Claimant from seeking to have the treatment covered at a hearing. *E.g., Garcia v. McDonalds Corp*., W.C. No. 4-862-853-01 (June 19, 2014). The Rule 16 prior authorization process provides a mechanism for providers to seek advance approval and guarantee their charges, but it imposes no substantive limitation on a claimant's entitlement to medical treatment that is otherwise reasonably needed and causally related to the work accident. *Id; see also Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990) ("when medical treatment results from a referral by an authorized treating physician, such treatment is considered part of the normal progression of authorized treatment and the express consent of the employer is not required.")

ORDER

It is therefore ordered that:

1. Claimant's request to reopen his claim is granted.

2. Insurer shall pay for the treatment provided by Dr. Roger Sung commencing August 20, 2020, including but not limited to, the cost associated with the October 27, 2020 lumbar surgery.

3. Insurer shall cover treatment provided by Dr. Sandell's office for Claimant's low back after June 25, 2020.

4. Insurer shall pay Claimant TTD benefits at the rate of $431.83 per week from June 26, 2020 through January 31, 2021.

5. Insurer shall pay statutory interest of 8% per annum on all benefits not paid when due.

6. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: September 22, 2021

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

The issues for determination involve Claimant's entitlement to medical benefits. The questions answered are:

I. Whether Claimant established, by a preponderance of the evidence, that an arthroscopic debridement of the left rotator cuff and labrum, with subacromial decompression and biceps tenodesis as recommended by Dr. Duffey is reasonable, necessary, and related to her June 12, 2020, industrial injury.

II. Whether Claimant established, by a preponderance of the evidence, that the referral to Dr. Hammers for a neurosurgical consultation concerning the lumbar spine is reasonable, necessary, and related to her June 12, 2020, industrial injury.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Drs. Finn and Duffey, the ALJ enters the following findings of fact:

1. On June 12, 2020, Claimant sustained injuries to her left shoulder and low back while down stocking pallets of fresh produce for Employer. Claimant explained that while breaking down pallets of lettuce, she lowered a box of produce from her head to her left shoulder and experienced a "pop" in her low back. Claimant testified that she felt an immediate "lightning bolt" like sensation down both legs. Claimant continued working for approximately another hour before requesting medical treatment. She selected UCHealth from the list of designated medical providers to treat her work injury.

2. Claimant proceeded to the UC Health Urgent Care Clinic where she was evaluated by Physician Assistant (PA) Jayme Eatough for complaints of back and left shoulder pain. Physical examination of the back revealed tenderness over the thoracic and lumbar spine and good, but painful range of motion of the back along with a slow stiff gait. Straight leg raise testing was negative and strength testing in the lower extremities was equal bilaterally. Palpation of the left shoulder revealed tenderness about the joint. Claimant demonstrated full shoulder extension but limited flexion and abduction movements. X-rays of the thoracic and lumbar spine were obtained. Thoracic spine x-rays revealed proper height and alignment of the vertebral bodies. However, "[m]oderate diffuse multilevel hypertrophic changes" throughout the thoracic spine was present. There was no evidence of acute fracture or compression deformity noted. X-rays of the lumbar spine revealed, "[m]oderate L3-L4 to L5-S1 disc space narrowing" but no evidence of lumbar spine fracture. PA Eatough indicated that Claimant's history and examination supported a mechanism of injury consistent with causing a work-related injury to the left

shoulder and low back. (Respondents' Submissions, Bates# 006- 009). Dr. Elizabeth Bisgard excused Claimant from work until June 17, 2020. Id. at Bate# 019.

3. Claimant followed up at Urgent Care with Dr. Emily Burns on June 17, 2020. During this appointment, Claimant reported a history of injuring herself while lifting a crate, which caused a pop in her back followed by immediate symptoms down both legs. She told Dr. Burns that her left shoulder pain started with this as well. Claimant reported ongoing pain in the low and mid back that had not improved along with pain in the left shoulder that was somewhat improved since the initial incident. Physical exam revealed significant diffuse tenderness to palpation along the lumbar spine and limited range of motion with flexion when Claimant started to bend her knees. (Claimant's Submissions, Bates# 0054- 0058).

4. Claimant underwent MRIs of the thoracic and lumbar spine on June 17, 2020. Claimant's thoracic imaging was "abnormal", demonstrating a "left-sided disc protrusion with potential compression of the left T10 nerve root." Images of the lumbar spine revealed evidence of prior surgery directed to the L3-L4 and L4-S1 spinal segments without residual or recurrent stenosis present.[1] Images of the L2-L3 spinal segment revealed a "posterior central disc protrusion and mild facet arthropathy with mild left lateral recess and foraminal stenosis without nerve compression. (Claimant's Submissions, Bates# 000218-00219).

5. Claimant returned to Dr. Burns on June 19, 2020. She continued to report lower back pain and right thigh numbness in addition to left shoulder soreness. Physical exam revealed diffuse tenderness throughout the lumbar spine and tenderness over the right SI joint as well as limited flexion of the spine. Left shoulder range of motion was limited and there was tenderness to palpation directly over the acromion. (Claimant's Submissions, Bates# 0063- 0067)

6. Claimant was reevaluated by Dr. Burns on June 29, 2020. Her pain was not improved. During this encounter, Claimant told Dr. Burns that on June 20, 2020, while walking at work, her right leg went completely numb and she could not move it. Claimant also reported that her right heel was numb since this incident. Claimant stated her left shoulder was painful across the front of her arm and that she was having difficulty working three hours a day. (Claimant's Submissions, Bates# 0068- 0071)

7. On June 30, 2020, Claimant presented to Absolute Healthcare for an initial chiropractic consultation with Dr. Brian Polvi. Claimant reported no improvement. She documented an 8/10 pain level. Her pain diagram revealed pain in the left parascapular shoulder region and mid to lower thoracic and lumbar spine. She also described gluteal pain, left hand numbness and lightening both type pain extending down both legs into her

[1] Claimant has a history of prior injury to the cervical and lumbar spine. She suffered a broken neck in a car accident, which lead to a cervical fusion. Moreover, a prior injury to the low back in 1994 resulted in a lumbar fusion from L5-S1 with subsequent extension of the fusion to include L3-L4 and ultimately removal of the fusion hardware.

feet and toes. Claimant participated in chiropractic care with no change in her pain levels until August 3, 2020, when she reported 4/10 pain instead of 8/10. (Claimant’s Submissions, Bates# 000223-000228; 000236-000261)

8. On July 13, 2020, Dr. Burns documented that while Claimant had improved with chiropractic care, she was still experiencing achiness and restricted motion with weakness in the left arm. Claimant described having to pick up her left arm to move it, particularly when she was laying down. Physical exam of left shoulder revealed tenderness about the entire shoulder. Dr. Burns noted Claimant was concerned about a rotator cuff injury in the left shoulder. Claimant also reported being tender to palpation of the lumbar spine but this had improved from previous appointments. Physical examination revealed a diminished right ankle reflex when compared to the left. (Claimant's Submissions, Bates# 0073- 0077)

9. Claimant underwent left shoulder imaging on July 20, 2020. The MRI from this date revealed mild tendinosis of the supraspinatus and infraspinatus without evidence of partial or full-thickness tearing, tendinosis of the intra-articular portion of the long biceps without evidence of partial or full- thickness tearing, and mild degenerative fraying of the anterior superior labrum without evidence of tear. (Claimant’s Submissions, Bates# 000220-000221)

10. Claimant participated in physical therapy (PT) for her left shoulder from July 22, 2020, to August 17, 2020. During her initial PT visit, Claimant reported tenderness to palpation of her left supraspinatus/infraspinatus, teres minor, and left deltoid joint. Claimant described having significant difficulties with her activities of daily living due to left shoulder symptoms, including severe pain and tingling. During her July 22, 2020, PT session, Claimant reported improvement of her left shoulder symptoms after working on range of motion in the pool. On August 13, 2020, Claimant reported improvement of her back symptoms but her shoulder was still tender, although improving. Claimant was discharged from PT on August 17, 2020. At that time, she reported mild difficulty with the performance of heavy household chores, carrying shopping bags, washing her back, and recreational activities. Her left shoulder pain was described as mild, and her activities of daily living were slightly limited due to her left shoulder pain. The PT note from her last visit indicates that Claimant was progressing well with exhibited improvement in functional strength and range of motion. Her pain was level was described as a 2 out of 10. (Claimant's Submissions, Bates# 81-84; 94-95; 98-99; 104-105; 107-108; 111-113).

11. Claimant returned to Dr. Burns on July 28, 2020, reporting that she was doing “okay.” She described a slight return of symptoms, including tingling in her right upper foot. Claimant reported she was doing her home exercises. She indicated that work was going okay. Regardless, she indicated that she could not vacuum and that her shoulder hurt badly after four hours of work. (Claimant's Submissions, Bates# 0088-0090)

12. Claimant followed-up with Dr. Burns on August 18, 2020. She reported significant improvement and asked to return to work full duty. She also indicated that she

was participating in pool therapy and exercises on her own. (Claimant's Submissions, Bates# 000117-000128)

13. When Claimant returned to Dr. Burns on August 24, 2020, she had almost no low back or left shoulder pain or symptoms. She requested a release to lift up to 50 pounds in order to return to full duty work. (Claimant's Submissions, Bates# 000129-000136).

14. On September 16, 2020, Claimant returned to Dr. Burns for a follow-up appointment. At this visit, Claimant reported that she was tolerating full duty but asked for injections directed to the areas of her remaining symptoms. (Claimant's Submissions, Bates# 000138-000139)

15. On September 29, 2020, Claimant underwent an injection of Betamethasone and Marcaine into the biceps sheath and subacromial space performed by Dr. James Duffey at the UCHealth Orthopedics Clinic. Dr. Duffey commented on Claimant's previously obtained imaging as follows: "Radiology studies independently visualized and are pertinent for MRIs reviewed. Tendons of the rotator cuff and biceps have evidence of tendinosis but without significant tear. No glenohumeral arthritis or other degenerative change. (Claimant's Submissions, Bates# 000144-000145)

16. On October 8, 2020, Claimant underwent an initial consultation with Dr. Kenneth Finn at Springs Rehabilitation for consultation regarding injection therapy directed to the low back. During this encounter, Claimant reported 3/10 back pain. She also noted that sitting, standing, walking, driving, household activities, work activities, static positioning, transitional movements, and activities that involve too much movement of her lumbar spine aggravated her back causing leg pain. Dr. Finn recommended a L2-L3 steroid injection, which Claimant underwent on November 3, 2020. (Claimant's Submissions, Bates# 000286-000290)

17. Claimant returned to Dr. Burns on October 14, 2020. She reported relief in her shoulder after September 29, 2020 injection. Claimant would remain at full duty work status until January 6, 2021, when she reported increased burning in her anterior thighs and left shoulder. (Claimant's Submissions, Bates# 000148-000151; 000160; 000175-000179)

18. Claimant followed-up with Sonja Griffith, physician assistant to Dr. Finn on November 17, 2020 to discuss the results of her November 3, 2020 injection. Claimant described improvement in her right anterior thigh burning/pain from level 5-7/10 to 1-2/10 for about three days after the injection. Her pain then "abruptly" returned to its higher levels. Claimant described using a Lidocaine patch and 200 mg. of Gabapentin daily. She also reported that prolonged walking resulted in right foot numbness. Additional transforaminal epidural steroid injections at L2-L3 were suggested. (Claimant's Submissions, Bates# 000289-000293).

19. On December 15, 2020, Dr. Duffey evaluated the Claimant and offered left shoulder arthroscopy, with arthroscopic debridement of rotator cuff and labrum, with subacromial decompression and biceps tenodesis. (Respondents' Submissions, Bates# 145). Respondents have denied the request for authorization to proceed contending that the recommended surgery is not reasonable, necessary or related to Claimant's June 12, 2020 work injury.

20. On December 16, 2020, Dr. Finn performed an L2-L3 transforaminal injection, which only afforded Claimant short-term pain relief. Accordingly, during a January 5, 2021 follow-up appointment, Dr. Finn opined he had nothing further to offer Claimant and referred her to neurosurgeon, Dr. Ronald Hammers for a surgical consultation. (Claimant's Submissions, Bates# 000295-000297). Authorization to proceed with the consultation has been denied for the same reasons that surgery for the left shoulder was denied, i.e. that the need for a neurosurgical consultation is not reasonable, necessary or related to Claimant's June 12, 2020 work injury.

21. Claimant attended an appointment with Dr. Polvi on December 28, 2020. During this visit, Claimant reported 8/10 pain with constant radiation into the left upper extremity and low back down both legs. (Claimant's Submissions, Bates# 000267-000268)

22. On January 26, 2021, Claimant had a follow up appointment with Dr. Burns. During this appointment, Claimant reported burning in her right leg after stopping Gabapentin. She also described continued difficulty with overhead reaching with her left arm/shoulder. Dr. Burns imposed restrictions including limited bending and no pushing or pulling of roller carts. (Claimant's Submissions, Bates# 000180-000184).

23. On January 29, 2021, Dr. Burns responded to a letter from Respondents seeking her opinions regarding Claimant's pre-injury baseline, maximum medical improvement (MMI) and future treatment needs. Dr. Burns opined that Claimant had not returned to her pre-injury baseline, was not at MMI and was waiting a neurosurgical evaluation to recommend additional treatment. (Respondents' Submissions, Bate# 090).

24. On February 9, 2021, Claimant underwent an examination with Dr. Wallace Larson to address the reasonableness, necessity and relatedness of Dr. Duffey's request for authorization to proceed with left shoulder surgery and Dr. Finn's referral to Dr. Hammers for neurosurgical evaluation. During this evaluation, Claimant reported tenderness in the entire thoracic and lumbar spine, as well as her buttocks, posterior hip and sacrum. Dr. Larson reviewed and compared records from Claimant's prior history of back pain to the records generated following her June 12, 2020 work injury. He also performed a physical examination. Following his records review and physical examination, Dr. Larson opined that Claimant had returned to baseline. As support for his opinion, Dr. Larson relied on the imaging studies, which he opined demonstrated no acute change/injury. Accordingly, Dr. Larson concluded that Claimant did not have "indications for surgical intervention to the lumbar spine or left shoulder." Citing a history of "chronic pain and multiple non-physiological findings on physical examination", Dr.

Larson opined that Claimant presented as a "likely" high risk for surgical failure. (Respondents' Submissions, Bates# 139-146).

25. Claimant's pain has persisted since her evaluation with Dr. Larson. On March 16, 2021, Claimant's restrictions were increased by Dr. Burns to no use of ladders, no overhead reaching, bending for only 1-2 hours per day, and no pushing or pulling of roller carts. Claimant's restrictions and pain levels remained largely the same until May 15, 2021 when Claimant was taken completely off work. (Claimant's Submissions, Bates# 000190-000192; 000198-000201; 000213).

26. On March 24, 2021, Claimant presented to Northgate Physical Therapy for a functional capacity evaluation (FCE). On her pain diagram, Claimant indicated she was having shooting pain in the back of her thighs, buttocks and in her mid-back. She was unable to tolerate stooping, crouching, kneeling, reaching overhead with her left arm, climbing stairs, lifting high, or pulling. She was able to perform lifting and pushing within the light category and carrying within the sedentary category. The FCE was determined to be valid. (Claimant's Submissions, Bates# 000305-000332).

Claimant's Testimony

27. Claimant testified that despite significant conservative care, including PT, chiropractic care, medications, home exercise and injection therapy she has continued to experience persistent low back and left shoulder pain. According to Claimant, she is still experiencing low back pain that radiates into both legs and groins, right greater than left. Claimant testified that due to low back pain she has numbness in her legs/feet, which makes it difficult to perform everyday activities such as driving. (Hrg. Tr. Pg. 11-15).

28. Claimant testified that she is currently experiencing a constant dull, achy, and sharp pain in the front and back of her left shoulder with limited range of motion. Claimant testified that she cannot lift her arm all the way up. She went on to explain that she has difficulty making her bed and washing/hanging clothes because of limited range of motion. Similarly, Claimant testified that she cannot style her hair because she cannot bring reach her arm all the way up to her head. Claimant testified that she can no longer go camping, fishing, four wheeling, motorcycle riding, or skiing due to on-going pain in her left shoulder and back.

29. Claimant testified that prior to her June 12, 2020 injury she was able to perform her job without difficulty and without assistance. (Hrg. Tr. Pg. 23-24). As noted above, Claimant is now restricted with respect to her physical capacity.

30. Claimant testified she had no issues with her left shoulder prior to her injury on June 12, 2020. (Hrg. Tr. Pg. 25, Lines 13-25).

31. Claimant testified that while she had a previous lumbar fusion related to a prior 1994 injury, she recovered from this injury without the need for continuing care following a

lumbar fusion. Claimant testified she was on pain medication (Tramadol) prior to June 12, 2020 for her knees and that this was to be used for the foreseeable future. (Hrg. Tr. Pg. 25-26). Based upon available record, including Dr. Larson's independent medical examination (IME) report, the ALJ finds Claimant's assertion that she did not need continuing care for her low back following her previous lumbar fusion unconvincing.

32. On cross-examination, Claimant testified that she did not remember seeking treatment for low back pain from 2015 through 2019. As noted, the available record contains references regarding Claimant having lumbago, sciatica and chronic pain and back issues related to a prior surgery. (Hrg. Tr. Pg. 34 Lines 12-25; See also, Respondents' Submissions, Bates# 142). Nonetheless, there is a dearth of evidence to suggest that Claimant's low back was symptomatic or disabling in the weeks and months before her June 12, 2020 work injury.

The Testimony of Dr. Larson

33. Dr. Wallace Larson testified in accordance with his report. He testified that Claimant had undergone a previous L3-S1 fusion, but was unsure whether that occurred as part of one procedure or two. He also testified that Claimant's reported symptoms in the legs and feet were inconsistent with an L2-L3 disc protrusion or L3 nerve compression as reported by Dr. Finn. He said this was because the pain associated with pathology at these spinal segments would be isolated to the anterior and lateral portion of the thigh rather than the back of the legs and feet. He also testified that a disc protrusion is a common asymptomatic finding in people of Claimant's age and that nothing on Claimant's MRI, including the disc protrusion at L2-L3 supports that she suffered an acute injury. Rather, Dr. Larson testified that the changes noted on MR imaging are degenerative in nature and Claimant had returned to her baseline. According to Dr. Larson, it is highly likely that the L2-L3 disc protrusion on MRI was present before Claimant's June 12, 2020 industrial injury, suggesting that Claimant's current symptoms are related to the degenerative process in her lumbar spine.

34. Dr. Larson testified that the abnormalities present on Claimant's lumbar MRI do not demonstrate the accepted severity of abnormalities necessary for surgical intervention per the medical treatment guidelines, adding that Claimant has chronic pain syndrome and non-physiologic findings on examination making her a poor surgical candidate. (Hrg. Tr. Pg. 48; 49; 50; 52 Lines 8-22).

35. Regarding Claimant's shoulder pain, Dr. Larson testified that there was no evidence of a rotator cuff tear, and that bursitis is normal for someone of Claimant's age. He testified that there was no surgically correctable lesion in the shoulder according to Claimant's MRI reports. Nonetheless, Dr. Larson admitted that Claimant had no complaints related to her left shoulder prior to her June 12, 2020 work injury. (Hrg Tr. Pg. 65 Lines 16-23).

36. During cross-examination, Dr. Larson admitted that spinal fusions place more stress on the segments above and below the level of the fusion, which can lead to adjacent level disease potentially making the disc above the fusion more susceptible to injury. According to Dr. Larson adjacent level disease can occur with or without trauma and manifests variably in time. He also testified that he would expect that if the symptoms were coming from Claimant's L2-3 region, the injections given by Dr. Finn would have helped her symptoms. (Hrg. Tr. Pg. 75 Lines 22-25; 76 Lines 2-6; 77 Lines 9-12; 79 Lines 7-19).

37. Dr. Larson testified that he based his opinions concerning the degenerative nature of Claimant's L2-3 disc protrusion on what he knows physiologically and medically about degenerative disc changes. He testified that there were no MRIs taken prior to Claimant's work injury that were available for him to review and no objective findings for him to base this on. (Hrg. Tr. Pg. 91 Lines 4-10; 18-22). Nonetheless, he suggested that neither Dr. Finn nor Dr. Duffey explained why this case represented an exception to the accepted MTGs to justify providing either the left shoulder surgery or a neurosurgical evaluation of the lumbar spine.

The Deposition Testimony of Dr. Duffey

38. Dr. Duffey testified by deposition as an expert in orthopedic surgery. Dr. Duffey testified in accordance with his reports and medical records. He testified that he diagnosed Claimant with rotator cuff syndrome and biceps tendonitis. He testified that he believes both the rotator cuff syndrome and biceps tendonitis are more likely than not related to Claimant's work injury of June 12, 2020, and that her current symptoms are consistent with Claimant's described mechanism of injury. (Duffey Depo. Tr. Pg. 14, Lines 3-5; 15, Line 2; Pg. 16, Lines 21-24).

39. Dr. Duffey testified that he considered an arthroscopic debridement to be reasonable and necessary as a result of the injury from June 12, 2020 because of "persistent and consistent" complaints for six months following Claimant's acute injury. He testified that he was not aware of any previous history of pain or problems in the left shoulder. Dr. Duffey testified that he disagreed with Dr. Larson's statement that Claimant had returned to baseline, explaining that there was no reference to pre-existing left shoulder pain in the medical record establishing a baseline upon which she could return. He testified that that her shoulder pain was, more probably than not, unrelated to her prior cervical fusion. According to Dr. Duffey, Claimant has an acute shoulder injury that indicates arthroscopic surgery. He testified that Claimant did not complain of diffuse tenderness while he was examining her. He testified that he was confident surgery would improve the state of Claimant's left shoulder. (Duffey Depo. Tr. Pg. 17 Lines 6-20; Pg. 18 Lines 11-24; Pg. 19 Lines 3-23; Pg. 20 Lines 4-25; Pg. 22 Lines 1-22).

40. On cross-examination, Dr. Duffey testified that his scope of treatment only included Claimant's left shoulder. He testified that even though Claimant began to report less pain in her left shoulder due to at-home physical therapy, the results of such therapy

cannot be measured day-to-day. He testified that Claimant did not report overall improvement of her left shoulder pain to him directly. He also maintained that Claimant did not demonstrate overall improvement with respect to the shoulder as she was still reporting significant pain during her recent visits. Dr. Duffey went on to testify that Claimant's increased work restrictions did not necessarily support a conclusion that her shoulder condition was improving because a workers' compensation doctor would be likely to increase restrictions, and Claimant's desire to return to full duty work may have been in part to demonstrate that she was not malingering. (Duffey Depo. Tr. Pg. 25 Lines 24-25; Pg. 26 Line 1; Pg. 29 Lines 16-25; Pg. 31).

41. On re-direct, Dr. Duffey testified that pain fluctuates, and it is not uncommon for a patient's pain levels to wax and wane. He further testified that while improvement of function is important per the Medical Treatment Guidelines, often his goal when deciding to perform surgery is to reduce pain.

Dr. Finn's Deposition Testimony

42. Dr. Kenneth Finn testified by deposition as an expert in Physical medicine and Rehabilitation (PM&R) in addition to pain management. He testified that a surgical consultation with Dr. Hammers would be reasonable and necessary, as there was no further treatment he could offer Claimant to relieve her symptoms. He testified that he referred Claimant to Dr. Ronald Hammers for a surgical consult due to failure of conservative care and lack of sustained improvement from injections. He explained that he considered the referral to Dr. Hammers to be reasonable, necessary and related to Claimant's work injury because of the mechanism of her injury and lack of records indicating any ongoing treatment after her spinal fusion. He testified that more likely than not, Claimant's lumbar injury and symptoms are a result of her June 12, 2020, injury. He also testified that Claimant's current symptoms were consistent with her mechanism of her injury. (Finn Depo. Tr. Pg. 12, Lines 15-24; Pg. 16 Lines 1-25; 17 Lines 21-25).

43. Dr. Finn testified that Claimant's prior L3-S1 fusion might have placed more stress at the L2-L3 level above the fusion leading to transitional segment disease causing the L2-L3 level to become weaker. He disagreed with Dr. Larson's opinion that Claimant had returned to baseline. He testified that the injections he administered served as a diagnostic tool in that Claimant's response to the injection demonstrated potential issues with the L2-L3 disc and surrounding nerves. He opined that the results of Claimant's physical examination was consistent with having a L2-3-disc protrusion. He testified that Claimant has reflex asymmetry, which supported pathology at the L3 level. Dr. Finn testified that it is not probable that Claimant would have developed adjacent segment syndrome absent her work injury. (Finn Depo Tr. Pg. 14, Lines 13-21; Pg. 18, Lines 14-17; 19 Lines 1-10; Pg. 22 Lines 1-4Pg. 27 Lines 8-12).

44. Dr. Finn testified that Claimant's prior spinal fusion, her symptoms and physical examination findings that correlating to "structural testing, along with her failure to improve

with conservative care, prompted his decision to make the referral to Dr. Hammers. Per Dr. Finn, the referral was reasonable and necessary. (Finn Depo, Tr. Pg. 17, Lines 8-20).

45. Dr. Finn testified that there was nothing about the previous treatment directed to Claimant's low back that made him hesitant to say that the current symptoms she is experiencing are related to anything but her work injury. (Finn Depo. Tr. Pg. 48).

46. Based upon the evidence presented as a whole, the ALJ finds the testimony and opinions of Drs. Duffey and Finn credible and more persuasive than the contrary opinions of Dr. Larson. The ALJ credits the testimony of Dr. Duffey and Dr. Finn to find that Claimant has established, by a preponderance of the evidence, that the surgery requested by Dr. Duffey, and the referral to Dr. Hammers as requested by Dr. Finn, is reasonably necessary medical treatment, related to the June 12, 2020, accident.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent, expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); see also, *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary opinion).

D. When considered in its totality, the ALJ concludes that the evidence in this case supports a reasonable inference/conclusion that Claimant's current left shoulder and low back pain complaints represent a continuation of the pain she has experienced since her June 12, 2020 work injury. Moreover, the evidence presented supports a conclusion that the recommended left shoulder surgery and low back neurosurgical consultation are reasonable and necessary treatment designed to cure and relieve Claimant from the ongoing effects of her June 12, 2020 industrial injury.

The Arthroscopic Left Shoulder Surgery Recommended by Dr. Duffey

E. Once a claimant has established the compensable nature of his/her work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable, necessary, and related medical care to cure and relieve the effects of the work injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). However, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949); *Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970)*;* § 8-41-301(1)(c), C.R.S. Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those that flow proximately and naturally therefrom. *Standard Metals Corp. v. Ball*, *supra*. In this case, Claimant has been consistent in reporting that she has never had treatment directed to the left shoulder and the available medical record supports her account. Here, the ALJ credits this testimony and the testimony of Dr. Duffey that Claimant's left shoulder symptomatology appeared unrelated to any prior neck problems as her pain was isolated to the left shoulder on examination to find and conclude that Claimant's need for additional left shoulder treatment, including the proposed arthroscopic surgery is causally related to her June 12, 2020 industrial accident. Nonetheless, Claimant must also establish that the recommended treatment, i.e. Dr. Duffey's requested surgery is reasonable and necessary before Respondents will be held liable to provide and pay for it.

F. The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact for determination by the ALJ. *City & County of Denver v. Industrial Commission*, 682 P.2d 513 (Colo. App. 1984). In this case, Dr. Duffey opined that Claimant is experiencing rotator cuff syndrome and biceps tendinitis in her left shoulder. The evidence presented, including Claimant's testimony that she has experienced functional decline due to persistent pain, weakness and impaired range of motion, supports these medical diagnosis and Dr. Duffey's opinion that the surgery he is recommending is reasonable and necessary. While Dr. Duffey testified that often his main goal when performing surgery is to reduce pain, the ALJ is convinced that improving Claimant's left shoulder pain will likely improve her function. Indeed, the medical record supports that as Claimant's pain temporarily improved with conservative care during which time she enjoyed a greater level of functional independence.

G. The MTG's enumerated at WCRP, Rule 17 are regarded as the accepted professional standards for care under the Workers' Compensation Act. *Hernandez v. University of Colorado Hospital*, W.C. No. 4-714-372 (January 11, 2008); see also *Rook V. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). WCRP Rule 17-2(A) provides: All health care providers shall use the Medical Treatment Guidelines adopted by the Division. In spite of this direction, it is generally acknowledged that the Guidelines are not sacrosanct and may be deviated from under appropriate circumstances. *See*, Section 8-43-201(3) (C.R.S. 2014); *Nunn v. United Airlines,* W.C. 4-785-790 (ICAO September 9, 2011). Nonetheless, they carry substantial weight as accepted guidance in the assessment/treatment of shoulder injuries.

H. Concerning the recommendation for left shoulder surgery, the MTG's, specifically, Rule 17, Exhibit 4 provides that surgical intervention of the shoulder "should be contemplated within the context of expected functional outcome and not purely for the purpose of pain relief." WCRP, Rule 17, Exhibit 4. Moreover, Exhibit 4 provides that the concept of "cure" with respect to surgical treatment by itself is generally a misnomer. Consequently, "[a]ll operative interventions must be based upon positive correlation of clinical findings, clinical course, and diagnostic tests. A comprehensive assimilation of these factors must lead to a specific diagnosis with positive identification of pathologic conditions. Based upon the evidence presented, the ALJ is convinced that Claimant has met the diagnostic criteria for consideration of shoulder surgery for conditions categorized as Rotator Cuff Syndrome/Impingement Syndrome and other Associated Shoulder Tendinopathies pursuant to WCRP, Rule 17, Exhibit 4.E.9. Indeed, physical examination and testing supports a conclusion that Claimant meets several of the indications for surgical intervention, including: positive impingement testing (Hawkins) a positive Yergason's test and painful range of motion in the abduction arc between 60 and 110 degrees. See, WCRP, Rule 17, Exhibit 4.E.9.c.i-ix. Moreover, the MTG's indicate that '[w]hen functional deficits interfere with activities of daily living and/or job duties after 3 to 6 months of active patient participation in an appropriate shoulder rehabilitation program, surgery may restore functional anatomy and reduce the potential for repeated impingement. Based upon the evidence presented, there is little doubt that Claimant has failed extensive conservative care. Moreover, Claimant continues to suffer from functional deficits, which are interfering with her ability to carry out her activities of daily living and the demands of her occupation.

I. In this case the ALJ resolves the conflicts in the evidence regarding whether the arthroscopic surgery recommended by Dr. Duffey is reasonable and necessary in favor of Claimant. Based upon the evidence presented as a whole, the ALJ is convinced that the proposed surgery has been contemplated within the context of improving Claimant's functional status by decreasing her ongoing pain. The contrary opinions expressed by Dr. Larson, while sincere, are simply unpersuasive. Accordingly, the ALJ concludes that the proposed left shoulder surgery represents reasonable and necessary treatment to cure and relieve Claimant of the ongoing effects of her June 12, 2020 industrial injury.

Dr. Finn's Referral to Dr. Hammers

J. It is well settled that a pre-existing condition "does not disqualify a claimant from receiving worker's compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). To the contrary, a claimant may be compensated if his or her employment "aggravates, accelerates, or "combines with" a pre-existing infirmity or disease "to produce the disability and/or the need for treatment for which workers' compensation is sought". *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment–related activities and not the underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940). As found, the persuasive evidence demonstrates that Claimant sought treatment for low back pain after engaging in a specific activity, i.e. lifting, and lowering boxes of fresh produce while down stocking pallets for Employer on June 12, 2020. Based upon the evidence presented, the ALJ finds/concludes that the activity in question likely placed Claimant's diseased back in a compromised position aggravating a pre-existing condition caused by her prior injury and subsequent fusion to give rise to her symptoms and need for treatment. Although Claimant has significant pre-existing degenerative changes in the low back, confirmed by MRI, the ALJ finds no persuasive evidence to establish that Claimant's low back was symptomatic or disabling immediately prior to June 12, 2020. Respondents' suggestion, as promoted by Dr. Larson that all of Claimant's low back symptoms can be explained on the basis that she had multiple non-physiologic findings on his physical examination is unpersuasive given the findings on MR imaging of the thoracic and lumbar spine. As noted by Dr. Finn, it is possible that Claimant's prior three-level fusion lead to adjacent segment syndrome, which subsequently weakened the L2-L3 spinal segment causing the protrusion, noted on MRI. While it is clear that Claimant remains symptomatic and that Dr. Finn has no further to treatment to offer in an effort to cure and relieve her persistent back pain, questions remain as to the origin of Claimant's intransigent pain. Indeed, Claimant's pain may be emanating from an injury to the L2-L3 disc caused by her work duties on June 12, 2020 or her symptoms may represent the natural and probable progression of her pre-existing degenerative changes caused by her prior injury and lumbar fusion.

K. Based upon the evidence presented, the ALJ finds/concludes that the potential low back pain generators have not been adequately defined and treated in this case as required by the MTG's. The ALJ concludes that a referral to a spinal surgeon, such as Dr. Hammers, with the expertise to identify Claimant's pain generator(s) is reasonable and necessary to adequately/effectively treat Claimant's ongoing low back pain. Although low back surgery has not been recommended to date, any recommendation for surgery shall be contemplated in accordance with the criteria set forth in WCRP, Rule 17, Exhibit 1 of the MTG's.

L. Rule 17, Exhibit 1.G.4.e provides that the following pre-surgical indicators be considered before proceeding with additional fusion surgery:

> i. All pain generators are adequately defined and treated; and
>
> ii. All physical medicine and manual therapy interventions are completed; and
>
> iii. X-ray, MRI, or CT myelography demonstrate spinal stenosis with instability or disc pathology, requiring decompression that may surgically induce segmental instability or a positive discogram; and
>
> iv. Spine pathology is limited to two levels; and
>
> v. Psychosocial evaluation with confounding issues addressed; (required for all cases except those with degenerative spondylolisthesis with persistent claudication or radicular leg pain with neurologic signs); and
>
> vi. For any potential fusion surgery, it is recommended that the injured worker refrain from smoking for at least six weeks prior to surgery and during the period of fusion healing. Because smokers have a higher risk of non-union and higher post-operative costs, it is recommended that insurers cover a smoking cessation program peri-operatively.

M. Taken in its entirety, the ALJ concludes that the evidentiary record contains substantial evidence to support a conclusion that a neurosurgical consultation with Dr. Hammers is reasonable and necessary to assist in the identification of Claimant's pain generators and the development of effective treatment options to address those generators in light of Claimant's prior lumbar fusion. As noted above, all pre-surgical indicators enumerated in the MTGs shall be considered before proceeding with additional surgery. Moreover, Respondents retain the right to challenge any future surgical request on the grounds that it is not reasonable, necessary or related to Claimant's June 12, 2020 industrial injury. *Stollmeyer v. Industrial Claim Appeals Office,* 916 P.2d 609 (Colo. App. 1995); Section 8-42-101 (1) (a), C.R.S.; *Hanna v. Print Expediters Inc.,* 77 P.3d 863 (Colo. App. 2003).

ORDER

It is therefore ordered that:

1. Respondents shall pay for all medical expenses, pursuant to the Workers' Compensation medical benefits fee schedule, to cure and relieve Claimant from the effects of her left shoulder and low back conditions, including, but not limited to the arthroscopic debridement of the left rotator cuff and labrum, with subacromial decompression and biceps tenodesis as recommended by Dr. Duffey and the neurosurgical referral to Dr. Hammers as requested by Dr. Finn.

2. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

DATED: September 22, 2021

/s/ Richard M. Lamphere________________
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-153-276-001/002/003

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he suffered compensable injuries on October 23, 2021.

II. If compensable, whether Claimant has proven by a preponderance of the evidence that he is entitled to receive authorized, reasonable and necessary medical benefits to cure or relieve the effects of his industrial injuries.

III. If compensable, whether Claimant has proven by a preponderance of the evidence that he is entitled to a one-time change of physician to Dr. Kareem Sobky at Presbyterian St. Luke.

IV. If compensable, what is Claimant's average weekly wage.

V. If compensable, whether Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from October 23, 2020 through the date of maximum medical improvement.

VI. Whether Claimant has proven by a preponderance of the evidence that he is entitled to penalties for alleged violations of Section 8-43-203, C.R.S. and W.C.R.P. Rule 5-2 for Respondents' failure to admit or deny the claim in a timely manner or if Respondents have cured any potential penalties pursuant to Section 8-43-304(4), C.R.S.

PROCEDURAL HISTORY

This matter was previously scheduled for Hearing for May 11, 2021 and came before Administrative Law Judge Edwin L. Felter, Jr. The parties submitted their exhibits at that time. Claimant stated that he did not have time to review Respondents' exhibits as they were provided electronically and he was unable to access them. Respondents stated that a hard copy of the exhibit packet had been left on Claimant's porch, but Claimant stated that he had not receive it. The parties disclose that PALJ Susan Phillips combined all issues listed on the multiple Applications for Hearing into one hearing.

There are two regular Applications for Hearing. One was filed by Claimant's prior counsel on December 23, 2020 which lists issues of compensability, medical benefits, average weekly wage ($1,191.71), temporary disability benefits and requests authorization of care under Dr. Carlos Glass, psychologist, pursuant to Dr. Corson's referral. The second one was filed by Claimant on December 23, 2020, which includes the additional issue of penalties for failure to admit or deny the claim, was accompanied by a Concentra Work Activity Status Report dated December 8, 2020 and a letter from the Division dated December 15, 2020, stating that they had not received a timely admission or denial. The third is an Applications for Expedited Hearing—One-Time Change of Authorized Treating Physician dated January 11, 2021 with an attached Notice of One-Time Change of Physician & Authorization for Release of Medical Information filed by Claimant on January 5, 2021 for a change to Dr. Kareem Sobky at Presbyterian St. Luke, from Dr. Corson at Concentra.

Other relevant procedural history includes Claimant's Petition to the Division's Director for penalties dated January 6, 2021 and Motion for Summary Judgment dated January 15, 2021. The motions were denied on January 27, 2021 by Director Tauriello pursuant to Sec. 8-43-203(2)(a), C.R.S. It is clear that the Motion for Summary Judgement was also filed with the OAC as ALJ Steven R. Kabler also denied the motion on January 26, 2021.

A Prehearing Order for Prehearing Conference of February 8, 2021 was issued by PALJ Susan D. Phillips granting Respondents' motion to engage in discovery with the *pro se* Claimant, denying Respondents' motion to compel Claimant's attendance at an IME, granting an extension of time, vacating a prior hearing set for March 12, 2021, consolidating all issues for the rescheduled hearing, denying Claimant's motion to compel claim file as moot, and denying Claimant's motion for penalties.

On May 7, 2021 and on subsequent dates Claimant sent multiple emails to the Office of Administrative Courts demanding an order that Respondents pay for benefits based on alleged statements made during the May 11, 2021 hearing before ALJ Felter. In an abundance of caution, Respondents filed a Response to Claimant's Motion for Summary Judgment on June 17, 2021. On June 28, 2021 ALJ Felter issued an order denying Claimant's Motion for Summary Judgment.

On July 14, 2021 ALJ Felter issued an Order Concerning Hearing of August 27, 2021 indicating that any ALJ could hear this matter and that no further extensions would be allowed unless under "extreme good cause."

During pretrial matters, Claimant was advised that he had the right to be represented by an attorney and waived that right. He was also advised that he would be held to the same standard as an attorney with regard to his knowledge of the Act, rules and case law and that the court could not assist in his prosecution of the claim. Claimant acknowledge his understanding and requested leave to proceed *pro se* (self-represented).

Claimant's exhibits 1 through 13 and 15 through 17 were admitted into evidence. Respondents objected to Exhibit 1 and 4 as Claimant had circled and written on the exhibits. This ALJ took judicial notice that there were some marks and writing on the exhibits but that this ALJ would not take notice, other than as part of Claimant's position statement regarding these markings, as they do not change the wording on the documents themselves. Respondents objected to Exhibits 15 through 17. These photographs were admitted following laying a foundation. The Respondents' Exhibits A through J were admitted into evidence without objection. The record was left open through September 15, 2021 for the parties to submit position statements which were timely submitted by both parties.

FINDINGS OF FACT

Based upon the evidence, the ALJ makes the following Findings of Fact:

1. Claimant testified that he was employed by Employer from April 1. 2020 through October 23, 2020 as a Class A truck driver. His duties included hauling flooring products in a large tractor trailer. Claimant had deliveries both within the state and out of state (Wyoming). This required Claimant to check the loads on the trailer, hook up the trailer, drive and deliver the products within a certain amount of time. He would also use a forklift to move the heavy products when necessary. Claimant was only allowed to drive up to 11 hours a day, at which time Claimant had to have overnight stays at motels. Overnights would occur approximately once per week. Claimant would be reimbursed for the overnight expenses including a per diem. Respondents would frequently pay for the motels with a company credit card. Claimant testified that on October 22, 2020 he was able to complete his job duties without difficulty, including unloading his truck while performing deliveries, and that he would not have been able to do so if he had been hurt.

2. During the week of October 23, 2020 Claimant was due to haul product from the Aurora facility to locations that were not familiar to Claimant. Claimant was assigned the new route because a co-worker was on vacation. Claimant objected to the change because he did not know the routes that had to be covered, did not have any training regarding the routes, including the delivery points and customers, the opening and closing times or the deadlines for delivery.

3. Claimant arrived at the Employer's facility extremely early on October 23, 2020 because he needed to obtain the paperwork, familiarize himself with the routes for deliveries, the loads on the trailer, the order of the delivers and whether the products were loaded in the right order in order to accomplish the deliveries. He also needed to make sure that the products were strapped in correctly. Claimant testified that the products were extremely heavy and his first delivery had to happen by 6 a.m. in the morning. On that particular day, it had snowed and the parking lot was covered in snow and ice. Claimant stated that the person in charge of the loading frequently would raise the trailer to a higher level, with the nose higher than the back end, in order to use a forklift, and would fail to level the trailer out after loading. This would cause problems when Claimant was hitching the semi-truck to the trailer because they were not able to couple correctly to secure the trailer to the semi-truck. Claimant needed to have the semi-truck come together with the trailer so that the king pin and lock achieve coupling in order to secure the load. However, if the front end was too high, this cannot happen.

4. On October 23, 2020 Claimant arrived at approximately 2:00 a.m. Claimant had been provided with the security code so that he could enter the building when needed.

He entered the building to access the truck, that was kept in the building due to the cold weather. He states that he had safety glasses, gloves, and steel toed boots, as required. He took the truck to his personal vehicle to get his personal belongings. As Claimant was walking from the vehicle to the truck, his arms full of personal items he was transferring, Claimant states he slipped on the ice and fell forward, injuring his abdomen and both knees. He states that it was so slippery that he lost control and that it was very fast. He also hit his head hard. He does not know if he lost consciousness. Claimant stated that he got up afterwards, after what he thought might have been a few minutes, and continued to the dock area to check the trailer.

5. Claimant assumed that the fall would have been caught by the security system on the building. He stated that the employees are advised that the premises are under surveillance because of the cost of the products, which could amount to millions of dollars. Claimant found out later that the security system was not operational and failed to record the fall as the video set up were just "dummies."[1] Claimant determined since Concentra was not open at that time in the morning and there was no one around to discuss what had happened to him that he would proceed with his deliveries and see how he did. He managed the pre-trip inspection of the semi-truck and drove to the dock area where the trailer was parked in the bay. He found that the trailer was too high. He tried to manually lower the trailer with the hand crank. He struggled with the crank and overstrained himself, causing severe pain in his abdomen and groin. Claimant did not know if the hernias occurred at the time of the fall or when he strained himself but his abdomen was already hurting by the time he was trying to crank the trailer down. Claimant testified that it took him approximately 20 to 30 minutes to get the trailer level so that it could be coupled with the truck.

6. Claimant identified and explained the notations he had made on the pictures he had taken of the parking lot and dock area with his phones. The parking lot and dock pictures were taken on the day of the injury at approximately 5:50 a.m.[2] These pictures were taken with his work phone. He described the hook up mechanism shown on the photos showing the large gap between the trailer and the truck (5th wheel). He stated that the lock jaws had a release handle once the coupling was achieved but it would not operate unless the coupling occurred correctly. When trailer was not level, the trailer would show the plate on the trailer as uneven. Claimant explained that the trailer must then be lowered so that the trailer skid plate is level or parallel with the 5th wheel plate until the king pin is able to be secured on the plate then the lock jaw release, so the handle can be operated to secure the load. The building pictures were taken on April 11, 2021.[3] These pictures were taken by Claimant with his personal phone. He downloaded and printed the pictures himself. He explained that the difference in color was because he printed some pictures with his own printer, which stopped working, and the remaining pictures with his mother-in-law's printer. He testified that no other person had access to either of his phones before he downloaded the pictures. As found, Claimant is credible

[1] Exhibit 1 pp. 1-2; Exhibit 17 pp. 1 & 3.
[2] Exhibit 15 & 16
[3] Exhibit 17

and has proven that he was injured in the course and scope of his employment, injuring his bilateral knees and abdomen.

7. Once Claimant was on his way, he was forced to stop at the open weigh station. He was advised that he was significantly overweight, at approximately 68,000 pounds. He returned to the facility and unloaded some of the product that he no longer had time to deliver that day due to the delays. He used a forklift to perform the activity. Claimant testified that he was in pain the whole time he was working that day and asked the customers to perform the unloading. On his way back, he contacted Concentra. He was asked questions, including whether he had been exposed to COVID-19. Claimant disclosed that he had been at the VA Hospital, after which he received a call that he might have been exposed. Concentra advised that they would be unable to see him for an exam until after a fourteen day self-quarantine.

8. Claimant returned to the Employer's facility and advised the management that he could not unload the trailer. Claimant stated he later communicated with the Human Resources department for Employer by email regarding the accident and incident and the fact that Concentra refused to see him for the next two weeks due to COVID-19 exposure. Since Claimant failed to receive a response from HR, he consulted with his personal provider, Dr. Tutt. He was provided with an appointment for the following Monday. Claimant stated that he did not discuss the work injury with his supervisor because he considered that he had a "hostile work environment" and was not getting along with his supervisor. Specifically, he discussed that his supervisor had threatened him not to make any further complaints about any issues about the company work or the other workers. He therefore would only discuss matters directly affecting his work, schedule or hours, not his medical conditions. As found, Claimant is credible in his testimony.

9. Claimant's direct supervisor testified that he provided text messages that he had kept from communications between himself and "[Claimant's first name] Driver," who he stated was Claimant.[4] The texts included several from June 2020, when Claimant had discussed a work-related back injury that subsequently resolved and November 9, 2020. On Monday, October 26, 2020 Claimant sent the following text to his supervisor:

> Claimant:
>
> Good evening Sir, I have a problem. I was informed today that I may have been exposed to vivid 19 at the VA where I go for some of my therapy sessions.
>
> I will begin a new test and screening tomorrow, but not sure how things are handled at work??? I'm being told I should self quarantine for 2 weeks but need to communicate with you.
>
> I just read your note about loading trucks, I apologize for missing, but Marcos usually waits till Tuesday morning to load my truck anyway.

[4] Exhibit 0, bates 75-89.

I attempted my therapy, but was turned away until I complete my screening period and am determined to be safe.

Supervisor:

Marcos will be in to load the trucks tomorrow. If you are not showing symptoms you can come to work

10. On October 28, 2020 Claimant sent his supervisor a text stating:

Claimant:

Hello Sir, just spoke with Mr Parrish and informed him I don't have a doctor's release to return to work yet. I see my primary care doctor Monday morning and she will provide me with instructions from there. I will make every effort to keep you informed as soon as I get answers myself.

Supervisor:

Thanks and I do hope you feel better. Please do.

11. The next text is dated November 3, 2020, though it seems that the following texts are from a different phone or text stream.

Claimant:

Do I request sick time, or PTO. I have a mild grade fever and have felt a little sluggish since Friday morning. I need to go to clinic for test and first screening tomorrow, I'd like to request time off.

Supervisor:
Ok let me know when you plan to be back.

Claimant:
I will speak with doctors and keep you informed, thanks Sir.

12. On October 29, 2020 relevant texts from the supervisor's phone state as follows:

Supervisor:
Are you expecting results on your testing soon?

Claimant:
I assume they will give me update on Monday. I did have positive symptoms, the low grade fever, muscle cramping, and breathing problems, fatigue, but did not state I do or do not have covid 19 for certain. They are treating the symptoms, and will consult with more docs on Monday. I may be seeing a specialist also???

Supervisor:

Specialist for what?

13. It seems that Claimant responded on Friday, Oct 30, 2020 as follows:

Claimant:
Good morning Sir, I've submitted information to Human Resource addressing the further medical concerns. But on a more pressing scale, I am unable to enter the Paylocity program to enter medical leave for this week, or next. Can you please assist and enter hours for me? Thanks.

14. It is not apparent from the texts that the supervisor responded to the above text. On Monday, Nov 2, 2020 Claimant sent his supervisor a follow-up text:

Claimant:
Good afternoon Sir, my primary doctor states mv fever has returned and my blood pressure is extremely high, so they are continuing the quarantine for now. Other medical information has been sent to HR.

Supervisor:
[Claimant] Hr will be calling you today. They said they haven't heard from you?

Claimant:
Ok, I have been texting Ms. [HR Consultant]'s number all my information.

Supervisor:
Make sure you speak with her today please.

Claimant:
I will be expecting and awaiting her call.

15. On Mon, Nov 2, 2020 the following texts show:

Claimant:
[Supervisor] I tried to call Ms. [HR Consultant] at 801-349-2595 but got no answer. Not sure why I can't reach her for follow up.

Supervisor
That is the correct number so I'll let her know.

Claimant:
Thanks Sir

16. On Tuesday, Nov 3, 2020 the supervisors' texts screen show:

Claimant:
Sorry, I can't talk right now.

17. The next text shows “Text Message, Friday 7:41 AM.” It is suggested by the placement of this text that since it is on the same screenshot as the prior November 3, 2020 text, that it would be Friday November 6, 2020. It seems to be addressed to the HR Consultant. This text does not display as the other text sent by Claimant in a grey box, but in green, like the texts from the supervisor. The text states as follows:

> Claimant:
> Good morning Ms. [HR Consultant], I'm writing to inform you I may have suffered an OJI. I fell on the ice last Friday in the company parking lot as I was getting ready for driving at 2am. I believe I may have injury to my

18. Then the message is cut off and continues “necessary by my medical providers.” Then another cut off portion states “I believe the hernia problem is the…” and again it is cut off. Following these messages, another message from Claimant to his supervisor on “Wednesday at 3:03 PM” states:

> Claimant:
> Hey [supervisor], I finished sending the rest of those messages to Ms. [HR Consultant] myself. Have a good evening.

19. This ALJ infers from the texts above that Claimant likely authored the texts but, whether the text messages were truly authored at the times suggested by the order of the list provided by the supervisor is in question. Some texts were clearly sent to the supervisor by another individual such as the time reference of “Text Message, Friday 7:41 AM.” looks different than the other texts and is in green instead of gray as other texts which are likely authored by Claimant. This ALJ finds that the texts under Finding of Fact numbers 17 and 18 are, in fact a text sent by Claimant. This is supported by certain references made by Claimant on October 26 which states that “I attempted my therapy, but was turned away until I complete my screening period.” This is consistent with Claimant’s testimony that he attempted to see someone at Concentra but was turned away due to his COVID exposure. It also follows that Claimant informed his supervisor on October 28 that he “just spoke with Mr Parrish and informed him I don't have a doctor's release to return to work yet. I see my primary care doctor Monday morning and she will provide me with instructions from there.” This is supported by the fact that Claimant was seen by Dr. Hutt on November 2, 2020. And on October 30 Claimant stated “Good morning Sir, I've submitted information to Human Resource addressing the further medical concerns.” From all this information, this ALJ finds that the copied text message listing “Text Message, Friday 7:41 AM” was more likely than not a text message originally sent by Claimant to the HR Consultant on Friday October 30, 2020, advising them of the prior Friday’s work related slip and fall accident and clearly advised of the hernia problem, though the full text message was not displayed by the evidence submitted. However this is supported by Claimant’s testimony listed above explaining how he was injured, which is found credible.

20. The last text dated “Today 8:18 AM,” which this ALJ infers to have taken place around November 9, 2020 based on the supervisor’s testimony and the

employment records detailing the Claimant's termination, is clearly addressed to multiple individuals, and states:

> Claimant:
> Good morning all, trying to get things off on a good note. Just need to get my final paycheck provided today as per Colorado guidelines. [Supervisor] I need my clipboard out of the truck, and I will be returning company products as well. [First unknown person] I'll need information on what I need to do to file my short and long term disability claim thru the insurance. [Second unknown person], you're right, Work Comp will take care of my OJI concerns. Thanks, [Claimant].

21. Claimant has a past history of several medical conditions. On June 26, 2016 Claimant was under the care of Dr. Charles Glass, a psychologist, due to a diagnosis of adjustment reaction with anxious features, relating to an on the job slip and fall injury in 2015 when he injured his right shoulder.[5] This care related to Claimant's fear of surgery and his past experiences with surgeries.

22. Claimant had a substantial right knee injury and surgeries resulting in a total right knee replacement (TKA) in January 2018.[6] Prior to surgery he was diagnosed with right knee osteoarthritis (OA) with retained hardware from prior ORIF for Tibial Plateau fracture and prior anterior cruciate ligament (ACL) reconstruction. In April 2018 Claimant complained of left foot problems and was diagnosed with a left foot second intermetatarsal space neuroma.[7]

23. Claimant went through the Division Independent Medical Examination (DIME) process in 2017 as a result of his right shoulder injury in 2015.[8] The evaluation included multiple conditions. The DIME physician identified no masses or tenderness in the abdomen.[9] The DIME documented examining the lower extremities showing muscle tone is diminished on gross inspection on the right side compared to the left. He found mild bilateral iliotibial-band tenderness on palpation, sitting straight leg raising was near full, with evidence of hamstring tension bilaterally. Surgery of the right shoulder occurred in April 2017.[10] The first documented work-related injury occurred on September 20, 2007, documenting thoracolumbar condition, for which he was given an impairment rating.[11]

24. Past medical-history is positive for hypertension diagnosed in the mid-1990's, diabetes diagnosed in 2017 and blood clots experienced in 2015 related to contusions to the right lower extremity.[12]

[5] Exhibit P, bates 90-93.
[6] Exhibit R, Kaiser medical records, bates 143-162; Exhibit S, bates 170-198.
[7] Exhibit R, bates 167-168
[8] Exhibit T, bates 199-231.
[9] Exhibit T, bate 223.
[10] Exhibit T, bate 229.
[11] Exhibit T, bate 202.
[12] Exhibit T, bate 221.

25. Claimant underwent a Department of Transportation (DOT) physical on March 26, 2020. At that time, Nurse Kathy Okamatsu completed the Federal Motor Carrier Safety Regulation examination, including of the abdomen and lower extremities for any abnormalities. She advised that Claimant had no abnormalities for the abdomen or the extremities and met the federal standards but required periodic monitoring of hypertension, finding Claimant qualified to continue driving. The same nurse also performed the October 23, 2019 DOT exam, making similar findings.[13]

26. On August 31, 2020 Claimant established care with Dr. Jennifer Marie Tutt at Centura Health. Dr. Tutt stated that Claimant had hyperextended his left knee four weeks prior to the exam but his symptoms had been slowly improving since the incident.[14]

27. Claimant returned to Dr. Tutt on November 2, 2020. Dr. Hutt stated that she was unable to fully examine Claimant as he had been exposed to COVID-19 and had a mild temperature on November 2, 2020. She suspected Claimant has an inguinal hernia so she ordered an ultrasound of the groin and also a referral to general surgery. She also placed a referral to orthopedic surgery.[15] Dr. Tutt assessed the following: [16]

> 1. Groin pain.
> Complains of having left groin pain and swelling for almost 2 weeks.
> Symptoms occurred after he slipped on the ice in a parking lot.
> The swelling/bulging gets worse and more painful with deep cough.
> Concerned he may have a hernia. Has a history of a right-sided hernia requiring surgery 12 years ago.
> Minimal pain at rest however with a cough pain can be quite severe. Has been taking Aleve with only partial relief.
>
> 2. Knee pain.
> C/o having left knee pain x 3-4 months.
> Injured his knee by twisting/hyperextending it several months ago.
> At that time had persistent swelling and pain. His symptoms gradually improved with time and using Voltaren gel.
> Reinjured his knee 10 days ago after slipping on ice.
> His current pain is worse than it was before. At rest his pain is a 6 out of 10.
> Has been taking Aleve with partial relief.

28. Respondents completed a First Report of Injury (FROI) on November 6, 2020 documenting that Respondents were notified of the work related injuries on November 3, 2020 regarding injuries to Claimant’s knee and groin due to a fall. They reported the date of injury as October 22, 2020 and stated that was Claimant’s last day of work. The form was completed an HR Employer Representative, the HR Consultant. They reported Claimant’s average weekly wage as $1,180.00.

[13] Exhibits 5 and 5B.
[14] Exhibit U, bates 236.
[15] Exhibit U, bates 259.
[16] Exhibit U, bate 261.

29. An Employer Termination Slip was issued on November 9, 2020, stating that Employer was unable to accommodate Claimant's light duty restrictions and was formally terminated from employment with Employer as of November 9, 2020.[17]

30. Claimant was first seen at Concentra on November 9, 2020 by Nurse Kathy Okamatsu. The history reported was that Claimant was in the process of moving items from his personal truck to the company truck, while walking on the icy parking lot. He slipped on the ice, falling forward and landing on both knees but that he did not strike his head. Shortly thereafter, Claimant used both hands to turn the crank arm of his truck to move the landing gear, while lowering the high trailer and had a sudden onset of pain in left groin. On exam Nurse Okamatsu found tenderness over the left lateral collateral ligament, over the medial collateral ligament and diffusely over the posterior knee. Upon palpation of the left knee she found crepitus and that Claimant had abnormal flexion and extension while performing range of motion, though without pain. She found mild swelling and tenderness of the right knee proximally to the patella. She also observed mild limping. Upon palpation of the abdomen, she noted that Claimant may have a left inguinal hernia. She assessed that Claimant had a strain in the left groin, and bilateral knee injuries. Nurse Okamatsu made a causality determination, stating that it is at least 51% likely this condition is a result of exposure at work. She ordered an MRI of the left knee and an ultrasound of the abdomen, as well as x-rays of the bilateral knees. She provided restrictions of lifting up to 10 lbs. occasionally, push/pull up to 15 lbs. occasionally, no squatting or kneeling.

31. Claimant had a limited abdominal ultrasound of the left groin area, on November 9, 2020, which showed a large indirect inguinal hernia.[18] This was pursuant to Nurse Okamatsu's referral. Also on November 9, 2020, Claimant obtained an MRI of the left knee, also pursuant to Nurse Okamatsu, which showed a horizontal tear of the left knee medial meniscus of the posterior horn, mild to moderate medial compartment arthritis, subchondral edema of the medial tibial plateau, moderate patellofemoral compartment osteoarthritis with some moderate to high-grade involvement of the central to lateral trochlea, subchondral edema, and left knee joint effusion.[19]

32. On November 11, 2020, Dr. Thomas Corson reviewed the MRI results with Claimant, which revealed a left medial meniscus tear of the posterior horn and the ultrasound reveals a reducible hernia. Dr. Corson reported Claimant's history of "significant PTSD and severe anxiety (he became tearful and anxious upon hearing the results and the likelihood of needing surgery for the hernia and possibly the meniscus. He sees a psychiatrist for his PTSD and says he was going to need to see him after hearing this news. He has a significant phobia of surgery." Claimant also reported that his right knee was still causing him a fair bit of discomfort as well. On exam Dr. Corson found reducible hernias on both the right and left inguinal sites. He also found swelling of the left knee over the medial joint line and tenderness as well as altered gait. He noted that Claimant was anxious, concerned, quiet and tearful. Dr. Corson modified restrictions

[17] Exhibit L, bate 57.
[18] Exhibit U, bate 318.
[19] Exhibit U, bates 333-334.

to include a 5 lbs. lifting occasionally and may not walk on uneven terrain or climb ladders. Claimant was referred to Dr. Robert Glass, psychologist (to assist Claimant with severe anxiety due to likelihood of surgery); to a general surgeon for the hernia, to an orthopedic surgeon at Steadman Hawkins in Vail for the knee conditions and to physical therapy.[20]

33. Employer sent Claimant a COBRA letter advising Claimant that he would no longer be entitled to health insurance benefits from Employer as of November 30, 2020. If he wished to continue health benefits under COBRA beginning December 1, 2020, he would be required to pay a premium of $1,172.61 per month to cover medical dental and vision benefits.

34. Respondent Insurer filed a Notice of Contest on November 19, 2020 stating further investigation of prior medical history and compensability evaluation was needed.[21] The Notice of Contest (NOC) showed a date of injury as October 22, 2020, consistent with the FROI filed by Employer. It is noted that the claim number on the NOC of "5153276" is the correct one for this claim, identified Claimant by name, address and social security number as well as the correct Employer and Insurer for this claim.

35. Employer's Statement, which is dated December 1, 2020 and signed by HR Consultant, stating that Claimant was no longer employed as of October 30.[22] It shows that as of June 1, 2020 Claimant's weekly earnings are $1,191.71 and Claimant worked 40 hours a week.

36. Dr. Charles Glass documented on December 3, 2020 that Claimant was interested in pursuing psychological evaluation and treatment but appointments were only being conducted by telehealth because of the Coronavirus pandemic and Claimant did not have the technical capability to have telehealth appointments.

37. Claimant returned to Concentra for follow-up on December 8, 2020. Dr. Corson examined Claimant, and palpated reducible right and left inguinal hernias. He found right knee swelling, tenderness diffusely over the anterior knee, over the lateral joint line, over the medial joint line, in the undersurface of the patella, in the inferior pole patella, on the distal patella tendon, in the mid portion of the patella tendon and in the superior pole patella, with limited range of motion in all planes. Dr. Corson found swelling of the left knee at the medial joint line, the patella, with tenderness over the medial collateral ligament, diffusely over the medial knee and diffusely over the posterior knee, in addition to crepitus and limited range of motion in all planes. He stated that MMI was unknown because he was awaiting specialist input. He assessed acute medial meniscal tear of the left knee, injury to the right knee and inguinal hernias. Dr. Corson stated that the objective findings were consistent with history and work-related mechanism of injury.

38. On December 15, 2020 the Division issued an Urgent Notice Requiring Immediate Response. It notified Respondents that the period for filing a timely position

[20] Exhibit V, bates 358-362.
[21] Exhibit 10.
[22] Exhibit 9.

statement had expired and that they were potentially in a penalty situation, as an admission or denial had not been filed with the Division. As found, Respondents complied with the requirement to file a Notice of Contest on November 19, 2020, though Division may have rejected it due to discrepancies of the date of injury.

39. Claimant filed a Notice of One-Time Change of Physician & Authorization form on January 5, 2021 requesting a change from Dr. Corson to Dr. Sobky. On January 6, 2021 Respondents denied the change of physician as Dr. Sobky was not on the designated provider list. As found Respondents failed to use the correct form required by the rules. Attached was a designated provider list but nothing on the list or document showed this had been provided to Claimant. As found, the designated provider list is unsigned and was therefore not provided in a "verifiable manner."[23] However, it is also found that Claimant failed to file the One-Time Change of Physician request within ninety days of the date of the injury. The deadline was December 31, 2020, pursuant to Sec. 8-43-404(5)(a)(III)(A), C.R.S. and W.C.R.P. Rule 8-5(A). Therefore, Claimant is not entitled to a one-time change of physician under this provision.

40. Dr. Kareem Sobky of HealthOne/OrthoOne, of Colorado Limb Consultants, evaluated Claimant on January 13, 2021 for the bilateral knee problems. He obtained x-rays that showed a total right knee arthroplasty in good position, no sign of obvious complications though a small fleck of bone or cement at the superior pole of the patella, but that the implants seemed to be stable. He also reviewed the left knee MRI, which he read as showing a medial meniscus tear, full thickness chondral loss, full thickness chondral loss of the medial femoral condyle. Dr. Sobky referred Claimant for physical therapy for edema control, strengthening of the quads, hip girdle, stabilization of the bilateral knees, and modalities twice a week for six weeks.

41. On January 15, 2021 Insurer filed an Amended Notice of Contest, which stated that it was "refiled to correct DOL [date of loss] to 10/23/2020." It included the claim number as "5153276," which is the correct claim number in this matter.

42. Claimant was evaluated by Dr. Anthony Canfield first on February 23, 2021 for the bilateral inguinal hernias. It is inferred that this was pursuant to a referral within the chain of referral as the "Workmen's Comp. coordinator" was present during the evaluation. On exam, Dr. Canfield, found that there was a left inguinal hernia palpable with Valsalva but the right side was uncomfortable but he did not feel a hernia on the right. He ordered a right sided dynamic ultrasound to rule out possible right groin recurrent right inguinal hernia. On February 24, 2021 he filed a request for surgery authorization scheduled for March 18, 2021 at Presbyterian St. Luke.

43. Claimant underwent an MRI of his right knee on March 3, 2021. The MRI showed low signal intensity thickening and internal architectural distortion of the quadriceps tendon; longitudinal clefts of hyperintensity at the patellar insertion consistent with partial tearing, overall comprising approximately 15% of the cross-

[23] Exhibit M, bate 58-59.

sectional circumference. The right knee showed signs of mild proximal tendinosis without signs of a tear.[24]

44. Dr. Sobsky assessed Claimant again on March 12, 2021. He read the right knee MRI, which showed an interstitial tear of the distal lateral quadriceps but no avulsion, loosening of the prosthesis or fracture of the prosthesis, no patellar tendon or quadriceps tendon avulsion. He found no significant effusion at that time.

45. On March 25, 2021 Dr. Alexandra McKenzie issued a report following a limited ultrasound of the right inguinal area. She found no definite evidence of a right inguinal hernia, stating that the ultrasound was limited by artifact shadowing related to existing mesh and the radiologist recommended a CT scan for further evaluation.

46. Dr. Corson stated on March 30, 2021 that Claimant's general surgeon, Dr. Canfield, had ordered a CT of his abdomen. He also documented that the MRI of the right knee showed some particle disease, but did not have the actual reports to review. He continued to state that the objective findings were consistent with history and work-related mechanism of injury. Dr. Corson concluded as follows:

> Returning for follow-up: 4/27
> Continue specialist care.
> Work/Activity Status
> Are your objective findings consistent with history and/or work-related mechanism of injury/illness: Yes
> Able to return to modified duty from: 3/30/21 to 4/27
> Limitations/Restrictions:
> Temporary Restrictions
> Lifting (maximum weight in pounds) 5 lbs.
> Pushing/Pulling 15 lbs
> Crawling 0 hours per day
> Kneeling 0 hours per day
> Squatting 0 hours per day
> Climbing 0 hours per day
> May not walk on uneven terrain.
> May not work in safety sensitive position.
> Follow Up Care And Referrals

47. On April 20, 2021, Dr. Carlos Cebrian authored an independent medical evaluation (IME). Respondents retained Dr. Cebrian, to conduct an IME evaluation which took place on April 5, 2021. Dr. Cebrian opined that Claimant's alleged mechanisms of injury did not support that he suffered a work injuries on October 23, 2020. Dr. Cebrian addressed the four areas of complaint in order. Regarding the left knee, Dr. Cebrian noted that Claimant's left knee pain complaint began the summer of 2020 due to a hyperextension and twisting injury documented by Claimant's personal care provider Dr. Tutt. Claimant's described his mechanism of injury to Dr. Cebrian as falling forward onto his knees. Dr. Cebrian stated this would be consistent with a bruise or strain, but would

[24] Exhibit Z, bates 460-461.

not with a meniscal tear. Regarding Claimant's right knee, Dr. Cebrian opined that Claimant had a history of right knee pain and complaints, including a prior right knee arthroplasty. He noted that Claimant did not complain of right knee pain on his initial evaluation with Dr. Tutt and therefore, the right knee complaints were pre-existing, not related to the work injury. Regarding Claimant's hernia, Dr. Cebrian noted that there was no evidence of a right-sided hernia condition. Regarding the left-sided hernia, Dr. Cebrian noted that Claimant's hernia was very large on the initial sonogram, indicating that it was a pre-existing condition. Dr. Cebrian noted that Claimant has a history of hernia repairs including a repair in 2007. Dr. Cebrian concluded that the request for a left inguinal hernia repair was not causally related to the work injury.

48. Also on April 20, 2021, either coincidentally or because he received Dr. Cebrian's report, Dr. Corson stated that Claimant was at maximum medical improvement (MMI) with no restrictions or impairment. The nurse case manager (NCM) was on teleconference throughout the patient's visit. However, his report still documented that the objective findings were consistent with history and work-related mechanism of injury. His assessment was as follows:

1. Acute medial meniscal tear, left, initial encounter (S83.242A)
2. Hernia, inguinal (K40.90)
3. Knee injury, left, initial encounter (S89.92XA)
4. Knee injury, right, initial encounter (S89.91XA)
5. Painful orthopaedic hardware (T84.84XA)
6. Strain of groin, left, initial encounter (S76.212A)

49. Dr. Cebrian testified at hearing consistent with his report. He stated that Claimant had a lengthy history of right knee complaints, including a right total knee arthroplasty. He testified that Claimant's right knee x-ray and other imaging studies did not show any damage to the hardware. With regard to the partial 15% quadriceps interstitial tear shown on the MRI, he stated that it was too small to be significant and was probably age related. Dr. Cebrian testified that Claimant's left knee meniscal injury pre-dated the work injury as documented in August and November of 2020 reports by Dr. Tutt. Dr. Cebrian testified that Claimant's left knee meniscal tear was consistent with a twisting injury not a straightforward fall to his knees initially described by Claimant. Lastly, Dr. Cebrian stated that there was no evidence suggesting that Claimant had or has a right-sided hernia and that inguinal hernias are generally the result of congenital non-work factors, that an upper body cranking motion would not put significant pressure on the groin in a way that would cause or worsen an inguinal hernia. Dr. Cebrian also noted that Claimant had not complained of lower back pain until approximately six months after the work injury.

50. Claimant testified that when he slipped on ice, he had multiple items in his hands as he was transferring them from his personal vehicle to his work truck. He was unbalanced and was slipping and sliding on the ice. He fell forward but knows that he was unstable on the ice before he actually fell forward. He does not know exactly if there was much twisting involved in the manner in which he was falling but knows there was some twisting involved before he went forward. He also stated that while he was

attempting to use the crank handle to lower the loaded trailer, he was slipping on the ice and had to attempt to lower the trailer multiple times before he was successful, all the while slipping on the ice, which was shown in the pictures he submitted.

51. Claimant agreed that he had prior problems with his knees, but not to the extend as after the October 23, 2020 injury. He did not deny that he had a hyperextension problem in the summer, but that it had resolved by the time of this injury with the care he had been previously given and had advised Dr. Tutt of that fact, which she documented. He also stated that his abdomen was sore after he fell but that the force involved in pulling on the hand crank was very significant because the trailer was overloaded with 68,000 lbs. of materials. He disagreed with his supervisor that the crank is easy to move. Claimant's testimony is credible and persuasive.

52. Claimant testified that he believed he earned $28.00 per hour plus overtime and incidentals. His incidentals were overnight trip per diem of approximately $500.00 per week. He received approximately $125.00 for the phone, $80.00 for the meals and for hotels up to $300.00 per night. Claimant also testified that when Claimant was stranded for the weekend on a Saturday, that his hours were not compensated despite being away from home. He also testified that he did not return to work after the October 23, 2020 date of injury, that Employer made a mistake in first reporting the injury as having occurred October 22, 2020 and that he was formally terminated as of November 9, 2020 because of his restrictions.

53. Claimant's direct supervisor testified he was the warehouse manager for Employer. He stated that someone that has a work related injury can report to him but that Claimant did not. He conceded that employees could report work injuries directly to the Human Resources (HR) department. He would generally communicate with Claimant directly or by text. He identified [Claimant] Drive as Claimant in the text messages he provided as above. He stated that he was not at the warehouse until approximately 7:30 a.m. each day. He stated that Claimant was paid hourly and was provide $20.00 per diem for breakfast and $60.00 per diem for dinner. The supervisor stated that generally he paid for hotels or motels with his own credit card, which was approximately $100.00 to $200.00 per night but that they would reimburse employees for out of pocket costs. The supervisor stated that the crank is not difficult to move but could not state what amount of strength or force in terms of pounds is required or if the weight of the trailer would change the amount of force involved, but that drivers had to do it every day.

54. Insurer's Senior Claims Representative testified that he had been involved in the claim since December 2020. The Claims Representative stated that Insurer received the claim on November 6, 2020. He stated that Insurer's records show that they sent in the Notice of Contest dated November 19, 2020 but that Division rejected the NOC because it did not have the correct date of loss that corresponded with the workers' compensation number. Insurer received correspondence from Division and documented a conversation with a Division representative regarding the NOC that was filed. Insurer then communicated with Employer to resolve the issue of the date of injury. After the Claims Representative was able to communicate with Employer and received further

information, Respondent Insurer filed a new NOC on January 15, 2021. He advised that NOCs are required to be filed electronically with the Division pursuant to the rules but that hard copies are sent to the parties. The Claims Representative is found credible. As found, it is determined that Respondents filed a timely Notice of Contest in this matter, which was likely rejected by the Division due to the discrepancy in the date of injury. As found, both NOCs provided Claimant notice of Respondents' position and no penalties are due for failure to admit or deny.

55. The wage records show that Claimant earned $30,367.87 for a weekly average of $1,073.61 from April 1, 2020 through October 15, 2020 [$30,367.87 / 198 days x 7 days]. This ALJ considered that Claimant received an increase in hourly earnings to $27.50 per hour as of June 1, 2020, and that Employer reported Claimant's average weekly wages as $1,180.00 and $1,191.71 in two separate documents. Despite these facts, as found, it is determined that the fair approximation of the Claimant's average weekly wage (AWW) as of October 23, 2020 is $1,153.61, which includes the $80.00 per diem and the average earnings from April 1, 2020. As of December 1, 2020, Claimant lost his health benefits, including medical, dental and vision. Claimant's COBRA benefits amounted to $1,172.61 per month or $270.60 per week. Therefore, as found, Claimant's AWW beginning on December 1, 2020 is $1,424.21.

CONCLUSIONS OF LAW

Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S., 2020. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias,

prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent, expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); *Dow Chemical Co. v. Industrial Claim Appeals Office*, 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary opinion).

Claimant sustained work related injuries

A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990).

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. Section 8-41-301(1)(b), C.R.S. (2020); *City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course" of employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *Horodyskyj v. Karania*n, 32 P.3d 470, 475 (Colo. 2001).

There is no presumption that injuries which occur in the course of a worker's employment arise out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). Rather, it is the claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. Section 8-43-201, C.R.S.; *Ramsdell v, Horn*, 781 P.2d 150 (Colo. App. 1989). The determination of whether there is a sufficient nexus or causal relationship between a Claimant's employment and the injury is one of fact and one that the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle*, 934 P.2d 861 (Colo. App. 1996). When a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *H & H Warehouse v. Vicory, supra.* A preexisting condition or susceptibility to injury does not disqualify a claim if the work related injury aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004).

As found, Claimant was injured in the course and scope of his employment on October 23, 2020. Claimant slipped on ice in Employer's parking lot, injuring his bilateral lower extremities, including a meniscal tear on the left side and aggravating the right knee as well as causing a quadriceps injury on the right. The accident also resulted in injury to his bilateral inguinal areas causing a definite hernia on the left side and possible hernia on the right side, aggravating the preexisting right sided conditions. This is supported by Claimant's testimony, which will not be recited here, but is contained in Findings of Fact 1 through 8 as well as findings determined in Findings of Fact 19, 50 and 51. This determination is also supported by the opinions of Dr. Corson, Dr. Hutt, Nurse Okamatsu, Dr. Sobky and Dr. Canfield.

Specifically it is found that Claimant injured his left knee, right knee and quadriceps, and bilateral inguinal areas on October 23, 2020 as a direct consequence of the fall and subsequent efforts in cranking motions to secure the trailer to the truck on October 23, 2020. Dr. Hutt stated that she was unable to fully examine Claimant as he had been exposed to COVID-19 and had a mild temperature on November 2, 2020. Dr. Hutt stated that Claimant had symptoms which occurred after he slipped on the ice in a parking lot including swelling/bulging in his abdomen, which gets worse and more painful with deep cough. She was concerned he may have a hernia, as he had a history of a right-sided hernia requiring surgery 12 years before, and reinjured his knee 10 days ago after slipping on ice. Nurse Okamatsu specifically found on exam on November 9, 2020 that Claimant had swelling and tenderness of the right knee proximally to the patella, left knee crepitus and abnormal flexion and extension, and upon palpation of the abdomen, she noted that Claimant may have a left inguinal hernia. Dr. Corson specifically stated multiple times that the mechanism of the Claimant's injuries were the cause of the work related injuries. Upon examination on two different occasions, he found palpable reducible hernias on both the right and the left. He reviewed the left knee MRI, which he read as showing medial meniscus tear, full thickness chondral loss, full thickness chondral loss of the medial femoral condyle. Dr. Corson reported that Claimant became tearful and anxious upon hearing the results of the diagnostic testing and the likelihood of needing surgery for the hernia and possibly the meniscus. Dr. Sobky also found that Claimant had a horizontal tear of the left knee medial meniscus and a right knee interstitial tear of the distal lateral quadriceps. This ALJ finds all of this testimony credible and persuasive.

With regard to the bilateral hernias, Dr. Corson continued to state that the Claimant's objective findings were consistent with history and work-related mechanism of injury, continuing to diagnose Claimant with inguinal hernias, left meniscal tear and right knee painful hardware, even at the time of releasing Claimant from care. Dr. Canfield, found that there was a left inguinal hernia palpable with Valsalva. On the right side Dr. Canfield noted that Claimant was uncomfortable but he did not feel a specific hernia at the time of exam but ordered a right sided dynamic ultrasound to rule out possible right groin inguinal hernia. The ultrasound was limited by artifact shadowing related to existing mesh and the radiologist recommended a CT scan, which has not yet taken place. Lastly, Claimant underwent a DIME in 2017 and DOT physicals in both 2019 and 2020 with Nurse Okamatsu which included abdominal examinations all three of which revealed no masses or abnormalities in the abdomen. Nothing in Dr. Cebrian's report or testimony persuades this ALJ that this is not the case. While Dr. Cebrian opined that that the work related incidents of October 23, 2020 did not cause Claimant's injuries to his bilateral knees and inguinal areas, this ALJ does not find that credible. As found, based on the totality of the evidence, Claimant has proven by a preponderance of the evidence that the October 23, 2020 incidents aggravated, accelerated or combined with his preexisting conditions to cause disability and need for medical treatment and therefore represents a compensable injury. When considered in its totality, the ALJ concludes that the evidence in this case supports the reasonable inferences/conclusions that Claimant suffers from compensable left and right knee injuries including a right quadriceps injury, as well as bilateral inguinal injuries.

Claimant has failed to show that his low back was injured in the claim as he did not have an exacerbation or aggravation of the low back as a result of the October 23, 2020 injury. Claimant argues that the records from Dr. Sobky demonstrate a spinal injury and foot drop issue. However, no such records were submitted in this matter. Medical records show that Claimant failed to mention problems with his back immediately after and subsequent to the injury for several months. The mere fact a claimant experiences symptoms following a work injury does not require the inference that there has been an aggravation or acceleration of a preexisting condition. See *Cotts v. Exempla, Inc.*, W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. See *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.,* W.C. No. 4-445-608 (ICAP, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (ICAP, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function or on the job injuries, does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's symptoms and work activities. As found, it is determined that the October 23, 2020 accident did not cause Claimant's continuing low back pain.

Medical benefits authorized, reasonably necessary and related to the injury

"Authorization" refers to the physician's legal authority to treat the injury at the respondents' expense. *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997). Under § 8-43-404(5)(a), the employer has the right to choose the treating physician in the first instance. It is well established that an employer does not lose the right to designate a treating physician merely because it denies a claim. *Yeck v. Industrial Claim Appeals Office,* 966 P.2d 228 (Colo. App. 1999). Once the employer has exercised its right of selection, the claimant may not unilaterally change physicians without prior approval from the respondents or an ALJ. Such permission may be express or implied, and a physician becomes authorized if the “employer has expressly or impliedly conveyed to the employee the impression” that he has permission to treat with the physician. *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985).

Here, Employer timely exercised its right to choose a physician after Claimant notified Employer of his injuries. The First Report of Injury states that Claimant provided notice of the injury as of November 3, 2020 and Claimant established care with Concentra as of November 9, 2020. As found, Respondents referred Claimant to Concentra upon notice of the claim. In fact, Claimant testified that he knew he needed to contact Concentra as of the day of injury and did so, but was unable to be seen because of his exposure to COVID-19, so he attended Dr. Hutt on November 2, 2020. This initial visit is considered an emergent care service and is compensable. Claimant was then seen and treated at Concentra as of November 9, 2020. This indicates that Claimant selected from the list of providers and proceeded to obtain care from the Concentra providers and the subsequent referrals of those providers. Therefore, as found, Claimant’s authorized treating providers are Nurse Okamatsu, Dr. Corson, Dr. Canfield, Dr. Glass and the orthopedic specialist at Steadman Hawkins pursuant to Dr. Corson’s referral. As found, this is in addition to the diagnostic testing and treatment referred by these providers, including physical therapy, pool therapy, MRIs of the left and right knees, ultrasounds of the abdomen, CT of the abdomen prescribed by Dr. Canfield and the psychological care prescribed by Dr. Corson with Dr. Glass, which are all authorized, reasonably necessary and related to the injury.

It is unclear from the record if Dr. Corson, another authorized provider or if Insurer authorized Dr. Sobky to address Claimant’s work related lower extremity injuries. However, Respondents conceded in their brief that Dr. Sobky is already an authorized treating physician in this matter. Therefore, this is taken as a judicial admission and Dr. Sobky is also an authorized treating physician.

Employer is liable to provide such medical treatment “as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury.” Section 8-42-101(1)(a), C.R.S. (2021); *Colorado Compensation Insurance Authority v. Nofio,* 886 P.2d 714 (Colo. 1994); *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo.App.1999); *Kroupa v. Industrial Claim Appeals Office*, *supra*. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. See generally *Stamey v. C2 Utility Contractors, Inc., et. al.,* W.C.No. 4-503-974 , ICAO (August 21, 2008); *Parker v. Iowa Tanklines, Inc.,* W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

Dr. Corson stated on March 30, 2021 that Claimant's general surgeon, Dr. Canfield, had ordered a CT of his abdomen. He also documented that the MRI of the right knee showed some particle disease. He continued to state that the objective findings were consistent with history and work-related mechanism of injury. Claimant has proven that the surgery, as recommended by Dr. Canfield, and for which he submitted a request for prior authorization, for the left inguinal hernia, is reasonably necessary and related to the compensable work injury of October 23, 2020. Claimant has proven that he requires further diagnostic testing as stated by the Dr. McKenzie, who performed the right inguinal limited ultrasound and recommended a CT scan for further evaluation, as well as Dr. Canfield, which this ALJ finds as reasonably necessary medical care. Claimant was found to have both swelling of the right knee and a quadriceps injury, which also need to be addressed by the authorized treating providers. Dr. Corson also referred Claimant to Dr. Glass for psychological treatment due to Claimant's anxiety related to proposed surgery, and which is found reasonably necessary and related to the injury. All of this care did not take place but is found to be reasonably necessary and related to the injury.

However, Dr. Corson, either by coincidence, communication with the nurse case manager, who was present by telephone throughout the visit, or by receipt of Dr. Cebrian's report, determined on April 20, 2021 that Claimant had reached MMI without need for further care or restrictions.

"Section 8-42-107(8)(b)(I), C.R.S., provides that 'an authorized treating physician shall make a determination' as to the achievement of MMI. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo.App. 2002). A determination of MMI by an authorized treating physician terminates a Claimant's ability to seek further care without a determination by a Division of Workers' Compensation Independent Medical Examiner's (DIME) opinion pursuant to Sec. 8-42-107(8)(b)(II), C.R.S., which states in pertinent part:

> If either party disputes a determination by an authorized treating physician on the question of whether the injured worker has or has not reached maximum medical improvement, an independent medical examiner may be selected in accordance with section 8-42-107.2…

Therefore, an MMI determination is binding in the absence of an independent medical examination (IME) or a change in that ATP's opinion. Furthermore, the statute prohibits the ALJ from resolving disputes until a DIME has been completed. *Story v. Industrial Claim Appeals Office,* 910 P.2d 80 (Colo. App. 1995).

In fact, a claim for additional medical benefits designed to improve Claimant's condition constitutes a constructive challenge to the determination of MMI. S*tory v. Industrial Claim Appeals Office*, *supra*. If Dr. Corson's true opinion is that Claimant does not require the care that he had previously recommended and had referred Claimant to receive, then Claimant must proceed through the DIME process. If Dr. Corson determines that Claimant is, indeed now not at MMI, then Claimant may proceed with the care recommended in this matter as the care has been found reasonably necessary and related to the injury. *Whiteside v. Smith*, 67 P.3d 1240, 1246 (Colo. 2003).

However, absent a completed DIME, the ALJ may not hear or decide any issue that constitutes an actual or constructive challenge to MMI. *Story v. Industrial Claim Appeals Office, supra.* The ICAO has repeatedly held that "after MMI [is] declared, the ALJ lack[s] jurisdiction to award or deny medical benefits to cure and relieve the claimant's condition." *McCormick v. Exempla Healthcare,* W.C. No. 4-594-683 (January 27, 2006); see also *Eby v. Wal-Mart Stores Inc.,* W.C. No. 4-350-176 (February 14, 2001) ("once an authorized treating physician places the claimant at MMI, and ALJ lacks jurisdiction to award additional medical benefits for the purpose of curing the industrial injury and assisting a claimant to reach MMI unless the claimant undergoes a DIME."); *Anderson-Capranelli v. RepublicIndustries, Inc*., W.C. No. 4-416-649 (November 25, 2002); *Cass v. Mesa County Valley School District,* W.C. No. 4-69-69 (August 26, 2005) ("[i]f an ATP places the claimant at MMI, an ALJ lacks jurisdiction to award additional medical benefits to improve the claimant's condition unless a DIME has been conducted on the issue of MMI.").

Although a DIME is not a jurisdictional prerequisite to a hearing on a request for post-MMI medical treatment, Claimant has not characterized the care previously recommended by Dr. Corson and the other authorized providers as a *Grover*-type benefit. At least the hernia surgery is intended to improve Claimant's condition, rather than merely relieve the effects of the injury and prevent deterioration. The ALJ concludes that awarding the treatment requested by Claimant would constitute a constructive challenge to MMI in circumvention of the DIME process pursuant to *Story v. Industrial Claim Appeals Office, supra*. While this situation is a little different because Claimant is unable to seek a DIME at this time, as the Claimant's right to a DIME is only triggered by the filing of a Final Admission of Liability by Respondents pursuant to Sec. 8-42-107.2,(2)(a)(I)(A), C.R.S., and Respondents have denied this claim, but this does not change the jurisdictional requirement. Lastly, Claimant failed to request that the issue of maintenance care after MMI be addressed at this hearing. Therefore, medical benefits after the April 20, 2021 finding of MMI by Dr. Corson are denied at this time, but reserved for future determination.

Change of Physician not authorized

While Claimant requested a one-time change of physician to Dr. Sobky, he did not seek this request within the required 90 days pursuant to Sec. 8-43-404(5)(a)(III), C.R.S., which states specifically:

> An employee may obtain a one-time change in the designated authorized treating physician under this section by providing notice that meets the following requirements:
>
> (A) The notice is provided within ninety days after the date of the injury, but before the injured worker reaches maximum medical improvement;…"

Claimant filed a Notice of One-Time Change of Physician & Authorization form on January 5, 2021 to request a change of provider from Dr. Corson to Dr. Sobky. The deadline to request a one-time change of physician was December 31, 2020, pursuant to Sec. 8-43-404(5)(a)(III)(A), C.R.S. and W.C.R.P. Rule 8-5(A). As found Claimant failed to file the One-Time Change of Physician request within ninety days of the date of the injury. (A one time change of physician would deauthorize Dr. Corson and the Concentra providers pursuant to statute, so it is different than Dr. Sobky simply being one of the authorized treating physician.) Therefore, Claimant is not entitled to a one-time change of physician under this provision.

Average Weekly Wage

Section 8-42-102(2) provides compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But Sec. 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77 (Colo. App. 1993). The ALJ must determine an employee's AWW by calculating the monetary rate at which services are paid the employee under the contract of hire in force at the time of the injury, which must include any advantage or fringe benefit provided to the Claimant in lieu of wages. Section 8-42-102(2), C.R.S.; *Celebrity Custom Builders v. Industrial Claim Appeals Office,* 916 P.2d 539 (Colo. App. 1995). Section 8-42-102(2), C.R.S. requires the ALJ to base claimant's AWW on his earnings at the time of the injury. Under some circumstances, the ALJ may determine the claimant's TTD rate based upon Claimant's AWW on a date other than the date of the injury. *Campbell v. IBM Corporation, supra.* Section 8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter that formula if for any reason it will not fairly determine claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective of calculating AWW is to arrive at a "fair approximation" of claimant's wage loss and diminished earning capacity. *Ebersbach v.United Food & Commercial Workers Local No. 7*, W.C. No. 4-240-475 (ICAO, May 7, 2007).

As found, Claimant's average weekly wage (AWW) as of October 23, 2020 is $1,153.61, and Claimant's AWW beginning on December 1, 2020 is $1,424.21. Respondents filed the FROI on November 6, 2020 reporting Claimant's average weekly wage as $1,180.00 and an Employer's Statement reporting a wage of 1,191.71. Employer conceded that Claimant received a wage increase on June 1, 2020 to $27.50 per hour and that Claimant would also travel with overnights at least once per week. Respondents also conceded that Claimant would be provided a per diem of $20.00 for breakfast and $60.00 for dinner for a total of $80.00 per week. The wage records show that Claimant earned $30,367.87 from April 1, 2020 through October 15, 2020 for a weekly average of $1,073.61 from April 1, 2020 through October 15, 2020 [$30,367.87 / 198 days x 7 days]. This ALJ considered that Claimant received an increase in hourly earnings to $27.50 per hour as of June 1, 2020 but determined that the fair approximation, despite the increase, is $1,073.61 plus the per diem of $80.00 for a total of $1,153.61 as of the date of the injury. Pursuant to the COBRA letter Claimant's health benefits were terminated as of November 30, 2020. The cost of continuing health benefits, beginning December 1, 2020, was $1,172.61 per month, $270.60 per week, which would increase the average weekly wage to $1,424.21. The ALJ concludes this methodology of calculating Claimant's AWW is the most accurate and appropriate.

Claimant is entitled to temporary total disability benefits

To prove entitlement to temporary total disability (TTD) benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg,* 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. There is no statutory requirement that a claimant must present medical opinion evidence from of an attending physician to establish his physical disability. Rather, the Claimant's testimony alone is sufficient to establish a temporary "disability." *Lymburn v. Symbois* Logic, 952 P.2d 831 (Colo. App. 1997).

As found, Claimant has established by a preponderance of the evidence that he is entitled to an award of TTD benefits beginning October 23, 2020 as Claimant testified that he was able to perform his job on October 22, 2020 and on October 23, 2020 he was not able to perform all of his activities. He specifically testified that he had to request that the customers unload the truck for him. He was unable to work after that date. Further, after he was provided restrictions by the Concentra ATP, Nurse Okamatsu, of lifting up to 10 lbs. occasionally, push/pull up to 15 lbs. occasionally, no squatting or kneeling and Employer issued a termination slip stating that they were unable to accommodate Claimant's restrictions. As found, the Claimant's testimony is found credible and the medical records in this case document that Claimant was continually kept on restrictions until he was placed at maximum medical improvement on April 20, 2021 by Dr. Corson. Claimant is entitled to TTD beginning October 24, 2020 through April 19, 2021, though those benefits may continue should Dr. Corson change this determination of MMI or a DIME physician finds that Claimant is not at MMI.

Penalties not warranted

Claimant argues that since the Division issued a letter dated December 15, 2020, stating that Division had not received a timely admission or denial from Respondents, that Claimant is entitled to penalties pursuant to alleged violations of Section 8-43-203(1)(a), C.R.S. and W.C.R.P. Rule 5-2. Section 8-43-203(1)(a) states that "the employer's insurance carrier shall notify in writing the division and the injured employee … within twenty days after a report is, or should have been, filed with the division pursuant to section 8-43-101, whether liability is admitted or contested…" W.C.R.P. Rule 5-2 states in pertinent part:

> (C) The insurer shall state whether liability is admitted or contested within 20 days after the date the employer's First Report of Injury is filed with the Division. If an Employer's First Report of Injury should have been filed with the Division, but wasn't, the insurer's statement concerning liability is

> considered to be due within 20 days from the date the Employer's First Report of Injury should have been filed. The date a First Report of Injury should have been filed with the Division is the last day it could have been timely filed in compliance with paragraph (B) above.
>
> (D) The insurer shall state whether liability is admitted or contested within 20 days after the date the Division mails to the insurer a Worker's Claim for Compensation or Dependent's Notice and Claim for Compensation.
>
> (E) A statement regarding liability is required for any claim in which a division-issued workers' compensation claim number is assigned or a First Report of Injury should have been filed pursuant to paragraph (B) of this rule. A statement regarding liability shall not be filed without a First Report of Injury, Worker's Claim for Compensation, or Dependents Notice and claim having been successfully filed and assigned a workers' compensation claim number. A first report of injury must be filed prior to a notice of contest being accepted by the division.

This ALJ infers from Claimant's argument that Claimant is stating that he did not have notice of the denial. However, Claimant failed to state that he did not receive the Notice of Contest dated November 19, 2020 and, in fact, confirmed his address as stated on the Notice of Contest. Pursuant to W.C.R.P. Rule 1-4(1)(A), proper service is to be made by mail. In *Bowlen v. Munford*, 921 P.2d 59, 60 (Colo. App.1996) the court acknowledged the rule that whenever a document is filed with the Division, a copy of the document shall be mailed 'to each party to the claim'; *Kuhndog, Inc. v. Ind. Claim Appeals Office,* 207 P.3d 949 (Colo. App. 2009).

Respondent Insurer filed a Notice of Contest on November 19, 2020 stating further investigation of prior medical history and compensability evaluation was needed. The Notice of Contest had the correct claim number of 5-153-276, identified Claimant by name, address and social security number as well as the correct Employer and Insurer for this claim. While the Division may have rejected the NOC due to the incorrect date of injury, the NOC served to give notice to Claimant regarding the denial of the claim.

An elementary and fundamental requirement of due process in any proceeding is notice reasonably calculated, under all the circumstances, to apprise Claimant of the pendency of the action and afford Claimant an opportunity to present a response. *Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950); *Schmidt v. Langel*, 874 P.2d 447, 451 (Colo.App.1993).

Due process does not require that the method of providing notice be absolutely certain to effect notice in every instance; it only requires that the method be reasonably calculated to effect notice to Claimant. *Kuhndog, Inc. v. Ind. Claim Appeals Office, supra.* Further, the record indicates, and Claimant does not contest, that Claimant was provided actual notice, as he provided a copy of the NOC in his Exhibit packet[25]. Accordingly, the service made in this instance was not deficient. *EZ Bldg. Components Mfg., LLC v. Indus.*

[25] Exhibit 10.

Claim Appeals Office, 74 P.3d 516, 518 (Colo.App.2003) (when there is no indication that the prescribed method of notice is jurisdictional, actual notice satisfied due process).

Further, under Sec. 8-43-203(2)(a), an employer "may become liable" to Claimant "for up to one day's compensation for each day's failure" to file an admission or notice of contest with the Division. The phrase "may become liable" means imposition of penalties under Sec. 8-42-203(2)(a) is discretionary. *Gebrekidan v. MKBS, LLC*, W.C. No. 4-678-723 (May 10, 2007). The purposes of requiring the employer to admit or deny liability are to notify the claimant he is involved in a proceeding with legal ramifications, and to notify the Division of the employer's position so the Division can exercise its administrative oversight over the claim process. *Smith v. Myron Stratton Home,* 676 P.2d 1196 (Colo. 1984). Two important purposes of penalties in general are to punish the violator and deter future misconduct. *May v. Colorado Civil Rights Commission*, 43 P.3d 750 (Colo. App. 2002). The ALJ should consider factors such as the reprehensibility of the conduct and the extent of harm to the non-violating party. *Associated Business Products v. Industrial Claim Appeals Office,* 126 P.3d 323 (Colo. App. 2005). The penalty should not be constitutionally excessive or grossly disproportionate to the violation found. *Dami Hospitality, LLC v. Industrial Claim Appeals Office,* 442 P.3d 94 (Colo. 2019). The claimant bears the burden of proof to establish circumstances justifying the imposition of a penalty under Sec. 8-43-203(2)(a), C.R.S. *Pioneer Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005). This has not occurred in this case. The Claims Representative testified that the NOC was filed timely on November 19, 2020 and this is credible.

Claimant failed to prove Employer should be penalized under Sec. 8-43-203(2)(a), C.R.S as there was no harm and, since Claimant received actual notice of the denial, there is no need to address the issue of the cure provision in this matter. The Claimant's claim for penalties is denied and dismissed.

ORDER

IT IS THEREFORE ORDERED THAT:

1. Claimant has proven by a preponderance of the evidence that he suffered compensable injuries on October 23, 2020 causing injuries to his bilateral knees, right quadriceps and bilateral inguinal injuries.

2. Claimant's claim for a lumbar spine injury is denied and dismissed.

3. Respondents shall pay for the authorized, reasonable and necessary medical benefits to cure or relieve the effects of his industrial injuries including all care, referrals through the Concentra system, diagnostic testing and therapy as stated above through the date of MMI, including Nurse Okamatsu, Dr. Corson, Dr. Canfield, Dr. Sobky, Dr. Glass, Dr. McKenzie, Dr. Tutt for only the emergency

visit of November 2, 2020, Denver Integrated Imaging, Health Images Cherry Creek, Presbiterian St. Lukes' Medical Center Diagnostic Imaging Department.

4. Claimant failed to show he is entitled a one-time change of physician pursuant to Sec. 8-43-404(5)(a)(III), C.R.S.

5. Claimant's average weekly wage as of October 23, 2020 is $1,153.61. Beginning December 1, 2020 Claimant's AWW is adjusted to $1,424.21 due to cancellation of his health insurance.

6. Respondents shall pay temporary total disability benefits from October 24, 2020 through the date of maximum medical improvement.

7. Claimant's claim for penalties is denied and dismissed.

8. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

9. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge' s order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

Dated this 23rd day of September, 2021.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that she suffered a compensable work injury to one or more parts of her body, to include her neck, mid-back, head, and left shoulder?

II. Has Claimant shown, by a preponderance of the evidence, that she is entitled to all reasonable, necessary, and related medical treatment for her work injury, most notably the left shoulder surgery as requested by Dr. Minihane?

III. Has Claimant shown, by a preponderance of the evidence, that she is entitled to Temporary Total Disability ("TTD") payments from January 25, 2021 through June 3, 2021?

STIPULATIONS

After the hearing was concluded, the parties have now agreed in their position statements that Claimant's Average Weekly Wage is 579.29. The ALJ adopts this stipulation.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

Background

1. Claimant began work as a store associate for Employer on August 30, 2018. Her duties included stocking in the dairy and frozen area, and involved lifting, stooping, bending, carrying, and shelving.

Surveillance Video

2. On September 2, 2020, while in a back hallway, Claimant was moving a cart loaded with boxes through a double door, which presumably led into the public area of the store. The ALJ notes that the DVD supplied by Respondents (Ex. L), and the thumb drive supplied by Clamant (Ex. 7) share identical content; surveillance video from directly overhead of an interior doorway, from an extreme fisheye perspective (so extreme that the resultant image is itself circular). As a result, images any activity occurring at either end of this hallway are quite distorted, curved, and disproportionately smaller.

3. Claimant is seen pushing a cart with merchandise ready to be stocked. As she passes under the camera, one can see that the oblong, unmarked cardboard box on

the upper left of the cart (which fell onto Claimant seconds later) has been opened, then partially reclosed, revealing contents blue in color. The size and shape of the box is entirely consistent with one containing a handful of hand brooms or mops (as Claimant later indicated). The bottom of the box is positioned at a height just above Claimant's head. Claimant then continues pushing the cart to the end of the hallway.

4. Upon arriving at the double doors, a smaller box appears to fall from the left side of the cart to the floor; immediately thereafter, a larger oblong box falls to the right. Claimant bends down to retrieve this smaller box, and as she does so, a coworker enters from outside the doors, apparently unaware of Claimant's presence, and attempts to replace this larger box back onto the cart. In this process, the coworker knocks the 'broom box' off the top of the cart and onto Claimant, who was still bent over. It cannot be ascertained exactly where the box struck her, other than somewhere onto her back side.

5. Claimant remains on her feet, and after a few seconds, resumes placing items back onto the cart, and leaves with the cart. It appears that the coworker re-enters the doors and retrieves the final box, which appears to be the 'broom box.' Other than the awkwardness of the shape this partially opened box (thus rendering it more likely to flex while handling it), the coworker appears not to struggle with the box's weight as he leaves the hallway and into the store.

Claimant Treats at Concentra, then Canon City Urgent Care

6. Claimant initially sought treatment on September 3, 2020, from Concentra. When seen at Concentra, the Claimant's complaints were of headache, low back pain and neck pain, *with no reference to left shoulder complaints*. Pain at 8/10. During the telemedicine intake, once Claimant revealed complaints of a head contusion, the attending physician, Aharon Wolf, MD, then recommended an in-person evaluation. (Ex C, pp. 52-53).

7. Claimant then sought treatment at Canon City Urgent Care, also on September 3, 2020. She was evaluated by PA Steven Quackenbush. While there is no narrative report, PA Quackenbush's WC164, dated 9/3/2020, states, *Injured Worker's Description of Accident/Injury* to be, "A box fell on the right side of head and fell onto left side". (Ex. H, p. 197).

8. Cervical x-rays taken 9/3/2020 showed "No acute fracture is identified. There is grade 1 retrolisthesis C4 on C5 and C5 on C6. There is grade 1 anterolisthesis C7 on T1. Multilevel degenerative disc disease is present. This is greatest at C4-5 and C5-6, where it is moderate in severity. Multilevel bilateral degenerative facet hypertrophy is present. There is no significant prevertebral soft tissue swelling." (Ex. 2, pp. 3-4).

9. Left shoulder x-rays taken 9/3/2020 showed: “no acute fracture or dislocation. No evidence of significant degenerative change. No destructive bony lesions are identified. The surrounding soft tissues are unremarkable.” *Id* at 4.

10. Based on this reported mechanism of injury, PA Quackenbush diagnosed the Claimant with a sprain of the left rotator cuff capsule, strain of cervical portion of left trapezius muscle, posterior chest wall strain. (Ex. H, pp. 194, 200).

11. By September 10, 2020, Claimant reported to PA Quackenbush that she continues to have some upper neck tenderness, which she states now, is on the right side. The posterior chest wall symptoms have resolved. She has persistent transient “tingling” into her right second and third fingers. She does not have an associated headache. She has some pain into her left shoulder, which has improved without popping of the shoulder. …She has been return[ed] to modified duty and is working within these restrictions without significant problems….The patient will be referred to physical therapy today…”(Ex. 2, p. 9).

12. The physical exam was unremarkable, except for “some right paracervical and trapezius muscular tenderness without erythema or discoloration or rash…[and]…The patient has minimal tenderness of the left anterior lateral [s]houlder with palpation without discoloration or deformity. *Id* at 10-11.

13. PA Quackenbush (co-signed by John Reasoner, MD) filed a new WC164 on 9/24/2020, with lifting and push/pull restrictions, PT recommendations, and an anticipated MMI date in 2-3 weeks. (Ex. 2, p. 16). The lung x-ray he recommended was unremarkable. *Id* at 17.

14. Claimant’s visit of 10/2/2020 showed continued improvement with chiropractic treatment. “The patient is also responding *very favorably to her physical therapy* with regard to the cervical neck and left shoulder symptoms and strain. *Id* at 19. No significant findings on exam. MMI now estimated “now after next follow-up visit or 2.” *Id* at 18. (emphasis added).

15. Claimant also received chiropractic treatment from 9/25/2020 through 10/15/2020. (*see, generally,* Exhibit 3, Exhibit I). On her final visit with Seth Oquist, DC, on 10/15/2020, he notes:

> *Karen feels the complaint has improved her ability to lifting, walking and standing and has changed about 90%* since the onset of the complaint/condition. She has been evaluated by analyzing the Functional Rating Index functional outcome assessment tool with beginning score or percentage of 25 and goal score or percentage of 50% or better. The current overall score or percentage is 7 with *an overall change of 80%.* In consideration of the findings from today’s re-evaluation of Karen’s

> complaints, the outcome score and my examination findings for this condition, *continued treatment is unnecessary and the new treatment plan will be discontinued* and advised to return as referred by CCOM. (Ex. 3, p. 112)(emphasis added).

16. Claimant's 10/25/2020 visit revealed no complaints or exam findings, except for a tight spasm on Claimant's left paracervical and trapezius areas of her upper back and neck. Id at 22, 23. No numbness of the extremities. *Id* at 23. PT to continue, chiropractic has been completed. *Id* at 22, 24.

17. On 11/6/2020, Claimant's exam was essentially normal. "She has *improved significantly* with transient and *greatly diminished pain* involving her paracervical and trapezius area." "She continues to take Robaxin in the morning and at noon and Flexeril at night is sleeping much better." *Id* at 27. No further testing or specialist visits were anticipated. MMI was deferred, once again, "at her next follow-up or two." *Id* at 27, 30. Left overhead reaching still restricted. Lifting, push/pull restrictions were raised from previous. *Id* at 30.

18. On November 12, 2020, PA Quackenbush opined the Claimant would be at MMI at her next visit. Her physical exam was essentially normal, but now with some increased pain complaints with her left shoulder and left neck. MMI was estimated to be at her next visit. *Id* at 31-34. Claimant was first to be checked by Dr. Reasoner for likely closure of the case. *Id.*

19. Dr. John Reasoner evaluated the Claimant on November 23, 2020. [For reasons unclear, the first page of this report was excised from Claimant's exhibit packet]. This first page [now from Respondent's exhibits] states:

> She states that she was doing better until Thursday when she developed an occipital headache on the right side causing pain into the right side of her neck. She has utilized her Robaxin, Flexeril, and Motrin *without any improvement*…She states she called off work the last 2 days but was unable to come in to be seen for her discomfort. *She has undergone physical therapy without any significant improvement.* Currently she states that her right first 3 fingers have been numb over the past week. Her current pain level is *8/10.* She states that any movement increases the discomfort in her neck and left shoulder. (Ex. H, p. 227)(emphasis added).

At that appointment, Claimant reported a worsening of symptoms in the cervical spine and left shoulder, without describing any precipitating event. Dr. Reasoner referred Claimant for cervical and left shoulder MRIs.

20. The left shoulder MRI showed a partial thickness, partial width tear of both the supraspinatus and infraspinatus tendons. The cervical MRI showed multilevel,

chronic degenerative changes. (Ex. H, p. 233). Dr. Reasoner referred the Claimant to orthopedic surgeon Keith Minihane, MD.

21. On 1/4/2021, Claimant returned to Dr. Reasoner. "*Diagnosis is cervical strain and partial left rotator cuff tear.* Patient continues to be symptomatic with shoulder and neck discomfort that affects her ability to sleep. *Patient is currently working modified work duties. She is working at the door and checking receipts….*Her current pain level is 5-6/10." (Ex H, p. 239)(emphasis added).

22. In his WC164, dated 1/4/2021, Dr. Reasoner continued to recommend a referral to Dr. Minihane (orthopedist), with temporary work restrictions of no climbing, crawling or overhead reaching, 5 lb. lifting and carrying, 10 lb. push/pulling. He noted that Claimant could perform 'administrative duties.' (Ex. H, p. 243).

23. Claimant returned to PA Quackenbush on 1/25/2021. "I am going through torture at work…The patient states that she has had significant exacerbation of neck and back pain after days labor at work" (Ex. H, p. 244). The *Review of Symptoms* noted "Positive for Arthralgias, back pain, myalgias, neck pain and neck stiffness" *Id* at 245. No *shoulder pain* is referenced in this narrative report. Nonetheless, in the WC164, Claimant was removed from work entirely on this date, with a work-related diagnosis of "left shoulder and left cervical strain, left chest wall contusion". *Id* at 248.

Claimant is Referred to Dr. Minihane

24. Orthopedist Keith Minihane evaluated Claimant on January 6, 2021. The mechanism of injury reported to Dr. Minihane was a direct blow to the left shoulder. (Ex. J, p. 308). Dr. Minihane diagnosed the Claimant with a traumatic incomplete tear of left rotator cuff and arthritis of the left acromioclavicular joint. An interarticular joint injection was performed, which only provided three days of relief. *Id* at 311, 312.

25. On February 11, 2021, Dr. Minihane requested prior authorization of a left shoulder arthroscopy with subacromial decompression and rotator cuff debridement with concurrent distal clavicle resection. (Ex. J, p. 320).

Dr. Cebrian Performs an IME / Claimant Placed at MMI

26. Dr. J. Carlos Cebrian evaluated the Claimant on April 26, 2021, at Respondents' request. (Exhibit K). In his written report dated 5/14/2021, Claimant gave Dr. Cebrian a history of the September 2, 2020, incident as follows: "As Ms. [Claimant] was bent over, a box fell and hit her on the back of the head on the right side in the mid back. *The box did not hit her left shoulder." Id* at 321. (emphasis added). In *Past Medical History*, he notes that Claimant "denies ever having any problems or complaints in the left shoulder or any treatment on her left shoulder. *Id* at 322.

27. Based on his review of the medical records, and evaluation of the Claimant, Dr. Cebrian opined the Claimant suffered, at most, a cervical contusion or strain as a result of the September 2, 2020, work incident. *Id* at 345. He opined that the proposed shoulder surgery was not reasonable or necessary, but in any event it was not causally related to her work injury, as the mechanism of injury as described could not cause the partial rotator cuff tears she suffers from. He opined that she reached MMI on 1/4/2021 for all work-related injuries, and is now able to return to work, with no restrictions, and no maintenance care. *Id* at 346.

28. Claimant had remained restricted from all work activity in the period January 25, 2021, through June 2, 2021. At Claimant's final appointment on June 4, 2021, PA Quackenbush (sanctioned by Steven Decoud, MD) released Claimant at MMI (*effective on 6/3/2021*, *see* Ex. H, p. 288, and narrative), with no restrictions, no impairment, and no need for medical treatment to maintain MMI. Under *Assessment and Plan,* he states: "After review of IME from Dr. Carlos Cebrian MD from May 14, 2021 the patient will be placed at MMI." *Id* at 283. He recommended that Claimant follow-up with her family physician and/or orthopedic specialist for non-work-related medical issues, most notably her left shoulder complaints. *Id.*

Claimant's Prior Medical History

29. Prior to her employment with Employer, the Clamant suffered a March 7, 2017, work injury. That injury occurred when the Claimant was operating a stand-up forklift, following a co-employee into a garage. The garage door started closing, striking the Claimant in the head and landing on her left shoulder. (Ex. C, p. 8). Claimant was diagnosed with a forehead contusion, contusion of the left upper arm, and cervical strain. Claimant consistently reported pain at a level 8/10 associated with her injuries. *Id* at 21, 26.

30. March 10, 2017, x-rays of the cervical spine were read as showing multilevel discogenic and bony degenerative changes. *Id* at 39. On March 15, 2017, Claimant reported previous injuries to the left neck, left shoulder, and head, as the result of a slip and fall while at work. *Id* at 45. She reported that her *left upper extremity is sore proximally*. *Id.* On that day, the provider released the Claimant from care on March 15, 2017, opining the Claimant had "returned to her pre-DOI baseline and is advised to follow up with her PCP for her chronic, pre-existing, non-work-related degenerative cervical spine condition." *Id* at 43.

31. On December 18, 2017, the Claimant sought treatment at the Arkansas Valley Surgery Center. Her prior medical history included dizziness, low back and neck injuries, fibromyalgia, and muscle spasms. (Ex. C, p. 57). Her prescription drug history included Tramadol, Voltaren gel, Hydrocodone-Acetaminophen, and Hydroxyzine, among multiple other medications. *Id* at 58-59.

32. Claimant also sought treatment with Metamorphosis Pain Management. On 4/11/2018, her subjective complaints included, “chronic pain syndrome”, with the reported “major” sources of pain being the neck, *left shoulder*, and low back. (Ex. F, p. 172). By 6/11/2018, Claimant’s problem list included, but was not limited to, arthritis/arthrosis, chronic back pain, degeneration of the cervical intervertebral disc, joint pain, lumbar radiculopathy, lumbar spondylosis, other spondylosis, with radiculopathy, and recurrent brief depressive disorder. *Id* at 165.

33. Ultimately, Claimant underwent a series of medial branch blocks. (Ex. F, p. 168, Ex. K, p. 324). On March 30, 2018, she was evaluated for pre-operative **bilateral** shoulder joint injections. The procedure was performed on 4/11/2018. (Ex. F, p. 168).

34. Claimant also established care with JPS Hospital Systems on April 29, 2019. She reported a past medical history to include chronic neck pain, chronic back pain, degenerative joint disease, and spinal stenosis. (Ex. E, p. 68). Her final diagnoses included chronic pain syndrome, chronic neck pain, chronic low back pain, and other long-term (current) drug therapy. *Id* at 62, 68.

Claimant Testifies at Hearing

35. Claimant testified about her duties as a stocker. She testified that prior to 9/2/2020, she was not having any left shoulder pain, and her left shoulder did not limit her ability to perform her job. While acknowledging some prior neck pain, she stated that post-injury, her neck pain was “a lost worse. I couldn’t hardly move.” (Transcript, p. 20).

36. In describing the incident, she stated “all of a sudden I felt boxes coming down on top of me and hitting me, and it kind of stunned me. Took a minute. I stood up, held on to the cart, trying to gather my thoughts of what just havened. And just the increased pain and all of it, I started crying and I just broke out.” *Id* at 20-21. She did not know how many boxes fell onto her, other than the one that did hit her was for sure “mops and brooms or something like that.” *Id.* She did not know the weight of this box. *Id.*

37. Claimant testified that she was given “such great grief [by managers at work] in regards to going to a doctor.” *Id* at 22. The next day she was scheduled for work, and “then I was hurting so bad I couldn’t hardly move. I went ahead and called in to take off that day.” *Id* at 22-23. The work-related pain Claimant described as still hurting, at the time of hearing, was “in my left front part of my shoulder, sometimes on top and down into my arm.” *Id* at 24, 25.

38. Claimant testified that she was offered, and accepted, modified duty from Employer for “four, five months.” She stated that she was taken off work on January 24, 2021, and then returned to work on *July 4,* 2021. She now works in cosmetics, a position she had sought prior to the work injury.

39. Claimant confirmed that the box[es] that fell did not hit her on the left shoulder or the left side of her back or left neck. *Id* at 29. Neither was she struck on her chest area, since she was bent over at the time. *Id* at 31. She did not fall to the ground, nor did she fall onto outstretched arms. *Id* at 29.

40. Claimant confirmed a prior work injury to her left shoulder in 2017, for which she was prescribed physical therapy and narcotic medications. Claimant disputed taking any drug screenings as recently as 2018 or 2019. She believed it to have been at least 10 years or more. *Id* at 34. She acknowledged prior diagnoses of fibromyalgia and chronic fatigue syndrome. *Id.* Claimant's recall of other recent treatment was vague, at best.

Deposition of Dr. Cebrian

41. In an August 12, 2021, post-hearing evidentiary deposition, Dr. Cebrian testified as a Level II accredited expert in the field of occupational medicine. Dr. Cebrian testified that Claimant suffered a cervical contusion/strain as a result of the September 2, 2020, incident. He testified it is not medically probable that Claimant's complaints of left-sided neck pain, left shoulder pain, and chest wall pain are related to the work event. He explained that getting hit on the right side of the head and back may injure the right-side of the neck or back, but it is not medically probable it would result in any injury to the left shoulder. There would not be enough force to the left shoulder to cause any kind of pathology to the left rotator cuff or shoulder joint.

42. Dr. Cebrian explained that both PA Quackenbush and Dr. Minihane relied on an incorrect description of the mechanism of injury in arriving at their opinions that Claimant suffered a left shoulder injury on September 2, 2020. Dr. Cebrian opined, to a reasonable degree of medical probability, that a cervical contusion/strain would improve with the passage of time, either with or without medical treatment. He opined, based on the Claimant's mechanism of injury, that it is not medically probable that a cervical contusion or strain would result in lost time from work or permanent impairment. He further opined that the work restrictions imposed on Claimant were not related to the September 2, 2021, work incident; instead they were related to her pre-existing chronic pain condition.

43. Dr. Cebrian testified that, given the Claimant's medical history, while it was reasonable for the Claimant to seek medical treatment following the September 2, 2020, incident, it was not medically necessary. He opined that, given the Claimant's medical history, while it was reasonable for PA Quackenbush to impose work restrictions through October 23, 2020, it was not medically necessary.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002).

D. In this instance, the ALJ finds Claimant to be a less-than-reliable medical historian. Her symptoms as relayed at various stages of her treatment follow no particular pattern, waxing and waning (and migrating) beyond what one might reasonably anticipate with simple 'good days and bad days'. Initially, her physical therapy is providing great results; then when she sees Dr. Reasoner for the first time, it had never helped. Neither did her medications help at all, despite refilling them regularly through PA Quackenbush, with no complaints. Claimant made no mention of her self-reported spectacular results from chiropractic care. Claimant denied any left shoulder issues pre-injury; the medical records say otherwise. While Claimant did acknowledge prior diagnoses for fibromyalgia and chronic fatigue syndrome, attempting now to correlate her current complaints with a specific work injury becomes clearly problematic.

Compensability, Generally

E. Claimant must prove by a preponderance of the evidence that he is a covered employee who suffered an injury arising out of and in the course of employment. C.R.S. § 8-41-301(1); S*ee*, *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett, 33 P.3d 1230* (Colo. App. 2001). A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 592 P.2d 792 (Colo. 1979).

F. An injury occurs "in the course of" employment where Claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638 (Colo. 1991). The "arising out of" requirement is narrower and requires claimant to show a causal connection between the employment and injury such that the injury has its origins in the employee's work-related functions and is sufficiently related to those functions to be considered part of the employment contract.

Compensability, as Applied

G. Claimant was struck somewhere on her back or neck (or both) by a large cardboard box from a height of 2-3 feet, from the top of the cart down to her back. Claimant believed the box contained brooms or mops, and the evidence is consistent with that belief. The box had apparently been opened, but not fully re-closed, quite possibly to allow one or two brooms to be removed in a pinch to stock an empty shelf. What can be inferred is that this box would not weigh much more than a few pounds, based upon: 1. Claimants own description of the contents, 2. The relative ease with which the co-worker carried it away after the incident, 3. Its placement on the very top of a push cart, when better options existed for transport of heavier objects by store personnel, and, 4. The ease by which this box was casually nudged over the side by the unknowing co-worker, while in the process of re-placing another lightweight box back onto the cart. Further, it appears it landed more or less flat onto Claimant, instead of along an edge, or even a corner, where all the transferred energy might otherwise impact a small area. In other words, Claimant did not suffer much of an impact at all from this box, although it was likely startling.

H. Given Claimant's preexisting medical history, her migratory and varying symptoms as reported, and the mechanism of injury here, the ALJ finds Dr. Cebrian's analysis to be persuasive. *At most, Claimant suffered a cervical contusion/strain, and* *minor back contusion.* The mechanism of injury could not have caused the partial tears in Claimant's infraspinatus or supraspinatus tendons, nor would it have precipitated the need for a subacromial decompression or a distal clavicle resection. The box never struck Claimant's left shoulder, nor did she land on outstretched arms. Any treatment for an alleged rib cage misalignment would not be related to this singular, minor work incident. Nor would her complaints of headaches, or tingling in her fingers, or *any other condition* she complained of beyond the cervical contusion/strain and minor back contusion. Further, the ALJ finds that, *beyond this minor work injury to her neck and back,* any other medical complaints were not the result of aggravating, either temporarily or permanently, a preexisting condition such that a disability resulted which required further medical treatment.

I. Nonetheless, Claimant has shown she did suffer a minor compensable work injury, which required medical treatment. The remainder of her complaints have not been shown to be work-related. While Canon City Urgent Care has served as Claimant's ATP from Day One, both PA Quackenbush and Dr. Reasoner's specialty is noted to be *Urgent Care*, and not Occupational Medicine. While they duly filled out WC164s regularly, the record does not reflect whether they are even Level II accredited. Given the ostensible urgency of Claimant's condition (overlain with existent covid considerations), issues of *causation* were not at the forefront of their considerations. As is not uncommon in urgent and emergency care situations, focus on the mechanism of injury understandably emphasizes *diagnosis and treatment,* rather than the forensic issue of *causation.* While Claimant may not to be to blame for any of this, her initial mechanism of injury on 9/3/2021 describes a *fall onto her left side*, which likely got carried over into future reports without much scrutiny. Additionally, adding to the confusion was her variety of self-reported symptoms which temporally correlated with the work injury.

Claimant's Date of MMI

J. While it is clear from the record that continued treatment was recommended by her ATPs for a variety of Claimant's complaints, to include most notably, her left shoulder, Dr. Cebrian's IME report changed the ATPs' analysis. Once this report was issued, it was plainly relied upon by PA Quackenbush (and now sanctioned by Dr. Decoud), who released Claimant at MMI, effective at her next appointment on June 3, 2021. At that appointment, he encouraged her to seek treatment for her shoulder complaints outside the workers compensation system. While Dr. Cebrian opined that Clamant was at MMI for all work related complaints as of 1/4/2021, PA Quackenbush simply assigned MMI on the 6/3/2021 appointment date; he did not make it retroactive. In this instance, the ALJ finds that Claimant's MMI status remained in flux solely as a result of her non-work-related complaints. Arguably, Claimant reached MMI well before the 1/4/2021 date assigned by Dr. Cebrian, but for purposes of this Order, the MMI date of 1/4/2021 will be accepted by the ALJ.

Medical Benefits

K. Respondents are liable for medical treatment which is reasonably necessary to cure and relieve the effects of an industrial injury. § 8-42-101 (1)(a), C.R.S. (2009); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). Where a claimant's entitlement to benefits is disputed, the claimant has the burden to prove a causal relationship between a work-related injury and the condition for which benefits or compensation are sought. *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997). Whether the claimant sustained his burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P .2d 496 (Colo. App. 1997).

L. Claimant has now received all medical treatment which was reasonable, necessary and related to treat her industrial injuries. She is at MMI for such injuries, and no medical maintenance care is required. Her rotator cuff complaints are *not causally related* to her work injury; therefore, there is no need to determine if such surgery is reasonable and necessary. Nor has Claimant shown that further treatment for any condition *except her cervical contusion/strain and back contusion* is *causally related* to her work injury. Perhaps further treatment might be *reasonable and necessary* to treat fibromyalgia in the same body parts complained of, but any such treatment is not *causally related*. No further medical benefits are due and owing to Claimant.

Temporary Total Disability

M. To prove entitlement to temporary total disability (TTD) benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts; that he left work as a result of the disability, and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of the earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the Claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

N. In this case, Claimant was taken of work by PA Quackenbush and Dr. Decoud on 1/25/2021, under their mistaken belief (as of 1/25/2021) that Claimant's shoulder complaints were work-related. They both concluded otherwise, effective 6/3/2021. The ALJ concurs with such assessment. Thus, while Claimant may well have left work as a result of a disability (to her shoulder) for more than three work shifts, and that she thereby suffered a commensurate wage loss, *she has failed to show that such* *events were caused by her industrial injury.* Further, the record is equally clear that Employer (while enjoying the inherent luxury of being *large*) had offered modified duty consistent with the work restrictions imposed by the ATP from Day One. Claimant accepted such modified duty, and while perhaps uncomfortable at times, had no apparent difficulty in completing it. And as noted, her total removal from work in 1/25/2021 was not related to Claimant's minor work injury. Temporary total disability payments are not appropriate for Claimant's situation.

ORDER

It is therefore Ordered that:

1. Claimant has suffered a minor compensable work injury, but limited only to a cervical contusion/strain and minor back contusion.

2. Claimant has now received all appropriate medical care which was reasonable, necessary, and related to her compensable work injury. Claimant's claim for any further medical treatment, to include the proposed shoulder surgery, is denied and dismissed.

3. Claimant's claim for Temporary Total Disability Benefits is denied and dismissed.

4. Claimant's Average Weekly Wage is $579.29.

5. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. *In addition, in order to best assure prompt processing of your Petition, it is* ***highly recommended*** *that you send a copy of your Petition to Review to the Colorado Springs OAC via email at oac-csp@state.co.us.*

DATED: September 23, 2021

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

- Did Claimant overcome the DIME's MMI date by clear and convincing evidence?

- Did Claimant prove by a preponderance of the evidence she suffered a functional impairment not listed on the schedule?

- If Claimant proved whole person impairment, did she overcome the DIME's impairment rating by clear and convincing evidence?

- If Claimant did not prove whole person impairment, did she prove a 16% extremity rating by a preponderance of the evidence?

- Did Claimant prove her average weekly wage (AWW) should be adjusted based on an increase in the Colorado state minimum wage?

- Did Claimant prove entitlement to medical benefits after MMI?

- Disfigurement.

FINDINGS OF FACT

1. Claimant worked for Employer as a hostess. At the time of her injury, she earned $11.33 per hour, plus tips. Wage records show $2,262.40 in declared tips from January 1 through October 24, 2019, which equates to an average of $226.24 per month.

2. Claimant suffered an admitted injury to her right shoulder on May 11, 2019 when she slipped on ice and fell.

3. Employer referred Claimant to Dr. Cynthia Schafer at UCHealth. At the initial visit on May 14, 2019, Claimant reported pain around the right clavicle, right shoulder, and the right side of her neck. The medial end of the clavicle had become "prominent" since the accident. Physical examination showed tenderness, decreased strength, and decreased range of motion of the right shoulder. She also had tenderness around the right side of her neck and right trapezius, with reduced cervical range of motion. Dr. Schafer diagnosed a right shoulder "sprain." She gave Claimant a shoulder immobilizer and referred her to Dr. Chad Abercrombie for chiropractic treatment.

4. Claimant's initial visit with Dr. Abercrombie to place on May 25, 2019. She reported chest pain, right collarbone pain, right greater than left neck pain, and diffuse mid back pain. On examination, her right shoulder was noticeably "depressed." Dr. Abercrombie also observed anterior prominence of the right sternoclavicular joint. Claimant had tenderness and spasm in the right upper trapezius extending into the right-sided neck muscles. Cervical range of motion was moderately limited. She was also

tender at the right sternoclavicular joint and around the sternocostal region. Dr. Abercrombie diagnosed sternocostal and sternoclavicular strains and cervicothoracic strains with facet and costovertebral joint components.

5. Claimant initially responded well to chiropractic treatment. On July 19, 2019, Dr. Abercrombie noted the right shoulder remained depressed but was "greatly improved" from her initial evaluation. She continued to exhibit tightness and trigger points along the trapezial ridge into the right lateral cervical muscles. She still had pain around the sternoclavicular and sternocostal areas.

6. Claimant saw Dr. Dwight Leggett on August 9, 2019. She explained the treatment with Dr. Abercrombie had been helpful but she was still having symptoms and associated limitations. She described persistent "swelling" over the collarbone since the accident which did not seem to be getting better. She also reported "a large amount of tension" in her neck, particularly on the right side. She felt her right shoulder pain was worsening and she had difficulty tolerating chiropractic treatment to that area. She experienced frequent clicking, popping, and catching, and the shoulder had become "stuck" on a few occasions. Dr. Leggett observed "a large amount of swelling of the right greater than left sternoclavicular joint, as well as somewhat into the region of the anterior scalenes." These areas were severely tender and hypersensitive to palpation. Dr. Leggett also identified "high levels of myofascial tightness" throughout the upper pectoralis, mastoid, scalenes, trapezius, and around the shoulder. Her right shoulder was approximately 2 inches lower than the left. Dr. Leggett recommended trigger point injections and sternoclavicular joint injections. He also wondered about possible labral and/or rotator cuff tears.

7. Dr. Leggett administered the injections on August 29, 2019. They provided short-term relief but no sustained benefit.

8. Claimant underwent an MR arthrogram of the right shoulder on August 30, 2019. It showed a partial supraspinatus tear with focal full-thickness perforation through the bursal surface of the tendon, a circumferential labral tear with a labral cyst, and tendinosis of the long head of the biceps. After reviewing the report, Dr. Schaffer referred Claimant to Dr. Christopher Jones for an orthopedic evaluation.

9. Claimant saw Dr. Jones on October 14, 2019. She described ongoing pain around the right shoulder and lateral neck. She felt the pain was getting worse. On examination, Dr. Jones found no tenderness to palpation of the sternoclavicular joint, clavicles, or bicipital groove. Claimant was tender at the acromioclavicular joint, the anterolateral acromion, cervical spine, and trapezius. She appeared "quite stiff." She had significant pain with shoulder extension and lateral rotation, and a positive Spurling maneuver. Dr. Jones noted mild crepitus on palpation of the subacromial space with range of motion. Impingement signs were positive but she had full rotator cuff strength. X-rays of the right shoulder showed arthritis with an early "goats beard osteophyte" at the inferior humeral neck and glenoid. The joint space was well preserved. There was also moderate AC joint arthritis. Dr. Jones opined the labral tear shown on the arthrogram was

degenerative and “normal for her age.” He thought most of Claimant’s pain was coming from her neck as opposed to any shoulder pathology, and recommended a cervical MRI.

10. Claimant was dissatisfied with Dr. Jones’ assessment and requested a second opinion, so Dr. Schaffer referred her to Dr. David Weinstein.

11. Claimant saw Dr. Weinstein on November 18, 2019. She reported persistent right shoulder pain radiating to the sternoclavicular joint. She also described clicking and popping within the shoulder joint. Physical examination showed tenderness around the neck, right trapezius, and right scapula. She was tender to palpation over the sternoclavicular joint, the subacromial space, and the proximal biceps tendon. Rotator cuff strength testing showed weakness with forward elevation, abduction, and external rotation. Provocative impingement and rotator cuff testing was positive. Dr. Weinstein did not mention any shoulder crepitus. He reviewed the arthrogram images and concurred with the assessment of a partial supraspinatus tear and diffuse labral tearing. He thought Claimant’s symptoms and clinical findings were consistent with a rotator cuff injury, but opined the labral tear was an incidental, age-related finding, and not a likely pain generator. Dr. Weinstein was primarily impressed with right shoulder myofascial inflammation, evidenced by significant tenderness over the trapezius, anterior chest, and costochondral area. He recommended Claimant return to Dr. Leggett for additional soft tissue treatment, but also recommended a diagnostic shoulder injection to determine whether any of her symptoms were related to the shoulder.

12. Claimant had the cervical MRI the same day she saw Dr. Weinstein. It showed moderate spondylosis and neural canal stenosis at multiple levels, but no evidence of nerve root impingement or cord compression.

13. Claimant followed up with Dr. Weinstein on January 2, 2020. Her symptoms and clinical examination findings were unchanged. Dr. Weinstein injected the right shoulder. Re-examination 15 minutes later showed no change in her overall exam, with continued diffuse tenderness, pain and weakness, and range of motion deficits. Dr. Weinstein concluded Claimant’s symptoms were not related to the pathology on the MRI, but were instead related to myofascial inflammation. He thought no treatment specifically directed at the shoulder would help, and recommended she follow up with Dr. Leggett.

14. Claimant returned to Dr. Leggett on January 9, 2020. He reviewed the interval history and the cervical MRI findings. Claimant was participating in physical therapy, but was having difficulty tolerating the sessions because of pain. Most of her pain was around the shoulder, scapula, and sternum. Examination of the right upper quadrant showed substantial hypersensitivity with multiple trigger points throughout the cervical and parascapular region, and into the upper lateral chest wall. Dr. Leggett agreed with Dr. Weinstein that the majority of Claimant’s pain was myofascial. He administered trigger point injections and referred Claimant back to Dr. Abercrombie for chiropractic treatment.

15. Claimant reported gradual but appreciable improvement over the next several months with trigger point injections and chiropractic treatment. Her trigger points were primarily located the trapezius and parascapular musculature.

16. On March 2, 2020, Dr. Leggett injected the right sternoclavicular joint and a few sternocostal joints.

17. Claimant followed up with Dr. Leggett on May 7, 2020. She reported a "clear decrease in hypersensitivity" after the injection, although she continued to have pain and tension in her neck and shoulder. Claimant's treatment had been interrupted by the "stay-at-home" order related to COVID, which caused her to "lo[se] some of the ground that we had made." Dr. Leggett injected multiple trigger points and sent her immediately over to Dr. Abercrombie's office.

18. On May 14, 2020, Dr. Leggett noted Claimant was beginning to identify a "cyclic nature of her pain." She typically enjoyed a "clear decrease in pain" for several days after trigger point injections, but the symptoms inevitably returned to the same level. She was frustrated and asked about treatment options that might prove more lasting. She reported intermittent popping and catching in the shoulder, which Dr. Leggett reproduced on examination. Dr. Leggett opined Claimant's myofascial pain in the neck had responded well to treatment, but persisted in the right shoulder girdle. He recommended PRP (platelet rich plasma) injections for the right shoulder.

19. Insurer approved the PRP treatment, and Claimant had the first injection in mid-June 2020.

20. On July 14, 2020, Dr. Leggett documented "substantial improvement since the injection, with improved activity tolerance and range of motion. She is able to do her own hair, which she is extremely pleased with. Overall, she feels that she is making clear gains." Examination of the right shoulder showed "a clear decrease in hypersensitivity diffusely throughout the region, and a clear increase in tolerance of exam. Range of motion is also clearly increased." Dr. Leggett anticipated she would continue to improve over the next few weeks, but might need a second round of PRP. He opined claimant was "approaching MMI in the near future."

21. Claimant followed up with Dr. Leggett on August 4, 2020. She stated her level of improvement was "amazing," with significant decrease in shoulder pain. Her range of motion and activity tolerance had also improved. However, she remained limited by ongoing hypersensitivity in the shoulder and chest region. Examination showed "a clear decrease in hypersensitivity" with palpation of the right shoulder. Provocative rotator cuff testing remained somewhat positive but was "clearly less intense as compared to previous evaluations." Dr. Leggett opined, "She has had clear benefit with the PRP injection into the right shoulder," and recommended a second injection. He planned to target the subacromial space again, but also the acromioclavicular and sternoclavicular joints.

22. The second set of PRP injections was completed on August 20, 2020.

23. At her next appointment on September 16, 2020, Claimant stated the additional injections were "quite beneficial" regarding her shoulder pain. Dr. Leggett noted her examination findings were improved from the last visit. Claimant was under the

impression she would be put at MMI soon, and Dr. Leggett suggested additional PRP injections may be warranted. He opined, “This could be done under ongoing treatment, or possibly under the maintenance phase of her treatment.”

24. Dr. Leggett administered a third set of PRP injections on October 20, 2020.

25. On November 13, 2020, Claimant reported the injection provided moderate benefit, but she still had pain over the anterior chest around the sternoclavicular joint. Claimant was emotionally labile and described significant depression and anxiety about the ongoing impact the injury was having on her life. She was concerned about returning to work given her age and functional limitations. She anticipated being placed at MMI by Dr. Schafer within a week, and asked about maintenance care. Dr. Leggett told Claimant he expected Dr. Schafer to outline a maintenance program at the time of MMI, which could include additional treatment with Dr. Abercrombie for pain flares and possible repeat PRP injections.

26. Dr. Schafer put Claimant at MMI on November 16, 2020. Claimant reported the PRP injections had improved her pain in the AC joint but were of little benefit for the sternoclavicular joint pain. Dr. Shafer observed Claimant’s clavicle “continues to be more prominent anterior to the sternum at that junction, [but] I told her there was little more that could be done in that regard.” On examination, Claimant was tender to palpation primarily in the AC joint and into the chest wall. Dr. Schafer appreciated “minimal crepitus.” Dr. Schafer opined “limited range of motion does not adequately reflect the level of dysfunction related to this injury, and I need to rate the anterior chest wall dysfunction.” To that end, she added 6% extremity for mild crepitus. This produced an overall rating of 16% extremity/10% whole person.

27. Dr. Schafer recommended maintenance care including meloxicam, up to 12 sessions of chiropractic treatment with Dr. Abercrombie over the next 12 months, and up to two PRP injections in the right shoulder or right chest wall in the next 12 months.

28. Dr. Rebekah Martin performed an IME for Respondents on January 4, 2021. Dr. Martin noted significant pain behaviors during the examination, including reported severe pain with light palpation around the right shoulder girdle, neck, and sternoclavicular joint. Dr. Martin saw no asymmetry between the left and right sternoclavicular or AC joints. The right shoulder was slightly lower than the left. In her opinion, the imaging studies showed only age-related degenerative changes and indicated no acute injury aside from the soft tissue strains. She opined Claimant suffered a soft tissue cervical strain, thoracic strain, pectoralis muscle strain, and parascapular muscle strain in the fall, but reached MMI approximately three months later, on August 11, 2019. Dr. Martin thought it was “unfortunate that the patient underwent a right shoulder MRI because it appears that the age-related findings on MRI led to significant unnecessary care.” She saw no objective findings to support Claimant’s reports of severe pain and dysfunction. She also felt Claimant did not put forth full effort during strength testing at the IME. Dr. Martin concluded Claimant suffered no permanent impairment and required no maintenance care or work restrictions.

29. Dr. Stephen Lindenbaum performed a DIME on March 19, 2021. His report reflects a comprehensive record review and thorough physical examination. Like Dr. Martin, Dr. Lindenbaum noted Claimant's significant pain reaction in response to even light touch. He could not elicit any crepitus despite repeated shoulder motion. He observed no significant sternoclavicular swelling or prominence. Dr. Lindenbaum opined Claimant probably had pre-existing age-related right shoulder pathology that was aggravated by the injury. He thought Dr. Martin's proposed MMI date of August 11, 2019 was "a little premature based on the fact the patient continued to have treatments with injections and chiropractic after that time." He concluded the appropriate MMI date was May 7, 2020. He reasoned,

> [that was] around the last treatments that Dr. Leggett and the chiropractor did together of 5/7/20. . . . [T]reatments after that were related to PRP injections which in themselves are not considered a mainstream for this type of injury, as well as the biofeedback that could have been done on a maintenance basis. It is for that reason that I think the date of MMI should have been as of 5/7/20.

30. Dr. Lindenbaum assigned an 8% upper extremity/5% whole person rating based on shoulder range of motion deficits. He noted the primary difference between his rating and Dr. Schafer's rating was the rating based on crepitus. He opined,

> [T]his would be covered under her decreased motion as far as impairment is concerned, and I did not feel any evidence of significant crepitus on examination of either the AC joint, sternoclavicular joint, or subacromial space. It is for that reason that I gave the patient 8% upper extremity rating that converted to a 5% whole person rating. This is in contrast to the 16% upper extremity rating that was given by Dr. Schafer of which the large percentage was related to a rating for crepitus which I did not see.

31. Dr. Lindenbaum opined Claimant should be permanently restricted to lifting no more than 5 pounds. He saw no need for any maintenance care.

32. Dr. Martin issued a supplemental report on May 13, 2021 after reviewing additional records, including Dr. Lindenbaum's DIME report. She agreed with Dr. Lindenbaum that no cervical spine rating was warranted, but disagreed with the shoulder rating. She reiterated her opinion that Claimant did not suffer a right shoulder injury from the fall.

33. Dr. Martin testified in deposition consistent with the opinions expressed in her reports.

34. Dr. Martin's opinion that claimant did not injure her right shoulder in the accident is not persuasive. That opinion is directly contradicted by the assessments of Dr. Schafer, Dr. Leggett, Dr. Abercrombie, Dr. Weinstein, and Dr. Lindenbaum, and the longitudinal treatment history as reflected in the medical records.

35. Claimant has reported popping and crepitation with movement of the right shoulder on multiple occasions. However, this finding has been only intermittently reproducible on examination. In her position statement, Claimant cited numerous medical records documenting crepitus on examination. But Respondents also highlighted multiple examinations which did not elicit crepitus. The ALJ sees no persuasive reason to disregard these records and finds that crepitus is a variable clinical finding, present at some examinations but not at others.

36. Claimant overcame Dr. Lindenbaum's May 7, 2020 MMI date by clear and convincing evidence. Claimant was still receiving treatment reasonably expected to improve her condition through October 2020. Moreover, Dr. Leggett documented significant improvement after each set of PRP injections. Dr. Lindenbaum was highly probably incorrect to assign an MMI date before Claimant completed active treatment that improved her condition, merely because PRP injections are not considered "mainstream." Claimant proved by clear and convincing evidence she was not as MMI as of May 7, 2020. Claimant reached MMI on November 16, 2020, as determined by Dr. Schafer.

37. Claimant proved she suffered functional impairment not listed on the schedule of disabilities. The records from Dr. Schafer, Dr. Leggett, Dr. Weinstein, and Dr. Abercrombie, coupled with Claimant's credible testimony on this topic, show functional impairment throughout the right shoulder girdle, extending into the trapezius, right lateral neck, and chest.

38. Claimant failed to overcome Dr. Lindenbaum's 5% whole person shoulder rating by clear and convincing evidence. There is no persuasive evidence to suggest Dr. Lindenbaum's range of motion measurements were inaccurate or the product of flawed methodology. The primary difference between his rating and Dr. Schafer's rating is the additional percentage for crepitus. It was within Dr. Lindenbaum's zone of discretion to omit a rating for crepitus because he appreciated no crepitus during the DIME appointment.

39. Claimant proved entitlement to a general award of medical benefits after MMI. Dr. Schafer and Dr. Leggett's opinions regarding Claimant's probable need for future treatment are credible and more persuasive than the contrary opinions offered by Dr. Lindenbaum and Dr. Martin.

40. Claimant failed to prove her AWW should be adjusted based on increases to the Colorado state minimum wage. Claimant was already earning above the minimum wage for "tipped employees" at the time of injury, and the minimum wage for tipped employees is still lower than the rate of pay upon which the admitted AWW is based.

41. Claimant demonstrated visible disfigurement consisting of: (1) shoulder asymmetry, with the right shoulder sitting noticeably lower than the uninjured left shoulder, (2) bulging or swelling around the right sternoclavicular joint, and (3) a subtle prominence of cartilage on the right chest. This disfigurement affects parts of the body normally exposed to public view. The ALJ finds Claimant should be awarded $2,500 for disfigurement.

CONCLUSIONS OF LAW

A. Claimant overcame the DIME regarding the date of MMI

A DIME's determinations regarding MMI and whole person impairment are binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c). The party challenging a DIME physician's conclusions must demonstrate it is "highly probable" the determination is incorrect. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). A party meets this burden if the evidence contradicting the DIME physician is "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). A "mere difference of medical opinion" does not constitute clear and convincing evidence. *E.g., Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (March 18, 2016).

"Maximum Medical Improvement" (MMI) is defined as the point when any medically determinable physical or mental impairment because of the industrial injury has become stable and when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5).

As found, Claimant the DIME's determination she was at MMI on May 7, 2020 by clear and convincing evidence. Claimant continued receiving treatment reasonably expected to improve her condition through October 2020. Although PRP is not a "common" procedure in the workers' compensation system, the MTGs support PRP injections for certain shoulder, elbow, and knee conditions. *E.g*., WCRP 17, Exhibit 4 § (E)(10)(e); Exhibit 5 § (H)(4)(a); Exhibit 6 § (F)(6)(d). More important, Dr. Leggett documented significant improvement after each set of PRP injections. The decision to put Claimant at MMI before she completed active treatment that improved her condition, merely because PRP injections are outside the "mainstream," was highly probably incorrect. Claimant proved by clear and convincing evidence she was not at MMI on May 7, 2020. Claimant reached MMI on November 16, 2020, as determined by Dr. Schafer.

B. Burdens of Proof regarding impairment

Claimant is requesting whole person benefits for her shoulder and also seeking to set aside Dr. Lindenbaum's rating in favor of Dr. Schafer's rating. Claimant argues both issues should be decided under the preponderance of the evidence standard. The ALJ disagrees with this position.

Whether Claimant's shoulder impairment represents a scheduled or whole person impairment is a threshold question that must be answered before we can determine the weight to be accorded to the DIME's rating. Section 8-42-107 sets forth two methods of compensating permanent medical impairment. Subsection (2) provides a schedule of disabilities and subsection (8) provides a DIME process for whole person ratings. The DIME's determination regarding whole person impairment is binding unless overcome by clear and convincing evidence. Conversely, scheduled impairment is a question of fact for the ALJ based on a preponderance.

Whether a claimant sustained a scheduled or non-scheduled impairment is a question of fact for determination by the ALJ. The heightened burden of proof that attends a DIME rating applies only if the claimant establishes by a preponderance of the evidence that the industrial injury caused functional impairment not found on the schedule. Then, and only then, does either party face a clear and convincing evidence burden to overcome the DIME's rating. *Webb v. Circuit City Stores, Inc*. W.C. No. 4-467-005 (August 16, 2002). Although the DIME's opinions may be relevant to this determination, they are not entitled to any special weight on this threshold issue. *See Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998) (DIME provisions do not apply to the scheduled ratings).

Claimant's argument is primarily predicated on *Fresquez v. Montrose School District RE-1J*, W.C. No. 4-969-602-01 (April 14, 2017). At first blush, the quoted language from *Fresquez* could be read to suggest a claimant can increase a whole person rating with a two-step process under the preponderance standard. But *Fresquez* differs from Claimant's case in a critical respect, namely, it involved only a dispute over the ATP's rating. In *Fresquez*, the ATP had initially provided a 16% extremity rating, but later corrected the rating to 24% at a hearing. The ALJ determined that the amended rating of 24% was the ATP's true rating, based on a preponderance of the evidence. The ALJ then applied the preponderance standard to determine the claimant suffered a whole person impairment.

When viewed in that context, *Fresquez* fits the legal framework outlined at the beginning of this section (B). It is well-established that an ATP or a DIME may amend or alter their rating. *Montoya v. Industrial Claim Appeals Office*, 203 P.3d 620 (Colo. App. 2008); *Jarosinski v. Industrial Claim Appeals Office*, 62 P.3d 1082 (Colo. App. 2002); *Kaur v. King Soopers*, W.C. No. 5-017-566-001 (January 8, 2020). And ALJs have jurisdiction to reconcile ambiguous or conflicting ratings issued by a single ATP. *E.g., Blue Mesa Forest v. Lopez*, 928 P.2d 831 (Colo. App. 1996); *Calvillo v. Intermountain Wood*, W.C. No. 4-462-927 (September 24, 2002). In such as case, the ALJ determines the physician's "true opinion" using the preponderance standard. *Simpson v. Safeworks, LLC*, W.C. No. 4-877-091-02 (January 23, 2014). That determination should include consideration of the physician's reports and testimony. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office*, 984 P.2d 656 (Colo. App. 1998). Once the doctor's opinion is ascertained, the evaluation of impairment proceeds on the normal path. If the claimant accepts the rating and only seeks to prove that they suffered whole person as opposed to a scheduled impairment, that issue is decided under the preponderance standard. But if the claimant wishes to challenge a whole person rating provided by the ATP, they must request a DIME. Similar logic applies where, as here, the DIME issues a shoulder rating that might reflect scheduled or non-scheduled impairment. The ALJ must first answer the threshold question of whether the claimant suffered a scheduled or whole person impairment. If the claimant has a scheduled impairment, the DIME's rating is entitled to no special weight. But if the claimant has a whole person impairment, the DIME's rating is binding unless overcome by clear and convincing evidence.

Accordingly, Claimant must prove she suffered non-scheduled impairment by a preponderance of the evidence. If successful, she must overcome the DIME's 5% whole person rating by clear and convincing evidence.

C. Claimant proved she suffered functional impairment not listed on the schedule

When evaluating whether a claimant has sustained scheduled or whole person impairment, the ALJ must determine "the situs of the functional impairment." This refers to the "part or parts of the body which have been impaired or disabled as a result of the industrial accident," and is not necessarily the site of the injury itself. *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366, 368 (Colo. App. 1996). The schedule of disabilities refers to the loss of "an arm at the shoulder." Section 8-42-107(2)(a). If the claimant has a functional impairment to part(s) of his body other than the "arm," she has sustained a whole person impairment and must be compensated under § 8-42-107(8).

There is no requirement that functional impairment take any particular form, and "pain and discomfort which interferes with the claimant's ability to use a portion of the body may be considered 'impairment' for purposes of assigning a whole person impairment rating." *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (June 30, 2008). Referred pain from the primary situs of the initial injury may establish proof of functional impairment to the whole person. *E.g., Latshaw v. Baker Hughes, Inc*., W.C. No. 4-842-705 (December 17, 2013); *Mader v. Popejoy Construction Co., Inc*., W.C. No. 4-198-489 (August 9, 1996). Although the opinions of physicians can be considered when determining this issue, the ALJ can also consider lay evidence such as the claimant's testimony regarding pain and reduced function. *Olson v. Foley's*, W.C. No. 4-326-898 (September 12, 2000).

Pain and limitation in the trapezius and scapular area can functionally impair an individual beyond the arm. *E.g. Steinhauser v. Azco, Inc.*, W.C. No. 4-808-991 (January 11, 2012) (pain and muscle spasm in scapular and trapezial musculature warranted whole person impairment); *Franks v. Gordon Sign Co.*, W.C. No. 4-180-076 (March 27, 1996) (supraspinatus attaches to the scapula, and is therefore properly considered part of the "torso," rather than the "arm"); *Martinez v. Albertson's LLC*, W.C. No. 4-692-947 (ICAO, June 30, 2008) (pain affecting the trapezius and difficulty sleeping on injured side supported ALJ's finding of whole person impairment). However, the mere presence of pain in a part of the body beyond the schedule does not automatically represent a functional impairment or require a whole person conversion. *Newton v. Broadcom, Inc*., W.C. No. 5-095-589-002 (July 8, 2021).

As found, Claimant proved she suffered functional impairment not listed on the schedule. The record is replete with references to myofascial pain, spasm, and trigger points around the shoulder, scapular area, trapezius, neck, and chest. Claimant received extensive treatment, including multiple trigger point injections, directed to parts of her body that are proximal to her arm. Claimant's testimony regarding the impact the injury has had on her ability to perform various activities was credible. The preponderance of persuasive evidence shows Claimant has functional impairment to parts of her body beyond her "arm."

D. Claimant failed to overcome the DIME's whole person rating

Claimant failed to overcome Dr. Lindenbaum's 5% whole person shoulder rating by clear and convincing evidence. The ALJ is not persuaded by Claimant's argument that Dr. Lindenbaum was deliberately attempting to minimize her rating. Had that been his motivation, it would have been easier to simply assign a zero percent rating based on exaggerated complaints and lack of objective injury-related pathology, consistent with Dr. Martin's assessment. Dr. Lindenbaum provided the rating he thought was most appropriate based on his review the records and the examination he performed.

The primary difference between Dr. Lindenbaum's rating and Dr. Schafer's rating is the additional percentage for crepitus. Although Claimant has repeatedly reported crepitus with shoulder motion, it has been only variably present on examination by multiple providers. Dr. Schafer referred to "mild" crepitus, so it is plausible it would not be appreciable on every examination. Dr. Lindenbaum could not elicit crepitus despite multiple attempts. It was within Dr. Lindenbaum's zone of discretion to omit a rating for crepitus because he could not substantiate its existence and permanence during the DIME appointment.

E. Claimant is entitled to a general award of medical benefits after MMI

The respondents are liable for medical treatment after MMI reasonably necessary to relieve the effects of the injury or prevent deterioration of the claimant's condition. Section 8-42-101; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Proof of a current or future need for "any" form of treatment will suffice for an award of post-MMI benefits. *Stollmeyer v. Industrial Claim Appeals Office*, 916 P.2d 609 (Colo. App. 1995). There is no requirement that a particular course of treatment be articulated or that the claimant actually be receiving treatment. *Holly Nursing Care Center v. Industrial Claim Appeals Office*, 992 P.2d 701 (Colo. App. 1999). If the claimant establishes the probability of a need for future treatment, she is entitled to a general award of medical benefits after MMI, subject to the respondents' right to dispute causation or reasonable necessity of any particular treatment. *Hanna v. Print Expediters, Inc.*, 77 P.3d 863 (Colo. App. 2003).

As found, Claimant proved a probable need for future treatment to relieve the effects of her injuries and prevent deterioration of her condition. Dr. Schafer and Dr. Leggett's opinions regarding Claimant's probable need for medical treatment after MMI are credible and more persuasive than the contrary opinions offered by Dr. Lindenbaum and Dr. Martin. Claimant remains symptomatic more than two years after the accident despite significant treatment. Her pain is unlikely to resolve, and it is reasonable and appropriate to allow access to treatment to help manage her condition.

F. Claimant failed to prove her AWW should be increased

Section 8-42-102(2), C.R.S. provides that compensation is payable based on the employee's average weekly earnings "at the time of the injury." The statute sets forth several computational methods for workers paid on an hourly, salary, per diem basis, etc. But § 8-42-102(3) gives the ALJ wide discretion to "fairly" calculate the employee's AWW in any manner that is most appropriate under the circumstances. The entire objective of AWW calculation is to arrive at a "fair approximation" of the claimant's actual wage loss and diminished earning capacity because of the industrial injury. *Campbell v. IBM Corp*., 867 P.2d 77 (Colo. App. 1993).

The discretionary authority regarding AWW extends to post-injury pay raises a claimant would have received but for the injury. *Ebersbach v. UFCW Local No. 7*, W.C. No. 4-240-475 (May 5, 1997); *Romero v. Cub Foods*, W.C. No. 4-218-823 (September 28, 2000). The critical question is whether the post-injury wage increase was "sufficiently definite" rather than merely speculative. In *Ebersbach*, *supra*, the ICAO held that the claimant was entitled as a matter of law to have her AWW adjusted to account for post-injury pay raises she was eligible to receive under a union contract. Similarly, in *Marr v. Current Inc*., W.C. No. 4-407-504 (September 20, 2000), the ALJ recomputed the claimant's average weekly wage to include a pay raise the claimant received approximately one month after the injury. The ICAO affirmed based on the rule in *Campbell*. The dispositive factor was whether the pay raise was sufficiently definite to be included in the AWW.

Article XVIII § 15 of the Colorado Constitution establishes the Colorado state minimum wage. The minimum wage is adjusted annually on January 1. However, the Constitution allows a lower minimum wage for employees who receive tip income. The Colorado Department of Labor and Employment regulations define a "tipped employee" as "any employee engaged in an occupation in which s/he customarily and regularly receives more than $30 per month in tips." 7 CCR 1103-1 COMPS Order #37. Claimant averaged $226.24 in tips for the first 10 months of 2019, well in excess of the $30 required by the regulations. The Colorado state minimum wage for tipped employees was $8.98 per hour in 2020 and $9.30 per hour in 2021. Claimant was paid $11.33 per hour in 2019, which was, and still is, higher than the "tipped employee" minimum wage. Accordingly, Claimant had no legal right to an increase in her rate of pay in January 2020 or January 2021. Whether Claimant's wages would have increased on January 1, 2020 based on an increase in the minimum wage is speculative. Although Employer might have increased her pay, it was under no legal obligation to do so. Claimant failed to prove a basis to invoke the ALJ's discretionary authority to adjust her AWW.

G. Disfigurement

Section 8-42-108(1) provides for additional compensation if a claimant is "seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view." As found, Claimant suffered visible disfigurement to her right shoulder and chest area. The ALJ concludes Claimant should be awarded $2,500 for disfigurement.

ORDER

It is therefore ordered that:

1. Claimant's date of MMI is November 16, 2020, as determined by Dr. Schafer.

2. Claimant's request to adjust the admitted AWW based on increases in the Colorado state minimum wage on or after January 1, 2020 is denied and dismissed.

3. Claimant's request to overcome the DIME's 5% whole person impairment rating is denied and dismissed.

4. Insurer shall pay Claimant PPD benefits based on the DIME's 5% whole person rating. Insurer may take credit for any PPD benefits previously paid to Claimant on this claim.

5. Insurer shall pay statutory interest of 8% per annum on all benefits not paid when due.

6. Insurer shall cover medical treatment after MMI from authorized providers reasonably needed to relieve the effects of her injury and prevent deterioration of her condition.

7. Insurer shall pay Claimant $2,500 for disfigurement. Insurer may take credit for any disfigurement benefits previously paid to Claimant.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to this order is the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: September 24, 2021

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-159-938-001

ISSUES

1. Whether Claimant established by a preponderance of the evidence that she sustained a compensable injury on December 14, 2020 arising out of the course of her employment with Employer.

2. If Claimant sustained a compensable injury, whether Claimant established by a preponderance of the evidence an entitlement to medical benefits.

3. Whether Claimant established by a preponderance of the evidence an entitlement to temporary total disability (TTD) benefits from January 7, 2021 to May 13, 2021.

FINDINGS OF FACT

1. The parties stipulated that Claimant's average weekly wage is $547.84, and if Claimant's injury is found compensable, Workwell would be Claimant's authorized treating physician.

2. Claimant was a bus driver employed by Employer working approximately 30 hours per week. On December 14, 2020, Claimant reported to Employer that she sustained a pulled muscle in her right shoulder, arm, and neck when she sharply turned the steering wheel to avoid an oncoming car. Claimant indicated the bus steering wheel was difficult to turn. (Ex. 6). Claimant did not seek or receive medical treatment for several weeks following the incident, but did file an "Employee's Workers' Compensation Notice" with Employer on December 14, 2020.

3. On January 2, 2021, Claimant filed a Worker's Claim for Compensation with the Division in which she reported sustaining a strain/pulled muscle of the right neck and shoulder while turning a bus. Claimant indicated she had not received any initial medical treatment. (Ex. A).

4. Claimant's first medical examination after December 14, 2020, was on January 6, 2021, when she was seen at Medical Center of Aurora emergency department for complaints of right-sided neck pain. Claimant reported she sustained an injury while straining to drive a bus three weeks earlier and had intermittent right-sided neck pain since the incident. Claimant also reported intermittent right arm numbness. Examination showed no spinal tenderness, no deformity, full range of motion of all joints, and no evidence of weakness or neurologic injury. X-rays showed degenerative changes in the cervical spine without acute radiographic abnormality. Claimant diagnosed with a cervical strain, treated symptomatically with pain medication, and advised to follow up with her workers' compensation physician. (Ex. J).

5. On January 7, 2021, Claimant was seen by Paul Ogden, M.D., at Workwell, for complaints of neck and right shoulder pain. Claimant reported she was in a bus with bad steering and was trying to turn swiftly when she felt a muscle pull in her right neck trapezius area. Claimant also reported she continued to work and had a "second episode" on January 4, 2021, with pain in her neck. Claimant indicated that she stopped work after the "second episode" on January 4, 2021. (Ex. 3).

6. Claimant also reported a prior injury with shoulder pain approximately one year earlier, which Claimant asserted had resolved until December 14, 2020. In addition to neck and shoulder pain, Claimant reported a tingling sensation into the left thumb. On examination, Dr. Ogden noted moderately limited cervical rotation to the right, and tenderness to palpation. Examination of Claimant's right shoulder was negative, with the exception of weakness with behind-the-back push-off. Dr. Ogden diagnosed Claimant with "strain of muscle, fascia and tendon at neck level" and "radiculopathy, cervical region." Dr. Ogden prescribed Flexeril and Voltaren gel, and recommended work restrictions to include no commercial driving. Finally, Dr. Ogden opined that Claimant's objective findings were consistent with a work-related mechanism of injury, although no narrative explanation for this opinion is contained in the medical record nor were any objective findings documented in the medical record. (Ex. 3).

7. Claimant continued to be seen at Workwell for treatment including massage, physical therapy, and chiropractic. Claimant continued to report pain in her neck and right shoulder which she reported was not improved, and headaches. Dr. Ogden's examination on January 11, 2021 was positive for tight musculature in the cervical spine and right shoulder, with mildly limited rotation of the cervical spine. (Ex. 3).

8. On January 28, 2021, at a visit with Dr. Ogden, Claimant reported for the first time that she was experiencing lower back pain, which she attributed to her neck pain. Dr. Ogden noted Claimant had tight posterior cervical musculature with improving range of motion. Examination of Claimant's right arm was normal with full range of motion. (Ex. 3).

9. At her February 8, 2021 visit with Dr. Ogden, Claimant reported doing worse after doing chores and experiencing increased pain in her right neck, shoulder and lower back. Cervical x-rays performed on February 8, 2021, showed reversal of cervical lordosis at C4-5, moderate degenerative disc disease at C5-6 and C6-7, and anterolistheses of 1mm of C4 on C5. (Ex. 3).

10. On February 23, 2021, Claimant reported to Dr. Ogden that she felt some improvement, but physical therapy and chiropractic aggravated her symptoms. Claimant also reported intermittent headaches and was "concerned that she will develop neck pain and headaches while driving, but overall her pattern is fine as long as she is not driving." Claimant also reported she was cutting hair part-time, which did not aggravate her symptoms. On examination, Dr. Ogden noted moderately restricted range of motion of the cervical spine with tenderness to palpation. Examination of Claimant's right shoulder showed full range of motion and strength, and negative responses to testing, with the exception of a positive O'Brien test. Dr. Ogden ordered an MRI of Claimant's cervical spine. (Ex. 3). The Colorado Medical Treatment Guidelines indicate a positive O'Brien

(Active Compression) test suggests labral and internal impingement or biceps instability. *See* W.C.R.P. Rule 17, Ex. 4. However, no physician diagnosed Claimant with either of these conditions, and that ALJ finds the positive O'Brien test not to be objective evidence of the injury Claimant claims to have sustained .

11. Claimant underwent a cervical spine MRI on March 15, 2021.

12. On March 22, 2021, Claimant saw Dr. Ogden. At that time, Claimant reported light activity around the house, such as cleaning, aggravated her neck pain. Examination of her cervical spine was essentially normal without significant tenderness, and only missing a few degrees of rotation of the cervical spine. Dr. Ogden noted that Claimant's MRI showed "extensive degenerative changes, some of which are significant" and indicated he would request Claimant be evaluated by Dr. Castro. He also opined Claimant was not ready to resume full work duties, and she seemed to get worse with physical therapy and other treatment. He indicated Claimant needed to undergo work conditioning to return to work but he was "not sure she will tolerate this." Due to Claimant's intolerance, physical therapy was discontinued but massage was continued. (Ex. 3).

13. On May 13, 2021, Dr. Ogden completed a Physician's Report of Worker's Compensation Injury, in which he indicated Claimant was at Maximum Medical Improvement (MMI) as of that date without impairment. He also released Claimant to full work duty. Dr. Ogden noted Claimant "has decided she would prefer not to return to bus operation." He noted if Claimant did return to bus operation, a work conditioning program would be appropriate. With respect to medical maintenance care, he opined that no further treatment was indicated, but Claimant should have access to Dr. Ogden for 2 months to discuss further care if needed. (Ex. 3).

14. On April 21, 2021, Claimant saw Lawrence Lesnak, D.O., for an independent medical examination (IME), at Respondent's request. Based on his review of the medical records and examination of Claimant, Dr. Lesnak concluded that Claimant did not sustain an injury on December 14, 2020. Therefore, Dr. Lesnak opined that maximum medical improvement, consideration of an impairment rating, and medical maintenance treatment were therefore not applicable.

15. Dr. Lesnak credibly opined that, to a reasonable degree of medical probability, the reported mechanism of injury would not cause or aggravate any specific cervical spine or shoulder injuries or pathology. He also opined that Claimant's report that she has no difficulty cutting hair is inconsistent with "any specific symptomatic pathology involving her cervical spine, shoulder or even soft tissues in her suprascapular scapular regions." (Ex. G).

16. At hearing, Claimant testified that on December 14, 2020, she pulled a muscle while turning the bus she was operating harder than normal to avoid a car. She testified she felt something pull in her neck at the time of the incident and experienced neck and shoulder pain. She filed written report to her employer about her injury on the day it occurred. Claimant testified that she requested to see a doctor on the date of injury and that she continued to work as a bus driver until approximately a week later when she

stopped due to pain. After suffering recurring headaches, she went to the emergency room on January 6, 2021. Claimant testified that she had worked part-time as a hairstylist at Great Clips for approximately five years, and that cutting hair did not cause an increase in symptoms she attributed to the December 14, 2020 incident.

17. Claimant also testified about a prior injury that occurred in October 2019 that caused neck and shoulder pain. She had been treated for this injury at Workwell, until the COVID-19 pandemic caused her treatment to end early. She continued to work as a bus driver while receiving treatment. She testified that the October 2019 injury had been resolved by the time the December 2020 injury occurred, and that the December 2020 injury was different because it caused more neck pain and headaches while she was at work.

18. Claimant's testimony and reports in the medical records that activities such as driving a bus (but apparently not another vehicle), doing household chores, and physical therapy made her symptoms worse, but that her other employment cutting hair did not cause any symptoms is not credible.

Prior Medical Conditions

19. Claimant was involved in a motor vehicle collision on June 1, 2019. Following the collision, Claimant received chiropractic treatment at North Aurora Chiropractic. Claimant reported that she was taken by ambulance to Medical Center of Aurora following the collision and had x-rays taken of her right wrist and back. The chiropractic records from North Aurora Chiropractic indicate that Claimant complained of and received treatment for her neck, thoracic spine, lumbosacral spine, headaches, right wrist, and right knee. Claimant had 25 chiropractic visits between June 3, 2019, and September 17, 2019. The final daily record from North Aurora Chiropractic indicated Claimant was dismissed from scheduled care on September 19, 2019 with a new "diagnosis" of "resolved to flair-up [sic] care." (Ex. D).

20. On October 17, 2019, Claimant reported that she sustained an injury to her neck when she was attempting to move her bus seat forward and grab a bag from the floor when she felt something "pop" in her neck and began to experience pain in her right neck and arm. (Ex. I).

21. Following the October 17, 2019 injury, Claimant received treatment at Workwell, and was diagnosed with a strain of the "other muscles, fascia and tendons at shoulder and upper arm level, right arm" and a strain of the "Muscle, fascia and tendon at neck level." (Ex. I.) Claimant denied any previous prior problems "of this type" and indicated there had been no prior medical care for this. Claimant's reported symptoms included pain in the posterior and anterior neck on the right side going down into her lateral trapezius and mid back. Claimant also reported that her pain was only present when she drove. Claimant's pain complaints following the October 17, 2019 injury were substantially the same as those she reported after December 14, 2020, with the exception of headaches.

22. At her December 27, 2019 visit with Dr. Ogden at Workwell, Claimant reported that on December 24, 2019, she was turning a bus and felt her symptoms in her right neck and posterior right trapezius into the upper arm get aggravated. (Ex. I).

23. Claimant was treated at Workwell, receiving massage therapy, until February 19, 2020, when treatment was terminated due to the Covid pandemic. At her January 30, 2020 appointment with Dr. Ogden (the last documented examination by a physician prior to February 19, 2020) Dr. Ogden noted that Claimant was not at MMI because she remained under treatment. Claimant testified she did not continue treatment due to the Covid pandemic.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id.* at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence

contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

COMPENSABILITY

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991)*.* The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v. Americold D/B/A Atlas Logistics*, W.C. No. 4-960-513-01, (ICAO, Oct. 2, 2015)

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Atsepoyi v. Kohl's Department Stores*, W.C. No. 5-020-962-01, (ICAO, Oct. 30, 2017). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000). *Fuller v. Marilyn Hickey Ministries, Inc., W.C. No. 4-588-675, (*ICAO, Sept. 1, 2006*)*

Claimant has failed to establish by a preponderance of the evidence that she sustained a compensable work injury on December 14, 2020. Although Claimant reported symptoms in her right shoulder and neck on December 14, 2020, Claimant continued to work and did not seek medical treatment until January 6, 2021, approximately three weeks following the incident. When Claimant did seek medical treatment, she reported to Dr. Ogden that she had a "second episode" on January 4, 2021, which lead to headaches, and after which she did not return to work. The record does not reflect either the nature or the circumstances of the "second episode." There is insufficient credible evidence to determine if Claimant's reported symptoms were the result of an incident on December

14, 2020, the “second episode” on January 4, 2021, or the continuation of symptoms she experienced as the result of one of her prior injuries.

Moreover, no credible evidence was presented to explain how the act of turning a steering wheel resulted in an injury to Claimant’s neck and shoulder. The ALJ credits Dr. Lesnak’s opinion that the mechanism of turning the steering wheel would not likely cause or aggravate any injury in the cervical spine or shoulder.

The ALJ concludes the evidence does not credibly establish it more probable than not that Claimant sustained a compensable injury on December 14, 2020.

MEDICAL BENEFITS

Under section 8-42-101(1)(a), C.R.S., respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *See Owens v. Industrial Claim Appeals Office*, 49 P.3d 1187, 1188 (Colo. App. 2002). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). All results flowing proximately and naturally from an industrial injury are compensable. *Id., citing Standard Metals Corp. v. Ball*, 474 P.2d 622 (Colo. 1970).

Because Claimant has failed to establish a compensable injury, Claimant is not entitled to an award of medical benefits.

TEMPORARY DISABILITY BENEFITS

To prove entitlement to Temporary Total Disability (TTD) benefits, Claimant must prove an industrial injury caused a disability lasting more than three work shifts, she left work as a result of the disability, and the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires Claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995).

Because Claimant has failed to establish a compensable injury, Claimant is not entitled to temporary disability benefits.

ORDER

It is therefore ordered that:

1. Claimant’s claim for workers’ compensation benefits for an alleged injury on December 14, 2020, is denied and dismissed.

2. Claimant’s claims for medical benefits and temporary disability benefits are denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 27, 2021

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUE

Whether Respondents have proven by a preponderance of the evidence that they are entitled to recover an overpayment of Temporary Total Disability (TTD) benefits in the amount of $12,925.55.

NOTICE OF THE PROCEEDINGS

1. Claimant failed to attend the September 9, 2021 video hearing in this matter. Therefore, prior to entering an order, the ALJ must consider whether Claimant had adequate notice of the proceedings.

2. Office of Administrative Courts Rules of Procedure for Workers' Compensation Hearings (OACRP) Rule 23 governs the entry of orders against non-appearing parties at hearings. Rule 23 provides, in relevant part:

> If a party fails to appear at a hearing after the OAC has sent notice of the hearing to that party, prior to entering any orders against the non-appearing party as a result of that hearing, the judge will consider:
>
> A. The addresses to which the notice of hearing was sent are the most recent addresses provided by the non-appearing party to either the OAC or the Division of Workers' Compensation; or
>
> …
>
> C. A copy of a record or other written statement from the OAC or the Division of Workers' Compensation containing the most recent address provided by the non-appearing party to either of those agencies shall be sufficient to create a rebuttable presumption that the non-appearing party received notice of the hearing.

3. On January 7, 2021 Claimant provided notice to Respondents' counsel's paralegal that he had moved to 540 Delta Street, Denver, CO 80221. Claimant used the email address dj[Claimant]@msn.com to inform Respondents of his new physical residence.

4. On May 14, 2021 Respondents filed an Application for Hearing endorsing the issue of seeking an Order for repayment of the overpayment of Temporary Total Disability (TTD) benefits. The Application for Hearing was mailed to Claimant's physical address at 540 Delta Street, Denver, CO and sent to his email address at dj[Claimant]@msn.com.

5. On June 11, 2021 the Office of Administrative Courts (OAC) sent a Hearing Confirmation to Claimant's email address at dj[Claimant]@msn.com. The Notice provided that Claimant's physical address was 540 Delta Street, Denver, CO 80221. The Notice specified that the hearing would be conducted on September 9, 2021 at 8:30 a.m.

6. On July 13, 2021 Respondents filed a Motion to Engage in Discovery with pro se Claimant. Respondents sent the Motion to Claimant at the physical and email addresses he had previously confirmed. On July 19, 2021 Respondents' counsel received a signed, certified mail receipt confirming delivery of the Motion to Claimant at his physical address.

7. On July 22, 2021 the OAC sent a Notice of Hearing to Claimant's email address at dj[Claimant]@msn.com. The Notice provided that Claimant's physical address was 540 Delta Street, Denver, CO 80221. The Notice specified that the hearing would be conducted on September 9, 2021 at 8:30 a.m. through Google Meet.

8. On September 3, 2021 Respondents filed a Case Information Sheet (CIS), again notifying Claimant of the September 9, 2021 hearing and the issues to be heard before the ALJ, The CIS was sent to the physical and email addresses Claimant had previously verified. On September 3, 2021 Respondents' counsel also sent an email to Claimant at dj[Claimant]@msn.com in an attempt to reach him regarding the claim and previously exchanged records.

9. Claimant did not file a CIS prior to the hearing in this matter. He also did not submit any exhibits.

10. On September 8, 2021 the OAC emailed the parties details of the virtual hearing to be conducted on September 9, 2021 through Google Meet. The parties were notified of the option to attend either by video (by clicking the hyperlink) or by telephone. The telephone number and access code were provided on the invitation.

11. Despite the preceding notice of the September 9, 2021 video hearing, Claimant failed to appear. At the outset of the hearing, the ALJ reviewed the record to determine whether Claimant had received adequate and proper notice of the 8:30 a.m. hearing. Based on a review of the file and comments from Respondents' counsel, the ALJ was satisfied Claimant had proper and adequate notice of the matter. Because the case involved Respondents' Application for Hearing, the ALJ proceeded with the matter.

12. The preceding chronology reflects that Claimant had adequate notice of the September 9, 2021 hearing in this matter. The Notice of Hearing was sent to Claimant's email address on file with the OAC. Moreover, on September 9, 2021 the OAC emailed the parties details of the virtual hearing to be conducted on September 9, 2021 through Google Meet. The parties were notified of the option to attend either by video (by clicking the hyperlink) or by telephone. Furthermore, Respondents corresponded with Claimant on multiple occasions through the email address of dj[Claimant]@msn.com as well as his physical address of 540 Delta Street, Denver, CO 80221 advising of him of the scheduled

hearing. The record thus demonstrates sufficient evidence to create a rebuttable presumption that Claimant received notice of the hearing. Claimant has failed to rebut the presumption. Because Claimant had adequate notice of the September 9, 2021 hearing but chose not to appear, entry of an order in this matter is appropriate.

FINDINGS OF FACT

1. Employer is in the business of operating steakhouses throughout the United States. The steakhouses included a former location in Denver, Colorado. Claimant is a 31-year old male who worked for Employer as a Human Resources (HR) Manager.

2. On December 29, 2019 Claimant sustained an admitted industrial injury during the course and scope of his employment with Employer. Claimant specifically suffered a right index finger and hand crush injury in the door of a freight elevator at work. Claimant had been trying to close the door of the freight elevator when his finger became caught in the door.

3. On December 29, 2019 Claimant obtained emergency medical treatment from Kevin E. Beato, M.D. He was diagnosed with an open displaced fracture of the proximal phalanx of the right index finger. Medical providers splinted and sutured his laceration.

4. On January 8, 2020 Claimant visited Stacy Lowe, PA at Denver Health for an evaluation. After a physical examination and x-rays of Claimant’s right index finger, PA Lowe recommended surgery in the form of an ORIF procedure.

5. On January 13, 2020 Claimant underwent a closed reduction and percutaneous pinning of the phalanx of the right index finger with Stephanie Malliaris, M.D. The surgery specifically addressed the following: (1) the displaced fracture of the shaft of the proximal phalanx of the right index finger; and (2) a laceration of the volar IF base/second webspace 4cm. Claimant was unable to return to work following the surgery.

6. On January 27, 2020 Respondents filed a General Admission of Liability (GAL). The GAL acknowledged that Claimant was entitled to receive medical benefits and Temporary Total Disability (TTD) benefits beginning on January 13, 2020. However, unknown to Insurer’s Adjuster Vanessa P[Redacted] Claimant returned to work earning full wages on February 10, 2020.

7. On February 26, 2020 Claimant attended another follow-up appointment with PA Lowe. PA Lowe noted Claimant was doing well, reported good improvement in his pain and denied any symptoms of fever, chills, malaise, numbness, tingling, or pain. The appointment would ultimately be the last time Claimant visited a medical provider for any treatment under his Workers’ Compensation claim.

8. On July 7, 2020 Employer’s HR Generalist Katie G[Redacted] confirmed to Ms. P[Redacted] that Claimant returned to work earning his full wages on February 10, 2020. Following his return to work, Employer furloughed Claimant due to the ongoing

COVID-19 pandemic. Claimant received TTD benefits for the period from January 13, 2020 until June 14, 2020 in the total amount of $16,133.27.

9. Because Claimant returned to work at full wages on February 10, 2020 his TTD benefits should have terminated. Claimant should only have received TTD benefits totaling $3,207.72. Subtracting $3,207.72 from $16,133.27 yields an excess payment of TTD benefits in the amount of $12,925.55.

10. On July 8, 2020 Respondents filed an amended GAL terminating TTD benefits effective February 9, 2020. On the amended GAL, Respondents asserted an overpayment of $12,925.55 for TTD benefits paid to Claimant after his return to work at full wages on February 10, 2020.

11. Respondents sought discovery into the background of Claimant's Worker's Compensation claim on October 30, 2020. They sent authorizations for the release of medical, personnel, unemployment and Social Security records. Respondents also requested a list of providers who have previously treated Claimant for relevant prior injuries and preexisting conditions.

12. After Claimant failed to attend any additional medical appointments following the February 26, 2020 visit with PA Lowe, Respondents scheduled a demand appointment with Dr. Malliaris on November 25, 2020. Respondents sent notice of the demand appointment to Claimant electronically and through the United States mail. Nevertheless, Claimant failed to attend the appointment.

13. On November 30, 2020 Claimant sent a response email regarding the demand appointment to the paralegal of Respondents' counsel. Claimant acknowledged that he was aware of the demand appointment but failed to attend. He sought to reschedule the demand appointment.

14. After Claimant failed to timely provide executed releases for his records or the list of providers who had previously treated him for relevant prior injuries and preexisting conditions, Respondents filed an Opposed Motion to Compel Authorizations for Release of Records and List of Providers on December 22, 2020. On January 5, 2021 ALJ Elsa Martinez Tenreiro granted Respondents' Motion in part and ordered Claimant to provide a list of providers he had seen over the last five years and executed releases for records within seven days of the Order. However, Claimant failed to produce a list of providers or executed releases.

15. Respondents scheduled a second demand appointment with PA Lowe for January 13, 2021. Respondents provided Claimant with notice of the second demand appointment through email and United States mail. However, Claimant failed to attend the second demand appointment.

16. Because of Claimant's failure to attend the two demand appointments, Respondents sent him a letter on February 3, 2021, pursuant to W.C.R.P. Rule 7-1(B)(3), notifying him of their intention to file a Final Admission of Liability (FAL) within 30 days. The FAL was predicated on the assumption Claimant had recovered to the point where

his physical condition was the same as it was prior to his admitted industrial injury. Respondents sent the letter through United States mail to the physical and email addresses Claimant had previously acknowledged with Respondents' counsel's paralegal on February 4, 2021. Claimant had 30 days to respond if he felt he needed additional treatment or was claiming any permanent impairment.

17. Because Claimant failed to respond to the letter, Respondents filed a FAL on March 25, 2021. The FAL was filed pursuant to W.C.R.P. 7-1(B). Respondents again asserted an overpayment of $12,925.55 for TTD benefits paid to Claimant after his return to work at full wages on February 10, 2020.

18. The FAL included attachments consisting of the following: (1) the first letter to Claimant regarding a demand appointment sent on November 11, 2020; (2) the second letter to Claimant regarding a demand appointment sent on December 10, 2020; (3) the records regarding his failure to attend the two demand appointments; and (4) the 30 day letter sent to Claimant on February 3, 2021. Claimant did not file an objection to the FAL. The matter thus closed by operation of law.

19. Respondents filed an Application for Hearing on May 14, 2021. They sought an Order for repayment of the overpayment in TTD benefits in the amount of $12,925.55 as had been asserted on the amended GAL and FAL.

20. Respondents have proven that it is more probably true than not that they are entitled to recover an overpayment of TTD benefits in the amount of $12,925.55 after Claimant returned to work at full wages on February 10, 2020. Initially, on December 29, 2019 Claimant suffered an admitted industrial injury during the course and scope of his employment with Employer. Claimant specifically suffered a right index finger and hand crush injury in the door of a freight elevator at work. On January 27, 2020 Respondents filed a GAL. The GAL acknowledged that Claimant was entitled to receive medical benefits and TTD benefits beginning on January 13, 2020. However, unknown to Insurer's Adjuster Ms. P[Redacted], Claimant returned to work earning full wages on February 10, 2020.

21. Claimant received TTD benefits from January 13, 2020 until June 14, 2020 in the total amount of $16,133.27. However, Claimant was only entitled to TTD benefits until February 9, 2020 because he returned to regular duty work on February 10, 2020. He thus should only have received TTD benefits totaling $3,207.72. Subtracting $3,207.72 from $16,133.27 yields an excess payment of TTD benefits in the amount of $12,925.55.

22. Claimant's entitlement to TTD benefits ceased when he returned to regular employment with Employer on February 10, 2020. Respondents paid Claimant TTD benefits in the amount of $12,925.55 after he returned to regular employment. He was thus not entitled to receive $12,925.55 in TTD benefits. Claimant received money in excess of the amount he should have been paid. He thus obtained an overpayment of TTD benefits totaling $12,925.55.

23. On March 25, 2021 Respondents filed a FAL, Claimant did not object and the matter closed. Respondents filed an Application for Hearing on May 14, 2021. They sought an Order for repayment of the overpayment of TTD benefits in the amount of $12,925.55 as asserted on the amended GAL and FAL. By filing an Application for Hearing seeking to recover an overpayment of TTD benefits, Respondents have made an effort to recover the overpayment within one year. Because Respondents have established an overpayment and sought to recover the amount within one year of the filing the FAL, they are entitled to recover $12,925.55 from Claimant.

24. Respondents seek recovery of the $12,925.55 overpayment from Claimant over a period of six months. Dividing $12,925.55 by six yields a monthly payment in the amount of $2154.26. A monthly payment of $2154.26 is excessive. Although Claimant returned to regular duty work for Employer on February 10, 2020, the record reveals that he was subsequently furloughed by Employer due to the ongoing COVID-19 pandemic. Because Claimant’s current financial situation is uncertain, repayment of the overpayment over a one year period is reasonable. Dividing $12,925.55 by 12 yields a monthly payment in the amount of $1077.13. Accordingly, Claimant shall repay Respondents $1077.13 per month in overpaid TTD benefits until recovered in full.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge’s factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Section 8-42-103(1), C.R.S. requires a claimant seeking temporary disability benefits to establish a causal connection between the industrial injury and subsequent wage loss. *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671 (Colo. App. 1997). To demonstrate entitlement to TTD benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The term "disability," connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

5. Section 8-40-201(15.5), C.R.S, defines "overpayment" as "money received by a claimant that exceeds the amount that should have been paid, or which the claimant was not entitled to receive, or which results in duplicate benefits because of offsets that reduce disability or death benefits payable under said articles." There are thus three categories of possible overpayment pursuant to §8-40-201(15.5), C.R.S. *In Re Grandestaff,* No. 4-717-644 (ICAO, Mar. 11, 2013). An overpayment may occur even if it did not exist at the time the claimant received disability or death benefits. *Simpson v. ICAO,* 219 P.3d 354, 358 (Colo. App. 2009). Therefore, retroactive recovery for an overpayment is permitted. *In Re Haney,* W.C. No. 4-796-763 (ICAO, July 28, 2011).

6. Under §8-42-113.5(b.5)(I), C.R.S. once an FAL has been filed, any attempt to recover the overpayment must be asserted within one year after the time the requester knew of the overpayment. Furthermore, under §8-42-113.5(c), C.R.S., if for any reason recovery of the overpayment is not practicable, an employer or insured is authorized to seek an Order for repayment of the overpayment. *See Peoples v. Industrial Claim Appeals Office*, 457 P.3d 143,148 (Colo. App. 2019) (determining that an attempt to recover an overpayment under §8-42-113.5(1)(b.5)(1), C.R.S. cannot be a mere assertion of an overpayment, but there must be some effort to regain the overpayment within one year of discovery).

7. As found, Respondents have proven by a preponderance of the evidence that they are entitled to recover an overpayment of TTD benefits in the amount of $12,925.55 after Claimant returned to work at full wages on February 10, 2020. Initially, on December 29, 2019 Claimant suffered an admitted industrial injury during the course and scope of his employment with Employer. Claimant specifically suffered a right index finger and hand crush injury in the door of a freight elevator at work. On January 27, 2020 Respondents filed a GAL. The GAL acknowledged that Claimant was entitled to receive medical benefits and TTD benefits beginning on January 13, 2020. However, unknown to Insurer's Adjuster Ms. P[Redacted], Claimant returned to work earning full wages on February 10, 2020.

8. As found, Claimant received TTD benefits from January 13, 2020 until June 14, 2020 in the total amount of $16,133.27. However, Claimant was only entitled to TTD benefits until February 9, 2020 because he returned to regular duty work on February 10, 2020. He thus should only have received TTD benefits totaling $3,207.72. Subtracting $3,207.72 from $16,133.27 yields an excess payment of TTD benefits in the amount of $12,925.55.

9. As found, Claimant's entitlement to TTD benefits ceased when he returned to regular employment with Employer on February 10, 2020. Respondents paid Claimant TTD benefits in the amount of $12,925.55 after he returned to regular employment. He was thus not entitled to receive $12,925.55 in TTD benefits. Claimant received money in excess of the amount he should have been paid. He thus obtained an overpayment of TTD benefits totaling $12,925.55.

10. As found, on March 25, 2021 Respondents filed a FAL, Claimant did not object and the matter closed. Respondents filed an Application for Hearing on May 14, 2021. They sought an Order for repayment of the overpayment of TTD benefits in the amount of $12,925.55 as asserted on the amended GAL and FAL. By filing an Application for Hearing seeking to recover an overpayment of TTD benefits, Respondents have made an effort to recover the overpayment within one year. Because Respondents have established an overpayment and sought to recover the amount within one year of the filing the FAL, they are entitled to recover $12,925.55 from Claimant.

11. As found, Respondents seek recovery of the $12,925.55 overpayment from Claimant over a period of six months. Dividing $12,925.55 by six yields a monthly payment in the amount of $2154.26. A monthly payment of $2154.26 is excessive. Although Claimant returned to regular duty work for Employer on February 10, 2020, the record reveals that he was subsequently furloughed by Employer due to the ongoing COVID-19 pandemic. Because Claimant's current financial situation is uncertain, repayment of the overpayment over a one year period is reasonable. Dividing $12,925.55 by 12 yields a monthly payment in the amount of $1077.13. Accordingly, Claimant shall repay Respondents $1077.13 per month in overpaid TTD benefits until recovered in full.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents are entitled to recover an overpayment in TTD benefits from Claimant in the amount of $12,925.55. Claimant shall repay Respondents $1077.13 per month in overpaid TTD benefits until recovered in full.

2. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty

(20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at https://oac.colorado.gov/resources/oac-forms*.

DATED: September 29, 2021.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-000-279-002

ISSUES

1. Whether Claimant established by a preponderance of the evidence that diclofenac gel 3% prescribed by Matthew Pouliot, D.O., and used by Claimant prior to reaching MMI was reasonably necessary to cure or relieve the effects of Claimant's industrial injury.

2. Whether Claimant established by a preponderance of the evidence that a pre-MMI dental occlusal mouth guard was reasonably necessary to cure or relieve the effects of Claimant's industrial injury, entitling Claimant to reimbursement of $500.00 for payment of that mouth guard pursuant to § 8-42-101 (6)(b), C.R.S.

FINDINGS OF FACT

1. On November 24, 2015, Claimant sustained an admitted injury to her left ankle arising out of the course of her employment with Employer.

2. Due to her work-related injury, Claimant has undergone three separate ankle surgeries, including a left ankle arthroscopy on March 7, 2016, a debridement and adhesion lysis on December 21, 2016, and a left ankle fusion on July 25, 2018. In addition, Claimant underwent multiple procedures for pain control, including lumbar sympathetic blocks and a PRP injection in her left ankle. On January 7, 2020, a trial spinal cord stimulator for pain control was implanted, and a permanent spinal cord stimulator was implanted on October 30, 2020.

3. Beginning on March 2, 2017, Claimant began seeing Matthew Pouliot, D.O., for management of leg pain, and received multiple prescriptions for pain management. Between March 2, 2017, and May 28, 2021, Claimant saw Dr. Pouliot or other providers in his clinic more than 50 times. Beginning in approximately July 2017, Claimant began using a pain compound cream which included among its ingredients, diclofenac 3% gel (a topical anti-inflammatory). The pain compound cream was apparently prescribed by a Dr. Nystrom, although no records were admitted into evidence from Dr. Nystrom. (Ex. 5).

4. On September 28, 2018, Dr. Pouliot provided Claimant with a sample of diclofenac 3% gel. Dr. Pouliot's records do not explain the rationale for providing the sample, and subsequent records do not describe Claimant's response to the medication. Claimant saw Dr. Pouliot approximately monthly for the next year, during which time no further samples of diclofenac 3% gel were documented as being provided. (Ex. 5).

5. On September 3, 2019, Dr. Pouliot prescribed Claimant diclofenac 3% gel, to be applied twice daily. Dr. Pouliot's records do not document the rationale for the medication. During this time, Claimant continued to use the same compound pain cream provided by Dr. Nystrom. (Ex. 5).

6. On September 13, 2019, Claimant filled the prescription for diclofenac 3% gel through the Injured Workers Pharmacy, at a cost of $1,124.29. (Ex. 4).

7. The request for diclofenac 3% gel was submitted to insurer, who submitted the request to Joseph Fillmore, M.D., for review. On September 18, 2019, Dr. Fillmore reviewed the request and noted that the Medical Treatment Guidelines recommend the use of oral anti-inflammatories before using a topical anti-inflammatory, and if a topical anti-inflammatory was to be used, the Claimant should start with the lowest possible dose. Dr. Fillmore recommended that Claimant try diclofenac 1% gel before progressing to diclofenac 3% gel. Insurer did not approve or pay for Claimant's diclofenac 3% gel. (Ex. 9).

8. Claimant saw Dr. Pouliot on September 19, 2019, and September 26, 2019. Dr. Pouliot's records do not indicate that Claimant attempted a trial of diclofenac 1% or 2% gel during this time. Dr. Pouliot's records also do not indicate whether the Claimant's use of diclofenac 3% resulted in an improvement in Claimant's function. As of September 12, 2019, Claimant was also being prescribed ibuprofen 800mg, oxycodone HCL 5mg, Xtampza ER (oxycodone) 9mg twice per day, and Gralise (gabapentin) 1800mg before bed. Each of these medications was prescribed for pain. (Ex. 5).

9. On October 8, 2019, Claimant filled another prescription from Dr. Pouliot's office for diclofenac 3% gel through the Injured Workers Pharmacy, at a cost of $1,124.29. (Ex. 4).

10. On October 16, 2019, Dr. Fillmore conducted a second review and again recommended that Claimant try diclofenac 1% gel to determine its effectiveness prior to advancing to diclofenac 3% gel. Insurer did not approve or pay for Claimant's diclofenac 3% gel. (Ex. 9).

11. On November 7, 2019, December 6, 2019, and January 14, 2020, Claimant filled additional prescriptions from Dr. Pouliot's office for diclofenac 3% gel through the Injured Workers Pharmacy, at a cost of $1,124.29 per prescription. (Ex. 4). During this time frame, Claimant did not attempt a trial of diclofenac 1% gel. (Ex. 5).

12. On January 14, 2020, Ms. Henrion submitted a "Medical Certification of Medical Necessity," to the Injured Workers Pharmacy, for diclofenac 3% gel, indicating that it was "used to relieve pain and swelling as well as stiffness in (L) LE – 3% needed as pt diagnosed with CRPS and will need stronger dose." (Ex. 5). As of January 14, 2020, no medical records indicate that Claimant had attempted a trial of diclofenac at any strength other than diclofenac 3% gel.

13. On January 22, 2020, Dr. Fillmore conducted another review of Claimant's request for diclofenac 3% gel. Dr. Fillmore indicated that he did not have sufficient information to approve the request for diclofenac 3% gel. (Ex. 7). Insurer did not approve or pay for Claimant's diclofenac 3% gel.

14. On February 7, 2020, March 9, 2020, and April 8, 2020, Claimant filled additional prescriptions from Dr. Pouliot's office for diclofenac 3% gel through the Injured Workers Pharmacy, at a cost of $1,124.29 per prescription. (Ex. 4). During this time frame, Claimant did not attempt a trial of diclofenac 1% gel. (Ex. 5). Insurer did not approve or pay for Claimant's prescriptions for diclofenac 3% gel.

15. Claimant continued to see Dr. Pouliot and Ms. Henrion through at least May 28, 2021. The first documented use of diclofenac 1% was on August 14, 2020. Claimant's September 29, 2020 record from UCHealth Pain Management Clinic indicates Claimant "has tried and failed oral NSAIDs as well as topical diclofenac 1%, we have been trying to get her topical diclofenac 3% however her insurance continues to deny." (Ex. 6).

16. At hearing, Claimant testified that the topical compound pain cream she used provided her no relief. She testified she initially tried 1% diclofenac, which did not provide her relief, that diclofenac 3% gel provided "instant relief" of her ankle pain, and that she used it for breakthrough pain and at night. Claimant testified that diclofenac 3% gives "immediate relief" of burning and aching and allows her to sleep at night and helps her ankle to relax. Claimant's testimony that she tried diclofenac 1% gel prior to diclofenac 3% gel, and that diclofenac 3% gel provides "instant" or "immediate" relief is not credible.

17. Between Dr. Pouliot's initial prescription for diclofenac 3% gel on September 3, 3019 and June 2020, Claimant's prescriptions included ibuprofen 800mg, Oxycodone HCL 5mg. compound pain cream, Gralise 1800mg. and Xtampza 9mg. During this time frame, Claimant's prescriptions for these other medications were not significantly modified or terminated after she began using diclofenac 3% gel. Additionally, during this time frame, despite the use of diclofenac 3% gel, neither Dr. Pouliot nor Ms. Henrion documented any improvement in Claimant's function or change in pain attributed to the use of diclofenac 3% gel.

18. Claimant was placed at Maximum Medical Improvement ("MMI") on May 10, 2021, by John Sacha, M.D., one of Claimant's authorized treating physicians. Dr. Sacha assigned Claimant a 24% lower extremity permanent impairment rating. For maintenance care, Dr. Sacha recommended pool physical therapy, and gym and pool pass, that Claimant wean off of opioids, and be allowed non-opioid analgesics for 12-24 months. Dr. Sacha did not recommend or comment on the use of diclofenac 3% gel or an occlusal mouth guard. (Ex. C).

19. Dr. McCranie testified that the pharmacology of diclofenac gel is not the type that would result in immediate pain relief. Dr. McCranie credibly testified that diclofenac is not an anesthetic, numbing medication. Instead, the pain relief that results from diclofenac is

a produce of the anti-inflammatory properties of the medication. Dr. McCranie testified that diclofenac inhibits prostaglandins, which decrease the body's reactions that cause swelling, and the resulting decrease in swelling causes a decrease in pain. She credibly testified that this process take time, and that it would not have an immediate effect to decrease pain.

20. In total, between September 13, 2019, and April 8, 2020, Claimant filled eight prescriptions for diclofenac 3% gel through the Injured Workers Pharmacy. During this time, neither Dr. Pouliot nor Ms. Henrion persuasively documented the necessity, reasonableness, or effectiveness of the medication.

21. Claimant testified at hearing that as a result of the pain in her ankle, she clenches her jaw and grinds her teeth at night. Claimant testified that before her injury she had not experienced tooth grinding. She testified she is currently using a mouth guard she purchased for $500 and now needs a new replacement mouth guard. The evidence did not clearly establish the date Claimant purchased her original mouth guard.

22. On December 4, 2019, James Plaisted (whom the ALJ infers is a dentist), wrote a letter indicating that Claimant "severely grinds her teeth at night leading to worn teeth and pain in TMJ." Dr. Plaisted opined that Claimant's grinding stems from the stress and pain from her ankle injury, although no other possible causes of grinding were addressed. He stated an occlusal guard worn at night would be the correct step to treat Claimant's grinding by transmitting the forces of the nighttime grinding to the occlusal guard as opposed to her teeth. (Ex. 8).

23. On December 20, 2019, David Orgel, M.D., reviewed Claimant's request for a dental mouth guard at Respondents' request. Dr. Orgel opined that bruxism (*i.e.*, teeth grinding) is most commonly related to sleep apnea, and that Claimant's BMI rendered her susceptible to sleep-disordered breathing and sleep apnea, and that the likely cause of her bruxism was Claimant's obesity. He recommended that Claimant be evaluated for sleep apnea. (Ex. G).

24. In an undated report, (which the ALJ infers was authored between December 20, 2019, and January 22, 2020) Sharon Day, P.T., indicated that Claimant had jaw clenching "caused by her serious pain flares from her Complex Regional Pain Syndrome of her Right foot and leg." Ms. Day wrote that Claimant had learned to control jaw clenching through biofeedback, but could not control the reaction while sleeping at night. (Ex. 8). No other records from Ms. Day were offered or admitted into evidence.

25. On January 22, 2020, David Orgel, M.D., reviewed Claimant's request for a dental appliance related to bruxism. Dr. Orgel again recommended a sleep apnea test and that the request for the dental mouth guard be reconsidered if Claimant's sleep apnea test was negative. (Ex. G).

26. On June 22, 2021, Bradford Edgren, D.D.S., authored a report regarding Claimant's "symptoms of discomfort and jaw dysfunction." In his report, Dr. Edgren indicated that Claimant had strong evidence of tooth grinding. However, Dr. Edgren did

not opine as to the cause of Claimant's tooth grinding or whether it was related to her industrial injury. (Ex. 8).

27. No credible evidence was presented to establish that Dr. Plaisted, Dr. Edgren or Ms. Day are authorized treating physicians.

28. In her June 8, 2021 Report, Dr. McCranie opined that there is "no direct causal relationship between the need for [a] mouth guard and that of her left ankle injury." Dr. McCranie also noted that obstructive sleep apnea was the highest risk factor for teeth grinding during sleep, and that Claimant had not been tested for sleep apnea. Dr. McCranie also noted that a mouth guard was not recommended as part of Claimant's maintenance care when Dr. Sacha placed Claimant at MMI. (Ex. A).

29. Claimant's medical records from Dr. Pouliot and Dr. Sacha do not reference any issues with bruxism, clenching, TMJ or jaw pain, or recommend any treatment for those conditions.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

SPECIFIC MEDICAL TREATMENT AT ISSUE

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. § 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO May 31, 2006). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002); *Hobirk v. Colorado Springs School District #11,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). The existence of evidence which, if credited, might permit a contrary result affords no basis for relief on appeal. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *In the Matter of the Claim of Bud Forbes, Claimant*, No. W.C. No. 4-797-103, 2011 WL 5616888, at *3 (ICAO Nov. 7, 2011). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School District No.11*, W.C. No. 3-979-487, (ICAO Jan. 11, 2012); *Ford v. Regional Trans. District,* W.C. No. 4-309-217 (ICAO Feb. 12, 2009).

DICLOFENAC 3% GEL

Claimant has failed to establish by a preponderance of the evidence that diclofenac 3% gel prescribed between September 2019 and April 2020 was reasonably necessary to cure or relieve the effects of Claimant's industrial injury. As found, Claimant began regularly using diclofenac 3% gel in September 2019, and continued to use the medication through at least April 2020. Prior to starting diclofenac 3% gel, Claimant did not attempt to use diclofenac 1% or 2% gel. That Claimant later used diclofenac 1% gel beginning and did not find it effective is not credible evidence that the medication would not have been effective if used earlier.

Nonetheless, after starting diclofenac 3%, Claimant's medical records do not document an increase in function, a decrease in pain, a decrease in other medications or that diclofenac 3% resulted in any significant effect on Claimant. Claimant's testimony that diclofenac 3% resulted in immediate relief of her pain permitting her to sleep is not credible or supported by the evidence for several reasons. No credible evidence was offered to explain why Claimant found no relief from the compound cream containing diclofenac 3%, but experienced “instant” relief when used on its own. Claimant’s medical records demonstrate that the only reported improvement in her sleep was the result of the SCS implant. The medical records make no mention that diclofenac 3% provided relief, much less “immediate” or “instant” relief, or that the medication improved function. The ALJ infers that if such information had been reported to her providers, given the significance of such a report, it would have been documented in the medical records, and would, at a minimum, have resulted in a decrease in the Claimant’s medications. The ALJ further credits Dr. McCranie’s testimony that the pharmacology of diclofenac would not result in the immediate relief Claimant described.

OCCLUSAL MOUTH GUARD

Claimant has failed to establish by a preponderance of the evidence that the use of an occlusal mouth guard was reasonably necessary to cure or relieve the effects of Claimant’s industrial injury. As found, Claimant purchased an occlusal mouth guard apparently on the recommendation of Dr. Plaisted, who is not an ATP. Despite seeing Dr. Pouliot more than 50 times between March 2017 and May 2021, Claimant’s records do not reflect any issues with bruxism, jaw clenching or other issues for which Dr. Plaisted, Dr. Edgren, or Ms. Day recommended the use of an occlusal mouth guard. The records do not reflect that Dr. Plaisted, Dr. Edgren or Ms. Day ruled out any other potential causes of Claimant’s bruxism. Claimant has not credibly established that the need for an occlusal mouth guard is related to her admitted work injury.

ORDER

It is therefore ordered that:

1. Claimant’s request for approval of pre-MMI prescriptions for diclofenac 3% gel is denied and dismissed.

2. Claimant’s request for approval and reimbursement of a pre-MMI occlusal mouth guard is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or

service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 30, 2021

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-123-008-001

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that the cervical spine disc replacement at C6-C7 recommended by authorized treating physician, Dr. B. Andrew Castro, is reasonably necessary and related to the admitted injury of October 5, 2019.

STIPULATIONS

The parties stipulated that the only issue to be addressed is medical benefits related to the surgical procedure recommended by the authorized treating physician (ATP), Dr. Castro, for C6-C7 disc replacement.

FINDINGS OF FACT

Based upon the evidence submitted by the parties in this matter, the ALJ makes the following Findings of Fact:

1. Claimant was a truck driver for Employer when he was injured in the course and scope of his employment on October 5, 2019. He was driving southbound on highway 85 at approximately 11:50 p.m., when a vehicle going northbound turned into his truck, striking the front part of his semi-truck. Claimant suddenly veered when the car hit him, causing him to go into the ditch. Claimant slammed his head and shoulder into the window or the pillar of his truck. He felt immediate pain in his left shoulder, neck and head. He is able to alleviate some of the pain going down his left arm by twisting his head to the right and forward. Claimant testified that prior to the October 2019 motor vehicle accident (MVA) he had no problems with his head, neck or left upper extremity. He went to the emergency room that night, transported by his supervisor. The following day he was seen by another physician and provided restrictions but it was three days before he was able to get an appointment with Advanced Urgent care.

2. Claimant was first evaluated at Platte Valley Medical Center Emergency Medicine Department in the early morning hours of October 6, 2019. The first evaluation was documented at approximately 2:41 a.m., stating that Claimant was a restrained driver, travelling at approximately 40 mph and was struck on the driver's side. He complained of left sided body pain after the MVA, patient did not lose consciousness and was complaining of left-sided head, paraspinal cervical neck pain and left shoulder pain. They documented that Claimant had a history of chronic lower back pain with radiculopathy, for which he was taking cyclobenzaprine tablets. He was discharge with no evidence of acute traumatic injury, but worsening degenerative disc disease, was advised to return to the emergency department if any additional concerning signs or symptoms developed, and referred to his PCP by Dr. Sarah Braden White.

3. A CT scan performed on October 6, 2019 of the cervical spine showed reversal of the normal cervical lordosis, which may have been due to patient positioning or muscle spasm. Dr. Michael Letzing, Neuroradiologist, found mild osteophytic endplate ridging and mild left neural foraminal narrowing from uncovertebral hypertrophy at the C3-C4; and endplate and uncovertebral spurring, mild thecal sac compression, mild right neural foraminal narrowing from uncovertebral and facet hypertrophy at the C6-C7 level. Dr. Letzing also read the CT of the head as normal. A lumbar spine CT was also performed and read by Dr. David Constantino of Diversified Radiology, showing significant impingement at the L3, L4, and L5 nerve roots and extensive degenerative disc disease and spinal stenosis. Dr. John Wendel read the left shoulder X-Ray as normal.

4. On October 7, 2019 Claimant was examined by Jennie Schulman, PA-C under Dr. Ethan Moses of Peak Form Professional. She assessed after examination that Claimant suffered from a head contusion with mild concussion, left shoulder contusion and mild exacerbation of chronic lumbar pain with radiculopathy. Claimant was provided with work restrictions of 6 to 8 hours out of 12/14 shift and a 20 lbs. lifting, carrying, pushing, pulling. She indicated that the injury was work related to a reasonable degree of medical probability.

5. Claimant was evaluated by Physician Assistant Alison Lenz of Advanced Urgent Care (AUC) on October 10, 2019, noting a chief complaint of shoulder, head and neck injury from the MVA. Claimant reported a 7/10 pain level with pain getting worse as the day goes on. She assess that Claimant had a contusion of the head, concussion of the brain, strain of the neck muscles with tenderness upon examination. Ms. Lenz prescribed use of ice, heat, over the counter anti-inflamatories and pain medication as needed for the neck pain. She released Claimant to work full duty upon Claimant's specific request.

6. Ms. Lenz reevaluated Claimant on October 17, 2019, noting Claimant was having neck pain, with numbness (hypesthesia) and tingling in the left arm and left hand when Claimant moves his head to look upward. Her assessments were contusion of the head, concussion, strain of the neck, fascia and tendons of the neck, and numbness and tingling sensation and paresthesia of the skin. Ms. Lenz ordered a cervical MRI due to the continuing neck pain and tingling/numbness radiating down the left arm.

7. The MRI of the cervical spine was performed on November 11, 2019 at Spectrum Medical Imaging. Indications shown are numbness and neck pain after MVA and showed multilevel, multifactorial cervical degenerative changes. Dr. Clayton Vandergriff stated that there was moderate foraminal and spinal canal stenosis, moderate disc osteophyte complex, moderate ligamentum flavum thickening, facet arthrosis, and uncovertebral arthrosis at the C6-7 level. He stated that the AP diameter of the thecal sac is 7mm.

8. Dr. Julie Parsons (also from Advanced Urgent Care) evaluated Claimant on December 4, 2019. Dr. Parsons documented that Claimant's neck was tight, would get pain from the neck into the shoulder, radiating down the left arm with numbness and

tingling. She noted extension aggravated the symptoms. On exam, she documented decreased range of motion on the left, showing a positive Spurling's test, (a positive test indicating nerve compression with specific movements[1]). She assessed contusion of the head, concussion, strain of the neck muscles, fascia and tendons, paresthesia and cervical radiculopathy. Claimant was referred to a Physical Medicine and Rehabilitation specialist, Dr. Roberta Anderson Oeser, to physical therapy and prescribed prednisone.

9. Dr. Anderson Oeser (Ascent Medical Consultants) first evaluated claimant on January 14, 2020 pursuant to Dr. Parson's referral. She documented the history of the MVA consistent with Claimant's testimony and history taken by prior providers. Specifically, she documented that on October 5, 2019:

> H[h]e was driving his semitruck through a green light when another driver traveling approximately 45 mph turned in front of him. The other vehicle struck the driver side front wheel. He states that his head and left shoulder struck the left pillar. He had no loss of consciousness. He states that his truck veered off to the right side of the road and ended up in the grass next to a fence. He recalls having immediately left shoulder pain. He states that he was unable to move his left arm. He called 911 and states that he then exited his truck. He said he had head and shoulder pain. He states that the company supervisor arrived and took him to Platte Valley Hospital in Brighton.

Dr. Anderson Oeser further noted:

> He states that he had difficulty extending his head and neck. He reports that if he extends his neck towards the left his deltoid goes numb. Dr. Parsons referred him for physical therapy. He states that the traction has been helpful. He had an MRI of the cervical spine performed on November 11, 2019. At the C4-5 level he was noted to have a small central disc protrusion and annular fissure. Mild to moderate facet and uncovertebral arthrosis. Moderate foraminal stenosis and mild spinal canal stenosis. At the C6-7 level he had moderate ligamentum flavum thickening, facet arthrosis and uncovertebral arthrosis. He has moderate spinal canal stenosis and moderate foraminal stenosis.

On exam Dr. Anderson Oeser found that Claimant's cervical spine revealed increased tone with palpable spasming in the cervical paraspinals, left greater than right. He was tender over the left cervical facet joints. Cervical range of motion was restricted with extension, lateral bending to the left and rotation to the left. Spurling's was mildly positive on the left. He had palpable spasms in the left upper trapezius, left upper scapulae and mild tenderness over the left acromioclavicular joint. She diagnosed strain of the muscles, fascia and tendons of the neck, cervical radiculopathy, parasthesia, contusion of the head and concussion. She recommended a trial of osteopathic manipulation with Dr. Conforti, a Tens Unit, and NCS/EMG study to rule out cervical radiculopathy and to continue physical therapy to increase range of motion, stretching and strengthening. The pain diagram documents Claimant's symptoms from the neck, into the shoulder and down the left upper extremity.

10. On January 15, 2020, Dr. Parson's nurse practitioner, Ms. Textoris, documented Claimant's complaints of muscle aches in the posterior left shoulder, with

[1] Exhibit 8, bate 274, Depo. pp. 34:22-35:12 & bate 277, Depo. p. 47:3-17.

turn of his head to the left and back, as well as numbness and tingling, which occurs mainly with straining to look upward. On exam she noted that Claimant had limited range of motion, mainly to the left, pain with neck movement to the left and back that radiated into the posterior shoulder and left upper extremity. Diagnosis remained the same and issued a referral to physical therapy.

11. Dr. Anderson Oeser performed an EMG/NVS of the left upper extremity on January 29, 2020, which was found to be normal, with no electrophysiologic evidence of a left cervical radiculopathy, brachial plexopathy or peripheral nerve entrapment neuropathy. Claimant continued to complain of pain in his neck, an aching sensation in the left cervical region in addition to pain and paresthesias throughout the left upper extremity, though he reported improvement with time. Claimant also reported a burning sensation in and increased pain with changing positions, including while sitting and driving, as well as with coughing, laughing, or sneezing, moving his head to the left or back. She reported Claimant’s physical exam was consistently similar with the prior exams but stated that Claimant had palpable spasms in the left upper trapezius and left levator scapulae, with mild tenderness over the left acromioclavicular joint. Dr. Anderson Oeser referred Claimant to Dr. Bunker for chiropractic care.

12. On February 6, 2020 Dr. Anderson Oeser noted that Claimant continued to complain of ongoing cervical pain and left upper extremity pain and paresthesias. Claimant reported that he was using his TheraBands at home and performing his stretches on a regular basis, still awaiting authorization for the neuromuscular massage, has been utilizing the TENS/IF unit, which he found quite beneficial to manage his pain and spasms. He advised Dr. Anderson Oeser that he would rather see Dr. Conforti for the OMT since his schedule had changed. His physical exam remained consistent with prior exams, including ongoing cervical pain and left upper extremity pain and paresthesias. He was given the option of proceeding with a diagnostic/therapeutic C6-7 interlaminar epidural steroid injection, and given a prescription to be seen by Dr. Patel for the procedure for both diagnostic and therapeutic purposes.

13. Claimant attended Dr. Parson’s PA, Alice Nguyen on February 14, 2020. She documented that Claimant was taking gabapentin. On exam, Ms. Nguyen stated that Claimant showed full range of motion of the neck but with neck movement to the left and back Claimant had radiating pain into the posterior shoulder and LUE, together with numbness and tingling with looking upward.

14. On March 5, 2020 Dr. Anderson Oeser’s PA, Kristin Seger, stated that Claimant returned after a C7-T1 ESI with Dr. Patel on February 24, 2020. He stated that he was 50% improved but returned to baseline by March 5, 2020. He complained of occipital headache, trapezius ache on the left side, unless he extends and rotates his head, which causes severe left arm pain, tingling and shoulder pain. During the exam, Ms. Seger found increased tone in the cervical spine with palpable spasming in the cervical paraspinals, left greater than right, tenderness over the left cervical facet joints, restricted range of motion with extension, lateral bending to the left and rotation to the left, mildly positive Spurling's on the left and palpable spasms in the left upper trapezius

and left levator scapulae. Her diagnosis remained the same as previously identified by Drs. Oeser, Parson and Chicoine.

15. Dr. Debra Conforti evaluated Claimant on March 25, 2020 for chief complaints of left cervical pain, left upper extremity pain and parasthesia. She reported that symptoms had slightly increased after the first visit. Following osteopathic treatment modalities, Dr. Conforti advised Claimant that she would be stopping manipulative treatments due to the COVID-19 pandemic restrictions but would see Claimant once the clinic reopened.

16. On March 30, 2020 PA Kristina Johnson at AUC stated that Claimant continued with the same symptoms and diagnosis previously documented by other providers at Advanced Urgent Care. On exam she stated that Claimant had decreased range of motion with minimal neck extension and minimal left lateral flexion. She stated that Claimant was to continue care with Dr. Oeser.

17. Dr. Anderson Oeser established a telemedicine consult with Claimant on April 7, 2020. Claimant reported ongoing left-sided cervical pain and left upper extremity pain and paresthesias. She documented that Claimant had a significant improvement of his symptoms with the C7-T1 interlaminar epidural steroid injection. Claimant reported that extending his neck or lateral bending to the left aggravates neck pain, and left upper extremity pain and paresthesias. Claimant conveyed he was unsure the treatment with Dr. Conforti was beneficial. Dr. Anderson Oser recommended Claimant undergo a second C7-T1 interlaminar epidural steroid injection in her notes, but the referral states "refer to Dr Patel for C6-7 interlaminar steroid injection for diagnostic/therapeutic purposes."

18. On May 12, 2020 Dr. Anderson Oeser conducted a second telemedicine appointment due to the ongoing pandemic. Claimant reported that he had persistent left-sided cervical pain and left upper extremity pain and paresthesias. He denied any specific weakness in the left upper extremity. He advised he was scheduled to have his 2nd cervical epidural injection on May 18, 2020 with Dr. Patel. He reported that extending his neck or lateral bending to the left aggravates neck pain and left shoulder girdle and upper extremity pain and paresthesias. She advised Claimant to continue with his independent home range of motion, stretching and exercise program and continue utilizing the TENS unit to address his pain, spasms, paresthesias and for him to improve blood flow to the area. Dr. Anderson Oeser also recommended Claimant proceed with the ESI with Dr. Patel.

19. Dr. Kevin Chicoine (AUC) evaluated Claimant on June 16, 2020. He noted that Claimant continued to report muscle aches in the posterior left shoulder with turning his head to the left and back as well as numbness (hypesthesia) of the left arm when he turns his head. Claimant reported that his pain was improved and generally does not have neck pain unless he tilts his head to the left side and holds it. Diagnosis remained the same as documented by Dr. Parson and other providers at Advanced Urgent Care.

20. On June 17, 2020, Claimant attended an in person visit with Dr. Anderson Oeser. Claimant was complaining of a burning, stabbing, pins and needle sensation in

the left cervical region with radiation throughout the left upper extremity and into his hand. Claimant stated that the symptoms are brought on by extending his head towards the left or when he rests his forearm on a window in his truck. Claimant had not yet undergone his injection. She completed a physical exam, which was consistent with prior exams showing muscle spasming, increased tone and tenderness as well as loss of range of motion of the neck and paraspinals muscles. She referred Claimant to Dr. Wernick to perform the repeat C7-T1 interlaminar ESI. She advised Claimant that he was quickly approaching MMI following further osteopathic manipulation, massage and ESIs.

21. Claimant returned to see Dr. Anderson Oeser on July 15, 2020 with continued neck, shoulder and arm pain, pins and needles, burning, aching, and stabbing sensations. Claimant advised her that he determined that the prior ESI was not of much help to control his symptoms and decided to forgo the injection as he had prior experience with ESIs without long lasting benefit. Dr. Anderson Oeser referred Claimant to Dr. B. Andrew Castro for a surgical consult and would determine MMI status following that evaluation.

22. On August 5, 2020 Laura McDonough, another of AUC's PAs, stated that Claimant had moderate improvement since last visit. She noted Claimant's pain in the left neck and tingling down the LUE with tilting his head back and to the left continues longer. Claimant continued to report muscle aches in the left trap with back and to the left motion only. Ms. McDonough diagnosed neck strain, paresthesia of the upper limb and cervicalgia. She recommended massage therapy and stated that Claimant's significant symptoms warranted a referral to an orthopedic surgeon. This was signed off on by Dr. Chicoine.

23. Dr. Chicoine evaluated Claimant next on August 25, 2020. On exam of the cervical spine, the exam was benign, except that he had a Spurling's test that was mildly positive on the left. On August 31, 2020 Dr. Chichoine stated that Claimant was not at maximum medical improvement (MMI) and that he would likely not achieve MMI for one to two months. On September 22, 2020 Dr. Chicoine reported Claimant's symptoms consistent with prior reports at Advanced Urgent Care. He noted that Claimant had paracervical tenderness. Claimant advised Dr. Chicoine that he would like to transfer care to Dr. Oeser since he had been with her the longest and is now seeing Dr. Castro in addition to Advanced Urgent Care. Claimant complained that it was a lot of visits. Dr. Chicoine agreed to the requested change to Dr. Oeser.

24. On August 26, 2020, Claimant was seen by Bryan Andrew Castro, M.D. at Cornerstone Orthopaedics. Claimant complained of ongoing neck pain, neck stiffness, peritrapezial, periscapular pain, pain in the outer arm and dorsoradial forearm down to the third and fourth digits. Dr. Castro's Impression/Plan stated: cervical radiculopathy, ongoing, failing to respond to conservative management. At this point, his MRI was greater than six months old and stated he would like to get a new cervical MRI to better evaluate for any neural encroachment to see if there is a better option Claimant would have as far as an injection.

25. On September 1, 2020, Claimant was seen by Dr. Anderson Oeser via telemedicine. Claimant continued to complain of left-sided neck pain and left upper extremity pain and paresthesias and weakness, though he reported that his pain was worse since the last visit. Claimant advised Dr. Anderson Oeser that his anti-inflammatory medication was not working as well as in the past and questioned whether there was something else he could take. She prescribed meloxicam 7.5 mg on a trial basis. On visual exam she found that Claimant's cervical range of motion was restricted with extension and lateral bending to the left; and shoulder range of motion was restricted with forward flexion, abduction and internal rotation on the left. Claimant had been seen by Dr. Castro, who requested an updated MRI.

26. On September 1, 2020, Claimant underwent an MRI of his cervical spine without contrast. The impression detailed a central disc protrusion at the C6-C7 level causing moderate stenosis. The MRI also showed facet arthropathy producing from mild-to-moderate neural foraminal narrowing at the C3-C4, C4-C5, and C6-C7 levels, with multilevel disc degeneration and facet arthropathy of the cervical spine. With respect to the C6-C7 level, the MRI showed a central disc protrusion with disc desiccation and disc space narrowing. The protrusion produces moderate central stenosis, narrowing the anteroposterior dimension of the thecal sac to 6 to 7 mm. Moderate bilateral facet arthropathy and uncovertebral hypertrophy produce mild to moderate right neural foraminal narrowing.

27. On September 22, 2020, Claimant was seen by Dr. Chicoine. Claimant was complaining of same or similar issues in his neck and left upper extremity. Dr. Chicoine noted that Claimant was seeing both Dr. Oeser and Dr. Castro, that it was Claimant's preference to see fewer doctors, and asked if Dr. Oeser could be the ATP from this point forward. Dr. Chicoine agreed with this request.

28. Dr. Castro performed a follow up exam on September 28, 2020. Who noted that Claimant has a central disc herniation at C6-C7 that is causing biforaminal stenosis and central canal impingement. Dr. Castro wrote:

> For his neck, we discussed treatment options as well. He has biforaminal stenosis and severe central canal impingement. I think that surgical intervention could be reasonably considered here. This would entail a one-level cervical disc replacement at C6-C7. …I believe his symptoms are ongoing and failing to respond to conservative approaches, and I do think his treatment as discussed is reasonable and related to his work-related injuries. His treatment as I have outlined does follow the Colorado Workers' Compensation Guidelines.

29. On October 20, 2020 Dr. Chicoine documented Claimant's complaints of muscle aches in the left trap with back and to the left motion, numbness (hyperesthesia) of the left arm only when he turns his head, as well as aching; burning; stabbing; throbbing; sharp; occasional; worsening; left arm goes numb quickly with any movement. He reported 4/10 pain level, and a positive Spurling's maneuver on the left side. He diagnosed contusion of the head (resolved), concussion of the brain, neck muscle strain, numbness and tingling of the left upper extremity dependent on positioning, paresthesia, and radiculopathy of the cervical spine. Dr. Chicoine also documented that Claimant was awaiting disc surgery for the neck.

30. Claimant discussed his case with Dr. Anderson Oeser on both October 5, 2020 and November 2, 2020. She documented that Claimant perceived his symptoms as continuing to worsen for the last several visits, as he is having more pain and muscle spasms. She recorded that he had aching, stabbing, pins and needles and numbing sensation throughout the left upper extremity.

31. On December 8, 2020 Claimant followed up with Dr. Anderson Oeser at Premier Spine and Pain Institute. Exam is consistent with her prior exams of Claimant as well as her diagnosis. She documented the following:

> He was evaluated by Dr. Castro who was recommending a cervical disc replacement. He has not proceeded with the cervical disc replacement due to the surge and COVID-19 cases. He plans to move forward with the surgery once the pandemic is under better control. He is concerned about contracting the virus. He continues with his independent home range of motion, stretching and exercise program on a regular basis. He will occasionally have symptoms in his right arm. He reports mild to moderate pain in the left arm which he describes is mostly a burning, pins and needle sensation.

Dr. Anderson Oeser stated that Claimant was to proceed with surgery once he is comfortable that the pandemic is under control and should continue with his independent home range of motion, stretching and exercise program, which she modified in depth during the consult.

32. Dr. Anderson Oeser reevaluated Claimant on January 7, 2021. Claimant was still complaining of left cervical pain and left upper extremity pain and paresthesias, was reporting numbness in the left shoulder girdle region and occasional electrical pain radiating down his left upper extremity. She advised Claimant to follow up with Dr. Castro to undergo surgery. On February 15, 2021 Dr. Anderson Oeser documented that Claimant was waiting to move forward with his surgery but had to undergo an independent medical examination (IME) first. He continued to complain of left sided cervical pain with stabbing, burning, aching with numbness of the left upper extremity. He reported that his pain levels range from a 5/10 to a 9/10 and turning his head to the left, extending his neck towards the left and sneezing aggravate his pain, though taking medication (diclofenac and misoprostol) and stretching help decrease his symptoms.

33. Dr. Carlos Cebrian evaluated Claimant on March 17, 2021 at Respondent' request for an Independent Medical Examination (IME). Claimant reported that he has a lot of neck pain, that it depends on how he is holding his head that controls the level of his pain, and that he has symptoms of numbness and pain going down his left arm if he moves his head to the left or extends his head. Claimant specifically told Dr. Cebrian that 70% of his pain is in his arm with movement though, if he is not moving his head, then the pain is limited to his neck, but this is not possible when he is driving. Dr. Cebrian examined Claimant and found loss of range of motion with discomfort primarily with extension and left lateral flexion and rotation. Dr. Cebrian diagnosed cervical strain with work related aggravation of cervical spine degenerative disc disease, left shoulder contusion and scalp contusion. He further opined that since the Claimant did not fit within

the Medical Treatment Guidelines, that the surgery recommended by Dr. Castro was not reasonably necessary. Dr. Cebrian opined that claimant is at MMI and had impairment of the work related cervical spine with moderate to severe degenerative changes and loss of range of motion. He stated that apportionment was not applicable.

34. On April 13, 2021 Dr. Oeser documented that prior to the accident Claimant had no cervical pain or left arm pain, paresthesias and weakness. Claimant advised that he had tried to pick up a plate and bowl with his left arm and had severe spasming in the left shoulder and biceps. He reported that he had minimal neck pain but significant pain, paresthesias and weakness in the left arm. He was unsure if he would will be able to continue working due to the pain, paresthesias and weakness of the arm. Dr. Oeser examined Claimant and found that evaluation of the cervical spine revealed increased tone with palpable spasming in the cervical paraspinals, left greater than right, tenderness over the left cervical facet joints, restricted cervical range of motion with extension, lateral bending to the left and rotation to the left, positive Spurling's on the left, palpable spasms in the left upper trapezius and left levator scapulae, with mild tenderness over the left acromioclavicular joint.

35. On July 14, 2021 Dr. Oeser documented that Claimant is having more pain with his left forearm, that the supination of the forearm is becoming more difficult due to pain and tightness, that his arm is "irritated" with increased use, continues to have difficulty using his hand and arm, has tremors in his left hand when the pain becomes severe and occasionally will drop objects from his left hand due to the numbness, tingling, weakness and spasming. She also documented that "using the left upper extremity aggravates his pain and paresthesias." She continued to find increased tone and spasming in the cervical paraspinals, tenderness over the left cervical facets and lower intradiscal spaces, restricted range of motion, and positive Spurling's on the left. She also found palpable spasm in the left upper trapezius and left levator scapulae, as well as tenderness over the acromioclavicular joint. She found decreased strength with left elbow flexion, wrist extension and grip strength. She also found that Claimant had loss of sensation on pinprick of the 3rd, 4th and 5th digit of the left hand.

36. Dr. Anderson Oeser testified by deposition on August 9, 2021,[2] who was accepted as an expert in physical medicine and rehabilitation, without objection. She stated that the diagnosis documented in the records with regard to the cervical spine, left shoulder and left upper extremity were due to the work related motor vehicle accident. Dr. Oeser testified that prior to the work injury Claimant was not having problems with the cervical spine or upper extremity. As found, this ALJ infers that Dr. Oeser was stating that Claimant did not have any significant symptoms of the cervical spine prior to the injury. Dr. Oeser stated that Claimant was referred to Dr. Castro because she had exhausted possible conservative care modalities, from which Claimant only had temporary relief, to determine if Claimant was a surgical candidate. Dr. Oeser opined that Claimant should undergo the surgery recommended by Dr. Castro for the disc

[2] Exhibit 8.

replacement at the C6-C7 level. With regard to the surgery she specifically stated as follows:

> Q. And why do you think he should undergo that surgery?
>
> A. Because he is getting worse with the passage of time. He has actually got weakness now in that left upper extremity that he did not have in the beginning when I saw him. He has tremors in his hands. He drops objects out of the hand and he has a lot of pain. You know, if he doesn't keep his head in one particular position, which is like straight, not really bending it, especially not off to the left or looking up, as soon as he does that, he has the pain shooting down into his arm and hand.
>
> Q. Should he get surgery, this surgery, would it be your opinion that that surgery would be related to his original October 2019 work injury?
>
> A. Yes, because he had no symptoms prior to it. Even though I know he had degenerative changes, he was totally asymptomatic.
>
> Q. And then do you believe that the surgery is reasonably necessary?
>
> A. Yes, I do, given the fact that he is getting worse with the passage of time.
>
> Q. Are there any other alternatives that you can think of that would help [Claimant]?
>
> A. Well, he has tried all the alternatives that I have and I send people to before I even consider surgery. I don't have anything else to offer him, other than treating him with medications. Even medications don't get rid of the weakness that he is experiencing in his arms, the tremors and stuff.

37. Dr. Oeser opined further that Claimant had failed conservative care, disagreed with Dr. Cebrian's opinion and that Dr. Cebrian was incorrect that Claimant has more problems in the neck than in his arm. She stated that when Claimant held his head in a neutral static position, Claimant did have pain in his neck but the minute he would flex or extend, his symptoms were 70% in his left upper extremity, which is classical for radicular symptoms. She testified that Claimant's biggest issue was his arm pain, numbness and weakness that Claimant developed spasming in the arm with difficulty using the arm and, if anything, the increasing symptoms, reinforced her opinion that he should move forward with the surgery before the symptoms become permanent. Lastly, she stated that Claimant was not at MMI. She opined that different radiologists read MRI films differently and the only way to resolve discrepancies in the reading of the MRI reports is to have a radiologist compare them. Dr. Oeser was very adamant in stating that she did not believe Claimant's ongoing symptoms were caused by the spinal degeneration because Claimant had no problems with his arm or neck prior to the injury.[3] Claimant's radiculopathy is confirmed by exam and by the positive Spurling's.[4] She also stated that Claimant's difficulty with weakness and pain that shoots down his arm is interfering with his functioning, despite Claimant's request to be left on full duty.[5] As found, Dr. Oeser has treated Claimant since a few months following the injury. While it

[3] Exhibit 8, bate 272, Depo. p.25:3-14.
[4] Exhibit 8, bate 275, Depo. p. 38:18-9.
[5] Exhibit 8, bate 276, Depo. p.44:4-11.

is true that Claimant has conceded that he does not always have pain if his neck is in a neutral position, he is unable to drive in this manner, or take on most activities of living in this manner. As found, Claimant testified, and the medical records amply support, the Claimant's consistent symptoms since his injury, including numbness, tingling, weakness and pain going down the left upper extremity. Both MRIs show that Claimant has significant stenosis of the spine at the C6-C7 level, which Dr. Oeser testified can alone cause the type of symptoms Claimant is having in his upper extremity. Dr. Oeser and Claimant are found credible in this matter.

38. Dr. Cebrian's deposition took place on September 2, 2021. He is board certified in family medicine and Level II accredited. He continued to opine that Claimant's cervical spine condition at the C6-C7 level was possibly related to the natural degenerative process. He mainly relied on the MRI reports being different and the one time evaluation as well as only those times when Claimant holds his head in a neutral position. He stated that, because Claimant did not meet all the requirements and criteria of the MTGs that Claimant does not qualify to proceed with the surgery suggested. As found, Dr. Cebrian's experience is limited to one visit, that is inconsistent with the consistent prior medical history and exams of other providers. Even Dr. Cebrian did not apportion the loss of range of motion, degenerative condition of the spine to any preexisting factors, stating that the impairment was related to the claim. Dr. Cebrian is found unpersuasive in regard to whether the cervical spine C6-C7 artificial disc replacement is reasonably necessary and related to the injury as well as the fact that Claimant is functioning in a normal manner. While he may be performing his job and Claimant did request that he not be given restrictions, this is not equivalent to being completely functional. The medical records are rife with documented facts that Claimant is having difficulty using his non-dominant upper extremity. As found Dr. Cebrian is unpersuasive.

CONCLUSIONS OF LAW

Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S., 2020. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra.*

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). To the extent, expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); *Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary opinion).

Medical Benefits that are reasonably necessary and related to the injury

Employer is liable to provide such medical treatment "as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury." Section 8-42-101(1)(a), C.R.S. (2021); *Colorado Compensation Insurance Authority v. Nofio,* 886 P.2d 714 (Colo. 1994); *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo.App.1999); *Kroupa v. Industrial Claim Appeals Office*, *supra*. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. See generally *Stamey v. C2 Utility Contractors, Inc., et. al.,* W.C.No. 4-503-974 , ICAO (August 21, 2008); *Parker v. Iowa Tanklines, Inc.,* W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002).

The mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability were caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals*

Corp. v. Ball, 172 Colo. 510, 474 P.2d 622 (1970); Sec. 8-41-301(1)(c), C.R.S. Based upon the evidence presented, the ALJ concludes that Claimant has proven that surgery recommended by Dr. Castro is reasonable, necessary and related to the injury. The medical reports outline persistent pain and functional decline in the face of failed conservative treatment leading Dr. Castro to recommend surgical intervention. The evidence shows that from the time Claimant slammed his head and shoulder into the window or the pillar of his truck, he felt immediate pain in his left shoulder, neck and head. He is able to alleviate some of the pain going down his left arm by utilizing maneuvers and stretching but the problems have persisted and continued to develop consistently, despite conservative care provided by his medical providers. Claimant testified that prior to the October 2019 motor vehicle accident (MVA) he had no problems with his head, neck or left upper extremity. Claimant is credible.

Dr. Oeser opined further that Claimant had failed conservative care, agreed that Claimant required surgery as recommended by Dr. Castro and disagreed with Dr. Cebrian's opinion, stating that Dr. Cebrian was incorrect. Dr. Oeser stated that Claimant has more problems with his symptoms in his left upper extremity, classical for radicular symptoms at any time he is not in a neutral static position. Claimant does have pain in his neck but the minute he would flex or extend, the problems are much greater going down the upper extremity. Dr. Oeser consistently documented in her records that Claimant has palpable spasming in the cervical paraspinals, left greater than right, tenderness over the left cervical facet joints, restricted cervical range of motion and positive Spurling's maneuver, which is indicative of a pinched nerve. The November 11, 2019 MRI shows moderate foraminal and spinal canal stenosis, moderate disc osteophyte complex, moderate ligamentum flavum thickening, facet arthrosis, and uncovertebral arthrosis at the C6-7 level with an AP diameter of the thecal sac is 7mm, which is abnormal. The subsequent MRI on September 1, 2020 showed a central disc protrusion at the C6-C7 level causing moderate stenosis, with disc desiccation, disc space narrowing, and a narrowing of the anteroposterior dimension of the thecal sac of 6 to 7 mm. Dr. Castro opined that Claimant has biforaminal stenosis and severe central canal impingement, recommending surgical intervention entailing a one-level cervical disc replacement at C6-C7, as a result of ongoing symptoms failing to respond to conservative approaches. Dr. Castro opined that the recommended treatment is reasonable and related to his work-related injuries which follow the Colorado Workers' Compensation Guidelines. Both Drs. Oeser and Dr. Castro are more persuasive that Dr. Cebrian in this matter.

The Medical Treatment Guidelines are regarded as the accepted professional standards for care under the Workers' Compensation Act. *Hernandez v. University of Colorado Hospital*, W.C. No. 4-714-372 (January 11, 2008); see also *Rook V. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo.App. 2005). The Medical Treatment Guidelines, Rule 17-2(A), W.C.R.P. provide "All health care providers shall use the Medical Treatment Guidelines adopted by the Division." In spite of this direction, it is generally acknowledged that the Guidelines are not sacrosanct and may be deviated from under appropriate circumstances. *Nunn v. United Airlines,* W.C. 4-785-790 (ICAO September 9, 2011). While the Guidelines may carry substantial weight, and provide substantial guidance, the ALJ is not bound by the Guidelines in deciding individual cases or the principles contained therein alone. Indeed, § 8-43-201(3), C.R.S. specifically provides:

> It is appropriate for the director or an administrative law judge to consider the medical treatment guidelines adopted under section 8-42-101(3) in determining whether certain medical treatment is reasonable, necessary, and related to an industrial injury or occupational disease. *The director or administrative law judge is not required to utilize the medical treatment guidelines as the sole basis for such determinations.* (*emphasis added*).

Pursuant to W.C.R.P. 17-1(A), the statement of purpose of the guidelines is as follows:

> In an effort to comply with its legislative charge to assure appropriate medical care at a reasonable cost, the director of the Division has promulgated these 'Medical Treatment Guidelines.' This rule provides a system of evaluation and treatment guidelines for high cost or high frequency categories of occupational injury or disease to assure appropriate medical care at a reasonable cost.

W.C.R.P. 17-5(C) provides: "The treatment guidelines set forth care that is generally considered reasonable for most injured workers. However, the Division recognizes that reasonable medical practice may include deviations from these guidelines, as individual cases dictate."

It is appropriate for an ALJ to consider the guidelines while weighing evidence, but the Medical Treatment Guidelines are not definitive. *Jones v. T.T.C. Illinois*, Inc., W.C. No. 4-503-150 (May 5, 2006); *aff'd Jones v. Industrial Claim Appeals Office* No. 06CA1053 (Colo. App. March 1, 2007) (not selected for publication); *Stamey v. C2 Utility Contractors et al*, W.C. No. 4-503-974 (August 21, 2008) (even if specific indications for a cervical surgery under the medical treatment guidelines were not shown to be present, ICAO was not persuaded that such a determination would be definitive). While the MTGs provide for that several preoperative surgical indications should be considered before surgery is undertaken, including assessment/definition and treatment of all likely pain generators along with xray, MRI or CT myelography findings consistent with spinal stenosis with instability or disc pathology, the Court is not bound by the MTGs in deciding individual cases on the guidelines or the principles contained therein alone.

Concerning the issue presented, the MTG's indicate that "[t]here is some evidence that the ALJ may decide the weight to be assigned the provisions of the *Guidelines* upon consideration of the totality of the evidence. *See Cahill v. Patty Jewett Golf Course,* WC 4-729-518 (ICAO February 23, 2009); *Siminoe v. Worldwide Flight Services,* WC 4-535-290 (ICAO November 21, 2006). As found in this case, the totality of the evidence presented supports a conclusion that Claimant meets the requirements for surgery as MRI imaging indicate that Claimant has central disc protrusion, and moderate stenosis at the C6-C7 level as well as severe central canal impingement. The evidence shows that upon any movement of the head, Claimant has significant dysfunction affecting the upper extremity. It is not reasonable to state that function is limited to only work activities that Claimant accomplishes with modifying behavior and activities. As found, Claimant proved the MTGs suggest patients with discs injury and radiculopathy should undergo surgery. The ALJ credits the medical records of the authorized treating providers that have evaluated and treated Claimant over time and the testimony of the claimant regarding the claimant's symptoms. The ALJ also credits the opinions of Drs. Oeser and Castro over the contrary opinion of Dr. Cebrian. The ALJ finds that Claimant has demonstrated that it is more likely than not that the C6-C7 disc replacement surgery is reasonable medical treatment necessary and related to the October 5, 2019 motor vehicle accident. Also as found, Claimant has demonstrated by a preponderance of the evidence that the October 5, 2019 MVA caused an aggravation or acceleration of the preexisting degenerative condition in the Claimant's cervical spine, resulting in the need for medical treatment in the form of surgery as proposed by Dr. Castro. As found, Claimant's testimony, the medical records and the opinions of Drs. Oeser and Castro are credible and persuasive, on this issue.

ORDER

IT IS THEREFORE ORDERED THAT:

1. Respondents shall pay for the C6-C7 disc replacement as recommended by Dr. B. Andrew Castro in accordance with the Colorado Medical Fee Schedule.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge' s order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 30th day of September, 2021.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant prove entitlement to TTD benefits commencing January 25, 2021?

- Did Respondents prove Claimant was responsible for termination of his employment?

- The parties agreed to reserve a dispute over the validity of a January 24, 2020 modified job offer for future determination.

FINDINGS OF FACT

1. Claimant worked for Employer as a dispatcher and manger trainee. The job was sedentary and required no significant lifting or standing. Although Claimant occasionally retrieved parts from the warehouse weighing up to 50 pounds, this was not part of the essential duties of the position.

2. Claimant suffered admitted injuries in a slip and fall accident on December 17, 2019. He was initially seen in the emergency room and admitted overnight.

3. Claimant was referred to CCOM after being was released from the hospital. He saw Dr. Thomas Centi on December 19, 2019. Claimant's primary complaints were pain in the neck, right shoulder, left ankle, and left ribs. Dr. Centi's physical examination was almost entirely normal, with the only significant clinical findings being right paracervical pain to palpation. Dr. Centi diagnosed contusions, a cervical strain, and a right shoulder strain.

4. Claimant followed up with Dr. Centi on December 23, 2019. The documented physical examination findings were unchanged. Dr. Centi reviewed multiple x-rays and CT images and saw no evidence of any acute musculoskeletal abnormalities. Dr. Centi imposed restrictions on lifting, keyboarding, grasping, pinching, and reaching.

5. Dr. Centi's January 3, 2020 report documents a normal physical examination. Specifically regarding the cervical spine, Dr. Centi found no spinal tenderness, no muscle spasms, and essentially full range of motion. He noted positive Waddell's findings and thought Claimant gave limited effort. He released Claimant to sedentary work with no lifting over 10 pounds.

6. On January 10, 2020, Dr. Centi documented Claimant had been to two sessions of physical therapy without benefit. The physical examination findings were unchanged from the previous visit. Dr. Centi ordered a cervical MRI, referred Claimant for massage therapy, and prescribed Flexeril. He maintained the same work restrictions.

7. The same physical examination findings were documented on January 17, 2020.

8. Respondents wrote to Dr. Centi on January 20, 2020 and asked him to approve a modified job offer. The proposed work duties involved online training, filing, restocking marketing material, inventory, and other general office duties. The schedule was from 7AM to 4PM with a one-hour lunch break. Claimant was to be paid his regular pre-injury wage.

9. Dr. Centi approved the modified job on January 22, 2020.

10. Employer send the modified job offer to Claimant on January 24, 2020. Claimant acknowledged receiving the job offer. Claimant conceded he did not return to work after receiving the offer. Claimant testified he assumed Employer did not expect him back "until I had received adequate medical care." There is no persuasive evidence Employer shared that view of Claimant's employment status.

11. Claimant had remained in near-daily contact with his direct supervisor, Kyle W[Redacted], while he was off work. Claimant typically texted Mr. W[Redacted] that he was not coming to work each day. Claimant texted Ms. W[Redacted] about the modified duty position, and explained he did not feel ready to return to work because he was still symptomatic and waiting for Insurer to approve the MRI and massage therapy. Claimant told Ms. W[Redacted], "you've been a good boss and I want you to know that I'm not trying to abandon my job. I'm just trying to get my back/neck to a point where I can work but I have had very little treatment so far."

12. Dr. Centi reviewed the MRI findings at Claimant's February 14, 2020 appointment, and described the results as "negative." The exam findings from that appointment were normal, with no cervical spine tenderness or spasm and full range of motion. Dr. Centi liberalized Claimant's work restrictions to allow lifting up to 15 pounds and standing and walking up to 75% of each shift.

13. Claimant's final appointment with Dr. Centi was on March 6, 2020. The examination findings were unchanged, with no cervical spine tenderness or muscle spasm and essentially full range of motion. Dr. Centi put Claimant at MMI[1] and released him to full duties.

14. Insurer filed a General Admission of Liability on March 12, 2020 admitting for a closed period of TTD from December 18, 2019 through December 28, 2020. The termination of TTD was based on "1/28 signed light duty offer letter."

[1] Neither party mentioned Dr. Centi's determination of MMI or suggested it provided an impediment to an award of TTD. Respondents cited only the full-duty release and Claimant's responsibility for termination as the basis for their defense. Respondents subsequently agreed to a change of physician and authorized additional treatment. The ALJ infers the parties mutually agreed to disregard Dr. Centi's declaration of MMI.

15. Mr. W[Redacted] left Employer in late January or early February 2020. Claimant did not communicate with his new supervisor or anyone else from Employer. He does not know who replaced Mr. W[Redacted]. Employer never provided Claimant with contact information for his new supervisor, but Claimant made no effort to obtain that information either.

16. Claimant had no further contact with anyone at Employer until he was terminated approximately one month later.

17. Claimant was informed of his termination by Melinda B[Redacted], an HR representative and workers' compensation coordinator for Employer. Ms. B[Redacted] explained Claimant was being terminated for job abandonment because he had gone too long without communicating with Employer.

18. Claimant had spoken with Ms. B[Redacted] about his claim several times in December 2019 and early January 2020. On January 9, 2020, Ms. B[Redacted] told Claimant he did not need to continue updating her regularly about his claim because "[Insurer] will obtain any documents needed." Claimant had no further contact with Ms. B[Redacted] until she called about the termination.

19. Although Ms. B[Redacted] did not need regular updates regarding his claim, there is no persuasive evidence she advised Claimant not to remain in contact with his supervisors about his employment.

20. The parties subsequently agreed to a change of physician to Dr. Shireen Rudderow. Claimant saw Dr. Rudderow on July 1, 2020. He described neck pain radiating down both arms, worse on the right, and stated, "it has been getting worse of the last several months." He also reported numbness and weakness in his right hand. On examination, Claimant reported increased upper back pain with forward flexion of his right shoulder. He was tender to palpation of the upper thoracic vertebra and parathoracic musculature. There was no tenderness of the cervical paraspinal muscles. Dr. Rudderow ordered right upper extremity electrodiagnostic testing and prescribed a prednisone taper. She gave Claimant work restrictions of no lifting over 10 pounds and no overhead reaching with the right arm.

21. Claimant moved to Pennsylvania and shortly thereafter moved to Delaware because he could not work and needed support from family and friends. Claimant has lived with his mother in Delaware since September 2020.

22. Claimant's care was transferred to a Concentra clinic in Newark, Delaware. He saw Dr. Michael Kennedy on January 21, 2021. Examination of Claimant's neck showed tenderness from C4 to C6, and also in the right trapezius muscle. There was no muscle spasm. Cervical range of motion was full but painful. Sensation to light touch was diminished in the right forearm, thumb, and fingers. Dr. Kennedy agreed "an EMG may be useful to reveal RUE neurologic problems." He imposed work restrictions of no lifting greater than 10 pounds occasionally and no reaching above shoulder level. Dr. Kennedy opined Claimant could work an 8-hour shift. Although he referenced the "Light" exertional

level per the DOT, the definition of light work requires lifting up to 20 pounds occasionally. The ALJ interprets Dr. Kennedy's restrictions as a hybrid sedentary-light.

23. The restrictions provided by Dr. Kennedy would not have precluded Claimant from performing the essential functions of his pre-injury job.

24. On February 3, 2021, Claimant saw Dr. Phyllis James at Concentra. Claimant stated that prolonged sitting aggravated his neck pain. Dr. James' examination showed tenderness and spasm in the right cervical paraspinals and limited cervical range of motion. There was also tenderness and spasm in the upper thoracic paraspinal muscles, with limited range of motion. Dr. James amended Claimant's lifting restriction to five pounds occasionally. She also referred Claimant to Dr. Selina Xing, an orthopedist.

25. Claimant's initial appointment with Dr. Xing took place on February 17, 2021. He described neck pain radiating to the right shoulder and arm, and tingling in his right hand. He was also having frequent headaches from the neck pain. The examination showed pain, hypertonicity and increased muscle tone in the cervical muscles, and decreased cervical range of motion. He had decreased sensation to light touch and pinprick testing in the right forearm and right fingers. Flexion-extension x-rays showed moderate facet hypertrophy diffusely in the cervical spine, mild disc space narrowing, and grade 1 anterolisthesis of C4 on C5. Dr. Xing diagnosed cervicalgia and cervical radiculopathy. She ordered a right upper extremity EMG, cervical x-rays, and a cervical MRI. Dr. Xing changed Claimant's work restrictions to sedentary work no more than four hours per day.

26. The upper extremity EMG was completed on February 25, 2021. The results were normal, but Dr. Xing opined "a sensory radiculopathy cannot be ruled out with this test."

27. On March 19, 2021, Dr. Kennedy released Claimant from further care at Concentra and instructed him to continue treating with Dr. Xing.

28. Dr. Xing administered multilevel cervical medial branch blocks on March 22, 2021.

29. Claimant saw Dr. Xing's partner, Dr. Douglas Patterson, on May 11, 2021. Dr. Patterson documented persistent numbness in Claimant fingers, and "worsening weakness." Clinical signs pointed to brachial plexopathy/thoracic outlet syndrome. Dr. Patterson noted "among the conditions that might be missed by electrophysiologic studies and would cause altered sensibility in multiple distributions are cervical radiculopathy and thoracic outlet syndrome." Because Dr. Xing was already treating radiculopathy, Dr. Patterson recommended therapy to address the TOS.

30. Claimant had a cervical epidural steroid injection in May 2021.

31. The most recent report from Dr. Xing in the record is dated June 14, 2021. She maintained the 4-hour shift limitation through that report. There is no persuasive evidence Dr. Xing has rescinded Claimant's restrictions since that last report.

32. Claimant has suffered from Crohn's disease for several years. He underwent multiple digestive tract surgeries between September 2017 and October 2019. He has been "in remission" since October 2019. Claimant suffers episodic nausea related to the Crohn's. He testified the nausea was exacerbated after the work injury, but Dr. Centi told him that "I was not allowed to reference any of that in relation to this case." Claimant testified the Crohn's disease limits his ability to work a full shift, but believes he could work a full 4-hour shift were it not for the Crohn's.

33. Respondents proved Claimant was responsible for termination of his employment.

34. Claimant proved his injury-related condition worsened after his termination and caused an additional impact on his earning capacity. The worsened condition precluded Claimant from performing his regular job as of February 17, 2021, when Dr. Xing restricted him to 4-hour shifts. Claimant is disabled by the effects of his admitted injury, irrespective of any poorly-defined limitations related to Crohn's disease. Claimant proved he is entitled to TTD benefits commencing February 17, 2021 and continuing until terminated by law.

CONCLUSIONS OF LAW

A. Claimant was responsible for termination of his employment

Sections 8-42-103(1)(g) and 8-42-105(4)(a) provide, "In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." A claimant's responsibility for termination not only provides a basis to terminate temporary disability benefits, but also limits the initial eligibility for TTD. Section 8-42-103(1)(g); *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 58 P.3d 1061 (Colo. App. 2002); *Valle v. Precision Drilling*, W.C. No. 5-050-714-01 (July 23, 2018). The respondents must prove the claimant was terminated for cause or was responsible for the separation from employment by a preponderance of the evidence. *Gilmore v. Industrial Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo. App. 2008). To establish that a claimant was responsible for termination, the respondents must show the claimant performed a volitional act or otherwise exercised "some degree of control over the circumstances which led to the termination." *Colorado Springs Disposal v. Industrial Claim Appeals Office*, 5 P.3d 1061, 1062 (Colo. App. 2002); *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1995); *Velo v. Employment Solutions Personnel*, 988 P.2d 1139 (Colo. App. 1988). The concept of "volitional conduct" is not necessarily related to moral turpitude or culpability but merely requires the exercise of some control or choice in the circumstances leading to the discharge. *Richards v. Winter Park Recreational Association*, 919 P.2d 983 (Colo. App. 1996). The ALJ must consider the totality of the circumstances to determine whether the claimant was responsible for his termination. *Knepfler v. Kenton Manor*, W.C. No. 4-557-781 (March 17, 2004).

As found, Respondents proved Claimant was responsible for termination of his employment. Claimant failed to communicate with Employer for a month after Mr.

W[Redacted] left the company. Although Employer did not provide contact information for his new supervisor, neither did Claimant make any effort to obtain that information. It is reasonable for an employer to expect its employees to maintain communication even if they are off work because of an injury. Claimant knew his treating physician had approved him to work in some capacity and knew Employer was willing to accommodate his injury with modified duties. Although Ms. B[Redacted] told Claimant he did not need to update her regularly regarding his claim, there is no persuasive evidence she told Claimant it was acceptable to stop communicating with Employer regarding his job. Claimant reasonably should have known maintaining "radio silence" for a month would jeopardize his job. Respondents proved Claimant's termination resulted from volitional conduct.

B. Claimant is entitled to TTD benefits commencing February 17, 2021

Termination for cause is not a permanent bar to receiving temporary disability benefits, and a claimant can reestablish eligibility for TTD by showing a worsened condition that caused a subsequent wage loss. *Anderson v. Longmont Toyota*, 102 P.3d 323 (Colo. 2004). A post-termination wage loss is "caused by a worsened condition" if the worsening results in limitations which did not exist at the time of the termination, and those limitations cause a limitation on the claimant's temporary earning capacity that did not exist at the time of the termination. *Martinez v. Denver Health*, W.C. No. 4-527-415 (August 8, 2005). The imposition of new work restrictions does not automatically establish a worsening, but is simply one factor to consider when evaluating the preponderance of evidence. *Apex Transportation, Inc. v. Industrial Claim Appeals Office*, 321 P.3d 630 (Colo. App. 2014). On the other hand, formal work restrictions are not a prerequisite to an award of TTD benefits, and a claimant may establish eligibility with any competent evidence, including lay testimony. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The burden of proof to establish a worsening of condition and consequent wage loss is on the claimant. *Green v. Job Site, Inc.*, W.C. No. 4-587-025 (July 19, 2005).

Claimant proved he is entitled to TTD benefits commencing February 17, 2021. The medical records show a worsening of Claimant's clinical findings after his termination. Dr. Centi repeatedly documented normal or near-normal physical examinations until he released Claimant on March 6, 2020. When Claimant saw Dr. Rudderow in July 2020, he said his neck and arm symptoms had "been getting worse of the last several months." That statement is corroborated by Dr. Rudderow's physical examination, which showed tenderness to palpation of the upper thoracic musculature, areas which Dr. Centi had previously found to be normal. Dr. Rudderow thought Claimant's symptoms warranted further investigation and ordered upper extremity electrodiagnostic testing. Claimant could not pursue treatment for almost seven months because he had to move out of state. When he was able to resume treatment in late January and early February 2021, examinations showed decreased range of motion, muscle spasms, and diminished sensation in the right upper extremity. Dr. Xing documented similar findings at her initial evaluation on February 17, 2021. Claimant proved a worsening of his condition.

In the context of TTD benefits, the concept of "disability" is generally tied to the claimant's ability to perform their preinjury job. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). Dr. Kennedy restricted Claimant to sedentary work with occasionally lifting 10 pounds. Those restrictions would have still allowed Claimant to perform his preinjury job as a dispatcher. But the limitation to four-hour shifts imposed by Dr. Xing would have precluded the performance of Claimant's regular job. The ALJ is persuaded Claimant reestablished a causal connection between his injury and his wage loss as of February 17, 2021, when he was medically restricted from performing his regular work.

An injury need not be the *sole* cause of the wage loss, and a claimant is entitled to TTD if a work-related injury contributes "to some degree" to a temporary wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). The evidence is vague regarding what portion of Claimant's disability may be attributable to Crohn's disease. The preponderance of persuasive evidence shows the vast majority of Claimant's disability since February 17, 2021 was caused by the effects of his work accident, irrespective of any poorly-defined limitations related to Crohn's disease.

ORDER

It is therefore ordered that:

1. Insurer shall pay Claimant TTD benefits, based on the admitted AWW of $506.46, commencing February 17, 2021, and continuing until terminated by law.

2. Insurer shall pay Claimant statutory interest of 8% per annum on all compensation not paid when due.

3. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: September 30, 2021

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 2864 S. Circle Drive Ste. 810, Colorado Springs, CO 80906	
In the Matter of the Workers' Compensation Claim of: **[REDACTED],** Claimant, v. **G[REDACTED],** Employer, and **A[REDACTED],** Insurer/Respondents.	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **WC 5-148-634-002**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

A hearing in the above captioned matter was held on July 20, 2021, before Administrative Law Judge (ALJ), Richard M. Lamphere. Because of COVID-19 related restrictions, the hearing was conducted remotely via video/teleconference. The hearing was digitally recorded on the Google Meets platform between 1:00 and 2:56 p.m.

Claimant was present and represented by [Redacted], Esq. Respondents were represented by [Redacted], Esq. Testimony was taken from Claimant, [Claimant] and Ronald C[Redacted]. In addition to the above referenced testimony, the following exhibits were admitted into evidence: Claimant's Hearing Exhibits 1-9 and Respondent's Hearing Exhibits A-I.

Following the presentation of evidence, the ALJ held the record open through August 10, 2021, to allow counsel time to file position statements in lieu of closing argument. The parties' position statements have been received. Consequently, the matter is ready for an order.

In this order, [Claimant Redacted] will be referred to as "Claimant"; G[Employer Redacted], Inc. will be referred to as "Employer" and A[Redacted] will be referred to as "Insurer". All others shall be referred to by name.

Also in this order, "Judge" or "ALJ" refers to the Administrative Law Judge, "C.R.S." refers to Colorado Revised Statutes (2020); "OACRP" refers to the Office of Administrative Courts Rules of Procedure, 1 CCR 104-1, and "WCRP" refers to Workers' Compensation Rules of Procedure, 7 CCR 1101-3.

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that he sustained a compensable injury to his low back while working for the Employer on August 13, 2020.

II. If Claimant established that he sustained a compensable low back injury, whether he also established that he is entitled to reasonable, necessary and related medical treatment to cure and relieve him from this injury.

III. If Claimant's low back injury is compensable, whether he established, by a preponderance of the evidence, that he is entitled to temporary partial and temporary total disability benefits for the following periods:

Temporary Partial Disability (TPD)	8/14/2020 – 12/17/2020.
Temporary Total Disability (TTD)	12/18/2020 – 12/22/2020
Temporary Partial Disability (TPD)	12/23/2020 - ongoing.

IV. Whether Respondents' established by a preponderance of the evidence that Claimant is responsible for his separation from employment thereby precluding his entitlement to temporary disability benefits after December 17, 2020.

V. Claimant's Average Weekly Wage ("AWW").

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant is a former trash truck driver for Employer who claims to have injured his low back while connecting a full rolling dumpster to the lift on his truck in preparation for tipping.

2. According to Claimant the incident occurred between 3:00pm to 3:30pm on August 13, 2020. Some of Claimant's work can be done with the truck alone; however, Claimant is often required to perform heavy lifting and other manual activity to complete his job tasks. Claimant testified that he ran both residential and commercial trash collection routes. Residential routes involve dumping typical household trashcans and garbage bags into the back of the truck, while collecting commercial trash involves emptying large rolling industrial dumpsters that may hold several yards of trash and are very heavy. Claimant explained that dumping commercial trash receptacles often requires the driver to physically push/pull the dumpsters into position so they can be hooked up to a lift on the trash truck and subsequently lifted into the air so the waste can be dumped into the back of the truck.

3. Claimant estimated that he had to make 175 stops on the day of his alleged injury and that he was assisting another driver (Ron C[Redacted]) with his route in Larkspur, Colorado when he got hurt. According to Claimant, he made a stop on the route to empty a large commercial dumpster. Claimant testified that he jumped out of his truck to hook up a three-yard commercial dumpster to the lift on his truck, which was not positioned correctly for dumping. Claimant pushed the dumpster into place and began the process to hook it to the lift on his truck. At about this time, Mr. C[Redacted] showed up at his site to see if Claimant needed assistance. Claimant testified that he completed latching one side of the dumpster to the lift and as he attempted to latch the top bar on the other side, it stopped and would not latch. Claimant pushed on the dumpster in an effort to get the latch to catch and in the process developed immediate pain in his low back. He testified that he bent over in pain grabbing his low back. According to Claimant, Mr. C[Redacted] witnessed the entire incident.

4. Claimant testified Mr. C[Redacted] helped get him back into his truck and they each proceeded to drive their trucks to the next stop on the route. Upon arrival at the next stop, Claimant realized he was not physically able to lift the three metal cans associated with the account, so Mr. C[Redacted] collected the trash at this stop. He and Mr. C[Redacted] then proceeded straight back to the Employer's headquarters. Claimant testified that upon reaching the yard, Mr. C[Redacted] assisted him into the building where he reported his injury to Ryan B[Redacted]. According to Claimant, Mr. B[Redacted] encouraged Claimant to see his chiropractor and "give it the weekend" to see if his condition would improve, noting that he had been hurt on the job before. Claimant agreed. Claimant's pain worsened, prompting him to seek treatment from Comfort Care Family Practice on Monday, August 17, 2020. Claimant testified that he chose this clinic because it was convenient and they were able to see him right away.

5. The claim was filed with a date of injury of September 13, 2020[1], but the evidence presented supports a finding that the true date of injury was probably August 13, 2020. Claimant testified that he was not sure of the exact date of the incident but believed it occurred on Thursday, August 13, 2020. He was certain the incident occurred on a Thursday because he was working with his co-worker Ron C[Redacted] with whom he only worked on Thursdays. He also reiterated that he was encouraged to wait the weekend before perusing the case further. As noted, Claimant presented to Comfort Care Family Practice on Monday, August 17, 2020. The record from this date of visit states that the injury occurred four days prior. (Clmt's. Ex. 3, p. 34). The first page of the report states it happened five days prior (Clmt's. Ex. 3, p. 32); however, Claimant confirmed at hearing that the incident occurred on a Thursday, and August 13, 2020 was a Thursday. *Id.* at 32. The first note also explicitly documents that Claimant's pain "started after pushing a dumpster at work." (Clmt's. Ex. 3, p. 32). According to this report, Claimant reported that he "felt his back go out and pain shooting down [his] left leg at the time of injury." *Id.* Claimant was assessed with "Low Back Pain", was given an injection of Toradol and a prescription for Zanaflex for pain and spasm and instructed to follow up with his primary care provider (PCP). This report did not impose or address work restrictions.

[1] *See* Clmt's. Ex. 9, p. 74.

6. Claimant went to see his PCP, Dr. Kurt Lesh, at Colorado Springs Family Practice on August 21, 2020 because Employer, despite having notice of his claimed injury (Resp. Ex. G, p. 52) did not provide him with a list of providers from which to choose to provide treatment for his alleged injuries. (Clmt's. Ex. 4). During his initial visit, Claimant reported "throbbing" pain in his low back with "shooting" pain down his legs to the top of his foot. Id. at p. 36. The report from this date of visit documents that Claimant was pushing a heavy dumpster when he felt a "crack" in his back causing his leg to involuntarily kick out. Physical examination revealed exquisite tenderness in one specific spot of the lumbar paraspinous musculature, which was felt to represent a trigger point. Dr. Lesh administered a trigger point injection that, by report, gave Claimant "almost immediate partial relief [from] his pain." *Id*. at p. 36.

7. Claimant underwent an MRI of his lumbar spine, as ordered by Molly Kallenbach, D.C. Imaging was completed on September 1, 2020 and interpreted by William Anderson, D.C. The MRI revealed mild degenerative narrowing and desiccation of the intervertebral disc, anterolateral spondylosis deformans and diffuse circumferential annular bulging at L2-L3. At the L4-5 level, in addition to mild degenerative disc desiccation, there was an "acute to subacute posterior/left paracentral extrusion of the nucleus pulposus which [had] fragmented, migrating cephalically into the left lateral recess and neural foramen" markedly compressing the interformanial left L4 nerve root. At L5-S1, there was "marked posterior/paramedian annular bugging and bilateral degenerative facet arthropathy. The degenerative disc facet complex was more advanced on the left side and was noted to "[lead] to left lateral recess and foraminal stenosis with subsequent interforaminal compression of the left L5 nerve root and marked crowding of the contralateral right L5 nerve root in the neural foramen. According to Dr. Anderson, these findings "may contribute to paresthesia and radiculopathy extending into the left and/or right L5 dermatomes. (Resp. Ex. D, p. 21).

8. On September 22, 2020, Claimant was evaluated by Dr. Christopher Malinky, by referral from Dr. Lesh. Dr. Malinky noted that Claimant complained of left-sided low back and buttock symptoms, as well as left leg symptoms. Dr. Malinky documented that Claimant's symptoms first occurred after a "trauma and/or injury while standing and twisting. He also noted, "The injury was not reported to worker's compensation." Physical examination revealed lumbar spine "tenderness and a positive straight leg raise test on the left. No Waddell's sings were present. Following the evaluation, Claimant was diagnosed with lumbar "intervertebral disc disorders with radiculopathy", lumbar degenerative disc disease and myalgia. He was subsequently provided with prescriptions for hydrocodone (5/325 mg) and methocarbamol 750 mg. and scheduled for a transforaminal epidural steroid injection. Finally, Dr. Malinky provided the following commentary:

> Patient with some low back pain and radicular symptoms three to four months ago. They did improve over six to eight weeks; however, approximately two weeks ago the patient has a significant low back pain and radicular symptoms in the left leg with some numbness and

> tingling in the left thigh and weakness. This has not been improving with conservative care. MRI was reviewed which does show disc bulges at L4/5 and L5/S1 with nerve compression on the L4 and L5 nerve.

(See generally, Clmt's. Ex. 6).

9. Claimant returned to Dr. Malinky on October 12, 2020. Dr. Malinky performed the aforementioned left-sided L4-L5 transforaminal epidural steroid injection (ESI) noting that further interventional procedures would depend on the results of the injection administered that day. (Clmt's Ex. 6, p. 53).

10. Claimant was evaluated in follow-up at Dr. Malinky's office on October 21, 2020. Adam Haeffner, Dr. Malinky's physician's assistant (PA), saw him. During this encounter, Claimant reported a pain level of 7-8/10. Physical examination revealed pain with lumbar extension and right lateral flexion along with tight lumbar paraspinal muscles that were tender to palpation. PA Haeffner ordered a L5-S1 injection for low back pain and radiculitis given that Claimant had "inadequate" relief from the previous L4-L5 ESI administered October 12, 2020 by Dr. Malinky. (Clmt's Ex. 6, p. 57).

11. On November 23, 2020, Dr. Malinky performed a fluoroscopically guided L5-S1 interlaminar epidural steroid injection. On December 8, 2020, Claimant returned to Dr. Malinky's office where it was noted that he experienced approximately 75% improvement of his symptoms and the relief was ongoing. Following the evaluation, a repeat ESI was considered. Dr. Malinky did not impose or address work restrictions.

12. Claimant admitted that he returned to work after the incident and that Mr. B[Redacted] put him on modified duty based upon claimant's subjective reports. Claimant could not recall exactly what type of work he was performing but admitted that for an unknown amount of time he was on "driving duty" only, which Claimant admitted is not physically demanding. Claimant resigned his position with GFL on December 17, 2020 and began working as an over the road truck driver for Expeditor Services performing substantially similar driving duties to those he had performed while on modified duty with GFL on December 23, 2020. (Ex. I).

13. Claimant underwent an independent medical examination (IME) with Dr. Timothy Hall at the request of Claimant's counsel on February 9, 2021. (Clmt's. Ex. 7). Dr. Hall had no records at the time of his IME. Nonetheless, he obtained the following history from Claimant:

> [Claimant] gives a history that on the date above (September 13, 2020) he was working his usual job picking up dumpsters. That day he made over 100 stops. He was then told to go help another driver. He backed up to a 3-yard dumpster. He got out and "latched" the dumpster to the truck, which involved lifting a latch and pushing. He does not report there being anything dysfunctional or out of the ordinary about this activity. In the midst of this activity, he felt pain in

> his anterior hip into his left thigh. He bent down due to the pain and when he stood back up he had burning in his low back. . . . He then went back to the yard and was in “serious pain.” He told his supervisor that “I hurt myself bad,” and the supervisor told him that they did not have a specific doctor but wondered if it was something that might just go away with time. [Claimant] agreed to see what happened and he simply took it easy over the weekend, but by Monday, he could hardly walk and went to urgent care.

(Clmt’s Ex. 7, p. 65).

14. Claimant also reported a “history about 2 months prior to this episode of having done something to his back.” According to Claimant, “a dumpster flew off a truck and he had to jump out of the way. This gave him some left knee area pain and some low back pain, which kept him off work for about 2 months. [Claimant] did not report the injury or get treated through work comp. He simply 'nursed [himself] at home.' He had been back to work about 6 weeks prior to this September injury. Per Claimant’s report, the pain from the August 13, 2020, event was “far worse and different in location and quality than the prior event.” (Clmt’s Ex. 7, p. 66).

15. Dr. Hall performed a physical examination, which revealed, “straightening” of the normal lordosis, bilateral tenderness of the thoracolumbar paraspinal musculature in the area of the quadratus laborum (QL) and limited lumbar range of motion in all planes. Claimant was generally hyporeflexive in the lower extremities with trace reflexes at the knees bilaterally. Dr. Hall was unable to elicit an ankle reflex on either side. Claimant was weak in dorsiflexion of the foot on the left side and he could not heel or toe walk. Finally, Dr. Hall noted sensory dysfunction in the L5 dermatome on the left side. Dr. Hall diagnosed Claimant with a lumbar herniated nucleus pulposus at L4-L5 with left L4 nerve root involvement and facet arthropathy at L5-S1 and potential left L5 nerve root involvement. Dr. Hall ultimately concluded that Claimant’s symptoms and need for treatment were precipitated by his work activities manipulating the dumpster in an effort to latch it to the lift on his trash truck. Dr. Hall did not address the need for work restrictions. (Clmt’s Ex. 7, p. 66-67).

16. Claimant underwent an IME with Dr. Lawrence Lesnak at the request of Respondents’ counsel on June 16, 2021. (Resp. Ex. A). Claimant told Dr. Lesnak that he had made 175 stops to pick up trash on the date of incident. He stated the incident occurred while he was connecting a dumpster to the latch on the truck. He had reportedly latched one side and walked around to the other side when he felt a sudden pop in his left lateral buttock and groin region. At this examination, Claimant reported diffuse symptoms involving the left lumbar region, bilateral buttocks, intermittent right sided upper back pains and frequent numbness and pins and needles sensations involving the entirety of his right upper extremity that had begun approximately 2.5 weeks after the incident. He also reported occasional left anterior medial knee pain and feelings of instability that began several months after the incident. Claimant also reported being an over the truck driving and working full time in that capacity.

17. Claimant also disclosed to Dr. Lesnak, as he had to Dr. Hall, that he had sustained an injury in July 2020. He again reported that he self-treated those symptoms for approximately one month until his symptoms improved. Other than the injury earlier in 2020, he denied any prior low back problems. On examination, Dr. Lesnak found no objective findings to support Claimant's subjective complaints. Dr. Lesnak's discussion begins with Claimant's apparent prior back condition, stating Claimant was having lower back for several months prior to the work incident. *Id.* at p. 8. Respondents also argued that Claimant had a longstanding history of similar symptoms. Claimant testified at hearing that he was not having any lower back issues leading up to the incident with the dumpster and the available medical record supports this testimony. Indeed, the closest medical record in time preceding the incident with the dumpster is a note from Comfort Care Family Practice dated July 9, 2020, approximately one month prior to Claimant's alleged date of injury in this case. Claimant presented to Comfort Care on this date because he was unable to get in to see his PCP and he had a three-month history of hypertension. *Id.* at 30. The note documents Claimant was in no acute distress, was healthy appearing, his station and gait were normal, and there was nothing on physical examination to suggest he was experiencing any back problems. *Id.* at 30-31. The more remote records support a finding that Claimant's prior medical treatment focused on his hypertension, his hepatitis C diagnosis and his efforts to stop smoking.

18. Dr. Lesnak did concede that based on the history Claimant provided to Comfort Care on August 17, 2020, it was possible that he sustained a mild back strain/sprain. (Resp. Ex. A, p. 8). Nonetheless, Dr. Lesnak opined that Claimant developed "symptoms involving his buttock, hips legs and most likely his low back approximately several months prior to any alleged incident that occurred on 8/7/2020. (Resp. Ex. A, p. 8)(emphasis in original). He opined that Claimant's myriad of symptoms/subjective complaints were not supported by objective findings, noting further that Claimant had been able to work full-time for the past six months. *Id.* Consequently, Dr. Lesnak concluded that, to a reasonable degree of medical probability, there is no medical evidence to support that [Claimant] sustained any type of injury as a result of any work activities that he may have been performing in August of 2020." *Id.* at p. 9. He further noted, that even if Claimant did sustain a soft tissue strain injury, Dr. Malinky noted on December 8, 2020 that claimant had little to no symptoms at that point which was about the same time he began working in his new employment and required no additional medical care at that time. *Id.* at p. 10.

19. Dr. Lesnak testified via prehearing deposition as a Level II accredited expert in the field of physical medicine and rehabilitation (PM&R). In general, he testified consistently with his written report admitting that it was possible that Claimant sustained a strain/sprain injury. Nonetheless, Dr. Lesnak acknowledged Claimant was a "very poor historian," noting further that newly obtained medical records associated with a claim for social security disability benefits from 2011 supported a conclusion that Claimant had prior back pain. Dr. Lesnak also did not believe the reported mechanism of injury (MOI), which did not involve any lifting, bending, or twisting would be sufficient to injure the low back. Accordingly, he opined that Claimant did not sustain any work related injury. Rather, Dr. Lesnak opined that Claimant's symptoms were due to a pre-existing condition

and a potential injury that had occurred approximately two months prior to the reported incident. During his deposition, Dr. Lesnak admitted that he saw no records documenting ongoing treatment directed to the low back between 2011 and the date of injury in this case. (Depo. Dr. Lesnak, p. 14, lines 4-10).

20. At hearing, Claimant explained that he had applied for social security disability income (SSDI) in 2011 primarily due to his hepatitis C. According to Claimant, his hepatitis C caused body aches all over, including in his low back and constant flu like symptoms. Review of the medical report associated with Claimant's application for SSDI substantiates that he was evaluated by Dr. Adam Summerlin on August 6, 2011 for a chief complaint of "Back pain." The report generated by Dr. Summerlin documents that Claimant dated his back pain to 2009 without any precipitating cause. He reported that he had a constant tender and achy back with pain at 6/10 that increased to 10/10 with bending and lifting. Pain was located in his low back and upper thoracic region. (Ex. B). Claimant's station and gait were normal for tandem and toe-heel walking. While Claimant had reported tenderness to palpation over all of the spinous processes from the mid thoracic spine to the sacrum, there was no noted paravertebral spasm. Dr. Summerlin concluded that Claimant did not have an objective physical condition that was likely to impose a limitation on him for 12 or more continuous months.

21. Ryan B[Redacted] testified as the Operations Supervisor for Employer. He was Claimant's supervisor on the date of the alleged incident. Mr. B[Redacted] explained that Claimant had worked for him for approximately five years with Tri-Lakes Disposal before Employer acquired that company. Mr. B[Redacted] testified that the latching mechanism Claimant was using weighed no more than 10 pounds and did not require any bending or twisting to attach the dumpster to the trash truck.

22. Mr. B[Redacted] testified that he did not recall any conversation with Claimant on August 13, 2020 regarding his alleged work injury. It was Mr. B[Redacted]'s testimony that he did not hear about Claimant's alleged injury until August 17, 2020, when Claimant sent him a text message that he would not be into work due to back and hip pain. Even then, Mr. B[Redacted] contends that Claimant did not inform him that his pain was connected to his work duties. Indeed, Mr. B[Redacted] did not complete a written accident report until October 13, 2020, which he asserts is the date he was first notified that Claimant's back pain purportedly had its roots in Claimant's work related functions on August 13, 2020. In his written statement, Mr. B[Redacted] contends that Claimant told him his pain was from a previous injury. (Resp. Ex. G, p. 52).

23. Mr. B[Redacted] also testified that he had a discussion with Claimant on September 13, 2020 regarding the condition of his low back. According to Mr. B[Redacted], Claimant was having a difficult time accessing his employer paid health insurance benefits due to the recent acquisition of Claimant's prior employer, Tri Lakes Disposal, by GFL on June 1, 2020. Mr. B[Redacted] testified that he was working with Claimant and other employees of the former company to help straighten out their health insurance benefits. Per Mr. B[Redacted], he spoke with Claimant in September 2020 at which time they discussed that he may want to see a chiropractor for his back pain in lieu

of going back to an urgent care clinic as a more economical option. Mr. B[Redacted] did not recall Claimant reporting the incident to him as a work-related during this conversation and reiterated that he first learned that Claimant was alleging a work injury after he filed his Workers Claim for Compensation.

24. As further evidence that he was unaware of the work related nature of Claimant's low back pain, Mr. B[Redacted] testified that he never received any written work restrictions from a medical provider attending to Claimant's back pain. He testified that he simply placed Claimant on modified duty beginning in August 2020 based upon his report of back pain. Claimant initially worked light duty at the transfer station, which Mr. B[Redacted] testified essentially amounted to office work. Mr. B[Redacted] then moved Claimant to driving duty only and regularly assigned Claimant a helper on his routes. Claimant was working on driving duty only on December 17, 2020 when he voluntarily resigned. Mr. B[Redacted] testified that he was willing to continue providing modified duty to Claimant at the time of the resignation but understood the desire to find less physically demanding work than driving a trash truck.

25. Claimant admitted that he voluntarily resigned from his position with Employer on December 17, 2020 and to starting a job as an over the road truck driver on December 23, 2020. Claimant testified that he resigned because: 1) he was dissatisfied with management, 2) he wanted better pay, and 3) he felt the job was too physically demanding. Although Claimant stated that he resigned in part because his job was too physically demanding, he could not recall if he was doing anything other than driving at the time of his resignation. Mr. B[Redacted] testified that Claimant was on "driving duty" only at the time of his resignation. Claimant admitted that "driving" the trash truck was similar to driving the freight truck, which he reported no difficulty performing.

26. Ron C[Redacted] testified in rebuttal on behalf of Claimant. Mr. C[Redacted] testified that he recalled Claimant hurting his back on a date in which the two men had worked together all day. He recalled Claimant reporting the injury to Mr. B[Redacted] upon returning to the yard although he did not directly witness the conversation between Claimant and Mr. B[Redacted]. Mr. C[Redacted] did not testify regarding the date and time of either the incident or the conversation between Claimant and Mr. B[Redacted]. Claimant also testified in rebuttal and stated that Mr. C[Redacted] was mistaken about the two men working together all day. Claimant believed that Mr. C[Redacted] had his dates confused and was likely referring to a different day. Despite testifying earlier that he only worked with Mr. C[Redacted] on Thursdays, Claimant testified in rebuttal that he worked with Mr. C[Redacted] multiple days per week and believed Mr. C[Redacted] was referring to events that occurred on a different day of the week.

27. Based upon the evidence presented, the ALJ finds Claimant to be a poor historian drawing the reliability of his testimony into question. Nonetheless, he has remained consistent regarding the MOI that gave rise to his symptoms and was adamant that the events leading to his low back pain happened on a Thursday when he was working with Mr. C[Redacted]. As found, the medical records substantiate that Claimant

first sought treatment on August 17, 2020, during which it was noted that he had had a four-day history of back pain supporting an onset date of August 13, 2020, which happens to fall on a Thursday. Moreover, Mr. C[Redacted] confirmed that Claimant injured his back on a day the two worked together and that Claimant reported the injury to Mr. B[Redacted] upon returning to the yard. Respondents' suggestion that Mr. C[Redacted] was probably recalling a different injury date on which he was working with Claimant as a "helper" after Claimant's injury had already occurred is unconvincing.

28. While Claimant described a prior incident involving a dumpster that flew off a truck causing low back pain two months before the index injury in this case, the evidence supports a finding that he recovered from this event and returned to full duty work after "nursing" himself at home. Accordingly, the ALJ is not convinced that this prior accident represents the underlying cause of Claimant's present pain.

29. While the remote medical records document that Claimant had pre-existing complaints of low back, there is a dearth of evidence, as admitted by Dr. Lesnak, to support a finding that he required treatment for or was disabled by those symptoms between 2011 and the date of injury in this case. Indeed, Dr. Summerlin, who evaluated Claimant at the behest of the Social Security Administration, concluded that Claimant did not have a medical condition that was likely to impose a limitation on him for 12 or more continuous months. (Resp. Ex. B, p. 16). Regarding Claimant's prior complaints of low back pain between 2009-2011, the ALJ credits Claimant's testimony to find that those symptoms were probably related to the flu like effects of his hepatitis.

30. The ALJ credits the medical records of Comfort Care Family Practice, Colorado Springs Family Practice (Dr. Lesh), Front Range Diagnostic Radiology, Interventional Pain Management and Dr. Hall to find that Claimant has established that he sustained a compensable injury to his lower back on August 13, 2020. While Dr. Lesnak opined the "incident" in August of 2020 was not a sufficient mechanism to injure the back, the content of the medical records convinces the ALJ that it is unlikely that Claimant was simply attaching one side of the metal latch to the dumpster as Dr. Lesnak suggested. The ALJ is convinced that Claimant was probably pushing on the dumpster while manipulating the latching mechanism in an effort to attach the container to his nearby truck injuring his back in the process. Dr. Lesnak's deposition testimony that Claimant's lumbar MRI is devoid of any evidence of an "acute injury or trauma-related pathology" appears patently incorrect. (Depo. Dr. Lesnak, p. 9, lines 14-23). Dr. Lesnak seemingly failed to notice Dr. Anderson's notation that Claimant's MRI demonstrated "probable acute to subacute" disc herniation at L4-L5 with paracentral extrusion and fragmentation of the nucleus pulposus which had migrated into the left lateral recess resulting in marked compression of the left L4 nerve root. (Resp. Ex. D, p. 21). Contrary to Dr. Lesnak's suggestion, the ALJ is convinced that Claimant's MRI demonstrates "trauma-related pathology" and objective evidence of an acute injury, which supports his subjective symptoms.

31. The ALJ finds the care Claimant received through Comfort Care Family Practice, Colorado Springs Family Practice (Dr. Lesh), Front Range Diagnostic

Radiology, Interventional Pain Management reasonable, necessary and designed to cure and relieve him of his ongoing pain and dysfunction.

32. Claimant began working for Employer on June 1, 2020. Wage records for the 14-week period from June 20, 2020 through September 25, 2020 were offered into evidence. (Resp. Ex. F). While these records document that Claimant earned a total of $12,723.60 for this period, the ALJ is cognizant that the wage records include earnings after Claimant's date of injury when his hours probably dropped off due to the effects of his industrial injury. For example, Claimant worked 9 hours for the pay period extending from August 15 through August 21, 2020. He only worked 10.90 hours the next pay period. (August 22-28, 2020). In the eight weeks extending from June 20, 2020 to August 14, 2020, the day after his August 13, 2020 injury, Claimant earned $9,307.00. This results in an average weekly wage of $1,163.37 ($9,307.00 ÷ 8 = $1,163.37). The ALJ finds that this figure represents a fair approximation of Claimant's earnings at the time of his industrial injury and his diminished earning capacity afterward.[2] *Campbell v. IBM Corp.,* 867 P.2d 77 (Colo. App. 1993); *National Fruit Prod. v. Crespin,* 952 P.2d 1207 (Colo. App. 1997).

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law: Conversely

General Legal Principals

A. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1), C.R.S.* Claimant must prove that he is a covered employee who suffered an injury arising out of and in the course of employment. *Section 8-41-301(1), C.R.S.; See, Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001).

B. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Clam Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

[2] Claimant's gross pay for the two-week pay period ending 7/3/20 was $2,270.00. Similarly, his gross pay for the two-week pay periods ending 7/17/20 and 7/31/20 was $1900.00 and $1,516.00 respectively. Conversely, Claimant's gross pay for the two-week pay period extending from August 15, 2020 to August 28, 2020 after his industrial injury was $398.00.

C. Assessing weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16; *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

D. The weight and credibility to be assigned expert testimony is also a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); see also, Dow Chemical Co. v. Industrial Claim Appeals Office, 843 P.2d 122 (Colo. App. 1992)(ALJ may credit one medical opinion to the exclusion of a contrary opinion). As found in this case, the ALJ credits Claimant's testimony regarding the MOI along with the content of the medical records and the expert medical opinions of Dr. Hall to conclude that Claimant probably injured his low back while attempting to attach a large commercial dumpster to his trash truck while helping Mr. C[Redacted] with his route on August 13, 2020. The contrary opinions of Dr. Lesnak are unconvincing.

Compensability & Claimant's Entitlement to Medical Treatment

E. A "compensable injury" is one which requires medical treatment or causes disability. *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167, 1169 (Colo. App. 1990). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romero*, supra; § 8-41-301, C.R.S. To sustain his burden of proof concerning compensability, Claimant must establish that the condition for which he seeks benefits was proximately caused by an "injury" arising out of and in the course of employment*. Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(l)(b), C.R.S.*

F. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements before an alleged injury will be determined to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 552 P.2d 1033, 1036 (1976). Based upon the evidence presented, there is little doubt that Claimant's alleged injuries occurred during the time and place limits of his relationship with Employer and during an activity connected to his job-related functions, namely collecting trash. Accordingly, the ALJ concludes that Claimant has proven that he was in the course and scope of his employment at the time he developed pain in his low back. While the evidence supports a conclusion that Claimant was in the course and scope of his employment the remaining question is whether Claimant's injuries arose out of his work duties.

G. The term "arises out of refers to the origin or cause of an injury. *Deterts v. Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando, supra; Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). Colorado courts have repeatedly emphasized that the determination of whether alleged injuries arose out of and in the course of an employment relationship is largely dependent upon the facts surrounding the injury in question. *Bennet v. Furr's Cafeterias, Inc.*, 549 F. Supp. 887 (D. Colo. 1982).

H. As found here, the contents of the medical records, particularly the September 1, 2020 MRI, support a conclusion that Claimant's trash collecting duties on August 13, 2020, probably caused "trauma-related pathology", including an acute herniated nucleus pulposus at L4-L5 giving rise to his symptoms and need for treatment on August 17, 2020. Based upon the available record, after 2011 and prior to August 17, 2020 there is a paucity of evidence to suggest that Claimant required treatment directed to his low back. While Claimant admitted to a prior incident involving a dumpster that flew off a truck causing back pain occurring approximately two months before the August 13, 2020 incident, the record is devoid of any indication that Claimant required treatment following this event. Indeed, Claimant credibly testified that he "nursed" himself at home. Moreover, the evidence presented supports a conclusion that following this incident Claimant returned to and participated in full duty work for several weeks before the suffering the injury in question here. Accordingly, the evidence supports a conclusion that this prior incident was not disabling as of August 13, 2020.

I. In this case, the totality of the evidence presented supports a reasonable inference that the event that caused Claimant to "nurse" himself at home probably injured and weakened the disc at L4-L5 causing a latent but non-disabling condition, which subsequently became manifest and required treatment when acted upon by the events of August 13, 2020. It is well settled that a pre-existing condition, whether manifest and not disabling or latent, "does not disqualify a claimant from receiving worker's compensation benefits." *Duncan v. Indus. Claims Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). To the contrary, a claimant may be compensated if his or her employment, as is the case here, "aggravates, accelerates, or "combines with" a pre-existing infirmity or disease "to produce the disability and/or the need for treatment for which workers' compensation is sought". *H & H Warehouse v. Vicory*, 805 P.2d 1167, 1169 (Colo. App. 1990). Even temporary aggravations of pre-existing conditions may be compensable. *Eisnack v. Industrial Commission*, 633 P.2d 502 (Colo. App. 1981). Pain is a typical symptom from the aggravation of a pre-existing condition. Thus, a claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment–related activities and not the underlying pre-existing condition. *See Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 488 (1940). In this case, the acute nature of Claimant's L4-L5 disc herniation persuades the ALJ that his back pain is a consequence of employment related activity. The evidence presented supports a reasonable inference that pushing on a heavy three-yard dumpster while manipulating the latch to attach the container to the truck probably hastened (accelerated) the deterioration of the disc causing it to rupture. The subsequent extrusion of the nucleus pulposus into the left lateral recess compressed the L4 nerve root which, more probably than not, gave rise to Claimant's symptoms and need for treatment. Accordingly, the ALJ concludes that the claimed injury is compensable.

J. Once a claimant has established the compensable nature of his/her work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable, necessary, and related medical care to cure and relieve the effects of the work injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Whether the claimant sustained his/her burden of proof is generally a factual question for resolution by the ALJ. *City of Durango v. Dunagan*, 939 P .2d 496 (Colo. App. 1997). In this case, the persuasive evidence demonstrates that after resting for the weekend without improvement, Claimant sought treatment for an acute injury to his low back sustained on August 13, 2020. As concluded, the ALJ is convinced that Claimant's symptoms and need for treatment, including his treatment with Comfort Care Family Practice, Dr. Lesh, Front Range Diagnostic Radiology and Interventional Pain Management is causally related to this compensable injury. The evidence presented also supports a conclusion that this treatment was reasonable and necessary to cure and relieve Claimant from his going symptoms. In so concluding, the undersigned ALJ rejects Dr. Lesnak's contrary opinions as unpersuasive.

Claimant's Separation from Employment & His Entitlement to Temporary Disability Benefits

K. As Claimant's injury was after July 1, 1999, sections 8-42-105(4) and 8-42-103(1)(g), C.R.S. apply regarding his entitlement to TTD benefits. These identical provisions state, "In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." Sections 105(4) and 103(1)(g) bar reinstatement of TTD benefits when, after the work injury, claimant causes his/her wage loss through his/her own responsibility for the loss of employment. *Colorado Springs Disposal d/b/a Bestway Disposal v. Industrial*

Claim Appeals Office, 58 P.3d 1061 (Colo. App. 2002). Simply put, if the claimant is responsible for his/her termination of employment, the wage loss that is the consequence of claimant's actions shall not be attributable to the on-the-job injury. *Anderson v. Longmont Toyota, Inc.,* W.C. No. 4-465-839 (ICAO February 13, 2002). Respondents shoulder the burden of proving by a preponderance of the evidence that Claimant was responsible for her termination. *Colorado Compensation Insurance Authority v. Industrial Claim Appeals Office,* 20 P. 3d 1209 (Colo. App. 2000).

L. The concept of "responsibility" is similar to the concept of "fault" under the previous version of the statute. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). "Fault" requires a volitional act or the exercise of some control in light of the totality of the circumstances. *Padilla v. Digital Equipment Corp.*, 902 P.2d 414 (Colo. App. 1994). An employee is "responsible" if the employee precipitated the employment termination by a volitional act that an employee would reasonably expect to result in the loss of employment. *Patchek v. Colorado Department of Public Safety*, W.C. No. 4-432-301 (September 27, 2001). "Fault" does not require "willful intent" on the part of the Claimant. *Richards v. Winter Park Recreational Association*, 919 P.2d 933 (Colo. App. 1996) (unemployment insurance); *Harrison v. Dunmire Property Management, Inc.,* W.C. no. 4-676-410 (ICAO, April 9, 2008).

M.. In this case, it was undisputed that Claimant voluntarily resigned his employment with Employer on December 17, 2020 and began work as an over the road freight driver for Expeditor Services less than one week later, on December 23, 2020. Mr. B[Redacted] credibly testified that despite never receiving any written work restrictions from a medical provider, he voluntarily provided modified duty to claimant based upon Claimant's subjective reports of his physical limitations. At the time of Claimant's resignation, he was performing driving duty only and working with a helper who was responsible for loading the dumpsters. Mr. B[Redacted] also testified that he would have continued providing modified duty to Claimant throughout his recovery.

N. Claimant admitted that driving of the trash truck was not physically demanding and no more demanding than driving the freight truck associated with his job with Expeditor Services. Nonetheless, Claimant argues that he was effectively forced to resign given the physical nature of his job. The ALJ is not persuaded. Claimant's voluntary decision to leave his modified job for Employer and begin performing substantially similar work for Expeditor Services less than one week later fundamentally undercuts his claim that he was physically incapable of performing the same type of work, i.e. driving for Employer. Based upon the evidence presented, the ALJ concludes that Claimant's resignation was not the result of his physical inability to perform the work for Employer or a failure on the part of Employer to accommodate his perceived restrictions. Rather, the ALJ is persuaded that Claimant's resignation was the result of his desire to work elsewhere. Considering the entire evidentiary record, the ALJ concludes that Claimant exercised a degree of control over the circumstances resulting in his termination by volitionally resigning from his position. The ALJ concludes that any employee would reasonably expect such action to result in the loss of employment. Because his termination was not compelled by the natural consequence of the work injury, Claimant is "responsible" for the termination of his employment. *Blair v. Art C. Klein Construction Inc., supra; Longmont Toyota, Inc.*, *supra*. Accordingly, Claimant's wage loss after December 17, 2020 is not attributable to his on-the-job injury. C.R.S. §§ 8-42-103(1)(g), 8-42-105(4). Nonetheless, Claimant also asserts entitlement to temporary partial disability (TPD) benefits extending from August 14, 2020 – December 17, 2020.

O. Temporary partial disability benefits are intended to pay for lost wages while a claimant is able to return to modified duty but not yet at maximum medical improvement. *Monfort of Colorado v. Husson*, 725 P.2d. 67 (Colo. App. 1986). In this case, Claimant failed to present wage records after September 25, 2020. Consequently, the ALJ cannot determine Claimant's entitlement to TPD benefits after this date. Nonetheless, the evidence presented persuades the ALJ that Claimant was unable to perform his usual job properly due to the effects of his industrial injury. He was subsequently placed on "drive only" modified duty status by employer[3] and suffered a wage loss as a consequence. Consequently, the ALJ concludes that Claimant was "disabled" within the meaning of section 8-42-105, C.R.S. entitling him to TPD benefits. While the ALJ cannot compute Claimant's potential entitlement to TPD benefits after September 25, 2020, the evidence presented persuades the ALJ that Claimant is entitled to TPD benefits at a rate of two-thirds of the difference between his average weekly wage (AWW) at the time of injury (as calculated below) and the weekly earnings during the continuance of his partial disability for the following periods in the following amounts:

8/15/20 – 8/21/20: $1,163.37 - $180.00 = $983.37
$983.37 × 2/3 = $655.58 (Clmt's. Ex. 8, p. 70)

8/22/20 – 8/28/20: $1,163.37 - $218.00 = $945.37
$945.37 × 2/3 = $630.25 (Clmt's. Ex. 8, p. 70)

8/29/20 – 9/4/20: $1,163.37 - $674.00 = $489.37
$489.37 × 2/3 = $326.25 (Clmt's Ex. 8, p. 72)

9/5/20 – 9/11/20: $1,163.37 - $794 = $369.37
$369.37 × 2/3 = $246.25 (Clmt's. Ex. 8, p. 72)

9/12/20 – 9/18/20: $1,163.37 - $690.00 = $473.37
$473.37 × 2/3 = $315.58 (Clmt's. Ex. 8, p. 73)

9/19/20 – 9/25/20: $1,163.37 - $670.00 = $493.37
$493.37 × 2/3 = $328.91 (Clmt's. Ex. 8, p. 73)

Total TPD Due = $2,502.82

Average Weekly Wage

[3] A medical opinion is not a prerequisite to proving entitlement to temporary disability benefits. Indeed, the testimony of the claimant, if credited is sufficient to prove causation and the inability to work. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997).

P. The overall purpose of the average weekly wage (AWW) statute is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity resulting from the industrial injury. *See Campbell v. IBM Corp., 867 P.2d 77 (*Colo. App. 1993)*; National Fruit Prod. v. Crespin,* 952 P.2d 1207 (Colo. App. 1997).

Q. Section 8-42-102(2), C.R.S., sets forth certain methods of calculating the average weekly wage. Section 8-42-102(2)(d) provides that "[w]here the employee is being paid by the hour, the weekly wage shall be determined by multiplying the hourly rate by the number of hours in a day during which the employee was working at the time of the injury or would have worked if the injury had not intervened, to determine the daily wage; then the weekly wage shall be determined from the daily wage in a manner set forth in paragraph (C) of this subsection (2). In this case, the ALJ concludes that utilizing an 8-week time period of earnings to calculate Claimant's AWW is fundamentally fair as it represents Claimant's earnings over a sufficient period after he began his employment with Employer and only one day after he suffered his compensable injury. This 8-week period takes into account the natural fluctuations that occurred in Claimant's earnings due both to overtime and holiday pay as well as his decision to use vacation time. Accordingly, the ALJ determines that Claimant's average weekly wage is $1,163.37. As found, this figure most closely approximates Claimant's actual wage loss and diminished earning capacity at the time of his August 13, 2020 compensable work related injury.

ORDER

It is therefore ordered that:

1. Claimant has established by a preponderance of the evidence that he sustained a compensable injury to his low back on August 13, 2020.

2. Claimant is entitled to all reasonable, necessary, and related medical care to cure and relieve him of the effects of his low back condition, including but not limited to his treatment with Comfort Care Family Practice, Colorado Springs Family Practice (Dr. Lesh), Front Range Diagnostic Radiology and Interventional Pain Management. All medical expenses associated with Claimant's injury shall be paid in accordance with the Colorado Workers' Compensation medical benefits fee schedule.

3. Claimant is entitled to TPD from August 14, 2020 through September 25, 2020.

4. Claimant's claim for TPD from September 26, 2020 to December 17, 2020 is reserved for future determination.

5. Respondents have established that Claimant was responsible for the termination of his employment on December 17, 2020. Consequently, his claim for temporary total and temporary partial disability benefits after December 17, 2020 is denied and dismissed.

6. The insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

7. Claimant’s average weekly wage is $1,163.37.

8. All matters not determined herein are reserved for future determination.

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 30, 2021

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-134-953-001

ISSUE

1. Whether Colorado has subject matter jurisdiction over Claimant's workers' compensation claim.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant is a 44 year-old truck driver who suffered a ruptured aneurysm on February 25, 2020, in Fort Collins, Colorado. Claimant was employed by Employer on the date of the injury.

2. Claimant subsequently received medical treatment at healthcare facilities in Colorado.

3. Claimant did not testify at the hearing because she is unable to speak from the injury she suffered on February 25, 2020. Her daughter, Alexandria JRedacted], testified on her behalf.

4. Employer is a trucking company headquartered in Omaha, Nebraska.

5. On December 20, 2019, Claimant applied for a position as a truck driver with Employer. Claimant completed a phone application. Per the application, Claimant lived in Commerce City, Colorado. (Exhibit C). Claimant still resides in Commerce City, Colorado.

6. Based on her application, Claimant met Employer's minimum guidelines for employment, so Employer invited Claimant to attend orientation in Omaha, Nebraska. Claimant attended orientation beginning January 13, 2020.

7. While Claimant was in Nebraska, Employer checked her references and past driving records. Claimant underwent a background check and completed drug and alcohol testing.

8. During orientation, and prior to being formally hired, Claimant signed a document with Employer titled "Acknowledgment of Employment in Nebraska and Consent to State of Nebraska Workers' Compensation." (Exhibit D). This document states: "[t]he driver hereby acknowledges and states he/she is fully aware, if [Employer] hires the driver, the driver will be a state of Nebraska-based employee, and all employees of [Employer] regardless of where employees claim residence, are subject to Nebraska's

workers' compensation jurisdiction and laws and Nebraska's labor and employment laws."

9. On January 17, 2020, Employer completed and approved Claimant's file and hired her as a student truck driver.

10. After completing orientation and being hired, Employer assigned Claimant to drive with trainer, Matthew H[Redacted]. From January 20, 2020 to February 12, 2020, Claimant completed 151 hours of training with Mr. H[Redacted], and they drove through 26 states. According to the driver log (Exhibit E), Claimant and Mr. H[Redacted] drove truck 17189, a total of 14,977 miles collectively. Truck 17189 was assigned to Mr. H[Redacted]. There is no evidence as to how many of the 14,977 miles Claimant drove.

11. According to the driver log, Claimant and Mr. H[Redacted] drove a total of 868 miles in Colorado. This represents approximately 6% of the total miles Claimant and Mr. H[Redacted] drove collectively from January 20, 2020 to February 12, 2020. They were in Colorado on three occasions. They delivered two loads to Colorado, and picked up one load in Colorado.

12. Scott H2[Redacted], Employer's corporate safety manager, testified that Employer has 200 divisions. He explained that some truck drivers drive between two cities so they can be home every night and others drive through all 48 states. According to Mr. H2[Redacted], Employer tries to accommodate its employees' preferences.

13. Employer hired Claimant as a full-time employee on February 14, 2020, and assigned her truck 71764. Employer dropped truck 71764 off in Colorado on January 30, 2020, for Claimant to pick up. Mr. H2[Redacted] testified that Claimant never hauled any loads on her own for Employer after being assigned truck 71764.

14. Employer assigned Claimant to Dollar General out of Fulton, Missouri. This route went through the Midwest. According to Mr. H2[Redacted] this route would have enabled Employer to get Claimant "home." Claimant's home is in Colorado.

15. Claimant's daughter, Ms. JRedacted], testified that Employer has a location in Colorado, and Claimant's vehicle is still parked at Employer's location in Colorado.

16. The Worker's Claim for Compensation form (Exhibit A) reflects that the "accident" occurred at the Budweiser Distribution Center in Fort Collins, Colorado on February 25, 2020. Mr. H2[Redacted] credibly testified that Employer has customers in Fort Collins, Colorado.

17. The evidence is undisputed that Claimant lives in Colorado and resided in Colorado at the time of her injury. Mr. H2[Redacted] credibly testified that Employer has customers in Colorado, and that Claimant and Mr. H[Redacted] dropped off and picked up three loads in Colorado during Claimant's training period. He further credibly testified that Employer delivered Claimant's truck to Colorado, and Employer assigned Claimant

to Dollar General in Fulton, Missouri, because the Midwest route would get her home. The ALJ reasonably infers that at the time of Claimant's injury, her routes for Employer would start and end in Colorado. Thus, the ALJ finds that a substantial portion of Claimant's work for Employer was performed in Colorado.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

ALJs are vested with original jurisdiction to hear and decide all matters arising under the Act. *See* § 8-43-201, C.R.S.; *Blood v. Qwest Servs. Corp.*, 224 P.3d 301 (Colo. App 2009). A court's jurisdiction consists of two elements: jurisdiction over the parties, or personal jurisdiction, and jurisdiction over the subject matter of the issue to be decided, or subject matter jurisdiction. *Leewaye v. Indus. Claim Appeals Office*, 178 P.3d 1254 (Colo. App. 2007). Subject matter jurisdiction involves a court's power to resolve a dispute in which it renders judgment. A court has subject matter jurisdiction if the case is one of the type of cases that the court has been empowered to entertain by the sovereign from which the court derives its authority. *Horton v. Suthers*, 43 P.3d 611, 615 (Colo. 2002). These concepts also apply to the authority of an administrative agency. *Leewaye*, 178 P.3d at 1257.

The jurisdictional prerequisites to recovering benefits under the Act are that a substantial portion of the employee's work be performed in Colorado combined with either an injury that occurred in Colorado or a contract for hire in Colorado. *United States Fidelity & Guar. Co. v. Indus. Comm'n*, 61 P.2d 1033 (Colo. 1936). It is undisputed that Claimant's injury occurred in Colorado. Thus, the question of jurisdiction turns on whether a substantial portion of Claimant's work is performed in Colorado.

"There is no strict formula for determining whether a claimant's work in Colorado is 'substantial.'" *Turner v. Sunrise Trans.*, W.C. 4-981-338 (ICAO Aug. 23, 2017). The determination of whether the claimant had "substantial employment" in Colorado is factual in nature. *See Roseborough v. Schneider Nat'l*, W.C. No. 4-007-808 (ICAO Dec. 17, 1991). "Substantial evidence is evidence which would support a reasonable belief in the existence of a fact without regard to conflicting evidence and inferences." *Rodenbaugh v. DEA Constr.,* W.C. No. 4-523-336 (ICAO Dec. 20, 2002) (citing *Ackerman v. Hilton's Mech. Men, Inc.*, 914 P.2d 524 (Colo. App. 1996)). A claimant's usual and regular employment are relevant factors in making a determination regarding substantial employment. *Id.* (citing *RCS Lumber Co. v. Worthy*, 369 P.2d 985 (Colo. 1962)); *see also Pfuhl v. Prime*, *Inc*., W.C. No. 4-215-425 (ICAO Feb. 16, 1995); *Hatt v. Scneider Nat'l Carriers, Inc*., W.C. No. 4-121-034 (ICAO Oct. 2, 1992); and *Bryan v. Schneider Nat'l, Inc*., W.C. No. 3-962-117 (ICAO Aug. 23, 1991).

In *Masters v. Viking Freight Sys.*, W.C. No. 4-119-690 (ICAO Mar. 21, 1995), the claimant was an over-the-road truck driver who sustained an injury in Colorado. The claimant drove in all 48 states, but Viking's primary business was in 11 western states. Notably, claimant picked up and delivered loads in Colorado. Additionally, he refueled at Viking's terminal in Colorado. The claimant traveled through Colorado seven times over a two and a half year period. The ALJ found that the court had jurisdiction because the claimant "frequently traveled through the State of Colorado" and performed substantial employment in Colorado. Similarly, in *Hunsinger v. Werner Enter., Inc.,* W.C. 3-957-206 (ICAO Jan. 24, 1992), the claimant was an over-the-road truck driver who was injured in Colorado. The claimant made 45 trips, 25 of which were training trips, through 47 states. Either one or five of the training trips went through Colorado, and seven subsequent trips went through Colorado. Further, all of the trips began and ended in Colorado. Based on this, the ALJ found that claimant performed a substantial amount of his work in Colorado, and the court had jurisdiction in the case.

The *Masters* and *Hunsinger* decisions are persuasive with respect to substantial employment in Colorado as related to over-the-road truck drivers. The evidence shows that Employer dropped Claimant's truck off in Colorado. (Findings of Fact ¶ 13). Further, Employer assigned Claimant to Dollar General based in Fulton, Missouri. This was a Midwest route enabling Claimant to get "home." (*Id.* at ¶ 14). The ALJ infers that at the time of Claimant's injury, her routes for Employer would start and end in Colorado. (*Id.* at

¶ 17). Thus, the evidence in the record established that a substantial portion of Claimant's work was performed in Colorado. Because a substantial portion of Claimant's employment was performed in Colorado, and Claimant was injured in Colorado, Claimant has met her burden of proving by a preponderance of the evidence that Colorado has jurisdiction over her claim.

ORDER

It is therefore ordered that:

1. Colorado has jurisdiction over Claimant's workers' compensation claim.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: September 30, 2021

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-163-001-001

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that he sustained a compensable occupational disease arising out of and in the course and scope of his employment with the employer.

2. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment he has received for his cervical spine, including a September 4, 2019 surgery performed by Dr. Donald Corenman, is reasonable and necessary to cure and relieve him from the effects of the occupational disease.

3. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that Dr. Corenman is an authorized provider.

4. If the claim is found compensable, whether the claimant has demonstrated, by a preponderance of the evidence, that he is entitled to temporary total disability (TTD) benefits for the period of September 4, 2019 through November 27, 2019.

5. If the claim is found compensable, what is the claimant's average weekly wage (AWW)?

FINDINGS OF FACT

1. The claimant suffered an injury at work on February 19, 2007[1], when he slipped on ice and fell while working at the employer's coal mine.

2. Subsequently on August 18, 2009, Dr. Sanjitapal Gill performed a C4-C5 and C5-C6 anterior cervical discectomy and fusion (ACDF), with allograft and plating.

3. On October 24 2013, Dr. David Corenman determined that the claimant had reached maximum medical improvement (MMI) for the 2007 injury. In addition, Dr. Corenman assessed permanent work restrictions of no lifting, pushing, or pulling more than 100 pounds. Dr. Corenman assessed permanent impairment of 21 percent whole person for the claimant's cervical spine, and 16 percent whole person for the lumbar spine.

4. On July 2, 2014, Dr. Brain Reiss performed a Division-sponsored independent medical examination (DIME) of the claimant for the 2007 injury. Dr. Reiss determined that the claimant had reached MMI. With regard to permanent impairment,

[1] The February 19, 2007 injury was assigned WC number 4-715-955.

Dr. Reiss assigned a whole person impairment of 17 percent. Dr. Reiss recommended that the claimant engage in a home exercise program with core strengthening.

5. Based upon the opinions of Dr. Reiss, on October 14, 2014, the respondents filed a Final Admission of Liability (FAL) for the 2007 injury. In the FAL, the respondents admitted for the impairment rating of 17 percent whole person, and the MMI date of July 2, 2014. The respondents also admitted for post-MMI medical treatment that is reasonable, necessary, and related to the 2007 injury.

6. The claimant testified that after he was placed at MMI he continued working for the employer as a roof bolter, a shuttle car driver, and a laborer. The claimant's roof bolter position involved overhead lifting of roof bolts, roof mesh, cable bolts, and bolt wrenches. The shuttle car position involved transporting coal to a feeder. In addition, the claimant used the shuttle car to transport roof mesh, ventilation tubes, and other materials to the miners. The claimant testified that driving the stuttle car involves sitting sideways, and constantly turning his neck and head while driving. The claimant also testified after he was placed in MMI, his neck was always stiff and he continued to have migraine headaches.

7. On June 2, 2019, the claimant sought treatment in the emergency department (ED) at the Ashley Regional Medical Center. The claimant testified that he sought treatment on that date because he woke up with pain shooting down his neck and left arm.

8. The ED medical record of June 2, 2019, indicates that the claimant's symptoms included " 'spasm' pain" in the left side of his chest, the left side of his back and his left arm. The claimant reported that he was injured in 2007 and he had similar pain that "acts up intermittently" and this was not new pain. Dr. Adam Nielson recorded the claimant's condition as strain of muscle and tendon of back wall of thorax.

9. On June 3, 2019, the claimant returned to the ED reporting back pain. On that date, Dr. Nolan Brooksby diagnosed the claimant with cervicalgia; upper extremity pain and spasm; cervical disc disorders; segmental and somatic dysfunction of the cervical region; and chronic pain syndrome. On that same date, Dr. Brooksby administered a trigger point injection to the claimant's left shoulder.

10. On July 1, 2019, magnetic resonance imaging (MRI) of the claimant's cervical spine showed a mature fusion at C4 through C6; a right C4-C5 subarticular osteophyte; and multilevel neural foraminal narrowing, most prominent at the left C6-C7 level.

11. On August 1, 2019, the claimant was seen at The Steadman Clinic by Eric Strauch, PA-C and Dr. Corenman. At that time, the claimant reported that he experienced severe left trapezius and arm pain when he woke up on May 31, 2019. On August 1, 2019, x-rays of the claimant's cervical spine showed the prior fusion was solidly fused, with normal plate alignment. The x-rays also showed disc narrowing at the C3-C4, C4-C5, and C6-C7 levels. Dr. Corenman opined that the claimant had C7 radiculopathy and

recommended an injection. Dr. Corenman implied that if the injection was not successful, a repeat ACDF would be pursued.

12. On August 20, 2019, Dr. Thos Evans administered a left transforaminal epidural steroid injection (TFESI).

13. On September 4, 2019, Dr. Coreman performed surgery that included removal of the C4 through C6 plate, ACDF at the C6-C7 level, using an iliac crest graft, local bone graft, and plate, with reconstruction of the graft site.

14. The claimant testified that following the September 4, 2019 surgery his arm and back pain were gone. The claimant further testified that this surgery was paid for by his personal insurance. The claimant testified that because he was in a great deal of pain, he did not report to the respondents that he believed that his need for medical treatment in September 2019 was work related.

15. At the request of the respondents, Dr. Brian Castro performed a review of the claimant's medical records in connection with the 2007 injury and the 2019 surgery. In his report dated February 29, 2020, Dr. Castro opined that the claimant was appropriately placed at MMI on July 2, 2014 for the 2007 injury. Dr. Castro further opined that the claimant may have suffered a new injury that is unrelated to the admitted 2007 work injury. Dr. Castro noted that the claimant's disc herniation is likely acute, and not due to adjacent segment syndrome. In his report, Dr. Castro noted that the claimant injured his left shoulder in July 2009, resulting in a left shoulder arthroscopy and rotator cuff repair.

16. On September 9, 2020, the parties went to hearing before the undersigned ALJ. The issue before the ALJ at that time was whether treatment of the claimant's cervical spine, (including the September 4, 2019 surgery), was reasonable medical treatment necessary to maintain the claimant at MMI and/or cure and relieve the claimant from the effects of the admitted February 19, 2007 work injury.

17. On October 8, 2020, the ALJ issued Findings of Fact, Conclusions of Law, and Order. In that order, the ALJ determined that the claimant's need for cervical surgery in 2019 was not related to the 2007 injury.

18. Subsequently, on February 8, 2021, the claimant filed a Worker's Claim for Compensation regarding the alleged occupational disease currently before the ALJ. Specifically, the claimant indicated that he had developed "[n]ew cervical radiculopathy and stenosis" because of "heavy manual labor between [2001] and [2019]".

19. On February 19, 2021, the respondents filed a Notice of Contest on the basis of "[p]re-existing conditions".

20. At the request of the respondents, on May 13, 2021, the claimant attended an independent medical examination (IME) with Dr. Nicholas Olsen. In connection with the IME, Dr. Olsen reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his IME report, Dr. Olsen opined that the symptoms the claimant experienced in June 2019 are not due to an occupational

disease. Rather, it is Dr. Olsen's opinion that the issues the claimant experienced in June 2019 are "merely symptoms that have developed following his left shoulder surgery."

21. Dr. Olsen's testimony was consistent with his written report. Dr. Olsen explained that trauma to the cervical spine typically occurs acutely. Dr. Olsen also testified that a cumulative trauma disorder of the cervical spine is extremely rare. Dr. Olsen noted that the Colorado Medical Treatment Guidelines (MTG) do not identify a cumulative trauma occupational disease of the cervical spine.

22. Dr. Olsen further testified that when determining whether work activities rise to the level of a compensable occupational disease, it is necessary to determine a diagnosis. Then it is necessary to obtain a history of the individual's work activities. The next step is to analyze whether the individual's work activities have the necessary force, frequency, and duration to cause the diagnosis. In addition, a determination is made as to whether the individual has adequate periods of rest and recovery. Dr. Olsen further testified that having a variety of work activities gives the body the opportunity to recover between stressful activities. It is Dr. Olsen's that the claimant's work activities were varied enough to allow his cervical spine to rest and recover between stressful activities.

23. Dr. Olsen also testified that during the IME the claimant indicated that following his 2009 shoulder surgery, he did not do any rehabilitation exercises. Dr. Olsen explained that to have the best result following a surgery, rehabilitation exercises are imperative. Therefore, if the claimant did not do physical therapy exercises after his left shoulder surgery, the claimant would likely develop shoulder girdle pain. Dr. Olsen testified that there is a significant overlap between shoulder girdle pain and cervical radiculopathy.

24. The ALJ credits the medical records and the opinions of Dr. Olsen and finds that the claimant has failed to demonstrate that it is more likely than not that he sustained a compensable occupational disease arising out of and in the course and scope of his employment with the employer. The ALJ credits the opinion of Dr. Olsen that the claimant's job duties were varied enough to allow for periods of rest and recovery. The ALJ is not persuaded that the claimant's cervical spine symptoms, and the need for the 2019 surgery were related to the claimant's job duties with the employer. The ALJ is likewise not persuaded that the claimant engaged in work activities with the necessary frequency, force, and duration to result in cumulative trauma to his cervical spine.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark*, 197 Colo. 306,

592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a pre-existing medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with" a preexisting disease or infirmity to produce disability or need for treatment. *H & H Warehouse v. Vicory, supra*.

5. The test for distinguishing between an accidental injury and occupational disease is whether the injury can be traced to a particular time, place, and cause. *Campbell v. IBM Corporation*, 867 P.2d 77 (Colo. App. 1993). "Occupational disease" is defined by Section 8-40-201(14), C.R.S. as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

6. A claimant is required to prove by a preponderance of the evidence that the alleged occupational disease was directly or proximately caused by the employment or working conditions. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251, 252 (Colo. App. 1999). Moreover, Section 8-40-201(14), C.R.S. imposes proof requirements in addition to those required for an accidental injury by adding the "peculiar risk" test; that test requires that the hazards associated with the vocation must be more prevalent in the workplace than in everyday life or in other occupations. *Anderson v.*

Brinkhoff, 859 P.2d 819, 824 (Colo. 1993). A claimant is entitled to recovery only if the hazards of employment cause, intensify, or, to a reasonable degree, aggravate the disability for which compensation is sought. *Id*. Where there is no evidence that occupational exposure to a hazard is a necessary precondition to development of the disease, the claimant suffers from an occupational disease only to the extent that the occupational exposure contributed to the disability. *Id*.

7. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *Cotts v. Exempla, Inc.*, W.C. No. 4-606-563 (ICAP, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *F. R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAP, April 10, 2008). Simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (ICAP, October 27, 2008).

8. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that he sustained a compensable occupational disease arising out of and in the course and scope of his employment with the employer. As found, the claimant's job duties were varied enough to allow for periods of rest and recovery. As found, the claimant's cervical spine symptoms, and the need for the 2019 surgery are not related to the claimant's job duties with the employer. As found, the claimant's job duties did not involve the necessary frequency, force, and duration to result in cumulative trauma to his cervical spine. As found, the medical records and the opinions of Dr. Olsen are credible and persuasive.

ORDER

It is therefore ordered that the claimant's claim for workers' compensation benefits related to an occupational disease is denied and dismissed.

Dated this 5th day of October 2021.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after

service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, his existing scheduled lower extremity impairment rating should be converted to a whole person rating.

II. Claimant endorsed disfigurement as an issue for determination; however, at the commencement of the hearing, he indicated he wished to hold this issue in abeyance pending a personal appearance before an ALJ. Respondent had no objection to this request. Consequently, the issue of disfigurement is not addressed in this order.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. The documentary record in this matter is voluminous. Indeed, Respondent submitted in excess of 500 pages of exhibits and Claimant submitted an additional 49 pages. The evidence presented supports a finding that Claimant was employed as a Patrol Officer by Respondent's police department. He injured his left knee on December 24, 2018, while struggling to arrest a suspect attempting to flee the police station. In an effort to subdue the suspect, Claimant fell down some cement stairs striking his left knee on the edge of one of the steps.

2. Claimant presented to Employer's Occupational Health Clinic ("Clinic") on January 4, 2019. Dr. Kurz reported, ". . . Mr. [Claimant] reports L (left) knee pain, swelling and kneecap bruising, that was improving, but now w/episodes of buckling, locking and giving out with pain rated at 8/10. He has some stiffness & soreness. He still has some pain with movement, like stirs [stairs] and entering exiting his vehicle. He is taking Tylenol P.M. with minimal benefit. He used the brace for the first week with some relief…" (Resp. Ex. p. 31). Dr. Kurz assessed "Left knee contusion, strain, and pain," and imposed light duty work restrictions. (Id.).

3. Claimant had no complaints or concerns about body parts other than his left knee. (Id.) Claimant noted he was 5' 11" and weighed 308 pounds. (Resp. Ex. p. 34). Moreover, on the initial intake form, Claimant noted his left knee as the only injured body part and marked only the left knee on the pain diagram. (Id. at p. 38).

4. MRI of the left knee was performed January 11, 2019. Imaging revealed no meniscus or ligament tear, grade 2 chondromalacia in the lateral tibial plateau and patellofemoral compartment, and mild lateral patellar subluxation. (Resp. Ex. p. 38). Claimant participated in physical therapy, without benefit.

5. Claimant saw Physician Assistant (PA-C), Paula Homberger, at the Clinic on

February 1, 2019. She noted he had injured the same knee in 2015, ". . . that was treated conservatively and closed w/o IR (impairment rating) or MM (medical maintenance), but he opines – 95% improved prior to this DOI (date of injury)." Ms. Homberger referred Claimant to orthopedic surgeon Dr. Michael Simpson. (Resp. Ex. p. 54).

6. Dr. Simpson met with Claimant on February 11, 2019 and noted, "[Claimant] is about 5 weeks out from a direct contusion to the anterior aspect of his knee and a subsequent follow-up episode where his knee buckled on him as he got out of the car. His MRI does not show any obvious ligamentous or significant meniscal pathology. However, by examination he still symptomatically (sic) and struggles with full range of motion. I think at this point it would be appropriate to consider corticosteroid injection." Dr. Simpson administered the injection. (Resp. Ex. p. 65).

7. Claimant returned to Dr. Simpson on March 4, 2019 and the doctor noted, "…Brian continues to struggle with pain and weakness in the sensation of giving way of his knee. His knee is painful when it gives way. On examination, he does have some repetitive clicking in his knee, which is worrisome for a chondral flap as opposed to simple chondromalacia. It is more distinct click as opposed to crepitation. It is reproducible on clinical examination. I have told him that at this point he is a bit of a difficult situation. He does have some lateral patellofemoral subluxation with an increased tibial offset. This would be a very hard problem to completely address short of a distal patellar realignment, which would have a lengthy recovery. His MRI does not show any evidence of a disruption of his patellofemoral ligament so I don't think there is a soft tissue procedure that would address any instability. I would recommend we start with an R scopic (arthroscopic) evaluation of his knee, chondroplasty of his patella and synovectomy as necessary. Hopefully this will relieve some of the source of discomfort in his knee and allow him to return to full activities. If he doesn't make rapid progress with this response, then a patellofemoral realignment may be required. This would have a lengthy recovery…" (Resp.' Ex. pp. 116, 117).

8. On March 7, 2019, Dr. Simpson performed "arthroscopy left knee with partial synovectomy, excision of medial plica, and debridement of infrapatellar plica left knee." (Resp. Ex. p. 136).

9. On March 8, 2019, Claimant saw PA-C, Kimberly A. Shenuk, for a post-op visit. There were no pain complaints other than to the left knee. (Resp. Ex. p. 157).

10. At hearing, Claimant testified his alleged hip pain began probably a little bit after his March 7, 2019 surgery. (Hrg. Tr. p. 24, l. 8-9). Claimant also alleged low back pain at the hearing, relating to his left knee; however, he did not provide any relative timeframe for its onset.

11. Between March 12, 2019 and June 18, 2019, Claimant participated in 26 physical therapy sessions. There are no references in any of the 26 reports from these visits of Claimant alleging hip or back pain. (See Resp. Ex. pp. 179 (3/12/19), 180, (3/19/19), 186 (3/22/19), 187 (3/28/19), 188 (4/2/19), 189 (4/4/19), 195-96 (4/9/19), 197 (4/11/19), 198 (4/16/19), 199 (4/18/19), 200 (4/23/19), 201 (4/25/19), 202 (4/29/19), 211 (5/1/19), 217

(5/7/19), 224 (5/9/19), 225 (5/13/19), 226 (5/16/19), 227 (5/21/19), 228 (5/23/19), 229 (5/28/19), 232 (5/30/19), 257 (6/6/19), 258 (6/11/19), 265 (6/14/19), 266 (6/18/19)).

12. Three different physical therapists provided treatment to Claimant over the aforementioned 26 treatment sessions. The 26 reports contain various notes, including Claimant alleging sleep trouble on March 28, 2019 (Resp. Ex. p. 187), Claimant reporting on April 4, 2019 he tripped on a curb the previous night and twisted his left knee (Id. at p. 189), Claimant reporting on May 23, 2019 his dog recently brushed against his left knee causing him to fall (Id. at p. 228), multiple reports noting Claimant's report that his left knee buckled/gave out, and multiple reports noting the physical therapist observed an antalgic gait.

13. During this same period, Claimant completed and signed Work Injury Symptom Review forms for the physical therapists on April 9, 2019 (Resp. Ex. p. 196), May 7, 2019 (Id. at p. 218) and May 30, 2019 (Id. at p. 233). Each Review form contains pain diagrams. On all pain diagrams, Claimant marked pain or symptoms to the left knee only.

14. In the three months after Dr. Simpson's March 7, 2019 surgery, Claimant returned to Dr. Simpson's office four (4) times to see Kimberly Shenuk, PA-C. None of the four corresponding reports from these visits reference complaints of hip or back pain. (See Resp. Ex. p. 153 (3/8/19), p. 203 (5/1/19), p. 234 (5/31/19), and p. 254 (6/4/19)).

15. In the three months after Dr. Simpson's surgery, PA-C Homberger and Nurse Practitioner (NP) Shannon Christopher from Dr. Kurz's office saw Claimant five times. Claimant only complained of pain to his left knee. None of the five reports from these dates of visit mention hip or back pain. (See Resp. Ex. p. 181 (3/20/19), 213 (5/3/19), 219 (5/9/19), 249 (6/4/19), and 272 (6/28/19)). On June 28, 2019, NP Christopher noted Claimant had difficulty initiating sleep. (Resp. Ex. p. 272 (6/28/19).)

16. Claimant saw PA-C Shenuk, in Dr. Simpson's office on June 6, 2019. She reported, ". . . Brian is still struggling with quite a bit of pain and he feels like the pain is actually worsening. He has good stability on exam and I do feel that this is related to lateral talar [patellar] subluxation, he is on the upper end of normal at 14 mm for his tibial tubercle trochlear groove calculations. I have discussed the case with Dr. Simpson and he has looked at his X-rays. Brian could have a component of femoral anteversion. Dr. Simpson is recommending a second opinion from Dr. Walden to see if he is a candidate for patellar realignment surgery." (Resp. Ex. p. 256).

17. Claimant saw Dr. David Walden on June 13, 2019 and he noted, ". . . I saw Officer [Claimant] in the office today. Unfortunately, he has struggled with regard to pain and episodes of subluxation of his patellofemoral joint following a work-related fall on 12/24/19. Because he is failed to progress, I would recommend an arthroscopic evaluation of the knee, an examination under anesthesia, a likely Fulkerson osteotomv (anterior medial tibial tubercle transfer) and a medial patellofemoral ligament reconstruction. I will discuss the case further with Dr. Simpson as well…" (Resp. Ex. p. 259).

18. Dr. Kurz placed Claimant at MMI on June 25, 2019, declaring that Claimant had

been treated properly per the Division of Workers' Compensation Medical Treatment Guidelines for his right knee contusion and has been objectively returned to his pre-injury baseline.[1] Dr. Kurz did not feel that Claimant's injury qualified for an impairment rating. Nor did he feel that Claimant required medical maintenance for his injury. (Resp. Ex. p. 269). Finally, Dr. Kurz opined no work restrictions were required. (Id.). Claimant would challenge Dr. Kurz' MMI opinion by requesting a Division Independent Medical Examination (DIME).

19. Claimant saw NP Christopher at the Clinic on June 28, 2019. NP Christopher noted, ". . . [Claimant] has trouble climbing stairs and has trouble walking. He is a police officer and cannot perform his normal job duties at this time. He needs a note for work stating he needs to be limited to desk duties." (Resp. Ex. p. 272). It was also noted, "Patient was evaluated in office today for knee pain post knee injury and surgery. His capacity to perform work in his regular line of duty is limited due to knee instability, decreased range of motion activities, [and a] decreased ability to ambulate. Please restrict patient to light work/desk duty. He will be re-evaluated in 2 months." (Id. at 275).

20. Claimant underwent a third surgical opinion, with Dr. Tyler Bron, on September 13, 2019. Dr. Bron reported, ". . . Patient is a very pleasant 33-year-old who prior to his fall in December 2018 was very active and [did] not have knee pain or limitation. Dr. Bron noted that Claimant developed patellar instability after his fall and that this "instability is his major underlying issue and the arthritis within the lateral patellar facet is likely secondary to the instability." Dr. Bron agreed with Dr. Waldman that Claimant required a patellar realignment procedure involving a tibial tubercle osteotomy or a Fulkerson osteotomy. He did not feel that any other procedure(s) would give Claimant significant pain relief, noting further that the osteotomy would both realignment Claimant's tracking and offload the lateral patellar facet. (Resp. Ex. pp. 280, 281).

21. Dr. Timothy Hall performed the requested DIME on September 30, 2019. Dr. Hall noted that Claimant was performing desk duty at the time of the DIME. He also noted that Claimant worked four days on and three days off work. Per Dr. Hall, by the fourth day at work, Claimant would experience more pain, more difficulty walking, and more instability in the knee. (Clmt's. Ex. p. 4). Dr. Hall observed that, ". . . [Claimant] has considerable ongoing functional deficits and pain complaints as described in section B (of his report). Functionally, he has difficulties with weight bearing, prolonged standing or walking, and range of motion. He cannot kneel. He cannot run. He generally does not feel safe particularly in the context of doing his job as a police officer due to his ongoing pain and limitations created by the knee." (Id. at p. 7). Dr. Hall concluded that, ". . . Mr. [Claimant] is not at maximum medical improvement. It is my opinion within a reasonable degree of medical probability it will take a surgery to get him to maximum medical improvement." (Id.)

22. Dr. Walden met with Claimant on November 22, 2019 and reported, ". . . The

[1] The ALJ finds Dr. Kurz' reference to Claimant having sustained a right knee contusion a probable documentation error as the balance of the evidentiary record, including Dr. Kurz' other reports supports that Claimant injured his left, rather than the right knee.

patient is here today stating he still has a great deal of difficulty walking with the knee. The kneecap remains unstable and there is persistent pain. He has persistent night pain. Pain is constant with no relief of his symptoms despite continued exercises from physical therapy and anti-inflammatories. His case has been reopened and he states the city has claim responsibility for this injury…The patient is now gotten a second opinion through CSOG (Colorado Springs Orthopedic Group). Dr. Bron provided the patient with a similar opinion that he would recommend a Fulkerson osteotomy, lateral release, medial patellofemoral ligament reconstruction, similar to what I had recommended previously. The patient then saw Dr. Hall for an IME. The patient is now approved for surgery. We described the surgery to the patient and I went over it again with him. I answered his questions. He understands that there is no cure for arthritis but this may help to unload the joint…" (Resp. Ex. p. 283).

23. Between Dr. Simpson's March 2019 surgery and December 2019, Claimant had three office visits with Dr. Kurz. Claimant only complained of pain in his left knee during each visit. The reports from these visits make no mention of alleged hip or back pain. (See R Ex. p. 190 (4/9/19), 268 (6/25/19), and 289 (12/10/19).) Similarly, between March 20, 2019 and December 10, 2019, Claimant completed and signed six PATIENT FOLLOW-UP VISIT forms from Dr. Kurz's office. Each form included pain diagrams and requested Claimant list the body parts in which he felt pain. On all six forms, Claimant only endorsed pain in his left knee and on all six-pain diagrams; Claimant marked the left knee only. (See Resp. Ex. p. 184 (3/20/19), p. 194 (4/9/19), p. 223 (5/8/19), p. 253 (6/4/19), p. 270 (6/15/19), and p. 293 (12/10/19)). Finally, Claimant saw Dr. Walden or his PA Rachel Cerchia on occasion between March 2019 and January 6, 2020 during which he did not report hip or back pain. (See Resp. Ex. p. 259 (6/13/19), p. 282 (11/22/19), and p. 296 (1/6/2020)).

24. On January 15, 2020, Dr. Walden performed a second surgery directed to the left knee, which included a Fulkerson osteotomy, a left knee medial patellofemoral ligament reconstruction, a left knee lateral release, and a left knee arthroscopic chondroplasty of the lateral facet of patella. (Resp. Ex. p. 302-306).

25. On February 13, 2020 Dr. Walden recommended continued use of a knee brace in addition to starting physical therapy. (Resp. Ex. p. 320).

26. Claimant participated in physical therapy from March, 2020 through September, 2020. (Resp. Ex. CCCC through HHHHHH). On March 13, 2020, a physical therapist reported, ". . . Good quad tone with weight shift with brace on, will unlock brace as instructed by MD after visit." (Id. at 338). On March 17, 2020, Dr. Walden's PA, Rachel Cerchia, noted, ". . . Aggressive physical therapy is indicated. His brace was opened up to match his motion at 60 degrees today and he is full weight bearing as tolerated with discharge of the crutches within the next week. Continue physical therapy is indicated and a prescription was given to him…" (Id. at 340).

27. On April 27, 2020, a therapist noted, ". . . Pt reports that he was walking on Friday and his knee gave out on him and he almost passed out from the pain." (Resp. Ex. TTTT, p. 381). On May 4, 2020, a therapist noted, "…Pt reports knee continues to be pretty sore. He has continued to have some giving out episodes. Stairs still challenging due to pain and weakness." (Resp. Ex. VVVV, p. 385).

28. Between March 10, 2020 and July 17, 2020, Claimant participated in 40 physical therapy sessions with four (4) different therapists. The documentary record contains 36 therapy reports for the aforementioned period. There are no references in any of these 36 reports of Claimant alleging hip or back pain to the therapist. (*See* Resp. Ex. pp. 334 (3/10/2020), 338, (3/13/2020), 349 (3/20/2020), 351 (3/27/2020), 353 (3/31/2020), 359 (4/3/2020), 361 (4/7/2020), 363 (4/10/2020), 365 (4/14/2020), 372 (4/16/2020), 377 (4/20/2020), 379 (4/22/2020), 381 (4/27/2020), 383 (4/29/2020), 385 (5/4/2020), 392 (5/6/2020), 394 (5/11/2020), 396 (5/13/2020), 405 (5/19/2020), 408 (5/22/2020), 411 (5/26/2020), 414 (5/29/2020), 417 (6/2/2020), 420 (6/5/2020), 428 (6/9/2020), 430 (6/12/2020), 437 (6/16/2020), 440 (6/19/2020), 443 (6/23/2020), 448 (6/26/2020), 451 (6/29/2020), 454 (7/1/2020), 457 (7/7/2020), 460 (7/10/2020), 468 (7/14/2020), 470 (7/17/2020)). While there are no references to hip or back pain in the aforementioned records, the reports support a finding that Claimant began experiencing increased knee pain after trying to increase his activity level. Indeed, on May 26, 2020 Claimant reported he walked about a mile the previous day. (Resp. Ex. p. 411-13). On May 29, 2020, Claimant reported he was sore from hiking the previous day. (Resp. Ex. p. 414-16). On June 19, 2020, Claimant reported he was sore from hiking with his dog the previous day (Resp. Ex. p. 440-42). On June 23, 2020, Claimant reported he called out of work because of increased soreness after pushing his activity over the weekend walking his dog and climbing stairs (Resp. Ex. p. 443-45). On June 29, 2020, Claimant reported having hiked about 2 miles (Resp. Ex. p. 451-53). On July 14, 2020, Claimant was limping due to increased pain (Resp. Ex. p. 468-69), and on July 21, 2020, Claimant reported he was taking one day off work per week due to knee pain (Resp. Ex. p. 472-75).

29. On May 5, 2020, Dr. Walden noted, ". . . Positive for gait problem. Negative for arthralgias, back pain, joint swelling and myalgias." (Resp. Ex. WWWW, p. 388).

30. On May 19, 2020, Dr. Kurz prescribed Temazepam for Claimant's sleep problems resulting from post-operative knee pain. (Resp. Ex. AAAAA, pp. 400-404).

31. Dr. Walden met with Claimant on June 9, 2020 and noted, ". . . Reports today that he has constant pain in the knee that he would rate approximately 4-5 out of 10. He does feel that his mobility and strength have improved but still lacking. He feels he was making good progress in physical therapy but now feels that he has plateaued. He still is unable to kneel on his knee and stairs continue to be an issue. He also reports that even when wearing a brace he feels some instability in the knee and that his leg gives out every few days." Dr. Walden recommended a patellar stabilizing brace and visco-supplementation injections. (Resp. Ex. p. 424).

32. On June 16, 2020, Claimant reported to Dr. Kurz that his sleep issues were slightly better with Temazepam. Claimant noted Temazepam on his medication list along with Cyclobenzaprine, Tramadol and ibuprofen on the Patient Follow-up Visit form for June 16, 2016. (See Resp. Ex. p. 403.) He also reported that left knee pain was impairing his ability to his physical therapist on September 16, 2020, September 17, 2020, September 21, 2020 and September 23, 2020.

33. A repeat MRI of the left knee was performed on June 23, 2020. (Resp. Ex. p. 446). Six days later a physical therapist noted, “Pt reports that he did about 2 miles hiking on Friday. He has been doing more stairs with continued pain. He cannot kneel on L knee due to pain with the pressure. Is able to get into kneeling position but cannot tolerate the position.” (Id. at 451).

34. On July 14, 2020 Dr. Walden reviewed the repeat MRI of the left knee taken June 23, 2020. He noted that the imaging demonstrated no acute changes, but added “. . . there is chondral damage noted on the lateral facet of the patella…” (Resp. Ex. p. 465). Dr. Walden reported, “. . . [Claimant] continues to report that he has constant pain in the knee. Unfortunately, he states that his pain has been increasing and is now worse than at his last office visit. He reports that he was instructed to increase his exercise and physical therapy which [he] feels has aggravated his symptoms. The knee is now swollen and stiff. Stairs and kneeling continue to be an issue for him as well…” Dr. Walden injected the knee. (Id. at p. 463). On the same day, a physical therapist noted, “Pt states 6/10, limping due to increased pain, due increasing ADL’s, i.e. trying reciprocal stairs.” (Id. at p. 468).

35. PA Cerchia performed Orthovisc injections on August 10, 17, and September 14, 2020. (Resp. Ex. pp. 476, 480, and 483 respectively). On September 15, 2020, Dr. Kurz noted Claimant reported “. . . constant L knee pain, 5/10. He feels like he is doing a lot of work to try & improve. He still reports struggling w/pain & instability esp. w/stairs. He struggles w/kneeling due to pain. He saw Dr. Walden and has completed the Synvisc injections, which reportedly did not provide any lasting benefit . . .” (Id. at p. 486). Dr. Kurz opined Claimant was able to return to work without restrictions. (Id. at p. 487).

36. On September 16, 2020, a physical therapist noted, “. . . [Claimant’s] gait is very rigid with limited hip mobility and is overusing hip mobility instead of proper sequencing for heel strike . . . left hip restricted in all planes of movement only grossly checked . . . Gait pattern and observation of tight mm in hips with restricted left LE extension of hip with gait pattern. (Resp. Ex. p. 491). She continued, “Patient has an extensive exercise program for his left knee, however has not addressed reduced hip mobility that may be causing part of his left knee issues . . .” (Id. at p. 492).

37. Claimant was seen at the City Employee Medical Clinic on September 17, 2020. Upon examination, NP Sullivan established that Claimant’s left knee/leg strength were diminished in flexion and extension against resistance. She found “[n]ormal hip ROM and strength.” There is no reference to Claimant reporting hip pain during this examination. (Resp. Ex. p. 495). NP Sullivan reported; “Will request records from Occ Health. Regardless of cause, patient is not safe to return to full duty as a Police Officer at this time. I will write note for patient to remain on light duty for 2 weeks, but I recommend patient seek expert opinion to find long-term solution for pain and decreased function of knee. Referral placed back to Dr. Walden, as he is familiar with case; however consider getting an additional opinion by Ortho. Referrals: Orthopedic Surgery. Evaluate and treat.” (Resp. Ex. p. 495).

38. On September 17, 2020 a physical therapist reported, “ASSESSMENT Loss of medial left hip rotation, unable to step down 2” step and grossly uneven in WB coming from sit to stand to sit. This presentation of basic functions, pain inhibition and limited

range of left knee and hip does not match with functions needed to be a police officer…" (Resp. Ex. p. 499). Four days later she noted, "Patient Is not noting any changes from the last couple of PT treatments in the pain noted in his left knee. He has a good exercise program for the knee, but the hip and ankle may be inhibiting normal gait and activity. Patient may benefit from biofeedback that may alter pain symptoms." (Id. at p. 504).

39. On September 23, 2020, Claimant completed and signed a Work Injury Symptom Review form for the physical therapist. On the pain diagrams, Claimant only marked pain or symptoms in the left knee. Claimant did not note any sleep problems. (Resp. Ex. p. 507).

40. Dr. Kurz placed Claimant at MMI with no work restrictions and no maintenance care on September 29, 2020. (Resp. Ex. pp. 508-513).

41. Dr. Hall performed a follow-up DIME on December 29, 2020. He noted, " . . . I discussed with the patient the surgery, therapies, and his present situation. Unfortunately, other than gaining minimal range of motion, he still has considerable pain. He has pain all the time in the knee. He has significant limitations in standing, walking, stair climbing, and uneven surfaces. He might at times be able to walk for an hour or so as long as it is a flat surface, but generally, he is limited. He cannot run, jump, squat, or kneel. He has no pain outside of the knee. Most of the pain is under the patella." (Resp. Ex. p. 525). Dr. Hall agreed Claimant had reached MMI, and he issued a 23% lower extremity rating, which converts to a 9% whole-person rating. (Id. at p. 526). Dr. Hall issued work restrictions to include, no walking or standing more than 30 minutes during any one-hour period, no walking on uneven surfaces, no stair or ladder activities, no squatting and no running. (Id.) Concerning maintenance care, Dr. Hall recommended medications including cyclobenzaprine. (Id.) Respondents filed a FAL consistent with Dr. Hall's opinions on February 17, 2021. (Id. at p. 516).

42. Claimant was evaluated by several physicians in connection with his claim for
43. FPPA (Fire and Police Pension Association) benefits.[2] On October 6, 2020, Claimant was evaluated by Dr. Phillip Stull, who reported:

> The patient reports limited to no benefit from the treatments that he has regarding his left knee symptoms. He reports persistent pain, some limitation in motion and generally poor function in his knee. He reports that he cannot run, jump, kneel, crawl, or squat. He reports he cannot participate in vigorous recreation. He reports he has been unable to return to regular duty as a police officer. He reports he has been working light duty, a desk job, since the left knee was injured in 2018. (Clmt's Ex. p. 48).

[2] Claimant testified he was seen "in-person" for some of the evaluations, and by video for others. He could not recall "which was which," but based on the written reports it appears Dr. Ramaswamy saw claimant either in-person or by video; that Dr. Arthur saw Claimant in-person; that Dr. Rokicki saw Clamant by video; and that Dr. Stull saw Claimant in-person. The ALJ places no particular importance on whether Claimant was examined in-person or by video.

On physical examination, Dr. Stull noted, ". . . Quadriceps and hamstring strength are 5/5. He walks with mild antalgia in his gait favoring the left side." (Id.) Dr. Stull opined Claimant "to be not disabled" as a result of his injury. (Id. at p. 49).

44. Claimant was evaluated by Dr. Jeffery Arthur on November 12, 2020. Dr. Arthur documented:

> . . . I do feel that appropriate treatments have been performed and that he really has exhausted all conservative measures up to this point. He is wanting to get back to full duty, if he could physically. He understands, and is in agreement, that this most likely is not a possibility. I do not think there is any other treatment modalities that would expedite his recovery or allow him to return to full duty as a police officer. He is continuing light duty at this time. There is a possibility this will not be able to be maintained into the new year. I feel he has reached maximum medical improvement at this time. If he had a job that did not require the strenuous activities that this job requires, he could return to full duty. However, as a police officer I do not feel it is safe for him or for his peers to return to work under his current state. (Clmt's Ex. p. 28).

Dr. Arthur concluded Claimant was permanently occupationally disabled. (Id. at p. 26).

45. Robert Rokicki, also evaluated Claimant on November 24, 2020. Dr. Rokicki noted:

> . . . The patient's chief complaint is left knee pain which is at a level of 5/10 nonstop 24 hours a day. The left knee pain increases to 8 or 9/10 when he uses the knee in activities such as kneeling, squatting, or stairclimbing. Because of chronic knee pain he does not sleep well and is up approximately six times a night. Often, he has to take the next day off because of lack of sleep and pain. Because of left knee pain he is incapable of running, jogging, squatting, kneeling, and stairclimbing. Indeed, he has to take stairs one at a time in a step-to type of gait. There is also a sense of giving way in the left knee which occasionally lead to falls. He has tried a wide variety of knee braces including specific patellar support sleeves which minimally improve his symptomatology. He has tried a wide variety of medications including Cyclobenzaprine which he takes at night which only helps a little. He has tried some occasional Ibuprofen but because of GI upset had to be placed on antacids recently. He takes Tramadol occasionally for very severe pain, at most every other day. . . (Clmt's Ex. p. 32)

Dr. Rokicki concluded:

> . . . His patellar chondromalacia is only grade 2 and is probably not the source of pain. His patellofemoral arthritis is not consistent with the severity of his current pain complaints. It is grade 5/10 at all times (even at rest) and 9/10 with any activity. It awakens him up to 6 times a night. It causes reflex

> giving way leading to falls. It was unresponsive to steroid injection, orthovisc injection, and two surgical procedures that theoretically should have corrected structural malalignment of the patello-femoral joint. It is minimally affected by oral pain medications. It is unresponsive to any form of bracing including specific patellar tracking sleeves. The pain is more severe and debilitating than would be expected from patellofemoral arthritis, or patellar tracking issues. I believe his current pain complaints may be related to "patellofemoral pain syndrome" in which CRPS may be playing a rote. Isolated CRPS of the patella does exist and is difficult to diagnoses and treat. This man is only 34 years old and has an incapacitating degree of chronic pain. Having to face the next 50 or so years of his life like this is understandably upsetting. He appears to have reached a plateau. Although it may be a long shot, perhaps testing with thermogram, sweat test, bone scan, or even sympathetic block might be considered, but I would leave that to the judgement of his treating physician.
>
> He is unable to return to his normal employment as a police officer because he cannot run, jog, jump, squat, kneel, climb stairs, or perform physical arrests. (Clmt's Ex. pp. 41-42).

Dr. Rokicki found Claimant permanently occupationally disabled. (Id. at p. 31).

46. On December 9, 2020, Dr. Rokicki composed a supplemental report, wherein he noted he reviewed a CD of left knee x-rays taken November 5, 2020. Dr. Rokicki noted the "findings on the x-rays indicate that Mr. [Claimant] has had a successful Fulkerson osteotomy with excellent healing of the tibial tubercle osteotomy site, and there appears to be no loosening of the screws. His joint spaces are well maintained, with no obvious cartilage space narrowing. Likewise, the patellar views show good preservation of the patellofemoral cartilage space." Dr. Rokicki stated, "These x-rays are consistent with my report of November 24, 2020, and they do not change it in any way." (C Ex. p. 43).

47. On December 31, 2020 Dr. Annu Ramaswamy noted:

> . . . Mr. [Claimant] states that range of motion in the knee improved but he still noted limited progress. He still noted instability and increased pain. He indicates that he is unable to kneel or squat without intense pain. He has trouble ascending and descending the stairs without holding onto the railing. He is unable to jog, run or walk without assistance of a cane, as all of these activities will cause increased pain or instability in the knee. Mr. [Claimant] states that given the chronic pain, he notes a lack of sleep. He has missed multiple days of work due to increased pain." (Clmt's Ex. p. 13).

48. Consistent with the aforementioned reports of Drs. Arthur and Rokicki, Claimant testified he was awarded FPPA benefits based on a permanent occupational disability.

49. Dr. Mark Failinger conducted a records review at Respondent's request. Following

this review, Dr. Failinger authored a report dated June 2, 2021. (Resp. Ex. A). Dr. Failinger opined that Claimant's left lower extremity rating should not be converted. He stated, "There does not appear to be any adjacent joint nor distant musculoskeletal symptoms or dysfunction in either the ipsilateral hip nor the contralateral hip, nor the contralateral lower extremity. There have been no complaints noted in the spine due to possible secondary compensatory development of discomfort. Given such, it does not appear reasonable to convert the patient's left knee impairment to the whole person after careful review of the records." (Resp. Ex. p. 18).

50. Dr. Failinger would subsequently testify by deposition on August 6, 2021. At his deposition, Dr. Failinger clarified his opinion on conversion of the knee rating to a whole person rating. He testified that the only mention of other involvement beyond the knee was restricted hip motion documented in the late physical therapy reports. (Failinger Depo. pp. 13:20 – 14:16.) He explained that any restriction in motion was due to the knee and did not indicate any structural impairment beyond the knee; rather, should Claimant strengthen his quadriceps muscles sufficiently any hip tightness and antalgic gait would resolve. (Id. at p. 14:19-25). Thus, he concluded that Claimant's impairment was localized to the knee.

51. On cross-examination, Dr. Failinger further clarified that the last four physical therapy reports (*See* Resp. Ex. pp. 491 (9/16/2020), 499 (9/17/2020), 503 (9/21/2020), and 506 (9/23/2020)) showed restricted motion in the hip, but did not show that the hip itself was significantly painful. (Failinger Depo. p. 19:22 – 20:25). Claimant's pain diagrams support the lack of significant pain complaints around this same time. (See Resp. Ex. pp. 507 (9/23/2020) & 515 (9/29/2020). Dr. Failinger further explained that the restricted motion, at least based on the physical therapy reports, was due to Claimant tightening up the left lower extremity because his body is not trusting the left quadriceps muscle. He reiterated that this would not be a basis for conversion in this case.

52. Claimant testified he experienced no relief resulting from the first knee surgery, and only "minimal" relief following the second surgery. After the injury, Claimant returned to "light duty." However, due to Employer's concerns about his ability to safely perform his job, he was never allowed to return to regular duty. According to Claimant, he had to "medically retire" due to his permanent occupational disability in January 2021. He had hoped to continue working as a Patrol Officer but his physical restrictions precluded this. Claimant now works as an Analyst for the police department's Vice, Narcotics and Intelligence unit. This is a "desk job" with none of the physical requirements associated with his prior patrol position.

53. Claimant testified that he continues to experience impaired sleep and symptoms in his left knee. According to Claimant, he wakes up about "a half a dozen times" every night due to knee and hip pain. Claimant testified his knee "gives out" and he has fallen down on "numerous, numerous occasions."

54. Claimant testified that he remains impaired and that his ability to complete everyday activities have been affected by his injury and ongoing symptoms. He explained that he has trouble carrying a laundry basket up the stairs and that it is difficult for him to

complete yardwork and daily household upkeep. Claimant testified that he had to purchase a snow blower because he was unable to shovel snow due to the injury. Moreover, Claimant testified that he has had to forego and completely cease some recreational pursuits, including weightlifting, hiking and mountain climbing. Claimant used to enjoy hunting prior to his injury; however, he testified that he is unable to hunt now because he cannot hike into the backcountry and could not carry an animal out if his hunt was successful.

55. Claimant testified that he began experiencing left hip pain shortly after his first surgery, likely due to his documented altered gait. Claimant testified that he limps as a result of his injury, and experiences low back pain from the limp. The documentary record contains references to limping and Claimant having an antalgic (abnormal) gait pattern. Claimant attributes his low back and hip pain to his altered gait, and explained it feels like "everything has been thrown out of whack." Claimant is able to differentiate between his knee, hip and back pain.

56. The ALJ credits the testimony of Claimant and the opinions of Drs. Hall, Arthur and Rokicki to find that he has established, by a preponderance of the evidence, that he has sustained functional impairment that extends beyond his lower extremity. While the documentary evidence does not specifically reference complaints of back pain and only mentions hip pain many weeks after the index injury in this case, a reasonable inference can be drawn from the evidence that Claimant's altered gait ultimately lead to hip and back pain causing functional impairment beyond the knee. Indeed, Dr. Arthur and Rokicki both concluded that Claimant was occupationally disabled and the record supports a finding that Claimant is unable to meet the full range of his personal and social demands. The contrary opinions of Dr. Stull and Failinger are unconvincing.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, *et seq.*, is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). A claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

B. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO,* 5 P.3d 385 (Colo. App. 2000).

C. In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201. As found, the medical record generally supports the testimony of Claimant regarding his hip pain and altered gait. It is plausible to conclude that that Claimant's knee/hip pain has altered his gait pattern and that this has resulted in back pain, which is limiting Claimant's functional capacity beyond that caused solely by his knee injury. Even if one were to disregard Claimant's assertions of low back pain, the opinions of Drs. Hall, Arthur and Rokicki support a conclusion that Claimant's knee injury alone has caused functional impairment beyond the knee. Indeed, Claimant cannot kneel or squat without intense pain. He has trouble ascending and descending the stairs, he is unable to jog, run or walk effectively and has trouble sleeping, all of which has limited his capacity to meet his personal, social and occupational demands.

Conversion

D. When a claimant's injury is listed on the schedule of disabilities, the award for that injury is limited to a scheduled disability award. *Section 8-42-107(1)(a), C.R.S*. However, a claimant may establish that his/her injury has resulted in "functional impairment" beyond the schedule enumerated in C.R.S. §8-42-107(2)(a); thus, entitling him/her to "conversion" of the scheduled impairment to impairment of the whole person. This is true because the term "injury" as used in § 8-42-107(1)(a)-(b), C.R.S., refers to the part or parts of the body which have been impaired or disabled, not the situs of the injury itself or the medical reason for the ultimate loss. *Walker v. Jim Fucco Motor Co,* 942 P.2d 1390 (Colo. App. 1997); *see also Strauch v. PSL Swedish Healthcare System,* 917 P.2d 366 (Colo. App. 1996). Thus, while ratings issued under the AMA Guides are relevant to determining the issue, they are not decisive as a matter of law. *Strauch v. PSL Swedish Healthcare System, supra*. Whether a claimant has sustained a scheduled injury within the meaning of § 8-42-107(2), C.R.S. or a whole person impairment compensable under § 8-42-107(8), C.R.S. is a factual question for the ALJ and depends upon the particular circumstances of the individual case. *Walker v. Jim Fucco Motor Co, supra*. In the case of a knee injury, the question is whether the claimant has sustained functional impairment beyond the leg at the hip. Section 8-42-107(2) (w).

E. "Functional impairment" is distinct from physical (medical) impairment under the AMA Guidelines and as noted above, the site of functional impairment is not necessarily the site of the injury itself. The site of functional impairment is that part of the body which has been impaired or *disabled*. *Strauch, supra*. Physical impairment relates to an individual's health status as assessed by medical means. Disability or functional impairment, on the other hand, pertains to a person's ability to meet personal, social, or occupational demands, and is assessed by non-medical means. Consequently, physical impairment may or may not cause "functional impairment" or disability. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office, 984 P.2d 656, 658 (Colo. App. 1998).* Physical impairment becomes a disability only when the medical condition limits the claimant's capacity to meet the demands of life's activities. *Lambert & Sons, Inc. v. Industrial Claim Appeals Office, supra at 658.* Furthermore, as pointed out by Claimant's counsel, functional impairment need not take any particular form. *See Nichols v. LaFarge Construction, W.C. No. 4-743-367 (October 7, 2009); Aligaze v. Colorado Cab Co., W.C. No. 4-705-940 (April 29, 2009); Martinez v. Alberston's LLC, W.C. No. 4-692-947 (June 30, 2008*). Consequently, "referred pain from the primary situs of the industrial injury may establish proof of functional impairment to the whole person." *Hernandez v. Photronics, Inc., W.C. No. 4-390-943 (July 8, 2005). Nonetheless, s*ymptoms of pain do not automatically rise to the level of a functional impairment. To the contrary, the undersigned concludes that there must be evidence that such pain limits or interferes with Claimant's ability to use a portion of her body to be considered functional impairment. See *Mader v. Popejoy Construction Co., Inc.,* W.C. No. 4-198-489 (August 9, 1996), *aff'd Popejoy Construction Co., Inc.,* (Colo. App. No. 96CA1508, February 13, 1997)(not selected for publication)(claimant sustained functional impairment of the whole person where back pain impaired use of arm). Thus, i*n order to determine whether permanent disability should be compensated as physical impairment on the schedule or as functional impairment as a whole person, the issue is not whether Claimant has pain, but whether the injury and the associated pain caused thereby has impacted part of Claimant's body which limits her "capacity to meet personal, social and occupational demands." Askew v. Industrial Claim Appeals Office, 927 P.2d 1333 (Colo. 1996).*

F. Based on the evidence presented as a whole, the ALJ concludes that conversion of Claimant's scheduled lower extremity impairment to impairment of the whole person is warranted. Here, the record supports a conclusion that Claimant's knee injury has led to an altered gait, which in turn has caused documented hip and probable low back pain. Combined Claimant's altered gait and persistent knee, hip and low back pain have caused permanent occupational disability. He is incapable of activities involving running, jogging, squatting, kneeling, and stairclimbing, which Claimant credibly testified limits and interferes with his ability to use his legs and back to meet his personal and social demands. While a knee injury may not typically be susceptible to conversion, the impact that this injury has had on Claimant's overall ability to function renders conversion appropriate in this case.

ORDER

It is therefore ordered that:

1. Claimant’s request for conversion of his 23% scheduled right knee impairment to the corresponding 9% whole person impairment is GRANTED. Permanent partial disability benefits shall be paid in accordance with C.R.S. § 8-42-107(8) at 9% impairment of the whole person.

2. All matters not determined herein, including disfigurement are reserved for future determination.

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 11, 2021

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
1259 Lake Plaza Drive, Suite 230
Colorado Springs, CO 80906

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that the surgery proposed by Dr. Larsen to his right wrist is reasonable and necessary to cure and alleviate him from the effects of his admitted work injury?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

Background / Initial Treatment

1. Claimant sustained an admitted injury to his right wrist on January 29, 2020 when he fell off of a ladder while clearing icicles from a building. The ladder shifted to one side, and he fell to his right to the ground. At hearing, he estimated that he fell from 7 to 9 feet.

2. Claimant began treating through San Luis Valley Health ("SLV Health") – Occupational Medicine. (Ex. 1; Ex. C). Claimant reported at his first visit that he fell approximately 8 feet off a ladder onto his right side, more specifically his right wrist. (Ex. C, p. 13). Claimant reported that he thought his wrist was bent in a flexed position underneath him. "He had some immediate pain and developed some fair significant swelling within a short period amount of time." *Id.* A February 14, 2020 MRI of the left wrist showed the central disc was irregular with intermediate signal likely representing an undersurface partial-thickness tear." (Ex. 1, p. 2).

3. Claimant underwent an EMG with Dr. Dwight Caughfield on May 19, 2020 to further evaluate Claimant's ongoing symptoms. (Ex. 2). Claimant reported that he fell at work on his flexed wrist and that he has had persistent pain in the right wrist, with tingling in all digits and his palm. Symptoms increased with use. *Id* at 34. The EMG demonstrated right ulnar neuropathy at the elbow and right median neuropathy at the wrist. *Id.*

First Surgery by Dr. Larsen

4. Claimant was seen by orthopedist Karl Larsen, MD, for evaluation of his right wrist on May 27, 2020. (Ex. 3, p. 39). Dr. Larsen opined that Claimant had developed carpal tunnel and cubital tunnel syndrome as a result of the traumatic fall. *Id.* He felt a carpal and cubital tunnel decompression on the right side would be a reasonable option. While performing this surgery, he would want to arthroscopically evaluate the wrist and either perform a TFC debridement or repair, if indicated. He further diagnosed Claimant as likely having a triquetral impingement ligament tear ("TILT") lesion. Dr. Larsen also recommended an ulnar capsulotomy to relieve pressure in this area and reduce his pain. *Id.*

5. Dr. Larsen performed surgery on Claimant's right wrist on June 23, 2020. (Ex. 3, pp. 44-46). The diagnoses both pre- and post-operatively were right carpal tunnel syndrome, cubital tunnel syndrome, wrist triangular fibrocartilage tear, wrist triquetral impingement ligament tear. *Id.* at 44. He performed a carpal tunnel release, a minimal incision ulnar neurolysis at the elbow, an arthroscopy of the wrist with extensive debridement and repair of the triangular fibrocartilage and ulnar capsulotomy for the triquetral impingement ligament tear. *Id.*

6. Claimant attended his first follow-up with Dr. Larsen on July 8, 2020. He was no longer experiencing any numbness or tingling, and his pain was controlled at the time. *Id* at 47. There was, however, pain with any attempted forearm rotation, so that axis was not stressed further. *Id.*

7. Claimant had the long arm cast removed on August 10, 2020. *Id* at 48. He was cautious to use his arm because it was "still quite painful for him." *Id.* Claimant felt as if he was having too much pain still to begin physical therapy, nor did he feel ready to be placed into a brace. Claimant was instead placed into a short arm cast for another month. *Id.*

8. On September 4, 2020, Claimant reported persistent ulnar-sided wrist pain. Ex. 3, p. 50). Examination suggested that the TILT procedure was most likely successful and that the pain was likely coming from the DRUJ. *Id.* Dr. Larsen indicated in his report these conditions can remain painful for up to a year. He therefore recommended ongoing conservative care and management, since Claimant was only 2½ months out from surgery. *Id.*

9. On October 2, 2020, Claimant indicated his numbness and tingling that had somewhat returned was now completely resolved, and the only problem remaining was the persistent ulnar sided wrist pain. (Ex. 3, p. 51). Claimant was given a "Wrist Widget strap" to try to stabilize his ulna in attempt to relieve the pain. *Id.* Dr. Larsen continued to recommend waiting on any potential surgical procedure.

10. Claimant followed up with Dr. Larsen's office on December 2, 2020. (Ex. 3, p. 52). "He continues to have ulnar-sided wrist pain and feels *he is now restricted in his daily activities and his pain has remained persistent*." Physical examination documented *palpable subluxation of the ECU tendon over the ulnar head. Id.* (emphasis added). At this appointment, Claimant was examined by both Dr. Larsen and his PA, Stephanie Noble. It was recommended that he receive a cortisone injection into his ECU tendon sheath. *Id.*

11. On January 4, 2021, Claimant stated that the injection provided no significant benefit. (Ex. 3, p. 54). Claimant continued to have activity-limiting pain, noticeable with grip, ulnar deviation, and twisting activities. *Id.* Dr. Larsen noted that Claimant's DRUJ felt stable, but it remained painful. Upon physical exam, Dr. Larsen noted:

> On examination, his wounds are benign. He has normal sensation in the dorsal sensory branch of ulnar nerve distribution, pads of the digit. His DRUJ is stable, but painful to stress. He is a little bit tender over his suture now from the TFC repair. He is very tender over the fovea and has marked

> pain with ulnocarpal grinding. The LT interval is stable. Watson’s maneuver is stable with no pain. (Ex. D, p. 72).

Second Surgery Recommended by Dr. Larsen

12. Dr. Larsen ultimately opined it made the most sense to perform a second surgery. Dr. Larsen’s procedure in the past for patients with persistent pain following TFC repairs is to perform an ulnar shortening osteotomy to “serve to unload the ulnar side of the wrist and tension the repair even more. In the same sitting, I would consider an arthroscopy to evaluate the TFC repair it is certainly possible that it has not healed or he has persistent laxity and while I think the exam points away from that, it is certainly advantageous to look while we are there and have the option available to revise the TFC repair in the same sitting as the ulnar shortening.” (Ex. 3, p. 54). Claimant was interested in trying the procedure since everything else to date had failed to relieve his pain. Dr. Larsen requested authorization to perform a “Right wrist scope, possible revision TFC repair, ulna shortening osteotomy”. (Ex. 3, p. 57). This was denied by Respondents.

13. Surveillance video of Claimant had apparently been obtained at some point that showed him using his right wrist. [This video was not tendered as a hearing exhibit by either party, nor was any accompanying narrative report; ergo, the ALJ has only seen second-hand references to its existence]. Neither Dr. Larsen nor (Respondent’s IME) Dr. Rovak expressed concern with what they saw on this video. Both physicians agree Claimant’s problem is not his initial ability to use his wrist at the start of a task, but the pain that follows shortly thereafter, thus preventing further use of the wrist.

IME by Dr. Primack

14. Respondents asked Scott Primack, D.O. to examine Claimant, review the medical records, review the aforementioned surveillance video, and opine whether the second surgery proposed by Dr. Larsen was reasonable and necessary for Claimant’s condition. Dr. Primack saw Claimant on March 1, 2021, and agreed with Dr. Rovak’s conclusion and opinion. Dr. Primack concluded:

    > Based upon the history, clinical examination, and the patient's high level of functioning, I do not feel as though the wrist scope, revision of the TFCC, ulnar shortening osteotomy, is medically reasonable or necessary to treat his condition. The goal for any surgical intervention such as this is to optimize the patient's functioning. The video surveillance does demonstrate excellent functioning. The patient was not utilizing his WristWidget or a brace. I do believe an ulnar shortening otectomy is a large procedure. It is not going to significantly alter his overall level of physical functioning given today's data. I also would not do any type of debridement to the ECU tendon.” (Ex. B, pp. 11, 12).

    Dr. Primack believed claimant was at MMI, with permanent right wrist impairment, for his injury covered by this claim. *Id.* Respondents thus continued to deny authorization of the second surgery proposed by Dr. Larsen.

IME by Dr. Rovak

15. Dr. Jason Rovak, MD, of Hand Surgery Associates, P.C. also performed an IME of Claimant for Respondents, and authored a report dated June 10, 2021. (Ex. 6; Ex. A). Claimant reported to Dr. Rovak that his issues with numbness and tingling have resolved; however, "he reports that he can use his wrist, but it *swells around the ulnar head." Id at 67.* (emphasis added). He reported a constant throbbing and aching that worsens with use. Voltarin gel was of minimal help; ice gave some relief. At rest, pain was reported as 3/10, but 5-6/10 when it flares up. Physical examination showed ECU synergy testing caused discomfort on the ulnar side of the wrist, as well as passive ulnar deviation. Dr. Rovak did not note any DRUJ laxity. Dr. Rovak also noted that Claimant's x-rays showed his ulna is congenitally 3mm negative. *Id.* at 68.

16. Dr. Rovak opined that Claimant's pain "probably" had "an element of TFCC pathology." *Id* at 68. He was not confident this would be the source of "all of the discomfort" though. *Id.* He opined that Claimant's symptoms were work related. *Id.* at 69. "While I feel that the pain is causally related to his injury, I do not think this surgery has much chance of eliminating his discomfort." *Id.*

17. Dr. Rovak noted Claimant's MRI arthrogram, "really did not show major TFCC pathology." While during the surgery Dr. Larsen noted, "that there was a fair bit of synovitis, but repairing a TFCC in this setting I have generally found to lead to fairly unsatisfactory results including stiffness and continued discomfort." Dr. Rovak also stated Claimant did not have DRUJ [Distal Radial Ulnar Joint] laxity, and thus, "[T]here is not a structural issue with the TFCC so I think it is fairly unlikely that is what is causing the discomfort." (Ex. A, pp. 1, 2)

18. Dr. Rovak opined that Claimant's discomfort was not coming from the TFCC. He wrote, "I think it is reasonably unlikely that revising the TFCC repair with a stable DRUJ is going to be the thing that makes this patient's pain go away. Along those lines, an ulnar shortening osteotomy is a fairly large procedure, and I think it has minimal chance of success in this case." He then stated: "it is fairly unlikely that further ulnar shortening is necessarily going to be the thing that improves his pain." Dr. Rovak recommended the denial of the surgery proposed by Dr. Larsen, as he thought that surgery was not reasonable or necessary *Id.* Respondents therefore denied the surgery's authorization.

Dr. Larsen testifies by Deposition

19. Dr. Karl Larsen testified via deposition on August 2, 2021. Dr. Larsen testified that he recommended the second surgery on Claimant because of ongoing pain that was limiting Claimant's function. (Larsen Depo., pp. 7, 8). There were two components to the proposed surgery: Dr. Larsen would look at his previous TFCC repair for possible laxity *and* perform an ulna shortening osteotomy. (Larsen Depo., p. 8). As he previously explained in his clinical note, although his exam pointed away from ongoing laxity, the problem certainly could still be ongoing laxity, or that it simply did not heal properly. Dr. Larsen explained that the ulna is the small finger side forearm bone and is what the TFCC

attaches to. The procedure entails cutting away millimeters of the ulna to make it shorter and provide even more tension through the cartilage. (Larsen Depo., p. 8).

20. Dr. Larsen elaborated on the difficulty of assessing laxity in a case such as Claimant's: "It's kind of a subjective thing. And when it's grossly unstable, it's pretty obvious. But when it's [subtly] unstable, it's really hard to discern." *Id* at 17, 18. So, despite the lack of strong clinical findings, Dr. Larsen continues to have "a fairly reasonable degree of success" on other patients with similar conditions that he is recommending for Claimant.

21. Dr. Larsen felt the procedures were 'more likely than not' to help relieve Claimant of the effects of the injury. *Id* at 18. In terms of risk, the biggest concern for him, aside from the inherent risks with any surgery, was that "we could all of this and not satisfactorily relieve his pain." *Id* at 19. He felt clarified that there is a 5/10 chance of an unfavorable or unimproved outcome after surgery. *Id* at 28. Later, he defined a successful surgery in this case:

> I think a successful surgery would be that the patient reporting less pain as an ultimate outcome, or a home run would be becoming pain free. I don't know…if that's realistic, but…I would love that….And then as for reporting that they're able to be more active, more physically active, more work active. *Id* at 31.

22. When asked about more conservative alternatives to improve function, he stated:

> Yeah, ….if looking in terms of what's available to apply to it, right, therapy, medications, injections, time, not really. You know, I think taking chronic pain medications for discomfort is an option, but I don't know that that necessarily results in a functional improvement.
>
> We've tried some injections that were not of benefit, so I think that's not the way we work. I don't think additional therapy is going to work, where he did a very long period of therapy afterwards. Id at 31, 32.

23. One of Dr. Rovak's reservations, as expressed in his report, regarding the ulna shortening is that Claimant is already 3mm ulna negative, yet there was not ulnocarpal impact. Dr. Larsen agreed there was not ulnocarpal impaction; however, "The length relationship between the radius and the ulna is not static. The ulna pistons long relative to its static position…. My exam and, you know, what we treated him for, points towards tearing and things that aggravate the ulna side of the wrist, in terms of loading to the triangular fibrocartilage." (Larsen Depo., p. 16).

24. On cross-examination, Dr. Larsen stated there are only a certain number of reasons that Claimant's condition can be painful, whether it's tearing, not being under the right amount of tension, etc. *Id* at 36, 37. By unloading that side, Dr. Larsen is trying to "reduce the maximum weight that the ulna can achieve and apply across the triangular fibrocartilage." *Id* at 16. Regarding Claimant being 3mm congenitally negative, Dr. Larson provided the following explanation why that was not an indication against surgery:

> And that shows that the static relationship between the radius and the ulna, when the rotation of the forearm is neutral, so midway between maximum pronation and maximum supination. What we know, that the relative length of the ulna, compared to the radius, can be increased by pronation and by grip and by application of force or weight-bearing. And that's not something that's not reflected in that 3 millimeter variance. So if I shorten him 2 millimeters in the neutral position and it doesn't change the…dynamic pistoning [sic] of the ulna, which is what I'm trying to deal with here. *Id* at 38.

25. Dr. Larsen summarized his position when asked about Dr. Rovak's opinion. "I mean, we…don't agree on that point… that is something that even in person we would debate. He doesn't feel like all the shortening would be helpful. You know, obviously, I do, or I wouldn't have offered it to him." *Id* at 15. Dr. Larsen has nothing else to offer Claimant in the way of potential relief without this surgery. *Id* at 17.

Dr. Rovak testifies by Deposition

26. Dr. Rovak testified via deposition on August 31, 2021. Dr. Rovak reiterated his opinion that the surgery was quite unlikely to help Claimant's pain and function. "I just don't think it would help. So in my practice, if I looked at this guy, there are patients where you just go, look, I understand that you have pain, but I don't think surgery is going to make it better. And that's where [Claimant] fell for me in this case given the stuff that I had to review." (Rovak Depo., pp. 15,16).

27. Dr. Rovak explained that before embarking on the second surgery proposed by Dr. Larsen, there needed to be an analysis done to be sure that the proposed surgery is going to be, "within the realm of what was going to be possibly helpful," [to Claimant]. (Rovak depo. p. 12). He concluded the second surgery proposed by Dr. Larsen was within that realm. Claimant's, "physical exam was a little bit, I wouldn't say unreliable, but I would say nondiagnostic because it was sort of diffuse and the pain was not limited to this particular maneuver or that particular maneuver." *Id* at 17. Dr. Rovak emphasized that the findings in Claimant's MRI arthrogram and Dr. Larsen's first surgery were, "all fairly minimal." *Id* at 14.

28. Dr. Rovak testified that there was no ulnar impaction syndrome present. Such impaction would exist if Claimant's ulna were too long. In fact, Dr. Rovak explained, the opposite situation exists, since Claimant's ulna is short. The proposed surgery to shorten Claimant's ulna would leave his right ulna, "2 millimeters shorter than his normal, which actually makes him very (5 mm) ulnar negative, which could be a problem." *Id* at 23, 24. Because he and Dr. Larsen agree Claimant's ligament isn't loose or unstable, by tightening it further will cause extra tension. Additionally, by shortening the ulna and taking it out of its natural alignment, the surface won't be articulating the same way. That can cause problems with discomfort and motion. *Id* at 24, 28. Dr. Rovak also shared Dr. Larsen's belief that Claimant's pain generator had not been conclusively identified, testifying that the symptom generator is unknown. *Id.*

29. Dr. Rovak further stated Dr. Larsen’s proposed second surgery is not reasonable and necessary because there are no findings or evidence that it will improve claimant’s condition:

> I would almost describe it [the proposed surgery] more as a Hail Mary. So a salvage operation means, look, you have a problem that is unfixable. I can't fix the problem, but what I could do is do this, what is called a salvage procedure, meaning I am going to do something that, you know, we are just going to try and take a tradeoff and salvage, you know, some degree of function, understanding that we can't fix the problem. That is a salvage operation. Salvage operations are very accepted, and you go, look, if somebody has like an arthritic wrist, I can't undo the arthritis, but I can, you know, do a procedure called like a proximal row carpectomy or a four-corner fusion, which you are going to have some limitations from but it may help your pain. That is a salvage. To me in this case, I would consider it not a salvage operation because salvage operations are predictable. I would say it is a Hail Mary where you are going, this is the last thing I have got, I don't know if this is going to help or not, you know, and then you are just throwing a long-bomb pass before the buzzer runs out, you know.” *Id* at 20.

30. However, Dr. Rovak was only against the ulnar shortening osteotomy. Dr. Rovak testified that if the only component of the surgery was the repeat wrist arthroscopy to check his work and look for a problem, that would not be unreasonable given the fact that “the morbidity of doing a repeat wrist arthroscopy is very low.” *Id* at 29. Dr. Rovak then testified the biggest risk associated with the ulnar shortening procedure is that it just is not going to help. *Id* at 32.

Claimant testifies at Hearing

31. Claimant testified at hearing. He explained that virtually any movement of his wrist prior to the first surgery would cause severe pain and swelling. His symptoms also included numbness and tingling, and weakness. The numbness and tingling went away with the surgery; however, the ongoing pain in the wrist has persisted. Additional conservative care, including an injection in the hand, did not help at all. Claimant also continued with more physical therapy. Despite the ongoing care, Claimant’s wrist would continue to hurt and swell, particular with use.

32. Claimant understands that, realistically, the surgery is not going return him to his preinjury condition, but that it could get it “somewhat” back to his baseline. Claimant testified that he continues to feel “broken” due to his inability to use the wrist for any prolonged period of time, and the constant pain associated with it. Claimant testified he is well aware that the surgery may not help his condition at all, but he feels he is “backed up to a corner” and is willing to undergo the surgery since it has the potential to alleviate his symptoms to some degree and increase his ability to use his wrist.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1).* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion).

C. In this instance, the ALJ finds Claimant to be credible in recounting the work incident, and in describing his ongoing symptoms to his medical providers and IMEs to the best of his abilities. Claimant has been sincerely dismayed at his condition, and has made every reasonable effort to rehabilitate from his injury and become as fully productive as possible. The ALJ sees no evidence of seeking secondary gain; to the contrary, Claimant wants to get as well as he can, so that he can at least reduce his pain after using this wrist, and thus gain greater function moving forward.

D. The ALJ further finds that the medical experts in this case have all rendered sincere medical opinions, but as is not infrequent, such opinions differ. In final analysis, the ALJ must decide who is more *persuasive* (as opposed to *credible*, per se), in light of their respective expertise and access to all pertinent information.

E. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Medical Benefits, Generally

F. Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the Claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). *Hobirk v. Colorado Springs School District #11,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). Our courts have held that in order for a service to be considered a "medical benefit" it must be provided as medical or nursing treatment, or incidental to obtaining such treatment. *Country Squires Kennels v. Tarshis,* 899 P.2d 362 (Colo. App. 1995). *A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the Claimant's physical needs. Bellone v. Industrial Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO, May 31, 2006). A service is incidental to the provision of treatment if it enables the Claimant to obtain treatment, or if it is a minor concomitant of necessary medical treatment. *Country Squires Kennels v. Tarshis,* 899 P.2d 362 (Colo. App. 1995)*; Karim al Subhi v. King Soopers, Inc.,* W.C. No. 4-597-590, (ICAO. July 11, 2012). The determination of whether services are medically necessary, or incidental to obtaining such service, is a question of fact for the ALJ. *Bellone v. Industrial Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO, May 31, 2006).

Medical Benefits, Repeat Wrist Arthroscopy

G. Causation for Claimant's predicament is not in dispute. It is due to his fall off the ladder at work. And the ALJ is not prepared to find Dr. Novak's position to be unreasonable; indeed, his positions are well thought out, and presumably the same positions he would take were he advising one of his own similarly-situated private patients. However, looking further, Dr. Novak even concurred that the repeat wrist arthroscopy (to look for structural issues not readily ascertained by imaging), as a stand-alone procedure, would not be unreasonable, especially since "the morbidity of doing a repeat wrist arthroscopy is very low." The ALJ concurs with that assessment, and finds that the repeat wrist arthroscopy component of the surgery proposed by Dr. Larsen is reasonable and necessary to address Claimant's medical condition.

Medical Benefits, Ulnar Shortening

H. Accepting that the repeat arthroscopy is reasonable and necessary (and assuming, as the ALJ does herein, that Claimant will follow through with that component), what then, is the remaining risk to adding in the ulnar shortening? Claimant will already be subjected to the usual inherent risks of surgery-anesthesia, infection, rehab, potentially disappointing results, etc. Dr. Rovak already agrees that the morbidity rate for such a procedure is ‘very low.’ While the ulnar shortening is admittedly another step beyond the arthroscopy, the ALJ finds that any *additional* morbidity risk in performing this proposed ulnar component is extremely slight. Everyone will already be at the party. And Respondents are already getting the bill.

I. In the end, Dr. Rovak conceded that while there are inherent risks (as there clearly are) to the ulnar shortening, the *biggest* risk is that it’s just not going to help. In the final analysis, Dr. Larsen, as the ATP, has expressed similar sentiments; he just feels that the risk is slighter than does Dr. Rovak, but still one worth taking. These are valid differences in medical opinions. But in the final analysis, *it is Claimant’s wrist.* This is how the rest of his life will play out. Everyone else involved gets to go home.

J. Claimant may indeed be disappointed in the results of the procedure, once all the rehab has been completed. Perhaps Dr. Rovak will be vindicated in the end. Claimant, however, has thought this issue through. He understands the risks, and has realistic expectations. Of course he wants the home run. He’ll settle for a single. In fact, he’ll settle for a groundout, but at least he got to bat. He understands what recovery from surgery is like, since he’s been there once already. And he does not want to live the rest of his life not knowing what things might have been like, if he’d just had the surgery and found out for himself. The ALJ cannot totally ignore this.

K. Claimant should not have to seek this treatment through private means, assuming he could even afford it. It would be patently unfair to tell him to just give up at this point, and live with the pain, and subsequent diminished function. Or worse yet, just live on pain meds. Instead, the ALJ finds that the ulnar shortening, combined with the arthroscopic revision, just as proposed by Dr. Larsen, is reasonable and necessary to cure and alleviate the effects from his work injury.

ORDER

It is therefore Ordered that:

1. Respondents shall authorize and pay for the right wrist surgery as proposed by Dr. Larsen.

2. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. *In addition, in order to best assure prompt processing of your Petition, it is* ***highly recommended*** *that you send a copy of your Petition to Review to the Colorado Springs OAC via email at oac-csp@state.co.us.*

DATED: October 12, 2021

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-091-545-001

ISSUES

1. Whether Claimant established by clear and convincing evidence that the Division Independent Medical Examination (DIME) opinion of Jade Dillon, M.D., that Claimant reached maximum medical improvement (MMI) on January 25, 2021, is incorrect.

2. If Claimant overcomes the DIME with respect to MMI, whether Claimant established by a preponderance of the evidence an entitlement to medical treatment reasonably necessary to cure or relieve the effects of his industrial injury.

3. If Claimant overcomes the DIME with respect to MMI, whether Claimant established by a preponderance of the evidence an entitlement to temporary total disability benefits after January 25, 2021.

4. If Claimant fails to overcome the DIME, has Claimant established by a preponderance of the evidence an entitlement to necessary, and related medical maintenance benefits designed to relieve the effects of his work-related injury or to prevent further deterioration of his condition pursuant to *Grover v. Indus. Comm'n*, 795 P.2d 705 (Colo. App. 1988).

5. Whether Claimant established by clear and convincing evidence that the DIME opinion of Dr. Dillon that Claimant did not have a permanent partial impairment from his work-related injury is incorrect.

PROCEDURAL ORDERS

Claimant endorsed the issue of disfigurement on his Application for Hearing. Because Claimant did not have video capability at the time of hearing, the ALJ orders that the issue of disfigurement is withdrawn without prejudice and with leave to refile an application for hearing on the issue of disfigurement. Respondents did not object to this relief.

FINDINGS OF FACT

1. Claimant is a 54-year-old male who sustained an admitted injury to his left shoulder arising out of the course of his employment with Employer on September 10, 2018.

Past Medical History

2. Claimant has a history of shoulder issues dating to August 2013. In August 2013, Claimant sought treatment from Melanie Metcalf, M.D. at Salud Family Health Centers (Salud), indicating he sustained an injury to his left shoulder while placing a box on the

floor. Claimant reported a burning sensation in his left shoulder with pain in the left side of his neck and trapezius area. Claimant also has a history of uncontrolled diabetes mellitus type II. (Ex. A).

3. On September 30, 2013, Claimant underwent a left shoulder x-ray which showed "abnormal sclerosis and slight flattening of the lateral humeral dome and greater tuberosity." The radiologist indicated the condition could relate to "age indeterminant [sic] Hill-Sachs deformity or impaction fracture." The radiologist indicated that a CT or MRI may be useful for further assessment. However, no MRI or CT was performed. A cervical x-ray performed on the same day showed "[m]ild cervical spondylosis with possible left C6-7 and C7-T1 osseous neuroforaminal narrowing." (Ex. A). Following the x-rays, Dr. Metcalf indicated Claimant's x-rays were both abnormal, and recommended a trial of gabapentin because Claimant's symptoms were radicular in nature. (Ex. A).

4. In January 2014, Dr. Metcalf referred Claimant for an orthopedic evaluation noting a suspected primary lesion in the left shoulder and superimposed pain from cervical radiculopathy. She also noted that Claimant's diabetes mellitus was uncontrolled. Dr. Metcalf indicated that an MRI was pending. (Ex. A).

5. On January 22, 2014, Claimant saw Daniel Heaston, M.D., for an orthopedic evaluation. Dr. Heaston diagnosed Claimant with adhesive capsulitis of the left shoulder and recommended conservative treatment, including physical therapy. (Ex. B). A radiology report from January 22, 2014, indicated Claimant had mild narrowing of the glenohumeral and acromioclavicular joints, and mild degenerative arthropathy of the left shoulder. (Ex. A). Claimant continued to report left shoulder symptoms through March 28, 2014. (Ex. A). No records were admitted into evidence indicating Claimant reported left shoulder symptoms between March 28, 2014, and January 2017.

6. In January 2017, Claimant was seen by Stefano Lee, M.D. at Salud, and reported a left shoulder injury. Claimant reported left shoulder pain while driving with decreased range of motion of the neck due to left trapezius tenderness. He was diagnosed with "stiffness of neck." At a follow-up visit one week later, Claimant reported his neck stiffness and pain had improved. (Ex. A).

7. On February 21, 2017, Claimant returned to Dr. Lee and reported his left shoulder pain had returned. He was diagnosed with a rotator cuff sprain. (Ex. A).

Claimant's September 10, 2018 Work Injury

8. Following Claimant's September 10, 2018 work injury, Claimant was seen at Concentra on September 11, 2018 by Gerald Pernak, PA-C, the physician assistant for Darla Draper, M.D. Claimant was diagnosed with a left shoulder strain, and muscle strain, multiple sites. Claimant was later seen by Dr. Draper and diagnosed with a left shoulder strain, thoracic myofascial strain, and cervical strain. Claimant was referred for physical therapy and massage, and an MRI of the left shoulder was ordered. (Ex. D).

9. The following day – September 12, 2018 – Claimant saw Kelli Shanahan, PA-C, at Salud Family Health Centers. Claimant reported left shoulder pain for three days, which

he did not attribute to any specific injury. Claimant was treated with Lidoderm patches, meloxicam, and cyclobenzaprine. Claimant was provided a Toradol injection in the office for acute pain. (Ex. E).

10. On September 25, 2018, an MRI of Claimant's left shoulder was performed that showed a full thickness tear with tendon retraction and moderate muscular atrophy, and a complete disruption and distal retraction of the left biceps tendon. (Ex. F & L).

11. Claimant was then seen by orthopedist Craig Davis, M.D., at Concentra on October 2, 2018. Dr. Davis noted that despite the size of the rotator cuff tear, Claimant had fairly good strength and motion, and his pain had improved. He recommended continuing therapy, and also noted that most people with a rotator cuff tear the size of Claimant's end up requiring surgery. (Ex. I).

12. Claimant then saw orthopedist Mark Failinger, M.D., for a second opinion on October 25, 2018. Dr. Failinger noted that Claimant had attended physical therapy with mild improvement. He diagnosed Claimant with a left supraspinatus tear with retraction, and a probable ruptured long head of the biceps, with AC joint osteoarthritis. Dr. Failinger recommended surgery to repair Claimant's rotator cuff, and not performing surgery on Claimant's biceps because function is not typically impaired by this injury. He also recommended that Claimant quit smoking and noted Claimant's diabetes and smoking were negative factors for healing. (Ex. I & L).

13. Dr. Failinger's surgical request was reviewed for Insurer by a Dr. Weingarten, who approved the surgery. (Ex. F). Subsequently, on November 16, 2018, Jon Erickson, M.D., performed a second review on behalf of Insurer. Dr. Erickson apparently reviewed additional medical records and noted Claimant had a prior left shoulder injury in January 2014 also associated with neck complaints. Based on this information, Dr. Erickson concluded that the recommended surgery was not work-related. Dr. Erickson also opined that all of the abnormalities shown on Claimant's September 25, 2018 MRI were old and pre-existing. He also opined there was no objective evidence of aggravation or worsening of his pre-existing condition. Dr. Erickson recommended denial of the surgery proposed by Dr. Failinger. (Ex. I).

14. Over the next several months, Claimant followed up with Scott Richardson, M.D., at Concentra. Dr. Richardson was an authorized treating physician (ATP). On January 17, 2019, Dr. Richardson opined that Claimant was at maximum medical improvement (MMI). (Ex. K). However, Claimant continued to receive care and pursue the surgery recommended by Dr. Failinger.

15. On September 8, 2019, Claimant saw James P Lindberg, M.D., for an independent medical examination at Respondents' request. Dr. Lindberg reviewed Claimant's September 2018 MRI and opined that Claimant had a chronic pre-existing rotator cuff tear dating to 2014. He also opined that Claimant has a biceps tendon rupture of unknown date, and that the biceps tendon rupture was not amenable to surgical repair. Dr. Lindberg opined Claimant was at MMI, and that Dr. Failinger's proposed surgery on Claimant's left shoulder was not related to a work-related injury. (Ex. F).

16. Ultimately, Insurer apparently approved Dr. Failinger's proposed surgery. On November 5, 2019, Dr. Failinger performed surgery on Claimant's left shoulder, including a mini-open rotator cuff repair, subacromial decompression, debridement of the rotator cuff, labrum, and synovectomy. Claimant's post-operative diagnoses were left shoulder medium to large supraspinatus tear, left shoulder chronic rupture of the long head of the bicep, left shoulder synovial degenerative tear, and left shoulder synovitis. (Ex. G).

17. Following surgery, Claimant received substantial post-surgery care, including evaluations at Concentra and by Dr. Failinger, two repeat left shoulder MRIs, evaluation and treatment by physiatrist John Aschberger, M.D., electrodiagnostic testing, a left elbow orthopedic evaluation by Todd Alijani, M.D., a cervical MRI, pain rehabilitation evaluation and cervical steroid injection from Robert Kawasaki, M.D., a surgical evaluation by Stephen Pehler, M.D., a surgical evaluation by Dr. Davis, and physiatry consultation and treatment from Kathy McCranie, M.D. (Ex. I).

18. In February 2020, Dr. Failinger diagnosed Claimant with adhesive capsulitis, and Claimant underwent an MRI, which Dr. Failinger interpreted as showing a healing rotator cuff repair, and no other internal derangement or significant shoulder problems. He noted that Claimant's then-existing complaints appeared to be peri-scapular and cervical in nature. (Ex. I).

19. Dr. Aschbacher evaluated Claimant for left arm fasciculation and symptoms of ulnar nerve irritation. He performed an EMG that was negative for cervical radiculopathy but showed moderate ulnar neuropathy of the left wrist, consistent with carpal tunnel syndrome. Dr. Alijani recommended surgery for ulnar nerve transposition, and Insurer denied this request based on a report issued by Davis Hurley, M.D., on July 13, 2020. Dr. Hurley opined that the need for surgery was not related to Claimant's shoulder injury or shoulder surgery, but more likely due to Claimant's pre-existing diabetes. (Ex. H).

20. On October 27, 2020, Dr. Davis opined that Claimant's ulnar nerve neuropathy was the result of the treatment to Claimant's left shoulder and recommended decompression or transposition of the ulnar nerve at the left elbow. He opined that Claimant's carpal tunnel symptoms were an incidental finding of the nerve study. (Ex. I).

21. On January 29, 2020, Kathleen D'Angelo, M.D., performed an independent medical examination of Claimant at Respondents' request. Based on her review of medical records and examination of the Claimant, Dr. D'Angelo stated: "while it is my medical opinion that [Claimant's] left shoulder complaints as well as his left shoulder MRI findings are **causally unrelated** to his 2018 work injury; the patient was approved for surgery." (Ex. I). She also opined that Claimant was at MMI for his left shoulder condition, which she believed should be limited to his left shoulder range of motion deficits. She noted given Claimant's "long history of decreased cervical spine ROM as well as left trapezius spasms and pain; I would not provide [Claimant] with any cervical spine impairment as this would be consistent with his pre-injury state."

22. On January 11, 2021, Dr. McCranie performed an impairment rating and assigned a 10% impairment for Claimant's left shoulder due to loss of range of motion. She noted

that there was no impairment for the surgery performed, and no neurologic impairment. Dr. McCranie opined that Claimant's left ulnar neuropathy was not related to his work injury. Similarly, she opined that there was no identifiable etiology in the cervical spine to warrant an impairment rating.

23. On January 25, 2021, Dr. Richardson placed Claimant at MMI noting that Claimant would have permanent restrictions and/or permanent partial disability. (The records is insufficient to determine why Dr. Richardson's initial MMI determination was retracted or withdrawn, but the ALJ infers that it was withdrawn due to Insurer's approval of Claimant's left shoulder surgery).

24. On April 13, 2021, Claimant underwent a DIME with Jade Dillon, M.D. Although Dr. Dillon's range of measurements resulted in an 11% upper extremity impairment rating, Dr. Dillon concluded that Claimant's impairment was not related to his industrial injury, and instead concluded that Claimant's condition was the result of a pre-existing condition. In doing so, she stated that she "concur[red] with Dr. McCranie[1] and Dr. Lindberg that the vast majority of [Claimant's] left shoulder problems predate the occupational injury in question. It is clear that he was [previously] diagnosed with adhesive capsulitis of that shoulder. Unfortunately, the MRI scan recommended at that time was not completed so we do not have definitive documentation of the actual pathology." She stated "there is no convincing evidence that this pre-existing condition was significantly permanently exacerbated by the occupational injury in question." Consequently, Dr. Dillon did not assign Claimant a permanent impairment rating, finding Claimant's impairment was not directly causally related to his work injury. Dr. Dillon placed Claimant at MMI on January 25, 2021. (Ex. L).

25. On May 6, 2021, Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Dillon's report, denying any permanent total disability. (Ex. M). On May 10, 2021, Claimant filed an Application for Hearing seeking the relief sought in this matter.

26. At hearing, Claimant testified that he continues to experience difficulties with his left arm, and has problems with his neck. Claimant testified that he has difficulty sleeping on his left side, putting on clothes and engaging in sports with his family. Claimant also testified that he believes his left biceps requires repair.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the

[1] In her report, Dr. Dillon conflates the opinions of Dr. D'Angelo with those of Dr. McCranie. The ALJ infers that Dr. Dillon's intended to reference Dr. D'Angelo's opinion.

evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

OVERCOMING DIME - MMI

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000); *Kamakele v. Boulder Toyota-Scion,* W.C. No. 4-732-992 (ICAO Apr. 26, 2010).

MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Indus. Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Indus. Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Indus. Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007); *Powell v. Aurora Public Schools* W.C. No. 4-974-718-03 (ICAO Mar. 15, 2017). A finding that the claimant needs additional medical treatment (including surgery) to improve his injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Indus. Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Indus. Claim Appeals Office,* 794 *P.2d 1090 (Colo. App. 1990); Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (ICAO Mar. 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *In Re Villela,* W.C. No. 4-400-281 (ICAP, Feb. 1, 2001).

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Indus. Claim Appeals Office, supra*. "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge D/B/A Colorado Athletic Club* W.C. No. 4-914-378-02 (ICAO June 25, 2015). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect, and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAO Nov. 17, 2000). Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries,* W.C. No. 4-712-812 (ICAO Nov. 21, 2008); *Licata v. Wholly Cannoli Café* W.C. No. 4-863-323-04 (ICAP, July 26, 2016).

Claimant has failed to establish by clear and convincing evidence that Dr. Dillon's determination that Claimant reached MMI on January 25, 2021 is incorrect. Dr. Dillon's opinion is consistent with MMI opinion of Claimant's authorized treating provider, Dr. Richardson and Dr. McCranie. Moreover, no physician has opined that Claimant is not at MMI, or that Claimant had not reached MMI by January 25, 2021. No credible evidence was offered to indicate that Dr. Dillon's MMI opinion is highly probably incorrect. As found, Claimant received substantial work-up and care for his work injury before being placed at MMI, and no medical evidence was submitted indicating that additional pre-MMI care is being recommended at this time. The ALJ concludes that Dr. Dillon's opinion that Claimant is at MMI for this claim is free from serious or substantial doubt.

MEDICAL BENEFITS

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. § 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO May 31, 2006). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002); *Hobirk v. Colorado Springs School Dist. #11,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). The existence of evidence which, if credited, might permit a contrary result affords no basis for relief on appeal. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Bud Forbes v. Barbee's Freeway Ford,* W.C. No. 4-797-103, (ICAO Nov. 7, 2011). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School District No.11*, W.C. No. 3-979-487, (ICAO Jan. 11, 2012); *Ford v. Regional Trans. District,* W.C. No. 4-309-217 (ICAO Feb. 12, 2009).

Because Claimant has failed to establish that the DIME physician's MMI determination is incorrect, Claimant has failed to establish an entitlement to general medical benefits. With respect to Claimant's request for repair of his left biceps tendon, the record reflects that Dr. Failinger was aware of Claimant's ruptured biceps tendon and recommended not performing surgery. Additionally, Dr. Lindberg also concluded that his left biceps tendon was not amenable to surgery. Claimant presented no evidence from any medical provider indicating that surgery on his left biceps was reasonable, necessary or related to his work injury.

TEMPORARY TOTAL DISABILITY BENEFITS

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* 8-42-105(1). C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). By statute, TTD benefits continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

Because Dr. Dillon determined Claimant reached MMI on January 25, 2021, and Claimant failed to overcome the DIME opinion regarding MMI, his entitlement to TTD benefits terminated on that date pursuant to § 8-42-105 (3)(a) – (d), C.R.S. Consequently, Claimant has failed to establish an entitlement to additional TTD benefits.

OVERCOMING DIME - IMPAIRMENT

The finding of a DIME physician concerning the claimant's medical impairment rating shall be overcome only by clear and convincing evidence. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995); *Lafont v. WellBridge,* W.C. No. 4-914-378-02 (ICAO June 25, 2015).

As a matter of diagnosis, the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Indus. Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003); *Sharpton v. Prospect Airport Services,* W.C. No. 4-941-721-03 (ICAO Nov. 29, 2016). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Indus. Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Indus. Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998); *Watier-Yerkman v. Da Vita, Inc.* W.C. No. 4-882-517-02 (ICAO Jan. 12, 2015). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Indus. Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000). A mere difference of opinion between physicians does not necessarily rise to the level of clear and convincing evidence. *See Gonzales v. Browning Ferris Indus. of Colo.*, W.C. No. 4-350-36 (ICAO Mar. 22, 2000); *Licata v. Wholly Cannoli Café,* W.C. No. 4-863-323-04 (ICAO July 26, 2016).

Claimant has failed to establish by clear and convincing evidence that the DIME physician's determination that Claimant has no permanent impairment related to his industrial injury is incorrect. Claimant presented no credible evidence showing that Dr. Dillon's determination that his permanent impairment is not causally related to his industrial injury is highly probably incorrect. No credible evidence was offered explaining why Dr. Dillon's opinion was incorrect. Consequently, Claimant failed to meet his burden of proving by clear and convincing evidence that he is entitled to a permanent impairment rating.

GROVER MEDICAL BENEFITS

Section 8-42-101(1), C.R.S. requires the employer to provide medical benefits to cure or relieve the effects of the industrial injury, subject to the right to contest the reasonableness or necessity of any specific treatment. *See Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). The need for medical treatment may extend beyond the point of MMI where the claimant presents substantial evidence that future medical treatment will be reasonably necessary to relieve the effects of the injury or to prevent further deterioration of his condition. *Grover v. Indus. Comm'n*, 759 P.2d 705 (Colo. 1988); *Hanna v. Print Expediters Inc.*, 77 P.3d 863, 865 (Colo. App. 2003). An award for *Grover* medical benefits is neither contingent upon a finding that a specific course of treatment has been recommended nor a finding that the claimant is actually receiving medical treatment. *Holly Nursing Care Center v. Indus. Claim Appeals Office,* 992 P.2d 701 (Colo. App. 1999); *Hastings v. Excel Electric*, W.C. No. 4-471-818 (ICAO May 16, 2002). There is no bright line test to distinguish treatment designed to cure an injury from treatment designed to relieve the effects of the injury. Surgery may be designed to cure an injury or may be maintenance treatment designed to relieve the effects or symptoms of the injury. Post-MMI treatment may be awarded regardless of its nature. *Corley v. Bridgestone Americas*, W.C. No. 4-993-719 (ICAO Feb. 26, 2020).

To prove entitlement to medical maintenance benefits, a claimant must present substantial evidence to support a determination that future medical treatment will be reasonably necessary to relieve the effects of the industrial injury or prevent further deterioration of his condition. *Grover v. Indus. Comm'n.,* 759 P.2d 705, 710-13 (Colo. 1988); *Stollmeyer v. Indus. Claim Appeals Office,* 916 P.2d 609, 611 (Colo. App. 1995). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School District No.11*, W.C. No. 3-979-487, (ICAO Jan. 11, 2012). Once a claimant establishes the probable need for future medical treatment he "is entitled to a general award of future medical benefits, subject to the employer's right to contest compensability, reasonableness, or necessity." *Hanna v. Print Expediters, Inc.*, 77 P.3d 863, 866 (Colo. App. 2003); *see Karathanasis v. Chilis Grill & Bar,* WC 4-461-989 (ICAO Aug. 8, 2003). Whether a claimant has presented substantial evidence justifying an award of *Grover* medical benefits is one of fact for determination by the Judge. *Holly Nursing Care Center v. Indus. Claim Appeals Office,* 919 P.2d 701, 704 (Colo. App. 1999).

Claimant has failed to establish by a preponderance of the evidence that he is entitled to medical maintenance benefits. No provider has opined that Claimant requires further treatment for his injuries that he has not already received. Again, Claimant offered no credible evidence to support his contention, other than his personal belief that he required surgery on his left biceps. As discussed above, no provider has recommended the surgery Claimant seeks. Moreover, Claimant has not presented credible evidence to indicate that other treatment is required.

CLAIMANT'S ADDITIONAL REQUESTS

In addition to the workers' compensation benefits Claimant seeks, in his position statement he requests an award of "at least" $150,000 to compensate Claimant for, among other things, loss of his "active lifestyle" and future lost wages. The ALJ's jurisdiction is limited to benefits provided under the Act. The Act contains no provision that permits an award of general damages for compensation or future lost wages. Consequently, the requests for such relief are denied.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by clear and convincing evidence that the DIME physician's opinion that Claimant reached MMI on January 25, 2021, was incorrect.

2. Claimant has failed to establish by clear and convincing evidence that the DIME physician's opinion that Claimant has no permanent impairment is incorrect.

3. Claimant's request for medical benefits is denied and dismissed.

4. Claimant’s request for Grover medical benefits is denied and dismissed.

5. Claimant’s request for additional temporary total disability benefits is denied and dismissed.

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 13, 2021

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered compensable injuries during the course and scope of his employment with Employer on October 6, 2020.

2. If the claim is compensable, whether Claimant's treatment through the Kaiser network was authorized.

STIPULATIONS

The parties agreed to the following:

1. If the claim is compensable, Claimant earned an AWW of $1,194.55 for the period October 6, 2020 through February 4, 2021 and an AWW of $1,396.61 for the period February 5, 2021 continuing.

2. If the claim is compensable, Claimant is entitled to receive TTD benefits for the period October 6, 2020 through January 9, 2021.

FINDINGS OF FACT

1. Employer is a hospital on the Anschutz Medical Campus. Claimant is a 26 year old male who began working for Employer on October 15, 2018 as a Respiratory Therapist. He ceased employment with Employer on February 5, 2021. Claimant worked three 12 hour shifts per week from 6:30 a.m. until 7:00 p.m.

2. Claimant was required to punch in and out on a time clock to report his work hours. He explained that the timekeeping system was available in various locations throughout Employer's hospital. Claimant noted that he drove to work every day and was instructed by Employer to park in the Capri parking lot. The lot is owned by The Childern's Hospital but leased by Employer. The Capri lot is located across Colfax Avenue from the Anschutz Medical Campus. To get from the Capri lot to the respiratory department of the Campus Claimant had to cross Colfax Avenue.

3. Claimant explained that Employer provided a shuttle to employees in order to transport them from the Capri lot to the Campus to clock in for their shifts. However, taking the shuttle was not mandatory. Claimant often simply walked to the hospital to begin his work shift. Other employees also walked from the lot to the facility. In fact, Claimant detailed that the majority of his co-workers (approximately 60%) had the same habit of walking rather than taking the shuttle. He noted that management was aware that many employees walked to the Campus, but never objected. Claimant estimated that

walking from the Capri lot to the hospital took about 10 minutes while taking the shuttle took about 15 minutes.

4. On October 6, 2020 Claimant arrived at the Capri lot at approximately 6:21 or 6:22 a.m. He chose to walk from the parking lot to the hospital to begin his 6:30 a.m. work shift. Claimant walked along the sidewalk and reached the light to cross Colfax Avenue. As he was “hustling across the crosswalk” he heard a vehicle accelerating from his right side. Claimant noticed a car coming towards him while he was in the crosswalk on Colfax Avenue. The vehicle struck his right knee, and his momentum carried him around to the front of the car. Claimant’s left foot went under the driver front tire and he fell to the ground. He quickly stood up to avoid oncoming traffic and hobbled to the center median of Colfax Avenue. The driver of the vehicle fled the scene.

5. From the median, Claimant called his charge nurse and reported the incident and resulting injuries. A fellow employee pulled up next to him and offered him a ride to the hospital. Claimant visited Employer’s Emergency Department and was treated for injuries to his right knee and left foot as a result of the accident.

6. Claimant commented that prior to about 11:00 a.m. on October 6, 2020 he contacted his supervisors Candice Parkinson and Dana Wilkening to report the accident. He also completed a Workers’ Claim for Compensation.

7. After Claimant received emergency care, he sought additional treatment through his personal medical provider Kaiser Permanente. Claimant explained that he spoke to Insurer’s adjuster but was informed that the October 6, 2020 accident would not be covered by Workers’ Compensation. He remarked that the adjuster advised him that, if he had been on either side of the street, the accident would have been covered. However, because he was in the street when the vehicle struck him, the accident was not covered. Because Employer never gave him a list of medical providers or authorized treatment, Claimant understood that he was required to obtain care through his personal medical provider. Claimant received treatment from the Kaiser network through January 13, 2021.

8. On October 7, 2020 Claimant received an e-mail from Employer representative TyAmber W[Redacted] informing him that a First Report of Injury had been filed for the October 6, 2020 accident and a claim was filed on his behalf. The designated medical provider was Elizabeth Bisgard, M.D. and all medical care for his work-related injuries was to be coordinated through her. The e-mail also directed Claimant to visit Dr. Bisgard because he had already received care from the emergency room. The e-mail provided the phone number for Employee Health so that he could schedule an appointment. Claimant acknowledged receiving the email. Respondents did not authorize any additional providers.

9. Despite the e-mail directing Claimant to pursue treatment through Dr. Bisgard, Claimant explained that he did not follow-up with her because his care would not be covered by Workers’ Compensation. Claimant specifically believed the e-mail

instructions were contingent on the Workers' Compensation insurance carrier accepting liability. However, the e-mail did not make representations about liability. Because Claimant was concerned that his personal health carrier Kaiser would not pay for treatment with Employer's designated provider, he chose to obtain medical care through the Kaiser network.

10. Employer's Manager for [Employer Redacted] Ms. K[Redacted] testified at the hearing in this matter. She explained that she oversees business operations and is responsible for managing the respiratory therapy department of Employer's entire hospital. She was Claimant's supervisor and explained Employer's tardiness policy. Ms. K[Redacted]agreed with Claimant that he had received three tardy warnings between the time he began working for Employer on July 15, 2020 and the date of the accident on October 6, 2020. She noted that Claimant would have received an additional tardiness warning if he had arrived at 6:36 a.m. for a 6:30 a.m. shift. Ms. K[Redacted] acknowledged that Employer would not have taken any significant action and Claimant's job would not have been in jeopardy if he had been tardy on October 6, 2020 because he would not have accumulated sufficient points to warrant additional corrective action.

11. Ms. K[Redacted]commented that she learned of Claimant's accident on October 6, 2020 from Ms. W[Redacted]. On October 7, 2020 she received a copy of the e-mail directing Claimant to Employee Health and Dr. Bisgard. Ms. K[Redacted]acknowledged that employees were not required to take the shuttle from the Capri parking lot to Employer's hospital. Some employees took the shuttle and others walked to the hospital from the parking lot.

12. Employer's Director of Guest Services at the outpatient pavilion Lourdes B[Redacted] testified at the hearing in this matter. She oversaw transportation and shuttle service at the Anschutz Medical Campus. Ms. V[Redacted] explained that Employer leased the Capri parking lot from The Children's Hospital and it is one of three employee parking locations. Employees pay $10.00 per month to park in the Capri lot. The distance from the Capri lot to Employer's respiratory therapy services in the AIP two building is about three blocks. Ms. B[Redacted]estimated that the shuttle ride from the Capri lot to the AIP two building took about six to eight minutes.

13. Insurer's Adjuster Melissa C[Redacted] testified at the hearing in this matter that she managed Claimant's Workers' Compensation claim. Employer's designated provider on October 6, 2020 was UC Health. She denied having any conversations with Claimant about whether his claim was compensable. Ms. C[Redacted] remarked that Kaiser was not an authorized medical provider.

14. Claimant has demonstrated that it is more probably true than not that he suffered compensable injuries during the course and scope of his employment with Employer on October 6, 2020. Initially, on October 6, 2020 Claimant arrived at Employer's leased Capri lot at approximately 6:21 or 6:22 a.m. He chose to walk from the parking lot to the hospital to begin his 6:30 a.m. work shift. Claimant walked along the sidewalk and reached the light to cross Colfax Avenue. As he was walking across

the crosswalk he was struck by a vehicle and suffered injuries to his right knee and left foot.

15. The record reveals that Claimant faced the special hazard of crossing Colfax Avenue while walking from Employer's designated Capri lot to the hospital to clock in for his shift. Although Employer provided a shuttle to employees in order to transport them from the Capri lot to the hospital to clock in for their shifts, taking the shuttle was not mandatory. In fact, Claimant and many of his co-workers often simply walked to the Anschutz Medical Campus to begin their work shifts. Notably, Ms. K[Redacted]acknowledged that employees were not required to take the shuttle from the Capri parking lot to Employer's hospital building. Some employees took the shuttle and others walked from the parking lot.

16. Employer's provision of a shuttle service that Claimant could have ridden does not change the facts of the case or the applicability of the relevant case law. Employees were not required to utilize the shuttle service. In choosing to walk to the hospital Claimant did not break any rules or deviate from the course and scope of his employment. Because Claimant was injured while crossing the special hazard of Colfax Avenue while walking between the designated Capri lot and his place of employment to begin work, his injuries are compensable.

17. The record reveals that Claimant's medical treatment through the Kaiser network was not authorized. Initially, on October 6, 2020 Claimant received emergency medical treatment for injuries to his right knee and left foot as a result of the accident through Employer's Emergency Department. In a medical emergency a claimant need not obtain authorization from his employer or insurer before seeking medical treatment. There is thus no dispute that Claimant's emergency treatment immediately after the accident was proper. However, once the emergency ended, Employer retained the right to designate the first non-emergency provider.

18. Employer directed Claimant to receive treatment through ATP Dr. Bisgard. On October 7, 2020 Claimant received an e-mail from Employer representative Ms. W[Redacted] informing him that a First Report of Injury had been filed for the October 6, 2020 accident and a claim was filed on his behalf. The designated medical provider was Dr. Bisgard and all medical care for his work-related injuries was to be coordinated through her. The e-mail also directed Claimant to visit Dr. Bisgard because he had already received care from the emergency room. The e-mail provided the phone number for Employee Health so that he could schedule an appointment. On October 7, 2020 Ms. K[Redacted]also received a copy of the e-mail directing Claimant to Employee Health and Dr. Bisgard. Finally, Insurer's Adjuster Ms. C[Redacted] testified that Employer's designated provider on October 6, 2020 was UC Health. She denied having any conversations with Claimant about whether his claim was compensable. Ms. C[Redacted] remarked that Kaiser was not an authorized medical provider.

19. Despite the e-mail directing Claimant to pursue treatment through Dr. Bisgard, Claimant explained that he did not follow-up with her because his care would

not be covered by Workers' Compensation. Claimant specifically believed the e-mail instructions were contingent on the Workers' Compensation insurance carrier accepting liability. However, the e-mail did not make representations about liability. Because Claimant was concerned that his personal health provider Kaiser would not pay for treatment with Employer's designated provider, he chose to obtain medical care through the Kaiser network. Claimant received treatment from Kaiser through January 13, 2021.

20. The Kaiser network was not an authorized medical provider because Employer only referred Claimant to ATP Dr. Bisgard and she did not make any referrals in the normal progression of authorized treatment. Because Claimant obtained unauthorized medical treatment, Respondents are not required to pay for it. Accordingly, Respondents are not financially responsible for Claimant's medical treatment for his October 6, 2020 industrial injuries through the Kaiser or any referrals from Kaiser.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v.*

Streeb, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "time" limits of employment include a reasonable interval before and after working hours while the employee is on the employer's property. *In Re Eslinger v. Kit Carson Hospital,* W.C. No. 4-638-306 (ICAO, Jan. 10, 2006). The "place" limits of employment include parking lots controlled or operated by the employer that are considered part of employer's premises. *Id.*

5. There is no requirement under the Act that a claimant must be on the clock or performing an act "preparatory to employment" in order to satisfy the "course of employment" requirement. *In re Broyles*, W.C. No. 4-510-146 (ICAO, July 16, 2002). As noted in Ventura v. Albertson's, Inc., 856 P.2d 35, 38 (Colo. App. 1992):

> The employee, however, need not be engaged in the actual performance of work at the time of injury in order for the "course of employment" requirement to be satisfied. Injuries sustained by an employee while taking a break, or while leaving the premises, collecting pay, or in retrieving work clothes, tools, or other materials within a reasonable time after termination of a work shift are within the course of employment, since these are normal incidents of the employment relation.

6. The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). Nevertheless, the employee's activity need not constitute a strict duty of employment or confer a specific benefit on the employer if it is incidental to the conditions under which the employee typically performs the job. *In Re Swanson,* W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). It is sufficient "if the injury arises out of a risk which is reasonably incidental to the conditions and circumstances of the particular employment." *Phillips Contracting, Inc. v. Hirst,* 905 P.2d 9, 12 (Colo. App. 1995). Incidental activities include those that are "devoid of any duty component, and are unrelated to any specific benefit to the employer." *In Re Rodriguez,* W.C. 4-705-673 (ICAO, Apr. 30, 2008). Whether a particular activity has some connection with the employee's job-related functions as to be "incidental" to the employment is dependent on whether the activity is a common, customary and accepted part of the employment as opposed to an isolated incident. *See Lori's Family Dining, Inc. v. Industrial Claim Appeals Office,* 907 P.2d 715 (Colo. App. 1995).

7. Generally, injuries sustained by employees while they are traveling to or from work are not compensable because such travel is not considered the performance of services arising out of and in the course of employment. *Madden v. Mountain West Fabricators*, 977 P.2d 861, 863 (Colo. 1999). However, injuries incurred while traveling are compensable if "special circumstances" exist that demonstrate a nexus between the injuries and the employment. *Id.* at 864. In ascertaining whether "special circumstances" exist the following factors should be considered:

- Whether travel occurred during working hours;
- Whether travel occurred on or off the employer's premises;
- Whether travel was contemplated by the employment contract; and
- Whether obligations or conditions of employment created a “zone of special danger” out of which the injury arose.

Id. In considering whether travel is contemplated by the employment contract the critical inquiry is whether travel is a substantial part of service to the employer. *See id.* at 865.

8. If special circumstances demonstrate a causal connection between the conditions under which the work is performed and the “off premises” injury, the resulting injury arises out of and in the course of the employment. Special circumstances may be found if the employer provides a parking area as a fringe benefit to employees and the claimant sustains an injury while using the lot. It is not essential to a finding of compensability that the employer actually own or physically operate and maintain the lot for the exception to apply. *See Woodruff World Travel, Inc. v. Indus. Claim Appeals Office,* 38 Colo. App. 92, 554 P.2d 705 (1976); *Rodriguez v. Exempla Healthcare, Inc.* WC 4-705-673 (ICAO, Apr 30, 2008). Additionally, once a parking lot has achieved the status of "a portion of the employer's premises, compensation coverage attaches to any injury that would be compensable on the main premises." *Larson's Workers' Compensation Law*, §13.04[2][b]. Similarly, special circumstances may be found where the employer, for its own benefit, intervenes in the employee’s parking choices as a matter of policy. In such circumstances selection or use of a parking area is not a purely personal choice. *Friedman’s Market, Inc. v. Welham,* 653 P.2d 760 (Colo. App. 1982).

9. It is not critical to a finding of compensability that the employer actually own, control, or maintain the premises for the special circumstances exception to apply. *See Woodruff World Travel, Inc.*, 554 P.2d at 707. The *Woodruff* Court explained that it was not essential that an injury occurred "near or on a parking lot owned, maintained, or controlled by the employer." *Id*. Rather, the court considered it sufficient that the parking lot was provided for the employees to use, the employer was aware its employees used the lot, and the lot constituted "an obvious fringe benefit to claimant." *Id.* Injuries sustained while an employee is leaving work and walking through a parking lot arise out of the employment because the employer is required to furnish a safe means of ingress and egress to and from the work location. *See State Compensation Insurance Fund v. Walter,* 143 Colo. 549, 354 P.2d 591 (1960); *Vigil v. Healthcare Services Group*, WC 5-100-792 (ICAO, June 10, 2020).

10. As found, Claimant has demonstrated by a preponderance of the evidence that he suffered compensable injuries during the course and scope of his employment with Employer on October 6, 2020. Initially, on October 6, 2020 Claimant arrived at Employer’s leased Capri lot at approximately 6:21 or 6:22 a.m. He chose to walk from the parking lot to the hospital to begin his 6:30 a.m. work shift. Claimant walked along the sidewalk and reached the light to cross Colfax Avenue. As he was walking across the crosswalk he was struck by a vehicle and suffered injuries to his right knee and left foot.

11. As found, the record reveals that Claimant faced the special hazard of crossing Colfax Avenue while walking from Employer's designated Capri lot to the hospital to clock in for his shift. Although Employer provided a shuttle to employees in order to transport them from the Capri lot to the hospital to clock in for their shifts, taking the shuttle was not mandatory. In fact, Claimant and many of his co-workers often simply walked to the Anschutz Medical Campus to begin their work shifts. Notably, Ms. K[Redacted] acknowledged that employees were not required to take the shuttle from the Capri parking lot to Employer's hospital building. Some employees took the shuttle and others walked from the parking lot.

12. As found, Employer's provision of a shuttle service that Claimant could have ridden does not change the facts of the case or the applicability of the relevant case law. Employees were not required to utilize the shuttle service. In choosing to walk to the hospital Claimant did not break any rules or deviate from the course and scope of his employment. Because Claimant was injured while crossing the special hazard of Colfax Avenue while walking between the designated Capri lot and his place of employment to begin work, his injuries are compensable. *See State Compensation Insurance Fund v. Walter,* 143 Colo. 549, 354 P.2d 591 (1960) (injuries sustained when the claimant was crossing a public way in order to reach a parking lot provided or maintained by the employer was compensable because crossing the street constituted special circumstances); *Vigil v. Healthcare Services Group*, WC 5-100-792 (ICAO, June 10, 2020) (injuries were compensable when the claimant slipped on an icy sidewalk in front of an entrance to the employer's premises where the time clock was located prior to beginning work).

Authorized Medical Provider

13. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In Re of Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

14. Section 8-43-404(5)(a), C.R.S. grants employers the initial authority to select the Authorized Treating Physician (ATP). However, in a medical emergency a claimant need not seek authorization from her employer or insurer before seeking medical treatment from an unauthorized medical provider. *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777, 781 (Colo. App. 1990). A medical emergency affords an injured worker the right to obtain immediate treatment without the delay of notifying the employer to obtain a referral or approval. *In Re Gant*, WC 4-586-030 (ICAO, Sept. 17, 2004). Because there is no precise legal test for determining the existence of a medical emergency, the

issue is dependent on the particular facts and circumstances of the claim. *In re Timko,* WC 3-969-031 (ICAO, June 29, 2005). Once the emergency is over the employer retains the right to designate the first "non-emergency" physician. *Bunch v. Indus. Claim Appeals Office of State of Colorado*, 148 P.3d 381, 384 (Colo. App. 2006).

15. Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the provider will be compensated by the insurer for treatment. *Bunch,* 148 P.3d at 383; *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Authorized providers include those medical providers to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of fact for the ALJ. *Kilwein v. Indus. Claim Appeals Office,* 198 P.3d 1274, 1276 (Colo. App. 2008); *In re Bell*, WC 5-044-948-01 (ICAO, Oct. 16, 2018). If the claimant obtains unauthorized medical treatment, the respondents are not required to pay for it. *In Re Patton*, WC's 4-793-307 & 4-794-075 (ICAO, June 18, 2010); *see Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228 (Colo. App. 1999); *Jewett v. Air Methods Corporation,* WC 5-073-549-001 (ICAO, Mar. 2, 2020) (reasoning that surgery performed by an unauthorized provider was not compensable because the employer had furnished medical treatment after receiving knowledge of the injury).

16. As found, the record reveals that Claimant's medical treatment through the Kaiser network was not authorized. Initially, on October 6, 2020 Claimant received emergency medical treatment for injuries to his right knee and left foot as a result of the accident through Employer's Emergency Department. In a medical emergency a claimant need not obtain authorization from his employer or insurer before seeking medical treatment. There is thus no dispute that Claimant's emergency treatment immediately after the accident was proper. However, once the emergency ended, Employer retained the right to designate the first non-emergency provider.

17. As found, Employer directed Claimant to receive treatment through ATP Dr. Bisgard. On October 7, 2020 Claimant received an e-mail from Employer representative Ms. W[Redacted] informing him that a First Report of Injury had been filed for the October 6, 2020 accident and a claim was filed on his behalf. The designated medical provider was Dr. Bisgard and all medical care for his work-related injuries was to be coordinated through her. The e-mail also directed Claimant to visit Dr. Bisgard because he had already received care from the emergency room. The e-mail provided the phone number for Employee Health so that he could schedule an appointment. On October 7, 2020 Ms. K[Redacted]also received a copy of the e-mail directing Claimant to Employee Health and Dr. Bisgard. Finally, Insurer's Adjuster Ms. C[Redacted] testified that Employer's designated provider on October 6, 2020 was UC Health. She denied having any conversations with Claimant about whether his claim was compensable. Ms. C[Redacted] remarked that Kaiser was not an authorized medical provider.

18. As found, despite the e-mail directing Claimant to pursue treatment through Dr. Bisgard, Claimant explained that he did not follow-up with her because his care would not be covered by Workers' Compensation. Claimant specifically believed the e-mail instructions were contingent on the Workers' Compensation insurance carrier accepting liability. However, the e-mail did not make representations about liability. Because Claimant was concerned that his personal health provider Kaiser would not pay for treatment with Employer's designated provider, he chose to obtain medical care through the Kaiser network. Claimant received treatment from Kaiser through January 13, 2021.

19. As found, the Kaiser network was not an authorized medical provider because Employer only referred Claimant to ATP Dr. Bisgard and she did not make any referrals in the normal progression of authorized treatment. Because Claimant obtained unauthorized medical treatment, Respondents are not required to pay for it. Accordingly, Respondents are not financially responsible for Claimant's medical treatment for his October 6, 2020 industrial injuries through the Kaiser or any referrals from Kaiser.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered compensable injuries during the course and scope of his employment with Employer on October 6, 2020.

2. Respondents are not financially responsible for Claimant's medical treatment for his October 6, 2020 industrial injuries through the Kaiser network or any referrals.

3. Claimant earned an AWW of $1,194.55 for the period October 6, 2020 through February 4, 2021 and an AWW of $1,396.61 for the period February 5, 2021 continuing.

4. Claimant is entitled to receive TTD benefits for the period October 6, 2020 through January 9, 2021.

5. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For* *further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at https://oac.colorado.gov/resources/oac-forms.*

DATED: October 15, 2021.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

STIPULATION

Prior to the commencement of the hearing, the parties stipulated that Claimant's average weekly wage is $1,275.56. This stipulation was accepted by the ALJ and is included as part of this Order.

REMAINING ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that he is entitled to wage loss benefits as a result of an admitted, January 16, 2021 industrial injury.

II. If Claimant established his entitlement to temporary total disability (TTD) benefits, whether Respondents established, by a preponderance of the evidence, that Claimant was responsible for the termination of his employment for failing to submit to a mandatory January 28, 2021 drug test, thus precluding wage loss benefits after this date.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

Claimant's January 16, 2021 Motor Vehicle Accident

1. Claimant is a former delivery driver for Employer. He was involved in a motor vehicle crash while driving Employer's truck on January 16, 2021. Claimant testified that he was driving from New Mexico northbound on I-25 past Trinidad, CO at the time of the accident. According to Claimant, he had to make an abrupt lane change during which he lost control of the truck and flipped it onto its side. Claimant broke several bones in his hand, cut his elbow badly, and described being bruised almost head-to-toe from the trauma. Claimant was able to make it out of the turned over vehicle and waited for police and EMS to arrive.

2. Claimant was transported to Mount San Rafael Hospital by ambulance where he called Employer to report the accident. (See generally, Resp. Ex. I). Post-accident drug testing was ordered and completed promptly in the hospital. Testing included both a breath alcohol test and a urine drug screen. (Resp. Ex. G & I).

Employer's Policies Regarding Post-Accident Drug Screening

3. Claimant's January 16, 2021 drug and alcohol testing was administered in accordance with Employer's policies. (Resp. Ex. G, p. 79-80). Claimant acknowledged the post-accident drug testing policy on November 24, 2020. *Id*. The testing policy

provides that any driver found to be in violation of any part of the policy, including refusal to submit to post-accident drug and alcohol testing, is subject to termination. *Id.* The evidence presented persuades the ALJ that Claimant was aware of the policy and consequences of failing to submit to a mandatory drug and alcohol test after an accident. (Resp. Ex. G).

4. Debra H[REDACTED], testified as Employer's Risk Management Director and the Designated Employer Representative ("DER") for Employers drug and alcohol testing program. As Employer's DER, Ms. H[REDACTED] testified that she coordinates Employer's post-accident drug and alcohol testing and handles Employer's workers' compensation claims. As Employer's DER Ms. H[Redacted] is also privy to and acts upon the information collected and maintained by the Federal Motor Carrier Safety Administration (FMCSR). The FMCSR maintains a "Clearinghouse" of information regarding drug and alcohol violations involving drivers and shares this information with commercial carriers. Ms. H[Redacted] has access to the information maintained in the Clearinghouse and reports specific information to the Clearinghouse herself.[1]

5. Ms. H[Redacted] testified that Employer's drug and alcohol testing policies follow the Department of Transportation ("DOT") guidelines; in a post-accident setting, including DOT testing requirements mandating that a breath alcohol test be completed within eight hours and that a urine drug screen be obtained within thirty-two hours of an accident.

6. Ms. H[Redacted] testified that all employees are made aware of Employer's post-accident drug and alcohol policy during their onboarding process. She also testified that when testing is necessary, she makes associates requiring a test aware of the need and is the point of contact should there be questions/concerns about testing or testing results.

7. As noted, Ms. H[Redacted] testified that an injured worker's failure to appear for testing is reported to the Clearinghouse. She also noted that if an associate requiring testing appears for, but does not complete testing for any reason, the medical review officer ("MRO") assigned to the case reports that to the Clearinghouse. According to Ms. H[Redacted], the consequence to the driver of having a report sent to the Clearinghouse is that the driver has a documented testing "violation" on their record and must then follow-up with a substance abuse professional, participate in recommended treatment and submit to follow-up testing for a period of months to years.

8. In order to complete testing; Ms. H[Redacted] testified that injured workers are sent a passport advising them where to appear for testing. Ms. H[Redacted] testified that drivers requiring testing are also informed that failure to present will be considered an automatic refusal to submit to testing and will be deemed an automatic positive result that will be reported to the Clearinghouse.

[1] Ms. H[Redacted] testified that she directly reports those individuals who fail to appear for drug testing to the Clearinghouse.

Claimant's January 16, 2021 Test Results

9. Ms. H[Redacted] testified that Claimant did in fact submit to drug and alcohol testing on January 16, 2021 and that she received his testing results later the same day. According to Ms. H[Redacted], Claimant's breath alcohol test was negative. However, Ms. H[Redacted] testified that immunoassay interference—of unknown etiology—caused invalid drug testing results. Ms. H[Redacted] testified that when there is an invalid test result, there usually is a suspicion that something was done to alter the results of the test. In these circumstances, the MRO has the right to cancel the test and ask for an observed test. According to Ms. H[Redacted], the MRO requested a second observed drug test in this case.

The Necessity for Additional Drug Testing and Claimant's Failure to Appear for the Same

10. Ms. H[Redacted] testified that she spoke with Claimant a couple of times after the initial drug test, including on January 27, 2021 when Claimant contacted her. According to Ms. H[Redacted], she informed Claimant that he needed to submit to an additional drug test, and that her associate, Kerry P[Redacted], would send him a passport for use at the testing site. The passport was sent to both Claimant's old and new cellphone numbers and he acknowledged its receipt.

11. Ms. H[Redacted] testified that during their January 27, 2021 conversation, she
informed Claimant of the consequences of not appearing for the requested observed drug test. According to Ms. H[Redacted], she advised Claimant that a failure to appear would be considered a refusal to test which would be reported to the Clearinghouse triggering a need to follow-up with a substance abuse professional and participate in recommended treatment, i.e. "entry into the SAP program."

12. Claimant did not appear for his second drug test.

Claimant's Termination

13. Claimant testified that he did not attend the second drug test because he had been terminated two days after his accident, on January 18, 2021. According to Claimant, he received a phone call from the terminal manager, Bobby G[Redacted] on January 18, 2021 informing him that Employer was going to "let [him] go" because of the accident.[2] The Employee Change Record, records Claimant's termination date as January 18, 2021. (Rs' Ex. G, P. 76). Claimant testified that because he had been fired on January 18, 2021 and he and Ms. H[Redacted] did not talk about his need to take a second drug test until January 27, 2021, he did not present for the requested second test. According to Claimant, his termination on January 18, 2021 formed the basis for his decision not to appear for the second drug test. Claimant testified that because he had been terminated before the second test was requested, he consulted his attorney to

[2] Mr. G[Redacted] did not testify.

determine if he had an obligation to submit to additional screening. Per Claimant, he was advised that he had no duty to present for additional testing, so he "didn't."

14. When asked about Claimant's date of termination, Ms. H[Redacted] testified that prior to January 27, 2021, the matter, i.e. Claimant's accident was under investigation and nothing had been processed. According to Ms. H[Redacted], Claimant was taken out of service but in "terms of any actual processing of paperwork, [Claimant] was still employed" with Employer.

15. Ms. H[Redacted] testified that she was not privy to any conversations between Claimant and Bobby G[Redacted]; however, she agreed that, as Claimant's manager, Mr. G[Redacted] would have spoken to Claimant about the accident. Ms. H[Redacted] then reiterated her suggestion that Claimant could not have been fired because "no paperwork was process at that point." She also testified that under the circumstances presented, authority to terminate Claimant's employment would have fallen to her office as a "safety-type term" adding that performance-based terminations are processed through the Human Resources department. Because Mr. G[Redacted] was not a member of Human Resources, Ms. H[Redacted] suggested that Mr. G[Redacted] had no authority to terminate Claimant's employment.

16. On cross-examination, Ms. H[Redacted] maintained that the reason Claimant's employment was terminated was his failure to present for a second drug test. Ms. H[Redacted] was asked if she recalled writing an email to Kerry P[Redacted] on January 18, 2021 at 1:22pm. She could not recall this specific email without it in front of her and asked what counsel was referencing. Claimant's then counsel read the following aloud:

> Seven-week employee with two injuries, the second involving taking our truck off road. Right now, they are investigating to see if he was driving down the wrong side of the interstate. Suffice it to say he will be terminated (for taking truck off roadway, rollover with total loss of truck, trailer, and load)." (Emphasis added).

17. Following the reading of Ms. H[Redacted]'s email to Kerry P[Redacted], she was asked if she recalled sending the message to Ms. P[Redacted] on January 18, 2021. Ms. H[Redacted] acknowledged that she did send the message adding the following:

> Firstly, its company policy is, if you take a truck off the roadway, it -- usually we, unless there's some reasonable explanation of why. And [Claimant] had indicated that his brakes had failed. That's what he reported at the time of the loss. So, the matter was still under investigation. But barring any – any other unusual circumstances, up to and including his refusal to test, it was likely that his employment would terminate. Yes, sir. (Hrg. Tr. p. 33, ll. 4-11).

18. Careful review of the Employee Change Record establishes that it was prepared by “Manager” Kimberly B[Redacted] on February 1, 2021.[3] The form also unequivocally documents that Claimant was terminated on “01/18/21”, 9 days before Ms. H[Redacted] claims he was terminated for failing to submit to repeat drug testing.

19. Suggesting that Claimant’s termination was processed following his failure to appear for a second drug test, Respondents assert that the actual date of Claimant’s termination is February 1, 2021, when Ms. B[Redacted] finalized the Employee Change Record. In contrast, Claimant contends that his testimony, the contents of the “Employee Change Record” and Ms. H[Redacted]’s email message to Ms. P[Redacted] contradicts the testimony of Ms. H[Redacted] to persuasively establish that he was terminated for suffering a prior injury and the January 16, 2021 accident itself. Claimant asserts that by the time the Employee Change Record was completed, Employer had all of the evidence regarding Claimant’s failure to take the second drug test, and yet the form indicates he was terminated on January 18, 2021, not January 27, 2021 or February 1, 2021.

Claimant’s Medical Treatment

20. Claimant was diagnosed with multiple injuries at the emergency room on January 16, 2021, including a fracture of his left little finger, and a displaced fracture of the middle left index finger. (Clmt. Ex. 2 p. 11). Claimant also reported pain in the left scapular area; left subscapular area; dorsal aspect of his left forearm, wrist, and hand; palmar aspect of left forearm and left knee pain. *Id.* at 12.

21. Claimant was first seen by a workers’ compensation physician 2 days later on January 18, 2021. (Clmt. Ex. 3, p. 15). Dr. Douglas Bradley with Concentra evaluated Claimant and assessed neck pain, left hand abrasion, left forearm abrasion, multiple closed fractures of the finger with malunion, thoracic myofascial strain, left elbow contusion, and left shoulder contusion. *Id.* at 16. Claimant was started on medication and appropriate referrals were made, e.g., to a hand surgeon, physical therapist, etc. Dr. Bradley imposed significantly limiting physical restrictions of no lifting or carrying more than 5 pounds, no crawling, no climbing, no driving of company vehicles, and to wear a split/brace on his left upper extremity for up to 8 hours per day, and most importantly, no use of the left upper extremity. *Id.* at 18. Claimant was released to modified duty following this appointment.

22. Claimant returned to Dr. Bradley for a follow-up appointment on January 22, 2021. At the close of this appointment, Dr. Bradley released Claimant to modified duty as of January 21, 2021, with the following restrictions: No lifting or repetitive lifting greater than 5 pounds, no carrying, pushing or pulling greater than 5 pounds, no crawling, no climbing, no use of the left upper extremity while in splint and no driving of company vehicles due to “functional limitations.” (Clmt. Ex. 3, p. 33).

[3] While the Employee Change Record clearly references Ms. B[Redacted] as a “Manager”, neither party established whether she is an employee in the Human Resources Department.

23. Claimant's restrictions remained unchanged following his January 29, 2021 appointment with Dr. Bradley. (Clmt. Ex. 3, p. 40). Claimant testified that Dr. Bradley nor any other physician released him to full duty work. (Hrg. Tr. p. 15, ll. 24-25).

24. Based upon the evidence presented, the ALJ finds that Claimant was not offered modified duty between January 16, 2021 and February 1, 2021, the date, which Respondents contend that he was terminated. Claimant testified that he can now lift 40 pounds but his remaining restrictions remain unchanged (Hrg. Tr. p. 16, ll. 4-6). The evidence presented persuades the ALJ that Claimant remains physically restricted and unable to perform the full range of work duties as a delivery driver.

Claimant Received Unemployment Benefits after He Stopped Working

25. After Claimant stopped working for Respondents, he applied for and received unemployment benefits. (Rs' Ex. J.)

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with § 8-43-215, C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, 5 P.3d 385 (Colo. App. 2000).*

C. Assessing the weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo.App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence presented. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002).

Temporary Total Disability Benefits

D. Pursuant to §§ 8-42-103 and 8-42-105, C.R.S., a claimant is entitled to an award of temporary total disability (TTD) benefits if: (1) the injury or occupational disease causes disability; (2) the injured employee leaves work as a result of the injury; and (3) the temporary disability is total and lasts more than three regular working days. *Lymburn v. Symbios Logic* 952 P.2d 831 (Colo. App. 1997). TTD benefits exist to help offset lost wages when the employee cannot work due to the injury. *Anderson v. Longmont Toyota, Inc.* 102 P.3d 323 (Colo. 2004). Accordingly, the statute expressly contemplates proof the injured worker left work or lost employment as a result of the industrial injury in order to establish entitlement to temporary disability benefits. *Randall v. The Anschutz Mining Corporation,* W. C. No. 4-433-235 (September 14, 2000). *See also City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997); *Lunsford v. Sawatsky,* 780 P.2d 76 (Colo.App. 1989) (temporary disability benefits are designed to protect the claimant against the loss of earnings caused by the industrial injury). The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment or wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric,* 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in §8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claims Appeals Office, supra*. The question of whether the claimant proved such a disability is one of fact for the ALJ. *See Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo.App. 1997).

E. In this case, the persuasive evidence demonstrates that on January 18, 2021, Claimant was given work restrictions of no lifting or carrying more than 5 pounds, no crawling, no climbing, no driving of company vehicles, and to wear a split/brace on his left upper extremity for up to 8 hours per day, and no use of the left upper extremity. The evidence supports a conclusion that these restrictions remained in place through February 8, 2021. Dr. Bradley also imposed a restriction precluding Claimant from driving company vehicles "due to functional limitations", which by the evidence presented was not lifted prior to February 8, 2021. The evidence presented persuades the ALJ that Claimant's ability to perform his regular employment was probably impaired by both a restriction of bodily function, particularly the use of his left upper extremity/hand and the restrictions imposed by Dr. Bradley. Although the medical records support that Claimant was released to modified duty, no evidence was presented that Employer offered Claimant modified duty between the date of his accident though the date of his termination regardless of whether that was January 18, 2021 or February 1, 2021. Based upon the evidence presented, the ALJ is persuaded that Claimant's motor vehicle accident (MVA) caused a temporary total disability and that this disability resulted in an actual wage loss for Claimant lasting more than three days. Accordingly, the ALJ concludes that Claimant has proven his initial entitlement to TTD benefits. See *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999); *Hendricks v. Keebler Company*, W.C. No. 4-373-392 (ICAO, June 11, 1999).

Termination for Cause

F. Although Claimant has established his initial entitlement to TTD benefits, this case raises a question of whether he is entitled to collect TTD based upon the assertion that he is responsible for his wage loss for failure to submit to repeat drug testing. As Claimant's injury was after July 1, 1999, §§ 8-42-105(4) and 8-42-103(1)(g), C.R.S. apply regarding his entitlement to TTD benefits. These identical provisions state, "In cases where it is determined that a temporarily disabled employee is responsible for termination of employment, the resulting wage loss shall not be attributable to the on-the-job injury." *Anderson v. Longmont Toyota*, Colo. 102 P.3d 323 (Colo. 2004).

G. The termination statutes provide an affirmative defense to a claim for TTD benefits, and the respondents bear the burden of proof to establish their applicability. *Witherspoon v. Metropolitan Club*, W. C. No. 4-509-612 (Dec. 16, 2004). The concept of "responsibility" is similar to the concept of "fault" under the previous version of the statute. See, *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). "Fault" requires a volitional act or the exercise of some control by a claimant over the circumstances leading to the termination." *Gilmore v. Indus. Claim Appeals Office*, 187 P.3d 1129, 1132 (Colo.App. 2008)(citing *Padilla v. Digital Equipment Corp.*, 902 P.2d 414, 416 (Colo.App. 1994). Generally, the question of whether the claimant acted volitionally and, therefore, is "responsible" for a termination from employment, is a question of fact to be decided by the ALJ, based on consideration of the totality of the circumstances. *See Gonzales v. Industrial Commission*, 740 P.2d 999 (Colo. 1987). An employee will be deemed "responsible" if he/she precipitated the employment termination by a committing a volitional act that an employee would reasonably expect to result in the loss of employment. *Patchek v. Colorado Department of Public Safety*, W.C. No. 4-432-301 (September 27, 2001). "Fault" does not require "willful intent" on the part of the Claimant. *Richards v. Winter Park Recreational Association*, 919 P.2d 933 (Colo.App. 1996); *Harrison v. Dunmire Property Management, Inc.,* W.C. No. 4-676-410 (ICAO, April 9, 2008).

H. In this case, significant questions exist surrounding the reason Claimant was terminated and whether he was employed by Employer at the time he allegedly committed the volitional act (failure to submit for additional drug screening) which Respondents contend precipitated his termination. Based upon the evidence presented, the ALJ credits Claimant's testimony and the Employee Change Record to find/conclude that Claimant was probably terminated on January 18, 2021. Although Mr. G[Redacted] did not testify, Ms. H[Redacted] admitted that he would have spoken to Claimant about the accident. Given this and that fact that the Employee Change Record reflects that Claimant was terminated on January 18, 2021, the ALJ finds it reasonable to conclude that Mr. G[Redacted] called Claimant to inform him that the Company was letting him go because of the accident.

I. The ALJ agrees with Claimant that the testimony of Ms. H[Redacted] is incongruent with the balance of the more persuasive evidence. Contrary to Ms. H[Redacted]'s testimony, the Employee Change Record supports a conclusion that Claimant was fired on January 18, 2021, not February 1, 2021 as she contends. While the report may have been finalized on February 1, 2021, the Change Record reflects, unequivocally, that Claimant was terminated on January 18, 2021. Moreover, Ms. H[Redacted]'s email message to Ms. P[Redacted], also dated January 18, 2021, reflects that she had already determined that Claimant would be terminated for taking the truck off the road, which caused it to rollover resulting in total loss of the truck, trailer and load. In keeping with her email message to Ms. P[Redacted], Ms. H[Redacted] testified during cross examination that, barring unusual circumstances, taking a truck off the roadway would likely lead to termination. Consequently, the ALJ concludes that the evidence presented supports a reasonable inference that not only was Claimant fired on January 18, 2021, but also that he was terminated for rolling his truck and losing the load. Because the evidence supports that Claimant was terminated on January 18, 2021, for leaving the roadway resulting in complete loss of the truck, trailer and load, the ALJ finds/concludes that the second request for drug screening was of no consequence to his status as an employee since his termination had been effectuated several days before. *Bolatito Akigbogun v. People Ready*, W.C. No. 5-050-006-001 (ICAO, December 10, 2018). Accordingly, the ALJ rejects Respondents' contention that Claimant committed a volitional act or otherwise exercised a degree of control over the circumstances resulting in his termination by failing to present for repeat drug testing. Based upon the totality of the evidence presented, the ALJ concludes that Claimant is not responsible for the loss of his employment and is thus entitled to TTD benefits.

J. Based upon the evidence presented, the ALJ is convinced that Respondents are entitled to offset Claimant's TTD benefits by the amount of unemployment benefits received in accordance with C.R.S. § 8-42-103(1)(f).

ORDER

It is therefore ordered that:

1. Claimant has proven his entitlement to temporary total disability benefits beginning January 17, 2021.

2. Respondents have failed to establish, by a preponderance of the evidence, that Claimant is responsible for his termination and resulting wage loss with Employer. Consequently, Respondents shall pay Claimant TTD benefits beginning January 17, 2021 and ongoing until properly terminated by law.

3. Respondents are entitled to offset Claimant's TTD benefits in accordance with C.R.S. § 8-42-103(1)(f).

4. As stipulated, Claimant's average weekly wage is $1,275.56.

5. Insurer shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

6. All matters not determined herein are reserved for future determination

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 18, 2021

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-144-591-002

ISSUE

1. Whether the left shoulder, arthroscopic surgery, which authorized treating physician ("ATP"), Michael Hewitt, M.D. requested for Claimant, is reasonable, necessary and causally related to the admitted industrial injury.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant is a 46 year-old woman who works for Employer as a dental practice manager.

2. On October 29, 2019, Claimant suffered an admitted industrial injury when she lifted a desk to remove a piece of paper. Claimant testified that she bent over "all the way", lifted the desk with her left hand and pulled the paper out with her right hand. Claimant testified that she felt a "pop" in her left arm. In less than an hour, her whole left arm went numb and her left hand was tingling.

3. Claimant credibly testified that she had no left upper extremity symptoms, limitations or pain complaints, prior to the October 29, 2019 industrial injury.

4. Claimant had a previous workers' compensation claim involving her cervical spine in 2009. None of Claimant's symptoms in 2009 involved her left shoulder. (Exs. C-I).

5. On October 30, 2019, the day after her industrial injury, Claimant presented to the Employer's designated medical provider, Denver Health Occupational Health ("Denver Health") for an evaluation. She presented with persistent pain (5/10) in her left shoulder. Claimant had radicular symptoms down her left arm to her hand and fingers. She also had intermittent numbness/tingling in her fingers. (Ex J).

6. ATP, Annette Davis, N.P., diagnosed Claimant with a "left shoulder strain/trap, rhomboid and left UE." Ms. Davis gave Claimant the following work restrictions – no lifting over ten pounds and no overhead work. (Ex. J.).

7. Claimant returned to Denver Health on November 5, 2019, and ATP, Joan Mankowski, M.D., treated her. Claimant presented earlier than scheduled due to her left arm pain and tingling that became worse two days prior. The pain was constant on her posterior left shoulder down to her entire hand, worse with hand dependency and better with left shoulder flexion. Her pain ranged from 4/10 to 8/10. The tingling was constant from her elbow distally along the flexor aspect of her forearm including fingers 2-5. Dr. Mankowski referred Claimant for physical therapy, and had her continue with massage therapy. Dr. Mankowski noted that if Claimant did not improve and the paresthesia

continued, she would consider a referral for EMG/NCV. Claimant remained on modified duty. (Ex. K).

8. As part of her November 5, 2019 examination of Claimant, Dr. Mankowski administered a Hawkins test, which was positive. (Ex. K). Respondent's expert, William Ciccone, M.D., credibly testified that the Hawkins test is used to test for impingement syndrome. *See* also WRCP, Rule 17, Exhibit 4(9)(c)(ix). Dr. Ciccone is an orthopedic surgeon who regularly treats and operates on shoulders.

9. On November 11, 2019, Claimant returned to Denver Health for a follow-up appointment with Ms. Davis. Claimant felt much improved after her second massage therapy appointment, and her first physical therapy appointment that day. Ms. Davis had Claimant continue with physical therapy and massage therapy, and her same work restrictions. Ms. Davis deferred EMG testing since Claimant's radicular symptoms and pain were improving. (Ex. L).

10. Claimant did not return to Denver Health until January 3, 2020. Claimant explained she was doing well until three days prior when her left shoulder started hurting again for an unknown reason. The pain was constant and she rated it as 4/10. Claimant had left scapular pain radiating to her posterior elbow. She did not report any upper extremity sensory changes or paresthesia, so EMG testing was not indicated. Dr. Mankowski ordered modified duty, and had Claimant resume physical therapy. (Ex. N.)

11. Claimant saw Dr. Mankowski on May 5, 2020. Dr. Mankowski noted that Claimant had persistent pain since her injury in October 2019, and she had a "[p]ositive provocative test." Dr. Mankowski referred Claimant for an MRI to rule out a rotator cuff or labral injury. Claimant had no work restrictions. (Ex. Q.).

12. On June 4, 2020, Claimant had a left shoulder MRI without contrast. Eduardo Seda, M.D. read the MRI and his impression was: "Supraspinatus, infraspinatus and subscapularis tendinosis with possible subtle calcification suggesting calcific tendinitis versus impingement by the small acromial osteophyte**.** Correlation with x-ray appearance is recommended." (Ex. 15).

13. Dr. Mankowski met with Claimant on June 8, 2020 to review the MRI and explain there were no rotator cuff issues or labral tears. Dr. Mankowski referred Claimant to an orthopedic surgeon and had her continue with physical therapy. (Ex. 4 at pp 81-83).

14. On June 19, 2020, ATP, Michael S. Hewitt, M.D. of Orthopedic Consultants reviewed Claimant's MRI and evaluated her. Dr. Hewitt's impression was impingement syndrome of the left shoulder. The treatment options for clinical impingement were: observation, activity modification, NSAIDs, therapy, cortisone injection, and lastly shoulder arthroscopy. Claimant decided to proceed with the subacromial injection. (Ex. 7).

15. Respondent's expert, Dr. Ciccone, testified that he agreed with these treatment options. Dr. Ciccone and Dr. Hewitt are partners.

16. Claimant returned to see Dr. Hewitt on August 14, 2020. The subacromial injection administered on June 19, 2020, provided Claimant mild to moderate improvement for "several weeks," but her symptoms gradually returned. At this appointment with Dr. Hewitt, Claimant complained of pain with overhead reaching and intermittent night pain. (Ex. 7).

17. Dr. Ciccone testified that a sign of impingement syndrome is pain with overhead reaching.

18. Dr. Hewitt and Claimant discussed the treatment options again, and he explained that her final option was surgery. Dr. Hewitt had previously noted surgery as a treatment option. Claimant decided to proceed with a repeat subacromial injection before considering surgery. Dr. Hewitt agreed with this approach, and gave her another injection. He explained they could consider surgery later in the year if her symptoms failed to resolve. (Ex. 7).

19. Dr. Hewitt examined Claimant approximately four months later, on December 2, 2020. The subacromial injection he administered on August 14, 2020, gave her mild-to-moderate transient improvement in her symptoms, but it did not provide her long-term relief. Dr. Hewitt, who had been treating Claimant for clinical impingement of her left shoulder for six months, opined that surgery was medically reasonable and appropriate. He recommended arthroscopy of her left shoulder with subacromial decompression. Claimant agreed to proceed with surgery. (Ex. 7)

20. On December 10, 2020, Respondent timely denied Dr. Hewitt's request for surgery. (Ex. 7).

21. On December 7, 2020, Dr. Ciccone submitted a records review report. Dr. Ciccone concluded that Claimant did not injure the shoulder joint itself and that she does not suffer from impingement syndrome. He opined that none of the findings seen on Claimant's left shoulder MRI were causally related to the industrial event. Dr. Ciccone determined that that Claimant experienced an injury to the muscles that attach to the scapula. (Ex. W.)

22. Dr. Ciccone conducted an IME of Claimant, and submitted his report on April 14, 2021. In his IME report, Dr. Ciccone concluded that the presented symptoms were not likely associated with a shoulder injury, but rather an injury to the trapezius and scapula. Dr. Ciccone concluded that the arthroscopic surgery recommended by Dr. Hewitt would not benefit Claimant or alleviate her symptoms. (Ex. Z)

23. Dr. Ciccone testified that it was not medically probable that impingement syndrome resulted from the mechanism of injury that Claimant suffered in this case. He testified that these injuries are typically caused by overhead movement, and the movement as demonstrated by Claimant at the hearing, was unlikely to result in impingement syndrome.

24. The ALJ finds Dr. Ciccone's testimony to be credible, but unpersuasive. Multiple ATS, including Drs. Mankowski and Hewitt, were fully aware of the manner in which

Claimant was injured and they concluded her injury was causally related. The ALJ finds that Claimant's injury is causally related to her October 29, 2019 industrial injury.

25. In his IME report, Dr. Ciccone recommended that Claimant have a cervical MRI scan and a physiatry evaluation. (Ex. Z.).

26. ATP, Jennifer Pula M.D., referred Claimant for an MRI of her cervical spine. (Ex. 9). Dr. Ciccone testified that the MRI ruled out cervical radiculopathy. Claimant's cervical spine was not the cause of her pain.

27. Dr. Pula also referred Claimant for a physiatry work up. Samuel Chan, M.D., a physiatrist, treated Claimant on four different occasions: April 30, 2021, May 17, 2021, June 14, 2021, and July 7, 2021. At each of these appointments, Dr. Chan, in his objective findings regarding Claimant's bilateral shoulders noted that "impingement signs are negative bilaterally." He also noted each time under diagnosis: "impingement syndrome of left shoulder." Further, in his assessments and recommendations, Dr. Chan noted "[t]here could potentially be subacromial space impingement." (Ex 13).

28. Dr. Chan diagnosed Claimant with: 1) muscle spasm of back; 2) pain of left shoulder region; 3) biceps tendinitis of left shoulder; 4) impingement syndrome of left shoulder; 5) medial epicondylitis, left elbow, and 6) neuropathy of left suprascapular nerve. (Ex. 13).

29. Dr. Ciccone testified that he agrees with Dr. Chan's diagnosis of neuropathy of the left suprascapular nerve, and that this is significant because Dr. Chan is the first physician who appropriately diagnosed Claimant. While Dr. Ciccone's testimony is credible, the ALJ finds this argument unpersuasive in light of the inconsistencies in Dr. Chan's records.

30. Dr. Ciccone agrees with four of Dr. Chan's six diagnoses. He does not agree with Dr. Chan's diagnoses of impingement syndrome of the left shoulder and biceps tendinitis of left shoulder. Dr. Ciccone testified that Dr. Chan's diagnosis of impingement syndrome of the left shoulder is likely a carryover diagnosis because Dr. Chan's examination did not confirm findings consistent with impingement. The ALJ finds this testimony to be speculative and unpersuasive.

31. Dr. Ciccone further testified that he did not read Dr. Chan's medical reports generated in this claim as endorsing or recommending that Claimant proceed with shoulder surgery. The ALJ finds that Dr. Chan took no position with respect to the recommended shoulder surgery.

32. Claimant previously suffered from scapular neuritis caused by an April 28, 2009 work accident. Claimant underwent scapular blocks for treatment of her 2009 industrial injuries. (Ex. I) Dr. Ciccone testified that Claimant's October 29, 2019 industrial accident aggravated her pre-existing scapular neuritis.

33. Dr. Ciccone's testimony is credible but unpersuasive. In light of the findings of fact above, it is specifically found that the expert medical opinions of ATPs, Drs. Mankowski

and Hewitt, with respect to Claimant's diagnosis of shoulder impingement, are credible and persuasive.

34. The ALJ finds that Dr. Mankowski and Dr. Hewitt evaluated Claimant and diagnosed her with left shoulder impingement.

35. Arthroscopic Surgery is an operative procedure to treat impingement syndrome and other injuries to the rotator cuff. WCRP, Rule 17, Exhibit E(9)(g), at p. 96. The goal is to "restore functional anatomy by re-establishing continuity of the rotator cuff . . . and reducing the potential for repeated impingement." WCRP, Rule 17, Exhibit E(9)(a), at p. 95.

36. The ALJ finds that Claimant completed the conservative treatment modalities recommended by Drs. Hewitt Ciccone, but they did not relive her symptoms.

37. Claimant credibly testified that she still has pain in the front and posterior portion of her left shoulder, and numbness and tingling in her fingers on the left hand. Claimant understands the risks of surgery. The ALJ finds the testimony of Claimant credible and persuasive.

38. The ALJ finds that arthroscopy of Claimant's left shoulder with subacromial decompression is reasonable, necessary and related to her admitted industrial injury.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101*, et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Medical Treatment

A Respondent is liable for medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. §8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002); *Hobirk v. Colo. Springs School District #11,* WC 4-835-556-01 (ICAO, Nov. 15, 2012). For a service to be considered a "medical benefit" it must be provided as medical or nursing treatment or incidental to obtaining such treatment. *Country Squires Kennels v. Tarshis,* 899 P.2d 362 (Colo. App. 1995). A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Industrial Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., WC 4-517-537 (ICAO, May 31, 2006). The determination of whether services are medically necessary or incidental to obtaining such service, is a question of fact for the ALJ. *Bellone v. Industrial Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *see Taravella v. US Bancorp,* WC 4-797-901 (ICAO, July 15, 2020). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004).

When determining the issue of whether proposed medical treatment is reasonable and necessary, the ALJ may consider the provisions and treatment protocols of the Division's Medical Treatment Guidelines ("Guidelines"). The Guidelines are generally accepted as professional standards for medical care under the Act and are to be used by health care providers when working under the Act. *Hall v. Indus. Claim Appeals Office*, 74 P.3d 459 (Colo. App. 2003). Evidence of compliance or non-compliance with the treatment criteria of the Guidelines is not dispositive of the question of whether medical treatment is reasonable and necessary. Rather the ALJ may give evidence regarding compliance with the Guidelines such weight as she determines it is entitled to considering the totality of the evidence. *See Adame v. SSC Berthoud Operating Co., LLC*., WC 4-784-709 (ICAO January 25, 2012); *Thomas v. Four Corners Health Care*, WC 4-484-220

(ICAO April 27, 2009); *Stamey v. C2 Utility Contractors, Inc.*, WC 4-503-974 (ICAO August 21, 2008); Section 8-43-201(3), C.R.S.

No benefits flow to the victim of an industrial accident unless the accident causes a compensable injury. A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 426 P.2d 194 (1967). In order to prove causation, it is not necessary to establish that the industrial injury was the sole cause of the need for treatment. Rather, it is sufficient if the injury is a "significant" cause of the need for treatment in the sense that there is a direct relationship between the precipitating event and the need for treatment. Although a preexisting condition does not disqualify a claimant from receiving workers' compensation benefits, the claimant must prove a causal relationship between the injury and the medical treatment claimant is seeking. *Snyder v. Indus. Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997). Treatments for a condition not caused by employment are not compensable. *Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1189 (Colo. App. 2002).

Factual determinations related to this issue must be supported by substantial evidence in the record. §8-43-301(8), C.R.S. Substantial evidence is that quantum of probative evidence that a rational fact finder would accept as adequate to support a conclusion without regard to the existence of conflicting evidence. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 415 (Colo. App. 1995).

While the Claimant had a prior 2008 workers' compensation claim involving her cervical spine, there is no evidence it involved Claimant's left upper extremity. (Finding of Fact ¶ 4). Claimant was credible in her testimony that she did not have symptoms, limitations or restrictions in her left shoulder area leading up to the admitted industrial injury. (*Id*. at ¶ 3). In November 2019, ATP, Dr. Mankowski, diagnosed impingement syndrome with a positive Hawkins test. (*Id*. at ¶ 8). ATP, Dr. Hewitt, treated Claimant for six months and consistently opined that Claimant had a left shoulder impingement syndrome. (*Id*. at ¶ 19). Medical records and diagnoses from treatment thereafter all reference shoulder impingement syndrome.

Dr. Chan diagnosed Claimant with multiple conditions including impingement syndrome of left shoulder and neuropathy of left suprascapular nerve. (*Id*. at ¶ 28). While Dr. Chan's notes are inconsistent, Dr. Chan never opines that the requested surgery is not appropriate. (*Id*. at ¶ 31). Further, in his assessments and recommendations, Dr. Chan notes "[t]here could potentially be subacromial space impingement." (*Id*. at ¶ 27).

Dr. Ciccone reaches an opinion that is different than that of his partner, Dr. Hewitt. Different doctors can reach different opinions. Despite the discrepancies between Dr. Ciccone's opinion and that of the treating physicians, the ALJ is persuaded that the surgery recommended by Dr. Hewitt is reasonable, necessary and related.

The ALJ concludes Claimant proved by a preponderance of the evidence that the request for arthroscopy surgery of the left shoulder with subacromial decompression is reasonable, necessary and related to her admitted October 29, 2019 industrial injury.

ORDER

It is therefore ordered that:

1. Dr. Hewitt’s request for left shoulder, arthroscopic surgery is reasonable, necessary and related to Claimant’s work injury.

2. Respondent shall pay for the cost of the surgery recommended by Dr. Hewitt.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 19, 2021

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-112-931-003

ISSUE

1. Has Claimant overcome the Division Independent Medical Examination ("DIME") physician's opinion regarding MMI by clear and convincing evidence?

2. Has Claimant overcome the DIME physician's opinion regarding impairment by clear and convincing evidence?

3. Has Claimant proven by a preponderance of the evidence that he is entitled to disfigurement benefits?

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant sustained an admitted work injury on June 8, 2019.

2. On June 13, 2019, Brittany Blanchard, PA-C examined Claimant for his work injury. Ms. Blanchard's assessment was strain of muscle at thorax level and thoracic back pain. She recommended heat and OTC ibuprofen/Salon Pas. Ms. Blanchard released Claimant to full-duty work. He was to follow up in one week. (Ex. B).

3. On June 22, 2019, Claimant had an MRI, without contrast, of his thoracic spine. Forrest Lensing, M.D., read the MRI. Dr. Lensing's impression was: "Normal thoracic spine MRI. No fracture. No evidence of advanced degenerative disc disease, disc herniation or foraminal narrowing." (Ex. E).

4. On June 25, 2019, ATP, Julie Parsons, M.D. evaluated Claimant. He told Dr. Parsons his upper back felt numb. Claimant had not started massage therapy as ordered. Dr. Parsons instructed Claimant to continue with the Amcare first aid on site for heat, to use OTC pain medications and patches, and to start massage therapy. Claimant could continue to work full duty. He was to follow up in two weeks. (Ex. F).

5. On July 10, 2019, Nathan Adams, PA-C examined Claimant. In addition to his complaints regarding the upper thoracic spine and upper extremity weakness, Claimant reported that he began to have right-sided neck pain with limited range of motion on July 3, 2019. Mr. Adams's assessment was neck strain and strain of thoracic back region. He prescribed Claimant acetaminophen 325 mg, methylprednisolone 4 mg, and naproxen 375 mg, and referred Claimant for physical therapy. Mr. Adams ordered x-rays of the cervical and thoracic spine and dispensed a Hot/Cold pack. He assigned Claimant restrictions of working only eight hours a day and lifting no more than 10 pounds. (Ex. I).

6. On August 1, 2019, Scott Richardson, M.D., saw Claimant. In addition to back and neck symptoms, Claimant admitted to anxiety and feeling a bit depressed since the injury. Claimant declined medication for anxiety/depression. Dr. Richardson thought Claimant's psychological state was interfering with his healing. He referred Claimant to a psychologist and for chiropractic care. Dr. Richardson assigned Claimant work restrictions with respect to pushing/pulling (10 pounds) and lifting/carrying (15 pounds), but noted Claimant could work his entire 10-hour shift. (Ex. L).

7. Matthew Lugliani, M.D. examined Claimant on September 24, 2019. Claimant continued to complain of upper mid-back pain and occasional non-reproducible numbness and tingling and weakness involving both extremities. Dr. Lugliani referred Claimant for an EMG/NCS and a consultation with Nicholas K. Olsen, D.O., a qualified pain management specialist. Dr. Lugliani also referred Claimant for chiropractic treatment and acupuncture treatment. He placed a hold on physical therapy and massage therapy. Dr. Lugliani released Claimant to modified duty including a five-pound lifting restriction. Claimant was to follow up on October 15, 2019. (Ex. Q).

8. On September 26, 2019, Claimant presented to Craig Anderson, M.D., on a walk-in basis, reporting increased symptoms since returning to work and expressing concerns regarding his work restrictions. Dr. Anderson attempted to reassure Claimant that he did not demonstrate evidence of a serious underlying injury that would be exacerbated by performing the tasks that Dr. Lugliani had specified. He noted they could not make the work restrictions any stricter or Claimant would not have any work. He increased the visits to Amcare for pain management to five per shift, for the next two weeks. Claimant was to follow up with Dr. Lugliani on October 15, 2019. (Ex. R).

9. On October 3, 2019, Claimant went to Dr. Olsen for a physiatry consultation and consideration of an EMG/nerve conduction study. Dr. Olsen's assessment of Claimant was a cervicothoracic sprain/strain, status post-thoracic MRI on June 22, 2019 (normal study), and subjective complaints of right upper extremity weakness and numbness. Dr. Olsen noted there was no indication on the MRI that Claimant had a pinched nerve. Dr. Olsen did a manipulation of Claimant's thoracic spine and recommended Claimant follow through with the EMG study. (Ex. S).

10. On October 21, 2019, Dr. Olsen performed the EMG/NCS. His impression was: "normal examination. There is no electrodiagnostic evidence of peripheral nerve entrapment, plexopathy, or cervical radiculopathy." (Ex. U).

11. On November 19, 2019, Dr. Lugliani determined Claimant had reached maximum medical improvement ("MMI") with no permanent impairment, as there was no specific diagnosis. He noted Claimant had been noncompliant with the treatment plan and had not been seen in two months. He recommended six additional sessions of chiropractic treatment and massage therapy as maintenance. Dr. Lugliani stated Claimant was safe to return to full-duty work with no restrictions. (Ex. W).

12. On April 20, 2020, Claimant was seen by John Sacha, M.D. for a DIME. Dr. Sacha's clinical diagnosis was thoracic strain versus thoracic displaced disc with ongoing symptoms. He agreed Claimant reached MMI on November 19, 2019, as he had plateaued in care and no other surgical or interventional procedures were indicated. He rated Claimant's permanent impairment at 4% of the whole person, combining 2% per Table 53 of the *American Medical Association's Guides to the Evaluation of Permanent Impairment* ("AMA Guides"), Third Edition (revised), and 2% for range of motion. The only area he believed was appropriate for impairment was the thoracic spine. He agreed Claimant could return to full-duty work. Dr. Sacha recommended maintenance care. (Ex. X).

13. On June 3, 2020, a Final Admission of Liability was filed consistent with Dr. Sacha's DIME report, including admitting liability for maintenance care after MMI. (Ex. Y).

14. Claimant presented for a Respondents' IME with Carlos Cebrian, M.D. on September 3, 2020. Dr. Cebrian's assessment was thoracic spine strain. He noted Claimant's normal thoracic MRI on June 22, 2019, and his normal right upper extremity EMG on October 21, 2019. He agreed Claimant was appropriately placed at MMI on November 19, 2019, and he agreed with Dr. Sacha's impairment rating of 4% of the whole person. He opined that "no maintenance care is medically reasonable, necessary or related," and Claimant needed to engage in a self-directed home exercise program. (Ex. A).

15. At the hearing, Claimant testified he sometimes has a bruise to the left of his upper spine. He believes this occurred after the manipulation by Dr. Olsen on October 3, 2019. Claimant testified that his wife recently noticed the bruise, and it is more visible after a hot shower.

16. Dr. Cebrian credibly testified that when he examined Claimant, he did not see any kind of bruising, redness, or swelling of his thoracic spine.

17. At the hearing, the ALJ asked Claimant to show her the bruising he referred to. The ALJ was not able to see any bruising.

18. Claimant testified his condition worsened after Dr. Olsen's manipulation of his thoracic spine.

19. Dr. Cebrian testified that the medical records do not report any worsening of Claimant's pain complaints as a result of Dr. Olsen's manipulation. He pointed out that when Claimant was seen by Dr. Anderson before his appointment with Dr. Olsen, he had 8/10 pain complaints. When he was seen by Dr. Lugliani after his appointment with Dr. Olsen, he had 5/10 pain complaints**.**

20. Dr. Cebrian reviewed Dr. Sacha's DIME report and testified he did not perceive any errors in Dr. Sacha's report. He noted Dr. Sacha reviewed the medical records, took a detailed history from Claimant, and documented the information. Dr. Cebrian credibly

testified that Dr. Sacha did not make any errors in coming up with the MMI date or in determining that Claimant's complaints warranted a permanent impairment rating.

21. The ALJ finds that Claimant did not overcome Dr. Sacha's opinions on MMI and impairment by clear and convincing evidence.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceedings is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved. The ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

DIME Physician's MMI and Impairment Findings

The party seeking to overcome the DIME physician's finding regarding permanent impairment bears the burden of proof by clear and convincing evidence. *Id.* Clear and convincing evidence is evidence that demonstrates that it is highly probable the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge,* WC 4-914-378-02 (ICAO, June 25, 2015). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., WC 4-476-254 (ICAP, Oct. 4, 2001).

In this case, the DIME physician, Dr. Sacha, determined that Claimant reached MMI on November 19, 2019. (Finding of Fact ¶ 12). This finding was consistent with that of the ATP, Dr. Lugliani, and with Respondents' IME physician, Dr. Cebrian. (*Id.* at ¶¶ 11 and 14). Dr. Sacha explained how he rated Claimant's permanent impairment at 4% of the whole person, per the *AMA Guides*, and Dr. Cebrian agreed that Dr. Sacha's rating was correct using the *AMA Guides*. That opinion must be overcome by clear and convincing evidence.

Claimant presented no medical evidence to challenge Dr. Sacha's findings. Similarly, Claimant presented no credible evidence demonstrating that Dr. Sacha's date of MMI or his impairment rating was in error. Claimant did not introduce sufficient evidence to meet his burden of proof to overcome Dr. Sachas' findings regarding MMI and impairment.

Disfigurement

Section 8-42-108(1) of the Colorado Revised Statutes provides for additional compensation if a claimant is seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view. The basis for Claimant's claim of disfigurement is a bruise he alleges he has, some of the time, to the left of his upper spine. The ALJ was not able to see any bruising on Claimant's back. Claimant submitted pictures of the "bruising". A bruise, however, is not a permanent disfigurement as defined in § 8-42-108(1), C.R.S.

ORDER

It is therefore ordered that:

1. Claimant has failed to prove by clear and convincing evidence that the DIME physician's finding of MMI is incorrect.

2. Claimant has failed to prove by clear and convincing evidence that the DIME physician's impairment rating is incorrect.

3. Claimant has failed to prove by a preponderance of the evidence that he is entitled to disfigurement benefits.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: 10/20/2021

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-108-794-001

ISSUE

1. Whether Claimant proved by a preponderance of the evidence that a right knee arthroscopy requested by authorized treating physician Dr. Hartman is reasonable, necessary, and causally related to his admitted industrial injury of May 15, 2019.

FINDINGS OF FACT

1. Claimant is a 34-year-old man who was employed by Employer as a truck driver. Claimant sustained an admitted injury to his right knee, and other body parts, in a work-related motor vehicle accident on May 15, 2019. (Ex. 1). The motor vehicle accident occurred while Claimant was driving a delivery truck and a semi-truck turned in front of him.

2. On May 15, 2019, Claimant was seen at the UC Health emergency room where he complained of neck and knee pain. A right knee x-ray showed normal alignment of the right knee, with no fracture or dislocation, mild degenerative changes along the medial compartment, prepatellar soft tissue swelling and no significant joint effusion. Claimant reported that his right knee was pinned between the dashboard and center console of the truck in the accident. (Ex. 4).

3. On May 30, 2019, Claimant began treatment at Workwell, and was later referred for a right knee MRI which was performed on July 2, 2019. The MRI showed superior surface partial tearing of the anterior root attachment of the medial meniscus with an adjacent lobular cystic structure that may represent a parameniscal cyst. The radiologist also noted "moderate edema seen within the superior-lateral aspect of Hoffa's fat pad which can be seen with an underlying patellofemoral tracking abnormality or Hoffa's diseases less likely." (Ex. 12)

4. On July 11, 2019, physician assistant Amber Payne, PA-C, reviewed Claimant's MRI and noted that Claimant was experiencing patellofemoral symptoms. Claimant was referred to Joshua Snyder, M.D., for an orthopedic evaluation. (Ex. 5).

5. Claimant saw Dr. Snyder and physician assistant Elizabeth Metz, PA-C, on August 6, 2020, reporting that his right knee struck the dashboard of his truck in the accident. Claimant reported ongoing right knee pain in the medial and anterior aspects of the knee. Claimant noted his pain was worse with walking and he was experiencing some catching and locking. Claimant reported undergoing physical therapy through Workwell twice per week, without much improvement, and that he had been wearing a patellar stabilizer which he felt was helpful. On examination, Dr. Snyder noted tenderness to palpation in the medial joint line, tenderness along the medial and lateral patellofemoral joint with positive patellar grind, but overall good stability of the knee. He diagnosed Claimant with

right knee pain with evidence of medial meniscal tear with parameniscal cyst and patellofemoral cartilage damage. Noting that Claimant had failed conservative therapy, he recommended a right knee arthroscopy with partial medial meniscectomy, removal of parameniscal cyst, and chondroplasty of the patella and lateral femoral condyle. (Ex. 6).

6. On November 6, 2019, Dr. Snyder performed surgery on Claimant's right knee. Dr. Snyder's pre- and post-operative diagnoses were right knee medial meniscal tear, chondromalacia patella, and maltracking patella. The procedures performed included right knee arthroscopy, partial medial meniscectomy, and patellar chondroplasty. (Ex. 6).

7. Following surgery, Claimant received physical therapy and by January 14, 2020, Claimant reported that his right knee was "back to normal." Between February 3, 2020, and May 14, 2020, Claimant was seen at Workwell approximately five times. During these visits, Claimant did not report any additional symptoms in his right knee and no examination of his knee was documented at these visits. (Ex. 5). At a physical therapy visit on January 9, 2020, Claimant reported 100% improvement of his right knee. (Ex. 10).

8. On June 11, 2020, Claimant saw Robert Watson, M.D. at Workwell. Dr. Watson performed an examination of Claimant's knee and noted that Claimant had slightly reduced motion with flexion and crepitation on motion. Dr. Watson also noted that Claimant's right knee had "essentially healed and is unlikely that further treatment is needed." The June 11, 2020 appointment was Claimant's only documented visit with Dr. Watson. (Ex. 5).

9. On July 13, 2020, Claimant saw Eric Shoemaker, D.O., for back issues, and reported that he had "some knee pain at times though this is mild and tolerable." (Ex. 8).

10. Over the next several months, Claimant had telemedicine visits with providers at Workwell. At his August 10, 2020 visit, Claimant reported that he was having issues with his right knee again and requested to see Dr. Snyder. (ex. 5).

11. On August 20, 2020, Claimant saw Dr. Snyder, reporting he had experienced increasing pain in his knee over the past couple of months, mostly around his kneecap. Claimant reported pain with squatting and pending, and swelling. On examination, Dr. Snyder noted Claimant walked with an antalgic gait, had no swelling present, and tenderness to palpation along the patellofemoral joint with significant crepitus. He also noted lateral translation of the patella. X-rays were performed of both knees. Dr. Snyder found Claimant had significant patellar tilt and joint space narrowing that was fairly symmetric on both knees. His impression was right knee patellofemoral symptoms and maltracking. He recommended Claimant follow up with Ryan Hartman, M.D. (Ex. 6).

12. Claimant saw Dr. Hartman on October 1, 2020. Claimant reported increased right knee pain/symptoms over the previous six months. Dr. Hartman opined that Claimant had significant underlying patellofemoral arthritic changes, "which were likely preexisting and aggravated by his work injury event." Claimant denied any pre-injury knee symptoms and noted that he had gained significant weight since his work-injury. On examination, Dr. Hartman noted mild to moderate retropatellar crepitus, trace effusion, patellar mobility

with 30% lateral subluxation, 15mm medial translation, and slight decrease in tilt with patellofemoral joint compression and grinding. Based on his review of imaging studies and examination, Dr. Hartman diagnosed Claimant with aggravation of patella femoral arthritis with patellar maltracking, tight lateral retinaculum, and "significant lateral facet patellofemoral arthritis aggravated with work injury." Dr. Hartman recommended Claimant undergo a Synvisc injection and consider a patellar realignment procedure If that intervention failed. Dr. Hartman noted Claimant does have a component of lateral patellar compression syndrome and that a patella realignment anterior medialization would have a reasonable chance of improving his symptoms. (Ex. 6)

13. On October 26, 2020, Claimant underwent a Synvisc injection with Dr. Hartman, which Claimant later reported afforded him approximately three months of relief. (Ex. 6).

14. On March 22, 2021, Dr. Hartman noted that Claimant had undergone conservative treatment with short-lived benefit, and recommended right knee arthroscopy, patellar chondroplasty, lateral retinacular release and open tibial tubercle osteotomy to realign the patella to offload the lateral facet." He opined that because Claimant has well-preserved cartilage medially, there is at least a 70% chance this will improve his symptoms and slow the progression of osteoarthritis. On March 23, 2021, Dr. Hartman submitted a surgery authorization request to Insurer. (Ex. 6).

15. On August 16, 2021, Dr. Hartman issued a letter explaining his rationale for recommending additional surgery to Claimant's right knee. In that letter, Dr. Hartman stated:

> The patient has underlying right knee patellofemoral arthritis, which I believe was aggravated with his work injury. He had a borderline elevated TT-TG distance which affects patellar tracking and adds increased pressure on the lateral aspect of his patella likely aggravating his knee pain. I felt there was a 70% chance his knee would improve with the surgical procedure to release his tight lateral retinaculum and transfer his tubercle which would put his patella in better alignment and potentially decrease his pain.

16. In the same letter, Dr. Hartman indicated that Claimant's knee issues were unrelated to his meniscus surgery. He indicated the patellar chondroplasty performed by Dr. Snyder "alone did not alleviate enough of his pain and did not address any of the patellar malalignment issues." He also indicated that while "the underlying patellofemoral arthritis was likely preexisting … when I saw the patient, he reported to me that he had no significant problems with his knee prior to his work injury; thus, I believe he had work related aggravation of a preexisting condition." (Ex. 6).

17. Dr. Hartman explained that the "proposed surgery would attempt to realign the patella to offload the more arthritic areas of the patella and thus has I believe more potential to improve his symptoms and decrease his pain. I do not think he will be pain free after the proposed patellar realignment procedure, but likely will be improved." (Ex. 6).

18. On July 14, 2021, Claimant attended an independent medical examination (IME) performed at Respondents' request with Jon Erickson, M.D. Dr. Erickson was admitted as an expert in orthopedic surgery. Dr. Erickson also performed a "physician advisor review" for Insurer on March 26, 2021, in which he opined that Claimant's right knee pathology as revealed on his MRI was "likely pre-existing, with no evidence of any acute trauma. If there were acute trauma present, it would have been surgically addressed by Dr. Snyder." He also opined that Claimant's "current symptoms are related to his worsening pre-existing condition." Dr. Erickson also expressed these opinions in his July 14, 2021 report. (Ex. E).

19. At hearing, Dr. Erickson testified that Claimant's lack of cartilage and patellar tracking and tilting issues were present prior to his injury. He testified that there are no acute findings in the anatomical areas of Claimant's knee where Dr. Hartman is proposing surgery. He testified that Claimant's knees could become symptomatic without trauma gradually over time. Dr. Erickson opined that as it relates to his work injury, Claimant's right knee issues resolved in January 2020, and when the Claimant got to the point where his knee was "normal" the "problem was solved.

20. Dr. Erickson does not agree with Dr. Hartman that Claimant's work-injury aggravated a pre-existing condition. Dr. Erickson stated in his report that "[f]or aggravation or worsening of a pre-existing condition, there must be radiographic evidence of acute trauma." He also testified that he cannot answer whether Claimant's injury accelerated his arthritis, and that a patient can go years before developing symptoms.

21. Dr. Erickson also testified that he does not agree with Dr. Hartman's assessment that the proposed surgery will likely improve Claimant's pain. He testified that he does not believe the surgery will be successful and will likely fail.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

AUTHORIZATION OF SURGERY

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. § 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO May 31, 2006).

The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002); *Hobirk v. Colorado Springs School Dist. #11,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). The existence of evidence which, if credited, might permit a contrary result affords no basis for relief on appeal. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School Dist. No.11*, W.C. No. 3-979-487, (ICAO Jan. 11, 2012); *Ford v. Regional Trans. Dist.,* W.C. No. 4-309-217 (ICAO Feb. 12, 2009).

A compensable aggravation can take the form of a worsened preexisting condition, a trigger of symptoms from a dormant condition, an acceleration of the natural course of the preexisting condition or a combination with the condition to produce disability. The compensability of an aggravation turns on whether work activities worsened the preexisting condition or demonstrate the natural progression of the preexisting condition. *Bryant v. Mesa County Valley School Dist. #51*, W.C. No. 5-102-109-001 (ICAO Mar. 18, 2020). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v.*

Streeb, 706 P.2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The issue before the court is whether the surgery requested by Dr. Hartman is reasonably necessary to cure or relieve the effects of Claimant's work injury. Ultimately, the resolution to the issue turns on two questions. First, whether Claimant's knee pain that developed in summer 2020 was causally related to his May 15, 2019 work injury. Second, if Claimant's knee pain is causally related, whether the surgery is reasonably necessary to cure or relieve the effects of that injury.

Dr. Hartman has opined that Claimant's work injury resulted in an aggravation of Claimant's pre-existing patellar arthritis. On the other hand, Dr. Erickson has opined that Claimant's right knee symptoms developed as the result of his pre-existing condition, and that the Claimant's work injury did not cause his current symptoms. Of the two opinions, the ALJ finds Dr. Hartman's opinion more probable than Dr. Erickson's opinion.

The essence of Dr. Erickson's opinion is that the Claimant's right knee symptoms spontaneously developed approximately seven to eight months after his initial surgery. As both Dr. Erickson and Dr. Snyder indicated, Claimant has similar underlying, pre-existing pathology in both knees. The primary difference between Claimant's knees is that his right knee was damaged in his work accident and subsequently surgically repaired due to that injury. Thus, the right knee is now anatomically different than his left knee. No evidence was admitted that Claimant sustained any traumatic injury to his right knee after his work injury. Respondents, however, point to Claimant's participation in activities, such as turkey hunting and gardening, as a potential cause of Claimant's symptoms. If, as Respondents argue, Claimant's symptoms were caused by his outside activities, independent of his work injury, one would expect that Claimant's left knee would also become symptomatic. The ALJ finds it more probable than not that Claimant's right knee symptoms are related to his injured and surgically repaired right knee than a spontaneous emergence of unrelated symptoms.

With respect to the potential efficacy of the surgery, Dr. Hartman opined that while the proposed surgery would not likely eliminate Claimant's pain, it would likely result in a reduction of Claimant's pain, which Dr. Hartman opined was caused by a work-related aggravation of his underlying arthritis. The ALJ infers from Dr. Hartman's opinions that while the surgery will address the preexisting maltracking, the ultimate purpose of the surgery is to relieve the pain caused by the work-related aggravation of Claimant's pre-existing condition. Dr. Erickson opined that the surgery would likely fail. Again, on balance, the ALJ finds Dr. Hartman's opinion to be more credible.

The ALJ concludes that the evidence indicates it is more likely than not that the surgery recommended by Dr. Hartman is reasonably necessary to cure or relieve the effects of Claimant's work injury.

ORDER

It is therefore ordered that:

1. The right knee arthroscopy recommended by Dr. Hartman is reasonably necessary to cure or relieve the effects of Claimant's May 15, 2019 injury.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 21, 2021

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable right wrist injury during the course and scope of his employment with Employer on February 7, 2021.

2. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Partial Disability (TPD) benefits for the period February 7, 2021 until terminated by statute.

3. Whether Claimant has established by a preponderance of the evidence that the right wrist surgery recommended by Authorized Treating Physician (ATP) Morry A. Olenick, M.D. is reasonable, necessary and causally related to his February 7, 2021 industrial injury.

STIPULATION

The parties agreed that Claimant earned an Average Weekly Wage (AWW), including concurrent employment, of $1,452.18.

FINDINGS OF FACT

1. Prior to February 7, 2021 Claimant worked for two employers. Claimant primarily worked as an Accountant for One TouchPoint. Claimant also worked a second job as a Customer Service Representative for Employer. His job duties involved returning merchandise from the service desk to the receiving area.

2. On February 7, 2021 Claimant was pushing a cart filled with a 60-inch television, a television stand and other heavy items while performing his job duties for Employer. Because the cart was overloaded and top heavy, it began tipping over. Claimant remarked that, because the service area was crowded with tax preparers and customers, he forcefully grasped the handles of the cart in an attempt to keep it from falling and potentially causing injury. He grasped the cart for at least a minute, "holding on as tight as [he] could," before the cart fell. Claimant explained that while attempting to stop the cart from falling he twisted his right wrist. He immediately experienced shooting pain down his wrist.

3. Employer's security video captured the February 7, 2021 incident. Claimant appeared on the video at approximately 2:29:23 p.m. The video depicts three associates behind the service desk and two customers in front of the desk. At 2:29:36 p.m. Claimant walked from behind the service desk to a cart loaded with merchandise. At 2:30:05 p.m. he began to push the loaded cart and at 2:30:08 p.m. the cart started to fall. Claimant immediately released the cart and threw his arms up and to his sides.

4. Claimant testified that prior to February 7, 2021 he had no limitations or symptoms in his right wrist. However, he previously suffered a right wrist fracture in 1972 while playing goalie for his high school soccer team.

5. The record reflects that Claimant had a previously unhealed right wrist fracture. On April 28, 2019 Claimant presented to the North Suburban Medical Center for treatment of a right index finger fracture. He underwent x-rays of the right hand and wrist in connection with the finger fracture. The wrist x-ray showed evidence of an unhealed scaphoid fracture and possible avascular necrosis. In discussing the x-ray findings Claimant noted that he suffered a wrist injury in high school that he believed never healed properly. Claimant commented that he thought, “he may [have] reinjured it sometime last summer.” The provider “discussed the importance of having a follow-up with this injury.”

6. On May 10, 2019 Claimant sought treatment from Morry A. Olenick, M.D. to repair his finger fracture. Dr. Olenick documented limited right wrist motion with SLAC wrist deformity, minimally displaced distal phalangeal fracture and nonarticular right index.

7. On June 7, 2019 Dr. Olenick again evaluated Claimant. On physical examination, Dr. Olenick documented that Claimant’s right wrist navicular was tender. Moreover, a Watson maneuver, which tests for scapholunate problems, was uncomfortable. Dr. Olenick recommended further work-up, including an MRI, for Claimant’s SLAC wrist deformity. He referred Claimant for right wrist x-rays for “injury with pain.”

8. On July 9, 2019 Claimant underwent right wrist x-rays. In connection with the x-rays, Claimant completed an intake questionnaire. Claimant noted he slammed his right index finger in the door in May. He also remarked, “previous right wrist fractures—pain.” Claimant specifically documented “chronic” right wrist pain for “years.” The right wrist x-rays revealed advanced osteoarthritis consistent with SLAC wrist.

9. On February 7, 2021 Respondents filed an Employer’s First Report of Injury. The Report specified that Claimant had injured his “hands” while “turning a full cart of return merchandise to take to claims” on February 7, 2021 at approximately 2:40 p.m.

10. Respondents subsequently filed a Notice of Contest denying that Claimant’s injury was work-related. Nevertheless, Claimant continued to receive treatment with the designated providers at Concentra Medical Centers.

11. On February 11, 2021 Claimant visited Concentra for an examination. Claimant reported two different descriptions of the February 7, 2021 mechanism of injury. He stated the first account was inaccurate but the second report was correct. In the latter description Claimant recounted that he was pushing an over-stuffed cart to receiving when it started to tip over. He tried to catch the cart but it fell over and he forcefully grasped the handle with his right hand. Claimant reported pain in the right wrist area, thumb and index finger. Nathan Adams PA-C diagnosed Claimant with a strain of the right hand that was consistent with a history of a “work-related mechanism of injury/illness.”

PA-C Adams assigned temporary work restrictions of no lifting in excess of one pound and referred Claimant to Authorized Treating Physician (ATP) Dr. Olenick.

12. Claimant testified that upon returning to work with Employer he discussed work restrictions with his supervisor. The supervisor advised Claimant that he would no longer be able to work overtime as a customer service representative because of the temporary work restrictions.

13. On February 16, 2021 Claimant returned to Concentra and was evaluated by Rosemary Greenslade, M.D. She concurred with PA-C Adams' diagnosis of a right-hand strain. Dr. Greenslade also agreed that Claimant's history was consistent with a work-related injury and maintained Claimant on a one-pound lifting restriction.

14. While Claimant was receiving treatment at Concentra he also underwent seven physical therapy visits. In the initial physical therapy note of February 12, 2021 Claimant reported "some chronic wrist pain to affected area with functional deficits." Notably, physical therapy did not relieve Claimant's right wrist symptoms.

15. On February 17, 2021 Claimant visited ATP Dr. Olenick for an examination. Dr. Olenick determined that on February 7, 2021 Claimant had suffered a "right wrist sprain, superimposed on previous SLAC wrist deformity, status post right carpal tunnel decompression."

16. On April 7, 2021 Claimant returned to ATP Dr. Olenick for an examination. Dr. Olenick recommended consideration of a cortisone injection and right wrist reconstruction. Dr. Olenick specifically requested surgery in the form of a "four-bone arthrodesis of the right-wrist with excision scaphoid." On May 7, 2021 Insurer denied Dr. Olenick's surgical request.

17. On May 18, 2021 Claimant returned to PA-C Adams for an evaluation. PA-C Adams noted that Insurer had denied the surgery requested by Dr. Olenick. Claimant had not yet tried steroid injections, but sought to pursue the procedure. He reiterated that he had no pain or functional deficits following his right wrist fracture in 1972. PA-C Adams commented that Claimant understood the concept of post traumatic arthritis and was frustrated that "his work related trauma exacerbated his underlying arthritis**.**" Claimant mentioned great difficulty with activities of daily living and was dependent on a wrist brace.

18. On June 9, 2021 Claimant underwent right wrist x-rays. The x-rays revealed a tiny bony density in the ulnar aspect of the right wrist that "could represent a tiny avulsion fragment or degenerative mineralization."

19. On August 17, 2021 Claimant underwent an independent medical examination with Sean Griggs, M.D. He conducted a physical examination and reviewed Claimant's medical records. Dr. Griggs issued a report and testified at the hearing in this matter.

20. Claimant reported to Dr. Griggs that he injured his right wrist while pushing a cart filled with returned items. In the process of grabbing the cart to prevent it from

tipping, Claimant twisted his right wrist. Claimant denied any history of right wrist pain or limitations prior to February 7, 2021 other than the 1972 right wrist fracture. Based on his review of the medical records and evaluation, Dr. Griggs diagnosed Claimant with a right wrist sprain with pre-existent severe scaphoid nonunion advanced collapse arthritis. Dr. Griggs initially determined that "the injury as described would lead to a sprain of the wrist but would not cause the severe arthritis that the patient has."

21. Dr. Griggs did not view the store security video of the February 7, 2021 incident prior to drafting his report. However, he had the opportunity to view the video at the time of hearing. Dr. Griggs determined that Claimant's description of the February 7, 2021 incident was inconsistent with the depiction on the security video. He concluded that the February 7, 2021 incident was minor because Claimant did not appear to hold onto the cart to prevent it from falling.

22. Dr. Griggs explained that Claimant's need for a four-corner fusion was not related to the February 7, 2021 event but was caused by chronic, severe scapholunate nonunion advanced collapse arthritis. He remarked that the natural history of scaphoid nonunion advanced collapse arthritis is that it will become symptomatic and painful over time. Dr. Griggs reasoned that Claimant would have required the requested surgery even in the absence of the February 7, 2021 incident.

23. At the time of the hearing in this matter Claimant remained under temporary work restrictions of wearing a right hand wrist splint and no lifting, pushing or pulling in excess of two pounds with the right hand. Medical records reveal that a date for MMI was uncertain "because surgery pending approval."

24. Claimant has demonstrated that it is more probably true than not that he suffered a compensable right wrist injury during the course and scope of his employment with Employer on February 7, 2021. Initially, Claimant explained that on February 7, 2021 he was pushing a cart filled with numerous heavy items while performing his job duties for Employer. Because the cart was overloaded and top heavy, it began to tip. Claimant grasped the handles of the cart in an attempt to keep it from falling, but twisted his right wrist. Store surveillance video reflects that Claimant immediately released the cart and threw his arms up and to his sides. He then experienced shooting pain down his right wrist.

25. On February 11, 2021 PA-C Adams at Concentra diagnosed Claimant with a strain of the right hand that was consistent with a history of a "work-related mechanism of injury/illness." PA-C Adams assigned temporary work restrictions of no lifting in excess of one pound and referred Claimant to ATP Dr. Olenick. On February 16, 2021 Dr. Greenslade at Concentra concurred with PA-C Adams' diagnosis of a right-hand strain. Dr. Greenslade also agreed that Claimant's history was consistent with a work-related injury and maintained Claimant on a one-pound lifting restriction.

26. The record reflects that Claimant had a previously unhealed right wrist fracture. Claimant acknowledged that he suffered a right wrist fracture in 1972 while playing goalie for his high school soccer team. On April 28, 2019, while receiving medical

treatment for his index finger, a right wrist x-ray showed evidence of an unhealed scaphoid fracture and possible avascular necrosis. On May 10, 2019 Dr. Olenick documented limited right wrist motion with SLAC wrist deformity, minimally displaced distal phalangeal fracture and nonarticular right index. Right wrist x-rays on July 9, 2019 revealed advanced osteoarthritis consistent with SLAC wrist.

27. After conducting a physical examination and reviewing Claimant's medical records, Dr. Griggs diagnosed Claimant with a right wrist sprain with pre-existing severe scaphoid nonunion advanced collapse arthritis. He initially determined that "the injury as described would lead to a sprain of the wrist but would not cause the severe arthritis that the patient has." After reviewing store surveillance video Dr. Griggs concluded that the February 7, 2021 incident was minor because Claimant did not appear to hold onto the cart to prevent it from falling.

28. Despite Dr. Griggs' opinion, the record reflects that Claimant's work activities on February 7, 2021 aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. Claimant explained that, while he was pushing an overloaded court that began to tip he attempted to stop it from falling but immediately suffered shooting pain down his right wrist. Video surveillance reveals that Claimant was pushing a loaded cart that tipped over. Respondents' First Report of Injury, the medical records and the testimony contain slight variations in the precise mechanism of injury to Claimant's right-wrist. Nevertheless, Claimant has consistently maintained that, as he attempted to prevent the cart from tipping, he twisted his right wrist. Finally, while undergoing treatment for a non-work-related right finger injury in 2019 with Dr. Olenick, right wrist x-rays revealed advanced osteoarthritis consistent with SLAC wrist. Dr. Olenick did not recommend right wrist surgery at the time, but requested right wrist surgery subsequent to the February 7, 2021 work incident. The record thus reflects that, although Claimant suffered from a pre-existing right wrist condition, the February 7, 2021 incident caused the need for medical care and work restrictions. Claimant's work activities on February 7, 2021 thus aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment.

29. Claimant has proven that it is more probably true than not that he is entitled to receive Temporary Partial Disability (TPD) benefits for the period February 7, 2021 until terminated by statute. On February 11, 2021 PA-C Adams diagnosed Claimant with a strain of the right hand and assigned temporary work restrictions of no lifting in excess of one pound. On February 16, 2021 Dr. Greenslade maintained Claimant on a one-pound lifting restriction. Claimant credibly explained that, because of his temporary work restrictions, he has suffered decreased earnings since February 7, 2021. Claimant detailed that upon returning to work with Employer he discussed restrictions with his supervisor. The supervisor advised Claimant that he would no longer be able to work overtime as a customer service representative because of the temporary work restrictions. At the time of the hearing in this matter Claimant remained under temporary work restrictions of wearing a right hand wrist splint and no lifting, pushing or pulling in excess of two pounds with the right hand. Medical records reveal that a date for MMI was uncertain "because surgery pending approval."

30. The record thus reveals that Claimant's February 7, 2021 work injuries decreased his ability to earn wages. He was specifically unable to work overtime because of his work restrictions. Accordingly, Claimant is entitled to receive Temporary Partial Disability (TPD) benefits for the period February 7, 2021 until terminated by statute.

31. Claimant has established that it is more probably true than not that the right wrist surgery recommended by ATP Dr. Olenick is reasonable, necessary and causally related to his February 7, 2021 industrial injury. Initially, on April 7, 2021 ATP Dr. Olenick recommended consideration of a cortisone injection and right wrist reconstruction for Claimant's February 7, 2021 industrial injury. Dr. Olenick specifically requested surgery in the form of a "four-bone arthrodesis of the right-wrist with excision scaphoid." On May 7, 2021 Insurer denied Dr. Olenick's surgical request.

32. Dr. Griggs explained that Claimant's need for a four-corner fusion was not related to the February 7, 2021 event but was caused by chronic, severe scapholunate nonunion advanced collapse arthritis. He remarked that the natural history of scaphoid nonunion advanced collapse arthritis is that it will become symptomatic and painful over time. Dr. Griggs reasoned that Claimant would have required the requested surgery even in the absence of the February 7, 2021 incident. His opinion reflects that Dr. Olenick's surgical request was reasonable and necessary, but not related to the February 7, 2021 work incident.

33. Despite Dr. Griggs' opinion, the record reveals that the February 7, 2021 work accident precipitated Claimant's need for right wrist surgery as recommended by Dr. Olenick. Notably, Dr. Olenick determined that on February 7, 2021 Claimant had suffered a "right wrist sprain, superimposed on previous SLAC wrist deformity, status post right carpal tunnel decompression." Although Claimant's industrial injury may not have been the sole cause of his disability it was a significant, direct, and consequential factor in his need for right wrist surgery. Claimant's employment thus aggravated, accelerated, or combined with his pre-existing condition to produce a need for surgical intervention. Accordingly, ATP Dr. Olenick's request for surgery in the form of a "four-bone arthrodesis of the right-wrist with excision scaphoid" is reasonable, necessary and causally related to Claimant's February 7, 2021 work incident.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.,* W.C. No. 4-650-711 (ICAO, Feb. 15, 2007); *David Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. The provision of medical care based on a claimant's report of symptoms does not establish an injury but only demonstrates that the claimant claimed an injury. *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020). Moreover, a referral for medical care may be made so that the respondent would not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id.* Although a physician provides diagnostic testing, treatment, and work restrictions based on a claimant's reported symptoms. It does not follow that the claimant suffered a compensable injury. *Fay v. East Penn manufacturing Co., Inc.*, W.C. No. 5-108-430-001 (ICAO, Apr. 24, 2020); *cf. Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997) ("right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment").

8. As found, Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable right wrist injury during the course and scope of his employment with Employer on February 7, 2021. Initially, Claimant explained that on February 7, 2021 he was pushing a cart filled with numerous heavy items while performing his job duties for Employer. Because the cart was overloaded and top heavy, it began to tip. Claimant grasped the handles of the cart in an attempt to keep it from falling, but twisted his right wrist. Store surveillance video reflects that Claimant immediately released the cart and threw his arms up and to his sides. He then experienced shooting pain down his right wrist.

9. As found, on February 11, 2021 PA-C Adams at Concentra diagnosed Claimant with a strain of the right hand that was consistent with a history of a "work-related mechanism of injury/illness." PA-C Adams assigned temporary work restrictions of no lifting in excess of one pound and referred Claimant to ATP Dr. Olenick. On February 16, 2021 Dr. Greenslade at Concentra concurred with PA-C Adams' diagnosis of a right-hand strain. Dr. Greenslade also agreed that Claimant's history was consistent with a work-related injury and maintained Claimant on a one-pound lifting restriction.

10. As found, the record reflects that Claimant had a previously unhealed right wrist fracture. Claimant acknowledged that he suffered a right wrist fracture in 1972 while playing goalie for his high school soccer team. On April 28, 2019, while receiving medical treatment for his index finger, a right wrist x-ray showed evidence of an unhealed scaphoid fracture and possible avascular necrosis. On May 10, 2019 Dr. Olenick documented limited right wrist motion with SLAC wrist deformity, minimally displaced distal phalangeal fracture and nonarticular right index. Right wrist x-rays on July 9, 2019 revealed advanced osteoarthritis consistent with SLAC wrist.

11. As found, after conducting a physical examination and reviewing Claimant's medical records, Dr. Griggs diagnosed Claimant with a right wrist sprain with pre-existing severe scaphoid nonunion advanced collapse arthritis. He initially determined that "the injury as described would lead to a sprain of the wrist but would not cause the severe arthritis that the patient has." After reviewing store surveillance video Dr. Griggs

concluded that the February 7, 2021 incident was minor because Claimant did not appear to hold onto the cart to prevent it from falling.

12. As found, despite Dr. Griggs' opinion, the record reflects that Claimant's work activities on February 7, 2021 aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. Claimant explained that, while he was pushing an overloaded court that began to tip he attempted to stop it from falling but immediately suffered shooting pain down his right wrist. Video surveillance reveals that Claimant was pushing a loaded cart that tipped over. Respondents' First Report of Injury, the medical records and the testimony contain slight variations in the precise mechanism of injury to Claimant's right-wrist. Nevertheless, Claimant has consistently maintained that, as he attempted to prevent the cart from tipping, he twisted his right wrist. Finally, while undergoing treatment for a non-work-related right finger injury in 2019 with Dr. Olenick, right wrist x-rays revealed advanced osteoarthritis consistent with SLAC wrist. Dr. Olenick did not recommend right wrist surgery at the time, but requested right wrist surgery subsequent to the February 7, 2021 work incident. The record thus reflects that, although Claimant suffered from a pre-existing right wrist condition, the February 7, 2021 incident caused the need for medical care and work restrictions. Claimant's work activities on February 7, 2021 thus aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment.

Temporary Partial Disability Benefits

13. Section 8-42-106(1), C.R.S. provides for an award of Temporary Partial Disability (TPD) benefits based on the difference between the claimant's Average Weekly Wage (AWW) at the time of injury and the earnings during the continuance of the disability. Specifically, an employee shall receive 66.66% of the difference between his wages at the time of his injury and during the continuance of the temporary partial disability. In order to receive TPD benefits the claimant must establish that the injury caused the disability and consequent partial wage loss. §8-42-103(1), C.R.S.; *see Safeway Stores, Inc. v. Husson,* 732 P.2d 1244 (Colo. App. 1986) (TPD benefits are designed as a partial substitute for lost wages or impaired earning capacity arising from a compensable injury). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). Section 8-42-106(2), C.R.S. provides that TPD benefits shall continue until either of the following occurs: "(a) The employee reaches maximum medical improvement; or (b)(I) The attending physician gives the employee a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment." *See Evans v. Wal-Mart*, WC 4-825-475 (ICAO, May 4, 2012).

14. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Partial Disability (TPD) benefits for the period February 7, 2021 until terminated by statute. On February 11, 2021 PA-C Adams diagnosed Claimant with a strain of the right hand and assigned temporary work restrictions of no lifting in excess of one pound. On February 16, 2021 Dr. Greenslade

maintained Claimant on a one-pound lifting restriction. Claimant credibly explained that, because of his temporary work restrictions, he has suffered decreased earnings since February 7, 2021. Claimant detailed that upon returning to work with Employer he discussed restrictions with his supervisor. The supervisor advised Claimant that he would no longer be able to work overtime as a customer service representative because of the temporary work restrictions. At the time of the hearing in this matter Claimant remained under temporary work restrictions of wearing a right hand wrist splint and no lifting, pushing or pulling in excess of two pounds with the right hand. Medical records reveal that a date for MMI was uncertain "because surgery pending approval."

15. As found, the record thus reveals that Claimant's February 7, 2021 work injuries decreased his ability to earn wages. He was specifically unable to work overtime because of his work restrictions. Accordingly, Claimant is entitled to receive Temporary Partial Disability (TPD) benefits for the period February 7, 2021 until terminated by statute.

Medical Benefits and Proposed Right Wrist Surgery

16. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The question of whether a particular disability is the result of the natural progression of a pre-existing condition, or the subsequent aggravation or acceleration of that condition, is itself a question of fact. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Finally, the determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

17. Section 8-41-301(1)(c), C.R.S. requires that an injury be "proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment." Thus, the claimant is required to prove a direct causal relationship between the injury and the disability and need for treatment. However, the industrial injury need not be the sole cause of the disability if the injury is a significant, direct, and consequential factor in the disability. *See Subsequent Injury Fund v. Industrial Claim Appeals Office,* 131 P.3d 1224 (Colo. App. 2006); *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001).

18. As found, Claimant has established by a preponderance of the evidence that the right wrist surgery recommended by ATP Dr. Olenick is reasonable, necessary and causally related to his February 7, 2021 industrial injury. Initially, on April 7, 2021 ATP Dr. Olenick recommended consideration of a cortisone injection and right wrist reconstruction for Claimant's February 7, 2021 industrial injury. Dr. Olenick specifically

requested surgery in the form of a "four-bone arthrodesis of the right-wrist with excision scaphoid." On May 7, 2021 Insurer denied Dr. Olenick's surgical request.

19. As found, Dr. Griggs explained that Claimant's need for a four-corner fusion was not related to the February 7, 2021 event but was caused by chronic, severe scapholunate nonunion advanced collapse arthritis. He remarked that the natural history of scaphoid nonunion advanced collapse arthritis is that it will become symptomatic and painful over time. Dr. Griggs reasoned that Claimant would have required the requested surgery even in the absence of the February 7, 2021 incident. His opinion reflects that Dr. Olenick's surgical request was reasonable and necessary, but not related to the February 7, 2021 work incident.

20. As found, despite Dr. Griggs' opinion, the record reveals that the February 7, 2021 work accident precipitated Claimant's need for right wrist surgery as recommended by Dr. Olenick. Notably, Dr. Olenick determined that on February 7, 2021 Claimant had suffered a "right wrist sprain, superimposed on previous SLAC wrist deformity, status post right carpal tunnel decompression." Although Claimant's industrial injury may not have been the sole cause of his disability it was a significant, direct, and consequential factor in his need for right wrist surgery. Claimant's employment thus aggravated, accelerated, or combined with his pre-existing condition to produce a need for surgical intervention. Accordingly, ATP Dr. Olenick's request for surgery in the form of a "four-bone arthrodesis of the right-wrist with excision scaphoid" is reasonable, necessary and causally related to Claimant's February 7, 2021 work incident.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered a compensable right wrist injury during the course and scope of his employment with Employer on February 7, 2021.

2. Claimant earned an AWW, including concurrent employment, of $1,452.18.

3. Claimant shall receive TPD benefits for the period February 7, 2021 until terminated by statute.

4. The right wrist surgery recommended by ATP Dr. Olenick is authorized.

5. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty

(20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: October 21, 2021.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-090-379-003

ISSUES

I. Whether Respondents have overcome the DIME physician's opinion, by clear and convincing evidence, that Claimant is not at MMI.

II. Whether Respondents have overcome the DIME physician's opinion, by clear and convincing evidence, that Claimant's left knee condition and left shoulder condition are causally related to her work injury.

III. Whether Claimant established, by a preponderance of the evidence, that Respondents are liable for her prior left knee replacement, her prior left shoulder replacement, and ongoing treatment for her left knee?

IV. Whether Claimant has established, by a preponderance of the evidence, that Respondents are liable for the additional medical treatment she is requesting.

V. Whether Claimant has established that Respondents are liable for an increase in her average weekly wage for temporary lodging provided at the ambulance station?

VI. Whether Claimant has to establish, by clear and convincing evidence, that Claimant is not at MMI for her other injuries – not her shoulder and knee injury.

VII. Whether Respondents are liable for Melissa Abate, a case manager, to be a case manager under this claim.

STIPULATIONS

Claimant, in her post hearing proposed order, stated that the parties have stipulated that the following medical providers are authorized:

- Dr. David Blatt
- Dr. Stephen Moe
- Dr. Braden Mayer
- Dr. Thomas Pazik
- Dr. Thomas Politzer
- Dr. David Schneider
- Dr. Greg Reichhardt
- Dr. Gregory Thwaites
- Royle Rebound Sports PT

- ProActive Physical Therapy
- Dr. John. R. Schultz, Centeno-Schultz Clinic
- Dr. Demetri J. Aguila, Healing Hands of Nebraska
- Dr. Jan Gillespie Wagner, Northern Colorado Pain Management
- Physicians and physician assistants at Banner Health Medical Group
- Dr. David L. Reinhard, Colorado Rehabilitation & Occupational Medicine

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. This case involves an admitted claim that occurred on October 18, 2018. At the time of Claimant's compensable accident, she was working for Morgan County as a paramedic. Claimant had worked as a paramedic for Morgan County since 2010. Although Claimant was working as a paramedic at the time of the accident, Claimant also worked as a volunteer firefighter for the Town of Galeton. Claimant had worked as a volunteer firefighter for Galeton since 2009.
2. On October 18, 2018, Claimant was involved in a significant high-speed motor vehicle accident.

Preexisting Left Knee and Left Shoulder Conditions

Preexisting left knee condition.

3. In September 2007, Claimant injured her left knee in an accident. Claimant suffered a tibial plateau fracture that required external fixation and a subsequent surgery. R. 765. Following a course of physical therapy and hardware removal she was released to full duty without restrictions as late as March 16, 2011. (Exhibit QQ, Page 1213)
4. While Claimant did have occasional left knee pain preceding the work accident, there is no credible and persuasive evidence establishing Claimant needed or sought medical treatment from March 17, 2011, through October 17, 2018, for her left knee. Plus, there is no credible and persuasive evidence establishing Claimant had any functional impairment – or disability – regarding her left knee from March 16, 2011, through October 17, 2018.

Preexisting left shoulder condition.

5. In December 2011, Claimant injured her left shoulder. She underwent an arthroscopy including a subacromial decompression and biceps tenodesis in February 2012 with Dr. Durbin at the Orthopedic Center of the Rockies (OCR). Following a course of physical therapy Dr. Durbin placed claimant at MMI on August 13, 2012 and released her to full activities as tolerated with no restrictions. (Exhibit QQ, Page 1150-1152, 1207-1210, 1212). Dr. Durbin, before the surgery, thought Claimant might have had a torn rotator cuff. But, during surgery, no rotator cuff tear was found. (*Id.* at 1207, 1209)

6. After being placed at MMI, Claimant sporadically sought additional medical treatment for her left shoulder. During the next four years, Claimant sought treatment about five times. Claimant returned for left shoulder pain two months later and a nerve study was recommended due to possible deltoid damage. (Exhibit QQ, Page 1147.). About two years later, in 2014, Claimant saw Dr. Yemm complaining of left shoulder pain. Dr. Yemm performed a subacromial injection which showed marked improvement after ten minutes. (Exhibit QQ, Page 1144). Dr. Yemm saw her again in February 2015 and performed another subacromial injection. (Exhibit QQ, Page 1142). Dr. Grey saw her in May 2015, and at this point Dr. Grey discussed the option of a possible partial arthrosurface (partial joint replacement) procedure but that it would not allow her to return to firefighting, but as a paramedic she "may be able to continue her work as she knows it." (Exhibit 21, Page 550). Her last pre-work-injury appointment was on August 10, 2016, with Dr. Yemm who performed another injection. (Exhibit 21, Page 552).

7. There is no credible and persuasive evidence establishing Claimant needed or sought medical treatment from August 11, 2016, through October 17, 2018, for her left shoulder condition. There is also no credible and persuasive evidence that established Claimant had any functional impairment – or disability – regarding her left shoulder from August 11, 2016, to October 17, 2018.

In 2017 Claimant Underwent a Firefighting Physical

8. In August 2017, Claimant underwent a complete physical exam so she could keep working as a firefighter. The physical was conducted pursuant to the National Fire Protection Association Guidelines. (Exhibit 5) In that exam Claimant was fully forthcoming about her prior left shoulder and left knee surgeries. *Id. at 133, 136.* Her arms and legs range of motion were within normal limits. *Id. at 134-135.* In the end, Dr. Vlahovich – the physician who performed the physical examination – concluded Claimant could work unrestricted duty as a firefighter. *Id. at. 136.*

Job Performance Requirement – Fit for Duty Assessment

9. On October 13th and 15th of 2018, Claimant participated in an extensive, comprehensive, and physically demanding Job Performance Requirement (JPR) or fit for duty assessment for her volunteer firefighting position. (Ex. 4, pp. 103-113 and pp. 115-130) The JPR required Claimant to perform extremely physically demanding activities consistent with fighting a fire and rescue operations. The physically demanding activities included, but were not limited to, the following.

    - Claimant had to put on her 21-pound breathing apparatus. This required Claimant to have full range of bilateral shoulder motion to flip the breathing apparatus over her head while simultaneously sliding her arms into the straps. (Ex. 4, p. 103.)

    - Claimant had to use a firefighting and rescue ladder. This required Claimant to work with another individual and lift a 70-pound ladder up from the ground and place it on one of her shoulders. Then, Claimant had to lift her arms overhead to extend the ladder and place the ladder against a wall. (Ex. 4, pp. 104-106.)

- Claimant had to climb the rescue ladder with a chain saw and breaker bar. This required Claimant to carry a 15-pound chainsaw up the ladder. Claimant was also required to carry a 9-pound breaker bar up the ladder to vent the structure. (Ex. 4)
- Claimant had to perform a simulated rescue of a 150-pound person. This required her simulate rescuing a person by using a dummy – called Rescue Randy - that weighed 150 pounds using the ladder. To perform this rescue simulation, Claimant was required to carry the 150-pound dummy down a ladder – across her arms – while wearing her firefighting gear. The firefighting gear weighed an additional 19-pounds. Thus, Claimant had to climb a ladder with 19 pounds of gear on and then carry 150 pounds down the ladder. As result, Claimant had to carry almost 170 pounds down the ladder. (Ex. 4)
- Claimant had to perform various water supply tests. This required Claimant to pull items using her entire body weight, with over 100 pounds of force. She also had to climb onto all sides of the firetruck. The water supply tests also required Claimant to reach up and grab items from the truck and attach heavy water hoses to the firetruck and a fire hydrant. (Ex. 4)

10. The JPR required Claimant to use her left knee and left shoulder to perform extremely physically demanding tasks. Claimant passed all physical demands of the JPR. Claimant therefore passed her physical and was cleared to work fully duty as a firefighter and also passed her JPR. As a result of Claimant passing her physical and being cleared to work full duty and passing her JPR, the ALJ finds that within a week of her work accident, Claimant did not have any functional limitations of her left knee or left shoulder due to her prior injuries.

11. On the other hand, during the approximate two-year period before her work accident, Claimant did have occasional pain and discomfort in her left knee and left shoulder. That said, the pain and discomfort did not prevent Claimant from performing her job duties as a volunteer firefighter or paramedic and such conditions did not require medical treatment.

12. As a result, the ALJ finds Claimant did not have any functional impairment or disability due to her prior left shoulder and left knee injuries that precluded her from performing her job as a volunteer firefighter and paramedic. The ALJ also finds that Claimant's prior left shoulder and knee injury did not require any medical treatment up until her compensable work accident on October 18, 2018.

Work Accident on October 18, 2018

13. On October 18, 2018, 36 hours into a 72-hour paramedic shift, Claimant and her partner had just dropped a patient off from an ambulance transport and were on a two-lane highway. Claimant was in the passenger seat and her partner was driving. The ambulance was traveling about 65 miles an hour. A semi tractor-trailer was approaching from the opposite direction and crossed into their lane. The semi struck the ambulance on the driver's side slamming it over onto its right (passenger) side. (Exhibit 20)

14. Claimant sustained loss of consciousness. When she regained consciousness, her partner was screaming because the main oxygen tank regulator had popped off and apparently oxygen was escaping from the tank. As a result, there was concern that the vehicle would blow up. Claimant was laying on the passenger's side door, as the vehicle was flipped onto its right side and onto the passenger's side. Claimant stood up on her door after releasing her seatbelt and was now vertical since the vehicle was flipped on its right side. Claimant's partner, who was driving, was hanging by her seatbelt that was holding her in place. Claimant released her partner from the seatbelt. To release her partner from her seatbelt, she had to lift the (much heavier) body weight of the driver off of the seatbelt with her left arm to unlock the seatbelt with her right arm. Claimant then lowered the driver down to her door. Once removing her partner from her seatbelt, they were unable get out of the ambulance because of the positioning of the vehicle. Claimant therefore decided to try to kick out the front window. Claimant, while in an awkward position, successfully kicked out the front window and she and her partner managed to get out of the ambulance.

15. After exiting the ambulance, Claimant checked her partner out first and noted there was blood on her face and that she was complaining of hip pain. Claimant then looked for the truck that hit her and called the accident into her office on the ambulance radio. The truck that hit the ambulance was not immediately visible, but she saw the truck in the distance in a field. Claimant and her partner tried to check on the driver of the semi, but the truck driver had gotten out of his vehicle.

Medical Treatment after the Work Accident

16. Right after the accident, Claimant was seen at the hospital in the early morning hours complaining of headache, vomiting, neck pain, left shoulder pain, chest wall pain, thoracic pain, left low back pain, and knee pain. Claimant was prescribed Norco for her shoulder and knee pain. (Ex. 18, pp. 514-515)

17. The next day, October 19, 2018, Claimant was seen by her primary occupational medical provider and her pain complaints still included headaches, head, neck, left shoulder, vomiting, low back, and left knee pain. (Ex. 18, p. 519)

18. Thus, Claimant's complaints of left shoulder pain and left knee pain are documented the day of the accident as well as the next day.

19. On November 1, 2018, Claimant underwent an MRI of her left shoulder. The MRI showed the following:

    - Supraspinatus tendinosis without a tear. The remaining rotator cuff was normal.

- Changes of biceps tenodesis at the upper bicipital groove with intact biceps tendon below that level.
- Mild glenohumeral degenerative arthrosis with diffuse grade 2 chondral thinning and fibrillation as well as an 8x8x5 mm loose body in the axillary recess.

(Ex. E, pp. 148-149)

20. Dr. Reichhardt, who was managing Claimant's workers' compensation injuries, referred Claimant to Thomas Pazik, M.D. (Ex. 7, p. 281)

21. On February 5, 2019, Dr. Pazik, M.D. evaluated Claimant for left knee and left shoulder pain. Dr. Pazik obtained a detailed history from Claimant about her preexisting shoulder and knee problems and how her symptoms got much worse after the work accident. Dr. Pazik's notes from this visit show Claimant stated that just before her work accident, her prior shoulder and knee injuries did not prevent her from functioning as a paramedic/firefighter. In essence, Claimant stated that she could function with no problems. Claimant's statements to Dr. Pazik about her functioning before and after the accident are consistent with her physical and JPR done shortly before the work accident. (Ex. 7, pp. 281-285.)

22. Dr. Pazik reviewed the November 1, 2018, MRI report of Claimant's left shoulder. He also reviewed the January 14, 2019, MRI of her left knee and discussed the findings with the radiologist. He also reviewed X-rays of Claimant's shoulder and knee. *Id.*

23. After performing a thorough assessment of Claimant's condition, Dr. Pazik concluded that the accident aggravated Claimant's preexisting left knee and left shoulder condition. He concluded that:

    - Claimant has post traumatic arthritis of her left knee. Claimant suffered from a preexisting condition that was exacerbated by the work accident. He based his opinion on the fact that Claimant was previously asymptomatic and functioning before the work accident and was not after the accident.
    - Claimant has osteoarthritis of the left shoulder. He also concluded that while Claimant's osteoarthritis preexisted her work accident, and that she had intermittent biceps achiness, the work accident exacerbated her shoulder condition.

    Id.

24. The ALJ finds Dr. Pazik's opinions that the work accident aggravated Claimant's left knee and left shoulder condition to be credible and persuasive. The ALJ finds his opinions to be persuasive because they are consistent with Claimant passing her physical and JPR shortly before the accident. They are also consistent with Claimant's statements about the worsening of her knee and shoulder pain after the accident. Plus, they are also consistent with Claimant's need for medical treatment that arose after the accident.

25. Dr. Pazik concluded that shoulder and knee surgery would be needed to relieve Claimant's pain that was caused by the work accident. (Ex. 7, p. 284) Claimant

decided to proceed with left knee surgery first because that was giving her more problems than her shoulder. (*Id.)* At the appointment, Dr. Pazik also stated that Claimant could proceed with either an arthroscopic procedure for her knee, or a total knee replacement, a more definitive procedure to cure Claimant from the effects of her work injury – by reducing her pain and increasing her function. (Ex. 7, p. 286)

26. On February 12, 2019, Claimant returned to Dr. Pazik. At this visit, Claimant again stated that she preferred to undergo a total knee replacement to alleviate her knee pain. Dr. Pazik agreed and stated that Claimant had failed nonoperative measures and was having increasing difficulty performing activities of daily living independently and comfortably because of her knee pain. For these reasons, he recommended Claimant proceed with a left total knee replacement. (Ex. 7, pp. 286-288)

27. On May 7, 2019, Claimant was evaluated by Dr. Pazik. Again, Dr. Pazik noted that Claimant had failed nonoperative treatment for her work-related knee injury. He also noted that Claimant was still having increasing difficulty performing activities of daily living – which Claimant could perform before her work injury. As a result, he again recommended a total knee replacement to cure Claimant from the effects of her work injury. Claimant agreed with his recommendation and decided to proceed with the total knee replacement.

28. Respondents denied the request for Dr. Pazik to perform the total knee replacement. Claimant, however, proceeded with getting the total knee replacement with Dr. Pazik under her personal insurance. (Ex. 7, p. 291)

29. On May 17, 2019, Claimant was evaluated by Dr. John Schultz. At this appointment, Dr. Schultz obtained a detailed history about Claimant's prior left knee and left shoulder injuries. He noted Claimant said that although she had some shoulder and knee pain before the accident, her shoulder and knee pain worsened after the accident. He noted that since the work accident, Claimant's left shoulder pain was different in character and constant in duration. He also noted Claimant's knee pain was constant in duration and diffuse in character. He also noted Claimant had a complex tear of the posterolateral meniscus with both horizontal and radial components. (Ex. 3, p. 47)

30. On May 20, 2019, Claimant underwent a total left knee replacement arthroplasty to decrease her pain and increase her function. The surgery was performed by Dr. Pazik. (Ex. 7, p. 299)

31. After her knee replacement, Claimant had ongoing left knee pain. Based on her ongoing pain, Dr. Pazik concluded Claimant had an injury to her saphenous nerve. Thus, he referred Claimant to Dr. Matthew Gray, a pain management physician. (Ex. 7, p. 312)

32. On August 29, 2019, Claimant was seen by Dr. Schultz for him to determine whether Claimant might have developed chronic regional pain syndrome (CRPS) because of her knee surgery. To help diagnose CRPS, Dr. Schultz performed a lumbar sympathetic nerve block. He also performed a left saphenous nerve block. Then, he performed another lumbar sympathetic block. By October 10, 2019, he thought Claimant had chronic regional pain syndrome of her left knee. (E. 7, p. 318)

33. On April 28, 2020, Dr. Schultz issued a follow up note in which he concluded that Claimant's left sided knee pain is consistent with CRPS. (Ex. 3)

34. Based on the work accident, Claimant developed pain in her knee. The total knee replacement was prescribed by Dr. Pazik to cure Claimant from the effects of her work injury. Thus, the knee replacement was reasonable, necessary, and related to treat Claimant from the effects of her work injury,

35. Based on the development of CRPS shortly after the knee surgery, the ALJ finds that the knee surgery caused Claimant's CRPS. This finding is also supported by the fact that none of the doctors who have evaluated Claimant have persuasively concluded that Claimant's CRPS was not caused by the knee surgery.

36. On May 12, 2020, Claimant underwent an exploratory left shoulder arthroscopy based on the chronic pain caused by the work accident. The surgery was performed by Dr. James Schneider. (Ex. 12, p. 421)

37. On May 29, 2020, and based on the findings during the exploratory shoulder surgery, Claimant underwent a left reverse total shoulder arthroplasty, which was performed by Dr. James Schneider. (Ex. AA, p. 646) The preoperative and postoperative diagnosis was severe osteoarthritis with rotator cuff injury. *Id*. The reverse total shoulder arthroplasty was recommended because of Claimant's osteoarthritis – which was aggravated by the work accident - and the rotator cuff injury that was either aggravated or caused by the work accident and identified during the surgery. As a result, the shoulder replacement surgery was due to her osteoarthritis, which was permanently aggravated by her work accident, and the rotator cuff tear that was either permanently aggravated or caused by the work accident. (Ex. 12, pp. 424-425) Moreover, the shoulder replacement surgery was reasonable and necessary to cure Claimant from the effects of her work injury because it was prescribed to reduce Claimant's pain and increase her functional deficit – both of which were caused by the accident. Thus, the shoulder replacement surgery was also related to her work accident.

38. On August 11, 2020, Claimant had a follow up appointment with Dr. Pazik. It is noted that at this appointment, Claimant stated that she was delighted with the results of her reverse total shoulder replacement. It was also noted that Claimant, based on her left knee complaints, had undergone further evaluation by Dr. Demetrio J. Aguila, and was diagnosed with saphenous neuroma and CRPS. It was also noted that Dr. Aguila recommended treatment of her CRPS and surgical treatment of her saphenous neuroma. Claimant was also evaluated by Dr. Kinder who also recommended the treatment outlined by Dr. Aguila before specific treatment of her knee – with possible revision surgery regarding her knee. Dr. Pazik noted that Claimant would like to proceed with the recommendations made by Dr. Aguila, but they were being denied by her workers' compensation carrier. Dr. Pazik concluded by again stating that Claimant's shoulder and knee problems were caused by the work accident. He also reaffirmed his referrals to Drs. Auguila, Schultz, and Kinder to continue treating Claimant's knee pain and to Dr. Schneider to continue treating Claimant's shoulder pain. (Ex. 7, pp. 334 – 336)

39. On September 3, 2020, Claimant underwent surgery of the left saphenous nerve to treat her left knee pain (CRPS). The surgery was performed by Dr. Aguilar. (Ex. 10, pp. 369-372) Claimant returned to see Dr. Aguilar one week later. At this visit, Claimant reported improvement of her knee pain.

40. On November 12, 2020, Claimant was evaluated by Dr. Jan Gillespie Wagner, of Norther Colorado Pain Management, via videoconference. The visit was to discuss the effects of Claimant's Ketamine infusion therapy for her CRPS. At this appointment, Claimant reported significant improvement in the burning and shooting pain down her lower leg. She also reported improvement to the hypersensitivity to the skin around the left knee. On the other hand, the deep pain and instability in the knee joint itself remained. Dr. Gillespie Wagner concluded by stating that Claimant should update her orthopedic surgeon, Dr. Kinder, regarding the pain relief she received from the ketamine. Dr. Gillespie also prescribed a custom-made left knee hinged knee brace for stability after her total knee replacement. (Ex. 11, p. 376)

24-Month Division Independent Medical Examination

41. On February 8, 2021, Claimant underwent a 24-month Division Independent Medical Examination (DIME) with Dr. John Hughes. Dr. Hughes performed a physical examination, reviewed Claimant's medical records, and obtained a detailed history from Claimant. Dr. Hughes noted that Claimant's reported history was consistent with the medical records. After examining Claimant, reviewing her medical records, and obtaining a detailed history, Dr. Hughes noted that Dr. Pazik's stated in his August 11, 2020, report that due to ongoing knee pain, Claimant might need a revision knee surgery. Based on his thorough evaluation of Claimant, Dr. Hughes concluded that Claimant suffered a number of injuries due to her work-related motor vehicle accident. The injuries included:

    - Closed head injury with visual, cognitive, and central vestibular symptoms.
    - Cervical spine sprain/strain with persistence of non-radicular cervical spine pain.
    - Left shoulder sprain/strain with aggravation of left shoulder osteoarthritis, leading to a total shoulder arthroplasty with good outcome.
    - Left knee sprain/strain, with aggravation of osteoarthritis, leading to left total knee arthroplasty with residual ligamentous laxity and left lower extremity CRPS, needing further treatment essentially as endorsed by Dr. Pazik.
    - Adjustment disorder.

42. In the end, Dr. Hughes concluded that Claimant was not at MMI because she needs to have additional medical treatment to cure her from the effects of her work-related knee injury and resulting CRPS as outlined and endorsed by Dr. Pazik in his August 11, 2020, report. The treatment endorsed by Dr. Pazik included:

    - Excision of the saphenous neuroma – which has been done.
    - Ongoing pain management with Dr. Schultz for Claimant's CRPS.

- Additional treatment with Dr. Kinder for her left knee pain - including possible revision surgery.

43. The ALJ credits, and finds persuasive, Dr. Hughes' ultimate opinions and conclusions that Claimant's suffered a work-related injury to her left shoulder and left knee based on an aggravation of a preexisting condition. The ALJ also credits and finds persuasive his ultimate opinion that Claimant is not at MMI because of her chronic knee pain and need for treatment to cure Claimant from the effects of her work injury. The ALJ credits and finds persuasive his ultimate findings because they are consistent with Claimant's history, consistent with the underlying medical records of her treating providers, and consistent with her treating providers who have not placed her at MMI for her chronic knee pain that was caused by her work accident – which they also relate to her work accident.

Dr. Schakaraschwili IME and Rule 16 Reviews

44. On April 2, 2019, Dr. Schakaraschwili performed an IME. Dr. Schakaraschwili reviewed Claimant's medical records and physically examined Claimant. After reviewing certain medical records, he concluded that the only injury or condition caused by the work accident was possibly posttraumatic stress disorder. As a result, he found Claimant did not injure her left knee or left shoulder during the accident. Thus, he found the high-speed motor vehicle accident did not cause the need for medical treatment for her left knee and left shoulder. The primary basis for his conclusion was that Claimant had preexisting shoulder and knee problems and it was noted in her medical records that she might need additional surgery at some point in the future to treat those conditions. He did not, however, consider Claimant's reports of increase in pain and decrease in function after the accident. Instead, he relied on the MRI findings which he concluded did not show an acute injury to her shoulder or knee. In his first report, he also did not have the results of Claimant's 2017 physical and the results of her 2018 JPR – each of which cleared Claimant for full duty as a firefighter. (Ex. YY, pp. 1462-1473)

45. On October 11, 2019, Dr. Schakaraschwili issued an addendum report after reviewing more medical records. In the end, his opinions remained basically the same. (Ex. YY)

46. On April 24, 2020, Dr. Schakaraschwili issued another addendum after reviewing additional records. In essence, Dr. Schakaraschwili's opinions remained the same. It was his opinion that there were no objective findings, based primarily on the MRIs, that supported a finding that Claimant injured her left shoulder and left knee during the accident. (Ex. YY) In other words, he basically concluded that the MRI findings were definitive and completely rejected Claimant's reports of increasing pain complaints and disability – all which occurred after the accident.

47. In the end, the ALJ does not find Dr. Schakaraschwili's opinions to be credible or persuasive for many reasons. First, he completely dismisses Claimant's statements about her condition just before the accident and after the accident. Second, he fails to adequately address whether the work accident could have aggravated her underlying conditions and necessitated the need for treatment. Third, he seemed to be dismissive of information that would lead to a finding of causation. For example, he

dismissed the fact that Claimant passed her JPR testing within a week of the accident and could perform her job before the accident but could not perform her job after the accident. In the end, it seems like he was merely looking for reasons to not find a causal link between her claimed injuries and the accident rather than acting independently. Thus, the ALJ neither credits, nor finds persuasive, the opinions of Dr. Schakaraschwili.

IME and Testimony of Dr. Failinger

48. On November 19, 2020, Dr. Failinger performed an IME on behalf of Respondents and issued a report. He also testified consistent with his report. It was his opinion that Claimant suffered a rotator cuff strain and that her preexisting shoulder and knee osteoarthritis was not aggravated by the motor vehicle accident. Dr. Failinger based his opinion on the subacromial injection that was performed on November 6, 2018, as well as the MRI findings. He also appears to base his opinion that Claimant had deferred undergoing shoulder surgery – which was suggested before the work accident – because Claimant could manage her symptoms. Missing from his analysis is the fact that Claimant could manage her occasional shoulder pain and still work before the accident – and then after the accident she could not manage the increase in pain and could not perform her job.

49. Dr. Failinger also supported his opinion that Claimant did not injure her knee during the accident because he contends the medical records from the day of the accident do not document Claimant had knee pain. But, in reviewing the medical records from the day of the accident, Claimant was treated with Norco for shoulder and knee pain. Plus, Claimant complained of left shoulder and left knee pain the day after the accident when she saw another provider. He also supported his opinion because x-rays taken on November 20, 2018, a month after the accident did not show any effusion. In the end, he concluded that Claimant probably sustained a strain or contusion to her knee but did not sustain a new injury.

50. Again, the ALJ comes back to the fact that Claimant's pain and disability increased significantly after the accident – which occurred days after Claimant successfully passed her JPR evaluation. Overall, the ALJ does not find Dr. Failinger's opinions to be credible and persuasive because he cannot explain Claimant's increased pain, continued pain, and disability that arose after the high-speed motor vehicle accident.

IME and Testimony of Dr. Orent

51. On February 25, 2020, Dr. Orent performed an Independent Medical Examination on behalf of Claimant. (Ex. 2) Dr. Orent also testified at hearing. Dr. Orent's testimony was consistent with his report.

52. In essence, it is Dr. Orent's opinion that Claimant's ability to pass her JPR just days before her work accident – even if she had some pain in her shoulder and knee because of her preexisting conditions - shows that her preexisting shoulder and knee conditions did not functionally impair Claimant's ability to perform her job. He also concluded that Claimant's ability to pass her JPR just days before the work injury shows Claimant did not require medical treatment for her preexisting knee and shoulder conditions at that time. It was also his opinion that Claimant injured her left knee and left shoulder due to the work accident and such injuries caused additional pain and disability and necessitated the need for medical treatment.

53. Dr. Orent also concluded that the need to treat Claimant's shoulder pain, knee pain and CRPS are due to her work accident – and not due to her preexisting conditions. In other words, he concluded that the shoulder replacement and knee replacement were reasonable and necessary to treat the increase in pain caused by the work accident.

54. He also concluded that Claimant's CRPS was caused by the knee surgery and therefore related to the work accident.

55. Lastly, he concluded that Claimant is not at MMI and needs additional treatment to cure her from the effects of the work injury and bring her to MMI.

56. In the end, Dr. Orent based his opinion on:

    - Claimant's current symptoms.
    - Claimant's underlying medical records.
    - Claimant's description of her lack of preinjury disability and then her postinjury disability.
    - Claimant's ability to pass the JPR just days before the work accident.
    - Claimant's description of her preinjury and postinjury shoulder and knee pain.
    - That Claimant was involved in a significant high-speed accident and subsequent extrication of her partner out of the ambulance.

57. As noted, Dr. Orent relied on Claimant's statements about how her pain got worse after the accident and how she could no longer perform her job. In essence, he found Claimant credible and credited her statements in determining causation.

58. It should also be noted that Claimant's stated history to Dr. Orent is consistent with the underlying medical records.

59. As a result, the ALJ finds Dr. Orent's opinions to be credible and highly persuasive. Dr. Orent's opinions are consistent with the underlying medical records, consistent with the Claimant's statements, and consistent with the findings and conclusions of Claimant's treating providers.

60. Thus, the ALJ finds that Claimant's left shoulder and left knee conditions were permanently aggravated by the work accident and such aggravation necessitated the need for medical treatment – including each joint replacement.

Housing Provided by Employer

61. Claimant worked a three day 72-hour shift and was on-call at all times during her shift. Then, Claimant would be off for six days. To perform her job, Claimant was provided a room to sleep in at the Employer's place of business – the ambulance station. The room was necessary for Claimant to perform her job so she could be on-call during her shift.

62. Claimant contends that the cost of her room – that was provided by Employer – should be included in her average weekly wage as a fringe benefit.

63. Claimant, however, maintained a separate and primary residence at which she resided at all other times. Moreover, Claimant, did not have reasonable access to the room provided at the ambulance station on a day-to-day basis. In other words, Claimant could not stay at the ambulance station whenever she wanted. She was only provided access to the room while working and to perform her job.

64. In addition, there is no economic or monetary loss to Claimant as a result of Claimant losing access to the room since she has not returned to work because of the accident. For example, Claimant did not have to replace the room for three days a week. As found above, Claimant has a primary residence.

65. There was no credible and persuasive evidenced submitted at hearing which established the provision of the room was bargained for or part of her compensation. For example, there was no testimony indicating Claimant was expected to have her own housing during each 72-hour shift and use of the room was a negotiated component of her compensation.

66. Nor did the room provide an actual economic benefit to Claimant. For example, she could not forgo other housing expenses. She still had to have a primary residence.

67. Claimant did testify about the daily rate of renting a hotel room. But there is no reason for Claimant to rent a room three days a week to replace the room she was being provided at the ambulance station.

Case Management

68. Dr. Schultz referred Claimant to Melissa Abate for managed care. Dr. Schultz recommended Ms. Abate to assist Claimant manage her care because Claimant was having significant difficulty managing and understanding the scope of her care and treatment. He also stated that the difficulties were profoundly impacting Claimant's care and recovery. He further stated that Claimant needed a case manager who will be able to work with her and her doctors to assist her with good clinical outcomes and to keep her treatment consistent.

69. His referral is consistent with the significant injuries sustained by Claimant, including her closed head injury, and the extensive amount of treatment she requires to cure and relieve her from the effects of her work injury. Therefore, the ALJ credits his opinion about the need for such treatment and the referral for such treatment. As a result, the ALJ finds Dr. Schultz' referral to Ms. Abate, a case manager, to be reasonable, necessary, and related to treat Claimant from the effects of her work accident.

Based on the preceding findings of fact, the Judge draws the following conclusions of law:

CONCLUSIONS OF LAW

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Respondents have overcome the DIME physician's opinion, by clear and convincing evidence, that Claimant is not at MMI.

II. Whether Respondents have overcome the DIME physician's opinion, by clear and convincing evidence, that Claimant's left

knee condition and left shoulder condition are causally related to her work injury.

MMI exists at the point in time when "any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." Section 8-40-201(11.5), C.R.S. A DIME physician's finding that a party has or has not reached MMI is binding on the parties unless overcome by clear and convincing evidence. Section 8-42-107(8)(b)(III), C.R.S.; *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Under the statute MMI is primarily a medical determination involving diagnosis of the claimant's condition. *Berg v. Industrial Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Monfort Transportation v. Industrial Claim Appeals Office,* 942 P.2d 1358 (Colo. App. 1997). A determination of MMI requires the DIME physician to assess, as a matter of diagnosis, whether various components of the claimant's medical condition are causally related to the industrial injury. *Martinez v. Industrial Claim Appeals Office*, 176 P.3d 826 (Colo. App. 2007). A finding that the claimant needs additional medical treatment (including surgery) to improve her injury-related medical condition by reducing pain or improving function is inconsistent with a finding of MMI. *MGM Supply Co. v. Industrial Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Reynolds v. Industrial Claim Appeals Office,* 794 P.2d 1090 (Colo. App. 1990); *Sotelo v. National By-Products, Inc.,* W.C. No. 4-320-606 (I.C.A.O. March 2, 2000). Similarly, a finding that additional diagnostic procedures offer a reasonable prospect for defining the claimant's condition or suggesting further treatment is inconsistent with a finding of MMI. *Patterson v. Comfort Dental East Aurora,* WC 4-874-745-01 (ICAO February 14, 2014); *Hatch v. John H. Garland Co.,* W.C. No. 4-638-712 (ICAO August 11, 2000). Thus, a DIME physician's findings concerning the diagnosis of a medical condition, the cause of that condition, and the need for specific treatments or diagnostic procedures to evaluate the condition are inherent elements of determining MMI. Therefore, the DIME physician's opinions on these issues are binding unless overcome by clear and convincing evidence. *See Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002).

The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*. Clear and convincing evidence is that quantum and quality of evidence which renders a factual proposition highly probable and free from serious or substantial doubt. Thus, the party challenging the DIME physician's finding must produce evidence showing it highly probable the DIME physician's finding concerning MMI is incorrect. Where the evidence is subject to conflicting inferences a mere difference of opinion between qualified medical experts does not necessarily rise to the level of clear and convincing evidence. Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries,* WC 4-712-812 (ICAO November 21, 2008). The ultimate question of whether the party challenging the DIME physician's finding of MMI has overcome it by clear and convincing evidence is one of fact for the ALJ. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

In this case, Claimant underwent a DIME that was performed by Dr. Hughes. Dr. Hughes reviewed Claimant's medical records, took a detailed history from Claimant, and performed a physical examination. Based on his evaluation of Claimant, he concluded Claimant sustained a number of injuries because of her work accident. He also concluded that Claimant was not at MMI and needed additional medical treatment to cure her from the effects of her work accident. He summarized his conclusions regarding Claimant's work-related injuries, conditions, and need for further treatment as follows:

- Closed head injury with visual, cognitive, and central vestibular symptoms.
- Cervical spine sprain/strain with persistence of non–radicular cervical spine pain.
- Left shoulder sprain/strain, with aggravation of left shoulder osteoarthritis, leading to a total shoulder arthroplasty with good outcome.
- *Left knee sprain/strain, with aggravation of osteoarthritis, leading to left total knee arthroplasty with residual ligamentous laxity and left lower extremity CRPS, meriting further treatment essentially as endorsed by Dr. Pazik* (emphasis added).
- Adjustment disorder.

He also set forth his opinion about Claimant's MMI status as follows:

> I do not believe [Claimant's name, Redacted] is at MMI. I endorse further surgical treatment recommended by Dr. Pazik. Hopefully this will lead to substantial improvement as surgical treatment of [Claimant's name, Redacted] 's left shoulder did.

The ALJ credited and found persuasive, Dr. Hughes' ultimate opinions and conclusions that Claimant suffered a work-related injury to her left shoulder and left knee based on an aggravation of a preexisting condition – and each injury caused the need for a total joint replacement. The ALJ also credited and found persuasive his ultimate opinion that Claimant is not at MMI due to her chronic knee pain and need for additional treatment to cure Claimant from the effects of her work injury. The ALJ credited and found persuasive his ultimate findings because they are consistent with Claimant's history, consistent with the underlying medical records of her treating providers, and consistent with the fact that her treating providers have not placed her at MMI for her work-related injuries – which includes her chronic knee pain that was caused by the work accident.

Claimant also underwent an IME with Dr. Orent. Dr. Orent concluded that Claimant injured her left shoulder and left knee during the work accident. He also concluded that Claimant's need for medical treatment, which included the left shoulder arthroscopic surgery, total reverse shoulder replacement, and total knee replacement were reasonably necessary and related to Claimant's work accident.

The ALJ found Dr. Orent's opinions to be credible and highly persuasive. Dr. Orent's opinions are consistent with the underlying medical record, consistent with the Claimant's statements, and consistent with the findings of the majority of Claimant's treating providers.

In order to overcome Dr. Hughes' opinions regarding MMI as well as the cause of Claimant's left shoulder condition, left knee condition, and the need for the surgeries Claimant underwent after her work accident, the Respondents provided the opinions of Dr. Schakaraschwili and Dr. Failinger. The ALJ did not, however, find their opinions to be persuasive.

Facts are stubborn things. In this case, Drs. Schakaraschwili and Dr. Failinger try their best to ignore the fact that Claimant passed her JPR and could perform her job as a firefighter within days of the accident – and then she could not. What happened during that short time? Claimant was involved in a significant high-speed motor vehicle accident.

Drs. Schakaraschwili and Failinger seek to construct an evidenced based opinion built upon some facts, but not all facts. In constructing their opinion, each doctor cherry-picked certain facts in the record to conclude that Claimant's need for medical treatment for her left knee and left shoulder is merely the natural progression of her preexisting and underlying medical conditions – and not altered by the significant high-speed accident.

It is as if Drs. Schakaraschwili and Failinger concluded that:

- Claimant did not pass her JPR just days before her accident.
- Claimant was not in an ambulance that got hit by a semi-tractor while going 65 miles per-hour and then tipped over and slid down the highway.
- Claimant did not rescue the driver of the ambulance – who weighed about 185 pounds – by lifting the driver up with her left arm, and then unbuckled her seatbelt with her right hand.
- Claimant did not get in an awkward position and forcefully kick out the front window – of the ambulance she thought would explode.
- Claimant did not have shoulder pain and knee pain in the emergency room right after the accident.
- Claimant did not go for years before the work accident without seeking medical treatment for her left shoulder and left knee and then sought and obtained medical treatment after the accident to reduce her pain and increase her functioning.

Moreover, in reaching their conclusions, Drs. Schakaraschwili and Failinger brush aside Claimant's contention that before the accident she could perform all aspects of her job and did not need any medical treatment and then right after the accident she had a change in her symptoms — pain — and could not perform her job and required medical treatment. Again, this is another fact ignored by Drs. Schakaraschwili and Failinger.

In the end, the ALJ did not find the opinions of Drs. Schakaraschwili and Failinger to be credible and persuasive given that Claimant passed the physically demanding JPR just days before her work accident, had not sought medical treatment for her left shoulder and left knee in years, and needed medical treatment right after the accident. As stated above, Claimant could perform all aspects of firefighting and rescue work right before the accident and then she could not because the work accident aggravated her preexisting knee and shoulder conditions and caused the need for medical treatment.

The ALJ is mindful that correlation does not prove causation. *Smith v. City of Ouray*, W.C. No. 4-992-026, (ICAO January 25, 2019). On the other hand, to the extent certain events occur nearly simultaneously, the causal connection between them becomes quite strong. *Wilson v. City of Lafayette*, 510 F. App'x 775 (10th Cir. 2013)

Thus, the ALJ finds and concludes that Respondents have failed to overcome the DIME opinion of Dr. Hughes by clear and convincing evidence. The Respondents did not establish that it is highly probable that Dr. Hughes' findings concerning MMI is incorrect. The Respondents failed to establish that it is highly probable that Dr. Hughes' is wrong in his conclusions that Claimant's left shoulder and left knee injuries are causally related to the industrial accident and that Claimant needs additional medical treatment to cure her from the effects of her work accident. As a result, the ALJ finds and concludes Claimant is not at MMI. The ALJ further finds and concludes that her left shoulder and left knee conditions - injuries - are causally related to her industrial accident.

III. Whether Claimant established, by a preponderance of the evidence, that Respondents are liable for her prior left knee replacement, her prior left shoulder replacement, and any ongoing treatment for her left knee?

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

A preexisting disease or susceptibility to injury does not disqualify a claim if the injury aggravates, accelerates, or combines with the preexisting disease or infirmity to produce the need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). The ICAO has noted that pain is "a typical symptom from the aggravation of a pre-existing condition" and a claimant is entitled to medical treatment for pain as long as the pain was proximately caused by the injury and is not attributable to an underlying preexisting condition. *Rodriguez v. Hertz Corp.,* WC 3-998-279 (ICAO February 16, 2001).

However, the mere occurrence of symptoms at work or after an accident does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any preexisting condition. Rather, the occurrence of symptoms at work or after an accident may represent the result of or natural progression of a preexisting condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

As found above, the ALJ credits and finds persuasive the opinions of Dr. Orent and Dr. Hughes which both found the need for Claimant’s left total shoulder replacement and left total knee replacement were reasonably necessary and related to Claimant’s work accident. And as found above, the ALJ did not find the opinions of Drs. Schakaraschwili and Failinger to be persuasive.

As found, before the work accident Claimant had occasional left shoulder and left knee pain. However, despite having some occasional shoulder and knee pain, Claimant could perform all aspects of her paramedic and volunteer firefighting job and did not require active medical treatment. As found, the accident permanently aggravated Claimant’s shoulder and knee condition and such aggravation resulted in a permanent increase in pain and functional impairment that prevented Claimant from performing her jobs and caused the need for medical treatment.

The shoulder and knee surgery were prescribed to alleviate Claimant’s pain and increase her decrease in function – each of which was caused by the accident. There was no credible and persuasive evidence submitted by Respondents that indicated the shoulder and knee replacement surgeries were not reasonable and necessary. The primary argument submitted by Respondents was that the treatment was not related to Claimant’s work accident.

While Claimant did have preexisting shoulder and knee problems, the work accident was the primary cause of Claimant’s need for the shoulder and knee replacement. As a result, the ALJ finds and concludes that Claimant has established by a preponderance of the evidence that the left total shoulder replacement and the left total knee replacement were reasonable, necessary, and related to Claimant’s work accident and injuries.

IV. Whether Claimant has established, by a preponderance of the evidence, that Respondents are liable for the additional medical treatment she is requesting.

Claimant has requested additional medical treatment to cure and relieve her from the effects of her work injury. That said, the record is not fully developed as to whether there is specific treatment at issue – compared to medical treatment in general - to treat a particular condition. Plus, the record is not clear as to whether any of the additional treatment she is requesting is currently being recommended and has been prescribed by an authorized treating physician. As a result, any medical benefits not specifically decided in this order are reserved for future determination.

V. Whether Claimant has established that Respondents are liable for an increase in her average weekly wage based on temporary lodging provided at the ambulance station?

Section 8-40-201(19)(b) provides that the term "wages" shall include the reasonable value of board, rent, housing, and lodging received from the employer, the reasonable value of which shall be fixed and determined from the facts in each particular case. The reasonable value of board and lodging is a question of fact. *Western Cultural Resource Management, Inc. v. Krull*, 782 P.2d 870 (Colo. App. 1989).

In *Meeker v. Provident Health Partners*, 929 P.2d 26 (Colo. App. 1996), the court discussed the circumstances under which a fringe benefit might be considered part of an employee's "wages" for purposes of 8-40-201(19)(b). The court indicated that a benefit may be considered "wages" if it has a "reasonable, present-day, cash equivalent value," and the employee has "reasonable access" to the benefit on a "day-to-day basis, either actually or potentially," or has an expectation interest in receiving the benefit under "appropriate reasonable circumstances." *Meeker* at 28.

Here, the evidence supports a finding that Claimant did not have a reasonable day-to-day expectation of receiving housing or lodging at the ambulance station. Claimant only had access to the room during her 72-hour shift – and then she did not have use of it during her six days off.

The temporary use of the room was necessary for Claimant to perform her job which required her to be on-call during each 72-hour shift. Plus, the room did not allow Claimant to forgo other housing. For example, Claimant could not give up her primary residence due to the temporary room provided by Employer and live at the ambulance station.

Thus, the ALJ finds and concludes that under the specific facts and circumstances of this case, the temporary use of the room provided by Employer did not have a reasonable value that should be included in her average weekly wage.

VI. Whether Claimant has to establish, by clear and convincing evidence, that Claimant is not at MMI for her other conditions.

Respondents contend Claimant has to prove by clear and convincing evidence that Dr. Hughes is wrong in determining Claimant reached maximum medical improvement (MMI) for her cervical condition, her left shoulder condition, and her TBI symptoms is wrong?

MMI is not divisible. *Paint Connection Plus v. Indus. Claim Appeals Office*, 240 P.3d 429, 433 (Colo. App. 2010). Moreover, the ALJ has not ordered any additional medical treatment to cure Claimant from the effects of her other injuries. As a result, such issue is not ready for determination.

VII. Whether Respondents are liable for Melissa Abate, a case manager, to be a case manager under this claim.

Section 8-42-101(3.6)(p)(II) provides that Respondents shall offer at least managed care or medical case management. In this case, Claimant is arguing that because Dr. Schultz referred Claimant to Melissa Abate for managed care, Respondents are liable for that cost.

However, case management can only be offered by Respondents and rejected by Claimant. The authorized treating providers cannot designate a person to provide case management services, *Muir v. King Soopers*, W.C. No. 4-350-892 (ICAO May 20, 2003). In *Muir*, Claimant was arguing that Respondents were obligated to pay for a case manager that one of her authorized treating providers had designated. The ICAO affirmed the ALJ's determination that Respondents would not be responsible for payment of case management services based on the ATP's designation of that case manager. The ICAO, interpreting Section 8-42-101(3.6)(p)(II), concluded that it was Respondents, in the first instance, that are allowed to designate the case manager. This particular statutory provision does not allow for an authorized treating provider to designate a different case manager. Consequently, based on the rationale in *Muir,* Claimant's request for Respondents to authorize and pay for case management services by Ms. Abate based on the arguments propounded by Claimant must be denied.

Moreover, 8-42-101(3.6)(p)(II) provides that Respondents shall offer managed care or medical case management. The issue of whether Respondents offered managed care or case management as defined by 8-42-101(3.6)(p)(I)(A) or 8-42-101(3.6)(p)(I)(B) is not before the court.

As a result, the ALJ finds and concludes that Respondents are not liable for Melisa Abate as a case manager.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents have failed to overcome the Division IME.

2. Claimant is not at MMI.

3. Claimant's left shoulder and left knee condition were aggravated by her work accident. As a result, they are related to her work accident.

4. Claimant's left shoulder replacement and left knee replacement were reasonable, necessary, and related to Claimant's work accident.

5. Claimant's average weekly wage shall not be increased based on the temporary use of a room provided by her employer.

6. Respondents shall provide Claimant reasonable, necessary, and related medical treatment to cure and relieve her from the effects of her work injuries.

7. Respondents are not liable for Melisa Abate as a case manager.

8. All issues, including any medical benefit issues not specifically addressed in this order, are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty

(20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 25, 2021.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant prove he suffered a compensable injury to his right shoulder on November 15, 2020?

- Did Claimant prove a right shoulder surgery recommended by Dr. Charles Hanson is reasonably needed to cure and relieve the effects of his compensable injury?

- The parties stipulated Dr. Hanson is the designated ATP. Respondent agreed if the claim is compensable, the December 16, 2020 MRI at St. Mary Corwin Medical Center and the treatment provided at Dr. Hanson's clinic, on November 20, December 10, 2020, and January 4, 2021, were reasonably necessary, causally related, and authorized.

- The parties stipulated to an average weekly wage (AWW) of $867.44, which corresponds to a TTD rate of $578.29.

- Respondent agreed if the claim is compensable, Claimant is entitled to TTD benefits commencing February 4, 2021.[1]

FINDINGS OF FACT

1. Claimant worked for Employer as an overnight grocery stocker. The job is physically demanding and requires lifting and carrying cases of heavy product, and frequent reaching.

2. On November 15, 2020, Claimant was stocking canned vegetables on a high shelf. A can fell from the shelf, and he instinctively reached with his right arm to try to catch it. Claimant did not catch the can but felt a painful pop in his right shoulder. He took a brief break and resumed his duties. The shoulder felt "sore" and continued to bother him through the remainder of his shift. Near the end of the shift, Claimant told a co-worker, "I think I tweaked something in my shoulder." Claimant did not report the injury to management or seek medical treatment because he assumed the injury "was just a muscle strain" that would resolve quickly.

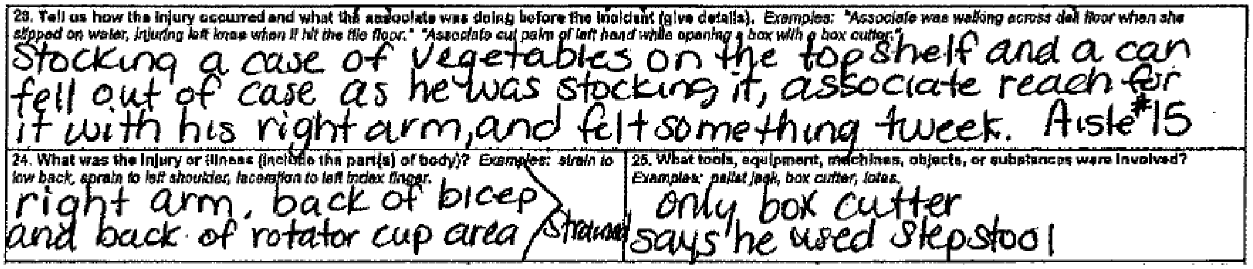
3. By the start of his next shift on November 18, Claimant's shoulder still felt "kind of sore" but he figured "it would work itself out." However, the pain increased significantly after stocking heavy items. At the end of the shift (the morning of November

[1] When discussing the issues at the outset of the hearing, counsel and the ALJ inadvertently referenced a TTD start date of February 4, 202**0**.In fact, Claimant's last date of work was February 3, 202**1**. The ALJ has therefore corrected the stipulation to reflect the parties' true intentions.

19), Claimant mentioned to his co-worker "Andrew" that he had "pulled something" in his shoulder. Claimant went home and went to bed.

4. When Claimant awoke that evening to get ready for his next shift, his shoulder was very painful, and he had difficulty moving his arm. He called the store and told the head clerk he could not come to work that night.

5. On November 20, Claimant met with the store manager, Lisa Q[Redacted], to discuss the injury. He explained what happened, and Ms. Q[Redacted] wrote the information on the accident report form. The form documented:



23. Tell us how the injury occurred and what the associate was doing before the incident (give details). *Examples: "Associate was walking across deli floor when she slipped on water, injuring left knee when it hit the tile floor." "Associate cut palm of left hand while opening a box with a box cutter."*

Stocking a case of vegetables on the top shelf and a can fell out of case as he was stocking it, associate reach for it with his right arm, and felt something tweek. Aisle #15

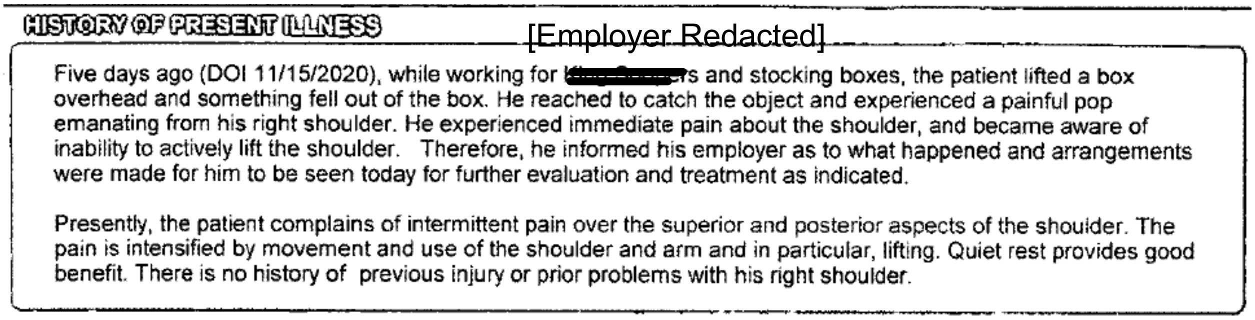
24. What was the injury or illness (include the part(s) of body)? *Examples: strain to low back, sprain to left shoulder, laceration to left index finger.*

right arm, back of bicep and back of rotator cup area / Strained

25. What tools, equipment, machines, objects, or substances were involved? *Examples: pallet jack, box cutter, totes.*

only box cutter says he used Stepstool

6. Claimant saw Dr. Charles Hanson, an orthopedic surgeon, on November 20, 2020. Dr. Hanson documented the history as:



HISTORY OF PRESENT ILLNESS

[Employer Redacted]

Five days ago (DOI 11/15/2020), while working for [redacted]s and stocking boxes, the patient lifted a box overhead and something fell out of the box. He reached to catch the object and experienced a painful pop emanating from his right shoulder. He experienced immediate pain about the shoulder, and became aware of inability to actively lift the shoulder. Therefore, he informed his employer as to what happened and arrangements were made for him to be seen today for further evaluation and treatment as indicated.

Presently, the patient complains of intermittent pain over the superior and posterior aspects of the shoulder. The pain is intensified by movement and use of the shoulder and arm and in particular, lifting. Quiet rest provides good benefit. There is no history of previous injury or prior problems with his right shoulder.

The history noted by Dr. Hanson is generally consistent with Claimant's testimony and the accident report. Claimant probably told Dr. Hanson the same thing he has told everyone else about how the accident occurred. Any apparent inaccuracy in the timeline is probably because Dr. Hanson was paraphrasing Claimant's statements rather than providing a verbatim transcript.

7. Dr. Hanson's examination showed pain, reduced strength, and limited range of motion. Dr. Hanson diganosed a "work related acute right shoulder injury" with a rotator cuff "sprain." He ordered an MRI to check for a rotator cuff tear. Claimant was put on work restrictions of no lifting more than five pounds with the right arm.

8. Claimant followed up with Dr. Hanson on December 10, 2020. His symptoms and physical examination findings were largely the same as at the prior appointment. Claimant had not had the MRI because it had not been approved. Dr. Hanson referred Claimant to physical therapy and maintained his work restrictions.

9. The shoulder MRI was completed on December 16, 2020. It showed moderate joint effusion, a complete supraspinatus tendon tear with marked edema at the musculotendinous junction, and a high-grade partial infraspinatus tear with marked edema. The MRI also showed slight AC joint arthropathy and mild hypertrophic bone spurring.

10. Respondent filed a Notice of Contest on December 18, 2020.

11. Claimant returned to Dr. Hanson on January 4, 2021. His symptoms were no better despite working light duty. Dr. Hanson recommended a mini-open right shoulder decompression, rotator cuff exploration, and rotator cuff repair.

12. Claimant has not seen Dr. Hanson since January 4 because no further treatment was authorized.

13. Employer accommodated Claimant's work restrictions through February 3, 2021. Employer stipulated Claimant is entitled to TTD benefits commencing February 4, 2021 if the claim is found compensable.

14. Claimant saw Dr. Wallace Larson for an IME at Respondent's request on April 21, 2021. Claimant's description of the accident was generally consistent with the accident report, his statements to Dr. Hanson, and testimony at hearing. Dr. Larson concluded the pathology in Claimant's right shoulder was not causally related to the incident at work on November 15, 2020. Dr. Larson suggested Claimant may be exaggerating his symptoms and functional limitations based on his review of video surveillance footage. The video was not offered into evidence.

15. Dr. Larson testified at hearing to elaborate on the conclusions expressed in his report. He opined the forces involved in reaching for the falling can were insignificant and insufficient to cause any injury to Claimant's shoulder. Dr. Larsen opined the underlying MRI findings are degenerative in nature and predated the November 15 work accident. He opined the fact Claimant's shoulder became symptomatic when he reached for the can was coincidental and did not indicate a causal relationship. He testified Claimant merely happened to be at work when he noticed right shoulder symptoms. He testified patients frequently experience the initial symptoms from underlying shoulder pathology while performing routine activities. He opined the rotator cuff tears shown on the MRI are highly unlikely to be traumatic. He concluded it is "almost certain" that the pathology in Claimant's right shoulder is age-related, degenerative, and entirely unrelated to his work. He opined the incident on November 15, 2020 neither caused nor aggravated any condition in Claimant's shoulder. Dr. Larson agreed Claimant needs the rotator cuff surgery, but not on a work-related basis.

16. Claimant's testimony was credible.

17. Dr. Larson's conclusion that Claimant's shoulder condition is entirely unrelated to his work is not persuasive. Claimant felt a painful pop in his right shoulder while reaching for the falling can, and he has been continuously symptomatic since that moment. Although it is unlikely that reaching for the can caused a complete tear, it may

have finished off the last intact fibers from a pre-existing partial supraspinatus tear and worsened the partial infraspinatus tear. The moderate joint effusion and marked edema shown on the MRI suggests a recent injury as opposed to purely longstanding pathology. On the other hand, Dr. Larson may be right that most, or even all, of the pathology shown on the MRI was pre-existing. But Claimant's shoulder was asymptomatic and nondisabling before he reached for the falling can. The fact that his shoulder might have become symptomatic at some time outside of work does not negate the fact it became symptomatic on November 15, 2020 because of his work. The preponderance of persuasive evidence shows the work accident either caused new pathology or aggravated pre-existing but asymptomatic pathology. Claimant proved he suffered a compensable injury.

18. Claimant proved the surgery recommended by Dr. Hanson is reasonably needed to cure and relieve the effects of his compensable injury.

19. As stipulated by the parties, Claimant is entitled to ongoing TTD benefits commencing February 4, 2021 because his injury has been found compensable.

CONCLUSIONS OF LAW

A. Compensability

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). The claimant must prove an injury directly and proximately caused the condition for which he seek benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

The Workers' Compensation Act recognizes a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence," whereas an "injury" is the physical trauma caused by the accident. Section 8-40-201(1); *City of Boulder v. Payne*, 426 P.2d 194 (Colo. 1967). Workers' compensation benefits are only payable if an accident results in a compensable "injury." The mere fact that an incident occurred at work and caused symptoms does not establish a compensable injury. A compensable injury is one that requires medical treatment or causes disability. *E.g., Montgomery v. HSS, Inc*., W.C. No. 4-989-682-01 (August 17, 2016).

If an industrial injury aggravates, accelerates, or combines with a pre-existing condition to produce disability or a need for treatment, the claim is compensable. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). A claimant need not show an injury objectively caused any identifiable structural change to their underlying anatomy to prove an aggravation. A purely symptomatic aggravation is sufficient for an award of medical benefits if the symptoms were triggered by work activities and caused the claimant to need treatment he would not otherwise have required. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Cambria v. Flatiron Construction*, W.C. No. 5-

066-531-002 (May 7, 2019). Pain is a typical symptom from the aggravation of a pre-existing condition, and if the pain triggers the claimant's need for medical treatment, the claimant has suffered a compensable injury. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Dietrich v. Estes Express Lines*, W.C. No. 4-921-616-03 (September 9, 2016). But the mere fact that a claimant experiences symptoms after an incident or activity at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). In evaluating whether a claimant suffered a compensable aggravation, the ALJ must determine if the need for treatment was proximately caused by the claimant's work or merely reflects the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

As found, Claimant proved he suffered a compensable injury to his right shoulder on November 15, 2020. Claimant's shoulder symptoms were precipitated by the distinctly work-related act of reaching for a falling can. Although the forces involved were relatively minor, they were sufficient to elicit symptoms in Claimant's shoulder. There is no persuasive evidence of any pre-injury right shoulder symptoms or limitations. Undoubtedly, at least some pathology shown on the MRI predated the work accident, and Dr. Larson may be correct that it was all pre-existing. But Claimant's right shoulder was asymptomatic, non-disabling, and required no treatment when he arrived at work on November 15, 2020. The work accident either caused new pathology, caused previously asymptomatic pathology to become symptomatic, or some combination thereof. The preponderance of persuasive evidence shows a work-related proximate cause is at least 51% likely.

B. Medical benefits

The respondents are liable for authorized medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. Respondent stipulated that the treatment Claimant has received from Dr. Hanson was reasonably needed, authorized, and a covered benefit if the claim is compensable. Claimant proved the surgery recommended by Dr. Hanson is reasonably needed and causally related. The ALJ credits Dr. Hanson's opinions regarding the most appropriate treatment modalities, including the proposed surgery. Additionally, Dr. Larson agreed the surgery is appropriate, and his only disagreement related to causation.

C. TTD commencing February 4, 2021

The parties stipulated Claimant is entitled to TTD benefits commencing February 4, 2021 if the claim is compensable.

ORDER

It is therefore ordered that:

1. Claimant's claim for a right shoulder injury on November 15, 2020 is compensable.

2. Respondent shall cover medical treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's compensable injury, including but not limited to the shoulder surgery recommended by Dr. Hanson.

3. Claimant's AWW is $867.44, with a corresponding TTD rate of $578.29.

4. Respondent shall pay Claimant TTD benefits at the weekly rate of $578.29, commencing February 4, 2021 and continuing until terminated according to law.

5. Respondent shall pay Claimant statutory interest of 8% per annum on all benefits not paid when due.

6. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: October 25, 2021

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-170-337-001

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that the surgery recommended by Joseph Hsin, M.D., for right shoulder arthroscopy with rotator cuff repair and subacromial space decompression, is reasonably necessary and related to the admitted April 1, 2021 injury.

II. Whether the request for prior authorization for right shoulder arthroscopy with rotator cuff repair and subacromial space decompression was properly denied per W.C.R.P. Rule 16.

PROCEDURAL HISTORY

Respondents filed a General Admission of Liability on May 4, 2021 admitting to medical benefits and temporary disability benefits. On June 8, 2021 Claimant filed an Application for Hearing with the Office of Administrative Courts on issues of reasonable, necessary and related medical benefits, specifically surgery recommended by his authorized treating physician, Dr. Joseph Hsin.

STIPULATION

The parties stipulated that the correct date of injury is April 1, 2021. Respondents agreed to amend the General Admission of Liability to reflect the correct date of injury.

FINDINGS OF FACT

Based on the evidence presented, the ALJ enters the following findings of fact:

1. Claimant is a 39 years old, 5 foot 2 inches tall, medical waste worker for Employer since January 25, 2021. He was a slip seat driver, so he would be in a different truck during any particular week. He was lifting full bins of TPO-4, which is medical waste, to stack them four high onto a truck that would hold about 150 bins total. The bins were originally loaded three high on a dolly and pulled onto the bed of the truck to unload, while pulling a forth bin up the ramp with a hook. Then Claimant would have to lift the fourth bin overhead. The truck itself had a 26 foot long bed and was 13 feet high off the ground. Each full bin weighs approximately 50 lbs., but many weigh more (up to approximately 80 lbs.) and the customers had to pay an overweight charge for those that were above the 50 lbs. limit.

2. Claimant had to stack the heavy bins despite the weight. The topmost bin must be lifted above the level of Claimant's head and Claimant was initially provided with a step stool, but that was taken away due to safety concerns. Claimant had to go onto his tip toes to reach the height required to stack the final fourth level bin to complete his job quickly. There was a time limit to accomplish his tasks. This made Claimant unstable in holding the full bins, with arms extended, above his height level. Claimant stated he could barely reach the height required. Claimant stated that he was supposed to be lifting in his "power zone," which is close to the body, not reaching away from the body with heavy weight.

3. In the days leading up to the incident, approximately one week before the incident, Claimant felt discomfort in his shoulder, and advised his supervisor, but he did not seek any medical care at that time.

4. Claimant was injured in the course and scope of his employment on April 1, 2021. On that day Claimant was lifting heavy bins that he thought were probably around 70 to 80 lbs. when he felt he injured his right shoulder. When reporting the April 1, 2021 injury, Claimant, who this ALJ infers has no medical training, stated that his shoulder problems may have been caused by repetitive use of his shoulder in overhead activities while stacking the bins. Such a reporting could support an occupational disease claim against the Employer. However, the ALJ finds that his injury was the result of an accidental occurrence on April 1, 2021, which aggravated and accelerated his underlying degenerative shoulder condition.

5. Claimant testified that Dr. Myles Cope did not wish Claimant to start therapy initially until he had seen an orthopedic specialist to determine how care should proceed. Claimant proceeded with physical therapy in July and August 2021, which improved Claimant's range of motion, but did not improve the pain in the top part of his shoulder. Before the physical therapy, Claimant stated his shoulder was locked up. He also temporarily improved with the cortisone/steroid injection he received on or about July 22, 2021. The injection helped with the symptoms, so long as he did not move his arm too much, but did not take away the pinching pain in his right shoulder.

6. Claimant has continued to work light duty with reduced hours initially performing office duty for two to three months for Employer. Then Claimant was sent to work for ARC Thrift Stores on a "return to work" program. Claimant continues to perform modified work at the ARC Thrift Stores as of the date of the hearing.

7. Claimant requested leave to proceed with the surgery recommended by his authorized treating physician, as he wishes to be able to continue to properly support his family and get back to regular work. Claimant is found credible as stated in these findings of fact.

8. Claimant was first evaluated by Myles Cope, M.D. on April 6, 2021. Dr. Cope documented Claimant strained his shoulder by lifting a 50 lbs. bin overhead, causing a sharp pain. Medications improved his symptoms but overhead reaching, and pulling motions made his pain worse. On exam he found Claimant was tender to palpation

along the acromioclavicular joint, with severe pain with resisted abduction and adduction, and strength of 4/5. Dr. Cope restricted Claimant to desk work only with no use of the right arm. At the time, Dr. Cope suspected a grade 1 acromioclavicular joint separation, and stated that objective findings were consistent with a history and/or work related mechanism of injury/illness. On April 12, 2021, Dr. Cope relaxed the work restriction but prescribed lidocaine patches and home exercises.

9. On April 26, 2021 Claimant was evaluated by Dr. Bruce Cazden who stated that Claimant was 3 weeks post lifting injury to the right shoulder and not improving with an exercise program. He was still having debilitating right shoulder pain and limited range of motion (ROM). On exam Claimant continued to have tenderness to palpation at the glenohumeral joint and bicipital groove, limited ROM for flexion, abduction and internal rotation, with a positive empty can test,[1] weakness against resistance in both flexion and abduction at 90° and stated that objective findings were consistent with a history and/or work related mechanism of injury/illness. He ordered an MRI of the right shoulder to rule out internal derangement. Claimant was to continue with gentle ROM exercises and follow-up to consider physical therapy (PT) or surgical referral.

10. Respondents filed a General Admission of Liability on May 4, 2021 admitting for reasonably necessary medical benefits and temporary disability benefits.

11. The magnetic resonance imaging (MRI) of May 4, 2021 showed multiple significant findings, including 1) a deep high-grade partial thickness tear involving the distal fibers of the infraspinatus tendon occurring at the greater tuberosity insertion spanning 9 mm, which involves greater than 75% of the tendon thickness and measures 10 mm medial to lateral, 2) a tear that also extends to and involves the posterior fibers of the distal supraspinatus tendon, 3) tendinosis and low grade partial thickness articular sided tearing of the distal most fibers of the subscapularis tendon, 4) tendinosis of the intra-articular segment of the proximal long head of biceps tendon, and 5) mild fatty atrophy of the teres minor muscle. Dr. Craig Stewart also read the MRI to show acromioclavicular joint osteoarthritis with surrounding bone marrow edema, a small amount of fluid in the subacromial subdeltoid bursa, degenerative superior and posterosuperior labral tearing with tendinosis of the proximal long head of the biceps tendon, tendinosis and very low-grade partial tearing of the distal subscapularis tendon.

12. On May 10, 2021 Teresa Ayandale, a physician assistant at WorkWell, referred Claimant to Dr. Hsin for a specialist consultation, and refilled the prescription for lidocaine patches as Claimant’s symptoms were unchanged.

13. Joseph Hsin, M.D. examined Claimant on May 18, 2021 and diagnosed traumatic complete tear of the right rotator cuff based on examination showing a positive drop-arm test[2] and Jobe test and review of the MRI films. Dr. Hsin and Claimant discussed treatment options, concluding that arthroscopy of the right shoulder with rotator cuff repair, subacromial space decompression and biceps tendinopathy was the right course of treatment. Dr. Hsin submitted a request for prior authorization for surgery at

[1] Empty can test, also known as Jobe test, is a test to examine the integrity of the supraspinatus muscle and tendon.

[2] Drop-arm test is used to assess whether a patient may have rotator cuff pathology, including tears.

that time to include right shoulder arthroscopy with rotator cuff repair and subacromial space decompression.

14. Dr. Cope reviewed the MRI findings on May 25, 2021 and noted the high-grade tear of the distal supraspinatus and infraspinatus tendons, osteoarthritis of the acromioclavicular joint, degenerative labral tear and partial tear of the distal subscapularis tendon. He noted a referral to Dr. Hsin. Dr. Cope stated that the mechanism of injury was from stacking bins overhead and that objective findings were consistent with a history and work related mechanism of injury.

15. On May 27, 2021 Respondents denied the request for prior authorization and advised Dr. Hsin that Respondents were seeking an Independent Medical Examination (IME) with Dr. Mark Failinger, which was scheduled for June 14, 2021. Respondents received the IME report from Dr. Failinger on June 28, 2021. On July 7, 2021 Respondents sent a follow up letter stating that they continued to deny the prior authorization of the surgery.

16. At Respondents' request, Claimant underwent an independent medical examination with Dr. Failinger. Dr. Failinger issued a report dated June 14, 2021. He examined Claimant and found that Claimant had a positive Hawkins' test[3] on the right but no other significant findings other than loss of range of motion with passive movement above 90°. He stated he reviewed the MRI imaging and opined that Claimant does not have a full-thickness tear, or even a significant high-grade tear visible on the MRI. He opined the surgical intervention would not be medically reasonable and necessary without the patient first undergoing conservative measures. Dr. Failinger cited to the Medical Treatment Guidelines (MTGs) that recommend conservative care as a first line medical care approach for rotator cuff tendinopathy when a full thickness tear or high-grade tear is not present. Dr. Failinger is not persuasive with regard to the findings on the MRI.

17. Dr. Failinger opined that most rotator cuff pathology occurs as degenerative in the absence of a specific disorder or aggravation of the underlying preexisting conditions. He specifically states:

> There are some patients who fail conservative measures, including relative rest, physical therapy, and cortisone injections, and they have ongoing pain. In that situation subacromial decompression, as well as a possible rotator cuff repair, is reasonable if, in fact, there is a high-grade tear of the rotator cuff, and if the location of the pain has been reasonably identified and confirmed by a diagnostic injection performed in the shoulder.

18. On June 16, 2021, Claimant started physical therapy with WorkWell under Seneca Tantura, P.T. She assessed that Claimant had pain with right glenohumeral motion to flexion and abduction, right AC joint laxity and tenderness to palpation. She

[3] Hawkins test is to assess whether there is impingement of the structures between the humerus and the coracohumeral ligament, especially the supraspinatus and infraspinatus.

noted Claimant had good pain relief with ice and e-stim, and that Claimant was motivated and had a good prognosis.

19. Claimant was evaluated by Nurse Practitioner Bill Ford on June 24, 2021. He diagnosed strain of muscles and tendons of the rotator cuff of the right shoulder, and rotator cuff tear or ruptures. He stated that objective findings were consistent with a history and/or work-related mechanism of injury.

20. Mr. Ford noted on July 22, 2021 that Claimant had a steroid injection with Dr. Hsin and was sore and stiff in the 24 hours following the injection but did note some improvement in pain. He also noted that physical therapy has been helpful and ordered further sessions of PT.

21. Claimant was next seen by Dr. Katherine Drapeau on August 2, 2021, who noted Claimant had some improvement with injection, but Claimant still noted a sharp pain in his right shoulder with any movement. She stated that objective findings were consistent with a history of work related mechanism of injury.

22. On August 18, 2021 Dr. Drapeau referred Claimant back to Dr. Hsin to discuss possible surgery. She continued the physical therapy to maintain range of motion and work on strength.

23. Dr. Failinger testified as an orthopedic surgeon and sports medicine expert. He testified consistent with his report, specifically explaining that Dr. Hsin should have recommended conservative care, including physical therapy and steroid injections before venturing to perform any surgeries. Dr. Failinger stated that he believed Dr. Hsin was a good orthopedic surgeon.

24. Dr. Failinger opined that Claimant may have suffered a minor strain/sprain injury on April 1, 2021. Dr. Failinger noted that Claimant had significant preexisting problems in his right shoulder. It was Dr. Failinger's opinion that the condition of Claimant's right shoulder is chronic, preexisting the injury and not the result of an acute injury. Dr. Failinger noted that rotator cuff surgery may be a reasonable treatment of Claimant's right shoulder, but that treatment was unrelated to the minor strain Claimant may have sustained on April 1, 2021. Dr. Failinger is not persuasive with regard to the preexisting condition and the causation analysis.

25. Dr. Joseph Hsin, Dr. Craig Stewart and Dr. Myles Cope all opined there was a high-grade tear after reviewing the May 4, 2021, MRI films and/or report. Dr. Drapeau sent Claimant back to Dr. Hsin to discuss further possibilities of surgery of the right shoulder. Multiple physicians found positive findings indicating rotator cuff pathology including Dr. Bruce Cazden, Dr. Drapeau, Dr. Hsin, and even Dr. Failinger (Hawkins' test and loss of range of motion above 90°). Dr. Stewart's and Dr. Hsin's opinions that Claimant has a high-grade tear of the infraspinatus, and a tear of the supraspinatus, are more persuasive than Dr. Failinger's opinion.

26. Claimant's testimony that he did not suffer from shoulder problems until working for Employer is also credible and persuasive. The mechanism of injury,

specifically lifting very heavy bins of materials significantly over the level of his head aggravated and accelerated the Claimant's preexisting asymptomatic rotator cuff pathology, causing the need for medical treatment and surgery. Claimant has proven that the right shoulder arthroscopy with rotator cuff repair and subacromial space decompression recommended by Dr. Hsin is reasonably necessary to cure and relieve him from the effects of the admitted April 1, 2021 work injury.

27. The ALJ credits Claimant's testimony, the medical records, and the opinions of Dr. Cope, Dr. Drapeau, Dr. Stewart, Dr. Cazden, Nurse Ford and Dr. Hsin over the contrary opinions of Dr. Failinger. The ALJ finds that Claimant's asymptomatic preexisting right shoulder rotator cuff pathology became symptomatic because of the April 1, 2021 injury at work. Based upon Claimant's testimony and the medical records, the ALJ finds that when Claimant was required to lift the heavy bins over the level of his head with his arms outstretched, his preexisting right shoulder condition was aggravated and accelerated, necessitating medical treatment. Therefore, the ALJ finds that Claimant has demonstrated that it is more likely than not that the recommended right shoulder surgery is reasonable medical treatment necessary to cure and relieve Claimant from the effects of the admitted work injury.

CONCLUSIONS OF LAW

Based on these findings of fact, the Judge draws the following conclusions of law:

A. General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S.. The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the claimant's rights nor in favor of the rights of the respondents; and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S..

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office (ICAO)*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v.*

ICAO, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2018). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Medical Benefits

The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits. Sections. 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000; *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979; *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984).

The right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301, C.R.S. See *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991); *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986). Therefore, in a dispute over medical benefits that arises after the filing of a general admission of liability, an employer generally can assert, based on subsequent medical reports, that the claimant did not establish the threshold requirement of a direct causal relationship between the work injury and the need for medical treatment. *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). A panel of the ICAO also addressed these issues in *Maestas v. O'Reilly Auto Parts*, ICAO, W.C. No. 4-856-563-01 (August. 31, 2012). The panel stated:

> [The *Snyder*] principle recognizes that even though an admission is filed, the claimant bears the burden of proof to establish the right to specific medical benefits, and the mere admission that an injury occurred and treatment is needed cannot be construed as a concession that all conditions and treatments which occur after the injury were caused by the injury.

Section 8-42-101(1)(a), C.R.S., provides that Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *Snyder v. Industrial Claim Appeals Office*, *supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002); *In re Claim of Foust*, I.C.A.O, WC, 5-113-596 (COWC October 21, 2020).

Claimant alleged that surgery recommended by Dr. Joseph Hsin, M.D., an ATP, for right shoulder arthroscopy with rotator cuff repair and subacromial space decompression is reasonably necessary and related to the admitted April 1, 2021 injury. Respondents argue that the surgery is neither reasonably necessary nor related to the injury. Respondents specifically argue that the Claimant's preexisting pathology caused the need for surgery and that the Claimant did not sustain the underlying rotator cuff pathology, for which Claimant is requesting surgery, during the course and scope of his employment.

A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999, 1001 (Colo. App. 2004). As found, Claimant aggravated his preexisting condition on April 1, 2021 to such an extent that it cause the needed medical care and surgery as recommended by Dr. Hsin. During the hearing, Claimant credibly testified that prior to working for Employer he had no issues performing heavy work. He credibly testified that, while he did have some symptoms the week leading up to the actual day of injury, they did not require him to seek any medical attention nor disable him from work. It was not until April 1, 2021 when lifting the 70 to 80 lb. bin full of medical equipment waste that he felt an intense pain in his right shoulder and he could no longer perform his work. Claimant's testimony is credible and persuasive.

At Respondents' request, Claimant underwent an independent medical examination with Dr. Failinger. Dr. Failinger opined that Claimant may have suffered a minor strain injury caused by the lifting, but that the minor injury had resolved. Dr. Failinger noted that Claimant has significant preexisting problems in his right shoulder. It was Dr. Failinger's opinion that the condition of Claimant's right shoulder is chronic and not the result of an acute injury. Dr. Failinger noted that rotator cuff surgery may be a reasonable treatment of Claimant's right shoulder, but that treatment was unrelated to the minor strain Claimant may have sustained on April 1, 2021. Dr. Failinger is not persuasive in this matter.

The medical records of Drs. Cope, Cazden, Drapeau, and Mr. Ford all found that the mechanism of injury of the right rotator cuff was related to the Claimant's work injury. This ALJ infers from these statements that, whether or not there was preexisting asymptomatic pathology, the pathology was aggravated, which caused the need for medical treatment. Further, Dr. Hsin and Dr. Stewart found that Claimant had a complete tear or high-grade tear of the rotator cuff structures. These opinions are also more persuasive than the contrary opinion of Dr. Failinger. Dr. Drapeau referred Claimant back to Dr. Hsin to consider surgery. It is inferred from this act, that Dr. Drapeau deemed the needed surgery was related to the mechanism of injury and reasonably necessary. The opinions of Drs. Cope, Cazden, Drapeau, Mr. Ford and Dr. Hsin are more persuasive than the contrary opinions of Dr. Failinger. As found, this ALJ concludes Claimant has established by a preponderance of the evidence that Dr. Hsin, who is an authorized treating physician, prescribed and recommended rotator cuff surgery for Claimant's right shoulder injury. This ALJ further finds and concludes Claimant has established by a preponderance of the evidence that the right shoulder arthroscopy with rotator cuff repair and subacromial space decompression recommended by Dr. Hsin is reasonably necessary and related to the admitted April 1, 2021 work injury.

Respondents also argued that Dr. Hsin failed to comply with the requirements of the Medical Treatment Guidelines in recommending surgery at the time of his first evaluation of Claimant, and subsequent actions, by not recommending Claimant proceed with conservative care, including physical therapy and a second steroid injection.

The Guidelines are contained in Workers' Compensation Rules of Procedure, Rule 17, 7 CCR 1101-3, and provide that health care providers shall use the Guidelines adopted by the Director of the Division of Workers' Compensation. Sec. 8-42-101(3)(b), C.R.S. state specifically that the MTG shall be used by health care practitioners. In *Hall v. Industrial Claim Appeals Office*, 74 P.3d 459 (Colo. App. 2003), the Colorado Court of Appeals noted that the Guidelines are to be used by health care practitioners when furnishing medical aid under the Workers' Compensation Act.

The Guidelines are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). It is appropriate for an ALJ to consider the Guidelines in deciding whether a certain medical treatment is reasonable and necessary for a claimant's work related condition. See *Deets v. Multimedia Audio Visual*, W. C. No. 4-327-591 (March 18, 2005).

Despite this, an ALJ's consideration of the Guidelines may include deviations from them where there is evidence justifying the deviations. *Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (Jan. 25, 2011). The Guidelines do not constitute evidentiary rules of procedure, and an expert's compliance with them does not dictate whether the expert's opinions are credible, admissible, or whether they may constitute substantial evidence. Rather, compliance with the Guidelines affects the weight given to the medical opinions and the determination to grant or deny a particular medical treatment as reasonably necessary. See *Cahill v. Patty Jewett Golf Course*, W.C. No. 4-729-518 (February 23, 2009); *Thomas v. Four Corners Health Care*, W.C. No. 4-484-220 (April 27, 2009); *Tafoya v. Associations, Inc.,* W.C. No. 4-931-088-03 (Jan. 13, 2017).

Section 8-43-201(3), C.R.S. states that "[t]he director or administrative law judge is not required to utilize the medical treatment guidelines as the sole basis" for determinations of whether a claimant may require or need surgery in context of medical issues tied to Guidelines. This ALJ is not bound by the Guidelines when awarding medical benefits that are reasonable, necessary and related to a particular injury. While it is appropriate for this ALJ to consider the Guidelines on the question of diagnosis, causal relationship or the aggravation of the claimant's condition, it does not compel the ALJ to adopt the opinion of any expert on the issue of causal connection between the work related injury and the need for medical care. As found, Dr. Hsin credibly diagnosed that Claimant had a high-grade tear or complete tear and required rotator cuff surgery at the time of the diagnosis. Further, as found and concluded, the surgery proposed by Dr. Hsin is reasonably necessary and related to the April 1, 2021 admitted work related injury.

C. Prior Authorization Denial

An authorized treating physician's request for prior authorization for medical care is controlled by W.C.R.P. Rule 16-7 as enacted as of January 1, 2021, which states in pertinent part as follows:

> Rule 16-7
>
> B. Prior Authorization for prescribed treatment may be granted immediately and without a medical review. However, the payer shall respond to all Prior Authorization requests in writing within 10 days from receipt of a completed request as defined per this Rule.
>
> Rule 16-7-2
>
> B. The payer shall have 10 days from the date of the appeal to issue a final decision and provide documentation of that decision to the provider and parties.
> ….
>
> E. Failure of the payer to timely comply in full with all Prior Authorization requirements outlined in this rule shall be deemed authorization for payment of the requested treatment unless the payer has scheduled an independent medical examination (IME) and notified the requesting provider of the IME within the time prescribed for responding.
>
> 1. The IME must occur within 30 days, or upon first available appointment, of the Prior Authorization request, not to exceed 60 days absent an order extending the deadline.
>
> 2. The IME physician must serve all parties concurrently with the report within 20 days of the IME.
>
> 3. The payer shall respond to the Prior Authorization request within 10 days of the receipt of the IME report.

The rule specifically requires Respondents to respond to a request for prior authorization within 10 days. Dr. Hsin made the request for prior authorization on May 18, 2021 and Respondents sent the letter denying the prior authorization on May 28, 2021, which is within the required time period. The IME was scheduled for June 14, 2021 and Claimant attend the IME. This falls within the 30 days required for IMEs to occur. Dr. Failinger issued a report, which Respondents represent they received on June 28, 2021. Respondents sent a letter on July 7, 2021 stating they continued to deny the surgery recommended by Dr. Hsin. This falls within the required 10 days of receipt of the report.

Claimant provided no evidence to the contrary and made no arguments that the facts provided by Respondents were incorrect. As found, Respondents complied with the prior authorization request requirements of W.C.R.P. Rule 16 with regard to the request for prior authorization made by Dr. Hsin.

ORDER

IT IS THEREFORE ORDERED THAT:

1. Respondents shall pay for the right shoulder rotator cuff surgery and decompression that is reasonably necessary and related to the admitted April 1, 2021 injury.

2. The surgery shall be paid in accordance with the Colorado Medical Fee Schedule.

3. Respondents complied with the requirements of W.C.R.P. Rule 16 following Dr. Hsin's request for prior authorization.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge' s order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 26th day of October, 2021.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-151-060-002

ISSUES

I. Whether the back surgery recommended by Dr. Robinson is reasonable, necessary, and related to Claimant's compensable work injury.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. Claimant began working for Rose Medical Center as a certified nursing assistant in February 2017. Claimant became a registered nurse in February 2020 and then worked at Rose Medical Center as a nurse. **[Transcript p. 34 ¶ 8-16]**
2. Claimant worked as a certified nursing assistant at Rose Medical Center for about two years. Claimant's job duties as a certified nursing assistant were strenuous and included activities such as moving patients in and out of beds and moving patients to and from commodes. Claimant's work as a certified nursing assistant, at times, required that he repetitively lift dementia patients. **[Transcript p. 35 ¶ 1-25/ Transcript p. 37 ¶ 7-9]**
3. Claimant had back surgery in 2005 to address a herniated disc at L4-L5. **[Transcript p. 19 ¶ 21-25]**
4. When Claimant had back surgery in 2005, Claimant's surgeon advised Claimant that back symptoms treated by surgery could return. **[Transcript p. 37 ¶ 14-25]**
5. During the two-year period that Claimant performed work as a certified nursing assistant at Rose Medical Center that Claimant described as strenuous, Claimant did not experience back pain. **[Transcript p. 37 ¶ 1-13]**
6. On July 10, 2020, after Claimant had become a nurse at Rose Medical Center, Claimant helped a dementia patient with heart problems transfer in and out of the patient's bed on multiple occasions after which Claimant reported back pain. **[Transcript pgs. 16-17]**
7. Respondents admitted liability for the injury Claimant suffered on July 10, 2020, at Rose Medical Center. **[Respondents' Exhibit P, p. 320]** As a result, this is an admitted claim.
8. Claimant's lumbar MRI on July 29, 2020 revealed the following: **[Respondents' I, pgs. 306-307]**

   L1-L2: There is mild bilateral facet arthropathy

   L2-L3: There is diffuse bulging and mild bilateral facet arthropathy resulting in mild right neural foraminal narrowing

> L3-L4: There is disc bulging asymmetric to the right, thickening of the ligamentum flavum and mild bilateral facet arthropathy resulting in severe right and mild left neural foraminal narrowing.
>
> L4--L5: There is diffuse disc bulging, small superimposed central-disc protrusion and mild bilateral facet arthropathy resulting in mild central canal stenosis and mild bilateral neural foraminal narrowing. A left hemilaminectomy is noted.
>
> L5-S1: There is minimal diffuse disc bulging and moderate bilateral facet arthropathy.
>
> IMPRESSION: Moderate degenerative changes including mild L4-L5 central canal stenosis and severe right L3-L4 neural foraminal narrowing.

9. On July 30, 2020, Dr. Irish saw Claimant and reviewed the July 29, 2020, MRI. Dr. Irish found that the MRI revealed “moderate degenerative changes throughout the lumbar spine.” Dr. Irish’s diagnosis was sacroiliac joint sprain. **[Respondents’ Exhibit C, pgs. 83,85]**

10. Claimant was seen by Dr. Chan on August 14, 2020. Dr. Chan diagnosed lumbar radiculopathy, sprain of ligaments of lumbar spine, SI joint dysfunction, and low back pain at multiple sites. Dr. Chan recommended an L4-L5 ESI injection to serve both “diagnostic and therapeutic purposes.” **[Respondents’ Exhibit B, p. 9**]

11. In a report dated August 14, 2020, Dr. Chan discussed his review of Claimant’s lumbar MRI stating: “MRI was reviewed with the patient at great length. There is no specific identifiable pathology. There are degenerative changes noted in the L3-4 and L4-5 levels…[t]hus, I am in agreement with Dr. Irish that the pain generator is somewhat elusive.” **[Respondents’ Exhibit B, p. 9]**

12. Dr. Irish examined Claimant on August 19, 2020. At the visit, Claimant asked to see a spinal surgeon which Dr. Irish refused pending the outcome of an injection. Dr. Irish advised Claimant “that the majority of the findings on MRI are degenerative and not acute.” Dr. Irish’s diagnosis was sacroiliac joint sprain. **[Respondents’ Exhibit C, pgs. 105,108]**

13. When Claimant followed-up with Dr. Chan on September 16, 2020, Dr. Chan noted that he had administered an L4-L5 injection 2 weeks earlier and that the injection provided “no diagnostic or therapeutic benefit at all whatsoever.” At the September 16, 2020, evaluation, Dr. Chan conducted lower-extremity EMG testing concluding that the test was negative for bilateral SI radiculopathy. **[Respondents’ Exhibit B, pgs. 34, 36]**

14. Dr. Chan administered an SI joint injection on October 7, 2020. Claimant saw Dr. Chan on October 15, 2020. Dr. Chan concluded that Claimant’s response to the L4-L5 and S1 joint injections was nondiagnostic. Dr. Chan noted that “[a]t this juncture, the pain generator is rather elusive. We are dealing with subjective pain complaint [sic].” **[Respondents’ Exhibit B, pgs. 45, 54]**

15. Dr. Chan evaluated Claimant on November 4, 2020. Dr. Chan noted:

> "I am in agreement with Dr. Irish that the pain generator is definitely elusive. We are dealing with subjective pain complaint without overt objective findings. Given the fact that the MRI did not show any significant pathology, and that the EMG did not show any frank neuropathic lesions, the patient's pain complaint could very well be myogenic in origin." **[Respondents' Exhibit B, p.57]**

16. Claimant was seen by Dr. Burke on November 17, 2020. The diagnosis was lumbar radiculitis and lumbar disc disease. Dr. Burke recommended a transforaminal ESI injection at L4-L5**. [Respondents' Exhibit E, pgs. 256-257]**
17. On January 4, 2021, Dr. Burke administered bilateral L4-L5 transforaminal epidural steroid injections. **[Respondents' Exhibit E, p. 259]**
18. Claimant saw Dr. Burke on January 12, 2021. Claimant reported that he experienced a 25% reduction of symptoms after the injection that lasted about 2 hours. **[Respondents' Exhibit E, pgs. 261-262]**
19. To succeed as a diagnostic tool, the results from an injection should occur within the expected time frame and there should be pain relief of approximately 80% demonstrated by pre and post Visual Analog Scale (VAS) scores**. WCRP 17, Exhibit 1, (E) (2) pg. 22 "The Medical Treatment Guidelines."**
20. Claimant attended a Respondent IME (RIME) with Dr. Burris on February 2, 2021. Dr. Burris concluded that Claimant's described mechanism of injury on July 10, 2021, likely, resulted in a minor lumbar soft tissue strain**.** Dr. Burris concluded that Claimant's diagnostic tests were negative and that Claimant's responses to injections were non-diagnostic**. [Respondents' Exhibit F. p. 277]**
21. In his RIME report dated February 2, 2021, Dr. Burris concluded that the that there were no indications for surgery in Claimant's case, and that Claimant reached maximum medical improvement on November 10, 2020. **[Respondents' Exhibit F, p. 277]**
22. In her deposition on February 23, 2021, Dr. Burke testified as follows: **[Claimant's Exhibit 1, p. 32 ¶ 21-25; p. 33 ¶ 1-17]**

> Question: Well, is there--is there anything, that's a [sic] purely objective [sic] nature, that establishes that he, that [Claimant's name redacted] , is having radicular symptoms?
>
> Answer: So pain is--there's nothing that can be objectively defining for pain, unless you have someone that gets a functional MRI of their brain while they're experiencing symptoms. See, even with the EMG studies that show radicular pathology, not everyone will even experience pain in that situation. So, you know, I would say across the board, simply put, by nature of what it is, pain is a subjective feature.

23. When asked what further treatment Claimant required, Dr. Burke testified at her deposition on February 23, 2021, as follows: "Other options would be to see if he's

a candidate for some type of surgical intervention. I don't think that he is." **[Claimant's Exhibit 1, p.18 ¶ 17-19]**

24. Claimant was seen for the first time by Dr. Robinson, a neurosurgeon, on March 3, 2021. Dr. Robinson's diagnosis was lumbar radiculopathy, degenerative disc disease, and post-laminectomy syndrome. Dr. Robinson stated that Claimant might be a "good candidate" for L4-L5 arthroplasty. Dr. Robinson referred Claimant for an x-ray. **[Respondents' Exhibit G, pgs. 279-280]**

25. Claimant had a lumbar x-ray on March 3, 2021, that revealed moderate disc space narrowing at L4-L5 and mild disc space narrowing at L3-L4 and L5-S1. The radiologist impression was "degenerative disc disease." **[Respondents' Exhibit J, p. 308]**

26. On March 15, 2021, Claimant was seen by Dr. Robinson a second time. Dr. Robinson recommended L4-L5 arthroplasty. **[Respondents' Exhibit G, p.284]**

27. Respondents received a request for authorization of L4-5 lumbar arthroplasty/lumbar artificial diskectomy surgery from Dr. Robinson on March 30, 2021, and denied authorization for surgery pending an IME with Dr. Rauzzino. **[Respondents' Exhibit K, p. 310]**

28. **WCRP 17, Exhibit 1, (G)(11) (c)** the Colorado "Medical Treatment Guidelines" set forth the following as indications for disc replacement surgery:

    All pain generators are adequately defined and treated;

    Spine pathology limited to one level;

    Symptomatic one-level degenerative disc disease established by objective testing (CT or MRI scan followed by [positive provocation discogram]);

    Symptoms unrelieved after six months of active non-surgical treatment;

    All physical medicine and manual therapy interventions are completed;

    Psychosocial evaluation with confounding issues addressed

29. **WCPR 17, Exhibit (G) (11) (d)** of the Colorado "Medical Treatment Guidelines" provides that the following, among other things, are contraindications for disc replacement surgery:

    Multiple-level degenerative disc disease (DDD).

    Generalized chronic pain

    Spondylolysis.

    Spinal canal stenosis.

    Symptomatic facet joint arthrosis – If imaging findings and physical exam of pain on extension and lateral bending are present, exploration of facet originated pain should be completed prior to disc replacement.

    Deficient posterior elements.

    Spondylolisthesis greater than 3 mm.

Significant spinal deformity/scoliosis.

Spinal instability at the pathologic or adjacent level requiring fusion.

Evidence of nerve root compression, depending on the device used.

30. Claimant attended another RIME. This second RIME was with Dr. Rauzzino on April 13, 2021. In his RIME report, Dr. Rauzzino concluded that if Claimant sustained an injury, the injury was likely a lumbar strain that would have resolved over time and would not account for Claimant's pain and radiculopathy. Dr. Rauzzino found that Claimant's physical examination and reported location of pain were not consistent with an L4-L5 injury, specifically. **[Respondent's Exhibit H, p. 303]**

31. Dr. Rauzzino helped procure and write the WCRP 17 Medical Treatment Guidelines. **[Transcript p. 53 ¶ 5-10]**

32. Dr. Rauzzino is a board-certified neurosurgeon who has been in private practice for about 20 years. Dr. Rauzzino has performed more than 100 disc-replacement procedures in connection with his surgical practice. Dr. Rauzzino serves as the Chief of Neurosurgery at Sky Ridge Hospital. **[Transcript p. 40 ¶ 7-18; p. 41 ¶ 1-4; p. 46 ¶ 3-15]**

33. In his RIME Report, Dr. Rauzzino concluded that the L4-L5 surgery recommended by Dr. Robinson is not a reasonable or necessary treatment for Claimant's spine and the treatment is not relatable to the work injury. **[Respondent's Exhibit H, p. 303]**

34. Dr. Rauzzino stated that the radiographic abnormalities seen in Claimant's diagnostic films are explained by Claimant's previous discectomy, and that there is no evidence that Claimant had an acute injury to the L4-L5 interspace that requires any sort of treatment. **[Respondent's Exhibit H, p. 302]**

35. In his RIME report, Dr. Rauzzino stated that Claimant's testing and treatment, to date, had not, appropriately identified Claimant's pain generators and that there have been no studies that localize Claimant's pain to the L4-L5 interspace. **[Respondent's Exhibit H, p. 303]**

36. When discussing contraindications for disc replacement surgery as stated in the Medical Treatment Guidelines (deficient posterior elements, symptomatic facet arthrosis, and multilevel lumbar degenerative disease), Dr. Rauzzino noted that Claimant had a previous discectomy at the level of proposed surgery and there is evidence of previous facet resection, facet arthrosis, and multi-level lumbar degenerative disc disease all that could be contributing to pain. **[Respondent's Exhibit H, p. 303]**

37. In his report, Dr. Rauzzino stated, "[i]t is important to remember that while a patient may have complaints of back pain that has failed other modalities, that does not mean that surgery is therefore indicated…" Dr. Rauzzino, further stated that "[Claimant's name redacted] does not meet the criteria for lumbar disc replacement or other types of surgery mainly because a pain generator has not been identified nor has his pain been localized specifically to the L4-L5 level. Mr. [Claimant's

name redacted] has had previous surgery and facet arthritis at this level as well as facet arthritis and chronic degenerative disc disease at multiple levels. **[Respondent's Exhibit H, p. 304]**

38. On July 2, 2021, Haley Burke, M.D., one of Claimant's treating providers, issued a report responsive to Dr. Rauzzino's RIME report. Dr. Burke noted that she is not a surgeon. Dr. Burke agreed that Claimant's mechanism of injury may have contributed to a myofascial strain, but that Claimant's constellation of symptoms was not consistent with a myofascial injury. **[Respondents' Exhibit E p. 267]**

39. Dr. Burke agreed that the decision to pursue surgery "ideally will come after diagnostic epidural injection yields outstanding benefit, but this too is not always a perfect diagnostic tool." Dr. Burke argued that Claimant's symptoms are consistent with discogenic pain but did not address whether this discogenic pain could be localized to the L4-L5 interspace. **[Respondents' Exhibit E p. 267]**

40. Dr. Rauzzino testified that artificial disc replacement involves cutting the disc out of the disc interspace and placing an artificial disc in the disc space. Unlike fusion surgery where the placement of instrumentation does not have to be perfectly symmetrical, successful disc replacement surgery requires that the artificial disc be properly recessed in the middle of the disc space. **[Transcript p. 47 ¶ 5-17]**

41. Dr. Rauzzino testified that failed disc replacement surgery or surgery that does not alleviate symptoms creates a "whole host of trouble" and that taking artificial discs out is "a dangerous thing" and "if you're going to take the trouble of putting one in and go through the risks of the surgery and all that, you really need to be sure that you have---you know, that this it. This is where the pain's coming from." **[Transcript p. 62 ¶ 3-1l]**

42. At hearing, Dr. Rauzzino testified that Claimant doesn't just have one bad disc or one bad level, he has multiple bad levels, and when a person doesn't have a single pain generator that is the proven source of their pain, that person is not a good candidate for disc-replacement surgery. **[Transcript p. 52 ¶ 11-21]**

43. When asked whether Claimant's L4-5 symptomology is established by objective testing, Dr. Rauzzino testified as follows. **[Transcript p. 57 ¶ 1-25]**

> "No, it hasn't. So, if, if you look at the, if you look at the patient's symptoms, if you look at the treatments which, which have been rendered, and if you look at the response to this treatment, again it doesn't seem to pass the test in my mind.
>
> If you look at his symptoms, he, he initially had backpain and some left leg pain. Then, the pain migrated to the right side. You know, that's different. It kind of changed over time.
>
> So it isn't like he just has symptomatic -- a, a, a clearly defined set of symptoms. He has diffuse complaints which have expanded over time. And then, radiographically, he has multilevel changes throughout this complaint. They talk about severe disease at the level above where they, they talked about an artificial disc being placed. He's had surgery at the L4-L5 level, which affects his success. And then, if you look at his response,

> he doesn't have a physical exam that points to it. He doesn't have a cliff drop or something that clearly says that there's that this is the disc which is producing his symptoms because he doesn't really have any disease on the right side."

44. At hearing, Dr. Rauzzino was asked whether Claimant's pain generators had been adequately defined and treated. In response, Dr Rauzzino testified that the L4-L5 disc has not been establish as the "root cause of the pain." Dr. Rauzzino testified further: **[Transcript p. 61 ¶ 8-16]**

> "I mean, we did the -- they did the injections there, which were nondiagnostic. They looked at, you know, he doesn't have a physical exam which points to specifically the L4-L5 level. He doesn't have isolated radiographic findings specific to L4-L5."

45. At hearing, Dr. Rauzzino was asked about a contraindication for disc replacement surgery, symptomatic facet joint arthrosis. Dr. Rauzzino testified that Claimant has facet arthritis, but that he could not determine whether it was symptomatic pending the results of a facet injection. **[Transcript p. 68 ¶ 4-25; p. 69 ¶ 1]**

46. The ALJ finds Dr. Rauzzino's opinions to be credible and highly persuasive for many reasons. First, he is a spinal surgeon who performs disc replacement surgery for his patients who are proper candidates. Second, his opinions are consistent with the Colorado Medical Treatment Guidelines. Third, he uses the same criteria set forth in the Colorado Medical Treatment Guidelines when determining whether disc replacement surgery is reasonable and necessary for his own patients. Fourth, his opinions are supported by Claimant's medical records – regarding Claimant having multilevel degenerative disc disease and the lack of an identifiable pain generator.

47. Claimant has multilevel degenerative disc disease of his lumbar spine. Thus, his spinal pathology is not limited to one-level of his lumbar spine.

48. The spinal injections provided to Claimant during the claim were nondiagnostic. As a result, the pain generator in Claimant's back has not been identified. Thus, it has not been established that the pain generator is localized at the L4-L5 level.

49. Because the pain generator has not been identified as coming from the L4-L5 level, and Claimant has multilevel degenerative disc disease, disc replacement surgery is contraindicated under the Colorado Medical Treatment Guidelines.

50. Because the pain generator has not been identified as coming from the L4-L5 level, and Claimant has multilevel degenerative disc disease, disc replacement surgery at the L4-L5 level is not reasonable and necessary to treat Claimant from the effects of his work injury. As a result, the ALJ finds that the disc replacement surgery recommended by Dr. Robinson is not reasonable and necessary to treat Claimant from the effects of his work injury.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether the back surgery recommended by Dr. Robinson is reasonable, necessary, and related to Claimant's compensable work injury.

C.R.S. § 8-42-101 (1)(a) provides that Respondents shall furnish medical care and treatment reasonably necessary to cure and relieve the effects of the injury. Claimant bears the burden of proof of showing that medical benefits are causally related to his work-related injury or condition. *Ashburn v. La Plata School District 9R,* W.C. No. 3-062-779 (May 4, 2007). Therefore, Claimant is not entitled to medical care that is not causally related to his work-related injury or condition. As noted in *Bekkouche v. Riviera Electric*, W.C. No. 4-514-998 (May 10, 2007), "A showing that the compensable injury caused the need for treatment is a threshold prerequisite to the further showing that treatment is reasonable and necessary." Where the relatedness, reasonableness or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc.,* W.C. No. 4-117-758 (ICAO April 7, 2003).

When determining the issue of whether proposed medical treatment is reasonable and necessary the ALJ may consider the provisions and treatment protocols of the Medical Treatment Guidelines because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, evidence of compliance or non-compliance with the treatment criteria of the Medical Treatment Guidelines is not dispositive of the question of whether medical treatment is reasonable and necessary. Rather the ALJ may give evidence regarding compliance with the Medical Treatment Guidelines such weight as he determines it is entitled to considering the totality of the evidence. *See Adame v. SSC Berthoud Operating Co., LLC.*, WC 4-784-709 (ICAO January 25, 2012); *Thomas v. Four Corners Health Care*, WC 4-484-220 (ICAO April 27, 2009); *Stamey v. C2 Utility Contractors, Inc.*, WC 4-503-974 (ICAO August 21, 2008).

Claimant suffered a compensable back injury on July 10, 2020, that required medical treatment. Before Dr. Burke referred Claimant to Dr. Robinson, Dr. Burke, mindful of Claimant's diagnostic test results, doubted that Claimant was a candidate for spinal surgery. Claimant saw Dr. Robinson for the first time on March 3, 2021. At that initial visit, Dr. Robinson thought Claimant might be a good candidate for an L4-L5 disc replacement pending an x-ray. Then, after an x-ray, he concluded Claimant was a good candidate for an L4-L5 disc replacement. Nowhere in Dr. Robinson's reports does he go through whether Claimant is a candidate for disc replacement surgery pursuant to the Colorado Medical Treatment Guidelines.

Dr. Rauzzino, a neurosurgeon who performs disc replacement surgeries, reported, and testified credibly and persuasively, that successful disc replacement requires precision, and that disc replacement surgery addresses a very specific pain generator. Here, the procedure addresses pain generated from L4-L5 disc space. Dr. Rauzzino credibly testified that if a patient's pain generators are not sufficiently identified, there is a risk that disc replacement surgery will not address the patient's symptoms and the surgery may have to be revised where revision can be dangerous.

Dr. Rauzzino testified credibly to his belief - a belief which tracks relevant portions of The Medical Treatment Guidelines - that before a disc replacement surgery is performed, the patient's pain generators should be clearly defined. The Medical Treatment Guidelines - discussing when disc replacement surgery is indicated - state that all pain generators should be identified and treated, and that spinal pathology should be limited to one level. Dr. Rauzzino reported and testified credibly that pain generators are identified through physical examination, diagnostic injections, and diagnostic imaging.

Dr. Rauzzino credibly testified that Claimant's MRI and x-ray films show evidence of multi-level degenerative lumbar disc disease and do not, themselves, establish the L4-L5 disc space as a primary pain generator. Dr. Chan conducted an EMG study that was negative for evidence of lower-extremity radiculopathy. Dr. Rauzzino, Dr. Chan, and Dr. Burris reported and/or testified credibly that spinal injections provided during the claim were nondiagnostic. Dr. Chan, after performing a second diagnostic injection stated, “[a]t this juncture, the pain generator is rather elusive.” Dr. Rauzzino testified credibly that Claimant’s physical examination does not establish the L4-L5 disc space as a pain generator.

In a July 2, 2021, report where Dr. Burke argued in favor of surgery and in support of the proposition that Claimant’s symptoms are discogenic in origin, Dr. Burke did not argue, persuasively, that the situs of the proposed surgery, L4-L5, is a pain generator and/or primary pain generator. The ALJ found that the source(s) of Claimant’s pain has not been clearly or objectively identified.

The Medical Treatment Guidelines provide, as an indication for disc replacement surgery, that there be one level of spinal pathology. The Medical Treatment Guidelines state that multiple-level degenerative disc disease is a contraindication to disc replacement surgery. Dr. Rauzzino testified credibly that Claimant’s diagnostic films evidence multiple-level degenerative disc disease. Dr. Burke, who argued in favor of disc replacement surgery, stated in her November 17, 2020, and January 12, 2021, reports that Claimant’s MRI showed multi-level disc disease. Dr. Chan reviewed Claimant’s lumbar MRI, which provided “[t]here are degenerative changes noted in the L3-4 and L4-5 levels.”

As found, Claimant has multilevel degenerative disc disease and Claimant has not established that his spinal pathology is limited to one-level of his lumbar spine. An L4-5 disc-replacement surgery targets a very specific and potential source of pain: the L4-5 disc space. The source of Claimant’s symptoms has not been adequately defined. Furthermore, it is not clear that Claimant’s disc pathology is limited to one-level. Claimant has multi-level degenerative disc disease. Dr. Rauzzino’s opinion that disc replacement surgery recommended by Dr. Robinson is not a reasonable or necessary treatment for Claimant’s spine - an opinion that finds support in the Medical Treatment Guidelines - is credited by the ALJ.

As a result, the ALJ finds and concludes that Claimant has failed to establish by a preponderance of the evidence that the disc replacement surgery recommended by Dr. Robinson is reasonable and necessary to treat Claimant from the effects of his work injury.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant’s request L4-L5 lumbar arthroplasty/lumbar artificial diskectomy is denied and dismissed.
2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the

certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 26, 2021.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-127-088-001

ISSUES

1. Whether Claimant established by clear and convincing evidence that the opinion of DIME physician, Bradley Abrahamson, M.D., that Claimant reached maximum medical improvement on December 30, 2020 is incorrect.

2. Whether Claimant established by clear and convincing evidence that Dr. Abrahamson's assignment of a 0% permanent impairment rating was incorrect.

FINDINGS OF FACT

1. On February 20, 2019, Claimant sustained an injury to his lower back in the course of his employment with a former employer – Vestas. Claimant received treatment at Banner Occupational Health Clinic (BOHC) under the direction of Linda Young, M.D. and from Gregory Reichhardt, M.D. at Rehabilitation Associates of Colorado for diagnoses of low back pain and right sided sciatica. In addition, Claimant received physical therapy, and chiropractic.

2. On December 6, 2019, Claimant saw Dr. Young for his February 2019 injury. Claimant reported back pain at a level of 5/10, tightness in his back, and difficulty sleeping due to back pain. Claimant had not yet begun massage therapy at that time, but had completed chiropractic and physical therapy. Dr. Young noted that Claimant had then-existing work restrictions, including frequent position changes, and lifting 25 pounds or more as tolerated. Dr. Young recommended Claimant see a psychologist to help with his sleep and issues related to anxiety and stress. Dr. Young also recommended Claimant re-initiate chiropractic care in conjunction with massage therapy. Claimant was scheduled for a follow-up appointment in four weeks, and Dr. Young indicated she anticipated putting Claimant back to work at full duty as tolerated at the next visit. As of December 6, 2019, Claimant had not been placed at maximum medical improvement (MMI) for his February 2019 injury. (Ex. E).

3. Sometime after his February 2019 injury, Claimant left employment with Vestas and began working for Employer. On December 17, 2019, Claimant was involved in a motor vehicle accident while performing deliveries for Employer.

4. On the date of the accident, Claimant was seen at Workwell by Lloyd Luke, M.D. Claimant reported right lumbar and hip pain, paresthesias down his right posterior thigh into the foot, jaw pain and neck stiffness. Claimant was not sure if he hit his head in the accident. Dr. Luke indicated he was not comfortable with the initial evaluation being performed at Workwell and sent Claimant to the emergency department without performing an examination. (Ex. 13).

5. Claimant then went to the UC Health emergency room where he reported neck, back, right shin, and facial pain, with some mid-line spinal tenderness. Imaging studies of Claimant's head, jaw, right leg, and cervical, thoracic, and lumbar spine were all interpreted as unremarkable. Claimant reported neurological symptoms including numbness, tingling, weakness, dizziness, and vision problems. Claimant was diagnosed with a muscle strain, contusions of the face and right leg, and bilateral back pain, and then discharged with muscle relaxers. (Ex. 14).

6. On December 19, 2019, Claimant was seen at BOHC by Douglas Drake, PA-C. Mr. Drake noted that Claimant also had a then-existing workers' compensation claim related to a low back injury sustained at Vestas and was under the care of Dr. Young at Banner for those injuries. Claimant reported pain in his neck, back and right knee, which he rated at 10/10. On examination, Mr. Drake noted mild tenderness to palpation in the thoracic spine, with limited range of motion due to discomfort. Examination of Claimant's neck was unremarkable. Mr. Drake diagnosed Claimant with cervicalgia, contusion of the head, contusion of the right knee and back pain. Mr. Drake prescribed Norco for pain. Claimant did not report cognitive issues at this visit. (Ex. 11).

7. On December 26, 2019, Claimant saw Mr. Drake again. Claimant reported that Norco and muscle relaxers were not helping and that he was having difficulty sleeping. He rated his back pain at 8/10. Mr. Drake prescribed poot therapy and physical therapy. Claimant did not report cognitive issues at this visit. (Ex. 10).

8. On January 10, 2020, Claimant apparently saw Mr. Drake in follow up for his February 2019 injury. No record for this date was offered or admitted into evidence. According to a medical summary prepared by Claimant's expert witness, Dr. Goldman, Claimant reported his low back pain level was 5/10. (Ex. 1).

9. On January 13, 2020, Claimant saw Daniel Bates, M.D., at BOHC. Dr. Bates noted Claimant was transitioning care from Dr. Young to him. Dr. Bates indicated Claimant was approaching MMI for his February 20, 2019 injury on October 18, 2019. While Dr. Bates apparently reviewed Claimant's prior medical records, he did not note that Dr. Young saw Claimant on December 6, 2019, or that Claimant was recommended to receive massage therapy and chiropractic after December 6, 2019. Dr. Bates indicated he was "closing" Claimant's February 2019 case, and that patient was at MMI for that injury, with no maintenance and no permanent impairment. (Ex. 9).

10. With respect to Claimant's December 17, 2019 injury, Dr. Bates indicated Claimant continued to report severe back pain and was ambulating with a cane. Claimant had been prescribed Flexeril and Norco, neither of which provided any reported benefit. Claimant reported "persistent bitemporal headache" worse through the day with mild photophobia and phonophobia, slurred speech and slowed cognitive process. Dr. Bates' diagnosis was neck strain, lower back strain, right knee contusion and concussion without loss of consciousness. Dr. Bates opined that Claimant's examination and history were consistent with a mild concussion with continued cognitive slowing and headache symptoms. He recommended beginning chiropractic and massage therapy and prescribed a trial of prednisone and Zanaflex. (Ex. 9).

11. On January 21, 2020, Claimant again saw Dr. Bates. Claimant continued to report severe back pain and that he was not improved with medication, including “high-dose corticosteroids and non-benzodiazepine muscle relaxer.” Claimant reported difficulty lying down due to discomfort and sleeping 1-2 hours per night. Claimant also noted headaches, slurred speech, and slowed cognitive process. On examination, Dr. Bates noted a negative straight leg raise test bilaterally, tenderness to palpation in the cervical and lumbar paraspinal muscles, and markedly limited range of motion in the cervical spine. Dr. Bates prescribed a trial of Valium, following up with physical therapy, chiropractic, and massage. In addition, Dr. Bates ordered a neuropsychological evaluation for Claimant’s concussion symptoms. (Ex. 8).

12. On January 30, 2020, Claimant was evaluated by Alissa Wicklund, Ph.D., for post-concussive symptoms. Claimant reported headaches, difficulty with concentration, memory and word-finding. Claimant also indicated that physical activity caused dizziness, balance instability, and photophobia. Based on her testing, Dr. Wicklund indicated there was some question in the validity of her testing, due to discordant testing results. For example, Dr. Wicklund noted Claimant’s new learning was tested as “profoundly impaired” but average in areas of retentive memory. Claimant’s clinical profile was “notable for overt focus on somatic symptoms, as well as a high level of symptoms of depression and anxiety, which are impairing functional ability.” On vestibular testing, she indicated Claimant’s eye movement was “unusual” and suggested it may be non-organic in nature. However, she also noted that Claimant would benefit from vestibular physical therapy due to his symptoms. In addition, she recommended psychological therapy for his emotional response to the injury. (Ex. 12).

13. On February 11, 2020, Claimant returned to Dr. Bates. Dr. Bates noted that Claimant’s physical examination was improved. Although Claimant reported tenderness to palpation in the cervical and lumbar musculature, Dr. Bates indicated that “actual palpation” “noted soft musculature without apparent spasm, vastly improved from previous examination which was notable for diffuse muscle tension and palpable spasm throughout the cervical[,] thoracic and lumbar spine.” Dr. Bates stated his examination of Claimant’s spinal muscles was “not consistent with [Claimant’s] continued complaints of tightness and pain. Overall [Claimant’s] objective findings are not consistent with his subjective pain complaints in the neck or back.” He further indicated that “[g]iven [Claimant’s] unusual pattern of complaints and lack of improvement with standard intervention at this time in his care[,] I am concerned for possible malingering.” He recommended Claimant return to active work with de-escalating restrictions consistent with the known physiologic injury he sustained.” He recommended Claimant continue with physical therapy, massage, and chiropractic. (Ex. 6).

14. On March 2, 2020, Claimant returned to Dr. Bates, but no examination took place. Dr. Bates indicated that Claimant began a “conflict laden conversation regarding the findings in the previous note, particularly the suspicion of malingering…” Dr. Bates requested that Claimant’s care be changed to a different primary treating provider. He also believed the majority of Claimant’s symptoms were non-physiologic, because his examinations had been consistently out-of-proportion to his injuries and a lack of improvement with conservative care. (Ex. 5).

15. On April 1, 2020, Claimant saw Marc-Andre Chimonas, M.D., at DOHC, who agreed to assume management of Claimant's care. Claimant's primary complaint was low back pain into the thoracic spine. Claimant reported his neck pain was vastly improved, but still had some blurry vision. On examination, Dr. Chimonas noted Claimant exhibited "notable pain behavior specifically pain with axial rotation, pain with light touch to the lumbar spine, and inconsistencies with range of motion." He also indicated Claimant's range of motion on examination was inconsistent with his ability to sit with his femur at roughly 90 degrees angle to the spine. Dr. Chimonas indicated he "removed" Claimant's back pain from his December 17, 2019 workers' compensation claim and that "further treatment of the back cannot occur for this injury." He recommended that Claimant seek treatment for his back through his prior (i.e., February 20, 2019) workers' compensation claim. Dr. Chimonas recommended that Claimant's neck and possible post-concussion symptoms be treated as through his December 17, 2019 claim, and requested vestibular rehabilitation for Claimant's post-concussive symptoms. He also noted that any work restrictions would not be related to the December 17, 2019 claim. (Ex. 4).

16. At Claimant's May 6, 2020 visit, Dr. Chimonas noted the insurance company did not wish to separate Claimant's treatment for different claims. Claimant had attended three vestibular rehabilitation treatments and felt that his dizziness was resolving, but continued to report residual double vision and difficulty focusing on close objects. Dr. Chimonas offered Claimant a psychological evaluation which Claimant declined. On examination, Dr. Chimonas elicited "notable pain behavior" and again indicated Claimant's range of motion was inconsistent with his ability to sit with his femur at a roughly 90-degree angle to the spine. Dr. Chimonas did not believe further treatment that would benefit Claimant. He recommended proceeding to a function capacity evaluation to determine permanent work restrictions and impairment rating, and referred Claimant to physical therapy to obtain range of motion measurements for a lumbar spine impairment rating. (Ex. 3).

17. On September 2, 2020, Dr. Chimonas placed Claimant at MMI effective September 2, 2020, and indicated Claimant would not benefit from maintenance care. He indicated Claimant had a previous visit on August 19, 2020, where range of motion testing was performed, but lumbar flexion measurements were invalid due to lack of reproducibility. (No records from August 19, 2020 were offered or admitted into evidence). Claimant's, lumbar range of motion was repeated and felt valid on September 2, 2020. Dr. Chimonas' lumbar spine measurements yielded a 9% total lumbar range of motion impairment. Dr. Chimonas assigned Claimant a 14% whole person impairment (9% for range of motion and 5% for a table 53 disorder. He noted that no other impairment for other body parts was indicated. (Ex. 2).

18. On December 30, 2020, John Burris, M.D., performed a record review at Respondents' request. Respondents presented Dr. Burris testimony by deposition in lieu of live testimony.

19. On February 22, 2021, Claimant underwent a Division Independent Medical Examination (DIME) with performed by Bradley Abrahamson, M.D. Dr. Abrahamson

opined that Claimant was at MMI on December 30, 2020, the date of Dr. Burris' record review. . (Ex. A, p. 25).

20. Regarding impairment ratings, Dr. Abrahamson performed range of motion measurements of Claimant's cervical, thoracic, and lumbar spine which, if valid, would correspond to 16%, 2%, and 19% range of motion impairments, respectively. Combined with corresponding Table 53 disorders, Claimant's combined impairment ratings would yield a 40% whole person impairment. Claimant's lumbar range of motion impairment was measured as 19%, more than double the range of motion impairment measured by Dr. Chimonas in September 2020. Additionally, Dr. Abrahamson determined that Claimant's traumatic brain injury would correlate to a 6% whole person impairment. The 40% and 6% whole person impairments convert to a 44% whole person impairment.

21. Ultimately, however, despite the fact that Claimant's range of motion measurements were internally consistent, Dr. Abrahamson determined that Claimant did not qualify for any permanent impairment. In addressing Claimant's spine ratings, Dr. Abrahamson stated:

> As a point of fact, throughout his treatment all three areas of the spine (cervical, thoracic and lumbar) were intermittently mentioned by occupational medicine providers and/or physical therapists over a period of time exceeding 6 months. Technically he does meet criteria then for a Table 53 11B rating of each area. I completed and attached all applicable worksheets. However, these findings were non-physiological and measurements were invalid on prior examinations. Also, since he was making no progress and not fully participating in PT and Functional Capacity Examinations, he could have been placed at MMI sooner than 6 months into the case. Therefore, no permanent disability is assigned (see also Section L) pursuant to the DIME tips #8 and the Spinal Rating tip #2. (Ex. A., p. 26).

22. At the time of Dr. Abrahamson's DIME, Claimant was working as a forklift operator for a new employer. Dr. Abrahamson indicated that based on his familiarity forklift operation, a forklift operator must turn his entire spine to see where they are going when backing up, which he characterized as a "routine part of the job." He found "it highly implausible (less than 50% probability) that any of [his] recorded spine range of motion measurements are actually valid." Dr. Abrahamson further stated: "In my opinion he was able to reproduce measurements within 10% variance, and in doing so he 'beat the test.' My findings are non-physiologic and also do not make sense for this injury." (Ex. A, p. 27).

23. Regarding Claimant's traumatic brain injury rating, Dr. Abraham stated:

> The mathematics would have qualified him for a 6 percent disability. However. since he refused all Psychological care and Dr. Wicklund's report expressed a great degree of doubt, this could have been at MMI long ago. I do not think there is greater than 50% probability that this can be

> considered a work-related finding in the absence of Psychological care, which was repeatedly offered and refused. … In summary, there is no physiologic permanent partial disability. (Ex. A, p. 26)

24. In explaining his rationale for refusing to assign a disability rating for a traumatic brain injury, Dr. Abrahamson stated “As pointed out in previous IME reports, [Claimant] did not consistently exhibit classic concussion symptoms. It was expected that there was a significant psychological component to his concussion-like symptoms. Moreover, Dr. Wicklund reported conflicting results in her testing that do not support a TBI work injury here.” (Ex. A, p. 27).

25. Dr. Abrahamson concluded, that based on his clinical judgment and observations of other providers, that “the findings are essentially non-physiologic. On these grounds, his permanent partial disability from this particular case is zero.” (Ex. A., p. 27). Regarding medical maintenance care, Dr.

26. At hearing, Claimant presented the testimony of H. Barton Goldman, M.D., who was admitted as an expert in physical medicine and rehabilitation. Dr. Goldman opined that Claimant was not at MMI, and that Dr. Abrahamson incorrectly determined that Claimant had no permanent impairment as the result of his work-related injuries. Dr. Goldman testified that he believed it would be difficult for Claimant to manipulate the results of his range of motion testing. Dr. Goldman agreed Claimant exhibited signs of symptom magnification. However, he believes Claimant’s symptom magnification should have been considered when determining the existence of an impairment, and not used as a basis for refusing to assign an impairment rating. Dr. Goldman testified that when he examined the Claimant, he was able to “extinguish” Claimant’s symptom magnification by providing cues and coaching to Claimant as to how to properly perform certain testing. For example, he testified that he was able to obtain a valid straight leg test from Claimant where other providers were not because he was able to “coach” claimant on how to properly perform the maneuver. Similarly, in his report, Dr. Goldman notes that Claimant had a positive Hoover’s sign, but it was extinguished with “verbal cueing.” Dr. Goldman’s ability to obtain ostensibly valid measurements does not render Dr. Abrahamson’s opinions incorrect.

27. Dr. Goldman assessed a 24% impairment rating for both the cervical spine (10%) and the lumbar spine (15%), which the Claimant requests that the ALJ find to be Claimant’s permanent impairment rating.

28. Dr. Goldman also testified that he does not believe Claimant is at MMI because he should have full neuropsychological testing to evaluate vision and memory issues, and that Claimant would benefit from more active therapy, and a pain management consultation.

29. Dr. Goldman testified that a DIME physician has the discretion not to apply otherwise valid range of motion measurements for impairment ratings if the DIME physician believes they lack credibility.

30. With respect to Claimant's MMI determination, Dr. Goldman testified that he believes Claimant could benefit from additional therapy. In his report, he states "it is not clear to this examiner that [Claimant] is in fact at [MMI} relative to the injury suffered December 17, 2019."

31. Claimant testified that he continues to have difficulty with his lower back and neck. He testified that he voluntarily left employment with Employer and began working as a forklift operator. He indicated that he was able to do that job, but had difficulty sitting for a long period of time. Claimant is currently working as a tattoo artist, where his job requires minimal lifting. Claimant testified that he did not recall being offered psychological treatment, and that he did not participate in a functional capacity evaluation when recommended because he was not employed by Employer at the time.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or

every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

OVERCOMING DIME ON IMPAIRMENT AND MMI

The Act defines MMI as "a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." § 8-40-201(11.5), C.R.S. Where disputes exist on whether a Claimant has reached MMI, the ALJ must resolve that issue.

Under § 8-42-107 (8)(b)(III), C.R.S., a DIME physician's opinions concerning MMI and whole person impairment carry presumptive weight and may be overcome by clear and convincing evidence. "Clear and convincing evidence means evidence which is stronger than a mere 'preponderance'; it is evidence that is highly probable and free from serious or substantial doubt." *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411, 414 (Colo. App. 1995). Accordingly, a party seeking to overcome a DIME's MMI determination and/or whole person impairment rating must present "evidence demonstrating it is 'highly probable' the DIME physician's MMI determination or impairment rating is incorrect and such evidence must be unmistakable and free from serious and substantial doubt. *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001); *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002). Whether a party has overcome the DIME physician's opinion is a question of fact to be resolved by the ALJ. *Metro Moving & Storage*, 914 P.2d at 414.

The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., W.C. Nos. 4-532-166 & 4-523-097 (ICAO, July 19, 2004); *see Shultz v. Anheuser Busch, Inc*., W.C. No. 4-380-560 (ICAO, Nov. 17, 2000). Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Indus.,* WC 4-712-812 (ICAO, Nov. 21, 2008); *Licata v. Wholly Cannoli Café*, W.C. No. 4-863-323-04 (ICAP, July 26, 2016).

As a matter of diagnosis, the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Indus. Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003); *Sharpton v. Prospect Airport Services,* W.C. No. 4-941-721-03 (ICAO, Nov. 29, 2016). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Indus. Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Indus. Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998); *Watier-Yerkman v. Da Vita, Inc.*, W.C. No. 4-882-517-02 (ICAO Jan. 12, 2015); *compare In re Yeutter*, 2019 COA 53 ¶ 21 (determining that a DIME physicians opinion carries presumptive weight only with respect to MMI and impairment). The rating physician's determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation, and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Indus. Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

Claimant has failed to establish by clear and convincing evidence that Dr. Abrahamson's opinions regarding maximum medical improvement and impairment are incorrect. With respect to MMI, Dr. Goldman's opinion that Claimant may benefit from additional treatment does not demonstrate that Dr. Abrahamson's MMI opinion is highly probably incorrect. Dr. Abrahamson's assignment of MMI is later than that assigned by Dr. Chimonas, and no treating physician has opined that Claimant is not at MMI. The ALJ finds that Dr. Goldman's opinions on this issue are merely a difference of opinion and do not reach the standard of clear and convincing evidence.

Regarding Dr. Abrahamson's decision not to assign permanent impairment ratings, again, Claimant has failed to establish to meet his burden of establishing that Dr. Abrahamson's opinions are incorrect by clear and convincing evidence. Given that at least three of Claimant's treating providers expressed concerns about the non-physiologic nature of Claimant's complaints, and the fact that Dr. Abrahamson's lumbar range of motion measurements were significantly different than those of Dr. Chimonas approximately five months earlier, there is insufficient evidence to find that Dr. Abrahamson's opinions are highly probably incorrect. While Dr. Goldman offered a plausible explanation and support for assigning Claimant an impairment rating, his testimony did not establish that Dr. Abrahamson's opinions on MMI and impairment rating were highly probably incorrect.

ORDER

It is therefore ordered that:

1. Claimant's has failed to establish by clear and convincing evidence that Dr. Abrahamson's determination that Claimant has no permanent impairment is incorrect. Claimant's request for permanent partial disability benefits is denied and dismissed.

2. Claimant has failed to establish by clear and convincing evidence that Dr. Abrahamson's MMI opinion is incorrect. Claimant reached MMI on December 30, 2020.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the

Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: October 28, 2021

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-172-164-002

ISSUES

1. Whether Claimant has established by a preponderance of the evidence that the right to select an Authorized Treating Physician (ATP) passed to her through Respondents' failure to provide a written list of at least four designated medical providers in violation of §8-43-404(5), C.R.S. and WCRP Rule 8-2.

2. Whether Respondents have demonstrated by a preponderance of the evidence that Claimant chose Concentra Medical Centers located at Chambers Road and I-70 as her ATP through her words and conduct.

FINDINGS OF FACT

1. Claimant is a 31-year-old shift manager for Employer. On April 13, 2021 she suffered an admitted right lower extremity injury when she tripped over a dustpan. She specifically suffered a right knee sprain. Claimant reported the injury to her immediate supervisor Alejandra C[Redacted].

2. Claimant was transported by ambulance to the Emergency Room at Platte Valley Medical Center. She reported that she "twisted her right knee" and was experiencing severe pain with any movement. Claimant denied any ankle pain, foot pain or other injuries. After a physical examination she was discharged with the clinical impression of a "right knee injury." An appointment was scheduled with John Mangelson, M.D. at the orthopedic clinic for the following day.

3. Claimant testified that she called Ms. C[Redacted] on April 14, 2021 to discuss the recommended follow-up treatment. Ms. C[Redacted] informed Claimant that she did not have any Workers' Compensation information and should contact Employer's District Manager Rafael G[Redacted]. Claimant remarked that she discussed the orthopedic referral with Mr. G[Redacted]. He informed her that Concentra Medical Centers was Employer's authorized provider and suggested a Concentra clinic located at Chambers Road and I-70 in Aurora.

4. Mr. G[Redacted] testified that on April 14, 2021 he discussed the injury with Claimant. He explained that he was not Employer's "point person" on Workers' Compensation issues and had already spoken to his supervisor Director of Operations Lana P[Redacted]. Mr. G[Redacted] commented that he advised Claimant she could search for and treat at any Concentra location she preferred. He mentioned he had previously sustained a Workers' Compensation injury, received treatment at the Concentra located on Chambers Road in Aurora and was satisfied with his care.

5. Mr. G[Redacted] testified that Claimant told him she wanted to treat at the Chambers Road Concentra because it was not far from her house and on her way to

work. She specifically stated “I will go there.” Although Mr. G[Redacted] reiterated that she could treat at any Concentra location, he understood that Claimant was selecting the Chambers Road Concentra facility.

6. Mr. G[Redacted] commented that Claimant requested contact information for the Chambers Road Concentra. He sent her the details after the telephone conversation in a text message on the afternoon of April 14, 2021. Mr. G[Redacted] remarked that, if Claimant had mentioned she wanted to treat at a different Concentra location, he would have provided her with the appropriate address.

7. Claimant testified that Mr. G[Redacted] instructed her to contact Ms. P[Redacted]. Claimant left a message for Ms. P[Redacted] on April 14, 2021 and Ms. P[Redacted] returned the call on April 15, 2021. They discussed the hospital’s referral to orthopedic physician Dr. Mangelson. Ms. P[Redacted] informed Claimant that she could not visit the orthopedic doctor and was required to choose a provider authorized by Respondents. She specifically advised Claimant that she could visit any Concentra or HealthOne clinic. Claimant informed her that she planned to visit the Concentra location at Chambers Road and I-70.

8. Ms. P[Redacted] testified that in her current position as Director of Operations and previously as Senior District Manager she is charged with handling Workers’ Compensation claims. When a workplace injury occurs at any of Employer’s stores, she ensures that the employee has access to treatment.

9. Ms. P[Redacted] confirmed that all of Employer’s stores have a designated provider list that includes several HealthOne and Concentra locations. She further commented that she would normally tender a letter when a claimant required or desired medical treatment. However, Claimant never returned to work by the time they talked about treatment on around April 14-15, 2021.

10. Ms. P[Redacted] discussed treatment options with Claimant. She told Claimant she could obtain treatment at any Concentra or HealthOne facility in the region. Ms. P[Redacted] specifically enumerated several locations, including the Green Valley, Colfax and Chamber Road Concentra facilities. During the conversation, Claimant stated that the Chambers Road Concentra was “the one that’s close to my house. That’s the one I am going to.” She detailed that the location was most convenient for her and she preferred to treat at that location. Ms. P[Redacted] understood Claimant was selecting the Chambers Road Concentra location as her authorized provider.

11. Claimant acknowledged on cross-examination that she spoke to Mr. G[Redacted], he told her that she could treat with any provider at Concentra and they discussed Mr. G[Redacted]’s prior experience at the Chambers Road facility. Claimant agreed that the Chambers Road Concentra location was the closest to her house. She confirmed that she received the text message with the address of the Chambers Road Concentra after she spoke to Mr. G[Redacted]. She also recognized that she spoke to Ms. P[Redacted] and received two provider choices. The options included Concentra and

another provider that she could not recall, but might have been HealthOne. Nevertheless, Claimant maintained that she did not select the Chambers Road Concentra, but only went there because she had nowhere else to go and the facility was close to her house.

12. On April 22, 2021 Claimant told Insurer's Claims Adjuster Hope W[Redacted] that she was treating at Concentra. Ms. W[Redacted] understood that Claimant would continue treating at the facility. Claimant did not express any dissatisfaction with her care, raise any concerns with the designation or request a change of physician. Ms. W[Redacted] subsequently did not receive a request for a change of physician.

13. Claimant explained that from April 15, 2021 through April 29, 2021 she visited the Chambers Road Concentra location for a total of three medical appointments and five physical therapy visits. Claimant scheduled her own appointments, provided transportation and voluntarily presented for care. On April 15, 2021 Amanda Cava, M.D. completed a Physician's Report of Workers' Compensation Injury in which she noted that Claimant suffered a right knee sprain when she slipped on a dust pan at work. Dr. Cava recommended a splint, provided work restrictions and scheduled follow-up treatment. The medical records reveal that Claimant subsequently visited Michael Pete, PA-C for medical treatment and DPT Ronald Kochevar, DPT for physical therapy.

14. Claimant testified that she was referred for an MRI and her therapist DPT Kochevar would "hold" her treatment until the MRI was completed. She noted that therapy sessions scheduled for the following week were then cancelled. Claimant waited for one month but the MRI was not been approved.

15. Despite Claimant's testimony, the last physical therapy record from April 29, 2021 reflects that she would continue treating with Concentra. There is no suggestion that treatment would be suspended. The April 29, 2021 medical record specifically provides that Claimant reported a benefit from her treatment based on a reduction in symptoms. Notably, Claimant was a good candidate for therapy intervention and demonstrated a positive prognosis for improvement. Furthermore, Ms. W[Redacted] explained that Respondents never received an MRI referral and did not deny or fail to authorize any medical treatment through Concentra. Finally, Claimant has since refused additional treatment under the claim and failed to present for demand medical appointments at Concentra scheduled for August 6, 2021 and August 30, 2021.

16. In May 2021 Claimant sought legal representation to obtain further medical treatment. She detailed that, because the requested MRI had not been approved, she could not receive additional treatment. Claimant noted that, if the MRI and additional medical treatment had been approved, she likely would have continued to obtain treatment through Concentra. She explained that she changed physicians and selected David Yamamoto, M.D. as her treating physician.

17. Claimant has established that it is more probably true than not that the right to select an ATP passed to her through Respondents' failure to provide a written list of at

least four designated medical providers in violation of C.R.S. §8-43-404(5) and WCRP Rule 8-2. Initially, on April 13, 2021 Claimant suffered an admitted right lower extremity injury when she tripped over a dustpan. She immediately received emergency treatment at the Platte Valley Medical Center. Claimant subsequently had conversations with supervisors Mr. G[Redacted] and Ms. P[Redacted] about treatment options through Employer's designated providers Concentra and HealthOne. Mr. G[Redacted] commented that he advised Claimant that she could search for and treat at any Concentra facility she preferred. Moreover, Ms. P[Redacted] told Claimant she could obtain treatment at any Concentra or HealthOne facility in the region. Ms. P[Redacted] specifically enumerated several locations, including the Green Valley, Colfax and Chambers Road Concentra facilities. Despite the verbal discussions between Claimant and her supervisors, the record is devoid of a written list of four designated providers. Furthermore, Respondents have conceded that they did not explicitly meet the requirements of WCRP 8-2 by tendering a written letter within seven days of the injury. The record also does not reveal any written list of providers. Because Respondents failed to provide Claimant with a written list of designated providers, the right to select an ATP passed to her.

18. Because the right of selection passed to Claimant, the central issue is whether she demonstrated by her words or conduct that she chose the Chambers Road Concentra location for treatment. The record reveals that Respondents have demonstrated that it is more probably true than not that Claimant selected the Concentra medical facility located at Chambers Road and I-70 as her ATP by her words and conduct. Mr. G[Redacted] commented that during his April 14, 2021 conversation with Claimant he mentioned he had previously sustained a Workers' Compensation injury, received treatment at the Concentra located on Chambers Road in Aurora and was satisfied with his care. Mr. G[Redacted] credibly testified that Claimant told him she wanted to treat at the Chambers Road Concentra because it was not far from her house and on her way to work. She specifically stated "I will go there." Although Mr. G[Redacted] reiterated that she could treat at any Concentra location, he understood that Claimant was selecting the Chambers Road Concentra facility. He noted that Claimant requested contact information for the Chambers Road Concentra and sent her the location details in a text message on the afternoon of April 14, 2021. Furthermore, Ms. P[Redacted] told Claimant she could obtain treatment at any Concentra or HealthOne in the region and enumerated several locations, including the Green Valley, Colfax and Chambers Road Concentra facilities. During the conversation, Claimant stated the Chambers Road Concentra was "the one that's close to my house. That's the one I am going to." She detailed that the location was most convenient for her and preferred to treat there. Ms. P[Redacted] remarked that she understood Claimant was selecting the Chambers Road Concentra facility as her authorized provider. The persuasive evidence in the record, as well as the credible testimony of Mr. G[Redacted] and Ms. P[Redacted] reflects that Claimant verbally chose the Chambers Road Concentra location for treatment. Although Claimant maintained that she did not select the facility, she acknowledged she had nowhere else to receive treatment and the facility was close to her house.

19. Claimant's conduct also reveals that she exercised her right of selection and chose the Chambers Road Concentra facility as her ATP. Claimant explained that from

April 15, 2021 through April 29, 2021 she visited the Chambers Road Concentra location for a total of three medical appointments and five physical therapy visits. She scheduled her own appointments, provided transportation and voluntarily presented for care. On April 15, 2021 Dr. Cava completed a Physician's Report of Workers' Compensation Injury in which she noted that Claimant suffered a right knee sprain when she slipped on a dust pan at work. Dr. Cava recommended a splint, provided work restrictions and scheduled follow-up treatment. The medical records reveal that Claimant subsequently visited PA-C Pete for medical treatment and DPT Kochevar for physical therapy. Furthermore, on April 22, 2021 Claimant told Insurer's Claims Adjuster Ms. W[Redacted] that she was treating at Concentra. Ms. W[Redacted] understood that Claimant would continue treating at the facility. Claimant did not express any dissatisfaction with her care, raise any concerns with the designation or request a change of physician.

20. Claimant testified that she was referred for an MRI and her therapist DPT Kochevar would "hold" her treatment until the MRI was completed. She noted that therapy sessions scheduled for the following week were then cancelled. Claimant waited for one month but the MRI was not been approved. She detailed that, because the requested MRI was not approved and she could not receive additional treatment, she sought legal representation and changed physicians to Dr. Yamamoto. Despite Claimant's testimony, the last therapy record from April 29, 2021 reflects that she would continue treating with Concentra. There is no suggestion that treatment would be suspended. The April 29, 2021 medical record specifically provides that Claimant reported a benefit from her treatment based on a reduction in symptoms. Notably, Claimant was a good candidate for therapy intervention and demonstrated a positive prognosis for improvement. Furthermore, Ms. W[Redacted] explained that Respondents never received an MRI referral and did not deny or fail to authorize any medical treatment through Concentra.

21. In the days after the April 13, 2021 work accident Claimant signified through her words and conduct that she had selected Concentra to treat her injuries. The credible testimony of Mr. G[Redacted], Ms. P[Redacted] and Ms. W[Redacted] reflects that Claimant had chosen the Concentra facility on Chambers Road for treatment. Furthermore, Claimant obtained either medical or physical therapy treatment through Concentra on at least eight occasions between April 15, 2021 and April 29, 2021. Accordingly, Claimant selected the Chambers Road Concentra facility as her ATP.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the

rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42-101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A preexisting condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In Re of Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

5. In a medical emergency a claimant need not seek authorization from her employer or insurer before seeking medical treatment from an unauthorized medical provider. *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777, 781 (Colo. App. 1990). A medical emergency affords an injured worker the right to obtain immediate treatment without the delay of notifying the employer to obtain a referral or approval. *In Re Gant*, WC 4-586-030 (ICAO, Sept. 17, 2004). Because there is no precise legal test for determining the existence of a medical emergency, the issue is dependent on the particular facts and circumstances of the claim. *In re Timko,* WC 3-969-031 (ICAO, June 29, 2005). Once the emergency is over the employer retains the right to designate the first "non-emergency" physician. *Bunch v. Indus. Claim Appeals Office of State of Colorado*, 148 P.3d 381, 384 (Colo. App. 2006).

6. Authorization to provide medical treatment refers to a medical provider's legal authority to treat the claimant with the expectation that the provider will be compensated by the insurer for treatment. *Bunch,* 148 P.3d at 383; *One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). Authorized providers include those to whom the claimant is directly referred by the employer, as well as providers to whom an ATP refers the claimant in the normal progression of authorized treatment. *Town of Ignacio v. Industrial Claim Appeals Office,* 70 P.3d 513 (Colo. App. 2002); *City of Durango v. Dunagan,* 939 P.2d 496 (Colo. App. 1997). Whether an ATP has made a referral in the normal progression of authorized treatment is a question of

fact for the ALJ. *Kilwein v. Indus. Claim Appeals Office,* 198 P.3d 1274, 1276 (Colo. App. 2008); *In re Bell*, WC 5-044-948-01 (ICAO, Oct. 16, 2018). If the claimant obtains unauthorized medical treatment, the respondents are not required to pay for it. *In Re Patton*, WC's 4-793-307 & 4-794-075 (ICAO, June 18, 2010); *see Yeck v. Industrial Claim Appeals Office,* 996 P.2d 228, 229 (Colo. App. 1999); *Jewett v. Air Methods Corporation,* WC 5-073-549-001 (ICAO, Mar. 2, 2020) (determining that surgery performed by an unauthorized provider was not compensable because the employer had furnished medical treatment after receiving knowledge of the injury).

7. Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck,* 996 P.2d at 229. However, the Colorado Workers' Compensation Act requires respondents to provide injured workers with a list of at least four designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. Specifically, if the employer or insurer fails to provide an injured worker with a list of at least four physicians or corporate medical providers, "the employee shall have the right to select a physician." §8-43-404(5)(a)(I)(A), C.R.S. W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, "the employer shall provide the injured worker with a written list of designated providers." W.C.R.P. Rule 8-2(E) additionally provides that the remedy for failure to comply with the preceding requirement is that "the injured worker may select an authorized treating physician of the worker's choosing." An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. industrial Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006).

8. The term "select," is unambiguous and should be construed to mean "the act of making a choice or picking out a preference from among several alternatives." *Squitieri v. Tayco Screen Printing, Inc.,* WC 4-421-960 (ICAO Sept. 18, 2000); *see In re Loy*, W.C. No. 4-972-625-01 (ICAO, Feb. 19, 2016). Thus, a claimant "selects" a physician when she "demonstrates by words or conduct that [she] has chosen a physician to treat the industrial injury." *W[Redacted] v. Halliburton Energy Services,* WC 4-995-888-01 (ICAO, Oct. 28, 2016); *Loy v. Dillon Companies*, W.C. No. 4-972-625 (Feb. 19, 2016). The question of whether the claimant selected a particular physician as the ATP is one of fact for determination by the ALJ. *Squitieri v. Tayco Screen Printing, Inc.,* WC 4-421-960 (ICAO, Sept. 18, 2000).

9. As found, Claimant has established by a preponderance of the evidence that the right to select an ATP passed to her through Respondents' failure to provide a written list of at least four designated medical providers in violation of C.R.S. §8-43-404(5) and WCRP Rule 8-2. Initially, on April 13, 2021 Claimant suffered an admitted right lower extremity injury when she tripped over a dustpan. She immediately received emergency treatment at the Platte Valley Medical Center. Claimant subsequently had conversations with supervisors Mr. G[Redacted] and Ms. P[Redacted] about treatment options through Employer's designated providers Concentra and HealthOne. Mr. G[Redacted] commented that he advised Claimant that she could search for and treat at any Concentra facility she preferred. Moreover, Ms. P[Redacted] told Claimant she could obtain treatment at any Concentra or HealthOne facility in the region. Ms. P[Redacted]

specifically enumerated several locations, including the Green Valley, Colfax and Chambers Road Concentra facilities. Despite the verbal discussions between Claimant and her supervisors, the record is devoid of a written list of four designated providers. Furthermore, Respondents have conceded that they did not explicitly meet the requirements of WCRP 8-2 by tendering a written letter within seven days of the injury. The record also does not reveal any written list of providers. Because Respondents failed to provide Claimant with a written list of designated providers, the right to select an ATP passed to her.

10. As found, because the right of selection passed to Claimant, the central issue is whether she demonstrated by her words or conduct that she chose the Chambers Road Concentra location for treatment. The record reveals that Respondents have demonstrated by a preponderance of the evidence that Claimant selected the Concentra medical facility located at Chambers Road and I-70 as her ATP by her words and conduct. Mr. G[Redacted] commented that during his April 14, 2021 conversation with Claimant he mentioned he had previously sustained a Workers' Compensation injury, received treatment at the Concentra located on Chambers Road in Aurora and was satisfied with his care. Mr. G[Redacted] credibly testified that Claimant told him she wanted to treat at the Chambers Road Concentra because it was not far from her house and on her way to work. She specifically stated "I will go there." Although Mr. G[Redacted] reiterated that she could treat at any Concentra location, he understood that Claimant was selecting the Chambers Road Concentra facility. He noted that Claimant requested contact information for the Chambers Road Concentra and sent her the location details in a text message on the afternoon of April 14, 2021. Furthermore, Ms. P[Redacted] told Claimant she could obtain treatment at any Concentra or HealthOne in the region and enumerated several locations, including the Green Valley, Colfax and Chambers Road Concentra facilities. During the conversation, Claimant stated the Chambers Road Concentra was "the one that's close to my house. That's the one I am going to." She detailed that the location was most convenient for her and preferred to treat there. Ms. P[Redacted] remarked that she understood Claimant was selecting the Chambers Road Concentra facility as her authorized provider. The persuasive evidence in the record, as well as the credible testimony of Mr. G[Redacted] and Ms. P[Redacted] reflects that Claimant verbally chose the Chambers Road Concentra location for treatment. Although Claimant maintained that she did not select the facility, she acknowledged she had nowhere else to receive treatment and the facility was close to her house.

11. As found, Claimant's conduct also reveals that she exercised her right of selection and chose the Chambers Road Concentra facility as her ATP. Claimant explained that from April 15, 2021 through April 29, 2021 she visited the Chambers Road Concentra location for a total of three medical appointments and five physical therapy visits. She scheduled her own appointments, provided transportation and voluntarily presented for care. On April 15, 2021 Dr. Cava completed a Physician's Report of Workers' Compensation Injury in which she noted that Claimant suffered a right knee sprain when she slipped on a dust pan at work. Dr. Cava recommended a splint, provided work restrictions and scheduled follow-up treatment. The medical records reveal that Claimant subsequently visited PA-C Pete for medical treatment and DPT Kochevar for physical therapy. Furthermore, on April 22, 2021 Claimant told Insurer's Claims Adjuster

Ms. W[Redacted] that she was treating at Concentra. Ms. W[Redacted] understood that Claimant would continue treating at the facility. Claimant did not express any dissatisfaction with her care, raise any concerns with the designation or request a change of physician.

12. As found, Claimant testified that she was referred for an MRI and her therapist DPT Kochevar would "hold" her treatment until the MRI was completed. She noted that therapy sessions scheduled for the following week were then cancelled. Claimant waited for one month but the MRI was not been approved. She detailed that, because the requested MRI was not approved and she could not receive additional treatment, she sought legal representation and changed physicians to Dr. Yamamoto. Despite Claimant's testimony, the last therapy record from April 29, 2021 reflects that she would continue treating with Concentra. There is no suggestion that treatment would be suspended. The April 29, 2021 medical record specifically provides that Claimant reported a benefit from her treatment based on a reduction in symptoms. Notably, Claimant was a good candidate for therapy intervention and demonstrated a positive prognosis for improvement. Furthermore, Ms. W[Redacted] explained that Respondents never received an MRI referral and did not deny or fail to authorize any medical treatment through Concentra.

13. As found, in the days after the April 13, 2021 work accident Claimant signified through her words and conduct that she had selected Concentra to treat her injuries. The credible testimony of Mr. G[Redacted], Ms. P[Redacted] and Ms. W[Redacted] reflects that Claimant had chosen the Concentra facility on Chambers Road for treatment. Furthermore, Claimant obtained either medical or physical therapy treatment through Concentra on at least eight occasions between April 15, 2021 and April 29, 2021. Accordingly, Claimant selected the Chambers Road Concentra facility as her ATP. *See Murphy-Tafoya v. Safeway, Inc.*, WC 5-153-600 (ICAO, Sept. 1, 2021) (where right of selection passed to the claimant, six months of treatment with personal provider following her work injury demonstrated that the claimant had exercised her right of selection); *Rivas v. Cemex Inc*, WC 4-975-918 (ICAO, Mar. 15, 2016) (through his words and conduct in obtaining treatment from Workwell for five weeks the claimant selected Workwell as his authorized provider); *Pavelko v. Southwest Heating and Cooling*, WC 4-897-489 (ICAO, Sept. 4, 2015) (the claimant exercised his right of selection when he obtained treatment for two years from provider recommended by the employer); *Tidwell v. Spencer Technologies*, WC 4-917- 514 (ICAO, Mar. 2, 2015) (where the employer failed to designate an authorized medical provider and claimant obtained treatment from personal physician Kaiser for his industrial injury, the claimant selected Kaiser as his authorized treating physician through his words or conduct).

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. The right to select an ATP passed to Claimant through Respondents' failure to provide a written list of at least four designated medical providers

2. Claimant selected Concentra as her ATP through her words and conduct.

3. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at https://oac.colorado.gov/resources/oac-forms*.

DATED: October 28, 2021.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant prove a C5-C7 surgery performed by Dr. Rauzzino on April 21, 2021 was causally related to his admitted September 1, 2020 work accident?

FINDINGS OF FACT

1. Claimant suffered admitted injuries to his right elbow and right shoulder on September 1, 2020. He was stepping up onto a concrete pad and his foot slipped, causing him to fall. He landed primarily on his right arm and right elbow. The impact also "jammed" his right shoulder. Claimant testified he fell awkwardly but conceded he noticed no specific trauma to his neck.

2. Claimant promptly reported the injury to his supervisor but did not seek immediate medical attention because he assumed he would recover quickly. However, his symptoms persisted and worsened, and after a few weeks he asked Employer to send him to a doctor.

3. Employer referred Claimant to Concentra. At his initial appointment on October 19, 2020, Claimant reported pain in his right elbow, and intermittent numbness and tingling in the fourth and fifth fingers of his right hand. There is no mention of any neck symptoms or symptoms in the thumb, index, or middle finger. X-rays of the right elbow were negative. Claimant was diagnosed with a right elbow contusion and possible ulnar nerve compression injury He was prescribed an NSAID cream and referred to physical therapy.

4. Claimant testified he first noticed intermittent neck pain "four or five weeks" after the accident. He further testified the neck pain "never was consistent. The issue wasn't so much the pain in my neck. It was a loss of use of my hand. And that's what was extremely concerning was that I was losing the use of my last two fingers. They were going weak."

5. On October 30, 2020, Claimant complained of worsening pain in his right shoulder. An MRI later confirmed a torn rotator cuff.

6. Claimant saw Dr. Christopher Joyce, an upper extremity surgeon, on December 23, 2020. Besides ongoing shoulder and elbow pain, Claimant reported "some new numbness that radiates down to the hand. It primarily is in the ulnar digits, however more recently has been in the medial digits as well." Examination showed decreased sensation in the right fourth and fifth fingers, the ulnar aspect of the hand, and the distal forearm. Sensation was normal in the C5, C6, and C7 distributions. Dr. Joyce diagnosed a rotator cuff tear and cubital tunnel syndrome. He recommended shoulder surgery but

wanted to wait for upper extremity electrodiagnostic testing to determine whether Claimant would need carpal tunnel or cubital tunnel surgery at the same time.

7. Claimant saw Dr. Fredric Zimmerman, a physiatrist, on December 31, 2020. Claimant reported numbness and tingling in the medial aspect of the right forearm and his third, fourth, and fifth fingers. Dr. Zimmerman noted Claimant had suffered a previous work-related neck injury in 2014, for which he ultimately received a 19% cervical spine rating. The review of systems referenced "chronic neck pain, which is unchanged from recent shoulder injury." Claimant exhibited decreased sensation to light touch primarily in the third, fourth, and fifth fingers. Right hand grip strength was mildly weaker than the left. Tinel's test was positive at the elbow. Cervical range of motion was "near normal," and Spurling's test was negative bilaterally. Dr. Zimmerman's diagnoses included right upper extremity paresthesias "consistent with ulnar neuropathy at the elbow," and "previous history of cervical fusion with no exacerbation of neck symptoms from this work-related injury." He ordered upper extremity electrodiagnostic testing.

8. At a January 5, 2021 follow up at Concentra, Claimant reported "[he] has new c/o right upper extremity weakness and increased numbness all fingers right hand. Patient states the new symptoms started after an exam technique by Dr. Zimmerman a little over a week ago." Examination of the right hand showed interosseous weakness, decreased sensation to light touch in all fingers, and reduced grip strength.

9. Claimant followed up with Dr. Zimmerman on January 7, 2021, and relayed "new complaints" of numbness and weakness in the right hand, particularly the thumb, index, and middle finger. Cervical range of motion was full, and Spurling's was normal. Dr. Zimmerman noted increased muscle tone and trigger points in multiple paracervical muscles. He diagnosed right upper extremity paresthesias "of unknown etiology" and ordered a cervical MRI.

10. Dr. McCranie performed the EMG/nerve conduction study on January 22, 2021. After describing the accident, Claimant told Dr. McCranie, "he later noted weakness in his right hand. This began in the 4th and 5th digits with tingling, and a couple weeks ago, he began having difficulty moving his index, middle finger, and thumb." The testing showed median and ulnar nerve abnormalities, most consistent with severe right carpal tunnel syndrome superimposed on diabetic peripheral neuropathy, and distal axonal ulnar neuropathy with reinnervation. There was no electrodiagnostic evidence of cervical radiculopathy.

11. The cervical MRI was completed on January 27, 2021. It showed disc osteophytes causing severe neuroforaminal narrowing and neural impingement from C5-6 though C7-T1, and severe spinal stenosis at C5-6 and C6-7.

12. Claimant returned to Dr. Zimmerman on February 4, 2021 to review the MRI findings. He continued to report decreased sensation and weakness in the right hand, including the thumb, index, and middle fingers. Dr. Zimmerman requested a repeat EMG/nerve conduction study and referred Claimant to Dr. Michael Rauzzino for a surgical

consultation. He also referred Claimant to Dr. Michael Madsen for a “second opinion” at Claimant’s request.

13. Claimant saw Dr. Madsen on February 9, 2021. His chief complaints were described as neck pain radiating to the parascapular region and right hand weakness. The physical examination was largely benign, except some right finger weakness. Dr. Madsen reviewed the MRI images and noted severe spinal canal stenosis at C4-6 secondary to large disc osteophyte complexes superimposed on a congenitally narrow canal. He thought Claimant was a good candidate for a C5-C7 decompression and fusion.

14. Claimant was evaluated by Dr. Rauzzino on February 16, 2021. Dr. Rauzzino documented:

> He fell, he landed on his right elbow and had tingling in the least 2 digits of his right hand. He had elbow soreness. He also had neck pain. The tingling began to improve in his right hand, but the hand itself continued to be weak and he noted worsening paresthesias after his fall in the first 3 digits of his right hand.

15. Dr. Rauzzino reviewed the MRI and noted disc herniations[1] at C5-C6 and C6-C7 causing severe stenosis. Claimant very concerned about the “constant and progressive” loss of use of his right hand. Dr. Rauzzino assessed “significant cervical radiculopathy with numbness and weakness in the distribution of C5-C6 and C6-C7 nerve roots.” He opined Claimant’s initial symptoms in the fourth and fifth fingers “was more of a stinger with the ulnar nerve in the ulnar tunnel.” He thought Claimant’s then-current symptoms were more likely related to cervical radiculopathy as opposed to “mild” carpal tunnel syndrome, although he acknowledged the possibility of a “double crush” syndrome. He recommended a C5-C7 decompression and fusion. Regarding causation, Dr. Rauzzino opined “he was clearly asymptomatic before the fall, not receiving treatment in any way for his neck or for his hand, and this fall clearly is the root cause to his need for surgery.”

16. Dr. John Aschberger performed repeat electrodiagnostic testing on March 2, 2021. It showed severe right carpal tunnel syndrome and ulnar neuropathy at the right elbow with significant slowing at the cross-elbow segment. There were also findings suggesting C6 radiculopathy, but no definitive denervation. Dr. Aschberger thought surgery was warranted given the severity of findings in the median and ulnar nerves and the progressive worsening compared with Dr. McCranie’s previous testing.

17. On March 8, 2021, Dr. Joyce responded to an email from Claimant about the timing of the multiple recommended surgeries. He told Claimant he could do the elbow procedure at the same time as the rotator cuff repair, but thought adding a carpal tunnel release would be “too much surgery for one arm into one sitting.” His preference was to perform the carpal tunnel and cubital tunnel surgeries of the same time, and do the shoulder surgery later.

[1] This finding is puzzling because the radiologist and Dr. Madsen saw osteophytes but no herniations.

18. Respondents had the request reviewed by Dr. Jonathan Sollender on March 11, 2021. Dr. Sollender assessed idiopathic carpal tunnel syndrome and posttraumatic cubital tunnel syndrome. He also diagnosed “superimposed diabetic neuropathy and cervical spine degenerative disc disease resulting in C6 radiculopathy on the right side.” Dr. Sollender concluded the cubital tunnel surgery was reasonably needed and related to the work accident but the right carpal tunnel syndrome was not casually related.

19. Dr. Neil Brown, a neurosurgeon, performed a record review for Respondents regarding the C5-7 ACDF recommended by Dr. Rauzzino. Dr. Brown agreed the surgery was reasonably necessary, but concluded it was not related to the September 1, 2020 work accident. Dr. Brown emphasized “the absence of any initial documentation of neck pain for several months (essentially five months) . . . .” He also noted Claimant’s initial upper extremity symptoms were confined to the fourth and fifth fingers, consistent with an ulnar injury from striking his right elbow in the fall. Dr. Brown was impressed by the severe multilevel degenerative changes in the cervical spine, which predated the work accident. He opined Claimant would have developed symptoms consistent with a cervical radiculopathy relatively quickly had the accident aggravated the pre-existing condition.

20. Dr. Rauzzino performed the surgery on April 21, 2021, under Claimant’s health insurance.

21. Dr. Brown authored an addendum report after reviewing medical records pertaining to Claimant’s 2014 work accident. The records included a November 2014 cervical CT scan that showed significant degenerative pathology very similar to that shown on the January 2021 MRI. The additional records solidified Dr. Brown’s opinion that the proposed cervical fusion but is not causally related to the September 2020 work accident. He reiterated his opinion that the delay between the accident and the initial onset of radicular symptoms “would not be consistent with an aggravation of pre-existing disorder.” He concluded, “Any sudden movement of the cervical spine in a patient with significant cervical spondylosis can result in a potential aggravation of their pre-existing condition, but . . . there is no plausible rationale for the delay in symptomatology and the cervical spine of approximately five months to substantiate a temporal causal relationship.”

22. Dr. Brown testified at hearing consistent with his reports.

23. Dr. Brown’s analysis and conclusions regarding causation are credible and persuasive.

24. Claimant failed to prove the cervical surgery performed by Dr. Rauzzino was causally related to his September 1, 2020 work accident.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. The mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. Even if the respondents admit liability and pay for some treatment, they retain the right to dispute the reasonable necessity or relatedness of any other treatment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). Where the respondents dispute the claimant's entitlement to medical benefits, the claimant must prove the treatment is reasonably necessary and causally related to the industrial accident. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999).

The existence of a pre-existing condition does not preclude a claim for medical benefits if an industrial injury aggravates, accelerates, or combines with the pre-existing condition to produce the need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). A claimant need not prove an injury caused any objective structural change to their underlying anatomy to prove an aggravation. A purely symptomatic aggravation will suffice for an award of medical benefits if the symptoms were triggered by work activities and caused the claimant to need treatment he would not otherwise have required. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Cambria v. Flatiron Construction*, W.C. No. 5-066-531-002 (May 7, 2019). But the mere fact that a claimant experiences symptoms after a work accident does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). In evaluating whether a claimant suffered a compensable aggravation, the ALJ must determine if the need for treatment was the proximate result of the claimant's work or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

As found, Claimant failed to prove the C5-7 surgery performed by Dr. Rauzzino was causally related to the September 1, 2020 work accident. There is no persuasive evidence the work accident caused any direct trauma to Claimant's neck. The MRI shows extensive pre-existing, multilevel degenerative changes in the cervical spine, with no persuasive indication of any acute injury. The accident did not cause or demonstrably change the underlying pathology. More important, Claimant experienced no upper extremity symptoms consistent with cervical radiculopathy until mid-to-late December, and reported no neck pain until February 2021. As Dr. Brown persuasively explained, the lengthy delay between the accident and the onset of radicular symptoms convincingly points away from a causal relationship. Dr. Rauzzino's brief and rather conclusory opinion about causation is premised in large part on the mistaken assumption that Claimant experienced neck pain immediately or shortly after the accident. None of Claimant's other treating physicians provided any specific discussion linking the cervical issues to the work accident. Although a claimant does not have to present expert opinion evidence to support his claim, the lack of such evidence is a legitimate factor to consider. Although Claimant's testimony was generally credible and appeared sincere, this case does not turn on Claimant's credibility; it hinges on a medical causation issue. The preponderance of persuasive evidence shows the need for surgery was caused by the natural progression of Claimant's pre-existing condition without contribution from the work accident.

ORDER

It is therefore ordered that:

1. Claimant’s request for medical benefits relating to the C5-7 surgery performed by Dr. Rauzzino is denied and dismissed.

2. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ’s order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: October 8, 2021

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that the lumbar surgery performed by Dr. Danylchuk on 8/23/2021 was reasonable, necessary, and related to the otherwise admitted work injury of 12/6/2019?

II. If said surgery is so found to be reasonable, necessary, and related, are Respondents responsible for Temporary Total Disability payments from 8/23/2021 and ongoing?

STIPULATIONS

The parties agreed that Claimant's Answers to Interrogatories #8 and #12 would be admissible without foundation. As a result of said Stipulation, Respondents would not continue to seek Claimant's attendance at this hearing.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

The Admitted Work Injury, and Subsequent Treatment

1. Claimant is a 51-year-old correctional officer. He sustained an admitted injury to his thoracic spine while bending over to pat down inmates on December 6, 2019. Claimant did not seek immediate medical treatment for the thoracic injury, although it was later admitted by Respondents.

2. Claimant now alleges an injury also occurred to his lumbar spine, either as a result of the same incident, or occurring during a separate incident during the same day, but this time resulted in ongoing bilateral radicular leg symptoms.

3. On December 3, 2019 (three days prior to the date of this alleged injury), Claimant visited Southern Colorado Clinic, P.C., for an "acute visit" with complaints involving bilateral leg pain radiating through the upper thighs down through the lower leg, left worse than right. (Ex. D, pp. 55-56). The patient history indicated that *"the symptoms began 5 days ago."* There was a diagnosis of sciatica on the left. *Id* at 57. It was noted that Claimant had a history of diabetes. *Id* at 56.

4. Claimant reported his (thoracic) injury to Employer on December 9, 2019. He saw Brendon Madrid, N.P., at CCOM in Pueblo, Colorado. (Ex. F, p.114). The report states that Claimant suffered a low back strain while patting down inmates, and that his job requires a lot of bending and standing. Claimant reported tingling to his

posterior thighs, bilaterally. Claimant's BMI was 41.1, with a height of 5' 5" and weight of 247 pounds, placing him in the "obese" category. *Id* at 115*.* Claimant reported no other injuries at this time.

5. X-rays of the lumbar spine showed no acute fracture, with moderate degenerative changes at the L1 through L4 level and mild degenerative changes at L4-5. (Ex. A, p. 11. There were also degenerative changes noted at the left SI joint. *Id*.

6. [According to the records review section of the IME report by Dr. Michael Rauzzino, MD, (Ex. B) Claimant saw Daniel Olson, M.D., at CCOM, on December 18, 2019. However, the ALJ was not provided copies of many of Dr. Olson's reports]. According to this IME report, "[Claimant] denied back pain previous to the incident." *Id* at 11. Claimant reported tingling into his legs and perineal area. X-rays showed degenerative changes in the left sacroiliac region with disc-space narrowing in the lumbar region and facet arthritis, particularly at L5-S1. Claimant was referred for physical therapy for a muscle strain. Id.

7. According to the IME report, *supra*, on January 7, 2020, Claimant returned to Dr. Olson, with continuing low back pain. *Id* at 12. Claimant reported little progress with therapy and noted ongoing numbness and tingling in both legs and a "shuffling" gait.

8. On January 21, 2020, at Dr. Olson's behest, Claimant underwent an MRI of the lumbar spine. (Ex. H). The following was indicated: L2-3 disc bulge with herniation and canal stenosis and foraminal narrowing bilaterally; L3-4 disc bulge with herniation and canal stenosis and bilateral foraminal narrowing; L4-5 disc bulge without stenosis but significant narrowing; L1-2 disc bulge with canal stenosis; and L5-S1 disc bulge with facet arthropathy, worse on right, without stenosis.

9. According, once again, only to the IME records review, Claimant returned to CCOM on January 23, 2020 for review of the MRI. He was then referred to Dwight Leggett, M.D., for steroid injections. (Ex. B, p. 13).

10. Then, on January 26, 2020, Claimant appeared at the Parkview Medical Center ER for complaints of back pain. (Ex. G). Claimant stated he was at work on December 6, 2019, when he felt something "pop" in his back, but he was not involved in any particular altercation or traumatic event. *Id* at 120. "He denies previous history of back problems."…. "PT reports left lower back pain and groin. States that pain sometimes radiates down both legs. Denies urinary complaints." *Id.*

11. [Respondents allege, via their IME records review only, that a number of visits occurred since the 1/26/2020 Parkview visit, *supra.* However, no such actual medical records were submitted into the record for the ALJ to review; only the IME's characterization of what they allegedly said, and without a cogent attribution. The ALJ will not indulge this practice further, and will not rely solely upon second-hand interpretations of medical records, which apparently exist, but were not submitted for review].

12. The first actual medical report submitted from orthopedist Kenneth Danylchuk, MD with Maple Leaf Orthopedics is dated 2/28/2020. (Ex. E, p. 65). By this point, a T7, T8, T9 laminectomy had already occurred two weeks prior. There was a large herniated disc "at that level" (?). *Id.* Claimant's symptoms had not appreciably improved, but his gait was better. A second surgery was a possibility, and a new MRI was ordered, with follow-up in two weeks.

13. On March 12, 2020, Dr. Danylchuk noted that Claimant was doing better and ordered a new MRI to assess recovery. Claimant was still having some leg pain that Dr. Danylchuk opined could certainly be due to the degenerative changes seen on MRI." *Id* at 67.

14. A thoracic MRI from March 27, 2020 showed laminectomy at T7-9 with edema and focal disc herniation at T6-7 without stenosis. (Ex. H, pp. 178-179). A disc bulge was present at the thoracolumbar junction. *Id*.

15. On April 2, 2020, Dr. Danylchuk followed up with Claimant, stating, in pertinent part:

> [Claimant] had an injury related to bending over a padding (sic) a prisoner down when he felt a sharp pain and pop in his back. According to Michael that heralded the onset of his current complaints……We did review the lumbar spine MRI that was done shortly before the admission [to St. Mary Corwin]. At that time I do not think there is sufficient stenosis to cause his symptoms…..Overall he's done well. He informs me today that his Workman's Compensation doctor does not think that *the area that we operated on was related to his Workmen's Compensation injury*, also he informs me that his attorney my also had dropped as Dr. Olson stated *that this is not the injury that was documented to be work related.* I certainly disagree. Patients are allowed to have more than one diagnosis. I think in this case. He clearly had 2 significant diagnosis, 1. severe thoracic spinal stenosis and 1. (sic) *Degenerative changes* of his lower lumbar spine associated with back and leg pain and numbness….Michael is confused by this. (Ex. E, p. 70)(emphasis added).

16. April 21, 2020, Dr. Danylchuk noted he believed the T8 thoracic injury was consistent with the mechanism of injury and that "the fact that he is significantly improved, however, not back to normal again gives evidence that that was the pain generator." (Ex. E, p. 72). On May 7, 2020, Dr. Danylchuk indicated he believe the initial injury was from bending over when Claimant "felt a sharp pop." *Id* at 73.

17. On June 4, 2020, Dr. Danylchuk recorded ongoing low back and bilateral leg symptoms. *Id*. Dr. Danylchuk stated "I feel strongly that he [had] no previous emergency room visits [for] being treated for low back pain . . . degenerative stenotic complaints. However, the presenting complaints cannot be explained by those

features, thoracic MRI revealed what I think was the symptoms generator in this patient." (Ex. E, p. 76).

Claimant Answers Interrogatories (sort of)

18. By counsel, *but never sworn to, nor notarized,* Claimant submitted Answers to Interrogatories to Respondents on May 22, 2020. (Ex. N). In pertinent part, Interrogatory #8 asked:

> …Specifically, identify any previous injury (including motor vehicle accidents, regardless of whether treatment was sought), **condition, or symptom(s)** experienced in the *lower back* ***or any other region of the body*** you claim to have been injured or otherwise affected by the alleged December 6, 2019 injury.
> ANSWER: ….the Claimant had no prior back injury, condition or symptom experienced to the low back prior to the work comp-related injury referenced in this claim. (emphasis added).

19. Interrogatory #12 asked, in pertinent part:

> ….Specifically, state whether you have treated at any time [in past 10 years] for *symptoms* involving the *low back* **and/or** *complaints of pain or neurological symptoms into the bilateral extremities*, in any state and at any time. For any treatment provided, please list the name and contact information of the provider through whom you were treated.
> ANSWER: Physician list has been previously provided. None these listed physicians had treated the Claimant for any lower back pain ***or complaints of pain or neurological symptoms*** into the bilateral lower extremities prior to the date of injury pertaining to this claim. (emphasis added).

While deflecting the significance of such omission, Claimant's counsel does not now dispute that such omission occurred, and that Claimant's 12/3/2019 treatment at Southern Colorado Clinic was not timely disclosed.

IME with Dr. Messenbaugh

20. Claimant submitted to a Respondents' IME with Robert Messenbaugh, M.D., orthopedic spine specialist, on June 11, 2020. At the time of the IME, Dr. Messenbaugh was not informed of the preexisting bilateral leg complaints or sciatica. This was not documented or considered in his report. *Claimant denied any prior back issues, evaluations, or treatments before December 6.* (Ex. C, p. 46). Claimant stated that his injury occurred at approximately 3:40 p.m., when he was leaning forward and twisting, patting down an offender "*when he felt a sudden pop* in his low back and felt pain in his upper and lower back regions with pain in his bilateral lower extremities." *Id* at 35.

21. Dr. Messenbaugh ultimately opined that the thoracic herniation and surgical procedure were related to the December 6, 2019 injury. *Id* at 50. He opined that, while Claimant strained/sprained his lumbar spine, “the lumbar MRI findings were insufficient to be the cause of persistent symptoms, specifically bilateral lower extremity burning and numbness.” *Id*. He further opined that a great deal of Claimant’s symptoms were attributable to the thoracic level; the lower extremity issues were attributable to degenerative pathology in the lumbar spine. *Id* at 51.

22. Dr. Messenbaugh stated that it was unclear why there were lingering symptoms, since there was no clear documentation identifying remaining pain generators. He recommended additional evaluation to determine the pain generators in the context of the thoracic versus lumbar pathology. Dr. Messenbaugh opined that Claimant was not a candidate for further surgery unless the precise cause of symptoms was clearly defined and all conservative measures exhausted. *Id*.

Treatment with Dr. Danylchuk / Maple Leaf Continues

23. On June 25, 2020, Dr. Danylchuk reviewed additional imaging which indicated degenerative disc disease in the lumbar spine, typical of Scheuermann’s disease. (Ex. E, p. 77). It was noted that ESIs had not helped in the long term. *Id*.

24. Claimant underwent facet injections of the lumbar spine on July 7, 2020 with some improvement. (Ex. E, pp. 79-80). On August 20, 2020, Dr. Danylchuk opined that Claimant could return to work on modified duty. *Id* at 82.

25. Respondents filed a General Admission of Liability (GAL) on August 24, 2020. (Ex. A).

26. On September 15, 2020, Dr. Danylchuk referred Claimant to Andrew Roberts, M.D. (also with Maple Leaf Orthopedics), for additional lumbar ESIs. (Ex. E, p. 86). It was noted that the prior ESIs with Dr. Bernauer did not work, nor did facet injections. *Id.* Lumbar ESIs at L4-5 were performed on October 1, 2020 with some improvement. Medial branch blocks were performed on November 3, 2020 and again on November 24, 2020 at L2-5. *Id* at 93-99.

27. On January 21, 2021, Dr. Danylchuk indicated that he did not think that Claimant’s presentation to the emergency room with severe weakness, peculiar gait, and bowl and bladder dysfunction could be easily attributable to the MRI of the low back and were instead due to the thoracic herniation. (Ex. E, p. 100. Dr. Danylchuk noted that Claimant had been seeking a “more definitive procedure” for the lumbar spine and Dr. Danylchuk indicated it was prudent to continue conservative treatment before any surgery. *Id*.

28. In a *Findings of Fact and Conclusions of Law* following a contested hearing in companion case WC 5-128-304-002, Dr. Danylchuk was subsequently designated the

Authorized Treating Physician by ALJ Edie in an Order dated January 29, 2021. At that time, this ALJ expressed concern that Dr. Danylchuk was not Level II accredited, should an impairment rating need to be assigned. The ALJ takes administrative notice of those proceedings.

29. On January 28, 2021, Claimant asked Dr. Roberts for something more definitive for his back and reported medial branch blocks had made him worse. (Ex. E, p. 102). Claimant now noted good results from the L4-5 ESI and stated his pain was below the L4 level. Dr. Roberts noted there was *no surgical pathology* at L4-5 or L5-S1. *Id*. On February 11, 2021, Claimant underwent L4-5 ESIs. *Id*.

30. Claimant returned to Dr. Danylchuk on February 16, 2021, who opined that the pain generators were related to L1-L4 but that there was also significant degeneration of the facet joints, specifically at the lumbosacral junction, and advised a second opinion. *Id* at 107. On April 15, 2021, Claimant requested additional lumbar ESIs from Dr. Danylchuk. *Id* at 109.

31. Claimant underwent multilevel lumbar laminectomy and fusion surgery with Dr. Danylchuk (L3-S1 levels) on or around August 23, 2021. [The reasonableness, necessity, and relatedness of this procedure now being at issue for this hearing]. Claimant has not worked since surgery.

IME by Dr. Rauzzino

32. On March 29, 2021, Claimant underwent an IME with neurosurgical spine specialist Michael Rauzzino, MD. Claimant reported he was injured on December 6, 2019 while patting down a prisoner and "felt a pop in his back and noted back and leg symptoms, although his leg symptoms did not develop for two or three days." (Ex. B, p. 24). Dr. Rauzzino noted that Claimant had seen his PCP three days before for sciatica, at which time he was prescribed medication*. Claimant purported to have no recollection of this at all. Id* at 24-25. Dr. Rauzzino noted there was a clear discrepancy between what was reported and what was in the records. Claimant stated he desired additional surgery. Claimant also told Dr. Rauzzino he never had trouble with his back prior to December 6, 2019.

33. Dr. Rauzzino opined that his main concerns were lack of appropriate mechanism of injury and lack of evidence of acute lumbar abnormality. *Id* at 31. Dr. Rauzzino opined that the lumbar MRI findings were not causally related to the work injury; further, no treatment for the lumbar condition was reasonably necessary or related. *Id* at 30. Dr. Rauzzino opined that there was not an appropriate pain generator identified which would be amenable to surgical intervention.

34. Dr. Rauzzino opined that the preexisting December 3, 2019 record reflected the onset of the same or similar symptoms which could be representative of a thoracic myelopathy as well as a lumbar disease. *Id*. He found it relevant that this was not disclosed to the treating providers, since a better causation analysis could have been

performed. *Id*. Dr. Rauzzino opined that he did not believe the mechanism was consistent with a thoracic herniation either. He noted that there was a lack of acute injury to the lumbar spine seen on the MRI studies, and that the eight weeks of therapy provided would have been sufficient to treat any muscle strain injury. *Id*.

35. Dr. Rauzzino further opined that the simple act of patting down a prisoner was not sufficient to have caused any acute structural injury to the lumbar spine, and there was no such injury seen on the imaging studies. *Id* at 31. Dr. Rauzzino opined that the mechanism was likewise insufficient to have aggravated or accelerated the preexisting degenerative condition or injury to have caused the need for treatment. He also indicated that the preexisting paresthesisas could have been evidence of a thoracic spinal cord compression. Dr. Rauzzino opined that if there were any significant acute injury that occurred in December 2019, one would have expected the same severity of the symptoms that Claimant later reported to the emergency room in February of 2020. *Id*.

Deposition of Dr. Rauzzino

36. Dr. Rauzzino testified as a board-certified neurosurgeon, specialist in spinal disorders, and Level II accredited physician. (Rauzzino Transcript) Tr. at 5. He reviewed imaging (including actual films) from Claimant's lumbar and thoracic spine, including x-rays and MRI studies. Tr. at 6. Dr. Rauzzino performed a physical examination and noted that Claimant presented with a cane. *Id*. Dr. Rauzzino testified that the ESIs which Claimant had received were ineffective, as they were not diagnostic to localize the source of pain and did not result if functional improvement. Tr. at 8.

37. Dr. Rauzzino testified regarding causation, summarized as follows: The mechanism of injury of bending to pat down inmates would not have exerted any specific axial load on the spine and the spine would not have been stressed beyond normal capacity based on the activity described. Tr. at 9-10. Repetitive motion of doing pat downs also would not be expected to stress the spine or cause permanent injury, especially a disc herniation or facet injury. Tr. at 10. X-rays from December 9, 2019 do not show acute injury. Tr. at 12. The lumbar MRI from January 21, 2020 showed no acute herniated disc or instability, only degenerative changes at multiple levels. *Id*. In comparison with the thoracic spine, where there was an acute process, there was no acute process in the lumbar spine. *Id*. The pain generator identified by Dr. Danylchuk from L1 to L4 level is not a pain generator, but simply a complaint of pain. *Id*. Dr. Rauzzino clarified that a pain generator is a specific structure or location that generates pain. *Id*. The degenerative changes may be attributable to pain, but there is no acute pain generator in connection with the mechanism of injury. Tr. at 13.

38. Dr. Rauzzino testified that as a practicing neurosurgeon and Level II physician, it is unlikely that two separate spinal processes would result from the single event provided by Claimant. Tr. at 13-14. There must be a force to produce an injury, and, like a stick, when a force is applied with enough intensity, this may break the stick but it only breaks at the weakest point. Tr. at 14. Dr. Danylchuk indicated that point was the

thoracic spine, where an acute injury existed, but that it was not medically reasonable for a separate lumbar injury to have occurred. *Id*.

39. Dr. Rauzzino testified that the most evident pain generator for ongoing symptoms would be the thoracic injury. Tr. at 15. Dr. Rauzzino posited that Claimant's obese body habitus puts undue stress upon the spine and causes degeneration, which is not an acute issue. Tr. at 16-17. Dr. Rauzzino opined that Claimant's ongoing symptomatology is not work related, instead they were much more likely to be explained by Claimant's degenerative changes occurring over time. Tr. at 57.

40. Dr. Rauzzino opined that the December 3, 2019 report indicated what he believed the cause of the symptoms were, not the work injury. Tr. at 20. Sciatica is a diagnosis of nerve root impingement of the nerves that makes up the sciatic nerve in the lumbar spine and involves the low back. Tr. at 54. The note involved a neurologic evaluation and the indication that the visit was an "acute visit" meant that something happened that changed the normal course of symptoms. Tr. at 54-55. The symptoms of bilateral leg pain were consistent with Claimant's presentation to his providers after the work injury. Tr. at 55. Dr. Rauzzino testified that Claimant was not an accurate medical historian. Tr. at 20. It is also relevant that Claimant claimed he did not develop symptoms immediately after the work injury, which Dr. Rauzzino testified would be expected with an acute event. Tr. at 56.

41. Dr. Rauzzino opined that the surveillance was relevant because it demonstrated Claimant simply carrying his cane but not actively using it. The video also demonstrated Claimant bending from the waist down in a fluid range of motion with no pain behavior as well as other movements without pain. Tr.at 21. These movements were not consistent with the antalgic gait presented during examination with Dr. Rauzzino, which was during the same period of time. Tr. at 22.

Deposition of Dr. Danylchuk

42. Dr. Danylchuk was deposed on August 17, 2021. He testified as an orthopedic surgeon, but is not Level II accredited. (Danylchuk Transcript) Tr. at 5. He testified a lumbar laminectomy and fusion at L3-S1 levels was scheduled for the near future (August 2021) but was unaware of the date. Tr. at 6. There was no request for prior authorization through the Workers Compensation process. *Id*.

43. Dr. Danylchuk testified that Claimant was at MMI for the thoracic spine condition. Tr. at 8-9. The thoracic injury was six levels away from the lumbar spine, at least three to four inches. Tr. at 13. Dr. Danylchuk maintained his opinion that there could be two separate spinal processes from the same injury. Dr. Danylchuk stated that he did not get into the specifics of the mechanism of injury with Claimant and "exactly what happened, God only knows." Tr. at 15. Dr. Danylchuk testified that he was unsure of the injury(ies) were the result of a single incident but probably the same mechanism, which he attributed to repetitive bending. Tr. at 16. He testified that "I think the way to explain it is, on the same day, if he's patting down inmates, it's *conceivable* that that mechanism can cause injury in two parts of the spine, maybe not exactly the same

pat-down movement. But that mechanism of injury for somebody who does a lot of that during the date is *compatible with* two injuries and two different parts of the spine." Tr. at 48.(emphasis added). He further indicated that injuring a spine in more than one place during one incident is "less likely", unless there was high velocity involved, such as a motor vehicle or skiing accident. Tr. at 14.

44. Dr. Danylchuk testified that sciatica generally involves pain originating from the low back, and that a diagnosis of sciatica generally evidences back pain and neurological pain into the legs. Tr. at 21-22. Dr. Danylchuk testified that Claimant's representation that he had no prior treatment for neurological symptoms into the bilateral lower extremities prior to the date of injury was inaccurate because Claimant was prescribed Prednisone and anti-inflammatories for his complaints on December 3, 2019. Tr. at 28-29. Dr. Danylchuk opined the pain generators were a combination of degenerative disc and facet joint disease, and neuroforaminal stenosis. Tr. at 35.

Hearing Testimony of Jennifer A[Redacted]

45. Ms. A[Redacted] testified as a witness for the Employer and human resources manager at the time Mr. Espinoza was injured. (Hearing Transcript) Tr. at 30. Ms. A[Redacted] testified that there are cameras throughout the Crowley County facility, including employee areas. Tr. at 31. These take video footage and can capture screenshots. Id. Ms. A[Redacted] observed Claimant, both personally and by camera. Tr. at 33-34; RHE K. Ms. A[Redacted] observed Claimant making intermittent use of his cane, not always utilizing the device to help him walk. Tr. at 33. Ms. A[Redacted] captured camera screenshots of intermittent use. Tr. at 34. Ms. A[Redacted] testified that it did not appear that Claimant depended on the cane to move around.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1).* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion).

C. The ALJ finds that each medical expert offering opinions has done so in good faith, and with a sincere effort to provide the ALJ valuable expert information. It is also noted that as a treating physician, Dr. Danylchuk recommended - and has now performed - treatment (with reservations as noted) that he sincerely believes might help Claimant address his symptoms. As such, the ALJ will determine these issues on the basis of *persuasiveness*, and not *credibility* per se.

D. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

A Word Regarding the IME's Summaries from Medical Reports

In this case, Respondents have made extensive citations to Dr. Rauzzino's IME report, which, in turn, purports to quote from medical reports by various treating providers of Claimant. The significant problem here is that many such medical records have not been received into evidence by the ALJ. This is concerning for two reasons: 1) The ALJ wants to see these primary sources for himself, to make certain such quotations are accurate, complete, and in context, and 2) Such medical records apparently exist, since Dr. Rauzzino references them, although the far better practice would have been for *him* to also cite the date and page number from each physician's report. This does not represent best practices. The ALJ, without corroboration, is reluctant to rely upon the IME report *standing alone* in support of a medical proposition of what some other physician allegedly said or did. There is no compelling reason not to provide and cite the primary sources.

A Word Regarding Claimant's Answers to Interrogatories

In reviewing his own 1/29/2021 Order in companion case WC 5-128-304-002 (Finding of Fact #28, *supra*), the ALJ notes that he found Claimant to have been credible in that case. There is nothing which requires such a finding of credibility to carry over into a subsequent case. In this instance, the ALJ emphatically does not. Claimant counsel's rationalizations aside, it strains credulity to think that Claimant went into the Southern Colorado Clinic on December 3, 2019, complaining of sciatica symptoms, injured his lumbar spine three days later, and then had no recall of this event to any medical provider or party to this case. Either he is a totally unreliable historian, both to the courts and his medical providers, or he did not want the participants in this case to have highly pertinent information.

In support of the latter, the ALJ notes that, for reasons unclear, Claimant never signed and attested his Interrogatory answers. For over a year. A review of the file and hearing transcript indicates that efforts to secure his simple cooperation in signing them as required were rebuffed. There is evidence strongly suggestive of Claimant dodging service of process. As it turned out, Respondents appeared satisfied with a stipulation on the authenticity of the Interrogatory answers; had Respondents wished Claimant to appear at hearing and be subject to cross-examination, the ALJ would have insisted upon it, and used every means at his disposal to assure it. A Claimant declining, of his own volition, to appear and testify in a case of this nature, while not required, is highly unusual, to say the least.

The purpose of discovery in every case is to assure the orderly and timely exchange of pertinent information. This requires dealing in good faith, even when it hurts. Claimant's purported distinction between sciatic symptoms and back symptoms does not get him a free pass for his failure to disclose. A cursory reading of Questions 8 and 12 meant *all symptoms*, not just his back. And yes, everyone in the Comp arena knows that lumbar problems and sciatica symptoms are inextricably linked. *When in doubt, disclose*. *The ALJ strongly disapproves of Claimant's inexcusable sins of omission, and subsequent stonewalling, and will not reward such conduct.*

Medical Benefits, Reasonable and Necessary, Generally

E. Claimant bears the burden of establishing entitlement to any specific medical treatment. *See Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990). Once a claimant has established a compensable work injury, he/she is entitled to a general award of medical benefits and respondents are liable to provide all reasonable and necessary medical care to cure and relieve the effects of the work injury. *Section 8-42-101, C.R.S.*; *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

Reasonable and Necessary, as Applied

F. As an aside, a review of the surveillance video, still shots, and narrative report of Claimant's comings and goings in early 2021 reveals little that could greatly assist either party to this action. Sometimes Claimant used a cane, sometimes he didn't. Sometimes he appeared to walk with some sort of shuffle or altered gait, sometimes he appeared to manage OK. Still at other times, no significant activity could be observed at all. It can be inferred that Claimant was not likely aware that he was being observed; thus his actions were not faked for effect. People with certain maladies have good days and bad ones. Often they are partially, but not wholly dependent upon a cane. Such is the case here. It likely means Claimant has some occasional need for a cane, but the observed malady cannot be ascertained. More significantly, there is no way to infer from this visual evidence what *caused* any altered gait.

G. In this case, the ALJ is comfortable with Dr. Danylchuk's assessment that the surgery performed on 8/213/2021 was reasonable and necessary to help Claimant cure his then-existing lumbar condition. He suffered from degenerative lumbar conditions, wrought by weight issues and preexisting diabetes. He had some level of altered gait. He walked with a shuffle. Outside of Claimant's unreliability as a medical historian, there was sufficient extrinsic evidence that the surgery could be justified.

Medical Benefits, Related to Work Injury, Generally

H. Further, however, a Claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his/her need for medical treatment. *Merriman v. Indus. Comm'n*, 210 P.2d 448 (Colo. 1949). Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997). In other words, the mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability were caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those that flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (October 27, 2008), simply because a Claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted, "[C]orrelation is not causation." Whether Claimant met the burden of proof to establish the requisite causal connection between the industrial injury and the need for medical treatment is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Related to Work Injury, as Applied

I. Regardless of the wisdom of proceeding with this rather complex procedure, Claimant has not shown that such procedure (even if it might later be shown to have helped considerably) is *causally related* to his alleged work injury. To his credit, Dr. Danylchuk did not oversell the relatedness issue. He is not Level II accredited, nor need he be to treat his patients effectively. At the end of the day, his position is that such a scenario posed by Claimant (two separate and discreet injuries to his spine-one thoracic, one lumbar- occurring during the course of one day of pat downs was *possible*, and *consistent* with the observed symptoms. Such possibilities do not constitute *medically probable.* In his experience, multiple fractures to the spine occurring in one day are more often associated with high velocity incidents. This makes sense.

J. Claimant's theory that he blew out his thoracic, then his lumbar discs (or vice versa) does not. His presentations were not consistent with what he now proposes. Dr. Danylchuk was himself skeptical along the way. He later became merely equivocal. If Claimant heard this alleged "pop", followed by pain, why did it take three days to report this to anyone? So he could keep working that day, and blow out another section of his spine? Why did his symptoms improve after Dr. Danylchuk addressed his thoracic complaints via surgery? Why does the imaging not support an acute lumbar finding? In the end, and leaving aside Claimant's serious credibility issues, Dr. Rauzzino makes a far more compelling case on the causation/relatedness component. Likewise for Dr. Messenbaugh. Claimant was given the benefit of the doubt on the 'pop' in his thoracic spine. He got a surgery, and will get a corresponding rating for that. That is all water under the bridge.

K. Nothing in the record, however, supports two 'pops' occurring the same day. What is supported is that Claimant voiced similar concerns to the Southern Colorado Clinic just three days before his alleged work incident - then promptly forgot about it every time he was asked by multiple medical providers – and by opposing counsel. Claimant has not met his burden of proof here. In fact, the ALJ finds that it is far more likely than not that Claimant did not injure his lumbar spine at work – on this or any other day. Instead, his lumbar symptoms, such as they are, are due to a constellation of health issues, not the least of which are degenerative conditions in his lumbar spine, wrought by diabetes and a poor BMI. Such degenerative condition was not rendered symptomatic by any work activities on any date.

L. Taking all the evidence into account, Claimant has not shown, by a preponderance of the evidence, that the lumbar condition he now complains of (whatever that might be) was proximately caused by his alleged work incident of 12/6/2019. The surgery performed by Dr. Danylchuk on 8/23/2021 was not related to Claimant's work injury.

Temporary Disability Payments

M. Since any temporary disability Claimant might have suffered as a result of the 8/23/2021 is not due to a work injury, Claimant's claim for Temporary Total Disability payments is denied and dismissed.

ORDER

It is therefore Ordered that:

1. Claimant’s request for reimbursement for Dr. Danylchuk’s 8/23/2021 lumbar surgery is denied and dismissed.

2. Claimant’s request for Temporary Total Disability payments is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. *In addition, in order to best assure prompt processing of your Petition, it is **highly recommended** that you send a copy of your Petition to Review to the Colorado Springs OAC via email at oac-csp@state.co.us.*

DATED: November 1, 2021

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-163-728-001

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that she sustained compensable injuries to her lower back, right hip and right leg on February 4, 2021.

II. Whether Claimant established, by a preponderance of the evidence, that she is entitled to reasonable, necessary and related medical treatment to cure and relieve her of the effects of her alleged injuries.

III. Whether Claimant established, by a preponderance of the evidence, that she is entitled to temporary total disability (TTD) benefits beginning February 5, 2021 and ongoing.

IV. Claimant's Average Weekly Wage (AWW).

At the conclusion of Claimant's testimony, Respondents withdrew the issue of offsets as Claimant testified that she has not received any benefits or payments from any source, including unemployment benefits that would give rise to any offset under the Colorado Workers' Compensation Act.

PROCEDURAL MATTERS/STIPULATIONS

At the outset of hearing, Respondents raised the following procedural matters and the parties reached the following stipulations:

- Respondents reserved, without objection, the Colorado Workers' Compensation Medial Benefit Fee Schedule for all medical treatment (benefits) awarded, ordered and/or paid.

- The parties stipulated that should the ALJ find the claim compensable, the medical treatment provided to Claimant on or after February 19, 2021 by Concentra Medical Centers and providers to whom they referred Claimant for treatment would be deemed reasonable, necessary, and causally related to Claimant's alleged February 4, 2021 injuries. The parties also stipulated that if Claimant's injuries were found compensable, her evaluation and treatment in the emergency room at St. Francis Medical Center on February 5, 2021 would be considered reasonable, necessary and related to her February 4, 2021 accident.

- Concerning temporary disability benefits, the parties stipulated that should the claim be found compensable, Claimant would be entitled to TTD benefits beginning February 5, 2021, and continuing.

The above referenced reservation and stipulations are accepted by the ALJ and are made part of this Order.

FINDINGS OF FACT

Based upon the evidence presented, including the deposition testimony of Dr. Finn, the ALJ enters the following findings of fact:

Background and Claimant's Testimony

1. Claimant was hired by Employer as a new house painter on February 3, 2021. As a painter, Claimant's duties included climbing ladders, painting walls, painting trim and cleanup.

2. Claimant alleges an injury to her low back, right hip and leg occurring February 4, 2021. According to Claimant, she was carrying a bucket of paint down a freshly washed driveway to another job site when she slipped on a glaze of ice that had formed on the concrete due to the prevailing air temperature. Claimant testified that she fell onto her buttocks and low back developing severe pain and numbness in her hips and low back. Per Claimant, her back pain and leg numbness were so severe that she was unable to get to her feet. Claimant testified that she lay on the driveway for approximately 10 minutes before getting assistance from a co-worker to stand up. Claimant testified that she returned to the house and once inside, informed her boss of her fall. She took some Tylenol and called her daughter to pick her up because she was in too much pain to drive home.

3. Claimant waited until the following morning (February 5, 2021) to seek medical attention. She testified she sought treatment at Penrose-St. Francis hospital the next morning because her pain did not abate overnight despite the use of medication. Claimant testified that she did not seek care immediately after the fall because she thought her condition would improve. She also suggested that her boss told her to wait and see if the pain subsided. When her pain did not subside, Claimant testified that she went to the emergency room for treatment.

4. Claimant testified that her initial symptoms included pain in her back and hip that traveled downward to the bottom of her feet. Claimant indicated that she attended physical therapy approximately four times with no relief. According to Claimant, physical therapy aggravated her condition and made her symptoms worse. Consequently, her physical therapy was stopped. Claimant testified she was given home exercises to do but she also stopped performing these movements as they were aggravating her condition. Claimant also testified that she was referred to Dr. Kenneth Finn who administered an injection into her low back that provided no relief.

5. Claimant testified that her current symptoms include pain in her back that

radiates down both legs into her feet – right greater than left. She described her current pain as stabbing and pinching. She reported experiencing burning and pricking pain, like needles in her back and legs. She testified to a pain level of 7/10 in the legs and back, noting further than her pain increases with prolonged walking/standing, cleaning, mopping and sweeping.

6. Claimant testified to a prior history of back pain after suffering a prior injury that occurred 20 years ago. She was unable to recall specifics about the event or the cause of this back pain. Nonetheless, she testified that she would suffer rare episodes of back pain that would manifest every few years at an intensity level much lower than her current pain. Indeed, Claimant reported that when she experienced back pain in the past, it would present at a 2/10 pain level as compared to the 7/10 intensity she currently experiences. Claimant also testified that she suffered a fall from a ladder in 2019, which caused temporary back pain. According to Claimant, she was able to return to work three days after this fall. Claimant testified she saw Dr. Barent on January 17, 2020 for low back pain and was referred to physical therapy, which she attended twice. Claimant reported that she stopped going to physical therapy because her pain subsided and she was working and did not have the time to go.

7. Claimant testified that in the months leading up to her February 4, 2021, slip and fall on the driveway; she had no pain in her low back, hips or legs. She also reported that she had no problems working or limitations concerning her activities of daily living due to back or hip pain in the year prior to her February 4, 2021 fall.

8. Claimant testified that she was paid $16/hour as a painter and that she was hired to work from 8 a.m. to 5 p.m., Monday through Friday. She testified her average weekly wage was $640 per week ($16 × 40 hours/week = $640/week) and that she was only able to work one day before her fall on February 4, 2021. Claimant testified that she has not returned to work since her injury. She stated she was never offered a modified duty position and that she was told by her boss, Mr. R[Redacted], that there was no more work for her because he already hired other personnel and the only work he had was "heavy."

9. During cross-examination, Claimant testified that she never told her medical providers about her fall from a ladder in 2019, because no one asked. She admitted that she sought treatment for back pain in January 2020, during which she purportedly told her doctor that she didn't know why she had pain. She rejected the suggestion that her pain was the result of falling from a ladder in 2019 and instead reiterated that she did not know what caused her pain at the time. She testified that she experienced pain for a couple of days in January 2020 before she sought treatment and that this pain was less intense than the pain she experienced when she fell from the ladder in 2019. Claimant also reiterated that she stopped going to physical therapy in 2020 after two visits because her pain responded to medication and went away. According to Claimant, she had no pain when she stopped attending physical therapy in 2020. Claimant stated she never filed a workers compensation claim for her fall from a ladder in July 2019, because her injury wasn't that bad and she returned to work. Claimant testified that prior to February

4, 2021; she had never undergone imaging of her back/hips.

Claimant's Medical Records

10. Claimant initially reported to St. Francis Medical Center on February 5, 2021. Her chief complaint was a fall. (Claimant's Submissions- Bate# 00001-0002) Claimant stated she was walking on a sidewalk when she slipped on ice, falling backwards. Claimant indicated she hit her right side, which caused pain in the right leg, back, and neck. Claimant stated her pain was worse the following morning. (Claimant's Submissions- Bate# 00016). Physical exam indicated tenderness to palpation at the lumbar spine and tenderness bilaterally over the tronchanter. (Claimant's Submissions- Bate# 00019- 00020). Claimant was diagnosed with a back strain, contusion of left shoulder, and a hip strain. Assessment by Certified Physician Assistant (PA-C) Chelsea Raby indicated, "with reasonable medical certainty this patient has multiple contusions after a ground-level fall that occurred yesterday while the patient was at work . . . no red flags." Assessment noted low back pain, bilateral hip pain, and left elbow pain. (Claimant's Submissions- Bate# 00022- 00027). Claimant was told she could return to work on February 8, 2021. (Claimant's Submissions- Bate# 00045).

11. Claimant presented to Dr. Peterson on February 19, 2021. Claimant reported slipping on ice on a driveway outside a home she was working at when she landed on her buttocks. Claimant stated the medication prescribed by the hospital on February 5, 2021 provided her no relief. Claimant described pain in her whole back, but mainly in her low back as well as pain in the anterior hips. Claimant reported no improvement in her condition. Physical exam revealed tenderness in the lumbar spine at the L2, L3, L4 and L5, tenderness in the sacroiliac joint bilaterally, and tenderness to the right and left facet joints. Assessment indicated fall from slipping on ice and lumbosacral strain. Claimant was given medication and referred to physical therapy for 3 times a week for 2 weeks. Restrictions indicated no lifting over 10 pounds; no walking or standing over 2 hours per day; no sitting over 4 hours per day. (Claimant's Submissions- Bate# 00047- 00054)

12. Claimant returned to Dr. Peterson on March 1, 2021. Chief complaint included lower back pain and pain in both hips. Claimant described her pain as constant. Claimant had not started physical therapy, was still not working, and was still having pain. Physical exam indicated tenderness to the lumbar spine, tenderness to the right sacroiliac join and right facet joint along with right sided muscle spasms. Range of motion testing was painful. Assessment remained unchanged. Dr. Peterson indicated the objective findings were consistent with her history and/or the described work-related mechanism of injury. (Claimant's Submissions- Bate# 00055-00057).

13. Claimant was seen by Dr. Peterson on March 8, 2021 for a follow-up. Claimant reported lower back pain that radiated to the bilateral hips. Claimant stated her back got worse 3 days ago but she did not have a new injury. Claimant also reported numbness in her feet bilaterally as well as numbness when driving for over 30 minutes. Claimant reported a prior work injury from 2 years ago with low back pain but stated it resolved with therapy. Assessment included bilateral lumbar radiculopathy and worsening

pain. A lumbar spine MRI was ordered to rule out a herniated disc. (Claimant's Submissions- Bate# 00058- 00061).

14. Claimant started physical therapy on March 12, 2021. Claimant described her mechanism of injury (MOI) as slipping on ice while walking down a driveway, which caused her to land on her buttocks and then her back. Claimant reported lower back pain, which radiated into the bilateral legs. She also reported weakness in her right leg causing it to give away when she walks. Pain was described as worse in the right leg. Physical therapist, William Birch stated "[patient]" had prior injury to low back years ago but recovered quickly without any functional deficits." (Claimant's Submissions- Bate# 00062-00066). Claimant had additional PT on March 19, 2021. Claimant reported her back felt the same and she only got relief when lying on her side using a heat pack. (Claimant's Submissions- Bate# 00071- 00073).

15. Claimant had an MRI of the lower back on March 22, 2021. This MRI demonstrated a central/left central 4 mm focal disc protrusion uplifting the posterior longitudinal ligament, which had migrated millimeters caudally from the disc space at L4-5. At L5-S1, the MRI demonstrated a similarly herniated disc with 2 mm of caudal migration from the disc space. Along with the above described disc herniation, the MRI mild to moderate hypertrophic changes of the articular facets at L4-5 and L5-S1. (Claimant's Submissions- Bate# 00099-00100).

16. Claimant reported to Dr. Peterson on March 24, 2021. Dr. Peterson noted that the MRI was positive for disc herniation at the L4-5 and L5-S1 spinal segments. Claimant was referred to Dr. Finn for further evaluation. (Claimant's Submissions- Bate# 00079-00082)

17. Claimant presented to Dr. Finn on March 29, 2021. She reported she slipped and fell at her employer after 2 days on the job. Claimant indicated PT caused increased pain and that medication had not helped. Dr. Finn noted that the lumbar spine MRI did show some disc abnormalities at L4-5 and L5-S1 and an injection was recommended. Claimant's lumbar spine symptoms were described as central right sided, constant in nature, fluctuating in severity, and radiating to the hip, buttock, right and left leg, and her foot. Claimant described numbness and tingling in her foot with weakness in the legs. Claimant's reported symptoms were described as being consistent with a L5-S1 distribution. Aggravating factors included work activities, household activities, driving, walking, standing, and sitting. Physical exam revealed limitations in all planes of spinal movement. Sensory exam showed a decrease in the L4, L5, and S1. Assessment included low back pain, spondylosis, and intervertebral disc degeneration of the lumbosacral region. Treatment plan consisted of one LESI at the right L5-S1 for mechanical/discogenic lower back pain and encouragement of a home exercise program. (Claimant's Submissions- Bate# 000110- 000112).

18. Dr. Finn administered a lumbar interlaminar epidural steroid injection to Claimant at the L5-S1 on April 19, 2021. (Claimant's Submissions- Bate# 000114-000115).

19. Claimant returned to Dr. Peterson on April 26, 2021. Claimant reported receiving an injection from Dr. Finn with no improvement. Dr. Peterson stated the MRI suggested discogenic pain. Claimant described numbness and tingling in the right anterior thigh that went down into the feet. Assessment and treatment plan did not change. (Claimant's Submissions- Bate# 00085- 00088).

20. Claimant presented to Dr. Peterson on May 2, 2021. Dr. Peterson stated further information was provided by company lawyers showing a long history of chronic back issues and that Claimant was under the care of her PCP on January 17, 2020, for complaints of low back, right buttock, and right hip pain. Dr. Peterson noted that a question of causality had been raised by company lawyers and Pinnacol Assurance. Dr. Peterson further clarified that the causality evaluation would seem to turn on the question of verifying whether Claimant did indeed slip on ice and fall on her back on February 4, 2021 as she claims. If she did, “then she clearly has a MOI that would typically make a pre-existing back complaint worse.” Dr. Peterson noted during her presenting exam she had signs, symptoms, and exam findings consistent with either facetogenic pain and/or SIJ mediated pain both of which would be consistent with an axial loading injury. Dr. Peterson noted that Claimant’s initial visit with her PCP was more suggestive of a disc issue or a hip labral tear. Lastly, Dr. Peterson stated if there was evidence that Claimant did not slip and fall on February 4, 2021, that her current complaints are likely her pre-existing symptomatic baseline. Claimant’s assessment and treatment plan remained unchanged. (Claimant's Submissions- Bate# 00089- 00093).

21. Claimant returned to Dr. Finn on May 11, 2021 for a follow-up. Claimant reported her previous L5-S1 IL ESI did not alleviate her pain. Claimant described right sided lumbar pain that was constant and which radiated to her right hip, buttock, leg, and foot in an L5 and S1 distribution. Physical exam of the lower back showed no pain behavior. Claimant was tender to palpation at the L4-S1, with paravertebral tenderness, SI joint tenderness, trochanteric tenderness. Patrick’s maneuver and Faber’s maneuver were positive. Assessment included pain in the right hip and lower back pain. Dr. Finn noted that Claimant’s pain was worsening in the right hip. He ordered an MRI of the hip and stated if it was unremarkable, he would consider a right hip SI joint injection for sacroiliitis and a possible referral to a chiropractor. (Claimant's Submissions- Bate# 000116- 000117).

22. Claimant was seen by Dr. Johnson on May 12, 2021. Claimant stated she had an injection at Dr. Finn’s office the day before, which was not helpful. Claimant reported continued lower back pain that was no better from the last visit. This pain was described as worse when she walks, mops, or lifts. Claimant described some radiation of pain into the legs. Claimant was noted as not being able to continue with PT due to pain. Physical exam showed continued tenderness at the L3-4 lumbar spine, right and left sacroiliac joint, and bilateral muscle spasms. Claimant’s restrictions included no lifting over 10 pounds, walking 2 hours per day, standing 2 hours per day, and bending only 3x an hour. (Claimant's Submissions- Bate# 00094- 00097)

23. Claimant presented to Dr. Timothy O'Brien for a Respondent requested Independent Medical Exam (RIME) on May 24, 2021. Claimant informed Dr. O'Brien that she was injured while carrying paint to another job across the street. According to Dr. O'Brien's RIME report, Claimant indicated that she slipped while descending a downhill grade on a wet driveway. Claimant stated it was the end of the day so she did not seek medical attention. Claimant also stated she thought her pain would get better but it did not. Claimant said she contacted and informed her boss of her injury. Claimant reported that she gave up walking and standing for too long as well as carrying heavy items. Claimant reported difficulty dressing, getting out of bed, emptying garbage, mowing the lawn, washing clothes, driving, changing shoes, cleaning her house, and vacuuming. Claimant's pain was reported as an 8/10 in intensity. Claimant's pain diagram showed pain that was diffuse on the right and left of the midline from the mid-thoracic level to just below the buttock, involving the entire back and buttock area.

24. After obtaining the above referenced history and reviewing Claimant's medical records, including Claimant's March 22, 2021 MRI, Dr. O'Brien opined that Claimant suffered a minor lumbosacral strain/sprain/contusion, a minor cervicothroacic spine strain/sprain and a minor left elbow contusion all of which had resolved as a result of her February 4, 2021 slip and fall. According to Dr. O'Brien, Claimant's work related incident was "minor" as supported by the fact that she "did not seek medical attention urgently or emergently and the fact that she "did not have immediate pain but rather noted an onset of symptoms hours after the incident." Dr. O'Brien went on to state that Claimant's MRI was "normal" for her age and did not demonstrate any evidence of acute injury.

25. Dr. O'Brien opined that Claimant reached an end of healing on or before March 22, 2021. He concluded that a "significant" portion of Claimant's pain was being driven by nonorganic factors "typically" associated with "secondary gain issues inherent to a workers' compensation claim." Dr. O'Brien wrote that Claimant's injury was self-limiting and self-healing. He suggested that Claimant needed to be informed that her pain is not harmful to her and more so that a significant component of her pain was not traceable to an organic source. According to Dr. O'Brien, whatever organic source of pain that persists for Claimant is a "personal health issue and is not in any way the result of her body's failure to heal." Dr. O'Brien stated the use of an epidural steroid injection to treat Claimant's persistent pain following her February 4, 2021 slip and fall, as administered by Dr. Finn was not warranted because an end of healing had already been reached. (Respondent Submissions- Bate# 001- 011)

Claimant's Prior Medical Treatment

26. Claimant was seen by PA Michael Miller on August 3, 2018 with complaints of abdominal pain and low back pain with right sciatica. Claimant reported lower abdominal and pelvic pain on the right side for the previous 10 days. Claimant indicated she has a history of a fall 20 years ago that left her with low back pain which became painful in the last week without known injury. This pain radiated into her right buttock, leg, and foot. There was no reported tingling or numbness. Physical exam showed no tenderness to

palpation over the lumbar spine or paraspinal musculature. Previous treatment was listed as none. Claimant was referred for CT scan of the right abdominal and pelvic pain. Claimant was given medication for her low back pain. An x-ray of the lumbosacral spine was unremarkable. (Respondents' Submissions- Bate# 014- 023).

27. Claimant was taken by ambulance to Memorial North ED after a fall from a ladder on January 17, 2019. Claimant reported pain in the hip and SI joint. (Respondents' Submissions- Bate# 056- 059).

28. Claimant was seen by Dr. Laurel Verant for hip pain on January 17, 2020. Claimant reported her left hip pain started in the hips and radiates into the buttock along with deep groin pain. Claimant reported low back pain as well with posterior radiation down the left and numbness in the thigh and lower leg. Assessment included low back pain and lumbar radiculopathy. Claimant was referred to physical therapy and an MRI was ordered. (Respondents' Submissions- Bate# 031- 039).There are no records evidencing Claimant had this MRI.

29. Claimant reported to physical therapy for right hip and low back pain on February 3, 2020. Claimant indicated her pain began about two months ago when she fell while working as painter. Claimant had a second physical therapy visit on February 13, 2020. Claimant reported limitations in hamstring and glute flexibility. Claimant reported no change overall in pain. (Respondents' Submissions- Bate# 047- 055)

Employer Documentation

30. A first report of injury was prepared by the owner of Modern Painting Services, Blas R[Redacted], on February 17, 2021. Mr. R[Redacted] indicated, "[Claimant] was walking and slid on driveway being frozen." Mr. R[Redacted] noted that Claimant worked 5 days a week for 8 hours each day. Claimant's pay rate was noted as $16/hour. (Claimant's Submissions- Bate# 000119)

31. Blas R[Redacted] issued a check to Claimant for $272 on March 2, 2021. (Respondents' Submissions- Bate# 000121)

Expert Testimony

32. Dr. Finn testified via deposition on July 6, 2021, as an expert in physical medicine and rehabilitation, pain medicine, and pain management. (Deposition Transcript Pg. 6). Dr. Finn testified that he initially saw Claimant on March 29, 2021, for a lower back injury. Dr. Finn stated Claimant's history indicated a traumatic event described as a slip and fall. Dr. Finn testified that Claimant had numbness and tingling in an L5 and S1 pattern, which correlated to the MRI findings that showed a right-side predominance of a disc protrusion that might be irritating or impinging on the traversing S1 nerve root. Dr. Finn opined that the traumatic event and symptoms correlated with structural testing and that Dr. Peterson's request for an epidural steroid injection was reasonable. Dr. Finn testified that he conducted a physical exam of Claimant, which revealed decreased

sensation in the right L4-L5 and S1 patterns with moderately limited range of motion. Dr. Finn testified that although sensation testing is subjective, it did correlate to the disc abnormalities of the L4-5 and L5-S1. Dr. Finn testified he recommended a right hip MRI that was denied by the insurance carrier. (Deposition Transcript, Pg. 7-16). Dr. Finn testified that Claimant's current symptoms are probably, meaning more likely than not, related to her February 4, 2021, work injury. Dr. Finn further testified that Claimant's mechanism of injury was consistent with her reported symptomatology and that a slip and fall from ground level would have caused an acute injury to her lower back and right hip. Dr. Finn also stated that Claimant's injury mechanism more likely than not caused the lumbar spine pathology identified in the March 22, 2021, MRI. (Deposition Transcript, Pg. 16-17). Dr. Finn asserted that the right hip MRI is reasonable and necessary to treat Claimant's injuries stemming from her February 4, 2021 injury at work. Dr. Finn stated that all medical treatment received by Claimant since February 4, 2021, was causally related to her slip and fall. Dr. Finn testified that all of Claimant's medical treatment to date was reasonable and necessary. Dr. Finn stated that one of the reasons for ordering the right hip MRI was Claimant's lower back condition was not improved and he wanted to continue to investigate the anatomic basis for her ongoing symptoms. (Deposition Transcript, Pg. 17-18). Dr. Finn testified he reviewed prior medical records for Claimant. Dr. Finn asserted that Claimant had prior issues with her back and leg but that any prior condition was more likely than not aggravated by this traumatic event. Dr. Finn clarified that if it had not been for this injury, he would not have seen her. Dr. Finn stated that Claimant had a documented traumatic event, a slip and fall onto her back and hip, which precipitated her need for care. (Deposition Transcript, Pg. 18-22). Dr. Finn testified that he reviewed the IME report from Dr. O'Brien and that he disagreed with Dr. O'Brien's assessment stating Claimant's lumbosacral spine strain/sprain resolved because Claimant had ongoing symptoms. (Deposition Transcript, Pg. 22). Dr. Finn disagreed with Dr. O'Brien that the work incident in question was minor and he pointed out that Claimant sought medical treatment within 24 hours. (Deposition Transcript, Pg. 23). Dr. Finn disagreed with Dr. O'Brien's report suggesting Claimant's slip and fall was minor because it was from ground level. Specifically, Dr. Finn stated a slip and fall from a standing position could cause relatively significant trauma. (Deposition Transcript, Pg. 25-26). Dr. Finn further disagreed with Dr. O'Brien's IME report, which stated Claimant's injury healed expeditiously. Dr. Finn indicated that Claimant was still symptomatic when he examined her and Claimant had not improved despite conservative measures including a trial of physical therapy and medication. (Deposition Transcript, Pg. 28).

33. On cross examination, Dr. Finn was asked if Claimant's subjective symptoms were related to a prior injury or condition. Dr. Finn stated that Claimant's symptoms could be longstanding but based on the documentation; Claimant had a very clear traumatic event described as a slip and fall that may have aggravated that prior condition. (Deposition Transcript, Pg. 45-46). On redirect, Dr. Finn clarified that more likely than not Claimant experienced an acute on chronic injury. Dr. Finn testified that Claimant's physical therapy treatment in February 2020 was not extensive and did not change his opinion regarding the etiology of Claimant's current symptoms. (Deposition Transcript, Pg. 48).

34. Dr. O'Brien testified at hearing as retired board certified orthopedic surgeon with an expertise in orthopedic medicine, including orthopedic surgery. Dr. O'Brien is Level II accredited. Dr. O'Brien reiterated his opinion that Claimant's injury was not severe because she did not seek treatment immediately. Dr. O'Brien testified that Claimant had lower back, right hip and lower extremity symptoms prior to her February 4, 2021, fall. Dr. O'Brien said there appeared to be a hiatus in care after February 2020 and that it was difficult without ongoing documentation to say what level of symptoms Claimant had after she stopped going to physical therapy.

35. Dr. O'Brien testified that the findings on Claimant's March 22, 2021 MRI were not related to the fall in this case and were normal for her age. According to Dr. O'Brien, the MRI findings were probably present prior to February 4, 2021.

36. Dr. O'Brien testified that Claimant current complaints are related to non-organic factors and driven by the claim itself. Regardless of what is driving Claimant current symptoms, Dr. O'Brien testified that whatever occurred on February 4, 2021, had healed by the date of the MRI. Dr. O'Brien stated it was appropriate for Claimant to have sought medical attention on February 5, 2021 and that he would have encouraged her to utilize over the counter anti-inflammatories and a home fitness regimen in an effort to reduce her pain. Dr. O'Brien testified that Claimant did not suffer an aggravation of a pre-existing condition because there was no objective evidence of tissue yielding. He also questioned Claimant's report of 8/10 pain at the RIME because Claimant appeared comfortable and able to participate in the examination. According to Dr. O'Brien there were no objective findings to support Claimant's subjective report of 8/10 pain.

37. During cross-examination, Dr. O'Brien testified that Claimant sustained a lumbosacral sprain and cervical thoracic spine sprain as a consequence of her February 4, 2021 fall. He also reiterated that Claimant reached end of healing on or before March 22, 2021, 46 days after her injury. He echoed his assertion as documented in his RIME report that a fall on the back from an icy or slippery surface is a minor mechanism of injury. Nonetheless, he did concede that significant injuries can occur from slip and falls at ground level.

38. Dr. O'Brien stated that he did not agree with the MRI report from March 2021 that stated there was disc herniation at the L4-5 and L5-S1 level because the disc displacement was 4 mm. According to Dr. O'Brien, such displacement would be indicative of a disc bulge rather than a herniation. Dr. O'Brien testified that disc herniations are not normal in a 37-year-old female but that he would not consider the MRI report to show a disc herniation.

39. The Court asked Dr. O'Brien to confirm if it was his opinion that Claimant suffered a minor sprain/strain as a consequence of her slip and fall on February 4, 2021 and Dr. O'Brien confirmed that was accurate. The Court also asked if it was Dr. O'Brien's opinion that this minor sprain/strain was self-healing and that Claimant reached maximum healing by March of 2021, which Dr. O'Brien also confirmed. Lastly, the Court asked if it was Dr. O'Brien's opinion that Claimant's ongoing symptoms were claim driven, which he

confirmed.

Employer Testimony

40. Blas R[Redacted] testified at hearing. Mr. R[Redacted] testified he is the owner of
Modern Painting Services, which has been in operation since 2014. Mr. R[Redacted] testified his company currently employs five people. Mr. R[Redacted] testified that Claimant was hired on February 3, 2021 at an hourly rate of $16. Mr. R[Redacted] stated that Claimant was hired at the same time as another woman (Carmen) to do the same job. Mr. R[Redacted] stated that this other woman continued to work after Claimant was injured and that she worked 61 hours in the two weeks following Claimant's injury. Mr. R[Redacted] testified that Claimant was supposed to work 40 hours a week, which was considered the base number of hours, but that hours can vary significantly. Mr. R[Redacted] stated he was made aware that Claimant injured herself on February 4, 2021, when he received a call saying she had fell. Mr. R[Redacted] said he told Claimant to go to the clinic to get checked out and that he called the insurance company the next day, after the fall, to get a list of medical information for Claimant. Mr. R[Redacted] testified that Claimant reported to him that she would be released to work on February 9, 2021 but that she was still in pain. Mr. R[Redacted] testified that this presented a "tricky situation" as he was reluctant to have Claimant return to work since she was in pain.

41. On cross-examination, Mr. R[Redacted] indicated he remembered filling out a first
report of injury for Claimant. Mr. R[Redacted] stated that this first report of injury indicated Claimant was to work 5 days a week, for 8 hours a day, at a rate of $16/hour. Mr. R[Redacted] testified that Claimant worked 2 days before her injury and she was paid $272. Mr. R[Redacted] indicated that in those 2 days, Claimant worked over 8 hours a day. Mr. R[Redacted] stated that he has hired two people at the same time before and that these people don't always get the same amount in their check specifying, "It's different for everybody."

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

B. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

C. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Compensability

D. A “compensable injury” is one which requires medical treatment or causes disability. *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167, 1169 (Colo. App. 1990). No benefits flow to the victim of an industrial accident unless the accident results in a compensable “injury.” *Romero*, supra; § 8-41-301, C.R.S. To sustain her burden of proof concerning compensability, Claimant must establish that the condition for which she seeks benefits was proximately caused by an “injury” arising out of and in the course of employment. *Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff’d Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(I)(b), C.R.S.*

E. The phrases "arising out of” and "in the course of" are not synonymous and a claimant must meet both requirements before an alleged injury will be determined to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). Thus, an injury occurs "in the course of" employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 552 P.2d 1033, 1036 (1976). Based upon the evidence presented, there is little question that Claimant's alleged injuries occurred during the time and place limits of her relationship with Employer and during an activity connected to her job-related functions as a painter, namely carrying a bucket of paint down a driveway to supply a different job site. Accordingly, the ALJ concludes that Claimant has proven that she was in the course of her employment at the time of her February 4, 2021 fall. While Claimant has established that she was in the course of her employment when she fell, the question of whether her alleged injuries arose out of her work duties must be answered before compensability can be determined.

F. The term "arises out of" refers to the origin or cause of an injury. *Deterts v.Times Publ'g Co. supra.* There must be a causal connection between the injury and the work conditions for the injury to arise out of the employment. *Younger v. City and County of Denver, supra.* An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employee's employment contract. *Popovich v. Irlando supra.* In this regard, there is no presumption that an injury that occurs in the course of a worker's employment, also arises out of the employment. *Finn v. Industrial Commission,* 165 Colo. 106, 437 P.2d 542 (1968); *see also, Industrial Commission v. London & Lancashire Indemnity Co.,* 135 Colo. 372, 311 P.2d 705 (1957) (*mere fact that the decedent fell to his death on the employer's premises did not give rise to presumption that the fall arose out of employment*). Rather, it is the Claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. § 8-43-201, C.R.S. 2013; *Ramsdell v, Horn,* 781 P.2d 150 (Colo. App. 1989).

G. In this case, Respondents contend that Claimant failed to establish a causal connection between her work duties and her back/hip pain. In support of their contention, Respondents argue that the medical records associated with the February 4, 2021 incident do not support a conclusion that she suffered an "injury" as a result of her fall because the records do not document that Claimant experienced pain at the time of or shortly after she fell. Simply put, Respondents assert that because the emergency room (ER) records document that Claimant began feeling tightness into her neck, low back, and both of her hips (without mention of pain) approximately two hours after the fall, which worsened the following morning, she failed to present sufficient evidence that she sustained a traumatic injury requiring treatment or causing disability. In contending as much, Respondents rely on the testimony of Dr. O'Brien to suggest that feeling "pain" is necessary to establish the existence of an acute injury. The ALJ is not convinced. Rather, the ALJ credits Claimant's testimony to find and conclude that the discomfort caused by the increased pressure (tightness) she felt in her neck, low back and hips after her fall likely represents a symptom associated with an acute injury to the structures that make up these body parts, including the soft tissues and intervertebral discs. The symptoms a person might experience following a low back/hip injury can vary greatly and may include numbness, tingling, burning, muscle spasm/tightness, aching, throbbing, shooting pain, stabbing pain, sharp pain, soreness and/or stiffness. (See generally, Claimant's Exhibits 2, 3, 4 and Respondents Exhibit A, p. 2). While "tightness" does not conform to the traditional definition of pain, it is clear in this case that Claimant's "tightness" caused an abnormal sensation of discomfort sufficiently distressing to prompt her to present to the emergency room for treatment.

H. Here, Claimant's testimony and the emergency room records document that she presented to the hospital because of a fall that caused tightness, "musculoskeletal pain" and tenderness to palpation (TTP) about the neck, the right lower anterior ribs, the "L-spine" and left elbow prominence requiring x-rays and an injection of pain medication (Toradol). As found, the ALJ credits this evidence to find and conclude that Claimant has presented sufficient proof that she suffered physical trauma caused by unexpectedly slipping on ice and falling to the pavement while carrying a bucket of paint triggering her need for medical treatment. Simply put, she sustained injuries arising out of her employment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *see also*, § 8-40-201 (2). Dr. O'Brien recognized this when he concluded, both in his RIME report and during his hearing testimony, that Claimant suffered injuries in the form of a lumbosacral strain/sprain/contusion, a cervicothroacic spine strain/sprain and a left elbow contusion regardless of his concerns concerning the severity of these injuries.

I. Respondents' remaining arguments in relation to Claimant's credibility, including the suggestion that she lied about, and then tried to minimize, her previous injury history, symptoms, and medical treatment of the same body parts involved in this claim have been carefully considered and are rejected as unpersuasive. Similarly, the intimation that Claimant's current symptoms represent the natural and probable progression of a pre-existing condition caused by an injury 20-years ago or alternatively following a fall from a ladder in 2019 is equally unconvincing. While Claimant has had some preexisting episodes of back pain, the evidence presented supports a conclusion that her back became significantly more symptomatic, in terms of the intensity, frequency and duration of her pain after the February 4, 2021 fall. Accordingly, the ALJ credits Dr. Finn's opinion that Claimant more likely than not experienced an acute on chronic injury. Based upon a totality of the evidence presented, the ALJ concludes that Claimant has established the requisite causal connection between her work duties and her low back/hip, neck and left elbow injuries. Given the parties' stipulations and the fact that Claimant has established the compensable nature of her injuries, this order does not address her entitlement to medical or temporary disability benefits.

Average Weekly Wage

J. The overall purpose of the average weekly wage (AWW) statute is to arrive at a fair approximation of Claimant's wage loss and diminished earning capacity resulting from the industrial injury. *See Campbell v. IBM Corp., 867 P.2d 77 (Colo. App. 1993); National Fruit Prod. v. Crespin, 952 P.2d 1207 (Colo. App. 1997).*

K. Section 8-42-102(3), C.R.S., permits the ALJ discretion in the method of calculating the average weekly wage if the nature of the employment or the fact that the injured employee has not worked a sufficient length of time, has been ill or self-employed, or if for any other reason, the specific methods do not fairly compute the average weekly wage. *Benchmark/Elite Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010); *Avalanche Industries, Inc. v. Clark*, 198 P.3d 589 (Colo. 2008); *Campbell v. IBM Corp.,* supra.

L. In this case, Claimant testified she was hired to work 8 hours a day, Monday through Friday, at a rate of $16 an hour. These hours and the hourly wage are corroborated in the first report of injury filled out by Claimant's supervisor Blas R[Redacted]. Claimant's supervisor also testified that Claimant was supposed to work 40 hours a week, which he characterized as a base number of hours subject to change. Respondents contend that Claimant's wages should be calculated based on the number of hours worked by another woman who was hired at the same time as Claimant. However, Mr. R[Redacted] testified that paychecks for individuals hired at the same time vary and that employees' checks are all different. Based upon the evidence presented, the ALJ finds that Claimant had a reasonable expectation that she would be working 40 hours per week. Moreover, although Claimant only worked two days before she was injured, she was paid $270 for her work, which covers approximately 16.875 hours or approximately eight hours per day. The evidence presented persuades the ALJ that Respondents reliance on a co-workers hours and earnings over a two-week period to calculate Claimant's average weekly wage amounts to a speculative methodology that is unlikely to result in a fundamentally fair figure representing Claimant's earnings over time. Consequently, the ALJ concludes that the most fair computation of Claimant's AWW is to consider the hours and hourly wages that were in place at the time she was injured. In this case, $16 an hour, multiplied by 8 hours a day, multiplied by 5 days a week, for an average weekly wage of $640.

ORDER

It is therefore ordered that:

1. Claimant's has established the compensable nature of her neck, back, and left elbow injuries.

2. Per the parties' stipulation, the medical treatment provided to Claimant by Concentra Medical Centers and by any providers to whom Claimant was referred to by Concentra or after February 19, 2021 is deemed reasonable, necessary, and causally related to Claimant's alleged February 4, 2021 injuries. Moreover, Claimant's evaluation and treatment in the emergency room at St. Francis Medical Center on February 5, 2021 is deemed reasonable, necessary and related to her February 4, 2021 accident.

3. Per the parties approved stipulation, Respondents shall pay TTD benefits beginning February 5, 2021, and continuing until such time that Claimant reaches MMI or can be terminated by operation of law.

4. Claimant's average weekly wage is $640.00.

5. All matters not determined herein are reserved for future determination.

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 3, 2021

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that she suffered a compensable work injury to her right hand or finger on or about January 31, 2020?

II. If Claimant suffered a compensable work injury, to what medical benefits is she entitled?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

The Work Incident, as Reported

1. Claimant was employed with Hospital Housekeeping Services since July 1, 2019, working a regular 40-hour day shift. (Ex. F, p. 97).

2. Claimant filed a Worker's Claim for Compensation on February 18, 2021. (Ex. 1). Claimant alleges that on January 31, 2020, she was by a ramp in the basement of her work, carrying with one hand UV light tubes when she felt a sharp pull in her hand.

3. Claimant presented to Dr. Emily Burns, MD on 3/4/2020 at UCHealth. Claimant was following up for a left shoulder work injury that had occurred on 8/5/2019. At this visit, Claimant then mentioned that she had hurt her right hand at work.

> She hurt her R hand-so *they had her go home because of the right hand, not because of the shoulder* that is part of this injury. The R hand-should be workers comp but they told her to let me know that it happened. She reports that the right hand injury *happened on 1/31/2020* and I verified this date with her several times as I did see her on 2/5/2020 and she did not mention the right hand. (Ex. D, p. 42). (emphasis added).

4. In a follow-up visit dated 3/25.2020, Claimant then mentioned issues to Dr. Burns with her hand, and the mechanism of injury being: "Carrying heavy tubes downhill with a coworker on the other end when her right hand was pulled forward by the tubes and she felt sharp pull in the dorsum of her hand and upper forearm," with pain in right hand, specifically the middle and little finger. *Id* at 48. In the narrative report, Dr. Burns then listed the date of injury as 2/7/2020. *Id.*

5. However, In Dr. Burns' Physician's Report of Workers' Compensation Injury dated March 25, 2020, Claimant's description of accident/injury was "R hand injury while carrying tubes

and having hand pulled." *Id* at 52. However, Dr. Burns noted the date of injury was: "3/4/2020" *Id*.

6. Meanwhile, During a March 23, 2020, Rehab Therapy Evaluation with April Bryan, OT, Claimant reported she had an injury at work in *February*. (Ex. E, p. 89) (emphasis added). On March 30, 2020, (one week later) it was noted Claimant was 7.5 weeks post *February 7, 2020*, injury to extensor tendons of her right hand. *Id* at 92 (emphasis added). Claimant reported ongoing edema, pain, and loss of PIP extension of her right ring finger and middle finger. *Id*.

7. During this March 30, 2020, appointment, Claimant reported that she is "worried that she will never be able to straighten *her two middle fingers again,* and that it is still too painful. (Ex. E, p. 93) (emphasis added).

8. [At hearing, Claimant testified that she has type 2 diabetes. (Hrg. Tr. p. 41). She testified that she has been diagnosed with a polyarthritis type condition, an arthritic type condition. *Id.*]

Claimant's Prior Medical Complaints

9. On April 9, 2018, Claimant had presented to Jessica Sena, NP, with Peak Vista Community Health Centers She reported severe, bilateral carpal tunnel symptoms, including pain in Claimant's fingers and hand[s] and a sense of weakness in her hand[s]. (Ex. C, p. 25).

10. On April 19, 2018, Claimant then presented to Leann Murphy, PA-C, at Davita Medical Group, wherein she complained of bilateral hand pain over the course of 5 years. (Ex. B, p. 17). Claimant reported experiencing bilateral numbness and tingling, and that when she grips something her hands become extremely numb, to the point where she cannot feel them. *Id*. Claimant reported her right hand is worse than her left. *Id*. Claimant's *Active Problems* were noted as "hand pain." (Ex. B, p. 18).

11. On July 3, 2018, Claimant presented to Dr. Elisa Knutsen, MD reporting a several year history of bilateral hand numbness, worse on the right than the left. (Ex. D, p. 32). Claimant also reported pain in her right *ring* finger, which sometimes locks and get stuck in flexion. Claimant elected to proceed with carpal tunnel release surgery, and Dr. Knutsen also discussed the origin and possible treatment options for Claimant's trigger finger. This included observation, corticosteroid injection, or surgical release. *Id* at 34. Claimant elected to proceed with trigger finger treatment surgically at the same time that her carpal tunnel syndrome was addressed. *Id.*

12. [At hearing, Claimant testified that, since this surgery, she no longer had trouble with her hand. (Hrg. Tr., p. 40).]

13. However, on August 14, 2018, Claimant returned to Dr. Knutsen for a surgical follow-up. *Id*. at 38. At that follow-up, Claimant reported continued numbness in her fingers. *Id*.

Additionally, the physical examination performed during this appointment noted Claimant had limited range of motion in all of her fingers. *Id.*

14. Also, during an August 30, 2018, Rehab Therapy Evaluation with Kim Cridelich, OT, at UCHealth Physical Therapy and Rehabilitation Clinic, Claimant "asks if she could get disability for her hand." (Ex. E, p. 65). Claimant reported at this appointment that while her hand was stiff prior to surgery, she still complained of numbness and tingling in all of her fingertips. *Id*. Claimant was listed at this visit as 'currently not working." *Id.*

15. Finally, during an October 2, 2018, Rehab Therapy Treatment with OT Cridelich, Claimant reported continued intense pain in her right hand at times, including numbness in her "right IF, MF, and radial RF". (Ex. E, p. 82).

Dr. Lawrence Lesnak's Deposition Testimony regarding his IME

16. Dr. Lawrence Lesnak, DO, performed an independent medical evaluation of Claimant for Respondents. He also issued a written report dated July 28, 2021. (Ex. A).

17. Dr. Lesnak testified that he performed a physical examination of Claimant during this appointment, specifically focused on her right fingers, and especially her right middle finger. (Lesnak Depo., p. 14). He testified that during his physical examination, Claimant demonstrated the ability to make a full fist with her right hand, including her middle finger. She also had the ability to fully extend all of her fingers, including her right middle finger. (Lesnak Depo., p. 15). He noted that Claimant had no evidence of any nodules in the palm of her fingers, there was no swelling, skin color changes, or locking of her fingers, with passive or active range of motion. *Id* at 15.

18. He testified that Claimant did report significant tenderness when he gently brushed over the skin overlying her right middle finger PIP joint. However, he opined that this was a nonphysiologic finding. *Id.* He testified that, based on his examination of Claimant, there were no objective findings that would explain Claimant's subjective complaints related to her right hand and fingers. *Id* at 16.

19. Dr. Lesnak opined in his report that, based on the information provided him and to a reasonable degree of medical probability, Claimant did not sustain any type of injury related to any type of incident that may have occurred during work hours on January 31, 2020. (Ex. A, p. 11).

20. Dr. Lesnak testified that Claimant's reported mechanism for injury - pushing a 'large-wheeled' light fixture down a ramp - is not an activity that is going to cause or aggravate any type of trigger finger. (Lesnak Depo., p. 31).

21. Dr. Lesnak testified that his opinion – that Claimant did not sustain any sort of injury on January 31, 2020 – is further bolstered by the fact that Claimant has reportedly chronic, right more so than left, hand pain, weakness, numbness and tingling dated back to approximately 2013. Even following a right carpal tunnel release and right ring finger trigger release in early July 2018, she continued to have limited range of motion. *Id.*

22. Dr. Lesnak further stated that there was no evidence of any acute injury or trauma-related pathology identified by Dr. Burns on March 4, 2020 involving Claimant's right middle finger. Claimant had also failed to mention any sort of symptoms to her right middle finger during an evaluation that occurred February 5, 2020, just five days after the alleged incident. *Id* at 31. He opined that, given the absence of any medical evidence supporting an injury, Claimant required no treatment. *Id* at 32.

23. Dr. Lesnak also opined in his report that Claimant most likely has symptomatic polyarthritis throughout joints in her body, including her hands and fingers, but that her reported polyarthritis is not in any way related to the work duties she was performing while she was employed as a housekeeper at the Memorial Hospital in Colorado Springs, Colorado. (Ex. A, p. 11).

24. Finally, Dr. Lesnak testified that if Claimant had sustained a soft tissue work-related injury related to the alleged January 31, 2021, incident, then Claimant's range of motion documented during her March 25, 2020, appointment appears to be, if anything, even better than it was as compared to her August 2018 appointment. (Lesnak Depo., p. 33). Therefore, if Claimant did sustain a work injury, she would have been at MMI no later than March 25, 2020. (Lesnak Depo., p. 33).

Claimant Testifies at Hearing

25. Claimant testified that she arrived at work on the alleged date of injury and was filing documents in an office due to being on work restrictions. (Hrg. Tr., p 21). Claimant testified that Rosa contacted her and asked her to go to a floor with her to work in a room. *Id.* She testified that Rosa requested she go with her to bring UV lights to be placed in the rooms that were dirty. *Id.*

26. Claimant then testified that she picked up the lights with Rosa to take the lights to the basement because that is where they were stored. She stated that there was a ramp leading to the basement. *Id.*

27. Claimant then testified that while taking the UV lights to the basement, she was holding the lights in her right hand and that they are in a pipe-form device. She testified that she felt severe pain in her right hand while holding the UV lights in her right hand. Claimant testified that they then stored the lights, put them away, and she left work and went home. *Id* at 21, 22.

28. Claimant later testified that her injury occurred when Rosa came to her office and asked her to help take lights somewhere, and that she went with Rosa and was pulling the cart her right hand. (Hrg. Tr., p. 65). Claimant testified the next day was when her fingers were stiff. *Id.*

29. Claimant testified that she reported a finger injury to Mr. P[Redacted] (her supervisor) on February 28, 2020, at 8:40 in the morning. (Hrg. Tr., p. 64). She testified that she told Mr.

P[Redacted] that her hand was hurting and that she injured it, and went on to describe the incident with Rosa with the lights.

30. Clamant testified that her understanding of why she was terminated from employment is because Employer did not want her to continue injuring her hand, and that they did not have any light duties for her, including lifting less than 10 pounds. (Hrg. Tr., p. 32). However, Claimant then admitted that it was true her restrictions at the time of her termination were related to her left shoulder injury, which is a separate workers' compensation claim. Id at 33.

31. Claimant testified that the issue she experienced with her *ring* finger in 2018 was that it would lock in place. (Hrg. Tr., p. 42). However, Claimant testified several times that she has never had problems with her *middle* finger that she alleged was injured on January 31, 2020. (Hrg. Tr. p. 25; p. 44).

32. Claimant also acknowledged that she has had problems with her hands for many years. (Hrg. Tr., p. 42). She testified that she obtained treatment in 2018 for her hands, and that she had been having problems with both of her hands for five years before that. *Id*.

33. Claimant testified that the day after her alleged work incident, Saturday, February 1, 2020, around 6:30 a.m., she began feeling very strong pain in her hand and numbness in her fingers. (Hrg. Tr., p. 22). She testified that she went in the bathroom and rubbed alcohol on her fingers, massaging them because they were stiff. *Id* at 22. She testified that she was able to massage four of her fingers into straightening, but that one of her fingers remained bent. *Id.*

34. Claimant testified that her issue with her middle finger is that it gets locked into place and she cannot bend it or straighten it. *Id* at 43. Claimant testified that she is no longer having problems with her ring finger. *Id* at 38, 39. She testified that the only finger she now has issues with is her middle finger. *Id* at 39.

Miguel P[Redacted] Testifies at Hearing

35. Miguel P[Redacted], assistant director of the EVS Department, testified that when Claimant reported her alleged injury, she reported she was on a break from her restricted-duty office work, which consisted of watching training videos, putting up job descriptions, and mailbox-type deals. (Hrg. Tr., pp. 51, 52). He testified that Claimant reported she was on one of her breaks when she saw Rosa pushing UV tower light systems used to disinfect rooms. Claimant reported that she "pretty much just said she went with her" and that she never stated anyone asked her to do so. D at 52. He testified that Claimant reported to him that she saw Rosa struggling, so she attempted to help her. *Id* at 52.

36. Mr. P[Redacted] testified that they are three sets of towers, maybe six feet, that they are on wheels usually maneuvered by one person, and that moving them is not a two-person job. (Hrg. Tr., p. 52). [Contrary to Claimant's representation to Dr. Lesnak at her IME,

Mr. P[Redacted] testified that the wheels on these towers are smooth, regular rubber, and 'real little'- about the size of a shopping cart. *Id* at 52.]

37. Mr. P[Redacted] testified that, prior to February 5, 2020, Rosa never indicated that Claimant had injured her middle finger on her right hand. (Hrg. Tr. pp. 48, 49). He further testified that, as of February 5, 2020, Claimant made no indication to him that she had injured her right hand or made any mention of right-handed issues. *Id.*

38. Mr. P[Redacted] testified that Claimant did not report her alleged incident and injury on February 28, 2020. (Hrg. Tr., p. 67). He further testified that the conversation she had earlier testified to on February 28, 2020, did not occur. Instead, he found out about her reported incident and injury after her medical appointment in March. *Id.*

39. Mr. P[Redacted] testified that he was first made aware of Claimant's alleged right hand injury on or about March 25, 2020. Before this date, Claimant never reported a right hand injury to him. (Hrg. Tr., pp. 49, 50). He testified that he filed paperwork associated with this appointment with corporate, but within a day or two corporate contacted him, because the purpose of the March 25, 2020, appointment was not for her right shoulder, but for a right hand injury. *Id.*

40. Mr. P[Redacted] testified that when Claimant was placed at 'maximum improvement' for her *shoulder,* corporate had contacted Mr. P[Redacted] and Willy about letting Claimant go, instead of having her come in to the hospital, particularly because COVID had started. (Hrg. Tr., p. 50). He testified that once COVID became more serious, there was a need to send people home who did not need to be in the hospital. *Id* at 54. He testified that his understanding was that he was sending her home because of her shoulder injury, but nothing related to her finger. *Id*. He testified that Claimant was not terminated. *Id*.

Willie N[Redacted] testifies at Hearing

41. Willie N[Redacted], regional director for HHS, Hospital Housekeeping Systems, testified that he performed an investigation into whether Claimant's claim was reported timely, and that his investigation into the matter found that Claimant did not report her claim timely. (Hrg. Tr. pp. 60, 61).

42. Mr. N[Redacted] testified that he was unsure whether Claimant was terminated or not, but that if Claimant was terminated, he was unsure why. *Id* at 65. He further testified that Claimant only had work restrictions for her shoulder. *Id* at 63.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

B. In accordance with *Section 8-43-215, C.R.S.,* this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. In deciding whether a party has met their burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensecki v. ICAO*, 183 P.3d 684 (Colo.App. *2008).* In short, the ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo.App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo.App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo.App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability, Generally

D. According to C.R.S. § 8-43-201, "a claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer, and a workers' compensation case shall be decided on its merits." *Also see Qual-Med, Inc. v. Indus. Claim Appeals Off.,* 961 P.2d 590, 592 (Colo. App. 1998) ("The Claimant has the burden of proving an entitlement to benefits by a preponderance of the evidence."); *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915, 918 (Colo. App. 1993) ("The burden is on the claimant to prove his entitlement to benefits by a preponderance of the evidence.").

E. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.,*104 P.3d 273, 275 (Colo. App. 2004).

F. For an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Off.,* 919 P.2d 207, 210, 210 (Colo. 1996); *Schepker v. Daewoo North*, W.C. No. 4-528-434 (ICAO April 22, 2003). An injury "arises out of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions as part of the employee's services to the employer. *See Schepker, supra.* "In the course of" employment refers to the time, place, and circumstances of the injury. *Id.* There is no presumption that an injury arises out of employment merely because an unexplained injury occurs during the course of employment. *Finn v. Indus. Comm'n,* 165 Colo. 106, 108-09, 4437 P.2d 542 (1968).

G. Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1)(c) C.R.S.*; Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for the determination by the ALJ. *Faulkner,* 12 P.3d at 846.

H. Colorado's Workers' Compensation Act creates a distinction between the terms "accident" and "injury". The term "accident" refers to an "unexpected, unusual, or undesigned occurrence." *See* §8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident. In other words, an "accident" is the cause and an "injury" is the result. *City of Boulder v. Payne,* 426 P.2 194 (1967). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." A compensable injury is one which requires medical treatment or causes a disability.

I. It is the claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between her employment and her injuries. An ALJ might reasonably conclude the evidence is so conflicting and unreliable that the claimant has failed to meet the burden of proof with respect to causation. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186, 191 (Colo. App. 2002) (weight to be accorded evidence on question of causation is issue of fact for ALJ). *See also, In the Matter of the Claim of Tammy Manzanares, Claimant*, W. C. Nos. 4-517-883 and 4-614-430, 2005 WL 1031384 (Colo. Ind. Cl. App. Off. Apr. 25, 2005).

Compensability, as Applied

J. The persuasive evidence establishes that Claimant has pre-existing history of bilateral hand pain, finger numbness and stiffness, limited range of motion in her right hand fingers, carpal tunnel syndrome, and trigger finger syndrome. Claimant has undergone treatment over a considerable period of time, including a carpal tunnel surgery, accompanied by a trigger release. While the medical records indicate these treatments may have been of some benefit, it is equally clear that Claimant's condition did not fully resolve with the surgery. At one point in her treatment, in 2018, Claimant even inquired about receiving disability for her hand condition.

K. Claimant did not help her own case, with her varying accounts of the alleged mechanism of injury, as recounted as hearing, versus what was recounted to other medical providers along the way. Her alleged date of injury is at odds with what she told other medical providers at different points. Claimant failed to inform Dr. Burns – who was actively treating Clamant for a separate work injury – when she first had the opportunity. Perhaps sensing a potential communication issue, Dr. Burns even went to great lengths to clarify Claimant's position. The timing of her reporting of this injury at work is at odds with the recall of Mr. P[Redacted], as well as Mr. N[Redacted], both of whom the ALJ finds to be credible and reliable. The mechanism of injury as reported to Mr. P[Redacted] does not entirely square with what she recounted at hearing. The ALJ finds that Claimant has been, at best, an unreliable medical historian.

L. The ALJ further credits the opinion of Dr. Lesnak that, to the extent Claimant sustained a soft tissue strain (which the ALJ does *not* find herein), her condition as of March 25, 2020, was, if anything, more improved than her August 2018 symptoms. Accordingly, the ALJ finds that Claimant has failed to prove that her ongoing condition is causally related to the work injury. Instead, the ALJ is persuaded by Dr. Lesnak that even accepting Claimant's reported mechanism of injury, it would not have resulted in the trigger finger symptoms she now complains of. In fact, it would not have resulted in any trigger finder symptoms even absent her history of persistently symptomatic trigger finger issues involving at least two, arguably three different fingers on Claimant's hand. Further, the ALJ does not find sufficient evidence that this alleged incident, if it even occurred, would have been sufficient to aggravate her preexisting medical condition to the point where it required medical treatment as a result.

M. The ALJ concludes that Clamant did not suffer a compensable injury to her right hand or fingers, either on 1/31/2020, or in any of the weeks following. Therefore, Claimant is not entitled to any medical benefits as a result of this alleged incident.

ORDER

It is therefore Ordered that:

1. Claimant did not suffer a compensable work injury. Her claim for medical benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. *In addition, in order to best assure prompt processing of your Petition, it is* ***highly recommended*** *that you send a copy of your Petition to Review to the Colorado Springs OAC via email at oac-csp@state.co.us.*

DATED: November 3, 2021

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-037-946-002

ISSUES

1. Whether Claimant established by a preponderance of the evidence that left shoulder surgery recommended by Armodios Hatzidakis, M.D., is reasonably necessary to cure or relieve the effects of Claimant's July 14, 2016 work injury.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following specific findings of fact:

1. Claimant is a 42-year-old man who sustained an admitted injury to his left shoulder arising out of the course of his employment with Employer on July 14, 2016. On that day, Claimant was moving a 4' x 8', 1/2-inch-thick acrylic panel weighing approximately 100-120 pounds. Claimant grasped the acrylic sheet with one hand on either side of the four-foot width and tipped it, so his left arm was bearing the majority of the weight. Claimant felt a pain in his left shoulder and felt his left arm give out. Clamant reported the injury to Employer, but did not seek medical attention for approximately two weeks.

2. Claimant credibly testified that he had no prior injuries to his left shoulder, and that generally his work did not require a large amount of physical labor, other than carrying lights, and other items necessary for television production.

3. On July 28, 2016, Claimant saw Sadie Sanchez, M.D., at Denver Health for his shoulder condition. Claimant reported when he attempted to turn the acrylic panel sideways to place it in a cart, he felt he overextended his shoulder and felt "a twinge" in his shoulder. Claimant continued to work but later in the day felt stiffness and pain in his left shoulder. It was noted that Claimant had minor decrease in range of motion and pain at extremes of range of motion. Dr. Sanchez' differential diagnosis was likely AC joint impingement vs. labral tear of the shoulder joint. Dr. Sanchez referred Claimant for physical therapy and was advised to take ibuprofen as needed. He was not assigned any work restrictions. (Ex. 1).

4. Claimant participated in physical therapy at Denver Health for approximately six weeks, without resolution of his left shoulder symptoms. He was then referred for an orthopedic evaluation. (Ex. 1). On October 19, 2016, Claimant saw Benjamin Sears, M.D., at Western Orthopaedics. Based on his examination, Dr. Sears opined that Claimant's left shoulder pain was consistent with a biceps labral complex injury, and ordered an MRI of the left shoulder. (Ex. B).

5. An MRI was completed on November 22, 2016, and was interpreted as showing a tear of the superior and posterior labrum including a full-thickness detachment of the

posterior labrum. It was also noted that Claimant had moderate to high-grade chondral thinning along the posterior rim of the glenoid that rapidly tapered to normal cartilage thickness and posterior translation of the humeral head relative to the glenoid. (Ex. 11).

6. Claimant returned to Dr. Sears on December 21, 2016. Dr. Sears's impression was a "left shoulder large posterior superior labral tear with continued pain." Dr. Sears recommended an arthroscopic evaluation and labral repair with possible tenodesis. (ex. 2)

7. On January 31, 2017, Dr. Sears performed a left shoulder arthroscopic posterior superior labral tear repair. (Ex. 2). Following surgery, Claimant continued to experience pain in his left shoulder and developed an infection which necessitated the placement of a PICC line. A second surgery was performed on January 9, 2018, which included a revision labral repair and debridement with a long head of the biceps tenodesis. (Ex. 2).

8. Claimant continued to experience pain and weakness in his left shoulder for the following year. On January 8, 2019, Dr. Sears performed a left shoulder posterior capsular and labral reconstruction. (Ex. 2). Following the Claimant's third surgery he again had an infection and was on antibiotics for two months. The third-surgery did not resolve Claimant's left shoulder pain and he continued to experience difficulty with range of motion, pain, and weakness in the left shoulder.

9. On November 8, 2019, Dr. Sears referred Claimant to Armodios Hatzidakis, M.D., for a second opinion. Dr. Hatzidakis noted that Claimant had a constant ache in his left shoulder and a decreased range of motion with numbness and tingling in his ulnar nerve distribution. He also noted that Claimant dropped things frequently. An earlier EMG demonstrated an ulnar neuropathy. (Ex. 7).

10. At his January 21, 2020 visit, Dr. Hatzidakis recommended that Claimant continue conservative measures, including anti-inflammatories, topical pain gel and physical therapy. He indicated that Claimant's glenohumeral arthritis was a contributing factor to his pain. He also indicated that if Claimant failed conservative care, surgical intervention, was a possibility. Claimant continued with conservative measures without significant improvement in his symptoms. On September 1, 2020, Dr. Hatzidakis submitted a request for authorization to Insurer for a fourth surgery. The proposed surgery was a left shoulder arthroscopic debridement with lysis resection and manipulation under anesthesia. (Ex. 7).

11. On November 4, 2020, Insurer denied based on an independent medical examination performed by Timothy O'Brien, M.D. (Ex. 7).

12. Claimant underwent independent medical examinations performed by Dr. O'Brien, on July 29, 2019, and October 22, 2020. Dr. O' The parties stipulated to Dr. O'Brien's admission as an expert in orthopedic surgery. Dr. O'Brien testified that, while he was engaged in active practice, his primary field was treatment of the lower extremities. He testified he has experience treating and evaluating shoulders, although the experience was limited to taking call in emergency rooms. Dr. O'Brien testified he believed Claimant

sustained a “minor” shoulder strain/sprain as the result of his work injury. He asserted that a labral tear is typically the result of a shoulder dislocation, which did not occur here. Although he did not review the Claimant’s radiological imaging films, and relied entirely on the radiologist’s reports, Dr. O’Brien opined that “everything we see on that MRI scan is degenerative and chronic.” In his July 27, 2019 report, Dr. O’Brien indicated Claimant’s left labrum was “degenerative and desiccated” and was not amenable to being reconstructed. Dr. O’Brien opined Claimant’s report to Dr. Sanchez of feeling a “twinge” was “not the behavior of a person who sustained a significant injury, but rather the behavior of a person who sustained an innocuous self-limiting and self-healing injury.” He also opined the surgery proposed by Dr. Hatzidakis was not related to his July 14, 2016, work injury because, in his opinion, the “original injury was minor, it was self-limiting and self healing. So a minor injury doesn’t require surgery to get it to heal. Minor injuries heal on their own. And I believe [Claimant’s] injury healed on its own.” Dr. O’Brien’s opinions are neither credible nor persuasive.

13. Respondents presented the testimony of William Ciccone, M.D., through deposition in lieu of live testimony. The parties stipulated to Dr. Ciccone’s admission as an expert in orthopedic surgery. Dr. Ciccone is a shoulder specialist and performed a record review at Respondents’ request to review Dr. O’Brien’s IME. Dr. Ciccone testified that he reviewed the Claimant’s medical records, including radiologist reports, but did not review MRI or other imaging films directly. Dr. Ciccone testified that he did not need to review the photos Dr. Sears took during surgery because he could “imagine in [his] mind’s eye exactly what it looked like while he was in there.” Dr. Ciccone agreed that the surgery proposed by Dr. Hatzidakis is reasonable and necessary, but disagrees that the need for surgery is related to Claimant’s work injury. In summary, Dr. Ciccone opined that Claimant’s mechanism of injury was inconsistent with a posterior labral tear, and that Claimant likely sustained a “minor” acromioclavicular strain as the result of his work injury. Dr. Ciccone also noted the Claimant’s use of the term “twinge” to describe his initial injury as part of the basis of his opinions. Dr. Ciccone concluded that Claimant’s need for surgery is not related to his work injury. Dr. Ciccone’s opinions were not persuasive.

14. Dr. Sears testified at hearing and was admitted as an expert in orthopedic surgery. Dr. Sears is fellowship-trained in shoulder and elbow surgery, and specializes in performing shoulder and elbow procedures. On May 21, 2021, Dr. Sears authored a letter to Claimant’s counsel offering his opinion regarding the IME reports of Dr. O’Brien and Dr. Ciccone. As relevant to the issues before the ALJ, Dr. Sears indicated that Claimant’s presentation is consistent with an acute, or acute on chronic labral lesion, rather than a chronic condition such as arthritis, as posited by Drs. O’Brien and Ciccone. He also indicated that a pull from a heavy object is a known mechanism for a posterior labral tear.

15. He indicated that the Claimant’s left shoulder tissue was generally consistent with that typically seen in a 37-year-old patient, in that it was not significantly degenerated. He also indicated that, contrary to Dr. O’Brien’s opinion, “there was certainly not ‘substantial arthritis that existed in the posterior aspect of the glenoid.” (Ex. 2). Dr. Sears has reviewed the Claimant’s imaging films, as well as the reports, performed surgery on the Claimant and has reviewed photos taken during surgery. Dr. Sears testified (and wrote) that he agreed with Dr. Hatzidakis’ proposed surgery. Additionally, Dr. Sears testified that

Claimant's reported mechanism of injury was consistent with a labral tear, and given the fact that Claimant had no history of left shoulder issues, he reasonably believed that Claimant's left shoulder symptoms and labral tear are the result of his work injury on July 14, 2016.

16. Dr. Hatzidakis' testimony was presented by deposition in lieu of live testimony. The parties stipulated that Dr. Hatzidakis is an expert in orthopedic. Dr. Hatzidakis specializes in treatment of the shoulder, and has done so for approximately twenty years. He has reviewed the Claimant's imaging studies, including CT scans and MRI, and ordinarily reviews the films as part of his practice. Dr. Hatzidakis opined that Claimant's described mechanism of injury could have caused a labral tear, and that causation cannot be determined based on an MRI alone. Dr. Hatzidakis credibly testified that patients with labral tears experience a variety of pain levels, symptoms, and dysfunction, and that patients manifest symptoms from pathology differently.

17. Alisa Koval, M.D., was admitted as an expert in occupational medicine and testified at hearing. Dr. Koval assumed Claimant's care at Denver Health after Dr. Sanchez stopped working there in early 2018, and saw Claimant more than 30 times between March 2018 and May 2021. Dr. Koval opined that Claimant's reported mechanism of injury was consistent with a labral tear. She further testified that since March 2018, she saw no evidence that Claimant had become asymptomatic or had returned to normal function. Dr. Koval also testified that, given the timing of Claimant's MRI, one cannot tell whether the Claimant' labral tear is chronic or acute.

18. Drs. Koval, Sears and Hatzidakis are each authorized treating physicians within the chain of referral.

19. The parties stipulated that the surgery recommended by Dr. Hatzidakis is reasonable and necessary given the current anatomy of Claimant's shoulder, but disagree that the need for the surgery is related to Claimant's admitted work injury.

20. The ALJ finds the surgery proposed by Dr. Hatzidakis is reasonable and necessary to address Claimant's shoulder anatomy, including the torn labrum sustained on July 14, 2016, and the sequela of that injury and the three surgeries he had undergone to address that condition.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

SPECIFIC MEDICAL TREATMENT AT ISSUE

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The existence of evidence which, if credited, might permit a contrary result affords no basis for relief on appeal. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002)." *In the Matter of the Claim of Bud Forbes, Claimant*, No. W.C. No. 4-797-103, 2011 WL 5616888, at *3 (Colo. Ind. Cl. App. Off. Nov. 7, 2011). When the respondents challenge the claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School Dist. No.11*, W.C. No. 3-979-487, (ICAO, Jan. 11, 2012); *Ford v. Regional Transp. Dist.,* W.C. No. 4-309-217 (ICAO, Feb. 12, 2009).

Claimant has established by a preponderance of the evidence that the surgical procedure recommended by Dr. Hatzidakis is related to his July 14, 2016 work injury. Drs. Sears, Hatzidakis, and Koval each testified that Claimant's reported mechanism of injury was consistent with a posterior labral tear. Although Claimant has undergone three surgeries to date, he has remained symptomatic and has not returned to his prior function. Drs. Sears, Hatzidakis, and Ciccone each agree that the proposed surgery is reasonable and necessary given the Claimant's current anatomy. The testimony of Claimant's treating physicians was credible and persuasive that Claimant's torn labrum was, more likely than not, caused by his work injury on July 14, 2016. The opinions of Dr. O'Brien and Dr. Ciccone that Claimant's need for surgery is unrelated to his work injury are not credible or persuasive. Because the surgery recommended by Dr. Hatzidakis is intended to address the Claimant's left shoulder injury, and the sequela of the subsequent surgeries performed to address this condition, it is causally related to that injury. Consequently, Respondents are liable for the surgery recommended by Dr. Hatzidakis.

ORDER

It is therefore ordered that:

1. Claimant's request for authorization of surgery recommended by Dr. Hatzidakis on September 1, 2020, is granted.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 8, 2021

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

I. Determination of a just and equitable allocation of death benefits between Claimant's minor dependents.

FINDINGS OF FACT

1. Decedent died on May 27, 2021 as the result of injuries sustained arising out of and during the course of his employment with Employer.

2. At the time of his death, Decedent was the father of four minor children: J.R.S. (DOB June 5, 2013); L.G.S. (DOB September 22, 2014); T.P.S. (DOB April 19, 2016); and A.E.S. (DOB July 28, 2017). These four children are dependents of Decedent and are Decedent's only known children.

3. On June 29, 2021, Respondents filed an Application for Hearing endorsing the issues of determining the division of death benefits among Decedent's minor dependents.

4. Decedent's ex-wife, V.E., is the mother of Decedent's four minor children. V.E. testified at hearing. She testified that she is only claiming death benefits for Decedent's children and not herself. V.E. is the legal guardian of the four aforementioned minor children and provides all care to the children and handles their financial affairs. She requests that Decedent's death benefits be allocated 25% to each minor dependent. V.E. testified she will manage the death benefits in the best interest of the children to provide for their needs.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado (the "Act"), Sections 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimants shoulder the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of claimants nor in favor of the rights of respondents. Section 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness' testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968).

The ALJ's factual findings concern only evidence found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

Allocation of Death Benefits

Section 8-42-121, C.R.S. provides that death benefits shall be paid to such one or more of the dependents of the decedent, for the benefit of all the dependents entitled to such compensation, as may be determined by the director, who may apportion the benefits among such dependents in such manner as the director may deem just and equitable. A just and equitable distribution will depend upon the facts of each case, and the ALJ may consider the "actual dependence" of the claimants as well as the relative incomes and circumstances of the claimants. *Spoo v. Spoo*, 145 Colo. 268, 358 P. 2d 870 (1961).

The ALJ concludes allocating Decedent's death benefits equally between each of Decedent's minor dependents represents a just and equitable allocation of the benefits. Accordingly, as requested by the dependents' mother, Decedent's death benefits will be allocated 25% to each of the four dependent children. As each dependent is a minor child and incapable of currently managing his or her own funds, V.E. shall receive the funds on behalf of each dependent.

ORDER

1. Decedent’s death benefits shall be equally allocated between Decedent’s four minor children as follows: 25% to J.R.S. (DOB June 5, 2013); 25% to L.G.S. (DOB September 22, 2014); 25% to T.P.S. (DOB April 19, 2016); and 25% to A.E.S. (DOB July 28, 2017).
2. The death benefits as ordered shall be paid to the mother of the dependent children, V.E.
3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 5, 2021

Kara R. Cayce
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-163-355-001

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that he was injured in the course and scope of his employment with Employer on January 15, 2021.

II. Whether Dr. Kenneth Keller is an authorized treating physician.

III. Whether Claimant has proven by a preponderance of the evidence that he is entitled to reasonably necessary medical benefits related to the January 15, 2021 injury, including the right knee arthroplasty.

PROCEDURAL HISTORY

On March 16, 2021 Claimant filed an Application for Hearing with the Greeley Office of Administrative Courts (OAC) on issues of compensability, reasonable, necessary and related medical benefits, authorization of medical provider Dr. Keller, average weekly wage, and temporary disability benefits. Respondents filed a Response to Application for Hearing on April 15, 2021 listing issues of termination for cause, responsible for termination and offsets, if applicable. Respondents conceded that an incident took place on January 15, 2021 but continued to allege that no compensable injuries or disability occurred as a result of the work related incident.

STIPULATION

The parties stipulated that the issues of average weekly wage, temporary disability benefits, termination for cause, responsibility for termination and offsets were reserved by the parties.

FINDINGS OF FACT

Based on the evidence presented, the ALJ enters the following findings of fact:

1. Claimant is a 61 years old (60 at the time he testified) maintenance mechanic who was hired by Employer to fix broken mechanical equipment at the Employer's plant. Claimant testified that the job requires him to use multiple different heavy tools, reach into mechanical equipment to repair them, reach into areas that are dangerous and hard to access, walk on high catwalks and bridges (over the plant area where the production occurs), climb ladders, climb stairs, crawl around and under equipment, move and pull equipment on carts, use straps to arrange or move heavy

equipment, work in darkened, greasy areas of the plant, and generally around dangerous heavy equipment. In essence, anything that was broken or did not function appropriately, the mechanics would fix to keep the plant running.

2. Prior to Claimant's employment with Employer, he always worked heavy duty jobs, including maintenance mechanic jobs, without limitations or impairments. He stated that he worked heavy duty jobs his whole life, including on oil rigs. When Claimant began his employment some months prior to the accident, and to the date of the incident, he had no problems performing his heavy-duty job. He initially took a job as a renderer, which required shoveling, climbing up and down high areas. However, shortly thereafter, Claimant took a test and was given the maintenance mechanic job.

3. The kill floor and rendering maintenance Superintendent (hereinafter Superintendent) stated that Claimant was first hired in general rendering maintenance but that his production general foreman stated that Claimant had experience working as a mechanic in the oil fields and the Superintendent gave him a chance to move to the position of maintenance mechanic after he took a test. The Superintendent stated that the plant was shorthanded and needed the help, and because he was a recent hire, he did not have to go through the steps of having Claimant bid for the job, he was just able to shuffle him into the new position.

4. On Friday, January 15, 2021, in the early morning hours, Claimant and a co-worker were instructed by their supervisor to adjust a trolley chain. The co-worker rigged up a strap to the trolley chain motor, with Claimant taking the larger front end with a come-along, or hoist, which was hooked up to the strap, and the co-worker took the smaller back end. As the coworkers was inserting a pin to stabilize the motor, the strap broke. It was sometime around 1:30 to 2:00 a.m. when it happened. Claimant was pulling the come along with a lot of tension. Claimant slipped backwards very fast into a panel on the left side of the catwalk, then to the catwalk surface. In the Employee Statement, he described the motion as flying backward into the guardrail. The catwalk is surrounded by square tubing to hold the catwalk up. The area was very dim and Claimant was using a hard hat light to see, as there was no lighting above the catwalk, only below the catwalk, above the kill floor.

5. Claimant stated that he fell in such a manner that if the guardrails were not there, he would have plummeted to the plant floor as his hard hat did. Claimant felt immediate pain in his right leg, knee and his whole body was in pain, throbbing, and Claimant had redness and swelling in his knee.

6. Claimant reported the injury to his supervisor right away and continued working his regular shift but did not perform any more heavy work that day by his supervisor's orders, as he was instructed to "take it easy." He saw the onsite nurse at the plant the next shift.[1] Thereafter, he saw the onsite nurse many times for several months. The following Monday, on January 18, 2021, he completed the Employee Statement and

[1] The Claimant worked from Monday through Saturday (if the Plant was open on Saturdays) and this ALJ infers from the evidence that when Clamant states the next day, it is to Claimant the next shift as he left at 8:08 a.m. and returned at 9:53 p.m.

stated his injuries were to his back, neck, shoulder, and right knee. At the time of the accident, Claimant was using the required safety equipment, including his hardhat, safety glasses, face shield, earplugs, and steel boots.

7. Employer's Workers' Compensation Coordinator completed the Employers' First Report of injury on January 20, 2021. The document states that they were notified of the incident on January 18, 2021, that "as the EE was moving a motor with a hurst [sic.][2] the strap broke causing him to fly backward striking a pole. EE suffered strain to neck, back, shoulder and knee, unknown if medical treatment is being sought."

8. On January 18, 2021 Claimant was provided with a designated prover list, which included Anne Manchester, M.D. and Kenneth Keller, M.D. It also provided the name of the Workers' Compensation (WC) Coordinator for Employer and the third party administrator.

9. Claimant was first seen by Dr. Carlos Cebrian at the Cargil Meat Solutions Occupational Health clinic on January 19, 2021[3] by telehealth. Claimant provided a history of the incident including that he fell so fast he was not sure how exactly he landed but that he had swelling of the chest, bruised his posterior RIGHT ribs, and caused pain and instability in his right knee. He also reported difficulty raising his right arm. Dr. Cebrian documented that Claimant continued to work, through he modified what he was doing. He denied any prior problems with his right knee and right shoulder, though had a prior left knee replacement. On physical exam (by video), Dr. Cebrian found bruising over the LEFT [sic.][4] posterior chest, abrasion on the right knee, with pain on movement of the right shoulder, back and knee. He assessed pain in the right shoulder, posterior chest on the RIGHT and right knee. He was provided restrictions of 10 pounds lifting, no activity above shoulder level and sitting fifty percent of the time. He was provided ibuprofen and referred for X-rays of the right knee, RIGHT shoulder, RIGHT ribs and chest.

10. Claimant was moved to the day shift to perform light duty work, folding gloves. The Superintendent for Employer stated that moving him to the day shift was necessary to keep Claimant out of the danger zone. The Superintendent agreed that Claimant's job of maintenance mechanic was physically demanding and intensive. He testified that Claimant made no complaints of being unable to perform his job prior to the January 15, 2021 incident and was provided no restrictions prior to the injury. The Superintendent did not work the night shift with Claimant so he was not privy to watching Claimant work but he would see him in passing in the mornings when Claimant would leave work. The Superintendent agreed that Claimant's supervisor did report that Claimant had been in an accident and that the supervisor sent Claimant to the plant nurse for evaluation. The Superintendent also received a report from the nurse.

[2] This ALJ infers that the WC Coordinator meant a "hoist."

[3] Neither party provided the nursing records for the clinic.

[4] This ALJ infers that, since Claimant complained of right rib bruising, Dr. Cebrian simply misdocumented the rib bruising side Claimant had injured, as he completed the exam by video, ordered right side x-rays and did not personally examine Claimant.

11. The January 27, 2021MRI[5] report stated they had the January 20, 2021 plain films[6] for comparison. Findings were read by Dr. Jamie Colonnello and showed complex tearing of the body and the posterior horn of the medial meniscus, moderate to severe medial compartment predominant tricompartmental osteoarthritis of the right knee, complex tearing of the body and posterior horn of the right knee medial meniscus, inner margin and vertical longitudinal tearing of the posterior horn of the latera meniscus near the posterior root attachment and joint effusion.

12. The next record from Dr. Cebrian is a referral to Dr. Hsin with a diagnosis of right knee meniscus tear, dated January 28, 2021.

13. Claimant was evaluated by Dr. Joseph Hsin on February 5, 2021. Dr. Hsin noted Claimant's mechanism of injury including that Claimant twisted his right knee during the fall. Claimant complained that he had constant right knee pain, worse with walking, turning, and inactivity in addition to the knee giving out frequently. On exam he noted a trace effusion over the right knee medial joint. He also noted genu varum[7] on the right and that Claimant denied any prior problems with the right knee. He assessed arthritis, drained and injected the joint with cortisone, provided lidocaine patches, and provided medication. He stated that Claimant had moderately severe osteoarthritis along with meniscal tearing in the right knee and an "aggravation of the preexisting arthritis." He recommended that Claimant follow-up with his joint replacement specialist at Loveland to discuss right knee replacement.

14. Dr. Cebrian authored a report on February 10, 2021. This was also a telehealth visit. He stated that they did an MRI of the right knee as it was Claimant's primary complaint. He documented that Dr. Hsin opined that Claimant had severe osteoarthritis in the right knee and recommended that he be treated outside the workers' compensation system. On physical exam, Dr. Cebrian noted that Claimant was wearing a brace on the right knee, moved slowly, had decreased thoracic spine movement and pain and swelling of the right knee. He assessed severe osteoarthritis in the right knee, past history of knee replacement of the left knee and thoracic spine pain. Dr. Cebrian explained that Claimant needed to be seen outside the WC system as he had preexisting problems that may require a knee replacement. He noted that Dr. Hsin advised he go back to the same surgeon that performed his prior left knee surgery. He stated that they would continue with nursing treatment primarily on the back.

15. Claimant stated that his prior surgeon, Dr. Hale, was based out of Fort Collins and Claimant had moved to Weldona, Colorado, nearer to the plant. Claimant does live close to Fort Morgan, where Dr. Keller is located. Claimant's wife would generally take Claimant to and from work, and to and from medical appointments, as they only had one vehicle.

16. On April 7, 2021 Claimant was attended by Dr. Kenneth Keller, who took a history of Claimant being thrown back against an electrical panel. He stated that Claimant

[5] Magnetic resonance imaging.

[6] Not in evidence.

[7] Bow-legged.

had been seen by another occupational medicine physician associated with their group[8] who ordered x-rays and MRI. He reviewed these x-rays and MRI which showed osteoarthritis and meniscal tears. He noted that Claimant was wearing a double neoprene brace on his right knee, had a varus configuration of the right knee, small effusion, good active range of motion with slight crepitance in the patellofemoral joint, with pain along the medial side of the knee as well as a positive McMurray's test.[9]

17. Dr. Keller documented that Claimant has a long history of performing heavy-duty work and noted Claimant had excellent muscle development in the extremities.[10] He opined that Claimant's pain is coming from both advanced trlcompartmental osteoarthritis and complex tearing of the menisci. He provided a medical opinion that, while the tricompartment osteoarthritis was not caused by the January 2021 work related injury, the accident was a large exacerbating factor in the onset of his pain and possible meniscal tearing. He specifically stated "[T]his is a difficult scenario in that the knee was functional but arthritic prior to the injury but now has been rendered dysfunctional and intolerable." He recommended a total knee replacement.

18. Claimant followed up with Dr. Keller on April 21, 2021. He documented that Claimant was able to carry out a fairly complicated heavy duty work prior to the injury of January 2021, and following the injury he had become extremely limited, including being unable to work in any other kinds of jobs due to the injury. Claimant discussed proceeding with the total knee replacement at that time. They had a long discussion regarding the condition of Claimant's right knee and the knee replacement. Claimant understood the risks, especially having gone through major complications when he had the left total knee replacement. Dr. Kelly reported that Claimant did not feel like he had a choice as he wanted to continue working and having a quality life.

19. On April 29, 2021 Dr. Keller issued his operative report from Colorado Plains Medical Center. He documented that "This is a 60-year-old active male with apparent progressive osteoarthritis of the right knee. Recently injured his knee where he simply had never really regained the ability to ambulate comfortably, indicated for knee arthroplasty." During the surgery, Dr. Keller noted that there was a moderate joint effusion present. He was discharged on May 1, 2021 in good condition and anxious to go home. On May 3, 2021 Dr. Keller reevaluated Claimant due to problems with excessive drainage and not enough pain control. On May 7, 2021 he was again evaluated in the ED, however there was no active drainage, the incision looked well and no suggestion of effusion in the knee but DVT[11] in the lower leg around the ankle.

20. On May 6, 2021 Claimant was evaluated by J. Tashof Bernton, an independent medical examination scheduled by Respondents, only a week after his total knee replacement took place. Dr. Bernton took a history of the mechanism of injury noting that Claimant fell backwards into an electrical panel and then hit the ground, where his

[8] Presumably Dr. Cebrian

[9] Test to assess tearing of the lateral meniscus.

[10] This ALJ infers from this information that Claimant had well developed muscle tone and was generally muscular.

[11] Deep vein thrombosis

legs got "tangled up." He noted the work related injury of January 15, 2021. He had available the original x-ray reports, including of the right knee which showed small effusion. Dr. Bernton recited portions of Respondents' letter to Dr. Bernton, including several medical records that were and were not sent to him. Among the medical records not sent to Dr. Bernton, but described in, were multiple Employer Clinic nurse notes. Dr. Bernton recited a portion of Dr. Keller's report pursuant to counsel's letter. It is undetermined if the letter from counsel was actually relied upon by Dr. Bernton in reaching his conclusions.

21. On exam, Dr. Bernton noted that Claimant had normal range of motion of the shoulder and no paraspinals muscle tension in the low back. Dr. Bernton noted Claimant had degenerative changes in the chest and AC joints, and joint space narrowing of the right knee. He noted good range of motion of the shoulder and that the right knee was somewhat swollen post operatively. He noted that there was no dorsalis pedis pulse and was concerned about thrombosis or infection. With regard to the January 15, 2021 accident he opined that Claimant "had a contusion of the shoulder and contusion and twisting of the right knee." He stated that the menisci tears could either be degenerative or could potentially be acute. Dr. Bernton further opined that "[T]reatment of the right knee acute injury is appropriate on a work-related basis, but treatment of the underlying advanced osteoarthritis, which would require knee replacement is, as noted by Dr. Cebrian and Dr. Hsin, non-work related."

22. During the May 17, 2021 follow up with Dr. Keller, he documented that post op care was complicated by edema and a calf DVT but seemed to be improving. Claimant complained of pain, more in the back of his upper calf, but the swelling had gone down significantly, he was ambulating with a walker but he could easily ambulate around the room without it. The incision was completely healed and there was no drainage or surrounding erythema and good range of motion.

23. By June 9, 2021 Claimant was progressing well functionally though somewhat frustrated with his pain and progress. Dr. Keller stated that he was doing quite well and may be doing too much at this stage as he could ambulate without assistive device. He recommended cold packs, physical therapy for quad strengthening and range of motion, though the ROM was excellent.

24. Claimant was first evaluated by Dr. Sander Orent on June 11, 2021. Dr. Orent document the Claimant's mechanism of injury, including that when Claimant was thrown backwards by the force of the breaking/snapping cable, he hit the electrical panel and twisted his knee under the railing on the catwalk. He had immediate pain in his right knee, particularly the medial and lateral side. Claimant reported to Dr. Orent that he was asymptomatic prior to the work injury but after the pain did not abate. He also reported that, initially he had neck and back pain, but by the time he saw Dr. Orent, the neck and upper back problems had resolved but that he continued to have low back pain that radiated to the right lower extremity, into the calf, all the way to the later aspect of his foot. Claimant reported he was given Lyrica, which helped the pain going down his leg but he continued to have back problems. On physical exam, Dr. Orent documented that Claimant had tense paraspinals muscles with loss of range of motion and marked

dorsiflexion weakness of the right foot. The right knee, post operatively, looked really good with no swelling, improving range of motion though some pain with extension. He reviewed the x-rays of the knee, ribs and shoulder, as well as the MRI and medical records.

25. Dr. Orent opined that Claimant was “clearly and without doubt injured in the course and scope of his work.” He stated that the accident occurred and that Claimant clearly described the incident to his providers, despite the fact that they stated that the knee arthroplasty is not work related. He noted that Claimant was completely asymptomatic for both the right knee and the lumbar spine prior to the work related injury. He highlighted the fact that Claimant was asymptomatic and had an excellent work record. He suggested that the primary and only reason for Claimant to have a total knee replacement on the right side was the injury that occurred during the January 2021 accident while working for Employer.

26. Dr. Orent was also concerned that the lumbar spine injury was completely ignored, especially considering the motor weakness of the right foot, needed an MRI of the lumbar spine and an evaluation by an orthopedist. Dr. Orent diagnosed complex meniscal tears, in the setting of osteoarthritis of the knee necessitating arthroplasty because of the acute injury. He also diagnosed lumbar strain with radiculopathy and motor weakness as a direct result of being thrown back into the electrical panel when the strap snapped.

27. Sander Orent, M.D. testified at hearing on September 10, 2021 and was accepted as an expert in occupational medicine, environmental medicine, internal medicine, and critical care as well as a Level II accredited physician. He testified that he received the same history as told at hearing with the exception of striking the right knee on the railing, twisting it and getting stuck under the railing. He reported Claimant relayed that the knee seemed to be on fire and crunchy, that it swelled. He stated that the mechanism of injury, the fact that he flew backwards, hitting his back and then twisting and falling, getting his knee caught under the rung, can rip a menisci free. He had an extruded menisci on the MRI, it was a complex tear and acute in nature with significant edema, a sign that Claimant had an acute injury.

28. Dr. Orent stated that if Claimant had an extruded complex torn meniscus prior to the injury, he would not have been able to perform the heavy, difficulty work he did for Employer, especially the climbing, fixing equipment, working in low light situations in a full duty capacity. Dr. Orent acknowledged that Claimant did have preexisting osteoarthritis of the right knee but that it was asymptomatic and Claimant could perform his full duty job without limitations. While Dr. Orent agreed that the MRI does not reveal the age of the edema, it does show that it was recent. Dr. Orent further testified that the event of January 15, 2021 was very fast, that not even Claimant knew exactly how the incident happened after the exertion he was placing and after the strap broke, but it is clear that Claimant was not having physical symptoms before the accident and that after he was unable to function freely. He was unequivocal, that despite what forces were applied to Claimant’s body and knee, that the January 15, 2021 accident caused Claimant’s right knee symptomology.

29. Respondents attempted to impeach Dr. Orent by stating that Claimant had never seen an onsite nurse as the records were not available for his review. However, the maintenance Superintendent testified that he had received a report from the nurse that Claimant had been injured in an accident. He believed that he received it on Monday January 18, 2021, when the nurse came in.

30. A kill floor maintenance worker also testified that he was a Union Steward and served as a mediator between Employer and workers that are written up. The Union Steward stated that he had worked with Claimant regarding some write-ups when Claimant was on light duty. He also had worked a little with Claimant when Claimant was doing maintenance work. He testified that it was common for the mechanics to either use flashlights or headlights to perform their work.

31. Lastly, at hearing, the Employer's WC coordinator testified regarding her job, being a liaison between the employee and Employer, submitted workers' compensation claims, worked with the third party administrator, scheduled Claimant's medical appointments, scheduled and assisted with transportation, translation, restricted duty walk-throughs, and light duty jobs. She testified that she instructed all new hires to report to their supervisor of any accident within 24 hours of the incidents. She described what the Employer's First Report of Injury stated. She described the nursing staff in the health services department, a full-on nursing staff, with a medical assistant during the days, Mondays through Saturday (if the plant was working), and Dr. Cebrian on Tuesdays. She disclosed that the nursing staff stays only as long as the kill floor is working, to around 1:30 a.m.

32. The WC coordinator stated that she believed that Claimant continued in his full time position until he was changed to the warehouse folding gloves, due to his restrictions. She did not see what work he was doing prior to being changed to the day shift. She recalled scheduling the appointment with Dr. Hsin for Claimant but does not know how Claimant was able to attend the appointment. She received a call from Claimant after Dr. Hsin's appointment and he advised that Dr. Hsin told him to see Dr. Hale. She testified she received a call from Dr. Hale's office, did speak with Dr. Hale's office and stated that Dr. Hale's staff indicated he did not wish to see Claimant. She further testified that she was not aware whether Claimant notified his supervisor within the required 24 hours because he did not immediately fill out any paperwork as required.

33. Claimant testified on rebuttal with regard to clarifying that his right leg got stuck between the beam and the rail and the floor. He stated that when he fell, he tried to prevent himself from falling and that his hardhat fell to the kill floor, many feet below. He advised that he had completed two different forms. The first he gave to his direct supervisor, the second he turned in to the WC coordinator. A couple of weeks after the incident he received a call from his supervisor to remind him to turn in another report. His supervisor was no longer working for Employer, as his parents were ailing; he was in Arizona and did not respond to Claimant's inquiry regarding testifying. Claimant also testified that his supervisor was no longer working for Employer.

34. Dr. Orent's testimony was also taken by deposition on July 7, 2021 by Respondents. At that time, Dr. Orent stated that "The fact that a piece of the meniscus has extruded, usually is pretty acute because that would cause the knee to lock up and cause people to have a great deal of difficulty ambulating. So an extruded fragment is much more likely, in my opinion, to be acute." Questioning in this deposition about Dr. Orent not being present with Claimant is unhelpful in reference to Claimant having difficulty prior to the work injury. The Superintendent, the WC coordinator and Claimant all testified that Claimant was performing his work well before the accident and no records were provided to this ALJ that Claimant had any preexisting medical problems with regard to the right knee. Therefore, this ALJ infers from the totality of the record that Claimant was asymptomatic with regard to his preexisting osteoarthritis.

35. Dr. Carlos Cebrian testified on August 20, 2021 and was accepted as an expert in occupational medicine and a Level II accredited physician. Dr. Cebrian stated that Claimant had a fall where he did injure his knee, he had pain complaints, some swelling and bruising of the knee. He stated that it was possible that there may have been a small meniscal tear that occurred as a consequence of the January 15, 2021 incident as there was swelling and an abrasion of the right knee, but opined that the underlying pathology was preexisting. Dr. Cebrian stated that there was no way to separate out the meniscal tear that occurred on January 15, 2021 from the preexisting pathology. This is not relevant in cases where there is an aggravation of a preexisting condition caused by a work related accident. He stated that the combination of a contusion with swelling that he was having could have put increased pressure on his joint, which caused some discomfort in the joint itself because of the presence of the osteoarthritis. Dr. Cebrian further stated that [Claimant] may have had a knee injury or contusion, abrasion and swelling but that conservative care only was reasonable, not a total knee replacement. He agreed that Claimant suffered a work related injury and needed only conservative treatment. He agreed that Claimant had no medical care for his right knee prior to the accident of January 15, 2021.

36. Claimant's coworker testified on September 22, 2021, that he was with Claimant at the time of the incident of January 15, 2021. The coworker was placing a pin in the motor to secure it and turned around when Claimant was sitting up already. He did not observe the fall until he turned around and saw Claimant sitting on the catwalk surface. He saw that he was lengthwise on the catwalk that was approximately four to five feet wide. He did not regularly work with Claimant, other than occasionally but never saw that Claimant had any problems before the incident. He did observe him one day, hanging plastic while on a ladder or stairs in the basement, but did not observe him walking. The witness did not specify when this occurrence actually happened. This ALJ is uncertain about whether the witness was talking about stairs or an actual ladder, as there were problems with the interpreter's interpretation, including multiple interruptions for explanations. It is unlikely that the witness was talking about ladders because, ladders generally do not have "landings" on two levels.

37. Dr. J. Tashof Bernton, Respondents' expert, testified on September 27, 2021 as an expert in occupational and internal medicine. He stated that the osteoarthritis was preexisting. However, he stated that, if the mechanism of injury is correct as

described by Claimant, there was a “sudden injury, acute onset of pain, and sudden functional decrement; in other words, he couldn't do things. And his functional status changed immediately after the injury. Presuming that those things occurred, then the meniscal component is presumed to be work related.” However, in further questioning, if there was an assumption that Claimant was working his regular job, continued to be high functioning without limitations, then Dr. Bernton opined that the meniscal tears were not probably acute or caused by the work related injury.

38. Here, as found, Claimant did sustain a work related injury, causing him pain, disability, and restrictions, which he did not have prior to his work related accident. This is supported by the Claimant’s testimony, which is credible. Claimant reported the accident to his supervisor, which is what he had been instructed to do by the WC Coordinator. He stated that his supervisor advised him to take it easy but continue working, which is what he did. The following day or shift, Claimant went to the nurse (per the WC coordinator the nurses only stay until approximately 1:30 a.m.). The nurse reported to the Superintendent that Claimant was involved in an accident.

39. Also persuasive is the fact that the Monday following the Friday incident, Claimant completed a written incident report regarding the accident, which specifically described the mechanism of the accident, where the strap broke and sent him flying backwards. He reported that he injured his neck, back, shoulder and knee. This is supported by the medical records. Whether he hit the electrical panel first or second or the pipe first or second is not significantly material to the fact that Claimant was, in fact, involved in an accident which cause injuries. Dr. Cebrian, an ATP who only saw Claimant through telemedicine, agreed that Claimant was involved in an accident that cause an abrasion, swelling and contusions. The doctors all have slightly different versions of how the mechanics of the accident happened and whether there was a twisting of the knee or not. However, Dr. Hsin documented in his February 5, 2021 report that Claimant twisted his right knee during the fall. This ALJ finds that the complicated nature of the accident, the high velocity of the fall caused by the broken strap that was under high pressure and the technically specific use of tools or equipment may not have been well understood by any of the providers that were documenting the mechanism of injury. This does not detract from the fact that Claimant was involved in a highly intensive falling backward, slipping on grease incident, while on a very elevated narrow catwalk above a production floor many feet below, only protected by guardrails. This would have caused any worker to be flailing about to attempt to catch themselves before going off the side and falling all the way down, including twisting his body and knee. Claimant’s explanation of the twisting mechanism of hitting and twisting his right knee is credible.

40. Claimant clearly had a preexisting condition. None of the medical providers disagreed with this fact. What is also clear is that prior to the January 15, 2021 accident, Claimant was performing his work, which Claimant and the Superintendent agreed was heavy work. He would fix heavy equipment, had to move and lift heavy tools to repair the machinery in the plant, he would move heavy equipment around in order to fix them, he would go up and down ladders and stairs with his tools, he would crawl under and around the equipment. He performed this work for over four months without restrictions or disability or need for medical attention. Claimant testified that he did heavy equipment

mechanic work in the oil fields prior to his work with Employer. Neither party submitted any medical records that documented that Claimant had an active prior symptomatic condition. Dr. Kelly stated that he had good muscle tone in his upper and lower limbs. All of which are indications that Claimant was performing his heavy work without difficulties. The facts above support that Claimant had an aggravation of his preexisting osteoarthritis when he fell backwards, hitting and twisting his right knee and went to the ground, on the greasy narrow catwalk that was many feet above the plant floor, where Claimant's hard hat ended up falling.

41. The persuasive medical records and medical testimony also support this conclusion that Claimant sustained work related injuries as a consequence of the accident. Dr. Cebrian agreed that Claimant had swelling, abrasion and contusions that were cause by the work related incident. Dr. Keller, Dr. Bernton and Dr. Orent stated that Claimant had an aggravation of his preexisting conditions caused by the work related event. Any evidence to the contrary is found unpersuasive. Claimant has proven by a preponderance of the evidence that he had a compensable accident that caused compensable injuries on January 15, 2021.

42. Claimant was instructed by both Dr. Hsin and Dr. Cebrian to return to Dr. Hale to address his right knee condition. The WC Coordinator scheduled the patient medical appointments. The WC Coordinator spoke with Dr. Hale's office and they advised her Dr. Hale did not wish to see Claimant. No evidence was provided by either party that might indicate, after the coordinator had notice Dr. Hale would not see Claimant, that Claimant was given any new medical provider or given another appointment with either Dr. Cebrian or Dr. Hsin. Therefore, the right of selection passed to Claimant. It is coincidental that Dr. Keller is within the same medical group as Dr. Cebrian and that he was a listed designated provider by the Employer.

43. Whether the right knee arthroplasty/total knee replacement is reasonably necessary and related to the injury is irrefutably a question of fact. In this matter, Dr. Kelly and Dr. Orent's opinions are more persuasive than Dr. Cebrian and Dr. Bernton. The accident of January 15, 2021 caused the Claimant's symptoms, aggravating his underlying osteoarthritis and meniscal tears. While there may have been pathology than long preexisted the accident, these conditions were dormant, not causing Claimant disability, impairment or restrictions. Claimant was able to perform his activities of daily living, including heavy work prior to the January 15, 2021 accident. Since an employer takes a claimant as they find him, the fact that Claimant had a preexisting condition does not negate the fact that all of the physicians, including Dr. Keller, Dr. Hsin, and Dr. Orent state that the arthroplasty was reasonably necessary. Even Dr. Cebrian and Dr. Bernton state that, considering Claimant's advanced osteoarthritis, a total knee arthroplasty was appropriate. As found, the persuasive medical records and testimony lead this ALJ to determine that Claimant's total knee replacement was reasonably necessary and related to the January 15, 2021 accident.

CONCLUSIONS OF LAW

Based on these findings of fact, the Judge draws the following conclusions of law:

A. General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S.. The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the claimant's rights nor in favor of the rights of the respondents; and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S..

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office (ICAO)*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2018). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Burden of Proof

The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits. Sections. 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000; *Kieckhafer v. Indus. Claim Appeals Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979; *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004).

"Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984).

C. Compensability

A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. Section 8-41-301(1)(b), C.R.S. (2020); *City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course" of employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *Horodyskyj v. Karania*n, 32 P.3d 470, 475 (Colo. 2001).

There is no presumption that injuries which occur in the course of a worker's employment arise out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). Rather, it is the claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. Section 8-43-201, C.R.S.; *Ramsdell v, Horn*, 781 P.2d 150 (Colo. App. 1989). The determination of whether there is a sufficient nexus or causal relationship between a Claimant's employment and the injury is one of fact and one that the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle*, 934 P.2d 861 (Colo. App. 1996). When a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *H & H Warehouse v. Vicory, supra.*

A preexisting condition or susceptibility to injury does not disqualify a claim if the work related injury aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). However, the mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO, Aug. 18, 2005).

Here, as found, the January 15, 2021 accident caused injury to Claimant's neck, back and right shoulder and substantially aggravated and accelerated the Claimant's right knee underlying pathology, requiring the need for medical care. Claimant was working on a high, narrow, greasy catwalk when a high tension strap, holding a motor broke, causing Claimant to fly backward, hitting his back, neck and right shoulder, and causing him to land in such a way that caused a twisting and injury to his right knee. While Claimant may not recall exactly each and everything that occurred during the fall, he did recall that he landed in such a way that he tried to prevent himself from falling from the catwalk. His co-worker did not see exactly how Claimant landed because he was placing a pin in the motor to secure it and turned around when Claimant was sitting up already. There were no other witnesses. Claimant reported the injury to his supervisor, who advised him to continue working but take it easy, which Claimant did. Claimant went to the onsite nurse the following shift. Claimant is found credible, especially with regard to his mechanism of injury.

Claimant's claim of compensability is supported by Claimant's testimony and Dr. Keller's determination that, while Claimant had underlying osteoarthritis, the work related accident aggravated his underlying condition causing the need for treatment. Dr. Orent's opinion that Claimant's right knee condition was aggravated by the January 15, 2021 event at work is also persuasive. It is particularly persuasive in light of the fact that Claimant had an extruded meniscus with complex tearing, which would have caused significant problems with walking and causing pain and none of the witnesses stated that Claimant had any problems performing his job prior to the work accident of January 15, 2021. Any contrary opinions of Dr. Cebrian and Dr. Hsin are unpersuasive and overcome by the opinion of Dr. Keller, and Dr. Orent's opinion with regard to the aggravation of the right knee condition. As found from the totality of the evidence, Claimant has proven by a preponderance of the evidence that Claimant had an accident on January 15, 2021 in the course and scope of his employment with Employer which caused injury to the neck, mid back, right shoulder and right knee, which required the need for medical care to cure and relieve Claimant from the effects of the work injury.

When expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); *Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992). As found, Dr. Orent's opinion is not found persuasive with regard to the lumbar spine. The records from Dr. Cebrian, Dr. Keller and Dr. Hsin make little mention of the lumbar spine condition. Dr. Bernton specifically found no palpable increased tone in the lumbar spine on May 6, 2021. This is found persuasive. Claimant has failed to show by a preponderance of the evidence that he has a lumbar spine condition or aggravation related to the January 15, 2021 work injury.

D. Authorized Medical Provider

"Authorization" refers to the physician's legal authority to treat the injury at the respondents' expense. *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997). Section 8–43–404(5), C.R.S.2011, gives employers or insurers the right to choose treating physicians in the first instance in order to protect their interest in overseeing the course of treatment for which they could ultimately be held liable. The initial right to select a treating physician is an obligation that must be met forthwith upon notice of an injury, *Bunch v. Indus. Claim Appeals Office*, 148 P.3d 381, 383 (Colo.App.2006), and if medical services are not timely tendered by the employer or insurer, the right of selection passes to the employee, *Andrade v. Indus. Claim Appeals Office*, 121 P.3d 328, 330 (Colo.App.2005).

Here, employer properly designated an ATP when Claimant reported the January 15, 2021 incident. However, the record substantially supports Claimant's account that both Dr. Hsin and Dr. Cebrian, the designated ATP, referred Claimant to his own orthopedic specialist, Dr. Hale. However, Dr. Hale's office advised the WC Coordinator that Dr. Hale would not see Claimant. This provided Employer with notice that Claimant required a new designation. Respondents' failure to act caused the right to select a new physician to pass to Claimant. Claimant selected Dr. Keller, who was also on Respondents' list of providers. The evidence does not indicate that when Employer received the notice from Dr. Hale's office they instructed Claimant to return to the ATP or otherwise authorized treatment with the ATP. Instead, according to the uncontradicted testimony of Employer's WC Coordinator and Claimant, Employer took no action.

Under these circumstances, the ALJ reasonably infers that Employer did not provide treatment in a timely manner and that the right of selection passed to Claimant. See *Bunch*, *supra* at 383 (an employer is deemed notified of an injury when it has some knowledge of facts connecting the injury or illness with the employment and indicating to a reasonably conscientious manager that a potential compensation claim may be involved). Employer's challenge to the compensability of the claim or the right knee condition did not excuse its obligation to tender timely treatment. See *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228, 229 (Colo.App.1999) (employer has right to select treating physician although it contests liability); see also *Andrade,* 121 P.3d at 330 (initial right of selection of treating physician passes to employee where medical services are not timely tendered by employer or insurer). Further, the ATP directly refused to treat Claimant for his knee condition. This ALJ infers from this information that the ATP discharged Claimant from care as the WC Coordinator failed to provide any further appointments in follow up, which she stated was her job.

The circumstances presented here demonstrate that it would have been a useless formality for Claimant to have directly sought additional treatment with the ATP or Dr. Hsin, given the medical records that show that both Dr. Hsin and Dr. Cebrian opined that the continuing right lower extremity problems were unrelated to the January 15, 2021 accident and Claimant's testimony that the WC Coordinator, who advised him she would not schedule an appointment with Dr. Hale.

This ALJ also considered the potential argument that section 8–43–404(5)(a)(I)(A), C.R.S.2021, limited an Employer's obligation to selecting the ATP after Claimant's initial injury on January 15, 2021. The Court in *Bunch* does not equate the statutory phrase "in the first instance" with the phrase "at the time of injury." Rather, those phrases are independent. Thus, when, as here, Claimant experienced a condition that the ATP opined was not related and referred Claimant to his own physician, and Employer had notice, this did not relieve Employer from making a new designation to provide to Claimant. Because Claimant followed the procedure here, advising the WC Coordinator of the referrals and requesting she schedule the appointment, without success, the right to select his treating physician properly passed to Claimant. *Loofbourrow v. Indus. Claims Appeals Office of State*, 321 P.3d 548 (Colo. App. 2011)

A referral in the normal progression of authorized treatment allows for the authorized treatment provided by the doctor accepting the referral. *Greager v. Industrial Commission,* 701 P.2d 168 (Colo. App. 1985). When the referral reveals it is based on the independent medical judgment of the referring doctor, it may be construed as an authorized referral. *City of Durango v. Dunagan*, 939 P.2d 496, 500 (Colo. App. 1997). Dr. Hsin's initial report specifically found that Claimant had moderately severe osteoarthritis along with meniscal tearing in the right knee and an "aggravation of the preexisting arthritis." He recommended that Claimant follow-up with his joint replacement specialist at Loveland to discuss right knee replacement. This indicates some measure of urgency that the knee surgery is reasonably necessary. Reflecting that urgency, the Claimant testified he inquired of the WC Coordinator what his options were when she refused to schedule the appointment with Dr. Hale. Claimant testified that he attempted to continue working but was having difficulty, missing days from work, which caused him to lose his job.

The ALJ resolved that the Claimant's determination that he needed to proceed with his surgery on his own, was a reasonable path, including the subsequent determination to select Dr. Keller to perform the right knee arthroplasty. Therefore, because Claimant selected Dr. Keller, following the ATP's referral to a personal care provider, Dr. Keller became an authorized treating physician in this claim. This is also the case because Dr. Cebrian declined to treat Claimant for non-medical reasons and advised Claimant to seek treatment elsewhere. Respondents denied treatment by refusing to authorize any further care for the right knee injury, which included the need for surgery. When a designated physician refuses to treat for non-medical reasons, the Respondents must either designate a new physician or else the ability to choose an authorized treating doctor passes Claimant. *Ruybal v. University of Colorado Health Sciences Center*, 768 P.2d 1259 (Colo. App. 1988). Claimant then, chose Dr. Keller as an authorized physician due to the refusal of Dr. Cebrian to treat for non-medical reasons. *In re Claim of Morin,* I.C.A.O., WC No. 4-906-748-04 (May 6, 2014). Claimant has proven by a preponderance of the evidence that Dr. Keller is an authorized treating physician.

E. Medical Benefits that are Reasonably Necessary and Related

The right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301, C.R.S. See *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991); *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986).

Section 8-42-101(1)(a), C.R.S., provides that Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *Snyder v. Industrial Claim Appeals Office*, *supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002); *In re Claim of Foust*, I.C.A.O, WC, 5-113-596 (COWC October 21, 2020).

Section 8-42-101(6), C.R.S. states as follows:

> (6) (a) If an employer receives notice of injury and the employer or, if insured, the employer's insurance carrier, after notice of the injury, fails to furnish reasonable and necessary medical treatment to the injured worker for a claim that is admitted or found to be compensable, the employer or carrier shall reimburse the claimant, or any insurer or governmental program that pays for related medical treatment, for the costs of reasonable and necessary treatment that was provided. An employer, insurer, carrier, or provider may not recover the cost of care from a claimant where the employer or carrier has furnished medical treatment except in the case of fraud.
>
> (b) If a claimant has paid for medical treatment that is admitted or found to be compensable and that costs more than the amount specified in the workers' compensation fee schedule, the employer or, if insured, the employer's insurance carrier, shall reimburse the claimant for the full amount paid. The employer or carrier is entitled to reimbursement from the medical providers for the amount in excess of the amount specified in the worker's compensation fee schedule.

Claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities and not the underlying preexisting condition. See *Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 448 (1949); *Abeyta v. Wal-Mart Stores*, W.C. No. 4-669-654 (January 28, 2008).

The issue of whether medical treatment is necessary for the compensable aggravation or a worsening of Claimant's pre-existing condition is also one of fact for resolution by the ALJ based upon the evidentiary record. See *University Park Care Center v. Industrial Claim Appeals Office,* 43 P.3d 637 (Colo. App. 2001); *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970); *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985).

Expert medical opinion is not needed to prove causation where circumstantial evidence supports an inference of a causal relationship between the injury and the claimant's condition. *Savio House v. Dennis,* 665 P.2d 141 (Colo. App. 1983). Where conflicting expert opinion is presented, it is for the ALJ as fact finder to resolve the conflict. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). However, the ALJ is not held to a crystalline standard in articulating her findings. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

The Medical Treatment Guidelines (MTGs) are regarded as the accepted professional standards for care under the Workers' Compensation Act. *Hernandez v. University of Colorado Hospital*, W.C. No. 4-714-372 (January 11, 2008); see also *Rook V. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). The Medical Treatment Guidelines, Rule 17-2(A), W.C.R.P. provide "All health care providers shall use the Medical Treatment Guidelines adopted by the Division." In spite of this direction, it is generally acknowledged that the Guidelines are not sacrosanct and may be deviated from under appropriate circumstances. *Nunn v. United Airlines,* W.C. 4-785-790 (ICAO September 9, 2011). While the Guidelines may carry substantial weight, and provide substantial guidance, the ALJ is not bound by the Guidelines in deciding individual cases or the principles contained therein alone. Indeed, Section 8-43-201(3), C.R.S. specifically provides:

> It is appropriate for the director or an administrative law judge to consider the medical treatment guidelines adopted under section 8-42-101(3) in determining whether certain medical treatment is reasonable, necessary, and related to an industrial injury or occupational disease. *The director or administrative law judge is not required to utilize the medical treatment guidelines as the sole basis for such determinations.* (*Emphasis added*).

Pursuant to W.C.R.P. Rule 17-1(A), the statement of purpose of the guidelines is as follows:

> In an effort to comply with its legislative charge to assure appropriate medical care at a reasonable cost, the director of the Division has promulgated these 'Medical Treatment Guidelines.' This rule provides a system of evaluation and treatment guidelines for high cost or high frequency categories of occupational injury or disease to assure appropriate medical care at a reasonable cost.

W.C.R.P. Rule 17-5(C) provides "The treatment guidelines set forth care that is generally considered reasonable for most injured workers. However, the Division recognizes that reasonable medical practice may include deviations from these guidelines, as individual cases dictate."

It is appropriate for an ALJ to consider the guidelines while weighing evidence, but the Medical Treatment Guidelines are not definitive. *Jones v. T.T.C. Illinois*, Inc., W.C. No. 4-503-150 (May 5, 2006); *aff'd Jones v. Industrial Claim Appeals Office* No. 06CA1053 (Colo. App. March 1, 2007) (not selected for publication); *Stamey v. C2 Utility Contractors et al*, W.C. No. 4-503-974 (August 21, 2008) (even if specific indications for a cervical surgery under the medical treatment guidelines were not shown to be present, ICAO was not persuaded that such a determination would be definitive). Concerning the issue presented, the MTG's indicate that "[t]here is some evidence that the ALJ may decide the weight to be assigned the provisions of the *Guidelines* upon consideration of the totality of the evidence. *See Cahill v. Patty Jewett Golf Course,* WC 4-729-518 (ICAO February 23, 2009); *Siminoe v. Worldwide Flight Services,* WC 4-535-290 (ICAO November 21, 2006). As found in this case, while the MTGs provide for conservative preoperative surgical care, including physical therapy, injections or other treatment before proceeding with a total knee arthroplasty, Dr. Hsin and Dr. Keller, both orthopedic specialist stated Claimant's knee condition, in light of the existing osteoarthritis, would likely need the arthroplasty. As found, Dr. Keller's opinion is found persuasive that Claimant's need for the total knee replacement was a reasonable course of care, despite other non-operative measures that could have been undertaken. Opinions to the contrary are not found persuasive. Claimant has proven by a preponderance of the evidence that Claimant's right knee surgery was reasonable, necessary and related to the January 15, 2021 work related accident.

ORDER

IT IS THEREFORE ORDERED THAT:

1. Claimant has proven by a preponderance of the evidence that he sustained compensable injuries to his neck, right shoulder, mid-back and right lower extremity, including an aggravation of his right knee osteoarthritis, in the course and scope of his employment on January 15, 2021.

2. Dr. Kenneth Keller is an authorized treating physician.

3. Respondents shall pay medical benefits that are reasonably necessary and related to the accidental injuries of January 15, 2021, including for the right total knee replacement recommended and performed by Dr. Keller, in accordance with the Colorado Medical Fee Schedule and pursuant to Section 8-42-101(6), C.R.S.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge' s order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the address below for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DIGITAL SIGNATURE

DATED: 11/8/2021

Elsa Martinez Tenreiro
Administrative Law Judge
Office of Administrative Courts
1525 Sherman St 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant prove he suffered a compensable injury to his left shoulder on April 5, 2021?

- If the claim is compensable, did Claimant prove he is entitled to TTD benefits commencing April 12, 2021?

- Did Claimant prove treatment he received from University Medical Center, Dr. Jennifer Fitzpatrick, and Parkview Medical Center was authorized?

- The parties stipulated to an average weekly wage of $773.22.

- The parties stipulated that if the claim is compensable, the treatment provided by and on referral from Southern Colorado Clinic and Dr. Terrance Lakin, was recently necessary, related, and authorized.

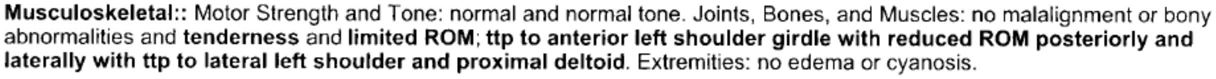
FINDINGS OF FACT

1. Claimant worked for approximately 20 years as cleaner in Employer's environmental services department. The job is physically demanding and requires frequent lifting and carrying of heavy items, including soiled linens and trash.

2. Claimant has a history of progressive left shoulder pain since 2018. Initially it was "just soreness . . . nothing major." He managed the pain with OTC ibuprofen, approximately once per week. He sought no other specific treatment, although he periodically mentioned the pain during visits with his PCP, Veronica Ritchey, FNP-C.

3. The pain gradually worsened and became more frequent. By 2020, he was taking ibuprofen approximately twice a week.

4. On March 1, 2021, Claimant complained to Ms. Ritchey of left shoulder pain with reduced range of motion and weakness in the left arm. Ms. Ritchey noted, "[he] has had chronic left shoulder pain that has progressed." Claimant testified he thought the pain was from "too much lifting" at work. Examination of Claimant's left shoulder showed"



Musculoskeletal:: Motor Strength and Tone: normal and normal tone. Joints, Bones, and Muscles: no malalignment or bony abnormalities and **tenderness** and **limited ROM**; **ttp to anterior left shoulder girdle with reduced ROM posteriorly and laterally with ttp to lateral left shoulder and proximal deltoid**. Extremities: no edema or cyanosis.

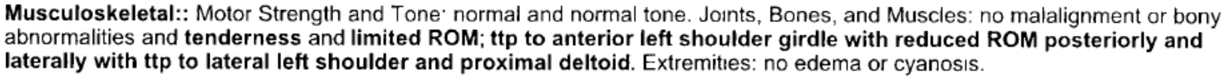
5. Confusingly, despite the reported symptoms and clinical findings, Ms. Ritchey provided no shoulder diagnosis and recommended no additional workup or treatment.

6. Claimant testified that on or about April 5, 2021, he had to clean a bathroom that was flooded by a backed-up drain. An unknown individual had attempted to soak up the water with several blankets. Claimant testified he placed the wet blankets in bags, loaded them into a laundry cart, and took them to the laundry room.

7. Claimant testified he experienced minor pain in his left shoulder while lifting the blankets. He continued working and finished his shift. Claimant did not report the incident to anyone because no one was around and because he "didn't think it was going to be that bad," and "figured it would go away."

8. Claimant worked his regular duties for several more days. He testified, "I didn't have any problems with it," until his shift on April 11, 2021. On that date, Claimant testified his left shoulder became very painful after two hours of work. He told his supervisor, Loretta Maddux, he could not keep working because of the shoulder pain and needed to go home. Claimant did not mention any accident or work injury to Ms. Maddux.

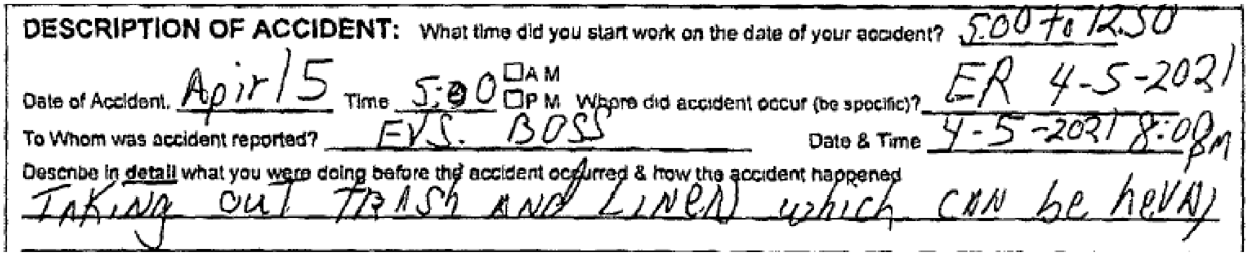
9. Claimant saw Ms. Ritchey on April 12, 2021. Ms. Ritchey documented, "pt in for pain in the left shoulder that he has had intermittently for the past few years, but over the past week it has progressed to severe with inability to use the LUE or pick it up laterally without the use of the right hand and he has tingling in the fingers of the left hand . . . . He has pain in the left shoulder, and ***denies injury*** although he does work in custodial work and sweeps, mops, and carries heavy objects." (Emphasis added). There was no mention of any incident involving wet blankets. Ms. Ritchey's examination findings were identical to those she had documented at Claimant's appointment on March 1, 2021:



Musculoskeletal:: Motor Strength and Tone: normal and normal tone. Joints, Bones, and Muscles: no malalignment or bony abnormalities and **tenderness** and **limited ROM; ttp to anterior left shoulder girdle with reduced ROM posteriorly and laterally with ttp to lateral left shoulder and proximal deltoid**. Extremities: no edema or cyanosis.

10. Ms. Ritchey diagnosed "pain of the left shoulder joint - with progressive pain that persists over the last several years with NSAIDs, although severe in the past week." She ordered an MRI and referred Claimant to Dr. Jennifer Fitzpatrick for a surgical evaluation. Ms. Ritchey also restricted Claimant to no lifting more than 10 pounds and no use of the left arm.

11. On April 13, 2021, Claimant reported the shoulder symptoms to Debra G[Redacted], a registered nurse in Employer's employee health department. Claimant said he had seen his doctor for shoulder pain but could not afford surgery. Claimant told Ms. G[Redacted] he thought the shoulder pain caused by his years of work for Employer. He said his shoulder had been painful for several years but had recently gotten worse. Ms. G[Redacted] explained she needed a specific date for the accident report, and asked if Claimant could recall any incident or activity that caused the injury. Claimant "didn't give me anything specific." Claimant completed the accident report, on which he stated the injury occurred on April 5, 2021. The form contains two sections that asked Claimant to describe how he was injured. He wrote:



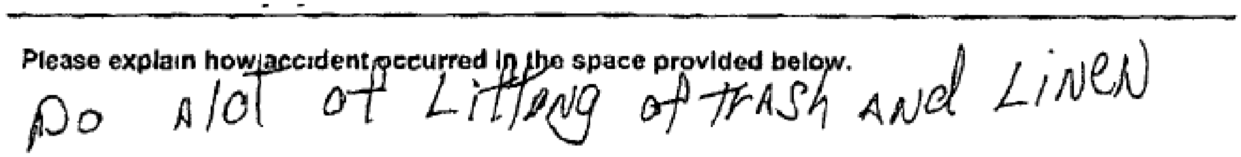
DESCRIPTION OF ACCIDENT: What time did you start work on the date of your accident? 500 to 1250

Date of Accident. Apir 15 Time 5:00 □A M □P M Where did accident occur (be specific)? ER 4-5-2021

To Whom was accident reported? EVS. BOSS Date & Time 4-5-2021 8:00 pm

Describe in detail what you were doing before the accident occurred & how the accident happened

TAKING OUT TRASH AND LINEN which CAN be heVAY



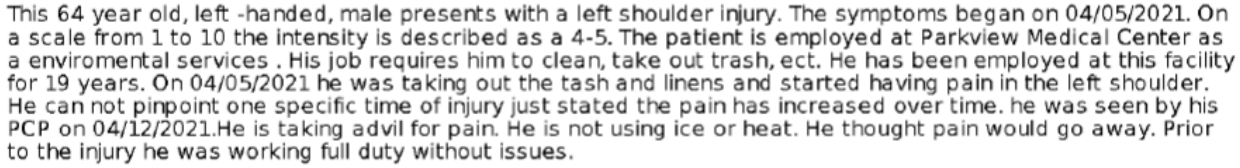
Please explain how accident occurred in the space provided below.

DO A lot of Lifting of TRASH AND LINEN

12. There was no mention of any flooded bathroom or wet blankets. Although Claimant referenced lifting heavy linen, the ALJ interprets this as was referring to his typical work activities rather than a specific accident. This interpretation is consistent with his inability to pinpoint any specific incident while discussing the matter with Ms. G[Redacted].

13. Ms. G[Redacted] gave Claimant a list of designated providers, and Claimant chose the Southern Colorado Clinic.

14. Claimant was evaluated by Terry Schwartz, PA-C at Southern Colorado Clinic on April 13, 2021. Claimant completed an intake form on which he described the accident/injury as "taking out trash in ER Dept." Mr. Schwartz documented the history as,



This 64 year old, left -handed, male presents with a left shoulder injury. The symptoms began on 04/05/2021. On a scale from 1 to 10 the intensity is described as a 4-5. The patient is employed at Parkview Medical Center as a enviromental services . His job requires him to clean, take out trash, ect. He has been employed at this facility for 19 years. On 04/05/2021 he was taking out the tash and linens and started having pain in the left shoulder. He can not pinpoint one specific time of injury just stated the pain has increased over time. he was seen by his PCP on 04/12/2021.He is taking advil for pain. He is not using ice or heat. He thought pain would go away. Prior to the injury he was working full duty without issues.

15. Mr. Schwartz further noted, "**left shoulder is progressively getting more painful with use. Left-handed. No specific injury or incident that precipitated this.**" (Bold in original). Physical examination showed tenderness of the anterior shoulder capsule and reduced range of motion. Impingement and rotator cuff tests were negative, except the lift off test, which was "comparable to right [shoulder]." Mr. Schwartz opined,

> Patient appears to have a progressive, degenerative situation. Cannot identify a specific event or injury related to onset. Discussed findings with patient. He had seen his PCP and was told he possibly has a tear but to pursue private insurance was going to be costly, so since it hurts at work, thought he should have evaluated through WC. I don't believe that this is a specifically WC injury or valid claim, so will open and close this case w/o impairment or maintenance established. Referred back to his employee health department.

16. Claimant took the paperwork he received from Southern Colorado Clinic back to Ms. G[Redacted]. She explained that because the designated provider determined the condition was not work-related, Employer would need an FMLA certification from his personal provider.

17. Claimant saw Ms. Ritchey on April 15, 2021 to complete the FMLA paperwork. Ms. Ritchey documented, "he has had persistent pain in the left shoulder as he is a housekeeper . . . and he mops, sweeps, and the left shoulder has progressed to the point that it hurts to use it, to do sweeping, mopping, or any repetitive movements." There is no mention of any incident with wet blankets. Ms. Ritchey completed the FMLA form, stating Claimant could not work his regular job until the results of the MRI were known and he had been evaluated by an orthopedist.

18. The left shoulder MRI was completed on April 30, 2021. It showed a full thickness supraspinatus tendon tear with adjacent tendinopathy, osteophytes at the margins of the AC joint impinging on the supraspinatus musculotendinous junction, small subchondral cysts in the lateral humeral head, thinning of articular cartilage in the superior glenoid, and effusion in the subacromial bursa.

19. Dr. Fitzpatrick performed left shoulder arthroscopic surgery on June 18, 2021. She performed a rotator cuff repair, distal clavicle excision, and extensive glenohumeral joint debridement. The operative report documents a large rotator cuff tear, a subacute traumatic labral tear, evidence of a prior biceps tendon rupture, minimal glenohumeral joint changes, significant AC joint arthrosis, significant synovitis in the subacromial space and anteriorly along the subscapularis, and a Type II acromion impinging on the rotator cuff. Dr. Fitzpatrick also noted significant AC joint arthrosis with associated soft tissue inflammation surrounding the AC joint.

20. Claimant saw Dr. Miguel Castrejon for an IME at his counsel's request on August 16, 2021. Claimant described cleaning up wet blankets on April 5, 2021, and stated, "at one point, he recalls lifting several blankets and throwing them forward onto the cart. As he did so, he experienced a pulling sensation within the left shoulder." Claimant told Dr. Castrejon the pain progressively worsened over the next several days to the point that he could not move his arm.[1] Claimant reported "occasional" shoulder pain before April 5, 2021 that improved with rest and did not limit his day-to-day activities. Dr. Castrejon disagreed with Mr. Schwartz's rationale for finding the shoulder symptoms are not work-related. Dr. Castrejon noted there was no documentation of any specific diagnosis, treatment recommendations, or shoulder-related disability before April 2021. Dr. Castrejon noted a pre-existing condition does not preclude workers' compensation coverage if an accident at work aggravates or accelerates the pre-existing condition. He pointed to Dr. Fitzpatrick's description of the labral tear as "subacute" as evidence of a "fairly" recent injurious event. Dr. Castrejon concluded Claimant's shoulder condition caused by the activity he described on April 5, 2021.

[1] This conflicts with Claimant's testimony that he "didn't have any problems with" the shoulder for several days after the alleged injury until April 11, 2021.

21. David S[Redacted] is the operations manager in Employer's environmental services department. Mr. S[Redacted] has known Claimant for many years. They are friendly with each other but do not have a close relationship because they work on different shifts. Mr. S[Redacted] testified to a brief conversation with Claimant in the break room. Claimant stated his shoulder was bothering him, and Mr. S[Redacted] said something to the effect of "boy, this getting old is for the birds, isn't it?" They chuckled and went their separate ways. Claimant said nothing about having hurt the shoulder at work. Mr. S[Redacted] could not recall the exact date of the conversation, but testified it was March or April 2021.

22. The testimony of Ms. G[Redacted] and Mr. S[Redacted] was credible and persuasive.

23. Claimant's testimony is not persuasive because it conflicts with his prior statements to Ms. Ritchey, Mr. Schwarz, and Ms. G[Redacted].

24. Mr. Schwartz's causation opinions are credible and more persuasive than the contrary opinions offered by Dr. Castrejon.

25. Claimant failed to prove he suffered a compensable injury to his left shoulder on April 5, 2021.

CONCLUSIONS OF LAW

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). A pre-existing condition does not disqualify a claim for compensation if a work accident aggravates, accelerates, or combines with the underlying condition to cause disability or a need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). The claimant must prove that an injury directly and proximately caused the condition for which he seeks benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The mere fact an employee experiences symptoms at or after work does not automatically establish a compensable injury. *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (October 27, 2008); *Garamella v. Paul's Creekside Grill, Inc.*, W.C. No. 4-519-141 (March 6, 2002). The claimant must prove entitlement to benefits by a preponderance of the evidence. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985). A preponderance of the evidence is evidence that leads the ALJ to find a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). Put another way, the standard is met when the existence of a contested fact is "more probable than its nonexistence." *Industrial Commission v. Jones*, 688 P.2d 1116, 1119 (Colo. 1984). The facts in a workers' compensation case are not interpreted liberally in favor of either the claimant or the respondents. Section 8-43-201.

As found, Claimant failed to prove he suffered a compensable injury to his left shoulder on April 5, 2021. Claimant's testimony that he injured his shoulder lifting wet blankets on April 5, 2021 conflicts with his own written statements on the accident report and the intake form at Southern Colorado Clinic. It also conflicts with his closely contemporaneous oral statements to Ms. Ritchey, Mr. Schwartz, and Ms. G[Redacted].[2] Claimant has repeatedly referenced his years of physically demanding work for Employer as potentially causative, but said nothing about any specific incident until many months later at the IME with Dr. Castrejon.

As for the opinion evidence, Mr. Schwartz's conclusions are credible and more persuasive than Dr. Castrejon's contrary opinions. Mr. Schwartz appropriately relied on the fact that Claimant did not report any specific incident but "just stated the pain has increased over time." He told Ms. Ritchey and Ms. G[Redacted] essentially the same thing. Ms. Ritchey has not explicitly stated she believes the condition is work-related, but to the extent she has addressed causation, she has repeatedly referenced Claimant's work activities in general, rather than any accident or specific incident. Although many years of manual labor could have contributed to the development of Claimant's shoulder pathology, this is not a claim for an occupational disease. This is a claim for an accidental injury caused by a discrete activity on a specific date.

Claimant had a documented history of progressive shoulder pain for several years before the alleged accident. Examinations by Ms. Ritchey shortly before and shortly after the alleged accident showed identical findings. Dr. The worsening of Claimant's pain April 2021 probably reflects the natural progression of Claimant's underlying condition as opposed to any work injury. Claimant failed to prove his left shoulder condition was caused or aggravated by his work activities on April 5, 2021.

ORDER

It is therefore ordered that:

1. Claimant's claim for workers' compensation benefits is denied and dismissed.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email

[2] Mr. Salazar thought the conversation took place in March or April 2021. Neither date is helpful for Claimant's case. If the conversation occurred in March, it means the shoulder was already bad enough to mention during a brief conversation with an acquaintance before the alleged incident. If the conversation was after the alleged injury, it provides yet another example of Claimant not referencing a specific incident when describing his shoulder problems.

address, it need n will only ot also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: November 8, 2021

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

The parties endorsed a number of issues for the November 4, 2021 hearing. However, as an initial matter, the ALJ considered the claimant's motion to return to Dr. Caroline Gellrick for completion of range of motion measurements as part of the Division sponsored independent medical examination (DIME) process. The ALJ heard arguments on the motion and now issues this order granting the motion.

As a result of the ALJ's present order, all other endorsed issues are held in abeyance pending the completion of the DIME process.

FINDINGS OF FACT

1. The claimant suffered a work injury on November 28, 2018. The respondents have admitted liability for the claimant's injury.

2. On May 16, 2020, the claimant attended a Division sponsored independent medical examination (DIME) with Dr. Caroline Gellrick. Following the DIME, Dr. Gellrick issued her DIME report. In that report, Dr. Gellrick noted that the range of motion (ROM) measurements could not be validated at the time of the DIME. Dr. Gellrick recommended the claimant undergo a psychiatric evaluation and then return to her for ROM measurements.

3. On July 11, 2020, the claimant was seen by Dr. Robert Kleinmann for a psychiatric evaluation.

4. After her review of Dr. Kleinmann's report, on September 12, 2020, Dr. Gellrick amended her DIME report. In that report, Dr. Gellrick stated that she was willing to see the claimant to complete ROM measurements.

5. On November 24, 2020, the Division of Workers' Compensation DIME Unit issued a letter to the parties. That letter instructed the claimant to return to Dr. Gellrick for repeat ROM measurements.

6. The claimant returned to Dr. Gellrick on February 2, 2021 for completion of the ROM measurements. However, it was on that date, that Dr. Gellirck learned that the claimant had undergone surgery of her lumbar spine on December 29, 2020. Dr. Gellrick noted in her February 2, 2021 report that she was unable to complete the ROM measurements because the claimant was under orders from her spine surgeon not to bend.

7. Although lumbar spine ROM measurements were not completed by Dr. Gellrick, on March 9, 2021, the DIME Unit issued a notice that the DIME process in this case had concluded.

8. On March 10, 2021, the respondents filed a Final Admission of Liability (FAL) relying upon Dr. Kleinmann's July 11, 2020 report.

9. It is the opinion of the ALJ that completion of the lumbar spine ROM measurements is necessary to complete the DIME process in this case. Therefore, the ALJ finds that good cause exists for the claimant to return to Dr. Gellrick for completion of the ROM measurements addressed in the Division's November 24, 2020 letter. Furthermore, until such ROM measurements are complete, and Dr. Gellrick amends her DIME report to reflect the same, the DIME process will not be complete.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

4. Section 8-43-502(3), C.R.S., provides, in pertinent part:

> Whenever the director or an administrative law judge deems it necessary to assist in resolving any issue of medical fact or opinion, the director or administrative law judge shall cause an employee to be examined by a physician or physicians from the medical review panel.

5. Here, the ALJ concludes that there is an issue involving a medical fact, namely, the lack of completion of ROM measurements. Therefore, the ALJ further concludes that the DIME process is not yet complete in this matter because Dr. Gellrick has been unable to complete ROM measurements as directed by the Division's

November 24, 2020 letter. Dr. Gellrick has attempted multiple times to complete ROM measurements, but has been unable to do so. The ALJ finds that it is necessary for the DIME physician to have the opportunity to complete the necessary ROM measurements and opine with regard to any related impairment rating. Therefore, the ALJ finds that good cause exists for the claimant to return to Dr. Gellrick for these ROM measurements.

ORDER

It is therefore ordered:

1. The DIME process is not yet complete in this matter.

2. The claimant shall return to Dr. Gellrick for the range of motion measurements (ROM) addressed in the Division's November 24, 2020 letter.

3. Dr. Gellrick shall complete range of motion measurements and update her DIME report to reflect these measurements and any related impairment rating.

4. The parties shall keep the DIME Unit apprised of the claimant's appointment date and any additional developments regarding the same.

5. All issues endorsed for the November 4, 2021 hearing are held in abeyance pending the completion of the DIME process.

Dated this 9th day of November 2021.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that his 16% extremity rating for his left shoulder should be converted to that of the whole person?

II. Disfigurement

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

The Admitted Work Injury, and Subsequent Treatment

1. Claimant sustained an admitted injury to his left shoulder region at work on April 16, 2019. (Ex. 1, p. 1). He initially reported having left shoulder pain after living a 50-pound bag of rice while at work. He was diagnosed with biceps tendinitis and a left trapezius strain. (Ex. C, pp. 1, 7-12). According to the initial progress note from April 17, 2019, the specific points of pain, as shown on a diagram, were over the left shoulder/biceps region, and also approximately where the scalene muscles attach from the cervical spine down to the upper two ribs. *Id* at 11. This area includes the trapezius and other muscles and tendons proximal to the shoulder joint. The note further states:

> Patient notes he is experiencing parasthesias and numbness in his left hand, pain with gripping and grasping. *Patient notes he has developed stiffness in his left neck and upper back.” Id.* at 8. (emphasis added).

Claimant’s initial physical therapy was specifically prescribed to target both the left shoulder *and* the left trapezius strain. *Id* at 22.

2. In a UCHealth progress note dated 7/8/2019 by PA Terry Westbrook, it was noted: “On exam, the patient does have reproducible numbness to the left arm with palpation above the *clavicle.* There is *no* reproducible left arm pain with movement of the neck or palpation of the *neck*.” Id at 27. (emphasis added).

3. Claimant returned to UC Health on August 21, 2019 for continued treatment. (Ex. 2, p. 55). The pain diagram points both to the shoulder and to approximately where the scalene muscles attach from the cervical spine. *Id* at 56. Dr. Burns performed a physical examination of the shoulder on September 19, 2019, stating:

> “moderate pain with *resisted cervical rotation to the left, the side of the pain….” Id.* at 59. She stated that Claimant’s primary finding on exam is *pain with resisted cervical rotation to the left,* pain is anterior, just above the medial clavicle.” *Id.* at 60. (emphasis added).

Shoulder Surgery by Dr. Duffey

4. Claimant failed conservative treatment and the surgery was performed by Dr. James Duffey on August 27, 2020. (Ex. 5). Claimant followed up with Dr. Duffey on October 2, 2020. Dr. Duffey states that, “[Claimant] feels like he is getting better week by week. The sore spot in his shoulder is anterior. He has some trapezial pain as well*. Id* at 109.

5. In Dr. Duffey’s post-surgical progress note dated 10/2/2020, Dr. Duffey noted: “Gradual progress following subacromial decompression, biceps tenodesis, labral debridement and distal clavicle resection. Will progress to resistive exercise at this point for his biceps and will continue with cuff rehab. He is still having some *trapezoidal pain* which is *likely related to his cervical spine issues.”* (Ex. 5, p. 109 (emphasis added).

6. Dr. Duffey continued: “He feels like he is getting better week by week. The sore spot in his shoulder is anterior. *He has some trapezial pain as well. I am reminded that he has a history of cervical spondylosis with radiculopathy.* He is not having *as many* radicular symptoms currently”. Id. (emphasis added).

7. Claimant underwent more physical therapy after his surgery. He attended his sixth post-surgical appointment on October 5, 2020. (Ex. 3, p. 87). It was noted that the shoulder itself was still not the primary functionally limiting factor: “[There is] Still pain in [left] upper shoulder/neck rather than [the] shoulder.” *Id.* Manual therapy was targeted at Claimant’s upper trapezius muscles and scalene muscles. *Id* at 88.

IME by Dr. Castrejon

8. Before being placed at MMI, Claimant underwent an independent medical examination with Dr. Miguel Castrejon on March 3, 2020. (Ex. 4). Dr. Castrejon performed an examination of Claimant’s under left upper quadrant. He noted tenderness along the superior aspect of the trapezius and along the left sternocleidomastoid distally onto the insertion of the clavicle. *Id.* at 96. He noted that the sternocleidomastoid muscle is located at the base of the skull and connects distally into the insertion of the clavicle. Claimant was experiencing muscle hypertonicity and spasm in this area. It was noted that these symptoms reduced Claimant’s cervical extension by approximately 50% of normal. *Id.*

Claimant placed at MMI by Dr. Burns / Impairment Rating Assigned

9. Claimant was placed at MMI by Dr. Burns on January 14, 2021 with a 16% scheduled rating. (Ex. 1, p. 12). Claimant was provided 10% for the distal clavicle resection and 7% for range of motion loss, which combined to 16% per the *AMA Guides.* The 16% percent scheduled rating would convert to a 10% whole person rating.

10. During her physical exam of Claimant, Dr. Burns noted, under Left Shoulder: "Palpation- mildly tender over the anterior shoulder/biceps tendon, no clavicle tenderness, no lateral tenderness or significant posterior tenderness to palpation. *He does not have any upper trap or left cervical tenderness". Id* at 11. (emphasis added).

11. Under her Assessment and Plan, she noted three items:

    1. *Strain* of left trapezius muscle, subsequent encounter
    2. Impingement syndrome of left shoulder
    3. Status post arthroscopy of left shoulder

    She then discussed with Claimant his issues with overhead lifting, and that they had agreed to note this as a permanent work restriction, even though he currently had a desk job. *Id* at 11, 12.

Claimant Testifies at Hearing

12. Claimant testified at hearing. He recalled the mechanism of injury, stating he was putting away a 50lb bag of rice under a counter when he heard a pop in his shoulder. This led to immediate pain in the "shoulder, neck, [and] down the arm." He was clear that "a lot of it was in the shoulder and the neck and in the back." (Transcript, pp. 13-14). He further stated he would have pain and tightness in his trapezius muscle. *Id* at 14-15.

13. Claimant testified that he underwent surgery for his shoulder in August of 2020. The surgery made the pain in and down the arm better, but he still continues to have the pain in his neck, the shoulder, and now headaches. *Id* at 16. Claimant stated that his physical therapy included the therapist working specifically on the trapezius and scalene muscles, because they would tighten up. It would also cause the headaches. *Id* at 17.

14. Claimant testified that he remains functionally limited in ways that impact his activities of daily living. Attempting to perform said activities leads to more tightness, soreness, and pain. Claimant attempted to demonstrate where the symptoms were located, stating "Throughout the whole shoulder right here, into the neck, and down the back into the – like, shoulder blade." *Id* at 19.

15. Claimant testified that he sustained four arthroscopic scars from his surgery. The ALJ had difficulty seeing the arthroscopic scars over the Google Meet platform, but was able to verify their existence. The ALJ accepted, through Counsel, that Claimant's arthroscopic

scars were "typical" of what you would see from this routine surgery, i.e., no extensive discoloration, keloid scarring, etc.

Dr. Scott's IME / Hearing Testimony

16. Dr. Douglas Scott performed an IME of Claimant on December 29, 2019. (Ex. B, pp. 7-13). Dr. Scott's report documented Claimant's complaints were "Left lateral neck pain" and pain radiating down his left upper shoulder into his left arm. *Id.* at 8. Dr. Scott discussed Claimant's mechanism of injury:

> [Claimant] describes the initiation of a forceful adduction/internal rotation of his left shoulder. This movement involves the subscapularis muscle with descending trapezius stabilization of the scapula. The descending trapezius muscle also bends the head to the ipsilateral side. *Id.*

17. Dr. Scott noted palpable muscle spasm over that portion of the trapezius on examination. *Id.* at 11. He acknowledged that the mechanism involved the descending trapezius that work to stabilize the scapula. Dr. Scott disagreed that the symptoms were work related.

18. Dr. Scott was asked:

> Q Did the Claimant have an injury from April 16 of 2019 that went beyond the shoulder?
> A Well, a strain of the trapezius muscle – the location of the strain is proximal to the left shoulder." (Transcript at 49).

Dr. Scott then opined, however, there was no indication of any functional impairment beyond the upper extremity. He stated that the ATP did not provide an impairment rating for the neck, therefore she felt that the injury was to the left shoulder. *Id* at 49-50. In the final analysis, Dr. Scott felt that Claimant had experienced a *strain* of his trapezius from the work injury, but the neck pain due to spondylosis was not due to the work injury.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. §8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. §8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). While the ALJ finds that Claimant has testified sincerely regarding his treatment and ongoing symptoms, and reported his symptoms to all medical providers, it is noted that Claimant has no expertise in issues of causation, nor could he be expected to.

D. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). In this instance, the ALJ has heard the IME opinions of two medical experts, both of whom are sincere in their opinions regarding the evidence at issue herein. Further, the ALJ has reviewed the medical opinions of Claimant's ATPs, as expressed through their written reports.

E. Further, courts are to be "mindful that the Workmen's Compensation Act is to be liberally construed to effectuate its humanitarian purpose of assisting injured workers." *James v. Irrigation Motor and Pump Co.*, 503 P.2d 1025 (Colo. 1972).

Conversion to Whole Person, Generally

F. Whether the Claimant sustained a "loss of an arm at the shoulder" within the meaning of § 8-42-107 (2) (a), C.R.S., or a whole person medical impairment compensable under § 8-42-107 (8), C.R.S. is one of fact for determination by the ALJ. In resolving this question, the ALJ must determine the situs of the Claimant's "functional impairment," and the situs of the functional impairment is not necessarily the location of the injury itself. Langton v. Rocky Mountain Health Care Corp., supra; Strauch v. PSL Swedish HealthcaSystem, supra. Because the issue is factual in nature, we must uphold the ALJ's determination if supported by substantial evidence in the record. Section 8-43-301(8), C.R.S.; Walker v. Jim Fuoco Motor Co., 942 P.2d 1390 (Colo. App. 1997). This standard of review requires us to defer to the ALJ's resolution of conflicts in the evidence, credibility determinations, and plausible inferences drawn from the record. Metro Moving and Storage Co. v. Gussert, 914 P.2d 411 (Colo. App. 1995).

G. Whether the Claimant has sustained an "injury" which is on or off the schedule of impairment depends on whether the claimant has sustained a "functional impairment" to a part of the body that is not contained on the schedule. *Strauch v. PSL Swedish Health Care System*, 917 P.2d 366 (Colo. App. 1996). Functional impairment need not take any particular impairment. Discomfort which interferes with the claimant's ability to use a portion of his body may be considered "impairment." *Mader v. Popejoy Construction Company, Inc.*, W.C. No. 4-198-489, (ICAO August 9, 1996). Pain and discomfort which limits a claimant's ability to use a portion of his body may be considered a "functional impairment" for determining whether an injury is on or off the schedule. *See, e.g., Beck v. Mile Hi Express Inc.*, W.C. No. 4- 238-483 (ICAO February 11, 1997).

Conversion, as Applied

H. In this case, the ALJ finds that Claimant injured his left trapezius, and injured his shoulder joint as well, while lifting the bag of rice at work. The claim was properly admitted as compensable, since Claimant suffered a work injury to both regions which required medical treatment. In this case, the ALJ finds that the treatment for his shoulder injury was appropriate, to wit: the subacromial decompression, biceps tenodesis, labral debridement, and distal clavicle resection as performed by Dr. Duffey on 8/27/2020. Claimant's physical therapy and aftercare was also appropriately rendered, resulting in him being placed at MMI by this ATP, Dr. Burns, for his impingement syndrome. The ALJ further finds that Dr. Burns applied the proper criteria in assigning an impairment rating of 16%, limited to the schedule. Per the AMA Guides, Dr. Burns also performed the ministerial, numerical act of converting from extremity to the whole person, but did not make this a recommendation or finding.

I. The ALJ concurs with Dr. Burns, and the subsequent opinion of Dr. Scott that this injury should not be converted – not because Claimant does not continue to have symptoms as he describes, but because Claimant suffered only a *strain* to his trapezius. He was properly placed at MMI for this trapezius strain when he was rated. In so doing, Dr. Burns found that this strain was not of a *permanent* nature; thus it did not warrant a *permanent* impairment rating. At the final exam, in fact, she noticed no *tenderness* with the trapezius. The strain had resolved. The ALJ concurs. In this instance, there is record support that Claimant's ongoing trapezius issues are due instead to Claimant's cervical spondylosis. This was noted by Dr. Duffey in his reports. Such finding is also consistent with PA Westbrook's notes of 7/8/2019, wherein Claimant's *arm* troubles (not his trapezius) were consistent with the impingement syndrome – which as appropriately addressed by Dr. Duffey's surgery. In fact, Claimant's *arm* issues largely resolved from the surgery.

J. There is no medical evidence that Claimant's cervical spondylosis (the source of his *ongoing* trapezius pain) was in any way *caused* by lifting the bag of rice. This degenerative condition already existed at the time of the injury. There is also insufficient evidence in the record that such lifting incident *caused* Claimant's latent spondylosis to become symptomatic, requiring medical treatment. Certainly neither Drs. Burns, Duffey, nor Scott so opined. The ALJ notes that while Dr. Castrejon no doubt made sincere observations about Claimant's trapezius complaints at the time of his IME exam, such exam was performed 10 months *before* Claimant was placed at MMI. Thus, in the interim, the *strain* component that Dr. Castrejon observed had resolved. Further, at no point did Dr. Castrejon opine (that the ALJ can discern) that any symptoms of spondylosis were *caused by* the lifting incident – thus leading to Claimant's *ongoing* trapezius complaints. To the extent that Dr. Castrejon did so opine, the ALJ is more persuaded by Drs. Duffey, Burns, and Scott.

K. In summary, while Claimant may have made a colorable claim that his ongoing trapezius complaints affect functioning proximal to the shoulder joint, he has not shown that such complaints are *causally related* to the work injury. Claimant has not shown in this instance that his scheduled rating should be converted to the whole person.

Disfigurement

L. The ALJ finds and concludes that as a result of his 4/16/2019 work injury, Claimant has a visible disfigurement to the body consisting of four arthroscopic surgical scars surrounding his left shoulder. As found, those four scars are typical of what one might observe from such procedure, with no observable swelling, and no significant skin discoloration or alteration of texture beyond the small incisional scars. Nonetheless, Claimant has sustained a serious permanent disfigurement to areas of the body normally exposed to public view, which entitles Claimant to additional compensation. Section 8-42-108 (1), C.R.S. The ALJ Orders that Insurer shall pay Claimant $500 for that disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

ORDER

It is therefore Ordered that:

1. Claimant's request to convert his extremity rating to that of the whole person is denied and dismissed.

2. Respondents shall pay disfigurement benefits in the amount of $500.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. *In addition, in order to best assure prompt processing of your Petition, it is **highly recommended** that you send a copy of your Petition to Review to the Colorado Springs OAC via email at oac-csp@state.co.us.*

DATED: November 9, 2021

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NOS. 5-111-973-005

ISSUES

The issues set for determination were:

- Is Claimant entitled to penalties for Respondent's failure to pay the settlement proceeds agreed to by the parties' Stipulation and approved by the Order dated March 11, 2020?

PROCEDURAL STATUS

At the outset of the hearing on June 9, 2021, the Court heard argument on Respondent's Opposed Motion for Extension of Time to Commence Hearing, filed on May 25, 2021. The ALJ reviewed the Motion, Claimant's Response (filed on June 7, 2021) and heard oral argument. Claimant objected to the requested continuance, as he relied on the Stipulation that Respondent would make settlement payments in accordance with the Stipulation and Order.

That Motion was denied, as the ALJ found there were significant delays from the date on which the hearing was originally set in March 26, 2020. Further, Respondent failed to show good cause for an Order granting the Opposed Motion for Extension of Time to Commence Hearing. The case then proceeded to hearing on June 9, 2021.

Respondent then filed a Motion for Additional Time to Respond and Order For Additional Time to Respond on June 25, 2021. This Motion requested additional time to August 2, 2021 to respond. The Motion for Additional Time to Respond was denied on July 1, 2021.

Respondent filed written submissions in response to the July 1, 2021 Order. In this filing, Respondent alleged that it was not responsible for the payment of benefits to Claimant because he had died while before all payments were made pursuant to the settlement agreement.

FINDINGS OF FACT

1. Claimant alleged he was injured at work on June 12, 2019 and that Respondent Kiowa Auto Repair, as well as its principal, Harland Rognmoe was uninsured at the time.

2. The parties reached a settlement agreement whereby Respondent agreed to pay Claimant a total of $20,000 in settlement of Claimant's workers' compensation claim.[1]

[1] Exhibit 2.

3. The settlement agreement provided that a $5,000.00 payment was to be made on or before March 26, 2020, with the remaining $15,000.00 to be paid before May 27, 2020.

4. The Stipulation and Settlement Agreement was approved by Order on March 11, 2020.

5. Claimant deferred going to hearing on the issues of compensability, wage and medical benefits in reliance on the settlement agreement.

6. Respondent made one payment on or about May 26, 2020, but failed to make any further payments.[2]

7. Respondent failed to abide by the settlement agreement when it did not pay the remaining amount of $15,000.00.

8. Claimant was harmed by Respondent's failure to pay the settlement proceeds.

9. The failure to make the remaining settlement payment was a violation of the Order approving the Stipulation and Settlement Agreement.

10. The violation of the Order approving the Stipulation was a violation of § 8-43-304(1) C.R.S.

11. Claimant died in the interim and his attorney of record filed an Application for a Hearing on February 26, 2021 on the issue of penalties.

12. Respondent offered no evidence in defense of the penalty claim.

13. There was no evidence in the record which showed Respondent's conduct was reasonable.

14. Claimant is entitled to recover penalties for Respondent's violation of the March 11, 2020 Order.

15. The ALJ has determined that penalties in the amount of $200.00 per day are warranted to punish Respondent's violation of § 8-43-304(1) C.R.S.

16. The $200.00 per day penalty (out of a potential $1000 per day penalty) is proportionate and reasonable given the violation of the Order in this case.

17. There are 378 days between May 27, 2020 and June 9, 2021.

[2] Exhibit 4.

18. Respondent is assessed penalties at the rate of $200 per day for 378 days for a total of $75,600.00 for its failure to comply with the March 11, 2020 Order.

19. Evidence and inferences inconsistent with these findings were not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Penalties-Violation of An Order

Whether statutory penalties may be imposed under § 8-43-304(1) C.R.S. involves a two-step analysis. The statute provides for the imposition of penalties of up to $1000 per day where the insurer "violates any provision of article 40 to 47 of [title 8], or does any act prohibited thereby, or fails or refuses to perform any duty lawfully enjoined within the time prescribed by the director or the panel, for which no penalty has been specifically provided, or fails, neglects or refuses to obey any lawful order made by the director or panel…"

This provision applies to orders entered by a PALJ. Section 8-43-207.5, C.R.S. (order entered by PALJ shall be an order of the director and is binding on the parties); *Kennedy v. Industrial Claim Appeals Office,* 100 P.3d 949 (Colo. App. 2004). A person fails or neglects to obey an order if he or she leaves undone that which is mandated by an order. A person refuses to comply with an order if she withholds compliance with an order. *See Dworkin, Chambers & Williams, P.C. v. Provo,* 81 P.3d 1053 (Colo. 2003).

In cases where a party fails, neglects or refuses to obey an *order* to take some action, penalties may be imposed under § 8-43-304(1), even if the Act imposes a specific violation for the underlying conduct. *Holliday v. Bestop, Inc.,* 23 P.3d 700 (Colo. 2001); *Giddings v. Industrial Claim Appeals Office,* 39 P.3d 1211 (Colo. App. 2001). Thus, the ALJ must first determine whether Respondent's conduct constitutes a violation of the Act, a rule, or an order.

In the case at bar, the undisputed evidence established the fact that Respondent violated the order issued by PALJ Clisham. (Finding of Fact 9). In particular, Respondent failed to make the agreed-upon payments pursuant to the agreement it had made with Claimant. (Findings of Fact 6-7). The Colorado Worker's Compensation Act requires settlement payments to be made in accordance with the agreement. The failure to make the settlement payments constitutes both a violation of the Act, as well as the Order approving the settlement. (Findings of Fact 9 and 10). Nothing in the record refutes the conclusion that the violation occurred. Accordingly, the first prong of the analysis as to whether penalties are appropriate was met in this case.

Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational argument based in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* W.C. No. 4-187-261 (ICAO, Aug. 2, 2006). There is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

The question of whether the insurer's (or Respondent's) conduct was objectively reasonable ordinarily presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005); *see also Paint Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). A party establishes a prima facie showing of unreasonable conduct by proving that an insurer violated a rule of procedure. *Pioneers Hospital v. Industrial Claim Appeals Office, supra*. If Claimant makes such a prima facie showing, the burden of persuasion shifts to the Respondents to show their conduct was reasonable under the circumstances. *Pioneers Hospital v. Industrial Claim Appeals Office, supra, Human Resource Co. v. Industrial Claim Appeals Office,* 984 P.2d 1194 (Colo. App. 1999).

Turning to the second part of the analysis, the ALJ concluded Respondent offered no explanation for its failure to make the payments it had agreed to at the time the case was settled.[3] (Finding of Fact 11). There was no evidence before the Court which provided any explanation for Respondent's conduct. *Id.* In fact, the record was bereft of any information or evidence provided by Respondent to explain the failure to pay what they had agreed to under the circumstances. Thus, there was no evidence that Respondent's conduct was reasonable under the circumstances. (Finding of Fact

[3] In this case, Respondent's conduct was evaluated on the issue of penalties, since it was legally obligated to make the payments under the agreement.

12). Accordingly, using the objective test, the ALJ concluded that this unreasonable conduct subjected Respondent to penalties under the Act.

As found, Claimant deferred going to hearing, relying instead on the settlement with Respondent. (Finding of Fact 5). Claimant was harmed by Respondent's failure to pay pursuant to the settlement agreement. (Finding of Fact 8). The ALJ determined penalties in the amount $200 per day for each day against Respondent was warranted in this case. Since Respondent failed to pay pursuant to the agreement made with Claimant, Respondent will be penalized a total of $75,600.00 for the 378 days it failed to pay.

Respondent cited *Estate of Huey ex rel Huey v. J.C. Trucking*, 837 P.2d 1218 (Colo. 1992) for the proposition that Claimant's death extinguished Respondent's duty to pay pursuant to the settlement agreement. Said reliance is misplaced, as the facts (and the penalty allegations are) distinct in the instant case. *Estate of Huey ex rel Huey v. J.C. Trucking* involved the question of whether Claimant's estate could recover benefits after his death. In *Estate of Huey ex rel Huey v. J.C. Trucking,* Claimant was injured when he fell from the cab of a truck. He required medical treatment and lost time from work as a result of his injuries. Claimant subsequently died and the case went to hearing. The ALJ found the claim compensable and ordered benefits to be paid to his estate.

On appeal, the issue was whether the benefits were "accrued and unpaid" (and therefore recoverable) despite Claimant's death. The Industrial Claim Appeals Panel ("Panel") reversed the ALJ's order and denied all benefits on the grounds that the ALJ did not have authority to order workers' compensation benefits after Claimant's death. The Colorado Court of Appeals affirmed the Panel's decision. The Colorado Supreme Court reversed and remanded with directions to return the case to the Panel for a review of the ALJ's determination that Claimant's injury occurred while he was performing services arising out of and in the course of his employment. The Court determined that the terms "accrued and unpaid" (and therefore recoverable) meant "due and payable" to Claimant's dependents, as the conditions for recovery under the Act were met because Claimant suffered a compensable injury. The Court found the ALJ's order awarding benefits was proper. *Id.* at 1221-1222

In the case at bar, the issue is not what benefits are due and payable, but rather whether the conduct of Respondent violated the statute and the Order which approved the settlement. Claimant is not seeking payment of the settlement proceeds, but rather penalties for Respondent's violation. The ALJ has determined that the issue of imposition of penalties is separate from the question of whether Claimant's estate can recover the settlement proceeds. It is undisputed that Respondent failed to comply with the lawful Order issued by the PALJ in this case. As found, Respondent was legally responsible to pay the settlement proceeds to Claimant and the failure to do so violated the Order approving the settlement. (Findings of Fact 9 and 10). Under these facts, where Respondent violated both the Act and an Order, the ALJ determined that penalties are properly imposed. The rationale for imposing a penalty for a violation of an Order was articulated by Justice Erickson in *Giddings v. Industrial Claim Appeals Office, supra*, 39 P.3d at 1214:

> "This interpretation of the penalty provision in § 8-48-304(1) furthers the legislative intent of the Act, which is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. 2001. The Act is intended to compensate injured workers, while controlling costs and minimizing claim delays. *Dep't of Labor & Employment v. Esser*, 30 P.3d 189 (Colo.2001). Allowing the imposition of penalties for the disobedience of an ALJ's order furthers this underlying policy by allowing full compensation and would likely compel insurers to comply with lawful orders. See *Arenas v. Industrial Claim Appeals Office*, 8 P.3d 558, 562 (Colo.App.2000) [purpose of penalty is to deter misconduct].

In this case, Respondent offered no evidence in defense of the violation of the statute and the failure to pay pursuant to the Order approving the settlement. There was no evidence in the record that Respondent attempted to cure the violation. The failure to abide by the settlement order directly harmed the Claimant, who did not have the benefit of the settlement he negotiated with Respondent. Accordingly, penalties are properly imposed in this case.

ORDER

IT IS HEREBY ORDERED:

1. Respondent shall pay the amount of $75,600.00 in penalties for its failure to pay the settlement proceeds when due.

2. Of the $75,600.00 assessed in penalties, Respondents shall pay 75% ($56,700.00) to Claimant and his attorney of record and 25% ($18,900.00) shall be paid to the uninsured employer fund.

3. Issues not expressly decided herein are reserved for future determination.

DATED: November 10, 2021

STATE OF COLORADO

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

ISSUES

Whether Claimant has established by a preponderance of the evidence that the surgery recommended by an authorized treating physician is reasonable, necessary and related to the July 12, 2020 admitted work injury.

PROCEDURAL HISTORY

Claimant filed an Application for Hearing on July 19, 2021 on issues of medical benefits that are reasonably necessary and related to the injury, including authorization for surgery.

Respondents filed a Response to Application for Hearing dated August 18, 2021 challenging the reasonable necessity, relatedness and causation of the surgery. At the time of the hearing Respondents withdrew the issues of waiver, estoppel and latches.

STIPULATIONS

The parties stipulated that the Claimant's date of injury is July 12, 2020, as shown on the General Admission of Liability dated August 25, 2020, despite multiple references in the records to an alternative date.

The parties further stipulated that Michael A. Gallizzi, M.D. of Ortho One at Sky Ridge is an authorized treating physician.

FINDINGS OF FACT

Based on the evidence and testimony presented, the ALJ enters the following findings of fact:

1. Claimant started working for Employer on or about July 10, 2020 as a nurse. She has a degree as a Licensed Practical Nurse (LPN) and has been working as a nurse off and on since she was in her teens. Claimant is currently 73 years old and was 72 when she was injured in the course and scope of her employment with Employer.

2. Employer is a long-term care facility, who hired Claimant as a temporary nurse through a temporary agency, as Employer was short staffed. Employer's temporary agency places nurses in different facilities when there is a shortage of staff. Claimant was placed at the long-term care facility, where she was injured a few days later.

3. On July 12, 2020 a Certified Nurses' Assistant (CNA) was attempting to lift a patient from the floor where the patient had slid off her reclining chair. The CNA was unable to lift the patient on her own and called for assistance. Claimant answered the call for assistance. The room where the patient had slid from the reclining chair to the ground was small and crowded by the bed, the chair, the patient and CNA. The CNA, who was using a gait belt, was behind the patient, and Claimant bent at the knees and forward to hold onto the gait belt from in front of the patient. Claimant aligned her feet and knees with those of the CNA so that they could both attempt lifting the patient, using the gait belt strap. In the process of pulling the patient upward, not realizing that the patient was not assisting and was dead weight, Claimant felt a sharp twinging pain in her low back that immediately wrapped around her abdomen with a ripping sensation.

4. Both Claimant and the CNA placed the patient back on the floor. Claimant sat on the patient's bed for a few minutes and a third individual came to assist in lifting the patient. Claimant then continued to work the rest of her shift, despite the pain. The following day, July 13, 2020, was Claimant's day off and she rested her back including taking medication, laying down and using a hot tub to try and relax the muscles of her back. However, by July 14, 2020, Claimant was in such extreme low back pain that she requested that her husband take her to be seen by a medical provider or assist her in obtaining medical care.[1] Claimant testified that, by then, the pain in her buttocks progressed and she was having problems standing or walking.

5. Claimant was first evaluated at HealthOne CareNow Urgent Care on July 17, 2020 by Kayla Fisk, NP. The medical records indicate a history consistent with the Claimant's description of the incident, where she was lifting a dead weight patient from the floor. The nurse described that the CNA was behind the patient and Claimant was in front of the patient, and when Claimant bent over to assist with the lift, she felt an immediate sharp pain in her low back that wrapped around her abdomen. Nurse Fisk reported that Claimant was already on Etodolac for Osteoarthritis (OA), which she continued taking until she was seen at CareNow, as well as resting, avoiding standing, applying Bengay, and sitting in the hot tub up to three times daily, without relief.

6. Nurse Fisk reported that Claimant did not complain of any radicular pain to the lower extremities, other than the buttocks pain. Claimant reported to Nurse Fisk that she had no prior medical history involving problems with her low back. Claimant did report that she had had knee replacements. On exam, Nurse Fisk noted Claimant had reduced range of motion (ROM) of the low back, abnormal gait and posture, including a hunched forward posture, muscular abnormalities, paraspinals spasming of the lumbar muscles, tenderness of the lumbar spine, and abnormal deep tendon reflexes of the right lower extremity. Claimant was diagnosed with sprain of the ligaments of the lumbar spine and provided restrictions and a muscle relaxer.

[1] The parties did not provide any medical records of an emergency visit, so this ALJ is assuming none exists, and that the request for assistance from Claimant's husband was to contact the employer to obtain the referral and/or authorization.

7. Claimant returned to Urgent Care on July 24, 2020 and Dr. Travis Bellville examined Claimant. Dr. Bellville has the exact same history paragraph as Nurse Fisk, word for word, so will not be repeated. Medical exam was significantly similar. Dr. Bellville ordered physical therapy (PT), advised to stop the Medrol Pak and continue with the muscle relaxer, though he noted improvement. The pain diagram shows complaints of pain across the low back and into the lower abdomen, with pain in the right upper buttocks area.

8. Claimant started physical therapy on August 10, 2020 at Rocky Mountain Spine and Sport Physical Therapy due to acute right-sided low back pain with right-sided sciatica and strain of the lumbar spine. Claimant reported low back pain that started on July 12, 2020 when she was helping a coworker get a patient off the floor and heard a pop in her back and strain along her abdomen. The next day she could barely move at home. She reported a sharp pain while moving around, only able to walk, sit, and stand for up to 30 minutes at a time. The records document that Claimant was barely able to walk longer than 70 feet at home and in community without pain in low back. Claimant reported that she had radiating pain into her buttock and an antalgic gait. She had not had any previous injuries like this before. Therapist Tylor Bennett noted that Claimant had difficulty with all activities due to pain, except for flexion, and had moderate tightness in the bilateral lumbar paraspinals muscles. They recommended treatment including dry needling, manual therapy, joint mobilization and manipulation of soft tissue, myofascial release and passive/assisted range of motion techniques, use of ice/heat and TENs unit, neuromuscular reeducation, and therapeutic exercises to increase mobility and strength.

9. On August 14, 2020 Claimant was seen by Jessica Leitl, M.D. History was again duplicated from the first visit. She continued to note reduced ROM, reduced flexion, abnormal gait and posture. Dr. Leitl noted Claimant had increased pain with position changes. She also documented muscular abnormalities as well as tenderness of the sacral muscles, right greater than left SIJs[2] and buttocks pain. She recommended Claimant speak with her therapist to include response to deep tissue massage and trial of different modalities, stating that the SIJs appear to be the primary pain generator. She ordered a trial of lidocaine patches, and continued PT. The pain diagram showed Claimant's low back problems and pain in her buttocks and groin area.

10. Respondents filed a General Admission of Liability (GAL) on August 25, 2021, admitting to medical benefits that are reasonably necessary and related to the July 12, 2021 accident, as well as to temporary total disability benefits beginning July 16, 2021.

11. Dr. Bellville again saw Claimant on August 26, 2021. He noted that Claimant's symptoms were similar to those identified by Dr. Leitl with tenderness of the sacral muscles, right greater than left SIJs and buttocks pain. Claimant advised she would like to be seen by a spine specialist and Dr. Bellville referred Claimant to Dr. Michael Gallizzi, an orthopedic surgeon, as he noted that Claimant was not improving

[2] Sacroiliac joints

with the PT. He continued the PT and medications. Claimant's pain diagram now showed progressing problems from the low back to the lower buttocks, abdomen and upper thighs, as well as bilateral knee pain.

12. Claimant had X-Rays performed on September 1, 2020 pursuant to Dr. Gallizzi's referral. The films were interpreted by Dr. Eduardo Seda of Health Images, Castle Rock, as showing degenerative disc and joint changes with moderate L4-5 spondylolisthesis.[3]

13. Michael A. Gallizzi, M.D. evaluated Claimant on September 2, 2020. He took a history that is consistent with the history provided at hearing, specifically that she was assisting with lifting a dead weight patient off the floor and felt immediate back pain. Claimant advised that she had not had back pain prior to the July 12, 2020 accident. He reviewed the X-rays and found that Claimant had a moderate 6 mm L4-5 degenerative spondylolisthesis on flexion, with mildly narrowed disc heights at the L4-5 and L5-S1. Gallizzi ordered medial branch blocks bilaterally to see if that would assist with treating Claimant's work-related pain complaints. He stated that if they provided greater than 50% relief of symptoms that she would be a candidate for endoscopic medial branch transection.

14. On September 16, 2020 Claimant returned to Dr. Gallizzi's office to advise that her symptoms had not improved since her prior visit, and she had not yet had the medial branch blocks recommended due to prior authorization difficulties. Adam Welker, PA-C, reported she continued to have difficulty with activities of daily living, such as washing dishes, doing laundry, making the bed. After any period of activity, her pain was drastically increasing. Claimant was encouraged to work with Mountain View Pain Center to schedule the injections and keep a pain log to document the effectiveness of the pain relief, especially immediately after the procedures. Mr. Welker counselled Claimant that the medial branch blocks would likely relieve Claimant's gluteal pain.

15. On October 1, 2021 Claimant was evaluated by Shaun Gabriel, M.D. of Mountain View Pain Center. Claimant reported significantly difficulty tolerating her daily living activities and managing her pain. Claimant was referred by Dr. Gallizzi for lumbar medial branch blocks (LMBBs) and possible radiofrequency ablations (RFA), if appropriate. Claimant reported pain in her low back bilaterally, radiating into the buttocks with left and right pelvic pain. She had burning sensation, aching pain, sharp and throbbing pain that was always present. She reported that her pain was worse when stooping, bending, lifting, and turning. She reported some relief when lying down, with heat, relaxation and taking medications.

16. On exam, Dr. Gabriel noted that Claimant had an antalgic gait and was limping. He noted she had tenderness along the posterior vertebral bodies at L4-L5 and extreme tenderness and ropiness along the paraspinals muscles at L3-L5. Straight leg raise was positive bilaterally. Facet loading test was positive bilaterally. Hip internal

[3] Vertebral slippage or malalignment.

rotation was positive bilaterally for pain. Dr. Gabriel assessed abnormal range of motion with pain. Diagnoses were lumbar spondylolysis, low back pain, lumbar strain, and muscle spasm of the back. After considerations of conservative measures, he recommended she pursue lumbar medial branch blocks leading to endoscopic RFAs if appropriate. He also recommended an MRI.[4]

17. Dr. Gabriel recommended the MBBs from L2-L5 and requested prior authorization on October 6, 2021.

18. John Keeling, PA-C attended Claimant on October 7, 2020 documenting that Claimant had loss of ROM of the lumbar spine, abnormal muscular exam, abnormal gait and posture, with axial pain that radiates to the buttocks. He also noted that Claimant was extremely frustrated and depressed at this point by her lack of improvement and lack of mobility. Claimant was also extremely frustrated that she had not yet been able to return to her work as a nurse, as she had been an active nurse for years, causing adjustment problems. He continued to diagnose lumbar spine sprain but also a major depressive disorder. He referred Claimant to Rocky Mountain Physical Therapy and to Dr. Kevin Reilly for psychological evaluation. He continued Claimant's restrictions of 10 lbs. lifting and carrying and limited walking and standing to 2 hours per day.

19. The MRI results were interpreted by Dr. James Piko of Resilience Imaging, which was performed on October 14, 2020. Most significantly, the MRI showed L4-L5, a posterior disc bulging of 4-5 mm. Dr. Pike noted that the posterior articular facets and ligamentum flavum had pronounced hypertrophic changes contributing to high-grade central canal stenosis with a canal width measuring 4 mm, high-grade lateral recess narrowing and moderate bilateral foraminal stenosis. At the L5-S1, Dr. Pike commented that there was disc bulging and a superimposed right central 4 mm focal disc protrusion with annular perforation indenting the thecal sac and impinging the right S1 nerve root. Other disc bulges were seen at the T12 through L3.

20. On October 27, 2020 Dr. Gabriel reexamined Claimant finding that she continued to have significant bilateral lumbar axial pain with radiation into her buttocks and hips, with constant pain worsened with forward bending and rotation. He stated that exam, and imaging, were consistent with facet-mediated lumbar pain in addition to some disc-mediated components as well. Dr. Gabriel noted that Claimant's pain was worse during this exam and stated he was awaiting insurance authorization to proceed with the MBBs.

21. Claimant was evaluated initially by Dr. Annie Richardson of NBRPS Neurobehavioral and Rehabilitation Psychology Services on October 19, 2020. Dr. Richardson took a history that Claimant was in her usual state of health until her on the job injury, while working as a nurse. She recounted a mechanism of injury substantially the same as testified by Claimant at hearing. She reported to Dr Richardson that she was experiencing significant symptoms of depression related to her pain, work

[4] Magnetic resonance imaging.

restrictions, and limited activity. She had decreased motivation, self-care, lack of interest, and engagement in activities. Claimant reported feeling worthless and had increased negative thoughts. Claimant conveyed that she had concerns about being unable to work, and had weight gain caused by the injury.

22. Claimant reported to Dr. Richardson that the pain in her lower back is predominantly on the left side. She rated her pain as a 5/10 on a visual analog scale (VAS), with her lowest pain rating at 2 and her worst pain an 8. Claimant reported that her pain does vary over the course of a usual day, though she did not notice any consistent patterns, other than when she switches positions or walks more than a short distance, which aggravates her pain. Sitting, lying down, using heating pads, and muscle relaxants help to alleviate her pain. Dr. Richardson diagnosed Claimant with somatic symptom disorder with chronic pain as well as an adjustment disorder with depressed mood related to the work injury. She recommended psychological counselling, including cognitive behavioral therapy, counselling focused on chronic pain coping strategies, and biofeedback or relaxation therapies with William Beaver, M.A. She also advised she should consider antidepressant medication.

23. Claimant had multiple telemedicine therapy sessions with Dr. Richardson focusing on stress management, pain management and identifying meaningful activities that Claimant should engage in, including light household chores, stretching and movement. Claimant also had multiple visits with Mr. Beaver for biofeedback.

24. Dr. Gabriel proceeded with a right L2, L3, L4 Lumbar Medial Branch and L5 Dorsal Ramus Blocks on November 2, 2020. Dr. Gabriel noted that following the injection Claimant reported increased ROM and 60-80% pain and symptom relief. On November 6, 2020 Dr. Gabriel proceeded with a left L2, L3, L4 Lumbar Medial Branch and L5 Dorsal Ramus Blocks. Dr. Gabriel noted that following the injection Claimant reported increased ROM and 100% pain and symptom relief.

25. On November 5, 2020 Mr. Keeling examined Claimant again, making similar findings. He ordered more PT, stated that psychological care was going well, needed to follow up with the orthopedic surgeon and he documented the MRI findings. Mr. Keeling referred Claimant back to biofeedback and injections with the pain clinic.

26. Dr. Gabriel performed a second set of right L2, L3, L4 Lumbar Medial Branch and L5 Dorsal Ramus Blocks on November 9, 2020 and a second set of left blocks on November 12, 2020. Dr. Gabriel noted that following the injection Claimant reported increased ROM and 60-80% pain and symptom relief for both sets of injections.

27. Claimant returned to consult with Dr. Gallizzi regarding the results of the medial branch blocks on November 18, 2020. Dr. Gallizzi's physician assistant, Mr. Adam Welker reviewed the MRI with Claimant and went over the images that show significant spinal stenosis in the L4-L5 region, measuring approximately 5 mm. Claimant reported that the medial branch blocks did provide some hours of significant, greater than 50%, relief of her back pain. Claimant reported she was able to do things that she wanted to do

without significant discomfort. Her main concern was that the injections provided only a "temporary fix" and she asked to discuss all options for her current condition.

28. Claimant reported to Mr. Welker that she leans forward on a shopping cart when shopping but stated that it was difficult for her to assess any lower extremity symptoms because of the overwhelming back pain. However, she did report that she gets fatigued with prolonged walking and has to sit and rest. They discussed the endoscope medial branch transection and lumbar fusion procedures, the risk/benefits associated with each and the recovery process following each procedure, but Claimant wanted to discuss all surgical options to repair her underlying abnormalities. Due to her significant spinal stenosis at the L4-5 region, approximately 5 mm thecal sac diameter, Mr. Welker advised Claimant to return to consult with Dr. Gallizzi to discuss options at her follow up visit.

29. On November 23, 2020 Ms. Laura Storage, a physical therapist, noted that Claimant continued to progress with core and lower extremity strengthening but Claimant complained of low back pain standing and walking. She had difficulty with transfers from sitting to prone position due to pain. She noted that Claimant had moderate tone in the right lumbar paraspinals, which improved with soft tissue mobilization. On November 25, 2020 Sarah Tangen noted that Claimant continued to still be very limited with standing and gait tolerance, lifting, and carrying.

30. On December 1, 2020 Ms. Tangen wrote that Claimant seemed to be getting worse, not better and that her legs gives out on her, even though she was giving good effort during physical therapy treatment. Taylor Bennet documented on December 2, 2020 that, while Claimant continued to have benefit of therapy, she continued to worsen as Claimant reported she was having difficulties with activities of daily living, lifting and navigating stairs, and continued to demonstrate an antalgic gait patter during walking.

31. Dr. Bellville assessed Claimant's progress on December 4, 2020 noting Claimant was complaining of symptoms of numbness and tingling, and weakness in the lower extremities. He reported Claimant had muscle pain, back pain, continuing with abnormal gait and posture, and reduced range of motion of the back. He continued the PT prescription and stated that Claimant was anticipating exploring surgical intervention options.

32. Claimant returned to consult with Dr. Gallizzi on December 9, 2020. On exam he found that Claimant had limited range of motion of the lumbar spine and that Claimant's pain would increase with hyperextension. She was tender to palpation in the lumbar spine. From a seated position, with the left and right leg fulling extended and then flexed at the hip with foot dorsiflexion, caused significant pain down to the calf. Dr. Gallizzi diagnosed spinal stenosis of the lumbar region with neurogenic claudication, spondylosis of lumbar spine, spondylolisthesis at L4-L5 level and spondylosis of lumbosacral region.

33. Dr. Gallizzi noted that, unfortunately, Claimant's work injury caused the symptoms that precipitated Claimant's rapid decrease in function. He noted that she had had no improvement with physical therapy, as she now uses a cane in her right hand to

be able to ambulate, Claimant's function continued to decrease due to her injury and she had spinal instability as well as neuroforaminal stenosis. Dr. Gallizzi recommended a staged L4-S1 anterior posterior lumbar interbody fusion to reduce the spondylolisthesis improve the neuroforaminal height at L5-S1 and improve her sagittal alignment. Dr. Gallizzi requested authorization to perform a L4-S1 360 anterior and posterior fusion.

34. Michael Janssen, D.O. a Physician Advisor for Insurer, specializing in spine surgery, issued an opinion on December 23, 2020 in response to the request for prior authorization for surgery for an anterior posterior reconstruction of the spine spanning L4-S1. Dr. Janssen provided a history that Claimant was "helping a co-worker lift a patient from the floor to reposition a chair and had some nonspecific low back pain." Dr. Janssen also stated that "the information states that the patient has highly suggestive of a long-standing pain, but the pain has not been "this severe."" This is not consistent with the medical records that report Claimant had never had the kind of pain she was experiencing following the work injury, even following either of her total knee replacements surgeries. Neither is this consistent with the Claimant's testimony.

35. Dr. Janssen goes on to state that "From review of this, it does not appear that this is consistent with the treatment guidelines since this is a pre-existing long-standing chronic anatomical condition that does not appear to be exacerbated (from an anatomical standpoint), caused by, or a direct relationship to this debilitating condition. Indeed, the patient may have had myofascial symptomatology as she was lifting something, but that in itself is not an indication for surgical intervention."

36. David Frank, M.D. of Urgent Care examined Claimant on January 7, 2021 and ordered further aquatic therapy at CACC Physical Therapy and referred Claimant to Hatch Chiropractic for dry needling, acupuncture and chiropractic care. He stated that Claimant appeared uncomfortable, had abnormal range of motion, with abnormal gait and posture, walking with a walker. Dr. Frank specifically stated that Claimant had intractable bilateral lower extremity pain, intractable lumbar spine pain, spinal stenosis, HNP[5] and facet arthrosis. Dr. Frank noted Claimant was using a walker and had "probable work-related aggravation of preexisting back pathology."

37. Dr. Gallizzi wrote a letter regarding Claimant's need for surgery, dated January 13, 2021, stating as follows:

> Ms. [Claimant] DOB 1/8/1948 has been under my care since September 2020. She is undergone extensive nonoperative treatment including physical therapy for greater than 3 months without any improvement. She does have spondylolisthesis of at least 5 mm with concomitant severe neuroforaminal stenosis at L5-S1. She also has a superimposed right central 4 mm focal disc protrusion annular tearing impinging the right S1 nerve root.

[5] Herniated nucleus pulposus.

> Due to her rapidly deteriorating ambulatory ability, most recently presenting to the office using a cane for ambulation, I do believe that the proposed staged L4-S1 360 fusion would be the best chance for her to get her ambulatory ability back before she deteriorates any further. I do not think delaying this patient's surgery in any way will benefit her return to work. *While she may have had some pre-existing issues, her injury at work precipitated a rapid increase in her disability causing her to now have to use assistive devices for daily function.* With the structural abnormalities and instability noted on her MRI etc., I do not think a decompression alone would help this patient. She needs to have the instability, and neuroforaminal stenosis addressed which in my hands is best treated with the proposed surgery of L4-S1 anterior lumbar interbody fusion with subsequent pedicle screw instrumentation and posterior spinal fusion. We do this in a staged fashion in order to decrease the morbidity of a formal open decompression. We use robotic assistance to improve the accuracy, and based on this patient's pathology I believe that this would be the ideal operation to address their [sic.] issues. (*Emphasis added*.)

38. On January 14, 2021 Dr. Gallizzi faxed the request for reconsideration of the denial for the surgery as previously recommended.

39. Dr. Janssen wrote a response to Dr. Gallizzi’s letter on January 20, 2021, stating that following his review he continued to be of the opinion that the Claimant’s findings were incidental and age related only, not compensable. Dr. Janssen does not provide any further medical record review. As found, Dr. Janssen is not credible or persuasive.

40. Dr. Frank noted similar symptoms and problems on February 4, 2021 as found on prior examinations, stating that Claimant’s lawyer was fighting for the surgery. He ordered continued treatment and an EMG[6].

41. Claimant started therapy at CACC Physical Therapy on February 9, 2021. Richard Wagner documented that Claimant presented with chronic low back pain consistent diagnosis of lumbar stenosis and a work-related injury occurring when patient was assisting a resident at the long-term care facility which had slid out of a recliner. He noted that Claimant was very limited during evaluation due to pain with minimal movement for ROM screening as well as prolonged weight bearing for balance testing, marked hypersensitivity to light palpation of surrounding musculature and recommended skilled PT services to address impairments and maximize recovery. Claimant continued with aquatic therapy through at least May 24, 2021.

42. Records from Hatch Chiropractic start as of February 11, 2021. Dr. Kelly Tonning diagnosed segmental and somatic dysfunction and recommended treatment for four weeks. On February 20, 2021 Claimant advised that the first adjustment helped her low back symptoms but continued with a sharp pain in her buttocks, which was more

[6] Abbreviation for “electromyography” test used to determine nerve dysfunction, muscle dysfunction or problems with nerve-to-muscle signal transmission.

frequent. On February 23, 2021 Claimant advised that the buttocks pain was now a constant sharp and shooting pain compared to prior to the beginning of chiropractic care, which was intermittent and only while engaging in activities. This did not change in subsequent treatment dates through March 6, 2021.

43. On March 4, 2021 Dr. Frank notes that the EMG was abnormal showing severe bilateral radiculopathy at the L5-S1 level and was awaiting surgery. Exam was essential unchanged other than Claimant's ability to walk was difficult for Claimant as she leaned to the left and needed assistance, including the walker. She was to continue aquatic therapy. He continued to diagnose the following:

- Spondylolisthesis, site unspecified (M43.10)
- Other intervertebral disc displacement, lumbosacral region (M51.27)
- Other intervertebral disc displacement, thoracolumbar region (M51.2S)
- Spinal stenosis, lumbar region without neurogenic claudication (M48.061)
- Elevated blood pressure reading, without diagnosis of hypertension (R03.0)
- Illness, unspecified (R69)
- Insomnia (G47.0)
- Low back pain (M54.S)
- Major depressive disorder, single episode, unspecified (F32.9)
- Other hyperlipidemia (E78.4)
- Other intervertebral disc displacement, lumbosacral region (M51.27)
- Other intervertebral disc displacement, thoracolumbar region (MS1.25)

44. On March 22, 2021 Dr. Michael Rauzzino evaluated Claimant at Respondents' request for an independent medical examination (IME). He took the a history regarding Claimant's pain which included tht she had pain in her back going down her legs with some weakness in her legs that cause her legs to give oust sometimes. She reported that she had pain in her buttocks and the pain was worse with ambulation. He reported that she uses a quad-walker and sometimes a cane.

45. Dr. Rauzzino wrote that the patient intake reflected the following:

> Ms. [Claimant] reports that she was injured on 07/11/20 [sic.]. She describes the mechanism of injury "Lifting a patient, went dead weight, injured back." She states that she did not have similar symptoms prior to this. She describes her current symptoms as "pain lower back, extending down L&R buttocks".
>
> On the pain diagram, she indicates axial low back pain that does not extend beyond the buttocks. She rates her pain 8/10. She endorses aggravation of her pain with standing, sitting, driving, going up/down stairs, walking, coughing and sneezing. It is not aggravated by lying down or sleeping. She relates 50% back pain and 50% buttock pain symmetrically. She perceives weakness of her posterior thighs. She reports no numbness in her legs.

46. Dr. Rauzzino provided an opinion that Claimant may have suffered a myofascial strain, but Dr. Gallizzi is recommending complex spinal reconstruction for a spinal deformity which is preexisting. Because of her rapid progression of symptoms over

time in the absence of any ongoing structural aggravation, it is much more likely than not that the surgery proposed by Dr. Gallizzi is not in any way occupationally related to the single lifting event.

47. He further stated:

> It is my opinion that none of these conditions were aggravated or accelerated or made symptomatic by the work injury. I believe the work injury resulted simply in myofascial strain. The basis for that opinion is the mechanism of injury, her initial presentation, and the nature of her symptomatology as well as the rapid progression of her symptoms in the absence of any continued occupational injury.
> …
>
> If Dr. Gallizzi feels that this needs to be decompressed and reconstructed, that would certainly be a reasonable thing to do, but the need for such a surgery is related to her underlying degenerative spinal condition and not to a single relatively minor lifting incident that occurred in July 2020. While this surgery could be done to treat [Claimant]'s current reported symptomatology, her current severe symptomatology is not relatable to the occupational injury she reported in July 2020; therefore, while the surgery may be reasonable and appropriate, it is not occupationally related.

48. Dr. Frank document some improvement with physical therapy in his note of April 1, 2021. Claimant continued under Dr. Frank's care on April 5, 2021. Physical exam and diagnosis remained the same. Dr. Frank requested that she continue with aquatic therapy to work on gait, strengthening and unloading as well as chiropractic care. Claimant stated she was unstable without the use of her walker and was trying not to do anything to aggravate her symptoms.

49. On May 6, 2021 Dr. Frank indicated that Claimant's symptoms were only radiating to her buttocks, but that other exam remained the same. He reviewed the IME physicians' report that stated that he did not feel surgery was indicated under the workers' claim. Claimant revealed that her lawyer was appealing the determination. Dr. Frank continued aquatic therapy and chiropractic care, as they seemed to be helping Claimant, and stated that he would await the legal outcome of the case. He also added further pain management treatment with the psychologist.

50. Claimant returned to Dr. Frank on June 3, 2021. Dr. Frank noted Claimant reported some tingling into her feet and shin area. Claimant was still using a walker. Claimant reported she had plateaued with the conservative care.

51. On September 2, 2021 Dr. Frank indicated that Claimant's situation had not changed, that she was having problems ambulating and her pain continued the same as well as her exam. He stated that he was holding off on the "IRE"[7] for now as the claim

[7] This ALJ infers that "IRE" refers to "impairment rating evaluation."

continued to be in litigation relating to the back surgery and that the MMI date was unknown or to be determined.

52. Claimant testified she had no prior lower back injuries, treatment, or restrictions, before her work injury. She stated that she has been working in multiple types of work, including as a nurse and other activities like retail. Claimant testified that the pain she is currently feeling is the worst pain she has ever felt. She stated that she has had knee replacement surgeries and she has never experienced pain like she is with her back and buttock pain. She currently has low back pain with shooting pain down her buttocks with tingling in her feet.

53. Claimant testified that the pain in her back began immediately after the lifting incident, with the pain in her buttock developing a couple of days after the initial injury. Claimant reported constant lower back pain and that moving or changing position causes shooting pain into her buttocks. Claimant testified she is now getting tingling in her lower legs and especially in her feet. Claimant testified that her current buttock pain gets as bad as the pain in her back with movement. Claimant testified that since her injury she really is limited in what she can perform.

54. Claimant testified she has difficulty with walking more than a few steps without getting pain shooting into her buttocks, standing up for long periods of time, or doing basic household activities like washing dishes. She states that she was able to do her activities of daily living prior to her industrial injury without any breaks or difficulties. She now must take breaks frequently.

55. Claimant testified she uses a walker to get around. Claimant reported her back pain increases with movement, and she has a sharp shooting pain when she is moving or changing positions. Claimant denied having any issues with her back, buttock, or her legs prior to her work injury. Claimant is found credible.

56. Dr. Rauzzino testified at hearing in this matter as an expert neurosurgeon specializing in brain and spine surgery and as a Level II accredited physician. Dr. Rauzzino stated he obtained a history and reviewed the medical records in the preparation of his report. He stated that the mechanism of injury was consistent with the Claimant's testimony at hearing. However, he testified that it was a "simple lifting" incident that caused only myofascial complaints and did not cause any aggravation or acceleration of the Claimant's underlying asymptomatic degenerative disc disease or spinal stenosis. He stated that the Claimant's initial presentation is consistent with simple muscle pain, not pain that is neuropathic or radicular.

57. Dr. Rauzzino opined that it is more likely than not that Claimant's myofascial conditions had resolved, and the increasingly progressive symptoms Claimant was experiencing were a component of Claimant's underlying degenerative process. He viewed the Claimant's symptoms as reported to him to be exaggerated and not consistent with the original symptoms reported to the providers at the beginning of the claim. He further opined that the fact that Claimant has a lack of neurological findings, including

weakness, numbness and tingling or radicular pain down the legs at the beginning of the claim, are indicia that there was no aggravation of the preexisting asymptomatic degenerative condition and stenosis.

58. Dr. Rauzzino testified that stenosis refers to when the sac containing nerves narrows due to compression from either the disc or the bone, which results in nerve compression and symptoms radiating down the legs and into the feet. He stated that Claimant had a space of 4 mm while it would normally be between 10 and 12 mm, indicating that Claimant has severe stenosis.

59. As found, Dr. Janssen's opinion is not found credible. This ALJ is unaware of what Dr. Janssen was provided as background documentation to review, but the exhibits provided at hearing are not consistent with his opinions with regard to history, mechanism of injury, preexisting pain complaints prior to the date of injury or the medical records provided at hearing that were available at the time of his evaluation. Dr. Janssen is not credible in his opinion with either the mechanism of injury or opinion with regard to causation.

60. As found, specifically Dr. Rauzzino is not credible in his opinion with regard to the mechanism of injury, that the forces applied upon Claimant were minimal and could not cause the Claimant's condition. Neither is Dr. Rauzzino's opinion regarding causation and the speculation with regard to the myofascial nature of the injury. The lack of medical records showing any kind of preexisting symptoms, restrictions or limitations is persuasive in this matter. Claimant was a 73-year-old nurse. Claimant testified that she had no problems prior to this injury, and this is credible. Claimant worked as a nurse for many years prior to the injury.

61. As found, the mechanism of the injury was awkward, where both Claimant and the CNA were exerting force upward to lift a patient from the floor in a limited amount of room, which caused the lifting incident to be ungainly. This caused unexpected strain for Claimant's back, as she was unaware and unprepared to lift the patient from a dead weight. This may have been a simple act, but it was not a minor or simple lifting incident. It is the trigger and cause of the admitted work-related injury, which aggravated Claimant's underlying asymptomatic condition. This aggravation in turn caused Claimant to require treatment, also causing disability and wage loss. As found, Claimant's testimony is credible.

62. As found, Dr. Gallizzi's opinion that Claimant's need for the surgery as related to the July 12, 2020 accident is more credible than the contrary opinions of Dr. Rauzzino and Dr. Janssen. Dr. Gallizzi, Claimant's authorized treating surgeon, opined the industrial injury caused Claimant's rapid decline in her condition and the recommended L4-S1 fusion surgery is reasonably necessary and related. The totality of the evidence shows the work injury of July 12, 2020 caused the Claimant's disability and need for treatment. Claimant has shown by a preponderance of the evidence, that it is more likely than not, that she sustained an aggravation of her asymptomatic preexisting

condition, and the subsequent need for medical care. As found, Claimant continued to develop progressive symptoms caused by the original work injury of July 12, 2020

63. As found, the July 12, 2020 industrial injury permanently aggravated Claimant's underlying lumbar condition and is the proximate cause of her need for the lumbar surgery recommended by Dr. Gallizzi. The ALJ finds Claimant's July 12, 2020 industrial injury aggravated, accelerated, and combined with her preexisting lumbar condition to cause an injury and need for treatment, including the lumbar surgery recommended by Dr. Gallizzi. The ALJ finds Claimant proved by a preponderance of the evidence the lumbar surgery recommended by Dr. Gallizzi is reasonable, necessary, and related to her July 12, 2020 industrial injury.

CONCLUSIONS OF LAW

A. General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the claimant's rights nor in favor of the rights of the respondents; and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office (ICAO)*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2018). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Burden of Proof

The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits. Sections. 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000; *Kieckhafer v. Indus. Claim Appeals Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979; *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984).

C. Medical Benefits that are Reasonably Necessary and Related

The right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301, C.R.S. See *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991); *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986).

Section 8-42-101(1)(a), C.R.S., provides that Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *Snyder v. Industrial Claim Appeals Office*, *supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002); *In re Claim of Foust*, I.C.A.O, WC, 5-113-596 (COWC October 21, 2020).

Claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities and not the underlying preexisting condition. See *Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 448 (1949); *Abeyta v. Wal-Mart Stores*, W.C. No. 4-669-654 (January 28, 2008).

The issue of whether medical treatment is necessary for the compensable aggravation or a worsening of Claimant's pre-existing condition is also one of fact for resolution by the ALJ based upon the evidentiary record. See *University Park Care Center v. Industrial Claim Appeals Office,* 43 P.3d 637 (Colo. App. 2001); *Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970); *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). The Act places full responsibility on the employer for benefits as a result of a work injury when there is an aggravation of an underlying dormant condition. *United Airlines, Inc. v. ICAO*, 993 P.2d 1152 (Colo. 2000). Expert medical opinion is not needed to prove causation where circumstantial evidence supports an inference of a causal relationship between the injury and the claimant's condition. *Savio House v. Dennis,* 665 P.2d 141 (Colo. App. 1983). Where conflicting expert opinion is presented, it is for the ALJ as fact finder to resolve the conflict. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). When expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); *Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992).

As found, Dr. Gallizzi's opinions that the work-related accident caused the need for the surgery is credible and more persuasive than the contrary opinions of Dr. Janssen and Dr. Rauzzino. This is reinforced by the records of Nurse Fisk. At the very first visit with Nurse Fisk Claimant complained of back pain, and Nurse Fisk found "reduced range of motion (ROM) of the low back, abnormal gait, and posture, including a hunched forward posture, muscular abnormalities, paraspinals spasming of the lumbar muscles, tenderness of the lumbar spine, and *abnormal deep tendon reflexes of the right lower extremity." (Emphasis added.)*

As found, Claimant continued to complain of back pain and buttock pain during her care with her medical providers, including difficulty standing and walking. The medical records show a consistent deterioration of function and decline from the date of the admitted July 12, 2020 injury. The EMG, as reported by Dr. Frank, showed that Claimant has an abnormal severe bilateral radiculopathy at the L5-S1 level. The reports of Dr. Gallizzi, Dr. Frank, Nurse Fisk and other ATPs are more persuasive than the contrary opinions of Dr. Janssen and Dr. Rauzzino. This is further bolstered by the credible testimony of Claimant that she was a 73-year-old nurse, with a long history in the nursing industry and that she did not have any problems with her low back or lower extremities immediately prior to the lifting incident of July 12, 2020. The lack of prior medical records showing a history of back or buttock complaints is also a material fact considered by this ALJ and is additionally persuasive. Claimant has no prior history of back problems.

A found, the awkward and ungainly way the Claimant and the CNA were attempting to lift the dead weigh patient from the floor caused the injuries to Claimant's back, which in turn caused the need for medical care. Had it not been for the lifting incident, Claimant may have continued to work as a nurse despite the preexisting degenerative condition of her back as she had been prior to the admitted work injury.

Ultimately it is found that the Claimant's need for the surgery as recommended by Dr. Gallizzi is proximately caused by the work injury of July 12, 2020 and is reasonably necessary to address the work-related injury and aggravation of Claimant's previously asymptomatic degenerative condition.

Respondents argue that Dr. Gallizzi did not follow the recommendations of The Medical Treatment Guidelines (MTGs). The MTGs are regarded as the accepted professional standards for care under the Workers' Compensation Act. *Hernandez v. University of Colorado Hospital*, W.C. No. 4-714-372 (January 11, 2008); see also *Rook V. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). The Medical Treatment Guidelines, Rule 17-2(A), W.C.R.P. provide "All health care providers shall use the Medical Treatment Guidelines adopted by the Division." In spite of this direction, it is generally acknowledged that the Guidelines are not sacrosanct and may be deviated from under appropriate circumstances. *Nunn v. United Airlines,* W.C. 4-785-790 (ICAO September 9, 2011). While the Guidelines may carry substantial weight, and provide substantial guidance, the ALJ is not bound by the Guidelines in deciding individual cases or the principles contained therein alone. Indeed, Section 8-43-201(3), C.R.S. specifically provides:

> It is appropriate for the director or an administrative law judge to consider the medical treatment guidelines adopted under section 8-42-101(3) in determining whether certain medical treatment is reasonable, necessary, and related to an industrial injury or occupational disease. *The director or administrative law judge is not required to utilize the medical treatment guidelines as the sole basis for such determinations.* (*Emphasis added*).

Pursuant to W.C.R.P. Rule 17-1(A), the statement of purpose of the guidelines is as follows:

> In an effort to comply with its legislative charge to assure appropriate medical care at a reasonable cost, the director of the Division has promulgated these 'Medical Treatment Guidelines.' This rule provides a system of evaluation and treatment guidelines for high cost or high frequency categories of occupational injury or disease to assure appropriate medical care at a reasonable cost.

W.C.R.P. Rule 17-5(C) provides "The treatment guidelines set forth care that is generally considered reasonable for most injured workers. However, the Division recognizes that reasonable medical practice may include deviations from these guidelines, as individual cases dictate."

It is appropriate for an ALJ to consider the guidelines while weighing evidence, but the MTGs are not definitive. *Jones v. T.T.C. Illinois*, Inc., W.C. No. 4-503-150 (May 5, 2006); *aff'd Jones v. Industrial Claim Appeals Office* No. 06CA1053 (Colo. App. March 1, 2007) (not selected for publication); *Stamey v. C2 Utility Contractors et al*, W.C. No. 4-503-974 (August 21, 2008) (even if specific indications for a cervical surgery under the medical treatment guidelines were not shown to be present, ICAO was not persuaded that such a determination would be definitive). Concerning the issue presented, the MTG's indicate that "[t]here is some evidence that the ALJ may decide the weight to be assigned the provisions of the Guidelines upon consideration of the totality of the evidence. See *Cahill v. Patty Jewett Golf Course,* WC 4-729-518 (ICAO February 23, 2009); *Siminoe v. Worldwide Flight Services,* WC 4-535-290 (ICAO November 21, 2006).

As found in this case, while the MTGs may provide for specific findings of radiculopathy to be present immediately following the injury, require specific care and have certain indications pursuant to W.C.R.P. Rule 17, Exhibit 1(G), Claimant has shown by a preponderance of the evidence that she suffered an aggravation of her preexisting underlying stenosis, complained of buttock pain within two days of the incident, and subsequent lower extremity problems, including tingling and numbness into her feet. Dr. Gallizzi has indicated that Claimant continues to deteriorate without the surgery at this point and this ALJ infers from the records that there is some urgency to proceed with the surgery. Claimant was a 73-year-old nurse assigned to work in a care facility where it is expected that she might need to assist with invalids and patients that cannot care for themselves. Claimant had significant immediate pain in her low back which developed to buttock pain and later to numbness and tingling going down her lower extremities into her feet. This is considered to be the natural progression of the work-related injury which aggravated the stenosis and accelerated the need for the surgery. This ALJ has considered the experts opinions and testimony with regard to the MTGs and has rejected the opinions of Dr. Rauzzino and Dr. Janssen in reference to the presence and requirement of radicular symptomology immediately following the July 12, 2020 work injury. Dr. Gallizzi has opined that, but for the July 12, 2020 lifting incident, Claimant's functional decline and subsequent need for surgery would not have been accelerated. Claimant has shown by a preponderance of the evidence that the July 12, 2020 accident precipitated Claimant's complaints of back, buttock and leg symptoms aggravating her underlying asymptomatic degenerative condition and proximately caused the need for the surgery proposed by Dr. Gallizzi. Claimant has shown by a preponderance of the evidence that the lumbar spine surgery proposed by Dr. Gallizzi is reasonably necessary and related to the July 12, 2020 injury.

ORDER

IT IS THEREFORE ORDERED:

1. Respondents shall authorize and pay for the surgery recommended by Dr. Michael Gallizzi as it is reasonably necessary and related to the admitted July 12, 2020 work injury.

2. Any payment for medical benefits is subject to the Division of Workers' Compensation Medical Fee Schedule.

3. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In addition, it is recommended that you send a copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.**

DATED this 10th day of November, 2021.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUE

Whether Claimant has established by a preponderance of the evidence that he should be permitted to reopen his November 29, 2015 Workers' Compensation claim based on a change in condition pursuant to §8-43-303(1), C.R.S.

FINDINGS OF FACT

1. Claimant is a 47 year-old Firefighter Captain for Employer. On November 29, 2015 Claimant suffered an admitted industrial injury while working for Employer. Specifically, Claimant developed back pain while attempting to control a dog during an investigation.

2. Claimant subsequently received a course of physical therapy. However, because physical therapy was unsuccessful, he underwent surgical repair with Chad J. Prusmack, M.D. on March 30, 2016. Dr. Prusmack performed a right L5/S1 microdiscectomy that specifically involved the removal of the lateral lamina and medial facet to expose the S1 nerve root.

3. Claimant noticed almost immediate improvement after surgery. On July 11, 2016 Kirk Nelson, D.O. determined Claimant had reached Maximum Medical Improvement (MMI) with a 16% whole person impairment rating for his November 29, 2015 industrial injury. In August 2016 Claimant returned to his regular work duties with no restrictions.

4. Claimant subsequently suffered sporadic back pain. He specifically remarked that he experienced "fairly consistent stiffness and soreness" in his back. Claimant continued with core strengthening exercises and sought to improve his flexibility.

5. By early 2020 Claimant's symptoms began to increase. In March 2020 he began working with athletic trainers and physical therapists in Employer's Wellness Bureau.

6. On March 16, 2020 Claimant visited Employer's athletic trainer Brian Crouser, LAT for an evaluation. Claimant recounted that when performing kettle bell swings while working out at Employer's Wellness Bureau he experienced tightness in the left lumbar spine area. LAT Crouser assessed Claimant with a lumbar disc irritation at L5-S1 and muscle tightness. By June 26, 2020 Claimant reported improvement and no radicular symptoms. He noted that performing a house project that required him to carry 100-125 pound boulders to build a retaining wall "actually made his back feel better."

7. Claimant performed his regular job duties on January 17-18, 2021 without any symptoms. On January 19, 2021 he attended a sit-down meeting at Employer's firehouse for about four hours and did not recall any episodes of pain.

8. While at home on January 21, 2021 Claimant suffered a large sneeze. He immediately experienced severe right lower leg pain that was worse than his initial work-related injury on November 29, 2015.

9. Claimant sought medical treatment through Concentra Medical Centers. On January 28, 2021 he visited Carrie Burns. M.D. for an examination. Claimant recounted that about five years earlier he suffered a lower back injury at work and underwent an L5-S1 microdiscectomy. He was out of work for eight months but then returned to regular duty employment. Claimant experienced occasional soreness but suffered a sneeze at home on January 21, 2021 that caused pain from his right hip down to his ankle. He did not return to work after the sneezing incident. Dr. Burns assessed Claimant with a history of a microdiscectomy and a lumbar sprain. She determined that Claimant's condition was not work-related and remarked "he had healed from previous injury; sneezing is a ubiquitous activity of daily living." Dr. Burns summarized that, based on a physical examination, a review of the records and consideration of the mechanism of injury, "it does not appear that the presenting complaint arose out of" Claimant's job duties. She released Claimant to full duty employment.

10. Claimant subsequently visited personal provider John Geraghty, M.D. for an evaluation. On February 1, 2021 Dr. Geraghty referred Claimant for an MRI of the lumbar spine. The MRI revealed the following: (1) a L5-S1 right central 1.4 cm disc herniation; (2) L5-S1 severe central canal stenosis; and (3) suspected right hemilaminectomy at L5-S1.

11. On February 8, 2021 Claimant visited David Whatmore, PA-C for an evaluation. PA-C Whatmore recounted that Claimant underwent a right L5-S1 microdiscectomy in March 2016 and "successfully recovered from the procedure." Claimant recently had an increase in radiculopathy into the right leg with additional back pain. He then underwent an MRI as directed by his primary care physician. PA-C Whatmore commented that the MRI revealed "a large multilobular herniated disk, most likely a recurrent disk on the right at the L5-S1 level." He noted that Claimant's original need for surgery was related to his November 29, 2015 industrial injury. Therefore, Claimant's "potential need for upcoming surgery would still be associated with his original Workers' Compensation claim." PA-C Whatmore planned to discuss the matter with Dr. Prusmack.

12. On February 9, 2021 Claimant visited the emergency room based on worsening pain and was admitted to the hospital. He underwent emergency surgery with Dr. Prusmack. In describing the surgery, Dr. Prusmack remarked that the procedure was required because Claimant "had failed conservative care, now causing recalcitrant radiculopathy and stabbing pain." The surgery specifically consisted of a "right re-exploration laminectomy for discectomy at L5-S1 and resection of recurrent herniated disc." Claimant's pre-operative and post-operative diagnoses included the following: (1) acute recurrent large disc herniation at L5-S1; (2) leg weakness; and (3) stenosis. The surgery was successful and Claimant returned to regular duty employment with Employer in July 2021.

13. On September 13, 2021 Claimant underwent an independent medical examination with Nicholas K. Olsen, M.D. Dr. Olsen also testified at the hearing in this

matter. At the independent medical examination Claimant recounted that he suffered a work injury on November 29, 2015 when he was in a crowded position, bent over and felt back pain. After unsuccessful physical therapy he underwent back surgery on March 30, 2016. Claimant resumed his full work duties in August 2016. However, over time Claimant's back was "typically sore and stiff." He worked with physical therapists and athletic trainers to improve his condition. On January 21, 2021 Claimant suffered a large sneeze at home that immediately caused right lower leg pain that was more severe than his initial injury of November 29, 2015. After undergoing an MRI, Dr. Prusmack performed a discectomy/laminectomy on February 9, 2021.

14. After reviewing Claimant's medical records and performing a physical examination, Dr. Olsen determined that Claimant's need for surgery on February 9, 2021 was not causally related to his work activities for Employer. He explained that, when Claimant had the large sneeze on January 21, 2021, he suffered "another separate and specific disk herniation on the right side at the L5-S1 disk causing radiculopathy." Dr, Olsen specified that, if someone is bending at his waist and improperly lifting weight, he is increasing pressure on the disc "similar to the way an increase Valsalva response with a sneeze increases pressure on the disk." Notably, a Valsalva response is when an individual increases internal pressure while bearing down.

15. Dr. Olsen summarized that Claimant performed his work duties for approximately four and one-half years after his initial injury. He was building a rock wall in 2021 while carrying 100-125 pound boulders, had completely recovered from his original surgery and did not have a radiculopathy. Dr. Olsen detailed that Claimant maintained a high level of function while working as a firefighter, performed yard work, did not have any reason to return to a physician and was benefiting from core exercises until the sneezing event. He reasoned that Claimant's large sneeze on January 21, 2021 triggered the onset of new right lower extremity radiculopathy and the necessity for a repeat surgery. He agreed with Dr. Burns that Claimant's need for surgery on February 9, 2021 was not related to any events at work, but instead to the sneezing incident at home on January 21, 2021.

16. Claimant has failed to establish that it is more probably true than not that he should be permitted to reopen his November 29, 2015 Workers' Compensation claim based on a change in condition pursuant to §8-43-303(1), C.R.S. initially, on November 29, 2015 Claimant suffered an admitted back injury while working for Employer when attempting to control a dog during an investigation. After unsuccessful physical therapy he underwent back surgery on March 30, 2016 with Dr. Prusmack. Claimant noticed almost immediate improvement in his condition. On July 11, 2016 Dr. Nelson determined Claimant had reached MMI with a 16% whole person impairment. In August 2016 Claimant returned to his regular work duties with no restrictions. Claimant subsequently experienced "fairly consistent stiffness and soreness" in his back. Nevertheless, by June 26, 2020 Claimant reported improvement with no radicular symptoms. He noted that performing a house project that required him to carry 100-125 pound boulders to build a retaining wall "actually made his back feel better." However, while at home on January 21, 2021 Claimant suffered a large sneeze and immediately experienced severe right lower leg pain that was worse than his initial work-related injury on November 29, 2015. On February 9, 2021 Claimant underwent emergency surgery with Dr. Prusmack in the form of a discectomy/laminectomy at the L5-S1 level.

17. Relying on the opinions of Dr. Prusmack and PA-C Whatmore, Claimant asserts that the necessity for a repeat surgery on February 9, 2021 constituted a worsening of condition that was causally related to his November 29, 2015 admitted work injury. Dr. Prusmack commented that Claimant required a second surgery on February 9, 2021 because he “had failed conservative care, now causing recalcitrant radiculopathy and stabbing pain.” Furthermore, Dr. Prusmack’s assistant PA-C Whatmore remarked that an MRI had revealed “a large multilobular herniated disk” that was likely a recurrent disk on the right at the L5-S1 level. He reasoned that Claimant’s original need for surgery was related to his November 29, 2015 industrial injury. Therefore, Claimant’s “potential need for upcoming surgery would still be associated with his original Workers’ Compensation claim.”

18. However, the persuasive medical evidence reflects that the sneezing incident on January 21, 2021 constituted an intervening event that severed the causal connection to Claimant’s original November 29, 2015 work-related injury. Approximately one week after the sneezing event Claimant visited Dr. Burns at Concentra for an examination. Dr. Burns assessed Claimant with a lumbar sprain. She persuasively determined that Claimant’s condition was not work-related and remarked “he had healed from previous injury; sneezing is a ubiquitous activity of daily living.” Dr. Burns summarized that, based on a physical examination, a review of the records and consideration of the mechanism of injury, “it does not appear that the presenting complaint arose out of” Claimant’s job duties. Moreover, after reviewing Claimant’s medical records and performing a physical examination, Dr. Olsen persuasively determined that Claimant’s need for surgery on February 9, 2021 was not causally related to his work activities for Employer. He summarized that Claimant performed his work activities for approximately four and one-half years after his initial injury, was functioning at a very high level, had completely recovered from his original surgery and did not have a radiculopathy. Dr. Olsen reasoned that Claimant’s large sneeze on January 20, 2021 triggered the onset of new right lower extremity radiculopathy and the necessity for a repeat surgery.

19. Based on the medical records and persuasive opinions of Drs. Burns and Olsen, the January 21, 2021 sneezing incident constituted an intervening event that severed the causal connection to Claimant’s original November 29, 2015 work-related injury. The intervening event triggered the onset of new right lower extremity radiculopathy and the necessity for Claimant’s second surgery on February 9, 2021. Accordingly, Claimant has failed to establish that he suffered a worsening of his lower back condition that is causally related to his admitted work injury. Accordingly, Claimant’s request to reopen his November 29, 2015 Workers’ Compensation claim based on a change in condition is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of

the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. Section 8-43-303(1), C.R.S. provides that a workers' compensation award may be reopened based on a change in condition. In seeking to reopen a claim the claimant shoulders the burden of proving his condition has changed and that he is entitled to benefits by a preponderance of the evidence. *Osborne v. Industrial Commission*, 725 P.2d 63, 65 (Colo. App. 1986). A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Jarosinski v. Industrial Claim Appeals Office,* 62 P.3d 1082, 1084 (Colo. App. 2002). A "change in condition" pertains to changes that occur after a claim is closed. *In re Caraveo,* W.C. No. 4-358-465 (ICAO, Oct. 25, 2006). The determination of whether a claimant has sustained his burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* W.C. No. 4-543-945 (ICAO, July 19, 2004).

5. The existence of a weakened condition is insufficient to establish causation if the new injury is the result of an efficient intervening cause. *Owens v. Industrial Claim Appeals Office,* 49 P.3d 1187, 1188 (Colo. App. 2002); *In Re Lang,* W.C. No. 4-450-747 (ICAO, May 16, 2005). No liability exists when a later accident occurs as the direct result of an intervening cause. *Vargas v. United Parcel Service*, W.C. No. 4-325-149 (ICAO, Aug. 29, 2002). However, the intervening event does not sever the causal connection between the injury and the claimant's condition unless the disability is triggered by the intervening event. *See Standard Metals Corp. v. Ball*, 172 Colo. 510, 474 P.2d 622 (1970); *Vargas v. United Parcel Service*, W.C. No. 4-325-149 (ICAO, Aug. 29, 2002). If the need for medical treatment occurs as the result of an independent intervening cause, then the subsequent treatment is not compensable. *Owens,* 49 P.3d at 1188. The new injury is not compensable "merely because the later accident might or would not have happened if the employee had retained all his former powers." *In Re Chavez,* W.C. No. 4-499-370 (ICAO, Jan. 23, 2004). The determination of whether an injury resulted from an efficient intervening cause is a question of fact for the ALJ. *Id.*

6. As found, Claimant has failed to establish by a preponderance of the evidence that he should be permitted to reopen his November 29, 2015 Workers' Compensation claim based on a change in condition pursuant to §8-43-303(1), C.R.S. initially, on November 29, 2015 Claimant suffered an admitted back injury while working for Employer when attempting to control a dog during an investigation. After unsuccessful physical therapy he underwent back surgery on March 30, 2016 with Dr. Prusmack. Claimant noticed almost immediate improvement in his condition. On July 11, 2016 Dr. Nelson determined Claimant had reached MMI with a 16% whole person impairment. In August 2016 Claimant returned to his regular work duties with no restrictions. Claimant subsequently experienced "fairly consistent stiffness and soreness" in his back. Nevertheless, by June 26, 2020 Claimant reported improvement with no radicular symptoms. He noted that performing a house project that required him to carry 100-125 pound boulders to build a retaining wall "actually made his back feel better." However, while at home on January 21, 2021 Claimant suffered a large sneeze and immediately experienced severe right lower leg pain that was worse than his initial work-related injury on November 29, 2015. On February 9, 2021 Claimant underwent emergency surgery with Dr. Prusmack in the form of a discectomy/laminectomy at the L5-S1 level.

7. As found, relying on the opinions of Dr. Prusmack and PA-C Whatmore, Claimant asserts that the necessity for a repeat surgery on February 9, 2021 constituted a worsening of condition that was causally related to his November 29, 2015 admitted work injury. Dr. Prusmack commented that Claimant required a second surgery on February 9, 2021 because he "had failed conservative care, now causing recalcitrant radiculopathy and stabbing pain." Furthermore, Dr. Prusmack's assistant PA-C Whatmore remarked that an MRI had revealed "a large multilobular herniated disk" that was likely a recurrent disk on the right at the L5-S1 level. He reasoned that Claimant's original need for surgery was related to his November 29, 2015 industrial injury. Therefore, Claimant's "potential need for upcoming surgery would still be associated with his original Workers' Compensation claim."

8. As found, however, the persuasive medical evidence reflects that the sneezing incident on January 21, 2021 constituted an intervening event that severed the causal connection to Claimant's original November 29, 2015 work-related injury. Approximately one week after the sneezing event Claimant visited Dr. Burns at Concentra for an examination. Dr. Burns assessed Claimant with a lumbar sprain. She persuasively determined that Claimant's condition was not work-related and remarked "he had healed from previous injury; sneezing is a ubiquitous activity of daily living." Dr. Burns summarized that, based on a physical examination, a review of the records and consideration of the mechanism of injury, "it does not appear that the presenting complaint arose out of" Claimant's job duties. Moreover, after reviewing Claimant's medical records and performing a physical examination, Dr. Olsen persuasively determined that Claimant's need for surgery on February 9, 2021 was not causally related to his work activities for Employer. He summarized that Claimant performed his work activities for approximately four and one-half years after his initial injury, was functioning at a very high level, had completely recovered from his original surgery and did not have a radiculopathy. Dr. Olsen reasoned that Claimant's large sneeze on January 20, 2021 triggered the onset of new right lower extremity radiculopathy and the necessity for a repeat surgery.

9. As found, based on the medical records and persuasive opinions of Drs. Burns and Olsen, the January 21, 2021 sneezing incident constituted an intervening event that severed the causal connection to Claimant's original November 29, 2015 work-related injury. The intervening event triggered the onset of new right lower extremity radiculopathy and the necessity for Claimant's second surgery on February 9, 2021. Accordingly, Claimant has failed to establish that he suffered a worsening of his lower back condition that is causally related to his admitted work injury. Accordingly, Claimant's request to reopen his November 29, 2015 Workers' Compensation claim based on a change in condition is denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's request to reopen his November 29, 2015 Workers' Compensation claim based on a change in condition is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: November 10, 2021.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant prove an L5-S1 fusion surgery recommended by Dr. Roger Sung is reasonably necessary to cure and relieve the effects of his admitted work injury?

FINDINGS OF FACT

1. Claimant works for Employer as an appliance repair technician. The job is physically demanding and requires lifting and moving heavy home appliances.

2. Claimant suffered an admitted low back injury on October 2, 2019 in a rear-end motor vehicle accident. The air bags did not deploy but the rear of his van was sufficiently damaged that the doors could not be opened.

3. Claimant has a history of low back problems dating to an injury in 2011 in the military. Claimant received lumbar epidural steroid injections at Evans Army Hospital, and then was deployed for an extended period. He returned to Colorado Springs in 2015 and underwent another set of injections. The injections were helpful and allowed him to work on core strengthening, which slowly helped reduce his pain.

4. Claimant's last treatment for the pre-existing back issues was a round of physical therapy in 2018. He was seen at Joint Effort on January 15, 2018 complaining of chronic low back pain. The pain at the time was a 6 out of 10, with the worst being 8 out of 10. He also reported numbness into his left glute and decreased sensation in his toes. Claimant's goals were to decrease his pain, get back to working out, and get back to running. Examination showed decreased sensation in the left L1-3 dermatomes. Lumbar spine ROM was reduced limited in all planes. The intake paperwork showed some degree of disability in all 10 categories on the Modified Oswestry Disability Scale as of January 6, 2018. The therapist recommended 1-2 PT sessions per week over 12 weeks.

5. Claimant responded fairly quickly to treatment, and reported significant improvement within a couple of weeks. The March 9, 2018 discharge report shows Claimant had a "good response [and] . . . sig[nificantly] less pain since starting P.T." The therapist noted improvement in strength, sciatic tests, and straight leg raise testing. Claimant still had "slight" tenderness to palpation around L5-S1. He was starting a new job with Dish Network and was concerned the pain might return because he would have to carry heavy ladders and perform satellite installations. The therapist recommended he continue his home exercise program and advised Claimant could return to PT if necessary for flares.

6. Claimant sought no further treatment for his low back until the MVA on October 2, 2019. He worked without difficulty for Dish for approximately a year until he

went to work for Employer in early 2019. There is no persuasive evidence to suggest Claimant's low back impeded his ability to perform his job or engage in any other activities before the MVA.

7. After the MVA on October 2, Claimant was taken by ambulance to the Memorial Hospital emergency department. His chief complaint was "neck and back pain after MVA." The provider documented, "Patient does have a history of chronic back pain but states this is different." Examination showed midline tenderness from the cervical area through the lumbar area. Lumbar x-rays showed "chronic findings around L5-S1 that he was aware of," including 13mm of anterolisthesis of L5 on S1. There was no fracture or other acute bony pathology. Claimant was diagnosed with a lumbar strain. The ER physician prescribed Flexeril and advised Claimant to follow up with his PCP.

8. Claimant saw Dr. Robi Baptist at DaVita Medical Group on October 7, 2019. He reported intermittent headaches, neck pain, low back pain, and radiating left leg numbness "ever since" the accident. Claimant reported a "distant" history of a low back pain from an injury while he was in the military. Dr. Baptist diagnosed a cervical myofascial strain and lumbar radicular pain. She planned to refer Claimant for physical therapy, but ultimately discharged him because "told by Sedgwick he must go to Concentra."

9. Claimant's initial appointment at Concentra took place on October 9, 2019 with PA-C Tianna Voros. His neck pain had improved since the accident but his low back symptoms had not. Claimant explained he had a previous low back injury in the military "but he did PT through the VA and his back pain was relieved." He was diagnosed with cervical and lumbar strains and referred to physical therapy.

10. At the initial PT evaluation on October 9, 2019, Claimant advised the therapist about his prior low back injury and known DDD. He said he had done PT "which was helpful." The therapist noted "patient reports no functional restrictions prior to this episode of care."

11. Claimant saw Dr. Daniel Peterson on October 16, 2019, who has been Claimant's primary ATP since then. Dr. Peterson documented that Claimant's primary care physician was of the opinion that the motor vehicle accident worsened his underlying spondylolisthesis at L5-S1. Claimant was still having significant low back pain and could not stand up straight. He also described intermittent numbness and tingling in the left leg. Examination of the low back showed palpable bilateral muscle spasms. Lower extremity examination showed normal strength, but some decreased sensation in the left leg in an L5 or more likely S1 distribution.

12. Claimant underwent EMG/NCV testing with Dr. Kathy McCranie in November 2019. It showed L5-S1 radiculopathy.

13. On November 21, 2019, Claimant met with Dr. Peterson to review the electrodiagnostic testing results. Dr. Peterson noted Claimant was still having leg symptoms "consistent" with the EMG findings. He referred Claimant to Dr. Mark Meyer for epidural steroid injections.

14. Claimant saw Dr. Larson for an IME at Respondents' request on January 28, 2020. Dr. Larson concluded Claimant suffered no significant injury in the MVA. Dr. Larson opined Claimant's lower extremity symptoms were "non-dermatomal" and his overall presentation was "non-physiologic." Dr. Larson concluded any low back symptoms were related to a pre-existing condition. He though Claimant was at MMI as of his initial appointment with Dr. Baptist on October 7, 2019.

15. Dr. Peterson subsequently reviewed Dr. Larson's report and strongly disagreed with it. He stated, "[Claimant] clearly had an injury event in the MVA and onset of symptoms after MVA." Dr. Peterson noted that Dr. McCranie "did a detailed unbiased medical evaluation. I strongly respect her evaluation and trust her independence whereas Dr. Wally Larson is well-known to write reports that are skewed in favor of the insurance companies."

16. Claimant saw Dr. Meyer on March 24, 2020. He reported ongoing left lower back pain with numbness and coldness in his left leg from the motor vehicle accident. Claimant told Dr. Meyer about his prior 2011 back injury from approximately 2011. Claimant said his back bothered him for several years but he received treatment through Evans Army Hospital that eventually alleviated his symptoms. After a series of injections, core strengthening, and physical therapy, "the back pain was essentially resolved for a couple years." He was pain free while working for Dish and when he began his employment with the Employer, and remained pain free until the MVA.

17. Dr. Meyer diagnosed L5-S1 spondylolisthesis, possible dynamic instability, and L5-S1 radiculopathy. Dr. Meyer opined, "[It is] my medical opinion the patient's symptoms are all typically related to the motor vehicle accident in question and his history demonstrates that he had resolution of his pre-existing back pain for 18 months prior to the Workers' Comp. injury, although there likely were some chronic L5-S1 changes." Dr. Meyer recommended 1-2 left L5-S1 ESIs, and flexion-extension x-rays to evaluate instability.

18. Claimant had an IME with Dr. Timothy Hall at his counsel's request on April 28, 2020. Dr. Hall reviewed Claimant's prior history of low back problems and documented, "he has had problems with his low back from the military. He went to Joint Effort after being released and did very well. For over two years prior to this MVA, he was working out in the gym. He was in no therapies, in no pain, and taking no medications. He had no consequences or disability or impairment." Dr. Hall diagnosed injury-related lumbar trauma resulting in worsening spondylolisthesis and potential left-cited radiculopathy, piriformis syndrome, and myofascial pain. He opined, "[Claimant's] symptoms fit very neatly with his trauma and findings on imaging. To me, it seems like a very straightforward case. This appears to be the consensus other than with Dr. Wally Larson. I disagree with pretty much everything he has to say." Dr. Hall recommended neuromuscular soft tissue treatment. He did not think Claimant was a surgical candidate.

19. Claimant underwent a left L5-S1 ESI with Dr. Meyer on June 9, 2020. On July 20, 2020, Claimant reported to Dr. Meyer he had over 50% improvement including

some improvement with the temperature of his leg. A repeat injection was performed. Unfortunately, Claimant received no measurable benefit from the 2nd injection.

20. Dr. Peterson referred Claimant to Dr. Roger Sung, an orthopedic surgeon, on August 14, 2020.

21. Claimant initially saw Dr. Sung's PA-C, Philip Falender. Claimant reported his prior medical history consistent with the medical record. X-rays taken in the office showed 12 mm of spondylolisthesis at L5-S1. They discussed surgery, but wanted an updated MRI first. Mr. Falender suggested a fusion would be required "due to the instability at L5-S1."

22. Claimant had the MRI, and returned to see Dr. Sung on September 23, 2020. Dr. Sung noted the flexion-extension x-rays showed 12 mm of spondylolisthesis. He reviewed the MRI images and saw L5-S1 spondylolisthesis with "significant neural foraminal stenosis." Dr. Sung recommended an L5-S1 anterior-posterior fusion. Although Claimant has some degeneration above L5-S1, Dr. Sung opined a single level fusion was most appropriate.

23. Dr. Peterson noted in his October 16, 2020 record that surgery was initially approved and then denied "and now he is being sent to see Dr. Wally Larson on 11/25! He is a hand surgeon and not a spinal surgeon and I have called the adjuster to register my protest that a second opinion should be with another spinal surgeon and not a hand surgeon." On November 17, 2020, Dr. Peterson noted the IME still had not occurred, and it made no sense to him why Respondents were sending Claimant to a hand surgeon for a second opinion regarding a spinal fusion. Dr. Peterson stated Dr. Larson is "well known to render opinions that favor insurance adjusters and is likely why the IME referral was made to him."

24. Claimant had the IME with Dr. Larson on December 23, 2020. Claimant's primary complaints were low back pain and left leg pain, numbness, and coldness. Dr. Larson documented a largely normal lumbar spine examination. He reviewed the x-rays and the MRI and noted grade 1 L5-S1 spondylolisthesis. He identified no nerve root compression. Dr. Larson opined Claimant had "multiple nonphysiologic symptoms" that "cannot be explained on the basis of any objective findings." Dr. Larson opined all of Claimant's symptoms were related to preexisting spondylolisthesis at L5-S1 and DDD of the lumbar spine, and "are not the result of an occupational injury." He thought it "very unusual" for such a minor MVA to cause any long-term or permanent subjective symptoms. He opined the MVA did not aggravate Claimant's preexisting spondylolisthesis. Dr. Larson also stated Claimant is a poor surgical candidate and "is at very high risk for increased reported symptoms and increased reported disability following any surgical procedure."

25. In his March 2, 2021 report, Dr. Peterson wrote that "I am in agreement with [Dr. Sung] that this WC injury exacerbated his underlying spinal instability and that his injury is compensable and to return him to his preinjury function he needs to proceed with spinal fusion."

26. Claimant had a second IME with Dr. Hall on June 24, 2021. Dr. Hall reviewed Claimant's pre-injury history again and documented, "It is quite clear that he had symptoms in the military. We discussed the interventions and that he had done quite well and was physically active prior to the motor vehicle collision. He has had symptoms ever since the collision. He was in no therapies. He was taking no medications. He had no injections for many months prior to the date of the collision." Dr. Hall reiterated his belief that Claimant's back and leg symptoms were causally related to the October 2, 2019 MVA. He opined, "even though it was not a high-impact collision . . . It would not take a great deal to worsen his underlying spondylolisthesis and radiculopathy."

27. Dr. Larson testified via deposition on August 11, 2021, consistent with his reports. He reiterated that the L5-S1 lumbar fusion is not reasonably necessary or causally related to the MVA. Dr. Larson testified it would be "almost impossible" for the very minor trauma associated with the MVA to cause any additional slippage in Claimant's underlying spondylolisthesis. Dr. Larson testified Claimant reported numerous "nonphysiologic" findings that cannot be explained by spondylolisthesis. He did not believe Claimant satisfied the criteria in the MTGs regarding indications for spinal fusion surgery, including adequate identification of all pain generators and completion of a physical medicine and manual therapy interventions. He testified the best treatment is a home exercise program with core strengthening.

28. Dr. Sung testified via deposition on August 11, 2021. When asked about his rationale for the proposed surgery, Dr. Sung explained,

> [Claimant] has compression on his nerves at L5-S1. And . . . that segment of his spine has become unstable. L5 is shifting in relation to S1, and – there's a dynamic component to his situation that makes this not a simple surgery were you just go in and trim out some space for the nerves or trim out some disc. You actually need to provide stability and alignment to that segment of the spine.

29. Dr. Sung testified the flexion extension x-rays showed "definite instability" in Claimant's spine. Regarding causation, Dr. Sung opined,

> I think that there is a component of underlying degeneration that was there before this current injury, and that has been with the patient for a period of time. The injury is what made his symptoms as bad as they are and created the leg pain. And that's why we were talking about doing the surgery at this point.

30. Dr. Sung disagreed with Dr. Larson's characterization of Claimant's symptoms as "nonphysiologic." In his estimation, Claimant's reported leg symptoms were consistent with his demonstrated pathology. Dr. Sung emphasized that the proposed surgery is confined to the L5-S1 level, which was aggravated by the MVA: "This is the level that is symptomatic. This is the level that's causing his leg symptoms. This is the level we are fixing. We're not chasing every bit of wear in his spine."

31. Dr. Sung’s deposition testimony is credible and highly persuasive.

32. The opinions and conclusions of Dr. Sung, Dr. Peterson, and Dr. Hall are more persuasive than the contrary opinions offered by Dr. Larson.

33. Claimant’s hearing testimony was credible and persuasive.

34. Claimant proved the L5-S1 fusion surgery proposed by Dr. Sung is reasonably needed to cure and relieve the effects of his admitted work injury.

CONCLUSIONS OF LAW

The respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). Even if the respondents admit liability, they retain the right to dispute the relatedness of any particular treatment, and the mere occurrence of a compensable injury does not compel the ALJ to find that all subsequent medical treatment was caused by the industrial injury. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997); *McIntyre v. KI, LLC*, W.C. No. 4-805-040 (ICAO, Jul. 2, 2010). Where the respondents dispute the claimant’s entitlement to medical benefits, the claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The claimant must also prove that the requested treatment is reasonably necessary, if disputed. Section 8-42-101(1)(a). The claimant must prove entitlement to medical benefits by a preponderance of the evidence.

The existence of a preexisting condition does not disqualify a claim for medical benefits where an industrial injury aggravates, accelerates, or combines with a preexisting condition to produce the need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). A claimant need not show an injury objectively caused any identifiable structural change to their underlying anatomy to prove an aggravation. A purely symptomatic aggravation is sufficient for an award of medical benefits if it the symptoms were triggered by work activities and caused the claimant to need treatment they would not otherwise have required. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949); *Cambria v. Flatiron Construction*, W.C. No. 5-066-531-002 (May 7, 2019). But the mere fact a claimant experiences symptoms after an incident at work does not necessarily mean the employment aggravated or accelerated the pre-existing condition. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). The ALJ must determine if the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

As found, Claimant proved the L5-S1 fusion surgery is reasonably needed to cure and relieve the effects of his work injury. Claimant became symptomatic immediately after the MVA and has remained so through the date of the hearing. As Dr. Sung explained, his back and leg symptoms are reasonably consistent with the underlying pathology. Claimant has been candid about his prior low back problems from day one. And he has been equally consistent that his post-accident symptoms are “different” than before. Claimant did well with physical therapy in 2018, and sought no additional treatment until after the MVA. He also performed physically demanding work without difficulty. Claimant’s pre-existing spondylolisthesis probably made him more susceptible to injury from a relatively “minor” accident than might otherwise be expected. Claimant’s treating providers believe the work accident aggravated his underlying condition and caused the need for surgery. Dr. Hall agrees. Dr. Larson’s contrary opinions are outliers and are not persuasive.

ORDER

It is therefore ordered that:

1. Insurer shall cover the L5-S1 fusion surgery recommended by Dr. Sung.

2. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ’s order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: November 12, 2021

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 2864 S. Circle Drive Ste. 810, Colorado Springs, CO 80906	
In the Matter of the Workers' Compensation Claim of: **[REDACTED],** Claimant, v. **S[REDACTED],** Employer, and **SELF-INSURED, c/o[REDACTED],** Insurer/Respondent Employer, and regarding, **M[REDACTED-MEDICAL PROVIDER],** Medical Provider, Respondent Hospital System.	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **WC 5-156-972-001**

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

A hearing in the above captioned matter was held on September 23, 2021, before Administrative Law Judge (ALJ), Richard M. Lamphere. Because of COVID-19 related restrictions, the hearing was conducted remotely via video/teleconference. The hearing was digitally recorded on the Google Meets platform between 9:00 and 10:58 a.m.

Claimant was present and represented [Redacted], Esq. H[Redacted] was represented by [Redacted], Esq. Respondent Employer did not appear or otherwise participate in the hearing. Testimony was taken from Claimant, [Claimant], Catherine H[Redacted] and Aaron F[Redacted]. In addition to the testimony of the aforementioned witnesses, the ALJ admitted the following exhibits (including supplements) into evidence: Claimant's Hearing Exhibits 1-5 and Respondents Hearing Exhibits A-C as relabeled by the ALJ and Supplemental Exhibit D.

Following the presentation of evidence, the ALJ held the record open through October 13, 2021, to allow counsel time to file position statements in lieu of closing argument. The parties' position statements have been received. Consequently, the matter is ready for an order.

In this order, Benjamin Sandoval will be referred to as "Claimant"; S[Redacted] will be referred to as "Employer" and H[Redacted] will be referred to alternatively as the Respondent-Hospital" or the "Hospital". All others shall be referred to by name.

Also in this order, "Judge" or "ALJ" refers to the Administrative Law Judge, "C.R.S." refers to Colorado Revised Statutes (2020); "OACRP" refers to the Office of

Administrative Courts Rules of Procedure, 1 CCR 104-1, and "WCRP" refers to Workers' Compensation Rules of Procedure, 7 CCR 1101-3.

ISSUE

I. Whether Claimant established, by a preponderance of the evidence, that penalties should be assessed against the Respondent-Hospital pursuant to C.R.S. § 8-43-304, for the Hospital's alleged violation of § 8-42-101(4), C.R.S.[1]

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. On December 1, 2020, Claimant sustained injuries in a work-related motor vehicle accident. Shortly after his accident, Claimant was treated at a facility operated by H (H[REDACTED]).

2. On December 21, 2020, Claimant's employer admitted liability for Claimant's injuries. Accordingly, Claimant's employer was obligated to cover the cost of his treatment at H[REDACTED]. *See* Exhibit 5.

3. Claimant testified that he advised the treating providers at H[REDACTED] that his injuries were work related and verified that all billing associated with treatment of his work-related injuries should/would be sent to his employer's workers' compensation insurance carrier.

4. Billing for Claimant's treatment related services, including an MRI was prepared by personnel at H[REDACTED] and forwarded to Broadspire, Employer's third party administrator for payment. *See generally*, Exhibit 4, p. 15. Claimant's treatment related charges totaled $2,897.21. Broadspire paid $1,092.06 of the service related expenses leaving an unpaid balance of $1,805.15. *Id.*

5. Claimant testified that he received a billing invoice from H[REDACTED] in the amount of $1,805.15 in March 2021. He testified that he forwarded this invoice to his attorney to address because there were no details explaining why he was billed and he was under the impression that his employer's workers' compensation carrier was obligated to cover the costs of his injury related treatment.

[1] Although Claimant's application for hearing references a claim for penalties for "repeated violations of Section 8-42-101(4), C.R.S. (2020) at a rate of $1,000 per day", Claimant clarified at hearing that he was seeking penalties at a rate of $1,000 per bill sent, not per day. *See*, Ex. 1, p. 3 ¶ 1; *see also*, *Delta Cty. Mem. Hosp. v. Indus. Claim Appeals Office*, 2021 COA 84 (2021). As Claimant alleged he was sent four separate billing invoices in violation of § 8-42-101(4), he asserted a maximum penalty of $4,000. Accordingly, the ALJ advised the parties that there was no further need to further address the maximum penalty amount sought in their post hearing position statements.

6. Careful review of the exhibits admitted into evidence supports a finding that a billing invoice was sent to Claimant as the “Responsible Party” for a debt of $1,805.15 on March 24, 2021. Exhibit 4, p. 13. This invoice was prepared on H[REDACTED] letterhead and directs Claimant to remit payment, in full, to SLV Health at: P.O. Box 780, Longmont, CO 80502-0780 by April 13, 2021.

7. Claimant testified that he received similar invoices requesting payment of $1,805.15 from H[REDACTED] in April and May 2021. The documentary evidence includes a billing invoice sent to Claimant by H[REDACTED] on May 27, 2021. Again, Claimant is listed as the “Responsible Party” for a debt of $1,805.15. Exhibit 4, p. 14. This invoice included an attachment outlining a description of the service rendered to Claimant along with the cost of that service. *Id.* at p. 15. The May 27, 2021 invoice is similar to the March 24, 2021 invoice in that it requests Claimant to pay $1,805.15 to H[REDACTED] by June 16, 2021. However, the May 27, 2021 invoice differs from the March 24, 2021 in that it clearly indicates that this invoice represents H[REDACTED]’s final attempt to secure payment of the outstanding debt before resorting to additional collection efforts. Indeed, the invoice contains the following language:

> FINAL NOTICE. You have not responded to our efforts to resolve the outstanding balance of your account. This unpaid balance is your responsibility and must be paid. YOUR ACCOUNT MAY BE REFERRED TO A COLLECTION AGENCY IF PAYMENT IS NOT RECEIVED WITHIN 30 DAYS FROM THE DATE OF THIS LETTER.
>
> We are reluctant to send any account to a collection agency, but when an account remains unresolved there is no other alternative. Services were provided in good faith, and we expect you to meet your obligation as well. We urge you to send your payment today so further collection efforts will not be necessary.

Id. at p. 14.

8. Although Claimant testified that he received a billing invoice from H[REDACTED] in April 2021, no such invoice was included in the exhibits submitted to the ALJ for inclusion in the evidentiary record.

9. In addition to the invoices Claimant testified he received in March, April and May, he testified that he received a billing invoice from H[REDACTED] for an outstanding balance of $30.11 in July 2021 for services rendered in connection with his December 1, 2020 industrial injuries. Exhibit 4, p. 16-17.

10. During cross-examination, Claimant conceded that he was unaware if the billing invoices had been turned over to any creditors. He also testified that, to date, there appeared to be no adverse effect on his credit from the various billing statements in question. He testified that outside of the written billing statements he has not received any verbal demands or other written demands for payment. Finally, he testified that he has not received any further billing statements from H[REDACTED] after July 2, 2021.

11. Andy L[Redacted] testified as the paralegal for Claimant's attorney of record, Lawrence D. Saunders. Mr. L[Redacted] testified that as the paralegal assigned to Claimant's workers' compensation case, he is the primary point of contact for Claimant. According to Mr. L[Redacted], Claimant contacted him in March 2021 about a bill he received from H[REDACTED]. Mr. L[Redacted] testified that he instructed Claimant to text him a screen shot of the bill in question. Mr. L[Redacted] testified that Claimant then sent him an image of the March 24, 2021 billing invoice sent to him by H[REDACTED]. *See* Exhibit 4, p. 13.

12. Mr. L[Redacted] testified that upon receipt of the March 24, 2021 billing statement from Claimant, he called the number located in the second paragraph of the invoice to inquire why Claimant was receiving billing statements. According to Mr. L[Redacted], he dialed 719-587-6364 and spoke with a female about the claim on March 30, 2021. He was unable to recall the name of the person with whom he spoke. Mr. L[Redacted] testified that during this conversation, he confirmed that the treatment forming the basis of the March 24, 2021 billing statement was related to Claimant's work-related injuries and rendered after the General Admission of Liability (GAL) was filed by Respondent insurance carrier in this case. *See*, Exhibits 4, p. 15 & 5, p. 18.

13. Upon confirming that the treatment associated with the March 24, 2021 billing invoice was related to Claimant's industrial injuries and rendered after Respondent's GAL was filed, Mr. L[Redacted] testified that he advised the H[REDACTED] representative that because liability for Claimant's injuries had been admitted, it was contrary to Colorado law to bill Claimant directly for the treatment connected to the March 24, 2021 billing statement. He testified that he asked that H[REDACTED] cease sending billing statements to Claimant and instead bill the insurance carrier. He testified that he then provided the name, phone number and email address to the adjuster assigned to the claim.

14. Mr. L[Redacted] testified that despite his conversation with a H[REDACTED] representative in March, Claimant contacted him around April 28, 2021 about receiving a second billing statement similar to the first he received in March. Mr. L[Redacted] testified that he immediately called the same 719-587-6364 number as listed on March 24, 2021 billing invoice and again spoke with a female advising her that he was calling a second time to ask that H[REDACTED] contact the adjuster for payment and cease sending additional invoices to Claimant. Although Mr. L[Redacted] was unable to recall the name of the person he spoke with, he confirmed that the representative had the adjuster's contact information.

15. Mr. L[Redacted] testified that Claimant received a third billing invoice from H[REDACTED] and presented it to his attorney in person on June 14, 2021, as he was traveling through Pueblo. As found, the evidence presented supports a finding that a billing statement was sent to Claimant on May 27, 2021, which statement advised that if payment in the amount of $1,805.15 was not received within 30 days, Claimant's account was subject to referral to a collection agency.

16. Mr. L[Redacted] testified that the May 27, 2021 billing invoice was handed to him by Claimant's attorney and that he immediately dropped what he was doing so he follow-up with a representative from H[REDACTED]. Mr. L[Redacted] testified that he called the number for H[REDACTED] on June 14, 2021 and once connected to a representative asked to speak with a supervisor regarding H[REDACTED]'s continued billing of Claimant. According to Mr. L[Redacted], he spoke with a supervisor during which conversation he asked if H[REDACTED] was going to stop sending billing statements to Claimant for his work-related injury treatment. Mr. L[Redacted] testified that he was then transferred to Brett R[Redacted], an attorney for BC[Redacted][2]. According to Mr. L[Redacted], he was advised that H[REDACTED] needed to be paid so they were going to stand by the prior billing and send the matter to collections. Mr. L[Redacted] testified that he then advised BC[Redacted] that Claimant would seek penalties against H[REDACTED] due to the bills the Claimant received.

17. Mr. L[Redacted] testified that because the previous telephone calls he placed had failed to resolve the matter and Claimant was still being billed for treatment associated with his compensable workers' compensation injuries, an Application for Hearing seeking penalties was filed on June 15, 2021. Exhibit 1, pp. 1-4.

18. Mr. L[Redacted] testified that sometime after June 15, 2021 and before July 22, 2021, an additional conversation was had with Brett R[Redacted], who purportedly told Mr. L[Redacted] that no further billing statements would be sent to Claimant.

19. Mr. L[Redacted] suggested that Attorney R[Redacted] mislead him as a fourth billing statement dated July 2, 2021 was sent to Claimant in the amount of $30.11 for services rendered in connection with his workers' compensation treatment. See, Exhibit 4, pp. 16-17.

20. Claimant texted a screen shot of the July 2, 2021, billing invoice to Mr. L[Redacted] on July 22, 2021. Upon receipt of this invoice, Mr. L[Redacted] testified that he attempted to reach Attorney R[Redacted] by phone. According to Mr. L[Redacted], Attorney R[Redacted] rebuffed his phone call because he (Mr. L[Redacted]) was an endorsed witness on the penalty application filed June 15, 2021. Accordingly, Mr. L[Redacted] testified that Attorney R[Redacted] advised him that he would not speak to him and hung up the phone. Claimant then filed a second Application for Hearing endorsing penalties on August 2, 2021. Exhibit 1, pp. 5-8.

21. Claimant's June 15, 2021 and August 2, 2021 Applications for Hearing were consolidated by Order of Prehearing ALJ Craig Eley on August 19, 2021 following a Prehearing Conference. Exhibit 3, pp. 10-12.

22. During cross-examination, Mr. L[Redacted] testified that he works part time from home due to Covid-19 pandemic. Mr. L[Redacted] testified that when working from

[2] BC Services is a third-party company retained by SLVH to prepare and send out billing statements for care rendered by SLVH and its providers to patients seen at their treatment facilities.

home, he uses his personal cell phone, assigned phone number 505-400-2882, to make work-related calls. He also testified that the Seckar Law Firm has 3-4 separate phone lines assigned to their office. The main number associated with the Seckar Law Firm is listed as 719-543-8636. While all incoming phone calls are made to the main number, the number assigned to outgoing calls from one of the firm's ancillary lines will differ from the main number if the main line is in use. Simply put, not all outgoing calls from the Seckar Law Firm originate from 719-543-8636.

23. Mr. L[Redacted] testified that he was working from the Law Firm's offices on March 30, 2021 and June 14, 2021. Conversely, he was working from home on April 28, 2021.

24. Catherine K[Redacted] testified as a "Patient Access Manager" for H[REDACTED]. Ms. K[Redacted] testified that she has worked in this capacity for approximately one year. As H[REDACTED] Patient Access Manager, Ms. K[Redacted] testified that she is in charge of in-patient admissions. She also supervises the health systems financial counselors who typically deal with billing questions. As the Patient Access Manager, Ms. K[Redacted] testified that she routinely addresses patient escalation questions, which revolve around serious queries or concerns about care or billing.

25. Ms. K[Redacted] testified that patients presenting to the emergency room (ER) are triaged and only after this is done and they are stable is insurance information obtained. According to Ms. K[Redacted], Claimant presented to the ER for treatment during which time he advised that the billing for services rendered should be sent to his employer's workers' compensation insurance carrier. She also testified that Employer's workers' compensation insurance was verified. Consequently, she testified that H[REDACTED] did not expect payment from Claimant.

26. Ms. K[Redacted] testified that BC[Redacted] is a billing vendor for H[REDACTED] and that she has almost daily contact with representatives from this company. According to Ms. K[Redacted], all calls coming in from 719-587-6364 are routed to financial counselors for H[REDACTED]; however, representatives from BC[Redacted] relay information to H[REDACTED] about patients who have called them over billing concerns.

27. Ms. K[Redacted] testified that H[REDACTED] maintains call logs tracking all incoming and outgoing calls pertaining to patient accounts. Ms. K[Redacted] identified Exhibit A, p.1 as "a" call log of H[REDACTED]'s entire phone system tracking all incoming and outgoing calls associated with Claimant's account. Per Ms. K[Redacted], there was only one outgoing call, placed May 7, 2021, that related to billing for Claimant's account and that was to secure additional services for Claimant.

28. Ms. K[Redacted] identified Exhibit B, p. 2 as the call log of all incoming and outgoing calls from or to the telephone number associated with the Seckar Law Firm, specifically identified as 719-543-8635. According to Ms. K[Redacted], H[REDACTED]

only received one call associated with the number pinned to the Seckar Law Firm between March 29, 2021 and June 17, 2021 and that call did not pertain to billing. Rather, the call was related to increasing the number of physical therapy visits for Claimant and was in follow-up to the outgoing May 7, 2021 call by a H[REDACTED] representative.

29. Ms. K[Redacted] testified that the billing invoices were mistakenly sent to Claimant by BC[Redacted] because H[REDACTED] had changed to a new automated billing system that failed to catch the fact that Claimant's treatment was covered under his employer's workers' compensation insurance policy. According to Ms. K[Redacted], the setting to prevent a billing statement from going to Claimant failed prompting the electronic system used by BC[Redacted] and H[REDACTED] to generate a billing invoice in Claimant's name.

30. Ms. K[Redacted] testified that once H[REDACTED] learned that Claimant was receiving billing invoices, immediate efforts were made to correct the problem. Ms. K[Redacted] testified that H[REDACTED] learned that Claimant was getting billing invoices from BC[Redacted] on June 15, 2021 when they (H[REDACTED]) received an emailed copy of Claimant's hearing application seeking penalties. She testified that H[REDACTED] was unaware of the problem surrounding Claimant receiving billing statements from BC[Redacted] before June 15, 2021, because Claimant allegedly did not contact H[REDACTED] prior to this date. Because Claimant did not notify H[REDACTED] about receiving billing statements before June 15, 2021, Ms. K[Redacted] testified that H[REDACTED] was unaware of the system failure and no steps were taken to fix the problem prior to this date.

31. Ms. K[Redacted] testified that as soon as H[REDACTED] learned that Claimant was receiving billing statements, changes were made to the billing program, which she assumed fixed the problem.[3] According to Ms. K[Redacted], changes were made to the system on June 17, 2021, which were focused on preventing Claimant and others similarly situated from receiving bills for their workers' compensation related treatment.

32. Despite H[REDACTED]'s efforts to fix its system so that the Claimant would not receive additional bills, the automated billing program generated yet another statement for Claimant on July 2, 2021. *See,* Exhibit 4, p. 16-17. When H[REDACTED] learned about the July 2, 2021 bill, it took additional steps to correct the error in the system and ensure that the Claimant did not receive any additional bills. According to Ms. K[Redacted], H[REDACTED] was able to correct the glitches, which caused the system to generate billing to Claimant on July 26, 2021.

33. During cross-examination, Ms. K[Redacted] conceded that it is never appropriate to direct a billing invoice to a workers' compensation claimant for treatment expenses related to their industrial injuries. She testified that there was never any intent

[3] Ms. K[Redacted] testified that she assumed the billing program had been fixed because she did not receive any complaints that Claimant or any other workers' compensation patient had been billed for treatment related to their industrial injuries after June 17, 2021 until July 2021.

to bill Claimant for the services rendered in connection with his work-related injuries. Rather, she reiterated that a computer problem failed to recognize that Claimant's treatment was related to a work injury and thus, the billing statements were sent to him automatically. According to Ms. K[Redacted], BC[Redacted] generates thousands of billing statements per day and H[REDACTED] does not track individual statements to assure accurate billing.

34. Ms. K[Redacted] testified that billing statements are generated roughly every thirty days leading Claimant to suggest that there must have been a bill generated and sent to Claimant in April, between the March 24 and May 27, 2021 billing statements because the amount requested in both those statements was the same. Ms. K[Redacted] testified that while statements are generated about 30 days apart, there is no guarantee that an invoice will be generated in a given month because activity on the account may preclude a statement from being generated.

35. Aaron F[Redacted] testified as a Senior Account Manager for BC[Redacted]. Mr. F[Redacted] testified that he acts as a lead liaison between BC[Redacted] and H[REDACTED] and that he communicates information from calls BC[Redacted] receives regarding patient accounts to representatives at H[REDACTED]. According to Mr. F[Redacted], all calls to BC[Redacted] are tracked and recorded.

36. Mr. F[Redacted] testified he became aware of Claimant's allegations that billing invoices were being sent to him inappropriately on June 14, 2021. According to Mr. F[Redacted], he was approached by Senior Account Supervisor, Kim D[Redacted] who reported to him that she had received a call during which the caller hung up on her. As all calls are recorded, Mr. F[Redacted] testified he was able to listen to the audio from the June 14, 2021 call to Ms. D[Redacted] and has done so "many times". He identified the caller as Andy L[Redacted] and testified that after listening to the audio recording and realizing there was an attorney involved he informed H[REDACTED] about the issues raised and then "escalated" the call to Attorney Brett R[Redacted] for action. Mr. F[Redacted] testified that Mr. L[Redacted] was not transferred to Attorney R[Redacted] nor was he told he would be transferred.

37. Mr. F[Redacted] testified that the inbound call placed to BC[Redacted] by Mr. L[Redacted] on June 14, 2021 was captured by the company's call log software. The information regarding this call was subsequently retrieved, printed and made part of H[REDACTED]'s exhibit packet. *See*, Exhibit C, p. 3. Mr. F[Redacted] testified that all calls associated with specific account numbers are captured by and documented on the company's call log tracking screens. Information contained on the call log screen includes the date of the call and the telephone number from whence the call came. Exhibit C, p. 3.

38. Mr. F[Redacted] testified that BC[Redacted] did not receive any phones calls from 719-543-8636 prior to June 14, 2021.

39. According to Mr. F[Redacted], H[REDACTED] requested that all billing to Claimant be stopped as of June 17, 2021 and that while prior billing went out, Claimant's account was not turned over to collection, nor was it identified as a delinquent or bad debt.

40. During cross-examination, Mr. F[Redacted] testified that any calls made to the 719-587-6364 number listed on the billing invoice would not ring into BC[Redacted]. Rather, he testified that that is the patient account number for H[REDACTED]. Mr. F[Redacted] clarified that the number to call to speak to a representative at BC[Redacted] is 719-937-4466 or toll free to 844-706-8740. Mr. F[Redacted] admitted that he would have no knowledge of whether Mr. L[Redacted] tried to call the patient account number for H[REDACTED] at 719-587-6364, as those calls would ring directly to H[REDACTED].

41. Mr. F[Redacted] also testified that he was aware that Attorney R[Redacted] attempted to reach Mr. L[Redacted] and that this attempt may have occurred on June 14, 2021. He also conceded that Mr. L[Redacted] and Attorney R[Redacted] might have spoken at some point.

42. The ALJ clarified with Mr. F[Redacted] that BC[Redacted] initiates the billing of patients of H[REDACTED] based upon information that is passed to them by the Hospital.

43. The ALJ has carefully listened to H[REDACTED] Exhibit D in its entirety. Exhibit D consists of a 10 minute 32 second audio recording of a telephone call between Mr. L[Redacted] and Ms. D[Redacted]. *See*, Exhibit D. During the call, Mr. L[Redacted] identifies himself and states that he is calling as a courtesy to inform Ms. D[Redacted] that Claimant would be filing an Application for Hearing seeking penalties because BC[Redacted] was continuing to bill Claimant for treatment associated with a compensable workers' compensation claim. Mr. L[Redacted] advises Ms. D[Redacted] that his call constitutes the third time he has had to address the situation and as such, Claimant was filing the application. Ms. D[Redacted] then informs Mr. L[Redacted] that she will "escalate" the information to the accounting team prompting Mr. L[Redacted] to ask for Ms. D[Redacted]'s supervisor and an email address where he can direct the application. Ms. D[Redacted] is unable to find an email address and places Mr. L[Redacted] on hold 3 minutes and 35 seconds into the conversation. Ms. D[Redacted] returns to the line at the 9 minute and 27 second mark of the phone call at which time she provides Mr. L[Redacted] an email address where the application can be sent. Mr. L[Redacted] then expresses that his office was attempting to get BC[Redacted] to back off from billing the Claimant and since that was not happening the application was going to be filed. He then abruptly terminates the call before Ms. D[Redacted] can respond.

44. Based on the evidence presented, the ALJ is persuaded that Mr. L[Redacted] probably called H[REDACTED] on March 30, 2021 to advise them Claimant was being billed for[Redacted] connected to his workers' compensation injuries. While H[REDACTED] suggests that no such call was made and cites to the H[REDACTED] call logs as proof, the ALJ notes that the call log marked as Exhibit A begins by documenting

a call on April 21, 2021, which is 22 days after the date Mr. L[Redacted] testified he called and many months after Claimant's admitted injury. Although Ms. K[Redacted] testified that Exhibit A constitutes a call log maintained by H[REDACTED], she did not testify that the call log constituted ***all*** calls to the Hospital associated with Claimant's account. The ALJ is simply not convinced that there were no calls to H[REDACTED] by anyone prior to April 21, 2021. Consequently, the ALJ questions the completeness of the call log marked as Exhibit A. Moreover, the ALJ is not convinced that H[REDACTED] would capture all calls from the Seckar Law Firm given the fact that not all calls coming from that office would be identified as originating from 719-543-8636.

45. Based upon the evidence presented, the ALJ finds that Claimant called BC[Redacted] on June 14, 2021 to alert them Claimant was still being billed for treatment expenses related to his admitted industrial injuries. While Mr. L[Redacted] suggested he called the number for patient accounts on this date, it is clear he is mistaken. The ALJ credits the testimony of Mr. F[Redacted] to find that Mr. L[Redacted] probably called 719-937-4466, which rang into BC[Redacted] where upon he had a conversation with Ms. D[Redacted].

46. While there are inconsistencies between Mr. L[Redacted]'s testimony and the balance of the evidentiary record, the ALJ resolves those inconsistencies in favor of Claimant to find that Mr. L[Redacted] probably made telephone calls to both an account representative at H[REDACTED] and a representative for BC[Redacted].

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Claimant's Penalty Claim

A. Section 8-43-304(4), C.R.S., provides that in "any application for hearing for a penalty pursuant to subsection (1) of this section, the applicant shall state with specificity the grounds on which the penalty is being asserted." The failure to state the grounds for penalties with specificity may result in dismissal of the penalty claims. *In re Tidwell*, WC 4-917-514-03 (ICAO, Mar. 2, 2015).

B. The purposes of the specificity requirement are to both: (1) provide notice of the basis of the alleged violation so the putative violator can have an opportunity to cure the violation and (2) provide notice of the legal and factual bases of the claim for penalties so that the violator can prepare its defense. *See Major Medical Insurance Fund v. Industrial Claim Appeals Office*, 77 P.3d 867 (Colo. App. 2003); *Davis v. K Mart,* WC 4-493-641 (ICAO, Apr. 28, 2004). The notice aspect of the specificity requirement is designed to protect the fundamental due process rights of the alleged violator to be "apprised of the evidence to be considered, and afforded a reasonable opportunity to present evidence and argument in support of" its position. *In re Tidwell*, WC 4-917-514-03 (ICAO, Mar. 2, 2015). Nevertheless, the statute does not prescribe a precise form for pleading penalties and an ALJ may consider the circumstances of the individual case to ascertain whether the application for hearing was sufficiently precise to satisfy the statute. *See Davis v. K Mart*, WC 4-493-641 (ICAO Apr. 28, 2004). Based upon the evidence presented, the ALJ concludes Respondent is on notice as to the legal and factual basis for concerning Claimant's asserted penalties in this matter. Indeed, Claimant's Statement of Specificity specifically alleges that Respondent is subject to penalties for a violation of Section 8-42-101(4), C.R.S. (2020) at a rate of $1,000 per day. As noted, Claimant amended his claim for penalties at hearing, without objection, to indicate that he was not seeking a per day penalty but rather a per incident penalty consistent with the holding in *Delta Cty. Mem. Hosp. v. Indus. Claim Appeals Office*, 2021 COA 84 (2021). While the evidence establishes that Claimant has complied with the statutory notice requirements in pleading her penalty, the question of whether statutory penalties may be imposed under § 8-43-304(1) C.R.S. requires a two-step analysis before penalties can be levied.

C. First, the ALJ must first determine whether a party's conduct constitutes a violation of the Act, a rule or an order. Second, the ALJ must determine whether any action or inaction constituting the violation was objectively unreasonable. The reasonableness of the insurer's action depends on whether it was based on a rational argument in law or fact. *Jiminez v. Industrial Claim Appeals Office,* 107 P.3d 965 (Colo. App. 2003); *Gustafson v. Ampex Corp.,* WC 4-187-261 (ICAO, Aug. 2, 2006). There is no requirement that the insurer know that its actions were unreasonable. *Pueblo School District No. 70 v. Toth,* 924 P.2d 1094 (Colo. App. 1996).

D. The question of whether the alleged violator's conduct was objectively unreasonable presents a question of fact for the ALJ. *Pioneers Hospital v. Industrial Claim Appeals Office,* 114 P.3d 97 (Colo. App. 2005); *see Paint Connection Plus v. Industrial Claim Appeals Office*, 240 P.3d 429 (Colo. App. 2010). In this case, Claimant contends that H[REDACTED] violated the Act, specifically, C.R.S. § 8-42-101(4) which provides: "Once there has been an admission of liability or the entry of a final order finding that an employer or insurance carrier is liable for the payment of an employee's medical costs or fees, a medical provider ***shall under no circumstances*** seek to recover such costs or fees from the employee (emphasis added). The ALJ reads the legislature's use of the language "shall" and "under no circumstances" to clearly state the intent that a medical provider shall cease all efforts to collect the cost of work related injury treatment from a claimant once there has been an admission of liability filed or a final order issued.

E. As one of Claimant's authorized medical providers, the ALJ finds and concludes that the Hospital is subject to the provisions of the Act. Therefore, the Hospital can be found to be in violation or in compliance with the Act.

F. In this case, Claimant's statement of penalty claim makes clear that he is seeking penalties for the Hospital's alleged violation of Section 8-42-101(4) for continuing to seek payment from the Claimant for treatment associated with his compensable workers' compensation injuries. The evidence presented persuades the ALJ that the Hospital continued to send billing invoices to Claimant for medical treatment related to his work injuries after the filing of a General Admission of Liability was filed. Indeed multiple billing statements were sent to Claimant in an attempt to collect an outstanding debt of

$1,805.15 and $30.11 directly from him as the party responsible for the debt. Here the evidence supports a conclusion that H[REDACTED] directed BC[Redacted] to issue billing statements to Claimant on March 24, 2021, May 27, 2021 and July 2, 2021. Concerning the alleged April billing statement, the ALJ credits the testimony of Ms. K[Redacted] and the totality of the record, as a whole, to find and conclude that Claimant has failed to establish that an April billing statement was actually mailed to him. Nonetheless, the ALJ concludes that H[REDACTED]s attempts to collect payment from Claimant, through their outside vendor, based upon the billing invoices dated March 24, 2021, May 27, 2021 and July 2, 2021 constitute separate violations of the clear language of C.R.S. § 8-42-101(4).

G. While Respondents may have cured the violation within twenty days of Claimant's applications for hearing[4], the evidence presented supports a conclusion that Claimant has established by clear and convincing evidence that H[REDACTED] knew or reasonably should have known that their continued efforts to collect payment from Claimant were in violation of the law and objectively unreasonable. Indeed, Ms. K[Redacted] testified that it was never appropriate to bill injured workers for treatment associated with compensable industrial injuries. She admitted she was aware of the law precluding such billing. Despite acknowledging that it was improper to bill the Claimant for his injury related treatment, Ms. K[Redacted] suggested that penalties should not be imposed simply because the billing statements were sent out by "mistake" due to a computer glitch. Because the evidence supports a conclusion that H[REDACTED] clearly and convincingly knew or should have known that their continued efforts to collect payment from Claimant for his injury related treatment was in contravention of the Act, the cure provision provides no safe harbor for H[REDACTED].

H. The fact that the billing statements may have been sent to Claimant by "mistake", as testified to by Ms. K[Redacted], also does not negate the violation. "Negligence, as opposed to recklessness or other standards of conduct, connotes an objective standard measured by the reasonableness of the offending party's action and does not require knowledge that the conduct was unreasonable." *CCIA v. ICAO,* 907 P.2d 676, 678 (Colo. App. 1995). Ms. K[Redacted]'s justification for the continued billing of Claimant simply consisted of an excuse that computer problems, which she assumed were fixed by June 17, 2021, caused the billing statements to issue by "mistake". Similar to the situation where an adjuster's "mistaken beliefs" and poor claims handling procedures are not predicated on a rational argument based on law or fact, and thus are not reasonable, H[REDACTED]'s justification that computer problems excuse their violation of the Act for the continued billing of Claimant is equally unreasonable. (*Diversified Veterans Corporate Center v. Hewuse,* 942 P.2d 1312, 1314 (Colo. App. 1997), The ALJ finds the articulated argument against the imposition of penalties in this matter analogous to that presented in *Arnhold v. UPS,* W.C. No. 4-979-20802 (ICAO Feb. 24, 2017). In *Arnhold*, respondents were ordered to pay back-due TTD within fifteen days of the order. The adjuster testified she miscalculated the due date mandated by order. The ALJ concluded this was a "human error," was not unreasonable, and declined to award penalties.

[4] Pursuant to section 8-43-304(4), C.R.S., if the violator cures the violation within twenty days of an application for hearing and the party seeking such penalty fails to prove by clear and convincing evidence that the alleged violator knew or reasonably should have known such person was in violation, no penalty shall be assessed.

The Industrial Claims Appeals Office (ICAO) reversed. The Panel noted, “Respondents cannot be both negligent in miscalculating the date the TTD payment was due and also be deemed reasonable in doing so.” *Arnhold* *4. *See also Kerr v. Costco,* W.C. No. 5-076-601 (ICAO June 2, 2021). In Kerr, respondents were required by W.C.R.P. 5-6(c) to timely issue PPD benefits. The ALJ found respondents violated the rule, but declined to issue penalties. The ALJ found that respondents forgot to update claimant’s address; “inadvertently” mailed the check to a wrong address, and concluded that this “clerical error” was not unreasonable. Again, ICAO reversed, noting, “A late payment due to a ‘clerical error’ and ‘inadvertence’ does not denote the conduct of a reasonable employer or insurer. That is the conduct of a negligent employer or insurer.” *Kerr* *8. The Panel remanded to the ALJ for assessment of penalties. Under the circumstances presented, the ALJ concludes that the conduct of H[REDACTED] is equally negligent and unreasonable. Thus, penalties must be assessed.

I. The Colorado Supreme Court has adopted the “gross disproportionality” test for determining whether a regulatory fine violates the Excessive Fines Clause. *Colorado Dept. of Labor & Empl. v. Dami Hospitality, LLC*, *supra* (hereinafter *Dami Hospitality*). In Concluding that corporations were protected from the imposition of excessive fines pursuant to the Eighth Amendment, the Court provided:

> In sum, we hold that the Eighth Amendment does protect corporations from punitive fines that are excessive. The appropriate test to apply in assessing whether a regulatory fine violates the Excessive Fines Clause is the “gross disproportionality” test. In assessing proportionality, a court should consider whether the gravity of the offense is proportional to the severity of the penalty, considering whether the fine is harsher than fines for comparable offenses in this jurisdiction or than fines for the same offense in other jurisdictions. In considering the severity of the penalty, the ability of the regulated individual or entity to pay is a relevant consideration. And the proportionality analysis should be conducted in reference to the amount of the fine imposed for each offense, not the aggregated total of fines for many offenses.

Dami Hospitality, *Id.* at 103.

J. Concerning the penalties (fine) imposed in this case, the ALJ is mindful that C.R.S. § 8-43-304 provides that, "Any employer or insurer or any officer or agent of either, or any employee, or any other person who violates articles 40 to 47 of this title 8 . . . shall be subject to such order being reduced to judgment by a court of competent jurisdiction and shall also be punished by a fine of not more than one thousand dollars per day for each offenses. . . ” The statute specifically authorizes an ALJ to assess up to $1,000 per day in penalties against any party who violates articles 40-47 of the Act. Here, Claimant urges the ALJ to assess monetary penalties at the maximum rate of $1,000.00 per billing incident consistent with the decision announced in *Delta Cty. Mem. Hosp. v. Indus. Claim Appeals Office*, 2021 COA 84 (2021) for a maximum penalty of $4,000.

K. H[REDACTED] correctly notes that the ALJ has discretion regarding the amount of any penalty assessed. However, "[t]he imposition of penalties under § 8-43-304(1) is mandatory if there has been a violation of the Act and the violation was not reasonable under an objective standard." *Castro v. FBG Service Corporation*, W.C No. 4-739-748(ICAO Dec. 31, 2008). *See also, Armbruster v. Rocky Mountain Cardiology,* W.C. No. 4-447-502 (ICAO Feb. 24 2003). *aff'd by Rocky Mountain Cardiology v. ICAO,* 94 P.3d 1182 (Colo. App. 2004). Based upon the evidence presented, the ALJ concludes that the imposition of penalties are appropriate in this matter. While there has been a clear statutory violation associated with H[REDACTED] attempts to collect payment from the Claimant based upon the billing statements dated March 24, 2021, May 27, 2021 and July2, 2021, the ALJ is not convinced that Claimant's cited hardships justify the imposition of the maximum penalty allowed for by statute. While the May 27, 20921 billing invoice notes that if payment was not received within 30 days from the date of the statement and Claimant was clearly frustrated by receipt of the aforementioned billing statements, he testified that he did not pay the bills, none of the bills were sent to collection, and the his credit was not harmed because of the bills. Ms. K[Redacted] and Mr. F[Redacted] corroborated much of this testimony.

L. The purpose of penalties is to address and dissuade similar ongoing conduct. Based upon the evidence presented, the ALJ finds and concludes that the Hospital's billing of Claimant in this case results from unintentional, yet unreasonable conduct, which was quickly rectified following the July 2, 2021 billing. Nonetheless, it is actionable. In this case, the ALJ concludes that the harm caused by Respondents decision to bill Claimant for treatment associated with his admitted workers' compensation injuries warrants a penalty to deter future like violations. Based upon the totality of the evidence presented, the ALJ finds/concludes that a penalty of $400 per bill for the three instances a bill was sent to Claimant, i.e. March 24, May 27, and July 2, 2021 is not grossly disproportionate to the harm or risk of harm caused by H[REDACTED]'s failure to comply with C.R.S. § 8-42-101(4). Simply put, the fine is proportional to the offending conduct and appropriate under the circumstances presented.

ORDER

The remaining contentions of H[REDACTED] have been considered and are rejected as unpersuasive. Accordingly, it is ordered that:

1. Respondent-Hospital shall pay Claimant penalties in the amount of $400 for the violation of C.R.S. § 8-42-101(4) occurring on March 24, May 27 and July 2, 2021 for a total penalty assessment of $1,200.

2. All matters not determined are reserved for future determination.

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 12, 2021

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-151-060-001

ISSUE

1. Whether Claimant has overcome the Division IME ("DIME") physician's Maximum Medical Improvement ("MMI") determination by clear and convincing evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant is a 76 year-old woman who worked as a kitchen manager for Employer. Claimant worked full time until the date of her admitted industrial injury. Claimant has not worked since the date of her injury.

2. On February 28, 2018, Claimant tripped over a box of lemons, fell on a concrete floor, and was unable to get up. Claimant was taken by ambulance to Lutheran Hospital. At the hospital, x-rays revealed that Claimant suffered a right intertrochanteric displaced hip fracture.

3. On March 1, 2018, Karre Kolstadt, M.D., operated on Claimant to repair her right intertrochanteric fracture. The surgical procedure included fixation of her fracture with a Titanium Fixation Nail. (Ex. K).

4. On March 5, 2018, Claimant transferred to Brookdale Rehabilitation Center ("Brookdale"), where she stayed until March 23, 2018. (Ex. C).

5. After Claimant was released from Brookdale, she was evaluated by Authorized Treating Provider ("ATP"), Hiep Ritzer, M.D., for follow-up care. Claimant reported having right leg and calf pain, with ankle swelling. (Ex. C).

6. Dr. Ritzer coordinated Claimant's care with other specialists. He also arranged Claimant's diagnostic tests, treatment management, and medication management. (Ex. C).

7. On April 25, 2018, Claimant's pain was seven out of ten, and the Tramadol was not helping. Dr. Ritzer referred Claimant to Yusuke Wakeshima, M.D. for a physiatry/pain management consultation. (Ex. A).

8. Dr. Wakeshima evaluated Claimant on May 11, 2018. Claimant complained of right hip, thigh and low back pain. She reported a pain level of six out of ten. Dr. Wakeshima prescribed an electric stimulation unit. (Ex. A.).

9. On August 1, 2018, Dr. Wakeshima referred Claimant to Joel Cohen, Ph.D., for a pain psychology evaluation. Claimant told Dr. Cohen she was concerned about reinjuring

herself, and that she was having bad dreams about falling. Dr. Cohen and Claimant also discussed her history of depression. (Exs. A and E.)

10. Dr. Wakeshima ordered an EMG study of Claimant's right lower extremity. The August 28, 2018 study was normal, including no evidence of sural, superficial peroneal, or peroneal tibial neuropathy. There was also no evidence of lumbar radiculopathy. (Ex. D).

11. On October 24, 2018, Claimant told Dr. Ritzer that her depression was worsening, and her pain was six out of ten. (Ex. C).

12. Dr. Cohen saw Claimant on November 5, 2018, and noted that Claimant had indications for suicidal ideation. He recommended urgent psychiatric consultation. (Ex. D).

13. John Disorbio, Ed.D, is an expert in clinical psychology, and he took over the care of Claimant following the retirement of Dr. Cohen. (Tr. 50:22-51:12). He referred Claimant to Stephen Moe, M.D. for a psychiatric evaluation. (Tr. 52:23-25).

14. On December 7, 2018, Claimant saw Dr. Moe. He noted that Claimant was emotionally dependent on her walker due to her intense fear of falling. He diagnosed Claimant with Major Depressive Disorder (severe), anxiety disorder (not otherwise specified with elements of adjustment disorder and a specific phobia of falling). (Ex. H).

15. Claimant continued to experience pain, particularly in her right hip, so she had an orthopedic consultation with Jeffery Arthur, M.D. On April 19, 2019, Dr. Arthur performed a total hip arthroplasty via a posterior approach, with a right hip hardware removal. (Ex. K).

16. Following surgery, Claimant was transferred to Encompass Health Rehabilitation Hospital where she stayed from April 23, 2019 to May 24, 2019. (Ex. A).

17. In May 2019, Claimant reported to her providers that her pain was improved with the total hip replacement. (Ex. A).

18. Claimant's pain levels fluctuated slightly between five out of ten and seven out of ten for approximately a year, from April 2019 to March 2020, during her continued treatment. During this time, Claimant engaged in physical therapy, both land and aquatic. She also received dry needling and massage therapy. Claimant received multiple epidural steroid and trigger point injections, but they did not provide significant or lasting relief. (Ex. D).

19. On February 17, 2020, Dr. Wakeshima indicated that no further referrals were necessary and no further injections would likely benefit Claimant. He opined that Claimant was approaching MMI. (Ex. E).

20. Dr. Ritzer referred Claimant to Giancarlo Barolat, M.D., to see if she would be a good candidate for a peripheral nerve stimulator. Dr. Barolat is an expert in neurological

surgery with an emphasis in neurostimulation, implants, and chronic pain. (Tr. 30:23-31:1). He is not Level II accredited. (Tr. 36:8-9).

21. Dr. Barolat evaluated Claimant on March 12, 2020, and concluded that she suffered from a chronic, severe, and likely permanent, pain condition affecting her right hip and thigh. He concluded it was neuropathic because it was present 24 hours per day. He noted that her pain had some distribution of the L4 nerve root. Dr. Barolat recommended a peripheral nerve stimulator trial and if that did not work, then a spinal stimulator for the L4 nerve root. Dr. Barolat stated a successful trial would result in greater than 50% improvement. (Ex. G).

22. Bart Goldman, M.D., conducted an Independent Medical Examination ("IME") of Claimant at the request of Respondents. He issued his IME report on June 4, 2020. Dr. Goldman opined that no objective neuropathic pain generator had been established in Claimant. (Ex. B.)

23. Dr. Goldman concluded that Claimant reached MMI as of June 4, 2020. (Ex. B)

24. Dr. Moe concluded that Claimant reached MMI from a psychiatric perspective as of June 4, 2020. (Ex. H).

25. On March 3, 2021, Claimant presented to Linda Mitchell, M.D., for a Division IME. Dr. Mitchell reviewed Claimant's medical records and conducted a physical examination of Claimant. She concluded that Claimant's pain was myofascial in nature. Claimant's OHS score had varied little throughout her course of treatment with the various treatment modalities. (Ex. A).

26. Dr. Mitchell concluded that under Rule 17, Exhibit 19 of the Medical Treatment Guidelines ("MTGs"), Claimant was not a candidate for peripheral nerve stimulation, nor was she a candidate for spinal cord stimulation based on the lack of evidence of radiculopathy related to the work condition, and her psychological contraindications.

27. Dr. Mitchell noted that Claimant's EMG was normal as of August 28, 2018, and Claimant had not responded to multiple epidural steroid injections. Additionally, Claimant's psychological evaluation from March 18, 2019, indicated she was a poor candidate for invasive procedures. Finally, Dr. Mitchell relied on the fact that even when Claimant reported a reduction in her pain from prior treatments, her functional status did not change, and it was unlikely that this would be the case with neurostimulation. (Ex. A).

28. Dr. Mitchell determined claimant reached MMI as of June 4, 2020. (Ex. A).

29. Claimant credibly testified that she has pain in her right hip and leg 24 hours a day, seven days a week, and would like to proceed with the trial stimulator. (Tr: 20:1-7, 25:9-14).

30. Dr. Disorbio credibly testified that if Claimant is denied the stimulator or if it does not provide relief, he is concerned about an increased risk for Claimant being a danger to

herself. (Tr. 56:20-57:2). He further testified that there could be contraindications to the neurostimulation, and cited Claimant's cognitive problems and depression. (Tr. 59: 9-21).

31. Dr. Barolat is a treating physician, not a workers' compensation expert. Dr. Barolat testified that he does not follow the MTGs when making decisions about trial stimulators and implantations, but recommends what is right for the patient. (Tr. 36:10-37:14).

32. Dr. Barolat credibly testified that stimulators do not address musculoskeletal or myofascial pain. (Tr. 40:13-16). Despite Claimant's negative EMG, Dr. Barolat believes that Claimant's chronic pain is due to a nerve injury. (Tr. 43:14-23). He further testified that chronic pain is complex and there is no sure way to determine if a person's pain is myofascial/musculoskeletal or neuropathic. (Tr. 45:15-46:3).

33. Dr. Goldman credibly testified that Claimant's pain generator is predominantly myofascial. (Tr. 70:14-17).

34. There is a disagreement between the physicians in this case regarding the source of Claimant's pain generator.

35. The ALJ finds Dr. Barolat's conclusion that Claimant's pain is due to a nerve injury to be speculative. She finds the opinions of Drs. Mitchell and Goldman that Claimant's pain is myofascial in nature to be persuasive.

36. Dr. Barolat testified that Claimant is not at MMI because "she has not had all of the treatments that are available." He further testified that if the stimulator does not help Claimant, then "maybe" Claimant would then be at MMI. (Tr. 35:4-14)

37. The ALJ does not find Dr. Barolat's testimony persuasive, as his definition of MMI is flawed. MMI is defined as "a point in time when any medically determinable physical or mental impairment as a result of injury has become stable and when no further treatment is reasonably expected to improve the condition." § 8-40-201(11.5), C.R.S.

38. Dr. Mitchell credibly and persuasively opined that a trial stimulator is not reasonably expected to improve Claimant's condition, and she confirmed MMI.

39. The ALJ finds that Claimant did not overcome Dr. Mitchell's opinions on MMI by clear and convincing evidence.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the

evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

DIME Physician's MMI and Impairment Findings

The party seeking to overcome the DIME physician's opinion bears the burden of proof by clear and convincing evidence. *Id.* Clear and convincing evidence is evidence that demonstrates that it is highly probable the DIME physician's opinion is incorrect. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge,* WC 4-914-378-02 (ICAO, June 25, 2015). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., WC 4-476-254 (ICAP, Oct. 4, 2001).

In this case, the DIME physician, Dr. Mitchell, determined that Claimant reached MMI on June 4, 2020. (Finding of Fact ¶ 28). This finding was consistent with that of Dr. Goldman, who completed an IME, on June 4, 2020. (*Id.* at ¶ 23). Dr. Mitchell's opinion must be overcome by clear and convincing evidence.

Dr. Barolat opined that Claimant is not at MMI because she has not had all of the treatments available to her. (*Id.* at ¶ 36). MMI, however, is defined as the point in time when any medically determinable physical or mental impairment as a result of an injury has become stable, and when no further treatment is reasonably expected to improve the situation. § 8-40-201(11.5), C.R.S.

Dr. Barolat offered an opinion regarding Claimant's pain generator that differs from the opinions of Drs. Mitchell and Goldman. (*Id.* at ¶¶ 24 and 31-33). There is no evidence, however, that Dr. Mitchell's opinion regarding Claimant's date of MMI is incorrect. Claimant did not introduce sufficient evidence to meet her burden of proof to overcome Dr. Mitchell's findings regarding MMI.

ORDER

It is therefore ordered that:

1. Claimant has failed to prove by clear and convincing evidence that the DIME physician's finding of MMI is incorrect.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 12, 2021

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-095-685-005

ISSUES

1. Whether Claimant established by a preponderance of the evidence that she sustained a compensable injury arising out of the course of her employment with employer on May 4, 2018.

2. Whether Claimant established an entitlement to a general award of medical benefits.

3. Whether Claimant established that the treatment she received after May 4, 2018 was reasonably necessary to cure or relieve the effects of a compensable industrial injury.

4. Whether Claimant established by a preponderance of the evidence an entitlement to temporary disability benefits from May 4, 2018 and ongoing until terminated by statute.

5. Claimant's average weekly wage.

6. Whether Respondents established by a preponderance of the evidence that Claimant was responsible for termination of her employment and the resulting wage loss from her termination.

FINDINGS OF FACT

1. Claimant is a 52-year-old woman who has worked for Employer since February 2016. Employer is a meat packing company located in Fort Morgan, Colorado. Claimant was employed as a shackle remover and bung stuffer in Employer's plant. Claimant's job duties required her to stand on her feet and place paper in the anus of cattle carcasses using a metal tool. A video of another worker performing the Claimant's bung stuffer duties was admitted as Exhibit C. The video demonstrates that the job requires the employee performing the position to stand and move constantly over an area of approximately 3-4 feet.

2. Claimant has limited proficiency in English and primarily speaks Spanish.

3. On Friday, May 4, 2018, while performing her job duties, Claimant testified she was walking backwards while holding the tail of a cow and experienced a cramp in her right leg by the hip. When she moved forward, her knee "popped a lot" and her foot folded. Claimant continued to work the remainder of her shift and went home for the weekend. Over the course of the weekend, Claimant's right knee became swollen, and she had an increase in pain. Claimant returned to work on Monday, May 7, 2018, and worked her entire shift, although she testified that she worked with pain.

4. On Tuesday, May 8, 2018, Claimant completed an injury report form for Employer. Claimant's primary language is Spanish, and Claimant completed the form in Spanish. An English translation was included on the document. The English translation reads: "As I was working pushing my right knee popped in the bone then my foot kind of twisted." (Ex. M).

5. On May 8, 2018, Claimant was seen by Cecilia Marquez, R.N., in Employer's on-site clinic. Ms. Marquez indicated Claimant had pain and swelling of the right knee/back of knee and calf, and ambulated with difficulty. Ms. Marquez's record, indicates Claimant reported that her right knee popped at work, and that it was sore "like if it was twisted." (Ex. E., p. 37). Ms. Marquez was apparently concerned about the possibility of a deep vein thrombosis (DVT), and advised Claimant to be evaluated for that potential condition. (Ex. 6).

6. Later that day, Claimant was seen at the Colorado Plains Medical Center (CPMC) emergency department by Jeff Cook, M.D. Claimant reported hearing a "pop" in her knee on Friday, May 4, 2018, and that she experienced increased pain and swelling in the knee and popliteal fossa over the weekend. Claimant also reported one similar episode in 2017. On examination, Dr. Cook noted joint effusion, pain, and limited range of motion of the right knee. He noted pain with palpation of the popliteal fossa, and a questionably positive McMurray's test. (McMurray's test evaluates a patient's meniscus).[1] Homan's sign (a test for DVT) was negative. A right lower extremity venous ultrasound was also performed and no DVT (or other abnormality) was identified. Based on his evaluation, Dr. Cook noted that he suspected a meniscal injury and discussed symptomatic management and advised Claimant to follow up with her physician. (Ex. 6).

7. On May 18, 2018, Claimant had a right knee x-ray performed at East Morgan County Hospital for right knee pain and swelling. The x-ray was interpreted as showing no evidence of an acute osseous or joint space injury. No soft tissue edema was seen. (Ex. 7).

8. On May 22, 2018, Claimant saw Kathleen D'Angelo, M.D., at Employer's on-site Clinic. Dr. D'Angelo, was admitted as an expert in occupational medicine, and testified by deposition in lieu of live testimony. Dr. D'Angelo documented an examination of the Claimant's right knee, and noted no swelling and no tenderness of the joint lines of the knee. (Ex. 8). Claimant testified that Dr. D'Angelo did not touch her knee during her examination.

9. During her visit with Claimant on May 22, 2018, Ms. Marquez, who speaks Spanish and English, served as an "interpreter." No evidence was presented to indicate whether Ms. Marquez is qualified to provide reliable Spanish-to-English interpretation other than the fact that she is bilingual. Dr. D'Angelo testified that she, herself, is not proficient in Spanish. Given the lack of evidence concerning the qualifications of the nurse to serve as an interpreter, and Dr. D'Angelo's limited proficiency in Spanish, the ALJ finds

[1] *See* Lower Extremity Injury Medical Treatment Guidelines, Rule 17, Ex. 6, pp. 9 & 90.

evidence of what Claimant reported to Dr. D'Angelo to be unreliable and of limited evidentiary value.

10. In her May 22, 2018 report, Dr. D'Angelo indicated Claimant's ER paperwork from the May 8, 2018 CPMC visit "suggested a differential diagnosis of cyst, gout or Infection." (Ex. 8). In her deposition, Dr. D'Angelo testified she believed the ER physician mentioned "gout, Baker's cyst," in his records. Claimant's May 8, 2018 ER record admitted into evidence does not mention gout, Baker's cyst, cyst, or infection as potential diagnoses. (Ex. 6).

11. Dr. D'Angelo indicated she watched a video of Claimant's job duties with Claimant and that Claimant's job "required minimal if any movement to her lower extremities." Claimant testified that she did not watch any video with Dr. D'Angelo. Dr. D'Angelo's assessment of Claimant's job requirements is not consistent with the video admitted into evidence (Ex. C) which shows the position being performed while standing and with constant movement of the legs. Dr. D'Angelo's deposition testimony indicates she may have seen a different video than that admitted into evidence.

12. Dr. D'Angelo's assessment of Claimant was "[s]pontaneous onset of knee pain." She indicated that Claimant's complaints were not work-related, released Claimant at MMI, and indicated that Claimant may perform regular job duties at that time.

13. Dr. D'Angelo testified that the horizontal and complex tears of the right meniscus shown on Claimant's right knee MRI were degenerative tears. Dr. D'Angelo testified that the mechanism of injury Claimant reported (i.e., taking a step) would not be consistent with a meniscal tear. But a meniscus tear could occur "with twisting." Dr. D'Angelo also testified that at her examination, two weeks after the alleged injury, Claimant did not have swelling or inflammation that would be expected with an acute meniscus tear. She opined that Claimant did not need work restrictions.

14. On June 11, 2018, Claimant saw Eric Becker, PA-C, at Marathon Health for multiple issues, including pre-existing diabetes that was not well-controlled. Claimant reported right knee and ankle pain after falling at work. Mr. Becker noted that Claimant's knee x-ray was normal, and her ankle x-ray showed mild arthritic changes. Examination showed full active range of motion of the knees, with negative testing and no swelling noted. Claimant did have pain to palpation at the right lateral knee. Mr. Becker made no diagnosis of Claimant's right knee. Mr. Becker also noted that Claimant requested a translator for the visit, but had communicated well in English in the past without the need for an interpreter. (Ex. H).

15. On June 20, 2018, Claimant was seen again by Mr. Becker for continued right knee pain. Claimant reported that she was injured at work while walking and holding a cow's tail, and that she fell to her knee as it gave way. Claimant reported pain in the medial and anterior aspects of the right knee, and reported a catching sensation. She also reported difficulty with stairs. On examination, Mr. Becker noted that Claimant's right knee was swollen compared to the left knee, with reduced flexion, and catching sensation with release was felt with flexion. He noted a positive McMurray's test for right medial meniscal

tear. Mr. Becker indicated that he advised Claimant to return to occupational health to re-examine her knee as he felt it was work-related. He indicated if it was determined not to be work-related, he would order a right knee MRI. In the event the MRI showed a meniscal tear, he noted that he would "refer her back to occupational health as it would be very suspicious for workplace injury." (Ex. 9).

16. On July 6, 2018, Claimant again saw Mr. Becker. Claimant reported that she continued to experience catching, locking and crepitus in her knee with severe pain. Mr. Becker noted mild swelling in the right knee compared to the left, and ordered a right knee MRI. (Ex. 9).

17. On July 13, 2018, Claimant underwent a right knee MRI, ordered by Mr. Becker. The MRI was interpreted as showing a horizontal tear of the body and posterior horn of the right knee medial meniscus and a complex tear of the body and anterior horn of the right knee lateral meniscus. (Ex. 10).

18. On July 18, 2018, Mr. Becker completed a work restriction form in which he indicated "R knee meniscal tear appear to be due to work injury that occurred on 5/4/18. Pt. will need following restrictions: No prolonged standing greater than 2 hours. Avoid use of stairs. Please refer pt. back to if this is found to not work-related." (Ex. 11).

19. Claimant continued to work for Employer after May 4, 2018, but Claimant did not return to work for Employer after July 18, 2018. (Ex. B and 19).

20. In late October 2018, Claimant was hospitalized for a shoulder condition and infection, and saw Mr. Becker on October 31, 2018. (Ex. J). On November 12, 2018, Mr. Becker noted that Claimant had been hospitalized for approximately one week due to sepsis and an abscess. (Ex. J).

21. Due to unrelated medical conditions, Claimant was not seen again for her right knee until June 20, 2019, when she was seen at Banner Health by Sandra Boone, NP. Claimant reported that she believed her knee injury was work-related but "they said that her knee is due to her diabetes." (Ex. 13, p. 36). Ms. Boone noted that Claimant had grinding of her right knee and was wearing a brace. She indicated she would refer Claimant for a right knee evaluation.

22. On December 9, 2020, Claimant was seen by Allison Fall, M.D. for an independent medical examination ("IME") at the request of Respondents. Dr. Fall testified at hearing and was admitted as an expert in physical medicine and rehabilitation. At the December 9, 2020 examination, Claimant reported that she took a few steps and her knee popped. While Dr. Fall agrees that Claimant has medial and lateral meniscal tears in her right knee, she opined that the condition is not causally related to a work-related event. Dr. Fall indicated that "merely stepping forward would not cause medial and lateral meniscus tears." She opined that Claimant "had intermittent pain and swelling in her knees as a result of underlying meniscus tears of unknown etiology but likely contribution from her obesity."

23. Dr. Fall testified that it is unlikely that both medial and lateral meniscal tears would be caused by one event, and that they are not consistent with the Claimant's report to her of stepping and her knee popping. The ALJ finds credible Dr. Fall's testimony that it is unlikely that Claimant sustained medial and lateral meniscal tears on May 4, 2018.

24. On March 17, 2021, Claimant saw John Hughes, M.D., for an independent medical examination at Claimant's request. (Ex. 16). Dr. Hughes described in his report that the history provided by Claimant was "impoverished" due to a language barrier. He reported, however, that Claimant indicated she "twisted, feeling sudden onset of a pop in her right leg in the area of the knee, and notes that her right leg gave out." Given the acknowledged language barrier, the ALJ finds what Claimant reported to Dr. Hughes to be unreliable and of limited evidentiary value.

25. Dr. Hughes indicated a "meniscus tear may have a natural course of waxing and waning over time, particularly over the early course of this injury," and opined that this explained the inconsistent reports of swelling and range of motion observed between Dr. D' Angelo and Mr. Becker on May 22, 2018, June 11, 2018 and June 20, 2018. He also noted that Claimant reported a fall down the stairs at work in 2018. Based on his examination and review of records, Dr. Hughes concluded that Claimant had a "work-related right sprain/strain with medial and lateral meniscus tears sustained May 4, 2018, with persistence of right knee arthritis meriting orthopedic surgical evaluation." Dr. Hughes opined that Claimant was not at maximum medical improvement and needs an orthopedic evaluation. (Ex. 16).

26. Claimant testified that she was employed at [Redacted] for approximately three years, working 38-40 hours per week. Her job duties entailed working on the kill floor, putting papers in the buttocks of cows, which required her to move both up and down and sideways.

27. She testified she was injured on Friday, May 4, 2018, around 9:00 at night. She was walking backwards while holding the tail of a cow and got what she thought was a cramp in her right leg by the hip. When she moved forward, her knee popped a lot and her foot folded.

28. Claimant testified that after her injury, she did not work the weekend and returned to work on the following Monday. She worked all day Monday. On Tuesday, Claimant went to the on-site medical clinic at [Redacted]. She received ice for her knee and was sent home, with instructions to go to the hospital for an ultrasound because of concern she may have a blood clot due to her diabetes.

29. Claimant testified that when she saw Dr. D'Angelo, she only spoke to the nurse who was acting as an interpreter. Claimant further claims that Dr. D'Angelo did not exam or touch her knee at this appointment.

30. On February 11, 2020, Claimant was terminated by Employer for failure to complete a Final Accommodation Review process.

31. Exhibits B, 19 and 20 purport to be wage and payroll information from Employer, and Exhibit 20 is identified as “Wage Table.” Neither party offered testimony explaining the information shown on the documents or how to calculate Claimant’s average weekly wage based on the information provided. The ALJ infers from Exhibits B and 19, that as of May 4, 2018, Claimant earned $15.55 per hour. Exhibits B and 19 indicate Claimant worked and was paid for work from the week of May 4, 2018 until the week of July 22, 2018. Claimant testified that prior to her injury, she worked 38 to 40 hours per week, which would equate to an average weekly wage of $590.90 to $622.00.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers’ Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers’ compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers’ compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm’n.*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng’g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

COMPENSABILITY AND MEDICAL TREATMENT

A claimant is required to prove by a preponderance of the evidence that the conditions for which she seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S. A claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Indus. Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result nor natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Constr. v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Med. Ctr.,* W.C. No. 4-727-439 (ICAO Aug. 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO Aug. 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Under section 8-42-101(1)(a), C.R.S., respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *See Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1188 (Colo. App. 2002). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002). All results flowing proximately and naturally from an industrial injury are compensable. *Id., citing Standard Metals Corp. v. Ball*, 474 P.2d 622 (Colo. 1970).

Claimant has established by a preponderance of the evidence that she sustained a compensable injury to her right knee arising out of the course of her employment with Employer on May 4, 2018. The ALJ credits Dr. Hughes' opinion that Claimant sustained a sprain/strain of her right knee on May 4, 2018, but not that Claimant sustained tears to her meniscus arising out of her employment. The ALJ credits Dr. Fall's testimony that Claimant's medial and lateral meniscal tearing is likely degenerative and was not caused by her employment, and that her described mechanism of injury is inconsistent with an acute meniscal tear. Claimant credibly testified that she experienced pain and a pop in her knee arising out of the course of her employment on May 4, 2018. The ALJ finds that Claimant's ability to work the remainder of her shift on May 4, 2018 and also to work on May 7, 2018 is not consistent with an acutely torn meniscus, but is consistent with a strain/sprain of the knee. When Claimant was seen on May 8, 2018, she exhibited objective signs of injury, including swelling that was documented by both the on-site clinic and Dr. Cook in the emergency room. Contrary to Dr. D'Angelo's opinion, there was no credible evidence that Claimant's pain was the result of a cyst, gout, or infection.

With respect to medical treatment, because Claimant has established a compensable injury, Claimant has also established by a preponderance of the evidence that she is entitled to a general award of medical benefits. The treatment Claimant received for her right knee sprain/strain is reasonably necessary to cure or relieve the effects of Claimant’s work injury.

TEMPORARY DISABILITY BENEFITS

To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that she left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-103(1)(g), 8-42-105(4), C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) of the Colorado Revised Statutes requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term “disability” connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage-earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). Impairment of wage-earning capacity may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Indus. Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant’s testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

Claimant has failed to establish an entitlement to TTD benefits. The evidence demonstrates that Claimant worked without restrictions following her injury until July 18, 2018. On July 18, 2018, Claimant received restrictions from physician assistant, Eric Becker. However, those restrictions were due to Claimant’s non-work-related meniscal tears, not the sprain/strain injury sustained on May 4, 2018. Claimant has failed to establish that she had a disability caused by a work-related injury that resulted in loss of earnings after July 18, 2018. Consequently, Claimant’s claim for TTD is denied.

AVERAGE WEEKLY WAGE

Section 8-42-102(2) of the Colorado Revised Statues requires the ALJ to base the claimant's Average Weekly Wage (AWW) on his or her earnings at the time of injury. However, under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Campbell v. IBM Corp.*, 867

P.2d 77 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.* Where the claimant's earnings increase periodically after the date of injury the ALJ may elect to apply § 8-42-102(3), C.R.S. and determine that fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability, not the earnings on the date of the injury. *Campbell v. IBM Corp.*, *supra*.

Because Claimant has failed to establish an entitlement to TTD benefits, determination of Claimant's average weekly wage is moot.

RESPONSIBILITY FOR TERMINATION

The Act prohibits a claimant from receiving TTD benefits if the claimant is responsible for termination of the employment relationship. *Gilmore v. Indus. Claim Appeals Office*, 187 P.3d 1129, (Colo. App. 2008); §§ 8-42-103(1)(g), 8-42-105(4)(a), C.R.S. The termination statutes provide that where an employee is responsible for his or her termination, the resulting wage loss is not attributable to the industrial injury. *In re of Davis*, W.C. No. 4-631-681 (ICAO, Apr. 24, 2006).

"Under the termination statutes, sections 8-42-103(1)(g) and 8-42-105(4), an employer bears the burden of establishing by a preponderance of the evidence that a claimant was terminated for cause or was responsible for the separation from employment." *Gilmore*, 187 P.3d at 1132. "Generally, the question of whether the claimant acted volitionally, and therefore is 'responsible' for a termination from employment, is a question of fact to be decided by the ALJ, based on consideration of the totality of the circumstances." *Gonzales v. Indus. Comm'n*, 740 P.2d 999 (Colo. 1987); *Windom v. Lawrence Constr. Co.*, W.C. No. 4-487-966 (November 1, 2002). *In re Olaes*, WC. No. 4-782-977 (ICAP, April 12, 2011). Implicit in the termination statutes is a requirement that Respondents prove Claimant committed an "act" which formed the basis for his or her termination. Ultimately, the question of whether the claimant was responsible for the termination is one of fact for determination by the ALJ. *Apex Transp., Inc. v. Indus. Claim Appeals Office*, 321 P.3d 630, 632 (Colo. App. 2014).

Because Claimant has failed to establish an entitlement to TTD benefits, the issue of responsibility for Claimant's termination is moot.

ORDER

It is therefore ordered that:

1. Claimant sustained a compensable injury to her right knee arising out of the course of her employment on May 4, 2018.

2. Respondents shall pay for medical treatment reasonably necessary to cure or relieve the effects of her industrial injury.

3. Claimant is not entitled to temporary total disability benefits.

4. All other matters identified as issues for hearing are moot.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 15, 2021

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that he is entitled to a change of physician.

FINDINGS OF FACT

1. On July 28, 2020, the claimant was working for the employer as the head saw filer. On that day, the claimant climbed on a conveyor belt to remove a board that had become stuck. The claimant testified that he jumped down from the conveyor to the concrete floor and immediately had pain in his right knee. The claimant testified that this was from a height of approximately five and a half feet.

2. Following his report of the incident to the employer, the claimant began receiving medical treatment at Peak Professionals (Peak). The claimant has seen Dr. Joseph Adragna and Isaac Klostermann, PA at Peak. Dr. Adragna is the claimant's authorized treating physician (ATP) for this claim.

3. The claimant was first seen at Peak on August 5, 2020. On that date the claimant was seen by both PA Klostermann and Dr. Adragna. In the medical record of that date, the claimant was diagnosed with suprapatellar bursitis of the knee. In addition, PA Klostermann noted that the condition of the claimant's right knee was not work-related. The reasoning regarding causation was based upon the claimant's report of the incident. Specifically, the August 5, 2020 medical record indicates that the claimant reported stepping out of the conveyor, approximately one foot down.

4. As a result of this initial opinion, the claim was denied. Despite the denial, the claimant continued to seek treatment with PA Klostermann and Dr. Adragna at Peak. These visits included knee aspirations and injections.

5. Subsequently, a magnetic resonance image (MRI) of the claimant's right knee showed a complex tear of the medial meniscus. Based upon the MRI results, Dr. Adragna referred the claimant to Dr. Vineet Singh for a surgical consultation.

6. On December 23, 2020, the claimant returned to Peak and was seen by both PA Klostermann and Dr. Adragna. On that date, the claimant presented paperwork regarding the July 28, 2020 incident. Based upon information that the claimant had jumped from the conveyor belt, PA Klostermann and Dr. Adragna opined that the claimant's mechanism of injury was work-related.

7. On December 28, 2020, PA Klostermann authored a letter in which he reiterated that based upon the information that the claimant jumped at the time of his injury, the injury was likely work-related.

8. Subsequently, in response to a May 12, 2021, letter from the respondents' attorney, Dr. Adragna indicated that he does not believe that the claimant's right knee injury is work-related.

9. Despite the changing opinions from Peak providers regarding causation, on June 30 2021, the respondents filed a General Admission of Liability (GAL) for the claimant's July 28, 2020 right knee injury.

10. The claimant has requested a change of physician. The claimant testified that he does not trust Dr. Adranga. The claimant also testified that he prefers the way Dr. Singh drains his knee, over Dr. Adragna's method.

11. Dr. Adragna testified that his treatment of the claimant's right knee condition has not and will not change based upon the cause of that condition.

12. Based upon the testimony and evidence presented at the hearing, the ALJ finds that the claimant has failed to demonstrate that it is more likely than not that he should be permitted to change physicians. The ALJ recognizes that the claimant is displeased with his providers changing their opinions regarding whether his injury is work-related. However, the claimant's personal dissatisfaction with Dr. Adragna does not rise to the level of making a "proper showing" to permit a change of physician.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

4. Section 8-43-404(5)(a), C.R.S. permits the employer or insurer to select the treating physician in the first instance. Once the respondents have exercised their right to select the treating physician, the claimant may not change the physician without the insurer's permission or "upon the proper showing to the division." Section 8-43-404(5)(a), C.R.S.; *In Re Tovar,* W.C. No. 4-597-412 (ICAO, July 24, 2008). Section 8-43-404(5)(a), C.R.S. does not define "proper showing". Therefore, the ALJ has discretionary authority to determine whether the circumstances warrant a change of physician. *Jones v. T.T.C. Illinois, Inc.,* W.C. No. 4-503-150 (ICAO, May 5, 2006), *Loza v. Ken's Welding,* WC 4-712-246 (ICAO January 7, 2009); *Pedro Gutierrez Lopez v. Scott Contractors*, W.C. No. 4-872-923-01, (ICAO Nov. 19, 2014). The ALJ's decision regarding a change of physician should consider the claimant's need for reasonable and necessary medical treatment while protecting the respondent's interest in being apprised of the course of treatment for which it may ultimately be liable. *Id.* An ALJ is not required to approve a change of physician for a claimant's personal reasons including "mere dissatisfaction." *In Re Mark*, W.C. No. 4-570-904 (ICAO, June 19, 2006).

5. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that he is entitled to a change of physician. As found, the claimant's personal dissatisfaction with Dr. Adragna does not rise to the level of making a "proper showing" to permit a change of physician.

ORDER

It is therefore ordered that the claimant's request for a change of physician is denied and dismissed.

Dated this 17th day of November 2021.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-108-386-002

ISSUES

1. Whether Claimant established by a preponderance of the evidence that her claim should be reopened for a worsening condition.

2. Whether Respondent established by a preponderance of the evidence that Claimant received an overpayment of temporary total disability benefits in the amount of $3,645.45.

STIPULATION

The parties stipulated that Claimant received an overpayment of temporary total disability benefits in the amount of $3,645.45.

FINDINGS OF FACT

1. On May 8, 2019, Claimant sustained an admitted injury arising out of the course of her employer while helping unload a truck. Claimant was initially seen outside the workers' compensation system at Kaiser Permanente. Over the course of several months, Claimant was evaluated and treated for right sided back pain radiating down her right leg, and was diagnosed with lumbar radiculopathy. An MRI taken on May 20, 2019, demonstrated degenerative changes and "advanced spinal canal stenosis" at the L4-5 level. (Ex. 3 and July 16, 2021 AFCLO).[1]

2. Following her injury on May 8, 2019, Claimant was seen at SCL Health on several occasions reporting lower back pain with pain radiating down her right leg with associated numbness and tingling. Claimant also reported lower abdominal pain into her groin. She was diagnosed with acute right-sided low back pain with right-sided sciatica and spinal stenosis of the lumbar region without neurogenic claudication. (Ex. E)

3. Between July 30, 2019, and August 28, 2019, Claimant was seen at Concentra for the May 8, 2019 injury, and diagnosed with low back pain, low back strain, and lumbar radiculopathy. In August 2019, Claimant complained of pain in her lower back and hip area, described by the treating physician, Brendan Matus, M.D., as lower back pain, and leg pain between the pelvic bones. (Ex. 3 and July 16, 2021 AFCLO).

[1] Ex. 3 is the Findings of Fact, Conclusions of Law and Order issued in WC 5-130-079-001, regarding Claimant's December 7, 2019 work injury. On July 16, 2021, the ALJ issued an Amended Findings of Fact, Conclusions of Law, and Order (July 16, 2021 AFCLO) in the same matter. The ALJ took judicial notice of the July 16, 2021.

4. On September 12, 2019, Claimant saw Christopher Hicks, M.D., at Kaiser Permanente. Claimant reported pain in her right hip radiating between the hip and back. At that time, Claimant was using a walker for assistance with ambulation. (Ex. 3 and July 16, 2021 AFCLO).

5. On September 23, 2019, Claimant received a right hip steroid and anesthetic injection at Kaiser due to degenerative joint disease. Claimant did not receive medical care for her hip or back between September 23, 2019, and December 10, 2019. (Ex. 3 and July 16, 2021 AFCLO).

6. On December 7, 2019, Claimant was performing her duties for Employer and sustained an injury to her right hip. (Ex. 3 and July 16, 2021 AFCLO). Following the December 7, 2019 injury, Claimant received treatment for both the right hip injury sustained in that incident, and the back injury sustained on May 8, 2019.

7. Between May 4, 2020, and August 13, 2020, Claimant saw Dr. Ogden or other providers at Workwell eight times. At these visits, Claimant reported that no treatment improved her right-sided lower back pain. Claimant also reported numbness in her leg, and difficulty walking and sleeping. Claimant reported pain levels between 8 and 10 during this time, and noted her pain was worse with walking, driving, and up and down motions. (Ex. D).

8. On August 13, 2020, Claimant's authorized treating physician Paul Ogden, M.D., at Workwell, placed her at MMI for her May 8, 2019 work injury. Dr. Ogden later clarified that Claimant did not sustain any impairment related to the May 2019 work injury, as he felt that any impairment was due to Claimant's December 7, 2019 injury. (Ex. D).

9. On December 2, 2020, Claimant underwent a Division independent medical examination (DIME) with Matthew Brodie, M.D. At the time of the DIME, Claimant was using crutches to walk. Claimant initially reported her lower back pain level as 10/10. After Dr. Brodie explained that 10/10 pain equated to incapacitation, she revised her pain description to 8/10. Dr. Brodie indicated Claimant exhibited "substantial gestures, pain projection, occasional outcries of pain, and demonstrations of unsteady station and balance." Dr. Brodie attempted to perform lumbar range of motion measurements three times. However, because Claimant displayed substantial pain mannerisms, ratcheting, and jerking motions, and was unable to perform some measurements unassisted, range of motion measurements were not considered valid. (Ex. B).

10. He diagnosed Claimant with multi-level lumbar spine spondylosis with multilevel canal and neural foraminal stenosis, and opined there was "an improbable causal association between the development of lumbar spine or pelvis/hip-related degenerative disk or joint diseases, and [Claimant's] work activities, including the work activity on May 8, 2019." Dr. Brodie placed Claimant at MMI as of May 4, 2020. He did not assign a permanent impairment and did not recommend maintenance medical care. (Ex. B).

11. On December 8, 2020, in a call with Dr. Hicks, Claimant reported continuing pain in her back. Dr. Hicks' progress note indicated "MRI shows worsening L4-L5 spinal stenosis progression from mild-moderate … to severe on MRI from 5/19 to 12/20." Dr. Hicks recommended a neurosurgery referral to consider a lumbar epidural steroid injection (LESI) vs. surgery. Dr. Hicks' report does not indicate that the progression in Claimant's spinal stenosis or the referrals for neurosurgery were causally-related to her May 8, 2019 work injury. (Ex. G).

12. Dr. Ogden evaluated Claimant on January 4, 2021, at Workwell, reporting continued lower back pain which she rated as a "10." Claimant reported she felt she was getting worse. Claimant also saw providers at Workwell on January 25, 2021, February 15, 2021, March 25, 2021, and April 15, 2021. During this time, Claimant continued to report the same or similar symptoms that she reported since May 2019. (Ex. D).

13. On January 18, 2021, Respondent filed a Final Admission of Liability (FAL), consistent with Dr. Brodie's DIME report. (Ex. 1). Claimant did not challenge the FAL or the DIME report within 30 days of the FAL. Consequently, Claimant's claim closed on February 17, 2021.

14. On January 21, 2021, Claimant saw Brian Mcintyre, D.O., at Kaiser. Claimant reported radiating pain from the right buttock through the right leg, into the foot and great toe area. (Claimant also reported similar symptoms at a Kaiser visit on June 4, 2019). (Ex. G). Dr. Mcintyre ordered a right transforaminal S1 epidural injection "to help ease selling/inflammation about the never roots, and decrease extremity symptoms." (E. H).

15. On January 25, 2021, Dr. Ogden recommended Claimant receive further treatment at Kaiser. Dr. Ogden diagnosed the Claimant as suffering low back pain, radiculopathy in the lumbosacral region, sciatica on the right side and unilateral primary osteoarthritis of the right hip. He indicated the injections Claimant had received had not provided relief. (Ex. 7).

16. On February 5, 2021, Claimant underwent a lumbar MRI at the Medical Center of Aurora, which showed, among other things, moderate to severe bilateral neural foraminal narrowing with abutment of bilateral exiting nerve roots, with no central canal stenosis. (Ex. J).

17. On February 11, 2021, Claimant had a telemedicine visit with Dr. Hicks at Kaiser. Claimant reported right leg pain with standing and any twisting or lifting. He noted that Claimant had an injection on January 28, 2021, which provided no relief. (Ex. G).

18. On February 15, 2021, Claimant saw Dr. Ogden at Workwell, and reported lower back pain rating a 10, as well as pain in the right groin. Claimant also noted numbness and tingling in her right leg, but not constant. (Ex. D)

19. Claimant continued to treat with Kaiser and Kaiser Neurosurgery between February 2021 and April 2021.

20. On March 11, 2021, Claimant saw Benjamin Rubin, M.D. at Kaiser. Claimant's primary complaint was right anterior groin pain and pain radiating into her right leg. Claimant indicated she had a recent epidural steroid injection which provided no relief. Dr. Rubin reviewed Claimant's December 7, 2020 MRI and noted that the findings did not fully explain her symptoms. He also noted that the "exact etiology of the pain is unclear, and she is essentially neurologically intact on exam with the exception of pain limited weakness in the right leg and positive SI joint provocative testing on the right side." Dr. Rubin offered no opinion on the cause of Claimant's symptoms or whether they related to her May 8, 2018 work injury. (Ex. G).

21. On April 16, 2021, Claimant underwent a right SI joint injection. (Exs. G and H)

22. On April 25, 2021, Claimant went to the emergency room at the Medical Center of Aurora, reporting worsening lower back pain radiating down her right leg. Claimant's complaints were substantially similar to those reported since May 2018. (Ex. J).

23. On April 25, 2021, Claimant had a lumbar MRI which showed multilevel degenerative changes; moderate to severe bilateral foraminal narrowing at L4-5; and moderate central canal stenosis at L3-4. (Ex. J). The reading radiologist indicated the degenerative changes were not significantly changed from the February 5, 2021 MRI. (Ex. J).

24. On April 28, 2021, Claimant underwent an L4-S1 lumbar fusion surgery performed by Colin Buchanan, M.D., at the Medical Center of Aurora. The pre- and post-operative diagnoses were lumbar spondylolisthesis, lumbar spondylosis with radiculopathy, and lumbar instability. (Ex. 5). Following her lumbar fusion surgery, Claimant continued to report similar symptoms as before the surgery.

25. At hearing, Claimant testified that in April 2021, she was experiencing severe back pain, and went to the emergency room. Claimant did not testify as to the cause of the back pain or whether any specific event was associated with the back pain. Claimant testified that post-surgery she continues to experience significant pain in her low back, but with some functional improvement.

26. Lawrence Lesnak, M.D., performed an independent medical examination of Claimant at Respondent's request on August 11, 2021. Dr. Lesnak was admitted as an expert in physical medicine and rehabilitation. Dr. Lesnak testified that based on his review of records and his examination, he did not note objective evidence that Claimant's condition had worsened between May 4, 2020, and her April 28, 2021 surgery. He also opined that Claimant's lumbar fusion surgery was not causally related to her May 8, 2019 work injury.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

REOPENING FOR CHANGE IN CONDITION

Section 8-43-303(1), C.R.S. provides that a worker's compensation award may be reopened based on a change in condition. In seeking to reopen a claim the claimant shoulders the burden of proving her condition has changed and that she is entitled to benefits by a preponderance of the evidence. *Berg v. Indus. Claim Appeals Office,* 128 P.3d 270 (Colo. App. 2005); *Osborne v. Indus. Comm'n*, 725 P.2d 63, 65 (Colo. App. 1986). A change in condition refers either to a change in the condition of the original compensable injury or to a change in a claimant's physical or mental condition that is causally connected to the original injury. *Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008); *Jarosinski v. Indus. Claim Appeals Office,* 62 P.3d 1082, 1084 (Colo. App. 2002). A “change in condition” pertains to changes that occur after a claim is closed. *In re Caraveo,* W.C. No. 4-358-465 (ICAO Oct. 25, 2006). Reopening is warranted if the claimant proves that additional medical treatment or disability benefits are warranted. *Richards v. Indus. Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Dorman v. B & W Constr. Co.,* 765 P.2d 1033 (Colo. App. 1988). The determination of whether a claimant has sustained her burden of proof to reopen a claim is one of fact for the ALJ. *In re Nguyen,* W.C. No. 4-543-945 (ICAO July 19, 2004).

Claimant has failed to establish by a preponderance of the evidence that she sustained a change in condition causally connected to her original work injury of May 8, 2019. Claimant’s claim was closed pursuant to the Final Admission of Liability filed on January 18, 2021. Following closure of Claimant’s case, she continued to report the same symptoms at the same pain levels as she had reported since her date of MMI – May 4, 2020. None of Claimant’s treating physicians have opined that Claimant’s symptoms after MMI, after the December 20, 2020 DIME, or after her case closure were causally-related to the injury she sustained on May 8, 2019. Claimant’s April 28, 2021 lumbar fusion surgery was to address lumbar spondylolisthesis, lumbar spondylosis with radiculopathy, and lumbar instability. No credible evidence was presented indicating that the diagnoses addressed by the surgery were causally related to Claimant’s May 8, 2019 work injury. The ALJ finds credible Dr. Brodie’s opinion that Claimant’s development of lumbar spine pathology was not likely caused by her work activities. Claimant has not established that the April 2021 lumbar fusion surgery was causally related to her May 8, 2019 work injury. Because Claimant has failed to meet her burden of establishing a change in condition causally related to her May 8, 2019 work injury, the ALJ finds no basis for reopening Claimant’s claim.

ORDER

It is therefore ordered that:

1. Claimant’s request to reopen her claim based on a worsening of condition is denied and dismissed.

2. Claimant received an overpayment of temporary total disability benefits in the amount of $3,645.45.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty

(20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 18, 2021

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that her sternoclavicular arthritis and chest abscess are related to her compensable work injury?

II. Has Claimant shown, by a preponderance of the evidence, that she is entitled to medical benefits for her sternoclavicular arthritis and chest abscess?

III. Has Claimant shown, by a preponderance of the evidence, that she is entitled to Temporary Partial Disability payments?

IV. Has Claimant shown, by a preponderance of the evidence, that she is entitled to Temporary Total Disability payments?

STIPULATIONS

The parties have stipulated that Claimant's Average Weekly Wage is $1,429.38.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

Claimant's Work Injury, and Subsequent Diagnosis and Treatment

1. Claimant has been a registered nurse (RN) for 33 years. on November 13, 2020, she was working as an RN Case Manager. Her job duties included start-of-care evaluations and discharges for patients who receive home health care. She also oversaw the LPNs' care of the patients. She was responsible for communication and problem solving between the medical team and the patients. Claimant also performed medical evaluations, wound assessments, education for patients regarding their care, and assessments to help the patients transition from the hospital or rehab to home.

2. On November 13, 2020, Claimant testified that she had performed wound care on the coccyx area of a stroke patient, and then had to move the patient back to the middle of the bed. While moving the patient back, Claimant felt a pop and immediate aching sensation in her left shoulder. She was able to finish her documentation with that patient, then see one more patient, just to provide medications, and then went home.

3. Claimant testified that, once home, she took 800 milligrams of Motrin and iced her shoulder. The next morning, she could not move her shoulder or arm. She needed to

use her right arm to move her left arm. Her left shoulder/arm started to swell and she experienced sharp pains and a deep muscle ache.

4. Claimant testified that she called her supervisor and reported the shoulder problem. They made a plan that she would rest and ice the shoulder over the weekend. However, the pain worsened over the weekend, and Claimant went to the emergency room on November 19, 2020. (Ex. 5). At the ER, Claimant received an x-ray, three days' worth of Tramadol, and a referral to orthopedics. At this visit, it was noted that Claimant denied any redness of the skin, bruising, fever, or chills. (Ex. 5, pp. 9-13). She was diagnosed at that visit with acute pain of the left shoulder and pectoralis muscle strain, and received a differential diagnosis that included "clavicle fracture" and "septic joint." *Id.* at 12. She was also provided with a sling to use over the following few days, and told not to move her arm. She was put on light duty work, so that she could not lift or perform patient care. *Id* at 12, 17.

5. Claimant was then seen by orthopedist Charles A. Hanson, M.D., on November 25, 2020. (Ex. 6, p. 19). Dr. Hanson also performed x-rays, along with a physical evaluation. (Ex. 6, p. 21). According to Claimant's interpretation at hearing, Dr. Hanson believed there was inflammation on the chest wall; she had a small mass that was near where her shoulder injury was, about the size of a walnut. By this point, her shoulder and chest both hurt, all the way from her elbow up over into her chest wall; her pain was listed at 8/10, despite the 800 milligrams of Motrin she had continued taking.

6. In this report, Dr. Hanson noted "mild swelling and mild to moderate tenderness in [Claimant's] *left sternoclavicular joint*." He noted "persistent post traumatic aching over the superior, anterior and posterior superior aspects of the shoulder as well as the *left sternoclavicular joint* in association with limitation of motion and weakness of the shoulder and arm *probably due to* grade 1 sprain of the rotator cuff as well as *grade 1 strain of the left sternoclavicular joint."* (Ex. 6, pp. 20-21)(emphasis added). Dr. Hanson wrote a referral for an MRI of the left sternoclavicular joint and left shoulder. However, Claimant testified that she had to wait for the referral to be approved, because it had to go through Workers' Compensation. (*see also*, Ex. 6, p. 23).

7. Claimant then went to CCOM on December 1, 2020. (Ex. 7, p. 25). Brandon Madrid, N.P., noted on his physical exam that Claimant had a limited range of motion in her shoulder, and that she had mild *swelling* to the left side chest area just distal to the *left clavicle* with mild to moderate point tenderness in the left side chest. No redness or bruising was noted. *Id* at 26. NP Madrid also ordered an MRI*. Id.*

8. Claimant testified that her pain was "a constant 10 out of 10." "The redness and swelling were increasing, coming across [her] chest wall from [her] shoulder, the AC

joint area, and came across [her] chest, and the swelling now was about the size of a baseball." (Transcript, p. 21).

9. Claimant next saw NP Madrid at CCOM on December 8, 2020. (Ex. 8). NP Madrid stated that Claimant was still complaining of swelling and moderate tenderness to the left side chest area, including stabbing pain, and discomfort with movement of her left arm. (Ex. 8, p. 29). [Claimant was still waiting on Workers' Compensation for approval of the requested MRI]. NP Madrid's inspection of the chest showed "a palm sized mass." *Id.* His *Review of Systems* for *Musculoskeletal* was: "positive for joint pain, joint stiffness, joint swelling, and muscle pain. Negative for joint redness." *Id.*

10. NP Madrid added a referral to the MRI for imaging of the "chest due to increased swelling and mass present to the left side chest." *Id.* NP Madrid provided the diagnoses of strain of muscle and tendon of the rotator cuff of the shoulder, strain of other muscles at left shoulder and upper arm, and strain of muscle and tendon of front wall of thorax. *Id.* He then opined that all of the diagnoses were related to work activities. *Id.*

11. Under COMMENTS for this December 8, 2020 visit, NP Madrid noted:

> I did get x-rays of the AP and lateral views of the chest x-ray of the C-spine due to I am (sic) masslike presentation to the left side upper chest.
>
> *On the initial exam the patient did complain of radiating pain that radiated to her left side chest to her lower shoulder. *She did complain of left-sided chest discomfort on the initial visit* (emphasis added). [ALJ Note* Claimant's initial visit with NP Madrid was December 1, 2020].

12. Claimant eventually received the MRI on December 10, 2021. (Ex. 9). [Claimant testified at hearing that she had to drive to Colorado Springs to get it, despite imaging services available in Pueblo. The ALJ infers that this was likely some sort of cost containment measure]. The MRI showed a partial articular surface tearing of the subscapularis tendon, as well as "significant inflammatory change involving the left sternoclavicular joint with complex collection extending superficial to the left sternoclavicular joint. Findings are worrisome for septic arthritis and abscess." *Id* at 37.

13. Claimant testified that by December 12, 2020, the pain was so severe at work that Claimant asked her supervisor about going to the ER. She then returned to the ER on December 13, 2020. The ER physician ordered a CAT scan, which showed sepsis in her chest. (Transcript, p. 22, 23) An orthopedist also evaluated her shoulder, and stated that she would need a rotator cuff repair, and to follow up with an orthopedic specialist after her treatment for the sepsis. (Transcript at 25); (*see also* Ex. 10 at 40, 162).

14. Claimant was admitted to the hospital, and on December 16, 2020, she underwent surgery with cardiothoracic surgeon John Dugal, M.D. Dr. Dugal cleaned out the abscess in the chest wall and put a wound vac into it. (Ex. 10 at 63, 42). The surgeon also diagnosed osteomyelitis, a bone infection arising from sepsis. He therefore cut out Claimant's entire clavicle. (Ex. 10, p. 63). Claimant then underwent a second surgery on December 18, 2020, to clean the chest again, sew the muscle layers back, put a JP drain, and suture the incision. *Id* at 63, 71, 84-85; (Transcript at 23). She remained in the hospital for eight days due to the surgeries and IV antibiotics. *Id*. At hearing, Claimant testified she has had no personal medical history of diabetes, cellulitis, significant bacterial infection, previous sepsis, or swelling of her chest.

15. Claimant was asked at hearing if she had ever treated a patient who had sustained an injury, and then developed sepsis:

A Yes. ...when I first started doing home health, I had a patient that developed an infection in his hip. He had a traumatic injury where he twisted his hip and leg when he fell, and they thought it was a fracture and bursitis, which is just swelling of the joint, and the doctor did an aspiration where he stuck a needle in and withdrew fluid, and it turned out to be pus... And the patient never had any kind of hip injury or anything like that. In fact, he was in his 40s.

Q Do he had a leg injury that developed into a sepsis joint?

A Correct, in the hip.

Q Okay. Now was that similar or different than your injury?

A No, it was similar to mine. I mean, you know, a young guy, never had any kind of major medical problems, no drug use or anything to cause, you know, sepsis, and fell, injured the hip, and it developed into sepsis.

They call it sterile abscess because it occurs in a traumatic area, and there are no open wounds in the skin or blood vessels that can—bacteria can enter. (Transcript, pp. 30, 31)

16. After Claimant's discharge, she was on IV antibiotics and home health care for six weeks, and was unable to work. (Transcript, pp. 25-25)(*see* Ex. 10, 12). NP Madrid noted that "Patient states that the abscess was formed from the left shoulder injury. She denies any injections or autoimmune disorders such as rheumatoid arthritis or lupus. She states that she did get her flu shot but that was in her right shoulder. She was told by the cardiothoracic surgeon that the abscess developed from the left shoulder." (Ex. 12, p. 405).

17. On the WC-164, dated 12/29/2020, NP Madrid again stated that the diagnoses were consistent with a work-related mechanism. (Cl's Ex. 12, p. 408). At her next

appointment NP Madrid noted that Claimant was in for her “follow-up visit status post left shoulder strain and abscess to the left side chest,” and that “[t]he cause of this problem is related to work activities. (Ex. 13, pp. 409-10).

18. Claimant testified that as of the date of hearing, her bills from the hospital, radiology, Dr. Seema [Mehta Steinke, M.D., the infectious disease doctor]; and Paragon Infusion for the medications and supplies for the IV antibiotics have not been paid. (Transcript, p. 26). The bills totaled around $150,000. *Id.*

19. After Claimant completed her six weeks of home IV antibiotic treatment, she saw Shannon Constantinides, NP, at the Colorado Center of Orthopaedic Excellence for her left shoulder. NP Constantinides independently interpreted the MRI of 12/10/20, and determined that Claimant had “high-grade partial-thickness tearing of the subscapularis tendon. The biceps tendon appears intact although there is quite a bit of fluid within the groove and evidence of longitudinal tearing. (Ex. 15, p. 418). NP Constantinides noted she would benefit from surgery “in the form of left shoulder arthroscopy with subacromial decompression, rotator cuff repair, and possible biceps tenodesis.” *Id* at 419. David Weinstein, M.D., and orthopedic surgeon requested the surgery, which was approved by Respondents. (Ex. 16*,* p. 421).

20. Thomas Centi, M.D., saw Claimant on March 16, 2021 at CCOM. He agreed with NP Madrid regarding the diagnoses and stated “[t]he cause of this problem is related to work activities.” (Ex. 17, p. 424).

21. On March 25, 2021, Dr. Weinstein performed a rotator cuff repair. (Ex. 18, p. 429) Claimant also testified: “The supraspinatus was totally tor[n]; the infraspinatus muscle, the one on the back of the shoulder, was partially tor[n], and they had to move the biceps tendon and screw it into my humerus, my upper arm bone.” (Transcript at 27). Since then, Claimant has been in physical therapy. (Ex. 18, p. 432).

IME by Dr. Larson

22. Orthopedist Wallace Larson, M.D., performed an independent medical exam of Claimant on February 11, 2021, to opine whether Claimant’s sternoclavicular septic arthritis was related to her work injury. (Ex. C, pp. 78-81). In his report, he noted that in Claimant’s 11/24/2020 visit at CCOM, “…x-rays were done *due to swelling in the front of her chest*” *Id* at 78 (emphasis added). In his own IME report, he noted that on 11/25/2020, “His [Dr. Hansen’s] Impression was *left sternoclavicular joint strain*. Left clavicle examination revealed *increased warmth with mild swelling and mild to moderate tenderness of the left sternoclavicular joint*…” *Id* at 80 (emphasis added).

23. The records made available to Dr. Larsen that he reviewed began on 11/19/2020, and ended with a record at CCOM dated 1/5/2021. He does not reference a CCOM record dated 12/8/2020.

24. In his written IME report, Dr. Larson opined that Claimant's "reported history of shoulder strain is unrelated to the septic arthritis of the sternoclavicular joint and subsequent treatment. It is likely the MRI indication of a *partial subscapularis tear* is a *coincidental* finding and is *not related to trauma* or the reported strain." *Id* at 81. When asked to 'Obtain an appropriate treatment plan', he responded: *"The patient does not require* ***any*** *treatment at this time."* Id at 81 (emphasis added).

Dr. Larson's Deposition

25. Dr. Larson's deposition was taken on August 3, 2021. He stated: "It's very clear that those were two separate issues. The sternoclavicular arthritis was completely unrelated to anything that would have happened at work. There was no evidence of any penetrating injury or anything that would have caused an infection in that joint." (Depo. Larson, pp. 9-10). He believed it was "basically a coincidence" that the septic arthritis occurred after Claimant's injury. (Depo. Larson, p. 19). He stated, the "sternoclavicular joint is not close to the shoulder joint . . . It's quite remote," (Depo. Larson, pp. 18-19). He testified that the common cause of sepsis is attempts at IV drug abuse, or some type of an open wound, and occurs when bacteria comes from the bloodstream and gets into a joint and causes an infection. However, he never saw any signs of IV drug abuse when he examined Claimant. *Id.*

26. When offering his opinion, both in his written report and while testifying, Dr. Larson did not have all of Claimant's medical records following her injury, including Claimant's December 8, 2020 visit at CCOM, [which included the diagnosis of "strain of muscle and tendon of front wall of thorax" and also noted that her chest had a palm sized mass]. (Depo. Larson, pp. 12-14). He was purportedly unaware of the existence of said report, and no explanation was provided why he did not have it. He was also unaware that Dr. Weinstein had diagnosed Claimant with a series of work-related injuries, having not seen any of those reports. He was only aware of this fact because *Claimant had told him* during the IME exam that "she had some surgery" that Respondents had apparently authorized.

27. Dr. Larson opined that none of Claimant's injuries were work-related. He did acknowledge that Claimant did not have a history of diabetes, prior cellulitis or sepsis, or significant previous bacterial infections. *Id.* at 17:7-15. Dr. Larson noted that he had "never seen like this" as an orthopedic surgeon, having never seen anything in the medical literature indicating that such an infection was possible without a penetrating wound.

28. Dr. Larson also stated: "…Also, to be clear, *there's no evidence that she had an injury to her sternoclavicular joint* either, so I think that his [Dr. Hughes'] conclusions were things that are certainly not supported by scientific literature." (Depo. Larson, p. 16)(emphasis added).

IME by Dr. Hughes

29. John S. Hughes, M.D., is Level II accredited for the Colorado Division of Workers' Compensation; board certified in preventative medicine and occupational medicine; and acts as a clinical assistant professor for the University of Colorado School of Medicine in the Department of Environmental and Occupational Health, where he also has served on the residency advisory committee. (Ex. 19, pp. 438-39). Dr. Hughes has periodically been an instructor for the Level II certification course for the Colorado Division of Workers' Compensation, and has sat on a variety of the task forces, as well as the medical care advisory team for the Division. *Id.*

30. Dr. Hughes performed a record review on behalf of Claimant in this case, dated 7/27/2021. He reviewed Claimant's medical records from the date of injury through her hospital stay to address the septic arthritis. He opined that Claimant had "Work-related sprain/strain of the left shoulder including a sprain/strain of the left sternoclavicular joint." *Id* at 436. This then developed into "Progressive septic arthritis, meriting surgical and postsurgical treatment as outlined in the medical records." *Id.*

31. Dr. Hughes noted that Dr. Larson had previously concluded that Claimant's left sternoclavicular septic arthritis was unrelated to a work-related injury of November 13, 2020. In response, he stated:

> I disagree with Dr. Larson's conclusion regarding a lack of work-relatedness. [Counsel for Claimant] represents to me by way of an e-mail that he sent on July 13, 2021 that Ms. [Claimant] has no history of diabetes, prior cellulitis or sepsis, or significant bacterial infections other than a sinus infection several years previously. Given the information currently available to me, I cannot find an alternate medical explanation for development of left sternoclavicular septic arthritis other than Ms. [Claimant]*'s* (sic) work-related left shoulder injury.
>
> It is common in injury cases for joint swelling to attract blood and other nutrients suitable for development of septic arthritis. This is commonly seen in the elbow and knee joints. I believe in Ms. [Claimant]'s case that she sustained an occupational injury to her left sternoclavicular joint that subsequently attracted a bacterial infection. In this way, it is my opinion that the septic arthritis of Ms. [Claimant]'s left sternoclavicular joint is a manifestation of a work-related injury. (Ex. 19, pp. 436-37).

TPD/TTD Benefits

32. Claimant testified that she has either been on light duty or totally off work since her initial injury, and she has still not been released to full duty. While on light duty, she has been unable to work as a case manager, so she has not received her full pay, because she is working "just 8:00-5:00 pay with the, you know, lunch breaktime in

there. When I worked as a case manager, I would get more pay than this." (Transcript, p. 29).

33. "PDO" on Claimant's paystubs means paid days off; it is vacation, sick time, and holiday time all rolled into one. (Transcript at 30). Respondents did not provide TTD during Nurse [Claimant]'s hospital stay and her treatment afterward, as well as TPD when she has had to miss work for physical therapy, orthopedic, and physician appointments. *Id* at 28. As a result, Nurse [Claimant] has had to use her PDO time, as reflected on her paystubs.

34. As a part of her pay, like all the employees for Employer, Claimant also received 60 hours of additional PDO time during the COVID crisis. She was forced to use those 60 hours for her time off due to this injury. *Id* at 35.

35. Respondents paid TTD benefits from 11/17/20 – 11/22/20; 11/25/20 – 12/1/20; and 3/25/21 – 3/28/21. (Ex. 1, p.1). Respondents did not pay benefits in December and January when Claimant had to see physicians for her injury, and when she was in the hospital or receiving home health care afterwards. Respondents did pay TTD while Clamant was off of work for her shoulder surgery (4 days in March of 2020), but did not pay TPD when she was unable to earn her full wages following the surgery, nor when she had medical appointments related to the authorized surgery. Claimant was forced to use her PDO time to cover her time off for medical treatment, but even the PDO did not cover all of her wage loss. (Ex. 23, p. 459).

36. From November 20, 2020 until June 26, 2020, Claimant testified that she used 150-160 hours of PDO time for her medical care related to her admitted workers' compensation injury, amounting to $7,588.80. (Transcript, p. 30). Although the pay stubs in the hearing exhibits stop at June 26, 2020, Claimant testified at hearing that she has continued to use PDO time for related medical appointments*. Id.* In sum, based on the stipulated average weekly wage, the wage records reflect that Nurse [Claimant] is owed $14,166.81 in TTD/TPD (which includes the reimbursement for her PDO) from the time of her admitted injury until 6/26/21. (Cl's Ex. 22, 23 at 459).

37. Respondents filed a General Admission of Liability for Claimant's claim on April 13, 2021. This General Admission of Liability shows Claimant was paid Temporary Total Disability from November 17, 2020 through November 22, 2020, November 25, 2020 through December 1, 2020, and March 25, 2021 through March 28, 2021 (Ex. A-3). The GAL also states that Claimant was paid an overpayment of TTD from March 29, 2021 through April 7, 2021 in the amount of $1,247.04 which will be credited against any future indemnity benefits. The amounts of TTD paid to Claimant pursuant to the April 13, 2021 General Admission of Liability were based on an Average Weekly wage of $1,309.92 (Respondents' Exhibit A-3).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado is to assure quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *Section 8-40-102(1).* Claimant must prove entitlement to benefits by a preponderance of the evidence. The facts in a workers' compensation case are not interpreted liberally in favor of either claimant or respondents. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

B. In determining credibility, the ALJ should consider the witness' manner and demeanor on the stand, means of knowledge, strength of memory, opportunity for observation, consistency or inconsistency of testimony and actions, reasonableness or unreasonableness of testimony and actions, the probability or improbability of testimony and actions, the motives of the witness, whether the testimony has been contradicted by other witnesses or evidence, and any bias, prejudice or interest in the outcome of the case. *Colorado Jury Instructions, Civil*, 3:16. The ALJ, as the fact-finder, is charged with resolving conflicts in expert testimony. *Rockwell Int'l v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990) Moreover, the ALJ may accept all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 165 Colo. 504, 441 P.2d 21 (1968); *see also Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary medical opinion).

C. In this instance, the ALJ finds Claimant to be sincere in recounting what occurred. Claimant has remained consistent with describing her mechanism of injury. She has, to the best of her abilities, described her symptoms to her treating providers, and the IME, in a sincere effort to get better. It is abundantly clear from the record that Claimant wanted, as is not uncommon, to just 'shake it off' in the beginning, but her circumstances became increasingly dire. Further delay in receiving imaging and emergent treatment could have proven catastrophic. Further, given her extensive experience as a nurse, the ALJ does credit her experience, and ability to articulate, the case of sterile abscess she recounted of the patient who had injured his hip.

D. The ALJ further finds that the medical experts in this case have all rendered sincere medical opinions, but as is not infrequent, such opinions differ. In final analysis, the ALJ must decide who is more *persuasive* (as opposed to *credible*, per se), in light of their respective expertise and access to all pertinent information. In this instance, the ALJ finds that, despite a rather brief analysis, Dr. Hughes has the more persuasive argument.

E. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Compensability, Generally

F. A compensable injury is one that arises out of and occurs within the course and scope of employment. § 8-41-301(1)(b), C.R.S. An injury occurs in the course of employment when it was sustained within the appropriate time, place, and circumstances of an employee's job function. *Wild West Radio v. Indus. Claim Apps. Office*, 905 P.2d 6 (Colo. App. 1995). An injury arises out of employment when there is a sufficient causal connection between the employment and the injury. *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which benefits are sought. *Snyder v. Indus. Claim Apps. Office*, 942 P.2d 1337 (Colo. App. 1997).

G. An aggravation of a preexisting condition is compensable. *Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. 1990). If there is a direct causal relationship between the mechanism of injury and resultant disability, the injury is compensable if it caused a preexisting condition to become disabling. *Duncan v. Indus. Claim Apps. Office*, 107 P.3d 999 (Colo. App. 2004). However, there must be some affirmative causal connection beyond a mere assumption that the asserted mechanism of injury was sufficient to have caused an aggravation. *Brown v. Indus. Comm'n*, 447 P.2d 694 (Colo. 1968). It is not sufficient to show merely that the asserted mechanism could have caused an aggravation, but rather Claimant must show that it is more likely than not that the mechanism of injury did, in fact, cause an aggravation.

H. The Workers' Compensation Act creates a distinction between an "accident" and an "injury." The term "accident" refers to an "unexpected, unusual, or undesigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" contemplates the physical or emotional trauma caused by an "accident." An "accident" is the cause and an "injury" is the result. No benefits flow to the victim of an industrial accident unless the accident causes a compensable "injury." A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.,* WC 4-650-711 (ICAO February 15, 2007).

I. The mere fact that a claimant experiences pain at work does not necessarily require a finding of a compensable injury. In *Miranda v. Best Western Rio Grande Inn,* WC 4-663-169 (ICAO April 11, 2007), the panel stated "pain is a typical symptom caused by the aggravation of a pre-existing condition. However, an incident which merely elicits pain symptoms caused by a pre-existing condition does not compel a finding that the claimant sustained a compensable injury."

Compensability, as Applied

J. One can see from the start of the medical records on 11/19/2020, through her surgery in December, that Claimant suffered injuries to her left shoulder, as well as her sternoclavicular joint. And it is clear from the records that Claimant became increasingly septic with the passage of time, with the first signs becoming apparent when she was given a differential diagnosis of septic joint on 11/19/2020- six days after the work injury. Dr. Hansen focused on the sternoclavicular joint at his first visit (11/25/2020), diagnosing a strain to that joint, while noting swelling and tenderness in that location. Such swelling was noted by NP Madrid, along with *point* tenderness in that area as early as 12/1/2020. By 12/8/2010, Claimant was showing a palm-sized mass in this same area. He also noted that Claimant had in fact complained of *chest discomfort* at her initial 12/1/2020 visit. The fears were confirmed by the 12/10/2020 MRI, and by December 12 the race was on. Even then, Claimant lost her clavicle in the process, due in no small part to the delays in getting a simple MRI approved when requested by her own ATP.

K. Dr. Larson opines that the sepsis Claimant suffered from was purely' coincidental' to Claimant's shoulder injury. He emphasized the physical distance from Claimant's shoulder joint to the sternoclavicular joint, and then doubled down in his deposition by stating "there's **no evidence** that she had an *injury* to her sternoclavicular joint." Some weight might have been afforded his opinion had he at least acknowledged the strain to this joint, but he denied *any evidence of it at all*, despite all medical records to the contrary. This is disappointing. For reasons unclear, he did not have all the reports at his disposal, including the 12/8/2020 report from NP Madrid. In fact, he reviewed nothing past 1/5/2021. He only had *awareness* that Dr. Weinstein had requested, and performed shoulder surgery (as approved by Respondents) for Claimant in March, 2021 *because Claimant told him.* And yet he still opined that *none* of Claimant's injuries were work related. He also stated that he was unaware of any instances of such septic infections without a penetrating wound to facilitate the entry of bacteria into the bloodstream. The ALJ takes him at his word that he is truly unaware.

L. Dr. Hughes, on the other hand, seemed quite aware of this possibility, so far as to state that it is commonly seen in the elbow and knee joints. Even Claimant was familiar with this phenomenon. While greater detail would have been of greater value, Dr. Hughes sufficiently described the mechanics of such an infection, even absent an identified entry point, to show that such infections can occur in such fashion. The ALJ finds this persuasive. It stands to reason that injured joints, which are more highly vascularized (and now inherently vulnerable) while the body heals itself, could be less able to fend off endemic bacteria in the bloodstream. Comparatively rare, yes. Impossible, no. And once it gains a foothold, bad things happen quickly.

M. The ALJ further finds Dr. Hughes' conclusion persuasive that it was indeed *this injury to Claimant's sternoclavicular joint that led directly to Claimant's septic infection.* This was no coincidence-it was a clear cause-and-effect relationship. The ALJ concludes that Claimant's suffered a compensable work injury, *including her sternoclavicular sepsis.* Her condition was then greatly aggravated by delays in getting imaging done timely. The ALJ further concurs with Dr. Weinstein (presumably a moot point, since Respondents admitted for the shoulder surgery) that Claimant's shoulder surgery, and all aftercare, was reasonable, necessary, and related to her original compensable work injury.

Medical Benefits, Generally

N. Once a Claimant has established the compensable nature of his work injury, he is entitled to a general award of medical benefits and respondents are liable to provide all reasonable, necessary, and related medical care to cure and relieve the effects of the work injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission,* 759 P .2d 705 (Colo. 1988); *Sims v. Industrial Claim Appeals Office,* 797 P. 2d 777 (Colo. App. 1990). However, a claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his need for medical treatment. *Merriman v. Indus. Comm'n,* 210 P. 2d 622 (197); *Standard Metals Corp.* V. *Ball,* 172 Colo. 510,474, P. 2d 622 (1970); *Section 8-41-301(1)(c), C.R.S.* Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of employment. *Snyder v. City of Aurora,* 942 P. 2d 1337 (Colo. App. 1997). Stated differently, occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability were caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. Ball, supra.*

O. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Al/right Colorado, Inc.,* W.C. No. 4-117-758 (!CAO April 7, 2003). The question of whether a particular medical treatment is reasonably necessary to cure and relieve a claimant from the effects of the injury is a question of fact. *City & County of Denver v. Industrial Commission,* 682 P. 2d 513 (Colo. App. 1984).

Medical Benefits, as Applied

P. In this case, the ALJ has concluded that all of Claimant's complaints, from her first visit to the ER, through and including all aftercare for her shoulder surgery, are due to compensable injuries. The ALJ now finds that all medical care rendered to date has been reasonable, necessary, and related to Claimant's compensable work injury. Respondents are responsible for paying for this treatment, limited of course to the applicable fee schedules as established.

Temporary Disability Payments

Q. Whether a claimant's industrial disability has caused or contributed to his reduced earnings is a question of fact. *Montoya v. Indus. Claim Appeals Off.,* 2018 COA 19, ¶ 14. Pursuant to § § 8-42-103 and 8-42-105, C.R.S., a claimant is entitled to an award of temporary disability benefits if: (1) the injury causes disability; (2) the injured employee leaves work as a result of the injury; and (3) the temporary disability lasts more than three regular working days. *See Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). To prove entitlement to temporary disability the claimant must prove the industrial injury caused a "disability." § 8-42-103(1), C.R.S. The term "disability," as used in workers' compensation cases, connotes two elements. The first is "medical incapacity" evidenced by loss or impairment of bodily function. The second is temporary loss of wage earning capacity, which is evidenced by the claimant's inability to perform his or her prior regular employment. *Culver v. Ace Electric,* 971 P.2d 641 (Colo. 1999). This element of "disability" may be evidenced by showing a complete inability to work, or by physical restrictions, which impair the claimant's ability effectively to perform the duties of his or her regular job. *See Ortiz v. Charles J. Murphy & Co.,* 964 P.2d 595 (Colo. App. 1998). A claimant is not required to prove both components to establish entitlement to disability benefits under the Workers' Compensation Act. *Montoya v. Industrial Claim Appeals Office,* 2018 COA 19 (Colo. App. 2018). Medical and therapy appointments to treat a work-related injury that cause a reduction in a claimant's earnings entitles a claimant to temporary partial disability. *Id.* at ¶¶ 14, 15. Medical appointments "implicitly impose" medical restrictions that preclude an injured worker from performing his regular work on the day of the appointment, since claimants cannot be in two places at once, and are subject to sanctions for failure to attend medical appointments. *See* Colo. Rev. Stat. §§8-42-105(2)(c) & §8-43-404(3); *Boddy v. Sprint Express Inc*.; WC No. 4-408-729 (August 15, 2000).

R. Claimant has either been on light duty or totally off work since her initial injury, and she has still not been released to full duty. The ALJ finds that all diminished wage earnings suffered by Claimant is due to her compensable work injuries. While on light duty, Claimant has been unable to work as a case manager, and has not received her regular pay. Further, she has been forced to use PDO time for her time off or medical appointments which the ALJ has found are all related to her admitted injury.

S. Claimant only received temporary benefits from 11/17/20 – 11/22/20; 11/25/20 – 12/1/20; and 3/25/21 – 3/28/21, even though she has been on light duty since her initial injury of 11/13/20, and has not earned her average weekly wage since then. Claimant is entitled to TPD from 11/23/20 – 11/24/20, 12/2/20 – 12/26/20, & 1/24/20 – ongoing. She is entitled to TTD from 12/27/20 – 1/23/21, in connection with her hospital stay and home health treatment as a result of her left sternoclavicular sepsis.

T. Vacation and sick benefits paid to the claimant cannot be deducted from, or credited against, the temporary disability benefits to which the claimant is entitled. *See,* COLO. REV. STAT. § 8-42-124(2); *Pub. Serv. Co. of Colo. v. Johnson*, 789 P.2d 487, 489 (Colo. App. 1990). Section 8-42-124(2) of the Act "reflects a legislative determination that an injured employee should not be required to sacrifice earned benefits in order to obtain statutorily mandated workmen's compensation benefits. Indeed, it is generally recognized that vacation and sick pay are benefits earned by virtue of past services rendered and that, as such, these 'earned' benefits should not be impaired by the employee's work-related injury. *See* 2 A. Larson, *Workmen's Compensation Law* § 57.46 at 10–164.53 (1989)." *Pub. Serv. Co. of Colo. v. Johnson*, 789 P.2d 487, 489 (Colo. App. 1990) (discussing the former statute 8-52-107(2)&(4), with the same language as the current section COLO. REV. STAT. 8-42-124). If the employer has charged the employee with any earned vacation leave, sick leave, or other similar benefit for any reason when the employee was entitled to receive an award of temporary partial or total disability, then the reduced benefits "shall be reinstated." COLO. REV. STAT. § 8-42-124(4).

U. Employer required Claimant to use her earned PDO time for medical appointments and time off related to her work injuries. Therefore, Claimant shall be reimbursed $7,588 for her PDO time. Any argument by Respondents that Claimant should not be reimbursed for her 60 hours of PDO for COVID crisis pay is in contradiction to the § 8-42-124(4). Claimant has worked throughout the COVID crisis as a nurse and should not lose the benefit of the COVID PDO time because of a Workers' Compensation injury.

V. Since the parties have now stipulated that Claimant's Average Weekly Wage is $1,429.38, all TPD and TTD calculations shall be made accordingly.

ORDER

It is therefore Ordered that:

1. Claimant's sternoclavicular arthritis and chest abscess are the result of her compensable work injury.

2. Respondents shall pay all medical treatment in connection with said condition, as well as all treatment as ordered by Dr. Weinstein.

3. Respondents shall pay Temporary Partial Disability payments to Claimant consistent with this Order.

4. Respondents shall pay Temporary Total Disability payments to Claimant consistent with this Order.

5. Claimant's Average Weekly Wage is $1,429.38.

6. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

7. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. *In addition, in order to best assure prompt processing of your Petition, it is **highly recommended** that you send a copy of your Petition to Review to the Colorado Springs OAC via email at oac-csp@state.co.us.*

DATED: November 18, 2021

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

1. Whether Claimant's request for an exercise bike is reasonably necessary to cure or relieve the effects of Claimant's work injury.

2. Whether nail therapy for Claimant's left hand is reasonably necessary to cure or relieve the effects of Claimant's work injury.

FINDINGS OF FACT

1. On November 2, 2019, Claimant sustained multiple admitted injuries arising out of the course of his employment with Employer when a bull trampled him.

2. Following the injuries, an ambulance took Claimant to Colorado Plains Medical Center. Claimant later transferred to UC Health, then Medical Center of the Rockies, and later to a rehab unit at Poudre Valley Hospital on November 12, 2019. Claimant then transferred to an inpatient rehabilitation program where he remained until May or June 2020. (Ex. H, p. 57). After discharge, Claimant resides at his home in Brush, Colorado.

3. On the day of Claimant's injuries, he was examined at Colorado Plains Medical Center and an assessment was performed. The Assessment Summary from November 2, 2019, under the heading "Normal Findings" lists multiple body parts, including the fingers of Claimant's left hand. No abnormalities of any finger were noted. (Ex. K, p. 243). The ambulance report also documents an examination of Claimant's upper extremities with no issues identified. (Ex. K, p. 247). Medical records from Colorado Plains Medical Center also note the placement of IVs in Claimant's left hand. (Ex K, p. 255, 256, 294).

4. On June 1, 2020, following discharge from the inpatient rehabilitation program, Claimant began seeing Kristin Mason, M.D., at Rehabilitation Associates of Colorado, who serves as his authorized treating physician. Between June 1, 2020 and December 10, 2020, Claimant saw Dr. Mason ten times. During these visits, Claimant did not complain of issues with the nails or nailbeds of his left hand. (Ex. H).

5. On January 7, 2021, Claimant saw Dr. Mason and reported a deformity of the nailbeds on the third and fourth digits of his left hand. Claimant reported that his nails had not been adherent to their beds since his work injury, and that he trimmed them short to keep them from snagging on things. Claimant indicated he thought the bull might have stepped on his hand at the time of his injury. Dr. Mason noted Claimant had not previously reported issues with his nails. (Ex. K, p. 110). Dr. Mason diagnosed Claimant with a deformity of the fingernails on the left hand "likely posttraumatic" and referred Claimant for evaluation with Dr. Morry Olenik for evaluation. (Ex. K, p. 110).

6. On January 12, 2021, Jeffrey Raschbacher, M.D., reviewed Claimant's request for an evaluation for his left digits on behalf of Insurer. Dr. Raschbacher opined that Claimant's nail deformities are not likely posttraumatic and that the issue was not raised until more than a year after Claimant's injury. He also opined that "[p]resumably, a treating physician would have noted the presence of this abnormality previously or the absence of it previously." (Ex. F).

7. Dr. Raschbacher testified at hearing and was admitted as an expert in occupational medicine. Dr. Raschbacher also performed an independent medical examination of Claimant on October 23, 2020. He testified that Claimant did not report any nail bed issues at that IME. Dr. Raschbacher testified that if Claimant had trauma to his left hand, it is likely that medical personnel would have inserted IVs into his opposite hand. Dr. Raschbacher opined that there are multiple possible causes of Claimant's nail bed issues, but he does not know what caused Claimant's condition. Dr. Raschbacher concluded that it is unlikely Claimant's nail bed issues are traumatic in origin.

8. On January 27, 2021, Claimant saw Morry Olenik, M.D. Dr. Olenik ordered an x-ray of Claimant's left hand on January 27, 2021, which showed mild degenerative joint disease of the fingers, and no evidence of acute or remote bony injury. (Ex. I, p. 56). Dr. Olenik's impression was "nail plate irregularity, left long and ring." Dr. Olenik wrote that he would "be happy to review the original medical records to make an opinion as to whether or not there is causality association." However, the parties offered no evidence indicating Dr. Olenik performed the referenced causation analysis. Dr. Olenik's records do not indicate he made any determination as to the cause of Claimant's nailbed issues, or arrived at a definitive diagnosis. (Ex. 2).

9. Claimant testified at hearing that he first noticed nail bed deformities after discharge from residential rehabilitation in 2020. Claimant also testified that he does not know what happened to his left hand when the bull trampled him.

10. Between November 2, 2019 and January 7, 2021, Claimant's admitted medical records contain no indication that Claimant had issues with the nailbeds of his left hand or other similar issues .

11. Occupational therapy records from June 2020 indicate Claimant reported left hand pain, and difficulty with grip strength in his left hand, but no indication of nail bed deformities. Claimant received occupational therapy through September 2020, during which, Claimant participated in therapeutic activities including fine motor coordination exercise involving both hands, such as using buttons, manipulation of objects in his hands, and sorting objects. The occupational therapy records do not indicate any issues with Claimant's nails. (Ex. K).

12. On March 29, 2021, Dr. Mason recommended an exercise bike for Claimant, which she indicated would be an alternative to a health club membership, which would require transportation due to the distance Claimant lived from the nearest health club. (Ex. 1).

13. On April 26, 2021, Claimant saw Dr. Mason and reported that the request for an exercise bike was denied. Claimant then requested a gym membership, which Dr. Mason indicated would benefit Claimant to use “at least a couple of times a week.” Dr. Mason wrote a prescription for a six-month gym membership. Dr. Mason opined that gym activities will help Claimant improve functionally. (Ex. H).

14. On July 1, 2021, Insurer authorized a gym membership for Claimant and transportation services to transport Claimant to and from his home to a gym to permit Claimant to have access to an exercise bike. (Ex. E).

15. At his August 5, 2021 appointment, Claimant reported that he would have preferred to have a stationary bike out of concerns that he could fall and reinjure himself. Dr. Mason encouraged Claimant to try the gym and see how things go. Dr. Mason stated that Claimant will need to be careful and aware of his environment, as he would be anywhere else. *(Ex. H).*

16. Claimant testified that he has balance issues and that he is fearful that if he goes to a gym to use an exercise bike he may fall and sustain injuries.

17. The parties stipulated that the driving time from Claimant’s home to relevant gym facilities is approximately 13-16 minutes.

18. Daniel B[Redacted], the adjuster assigned to Claimant’s claim by insurer testified at hearing. Mr. B[Redacted] testified that Insurer has authorized transportation to take Claimant from his home to a gym with 72-hours’ notice, and also that Insurer would reimburse Claimant for other transportation such as Uber or Lyft. Although Mr. B[Redacted] is not aware if Uber or Lyft had a presence in Brush, Colorado, where Claimant resides.

19. As of the date of hearing, Claimant had not attempted to go to a gym to use an exercise bike.

20. The parties stipulated that Claimant answered interrogatories submitted by Respondent as follows:

> Interrogatory No. 6: Describe in detail what medical care you are seeking which has not been provided.
>
> Response: I would like the gym membership to be authorized, I will need transportation to and from the gym OR to have the exercise bike authorized.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers’ Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See*

§ 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

AUTHORIZATION OF SPECIFIC MEDICAL TREATMENT

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. § 8-42-101(1)(a), C.R.S. A service is medically necessary if it cures or relieves the effects of the injury and is directly associated with the claimant's physical needs. *Bellone v. Indus. Claim Appeals Office,* 940 P.2d 1116 (Colo. App. 1997); *Parker v. Iowa Tanklines*, Inc., W.C. No. 4-517-537, (ICAO May 31, 2006). The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Indus. Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002); *Hobirk v. Colorado Springs School Dist. #11,* W.C. No. 4-835-556-01 (ICAO Nov. 15, 2012). The existence of evidence which, if credited, might permit a contrary result affords no basis for relief on appeal. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). When respondents challenge a claimant's request for specific medical treatment the claimant bears the burden of proof to establish entitlement to the benefits. *Martin v. El Paso School Dist.*

No.11, W.C. No. 3-979-487, (ICAO Jan. 11, 2012); *Ford v. Regional Trans. Dist.,* W.C. No. 4-309-217 (ICAO Feb. 12, 2009).

Treatment for Nail Issues.

Claimant has failed to establish that treatment for his nailbed issues is reasonably necessary to cure or relieve the effects of his industrial injury. While treatment for Claimant's nails may be reasonable, Claimant has failed to establish that the nailbed issues are the result of his industrial injury. No physician has credibly opined that Claimant's injuries are the result of his work injury. The admitted evidence and medical records do not Dr. Mason's opinion that Claimant's nail condition is post-traumatic. No credible evidence shows Claimant sustained a traumatic injury to his left hand which could have caused the issues he reported on January 7, 2021. Claimant does not know what happened to his left hand when the bull hit him. Had Claimant's left hand sustained a traumatic injury, it is probable Claimant's medical providers would have noted such in his medical record. However, Claimant's left hand was examined on the date of accident, and found to be normal. During his hospitalization, IVs were inserted into his left hand. Later, Claimant participated in occupational therapy which required the use of his left hand to perform fine motor activities. None of these records note any issues with the nails on Claimant's left hand. Moreover, even if Claimant had sustained a traumatic injury to his left hand, no credible evidence explained how Claimant's nail bed issues would have been the sequela trauma or otherwise caused by his work injury.

Authorization Of Home Exercise Bike

Respondent has provided Claimant a gym membership and transportation to and from the gym. Both of which he has failed to avail himself. Claimant's primary concern is that he has balance issues and may injure himself, apparently walking into a gym, not concerns about the types of bikes available to him. Claimant offered no credible evidence to indicate how the use of a stationary bike located at Claimant's home, versus one located at a gym would reduce the risks associated with Claimant's balance issues. Claimant has failed to establish that the purchase of an exercise bike is reasonably necessary to cure or relieve the effects of his industrial injury, especially given that a gym membership has been authorized, and is currently available for Claimant's use.

ORDER

It is therefore ordered that:

1. Claimant's request for authorization of treatment for his left-hand nail issues is denied and dismissed.

2. Claimant's request for authorization for purchase of an exercise bike is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 19, 2021

____
Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

I. Whether Respondents has proven by a preponderance of the evidence that they are entitled to withdraw the admission for maintenance care admitted pursuant to the Final Admission of Liability dated March 4, 2008 terminating benefits.

II. Whether Claimant has proven by a preponderance of the evidence that maintenance medical care continues to be reasonably necessary and related to the admitted March 6, 2004 work injury.

PROCEDURAL HISTORY

Claimant filed an Application for Hearing on June 25, 2021 on the issue of medical benefits that are reasonably necessary under maintenance care, including Hydrocodone prescribed by an authorized treating physician. Respondents filed a Response to the Application for Hearing dated July 20, 2021 on additional issues of causation, necessity, relatedness, intervening injury or condition. Respondents added that they were seeking to cut off liability for all maintenance medical treatment, withdraw the general maintenance admitted pursuant to the March 4, 2008 Final Admission of Liability and modify the admission pursuant to Sec. 8-43-201(1), C.R.S.

The parties disclosed that the medical benefits currently being provided and paid for are Hydrocodone, Gabapentin and Methocarbamol. However, Respondents continue to deny that medications currently prescribed by the authorized treating provider are reasonably necessary or related to the injury.

FINDINGS OF FACT

Based on the evidence and testimony presented, the ALJ enters the following findings of fact:

1. Claimant is 66 year old and was born on January 1, 1955 in Pakistan. Claimant was injured in the course and scope of his employment as an ice cream server at a fast food restaurant with Employer on March 16, 2004, when he slipped and fell twice while working.

2. Just prior to the time of the accident, Claimant had no problems with either his low back or his lower extremities. He had no restrictions or limitations at that time.

Claimant was first seen by several providers at Concentra. He was referred by Concentra to Dr. Aschberger.

3. Claimant was first evaluated by Dr. John Aschberger on June 11, 2004 following his work related injury. Dr. Aschberger reported that Claimant was a 48 year old man who reported slipping on a wet floor and landing on his back and buttock. He experienced pain across the low back and persistent irritation. He presented to Concentra for evaluation. Initial x-rays were negative. Claimant was reporting continued irritation without overall improvement in pain. However, Claimant did admit to some improvement in terms of motion. Claimant continued to complain of constant pain across the low back and radiating into the buttocks without distal symptomatology of pain, numbness, tingling or weakness. On exam, Dr. Aschberger found mild tightness at the right lumbar paraspinal musculature but good extension with complaints of tightness and negative straight leg raise also with results of back pain. Dr. Aschberger noted that Claimant was on an anti-inflammatory, a muscle relaxant and narcotics for pain, which he advised was reasonable since Claimant complained of significant pain and was continuing to work, so long as Claimant continued to take narcotics responsibly, the medications should be continued.

4. Dr. Aschberger examined Claimant on July 9, 2004 and found tenderness at the sacral sulcus and the piriformis bilaterally, tight at the lumbar levels, with good lumbosacral flexion which included tightness and pain but good motor strength and a Patrick's[1] test resulting in irritation bilaterally, at the lower lumbar levels worse on the right than the left. At that time Dr. Aschberger referred Claimant to Dr. Robert Kawasaki for SI joint injections. On November 3, 2004 Claimant did not show improvement so he order an MRI.[2]

5. An MRI of the lumbar spine performed on November 5, 2004 showed facet joint osteoarthritis at L4-5 and L5-S1, with minimal protrusion of the L2-3 level with a slight thecal sac deformity. At L4-5, there was moderate left-sided facet joint osteoarthritic changes and mild right-sided facet joint osteoarthritic changes. There was minor buckling and hypertrophy of the ligamentum flavum. Both L5-S1 facet joints showed mild facet joint osteoarthritic changes, left greater than right.

6. Claimant retuned to see Dr. Aschberger on November 19, 2004. Claimant's findings of SI irritation and dysfunction did not respond to SI injections, though overall Claimant seemed to be somewhat improved but subjectively had persistent irritation. On exam Claimant had mildly tight lower lumbar paraspinal levels, more extensive pain with extension and rotation and suspected facet treatment would be necessary, including facet blocks with Dr. Kawasaki.

7. On December 27, 2004 Claimant reported to Dr. Aschberger that he had symptoms of numbness and sharp pain in the low back. The blocks showed good response to the lumbar facet irritation but not helpful long term. Claimant had persistent

[1] Patrick's test is performed to assess or evaluate pathology of the hip or sacroiliac joint pathology.
[2] Magnetic resonance imaging.

radiated pain to the right gluteal area, with spasm on exam, as well as tenderness at the right sacral sulcus and an anterior pelvic compression resulting in posterior irritation on the right. He recommended additional osteopathic manipulation for the sacrum and pelvis as well as an exercise program. He recommended maintenance care after an impairment rating evaluation.

8. Dr. Aschberger performed the impairment rating on January 21, 2005. On exam Dr. Aschberger found Claimant tight on palpation at the lower lumbar paraspinal musculature, the piriformis musculature, and lateral thigh musculature. Straight leg raising results complaints of tightness in the hamstring and back without distal symptoms. He provided a 5% for table 53IIB specific disorder of the spine and a 2% for loss of range of motion for a combined total of 7% whole person impairment in accordance with the *AMA Guidelines to the Evaluation of Permanent Impairment*, 3rd Edition, *Revised*. He recommended maintenance care of osteopathic sessions as needed, repeat injections and follow up in one month.

9. Claimant was placed at maximum medical improvement initially by Dr. Laura Caton on March 22, 2005, which relied upon an impairment rating provided by Dr. John Aschberger of 7% whole person impairment rating. At that time, Dr. Caton recommended maintenance medical care, including a narcotic, possible repeat injections and several additional osteopathic manipulation therapy treatments.

10. Claimant challenged the MMI determination and requested a Division of Workers' Compensation Independent Medical Examination (DIME), which took place on February 8, 2006 with Dr. Edwin Healey. Dr. Healey stated that Claimant was not at MMI for the lumbar spine conditions that were related to the March 16, 2004 injury. He noted that Claimant was complaining of significant pain in his low back and going into his buttock.

11. Dr. Healey diagnosed an aggravation of his underlying degenerative facet disease at the L4-L5 and L5-S1 levels and a superimposed lumbar quadratus lumborum iliocostal myofascial pain syndrome. He recommended medial branch blocks for the aggravation of Claimant's facet injury and trigger point injections for the lumbar myofascial injury. He stated at that time that Claimant was on both narcotics and muscle relaxers for the lumbar spine injuries. He suggested that if the treatment was unsuccessful, that Claimant may require maintenance treatment for the chronic conditions caused by the work related injury.

12. Respondents filed a General Admission of Liability (GAL) on March 6, 2006 admitting to the DIME physician's not at MMI determination.

13. Claimant testified that, during this time, he was complaining of low back pain and leg pain going all the way down to the ankle, greater on the left than the right. He stated that the symptoms into his legs would come and go and were not constant. He stated that he had multiple injections with Dr. Kawasaki for his condition. Claimant testified that the injections did help take away his pain and that he was pleased with the

relief provided by the procedures performed by Dr. Kawasaki as he achieve a point where he had no pain, but that the pain came back.

14. On September 12, 2007 Claimant underwent a follow-up DIME with Dr. Healey. At that time, Dr. Healey stated that he agreed with Dr. Aschberger that Claimant was at MMI with regard to his chronic facet arthropathy and chronic pain syndrome with both physical and psychological factors. Dr. Healey noted that Claimant had a gradual return of the same type of sharp, shooting and aching low back pain aggravated by standing, walking and extension that he had previous to undergoing the radiofrequency rhizotomies with Dr. Kawasaki. Dr. Healey recommended that Claimant continue on maintenance medical care including an opioid medication (a morphine extended release) with a rapid acting opioid for breakthrough pain, together with Lidoderm patches,[3] a muscle relaxant and an anticonvulsant like Lyrica for the neuropathic component to the chronic lumbar pain.

15. On October 19, 2007 Respondents filed a Final Admission of Liability (FAL) denying liability for maintenance medical care after MMI, though admitted to the rating provided by the follow-up DIME evaluation by Dr. Healey.

16. Claimant objected to the FAL with regard to the maintenance care only on October 24, 2007.

17. On January 25, 2008 Claimant followed up with Dr. Aschberger for a maintenance evaluation. Dr. Aschberger found that Claimant was stiff and had tightness in the paraspinal musculature. He renewed Claimant's medications including Opana 10 mg twice per day and Vicodin, which Claimant was taking for breakthrough pain. On February 22, 2008 Claimant remained status quo. Dr. Aschberger continue to assess chronic low back pain with facet irritation and stated he would continue his medication regimen.

18. On March 4, 2008 Respondents amended the FAL to admit to reasonable and necessary medical benefits after MMI, attaching the September 12, 2007 DIME report.

19. Dr. Aschberger reevaluated Claimant on March 21, 2008 stating that Claimant had been taking Opana ER 10 mg twice per day and Vicodin about once per day, occasionally twice a day. Functionally he was working. He still had difficulty with motion, bending, and lifting. On exam, he was very tight at the paraspinal musculature, predominantly the quadratus lumborum, and the mid lumbar paraspinals. He continued to assess chronic persistent low back pain, documenting that Claimant had been on maintenance narcotics. He also noted Claimant was functionally doing okay with that, although still had a lot of irritation. At that point, Dr. Aschberger increased Claimant's narcotic medications.

20. On September 12, 2008 Dr. Aschberger noted that he continued on chronic pain medications and renewed them. On November 14, 2008 he also noted that Claimant

[3] Patches with lidocaine, an anesthetic used for nerve pain.

was handling chiropractic sessions well, as well as finding the Skelaxin helpful and continued on the Opana ER 15 mg twice per day.

21. Claimant returned to Dr. Aschberger on December 12, 2008. He noted Claimant had pain at the L5 and S1 levels with rotation on extension and at L4-L5 level. He was tight in the paraspinal musculature throughout the lumbar region. He assessed chronic low back pain and facet irritation. Dr. Aschberger acknowledge that Claimant was on chronic pain management. He ordered flexion-extension X-Rays to rule out instability, which were negative. He recommend an MRI scan for comparative purposes. If there was no deterioration, he would warrant continued maintenance medication intervention and possibly some periodic chiropractic.

22. Dr. Bao Nguyen interpreted the MRI of December 24, 2008 as showing lower lumbar spondylosis (with facet predominance) resulting in moderate-severe bilateral neural foraminal stenosis at L4-5 and moderate bilateral neural foraminal stenosis at L5-S1.

23. Dr. Aschberger interpreted the MRI findings on December 26, 2008 as having facet arthrosis at the L4-5 and L5-S1 with disc bulging extending into the neural foramina at both levels, with moderate foraminal stenosis. However, on exam, he had intact reflexes and no radicular symptoms. Dr. Aschberger stated that Claimant continued to have consistent complaints through the course of his treatment, with continued maintenance care for the chronic low back pain. Claimant continued to work and had no changes in his level of function.

24. During his January 16, 2009 follow-up with Dr. Aschberger, Claimant was not interested in further types of treatments as he continued to function with his maintenance care program.

25. On March 20, 2009 Dr. Aschberger again evaluated Claimant without much change. He assessed low back pain with degenerative changes and facet degeneration but continued without much radicular symptoms and continued to function, looking well. Dr. Aschberger continued Claimant’s opioid and muscle relaxer.

26. The following exam took place on June 25, 2009 and Claimant was doing fairly well on his medication regime, looking much better overall. Dr. Aschberger discussed possibly tapering Claimant’s maintenance medications.

27. On August 21, 2009 Claimant had an increase in symptoms but exam was consistent to prior exams. On October 16, 2009 he was doing pretty well though had some up and downs with his back symptoms from his chronic low back pain. Due to secondary effects, Dr. Aschberger determined to taper him off the opioid and consider other medications as needed. Claimant returned the following week and surrendered his narcotics and was provided with a lower dose to determine if the secondary effects were caused by the medication.

28. During his October 30, 2009 follow-up Claimant reported doing fairly well with the level of pain on the reduced dose and it was again reduced. By November 6,

2009 his symptoms were ameliorated but not gone. Dr. Aschberger determine to keep him on the reduced dose and make a final decision during his follow-up evaluation.

29. On November 20, 2009, Claimant was reporting increased back pain and he reported that he had obtained medication from his primary care physician. Claimant was counselled that he could not obtain medications from two physician or his care would be terminated. Claimant continued with chronic low back pain and had symptom flare up on the reduced levels of medication, so Dr. Aschberger increased the medication dose.

30. On December 31, 2009 Claimant was reporting more stability at the higher dose, with less side effects. He had less tightness in the paraspinals musculature and excellent flexion and good extension. He was on Opana ER 50 mg b.i.d.[4] and was taking Naproxen and Skelaxin twice a day.

31. Dr. Aschberger attended Claimant on February 19, 2010 in follow-up. Clamant was reporting some symptoms in the left leg but had no response to provocative maneuvers. Claimant also tapered down his Opana ER to 15 mg once per day and doing well. He discussed possibly tapering it further to only 10 mg.

32. Claimant returned to Dr. Aschberger on May 28, 2010 reporting that he was stable with the medications. He had gone from Opana ER 50 mg once per day to Opana ER 10 mg twice per day. He was tolerating that better and reported good symptomatic relief. Chemistry panel performed came back completely normal. Dr. Aschberger reported that Claimant's assessment of chronic low back pain and facet irritation remained the same and that Claimant was compliant with medication per the PDMP.[5]

33. On July 23, 2010 Claimant returned for a maintenance recheck. Claimant reported to Dr. Aschberger that he had been doing fair. He had recurrent back pain with up and down symptoms. Functionally, the medication was helpful in terms of allowing daily activity, though with some increased flares on an intermittent basis. On exam he was tight at the quadratus lumborum bilaterally, with excellent lumbosacral flexion but limitation with extension. Neuromuscular examination of the lower extremities was intact. Dr. Aschberger did not change his diagnosis and continued to prescribe Claimant with Opana ER, Skelaxin and Naproxen, an anti-inflammatory.

34. On October 1, 2010 Claimant reported that the pharmacy could not refill his narcotic medication and he was out for a couple of days, exacerbating his pain symptoms. However, on exam his findings remained the same. Lab testing of October 28, 2010 showed positive for opioid mediation. Claimant followed up on November 12, 2010, reporting up and down symptoms. The drug screen performed at the evaluation came back consistent with maintenance medications. On exam there was muscular

[4] B.I.D. is the medical abbreviation for "twice a day."

[5] Prescription Drug Monitoring Program.

tightness and Dr. Aschberger prescribed some maintenance deep tissue release. He continued to refill the Opana ER, Skelaxin and Naproxen on November 26, 2010.

35. Claimant retuned on March 4, 2011 reporting good benefit with the massage therapy with improving range of motion. He reported lessening pain with improving activity tolerance and less irritation by the end of the workday. Dr. Aschberger continued to note chronic low back pain with facet irritation and degenerative changes. He discussed tapering the Opana to 5 mg twice per day and renewed the Skelaxin, and ordered dry needling.

36. On June 3, 2011 Claimant continued to report improvement, diminishing reports of pain and continued functional gains. Dr. Aschberger provide a prescription for the Opana ER 5 mg to start the tapering process. However, on August 5, 2011 Claimant retuned to Dr. Aschberger discouraged by increasing low back pain and gradual worsening of his symptomology. On exam Claimant had irritation with facet loading and tightness in lumbar paraspinals muscles. Dr. Aschberger reordered dry needling to see if Claimant could be kept at the current dosage or if they would need to go back to the prior prescription of narcotic levels.

37. By September 9, 2011 Dr. Aschberger's examination showed findings of myofascial irritation and facet irritation. He noted that they had cut back on the Opana ER and he had hoped to keep Claimant at the lower level. Because of Claimant's persistent difficulties, however, Dr. Aschberger placed him back on Opana ER 10 mg twice per day.

38. Claimant was doing and looking better by the following visit on October 14, 2011. Dr. Aschberger found on exam less muscle spasm and good motion. He did note some myofascial irritation along Claimant's thigh and discussed stretching and icing. On December 9, 2011 Claimant was still concerned with the thigh symptoms though Dr. Aschberger found no neurological problems, but noted he was tight at the lower extremity, with tenderness at the right iliopsoas and along the lateral thigh. He continued the Opana, Skelaxin and Ibuprofen. The December 13, 2011 labs showed consistent opioid testing.

39. Dr. Aschberger evaluated Claimant on May 11, 2012. He stated that Claimant had missed one of his appointments as he was taking care of his sick mother but his urine test showed good compliance with this medications. He continued to diagnose chronic low back pain with facet irritation and recurrent myofascial pain. He ordered maintenance massage and refilled his Opana, Naproxen and Skelaxin. Lab work of the same day showed positive and consistent testing for opioid use.

40. On August 17, 2012 Dr. Aschberger noted that Claimant continued overall the same. He changed Claimant's prescription from Opana to Kadian, a different morphine narcotic, in order to determine if other medication could be tapered or cut off since Claimant had been on the same medications for a significant amount of time. On October 12, 2012 he changed Claimant to Limbrel, increased his Kadian and renewed

his Gabapentin and Metaxalone medications, stating he would like to monitor meds every 4 weeks due to the changes in prescriptions.

41. Claimant returned to see Dr. Aschberger on November 30, 2012. He noted that the Kadian at 20 mg has been of some limited benefit, Claimant continued with tightness in the back which has been significant, and difficulty sleeping at night. On exam, Claimant was significantly tight throughout the thoracolumbar paraspinal levels, though had good lumbosacral flexion and extension was still limited with increased low back pain. Otherwise the exam was negative. Claimant reported that due to gastrointestinal problems, he had to temporarily discontinue the naproxen and anti-inflammatories so he had significant recurrent myofascial irritation. Dr. Aschberger increased the dose of Kadian and prescribed further massage therapy to keep Claimant's muscle tightness under control. On December 7, 2012 Dr. Aschberger wrote that lab work related to Claimant's long-term maintenance showed consistent use of prescribed medications.

42. On February 1, 2013 Dr. Aschberger reported the same assessment as before, stated that Claimant was doing well on his increased dose of medication, was functional without aggravation, and refilled his medications.

43. Dr. Aschberger noted on August 9, 2013 that Claimant was tolerating the Kadian better than the Opana, with adequate symptomatic control, and working, tolerating activity. Claimant reported he had missed work and follow-ups due to an illness with his mother who had been hospitalized. He continued to assess chronic low back pain, and previous findings of facet irritation. Claimant reported some increased symptoms into the buttock and posterior thigh, but Dr. Aschberger did not identify any neuromuscular deficits. He continued Claimant's maintenance medication and prescribed continued massage therapy.

44. On December 13, 2013 Dr. Aschberger continued Claimant's maintenance medications as they kept Claimant functional. He continued diagnosing the facet and myofascial irritation with soreness in the buttock and posterior thigh.

45. Pursuant to an inquiry from Insurer, on March 14, 2014 Dr. Aschberger noted that Claimant has had facet and myofascial irritation since his injury, requiring maintenance medications, including the Kadian, which is at a much lower dose than when Claimant was on Opana. He also stated that the occasional massage therapy helps keep down the excessive tightness in the lumbar spine related to the injury and has allowed the tapering of medication. Dr. Aschberger wrote a follow up on March 21, 2014 that emphasized that Claimant has had consistent findings throughout his course of treatment, including the facet irritation and myofascial irritation related to the aggravation of the facet injury. He noted that the massage therapy keeps Claimant functioning the same as his medications.

46. On April 25, 2014 Dr. Aschberger reported that Claimant continued on Kadian, Limbrel and Skelaxin with up and down symptomology. He had not had any massage therapy recently and had worsening symptoms, with tightness and tenderness

upon palpation of the lumbar spine. He again determined to reduce his medication levels. He followed up on June 27, 2014 and reported an increase in symptoms with the lower dose of medication. At that time he was taking Kadian 30 mg in the morning and 20 mg at night. Lab work from the same date listed Claimant was prescribed Kadian, and was positive and consistent for opioid use.

47. On July 18, 2014 Claimant returned to consult with Dr. Aschberger. Claimant had worsening symptoms but reported some confusion with regard to the doses he was to be taking. They reviewed his medication and schedule.

48. On September 5, 2014 Dr. Aschberger reviewed the PDMP, which showed Claimant to be compliant. Claimant reported that the maintenance program is keeping him functional and active. Dr. Aschberger renewed medications.

49. On December 19, 2014 Claimant reported some ups and downs as expected. Dr. Aschberger confirmed compliance of medications with the PDMP again, and noted that prescriptions were keeping Claimant functional.

50. On February 27, 2015 Claimant was reporting increasing pain in the back and radiation of symptoms to both lower extremities, though he reported no new trauma or injury, stating that it was a progressive worsening. He was on Kadian, Limbrel, and Metaxalone. Dr. Aschberger assessed chronic low back pain with previous findings of facet irritation. He stated that increased symptoms of radiculitis would warrant follow-up radiological evaluation, but if Claimant has new findings or injury that would be unrelated to the Workers' Compensation incident. He referred Claimant for therapy to go over some mobilization and stability exercises for reinforcement. The February 27, 2015 lab work detected the use of morphine.

51. Dr. Aschberger reported on March 13, 2015 that the urine screening showed compliance with medications and so did the PDMP. On March 27, 2015 Claimant was reporting less symptoms and good response from therapy.

52. When Claimant returned to see Dr. Aschberger on May 1, 2015, he reported up and down symptoms. He had continued pain in the back and radiating pain in the buttock and posterior thigh. Facet loading was positive. He recommended a follow up MRI and consideration of follow-up facet joint injections including medial branch blocks.

53. The May 18, 2015 MRI showed anterolisthesis of L4 on L5 with moderate canal stenosis and bilateral lateral recess and foraminal stenosis, with contact of bilateral descending L5 nerve roots and exiting L4 nerve roots. 2. L3-L4 disc degeneration with broad-based disc bulge causing mild bilateral lateral recess and foraminal stenosis without nerve root deformity. 3. L5-S1 disc degeneration with broad-based disc bulge and bilateral lateral recess and foraminal stenosis without nerve root deformity.

54. Dr. Aschberger examined Claimant on June 5, 2015 and stated that there was progressive degenerative changes. Claimant reported that there was inadequate

pain management with medication and Dr. Aschberger referred Claimant to Dr. Kawasaki for MBBs at the L4-S1 levels.

55. On September 11, 2015 Dr. Aschberger reported that Claimant had good symptom relief from the MBBs two weeks prior, with no pain post injection and continued significant benefit. He recommended a repeat second confirmatory injection if symptoms returned, which was ordered on October 2, 2015.

56. Claimant returned to Dr. Aschberger on November 6, 2015 following the second MBBs with a zero over ten pain rating. Dr. Aschberger discussed possible rhizotomy. On November 13, 2015 Dr. Aschberger sent Claimant for the rhizotomy.

57. On January 22, 2016 Claimant reported to Dr. Aschberger that he had excellent symptomatic results from the rhizotomy with Dr. Kawasaki as he had 2 weeks without pain, though some increased irritation since then. Dr. Aschberger ordered additional therapy to help with the mild tightness.

58. Claimant returned to consult with Dr. Aschberger on March 4, 2016 who assessed continuing chronic low back pain and facet irritation, with a nice diagnostic response to medial branch blocks and rhizotomy. Claimant was reporting worsening symptoms since then. His examination, however, was still significantly improved over his pre-procedure findings.

59. Dr. Aschberger reevaluated Claimant on April 29, 2016 stating that he continued with chronic low back pain, associated myofascial irritation and opioid medication management including Kadian 20 mg twice per day. He renewed Claimant’s medications and massage therapy and added Lidoderm patches for the superficial tenderness at the sacral sulcus bilaterally.

60. On June 3, 2016 Dr. Aschberger documented that Claimant only had very mild tightness because he had just had massage therapy. Claimant’s pain level had increased to 4 or 5/10. The prior appointment Claimant was at zero to 1/10. On July 29, 2016 Claimant was doing fairly well but had exhausted his massage therapy due to some confusion, but it was keeping him functional and cutting down on his opioid intake.

61. The October 14, 2016 documented Claimant had missed a couple of appointments as he was taking care of his ill mother. The lab work of the same day detected use of morphine consistent with prescriptions. Claimant continued with maintenance medications and had a consistent urine screen on November 11, 2016. Dr. Aschberger continued medications and massage therapy as of December 23, 2016, demonstrating ups and downs but consistent exams throughout 2016.

62. On March 24, 2017 Dr. Aschberger assessed chronic low back pain and previous indications of facet irritation. There was lot of myofascial restriction and tightness, chronically identified. Medications were renewed. Claimant had been receiving maintenance massage that helps minimize medication use. On exam he presented with no new neurological deficits. He did report that he was dealing with

stress as his mother was gravely ill. He had soreness in the back with pain in the buttock and proximal thighs.

63. By May 26, 2017 Claimant's symptoms increases to the level prior to the last rhizotomy. Dr. Aschberger noted that Claimant had about 5-6 months of symptomatic benefit and had a nice diagnostic response to medial branch blocks. He discussed with Claimant repeat facet rhizotomy in order to potentially cut back on medication utilization. He put in a referral with Dr. Kawasaki.

64. Dr. James Ogsbury, an Insurer physician advisor, performed a record review on June 21, 2017 following a request for authorization of the repeat medial branch blocks. Dr. Ogsbury recommended the injections be denied pending Dr. Aschberger's reevaluation of the patient and an analysis and development of a long term maintenance program to determine if rhizotomies are reasonable.

65. On September 1, 2017 Claimant attended an appointment with Dr. Aschberger during which Claimant stated that he had taken his Kadian medication but the PDMP only showed intermittent use of his medications. On exam he showed he was pretty tight once again at the upper lumbar paraspinal musculature, with mild tenderness. He had good forward flexion of 80 degrees with good reversal and mild tightness, with extension increasing his pain at L5-S1. However, reflexes and lower extremity strength were intact and pelvis was level. He assessed chronic low back pain, myofascial tightness and opioid management. He anticipated being able to taper medications given use for symptom management only but stated that Claimant continued to be a candidate for rhizotomy given good results in the past. Claimant reported he was currently working and was also looking after his ailing mother. Lab work for the same day detected the use of prescribed morphine medication.

66. Respondents scheduled Claimant for an Independent Medical Evaluation (IME) with Dr. Michael Rauzzino, which took place on October 30, 2017. The questions asked of Dr. Rauzzino relate to the need and relatedness of future rhizotomies to maintain maximum medical improvement. Dr. Rauzzino reviewed the 13 years of medical records emphasizing that Dr. Healey, the DIME physician, in 2007 did not recommend further rhizotomy as they were of limited benefit and duration. He went on to explain that Claimant's underlying degenerative process of his spine was unrelated to the 2004 claim as the natural course of degeneration had overcome any aggravation that had been caused by the work related slip and fall accident. Dr. Rauzzino goes on to state that Claimant was no longer working, as he was taking care of his ill mother, no longer working and there was really no documentation of improved functional capacity with or without the medication except as related to the subjective complaint of pain. He stated that all other modalities provided very temporary relief and then he would returns to his baseline pain and could not be weaned off narcotics. Dr. Rauzzino went on to opine that since these adjuvant therapies were not leading to an improved functional outcome and have not been linked to a decrease in his use of medication, there would be no reason to continue these through the workers' compensation program even if they were maintenance treatment.

67. Claimant followed up with Dr. Aschberger on November 10, 2017 noting that Claimant had persistent back pain that was up and down in terms of severity with no overall change in exam and renewed medications.

68. On December 13, 2017 Dr. Rauzzino performed a record review, upon receipt of additional medical records, and stated that they did not change his original opinion.

69. On January 26, 2018 Claimant returned to see Dr. Aschberger in distress following the IME with Dr. Rauzzino and the death of his mother. Dr. Aschberger noted that Dr. Rauzzino recommended taking Claimant off medications. He reviewed Claimant's medical history including that Claimant had a document aggravation of his lumbar spine causing chronic facet irritation, with good response to MBBs and rhizotomy and controlled pain complaints with maintenance medications. He recognized that Claimant was not always consistent in taking his medications but has consistently taken them as needed to control the symptoms. He also recognized that there had been some missed appointments due to Claimant having to care for his mother during her illness. His exam was consistent with prior exams with 80 decrees flexion and 20 degrees extension with lumbar pain, tightness at the lower paraspinal muscles and positive facet loading with intact strength and reflexes. At that time Dr. Aschberger agreed it was reasonable to go ahead and try to taper Claimant from the morphine, substituting Hydrocodone three times per day and follow up back in 4 weeks.

70. The next ATP medical record is from April 13, 2018 documenting that Claimant travelled to Pakistan related to his mother's passing. He received PT there but the quality of the care was not the same, though helpful. Claimant continued with chronic persistent back pain with no radicular radiation of symptoms, with symptoms up and down. Diagnosis remained the same. He mentioned a *Samms* conference when they discussed the need for repeat facet procedures but not immediately necessary as symptoms seemed to be diminished. Dr. Aschberger reported Claimant was taking Hydrocodone, and he replaced the Skelaxin for Robaxin.

71. On June 22, 2018 Claimant reported doing well though had some numbness in his legs though no weakness. He reviewed his home exercise program and recommended Claimant walk daily. He was on Hydrocodone and Robaxin. On exam he found Claimant to be "status quo" with good flexion. He continued to provide maintenance management.

72. Claimant moved up his follow up appointment with Dr. Aschberger to July 13, 2018, concerned with increasing pain in the back radiating to the buttock and posterior thighs bilateral, left worse than right. Claimant denied any new trauma and did not report any localized weakness. He reported some tightness on exam and decrease in flexion, a positive straight leg raise with pain in the thigh and calf with passive ankle dorsiflexion. Dr. Aschberger noted that a radicular abnormality was unlikely related to the workers' compensation claim and ordered an MRI. He provided Gabapentin for additional symptom management.

73. The MRI of July 24, 2018 showed degenerative disc and joint changes superimposed on developmentally narrow bony canal at the L4-5 level with stable moderate dural sac narrowing with mild changes in the cauda equina and stable foraminal right L4 the root sleeve and dorsal root ganglion deformity. The left L5 dorsal ganglion deformity was stable however there is a small new left foraminal synovial cyst.

74. On August 3, 2018 Dr. Aschberger stated that the increased symptomology of radiculitis at the time of his examination was likely related to the additional findings on MRI.

75. However, by October 5, 2018 Dr. Aschberger reported that Claimant's radiating symptoms had resolved, and he continued opioid management, refilling Claimant's prescriptions for his continuing work related conditions.

76. On January 18, 2019 Dr. Aschberger documented that Claimant was doing well though had low back soreness without significant radicular symptoms. He also noted that Claimant was functioning well and working. He reported Claimant was taking Hydrocodone twice a day with good symptom control, but lab work performed on the same day showed no prescribed medications in his system.

77. Claimant returned to Dr. Aschberger on April 5, 2019 with some increase in symptoms with recurrent numbness into the lower extremities, which only occurs with sitting and no radicular symptoms. Claimant has been able to continue working as a cashier being able to lift and pivot without issue. Claimant was tight on exam but had forward flexion of 90 degrees without any radiated symptoms, full extension and no increased symptoms with sustained extension. Current medications included Gabapentin 300 mg one per day, Hydrocodone 5/325 mg twice a day which he finds to be helpful in terms of activities of daily living (ADLs). He was also on Methocarbamol. Naproxen was renewed although Dr. Aschberger asked him to discuss that with his cardiologist regarding continued use of Naproxen.

78. On May 15, 2019 Dr. Aschberger answered an inquiry from Insurer stating that Claimant was under a narcotics contract, stating that Claimant is taking his medication as needed for maintenance care, has decreased his narcotic medications significantly over time and will discontinue them if Claimant continues to test negative for narcotic use, noting that the PDMP shows Claimant to be compliant with infrequent refills, on a less than daily schedule.

79. On June 21, 2019 Claimant reported to his ATP increasing pain into his legs but findings were consistent with prior exams. He again explained that Claimant had simply run out of his medication and had problems with the pharmacy refilling them. Dr. Aschberger noted that Claimant had significantly decreased his narcotic pain medication use over the years and has remained functional and working with the current dose to help maintain him.

80. Claimant retuned for maintenance recheck on August 30, 2019 with Dr. Aschberger. He reports right lumbosacral pain but the previous report of radiated

symptomology had settled down nicely. He was not having much in way of distal radiation. He continued on medication management, Hydrocodone twice per day and Methocarbamol. He assessed chronic low back pain with initial issues of significant facetogenic pain and an improved physical exam.

81. Claimant returned to see Dr. Aschberger on November 15, 2019 with current medications of occasional Hydrocodone, Methocarbamol, and Gabapentin. He has had pain at the low back, buttock, and proximal posterior thighs. Pain levels have waxed and waned. He continues to work and tolerates that well. Dr. Aschberger noted that Claimant was concerned with change in symptomology but reassured Claimant that they were myofascial in nature.

82. The next ATP record is from July 9, 2020 noting Claimant had persistent irritation in the back. It has been waxing and waning in severity. Claimant reported he did have an illness suspicious for COVID-19 though tested negative. Dr. Aschberger noted that Claimant's prior increased irritation had settled down and was back to MMI baseline. He continued to assess chronic low back pain with opioid management and refilled Hydrocodone, Gabapentin and Methocarbamol.

83. Claimant continued with maintenance care with Dr. Aschberger on October 20, 2020. Claimant reported up and down symptoms in the back as always. There had been some radiation to the gluteal musculature, but no distal pain down the legs. He reported good functional activity with medication intervention. He was taking Hydrocodone twice a day and Methocarbamol once as needed. Dr. Aschberger noted that Claimant was doing well overall.

84. On June 17, 2021 Claimant reported corning down with COVID-19 for a second time. He was in fact hospitalized and brought in records regarding his hospitalization. He received a prescription for oxycodone for his headache symptomatology back in March, and also had a prescription of guaifenesin/codeine provided to him. He reported significant body pain, headaches, and weakness all of which had settled down for him. He had returned to work, though Claimant did report increased soreness of the back, without any no new trauma. On exam, Claimant had low back tightness but good movement. Dr. Aschberger reported Claimant to be compliant with medications per the PDMP and the medical record Claimant brought in. He renewed Claimant's medications at that time.

85. Claimant returned to see Dr. Aschberger on July 15, 2021 stating Claimant was back to baseline, taking Hydrocodone twice a day. He renewed Claimant's Hydrocodone, Gabapentin and Methocarbamol.

86. On September 20, 2021 Dr. F. Mark Paz issued an IME report at Respondents' request. He examined Claimant on August 24, 2021. Dr. Paz documented that Claimant continued to work as a cashier at a liquor store, which does not involve any lifting or stocking. Dr. Paz opined that none of the current care is related to the 2004 work related injury but to the subsequent findings on MRI.

87. Claimant testified at hearing he currently works for a liquor store ordering supplies, doing price changes, and cashiering, where he does not lift any significant weight, or perform any work that requires frequent bending. He stated his current employer has accommodated his limitations as they know about his back injury and allow him to sit on the job. He has been there for approximately 15 years. If he is standing too long, his pain will increasing but has never had any other accidents or injuries after the work related slip and falls. He further testified he would not have been able to perform his job without his medications. Claimant stated that without the medications that Dr. Aschberger is prescribing he would not be able to function, including his ADLs and working.

88. He stated that Dr. Aschberger has changed his medications multiple times to decrease them and then increase them when he was unable to function or the medications he was currently taking were not as helpful.

89. Claimant stated that his symptoms over the years, since his injury, have varied, going up and down. When the pain was high he would take up to three pills in the morning and three in the evening. When he was hospitalized the second time he contracted COVID-19, he was instructed to stop his medications as they were going to provide other medications that addressed the severe headaches related to the virus symptoms. Sometime after he was released in 2021, he returned to his maintenance care program. He stated that he has also had times when the Insurer was not authorizing medications and he ran out until they would get authorization to fill the prescription. Claimant testified he wishes to continue with his medications in order to continue to function and work.

90. Dr. Paz testified at hearing as an expert in occupational medicine, internal medicine and as a Level II accredited physician. Dr. Paz testified regarding his evaluation on August 24, 2021. He opined that the continued medical care Claimant was receiving is not medically probable to be related to the March 16, 2004 injuries or reasonable and necessary for the work injury.

91. Dr. Paz testified that Claimant was diagnosed by the DIME physician, Dr. Healey as arthropathy. He explained that arthropathy is arthritis that can include sliding of the facets, and narrowing of the space where the nerves pass. The facet arthropathy was a preexisting condition that was aggravated by the March 2004 injury according to Dr. Healey and Dr. Aschberger. Dr. Paz stated that the current pain generator is not the same as the original 2004 pain generator. He did not deny that Claimant continues to have pain but stated that the pain now is due to the natural progression of the degenerative problem that are preexisting and agreed with Dr. Rauzzino that the degeneration is overcome the prior work injury aggravation. He stated that the sequential MRIs, concluding with the 2018 MRI findings show the arthropathy to have progressed from mild to moderately severe compared to the prior ones.

92. Dr. Paz stated that Claimant has conditions related to the arthropathy, which is a general chronic low back pain, with predominant back pain of 90% compared to general leg pain, that only represents 10% of Claimant's pain complaints. Dr. Paz

testified that the symptoms of numbness into the legs could be related to the facet irritation and were not indicative of radicular symptoms. He further stated that only the left sided L4-5 and L5-S1 facets were aggravated by the work injury according to Dr. Healey. Further, Dr. Paz described the progression of the degenerative process and stated that following the MRI in 2015 Claimant proceeded with injections and rhizotomies at the L4-S1 level, which he perceived as not being successful.

93. The Low Back Pain Medical Treatment Guidelines are considered to represent reasonable care in appropriately selected cases. W.C.R.P. Rule 17, Exhibit 1, Sec. B (13). However, the Low Back MTG state at Sec. B (14) as follows:

> MMI should be declared when a patient's condition has plateaued to the point where the authorized treating physician no longer believes further medical intervention is likely to result in improved function. However, some patients may require treatment after MMI has been declared in order to maintain their functional state. The recommendations in this guideline are for pre-MMI care and are not intended to limit post-MMI treatment.

94. The appropriate MTG to consider in this matter are the Chronic Pain Disorder, W.C.R.P. Rule 17, Exhibit 9, which have a section that addresses maintenance care. Sec. (I) states I pertinent part as follows:

> Successful management of chronic pain conditions results in fewer relapses requiring intense medical care. Failure to address long-term management as part of the overall treatment program may lead to higher costs and greater dependence on the health care system. Management of CPD continues after the patient has met the definition of maximum medical improvement (MMI). MMI is declared when a patient's condition has plateaued and an authorized treating physician believes no further medical intervention is likely to result in improved function. When the patient has reached MMI, a physician must describe in detail the maintenance treatment.

95. W.C.R.P. Rule 17, Exhibit 9, Sec. (I) (5) states in pertinent part:

> In some cases, self-management of pain and injury exacerbations can be handled with medications, such as those listed in the Medication section. Physicians must follow patients who are on any chronic medication or prescription regimen for efficacy and side effects. Laboratory or other testing may be appropriate to monitor medication effects on organ function.

96. W.C.R.P. Rule 17, Exhibit 9, Sec. (I) (6) specifically states that "scheduled opioids may prove to be the most cost effective means of ensuring the highest function and quality of life." The rule goes on to state that "The medications should be clearly linked to improvement of function, not just pain control. … Examples include the abilities to perform: work tasks, … participate in normal family and social activities."

97. As found, Dr. Healey's original diagnosis was chronic mechanical low back pain with evidence of lumbar spondylosis and degenerative lumbar facet disease at L4-L5, L5-S1 with superimposed lumbar quadratus lumborum iliocostal myofascial pain pursuant to the February 2006 report. Pursuant to the subsequent September 2007 report, Dr. Healey diagnosed chronic mechanical low back pain secondary to

chronic facet arthropathy post fall. This is interpreted and inferred as the same diagnosis. Based on Dr. Paz's this mistaken recollection of Dr. Healey's diagnosis, Dr. Paz is not found credible.

98. As found, neither party provided the records from Dr. Kawasaki. However, as further found, on September 11, 2015 Dr. Aschberger reported that Claimant had good symptom relief from the MBBs, with no pain post injection and continued significant benefit. He recommended a repeat second confirmatory injection. On November 6, 2015 Dr. Aschberger stated that the second MBBs achieved a zero over ten pain rating. On November 13, 2015 Dr. Aschberger sent Claimant for the rhizotomy. Finally, as found, on January 22, 2016 Claimant reported to Dr. Aschberger that he had excellent symptomatic results from the rhizotomy with Dr. Kawasaki as he had 2 weeks without pain. Dr. Aschberger's interpretation of the injection results was a positive symptomatic relief and is found to be more credible than Dr. Paz's independent interpretation. Based on Dr. Paz's mistaken interpretation of symptomatic relief of the injections from 2015, Dr. Paz is not found credible.

99. As found, Dr. Rauzzino's opinion that the "adjuvant therapies" were not leading to an improved functional outcome is not credible. The medical records clearly document, throughout the years from when Claimant reached MMI in 2007, that Claimant has had increases and decreases of medication, some of which have been significant. When he was placed at MMI he was on very high doses of narcotic medications including Opana and Vicodin. For example in 2010 Claimant was taking Opana ER 50 mg twice a day and Vicodin 10 mg for breakthrough pain. From April 5, 2019 and through the time of the hearing, Claimant was only taking Hydrocodone 5/325 mg up to twice a day[6] to manage his pain. Claimant has decreased his medications and even taken them intermittently when Claimant is able to handle his ADLs and work without the pain medication. He has disclosed this to his authorized treating physician, Dr. Aschberger, who has continued to manage Claimant's care. Dr. Aschberger is found credible.

100. As found, the purpose of maintenance care is to maintain Claimant at a baseline. Over the years, Claimant has had waxing and waning of the level of his pain caused by the work related aggravation of his underlying degenerative facet injury and the myofascial component of his work related injury. This is to be expected of any chronic medical condition. As found, in 2007 the DIME physician, Dr. Healey, recommended long term care to include medications such as narcotics (Hydrocodone),[7] anti-inflammatory (Skelaxin) and muscle relaxants (Methocarbamol) as well as an anticonvulsant (Gabapentin).

101. As found, Dr. Aschberger has managed Claimant's complaints by prescribing multiple therapeutic treatments, including medications, massage and physical therapy, as well as injections. While the maintenance care may not have long

[6] Opana ER 50 mg d.i.b is a 300 Morphine Milligram Equivalent (MME), while Hydrocodone 5/325 mg d.i.b is a 10 MME. Chronic Pain Disorder MTG, W.C.R.P. Rule 17, Exh. 9 Sec. I (6) states that there is good evidence that optimal MME for maintenance care is approximately 50 MME or less.

[7] The medications in parenthesis is what Claimant was taking at the time of the hearing.

lasting effect, the nature of maintenance care, as stated above, is to maintain Claimant stable and at a status quo.

102. As found, Dr. Aschberger has documented the times that treatment has significantly help keep Claimant functioning both with ADLs and working, and when the treatments have been decreased, when Claimant has had temporary worsenings that were again stabilized by the use of the ongoing maintenance care. Dr. Aschberger, who has been Claimant's ATP for more than 17 years, and Dr. Healey, the DIME physician, are more credible than Dr. Rauzzino and Dr. Paz. Claimant has proven by a preponderance of the evidence that he requires continuing maintenance care related to the facet irritation of the lumbar spine and the myofascial injury from the March 16, 2004 admitted work related injury.

CONCLUSIONS OF LAW

A. General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the claimant's rights nor in favor of the rights of the respondents; and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office (ICAO)*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2018). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Burden of Proof

The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits. Sections. 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000; *Kieckhafer v. Indus. Claim Appeals Office*, 284 P.3d 202, 205 (Colo. App. 2012).

However, where an insurer seeks to terminate benefits that have been admitted, they must prove by a preponderance of the evidence that Claimant requires no additional post-MMI treatment. See § 8-43-201(1), C.R.S.

A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979; *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984).

C. Medical Benefits that are Reasonably Necessary and Related

Respondents are liable for authorized medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101(1)(a), C.R.S.; *Sims v. Indus. Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Medical benefits may extend beyond MMI if a claimant requires treatment to relieve symptoms or prevent deterioration of their condition. *Grover* v. *Indus. Commission*, 759 P.2d 705 (Colo. 1988). If the claimant establishes the probability of a need for future treatment, he is entitled to a general award of medical benefits after MMI, subject to the respondents' right to dispute causation or reasonable necessity of any particular treatment. *Hanna v. Print Expediters, Inc*., 77 P.3d 863 (Colo. App. 2003). The claimant must prove entitlement to post-MMI medical benefits by a preponderance of the evidence. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997).

Here, Respondents admitted by Final Admission of Liability dated March 4, 2008 with a general award of medical benefits that are reasonably necessary and related to the claim after the maximum medical improvement determination. Claimant continued to receive post-MMI care from 2007 through the date of the hearing on October 13, 2021. However, as of the date of the hearing, Respondents alleged that the medical care that Claimant is currently receiving from his ATP is no longer reasonable, necessary or related to the March 16, 2004 injury. Respondents contested continuing medical care, and stated that it is Claimant's burden to prove that the care continues to be reasonable, necessary and related to the injury.

In essence, Respondents seeks to withdraw the "admission" for medical treatment after MMI on the theory that no further care is reasonably necessary or causally related to the March 2004 admitted injury. While, Claimant must prove initial entitlement to disputed medical benefits by a preponderance of the evidence to establish care, the Act was amended in 2009[8] to place the burden of proof on the party seeking to modify an issue determined by a previous admission or order. Therefore, where Respondents' seek to terminate previously admitted maintenance benefits, Respondents must prove by a preponderance of the evidence that treatment is no longer reasonably necessary or causally related to the injury. Section 8-43-201(1); *Salisbury v. Prowers County School District RE2*, W.C. No. 7-702-144 (June 5, 2013); *Dunn v. St. Mary Corwin Hospital*, W.C. No. 4-754-838 (October 1, 2013).

As found, causation was established at the time the DIME physician, Dr. Healey, diagnosed Claimant's injuries including chronic mechanical low back pain with evidence of lumbar spondylosis and degenerative lumbar facet disease at L4-L5, L5-S1 with superimposed lumbar quadratus lumborum iliocostal myofascial pain related to the March 2004 injury, pursuant to the February 2006 report. Dr. Healey issued a subsequent report in September 2007 and diagnosed chronic mechanical low back pain secondary to chronic facet arthropathy post fall. This ALJ interprets and infers the diagnoses in the two reports as the same diagnoses and equivalent. Respondents filed a General Admission following the first report and a Final Admission following the second DIME report, accepting the causation determination.

As found, at the time of MMI, Dr. Healey recommended long term care post MMI to include medications such as narcotics, anti-inflammatory, muscle relaxants and an anticonvulsant. Since the 2007 DIME opinion, Claimant's ATP, Dr. Aschberger, has been prescribing some sort of narcotics, anti-inflammatory, muscle relaxants and/or an anticonvulsant, which have changed over time in prescription and dosage, in addition to other therapeutic treatments such as massage and other therapies. This was in addition to follow-up injections to maintain Claimant at MMI or return Claimant to his status quo or to the baseline established at the time of MMI. As found, Dr. Aschberger has further ordered diagnostic testing in order to determine if care continued to be reasonably necessary and related to the 2004 work injury. As concluded, the care provided by Dr. Aschberger has been reasonably necessary and related to the March 16, 2004 injuries to maintain Claimant at MMI.

As found, Claimant continues to take Hydrocodone (narcotic medication), Methocarbamol (muscle relaxant) and Gabapentin (anticonvulsant) to maintain the status quo and to keep Claimant functional. Dr. Aschberger has continued to keep Claimant functional or to return Claimant to baseline when there have been exacerbations of the chronic pain. Dr. Aschberger documented that Claimant has been able to continue working and able to perform his activities of daily living because of the maintenance care he has been provided. As found, Dr. Aschberger's opinions are overwhelmingly

[8] See Sec. 8-43-201(2), C.R.S. "The amendments made to subsection (1) of this section by Senate Bill 09-168, enacted in 2009, are declared to be procedural and were intended to and shall apply to all workers' compensation claims, regardless of the date the claim was filed."

persuasive and credible, over the contrary opinions of Dr. Paz and Dr. Rauzzino, whose opinions are not persuasive. Also as found, Claimant's testimony that his medications have been able to keep him working and allow him to perform his activities of daily living is credible as well. The ALJ concludes that all post-MMI care as recommended by Dr. Aschberger to date was reasonable, necessary, and related to Claimant's admitted 2004 work injuries. The ALJ further concludes that Claimant continues to require the narcotic, muscle relaxant and anticonvulsant/neuropathic pain medications to maintain Claimant at MMI for his March 16, 2004 work related injuries.

Respondents argue that Claimant's continuing problems are related to the progressive degenerative problems as demonstrated by the 2015 and 2018 MRI findings and the opinions of Dr. Paz and Dr. Rauzzino. However, these arguments are not persuasive. Nothing has changed with regard to Claimant's symptoms other than the occasional lower leg symptoms that are intermittent at best, as documented by Dr. Aschberger. As far back as the inception of the claim Claimant complained of buttock and upper thigh pain. When Dr. Aschberger evaluated Claimant initially for an impairment rating in 2005 (before MMI) Claimant complained of symptoms in the lower lumbar paraspinal musculature, the piriformis musculature, and lateral thigh musculature. Further, Dr. Paz testified that the symptoms of numbness into the legs could be related to the facet irritation and were not indicative of radicular symptoms. Claimant aggravated the L4-S1 facets as well as had myofascial low back injuries caused by the 2004 accident, and the chronic facet irritation has been well documented over the years since 2004 to the present. The type of care being recommended by Dr. Aschberger is the same as was prescribed at the time of MMI. The findings on the diagnostic testing, while they may show further degeneration on imaging, this does not equate to changing the chronic facet irritation that Claimant was experiencing in 2004 at the time of his injury or in 2007 when he was placed at MMI. The diagnostic testing in 2008 (the second MRI), and subsequent MRIs, including 2018 only show imaging, they do not show symptomology. As found and is concluded, Claimant's symptoms have not significantly changed in origin throughout his course of treatment.

As found, when Claimant was placed at MMI Claimant was taking multiple narcotics. Before Claimant was placed at MMI in 2007 by the DIME physician, on June 11, 2004 Dr. Aschberger noted that Claimant was on an anti-inflammatory, a muscle relaxant and narcotics for pain, which should be continued so long as Claimant continued to take narcotics responsibly, and on March 22, 2005 Dr. Caton recommended maintenance medical care, including narcotics, possible repeat injections and additional osteopathic manipulation therapy treatments. In 2010 Claimant was taking opioids as high as Opana ER 100 mg per day and Vicodin for breakthrough pain. At the time of the hearing, in 2021, Claimant was only taking Hydrocodone 10 mg per day. This is a change from 300 MME in 2010 down to 10 MME in 2021. As found, Dr. Rauzzino's opinion that the "adjuvant therapies" were not leading to an improved functional outcome is not credible. The medical records clearly document, throughout the years from when Claimant reached MMI in 2007, that Claimant has had increases and decreases of medication, some of which have been significant. When he was placed at MMI he was on very high doses of narcotic medications including Opana and Vicodin. Claimant has decreased his medications and even taken them intermittently when Claimant is able to handle his ADLs and work without the pain medication. He has disclosed this to his authorized treating physician, Dr. Aschberger, who has continued to manage Claimant's care and has kept Claimant functional. This ALJ concludes this is a significant decrease in pain medication controlling his symptoms of facet irritation caused by the aggravation of his underlying facet irritation related to the 2004 admitted injury. This ALJ concludes that the difference also shows that Dr. Aschberger has optimized Claimant's maintenance care program to address keeping Claimant at MMI and at what he calls "status quo." Respondents have failed to show that the causation or the reasonable need for maintenance treatment for the March 16, 2004 injury has changed.

Respondents bore the burden of proving by a preponderance of the evidence that the medications Dr. Aschberger currently prescribes are no longer reasonably necessary and causally related to the 2004 work injury. The *Guidelines* provide, in relevant part, that "medications should be clearly linked to improvement of function, not just pain control." Furthermore, the *Guidelines*, specify that, "examples of routine functions include the ability to perform work tasks, … or participate in normal family and social activities." WCRP 17, Exhibit 9(I)(6). As concluded, Dr. Aschberger has documented such improvement on a frequent basis as listed above.

Respondents have failed to established by a preponderance of the evidence that Claimant's maintenance treatment is no longer reasonably needed, or that the maintenance treatment is no longer related to Claimant's work injury. The record is replete with evidence that Claimant continues to suffer chronic pain in the low back with frequent tightness and limited range of motion, and lifting restrictions because of his 2004 work injury. This ALJ concludes that Respondents have failed to show by a preponderance of the evidence that the proximal cause for the need for treatment prescribed by ATP Dr. Aschberger has changed. Respondents have failed to show by a preponderance of the evidence that Claimant no longer needs the maintenance care prescribed by Dr. Aschberger to Claimant related to the March 16, 2004 claim.

In fact, as found above, Claimant has established by a preponderance of the evidence that he needs maintenance care, which include medications and regular medical evaluations by a physician. It is through these regular medical evaluations that specific medications and medical treatment can be prescribed to maintain Claimant at MMI and prevent his condition from deteriorating. The medications currently include Hydrocondone, Methocarbamol and Gabapentin. However, it will be up to the physician to determine what appropriate maintenance medical treatment at each evaluation is. Medications and future medical care may change from time to time and Respondents will continue to be entitled to challenge the reasonable necessity and relatedness of any new type of treatment. However, as concluded, Claimant established by a preponderance of the evidence the need for future treatment to relieve the effects of his industrial injuries, and proved a sufficient causal nexus between his ongoing symptoms and the admitted work accident. As Concluded, Claimant has proven by a preponderance of the evidence that he continues to have facet irritation and myofascial low back pain that required ongoing maintenance care, including Hydrocodone, Methocarbamol and Gabapentin as well as regular follow-up care with Dr. Aschberger related to the March 16, 2004 injuries.

ORDER

IT IS THEREFORE ORDERED:

1. Respondents shall continue to authorize and pay for the narcotic, muscle relaxant and anticonvulsant/neuropathic pain medications prescribed by Dr. John Aschberger as reasonably necessary and related to the March 16, 2004 injuries.

2. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 19th day of November, 2021.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that on March 6, 2021, she suffered an injury arising out of and in the course and scope of her employment with the employer.

2. If the claimant proves a compensable injury, whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment she has received at Grand River Medical is reasonable, necessary, and related to the work injury.

3. If the claimant proves a compensable injury, whether the claimant has demonstrated, by a preponderance of the evidence, that the spine surgery recommended by Dr. Brian Witwer is reasonable, necessary, and related to the work injury.

4. If the claimant proves a compensable injury, whether the claimant has demonstrated, by a preponderance of the evidence, that she is entitled to temporary total disability (TTD) benefits and/or temporary partial disability (TPD) benefits.

5. The endorsed issue of average weekly wage (AWW) is held in abeyance as ordered by PALJ Laura Broniak in a Pre-Hearing Order issued on October 13, 2021.

FINDINGS OF FACT

1. The claimant began working for the employer as a hairstylist in 2007. The claimant testified that on March 6, 2021, her salon received several boxes from a neighboring salon. On that date, the claimant attempted to lift a box of hair product and move it to the back room. The claimant testified that as she lifted the box, she felt a stabbing pain in her back.

Treatment prior to March 6, 2021

2. Prior to the 2021 box lifting incident, the claimant suffered a back injury in 2014 while she was employed with the employer. In that instance, the claimant was moving a salon chair and felt pain in her back.

3. On June 2, 2014, the claimant underwent a left sided L5-S1 hemilaminectomy, mesial facetectomy, foraminotomy, and microdiscectomy.

4. On October 15, 2014, a magnetic resonance image (MRI) of the claimant's lumbar spine showed a broad based disc bulge, with mild canal and neural foraminal narrowing at the L4-L5 and L5-S1 levels. In addition, the MRI showed mild degenerative facet arthropathy at various levels, but increased at the left L5-S1 level.

5. The claimant was placed at maximum medical improvement (MMI) for the 2014 injury on April 10, 2015, and was assigned permanent impairment of 15 percent,

whole person. At that time, the claimant reported ongoing left hip and left lower extremity pain.

6. The claimant testified that following the 2014 injury and related surgery, she fully recovered. The claimant also testified that in the years, days, and hours leading up to the March 6, 2021 box lifting incident, she did not have pain in her back.

Treatment beginning March 6, 2021

7. Following the feeling of pain in her back on March 6, 2021, the claimant went home to rest. While at home, the claimant applied ice and heat to her back. However, the claimant continued to experience pain and she sought treatment in the emergency department at Grand River Medical Center on March 8, 2021.

8. At the emergency department, the claimant was seen by Dr. Elizabeth Casner. The claimant was diagnosed with a lumbar back strain and provided with pain medication. The claimant was instructed to follow up with her primary care physician.

9. In the interim, the respondents referred the claimant to Mark Quinn, PA-C as her authorized treating provider (ATP) for this claim. PA Quinn practices at Grand River Medical Clinic. The claimant was first seen by PA Quinn on March 9, 2021. At that time, PA Quinn diagnosed a lumbar sprain and recommended pain medication and stretching exercises.

10. On March 15, 2021, the claimant returned to PA Quinn and reported severe stabbing pain in her chest and upper back. PA Quinn diagnosed subluxation of costovertebral joints and performed rib head reductions with osteopathic manipulative treatment (OMT). The claimant reported pain relief following this treatment. On that date, PA Quinn recommended no heavy lifting. In a WC 164 form dated March 16, 2021, PA Quinn assigned work restrictions of no lifting, carrying, pushing, or pulling over five pounds.

11. On April 26, 2021, the claimant returned to PA Quinn. At that time, PA Quinn changed the claimant's work restrictions to no lifting, carrying, pushing, or pulling over 10 pounds.

12. On May 24, 2021, a magnetic resonance image (MRI) of the claimant's lumbar spine was performed. The MRI showed moderate spinal canal stenosis at L5-S1, with a moderate posterior disc bulge and superimposed moderate left disc protrusion (causing severe narrowing of the lateral recess). The MRI also showed a central posterior annular tear at the L4-L5 level.

13. On June 23, 2021, the claimant was seen by Dr. Brian Witwer for consultation. At that time, the claimant reported sharp and burning back pain that radiated into her left leg. Dr. Witwer noted that the MRI results showed a disc herniation at the L4-5 level. Dr. Witwer recommended that the claimant undergo a microlumbar discectomy.

14. On August 11, 2021, the claimant attended an independent medical examination (IME) with Dr. Brian Reiss. In connection with the IME, Dr. Reiss reviewed the claimant's medical records, obtained a history from the claimant, and performed a

physical examination. In his IME report, Dr. Reiss opined that the claimant's current symptoms are due to an aggravation of her pre-existing condition. Dr. Reiss further opined that the claimant needs further diagnostic testing. With regard to the surgery recommended by Dr. Witwer, Dr. Reiss opined that such a surgery is not reasonable or necessary treatment of the claimant's condition.

15. Dr. Reiss' deposition testimony was consistent with his written report. Dr. Reiss testified that the claimant may not have a herniated disc, but rather scar tissue surrounding that level. Dr. Reiss also testified that the claimant "tweaked her midback, and her chiropractic treatment, . . . irritated her lower back and left lower extremity making it probably related." Dr. Reiss reiterated his opinion that the surgery recommended by Dr. Witwer would not be beneficial in treating the claimant's current symptoms. Dr. Reiss also testified that he compared the 2014 and 2021 MRIs and determined that the same soft tissue surrounding the S1 nerve root is present in both scans. Dr. Reiss further testified that this indicates that the claimant's condition is a continuation of scar tissue and not a recurrent disc herniation.

16. While employed with the employer, the claimant also worked part-time for a liquor store, Spirits of New Castle. The claimant testified that prior to March 6, 2021, she worked approximately 23 hours per week for the employer and 11 hours per week for Spirits of New Castle.

17. Wage records entered into evidence demonstrate that the claimant worked for the employer approximately 25 hours per week in April 2021. In addition, the claimant worked approximately seven hours per week for the liquor store in April 2021. The ALJ finds no significant change between the claimant's wages before and after the March 6, 2021 incident.

18. The ALJ credits the claimant's testimony regarding the March 6, 2021 lifting incident and her resulting symptoms. The ALJ also credits the medical records and finds as true that the lifting incident on March 6, 2021 was the event that caused the aggravation to the claimant's pre-existing low back condition. Therefore, the ALJ finds that the claimant has demonstrated that it is more likely than not that on March 6, 2021, her work activities led to an aggravation of her pre-existing back condition, resulting in the need for medical treatment. The ALJ also notes that in his IME report, Dr. Reiss opined that the claimant experienced an aggravation of her pre-existing back condition.

19. The ALJ credits the claimant's testimony regarding the March 6, 2021 incident and the medical records and finds that the claimant has demonstrated that it is more likely than not that the medical treatment she has received at Grand River Medical is reasonable, necessary, and related to the March 6, 2021 work injury.

20. The ALJ credits the opinion of Dr. Reiss regarding the reasonableness and necessity of the recommended surgery. The ALJ also credits the medical records on this issue. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that the surgery recommended by Dr. Witwer is reasonable and necessary treatment of the claimant's back condition, absent additional diagnostic testing.

21. The ALJ credits the wage records entered into evidence and finds that the claimant has failed to demonstrate that it is more likely than not that she is entitled to TTD or TPD benefits. As noted above, the ALJ finds no significant change between the claimant's wages before and after the March 6, 2021 work injury.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

4. A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. The existence of a preexisting medical condition does not preclude the employee from suffering a compensable injury where the industrial aggravation is the proximate cause of the disability or need for treatment. *See H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990); *see also Subsequent Injury Fund v. Thompson*, 793 P.2d 576 (Colo. App. 1990). A work related injury is compensable if it "aggravates accelerates or combines with a preexisting disease or infirmity to produce disability or need for treatment." *See H & H Warehouse v. Vicory, supra.*

5. As found, the claimant has demonstrated by a preponderance of the evidence, that on March 6, 2021, she suffered an injury arising out of and in the course and scope of her employment with the employer. More specifically, the ALJ concludes that the lifting incident on March 6, 2021 caused an aggravation of the claimant's pre-existing condition, resulting in the need for medical treatment. As found, the claimant's testimony, the medical records, and Dr. Reiss's opinion that an aggravation occurred are credible and persuasive.

6. Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work related injury. Section 8-42-101, C.R.S.; *see Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990).

7. As found, the claimant has demonstrated by a preponderance of the evidence, that medical treatment she has received at Grand River Medical is reasonable, necessary, and related to the work injury. As found, the claimant's testimony and the medical records are credible and persuasive on this issue.

8. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that the spine surgery recommended by Dr. Brian Witwer is reasonable, necessary, and related to the work injury. As found, the medical records and the opinion of Dr. Reiss are credible and persuasive on this issue. Specifically, the ALJ credits the opinion of Dr. Reiss that the surgery is not reasonable or necessary, absent additional diagnostic testing.

9. To prove entitlement to temporary total disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a) C.R.S., *supra*, requires a claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by a claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that a claimant establish physical disability through a medical opinion of an attending physician; a claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998).

10. To prove entitlement to temporary partial disability (TPD) benefits, a claimant must prove that the industrial injury contributed to some degree to a temporary wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). TPD payments ordinarily continue until either claimant reaches maximum medical improvement or an attending physician gives claimant a written release to return to modified employment, such employment is offered to the employee in writing, and the employee fails to begin such employment. *See* 8-42-106, C.R.S.

11. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that she is entitled to TTD and/or TPD benefits. As found, the wage records show no significant change between the claimant's wages before and after the March 6, 2021 work injury.

ORDER

It is therefore ordered:

1. The claimant suffered a work injury on March 6, 2021.

2. The respondents shall pay for treatment the claimant has received from Grand River Medical, pursuant to the Colorado fee schedule.

3. The claimant’s request for spine surgery, as recommended by Dr. Witwer, is denied and dismissed.

4. The claimant’s request for TTD and TPD benefits, is denied and dismissed.

5. The issue of AWW is held in abeyance pursuant to PALJ Broniak’s order.

6. All matters not determined here are reserved for future determination.

Dated this 22nd day of November 2021.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-162-593-001

ISSUES

I. Whether Claimant established by a preponderance of the evidence that he sustained a compensable work injury on November 20, 2020.

II. Whether Claimant established by a preponderance of the evidence that he is entitled to reasonable and necessary medical treatment that is related to his compensable injury.

III. Whether Claimant established by a preponderance of the evidence an entitlement to temporary total disability (TTD) benefits from December 9, 2020, through ongoing.

IV. Determination of Claimant's average weekly wage (AWW).

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. Claimant is a 27-year-old male who worked for Employer, a masonry company, as a brick layer. Claimant's job duties for Employer included grouting and laying brick.
2. Claimant has worked for Employer for various periods of time over the years:
   - He began working for Employer in 2012 when he was 18 years old. Then, he quit in 2014.
   - He was rehired in February 2016 and quit again in November 2016.
   - Claimant was rehired again in December 2016 and then he was fired in December 2017 due to attendance issues.
   - Claimant was rehired in May 2018, by his father Arturo G[Redacted], who works as a foreman for Employer.
   - Claimant was fired on December 9, 2020, for no call no show at work.
3. Claimant alleges he injured his back on November 20, 2020. Claimant, however, has long standing preexisting back problems which required medical treatment and were disabling.
4. In 2001, Claimant injured his back while training for boxing. (Ex. I, BS 47)
5. On March 1, 2019, Claimant went to Innovative Chiropractic for pain in his mid-back, lower back, and pain going down his right leg all the way to his ankle. Claimant stated the problem started 8 years ago. Claimant also complained of tingling and numbness going down his right leg. At this appointment, he rated his

current pain at 10/10 and his average pain at 8/10. He also stated that the pain was present all day long. In addition, Claimant indicated that exercise and working out made his symptoms worse. He did not, however, say that working made his symptoms worse. At his March 2019 chiropractic visit, the chiropractor noted Claimant was found to have a positive straight leg test, positive Kemp's test, and positive toe walk and heel walk. Claimant also had x-rays taken that demonstrated narrowed disc space at L4-L5 and L5-S1 as well as encroachment of the neuroforamina at the L5-S1 level. (Ex. I, BS 47-50)

6. Claimant testified and acknowledged that he has had long standing back issues. Claimant also testified that between December 2019 and December 2020, he missed about 23 days of work due to back pain.

7. Claimant had back problems when he first started working for Employer. Claimant's preexisting back problems caused him to have about 2 bad workdays per week for the last seven years. For example, Mr. Ricardo "Rico" D[Redacted], a coworker, credibly testified that he would notice Claimant having problems walking from his car – due to his prior back injury.

8. Claimant testified that there was not a specific event that caused his back pain on November 20, 2020. Instead, Claimant testified that his back just slowly got worse. He also testified that as his pain progressed and got worse – it was different than before.

9. Claimant's testimony that his worsening back pain developed gradually at work is inconsistent with his Worker's Claim for Compensation. On February 3, 2021, Claimant completed his Worker's Claim for Compensation. Rather than stating that his back pain came on gradually over time, Claimant stated that he injured his back lifting a bucket of gravel. Claimant specifically stated, "2 herniated discs upon lifting a bucket of gravel up to a shoulder height P felt pain in the lumbar." (Ex. B, BS 2)

10. Claimant's testimony on direct examination about the gradual onset of his alleged injury is also inconsistent with his answers to discovery. Rather than describing the gradual onset of back pain, Claimant again described injuring his back during a single event which consisted of lifting a bucket of gravel. In his answers to interrogatories, Claimant stated:

    > On November 20, 2020, when I lifted one of the buckets full of grout to shoulder height, I felt a sharp stabbing pain that made me fall on my knees in excruciating pain. I let the pain subside a bit until I was able to get back up and stand.

11. On his Worker's Claim for Compensation, Claimant listed two witnesses to his alleged accident. Claimant listed Julio and Steven. But in his answers to discovery, Claimant did not state that Julio witnessed the accident. Instead, he listed Gabriel and Steven.

12. Claimant stated in his answers to interrogatories that he reported his work injury to his boss, Ricardo "Rico" D[Redacted], who knew Claimant had been in pain for quite a while. Claimant testified that he does not think it was taken seriously.

13. Mr. D[Redacted] testified at hearing. Mr. D[Redacted] credibly testified that he was

not supervising Claimant on the day of Claimant's alleged accident. He also credibly testified that Claimant did not report his injury – or any back problems - to him on November 20, 2020.

14. After his alleged injury, Claimant continued working full duty for Employer until he was terminated. Claimant was terminated for his failure to show up on a particular job. The owner of the company, Gregg S[Redacted], had promised a client that he would have a full crew on a particular job on December 8, 2020. Claimant was supposed to be one of the crew members. Claimant, and one other co-worker, did not show up for the December 8, 2020, job. Therefore, Mr. S[Redacted] decided to terminate both Claimant and the other employee. As a result, he told Matthew M[Redacted], the project foreman, to terminate Claimant if he showed up again. Claimant showed up the next day, December 9, 2020, and Mr. M[Redacted] terminated him.

15. In his answers to discovery, Claimant set forth the basis for his claim for temporary disability benefits starting December 9, 2020, and continuing. In support of his claim for temporary disability benefits since his termination, Claimant alleged he had not worked for anyone since being terminated by Employer. Claimant stated:

> I have not been able to work as a result of severe back pain and I have not received any income since being fired on December 9, 2020. I have not received any compensation because you denied my work injury claim.
>
> I have not returned to work since being terminated from C Morgan Masonry.
>
> (Ex. D)

16. However, during cross-examination, Claimant admitted his answers to interrogatories were not true. Claimant admitted during cross-examination that he started working for another employer after his termination.

17. On December 21, 2020, after being terminated, Claimant completed an Employment Application for Bighorn Plastering. On the same date, Claimant also underwent a preemployment medical evaluation at Concentra. Claimant underwent the evaluation to determine whether he could perform the physical duties of the new job for which he was applying. As set forth in the preemployment evaluation, Claimant affirmed that he could perform the requirements of the job that required:

- Lift – Carry. Claimant stated that he could lift and carry 80 pounds from a vertical lift from the floor and place it on one shoulder and horizontally transfer it 50 feet and place it on a shelf that was 4 feet from the ground.
- Climb. Claimant stated that he could ascend and descend a step with a height of 7 inches from the floor and do that 30 times in 3 minutes. Claimant also stated that he could ascend and descend 4 rungs on a ladder 10 times in 2 minutes.

18. Along with Claimant stating that he could perform the above physical tasks, he was

also tested to see if he could perform the tasks. As stated in the Concentra medical report, Claimant passed each of the physical requirement tests set forth above. (Ex. K, BS 81)

19. From about December 21, 2020, to January 20, 2021, Claimant worked for Big Horn Plastering. During his employment with Big Horn Plastering, Claimant's back pain got worse and caused him to seek medical treatment with Dr. Bainbridge.

20. From about January 5, 2021, through January 12, 2021, Claimant missed work at Big Horn Plastering due to an increase in his back pain. (Ex. J, BS 52)

21. On January 13, 2021, Claimant was evaluated by Dr. Bainbridge. At this appointment, Claimant completed a Spine Health History. Claimant was specifically asked whether a specific injury caused his symptoms and whether it was a job injury. Claimant responded "no" to such question. (Ex. J, BS 57)

22. Claimant told Dr. Bainbridge that he had passed out the prior evening due to taking a friend's muscle relaxer – and was taken to the emergency room. Claimant also told Dr. Bainbridge that he had participated in physical therapy at Wells PT for the last two weeks, but his pain was getting worse.

23. Rather than telling Dr. Bainbridge that he injured his back in November 2020 working for Employer, Claimant told Dr. Bainbridge that his back pain had been persistent for the last four years. (Ex. J, BS 52) Dr. Bainbridge assessed Claimant as suffering from a possible wedge compression fracture of the first vertebra, due to Claimant's fall, lumbar disc degeneration, a lesion of the ulnar nerve, and a lumbar disc protrusion with radiculopathy. (Ex. J, BS. 53)

24. On January 20, 2021, Claimant was examined by Monica Gordon, PA (Ex. J, BS 60) PA Gordon noted Claimant's history of four years of lower back pain that had gotten "much worse." It was also noted that imaging had been conducted and it revealed severe L4-5 central canal stenosis due to a large disc protrusion with questionable impingement of the cauda equina. It also showed L4-5 severe lateral recess stenosis bilaterally, and a large disc protrusion with severe central canal stenosis completely effacing the CSF from around the cauda equina at the L4-5 level with severe bilateral lateral recess stenosis and mild bilateral neural foraminal narrowing. PA Gordon recommended bilateral L3-4 and L5-S1 transforaminal epidural steroid injections. (*Id.* at BS 61-62) Claimant again did not allege that he suffered a work-related injury working for Employer during this appointment.

25. On August 16, 2021, PA Gordon issued a letter about this claim. PA Gordon stated in her letter that Claimant sustained a "recent injury" in the fall of 2020. She wrote that Claimant was lifting heavy buckets of grout in October 2020, when he began having low back pain. The pain increased "substantially" in November 2020, resulting in Claimant leaving his job early on average once per week due to pain. PA Gordon also stated that:

> Disc injuries are usually caused by increasing tension on the disc until it cannot withstand the tension and it protrudes. In some cases, causes compression of traversing or exiting nerve roots, and causing significant pain along the path of the affected nerve. Because nerves

> supply both sensation and motor function, there can also be significant weakness of the muscles innervated by the nerve. [Claimant's name Redacted] exhibits both sensory and motor function deficits.
>
> (Clmnt's Ex. 37-38)

26. PA Gordon Concluded that Claimant's current symptoms are the more likely the result of Claimant's "current job." (Clmnt's Ex. 36-37) PA Gordon does not, however, address Claimant's prior statements to her, and Dr. Bainbridge, saying his back pain had been persistent for four years and that it had gotten worse while working for his subsequent employer - Bighorn Plastering – and caused him to seek treatment from Dr. Bainbridge.

27. On September 13, 2021, Albert Hattem, M.D., was retained by Respondents to review the evidence in this claim. He issued a report with his opinions. (Resp. Ex. M) Dr. Hattem reviewed the records from Dr. Bainbridge, PA Gordon, Concentra Health, Innovative Chiropractic, and a statement written by Mr. D[Redacted]. Based on this information, Dr. Hattem concluded that Claimant's "current low back pain/condition is not causally related to an event that occurred at work on November 20, 2020, but is instead due to a preexisting condition." In support of his opinion, Dr. Hattem cites Claimant's statements to Innovative Chiropractic that he had severe, chronic, low back pain, present for at least 10 years before the alleged date of injury. Dr. Hattem also noted that Claimant never described a work injury to any provider for over three months after the alleged incident, and that the lumbar MRI conducted by Denver Back Pain Specialists demonstrated only chronic degenerative changes without evidence of acute injury. (*Id.* at pgs. 5-6) The ALJ finds Dr. Hattem's opinions credible and persuasive because they are fairly consistent with the underlying medical record regarding Claimant's preexisting condition and the testimony of Claimant's co-workers/supervisors.

28. In his answers to discovery, Claimant also stated that when he missed work on December 8, 2020, his dad told Claimant's supervisor – Mike – that Claimant would not be in that day and that his supervisor said, "no problem." However, Claimant's supervisor Mike S[Redacted] testified at hearing. Mr. S[Redacted] credibly testified that he did not speak with Claimant's dad on December 8, 2020, about Claimant being unable to come into work that day. As a result, he testified that he never told Claimant's dad that it was "no problem" that Claimant did not show up for work that day.

29. Claimant also stated in his answers to discovery that he told the foreman - Ricardo "Rico" D[Redacted] - about his back injury on November 20, 2020. However, Mr. D[Redacted] testified at hearing. Mr. D[Redacted] credibly testified that he was not even supervising Claimant on the day of the alleged accident. He also testified that Claimant never discussed any back condition with him on November 20, 2020. He did, however, testify that Claimant has had back problems for years and that it bothered Claimant approximately 2 or more days a week. He also testified that he could tell when Claimant was having a bad day because he would have problems just walking from his car. The ALJ finds Mr. D[Redacted]'s testimony to be credible

and persuasive because it is consistent with Claimant’s medical records as to Claimant’s preexisting back problems.

30. Based on Claimant’s inconsistencies regarding the manner of his injury, and his misrepresentations contained in his answers to discovery, Claimant is not found to be credible.

31. The ALJ finds the testimony of Respondents’ witnesses more credible and persuasive than Claimant’s testimony.

32. The ALJ finds that Claimant did not suffer an injury on November 20, 2020, while working for Employer.

33. The ALJ also finds that Claimant did not suffer an aggravation of a preexisting condition while working for Employer.

34. The ALJ finds the great weight of the evidence supports a finding that Claimant has not carried his burden of proving a compensable claim by a preponderance of the evidence.

35. Claimant failed to prove it is more probable than not he suffered a compensable industrial injury arising out of his employment with Employer.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers’ Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers’ compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers’ compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ’s factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng’g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered “to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence.” *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant established by a preponderance of the evidence that he sustained a compensable work injury on November 20, 2020.

Claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998).

A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center,* WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc.,* WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant testified that there was not a specific event that caused his back pain on November 20, 2020. Instead, Claimant testified that his back just slowly got worse. He also testified that as his pain progressed and got worse – it was different than before. However, as found, Claimant's testimony that his worsening back pain developed gradually at work is inconsistent with his Worker's Claim for Compensation. On February 3, 2021, Claimant completed his Worker's Claim for Compensation. Rather than stating that his back pain came on gradually over time, Claimant stated that he injured his back lifting a bucket of gravel. Claimant specifically stated, "2 herniated discs upon lifting a bucket of gravel up to a shoulder height P felt pain in the lumbar."

In addition, Claimant's testimony on direct examination regarding the gradual onset of his alleged injury also conflicts with his answers to discovery. Rather than describing the gradual onset of back pain, Claimant again described a specific event in which he injured his back on November 20, 2020, while lifting a bucket of gravel.

Claimant also stated in his answers to discovery that he had not worked since being terminated on December 9, 2020. However, as testified to by Claimant, that answer was not true. Claimant did work for Bighorn Plastering after he was terminated by Employer.

Plus, Claimant did not seek medical treatment for his alleged back injury right after it allegedly happened in November. In fact, Claimant continued working full duty until he was terminated on December 9, 2020. Then, after he was terminated, he did not seek medical treatment until after he started working for another employer – and his symptoms got worse.

In addition, when Claimant presented to Dr. Bainbridge, he did not say that his back pain was caused by his prior job with Employer. Instead, he stated that he has had chronic back pain for the last four years - which got worse while working for a subsequent employer – Bighorn Plastering.

Claimant also indicated that he told Mr. D[Redacted] that he was having back problems on November 20, 2020. Mr. D[Redacted], however, credibly testified that Claimant said nothing to him about his back on November 20, 2020.

Based on all the inconsistencies found above, the ALJ does not find Claimant to be credible. Whether Claimant suffered a compensable injury greatly depends on the credibility of Claimant. As found, Claimant's contention that he injured himself at work is not found to be credible. While the ALJ is mindful that Claimant's job involved heavy lifting, Claimant's lack of credibility is too great to find that he suffered a compensable injury while working for Employer.

The ALJ has also considered the August 16, 2021, letter from PA Gordon. While PA Gordon contends Claimant's current symptoms are related to Claimant's heavy lifting at work, she did not address the Claimant's preexisting back problems which started approximately 9-10 years earlier and caused Claimant to miss work on a fairly regular basis. Moreover, her conclusions are based upon the history provided by Claimant - and the ALJ has found that Claimant's testimony and prior statements are not found to be credible.

As a result, the ALJ finds and concludes that Claimant has not carried his burden of proving a compensable injury by a preponderance of the evidence. The ALJ finds and concludes that Claimant has failed to establish by a preponderance of the evidence that he injured his back on November 20, 2020, due to a distinct injury, or that he suffered an aggravation of a preexisting condition.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant failed to prove by a preponderance of the evidence he sustained a compensable industrial injury.
2. Claimant's claim for benefits is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 22, 2021.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

1. Whether the claimant has demonstrated, by a preponderance of the evidence, that her claim should be reopened pursuant to Section 8-43-303, C.R.S. due to a worsening of her condition.

2. If the claimant's claim is reopened, whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment she has received from Dr. Michael Campian and Ivy Chalmers, PA-C is reasonable medical treatment necessary to cure and relieve the claimant from the effects of the work injury.

3. If the claimant's claim is reopened, whether the claimant has demonstrated, by a preponderance of the evidence, that medical treatment she has received from Dr. Campian and PA Chalmers is authorized.

4. If the claimant's claim is reopened, whether the claimant has demonstrated, by a preponderance of the evidence, that she is entitled to temporary total disability (TTD) and/or temporary partial disability (TPD) benefits beginning July 16, 2021 and ongoing.

FINDINGS OF FACT

1. The claimant works for the employer as a room attendant. The claimant's job duties involve cleaning guest rooms at the employer's resort.

2. On June 3, 2019, the claimant suffered an injury at work when she slipped and fell to the ground. The claimant testified that when she fell she landed on the side of her right leg.

3. The claimant first sought treatment in the emergency department at Aspen Valley Hospital. Dr. Catherine Bernard noted the claimant's report that she slipped on a wet floor at work resulting in right hip and hamstring pain. An x-ray of the claimant's pelvis showed no fracture or malalignment. Dr. Bernard diagnosed muscle strains of the claimant's right hip and hamstring. The claimant was instructed to take over the counter pain medication.

4. Thereafter, the claimant's authorized treating provider (ATP) for the June 3, 2019 injury was Dr. Bruce Lippman, Jr. with Glenwood Medical Associates.

5. On July 8, 2019, the respondents filed a General Admission of Liability (GAL) admitting for medical benefits and temporary total disability (TTD) benefits.

6. On September 12, 2019, Dr. Lippman released the claimant to full duty, with no restrictions.The claimant has worked her normal job duties, without restrictions from September 12, 2019 to the date of hearing.

7. On November 14, 2019, Dr. Lippman determined that the claimant had reached maximum medical improvement (MMI). Dr. Lippman assessed no permanent impairment and recommended no maintenance medical treatment.

8. Relying on Dr. Lippman's November 14, 2019 report, the respondents filed a Final Admission of Liability (FAL) on December 5, 2019.

9. On January 15, 2021, the claimant sought treatment at Roaring Fork Family Practice[1] and was seen by Ivy Chalmers, PA-C. At that time, the claimant reported that she had slipped in a bathroom she was cleaning on November 1 and strained her right leg. The claimant also reported that she had a similar injury on her left side that never improved. PA Chalmers listed the claimant's diagnoses as right hip muscle strain, neuropathy, and sciatica. PA Chalmers released the claimant to full duty, with no work restrictions. In addition, she referred the claimant to Dr. Michael Campion for consultation.

10. On April 21, 2021, the claimant was seen by Dr. Campion. At that time, the claimant reported that she had fallen two years prior and injured her right hip. The claimant also reported that after her "second fall", she began to have leg numbness and knee pain. Based upon the medical record of that date, it appears that Dr. Campion referred to an initial fall in 2019, and a second fall on November 1, 2020. Dr. Campion recommended a magnetic resonance image (MRI) of the claimant's lumbar spine.

11. The claimant testified that after she was placed at MMI, her right hip condition became worse. The claimant also testified that she did not return to Dr. Lippman about her hip symptoms because Dr. Lippman died. The ALJ takes administrative notice of the Post Independent newspaper which reported that Dr. Lippman passed away on September 25, 2020.

12. However, the medical records entered into evidence demonstrate that the claimant did return to Dr. Lippman, and other providers at Glenwood Medical associates for other concerns.

13. On February 21, 2020, the claimant was seen by Dr. Lippman for bilateral shoulder and left foot issues. The claimant did not report worsening right hip symptoms at that time.

14. On March 3, 2020, the claimant was seen by a podiatrist, Dr. Noel Armstrong. In the medical record of that date, Dr. Armstrong thanks Dr. Lippman for his referral of the claimant. The claimant reported that her left foot became tangled in the cord of a lamp, causing pain in her great toe. Dr. Armstrong noted that the claimant had some degenerative changes in her left foot. He identified a hallux valgus and bunion on the left, as well as a sprain of the left foot.

15. On April 3, 2021, the claimant was seen at Glenwood Medical Associates by Dr. Sarah Rieves. At that time the claimant had complaints of rapid weight loss and

[1] Roaring Fork Family Practice is part of the Valley View Hospital system.

concerns about her diabetes. The claimant did not report worsening right hip symptoms at that time.

16. On May 25, 2021, the claimant returned to Dr. Rieves for an annual physical. The claimant did not report worsening right hip symptoms at that time.

17. On the issue of a worsening right hip condition, the ALJ does not find the claimant's testimony to be credible or persuasive. The ALJ credits the medical records and finds that the claimant did not report any worsening of her condition to her medical providers. The claimant began to report new symptoms when she saw PA Campion in January 2021. However, at that time, the claimant related her issues to an incident that occurred on November 1, 2020. The ALJ finds that the claimant has failed to demonstrate that it is more likely than not that she has experienced a worsening of her right hip condition, necessitating the reopening of her claim.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

4. Section 8-43-303(1) provides that "any award" may be reopened within six years after the date of injury "on the ground of fraud, an overpayment, an error, mistake, or a change in condition." Reopening for "mistake" can be based on a mistake of law or fact. *Renz v. Larimer County School District Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996). A claimant may request reopening on the grounds of error or mistake even if the claim was previously denied and dismissed. *E.g., Standard Metals Corporation v.*

Gallegos, 781 P.2d 142 (Colo. App. 1989); *see also Amin v. Schneider National Carriers*, W.C. No. 4-81-225-06 (November 9, 2017). The ALJ has wide discretion to determine whether an error or mistake has occurred that justifies reopening the claim. *Berg v. Industrial Claim Appeals Office*, 128 P.3d 270 (Colo. App. 2005); *Travelers Ins. Co. v. Industrial Commission*, 646 P.2d 399 (Colo. 1981).

5. A change in condition refers to "a change in the condition of the original compensable injury or to a change in the claimant's physical or mental condition which can be causally connected to the original compensable injury." *Heinicke v. Industrial Claim Appeals Office*, 197 P.3d 222 (Colo. App. 2008). The ALJ is not required to reopen a claim based upon a worsened condition whenever an authorized treating physician finds increased impairment following MMI. *Id.* The party attempting to reopen an issue or claim shall bear the burden of proof as to any issues sought to be reopened. Section 8-43-303(4), C.R.S.

6. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that her claim should be reopened due to a worsening of her condition. All remaining endorsed issues are dismissed as moot.

ORDER

It is therefore ordered that the claimant's request to reopen her claim related to a June 3, 2019 injury is denied and dismissed.

Dated this 23rd day of November 2021.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts
222 S. 6th Street, Suite 414
Grand Junction, Colorado 81501

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered compensable injuries during the course and scope of his employment on March 9, 2021 while working at a construction site located at 4343 South Picadilly Street in Aurora, Colorado.

2. Whether Claimant was an independent contractor pursuant to §8-40-202(2) C.R.S. on March 9. 2021.

3. If Claimant was not an independent contractor, whether B[Redacted] or R[Redacted]. was his Employer liable for his March 9, 2021 industrial injuries.

FINDINGS OF FACT

1. Claimant asserts that he was injured on March 9, 2021 working at a construction site located at 4343 South Picadilly Street in Aurora, Colorado. The work site was referred to as the "Capitalist" project.

2. R[Redacted] was hired by general contractor C[Redacted], to coordinate the framing and siding of a multifamily housing and apartment building at the Capitalist site. Rick Rosenkranz worked for C[Redacted] and was the superintendent on the Capitalist project. As the project coordinator, R[Redacted] hired subcontractors for every part of the building's construction because its employees do not perform any physical labor. R[Redacted] carries Workers' Compensation insurance for its employees through Pinnacol Assurance.

3. President of R[Redacted] Francisco Javier D[Redacted] testified that subcontractors B[Redacted] and L[Redacted] worked for R[Redacted] on the Capitalist project. Mr. D[Redacted] specified that R[Redacted] hired B[Redacted] to provide labor, materials, and perform construction carpentry work on the 4343 Piccadilly job site. R[Redacted] used L[Redacted] for the exterior siding work. He noted that sometimes R[Redacted] needs to use more than one subcontractor to build the structure. In those cases, R[Redacted] uses Otra Ves and Garcias Construction in addition to B[Redacted] to complete the structure. Mr. D[Redacted] commented that there were 20-30 workers on the Capitalist project from B[Redacted] and/or L[Redacted] and they were paid by their respective companies.

4. B[Redacted] is a subcontractor in the business of framing, siding and general carpentry. The company carries Workers' Compensation insurance for its employees through National Liability & Fire Insurance. B[Redacted] executes agreements with subcontractors for framing, siding and carpentry projects.

5. The record reveals that B[Redacted] executed Subcontractor Agreements with some workers during March-May, 2020. The Agreements specify that individuals would “furnish nails and/or staples and/or house wrap” to perform carpentry work according to plans and specifications to the satisfaction of B[Redacted] for all projects. The Subcontractor Agreements specified that individuals were not required to work exclusively for B[Redacted], did not establish a quality standard for the work performed and workers would be paid at a fixed or contract rate instead of a salary or hourly rate. Furthermore, B[Redacted] could not terminate the work during the contract period unless the individual violated or did not produce work within the specifications of the Agreement. The company would provide only minimal training, would not supply tools and would not dictate the time of performance or combine its business with the business of the worker. Despite the presence of several Subcontractor Agreements in the record, there is none specifically for Claimant.

6. Mr. D[Redacted] detailed that R[Redacted] hired B[Redacted] as a subcontractor for the Capitalist project to perform carpentry work. He commented that B[Redacted] provided laborers for the interior work of structures including walls, floors and ceilings. Mr. D[Redacted] remarked that R[Redacted] contracted with B[Redacted] and set project prices based on the square footage of the buildings. B[Redacted] then handled payment of its workers. Mr. D[Redacted] noted that B[Redacted] is not required to work exclusively for R[Redacted].

7. On January 29, 2020 and April 7, 2021 R[Redacted] and B[Redacted] executed Independent Contractor Agreements. Mr. D[Redacted] and President of B[Redacted] Donald S[Redacted] signed the Agreements. The Agreements specify that B[Redacted] would provide services on projects for a term of one year. Claimant’s accident at the Capitalist project occurred between the dates of the Agreements on March 9, 2021. Nevertheless, the record reveals that R[Redacted] and B[Redacted] effectively operated pursuant to the Agreements on the Capitalist project. Furthermore, the Agreements are consistent with the testimony of Mr. D[Redacted] regarding the business relationship of the parties.

8. The Independent Contractor Agreements specified that R[Redacted] would pay B[Redacted] in exchange for carpentry services performed on projects. The services specifically included labor, tools, insurance, taxes, meals, lodging, overtime, profit and overhead. The Agreements also expressly noted that B[Redacted] would provide all tools, equipment and materials for the projects. The Independent Contractor Agreements also required B[Redacted] to carry and furnish Workers’ Compensation and general liability insurance. Finally, the Agreements noted that B[Redacted] was an independent contractor and not an employee of R[Redacted].

9. R[Redacted] requires all of its subcontractors to possess their own general liability and Workers’ Compensation insurance policies. R[Redacted] is the certificate holder for B[Redacted]’ certificates of insurance on projects. B[Redacted]’ Certificate of Insurance states it is a carpentry business. B[Redacted] also submitted the insurance

documents to general contractor C[Redacted] as required of subcontractors on the jobsite at 4343 South Picadilly Street in Aurora, Colorado.

10. Carlos T[Redacted] was R[Redacted]'s Capitalist project site foreman overseeing the work performed by B[Redacted] and L[Redacted]. In March of 2021 Claimant was working full-time as a carpenter at the Capitalist project. His regular hours were from 7:00 a.m. to 5:00 p.m. Monday through Friday and from 7:00 a.m. until 12:00 p.m. on Saturday. Claimant worked closely with Rogelio RL[Redacted] on the construction site. Both he and Mr. RL[Redacted] would report to Mr. T[Redacted] at 7:00 a.m. to receive work assignments. Claimant remarked that he checked in with Mr. T[Redacted] in the morning and checked out with him after finishing work each day.

11. Mr. T[Redacted]' job duties and actual job performance did not involve supervision of the B[Redacted] workers. Although Mr. T[Redacted] was in charge of the subcontractors at the job site, R[Redacted] had no authority or control over Claimant or the other subcontracted workers. R[Redacted] could only provide Claimant the plans for the jobsite. R[Redacted] could not hire or fire Claimant, did not train Claimant or tell him how to do the work, did not control Claimant's wages or pay him and did not set Claimant's schedule.

12. At the time of the March 9, 2021 accident Claimant had worked on the Capitalist project for about nine months. Claimant commented that he was hired by Mr. T[Redacted]. Mr. T[Redacted] explained that Claimant would earn $21.00 per hour for his work on the project. Mr. RL[Redacted] was also paid by the hour for his work on the Capitalist project. Both he and Claimant reported daily hours worked on the project at the end of their shifts to Mr. T[Redacted].

13. On March 9, 2021 Claimant and Mr. RL[Redacted] arrived at the Capitalist job site at 7:00 a.m. and met with Mr. T[Redacted] to obtain their job assignments. Mr. T[Redacted] sent the men to work in a specific building and both proceeded to the structure. At about 7:30 a.m. Claimant fell on ice located at the entrance to the building. Claimant remarked that five other individuals, including Mr. T[Redacted], also fell on the ice. Claimant immediately experienced pain and symptoms in his back, neck and left leg as a result of the fall.

14. Claimant reported his injury to Mr. T[Redacted] and noted that was unable to work. However, Claimant commented that Mr. T[Redacted] required him to stay at the site. Mr. T[Redacted] then referred Claimant to a massage therapist for treatment. Nevertheless, Claimant chose to pursue chiropractic treatment for his injuries.

15. Claimant emphasized that he was not permitted to set his own hours and was not paid by the project. He never claimed the status of an independent contractor or worked for others while completing the Capitalist project. Claimant noted that tools and supplies were available at the job site. He only brought a saw and nail gun to the project. Claimant received weekly checks from B[Redacted] that were distributed by Mr. T[Redacted].

16. Claimant did not receive a paycheck from R[Redacted]. Every paycheck he received while working on the Capitalist project for his nine-month period was made out to him personally and issued by B[Redacted]. Claimant also never received cash for his services on the Capitalist project. Mr. T[Redacted] handed Claimant a paycheck once each week. Claimant also did not pay any other workers out of the checks he received. Finally, Claimant was not reimbursed for any costs and/or expenses on the project.

17. Claimant considers his normal and customary occupation to be a construction worker. During the nine-month period Claimant performed work on the Capitalist project he did not work elsewhere. Moreover, Claimant never held himself out as an independent contractor performing carpentry work or other services. Claimant emphasized he was an employee and not an independent contractor while performing carpentry work on the Capitalist job site.

18. Claimant brought hand tools for his personal use to 4343 South Picadilly Street in Aurora, Colorado. However, the tools merely consisted of a nail gun and a saw. Mr. T[Redacted] would lend Claimant and any other workers larger tools and other equipment they required. Many of the tools were located in a large four foot by three foot tool box on the site that was maintained and controlled by Mr. T[Redacted]. Furthermore, materials that Claimant needed to perform carpentry work were provided at the job site.

19. Mr. T[Redacted] provided Claimant with a yellow safety vest to wear while working on the Capitalist construction site. The vest had R[Redacted]'s name on it, but Claimant did not receive a uniform or any other personal protective equipment for use on the Capitalist job site. The general contractor encouraged Claimant and all workers to wear safety vests.

20. On March 17, 2021 Claimant presented to Michael Sanders, D.C. with complaints of constant lower back and neck pain after his "slip and fall on the ice" that was affecting his construction work duties. Dr. Sanders diagnosed Claimant with segmental and somatic dysfunction of his cervical, thoracic, lumbar and sacral regions. Claimant received chiropractic adjustments to the affected body parts. Dr. Sanders provided adjustments to Claimant on March 18, 19, 20, 23, 25, 26, and 30, 2021.

21. On May 7, 2021 Claimant visited Paul Ogden, M.D. at Workwell Occupational Medicine and reported constant neck, back and left leg pain. Dr. Ogden diagnosed him with cervical, thoracic and lumbar strains and limited his work to lifting, pushing or pulling no greater than 20 pounds. He referred Claimant to physical therapy. Based on his reported history of slipping and falling on ice while walking on the job site, Dr. Ogden noted the symptoms appeared to be work-related. Dr. Ogden also determined that Claimant's objective findings were consistent with a work-related mechanism of injury.

22. On May 13, 2021 Claimant returned to Dr. Ogden for an evaluation. Claimant appeared to be "markedly worse" and reported pain in his neck that radiated into his left upper extremity as well as his posterior left leg. Work restrictions remained unchanged. Dr. Ogden recommended MRIs of Claimant's cervical and lumbar spine. He

also referred Claimant for a psychological evaluation and treatment if necessary. However, the recommended treatment never occurred because it was not authorized.

23. On August 27, 2021 Claimant underwent an independent medical examination with Ranee Shenoi, M.D. Claimant reported that he was injured while working at a construction site on March 9, 2021. He commented that he was walking with his tools and slipped on ice while approaching a building at the site. He specifically noted he did not see the ice and touched the ground with his buttocks when he slipped. Claimant detailed that "his head hit the floor and his helmet went flying when it touched the ground." When Claimant attempted to stand up after the fall he felt pain in his back, neck and left leg. Claimant reported that five others fell on the ice while approaching the building.

24. Based upon Claimant's mechanism of injury, a review of his medical records and a physical examination, Dr. Shenoi determined that Claimant sustained both cervical and lumbar spine strains/sprains. The symptoms were associated with left L4-5 radiculitis or radiculopathy from nerve irritation as a result of his fall on March 9, 2021. Dr. Shenoi noted that Claimant had not reached Maximum Medical Improvement (MMI) and determined that further conservative care was necessary for Claimant's cervical and lumbar spine injuries. She also referred Claimant to a neurologist for evaluation of possible post-concussive disorder as well as headache management. Finally, Dr. Shenoi suggested a psychological evaluation for Claimant's reactive issues and/or mood disorder.

25. Claimant has demonstrated that it is more probably true than not that he suffered compensable injuries during the course and scope of his employment on March 9, 2021 while working at the Capitalist construction site located at 4343 South Picadilly Street in Aurora, Colorado. Initially, on March 9, 2021 Claimant arrived at the Capitalist job site at 7:00 a.m. and met with Mr. T[Redacted] to obtain his job assignment. As Claimant proceeded to his assigned location, he fell on ice located at the entrance to the building. Claimant credibly testified that he immediately experienced pain in his back, neck and left leg as a result of the fall. On March 17, 2021 Claimant presented to chiropractor Dr. Sanders with complaints of constant lower back and neck pain after his "slip and fall on the ice." Dr. Sanders diagnosed Claimant with segmental and somatic dysfunction of his cervical, thoracic, lumbar and sacral regions. Claimant subsequently underwent chiropractic adjustments with Dr. Sanders on March 18, 19, 20, 23, 25, 26, and 30, 2021.

26. On May 7, 2021 Claimant visited Dr. Ogden at Workwell and reported constant neck, back and left leg pain. Dr. Ogden diagnosed Claimant with cervical, thoracic and lumbar strains and limited his work to lifting, pushing or pulling no greater than 20 pounds. Based on Claimant's reported history of slipping and falling on ice while walking at a job site, Dr. Ogden noted the symptoms appeared to be work-related. Dr. Ogden also persuasively determined that Claimant's objective findings were consistent with a work-related mechanism of injury. Furthermore, in an August 27, 2021 independent medical examination with Dr. Shenoi, Claimant again reported that he slipped on ice while approaching a building at a job site. Based on Claimant's mechanism of injury, a review

of his medical records and a physical examination, Dr. Shenoi persuasively determined that Claimant sustained both cervical and lumbar spine strains/sprains. The symptoms were associated with left L4-5 radiculitis or radiculopathy from nerve irritation as a result of his fall on March 9, 2021.

27. Based on Claimant’s credible testimony, the consistent accounts in the medical records and the persuasive opinions of Drs. Ogden and Shenoi, Claimant suffered compensable industrial injuries while working on the Capitalist project on March 9, 2021. The record reveals that Claimant consistently reported he slipped on ice while approaching a building on the Capitalist job site and immediately suffered symptoms in his back, neck and left leg. Drs. Ogden and Shenoi persuasively concluded that Claimant’s injuries were consistent with his described mechanism of injury on March 9, 2021. Claimant’s work activities thus aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. Accordingly, Claimant suffered compensable industrial injuries to his neck and back with radiating symptoms into his left leg during the course and scope of his work activities at the Capitalist project on March 9, 2021.

28. Claimant was not an independent contractor while working at the Capitalist project on March 9, 2021. The record reveals that Claimant was not engaged in an independent trade, occupation, profession or business and not free from control and direction in the performance of his services at the Capitalist job site. Specifically, Claimant’s actual working relationship while performing duties on the Capitalist project reflects that he was not an independent contractor. Accordingly, Claimant was an employee when he suffered compensable injuries on March 9, 2021.

29. Initially, the record reveals that B[Redacted] executed Subcontractor Agreements with some workers during March-May, 2020. The Agreements specify that individuals would “furnish nails and/or staples and/or house wrap” to perform carpentry work according to plans and specifications to the satisfaction of B[Redacted] for all projects. Despite the presence of several Subcontractor Agreements in the record, there is none for Claimant. Therefore, there is no rebuttable presumption of an independent contractor relationship between Claimant and B[Redacted].

30. In March of 2021 Claimant was working full-time as a carpenter at the Capitalist project. His regular hours were from 7:00 a.m. to 5:00 p.m. Monday through Friday and from 7:00 a.m. until 12:00 p.m. on Saturday. Claimant would report to Mr. T[Redacted] at 7:00 a.m. to receive work assignments. He checked in with Mr. T[Redacted] in the morning and checked out with him after finishing work each day.

31. Claimant considers his normal and customary occupation to be a construction worker. At the time of the March 9, 2021 accident Claimant had worked on the Capitalist project for about nine months. Claimant earned $21.00 per hour and reported his daily hours to Mr. T[Redacted] at the end of each shift. Claimant emphasized that he was not permitted to set his own hours and was not paid by the project. He never claimed the status of an independent contractor or worked for others while completing the

Capitalist project. Claimant noted that tools and supplies were available at the job site. He received weekly checks made out to him personally from B[Redacted] that were distributed by Mr. T[Redacted].

32. Claimant brought hand tools for his personal use to 4343 South Picadilly Street in Aurora, Colorado. However, the tools merely consisted of a nail gun and a saw. Mr. T[Redacted] would lend Claimant and any other workers larger tools and other equipment they required. Many of the tools were in a large four foot by three foot tool box located on site that was maintained and controlled by Mr. T[Redacted]. Furthermore, materials that Claimant needed to perform carpentry work were provided at the job site.

33. Claimant did not receive a paycheck from R[Redacted]. Every paycheck he received while working on the Capitalist project over a nine-month period was made out to him personally and issued by B[Redacted]. Claimant also never received cash for his services. He did not pay any other workers out of the checks he received from B[Redacted]. Finally, Claimant was not reimbursed for any costs and/or expenses on the project.

34. Considering the totality of the circumstances and the nature of Claimant's working relationship at the Capitalist job site reveals that he was not an independent contractor. Claimant did not operate a separate business in the field. Specifically, Claimant did not have an independent business card, listing, address or telephone contact. He also did not have a financial investment so that there was a risk of suffering a loss on the Capitalist project. Claimant only provided hand tools and thus did not supply his own materials or equipment on the project. Furthermore, Claimant did not set the price for performing the work, did not employ others to complete the project and did not carry liability insurance. Accordingly, Claimant was an employee when he suffered compensable injuries while working at a construction site located at 4343 South Picadilly Street in Aurora, Colorado on March 9, 2021.

35. The record reflects that B[Redacted] was Claimant's Employer liable for his March 9, 2021 industrial injuries. General contractor C[Redacted] hired R[Redacted] to coordinate the framing and siding of a multifamily housing and apartment building at the Capitalist site. As the project coordinator, R[Redacted] hired B[Redacted] and other specialty subcontractors to perform this work. Mr. D[Redacted] credibly detailed that R[Redacted] specifically hired B[Redacted] to provide laborers for the interior work of structures including walls, floors and ceilings. Mr. D[Redacted] remarked that R[Redacted] contracted with B[Redacted] and set project prices based on the square footage of the buildings. B[Redacted] then handled payment of its workers.

36. On January 29, 2020 and April 7, 2021 R[Redacted] and B[Redacted] executed Independent Contractor Agreements. The Agreements specified that B[Redacted] would provide services on projects for a term of one year. Claimant's accident at the Capitalist project occurred between the dates of the Agreements on March 9, 2021. Nevertheless, the record reveals that R[Redacted] and B[Redacted] effectively operated pursuant to the Agreements on the Capitalist project. Furthermore, the

Agreements are consistent with the testimony of Mr. D[Redacted] regarding the business relationship of the parties. The Independent Contractor Agreements specified that R[Redacted] would pay B[Redacted] in exchange for carpentry services performed on projects. The services specifically included labor, tools, insurance, taxes, meals, lodging, overtime, profit and overhead. The Agreements also expressly noted that B[Redacted] would be responsible for all tools, equipment and materials on projects. Finally, Claimant was not paid by R[Redacted] but received a monthly paycheck from B[Redacted] made out to him personally for his duration of work on the Capitalist project.

37. R[Redacted] required all of its subcontractors to possess their own general liability and Workers' Compensation insurance policies. Specifically, R[Redacted] is the certificate holder for B[Redacted]' certificates of insurance. B[Redacted] also submitted the insurance documents to general contractor C[Redacted] as required of subcontractors on the jobsite at 4343 South Picadilly Street in Aurora, Colorado.

38. The preceding evidence demonstrates that Claimant was an employee of B[Redacted] and was not employed by R[Redacted]. The credible testimony of Mr. D[Redacted] in conjunction with the documentary evidence in the record reveals that B[Redacted] was an insured subcontractor of R[Redacted] performing interior carpentry services on the Capitalist project. B[Redacted] specifically provided labor, tools and materials to complete the work. Because B[Redacted] had its own Workers' Compensation insurance policy through National liability & Fire Insurance, Claimant cannot reach "upstream" to impose liability on R[Redacted] as the statutory employer. Accordingly, B[Redacted] was Claimant's Employer who is liable for his March 9, 2021 industrial injuries while working on the Capitalist project.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.,* W.C. No. 4-650-711 (ICAO, Feb. 15, 2007); *David Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a preexisting condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO, Aug. 18, 2005). Rather, the symptoms could represent the “logical and recurrent consequence” of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant’s symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that “correlation is not causation,” and merely because a coincidental correlation exists between the claimant’s work and his symptoms does not mean there is a causal connection between the claimant’s injury and work activities.

7. The provision of medical care based on a claimant’s report of symptoms does not establish an injury but only demonstrates that the claimant claimed an injury. *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020). Moreover, a referral for medical care may be made so that the respondent would not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id.* Although a physician

provides diagnostic testing, treatment, and work restrictions based on a claimant's reported symptoms. It does not follow that the claimant suffered a compensable injury. *Fay v. East Penn manufacturing Co., Inc.*, W.C. No. 5-108-430-001 (ICAO, Apr. 24, 2020); *cf. Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337, 1339 (Colo. App. 1997) ("right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment"). While scientific evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory supporting compensability. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020).

8. As found, Claimant has demonstrated by a preponderance of the evidence that he suffered compensable injuries during the course and scope of his employment on March 9, 2021 while working at the Capitalist construction site located at 4343 South Picadilly Street in Aurora, Colorado. Initially, on March 9, 2021 Claimant arrived at the Capitalist job site at 7:00 a.m. and met with Mr. T[Redacted] to obtain his job assignment. As Claimant proceeded to his assigned location, he fell on ice located at the entrance to the building. Claimant credibly testified that he immediately experienced pain in his back, neck and left leg as a result of the fall. On March 17, 2021 Claimant presented to chiropractor Dr. Sanders with complaints of constant lower back and neck pain after his "slip and fall on the ice." Dr. Sanders diagnosed Claimant with segmental and somatic dysfunction of his cervical, thoracic, lumbar and sacral regions. Claimant subsequently underwent chiropractic adjustments with Dr. Sanders on March 18, 19, 20, 23, 25, 26, and 30, 2021.

9. As found, on May 7, 2021 Claimant visited Dr. Ogden at Workwell and reported constant neck, back and left leg pain. Dr. Ogden diagnosed Claimant with cervical, thoracic and lumbar strains and limited his work to lifting, pushing or pulling no greater than 20 pounds. Based on Claimant's reported history of slipping and falling on ice while walking at a job site, Dr. Ogden noted the symptoms appeared to be work-related. Dr. Ogden also persuasively determined that Claimant's objective findings were consistent with a work-related mechanism of injury. Furthermore, in an August 27, 2021 independent medical examination with Dr. Shenoi, Claimant again reported that he slipped on ice while approaching a building at a job site. Based on Claimant's mechanism of injury, a review of his medical records and a physical examination, Dr. Shenoi persuasively determined that Claimant sustained both cervical and lumbar spine strains/sprains. The symptoms were associated with left L4-5 radiculitis or radiculopathy from nerve irritation as a result of his fall on March 9, 2021.

10. As found, based on Claimant's credible testimony, the consistent accounts in the medical records and the persuasive opinions of Drs. Ogden and Shenoi, Claimant suffered compensable industrial injuries while working on the Capitalist project on March 9, 2021. The record reveals that Claimant consistently reported he slipped on ice while approaching a building on the Capitalist job site and immediately suffered symptoms in his back, neck and left leg. Drs. Ogden and Shenoi persuasively concluded that

Claimant's injuries were consistent with his described mechanism of injury on March 9, 2021. Claimant's work activities thus aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. Accordingly, Claimant suffered compensable industrial injuries to his neck and back with radiating symptoms into his left leg during the course and scope of his work activities at the Capitalist project on March 9, 2021.

Independent Contractor

11. Pursuant to §8-40-202(2)(a), C.R.S. "any individual who performs services for pay for another shall be deemed to be an employee" unless the person "is free from control and direction in the performance of the services, both under the contract for performance of service and in fact and such individual is customarily engaged in an independent . . . business related to the service performed." Moreover, pursuant to §8-40-202(2)(b)(I), C.R.S. independence may be demonstrated through a written document.

12. A necessary element to establish that an individual is an independent contractor is that the individual is customarily engaged in an independent trade, occupation, profession or business related to the services performed. *Allen v. America's Best Carpet Cleaning Services,* W.C. No. 4-776-542 (ICAO, Dec. 1, 2009). The statutory requirement that the worker must be "customarily engaged" in an independent trade or business is designed to assure that the worker, whose income is almost wholly dependent upon continued employment with a single employer, is protected from the "vagaries of involuntary unemployment." *In Re Hamilton,* W.C. No. 4-790-767 (ICAO, Jan. 25, 2011).

13. The "employer" may also establish that the worker is an independent contractor by proving the presence of some or all of the nine criteria enumerated in §8-40-202(2)(b)(II), C.R.S. *See Nelson v. ICAO,* 981 P.2d 210, 212 (Colo. App. 1998). The factors in §8-40-202(2)(b)(II), C.R.S. suggesting that a person is not an independent contractor include whether the person is paid a salary or hourly wage rather than a fixed contract rate and is paid individually rather than under a trade or business name. Conversely, independence may be shown if the "employer" provides only minimal training for the worker, does not dictate the time of performance, does not establish a quality standard for the work performed, does not combine its business with the business of the worker, does not require the worker to work exclusively for a single entity, does not provide tools or benefits except materials and equipment, and is unable to terminate the worker's employment without liability. *In Re of Salgado-Nunez,* W.C. No. 4-632-020 (ICAO, June 23, 2006). Section 8-40-202(b)(II), C.R.S. creates a "balancing test" to ascertain whether an "employer" has overcome the presumption of employment in §8-40-202(2)(a), C.R.S. The question of whether the "employer" has presented sufficient proof to overcome the presumption is one of fact for the Judge. *Id.*

14. Section 8-40-202(2)(b)(IV), C.R.S. provides that If the parties use a written document specifying the existence of the nine factors referenced in §8-40-202 (2)(b)(II), C.R.S. the document can create a rebuttable presumption of an independent contractor relationship. The document must advise in larger or bold type that the individual is not

entitled to Workers' Compensation benefits and must pay his own federal and state income tax on any moneys earned.

15. In *Industrial Claim Appeals Office v. Softrock Geological Services*, 325 P.3d 560 (Colo. 2014), the Colorado Supreme Court expanded the analysis for determining whether a worker is an employee or an independent contractor beyond the factors enumerated in §8-70-115(1)(c), C.R.S. The *Softrock* decision addressed the evidence necessary to establish that a worker is customarily engaged in an independent trade or business in the context of unemployment insurance benefits. The Court reasoned that the nine factors listed both in §8-70-115(1)(c) and (2), C.R.S. (involving unemployment benefits) and §8-40-202(2)(a) and (b), C.R.S. (pertaining to Workers' Compensation), were relevant to the assessment of the maintenance of an independent business. However, the Court also determined none of the preceding criteria, by themselves, were exhaustive of the inquiry. The Court noted that the status of the claimant must include consideration of the totality of the circumstances and examination of "the nature of the working relationship." *Id*. at 565. The decision pointed to indicia that would normally accompany the performance of an ongoing separate business in the field. Considerations included whether the worker used an independent business card, listing, address, or telephone; had a financial investment such that there was a risk of suffering a loss on the project; used his or her own equipment on the project; set the price for performing the project; employed others to complete the project; and carried liability insurance. *Id*.

16. The question whether *Softrock* applied in the Workers' Compensation context was open until the court of appeals decision in *Pella Windows & Doors, Inc. v. Industrial Claim Appeals Office*, 458 P.3d 128 (Colo. App. Div. 2 2020). In *Pella Windows* the court concluded that the factors articulated in *Softrock* also apply to Workers' Compensation cases. *See Id.* at 136 ("We therefore conclude that the [p]anel did not err when it determined that [the administrative law judge] . . . should have considered the *Softrock* factors in weighing whether claimant's business was independent of Pella.").

17. As found, Claimant was not an independent contractor while working at the Capitalist project on March 9, 2021. The record reveals that Claimant was not engaged in an independent trade, occupation, profession or business and not free from control and direction in the performance of his services at the Capitalist job site. Specifically, Claimant's actual working relationship while performing duties on the Capitalist project reflects that he was not an independent contractor. Accordingly, Claimant was an employee when he suffered compensable injuries on March 9, 2021.

18. As found, initially, the record reveals that B[Redacted] executed Subcontractor Agreements with some workers during March-May, 2020. The Agreements specify that individuals would "furnish nails and/or staples and/or house wrap" to perform carpentry work according to plans and specifications to the satisfaction of B[Redacted] for all projects. Despite the presence of several Subcontractor Agreements in the record, there is none for Claimant. Therefore, there is no rebuttable presumption of an independent contractor relationship between Claimant and B[Redacted].

19. As found, in March of 2021 Claimant was working full-time as a carpenter at the Capitalist project. His regular hours were from 7:00 a.m. to 5:00 p.m. Monday through Friday and from 7:00 a.m. until 12:00 p.m. on Saturday. Claimant would report to Mr. T[Redacted] at 7:00 a.m. to receive work assignments. He checked in with Mr. T[Redacted] in the morning and checked out with him after finishing work each day.

20. As found, Claimant considers his normal and customary occupation to be a construction worker. At the time of the March 9, 2021 accident Claimant had worked on the Capitalist project for about nine months. Claimant earned $21.00 per hour and reported his daily hours to Mr. T[Redacted] at the end of each shift. Claimant emphasized that he was not permitted to set his own hours and was not paid by the project. He never claimed the status of an independent contractor or worked for others while completing the Capitalist project. Claimant noted that tools and supplies were available at the job site. He received weekly checks made out to him personally from B[Redacted] that were distributed by Mr. T[Redacted].

21. As found, Claimant brought hand tools for his personal use to 4343 South Picadilly Street in Aurora, Colorado. However, the tools merely consisted of a nail gun and a saw. Mr. T[Redacted] would lend Claimant and any other workers larger tools and other equipment they required. Many of the tools were in a large four foot by three foot tool box located on site that was maintained and controlled by Mr. T[Redacted]. Furthermore, materials that Claimant needed to perform carpentry work were provided at the job site.

22. As found, Claimant did not receive a paycheck from R[Redacted]. Every paycheck he received while working on the Capitalist project over a nine-month period was made out to him personally and issued by B[Redacted]. Claimant also never received cash for his services. He did not pay any other workers out of the checks he received from B[Redacted]. Finally, Claimant was not reimbursed for any costs and/or expenses on the project.

23. As found, considering the totality of the circumstances and the nature of Claimant's working relationship at the Capitalist job site reveals that he was not an independent contractor. Claimant did not operate a separate business in the field. Specifically, Claimant did not have an independent business card, listing, address or telephone contact. He also did not have a financial investment so that there was a risk of suffering a loss on the Capitalist project. Claimant only provided hand tools and thus did not supply his own materials or equipment on the project. Furthermore, Claimant did not set the price for performing the work, did not employ others to complete the project and did not carry liability insurance. Accordingly, Claimant was an employee when he suffered compensable injuries while working at a construction site located at 4343 South Picadilly Street in Aurora, Colorado on March 9, 2021.

Liable Employer

24. An employee is a person who "performs services for pay for another." §8-40-202(2)(a), C.R.S. Section 8-41-401(1)(a), C.R.S. creates a statutory employment relationship when a company contracts out part or all of its work to any subcontractor. Under these circumstances, the contracting company "shall be liable" to pay compensation for injuries to employees of subcontractors. The purpose of the statute is to prevent employers from "avoiding responsibility under the workers' compensation act by contracting out their regular business to uninsured independent contractors." *Finlay v. Storage Technology Corp*., 764 P.2d 62 (Colo. 1988); *Trujillo v. United Medical Group*, W.C. No. 4-537-815 (ICAO, Mar. 12, 2004).

25. However, §8-41-401(2), C.R.S. prevents an injured employee from reaching "upstream" to impose liability on another contractor if the subcontractor has procured insurance that covers the injury. *In Re Noyola*, WC 4-969-386 (ICAO, Sept. 19, 2017) *citing Finlay v. Storage Technology Corp.,* 764 P.2d 62 (Colo. 1988). The statutory exemption created by §8-41-401(2), C.R.S., is an affirmative defense to the contracting employer's liability regarding the statutory employer. *Postlewait v. Industrial Claim Appeals Office,* 905 P.2d 21 (Colo.App. 1995); *see Stampados v. Colorado D & S Enterprises, Inc.,* 833 P.2d 815 (1992) (whether claimant is an independent contractor is an affirmative defense on which the employer bears the burden of proof). Nevertheless, in the absence of proof that the subcontractor was also an insured employer, the statutory employer remains solely liable for the work-related injuries of the employees of the subcontractor. *See Buzard v. Super Walls Inc.,* 681 P.2d 520 (Colo. 1984); *City and County of Denver v. Industrial Claim Appeals Office,* 58 P.3d 1162 (Colo. App. 2002). Importantly, in order to obtain the immunity conferred by §8-41-401(2), C.R.S., the statutory employer is obligated to establish not only that the subcontractor purchased a policy of Workers' Compensation insurance, but that the policy covered the claimant at the time of the injury. *In Re Noyola*, WC 4-969-386 (ICAO, Sept. 19, 2017).

26. As found, the record reflects that B[Redacted] was Claimant's Employer liable for his March 9, 2021 industrial injuries. General contractor C[Redacted] hired R[Redacted] to coordinate the framing and siding of a multifamily housing and apartment building at the Capitalist site. As the project coordinator, R[Redacted] hired B[Redacted] and other specialty subcontractors to perform this work. Mr. D[Redacted] credibly detailed that R[Redacted] specifically hired B[Redacted] to provide laborers for the interior work of structures including walls, floors and ceilings. Mr. D[Redacted] remarked that R[Redacted] contracted with B[Redacted] and set project prices based on the square footage of the buildings. B[Redacted] then handled payment of its workers.

27. As found, on January 29, 2020 and April 7, 2021 R[Redacted] and B[Redacted] executed Independent Contractor Agreements. The Agreements specified that B[Redacted] would provide services on projects for a term of one year. Claimant's accident at the Capitalist project occurred between the dates of the Agreements on March 9, 2021. Nevertheless, the record reveals that R[Redacted] and B[Redacted] effectively operated pursuant to the Agreements on the Capitalist project. Furthermore, the Agreements are consistent with the testimony of Mr. D[Redacted] regarding the business relationship of the parties. The Independent Contractor Agreements specified that

R[Redacted] would pay B[Redacted] in exchange for carpentry services performed on projects. The services specifically included labor, tools, insurance, taxes, meals, lodging, overtime, profit and overhead. The Agreements also expressly noted that B[Redacted] would be responsible for all tools, equipment and materials on projects. Finally, Claimant was not paid by R[Redacted] but received a monthly paycheck from B[Redacted] made out to him personally for his duration of work on the Capitalist project.

28. As found, R[Redacted] required all of its subcontractors to possess their own general liability and Workers' Compensation insurance policies. Specifically, R[Redacted] is the certificate holder for B[Redacted]' certificates of insurance. B[Redacted] also submitted the insurance documents to general contractor C[Redacted] as required of subcontractors on the jobsite at 4343 South Picadilly Street in Aurora, Colorado.

29. As found, the preceding evidence demonstrates that Claimant was an employee of B[Redacted] and was not employed by R[Redacted]. The credible testimony of Mr. D[Redacted] in conjunction with the documentary evidence in the record reveals that B[Redacted] was an insured subcontractor of R[Redacted] performing interior carpentry services on the Capitalist project. B[Redacted] specifically provided labor, tools and materials to complete the work. Because B[Redacted] had its own Workers' Compensation insurance policy through National liability & Fire Insurance, Claimant cannot reach "upstream" to impose liability on R[Redacted] as the statutory employer. Accordingly, B[Redacted] was Claimant's Employer who is liable for his March 9, 2021 industrial injuries while working on the Capitalist project.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered compensable injuries to his neck and back with radiating symptoms into his left leg during the course and scope of his employment on March 9, 2021 while working at the Capitalist construction site located at 4343 South Picadilly Street in Aurora, Colorado.

2. Claimant was not an independent contractor when he was injured on March 9, 2021.

3. B[Redacted] was Claimant's Employer and is liable for his March 9, 2021 industrial injuries while working on the Capitalist project.

4. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge’s order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: November 23, 2021.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-126-991-001

ISSUES

I. Whether the occupational therapy (OT) ordered by Dr. Pulikkottil is reasonable, necessary, and related to Claimant's work-related injury.

II. Whether the scalene muscle block, pectoralis minor muscle block, carotid bilateral duplex, and brain MRI without contrast ordered by Dr. Annest are reasonable, necessary, and related to Claimant's work-related injury.

III. Whether the trigger point injections, greater occipital nerve block, and transforaminal epidural steroid injections at C7-T1 ordered by Dr. Burke are reasonable, necessary, and related to Claimant's work-related injury.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. In July 2019, Claimant was employed by [Employer's name Redacted] (Employer) as a field locator. (Hr'g Tr. p. 14).
2. Claimant's job duties included locating and marking underground utilities, mapping the utility locations, and providing the mapped utility location to the surveyors. (Hr'g Tr. p. 14).
3. The Employer has employees in Colorado and Montana. (Hr'g Tr. p. 17).
4. On December 19, 2019, Claimant was scheduled by Employer to drive the company's Ford F-150 pickup from Brighton, Colorado to Buffalo, Wyoming. An employee from the Montana office was to drive a company van from Montana to meet Claimant in Buffalo, Wyoming, where the van would be exchanged for the company's Ford F-150 pickup. Claimant would then drive the van back to Brighton, Colorado. (Hr'g Tr. p. 14-15).
5. About halfway between Casper and Buffalo, Wyoming, an animal ran onto North bound I-25 in front of Claimant. (Hr'g Tr. P. 15). Claimant was driving at interstate speeds. (Cl. Ex. 4, p. 20). Claimant swerved to miss the animal, but lost control of the truck and it rolled down an embankment. (Hr'g Tr. p. 15).
6. It was estimated that the truck rolled somewhere between 3 and 7 times before it came to rest on the roof. (Cl. Ex. 10, p. 222); (Hr'g Tr. p. 17-18).
7. Claimant testified, "I remember the first time when I saw dirt against the window, and my head hit it and shattered it. I remember the second time my arm flew out, and I

grabbed my arm with my right hand to try to pull it back in. And it was crushed between the top of the truck in the ground. I remember the third . . .. The last thing I remember I woke upside down on the feeder road." (Hr'g Tr. p. 17-18).

8. As a result of the high-speed rollover accident, Claimant suffered a severe degloving injury from her left elbow to the knuckles of her left arm; a torn rotator cuff; a broken first rib, which is impinging on the brachial plexus; two herniated disks in her neck; a traumatic brain injury; and possible TIAs. (Hr'g Tr. p. 15-16).

9. The degloving injury resulted in muscle and tendons being torn from Claimant's left arm. (Hr'g Tr. p. 16).

10. Claimant was transported to Wyoming Medical Center by Life Flight with severe trauma. (Cl. Ex. 4, p. 24). Claimant underwent several diagnostic imaging studies including a CT scan of her head which revealed a contusion with petechial hemorrhage at the median aspect of the left cerebral hemisphere. (Cl. Ex. 4, p. 27). Claimant was intubated and placed in ICU. (Cl. Ex. 4, p. 23).

11. Claimant was also diagnosed with a concussion, degloving injury of the left arm down to the tendons and nerves, extensor tendon laceration of the left wrist with open wound, left radial fracture, and a left ulnar fracture, (Cl. Ex. 4, p. 25, 27).

12. Claimant underwent several reconstructive procedures in Wyoming for fixation of her radius and ulna fracture, as well as skin and soft tissue reconstruction for the degloving injury of her left arm. (Cl. Ex. 5, p. 29).

13. Joseph Pulikkottil, M.D., is the primary surgeon who treated Claimant's degloving injury after she returned to Colorado. (Cl. Ex. 5, p. 29). Dr. Pulikkottil performed several procedures and skin grafts to her left upper extremity, including: an open reduction and internal fixation (ORIF); application of Integra (skin graft), closed manipulation of left hand, internal neurolysis of femoral nerve with repair of femoral nerve, laser scar revisions, and adipofascial ALT free flap. (Hr'g Tr. p. 24-25); (Cl. Ex. 5, p. 138).

Dr. Pulikkottil's Request for 6 Occupational Therapy Visits.

14. Claimant has received significant occupational therapy pursuant to Dr. Pulikkottil's orders and is making functional gains. (Hr'g Tr. p. 28). At her occupational therapy appointments, the therapist would apply heat to loosen the joints, manipulate the joints in both hands, measure her range of motion, teach Claimant home exercises, and adjust Claimant's arm splints. However, due to her injuries, Claimant cannot manipulate the joints in her hands or adjust the splints independently without the aid of the occupational therapist. (Hr'g Tr. p. 25-26; Cl. Ex. 23).

15. Claimant uses about eleven different arm splints, each has a different purpose, to assist her with increasing the function of her severely injured left upper extremity. (Hr'g Tr. p. 26-20; Cl. Ex. 23).

16. Because of her severe left upper extremity injury, Claimant has undergone a significant amount of occupational therapy. Such therapy has, however, provided Claimant functional gains in the form of increased range of motion and strength in her left hand.

17. On June 30, 2021, Claimant was reevaluated by Dr. Pulikkottil. At this appointment, Claimant presented for a post-operative follow up appointment for her October, November, and December 2020 procedures. It was noted that Claimant stated that she has continued using the stat-a-dyne splint and is seeing a hand therapist "which the patient has noticed significant improvement with." Cl. Ex. 5, p. 141) After examining Claimant, Dr. Pulikkottil concluded:

> I discussed the situation with the patient. At this time upon evaluation and examination of the patient's condition, the patient demonstrates significant improvement with OT for hand therapy as well as utilization of stat-a-dyne and will continue to make improvement at this rate. I strongly recommend the patient continue formal hand therapy and use of stat-a-dyne.

Cl. Ex. 5, p. 143)

On July 15, 2021, and based on Dr. Pulikkottil's recommendations for formal hand therapy, Amy Nguyen, P.A., under the supervision of Dr. Pulikkottil, requested 12 occupational therapy visits over a six-week period. (Cl. Ex. 5, p. 145).

18. In response to the request for 12 additional occupational therapy visits, the Insurer requested a peer review to determine medical necessity and certification. The peer reviewer, Mahdy Flores, D.O., Level 1 Accredited, stated that:

> Although, claimant has undergone multiple rounds of OT, this is a claimant who has undergone extensive surgery and has had objective improvement with past OT and recently underwent laser treatment for scar management, so continued OT is warranted, but the request is excessive. Modify to OT 1 x 6 left hand only.
>
> (Cl. Ex. 3, p. 19).

19. Peer-reviewer Flores specifically listed 14 procedures that were performed on Claimant's left upper extremity, which included a surgery in December 2020 and a scar revision procedure in July 2021. (Cl. Ex. 3, p. 18). Dr. Flores did not, however, persuasively and in sufficient detail, set forth the basis of her opinion that only 6 more visits were reasonable and necessary – but yet 6 were not.

20. Dr. Sander Orent, who was qualified as an expert in internal medicine and is Level II Accredited, reviewed the matter. After reviewing Dr. Flores' modified approval of the occupational therapy visits, Dr. Orent could not determine the basis for the peer reviewer's modified approval. Dr. Orent testified, "There is no rationale here other than the fact that doctors say that the continued OT is warranted, but the request is excessive." The peer review does not provide a reasonable reason as to why he thinks 6 additional OT visits are excessive. (Cl. Ex. 3, p. 19). Moreover, Dr. Flores never

spoke with the physician that ordered the OT to discuss the basis for the additional OT. (Cl. Ex. 3, p. 19).

21. As testified to by Dr. Orent, Claimant recently had surgery to her hand as well as fractional CO2 laser treatment. In addition, Dr. Orent stated that the ordering physician strongly recommended that Claimant continue in therapy. (Hr'g Tr. p. 61).

22. Dr. Orent concluded that after taking one look at Claimant's arm, the occupational therapy requested is more than reasonable. In addition, Dr. Orent also found the OT requested was reasonably necessary and related to treat Claimant from the effects of her work-related high-speed rollover accident. In the end, Dr. Orent concluded that the peer reviewer's failure to provide full approval was absurd. (Hr'g Tr. p. 62).

23. Claimant has made significant functional gains with the OT increasing her grip from 2 pounds to 10 pounds. Claimant would like to have the requested OT so that she has the chance to continue to make functional gains and get her arm back, i.e., increase her function. (Hr'g Tr. p. 31).

24. Based on the medical records, the testimony of Claimant and the opinions of Dr. Orent, the 12 OT therapy treatment sessions are found to be reasonably necessary to treat Claimant from the effects of her work injury.

Dr. Annest's request for scalene muscle blocks, pectoralis minor muscle block, MRI of the brain without contrast, and a carotid artery duplex ultrasound.

25. Claimant was seen by Dr. Griggs for the treatment of her torn rotator cuff. Claimant underwent an MRI on February 16, 2021. The MRI showed an abnormal left brachial plexus at the junction of the first rib. (Cl. Ex., p. 126) Based on the abnormal findings regarding Claimant's left brachial plexus, Dr. Griggs referred Claimant to Dr. Annest to evaluate and treat her brachial plexus injury. (Cl. Ex. 10, p. 221); (Hr'g Tr. p. 17).

26. Claimant's brachial plexus injury produces stabbing pain of 5 out of 10 on a good day and 10 out of 10 on a bad day. Claimant has more bad days than good. (Hr'g Tr. p. 18).

27. Dr. Annest determined that Claimant required surgery of the brachial plexus. (Cl. Ex. 10, p. 218). At the same time, because Claimant hit her head and suffered a TBI and because of the possibility that she was having 'mini strokes,' Dr. Annest requested a carotid bilateral duplex ultrasound, and brain MRI without contrast, as a precautionary measure. Dr. Annest was concerned that Claimant may suffer a stroke during surgery. In the meantime, Dr. Annest ordered a scalene muscle block and pectoralis minor muscle to help Claimant with the pain until the carotid bilateral duplex ultrasound and brain MRI were completed and surgery could commence. (Hr'g Tr. pp. 19, 20.); (Cl. Ex. 10, p. 222)

28. After Dr. Annest requested authorization for the scalene muscle block, pectoralis minor muscle block, carotid bilateral duplex, and brain MRI without contrast, the Insurer obtained a peer review from Siva Ayyar, M.D., who is Level 1 accredited. (Cl. Ex. 1, p. 2). The peer-reviewer issued a report in which he found all of Dr. Annest's requested treatment not reasonably necessary. (Cl. Ex. 1).

Scalene and Pectoralis Muscle Blocks

29. In response to the request for scalene muscle blocks, the May 20, 2021, peer review report referenced the Colorado Treatment Guides treatment recommendations for the diagnosis of acromioclavicular joint sprains and dislocations, as the basis for his opinion that the scalene muscle blocks ordered by Dr. Annest were not medically necessary. (Cl. Ex. 1, p. 3).

30. Although the peer-review concluded that Dr. Annest did not provide a clear compelling rationale for a scalene block, the peer-reviewer did not speak with Dr. Annest about his rationale for the scalene blocks. About two and a half days after the first attempt to reach Dr. Annest, the peer reviewer filed the report not recommending the requested treatment. The peer-reviewer never evaluated Claimant and never spoke to Dr. Annest about the requested treatment and his rationale for the scalene blocks. (Cl. Ex. 1, p. 4).

31. The peer-reviewer stated that Dr. Annest's decision to pursue the scalene block flies "in the face of the unfavorable Colorado position on the same." (Cl. Ex. 1, p. 3). However, the "unfavorable Colorado position" the peer-reviewer incorrectly relies on in his report to withhold certification of the scalene blocks, is based on Colorado medical treatment guides recommendations for acromioclavicular joint sprains and dislocations. As Dr. Orent pointed out at hearing, Dr. Annest's diagnosed Claimant with brachial plexus entrapment not acromioclavicular joint sprains. As a result, the peer reviewer's reliance on the treatment recommendations for acromioclavicular joint sprains and dislocations is improper. Dr. Orent redresses peer reviewer's error by clarifying that Claimant's injury is so unusual and rare it is not addressed in the guidelines. (Hr'g Tr. p. 49).

32. Dr. Orent, who is a level II accredited physician, also pointed out that the peer-reviewer did not provide a reasonable medical reason for not recommending the scalene muscle block. (Hr'g Tr. p. 47-48).

33. The peer-reviewer concluded that the pectoralis minor muscle block is also not medically necessary. The peer-reviewer opined:

> [I]t was unclear as to what is sought. It is unclear what is suspected. The attending provider failed to set forth a clear or compelling rationale or theory of pain referable to pectoralis minor muscle. The attending provider's concomitant request for both pectoralis minor and scalene muscle blocks suggests that the injections in question are, in fact, ordered indiscriminately, without a clear diagnosis in mind.

(Cl. Ex. 1., p. 4).

34. Essentially, the peer-reviewer, without ever evaluating Claimant or speaking to the treating provider, concluded that Dr. Annest is ordering blocks in a way that does not show any care or judgment. That said, the peer-reviewer does not provide a reasonable and persuasive rationale as to why the blocks would not be reasonable to treat Claimant's condition.

35. Contrary to the peer-reviewer's opinion, Dr. Orent testified that the scalene muscle block and pectoralis minor muscle block ordered by Dr. Annest are reasonable. (Cl. Ex. 1, p. 4); (Hr'g Tr. p. 45-46). The muscle blocks will help the surgeon determine whether Claimant's pain is coming from the obstructed brachial plexus or the shoulder. (Hr'g Tr. p. 45-46). Dr. Orent testified that determining the pain generator can be very difficult, however the blocks will assist in the diagnostic challenge and provide Claimant pain relief in the interim while she is awaiting surgery. (Hr'g Tr. p. 46). This is consistent with Dr. Annest's report that states, Claimant "has on MRI impingement by the left first rib of the brachial plexus . . . Part of the reason for her visit to me is to determine contribution of brachial plexus entrapment to her [symptoms]." (Cl. Ex. 10, p. 221).

36. Finally, the peer reviewer's statement that Dr. Annest failed to provide a theory of pain referable to pectoralis minor muscle is incorrect. Dr. Annest's May 3, 2021, medical report documents the pain related to the pectoralis minor muscle, "Pec Minor Eval: Left Forward position causes anterior shoulder pain, retraction causes pain in the supraclavicular fossa." (Cl. Ex. 10, p. 223).

37. Based on the medical records of Dr. Annest, and the opinions of Dr. Orent, the ALJ finds the scalene and pectoralis muscle blocks to be reasonable and necessary to treat Claimant from the effects of her work injury.

MRI of the Brain without Contrast

38. The peer-reviewer also considered Dr. Annest's request for an MRI and recommended non-certification. The peer-review agrees that the Colorado Mild Traumatic Brain Injury Medical Treatment Guidelines acknowledges:

> MRI scans are also useful to assess transient or permanent changes, to determine the etiology of subsequent clinical problems, and to planned treatment,' here, however, it is unclear what is sought. It is unclear what is suspected. It is unclear why a repeat brain MRI was needed so soon after the claimant had reportedly had a prior study in August 2020. There is no record of any acute deterioration or decompensation in the claimant's neurological presentation which would potentially have made a case for the repeat study in question. There is no mention of how (or if) the MRI at issue would influence or alter the treatment plan.

(Cl. Ex. 1, p. 4).

39. Claimant testified that about eight years ago she was diagnosed with a seizure disorder. At that time, her treaters could not identify the cause of the seizures. Claimant was prescribed Depakote and her seizures stopped around four years before the work-related accident in this case. Further, about two years ago Claimant stopped the seizure medication. Claimant has had no seizures for the two years before the work-related high-speed rollover accident. (Hr'g Tr. p. 18).

40. Since the high-speed rollover accident, Claimant testified that she has had about 3 or 4 seizures. (Hr'g Tr. p. 18). Claimant testified that she had one seizure at the primary physician's office, which was witnessed by the nurse case manager; one seizure at

Vibra Rehabilitation Hospital of Denver; and one or two seizures at home. (Hr’g Tr. p. 19).

41. On December 26, 2019, Benson Joseph Pulikkottil, M.D. documented that Claimant “states that she has been having increased number of seizures since her head injury.” (Cl. Ex. 5, p. 29).

42. On February 7, 2020, Claimant was admitted to Vibra Rehabilitation Hospital of Denver for gait and mobility deficits secondary to traumatic brain injury and severe degloving of the left upper extremity. (Cl. Ex. 6, p.153). The Vibra medical record documents that Claimant has a history of seizures and was placed on Keppra. (Cl. Ex. 6, p. 156). It is also noted that Claimant has a traumatic brain injury with post-concussion syndrome and is experiencing headaches. Gareth Shemesh, M.D. requested speech and language, as well as cognitive deficit assessments. (Cl. Ex. 6, p. 157).

43. Dr. Annest’s May 3, 2021, medical report documents that 3 days after the car crash Claimant had left body weakness, which was ongoing for 2 days. Claimant was evaluated and found to have a couple of mini strokes. (Cl. Ex. 10, p. 222).

44. Haley Burke, M.D.’s June 10, 2021, medical report documents “3 episodes of ‘mini strokes’ in the hospital and is now using ASA. Reports transient facial droop and speech difficulty.” It further documents that Claimant was also having headaches since the motor vehicle accident and that she may have 1-4 headaches each week, which may last hours to two and a half days. It also documents that Claimant may also be having sensitivity to light and sound, in addition to nausea. (Cl. Ex. 11, p. 228).

45. Claimant described the symptoms of the seizures/TIAs/mini strokes, as becoming very confused; difficulty speaking; dizziness; and nausea. (Hr’g Tr. p. 22).

46. Although Claimant did have an MRI of her cervical spine on July 30, 2020, Claimant does not recall receiving an MRI, for her brain, at that time. Claimant could only recall the MRI of her neck and brachial plexus. (Hr’g Tr. p. 74-75).

47. Dr. Orent testified that the brachial plexus surgery recommended by Dr. Annest is “a pretty invasive procedure.” Before clearing Claimant for surgery, it is reasonable to request an MRI of the brain giving Claimant’s history of possible strokes and seizures. The surgery that is being recommended is in the area that is vascularized by the structures that carry blood to the brain. Thus, Dr. Orent concluded that it is reasonable to request the MRI of the brain so that the surgeon would know the pathology of the brain, i.e., is Claimant having strokes, is she having seizures, is there an epileptic focus that can be seen on the MRI because of the scar in her brain, before performing the surgery. (Hr’g Tr. p. 41-43).

Carotid Duplex

48. The peer-reviewer referenced the Colorado Mild Traumatic Brain Injury Medical Treatment Guidelines and acknowledged that: “Vascular imaging tests reveal arterial or venous abnormality is in the chest, neck, head, or extremities (e.g., thrombosis, dissection, spasm, emboli, or tearing).” (Cl. Ex. 1, p. 4). However, the peer-reviewer then recommended non-certification of carotid duplex that Dr. Annest ordered. The

peer-reviewer states, “it is unclear what was sought. It is unclear what is suspected. A clear differential diagnosis was not furnished.” (Cl. Ex. 1, p. 4).

49. Dr. Orent testified that a carotid duplex is an ultrasound study of the carotid arteries. The test reveals if there is a thickening of the interlining of the artery which is an early sign of vascular disease; if there is development of atherosclerotic plaque (deposition of cholesterol, clot, fat, and inflammatory tissue); is that hemodynamically significant (is there enough obstruction so that she is at risk for stroke should anything interfere further with an already obstructed carotid artery. Dr. Orent testified that in his expert opinion the test is important, simple, inexpensive, and reasonable to do prior to Claimant’s surgery. Further, Dr. Orent testified the carotid duplex is related to the treatment of Claimant’s work-related injuries. (Hr’g Tr. p. 44-45).

50. Based on the Claimant’s medical records, the credible and persuasive testimony of Claimant and Dr. Orent, combined with Dr. Annest’s medical report, the scalene muscle block, pectoralis minor muscle block, carotid bilateral duplex, and the brain MRI are found to be reasonable and necessary to treat Claimant from the effects of her work injury.

Dr. Burke’s request for trigger point injections, greater occipital nerve block, and transforaminal epidural steroid injections at the C7-T1 level.

51. Dr. Cava referred Claimant to Dr. Burke for Claimant’s neurological complaints. (Hr’g Tr. p. 20); (Cl. Ex. 11, p. 227).

52. On June 10, 2021, Dr. Burke evaluated Claimant and diagnosed her with intractable chronic post-traumatic headaches, cervical radiculitis, neuropathic pain, and poor short-term memory.

53. Claimant describes her headaches as sharp and throbbing to the point that some days she has to sit in a dark room to calm down. Claimant rated her headache pain as 4 or 5 out of 10 on a good day and 8 or 9 out of 10 on a bad day. (Hr’g Tr. p. 24). Claimant testified that she has 3 to 4 headaches each week. (Hr’g Tr. p. 23).

54. Claimant also described her neck pain has 4 or 5 out of 10 on a good day and about 8 or 9 out of 10 on a bad day. Claimant testified that she seldom has a week without pain. (Hr’g Tr. p. 21).

55. Dr. Burke concluded that Claimant may benefit from an occipital nerve block and cervical trigger point injections. Further it was noted that Claimant is having some notable cervical radicular symptoms with pain radiating to the fourth and fifth digits on the left-hand. Claimant also has neuropathic/sympathetic type nerve symptoms along the ulnar wrist. Dr. Burke concluded that Claimant would be a reasonable candidate for a cervical epidural injection. (Cl. Ex. 11, pp. 229, 230)

Greater Occipital Nerve Block and Trigger Point Injections

56. Dr. Burke ordered a greater occipital nerve block and trigger point injections in 3+ muscles to treat Claimant’s chronic post-traumatic headaches. In addition, a left C7-T1 transforaminal epidural steroid injection (ESI) was ordered to address Claimant’s cervical radiculitis. (Cl. Ex. 11, p. 229-230); (Hr’g Tr. p. 20).

57. Dr. Orent testified that he reviewed Dr. Burke’s medical record and concluded that the requested treatment is reasonable and necessary. Dr. Orent stated that when a patient has intractable headaches it is challenging to determining whether the headaches are posttraumatic migraines or occipital myalgia from the muscle spasm in the back of the neck. The requested greater occipital nerve block and trigger point injections can be both diagnostic and therapeutic in patients with chronic headaches. (Hr’g Tr. p. 55).

58. Dr. Orent also stated that trigger point injections help the physician determine the pain generator. If the physician believes that the pain is coming from the posterior side of the of the neck, then the trigger point injections would be reasonable. (Hr’g Tr. p. 55-56).

59. Dr. Orent also concluded that the epidural steroid injection is also reasonable and necessary as Claimant is having radicular symptoms. Dr. Burke diagnosed Claimant with radiculitis and therefore a reasonable intervention for radiculitis or radiculopathy is a corticosteroid injection into the epidural space. (Hr’g Tr. 56).

60. The Insurer requested a peer review of the occipital nerve block, trigger point injections, and epidural steroid injection requested by Dr. Burke. Diana Hussain, M.D., a Level 1 Accredited physician conducted the peer review. (Cl. Ex. 2).

61. The peer reviewer denied all the injections recommended by Dr. Burke. (Cl. Ex. 2, 14).

62. The peer-reviewer’s basis for the denial of the trigger point injections in 3+ muscles states:

> The documentation submitted for review did not include information to indicate that the claimant was actively participating in active therapy. In addition, the current request does not include the specific muscles that were to [be] injected. Therefore, the current request does not meet Guideline recommendations. Furthermore, the documentation submitted for review did not include subjective or objective findings to indicate that trigger point injections were medically necessary.

(Cl. Ex. 2, p. 14).

63. The peer-reviewer’s own report references the Colorado Medical Treatment Guidelines stating that trigger point injections are generally accepted treatments to relieve myofascial pain. (Hr’g Tr. p. 57); (Cl. Ex. 2, p. 8).

64. Dr. Orent also pointed out that the peer-review also denies the trigger point injections because the specific muscles that were to be injected were not identified. Dr. Orent considered this an absurd reason for denial. Dr. Orent credibly and persuasively explained that physicians often do not know which muscles will be injected until they start the procedure. The muscles that are to be injected is based on the patient’s

presentation, what is tender, and the patient's reaction to the injection. (Hr'g Tr. p. 58). Dr. Orent's opinion is consistent with Dr. Burke's request for 3+ trigger point injections. The number of injections requested is more than 3. It can be inferred that Dr. Burke is certain that she will need 3 or more trigger point injections, as her request does not provide a specific number of injections. The request leaves open the option for more than three injections, depending on Claimant's presentation, as Dr. Orent testified.

65. In response to the peer-reviewed denial of the trigger point injections because Claimant was not actively seeking therapy, Dr. Orent pointed out that the peer-reviewer is incorrect as Claimant is participating in active therapy through her home exercises. (Hr'g Tr. p. 58).

66. When asked about the occipital nerve block, Dr. Orent testified that this is a common procedure. Dr. Orent points out that the Medical Treatment Guidelines are simply guidelines. If a Claimant has headaches as described in Dr. Burke's medical records and the physician believes the nerve blocks will help Claimant then the peer-reviewer, at minimum, should have a conversation with the physician ordering the treatment to discuss the treatment. (Hr'g Tr. p. 59-60).

67. In this case, the peer-reviewer made only two attempts to contact Dr. Burke. The first attempt was made on June 15, 2021, at 11:33 AM Central time. The second attempt was made, the next day, on June 16, 2021, at 12:18 PM Central time. Neither attempt was successful, and a message was left for Dr. Burke. The peer-reviewer's report was dated June 16, 2021, and faxed the same day at 4:36 PM. The peer-reviewer's report was provided to the Insurer before Dr. Burke had a reasonable opportunity to respond to the peer-reviewer's message. (Cl. Ex. 2, p. 14-15).

68. The ALJ finds that based on Claimant's medical records, Dr. Burke's medical records, Claimant's testimony, and Dr. Orent's opinions – which are found to be highly persuasive - the greater occipital nerve block and trigger point injections are found to be reasonable and necessary to treat Claimant from the effects of her work injury.

C7-T1 TFESI

69. The peer-reviewer also denied certification of the C7-T1 TFESI. The peer-review cited the Colorado Medical Treatment Guidelines stating that:

> [E]pidural steroid injections are not recommended for non-radicular cervical pain. . .. However, the documentation submitted for review did not provide clear rationale as to why the current request is medically necessary. In addition, guidelines do not recommend cervical epidural injections for patients with non-radicular cervical pain. Therefore, the current request does not meet guideline recommendations.

(Cl. Ex. 2, p. 14).

70. As Dr. Orent pointed out, the peer-reviewer is wrong in denying the C7-T1 TFESI, based on non-radicular cervical pain. Dr. Burke diagnosed Claimant with "cervical radiculitis." (Cl. Ex. 11, p. 229). As stated *supra.* "[Claimant] also is having some notable cervical radicular symptoms with pain radiating to the fourth and fifth digit on

the left hand." Dr. Orent questioned the peer-reviewer's unfounded basis for determining that the Claimant does not have a diagnosis of radiculitis, in the face of Dr. Burke's diagnosis of radiculitis, without ever examining Claimant. (Hr'g Tr. p. 60).

71. Dr. Orent found that the C7-T1 TFESI, ordered by Dr. Burke is reasonable, necessary, and related to Claimant's work-related high-speed rollover accident. (Hr'g Tr. p. 60).

72. As a result, the ALJ finds that based on Claimant's testimony and medical records, which includes the medical records of Dr. Burke, combined with the credible and persuasive opinions of Dr. Orent, the C7-T1 TFESI is reasonable and necessary to treat Claimant from the effects of her work injury.

Credibility of Claimant

73. Overall, the ALJ finds Claimant's statements to her medical providers as well as her testimony to be credible because both are consistent with one another. Moreover, her testimony about her symptoms is consistent with the extent of her high-speed motor vehicle accident and the severity of her injuries - which are well documented in her medical records.

Credibility of Dr. Orent

74. The ALJ also finds Dr. Orent's opinions and testimony to be credible and highly persuasive for many reasons. First, his opinions are consistent with Claimant's underlying medical records. Second, his opinions are consistent with Claimant's testimony about her accident, her symptoms, and her understanding of the basis for the treatment that has been prescribed. Third, his reasoning seems logically supported by the fact that Claimant was involved in a high-speed motor vehicle accident which is also documented in Claimant's underlying medical records.

Lack of Persuasiveness of Peer Review Reports

75. The ALJ does not find the opinions of the peer-reviewers to be credible or persuasive for many reasons. First, it appears to this ALJ that each peer-reviewer focused primarily on trying to deny each prescribed treatment based on an application of the Colorado Medical Treatment Guidelines in a vacuum – and without considering – in a sufficient and persuasive manner - the Claimant's unique circumstances and the extent of her injuries. Second, missing from each report is a credible and persuasive application of their own medical judgement in determining whether the treatment is reasonable and necessary based on Claimant's injuries and unique circumstances. For example, rather than set forth their entire clinical rationale for denying all of the treatment, each provider reserved providing such by stating: "The clinical rationale used in making this non-certification determination is available upon written request." On the other hand, Dr. Orent used and set forth his clinical rationale for the treatment at issue. Third, at the end of each report they acknowledge that the ultimate responsibility for treating Claimant remains with the treating provider, by stating: "The treating medical provider(s) remain responsible for the medical care and treatment of the injured worker." In other words, they contend that the treatment is not reasonable and necessary, but yet take no responsibility for the consequences of their decisions and the impact it might have on the Claimant's medical condition. Fourth, none of the peer-reviewers examined Claimant in person.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office,* 53 P.3d 1192 (Colo. App. 2002).

When determining whether proposed medical treatment is reasonable and necessary the ALJ may consider the provisions and treatment protocols of the Medical Treatment Guidelines because they represent the accepted standards of practice in workers' compensation cases and were adopted pursuant to an express grant of statutory authority. However, evidence of compliance or non-compliance with the treatment criteria of the Medical Treatment Guidelines is not dispositive of the question of whether medical treatment is reasonable and necessary. Rather the ALJ may give evidence regarding compliance with the Guidelines such weight as he determines it is entitled to considering the totality of the evidence. *See Adame v. SSC Berthoud Operating Co., LLC.*, WC 4-784-709 (ICAO January 25, 2012); *Thomas v. Four Corners Health Care*, WC 4-484-220 (ICAO April 27, 2009); *Stamey v. C2 Utility Contractors, Inc.*, WC 4-503-974 (ICAO August 21, 2008).[1]

I. Whether the occupational therapy (OT) ordered by Dr. Pulikkottil is reasonable, necessary, and related to Claimant's work-related injury.

Due to her severe left upper extremity injury, Claimant has undergone several surgeries and has also undergone a significant amount of occupational therapy. The occupational therapy has, however, provided Claimant functional gains in the form of increased range of motion and strength in her left hand.

Due to her left upper extremity injury, Claimant uses about eleven different arm and hand splints. Each splint has a different purpose in helping Claimant increase the function of her severely injured left upper extremity.

At her occupational therapy appointments, the therapist applies heat to loosen her joints, manipulates the joints in both hands, measures her range of motion, and adjust Claimant's arm splints. However, because of her injuries, Claimant cannot manipulate the joints in her hands or adjust the splints independently without the aid of the occupational therapist.

On June 30, 2021, Claimant was reevaluated by Dr. Pulikkottil. At this appointment, Claimant presented for a post-operative follow up appointment for her October, November, and December 2020 procedures. It was noted that Claimant stated that she has continued using the stat-a-dyne splint and is seeing a hand therapist and that Claimant noticed significant improvement. After examining Claimant, Dr. Pulikkottil concluded:

> I discussed the situation with the patient. At this time upon evaluation and examination of the patient's condition, the patient demonstrates significant improvement with OT for hand therapy as well as utilization of stat-a-dyne and will continue to make improvement at this rate. I strongly recommend the patient continue formal hand therapy and use of stat-a-dyne.

[1] Based on the severity of Claimant's injuries, the uniqueness of her case, and the totality of the evidence, the ALJ does not find the Colorado Medical Treatment Guidelines to be persuasive as to whether the treatment at issue is reasonable and necessary in this particular case.

On July 15, 2021, and based on Dr. Pulikkottil's recommendations for formal hand therapy, Amy Nguyen, P.A., under the supervision of Dr. Pulikkottil, requested 12 occupational therapy visits over a six-week period.

In response to the request for 12 additional occupational therapy visits, the Insurer requested a peer review to determine medical necessity and certification. The peer reviewer, Mahdy Flores, D.O., Level 1 Accredited, stated that:

> Although, claimant has undergone multiple rounds of OT, this is a claimant who has undergone extensive surgery and has had objective improvement with past OT and recently underwent laser treatment for scar management, so continued OT is warranted, but the request is excessive. Modify to OT 1 x 6 left hand only.

Peer-reviewer Flores specifically listed 14 procedures that were performed on Claimant's left upper extremity, which included a surgery in December 2020 and a scar revision procedure in July 2021. Dr. Flores did not, however, set forth in sufficient detail, or persuasively, the basis of her opinion that only 6 more visits were reasonable and necessary – but yet 6 were not.

Dr. Sander Orent, who was qualified as an expert in internal medicine and is Level II Accredited, reviewed the matter. After reviewing Dr. Flores' modified approval of the occupational therapy visits, Dr. Orent could not determine the basis for the peer reviewer's modified approval. Dr. Orent testified, "There is no rationale here other than the fact that doctors say that the continued OT is warranted, but the request is excessive." The peer review does not provide a reason as to why he thinks 6 additional OT visits are excessive. Moreover, Dr. Flores never spoke with the physician or P.A. that ordered the OT to discuss the basis for the additional OT.

As testified to by Dr. Orent, Claimant recently had surgery to her hand as well as fractional CO2 laser treatment. In addition, Dr. Orent stated that the ordering physician strongly recommended that Claimant continue in therapy. Dr. Orent concluded that after taking one look at Claimant's arm, the occupational therapy requested is more than reasonable. In addition, Dr. Orent also found the OT requested was reasonably necessary and related to treat Claimant from the effects of her work-related high-speed rollover accident. In the end, Dr. Orent concluded that the peer reviewer's failure to provide full approval was absurd.

Claimant has made significant functional gains with the OT increasing her grip from 2 pounds to 10 pounds. Claimant would like to have the requested OT so that she is able to continue to make functional gains and get her arm back, i.e., increase her function. Based on the evidence presented, it is reasonable to expect that additional OT will provide Claimant the opportunity to continue to improve her functioning.

The ALJ finds and concludes that based on the totality of the evidence, Claimant has established by a preponderance of the evidence that the 12 visits of OT prescribed is reasonably necessary to treat Claimant from the effects of her work injury.

II. Whether the scalene muscle block, pectoralis minor muscle block, carotid bilateral duplex, and brain MRI without

contrast ordered by Dr. Annest are reasonable, necessary, and related to Claimant's work-related injury.

Claimant underwent an MRI on February 16, 2021. The MRI showed an abnormal left brachial plexus at the junction of the first rib. Based on the abnormal findings, Claimant was referred to Dr. Annest to evaluate and treat Claimant's brachial plexus injury.

Claimant's brachial plexus injury produces stabbing pain of 5 out of 10 on a good day and 10 out of 10 on a bad day. Unfortunately, Claimant has more bad days than good.

Dr. Annest determined that Claimant required surgery of the brachial plexus. However, because Claimant hit her head and suffered a TBI and because of the possibility that she was having 'mini strokes,' Dr. Annest requested a carotid bilateral duplex ultrasound, and a brain MRI without contrast, as a precautionary measure. As credibly and persuasively testified to by Dr. Orent, there was a concern that Claimant may suffer a stroke during surgery.

But before Claimant could undergo brachial plexus surgery, Dr. Annest ordered a scalene muscle block and pectoralis minor muscle block to help Claimant with the pain until the carotid bilateral duplex and brain MRI were completed and surgery could commence.

Dr. Orent credibly and persuasively concluded that the scalene muscle block and pectoralis minor muscle block were reasonable and necessary to treat Claimant's pain from her brachial plexus injury.

Dr. Orent also credibly and persuasively explained that the carotid bilateral duplex ultrasound and brain MRI were also reasonable and necessary – before proceeding with surgery – to determine whether Claimant has had any strokes and whether she has atherosclerotic plaque in her carotid arteries that could result in complications during surgery such as a stroke.

The ALJ has considered the peer review report of Dr. Ayyar. The ALJ does not, however, find Dr. Ayyar's conclusions to be persuasive for many reasons. First, it is not clear which medical records Dr. Ayyar reviewed and which records he did not review. Second, Dr. Ayyar did not discuss the matter with Dr. Annest. Third, while Dr. Ayyar is critical of Dr. Annest's report that recommends such treatment, it does not appear that Dr. Ayyar used his own clinical judgement – in a persuasive manner - to evaluate whether the tests were reasonable and necessary under the unique circumstances of this case – as did Dr. Orent. In this case, Dr. Orent provided clear and cogent reasons for why such tests are warranted in this case. Dr. Ayyar, on the other hand, did not. Dr. Ayyar merely resorted to the Medical Treatment Guidelines and did not seem to take into consideration the specifics of this case and the extent of Claimant's injuries and global nature of her symptoms.

Based on the totality of the evidence, the ALJ finds and concludes that Claimant has established by a preponderance of the evidence that the scalene and pectoralis muscle blocks, carotid bilateral duplex ultrasound, and brain MRI are reasonable and necessary to treat Claimant from the effects of her work injury.

III. Whether the trigger point injections, greater occipital nerve block, and transforaminal epidural steroid injections at C7-T1 ordered by Dr. Burke are reasonable, necessary, and related to Claimant's work-related injury.

Dr. Burke evaluated Claimant and diagnosed her with intractable chronic post-traumatic headaches, cervical radiculitis, neuropathic pain, and poor short-term memory.

Claimant described her headaches as sharp and throbbing to the point that some days she has to sit in a dark room to calm down. Claimant rated her headache pain as 4 or 5 out of 10 on a good day and 8 or 9 out of 10 on a bad day. Claimant has 3 to 4 headaches each week.

Claimant also described her neck pain as 4 or 5 out of 10 on a good day and about 8 or 9 out of 10 on a bad day. Claimant seldom has a week without pain.

Dr. Burke concluded that Claimant may benefit from an occipital nerve block and cervical trigger point injections. Further it was noted that Claimant is having some notable cervical radicular symptoms with pain radiating to the fourth and fifth digits on the left-hand. Claimant also has neuropathic/sympathetic type nerve symptoms along the ulnar wrist. Dr. Burke concluded that Claimant would be a reasonable candidate for a cervical epidural injection.

Greater Occipital Nerve Block, Trigger Point Injections, and C7-T1 TFESI

Dr. Burke ordered a greater occipital nerve block and trigger point injections in 3+ muscles to treat Claimant's chronic post-traumatic headaches. In addition, a left C7-T1 transforaminal epidural steroid injection (ESI) was ordered to address Claimant's cervical radiculitis.

Dr. Orent credibly and persuasively testified that he reviewed Dr. Burke's medical record and concluded that the requested treatment is reasonable and necessary. Dr. Orent stated that when a patient has intractable headaches it is challenging to determine whether the headaches are posttraumatic migraines or occipital myalgia from the muscle spasm in the back of the neck. The requested greater occipital nerve block and trigger point injections can be both diagnostic and therapeutic in patients with chronic headaches.

Dr. Orent also stated that trigger point injections help the physician determine the pain generator. If the physician believes that the pain is coming from the posterior side of the of the neck, then the trigger point injections would be reasonable.

Dr. Orent also concluded that the epidural steroid injection is also reasonable as Claimant is having radicular symptoms. Dr. Burke diagnosed Claimant with radiculitis and therefore a reasonable intervention for radiculitis or radiculopathy is a corticosteroid injection into the epidural space.

The Insurer requested a peer review of the occipital nerve block, trigger point injections, and epidural steroid injection requested by Dr. Burke.

Diana Hussain, M.D., a Level 1 Accredited physician conducted the peer review. Dr. Hussain denied all the injections recommended by Dr. Burke. Dr. Hussain's basis for the denial of the trigger point injections in 3+ muscles states:

> The documentation submitted for review did not include information to indicate that the claimant was actively participating in active therapy. In addition, the current request does not include the specific muscles that were to [be] injected. Therefore, the current request does not meet Guideline recommendations. Furthermore, the documentation submitted for review did not include subjective or objective findings to indicate that trigger point injections were medically necessary.

The peer-reviewer's own report references the Colorado Medical Treatment Guidelines stating that trigger point injections are generally accepted treatments to relieve myofascial pain.

Dr. Orent also pointed out that the peer-review also denies the trigger point injections because the specific muscles that were to be injected were not identified. Dr. Orent considered this an absurd reason for denial. Dr. Orent explained that physicians often do not know which muscles will be injected until they start the procedure. The muscle to be injected is based on the patient's presentation, what is tender, and the patient's reaction to the injection. Dr. Orent's opinion is consistent with Dr. Burke's request for 3+ trigger point injections. The number of injections requested is more than 3. It can be inferred that Dr. Burke knows that she will need more than three trigger point injections, as her request does not provide a specific number of injections. The request leaves open the option for more than three injections, depending on Claimant's presentation, as Dr. Orent testified.

In response to peer-reviewed denial of the trigger point injections because the patient was not actively seeking therapy, Dr. Orent pointed out that the peer-reviewer is incorrect as Claimant is participating in active therapy through her home exercises.

When asked about the occipital nerve block, Dr. Orent testified that this is a common procedure. Dr. Orent pointed out that the Medical Treatment Guidelines are simply guidelines. If a Claimant has headaches as described in Dr. Burke's medical records and the physician believes the nerve blocks will help Claimant then the peer-reviewer, at minimum, should talk to the physician ordering the treatment to discuss the treatment.

The peer-reviewer also denied certification of the C7-T1 TFESI. The peer-review cited the Colorado Medical Treatment Guidelines stating that:

> [E]pidural steroid injections are not recommended for non-radicular cervical pain. . .. However, the documentation submitted for review did not provide clear rationale as to why the current request is medically necessary. In addition, guidelines do not recommend cervical epidural injections for patients with non-radicular cervical

> pain. Therefore, the current request does not meet guideline recommendations.

As Dr. Orent pointed out, the peer-review is wrong in denying the C7-T1 TFESI, based on non-radicular cervical pain. Dr. Burke diagnosed Claimant with “cervical radiculitis.” Further, it was noted that “[Claimant] also is having some notable cervical radicular symptoms with pain radiating to the fourth and fifth digit on the left hand.” Dr. Orent questioned the peer-reviewer’s unfounded basis for determining that the Claimant does not have a diagnosis of radiculitis, in the face of Dr. Burke’s diagnosis of radiculitis, without ever examining Claimant.

Dr. Orent found that the C7-T1 TFESI, order by Dr. Burke is reasonable, necessary, and related to Claimant’s work-related high-speed rollover accident.

Based on the totality of the evidence, which includes the credible and persuasive opinions of Dr. Orent, the ALJ finds and concludes that Claimant has established by a preponderance of the evidence that the greater occipital nerve block and trigger point injections are reasonable and necessary to treat Claimant from the effects of her work injury. The ALJ also finds and concludes that Claimant has established by a preponderance of the evidence that the C7-T1 TFESI is reasonable and necessary to treat Claimant from the effects of her work injury.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Respondents shall pay for the twelve occupational therapy visits, of which only 6 are in dispute.

2. Respondents shall pay for the scalene muscle block, pectoral minor muscle block, carotid bilateral duplex, and brain MRI without contrast prescribed by Dr. Annest.

3. Respondents shall pay for the trigger point injections, greater occipital nerve block, and transforaminal epidural steroid injections C7-T1 prescribed by Dr. Burke.

4. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference,

see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 24, 2021.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant prove by a preponderance of the evidence that her left shoulder injury caused functional impairment not listed on the schedule?

- If Claimant proved whole person impairment, did Respondents overcome the DIME's 15% whole person rating by clear and convincing evidence?

- Did Claimant prove by a preponderance of the evidence that ongoing use of Nucynta prescribed by and through Dr. Kenneth Finn is reasonably needed to relieve the effects of her work injury and prevent deterioration of her condition?

FINDINGS OF FACT

1. Claimant was a production worker in Employer's packaging department. Employer provided on-site massages for its employees as a benefit of employment. Claimant suffered admitted injuries on December 13, 2017 while receiving a massage at work. She was lying face down on a massage table when the table collapsed, causing her to fall to the ground. She landed primarily on her left shoulder.

2. Claimant was seen at the UC Health emergency department after the accident complaining of neck pain, left shoulder pain, and left elbow pain. She was diagnosed with a left shoulder "sprain" and multiple contusions.

3. Employer referred Claimant to Dr. Cynthia Schafer, who has been the primary ATP throughout the claim. At her initial appointment, Claimant stated the elbow and neck pain were resolving, but the left shoulder remained severely painful. Dr. Schafer prescribed Percocet, Flexeril, and NSAIDs.

4. Claimant saw Dr. James Duffey, an orthopedic surgeon, on January 26, 2018. Examination showed marked limitations with range of motion and questionable instability. Dr. Duffey suspected Claimant dislocated her shoulder and may have torn her labrum. He recommended an MR arthrogram and referred Claimant to physical therapy "to start mobilizing the shoulder to gain whatever flexibility and strength she can" and hopefully "avoid developing a frozen shoulder."

5. On February 2, 2018, Claimant told Dr. Schafer she had been experiencing dizziness with head movement since the accident.

6. The MR arthrogram was completed on February 12, 2018. It was interpreted as showing a possible labral tear.

7. Claimant followed up with Dr. Duffey on March 2, 2018. He reviewed the arthrogram images and saw a superior labral tear and a biceps tendon tear. Claimant's

left shoulder remained severely painful with marked range of motion deficits. She was not making progress with PT, and Dr. Duffey recommended surgery.

8. On March 22, 2018, Dr. Duffey performed an arthroscopic biceps tenodesis, tendon and labral debridement, and a subacromial decompression.

9. Claimant followed up with Dr. Schafer on April 3, 2018. She explained that a few days ago, she felt lightheaded and reached out to catch herself with her left arm. This caused immediate severe pain in the left shoulder. She went to the emergency room and was prescribed fentanyl and Dilaudid to try to bring the pain under control.

10. Claimant returned to Dr. Schafer on April 12, 2018. She was taking Percocet every 4-5 hours in addition to the "max dose" of ibuprofen. Dr. Schafer noted that Claimant disliked the nausea and dizziness she has on Percocet but could not tolerate the pain without it. Claimant stated she would really like to get off the narcotics if possible because she knew about the risk of addiction.

11. Claimant had a repeat left shoulder MRI on May 25, 2018. It showed AC joint DJD and subacromial/subdeltoid bursitis. The proximal head of the biceps tendon could not be visualized, and the radiologist opined it might be torn and mildly protracted.

12. Dr. Duffey reevaluated Claimant and reviewed the MRI on May 29, 2018. He did not recommend additional surgery even if the tenodesis was not intact. Claimant was trying to wean off Percocet, but was finding it difficult because of the severe ongoing pain. Dr. Duffey agreed Claimant should try to wean off the Percocet, but noted she might need some help with chronic pain management. He gave Claimant a subacromial injection, which was not helpful.

13. On May 31, 2018, Dr. Schafer documented Claimant was taking only one quarter tablets of the Percocet plus the maximum dose of ibuprofen. Claimant explained she had previously used Norco for several years because of an unrelated condition, but had weaned off it on her own approximately 10 years ago. As a result, "she is not concerned about getting off narc[otics], but is unable to tolerate any motion of the shoulder without them." Claimant was tearful and worried about "being left with the shoulder that does not function well." Claimant agreed to a second opinion after Dr. Schafer "convinced her it would not hurt Dr. Duffey's feelings, whom she respects." Dr. Schafer referred Claimant to Dr. Christopher Jones. She also started Claimant on gabapentin.

14. Claimant saw Dr. Jones on July 12, 2018. She described ongoing pain and severe limitation in use of her left arm. Dr. Jones noted marked restriction in the left shoulder range of motion. He diagnosed postoperative adhesive capsulitis. He injected the shoulder and advised Claimant to perform gentle stretching for the next few weeks.

15. Claimant had an initial pain management consultation with Dr. Kenneth Finn on August 1, 2018. She described diffuse left shoulder pain with some radiation toward the neck and down the left biceps to the elbow. Dr. Finn diagnosed chronic pain syndrome and uncomplicated opioid dependence. In his deposition, Dr. Finn explained he used the term "uncomplicated" because Claimant had been on Percocet for a long time and was

probably dependent on it, but was not misusing or abusing the medication. He opined Claimant probably had adhesive capsulitis and recommended she consider manipulation under anesthesia (MUA). He recommended she stop the Percocet “because it does not appear to be very helpful.” He started a trial of Nucynta ER 100 mg every 12 hours and Nucynta IR 50 mg 2-3 times per day for breakthrough pain.[1] Dr. Finn reviewed the PDMP, which raised no concerns, and had Claimant sign an opioid contract. He also increased the gabapentin dosage.

16. Dr. Jones’ August 24, 2018 note documents the first injection provided no pain relief. However, Dr. Jones noted a slight improvement in range of motion, so he wanted to try another injection and wait a bit longer before considering MUA.

17. Claimant saw Dr. Finn’s nurse practitioner, Sonja Griffith, on September 4, 2018. She said increasing the gabapentin had been helpful and the Nucynta was “quite effective for pain. She notices her pain average has reduced from 8/10 to 5/10 and this is considered a tolerable level for her.” Ms. Griffith stated, “[the] medication is working well and is tolerated, no changes will be made.”

18. A pain diagram dated September 6, 2018 shows Claimant was experiencing pain in the shoulder radiating up the trapezial ridge to the neck and down the arm. She also noted pain in the left upper back around the scapula, and in the left chest around the pectoral muscles.

19. Claimant returned to Dr. Jones on September 24, 2018. She explained the second injection did not help and she was still having severe pain. Dr. Jones recommended an arthroscopic MUA and debridement of scar tissue.

20. Dr. Jones performed the surgery on November 28, 2018. He observed “obvious significant scarring adhesions” throughout the shoulder. He performed extensive debridement and release of adhesions.

21. On December 13, 2018, Dr. Jones documented “she had an episode in PT were her shoulder popped and she has had a lot of pain. Before then she felt like it was doing quite well. Now her pain level is really high again.” Dr. Jones noted definite improvement in range of motion, and encouraged Claimant to continue with PT. Claimant asked if she could return to Dr. Finn for pain management, and Dr. Jones agreed this was a good idea because he was not comfortable prescribing large doses of pain medication.

22. Claimant saw Ms. Griffith on December 18, 2018. She reported the PT was painful but her ROM was slowly improving. Claimant explained Dr. Jones had given her Percocet after surgery, which caused vomiting. She wanted to go back on Nucynta. Ms. Griffith reinitiated Nucynta after reviewing the PDMP. She notified Dr. Jones office that “we are taking over medications again.”

[1] Nucynta ER is the “extended release” version, and Nucynta IR means “immediate release.”

23. PT notes from December and January show treatment was directed to areas around the shoulder including the scapula, left upper trapezius, left scalenes, and pectoral minor.

24. Claimant saw Dr. Jones' PA-C, Sara Beauchamp, on January 14, 2019. She stated, "She is back in pain management and feels that Nucynta is working better than Percocet did. Her pain is 6-7 out of 10. She feels she is some better but still has pain."

25. Claimant followed up with Dr. Jones on February 4, 2019. He noted her pain continued to escalate and she was "losing ground" with range of motion.

26. Dr. Jones performed a second MUA on February 12, 2019. He confirmed intraoperatively that mobility of the shoulder was severely limited but was able to mobilize the shoulder and release some of the scar tissue.

27. Claimant followed up with Ms. Beauchamp on March 4, 2019. She reported ongoing left shoulder pain and neck pain. Ms. Beauchamp spoke with Dr. Jones, who recommended evaluation of Claimant's neck.

28. Dr. Schafer's March 5, 2019 report shows passive ROM was better but the left shoulder pain was worse or the same. She documented Claimant's pain went up into the lateral posterior neck on the left side. Dr. Schafer referred Claimant to Dr. Brian Polvi, a chiropractor.

29. Claimant started treatment with Dr. Polvi on March 28, 2019. According to the pain diagram, Claimant had issues in the left paracervical, superior trapezius, left shoulder, and throughout the left upper extremity region. Dr. Polvi's note also reflects increased pain with dressing, bathing, household cleaning, sweeping/mopping, vacuuming, meal preparation/cooking, lifting above shoulder, lifting from floor, reaching, pulling and sleeping. Physical examination showed decreased ROM in the left shoulder and tenderness with associated hypertonicity and trigger point formations throughout the left shoulder region including the thoracic and cervical spines. Dr. Polvi performed acupuncture directed to the left scapula, neck, and left shoulder.

30. Claimant treated with Dr. Polvi on multiple occasions through April 15, 2019. He repeatedly documented tenderness with trigger points in the thoracic and cervical muscles, left shoulder, and left scapula.

31. A pain diagram dated April 16, 2019 shows pain in the entire left shoulder region to include the trapezius radiating up toward the neck and down the arm. It also shows pain in the front of the shoulder including the clavicle, pectoral muscles, and axilla. This pain diagram is corroborated by Dr. Schafer's physical examination, which found tenderness in the left shoulder, left trapezius, axilla, and cervical spine.

32. Claimant was evaluated by Nathan Carpenter, an orthopedic PA-C, on April 17, 2019. Claimant described pain from the base of her neck, across her shoulder, under her scapula, and to her left shoulder. She rated the pain in her neck as mild and her left

shoulder as “severe to worst ever.” Cervical spine examination showed decreased ROM and tenderness across the trapezius.

33. Dr. Schafer’s examination on June 11, 2019 showed tenderness in the left shoulder joint line, trapezius and posterior axilla.

34. On June 18, 2019, Ms. Griffith noted that Claimant “is having fairly good results with Nucynta IR and ER” and refilled her medications.

35. Claimant had a cervical MRI on July 8, 2019. It showed straightening of the cervical lordosis but no other abnormalities. Based on the MRI findings, Mr. Carpenter opined Claimant’s symptoms are not coming from her neck and recommended she continue treatment for the shoulder.

36. A repeat shoulder MRI on September 13, 2019 showed multiple abnormalities, including one or more tears. Dr. Jones opined the findings were consistent with a frozen shoulder. He did not think additional surgery would be helpful.

37. Dr. Schafer put Claimant at MMI on October 15, 2019. She assigned a 27% upper extremity rating, which converts to 16% whole person. The rating was comprised of 17% for ROM deficits and 12% under Table 17 for moderate crepitus. Dr. Schafer opined the ROM rating alone “does not adequately reflect the level of dysfunction related to this injury.” She also assigned a 5% psychological rating based on limitations relating to social functioning and maintaining attention and concentration. She recommended maintenance care with Dr. Finn, “including any support required to wean medications.”

38. Claimant saw Ms. Griffith on December 9, 2019, who documented “further surgery for LUE is not advisable and symptoms will continue.” Ms. Griffith noted Claimant’s best pain level was 8/10, so she recommended increasing the Nucynta ER dose to “hopefully provide better consistency with pain control.”

39. Claimant followed up with Ms. Griffith on June 11, 2020. Claimant continued to have “decent” pain control with Nucynta and gabapentin. She noted Claimant had failed nortriptyline and amitriptyline in the past and did not respond to Lyrica. She stated “so far, Nucynta has offered most effect. Trade other opiate medications for pain but this did not address neuropathic pain well.” Ms. Griffith concluded “Nucynta is the best choice for neuropathic pain and is reasonable for her to remain with this medication. Will alter her gabapentin dose upward to see if this will help further control pain.”

40. According to a “Pain Self Evaluation” form dated July 20, 2020, Claimant has had headaches, neck pain, and left arm pain since her injury. The diagram reflects pain in the left shoulder, left trapezius, left side of cervical spine, radiating down the left arm. When asked what aspect of her pain Claimant feels is most bothersome, Claimant wrote “[s]ome days my shoulder pain is worse and sometime the neck is really bad.” Claimant also wrote that she gets headaches and stiff neck with the shoulder pain.

41. Dr. L. Barton Goldman performed an IME for Respondents on August 31, 2020. Dr. Goldman agreed Claimant was at MMI but disagreed with Dr. Schafer’s rating.

He calculated a 15% rating based on ROM deficits, which converts to 9% whole person. He did not appreciate any crepitus, and opined the crepitus rating provided by Dr. Schafer was "[not] a consistent finding on multiple examinations." Dr. Goldman also assigned a 2% psychological rating.

42. Dr. Goldman opined ongoing use of narcotics is not reasonable because it is not improving Claimant's function or decreasing her numerical pain score in a clinically meaningful fashion. Dr. Goldman noted the medication "only" decreased Claimant's typical pain from 8/10 to 7/10 but she still maintained a very restricted lifestyle and reported lying down during the day to manage her symptoms. Dr. Goldman cited the Chronic Pain MTGs which state that long-term ascription of opioids is generally only appropriate in "very selective cases" and must be "clearly linked to improvement of function, not just pain control." He opined Claimant's current medication regimen meets neither criteria. He concluded Claimant should be weaned off Nucynta, and opined she should consider different medications such as Suboxone, or Trazadone in conjunction with pool therapy, basic strength training, optimal treatment of her sleep issues, and/or pool therapy.

43. Insurer filed a Final Admission of Liability (FAL) dated November 20, 2020, admitting for the 5% psychological impairment and the 27% scheduled upper extremity ratings provided by Dr. Schafer.

44. Claimant attended a DIME with Dr. William Watson on February 16, 2021. Dr. Watson's significant exam findings included pain in neck and left trapezius when turning her head to the left, markedly positive impingement signs, tenderness over the acromioclavicular joint, and mild atrophy of the supraspinatus, infraspinatus, and deltoid muscles. He noted that Claimant "hikes" her scapula with the trapezius muscle when she tries to abduct her shoulder. Dr. Watson provided an impairment rating very similar to Dr. Schafer's rating. He calculated 17% for shoulder ROM deficits. He found no crepitus on examination, so did not provide a rating for crepitus. Dr. Watson agreed with Dr. Schafer "that the [ROM] rating does not give credence to the severity of her injury and current problems." Therefore, he added 10% for the "two surgical interventions in the subacromial space." Dr. Watson cited the Division's Impairment Rating "Tips," which allow discretion to provide up to 10% for a subacromial decompression when the examiner concludes "loss of range of motion alone [does] not adequately represent the extent of the impairment." The combined rating was 25% upper extremity, which converts to 15% whole person. He also adopted the 5% psychological rating assigned by Dr. Schafer. Dr. Watson agreed with Dr. Goldman that Claimant should be weaned off Nucynta because "even with the medication she is having severe pain and discomfort. This would be the rationale for her continuing to see Dr. Kenneth Finn on a regular basis and perhaps he could initiate this over the next two to three years."

45. Dr. Finn testified via deposition on July 8, 2021. He explained Nucynta is an atypical opioid and is safer with less potential for abuse than medications such as oxycodone (Percocet). He testified there is no indication Claimant has misused or abused her medication. He conceded Claimant is on a high dose of Nucynta, but believes it is justified given her severe pain and poor response to other medications. Dr. Finn does not

like his patients to be on long term opioids but if they allow a patient to "function with little to no side effects and are reasonably controlling their pain it would not be unreasonable for the patient to continue." Dr. Finn opined other treatment modalities such as PT, biofeedback, or acupuncture would only provide short term relief and would be a waste of time, energy, and money. Dr. Finn testified that weaning Claimant off all narcotics "would be a godsend if we could do that . . . But given her history, I think she would probably do poorly with a medication taper." He testified there is no medication that will reduce Claimant's pain level to zero, and his overall goal is to bring it down to a level that is tolerable for her. He acknowledged that Claimant reports high levels of pain and restricted activities even with Nucynta but opined that "if we tapered her, her pain levels would go up and her poor functioning would be even more poor." Dr. Finn opined there was probably not any significant long-term health risk from Nucynta. Dr. Finn indicated he would discuss other medication options with Claimant at her next appointment.

46. Claimant saw Dr. Finn on August 5, 2021. He noted she had previously tried multiple pain medications including oxycodone, hydrocodone, and Tylenol 3 without relief. She found Nucynta to be the most helpful medication but unfortunately experiences some associated sedation. Dr. Finn recommended changing her medication to Belbuca (buprenorphine) "to see if this can afford better pain relief without the sedation."

47. Claimant called Dr. Finn on August 24, 2021 to discuss her response to the Belbuca. Claimant explained, "I am on day 8 with it and I'm not having really any pain relief. My pain is staying up around 9-10. It makes me even more sleepy than my Nucynta and I'm nauseous all day with dry heaves." Based on Claimant's poor response, Dr. Finn discontinued Belbuca and restarted Nucynta.

48. Dr. Watson testified via deposition on September 30, 2021. Dr. Watson opined Claimant's shoulder injury affects multiple structures proximal to her arm, such as the trapezius, scapula, infraspinatus, supraspinatus, pectoral muscles, serratus, and neck. He confirmed he had observed scapular dyskinesia with shoulder movement and atrophy of the supraspinatus and infraspinatus muscles from "not moving her shoulder." He testified scapular and trapezial pain are "pretty typical" and "fairly common" with shoulder injuries. He opined Claimant's reported pain levels and significant ROM deficits were consistent with the "severe, severe scar tissue formation" and "extensive" debridement documented by Dr. Jones. Dr. Watson explained that he "normally" does not give an extra rating for subacromial decompression surgery, but thought it justified in this case considering Claimant's well-documented severe pathology and significant functional impairment following multiple surgeries.

49. Dr. Goldman testified at hearing consistent with his report. Dr. Goldman discussed the difference between pain and suffering, and opined it is improper to treat suffering with opioid medications. He discussed the evolution of his philosophy for treating chronic pain over the years away from reliance on opioids. Dr. Goldman advocates a "more functional approach" to chronic pain management, focused on cognitive behavioral therapy, reprogramming, antidepressant medications, sleep hygiene, activity desensitization, and mindfulness. Dr. Goldman cited the Chronic Pain Medical Treatment Guidelines, which stated that long-term prescription of opioids is generally only

reasonable in "very selective cases" and must be "clearly linked to improvement of function, not just pain control." Dr. Goldman noted Claimant lives a very restricted lifestyle and believes the Nucynta provides insufficient functional benefit to justify its ongoing use. He recommended weaning Claimant from Nucynta (probably with the assistance of Suboxone), and transitioning to "different approaches with less risk that are more effective to deal with the suffering" from her chronic pain.

50. Dr. Goldman testified shoulder surgery tends to be "one of the most difficult surgeries to rehabilitate" because of the complexity of the shoulder joint. He agreed that Claimant's injury affects the whole shoulder girdle to include the serratus, trapezius, pectoralis minor, supraspinatus, infraspinatus and deltoid. Furthermore, Dr. Goldman explained that pain and stiffness in the trapezius can impact movement of the cervical spine. However, he opined the ultimate functional impairment was limited to use of Claimant's left arm, and therefore the extremity rating should not be "converted" to whole person.

51. Dr. Goldman opined Dr. Watson erred by including the additional 10% based on Claimant's surgeries. He testified Claimant had a run-of-the-mill subacromial decompression that does not justify an extra rating beyond range of motion. He conceded the Rating Tips do not establish specific criteria for the additional 10%, and each physician must use their best clinical judgment when deciding whether to give the extra rating.

52. Dr. Watson's opinions regarding permanent impairment are credible and more persuasive than the contrary opinions offered by Dr. Goldman.

53. Dr. Finn's opinions regarding the ongoing prescriptions for Nucynta are credible and more persuasive than the contrary opinions offered by Dr. Goldman.

54. Claimant credibly testified she continues to experience pain and stiffness in her left shoulder, neck, trapezius, and left scapular area. Claimant further testified that temperature changes increases symptoms in her neck and left shoulder to include her trapezial ridge. Claimant also testified that the pain in her neck, trapezius, and left shoulder is exacerbated by activities such as doing the laundry, washing her hair, bathing, cooking, vacuuming, and donning certain items of clothing. Claimant has sleep issues, in part, due to her shoulder pain.

55. Claimant proved by a preponderance of the evidence her shoulder injury caused functional impairment not listed on the schedule.

56. Respondents failed to overcome Dr. Watson's 15% whole person shoulder rating by clear and convincing evidence.

57. Claimant proved the ongoing prescriptions for Nucynta are reasonably needed to relieve the effects of her injury and prevent deterioration of her condition.

CONCLUSIONS OF LAW

A. Whole person impairment

When evaluating whether a claimant has a scheduled or whole person impairment, the ALJ must determine “the situs of the functional impairment.” This refers to the “part or parts of the body which have been impaired or disabled as a result of the industrial accident,” and is not necessarily the site of the injury itself. *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366, 368 (Colo. App. 1996). The schedule of disabilities refers to the loss of “an arm at the shoulder.” Section 8-42-107(2)(a). If the claimant has a functional impairment to part(s) of his body other than the “arm,” they have suffered a whole person impairment and must be compensated under § 8-42-107(8).

There is no requirement that functional impairment take any particular form, and “pain and discomfort which interferes with the claimant’s ability to use a portion of the body may be considered ‘impairment’ for purposes of assigning a whole person impairment rating.” *Martinez v. Albertson’s LLC*, W.C. No. 4-692-947 (June 30, 2008). Referred pain from the primary situs of the initial injury may establish proof of functional impairment to the whole person. *E.g., Latshaw v. Baker Hughes, Inc*., W.C. No. 4-842-705 (December 17, 2013); *Mader v. Popejoy Construction Co., Inc*., W.C. No. 4-198-489 (August 9, 1996). Although the opinions of physicians can be considered when determining this issue, the ALJ can also consider lay evidence such as the claimant’s testimony regarding pain and reduced function. *Olson v. Foley’s*, W.C. No. 4-326-898 (September 12, 2000).

Pain and limitation in the trapezius or scapular area can functionally impair an individual beyond the arm. *E.g. Steinhauser v. Azco, Inc.*, W.C. No. 4-808-991 (January 11, 2012) (pain and muscle spasm in scapular and trapezial musculature warranted whole person impairment); *Franks v. Gordon Sign Co.*, W.C. No. 4-180-076 (March 27, 1996) (supraspinatus attaches to the scapula, and is therefore properly considered part of the “torso,” rather than the “arm”); *Martinez v. Albertson’s LLC*, W.C. No. 4-692-947 (June 30, 2008) (pain affecting the trapezius and difficulty sleeping on injured side supported ALJ’s finding of whole person impairment). Limitations on overhead reaching can also consitute functional impairment beyond the arm in appropriate cases. *E.g*., *Brown v. City of Auror*a, W.C. No. 4-452-408 (October 9, 2002); *Heredia v. Marriott*, W.C. No. 4-508-205 (September 17, 2004). However, the mere presence of pain in a part of the body beyond the schedule does not automatically represent a functional impairment or require a whole person conversion. *Newton v. Broadcom, Inc*., W.C. No. 5-095-589-002 (July 8, 2021).

As found, Claimant proved she suffered functional impairment not listed on the schedule. The surgery performed by Dr. Duffey was directed to anatomical structures proximal to the “arm,” including a subacromial decompression. Additionally, Dr. Jones documented extensive scar tissue throughout the entire shoulder. Although the anatomic location of the injury is not dispositive, it is a legitimate factor to consider when determining whether a claimant has a scheduled or whole person impairment. *See, e.g., Martinez v. Albertson’s LLC*, W.C. No. 4-692-947 (June 30, 2008) (“The [claimant’s] subacromial decompression was done at the acromion and the coracoacromial ligament in order to relieve the impingement, which is all related to the scapular structures above the level of the glenohumeral joint"); see also *Newton v. Broadcom, Inc*., W.C. No. 5-095-589-002 (July 8, 2021). Dr. Watson objectively observed functional limitation of Claimant's scapula and trapezius, and atrophy of the rotator cuff muscles. Claimant credibly described pain in areas proximal to her arm such as the scapula, trapezius, and pectoral muscle. This pain affects her ability to engage in various activities, including overhead reaching. Dr. Goldman agreed the injury affects Claimant's "whole shoulder girdle." The preponderance of persuasive evidence shows Claimant has functional impairment in parts of her body beyond the arm at the shoulder.

B. Overcoming the DIME's impairment rating

A DIME's determination of whole person impairment is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(c). The party challenging a whole person rating must show it is "highly probable" the DIME is incorrect. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). A party meets this burden if the evidence contradicting the DIME rating is "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). A "mere difference of medical opinion" does not constitute clear and convincing evidence. *E.g., Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (March 18, 2016).

As found, Respondents failed to overcome Dr. Watson's rating by clear and convincing evidence. The Division's Impairment Rating Tips, Desk Aid #11 (rev. July 2020) provide,

> In general, subacromial arthroplasty (a term used to describe acromioplasty and subacromial decompression) should be rated using range of motion. There are some situations when loss of range of motion alone may not adequately represent the extent of the impairment following subacromial arthroplasty. In those cases, up to 10% sign upper extremity impairment may be assigned. Make sure the rationale is provided in the report.

Dr. Watson explicitly relied on this provision of the Rating Tips. He persuasively explained that he did not think a strictly range of motion-based rating would adequately capture the full extent of Claimant's impairment. Dr. Schafer was of the same opinion. Dr. Goldman conceded the Rating Tips did not contain precise criteria for the additional diagnosis-based rating, and the decision is largely left to the rating physician's judgment. Dr. Watson's decision to give an additional 10% rating is well-supported and appropriate in this case. Claimant's initial surgery led to the development of severe scar tissue and necessitated a major debridement and a subsequent MUA. Dr. Goldman's testimony reflects a mere difference of medical opinion and does not rise to the level of clear and convincing evidence.

C. Nucynta prescriptions

The respondents are liable for medical treatment reasonably needed to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a). Medical benefits can continue after MMI if necessary to relieve the effects of the injury and prevent deterioration of the claimant's condition. *Grover v. Industrial Commission*, 759 P.2d 705 (Colo. 1988). Even if the respondents admit liability, they retain the right to dispute the reasonable necessity of any particular treatment, and the mere occurrence of a compensable injury does not compel the ALJ to approve all requested treatment. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997); *McIntyre v. KI, LLC*, W.C. No. 4-805-040 (ICAO, Jul. 2, 2010). The claimant must prove entitlement to specific medical benefits by a preponderance of the evidence. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997).

Claimant proved the ongoing prescriptions for Nucynta are reasonably needed to relieve the effects of her injury and prevent deterioration of her condition. Claimant suffers severe shoulder pain despite extensive treatment and multiple surgeries. Dr. Goldman and Dr. Finn agree chronic pain is difficult to manage, and reasonable physicians can disagree about the best approach for their patients. Dr. Goldman has a well-developed philosophy of chronic pain treatment and makes a strong case for the regimen he would implement if Claimant were his patient. But she is not his patient. While Claimant is certainly free to request a change of physician to Dr. Goldman should she desire, in the meantime, Dr. Finn is driving the bus regarding her care. Despite the well-publicized health risks and negative societal consequences from indiscriminate overprescription of narcotic medications, they remain one of the few tools available to manage chronic pain patients. Dr. Finn is mindful of the potential issues related to narcotics but is confident Claimant uses the medication appropriately. Nucynta is more effective in reducing Claimant's severe pain than numerous other medications she has tried. Although the numerical pain scale reduction may not appear significant to Dr. Goldman, the level of relief is substantial *for Claimant*. Her dosing is relatively stable and below the maximum allowable level. She takes the medication as prescribed with no persuasive evidence of any misuse or abuse. Dr. Finn and his associates regularly check the PDMP and administer urine drug screens, all of which Claimant has passed. There is no persuasive evidence Claimant has suffered any adverse health impact because of Nucynta, notwithstanding the potential risks. While Nucynta is undeniably expensive, there is no persuasive evidence of an equally efficacious, lower-cost alternative.[2] Under the circumstances, the continued use of Nucynta is reasonable.

ORDER

It is therefore ordered that:

[2] Respondents' Medication Therapy Cost Analysis report recommended switching Claimant to morphine sulfate. Although morphine sulfate is far cheaper than Nucynta, changing to a typical opioid would entail greater risks and be entirely inconsistent with Dr. Goldman's recommendations.

1. Insurer’s request to overcome the DIME’s 15% whole person rating is denied and dismissed.

2. Insurer shall pay Claimant PPD benefits based on the 15% whole person physical rating and the 5% psychological rating assigned by the DIME. Insurer may take credit for PPD benefits previously paid to Claimant in connection with this claim.

3. Insurer shall pay Claimant statutory interest of 8% per annum on all benefits not paid when due.

4. Insurer shall cover the Nucynta ER and IR prescribed by and through Dr. Finn.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ’s order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: November 24, 2021

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-975-232-005

ISSUES

1. Whether Claimant established by a preponderance of the evidence the existence of mistake or fraud warranting reopening her claim to deem her admitted work injury non-compensable.

FINDINGS OF FACT

Claimant's Injuries

1. Claimant worked for Employer as a part-time EMT on ski patrol and also as a part-time ski instructor.

2. On February 4, 2015, Claimant was volunteering at [Redacted] and was not working for Employer. Claimant was skiing when another skier came at her out of control. Claimant tried to immediately react and stopped quickly on the downhill edge of her right ski to avoid a collision. Claimant felt a snap on the inside of her right knee. Her knee was weak and swollen. (R. Ex. D).

3. On February 8, 2015, Claimant worked her scheduled shift for employer and felt her knee was good enough to work. Claimant had no issues working that day. (R. Ex. D).

4. On February 9, 2015, Claimant was working her scheduled shift for Employer at [Redacted]. Claimant unclipped from her skis and was in her ski boots unloading fencing supplies from the basket of a snow cat. Claimant twisted to throw fencing out of the basket and felt a snap across her right knee and her right knee gave way a little bit. (R. Ex. D).

5. Claimant did not fall and was able to finish unloading the fencing and was able to ski down the hill. Claimant advised her supervisor about her knee issues and that she would most likely not be able to work the next day. (R. Ex. D).

6. On February 13, 2015, Employer filed an Employer's First Report of Injury (FROI). (Cl. Ex. A-2). The FROI lists the date of injury as February 4, 2015, but also includes a narrative which explained Claimant was initially injured while working as a volunteer at [Redacted] (incorrectly noting the date as February 3, 2015). The FROI narrative indicates Claimant injured her knee again on February 9, 2015 while unloading spectator fencing in the course while working for Employer. The FROI notes Claimant initially indicated the original injury occurred at [Redacted] and did not think it would be a workers' compensation claim. The FROI further indicates that after her February 9, 2015 injury, Claimant reported her knee continued to be painful and swollen "and [w]hen [Claimant's] pain and swelling did not subside, she approached the Worker's Comp Department." (Cl. Ex. A-2).

7. In a February 18, 2015 email to Employer's Occupational Health Specialist, Claimant reported that her injury for Employer happened on February 9, 2015, and was not the same injury as on February 4, 2015. Claimant reported that both injuries involved the right knee but that the mechanism of injury was different and that different parts of the knee were injured in each incident. (R. Ex. D).

Overview Of Medical Treatment

8. Following her injury, Claimant's authorized treating physician, Frederick Scherr, M.D., referred Claimant to Peter Janes, M.D., of Vail Summit Orthopaedics who performed right knee surgeries on March 3, 2015, and June 16, 2015. (R. Ex. D & H).

9. On February 19, 2015, Claimant saw Lucia London, CNP, at Vail Valley Medical Center. Claimant reported both the February 4, 2015 and February 9, 2015 injuries. Claimant reported the February 9, 2015 injury likely worsened her prior injury. Claimant had already made an appointment with Vail Summit orthopedics for the following day. (Cl. Ex. B-3).

10. In his report related to his February 20, 2015 examination, Dr. Janes indicated Claimant sustained two different injuries, one on February 4, 2015 and the second on February 9, 2015. Dr. Janes' description of the mechanism of injury was consistent with the Claimant's testimony and her reports to other providers. (Cl. Ex. B-4).

11. After Claimant continued to report issues with her knee, Dr. Janes referred Claimant to two additional orthopedic surgeons for evaluation – Dr. Sterett, and Dr. Laprade. All three orthopedic surgeons agreed Claimant would benefit from additional surgical intervention if conservative treatment failed. (R. Ex. D and H).

12. In April 2016, Claimant returned to Dr. Scherr requesting a referral for a fourth surgical opinion. Dr. Scherr believed three concurring opinions were sufficient. He noted Claimant did not desire another surgery and observed that her knee was functional. Based on Claimant's reluctance to undergo additional surgery, Dr. Scherr placed Claimant at maximum medical improvement (MMI) as of April 26, 2016, and assigned a 22% permanent impairment rating for the lower extremity. (R. Ex. A & F).

13. On October 7, 2016, Claimant underwent a Division independent medical examination (DIME) with Stephen Lindenbaum, M.D. Dr. Lindenbaum was aware of the facts and circumstances of both of Claimant's accidents. He opined it was more likely that Claimant sustained an anterior-cruciate ligament injury on February 4, 2015 than on February 9, 2015. Dr. Lindenbaum apparently believed both Claimant's injuries occurred while working for Employer, and found no basis for apportionment. Dr. Lindenbaum placed Claimant at MMI effective April 26, 2016 with a 19% right lower extremity impairment rating. (R. Ex. B & Cl. Ex. A-3).

14. After MMI, Claimant sought treatment with Dr. Gottlob and Axis Physical Therapy, and treated with these providers between April 24, 2016, and December 30, 2016. (R. Ex. H).

Procedural History

15. On November 10, 2016, Respondents filed a Final Admission of Liability (FAL) with respect to Claimant's injury consistent with Dr. Lindenbaum's MMI and impairment opinions. The FAL incorrectly lists Claimant's date of injury as February 4, 2015. Respondents admitted for medical treatment to date, post-MMI medical treatment; temporary total disability (TTD), temporary partial disability (TTD), and permanent partial disability (PPD). According to the FAL, Respondents had paid $61,879.60 in medical expenses, $3,524.95 in TTD benefits; $556.46 in TPD benefits; and Claimant was entitled to $10,948.23 in PPD with an offset of $169.84 for overpayment. Respondents admitted to an average weekly wage (AWW) of $99.08. (R. Ex. C).

16. In December 2016, Claimant filed an Application for Hearing (AFH), which was designated as WC 4-975-232-**01**.[1] On April 6, 2017, the parties participated in a hearing before ALJ Michelle E. Jones, to address the issues of whether Claimant was entitled to change ATPs; whether Claimant had overcome DIME physician Dr. Lindenbaum's MMI opinion; determination of Claimant's PPD impairment rating; and determination of Claimant's AWW. In that hearing, Claimant contended that she was not at MMI on April 26, 2016, and that Dr. Lindenbaum's impairment rating should be adjusted to include a rating for a surgery performed in November 2016. (R. Ex. D).

17. In her April 27, 2017 Order, ALJ Jones denied Claimant's request to designate a new ATP, and also found Claimant failed to meet her burden to overcome DIME Physician Dr. Lindenbaum's opinions with respect to MMI and 19% lower extremity impairment rating. ALJ Jones found that Claimant's AWW at the time of injury was $400.00. (R. Ex. D.).

18. On May 22, 2017, the parties entered into a "Stipulation Resolving Temporary Disability Benefits," that PALJ John Sandberg approved on May 26, 2017. (R. Ex. E). Through the Stipulation, Respondents agreed to pay Claimant an additional $3,548.07 for temporary disability benefits from February 9, 2015 through April 26, 2016 (the date of MMI). Claimant agreed "Respondents need not file a new FAL." The parties also agreed the Stipulation resolved ALJ Jones' orders with respect to overcoming the DIME, PPD and AWW, but Claimant could appeal of ALJ Jones' ruling regarding Claimant's ATP. (R. Ex. E).

19. Claimant then sought review of ALJ Jones' denial of her request to change ATPs. On October 17, 2017, the Industrial Claim Appeals Office (ICAO) issued a Final Order affirming ALJ Jones' April 27, 2017 Order. (R. Ex. F). Claimant appealed the ICAO's October 17, 2017 Final Order, and the Colorado Court of Appeals affirmed on November 1, 2018. (R. Ex. I).

20. The parties then participated in a hearing on January 18, 2018, before ALJ Margot W. Jones in WC 4-975-232-**02**. In the hearing, Claimant requested that Respondent be

[1] Claimant has filed 8 Application for Hearing, which are designated in OAC records as WC 4-975-232-01; 4-975-232-02; 4-975-232-001; 4-975-232-002; 4-975-232-003; 4-975-232-004; 4-975-232-005; and 4-975-232-006.

held financially responsible for medical treatment Claimant received from Dr. Gottlob and Axis Physical Therapy after reaching MMI. In a Summary Order dated March 18, 2018, ALJ Jones denied Claimant's requested relief. (R. Ex. G). ALJ Jones then issued a Findings of Fact, Conclusions of Law, and Order dated April 30, 2018, also denying Claimant's requested relief. (R. Ex. H). Claimant sought review of ALJ Jones' April 30, 2018 Order, and the ICAO issued a Final Order affirming on December 24, 2018. (R. Ex. J). Claimant appealed the ICAO's December 24, 2018 Final Order, and the Colorado Court of Appeals affirmed on November 27, 2019. (R. Ex. N).

21. On May 6, 2019, Claimant filed an AFH designated as WC 4-975-232-**001**. In that AFH, Claimant endorsed the issues of Compensability, and Petition to Reopen Claim. Under "Other issues to be heard at this hearing are," Claimant indicated "Mistake of fact, mistake of law, conclusion in a DIME."[2] (OAC File, AFH WC 4-975-232-001). The matter was originally scheduled for a hearing on August 29, 2019, and later continued to October 29, 2019.

22. On June 18, 2019, at Claimant's request, the parties participated in a prehearing conference before PALJ Sandberg in which Claimant raised multiple issues, including Claimant's petition to reopen, a "motion to address the compensability of the claim," a motion to compel production of a claim file and other issues. Because the matter had already been set for hearing at the OAC, PALJ Sandberg denied Claimant's requested relief. (R. Ex. K).

23. After the August 29, 2019 hearing was rescheduled for October 29, 2019, the parties appeared at a prehearing conference before PALJ David W. Gallivan. In addition to discovery issues, PALJ Gallivan held that the October 29, 2019 hearing would be limited to "Claimant's contention that this claim is not compensable and that she did not sustain an injury while in the course and scope of her employment." (R. Ex. L).

24. On October 3, 2019, the parties appeared at another prehearing conference in which Claimant objected to the medical releases Respondent requested she sign. Claimant also requested an order from the PALJ determining who was the ATP for her claim, and clarification of the issues for hearing. In an order dated October 4, 2019, PALJ Gallivan denied Claimant's requested relief. (R. Ex. M). Ultimately, for reasons that are not apparent from the record or OAC files, the scheduled October 29, 2019 hearing related to WC 4-945-232-001 did not take place and the case was closed within the OAC.

25. On October 23, 2019, Claimant filed another AFH with the OAC designated as WC 4-975-232-**002**. In that AFH, Claimant endorsed issues including medical benefits, authorized provider, and petition to reopen. In the AFH, Claimant also stated

[2] Although not included in the evidentiary record submitted by the parties, the ALJ takes judicial notice of the Office of Administrative Courts' files related to this claim. *See Habteghrigis v. Denver Marriott Hotel*, W.C. No. 4-528-385 (ICAO March 31, 2006) ("A court can take judicial notice of its own records and files."). References to pleadings contained in the Office of Administrative Courts' files are designated as "OAC File").

"Respondents liable for medical treatment due to worsening of condition for admitted injuries." The hearing was scheduled for February 18, 2020. (R. Ex. O).

26. Claimant then filed another AFH on November 25, 2019, designated as WC 4-975-232-**003**, in which she endorsed compensability, petition to reopen, and "Mistake of Fact, Mistake of Law, Conclusion in DIME." The matter was scheduled for hearing on March 12, 2020. (R. Ex. O).

27. On January 22, 2020, PALJ Michelle S. Sisk issued an order consolidating WC 4-975-232-002 and 003 for hearing. (R. Ex. O). The matter proceeded to a hearing before ALJ Peter J. Cannici on February 18, 2020, which addressed two issues: (1) Claimant's request for reimbursement of medical costs related to right knee treatment; and (2) Claimant's request to find her claim not compensable." (R. Ex. Q). After the hearing, the parties entered into a stipulation through which Respondent agreed to reimburse Claimant $6,911.15 for a September 6, 2019 right knee surgery, and to file a FAL reflecting the additional $6,911.15 in the FAL's column noted "medical to date." The parties further stipulated this would "be the only change to the most recent FAL filed on November 10, 2016." (Emphasis added). ALJ Cannici approved the Stipulation on March 18, 2020. (R. Ex. P).

28. On March 25, 2020, ALJ Cannici granted Claimant's unopposed motion to dismiss the issue of compensability (*i.e.*, Claimant's request to find her claim not compensable), and dismissed the issue without prejudice. (R. Ex. O).

29. Consistent with the parties' March 18, 2020 Stipulation, Respondent filed a new FAL on April 23, 2020, reflecting the additional $6,911.15 paid for medical benefits. (R. Ex. R).

30. On May 22, 2020, Claimant filed another AFH designated as WC 4-975-232-**004**. In this AFH, Claimant endorsed "Omissions and calculation errors on final admission of liability dated 4/23/20." (OAC File, AFH WC 4-975-232-004). Respondent filed a Response to Claimant's AFH, in which it stated: "Issued endorsed by claimant are closed; issues are not ripe for hearing." (OAC File, Response WC 4-975-232-004). The parties then attended a prehearing conference before PALJ Gallivan in which Respondent moved to strike Claimant's AFH. PALJ Gallivan found there were no ripe issues on the AFH, and granted Respondent's motion to strike. (R. Ex. U).

31. On September 3, 2020, the parties attended a prehearing conference before PALJ Craig Eley in which Claimant sought an order compelling Respondent to file an amended FAL correcting allegedly inaccurate information. Specifically, Claimant indicated the April 23, 2020 FAL listed an incorrect AWW, resulting in an incorrect statement of temporary benefits paid. Claimant did not contend she was not paid the correct benefits, but sought to require Respondent to file a new, corrected FAL reflecting the benefits actually paid. Respondent objected to the request, presumably "because doing so may give rise to an objection period and additional litigation." (R. Ex. V).

32. Relying on the parties' May 2017 Stipulation and ALJ Cannici's March 18, 2020 Order, PALJ Eley denied the motion by order dated September 4, 2020. (R. Ex. V). Claimant then sought review of the order by the Division, and PALJ Gallivan dismissed the motion to review noting that dismissal "will permit Claimant to seek review before the Office of Administrative Courts." (R. Ex. W).

33. On November 12, 2020, the parties attended another prehearing conference in which Claimant moved "to void the admission of liability for post-MMI care." PALJ Gallivan granted Claimant's motion, ordering "The admission for post-MMI medical benefits is void and withdrawn. Respondent is no longer obligated to provide any medical treatment in this case absent reopening pursuant to § 8-43-303. This order does not otherwise disturb the final admission of liability." (R. Ex. X).

34. On December 1, 2020, the parties attended another prehearing conference before PALJ Sandberg, in which Claimant moved "to void endorsement of medical maintenance benefits on Final Admission of Liability," to "allow" Respondents to amend the April 23, 2020 FAL "not subject to new objection or reopening of previously closed issues by Final Admission of Liability or by ALJ order" and to "reinstate/change/correct date of injury based on alleged material errors." (R. Ex. Y). PALJ Sandberg denied Claimant's motions. (R. Ex. Y).

35. On February 4, 2021, Claimant filed the present AFH (designated as WC 4-975-232-**005**, which includes only a petition to reopen "for Mutual mistakes, Errors and/or Fraud, Date of Injury, Computation and Omission Errors on FAL, Claim Adjusting Errors Claim will remain closed for any and all changes/awards of Worker's Comp benefits and closed for any medical treatment." (Capitalization original).

36. On March 2, 2021, Respondent filed its Response to the present AFH, noting "Claim is closed; matter is barred by the reopening statute of limitations, Section 8-43-303." Respondents' Response does not seek repayment of any previously paid benefits.

Claimant's Testimony

37. At hearing, Claimant testified she initially injured her right knee while volunteering for the Vail Valley foundation on February 4, 2015. She testified she did not tell anyone she was injured, but took a couple of days off work. On February 9, 2015, Claimant worked most of the day for Employer and was unloading supplies from a snowcat. While moving a roll of fencing while wearing ski boots, Claimant experienced pain in her right knee. Claimant reported her knee pain to Employer and indicated she was not able to work further because of her knee pain.

38. Claimant testified that on February 11, 2015, she contacted Employer's human resources department and was advised to complete a First Report of Injury (FROI). The following day, Claimant's supervisor, Mark C[Redacted], completed the form with Claimant's assistance, and the FROI was filed. Claimant testified that Mr. C[Redacted] incorrectly stated the date of her February 4, 2015 injury as February 3 2015, but agreed this was a harmless error. Claimant testified that with the exception of this incorrect date,

the description of events on the FROI is accurate. Claimant further testified she was sent to Employer's health clinic, and mistakenly believed she was being sent for drug testing following her February 9, 2015 injury. She testified the employer-designated provider requested she sign a consent for treatment. Claimant testified she informed the health clinic she did not wish to be treated by anyone on behalf of employer.

39. Claimant testified she believes multiple mistakes were made the course of her claim. Most significantly, Claimant testified she believes the injuries to her knee were not related to her work for Employer and were, instead, related to her February 4, 2015 injury while volunteering at [Redacted]. In substance, Claimant testified her injuries should not have been treated as a workers' compensation injury.

40. Claimant testified she believes her benefits were calculated incorrectly and Insurer paid her more benefits that she was entitled. Additionally, Claimant testified the amount of medical and temporary total disability benefits stated on the Final Admissions of Liability are incorrect and do not correspond to the amounts paid.

41. Claimant testified she first saw Dr. Scherr in July 2015, and that she did not believe Dr. Scherr was aware of her February 4, 2015 injury. She also testified she believed there were irregularities in her medical records, including Dr. Scherr's signature being "rubber stamped" on medical records. Claimant believes the DIME physician's mistaken belief that Claimant's February 4, 2015 and February 5, 2015 injuries were sustained while working for the same employer constitutes "fraud."

42. Claimant further testified Insurer mistakenly paid her TTD benefits after Claimant informed Insurer she had a job and was earning a living in Autumn 2015. On cross examination, Claimant testified she is not seeking any additional medical or indemnity benefits from Respondents.

43. Claimant did not testify or present evidence that due to any of the alleged errors she was underpaid benefits, nor did Claimant testify or present evidence that she is seeking additional benefits, or is otherwise entitled to additional benefits.

44. Respondent did not endorse repayment of benefits as an issue at hearing.

Testimony of Frederick Scherr, M.D.

45. Claimant conducted the post-hearing deposition of Frederick Scherr, M.D. Dr. Scherr was employed as the medical director at the Avon Occupational Health Clinic (now Vail Health Clinic) from March 2015 to September 2017, and served as Claimant's authorized treating provider during that time period. Dr. Scherr testified he treated Claimant for an ACL tear. He testified his April 26, 2016 report lists only February 9, 2015 as the date of injury, and that Claimant was injured while throwing a bale of fencing. He testified that, based on the previous history in the record, it is unlikely Claimant' ACL treat was caused on February 9, 2015, although he also testified there was no way to objectively determine what happened to Claimant's knee on February 4, 2015 because MRIs were not taken until after February 9, 2015. Dr. Scherr noted that the

contemporaneous medical report noted the February 9, 2015, incident likely worsened any injury that may have occurred on February 4, 2015.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Ins. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Claimant's Petition To Reopen

Claimant's petition presents a unique issue because Claimant seeks reopening to have the claim deemed non-compensable, presumably *ab initio*. Respondents do not seek repayment of any benefits. Claimant contends the parties mistakenly attributed her knee injury to her employment and thus her claim was never compensable. Claimant also alleges multiple “mistakes” in the course of her claim, including being over-paid TTD benefits, and the inclusion of incorrect information on Final Admissions of Liability. Claimant also alleges fraud, although the basis of the alleged fraud is vague. Claimant has failed to establish by a preponderance of the evidence sufficient grounds to justify reopening of her claim.

Once a case has been closed, the issues resolved by a Final Admission of Liability are not subject to litigation unless they are reopened pursuant to § 8-43-303, C.R.S. § 8-43-203 (2)(d), C.R.S.; *see also Berg v. Indus. Claim Appeals Office*, 128 P.3d 270, 272 (Colo. App. 2005); *Webster v. Czarnowski Display Serv., Inc*., W.C. No. 5-009-761-03 (ICAO, Feb. 4, 2019). Section 8-43-303(1) C.R.S., allows an ALJ to reopen any award within six years of the date of injury on a several grounds, including error, fraud, or mistake. *Heinicke v. Indus. Claim Appeals Office*, 197 P.3d 220 (Colo. App. 2008). Reopening of a closed claim may be granted based on any mistake of fact that calls into question the propriety of a prior award. Section 8-43-303(1), C.R.S.; *Richards v. Indus. Claim Appeals Office,* 996 P.2d 756 (Colo. App. 2000); *Standard Metals Corp. v. Gallegos*, 781 P.2d 142 (Colo. App. 1989). When a party seeks to reopen based on mistake the ALJ must determine "whether a mistake was made, and if so, whether it was the type of mistake which justifies reopening." *Travelers Ins. Co. v. Indus. Comm’n*, 646 P.2d 399, 400 (Colo. App. 1981). When determining whether a mistake justifies reopening the ALJ may consider whether it could have been avoided through the exercise of available remedies and due diligence, including the timely presentation of evidence. *See Indus. Comm’n v. Cutshall*, 433 P.2d 765 (Colo. 1967); *Klosterman v. Indus. Comm’n*, 694 P.2d 873 (Colo. App. 1984).

The power to reopen is permissive, and is therefore committed to the ALJ's sound discretion. Further, the party seeking to reopen bears the burden of proof to establish grounds for reopening. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Barker v. Poudre School Dist.*, W.C. No. 4-750-735 (ICAO, Mar. 7, 2012).

Claimant’s Petition to Reopen due to Mistakes

Claimant has failed to present credible evidence indicating that any mistake occurred which would justify reopening her claim, and has therefore failed to meet her burden of proof. Claimant’s primary claim is that Respondents mistakenly deemed her right knee injury a compensable injury. The credible evidence demonstrates that Claimant, Respondents, and her treating physicians were, from the beginning, aware of the circumstances of Claimant’s injuries on February 4, 2015, and February 9, 2015. Throughout her claim, Claimant clearly communicated to Respondents and her health care provider that two incidents occurred. Claimant assisted Employer in filing a First Report of Injury, and actively sought and accepted workers’ compensation benefits.

The only putative “mistake” identified in the record is DIME physician Dr. Lindenbaum’s apparent belief that both the February 4, 2015 and February 9, 2015 injuries occurred in the course of Claimant’s employment with Employer. To the extent this was erroneous, no credible evidence was presented to indicate Claimant’s February 9, 2015 injury was not compensable. To the contrary, Claimant reported to her providers that the February 9, 2015 injury worsened her prior injury which would render the claim compensable as an aggravation for a pre-existing injury. She also reported to Employer that her February 9, 2015 injury was a different injury, which would also render the injury compensable. Thus, the ALJ concludes Dr. Lindenbaum's mistaken belief that the two February 2015 incidents occurred in the course of her employment with Employer does not call into question the propriety of the Claimant's award of PPD or other workers' compensation benefits.

Notwithstanding, if, as Claimant now contends, Dr. Lindenbaum's attribution of her impairment to her employment was in error, Claimant had a remedy available to her by filing an AFH to challenge the DIME's impairment rating. Although, Claimant did file an AFH in December 2016 challenging the DIME opinions in WC 4-975-232-01, she did not contend the DIME erred in attributing her impairment to her employment. Instead, Claimant sought to increase her impairment rating and obtain additional benefits. At the time, Claimant was aware of the DIME physician's opinion and the facts related to the two February 2015 incidents. Thus, to the extent the DIME physician's opinion was in error, Claimant could have remedied any mistake by requesting that the DIME's attribution of her impairment to her employment be deemed incorrect, and presenting evidence supporting that position. Claimant elected not to do so.

Even after her initial DIME challenge, Claimant sought, pursued, and accepted significant benefits over a period of years. As of November 10, 2016, Respondents paid - and Claimant accepted - $61,879.60 in medical benefits and $15,029.64 in combined TTD, TPD and PPD benefits. Over the next three years, Claimant filed multiple actions affirmatively pursuing additional workers' compensation benefits for her injuries, ultimately obtaining an additional $3,548.07 in temporary disability benefits. Clamant did not contend her injury was not compensable until May 2019. Even after that, Claimant continued to pursue workers' compensation benefits. For example, on October 23, 2019, in WC 4-975-232-002, Claimant sought to hold Respondent liable for "medical treatment due to worsening of condition for admitted injuries." Claimant then accepted reimbursement of an additional $6,911.15 in medical benefits from Respondent in March 2020. Throughout this time, Claimant, Respondents, and her treating physicians were aware of the circumstances of her injuries on February 4, 2015, and February 9, 2015, as well as Dr. Lindenbaum's opinion. The ALJ concludes that Claimant has failed to demonstrate grounds for reopening her case for a mistake.

At hearing Claimant contended the April 23, 2020 FAL contains incorrect information and seeks to require Respondent to file a new FAL correcting the alleged errors. To the extent Claimant asserts that information in FAL constitutes a "mistake" justifying reopening of her claim, the ALJ finds no grounds to reopen Claimant's claim.

The initial FAL from November 10, 2016 did contain an incorrect date of injury. However, after ALJ Michelle Jones ruled in Claimant's favor of increasing her AWW from $99.08 to $400.00, Claimant expressly agreed that Respondent did not need to file a new FAL. As part of the March 18, 2020 Stipulation, Claimant and Respondent expressly agreed that Respondent would file a new FAL which would reflect the additional $6,911.15 in the FAL's "medical to date" column, and that "This will be the **only** change on the most recent FAL filed on November 10, 2016." (R. Ex. P (emphasis added)). Respondent complied with this agreement when it filed the April 23, 2020 FAL. Accordingly, with respect to the content of the April 23, 2020 FAL, Claimant received what she negotiated. Moreover, to the extent the information contained on the April 23, 2020 FAL is inaccurate, the inaccurate information constitutes ministerial errors which have no substantive impact on Claimant's claim, and do not justify reopening of her claim.

Claimant's Petition to Reopen for Fraud

Claimant has also failed to establish by a preponderance of the evidence the existence of any fraud by Respondents. The elements of fraud or material misrepresentation are well-established in Colorado law. The elements are: (1) A false representation of a material existing fact, or a representation as to a material fact with reckless disregard of its truth; or concealment of a material existing fact; (2) Knowledge on the part of one making the representation that it is false; (3) Ignorance on the part of the one to whom the representation is made, or the fact concealed, of the falsity of the representation or the existence of the fact; (4) Making of the representation or concealment of the fact with the intent that it be acted upon; (5) Action based on the representation or concealment resulting in damage. *Arczynski v. Club Mediterranee of Colorado, Inc.*, W.C. No. 4-156-147 (ICAO Dec. 15, 2005), *citing Morrison v. Goodspeed*, 68 P.2d 458, 462 (Colo. 1937). "Where the evidence is subject to more than one interpretation, the existence of fraud is a factual issue for resolution by the ALJ." *Arczynski, supra.*

Claimant has failed to prove by a preponderance of the evidence that Respondents committed any fraud. Claimant has failed establish by credible evidence that either Employer or Insurer knowingly made any false representation or knowingly concealed any material existing fact. Thus, Claimant has failed to establish the first two elements of fraud. Claimant has failed to establish the third element of fraud, because the evidence established that including Claimant was aware, at all material times, of the facts surrounding Claimant's injuries on February 4, 2015 and February 9, 2015, as well as Dr. Lindenbaum's DIME opinion. Claimant has also failed to establish the fourth and fifth elements of fraud because she presented no credible evidence that she took any action based on any alleged material misrepresentation or concealment, or that she suffered any resulting damage.

Claimant has not articulated any cogent rationale for reopening her claim and has not met her burden of proof of establishing either a mistake or fraud. The ALJ finds and concludes that no grounds exists for Claimant to reopen her claim to have it deem non-compensable.

ORDER

It is therefore ordered that:

1. Claimant's request to reopen her claim is denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 29, 2021

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, -Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 4-979-611-002

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that PA-C Teresa Turgeon and Fit Physical Therapy (a.k.a. Fyzical Therapy & Balance Centers) are authorized providers.

II. Whether Respondents have proven by a preponderance of the evidence that the admission with regard to reasonably necessary and related maintenance medical benefits may be withdrawn and whether the February 22, 2013 claim may be closed.

III. Whether Claimant has proven by a preponderance of the evidence that Claimant is entitled the post-maximum medical improvement (MMI) benefits provided by Fit Physical Therapy for the period between October 8, 2019 and July 30, 2020.

IV. Whether Claimant has proven by a preponderance of the evidence that Claimant is entitled to reasonable and necessary medical benefits after MMI, including for the period between July 31, 2020 through the present and continuing.

STIPULATIONS

The parties stipulated that Insurer no longer insures Employer since December 31, 2017.

PROCEDURAL MATTERS

Claimant filed an Application for Hearing on June 11, 2021 on issues of medical benefits that are authorized, reasonably necessary and related to the February 22, 2013 claim, including physical therapy with Fit Physical Therapy.

Respondents filed a Response to Application for Hearing on June 16, 2021 denying that physical therapy is reasonably necessary and related to the injury. Respondents questioned whether Fit Physical Therapy is an authorized treating provider.

The parties agreed that Panorama Orthopedics is one of Claimant's authorized medical providers, but Respondents are disputing the reasonable necessity of physical therapy, which was prescribed by a physician assistant and not a physician.

Claimant was involved in a second work related event on January 20, 2017, which is the subject matter of W.C. No. 5-073-253, involving a neck injury. This claim was accepted by Insurer and Claimant received physical therapy for the neck until 2019.

The parties also agreed that, after Insurer's liability was terminated in 2017, Claimant was involved in a third work related accident. This is the subject of W.C. No. 5-

108-379 and was a neck injury. Both neck injury cases were consolidated, and the claims were settled. An order in the consolidated matters was approved on January 22, 2020.

The Respondents conceded that *Grover* medical benefits were admitted by Final Admission of Liability following a determination of MMI and admitted for a 10% whole person impairment.

Respondents requested that this ALJ take administrative notice of the Low Back Medical Treatment Guidelines, specifically pages 3, 63, and pages 83 through 91; and also take administrative notice of W.C.R.P. Rule 16. In their position statement Respondents requested that this ALJ also take administrative notice of the Level I Accreditation Curriculum.

FINDINGS OF FACT

1. Claimant was born on August 17, 1973 and was 48 years old at the time of the hearing. Claimant has been a consulting engineer for the past 24 years.

2. Claimant had a prior disc replacement surgery at the L4-5 and L5-S1 levels in 2011. This resulted as a consequence of an injury involving his son. Following the surgery he was off work for a period of approximately six weeks, following which he returned to part time work for a couple of months. After this recovery period, Claimant returned to work full time. He stated that he did not have any significant problems or limitations for some time before his 2013 accident.

3. Claimant was injured in the course and scope of his employment with Employer on February 22, 2013, injuring his low back. Claimant was representing Employer for a client on the north side of Denver. He was walking toward an on-site trailer, across the parking lot, when he slipped on ice, falling hard, aggravating his preexisting low back condition. It has affected his low back and bilateral lower extremities.

4. He was seen by Dr. Karen Knight, of Panorama Orthopedics and Spine for the aggravation and has not recovered from that incident. Dr. Knight placed Claimant at maximum medical improvement in 2015. He continued to be treated by Dr. Knight after MMI and she would regularly prescribe therapy to maintain MMI.

5. Claimant stated that, as a consultant, he would take time off work to attend his medical appointments but had to make up the time and was working full time following the work-related accident of 2013. He had physical therapy first at Panorama but after he was placed at MMI, he was transferred to Fit Physical Therapy on or about June, 2015. Panorama declined to continue to see him in PT as he was at MMI, so they provided a list of places he could continue his maintenance PT. Claimant chose Fit Physical Therapy as it was closest to his work.

6. On February 25, 2015 Dr. Roberta Anderson Oeser noted that she was seeing Claimant pursuant to a referral from Karen Knight, M.D. to perform the impairment rating in this case. Dr. Anderson took a history, noting that Claimant had had a prior disc surgery and a subsequent slip and fall on ice in 2013 while at work, aggravating his

preexisting underlying condition. Dr. Anderson stated that, despite all treatment rendered on the claim, Claimant continued to have ongoing symptoms. At the time Claimant advised that dry needling tends to decrease his symptoms in his low back, which was effective with controlling his symptoms, and should continue with independent exercise and stretching programs. She noted that Claimant was on Horizant to manage his neuropathic type pain and he was more active with the medicine. She noted that Claimant was quite frustrated by the fact that his symptoms have not resolved. On physical exam, Dr. Anderson found minor increase in lumbar paraspinal tone, tenderness in the low back, the PSIS and gluteal muscles. She diagnosed lumbago, lumbar radiculitis, history of surgery, lumbar spondylosis and degenerative disc disease of the lumbar spine. Dr. Anderson performed an impairment rating evaluation and concluded Claimant had a 10% whole person impairment related to the February 22, 2013 claim. He was sent back to Dr. Knight for continuation of medications and dry needling. Claimant was also encouraged to continue with his independent stretching and exercise program. Lastly, she stated that Claimant continued to work without restrictions and should continue in that capacity.

7. On March 18, 2015 Dr. Karen Knight issued a Physician's Report of WC Injury diagnosing degenerative disc disease of the thoracic and lumbar spine, stating that Claimant was at maximum medical improvement. Dr. Knight also stated Claimant required maintenance care. Claimant's treatment plan included medication (Horizant) and physical therapy once to twice a month of dry needling and medical massage. Dr. Knight provided no restrictions.[1]

8. Respondents filed a Final Admission of Liability on April 21, 2015 admitting that Claimant was at maximum medical improvement as of March 18, 2015. Respondents further admitted to maintenance medical care that is reasonably necessary and related to the injury and in accordance with Dr. Knight's assessment.

9. On May 1, 2015 Dr. Knight prescribed 12 additional visits for physical therapy for the lumbar spine condition, including exercise, myofascial release, spine neutral core endurance, modalities as needed, home exercises, back biomechanics education and dry needling. A notation on the prescription noted that the visits were authorized per Brandon on June 23, 2015.

10. Claimant was first seen at Fit Physical Therapy (Duncan YMCA-Arvada) on June 17, 2015 by Lisa Chevalier. The prescription related to his ongoing bilateral leg pain and lumbar pain pursuant to Dr. Karen Knight's referral. Claimant provided a history of being better while on medication, was having difficulty sleeping and had to change positions. Ms. Chevalier noted Claimant benefited from dry needling in the past. She also documented Claimant was a regular exerciser and was compliant with his home exercise program. They established a plan that would include: Therapeutic Exercises (ROM, Strength, Endurance, Stability), Therapeutic Activity (Work Specific), Neuromuscular Rehabilitation (Balance/Proprioception Training, Muscle Re-Education), Manual Therapy (Soft Tissue Mobilization, Joint Mobilization, Spinal Mobilization, Myofascial Release,

[1] Neither party submitting into evidence a copy of Dr. Knight's final report.

Muscle Energy Techniques, Manual Resistive Exercise, Dry Needling/Intramuscular Manual Therapy, (Graston or ASTYM Techniques).

11. On June 24, 20215 Claimant proceeded with his first treatment with Fit Physical Therapy, which included neuromuscular re-education with e-stim, including dry needling, massage therapy in the lower thoracic and lumbar areas, as well as the gluteals and hips, and therapeutic and kinetic stretches. They noted that Claimant had a good home program of core stabilization but needs low level contraction with LE movement.

12. On July 1, 2015 Ms. Chevalier documented that Claimant was doing well, working on lumbar stabilization. Claimant understood the importance of lumbar stabilization with lower extremity movement and did better with bent knee fall out (BKFO) and prone knee flexion. Claimant continued in PT for multiple dates with therapeutic exercises, neuromuscular re-education and massage throughout 2016.

13. On December 29, 2015 Dr. Knight issued a prescription for another 12 visits of lumbar spine physical therapy to include myofascial release, core endurance, modalities and dry needling. A notation on the prescription documented that the 12 visits were approved by Brandon from [Insurer] on January 12.[2]

14. Dr. Knight issued a subsequent prescription for physical therapy on December 21, 2016 for 12 visits of physical therapy for the continuing lumbar radiculopathy for gentle myofascial release, spine neutral core endurance program with emphasis on dynamic motor control.

15. The Claimant was, however, not seen by Dr. Knight on December 21, 2016, but by her physician assistant, Christina Lee, PA-C., who acknowledged Claimant was seen for his continuing lumbar spine pain with symptoms of tension and spasm. They discussed treatment option and was given the prescription for physical therapy, advised to continue activity as tolerated as well as a home exercise program daily and return to clinic as needed. They also discussed medications, which Claimant declined. The report stated that the patient was discussed with Dr. Knight who concurred with the plan.

16. Claimant was provided a new 12 visit physical therapy prescription by Dr. Knight on October 12, 2017 to address his low back pain. It specified gentle range of motion, myofascial release, core endurance, modalities as needed and back biomechanics education. This prescription was again renewed by Dr. Knight on October 17, 2018.[3]

17. On August 8, 2019 Dr. Knight changed the format of the prescription. This prescription notes that the ordering diagnosis is for cervicalgia and noted primary

[2] This ALJ infers that this was dated January 12, 2016.
[3] No corresponding reports of evaluations were admitted into evidence for these dates, just the prescriptions.

insurance as Aetna Insurance[4]. It ordered the same kind of care, and does specify that the body part location for therapy is both the lumbar spine and the cervical spine.

18. On August 7, 2019 Claimant was seen by Jennifer Morton of Fit PT. Claimant continued to complain of bilateral leg pain and lumbar pain. It noted that the low back was tight but had been working on more stretching of his hips and ITBand. The week before he had bent over and got a catch in his low back on the right side but it had already eased up since. Ms. Morton noted that Claimant greatly benefited from monthly physical therapy to address impairments and allow him to maintain physical activity, reduce pain, reduce need for any medications, continue working in full without limitations, and continue an active lifestyle. She noted that Claimant responded very well to manual therapy and needling and had significant pain reduction.

19. On September 17, 2019 the therapist, Patricia M McNutt, PT, documented that Claimant continued to treat for the low back pain. It stated that Claimant continued to complain of bilateral leg pain and lumbar pain, had tightness in the low back and had been working on more stretching on hips and ITband as he could not fully exercise related to his neck complaints. They worked on neuromuscular re-education from T2-S1, with e-stim, low back massage therapy as well as the gluteals and hips. The therapist stated that Claimant greatly benefited from monthly therapy to address impairments and allow him to maintain physical activity, reduce pain, reduce need for medications, continue working out as he is able and continue with his lifestyle.[5]

20. On November 21, 2019 Claimant returned to Fit PT, noting he was tight across the low back and noted right quad differences. He complained of bilateral leg pain and lumbar pain. He proceeded with neuromuscular reeducation and massage. Ms. McNutt stated that Claimant greatly benefits from monthly physical therapy visits to address impairments and allow him to maintain physical activity, reduce pain, reduce need for any medications, continue working out (as he is able) and continue an active lifestyle.

21. On February 17, 2020 Jennifer Morton of Fit PT stated that Claimant "greatly benefits from bi-monthly physical therapy visits to address impairments and allow him to maintain physical activity, reduce pain, reduce need for any medications, continue working out (as he is able) and continue an active lifestyle." The therapist noted that Claimant "had a little groin pull with squats but feeling better now." The physical therapy's note further states that his "[L]ow back is a little tight but has been working on more stretching of hs[6] (sic.) and ITB[7] as he cannot exercise right now with his neck" injury. They also specifically recommended that Claimant continue with therapy as he responded very well to manual therapy and DN with pain reduction. They discussed his exercise program and recommended he increase squats, deadlifts, lunges, and carries to improve lower extremity and core stability and strength to improve his low back.

[4] This ALJ infers that this was Claimant's personal insurance.

[5] The therapist also addressed some issues related to the neck which are not relevant to this claim.

[6] This ALJ infers this means "hips"

[7] This ALJ infers ITB is iliotibial band.

22. On July 31, 2020 Claimant returned to Panorama Orthopedics and Spine Center. He was evaluated by Dr. Knight's physician assistant, Ms. Teresa Turgeon, PA-C, via telehealth[8]. She noted that Claimant presented with low back pain and was requesting continuation of his physical therapy to address the low back tightness as the dry needling helps to keep it tolerable. She noted that most of his pain is axial back and with forward flexion, documented that activity seemed to exacerbate the pain but that he lives with it because he has to continue with life. Claimant reported that he does a lot of activity modification to avoid stress on his back and takes meloxicam, if he needs it for the pain. On evaluation claimant had decreased forward flexion, extension, and lateral rotation in the extremes of range, shifts from right to left caused reproduction of pain on both the right and the left sides, pain with motion reproduced during the exam with forward flexion and return to extension across the low back in the L4-5 facet pain area. Following instructions to palpate, Claimant had tenderness in the lumbar paraspinals and a positive facet load. They discussed continuing therapy and a prescription was to be sent to the patient. Other treatment options were discussed as well. Claimant was also advised to continue activity as tolerated and continue with his home exercise program daily.[9]

23. On August 10, 2020 Fit Physical Therapy submitted to Insurer a written request for prior authorization for an additional 12 physical therapy visits related to his February 22, 2013 claim to Insurer.

24. Dr. Marc Steinmetz issued an independent medical evaluation upon Respondents' request dated April 27, 2021. Dr. Steinmetz reviewed records provided which included records from Fit Physical Therapy, a Job Demands Analysis, the settlement documents in the 2017 claim, the Final Admission of Liability in the 2013 claim as well as medical records from Dr. Knight and the impairment rating issued by Dr. Roberta Anderson Oeser[10]. The report makes multiple credibility determinations. He noted that there are several notations in the medical records with regard to Claimant engaging in training for a triathlon such as cycling, swimming, hiking, that tighten up his back. He also had records stating that Claimant engaged in snow shoeing, which also tightened up his back. Dr. Steinmetz confirmed during his evaluation that Claimant continued to use his bicycle during the summer on occasion and his stationary bike as well as snow shoeing and hiking. Claimant advised Dr. Steinmetz that he had not recently been swimming because the gyms were closed because of the pandemic. He advised that Panorama would provide him with prescriptions every year for physical therapy and obtained meloxicam from his general practitioner. Claimant advised Dr. Steinmetz that his back would flare up when sitting too long at work.

25. Dr. Steinmetz noted on exam that Claimant's low back was tender at the paraspinal muscles but had no appreciable spasms. Claimant also complained of tenderness in the gluts and hamstrings. Dr. Steinmetz stated that Claimant had normal range of motion, had good reflexes and strength, no atrophy in the legs or palpable trigger

[8] This ALJ takes judicial notice that Colorado was under COVID-19 pandemic statewide restrictions beginning March 2020 through the end of 2020 and telehealth was a common practice during the period.
[9] Neither party provided a copy of the therapy prescription issued on this date.
[10] Other records are mentioned involving the neck injury, which are not relevant here, including a report from Dr. Steinmetz from 2019.

points. He noted that Claimant had waxing and waning of low back symptoms but could not appreciate what this was due to other than Claimant's mentions of prolonged sitting at work. He opined that Claimant no longer required treatment related to the 2013 low back injury. He stated that the physical therapy may be reasonably necessary but related to other temporary exacerbations caused by Claimant's activities and work.

26. Claimant had multiple physical therapy visits between the first evaluation with Fit Physical Therapy on June 17, 2015 and the last report submitted into evidence for December 21, 2020. Additional physical therapy records from PT Physical therapy addressed the cervical spine complaints, which are not relevant to this matter, covering periods from April 11, 2018 to March 23, 2021. [Exhibit I, bates 145-241.]

27. The payment log shows that there were 64 payments made to Fit Physical Therapy for the period of June 17, 2015 through October 8, 2019 by Respondents under the low back claim, which would represent a little more than once per month or 1.23 per month. Nothing in the payment log certifies that all payments made were related to the 2013 claim, but they correspond with the records submitted into evidence. While Claimant continued with PT after October 8, 2019, some of the records document it was for the cervical spine condition unrelated to the low back claim and some address the 2013 claim.

28. Claimant testified he continued to see Dr. Knight after MMI, who recommended a course of maintenance treatment, including physical therapy, a home exercise program, dry needling and other therapies to maintain his function and diminish his low back pain. Claimant testified he would not always specifically request the continued PT though he discussed treatment options. Sometimes Fit PT would contact Dr. Knight's office to get a prescription for continued maintenance when the prescriptions would run out. This has continued since 2015.

29. Claimant testified that he would typically be seen by physical therapy once a month to diminish tightness and maintain mobility of his lumbar spine. Claimant stated when he does not see the therapist, that he has an increase in stiffness and pain in his lower back area. He stated that Insurer would pay for his care and he did not hear about any denial of therapy until approximately 2020. Claimant has continued with PT as it has assisted him in maintaining a baseline.

30. Claimant stated that he has continued pain in his low back and persistent muscular tightness and dysfunction for which he gets the dry needling treatment. Claimant testified that he does exercise but that he does nothing that is too intense. He primarily sees the therapist for his low back but they do sometimes address neck problems.

31. Claimant had been involved in a motor vehicle accident in 2008, for which he was not injured and sought no medical care. He was involved in a second very low velocity motor vehicle accident in approximately 2009, for which he had no injuries and sought no medical care.

32. Claimant had been involved in organized sports when he was a teen, like rugby and soccer, but it had been a very long time since he had engaged in those organized types of activities. He also used to do mountain biking and trail biking but that was also some time ago, before his 2011 surgery. He stated that he has kicked a soccer ball with his son but has not engaged in organized soccer for some time. He stated that he has not engaged in any triathlons, but he did do the Pike's Peak marathon but mostly walked though it was a timed event. He also goes snow shoeing approximately twice a year, but only takes easy trails as the poling affects his neck. He does bike on occasion on a standard bike. He stated that he cannot use a racing bike any longer as he is unable to handle the pressure on his neck since his 2017 neck injury. He testified that he gave his racing bike to his son as he could no longer use it due to his neck injury. He has not had any incidents or intervening events since the 2013 injury affecting his low back. In fact, Claimant stated that he has now curtained any activities that might exacerbate or flare his lower back symptoms, and needs the therapy to keep him active.

33. The Regional General Adjuster (Adjuster) for Insurer testified that she has worked for Insurer, managing workers' compensation claims, which include indemnity and medical benefits. She took over the January 20, 2017 claim for the neck injury in W.C. No. 5-073-253 from the beginning of the claim. She became involved with the low back claim after it had already been on a final admission. She stated that the February 22, 2013 claim was handled initially by Brandon (Prior Adjuster). She reviewed both claim files before the hearing.

34. Adjuster stated that she had never authorized any medical care on the 2013 claim personally. She noted that the Prior Adjuster had authorized and paid care at Fit Physical Therapy under the low back claim of 2013. She received a call from the therapist at Fit Physical Therapy to authorize ongoing physical therapy for Claimant around August 2020. Adjuster responded that she did not understand why the physical therapist was requesting authorization since the neck claim was closed. The therapist then gave the Adjuster the correct claim number for the open low back claim. However, the claim was under an old system, she did not have access to it and advised she would not authorize care. The therapist contacted Insurer multiple other times, though others within the insurance company took those calls.

35. Adjuster testified that she looked at the payment log, noting that physical therapy was paid on the low back claim through October 8, 2019. She did not understand why the provider was billing on this claim. However, Adjuster stated that physical therapy was authorized and paid for by Insurer through October 8, 2019.

36. Adjuster testified that there was a report received by Insurer from Dr. Knight's office recommending the physical therapy but that she believed it was for the neck, not the back. However, a proper request for prior authorization pursuant to Rule 16 was not received according to Adjuster, just the report prescribing it. She further stated that the report of July 31, 2020 was from a physician assistant at Panorama, not the doctor. Adjuster testified that since she had not technically received a Rule 16 request, no formal denial had been issued and she had verbally denied any authorization for physical therapy.

37. On August 14, 2020 Adjuster wrote to Fit Physical Therapy that they would not be authorizing any treatment on the lumbar spine claim because they had not received a proper Rule 16 request. They additionally stated that they would have Claimant undergo an independent medical examination to determine causation of the ongoing treatment.

38. Dr. Marc Steinmetz testified on October 26, 2021 during a post hearing deposition. Dr. Steinmetz was qualified as an expert in occupational medicine. He authored two separate independent medical evaluations on behalf of Respondents. The first was dated March 27, 2019 involving the 2017 neck injury claim. The second was dated April 27, 2021 involving the low back claim. Dr. Steinmetz documented that there were several mentions of physical activities like hiking and swimming, Claimant engaged in, that would temporarily aggravate his low back, specifically in 2016. He also mentioned that Claimant was engaged in exercises including squats that would tighten his groin and low back. Dr. Steinmetz indicated that Claimant had temporary aggravations engaging in travelling and sitting at work. Dr. Steinmetz mentions repeatedly that Claimant mentioned that he had had a groin pain or strain from squats. His ultimate opinion is that the low back injury of 2013 did not cause the need for physical therapy but that Claimant's activities did, and he found Claimant not credible in his recounting of those physical activities, stating that the subsequent new job may have been the cause for Claimant's need for continuing physical therapy.

39. As found, Dr. Steinmetz is not credible. The February 17, 2020 report from Fit Physical Therapy states specifically that Claimant "had a little groin pull with squats but feeling better now." The physical therapy note further states that his low back is a little tight but has been working on more stretching of hips and iliotibial band as he cannot exercise due to his neck injury. At the time of MMI in 2015, Dr. Knight continued to recommend medications as well as continuing physical therapy. Dr. Anderson Oeser encouraged Claimant to continue his independent exercise program to maintain MMI and to return to Dr. Knight for follow up including dry needling. Throughout the record, both the providers at Panorama as well as the therapists at Fit Physical Therapy kept encouraging Claimant to exercise and maintain his level of activity in order to continue in a stable condition. This included recommendations for continued therapy and exercise. This ALJ infers from all the prescriptions for physical therapy that this was needed to provide Claimant the ability to keep at his baseline MMI status without further actual aggravation. As found, the fact that medical records document that Claimant continued to attempt various endeavors to maintain that level of physical activity is indicative that he was trying to follow the directions of his providers. The evidence fails to show that Claimant's normal activities of daily living, including his daily exercise, activities and work aggravated Claimant's condition. Claimant continued to require physical therapy to maintain his low back condition.

40. As found, Claimant's testimony is more credible than Dr. Steinmetz's, despite Dr. Steinmetz's multiple attempts to discredit Claimant remarks and testimony. Claimant is found credible. Respondents have failed to prove by a preponderance of the evidence that they are entitled to withdraw the admission for reasonable and necessary maintenance care related to the February 22, 2013 low back injury claim.

41. As found, Panorama Orthopedics and Spine, Dr. Knight and her physician assistants, Christina Lee, PA-C. and Teresa Turgeon, PA-C are authorized medical providers. Respondents admitted that Panorama and Dr. Knight was were authorized medical providers. In fact, Ms. Lee recommended physical therapy and Respondents authorized the therapy in 2016. As found, Ms. Turgeon is within the chain of referral and an authorized medical provider. Claimant has proven by a preponderance of the evidence that Ms. Turgeon is an authorized treating provider in the February 22, 2013 claim.

42. As found, Fit Physical Therapy is an authorized provider. Claimant testified that Panorama would no longer provide maintenance care at the Panorama physical therapy department and was provided a list of therapy clinics by Dr. Knight's staff. Claimant selected Fit Physical Therapy as it was closest to Employer's location. Claimant started physical therapy shortly after MMI on June 17, 2015 with Fit Physical therapy. The initial record from Fit Physical Therapy noted that Dr. Knight made the referral. Claimant and the records from Fit Physical Therapy are found credible in this matter. Further, the records showed that from June 17, 2015 through October 8, 2019 Respondents continued to make payment to Fit PT. It is inferred from these actions that Respondents acknowledge and accepted the referrals from Dr. Knight and Ms. Lee to Fit Physical Therapy. The chain of referral was preserved. Claimant has proven by a preponderance of the evidence that Fit Physical Therapy is authorized to treat Claimant as an authorized treating provider.

43. Ms. Turgeon issued a recommendation for physical therapy as Claimant continued to have back pain as a result of his 2013 low back injury. As found, Claimant has proven by a preponderance of the evidence that Claimant continues to be entitled to physical therapy as prescribed by Ms. Turgeon on July 31, 2020.

44. Also as found, Claimant has failed to show by a preponderance of the evidence that Dr. Knight appropriately recommended treatment specifically for the low back condition on August 8, 2019. She changed the format of the prescription, and the ordering diagnosis is for cervicalgia. While she may have intended to provide a prescription for both the 2013 and the 2017 injuries at the same time as she noted treatment of the spine location for therapy was both for the lumbar spine and the cervical spine, it is not clearly noted and not sufficient evidence to show that the treatment ordered was for the 2013 low back injury claim.

CONCLUSIONS OF LAW

A. General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the claimant's rights nor in favor of the rights of the respondents; and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office (ICAO)*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2018). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Burden of Proof

The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits. Sections. 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000; *Kieckhafer v. Indus. Claim Appeals Office*, 284 P.3d 202, 205 (Colo. App. 2012).

However, where an insurer seeks to terminate benefits that have been admitted, they must prove by a preponderance of the evidence that Claimant requires no additional post-MMI treatment. See § 8-43-201(1), C.R.S. By filing an admission of liability, the employer or insurer has "admitted that the claimant has sustained the burden of proving entitlement to benefits," to which Respondents have admitted. *City of Brighton v. Rodriguez*, 318 P.3d 496, 507 (Colo. 2014).

A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo.

306, 592 P. 2d 792 (1979; *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984).

C. Authorized Medical Provider

"Authorization" refers to the physician's legal authority to treat the injury at the respondents' expense. *Popke v. Industrial Claim Appeals Office*, 944 P.2d 677 (Colo. App. 1997). Section 8–43–404(5), C.R.S.2011, gives employers or insurers the right to choose treating physicians in the first instance in order to protect their interest in overseeing the course of treatment for which they could ultimately be held liable. The initial right to select a treating physician is an obligation that must be met forthwith upon notice of an injury, *Bunch v. Indus. Claim Appeals Office*, 148 P.3d 381, 383 (Colo.App.2006), and if medical services are not timely tendered by the employer or insurer, the right of selection passes to the employee, *Andrade v. Indus. Claim Appeals Office*, 121 P.3d 328, 330 (Colo.App.2005). Further, a claimant "may engage medical services if the employer has expressly or impliedly conveyed to the employee the impression that the employee has authorization to proceed in this fashion." *Greager v. Industrial Commission*, 701 P.2d 168, 170 (Colo. App. 1985); see also, Brickell v. Business Machines, Inc., 817 P.2d 536. Lastly, an insurer may, by their conduct, waive the right to object that the medical provider was not an authorized provider. *Wielgosz v. Denver Post Corporation*, W. C. No. 4-285-153, (ICAP, December 3, 1998).

Here, Respondents have conceded that Dr. Karen Knight of Panorama Orthopedics and Spine was an authorized treating physician by their actions in filing a Final Admission of Liability on April 15, 2015, noting Respondents' position regarding medical benefits after MMI. The FAL specifically stated that Insurer "will admit to pay reasonable, necessary, and related treatment recommended by Dr. Karen Knight." Clearly Dr. Knight is an authorized treating physician.

Further, it is clear that Claimant was treated at of Panorama Orthopedics and Spine by other providers in addition to Dr. Knight. For example, on December 21, 2016 Christina Lee, PA-C. was the provider to examine Claimant. However, the prescription for therapy for the same day for 12 visits for the continuing lumbar radiculopathy for gentle myofascial release, spine neutral core endurance program with emphasis on dynamic motor control was issued directly by Dr. Knight. This implies that other providers within Panorama were authorized.

As found, Panorama Orthopedics and Spine, Dr. Knight and her physician assistants, Christina Lee, PA-C. and Teresa Turgeon, PA-C are authorized medical providers. As found, Ms. Turgeon is within the chain of referral and an authorized medical provider. Claimant has proven by a preponderance of the evidence that Ms. Sturgeon is an authorized treating provider.

A referral in the normal progression of authorized treatment allows for the authorized treatment provided by the medical provider accepting the referral. *Greager v. Industrial Commission,* 701 P.2d 168 (Colo. App. 1985). When the referral reveals it is based on the independent medical judgment of the referring doctor, it may be construed as an authorized referral. *City of Durango v. Dunagan*, 939 P.2d 496, 500 (Colo. App. 1997). Dr. Knight, Ms. Lee and Ms. Turgeon all work for the same clinic at Panorama Orthopedics. The ALJ infers from this information that Dr. Knight requested that the PA-Cs examine and treat Claimant for his work related February 22, 2013 injury. In fact, Ms. Lee confirmed that she had consulted with Dr. Knight and she confirmed that she agreed to proceed with the referral to physical therapy.

As found, Fit Physical Therapy is an authorized provider. Claimant testified that Panorama would no longer provide maintenance care at the Panorama physical therapy department and was provided a list of therapy clinics by Dr. Knight's staff. Claimant selected Fit Physical Therapy as it was closest to Employer's location. Claimant started physical therapy shortly after MMI on June 17, 2015 with Fit Physical therapy. The very first report from Fit Physical Therapy notes that Dr. Knight made the referral. Claimant is found credible in this matter.

Further, the records show that from June 17, 2015 through October 8, 2019 Respondents continued to make payment to Fit Physical therapy. It is inferred from these actions and conduct that Respondents acknowledged and accepted the referral from Dr. Knight and the PA-Cs to Fit Physical therapy. Therefore, the chain of referral was preserved. Claimant has proven by a preponderance of the evidence that Fit Physical Therapy (a.k.a. Fyzical Therapy & Balance Centers) is authorized to treat Claimant as an authorized treating provider.

D. Termination of Grover medical benefits

Respondents are liable for authorized medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. Section 8-42-101(1)(a), C.R.S.; *Sims v. Indus. Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Medical benefits may extend beyond MMI if a claimant requires treatment to relieve symptoms or prevent deterioration of their condition. *Grover* v. *Indus. Commission*, 759 P.2d 705 (Colo. 1988). If the claimant establishes the probability of a need for future treatment, he is entitled to a general award of medical benefits after MMI, subject to the respondents' right to dispute causation or reasonable necessity of any particular treatment. *Hanna v. Print Expediters, Inc*., 77 P.3d 863 (Colo. App. 2003). The claimant must prove entitlement to post-MMI medical benefits by a preponderance of the evidence. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997).

Here, Respondents admitted by Final Admission of Liability dated April 21, 2015 with a general award of medical benefits that are reasonably necessary and related to the claim after the maximum medical improvement determination. Claimant continued to receive post-MMI care from 2015 through October 8, 2019. However, after the date Claimant received physical therapy on October 8, 2019, Respondents alleged that the medical care that Claimant was receiving from his ATP, Fit Physical Therapy was no longer reasonable, necessary or related to the February 22, 2013 injury. Respondents contested continuing medical care and stated that it is Claimant's burden to prove that the care continues to be reasonable, necessary and related to the injury.

In essence, Respondents seeks to withdraw the "admission" for medical treatment after MMI on the theory that no further care is reasonably necessary or causally related to the February 22, 2013 admitted injury. While Claimant must prove initial entitlement to disputed medical benefits by a preponderance of the evidence to establish care, the Act was amended in 2009[11] to place the burden of proof on the party seeking to modify an issue determined by a previous admission or order. Therefore, where Respondents seek to terminate previously admitted maintenance benefits, Respondents must prove by a preponderance of the evidence that treatment is no longer reasonably necessary or causally related to the injury. Section 8-43-201(1); *Salisbury v. Prowers County School District RE2*, W.C. No. 7-702-144 (June 5, 2013); *Dunn v. St. Mary Corwin Hospital*, W.C. No. 4-754-838 (October 1, 2013).

Respondents rely on the reports and testimony of Dr. Marc Steinmetz for the proposition that the physical therapy as well as the care he receives under Panorama Orthopedics, while it may be reasonably necessary, is no longer related to the claim. As found, Dr. Steinmetz is not credible. He relies on the fact that almost thirty years after Claimant engaged in the organized sports, like rugby and soccer, when Claimant was in his teens, triggered the underlying pathology that caused the required ongoing physical therapy treatment. He further relies on the fact that Claimant has had exacerbations following activities that he engaged in the years following reaching MMI, including swimming, hiking and biking. As found, Dr. Steinmetz is not credible. The February 17, 2020 report from Fit Physical Therapy states specifically that Claimant's his low back is a little tight but has been working on more stretching of hips and iliotibial band. At the time of MMI in 2015, Dr. Knight continued to recommend medications as well as continuing physical therapy. At the time of the hearing, Claimant stated that he had not been taking medications and depended on the physical therapy to keep him as functional and active as he was able. Dr. Anderson Oeser encouraged Claimant to continue his independent exercise program to maintain MMI. Throughout the record, both the providers at Panorama as well as the therapists at Fit Physical Therapy kept encouraging Claimant to exercise and maintain his level of activity in order to continue in a stable condition. This included recommendations for continued therapy and exercise. This ALJ infers from all the prescriptions for physical therapy that this was needed to provide Claimant the ability to keep at his baseline MMI status without further actual aggravation. The fact that medical records document that Claimant continued to attempt various endeavors to maintain that level of physical activity is indicative that he was trying to follow the directions of his providers. This ALJ infers from the record that the occasional exacerbations from engaging in activities such as swimming, hiking, snow shoeing and biking as well as work as an engineer, are all activities contemplated by the providers as Claimant's normal activities. As found, Claimant was instructed by his medical providers, that he continue his normal activities as he was able and was given no restrictions. As

[11] See Sec. 8-43-201(2), C.R.S. "The amendments made to subsection (1) of this section by Senate Bill 09-168, enacted in 2009, are declared to be procedural and were intended to and shall apply to all workers' compensation claims, regardless of the date the claim was filed."

found, those activities may have exacerbated the low back by causing tightness but did not aggravate his February 22, 2013 work related low back injury.

As found, Claimant's testimony is more credible than Dr. Steinmetz's, despite Dr. Steinmetz's multiple attempts to discredit Claimant's remarks and testimony. Claimant is found credible. Respondents have failed to prove by a preponderance of the evidence that they are entitled to withdraw the admission for reasonable and necessary maintenance care related to the February 22, 2013 low back injury claim.

As found, Claimant was encouraged by Dr. Anderson Oeser to engage in an independent exercise program and released Claimant without restrictions as did Dr. Knight. Claimant was frequently encouraged to be active by his therapists, as shown in the September 17 and November 21, 2019 notes. The persuasive evidence in this matter is that Claimant was placed at MMI with no restrictions advised to remain as active as possible, which he did, as he was able. It is concluded that Respondents failed to show that there has been an intervening event that might have terminated benefits or prove by a preponderance of the evidence that they are entitled to withdraw the admission of liability regarding continuing maintenance care.

E. Medical Benefits that are Reasonably Necessary and Related

The right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301, C.R.S. See *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991); *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986).

Section 8-42-101(1)(a), C.R.S., provides that Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *Snyder v. Industrial Claim Appeals Office*, *supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002); *In re Claim of Foust*, I.C.A.O, WC, 5-113-596 (COWC October 21, 2020).

Claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities and not the underlying preexisting condition. See *Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 448 (1949); *Abeyta v. Wal-Mart Stores*, W.C. No. 4-669-654 (January 28, 2008).

The issue of whether medical treatment is necessary for the compensable aggravation or a worsening of Claimant's pre-existing condition is also one of fact for resolution by the ALJ based upon the evidentiary record. See *University Park Care Center v. Industrial Claim Appeals Office,* 43 P.3d 637 (Colo. App. 2001); *Standard Metals Corp.*

v. Ball, 172 Colo. 510, 474 P.2d 622 (1970); *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985). The Act places full responsibility on the employer for benefits as a result of a work injury when there is an aggravation of an underlying condition. *United Airlines, Inc. v. ICAO*, 993 P.2d 1152 (Colo. 2000). Expert medical opinion is not needed to prove causation where circumstantial evidence supports an inference of a causal relationship between the injury and the claimant's condition. *Savio House v. Dennis,* 665 P.2d 141 (Colo. App. 1983). Where conflicting expert opinion is presented, it is for the ALJ as fact finder to resolve the conflict. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). Further, when expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); *Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992). Lastly, Rule 16 prior authorization process provides a mechanism for providers to seek advance approval and guarantee their charges, but it imposes no substantive limitation on a claimant's entitlement to medical treatment that is otherwise reasonably needed and causally related to the work accident. The fact that Claimant's provider did not respond to Respondents' request for a formal request for authorization pursuant to Rule 16 does not preclude Claimant from seeking to have the treatment covered by Respondents at hearing. *Garcia v. McDonalds Corp*., W.C. No. 4-862-853-01 (June 19, 2014); *Sims v. Industrial Claim Appeals Office,* 797 P.2d 777 (Colo. App. 1990) ("when medical treatment results from a referral by an authorized treating physician, such treatment is considered part of the normal progression of authorized treatment and the express consent of the employer is not required.")

The Medical Treatment Guidelines (MTGs) are regarded as the accepted professional standards for care under the Workers' Compensation Act. *Hernandez v. University of Colorado Hospital*, W.C. No. 4-714-372 (January 11, 2008); see also *Rook V. Industrial Claim Appeals Office*, 111 P.3d 549 (Colo. App. 2005). The Medical Treatment Guidelines, Rule 17-2(A), W.C.R.P. provide "All health care providers shall use the Medical Treatment Guidelines adopted by the Division." In spite of this direction, it is generally acknowledged that the Guidelines are not sacrosanct and may be deviated from under appropriate circumstances. *Nunn v. United Airlines,* W.C. 4-785-790 (ICAO September 9, 2011). While the Guidelines may carry substantial weight, and provide substantial guidance, the ALJ is not bound by the Guidelines in deciding individual cases or the principles contained therein alone. Indeed, Section 8-43-201(3), C.R.S. specifically provides:

> It is appropriate for the director or an administrative law judge to consider the medical treatment guidelines adopted under section 8-42-101(3) in determining whether certain medical treatment is reasonable, necessary, and related to an industrial injury or occupational disease. *The director or administrative law judge is not required to utilize the medical treatment guidelines as the sole basis for such determinations.* (*Emphasis added*).

Pursuant to W.C.R.P. Rule 17-1(A), the statement of purpose of the guidelines is as follows:

> In an effort to comply with its legislative charge to assure appropriate medical care at a reasonable cost, the director of the Division has promulgated these 'Medical Treatment Guidelines.' This rule provides a system of evaluation and treatment guidelines for high cost or high frequency categories of occupational injury or disease to assure appropriate medical care at a reasonable cost.

W.C.R.P. Rule 17-5(C) provides "The treatment guidelines set forth care that is generally considered reasonable for most injured workers. However, the Division recognizes that reasonable medical practice may include deviations from these guidelines, as individual cases dictate."

W.C.R.P. Rule 17, Exhibit 1, Low Back Pain MTG, Section B(14) addresses care beyond MMI. They were effective March 30, 2014. While there is a proposed new Exhibit 1 MTG, they are not yet effective. Respondents specifically point to pages 3, 63 and 86 through 91. However, Exhibit 1 is only for care prior to MMI. Section B(14) of the Low Back Medical Treatment Guidelines specifically state:

> MMI should be declared when a patient's condition has plateaued to the point where the authorized treating physician no longer believes further medical intervention is likely to result in improved function. However, some patients may require treatment after MMI has been declared in order to maintain their functional state. The recommendations in this guideline are for pre-MMI care and are not intended to limit post-MMI treatment.

As found, Claimant was placed at MMI on March 18, 2015 by Dr. Karen Knight and Respondents admitted to this date of MMI in the Final Admission of Liability dated April 21, 2015.

In dealing with post MMI care for a patient that has not recovered, continues to have chronic pain, and required continuing care, the Chronic Pain Disorder Medical Treatment Guidelines are more instructive. W.C.R.P. Rule 17, Exhibit 9, CDP MTG Section G addresses the appropriateness of Therapeutic Procedures that are non-operative, including dry needling under Subsection 19(n), which specifically states in pertinent part:

> The goal of dry needling is to improve overall function and disability by decreasing pain and improving range-of-motion, strength, and/or muscle firing patterns. It is a technique that is utilized in conjunction with other physical therapy treatments including therapeutic exercise, manual therapy, stretching, neuromuscular re-education, postural education, and pain neuroscience education.
>
> Indications: Trigger point dry needling is indicated when myofascial trigger points are identified in muscles in conjunction with decreased range-of-motion, decreased strength, altered muscle firing patterns, and/or pain which negatively affect a patient's overall function.

W.C.R.P. Rule 17, Exhibit 9, CDP MTG Section (I) specifically addresses maintenance management of ongoing care and states in pertinent part:

> Successful management of chronic pain conditions results in fewer relapses requiring intense medical care. Failure to address long-term management as part of the overall treatment program may lead to higher costs and greater dependence on the health care system. Management of CPD continues after the patient has met the definition of maximum medical improvement (MMI). MMI is declared when a patient's condition has plateaued and an authorized treating physician believes no further medical intervention is likely to result in improved function. When the patient has reached MMI, a physician must describe in detail the maintenance treatment.
>
> …
>
> Maintenance care will be based on principles of patient self-management. When developing a maintenance plan of care, the patient, physician, and insurer should attempt to meet the following goals:
>
> ● Maximal independence will be achieved through the use of home exercise programs or exercise programs requiring special facilities (e.g., pool, health club) and educational programs;
>
> ● Modalities will emphasize self-management and self-applied treatment;
>
> ● Management of pain or injury exacerbations will emphasize initiation of active therapy techniques and may occasionally require anesthetic injection blocks.
>
> ● Dependence on treatment provided by practitioners other than an authorized treating physician will be minimized;
>
> ● Reassessment of the patient's function must occur regularly to maintain daily living activities and work function;
>
> ● Patients will understand that failure to comply with the elements of the self-management program or therapeutic plan of care may affect consideration of other interventions.

W.C.R.P. Rule 17, Exhibit 9, (I)(7)& (8) provide some guidance of the type of care and maintenance duration of the management of therapy and dry needling. The *Guidelines* further provide, in relevant part, that "medications should be clearly linked to improvement of function, not just pain control." Furthermore, the *Guidelines*, specify that, "examples of routine functions include the ability to perform work tasks… or participate in normal family and social activities." WCRP 17, Exhibit 9(I)(6).

As found, Claimant has benefited from the maintenance care prescribed by Panorama Orthopedics through Dr. Knight and her physician assistants in order to keep Claimant functioning, working, able to carry out his activities of daily living and exercising in order to remain at a baseline established at the time he was placed at MMI.

It is appropriate for an ALJ to consider the guidelines while weighing evidence, but the MTGs are not definitive. *Jones v. T.T.C. Illinois*, Inc., W.C. No. 4-503-150 (May 5, 2006); *aff'd Jones v. Industrial Claim Appeals Office* No. 06CA1053 (Colo. App. March 1,

2007) (not selected for publication); *Stamey v. C2 Utility Contractors et al*, W.C. No. 4-503-974 (August 21, 2008). Concerning the issue presented, the MTG's indicate that "[t]here is some evidence that the ALJ may decide the weight to be assigned the provisions of the *Guidelines* upon consideration of the totality of the evidence. See *Cahill v. Patty Jewett Golf Course,* WC 4-729-518 (ICAO February 23, 2009); *Siminoe v. Worldwide Flight Services,* WC 4-535-290 (ICAO November 21, 2006).

As found in this case, the totality of the evidence presented supports a conclusion that Claimant has required maintenance care in the form of physical therapy which include active therapy, exercise, myofascial release, spine neutral core endurance, modalities as needed, independent exercises, back biomechanics education and dry needling according to Dr. Knight's report of May 1, 2015. The care Claimant received from June 17, 2015 through October 8, 2019 and paid for by Respondents was reasonable, necessary, and related to the February 22, 2013 low back injury.

On August 8, 2019, Dr. Knight specifically changed the format of the prescriptions she had previously issued, and the ordering diagnosis is for cervicalgia. While she may have intended to provide a prescription for both the 2013 and the 2017 injuries at the same time, this is not persuasive. Dr. Knight noted that the treatment of the spine location for therapy was both for the lumbar spine and the cervical spine. However, it is not clearly noted and not substantial evidence to show that the treatment ordered was for the 2013 low back injury claim for the 12 weeks of therapy after October 8, 2019 through July 30, 2020. As found, Claimant has failed to show by a preponderance of the evidence that Dr. Knight appropriately recommended treatment specifically for the low back condition on August 8, 2019, which would cover therapy beginning October 9, 2019 through July 30, 2020.

As found, on September 17, 2019 the therapist, Patricia McNutt, PT, from Fit Physical Therapy documented that Claimant continued to treat for the low back pain. It stated that Claimant continued to complain of bilateral leg pain and lumbar pain, had tightness in the low back and had been working on more stretching on hips and ITband. They worked on neuromuscular re-education from T2-S1, with e-stim, low back massage therapy as well as the gluteals and hips. The therapist stated that Claimant greatly benefited from monthly therapy to address impairments and allow him to maintain physical activity, reduce pain, reduce need for medications, continue working out as he is able and continue with his lifestyle. Dr. Knight and the physical therapists from Fit Physical Therapy are credible and more persuasive than the contrary opinion of Dr. Steinmetz, who is found not persuasive.

Ms. Turgeon of Panorama Orthopedics and Spine issued a recommendation for physical therapy as Claimant continued to have low back pain as a result of his February 22, 2013 low back injury. As found, Claimant has proven by a preponderance of the evidence that Claimant continues to be entitled to physical therapy as prescribed by Ms. Turgeon on July 31, 2020.

ORDER

IT IS THEREFORE ORDERED THAT:

1. Respondents have failed to prove by a preponderance of the evidence that maintenance medical care should be terminated and the February 22, 2013 claim closed.

2. Insurer shall pay for the authorized reasonably necessary and related treatment of Claimant from Panorama Orthopedics and Spine, including but not limited to the maintenance care prescribed by authorized treating providers, Dr. Karen Knight and Teresa Turgeon, PA-C from October 8, 2019 and continuing as maintenance care.

3. Insurer shall pay for the physical therapy provided by authorized provider, Fit Physical Therapy (now Fyzical Therapy & Balance Centers) that is reasonably necessary and related to the Claimant's February 22, 2013 low back work injury, including pursuant to the recommendations of Ms. Turgeon on July 31, 2020.

4. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge' s order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 29th day of November, 2021.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-140-043-001

ISSUES

I. Whether Claimant has established that Prehearing Administrative Law Judge John Sandberg's May 7, 2021, Order denying her request for a disfigurement award was in error and should be reversed.

II. If Claimant establishes Judge Sandberg erred, the amount of disfigurement benefits to which Claimant is entitled.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. Claimant suffered an admitted injury on May 6, 2020.
2. Claimant testified that she suffered what was categorized as a second degree burn after burning her arm on a fryer. (T 12:11; 19:22).
3. On May 19, 2020, Claimant was placed at maximum medical improvement. (Rs' Ex. A at 9).
4. On June 11 ,2020, Respondents filed a Final Admission of Liability (FAL) admitting to $0 disfigurement and stating that "benefits not admitted are specifically denied." The FAL has a completed certificate of mailing dated June 11, 2020. Claimant's name has a check mark next to it, and her address is listed as 526 Villa Dr., Apt 1504, Castle Pines, CO 80108. (Rs' Exhibit A at 2). The FAL, and its attachments, encompasses 8 pages. (Rs' Exhibit A at 2-9). Page 8 of the FAL also has a stamp dated June 11, 2020, which says "copies of this document mailed to the following" with check marks next to "Clmt." *Id*. at 9.
5. Claimant testified that when she lived in Colorado her address was 526 Villa Dr., Apt 1504, in Castle Pines, Colorado. (T 40:15-17). This was her address until she moved to California in August 2021. (T 41:19-25).
6. Claimant testified that she received the FAL. (T 43:6-25; 44:1-11).
7. Claimant had 30 calendar days, from the date of mailing, to object to the FAL and file a Notice and Proposal for a DIME and/or an Application for Hearing for disfigurement benefits.
8. Claimant did not file an objection to the FAL within 30 days of the June 11, 2020, FAL.
9. Claimant did not file a Notice and Proposal for a DIME and/or an Application for Hearing requesting disfigurement benefits within 30 days of the June 11, 2020, FAL.
10. On April 23, 2021, nearly a year after the June 11, 2020, FAL was filed and mailed to Claimant, Claimant filed a Request for Disfigurement Award, including photos of her

disfigurement. The Request for Disfigurement Award was received on April 30, 2021. (Rs' Ex B at 18). She listed her address as the Villa Drive address in Castle Pines. (T 46:1-3).

11. Claimant testified that her April 23, 2021, Request for Disfigurement Award was the first date she filed a request for disfigurement benefits. (T 39:10-17). She also testified that she was not rejecting the FAL. *Id*.

12. Respondents filed an Opposed Motion to Strike Claimant's April 23, 2021, Request for Disfigurement Award. Respondents opposed motion was granted by Prehearing Administrative Law Judge (PALJ) John Sandberg who denied Claimant's request for disfigurement benefits in his May 7, 2021, Order. PALJ Sandberg held that Claimant's request for disfigurement benefits was untimely and therefore denied, citing the Industrial Claim Appeals Office's holding in *Vasquez Cruz v. Lancelot,* W.C. 5-040-419 (ICAO 5/17/18). (Rs' Ex C at 20-21). Claimant testified that she did receive this Order by mail to her 526 Villa Dr., Apt 1504 address in Castle Pines. (T 42:13-18).

13. Claimant subsequently filed an undated Application for Hearing, appealing PALJ Sandberg's Order. (Rs' Ex D at 24). The endorsed issues were clarified in a pre-hearing conference held on June 29, 2021. PALJ Marcus Zarlengo clarified that the relief Claimant was seeking consisted of disfigurement benefits and an appeal of PALJ Sandberg's May 7, 2021, Order. (Rs' Ex E at 29).

14. At hearing, Claimant testified that PALJ Sandberg's Order was in error because the scar pictures were taken timely - six months after her date of injury. (T 35:2-4).

Tisha R[Redacted]

15. Tisha R[Redacted] is a data administrative support supervisor for CCMSI and has worked in that position for 22 years. (T 49:13-19).

16. Ms. R[Redacted] testified that she assisted with mailing the FAL in this claim to the Claimant. (T 50:2-4). She testified that the adjuster gave the FAL to an administrative assistant to prepare for mailing, and that Ms. R[Redacted] then mailed the original to the Claimant, making a copy for the file to show it was sent to the Claimant. (T 50:25; 51:1-3). Ms. R[Redacted] testified she mailed the FAL to Claimant at 526 Villa Dr., Apt 1504, Castle Pines, CO 80108 on June 11, 2020, with adequate prepaid postage. (T 52:18-25; 53:1). Ms. R[Redacted] made a record of the mailing on the FAL with checkmarks on the FAL and also by making claims note documenting the mailing. (T 51:16-25; 52:1-4). Ms. R[Redacted] testified she also stamped the FAL documenting the mailing. (T 52:12-15).

17. The ALJ finds Ms. R[Redacted] 's testimony to be credible and persuasive.

18. Based on the certificate of mailing on the FAL as well as the testimony of Ms. R[Redacted] , the ALJ finds that the FAL, and its attachments, were mailed to Claimant, with proper postage, to her proper address on June 11, 2020.

19. Based on the testimony of Claimant and Ms. R[Redacted] , plus the Respondents' Exhibits, the ALJ finds Claimant received the FAL in a timely manner, i.e., within the 30-day time period to contest the FAL and file an Application for Hearing.

20. Claimant failed to establish that she filed an objection to the FAL within 30 days of the FAL being mailed on June 11, 2020. Claimant also failed to establish that she filed an

Application for Hearing requesting disfigurement benefits within 30 days of the FAL being mailed on June 11, 2020.

21. Claimant failed to overcome any presumption that she received the June 11, 2020, FAL shortly after it was mailed and in time to object and file an Application for Hearing.

22. Claimant did not establish that the time to object to the FAL and file a Notice and Proposal for a DIME and/or Application for Hearing should be extended because she did not receive actual notice, via receipt of the June 11, 2020 FAL, in a timely manner. For example, Claimant did not establish that she did not receive the FAL until after the 30-day time period to object and file an Application for Hearing had run.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant established that Prehearing Administrative Law Judge John Sandberg's May 7, 2021, Order denying her request for a disfigurement award was in error and should be reversed.

A. Claimant's appeal of PALJ Sandberg's Order is denied as Claimant failed to establish any legal basis to overturn the order.

PALJ John Sandberg held that Claimant's April 23, 2021, request for a disfigurement award was not timely because she failed to object to the June 11, 2020, FAL which admitted to $0 in disfigurement and apply for a hearing withing 30 days. PALJ Sandberg cites the holding in *Vasquez Cruz v. Lancelot* W.C. 5-040-419 (ICAO 5/17/18) to establish that if an FAL is filed, a claimant can object and pursue disfigurement regardless of the date of injury, and the 6-month time frame is inapplicable. Since no objection to the FAL was lodged, PALJ Sandberg ordered that the request for disfigurement was denied.

Claimant alleges PALJ Sandberg was in error because she did take photographs timely after 6 months. This is the sole allegation of error made by Claimant. The timing of Claimant's photographs is irrelevant to the ruling of PALJ Sandberg on whether a timely objection to the FAL was made. In fact, PALJ Sandberg noted the 6-month time period was irrelevant given the filing of the FAL. Accordingly, the ALJ finds that Claimant failed to meet her burden to establish that PALJ Sandberg's order was in error.

B. Claimant's appeal of PALJ Sandberg's Order is denied as there was not a timely objection to the FAL and Application for a Hearing for Disfigurement Benefits.

Pursuant to C.R.S. §8-43-203(2)(b)(II)(A) a case will be automatically closed as to the issues admitted in the final admission if the claimant does not, within thirty days after the date of the final admission, contest the final admission in writing and request a hearing on any disputed issues that are ripe for hearing. Case law holds that a claimant waives their right to litigate issues not raised on an application for hearing challenging a FAL. *See Olivas-Soto v. Genesis Consolidated,* W.C. 4-518-876 (November 2, 2005); affirmed 143 P.3d 1178 (Colo. 2005).

As found, the June 11, 2020, FAL was mailed to Claimant and timely received by Claimant. As a result, Claimant had 30 days from June 11, 2020, to file an objection to the FAL and File an Application for Hearing for disfigurement benefits. In this case, Claimant did not object to the FAL and did not file an Application for Hearing within 30 days of mailing of the June 11, 2020, FAL.

Moreover, Claimant admitted to receiving the June 11, 2020 FAL. She also admitted that the first "objection" and request for disfigurement was not filed until April 2021. Based on her testimony, and the evidence submitted at hearing, the PALJ's Order denying her request for a disfigurement award was proper given her failure to timely object to the June 11, 2020, FAL and apply for a hearing. As a result, the case closed on the FAL.

Yet even had Claimant not admitted to receiving the FAL, receipt is presumed based on the testimony of Tisha R[Redacted] and the evidence of proper mailing. The Industrial Claims Appeals Office has held that receipt through mail may be presumed as received by its addressee “when there is proper evidence of its mailing to a named person at a correct address, with adequate prepaid postage,” and that a properly executed certificate of mailing may create a presumption that a notice was received by the Claimant. *Munford v. Bowlen and Colorado Compensation Insurance Authority*, WC No. 3-889-101; 3-920-806; 3-966-582; 4-003-898; 4-205-807, 5-6 (ICAO July 14, 1995). This presumption is met in this case. Ms. R[Redacted] testified that she mailed the FAL to Claimant’s address with proper postage, contemporaneously documenting the mailing in multiple locations. The address Ms. R[Redacted] mailed the FAL to is the same Castle Pines address Claimant testified as living at during her time in Colorado, and testified that she received other orders, such as PALJ Sandberg’s Order denying her disfigurement benefits. As such, receipt of the FAL is presumed.

Whether through the presumption of receipt or through Claimant’s own admissions of receipt at hearing, it is established that Claimant received the June 11, 2020, FAL in a timely manner. It is also established that Claimant did not file any objection or other document until her April 2021, request for a disfigurement award with photos. This request was beyond the 30 days allowed and was not timely. Pursuant to the established law, this claim closed on the FAL. The ALJ finds and concludes that this claim closed as to the admitted issues – which includes disfigurement benefits - pursuant to the June 11, 2020, FAL on June 11, 2020.

II. Whether Claimant has proven by a preponderance of the evidence that she is owed a disfigurement award.

As set forth above, Claimant’s case closed on June 11, 2020, as to the admitted benefits set forth in the June 11, 2020, FAL – which included disfigurement benefits. Therefore, Claimant is not entitled to a disfigurement award.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Prehearing Administrative Law Judge John Sandberg’s May 7, 2021, Order is upheld.

2. The June 11, 2020, Final Admission of Liability is final.

3. Claimant’s request for disfigurement benefits is denied and dismissed with prejudice.

4. Any issues not addressed in this Order are reserved.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: November 29, 2021.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Whether Respondent produced clear and convincing evidence to overcome the impairment rating opinions of Dr. Thomas Higginbotham.

- If Respondents overcame the impairment rating determinations of Dr. Higginbotham, what is the correct percentage of impairment associated with Claimant's May 4, 2019 industrial injuries.

- Whether Claimant established, by a preponderance of the evidence, that she is entitled to an award for disfigurement.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant is a former veterinarian assistant of Employer. Claimant suffered admitted injuries to her face after being bitten by a large dog on May 4, 2019. According to the medical record,[1] Claimant was attempting to weigh a large pit bull dog when a door unexpectedly slammed shut. The noise from the slamming door spooked the dog, which lunged toward Claimant, biting her in the face. The dog's upper teeth penetrated the left upper aspect of Claimant's cheek and the teeth in the lower jaw penetrated her right lower cheek and jawline. Claimant reported a torqueing of her lower jaw when the dog clasped its jaws.

2. Claimant was able to free herself from the dog's mouth after which she proceeded to a Fire Station next door to Employer's offices for treatment. Claimant was triaged at the firehouse and advised to proceed to the emergency department (ED) at the local community hospital.

3. Claimant proceeded to the ED at Castle Rock Adventist Hospital where it was discovered that, in addition to the lacerations to her face and jaw, Claimant had superficial lacerations to her neck. Her wounds were sutured and she was given a prescription for antibiotics and a DPT booster shot prior to being discharged.

4. Claimant returned to the ED the next day with severe left-sided facial swelling. She was unable to open her jaw and had difficulty eating. Claimant was

[1] Neither party submitted any of Claimant's treatment records for review by the ALJ. Rather, the pertinent medical information cited in this order comes from review of the impairment rating report of Dr. Samuel Chan, the Independent Medical Examination Reports of Dr. Michael Maher and Dr. Kathleen D'Angelo and the Division Independent Medical Examination (DIME) report of Dr. Thomas Higginbotham.

diagnosed with facial cellulitis and admitted to the hospital for placement of a peripherally inserted central catheter (PICC) line for infusion of intravenous antibiotics for a suspected multi-microbial infection. Claimant was discharged from the hospital after one week but continued with IV antibiotic through the PICC line on an outpatient basis.

5. Despite efforts to prevent a deep vein thrombosis (DVT), Claimant developed "pain and abnormal sensations" in her left upper extremity at the site of her PICC line. An ultrasound performed shortly after the May 4, 2019 dog bite confirmed the presence of a superficial venous thrombosis in the left basilic vein. Claimant was anticoagulated so that the PICC line could be retained in order to complete her course of antibiotic treatment. Upon completion of her infusion therapy, the PICC line was removed.

6. Despite removal of the PICC line, Claimant developed recurrent tingling and swelling of the left arm around July 2019, prompting a repeat ultrasound. The ultrasound demonstrated a non-occlusive DVT in the subclavian vein extending to the brachial vein. Anticoagulation treatment was initiated with Lovenox but Claimant did not tolerate it well. Consequently, her blood thinner was switched to Xarelto. With anticoagulation, Claimant's DVT appeared to resolve as demonstrated by ultrasound performed October 22, 2019.

7. Claimant subsequently developed pain in her left arm around April 2020. An ultrasound of the left upper extremity performed April 9, 2020 demonstrated a new occlusive DVT in the proximal left basilic vein. By this time, Claimant was seeing a psychologist to whom she reported that she was adjusting to the recent recommendation of her hematologist regarding her need to take blood-thinners for the rest of her life because the PICC line had caused scarring of her veins creating a susceptibility to develop repeat blood clots.

8. Along with her left shoulder problems, Claimant continued to experience facial pain, migraine headaches, jaw pain and difficulty chewing, swallowing and yawning. She reportedly had trouble chewing solid foods and therefore restricted her diet to soft or semisolid foods only. She saw a neurologist who diagnosed her with trigeminal neuralgia and recommended an evaluation with a temporomandibular joint (TMJ) specialist. Claimant underwent treatment for TMJ syndrome. She was also evaluated by a dentist who noted that the nerves to four of her teeth had "died" prompting the need for multiple root canals.

9. As referenced above, Claimant began treatment with psychologist, Dr. John Disorbio shortly after the May 4, 2019 incident. The medical record supports a finding that Claimant was seen on multiple occasions to address Claimant's development of an adjustment reaction with depressed mood and anxiety following her May 4, 2019 dog bite.[2]

[2] See the IME report of Dr. Maher at Claimant's Exhibit 3, pp. 54-68.

10. Claimant was placed at maximum medical improvement (MMI) by Dr. Robert Broghammer on November 11, 2020. Dr. Broghammer noted that Claimant "qualified" for an impairment rating which he requested be completed by Dr. Samuel Chan. Dr. Chan completed the requested impairment rating on December 7, 2020. In his impairment rating report, Dr. Chan references that Claimant had "been treated for a possibility of TMJ" and had "been seen by Dr. Disorbio from a psychological standpoint". He diagnosed Claimant with neurogenic thoracic outlet syndrome, trigeminal neuralgia, brachial neuritis, and atypical facial pain and provided 5% whole person impairment for persistent trigeminal neuralgia symptoms and 10% scheduled impairment for Claimant's left upper extremity condition. In reaching his opinions regarding impairment, Dr. Chan stated:

> As per AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised). There are 2 areas that would be related to the injury. One is her facial pain, as she sustained a dog bite. She has been given a diagnosis of trigeminal neuralgia. As per Chapter 4, page 111, under Table 2 under trigeminal nerve, the patient has an atypical facial neuralgia and this is involving mostly the maxillary nerve on the left side. Thus, the patient is therefore given a total of 5% whole-person impairment for her persistent symptoms due to trigeminal neuralgia that requires ongoing medication usage.
>
> The 2nd aspect is that the patient developed cellulitis, which required for the patient to have a PICC line for IV antibiotics. Because of the PICC line, the patient then developed deep vein thrombosis of the left upper extremity, and unfortunately, she has to be on anticoagulation indefinitely. Because the fact that the patient still requires medication usage for the ongoing issue, impairment rating should be given. This is based on Chapter 3; page 47 Table 16 of the guidelines. Even though the patient does have pain complaint subjectively, there is no edema noted and there is no vascular damage evidenced by any kind of amputation or Raynaud phenomenon. Thus, the patient would fit into category 2, where the patient will be given a total of 10% upper extremity impairment.

(Claimant's Exhibit 1, pp. 9-10).

11. Respondents filed a Final Admission of Liability (FAL) consistent with Dr. Chan's opinions on January 8, 2021. (Claimant's Exhibit 1). Claimant objected to the FAL and requested a DIME.

12. Dr. Thomas Higginbotham was selected as the examining physician. He completed the requested evaluation on April 5, 2021 and issued a report outlining his opinions on April 17, 2021. (Claimant's Exhibit 2, pp. 13-35). During the DIME, Claimant described "fiery and unspeakable" pain about the left side of her face. She reported that she had "difficulty . . . opening her mouth fully and [when] doing so she incurs a click and

pop about the left temporomandibular joint which fires off her facial pain". She reported that "nothing seems to make her facial pains better. She also reported daily headaches with occasional migraines causing blurred vision and dizziness.

13. In addition to the above, Claimant described "constant pain about the lateral shoulder, biceps and axilla". She reported shooting pain down to the third, fourth and fifth fingers of the left hand affecting her grip. She described sensory changes and swelling of the left hand along with an occasional "grayish-purplish" discoloration of the hand when the pain in her left arm worsens. Claimant reported that her ongoing left upper extremity and hand sequela comprised her ability to complete work activities and disrupted her sleep. Finally, Claimant reported depressed and anxious moods and a sense of "tension and pain" in the lateral left aspect of the neck.

14. Dr. Higginbotham agreed with Dr. Broghammer's date of MMI, but assigned Claimant 10% whole person impairment for trigeminal neuralgia, 13% whole person impairment for temporomandibular joint dysfunction, 14% whole person impairment for cervical spine range of motion loss and 10% scheduled impairment for Claimant's left upper extremity condition. While he recognized that Claimant had undergone psych treatment for adjustment disorder with depressed and anxious moods, Dr. Higginbotham did not assign any mental impairment. Dr. Higginbotham's combined whole person impairment rating is 37%. (Respondents do not contest the 10% upper extremity rating assigned by Dr. Higginbotham as it is the same as Dr. Chan's rating. Moreover, they agree with Dr. Higginbotham's assignment of a 0% impairment for mental/behavioral conditions, which neither party raised at hearing. See FN 4).

15. With regard to his trigeminal neuralgia rating, Dr. Higginbotham agreed with Dr. Chan's finding based upon Table 2 of the Values for Impairment of the Cranial Nerves, Claimant's range of impairment for her atypical facial neuralgia was 0-20%. Citing from the *AMA Guides to the Evaluation of Permanent Impairment*, Third Edition (Revised) (hereinafter the "AMA Guides"), Dr. Higginbotham noted that "[i]mpairment from the pain of 'atypical trigeminal neuralgia" is to be made on the basis of how much the neuralgia interferes with daily activities of the patient." Noting that Claimant required "constant" medication for her neuralgia, which was "ever present" and occasionally prevented and frequently interfered with activities, Dr. Higginbotham elected to assign 10% impairment per the aforementioned range. This represents an increase of 5% above what Dr. Chan assigned for impairment related to Claimant's atypical facial neuralgia.

16. With regard to his whole person impairment for temporomandibular joint dysfunction, Dr. Higginbotham broke the 13% he assigned into two components. First, he noted that Claimant had an "incisor-to-incisor" opening of 18 mm, which was far less than the normal opening of 50 mm. Relying on an article attached to his impairment rating report that provided a methodology for rating TM joint dysfunction based upon range of motion loss, Dr. Higginbotham assigned 8% whole person impairment.[3] He assigned this

[3] Assuming that a 50 mm opening (from incisal edge of maxillary teeth to incisal edge of mandibular teeth) to be normal, Claimant's opening of 18 mm would fall into the 10 to 20 mm opening range or 40% of a normal opening, which would entitle her to 8% whole person impairment.

impairment despite his acknowledgment that the AMA Guides do not provide for a TM joint rating based upon range of motion loss. Second, Dr. Higginbotham noted that Claimant's TMJ dysfunction precluded her from opening her mouth for biting all but modest portions of food. He also observed that Claimant could not chew foods that required extensive mastication as that aggravated her TM joint pain as well as her trigeminal neuralgia. Accordingly he assigned 5% whole person impairment per Section 9.3b on page 180 of the AMA Guides based upon Claimant's need to restrict her diet to soft or semisolid foods. Dr. Higginbotham then combined the impairment for range of motion loss of the TM joint with Claimant's impairment based upon her need to restrict her diet to reach the aforementioned 13% whole person impairment.

17. Dr. Higginbotham also assigned 14% whole person rating for range of motion loss of the cervical spine despite acknowledging that Claimant's "neck was not injured in itself as part of this injury claim." While he conceded that assigning a Table 53 specific disorder rating would be inappropriate, Dr. Higginbotham nonetheless assigned 14% impairment for range of motion loss on the basis that Desk Aid #11, issued by the Division of Workers' Compensation indicated that an isolated cervical range of motion impairment could be given if it is well justified by the clinician. Neither Claimant nor Respondents submitted those portions of the AMA Guides or the Desk Aids cited by the various clinicians who have evaluated Claimant. Although not submitted by either party, the ALJ takes administrative notice of the AMA Guides to the Evaluation of Permanent Impairment *Third Edition (Revised)* and the Rating Tips (Desk Aids) as materials officially promulgated by the Director of the Division of Workers' Compensation.

18. Per Dr. Higginbotham, 14% impairment for cervical range of motion loss was justified on the basis that Claimant's "temporomandibular neuralgia, temporomandibular dysfunction and deep vein thrombosis of the left upper extremity proximal vein systems [caused] significant splinting and guarding of the neck and upper torso musculatures [to occur] in reaction to these pain generators."

19. While he documented that "[s]car disfigurement [was] at the discretion of the administrative process, Dr. Higginbotham noted: "[Claimant] has an upper left cheek mark related to the dog bite. It is well healed and noticeable, but not disfiguring. She has a notable dog bite scar about the right submandibular area that is slightly disfiguring. The dimpling of the right mandible area was appreciated when she mimicked neck strain of jaw movement."

20. Respondents asked Dr. Chan to review Dr. Higginbotham's impairment rating report and comment on whether he believed that Dr. Higginbotham's ratings were clearly erroneous. In a letter dated September 23, 2021, Dr. Chan responded by indicating that his "original opinion as to [Claimant's] impairment ratings that were previously assessed in December of 2020 [had] not changed." He then noted that Dr. Higginbotham's ratings differed from his in "two categories"- the cervical spine and temporomandibular joint dysfunction.

21. With regard to the cervical spine, Dr. Chan assumed that Dr. Higginbotham's rating was based upon Claimant's subjective complaints. Dr. Chan noted that the cervical spine was not an original body part that was injured and that none of the multiple treating providers had concerns or noted an underlying pathology regarding the cervical spine. Dr. Chan stated that pursuant to the AMA guides, under Appendix B, "chronic pain is perceptual and cannot be validated objectively or quantitated. Therefore, little if any, impairment exists in most circumstances. Thus, [an] impairment rating should not be given based on subjective pain alone."

22. With regard to the temporomandibular dysfunction rating. Dr. Chan noted that Claimant had considerable treatment under the guidance of a dentist and her TMJ problem had been "adequately addressed." He concluded that there was "no specific permanent sequela to her current symptoms" and that a rating, again, "should be based on a permanent pathology rather than subjective symptoms alone."

23. Dr. Kathleen D'Angelo performed an Independent Medical Examination (IME) of the Claimant for Respondents on October 8, 2021. Claimant reported to Dr. D'Angelo "weird general neck pain" which surprised Dr. D'Angelo as the medical records did not document this symptom. She noted that Claimant had no treatment directed to problems with her cervical spine and had full range of motion at Dr. Chan's examination on August 14, 2020 and December 7, 2020. Moreover, Dr. D'Angelo noted that Claimant's EMG studies from September 24, 2020 were within normal limits.

24. During Dr. D'Angelo's examination, Claimant reported pain in her neck but described it as diffuse and poorly localized. Dr. D'Angelo was unable to appreciate any spasm, trigger points or hypertonicity about the paraspinal musculature of the neck and Claimant reportedly never complained of localized pain or tenderness with palpation. Finally, while it appears that Dr. D'Angelo never completed range of motion testing, she indicated that Claimant had full range of motion (FROM) in her cervical spine without pain complaints. Dr. D'Angelo opined that if Claimant had "sustained a cervical spine injury during the dog bite incident on May 4, 2029; it is anticipated she would have findings of such an injury on EMG/NCV by September 2020.

25. Dr. D'Angelo also reported that Claimant was able to open her mouth without apparent pain when speaking and showing the teeth that underwent root canal treatment. According to Dr. D'Angelo, there was no discernable crepitus or clicking noted to either TMJ with opening and closing of the mouth. She also noted that while Claimant asserted an inability to talk and eat, there was no documented evidence of sustained weight loss or any objective evidence of dysarthria.

26. With regard to disfigurement, Dr. D'Angelo noted Claimant had facial scars but no swelling at the TMJ regions or asymmetry at the zygomatic arch.

27. Dr. D'Angelo addressed Claimant's mental health status by indicating simply that Claimant was "alert and answered all questions appropriately". She assigned no rating for mental impairment.

28. Dr. D’Angelo agreed with Dr. Chan that Claimant’s facial pain complaints were due to trigeminal neuralgia. She noted that Claimant’s examinations and complaints during her visits with Dr. Chan were not indicative of TMJ abnormalities, but related to trigeminal neuralgia. She concluded that Claimant’s facial pain was appropriately rated by Dr. Chan and found that the additional impairment for TMJ assigned by Dr. Higginbotham was inappropriate and in error.

29. Dr. D’Angelo concluded that Dr. Higginbotham provided Claimant with “redundant impairments for the same medical issues and/or included impairments for [Claimant’s] subjective complaints, which were inconsistent with her documented medical injuries and/or objective diagnostic findings”. Accordingly, she opined that Dr. Higginbotham’s impairment rating decisions were inconsistent with the AMA Guides and the Level II accreditation training courses.

30. Claimant was also evaluated by Dr. Michael Maher on September 24, 2021. Similar to Drs. Higginbotham and D’Angelo, Dr. Maher took a history from Claimant, reviewed medical records, including extensive psychological reports outlining symptoms of psychological distress consistent with anxiety and PTSD. He also completed a physical examination. Following his evaluation, Dr. Maher assigned the following ratings per the AMA guides:

> Trigeminal Neuralgia: Section 4.2, Table 2: 0-20% WP for atypical facial neuralgia. I would rate this at 15% WP.
>
> Temporal Mandibular Joint Dysfunction: Section 9.3b: 5-10% for a diet that is limited to semi-solid or soft foods. I would rate this at 10% WP.
>
> Thoracic Outlet Syndrome: Section 3.1i, Table 16: The Patient fits into category 2 (10-35% UE impairment) due to intermittent claudication on severe usage of the UE. U/S confirmed thickened arteries and recurrent DVT thus she qualifies in my opinion for vascular damage. I would rate this at 15% UE. This converts to 9% WP.
>
> Mental/Behavioral System: The Permanent Work-Related Mental Impairment Rating Report Worksheet was used from the Division’s website. Please see the attached sheet for description of assessment. I rate her at a 23% WP impairment.[4]
>
> I cannot justify a cervical ROM impairment.

[4] Neither party raised the issue of overcoming Dr. Higginbotham’s determination that Claimant reached maximum medical improvement without mental impairment related to the aftermath of her dog bite injuries. Consequently, this order does not address whether Dr. Higginbotham may have erred in this regard.

> Using the Combined Values Table: Combining largest to smallest: 23%; 15%; 10%; 9% for combined total of with (sic) 47% whole person.

31. While Dr. Maher did not comment on the appropriateness of the various ratings assigned by Dr. Higginbotham, he too assigned impairment for many of the same conditions Dr. Higginbotham included in his DIME report with some modification.[5] Accordingly, the ALJ finds that Dr. Maher found it "appropriate" and in keeping with the AMA Guides to include a rating for TM joint dysfunction, mental impairment and the vascular component of Claimant's UE condition when calculating her overall impairment.

32. Based upon the evidence presented, the ALJ finds that Dr. Higginbotham erred in concluding that Claimant was entitled to impairment for cervical range of motion loss. The ALJ is convinced that Dr. Higginbotham misapplied Desk Aid 11 when he concluded that Claimant's pain in combination with the "splinting and guarding" of the muscles in the neck and upper torso qualified her to receive an impairment for range of motion loss given that she did not suffer a direct injury to the neck or qualify for a Table 53 rating.

33. The ALJ also finds that Dr. Higginbotham clearly erred when he opined that Claimant was entitled to an additional 8% WP impairment for range of motion loss of the jaw based upon her TMJ diagnosis. While the article attached to his impairment rating outlines a process by which the impairing effects of TMJ dysfunction can be measured, Dr. Higginbotham failed to present evidence that the methodology delineated therein has been adopted by the Colorado Division of Workers' Compensation. Indeed, Dr. Higginbotham conceded that the AMA Guides do not provide for a TMJ rating based on range of motion loss. Nonetheless, Dr. Higginbotham correctly recognized that the AMA Guides provide for TMJ impairment when chewing has been compromised prompting a restricted diet. Consequently, the ALJ finds Dr. Higginbotham's assignment of 8% WP impairment for range of motion loss of the jaw contrary to the AMA Guides and highly probably incorrect.

34. While Dr. Higginbotham may have strong feelings about Claimant's cervical spine and TM joint range of motion loss, the ALJ is persuaded that the foundation for his opinion that such loss qualifies Claimant for additional impairment rests upon a misinterpretation of Desk Aid 11 and the principles set forth in the AMA Guides. As presented, the evidence convinces the ALJ that Dr. Higginbotham's opinions regarding impairment concerning the cervical spine and the TM joint have been overcome.

35. Claimant is seeking a disfigurement award for scarring associated with her dog bite. As noted, Claimant attended the hearing via video conference during which the ALJ visually inspected the scarring associated with the May 4, 2019 incident. Per request

[5] Dr. Maher gave a higher percentage of impairment for trigeminal neuralgia (15%), a lower TMJ rating, (10%), a higher UE rating for thoracic outlet syndrome, no cervical spine rating and a 23% mental health rating when compared to Dr. Higginbotham's impairment rating report.

of the ALJ, Claimant also submitted photographs as part of the evidence in this case. The ALJ accepts the photos and enters them into evidence as Claimant's Exhibits 4 – 8.

36. The ALJ finds that as a result of her admitted dog bite, Claimant has a visible disfigurement to the body consisting of three (3) visible scars about the face/neck. There is an approximately 10 mm Keloid scar on the left lateral aspect of the neck. This scar is pink to red in color and as noted is raised when compared to the contour of the surrounding skin. (See Claimant's Exhibits 5 & 8). There is a scar of similar length located in the middle of the left lower jaw line. The wound associated with this scar healed to reveal a lightly pigmented and depressed scar akin to a pockmark on the left cheek. (See Claimant's Exhibits 6 & 8). Finally, there is an approximately 12 mm long scar located on the frontal aspect of the right cheek, between the nose and mouth. This scar is pink in color and slightly depressed when compared to the surrounding skin.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. In accordance with Section 8-43-215, C.R.S., this decision contains Specific Findings of Fact, Conclusions of Law, and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Clam Appeals Office*, 5 P.3d 385 (Colo.App. 2000).

B. Assessing the weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo.App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo.App. 2008). To the extent, expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); see also, *Dow*

Chemical Co. v. Industrial Claim Appeals Office, 843 P.2d 122 (Colo.App. 1992) (ALJ may credit one medical opinion to the exclusion of a contrary opinion).

Overcoming the DIME Opinion of Dr. Higginbotham Regarding Permanent Impairment

C. A DIME physician's findings concerning causation and impairment are binding on the parties unless overcome by "clear and convincing evidence." Section 8-42-107(8)(b)(III), C.R.S.; *Qual-Med v. Industrial Claim Appears Office*, 961 P.2d 590 (Colo. App. 1998); *Peregoy v. Industrial Claim Appeals Office*, 87 P.3d 261, 263 (Colo. App. 2004). "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's opinion concerning impairment is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding impairment the party challenging the DIME must demonstrate that the physicians determinations in this regard is highly probably incorrect and this evidence must be "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office,* 62 P.3d 1015, 1019 (Colo. App. 2002). *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAO, Oct. 4, 2001). The enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.*

D. In resolving the question of whether the DIME physician's opinions have been overcome, the ALJ may consider a variety of factors including whether the DIME physician properly applied the AMA Guides and other rating protocols. *See Metro Moving and Storage Co. v Gussert, supra*; *Wackenhut Corp. v. Indus. Claim Appeals Office*, 17 P.3d 2002 (Colo. App. 2000); *Aldabbas v. Ultramar Diamond Shamrock*, W.C. No. 4-574-397 (ICAO August 18, 2004). The determination of impairment under the AMA Guides inherently requires the rating physician, when diagnosing the claimant's condition, to evaluate and identify all losses caused by the industrial injury. The AMA Guides, Section 1.2 provides as follows: "The key to an effective and reliable evaluation of impairment is review of the office and hospital records maintained by the physicians who have provided care since the onset of the medical condition." Section 2.1 further states that, "When a medically sufficient evaluation is carried out, the current clinical status of the individual will be documented accurately." In this case, Respondents contend that Dr. Higginbotham erred in assigning impairment for cervical range of motion loss when Claimant did qualify for a specific disorders rating per Table 53 of the AMA Guides since she did not sustain any injury to the neck itself. The ALJ concurs.

E. As found, the evidence presented supports a conclusion that Dr. Higginbotham clearly erred in giving a rating for the cervical spine. Dr. Higginbotham, himself, acknowledged that the neck was not directly injured in the dog bite. As Dr. Chan and Dr. D'Angelo noted none of the multiple treating physicians indicated a concern or provided treatment for it. Moreover, as Dr. Chan noted, Dr. Higginbotham's cervical spine rating is largely based on subjective pain alone, which is contrary to the principles of the AMA Guides. *See* C.R.S. § 8-42-101(3.7); AMA Guides to Evaluation of Permanent impairment, third edition, Appendix B.

F. In support of his contention that Claimant is entitled to impairment for cervical range of motion loss, Dr. Higginbotham relies upon the exception to using Table 53 of the Guides contained in Desk Aid #11 – Impairment Rating Tips for providing an impairment rating when not using Table 53 of the Guides. However, application of the exception is reserved for "unusual cases with established severe shoulder pathology accompanied by treatment of the cervical musculature" and only then, if the clinician provides sound justification for the inclusion of such impairment. See Desk Aid 11. Otherwise, there are no exceptions to the requirement for a corresponding Table 53 rating. Purported justification for inclusion of impairment for cervical range of motion loss was cited by Dr. Higginbotham as "splinting and guarding" of the paraspinal muscles caused by her other diagnoses as well as Claimant's propensity to develop DVT's following placement of her PICC line. As found, the ALJ is persuaded that Dr. Higginbotham misapplied the principles of Desk Aid 11 in this case. Here, the evidence presented fails to demonstrate that Claimant suffered either a neck injury or severe shoulder pathology[6] which necessitated treatment directed to the cervical spine. Based upon the evidence presented, the ALJ finds Dr. Higginbotham's justification for inclusion of a cervical spine range of motion loss rating unpersuasive and contrary to the AMA Guides and Desk Aid 11. Consequently, Dr. Higginbotham's rating for cervical range of motion loss is unjustified and highly probably incorrect.

G. Respondents also contend that Dr. Higginbotham's rating for TMJ dysfunction is erroneous because Claimant's facial pain emanates from trigeminal neuralgia rather than the TM joint. Because Dr. Higginbotham considered and rated Claimant's facial pain, Respondents contend that the rating for TM joint dysfunction is duplicative and redundant. While the ALJ agrees with Respondents, that part of Dr. Higginbotham's rating for TM joint dysfunction is contrary to the AMA guides and redundant in nature, the ALJ is not convinced that the entire TMJ rating is highly probably incorrect. As found, the record supports a conclusion that Claimant had to restrict her diet to soft or semi-solid foods following the development of jaw pain and difficulty chewing after the dog bite in question. While both Dr. Chan and Dr. D'Angelo found no specific permanent sequela related to Claimant's current TMJ symptoms and indicated that the TM joint rating was based upon subjective complaints of pain only, the record supports a conclusion that Claimant's jaw function was compromised as evidenced by her limited ability to open her mouth and chew food. Based upon the evidence presented, the ALJ finds that Dr. Higginbotham's 5% TMJ rating is based upon function of the TM joint and Claimant's need to restrict her diet rather than facial pain. The ALJ is not convinced that this rating is duplicative as suggested by Drs. Chan and D'Angelo. To the contrary, the record supports a conclusion that Dr. Higginbotham correctly recognized that interference of mastication typically results in the imposition of dietary restrictions, which can form the basis for assignment of permanent impairment. Careful review of the record persuades the ALJ that Dr. Higginbotham's assignment of 5% WP impairment is supported by the record and in keeping with the AMA Guides. Accordingly, Respondents have failed to

[6] While placement of the PICC line caused changes to the vascular structures of Claimant's left upper extremity, leading to recurrent DVT's and thoracic outlet syndrome, the ALJ is not convinced that these changes/conditions constitute the type of "severe" pathology contemplated by Desk Aid 11.

present clear and convincing evidence that this portion of Dr. Higginbotham's impairment rating is highly probably incorrect.

H. While the ALJ concludes that there is record support for Dr. Higginbotham's assignment of 5% WP impairment based upon Claimant restricting her diet to soft or semi-solid foods, his decision to assign an additional 8% WP impairment based upon range of motion loss of the TM joint appears contrary to the AMA Guides. Claimant failed to establish that the cited methodology for assessing impairment of the TM joint by measuring range of motion of the jaw has been adopted by the Colorado Division of Workers' Compensation or referenced in the AMA Guides. Indeed, Dr. Higginbotham conceded that the AMA Guides do not provide for a rating based upon such range of motion loss. Nonetheless, he justified including 8% range of motion loss of the TM joint in Claimant's overall rating because, as with other joint conditions, the AMA Guides permit specific disorders (Claimant's impaired mastication) to be combined with range of motion loss to determine the overall impairment. The revised third edition of the AMA Guides allow for a rating of jaw function based upon the Table outlined at Section 9.3, without contribution from range of motion loss. It is reasonable to infer from the AMA Guides that motion loss of the TM joint has been subsumed and otherwise considered in the Table located at Section 9.3 of the AMA Guides. Adding an additional 8% impairment for range of motion loss of the TM joint is redundant and contrary to the AMA Guides as it greatly enhances the risk of artificially increasing Claimant's impairment by including a rating factor already accounted for in Section 9.3 of the AMA Guides. Accordingly, the ALJ finds the inclusion of an additional 8% WP impairment for range of motion loss of the TM joint highly probably incorrect. Nonetheless, Claimant is entitled to a 5% whole person impairment rating based on the compromised function of her TM joint as supported by her need to restrict her diet to soft or semi-solid foods.

I. Where the ALJ determines that the DIME physician's opinion has been overcome, the question of the claimant's correct medical impairment rating then becomes a question of fact for the ALJ. The only limitation is that the ALJ's findings must be supported by the record and consistent with the AMA Guides and other rating protocols. *Jacob Niedzielski v. Target Corp.*, W.C. No. 5-036-773-001. Thus, once the ALJ determines that the DIME's opinion has been overcome in any respect, the ALJ is free to calculate the claimant's impairment rating based upon the preponderance of the evidence. *Mosley v. Industrial Claim Appeals Office*, 78 P.3d 1151, 1153 (Colo. App. 2003) (once the DIME is overcome "the ALJ was free to consider the other medical evidence concerning claimant's permanent medical impairment"); *Paredes v. ABM Industries*, W.C. No. 4-862-312 (April 14, 2014); *DeLeon v. Whole Foods Market*, W.C. No 4-600-477 (November 16, 2006); *Garlets v. Memorial Hospital*, W.C. No. 4-336-566 (September 5, 2001). In this case, the ALJ concludes that the following impairments are supported by the record. They therefore constitute the correct rating associated with Claimant's May 4, 2019 work injuries:

> Trigeminal Neuralgia: The ALJ adopts Dr. Higginbotham's percentage of impairment for atypical facial neuralgia of 10% WP. While it is clear that Drs. Chan and D'Angelo assigned a lower percentage of impairment (5%)

and Dr. Maher assigned a higher degree (15%) of impairment for this condition, the variability in placement of Claimant on Table 2 of Section 4.2 of the AMA Guides represents a difference of opinion between the evaluators in this case. A mere difference of opinion between physicians fails to constitute error. *See Gonzales v. Browning Farris Indust. of Colorado*, W.C. No. 4-350-356 (ICAO March 22, 2000). Consequently, Respondent has failed to prove that Dr. Higginbotham's 10% impairment for atypical facial neuralgia is highly probably incorrect and Dr. Higginbotham's 10% WP rating stands.

Thoracic Outlet Syndrome: Because neither party challenged Dr. Higginbotham's rating of 10% scheduled upper extremity rating for damage to the left shoulder vascular system, that rating shall stand.

Temporal Mandibular Joint Dysfunction: As noted above, Dr. Higginbotham's assignment of 8% WP impairment for range of motion loss of the TM joint is highly probably incorrect. Consequently, that portion of Dr. Higginbotham's TMJ impairment rating is set aside. Nonetheless, Dr. Higginbotham's assignment of 5% WP impairment for TM joint dysfunction based on difficulty with mastication and Claimant's need to restrict her diet to soft or semi-solid foods is supported by the record and consistent with the tenants of the AMA Guides. Accordingly, that impairment rating shall stand. The contrary opinions of Dr. D'Angelo are unpersuasive.

Cervical Spine: As noted above, Dr. Higginbotham's assignment of impairment for cervical range of motion loss is highly probably incorrect and therefore set aside. There is no impairment associated with the cervical spine.

Disfigurement

J. In *Arkin v. Industrial Commission*, 145 Colo. 463, 358 P.2d 879 (1961), the Court held that the term "disfigurement" as used in the statute, contemplates that there be an "observable impairment of the natural person." As found at Finding of Fact, ¶ 39, Claimant has suffered a "disfigurement", i.e. facial/neck scarring as a consequence of the May 4, 2019 dog attack. The ALJ concludes that this scarring constitutes an observable alteration in the natural appearance of the structure and skin covering the face and neck. Accordingly, the ALJ concludes that Claimant has suffered a visible disfigurement entitling her to additional benefits pursuant to Section 8-42-108 (1), C.R.S.

ORDER

It is therefore ordered that:

1. Respondent's request to set aside the impairment rating of Dr. Higginbotham is GRANTED IN PART. The ALJ sets aside Dr. Higginbotham's assigned 14% WP cervical spine impairment in its entirety. The ALJ also sets aside the 8% WP impairment

assigned by Dr. Higginbotham for TM joint range of motion loss as neither the cervical spine rating nor the rating for range of motion loss of the TM joint are supported by the AMA Guides or the Desk Aids issued by the Division of Workers' Compensation. Accordingly, the Respondents shall pay permanent partial disability (PPD) benefits consistently with the combined rating associated with 10% WP for atypical facial neuralgia and 5% WP for temporal mandibular joint dysfunction. Respondents shall also pay PPD benefits in conjunction with Claimant's 10% scheduled left upper extremity impairment.

2. Insurer shall pay Claimant $1,750.00 for the above-described disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

3. All matters not determined herein are reserved for future determination.

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 2, 2021

/s/ Richard M. Lamphere__________________
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that his right knee arthroplasty from April 15, 2021 was reasonable, necessary, and causally related to his admitted work injury of April 28, 2014? Alternatively, has Claimant shown sufficient evidence to warrant a reopening of his claim based upon a worsening of his condition?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

Procedural Background

1. Claimant was employed as a firefighter for the Respondent from 2004 until he was medically retired on occupational disability by the Fire and Police Pension Association (FPPA) in 2015.

2. On behalf of Claimant, orthopedist Tyler Bron, MD, had sought authorization from Respondents for (yet another) right knee medial menisectomy. After an IME at Respondents' request by orthopedist William Ciccone, MD., Respondents denied said authorization in a letter to Dr. Bron dated 4/30/2020 (Ex. QQ, p. 165).

3. Claimant's condition continued to deteriorate. In a consult with Dr. Bron on 4/6/2021, Dr. Bron noted "Patient has *previously been seen and diagnosed with osteoarthritis* and we have discussed treatment options extensively in the past….Unfortunately his pain has continued to progress and he is interested in proceeding forward with a total knee arthroplasty." (Ex. 9, p. 209)(emphasis added).

4. Following this latest request for surgery, which Respondent's denied, a right knee arthroplasty was nonetheless performed by Dr. Bron on 4/15/2021. (Ex. 9, pp. 212—214). Claimant now seeks a finding that this surgery was reasonable, necessary, and causally related to an admitted work injury which occurred on April 28, 2014.

Claimant's Preexisting Right Knee Symptoms and Treatment

5. Prior to the admitted injury of April 28, 2014 to Claimant's right knee (and the subject of the current claim) Claimant had a previous non-work-related injury to his right knee. On an intake note with orthopedist Christopher Jones, MD, dated 8/16/2012, Dr. Jones stated: "The patient is a 47-year-old fireman here today to evaluate the right knee. *He reports an atraumatic knee effusion*….Exam today, he does have 2++ effusion.

…*ROM and otherwise physical exam is very difficult* *because of pain.* (Ex. RR, p. 167)(emphasis added).

6. Claimant then underwent surgical intervention by Dr. Jones on September 26, 2012. Prior to that surgery, Dr. Jones had reviewed the MRI, which he found to be unremarkable except for some joint effusion. On August 16, 2012 Dr. Jones initially thought that the joint effusion might have been due to a flare up of gout.

7. Claimant, however, did not improve. On September 26, 2012, Dr. Jones performed surgery on Claimant. His *preoperative diagnosis* was "right knee pain with chondromalacia patella." However, his *postoperative diagnosis* was 1. Grade 3 chondromalacia patella involving predominately the lateral facet and trochlear groove. 2. *Chondromalacia medial femoral condyle with large flap lesion with grade 3 lesion* measuring approximately 10 mm squared." (Ex. TT, p. 170)(emphasis added).

8. There are no reported issues in the available medical records between this surgery and the admitted injury of April 28, 2014.

The Admitted Work Injury of April 28, 2014

9. On April 28, 2014, Claimant was assigned as a driver-engineer. CSFD received a medical alert from a nursing home facility concerning a patient that had fallen. Due to the configuration of the narrow driveway, Claimant had to park the truck such that when he got out, he had to walk across an unstable substrate of 6-8" rocks. Upon returning to the truck after this call, he twisted his right knee negotiating these rocks.

10. Claimant and his team finished that call, but he indicated that he did not report the injury at that time. Instead, they got another call about a very heavy patient having fallen. During that call, while helping that patient, Claimant also injured his back and shoulder (not subject to this claim at issue).

11. Claimant reported the injury to his right knee to his supervisor when the supervisor returned from a meeting out of the station. Claimant estimated that he reported it to his supervisor about 5:00 pm on April 28, 2014.

Treatment for the April 28, 2014 Admitted Injury

12. Claimant initially went to Respondent's occupational clinic, and was examined by Susan Dern, D.O. The first reported is dated May 8, 2014. (Ex. E, pp. 25-27). Her note indicates that Claimant twisted his right knee on rocks when he was getting back in the fire engine after the call. Knee was reported to be 'uncomfortable' and Claimant felt it was mildly unstable. Pain 4/10. Physical examination indicated slight swelling medially. Claimant indicated that he continued to follow up with the occupational clinic without improvement in his pain complains or functional capabilities.

13. Dr. Miguel Castrejon took over as Claimant's ATP. Dr. Castrejon issued a progress report on June 30, 2014. He ordered an MRI of the right knee, which was performed on July 2, 2014. That MRI showed a horizontal tear of the medial meniscal posterior horn with a parameniscal cyst, and mild to moderate patellofemoral and mild *medial compartment chondromalacia* (Ex 7, p. 100)(emphasis added).

14. Since Dr. Jones had previously performed surgery on his right knee, Claimant was referred by the occupational clinic to Dr. Jones for evaluation and treatment. Claimant initially saw Dr. Jones on July 3, 2014. Claimant's history given to Dr. Jones was that he got out of the truck, had to walk across an uneven surface, twisted his knee, and felt a sharp pain. Dr. Jones' preliminary assessment was of a tear of the medial meniscus. (Ex. 9, p. 168).

15. Dr. Jones performed surgery on Claimant's right knee on July 15, 2014. The procedures performed were a right knee arthroscopic partial medial meniscectomy and a right knee arthroscopic chondroplasty of the patellofemoral joint. The post operative diagnosis of the meniscectomy damage was that it was a "complex tear of the posterior horn medial meniscus", as well as *"Chondromalacia of patella grade 2 and 3."* (Ex. 9, p 172)(emphasis added).

16. On August 28, 2014, Claimant underwent a second MRI of the right knee. It was read to show complex tear of the medial meniscus, posterior horn in mid-point. Chondromalacia of the lateral patella femoral joint. Mild articular cartilage thinning, posterior medial tibial condyle. Moderate joint effusion. (Ex. G, p. 32).

17. After Claimant indicated in follow-ups that his 7/15/2014 procedure did not correct his issues, Dr. Castrejon then referred Claimant to orthopedist David Walden, MD. A third MRI was performed on October 30, 2014.

18. Dr. Walden reviewed this MRI, and on November 4, 2014, his *Impression* was "Right knee chronic persistent pain *possibly* secondary to a recurrent medial meniscus tear versus *medial compartment overload* and *underlying osteoarthritis* of the patella." (Ex. 8, p. 116)(emphasis added).

19. On November 12, 2014, Dr. Walden performed a right knee arthroscopic partial medial meniscectomy and an arthroscopic chondroplasty of the femoral trochles and medial femoral condyle. In his operative report, Dr. Walden noted that the indications for surgery were "[t]he patient was 49 years old with history of prior arthroscopy of the knee. He had continued symptoms and therefore underwent two subsequent MRI scans, both of which seemed to show possibility of recurrent posterior horn tear of the medial meniscus. *The patient was made aware that symptoms could also be coming from arthritis and may or may not improve and this [the surgery] may or may not improve his overall situation.* With full knowledge of these limitations . . . the patient signed consent form in which to proceed." (Ex. J, p. 45)(emphasis added).

20. Dr. Walden's surgical notes from this procedure noted as a *Preoperative Diagnosis:* 1. Right knee possible recurrent medial meniscus tear, 2. Right knee osteoarthritis. His *Postoperative Diagnosis* was: 1. Right knee recurrent posterior horn tear of medial meniscus, 2. *Right knee osteoarthritis*. *Grade 3 chondral damage*, femoral trochlea and *grade 3 chondral damage* weightbearing surface of medial femoral condyle. (Ex. 8, p. 121) (emphasis added).

21. After the 11/12/2014 surgery by Dr. Walden, Claimant's knee condition did not improve according to expectations. Claimant had multiple aspirations of the knee, significant swelling, and reported a difficult time walking.

22. In a follow-up with Dr. Walden on 6/20/2017, for example, Claimant had failed to progress as expected. Under *Plan,* Dr. Walden stated: "I talked to the patient about following through with a referral to a joint arthroplasty specialist to discuss the recovery, the longevity, and activity restrictions with regard to this type of surgery. He has been medically retired from the city….From my perspective, it is unlikely that additional arthroscopy would be beneficial since previous arthroscopies have not been overly helpful. I discharge him from my care at this point with follow-up on an as-needed basis. (Ex. 8, p. 163).

Claimant Testifies at Hearing

23. Claimant testified that between his 2012 surgery and his 4/28/2014 work injury, not only was he assigned to the basic duties of firefighting operations but also to the hazmat program of the CSFD which required a lot of Level A suit entry, a lot of kneeling, and a lot of crawling. He also testified that he spent long hours on the fire lines on the Waldo Canyon and Black Forest fires, without incident and had no restrictions or pain.

24. However, Claimant testified that his 2012 injury was also work-related., (Transcript, pp. 14-15).

25. Claimant never returned to full duty with the fire department after the injury of April 28, 2014. He performed some light duty work with the CARES program for approximately three weeks, but was unable to perform even that work, due to the issues with his knee and his back.

26. Claimant testified that after the surgery by Dr. Walden in November of 2014, he continued to have protracted pain. In addition to the injections, he attempted physical therapy, purchased workout equipment for his use at his residence, took medications, had seven or eight aspirations of his knee to remove fluid, and received steroid and PRP injections.

27. Claimant testified that by 2020, he could not tolerate the pain and significant reduction in the quality of life. He went back to see Dr. Castrejon, who referred him to Dr.

Bron for evaluation and treatment. Dr. Bron recommended either an additional medial meniscectomy, or a total knee replacement. By letter to Dr. Bron of April 30, 2020, Respondent denied any additional treatment for the right knee, for not being reasonably necessary and causally related.

28. Claimant further testified that he had no additional injuries to his right knee between April 28, 2014 and the time of the total knee replacement of April 15, 2021.

Dr. Castrejon Testifies at Hearing

29. Dr. Castrejon testified as an expert in physical medicine and rehabilitation. He is Level II accredited. Dr. Castrejon was the ATP for the duration of the care and treatment of Claimant's right knee injury of April 28, 2014.

30. Dr. Castrejon testified that he had reviewed all of the clinical records of the ongoing care and treatment that claimant has received, and has reviewed the reports of Respondent's expert, Dr. Ciccone. He disagrees with Dr. Ciccone regarding the relationship between the April 28, 2014, injury and the need for the total knee replacement. Dr. Castrejon testified that there is a seven-fold increased risk of osteoarthritis following a partial meniscectomy. The weakness in Claimant's knee, and its inflammatory condition, aggravated and accelerated the osteoarthritis process leading to the need for the total knee arthroplasty.

31. In critiquing Dr. Ciccone's analysis, Dr. Castrejon noted:

> A ….Dr. Ciccone did not take into consideration that at the time…of the 2012 surgery that was performed by Dr. Jones, there was no evidence of a meniscal tear; *there was evidence of arthritic changes.* Dr. Jones performed a chondroplasty. *There is an association of chondroplasty and a 17-fold increase in development of osteoarthritis*….(Transcript, p. 38)(emphasis added)..

32. In further opining that Dr. Ciccone had 'insufficient evidence' to support a natural progression [of preexisting osteoarthritis] Dr. Castrejon stated:

> When you look at the actual pathology of what actually occurred to this gentleman as of 2012, and if the medical file is actually reviewed, *the patient also sustained work-related injuries to his right knee on October 29, 2004, and November 5, 2004. So the history of injuries is actually going back a little bit more than the initial 2012 that we have a record of.* (Transcript, p. 40)(emphasis added).

33. Dr. Castrejon testified that Claimant's need for the knee replacement was a result of a progressively worsening condition of the knee, brought on by the 4/28/2014 work injury, and the surgical procedures that he underwent. He testified that "there is no

doubt in my mind that the event … is responsible for the treatment that this patient went on to require.” (Transcript, p. 40).

34. Dr. Castrejon also compared the contralateral knee, which also has osteoarthritis, but has not required surgeries. The difference is that the right knee has had the multiple surgeries, which have permanently aggravated the underlying condition.

35. After Dr. Ciccone testified, Dr. Castrejon testified in rebuttal. When asked if he concurred with Dr. Ciccone’s causation analysis, Dr. Castrejon responded:

> A *I do not feel that Dr. Ciccone has provided enough substantial evidence* as to why the event of April 28, 2014, did not result in an aggravation of a preexisting condition when the medical record is very clear in terms of delineating a progression ongoing for years of knee pain that went on the require multiple injections, treatment, PRP, all evidence of treatment, until finally functionally and emotionally this gentleman needed the finality of treatments that consisted of a total knee replacement. (Transcript, p. 88)(emphasis added).

Jane M[Redacted] Testifies at Hearing

36. Jane M[Redacted] has been a Worker’s Compensation claims adjuster for the [Employer] for about six years. She is familiar with Claimant’s claim file, and has met with him in her office. In reviewing Claimant’s entire claim file, she has no record of a claim for a 2011 or 2012 right knee injury for Claimant. Nor does she have anything regarding any work-related right knee injuries dating to 2004.

Dr. Ciccone Testifies at Hearing

37. Dr. Ciccone testified as an expert in the field of orthopedic surgery. He is Level II accredited. Dr. Ciccone testified that he performed multiple records reviews of Claimant’s April 28th injury, but did not examine him.

38. Dr. Ciccone testified that the MRIs from Claimant’s treatment showed basically degenerative changes in his right knee. Regarding the tears of the medial meniscus, Dr. Ciccone indicated that he could not tell whether the meniscal tears were chronic or acute in nature. He characterized chondromalacia as a thinning, early degeneration of the [knee] cartilage. He further described Grade 3 chondromalacia [dating to 2012] as “almost complete exposure of the bone and loss of cartilage.” (Transcript, pp. 64-65).

39. Dr. Ciccone’s interpretation of Dr. Walden’s 11/14/2014 surgery on Claimant was that Dr. Walden was himself unclear of whether Claimant’s pain was coming from the torn meniscus vs. arthritis in this knee. He also opined that “..arthritis doesn’t occur rapidly. So if you have arthritis on imaging studies, it’s usually ben there for years.” (Transcript, p. 78). He also noted that “Most of the time….degenerative changes

in joints are not related to each other. So that being said, most people if they get joint replacements, they'll get one knee done and never need the other knee done…..So you cannot use another joint as a guide to assess the progression in an opposite joint." (Transcript, p. 77).

40. Dr. Ciccone opined that Claimant's need for the total knee replacement surgery was as a result of having knee problems for a long period of time, and was as a result of the natural progression of degenerative changes in the knee.

41. When asked about Dr. Castrejon's opinion that statistically, menisectomies greatly increase the likelihood of arthritis, Dr. Ciccone explained the nuances in more detail:

> A ….and there's no question, the more meniscus you lose, the higher your risk of arthritis. But it all is dependent upon the degree of meniscus loss. There's plenty of studies that show *small menisectomies have no effect on the progression of arthritis in knees;* we know that the old-fashioned complete menisectomies have significant effect on arthritis occurring within knees.
>
> So there's not a general number if you have a knee scope and a meniscectomy that you're at whatever percentage risk for – it's all variable.
>
> Now, in this case it's even more variable because the meniscus tear is likely degenerative and unrelated to any injury. So the reality of it all is—and Dr. Walden speaks to this in his operative note---is *that doing an arthroscopy and removing the meniscus may have zero effect on the patient's complaint* because—especially in the area of degenerative change not secondary to the meniscal tear. And *that's why he didn't do well following the surgery*. (Transcript, pp. 68-69)(emphasis added).

42. Dr. Ciccone also noted: "You can't even tell where their pain's coming from. So….this is the thing that Dr. Walden was getting at in his operative note. You cannot tell on an MRI scan in someone with degenerative change whether or not their pain is coming from the meniscus or from the arthritis. (Transcript, p. 81)

43. Explaining the cause and effect relationship of meniscal tears and arthritis, Dr. Ciccone stated: "If you don't have arthritis, it's likely that a trauma caused your meniscus tear. *When you do have arthritis, it is unknown whether or not a trauma would have caused the meniscus tear."* (Transcript, pp 80-81)(emphasis added).

44. Dr. Ciccone concurred that another medial menisectomy was not appropriate at this time. However, regarding the total knee replacement, he stated:

> A ….in a patient who's 55 with complaints of knee pain and swelling starting back in 2012, with degenerative changes noted already on

> arthroscopy, yeah, potentially. ...I think you're walking the line for an indication for knee replacement already. (Transcript, p. 79)

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. §8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. §8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility and sufficiency of evidence in a workers' compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). In this case, while the ALJ has some reservations after Claimant's testimony that his 2012 knee injury was work-related [it clearly was not], it is possible that things just 'ran together' for him, given his long and painful history with his right knee. Overall, the pain that Claimant was feeling and describing was very real, and consistent with the medical evidence. However, Claimant's reported symptoms do not bear on the forensic matter of causation. He just knows when it hurts.

D. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). In this case, the ALJ finds that both medical experts testified sincerely, and according to their best interpretation of the medical literature and evidence. Thus, their opinions are to be weighted according to their *persuasiveness,* as opposed to *credibility*, per se.

E. Further, courts are to be "mindful that the Workmen's Compensation Act is to be liberally construed to effectuate its humanitarian purpose of assisting injured workers." *James v. Irrigation Motor and Pump Co.*, 503 P.2d 1025 (Colo. 1972).

Aggravation of a Preexisting Condition, Generally

F. A Claimant sustains a compensable on-the-job injury if work activities, activate, cause, aggravate, accelerate or combine with nonindustrial factors to result in disability or need for medical treatment. The employer takes the employee as he is, on the date of the compensable injury, and compensation is not dependent on the state of an employee’s health or his freedom from constitutional weakness or latent tendency. *Peter Kiewit Sons’ Co. v. Industrial Commission*, 124 Colo. 217, 236 P.2d 296 (1951). Compensation in aggravation cases is well developed in the appellate case law in a variety of cases which involve the principle. The preexisting condition can be manifest but not yet disabling or as in this situation can be latent until manifested by the work injury. *See*, *Subsequent Injury Fund v. Devore*, 780 P.2d 39 (Colo. App. 1989; *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986) or can accelerate the natural course of a preexisting condition. *H H Warehouse v. Vicory*, 805 P. 2d 1167 (Colo. App. 1990).

Medical Treatment, Generally

G. Respondents are liable for medical treatment reasonably necessary to cure or relieve the employee from the effects of the injury. C.R.S. § 8-42-101. The right to workers’ compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. C.R.S. § 8-41-301(1)(c); *Faulkner v. ICAO,* 12 P.3d 844, 846 (Colo. App. 2000).

Reasonable and Necessary, as Applied

H. The ALJ finds, by a preponderance of the evidence, that the right knee arthroplasty performed by Dr. Bron on April 15, 2021 was reasonable and necessary to cure Claimant of the effects of his medical condition. Conservative care had failed Claimant for years, despite his sincere efforts at physical therapy, vitamin therapy, and several menisectomies along the way. Not only did his pain not abate, it got progressively worse. This procedure was suggested as least as early as 2017 by Dr. Walden, but there is nothing in the record that Claimant sought it at that time. He finally has done so. In the final analysis, even Dr. Ciccone conceded that, given the state of his arthritis, this could well be "walking the line" as the next step to take.

Causally Related to the Work Injury, as Applied

I. Claimant had a longstanding issue with grade 3 chondromalacia in his right knee at least two years before this admitted injury in 2014. While not in the medical records before the ALJ, Dr. Castrejon (from whatever source) referenced some sort of work injury (from whatever employer) from 2004 to Claimant's right knee. Even leaving that aside, Claimant's atraumatic, yet painful, symptoms began to show as early as 2012. The ALJ is persuaded by Dr. Ciccone that the degenerative process likely began well before that, and is further persuaded that one may not look to the contralateral knee as a reliable indicator that such degeneration must have been caused by trauma-although it certainly remains possible.

J. Further, the ALJ is not persuaded that the incremental removal of Claimant's meniscus fragments in two surgeries from 2014 led directly to his arthritis, when the better evidence suggests that the arthritis Claimant now suffers from [or at least did, prior to his arthroplasty] would have been set further in motion from his chondroplasty by Dr. Jones in 2012. And, as noted by Dr. Ciccone, Claimant just knows his knee really hurts, but he cannot be expected to pinpoint exactly where within his medial compartment the pain generator resides.

K. In the final analysis, perhaps Dr. Castrejon, quite unintentionally, said it best when he stated that Dr. Ciccone did not provide "*enough substantial evidence* as to why the event of April 28, 2014 *did not result* in an aggravation of [Claimant's] preexisting [knee] condition." If Respondents were seeking to overcome a DIME on causation today, perhaps Dr. Castrejon might have a point. But they aren't saying that. Respondents are saying that Claimant's need for his right knee arthroplasty has not been proven, by a preponderance of the evidence, to have been causally related to his work injury from seven years prior. The ALJ concurs in this assessment.

L. The ALJ instead finds Dr. Ciccone's analysis to be more persuasive. Claimant, likely through no fault of his own, has just suffered from a bad knee for years; at least since 2012, and quite possibly years before that. This is why the partial menisectomies from 2014 did not fix the underlying problem - *nor did they create the need for the arthroplasty.* The ALJ further notes that, *at most*, the torn posterior horn repaired on 7/15/2014 would have been *directly* due to stepping on the rocks. Claimant has not shown that his 4/28/2014 work injury aggravated his preexisting arthritis, such that he now needs a total knee replacement. Nor has he shown sufficient evidence to now warrant a reopening due to a worsening. Hopefully this latest procedure will provide him the relief he deserves however, it will remain outside the Workers Compensation system.

ORDER

It is therefore Ordered that:

1. Claimant has not shown that his right knee arthroplasty was causally related to his admitted work injury. His request for reimbursement for this procedure is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. *In addition, in order to best assure prompt processing of your Petition, it is* ***highly recommended*** *that you send a copy of your Petition to Review to the Colorado Springs OAC via email at oac-csp@state.co.us.*

DATED: December 2, 2021

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

W.C. No. 5-106-555-003

FULL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

IN THE MATTER OF THE WORKERS' COMPENSATION CLAIM OF:

[Redacted],

Claimant,

v.

[Redacted],

Employer,

and

[Redacted],

Insurer / Respondents.

Hearing in the above-captioned matter was held before Edwin L. Felter, Jr., Administrative Law Judge (ALJ), on January 5, 2021, in Denver, Colorado. The hearing was recorded by Google Meets (reference: 1/5/21 Google Meets, beginning at 8:30 AM, and ending at 11:00 AM).

The Claimant was virtually present in person and represented by [Redacted], Esq. Respondents were represented by [Redacted], Esq.

Hereinafter [Redacted] shall be referred to as the "Claimant." [Redacted] shall be referred to as the "Employer." All other parties shall be referred to by name.

Claimant's Exhibits 1 through 4 were admitted into evidence, without objection. Respondents' Exhibits A through MX, S and T were admitted into evidence, without objection. The transcripts of the evidentiary depositions of Daniel Possley, D.O., John Raschbacher, M.D. and Brian Reiss, M.D. were admitted into evidence in lieu of their testimony during the hearing

At the conclusion of the hearing, the ALJ ruled from the bench in favor of the Respondents, referring preparation of a proposed decision to counsel for the Respondents, which was submitted on January 8, 2021, and giving the Claimant two working days within which to file objections thereto. No timely objections having been filed, the matter was submitted for decision on January 13, 2021.

ISSUES

The issue to be determined by this decision is whether Respondents can terminate the post maximum medical improvement (MMI) general maintenance medical admission under their December 5, 2017 Final Admission of Liability, (FAL), pursuant to. § 8-43-201, C.R.S.

Respondents bear the burden of proof by a preponderance of the evidence.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following Findings of Fact:

1. The Claimant is a 37 year old man with a work related back injury of January 24, 2014.

2. As a result of the work-related injury, the Claimant underwent a partial laminecetomy and discectomy at L5-S1 on December 23, 2014. It is undisputed that the Claimant had degenerative changes throughout his spine at the time of the work injury. *Ex. N, Bate 306-308.* The Claimant received treatment under the claim for his L5-S1 until MMI was determined by 24-month DIME Dr. Franklin Shih. *Ex. C.* Dr. Shih found MMI as of July 13, 2016 and provided a 15% whole person impairment rating for the L5-S1 level of the lumbar spine (Respondents' *Exhibit. C, bates 52*).

3. Respondents filed a Final Admission of Liability (FAL), based upon the opinion of Franklin Shih, M.D.. The FAL was dated December 5, 2017, and noted, "We admit for reasonable and necessary and related medical treatment and/or medications after MMI.

4. It is undisputed that the Claimant left work with the Employer and became a self-employed carpenter/handyman after his work injury (Respondents' *Exhibit. D, bates 57*). The evidence establishes that the Claimant has since worked in a full duty capacity as a self-employed carpenter and that job requires heavy labor. The heavy labor done during the self-employment caused symptoms and complaints in the low back. During his treatment, Dr. Keith Graves, D.C., indicated that the Claimant was making poor progress, and stated: "Lasting functional relief from his symptomatology and any change in physical examination have not occurred primarily due to his

continued labor intensive workloads as a self employed general contractor (Respondents' *Exhibit D, bates 67*). "He has increased lumbar spine/lumbosacral junction pain/symptomatology with labor-intensive workloads as a general contractor" (Respondents' *Exhibit. D, bates 61*). On November 17, 2015, Chiropractic Dr. Graves's notes reflected a flare of symptoms while loading his residence without much help (Respondents' *Ex. D ,bates 61*). Chiropractor Graves also said, "Most of the patient's continued flare-ups occur with his work as a self-employed general contractor" (Respondents' *Exhibit. D, bates 72*). Dr. Graves repeated this thought throughout his treatment.

5. The Claimant has received maintenance medical treatment under this claim since the FAL was filed. In November of 2018, Daniel Alan Drennan, M.D. became the authorized treating physician (ATP) providing maintenance treatment to the Claimant (Respondents' *Exhibit. F, bates* 83)

6. On March 10, 2020, the Claimant appeared for follow up with Dr. Drennan. The Claimant reported a pain score of 6/10 with medication. He described a constant sharp ache that was not relieved by anything (Respondents' *Exhibit F, bates 141*). Dr. Drennan prescribed morphine 15 mg, Butrans 20 mcg/hour transdermal patch, and Baclofen 10 mg. He recommended a bilateral L4/5 L5/S1 transforaminal epidural steroid injection, a Spinal Q Vest, a surgical evaluation, and noted that the Claimant may benefit from a referral to behavioral medicine for depression, anxiety and coping Respondents' *Exhibit F, bates 142-143*).

7. The Claimant's activities were captured on video on March 10, 2020. He is seen in this video arriving at his March 10, 2020 appointment with Dr. Drennan. The Claimant is in a pick up truck with a construction trailer attached. The truck is parked and another individual waits in the truck while the Claimant attends his appointment. Following the appointment, the two proceed to Home Depot. The video then shows the Claimant repeatedly loading framed doors into the construction trailer. The person with him and the Home Depot employee near him watch the Claimant as he bends, lifts, and carries the doors into the trailer. There is no visible hesitation in his movement while he is doing this. He is not assisted by the others in his lifting.

8. The video was presented to Dr. Drennan, and he was asked whether his recommendations for treatment would change based upon the video. Dr. Drennan replied that it did not, and stated, "He does have a labor intensive job. I have back pain and problems as well, but still work on my farm, lifting heavy items that make me hurt. However, the work still has to be done, regardless of the pain it causes (Respondents' *Exhibit F, bates 147*).

9. In the September 8, 2020 appointment with the Claimant, Dr. Drennan noted continued low back complaints. He also noted that the Claimant's neck popped

and clicked and there was occasional pain and tingling in his arms and hands “that has not been addressed” (Respondents’ *Exhibit. F, bates 160*). Dr. Drennan prescribed voltaren gel for the knees and requested a right knee MRI (magnetic resonance imaging) and a right lateral genicular knee nerve block. He repeated his recommendations for spinal injections, a Spinal Q Vest and a spinal surgical evaluation. He refilled the Claimant’s medication, including morphine, buprenorphine, and baclofen (Respondents’ *Ehibitx. F, bates 161-163*).

10. The Claimant took the evidentiary deposition of Dr. Possley, orthopedic surgeon. Dr. Possley last saw the Claimant for treatment on March 6, 2020, a few days prior to the video of March 10, 2020. During that appointment, the Claimant represented that his condition had gotten worse six weeks prior to that appointment. He reported that he was having trouble working, with activities of daily living and with self care. (*Possley Depo. p. 15, Claimant’s Exhibit. 2, bates* 10)7*.* Dr. Possely recommended injections. Dr. Possley felt that the Claimant’s current symtoms were from a herniation at L4-5 and bone spurs at L5-S1. He stated that the need for treatment at these levels was a combination of acute and chronic issues (*Possley Depo. p. 16*)*.* He agreed that he had not done a causation analysis and that his opinion was not specific to a work diagnosis. *Id., p. 22.* Dr. Possley’s opinion was only based upon what the Claimant had told him about his back feeling worse. Dr. Possely admitted that he had not reviewed all of the Claimant’s MRI reports, and could not comment on whether these showed a difference in the spinal condition since MMI. He testified that he had not done a causation analysis, and had not reviewed the Dr. Shih’s DIME (Division Independent Medical Examination) report. Dr. Possely’s opinion was advanced as his recommendation for treatment of the Claimant’s present complaints, without consideration of causation, and without the benefit of the medical records or the March 10, 2020 video. The ALJ finds that Dr. Possley’s opinion is not found to include a determination of whether his recommendations are related to the work injury of January 24, 2014.

11. Dr. Reiss testified by deposition. Dr. Reiss is also an orthopedic spinal surgeon. Dr. Reiss had performed a face-to-face evaluation with the Claimant on July 5, 2017. He also performed an updated records review addressing the question of the reasonableness, necessity, and relatedness of continued maintenance treatment under this claim. He provided a summary of all medical records (Respondents’ *Exhibit. A*). In comparison with the pre-MMI MRI (Respondents *Exhibit. B, bates 14; Exhibit. N and Reiss Depo p. 14*)*.* Dr. Reiss concluded that it was not reasonable or necessary to repeat epidural injections at this point in time, given the limited benefit from injection therapy in the past (Respondents’ *Exhibit. A, Bates 14*)*.* He noted, “It must be remembered that [Claimant] was having significant lower back and left lower extremity pain prior to the minor work incident. [The Claimant’s] symptomatology was irritated by his activating including work which is no different than his probable condition right now.” *Id.* Dr. Reiss was of the opinion that the Claimant was back to his pre-injury **baseline** and that the need for treatment is related to his pre-existing ongoing condition

(Respondents' *Exhibit A, bates 15; Reiss Depo p. 12-16*) . Dr. Reiss testified that the bilateral knees are not related to the work injury of January 24, 2014.

12. Dr. Raschbacher testified by deposition. Dr. Raschbacher conducted independent medical examinations (IMEs) of the Claimant on May 1, 2014, March 8, 2016, and July 28, 2017. He provided physician staffing opinions regarding requested medical treatment, and he performed a medical records review and provided a report addressing the reasonableness, necessity, and relatedness of ongoing maintenance medical treatment dated June 22, 2020 (Respondents' *Exhibit.B).* Dr. Raschbacher was of the opinion that continued treatment, including Dr. Drennan's current recommendations, is not reasonable, necessary, or causally elated to the workers' compensation claim of January 24, 2014 (Respondents' *Exhibit. B, bates 47*)*.* Consistent with Dr. Reiss, he was of the opinion that any aggravation of the Claimant's back symptoms at this time are from his current self-employed work related activities, as illustrated by the March 10, 2020 video (Respondents' *Exhibit. B, bates 47; Raschbacher Depo. P. 29*)*.* According to Dr. Raschbacher continued maintenance treatment is not reasonable, necessary or causally related to the work injury (*Raschbacher Depo p. 30.* Dr. Raschbacher testified that neither the bilateral knees nor the neck are related to the original work injury (*Raschbacher Depo p. 39, 42*).

Ultimate Findings

13. The ALJ finds the opinions of Drs. Reiss and Raschbacher highly credible ,*i.e.,* that Claimant's present back condition is not causally related to the admitted work-related injury of January 24, 2014, nor is there any indication of work-relatedness in their opinions. Further, Dr. Possley was unable to express an opinion concerning work-relatedness. In fact, only ATP Drennan implies work relatedness of the admitted back injury. The ALJ rejects Dr. Drennan's implied opinion as inadequately founded or expressed. Therefor, the ALJ finds his opinion lacking in credibility to support work-relatedness.

14. Between conflicting opinions and testimony, the ALJ makes a rational choice, based on substantial evidence, to accept the opinions of Drs. Reiss and Raschbacher, which do not support work-relatedness of the January 24, 2014 admitted claim and to reject the implied opinion of work-relatedness, expressed by ATP Dr. Drennan.

15. The Respondents have established that the Claimant's current post-MMI medical maintenance treatment is **not** causally related to the admitted injury of January 24, 2014.

16. Respondents have proven, by a preponderance of the evidence that the Claimant's current post-MMI medical maintenance treatment is **not** causally related to the January 24, 2014 back injury.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ makes the following Conclusions of Law:

Credibility

b. In deciding whether an injured worker has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. Indus. Claim Appeals Office,* 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Indus. Claim Appeals Office*, 53 P.3d 1192, 1197 (Colo. App. 2002); *Rockwell International v. Turnbull,* 802 P.2d 1182, 1183 (Colo. App. 1990); *Penasquitos Village, Inc. v. NLRB*, 565 F.2d 1074 (9th Cir. 1977). The ALJ determines the credibility of the witnesses. A*renas v. Indus. Claim Appeals Office*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Youngs v. Indus. Claim Appeals Office,* 297 P.3d 964, 2012 COA 85. The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *also see Heinicke v. Indus. Claim Appeals Office,* 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of a witness' testimony and/or actions; the reasonableness or unreasonableness (probability or improbability) of a witness' testimony and/or actions (this includes whether or not the expert opinions are adequately founded upon appropriate research); the motives of a witness; whether the testimony has been contradicted; and, bias, prejudice or interest. *See Prudential Ins. Co. v. Cline,* 98 Colo. 275, 57 P. 2d 1205 (1936); CJI, Civil, 3:16 (2005). The fact finder should consider an expert witness' special knowledge, training, experience or research (or lack thereof). *See Young v. Burke,* 139 Colo. 305, 338 P. 2d 284 (1959). The ALJ has broad discretion to determine the admissibility and/or weight of evidence based on an expert's knowledge, skill, experience, training and education. *See* § 8-43-210, C.R.S; *One Hour Cleaners v. Indus. Claim Appeals Office,* 914 P.2d 501 (Colo. App. 1995). As found, the opinions of Drs. Messenbaugh and Feldman were most credible for what they did not express, *i.e.,* there is no indication of work-relatedness in their opinions. On the other hand, the opinions of Drs Kuklo and Hughes regarding work-relatedness are not credible because they relied entirely upon what the Claimant told them; and, the Claimant's history of the work-related "falling from the Tree' incident and the consequences thereof was not credible.

Substantial Evidence

c. ALJ's factual findings must be supported by substantial evidence in the record. *Paint Connection Plus v. Indus. Claim Appeals Office,* 240 P.3d 429 (Colo. App. 2010); *Leewaye v. Indus. Claim Appeals Office,* 178 P.3d 1254 (Colo. App. 2007); *Brownson-Rausin v. Indus. Claim Appeals Office,* 131 P.3d 1172 (Colo. App. 2005). *Also see Martinez v. Indus. Claim Appeals Office,* 176 P.3d 826 (Colo. App. 2007). Substantial evidence is "that quantum of probative evidence which a rational fact-finder would accept as adequate to support a conclusion, without regard to the existence of conflicting evidence." *Metro Moving & Storage Co.v. Gussert,* 914 P.2d 411 (Colo. App. 1995). Reasonable probability exists if a proposition is supported by **substantial evidence** which would warrant a reasonable belief in the existence of facts supporting a particular finding. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985). It is the sole province of the fact finder to weigh the evidence and resolve contradictions in the evidence. See *Pacesetter Corp. v. Collett,* 33 P. 3d 1230 (Colo. App. 2001). An ALJ's resolution on questions of fact must be upheld if supported by substantial evidence and plausible inferences drawn from the record. *Eller v. Indus. Claim Appeals Office,* 224 P.3d 397, 399-400 (Colo. App. 2009). As found, between conflicting opinions and testimony, the ALJ made rational choice, based on substantial evidence, to accept the opinions of Drs. Messenbaugh and Feldman and what is not in those opinions; and, to reject the opinions of Drs. Kuklo and Hughes, as well as the Claimant's testimony, for the reasons herein above specified.

Compensability—Aggravation/Acceleration of Pre-Existing Conditions

d. A compensable injury is one that arises out of and in the course and scope of employment. § 8-41-301 (1) (b), C.R.S. The "arising out of test is one of causation. As found, the Claimant has failed to adequately causally connect his present medical problems to the alleged "tree-falling" incident. The alleged "tree-falling" incident only satisfies the "course and scope" test. If an industrial injury aggravates or accelerates a preexisting condition, the resulting disability and need for treatment isa compensable consequence of the industrial injury. Thus, a claimant's personal susceptibility or predisposition to injury does not disqualify the claimant from receiving benefits. *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990). If the employment-related activities aggravate, accelerate, or combine with a pre-existing condition to cause disability, a compensable phenomenon has occurred. § 8-41-301 (1) (c), C.R.S. *See Merriman v. Indus. Comm'n,* 120 Colo. 400, 210 P.2d 448 (1949); *Anderson v. Brinkoff,* 859 P.2d 819 (Colo. 1993); *National Health Laboratories v. Indus. Claim Appeals Office,* 844 P.2d 1259 (Colo. Pp. 1992); *Snyder v. Indus. Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). *Also see* § 8-41-301 (1) (c), C.R.S; *Parra v. Ideal Concrete,* W.C. No. 4-179-455 [Indus. Claim Appeals Office (ICAO), April 8, 1998] *Witt v. James J. Kell, Jr.,* W.C. No. 4-225-334 (ICAO, April 7, 1998). As found, the Claimant failed to establish that he sustained aggravating or accelerating injuries arising out of his employment for the Employer on December 13 or 18, 2018, as alleged. Thus, the Claimant failed to establish a compensable injury.

Burden of Proof

e. The injured worker has the burden of proof, by a preponderance of the evidence, of establishing the compensability of an industrial injury and entitlement to benefits. §§ 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000). *Kieckhafer v. Indus. Claim Appeals.Office*, 284 P.3d 202, 205 (Colo. App. 2012). Also, the burden of proof is generally placed on the party asserting the affirmative of a proposition. *Cowin & Co. v. Medina,* 860 P.2d 535 (Colo. App. 1992). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979). *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004); *Hoster v. Weld County Bi-Products, Inc.,* W.C. No. 4-483-341 [Indus. Claim Appeals Office (ICAO), March 20, 2002]. *Also see Ortiz v. Principi,* 274 F.3d 1361 (D.C. Cir. 2001). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984). As found, the Claimant failed to sustain his burden on the issue of compensability.

ORDER

IT IS, THEREFORE, ORDERED THAT:

Any and all claims for workers' compensation benefits are hereby denied and dismissed.

DATED this 7th day of December 2020.

DIGITAL SIGNATURE

EDWIN L. FELTER, JR.
Administrative Law Judge

ISSUES

1. Whether the ALJ has jurisdiction to address Claimant's request for medical maintenance benefits because Respondents' October 30, 2020 Final Admission of Liability (FAL) closed the claim and Claimant has not filed a petition to reopen.

2. If Claimant's claim for medical maintenance benefits remains open, whether Claimant has proven by a preponderance of the evidence that medical maintenance benefits in the form of massage therapy, acupuncture, and physical therapy are reasonable and necessary to relieve the effects of her January 2, 2018 industrial injury or prevent further deterioration of her condition.

3. Whether Claimant has established by a preponderance of the evidence that she is entitled to reimbursement for mileage expenses for authorized visits to medical appointments during the period February 11, 2021 through June 23, 2021.

FINDINGS OF FACT

1. Claimant worked for Employer as a Stage Production Manager. On January 2, 2018 she stepped off an elevated stage and fell onto a concrete floor. Claimant commented that the accident felt like a body slam because she missed a step and fell straight down on her shoulders, hands and knees. She initially experienced total body pain, but her primary symptoms involved her right shoulder, left hand, neck and knees.

2. On January 3, 2018 Claimant visited Physician's Assistant Hanna Bodkin at Authorized Treating Physician (ATP) Concentra Medical Centers for an examination. PA Bodkin referred Claimant to Yani C. Zinis, D.O. for pain management.

3. On February 16, 2018 Claimant began treatment with Dr. Zinis. Claimant had previously treated with Dr. Zinis in 2005-2006 and 2010-2011. However, she had not received care from Dr. Zinis between 2011 and her injury on January 2, 2018.

4. During her course of treatment Claimant was also referred to neurologist Steven H. Shogan, M.D. for an evaluation. Dr. Shogan has recommended that Claimant return every six months to evaluate her neurological status and the stability of her neck.

5. Throughout her care Claimant has been prescribed lidocaine patches, Medrol, Oxycodone, Percocet, Xanax, and Ativan. She has also undergone treatment in the form of physical therapy, massage therapy and acupuncture.

6. Claimant testified at the hearing in this matter. She explained that the combination of physical and massage therapy treatments have decreased her use of pain medications. The treatment modalities have also improved her function. Specifically, the therapy has allowed her to be more mobile and continue working a limited schedule.

7. On October 8, 2020 Claimant underwent a 24-month Division Independent Medical Examination (DIME) with Stephen D. Lindenbaum, M.D. Dr. Lindenbaum conducted a physical examination and reviewed Claimant's medical records. He determined that Claimant reached Maximum Medical Improvement (MMI) on September 18, 2019. Dr. Lindenbaum reasoned that Claimant had received a significant number of treatment modalities, including acupuncture, physical therapy and massage therapy, over a period of two years. She has experienced a waxing and waning of symptoms and diagnostic studies have revealed that surgical intervention was not appropriate. Therefore, MMI was appropriate when all testing was completed on September 18, 2019. He assigned the following permanent impairment ratings: (1) a 10% extremity rating for the left knee; (2) a 3% extremity rating for the right shoulder; and a 23% whole person rating for the cervical spine. Dr. Lindenbaum recommended work restrictions including the following: (1) lifting not to exceed 25-30 pounds; (2) lifting of weight above chest height restricted to 10-15 pounds on the right side; and (3) no repetitive kneeling and squatting.

8. Dr. Lindenbaum explained that Claimant was entitled to limited medical maintenance treatment. In specifically addressing post-MMI medical benefits, Dr. Lindenbaum suggested follow-up visits with Dr, Zinis to monitor cervical spine complaints and maintain treatment medications. He noted that Claimant did not require supervised treatment modalities of acupuncture, massage therapy or physical therapy. Dr. Lindenbaum commented that there might be an "occasional episode" where Claimant would require 6-8 sessions of massage or physical therapy each year. Nevertheless, he reasoned that the preceding modalities should not be used excessively as they had been in the past. Dr. Lindenbaum also suggested quarterly visits with Dr. Zinis over the following year. Finally, he recommended two visits over the ensuing year with Dr. Shogan for neurological monitoring.

9. On October 30, 2020 Insurer filed a Final Admission of Liability (FAL) consistent with Dr. Lindenbaum's MMI and impairment determinations. The FAL also recounted Dr. Lindenbaum's medical maintenance recommendations. Specifically, the FAL limited future medical benefits to the following:

> Dr. Zinis should follow her cervical spine complaints and Rx. She does not need acupuncture, PT or MT. There may be an occasional episode where the patient will have exacerbation where she would need up to 6-8 sessions combined per year of these treatments. She should be seen on a quarterly basis. Ancillary massage therapy and PT could be decided by Dr. Zinis but certainly should not be excessively used such as in the past, 6-8 visits a year. Another visit from Dr. Shogan should be allowed twice over the next year for neurological monitoring.

The record reveals that Claimant never objected to the FAL or filed a petition to reopen the claim.

10. Claimant explained that subsequent to the DIME appointment she has repeatedly followed up with Drs. Zinis and Shogan, The physicians have recommended

continued physical therapy, acupuncture and massage therapy. Claimant remarked that the conservative treatments have been recommended to avoid surgery, keep her off pain medications and maintain her function.

11. On April 26, 2021 Claimant visited Dr. Shogan for an evaluation. Claimant recounted that she has suffered chronic neck pain, but her January 2018 industrial injury increased her symptoms. Dr. Shogan noted that Claimant had attended physical therapy, massage therapy and acupuncture. He commented that Claimant would continue with conservative treatment modalities.

12. On September 13, 2021 the parties conducted the pre-hearing evidentiary deposition of Dr. Lindenbaum. He elaborated on his medical maintenance treatment recommendations as detailed in his DIME report. Dr. Lindenbaum acknowledged that the medical records revealed Claimant had received in excess of 40 massage therapy sessions, in excess of 100 physical therapy visits and 48 acupuncture sessions. He explained that continuing with the preceding treatment modalities was no longer appropriate. Based on Rule 17 of the Colorado Division of Workers' Compensation *Medical Treatment Guidelines* (*Guidelines*), Dr. Lindenbaum noted that Claimant suffers from chronic pain. The maximum number of massage therapy, physical therapy and acupuncture visits is limited unless there is "documented, objective evidence" that the therapy is providing a benefit. Dr. Lindenbaum remarked that individuals are roughly limited to a total of 15-16 physical therapy sessions over a maximum of eight weeks. Acupuncture is limited to about 15 visits and massage therapy includes 8-10 visits each year. He reasoned that, aside from Dr. Zinis' opinion that Claimant was improving with conservative care, the medical records lacked adequate objective documentation to support referrals for additional conservative treatment.

13. On October 7, 2021 Claimant visited Dr. Zinis for an examination. In addressing Claimant's conservative treatment, he summarized that medical massage, acupuncture, and physical therapy all have been considerably helpful in maintaining her chronic neck pain and allowed her to minimize the use of pain medications. However, Claimant has suffered worsening symptoms over the past several weeks because she was unable to access her treatment providers for massage therapy, acupuncture and physical therapy. Dr. Zinis summarized that Claimant had improved through the combination of maintenance treatments "with regards to the extent of persistent pain and neck stiffness, and much worse since these have been denied by insurance, in spite of previous documentation that these be maintained to keep her at MMI."

14. At the time of her industrial injury Claimant listed her residence as 2685 South Dayton Way #302, Denver, Colorado, 80231. After her January 2, 2018 work accident Claimant received medical treatment from Concentra and Dr. Zinis. Claimant also underwent physical therapy and massage therapy. Claimant traveled the following mileage from her home address in 2018 to her treatment providers:

- Concentra- 19.4 miles round trip
- Dr. Zinis- 13.4 miles round trip
- Physical Therapy- 11 miles round trip
- Massage Therapy- 15.8 miles round trip

15. At some point in 2018 Claimant relocated her residence to 4479 Tierra Alta Drive, Castle Rock, Colorado. The move increased her mileage to and from medical appointments to the following:

- Concentra- 46 miles round trip
- Dr. Zinis- 50.8 miles round trip
- Physical Therapy- 43.8 miles round trip
- Massage Therapy- 47.6 miles round trip

16. Claimant testified she received a prescription for acupuncture therapy sometime after her move to Castle Rock. She chose acupuncture treatment at the same location as her massage therapy provider or 47.6 miles round trip from her Castle Rock home.

17. In October of 2020 Claimant sent a mileage reimbursement request to Respondents. She sought payment in the amount of $8,655.96 for travel mileage to and from her appointments. The dates for reimbursement extended from January 2, 2018 until July of 2020. Claimant acknowledged that she was reimbursed for the preceding travel expenses.

18. On June 23, 2021 Claimant submitted a mileage reimbursement request for a total amount of $1,194.40. The amount requested covered 2253.6 miles at the rate of $0.53 per mile. The mileage requests involved travel during the period February 11, 2021 and June 23, 2021. Claimant testified that the mileage reimbursement requests she has submitted are accurate and she attended each of the claimed appointments. She commented that she tries to schedule multiple appointments on the same day to minimize her mileage. Claimant remarked that she desires to continue treating with her providers to assure continuity of care. Nevertheless, Claimant explained that she has been denied additional mileage reimbursement from February 11, 2021 through June 23, 2021. On the Application for Hearing in this matter Respondents challenged the preceding reimbursement request because it was not reasonable.

19. The ALJ lacks jurisdiction to address Claimant's request for medical maintenance benefits because Respondents' October 30, 2020 FAL closed Claimant's claim and she has not filed a petition to reopen. Initially, although §8-42-107, C.R.S. places an affirmative duty upon the respondents to admit for future medical benefits in a FAL, the statute only applies when "there is no contrary medical opinion in the record." Here, the medical records reflect that Dr. Lindenbaum provided a contrary medical opinion to ATP Dr. Zinis regarding medical maintenance benefits. Specifically, Dr. Lindenbaum explained that treatment modalities including massage therapy, acupuncture and physical therapy were no longer appropriate for Claimant. He reasoned that, aside from Dr. Zinis' opinion that Claimant was improving with conservative care, the medical records lacked adequate objective documentation to support referrals for additional conservative treatment. Respondents' were thus not required to admit future medical benefits in the October 30, 2020 FAL pursuant to §8-42-107, C.R.S.

20. The FAL specifically recounted Dr. Lindenbaum's medical maintenance recommendations. Notably, the FAL acknowledged that Dr. Zinis should follow Claimant's cervical spine complaints, but stated that Claimant did not need acupuncture, physical therapy or massage therapy except for "an occasional episode" during an exacerbation "where she would need up to 6-8 sessions combined per year of these treatments." Moreover, Claimant could visit Dr. Shogan twice in the ensuing year for neurological monitoring. Based on Dr. Lindenbaum's DIME report, Respondents acted reasonably when they limited the admission of medical maintenance benefits. However, Claimant failed to object to the FAL within 30 days. The issue of medical maintenance benefits thus closed pursuant to statute and Claimant has not filed a petition to reopen the claim. Accordingly, the ALJ lacks jurisdiction to address Claimant's request for medical maintenance benefits.

21. Claimant has established that it is more probably true than not that she is entitled to reimbursement for mileage expenses for authorized visits to medical appointments during the period February 11, 2021 through June 23, 2021. Initially, in October of 2020 Claimant sought payment in the amount of $8,655.96 for travel mileage to and from her medical appointments. The dates for reimbursement extended from January 2, 2018 until July of 2020. Claimant acknowledged that she was reimbursed for the preceding travel expenses. However, Claimant explained that she has been denied additional mileage reimbursement for the period February 11, 2021 through June 23, 2021. On the Application for Hearing in this matter Respondents challenged the preceding reimbursement request because it was not reasonable.

22. On June 23, 2021 Claimant submitted a mileage reimbursement request for a total amount of $1,194.40. The amount requested covered 2253.6 miles at the rate of $0.53 per mile. The mileage requests involved travel during the period February 11, 2021 through June 23, 2021. Claimant timely submitted the mileage reimbursement requests and verified in her testimony that the mileage was related to her attendance at appointments with her authorized treating providers. Nevertheless, Respondents contend that, because Claimant moved from Denver to Castle Rock during her medical treatment, her mileage expenses are no longer reasonable. Specifically, Claimant's round trip mileage requests increased from 19.4 to 46 miles for her visits to Concentra, 13.4 to 50.8 miles for her appointments with Dr. Zinis, 11 to 43.8 miles for her physical therapy sessions and 15.8 to 47.6 miles for her massage therapy visits.

23. Claimant's change of residence required her to travel substantially further distances to obtain medical treatment. However, the record reflects that Claimant incurred reasonable and necessary mileage expenses for travel to and from her medical appointments during the period February 11, 2021 through June 23, 2021. Claimant credibly testified that the requests she has submitted are accurate and she attended each of the claimed appointments. She commented that she tries to schedule multiple appointments on the same day to minimize her mileage. Claimant remarked that she desires to continue treating with her providers to assure continuity of care. The record thus reveals that Claimant's mileage expenses were reasonable and incidental to obtaining necessary medical treatment. Claimant's request for mileage reimbursement for the period February 11, 2021 and June 23, 2021 is thus compensable. Accordingly,

Respondents shall reimburse Claimant in the amount of $1,194.40 for mileage expenses incidental to obtaining medical treatment for the period February 11, 2021 through June 23, 2021.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge’s factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. Indus. Claim Appeals Off.,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Jurisdiction

4. Section 8-43-203(2)(b)(II), C.R.S. provides that a claim will automatically close after the date of the FAL unless the claimant contests the FAL in writing and requests a hearing on any disputed issues that are ripe for hearing including selection of a DIME. *See Stefanski v. Indus. Claim Appeals Off.,* 128 P.3d 282 (Colo. App. 2006) (noting that “any pleading that adequately notifies the employer that the claimant does not accept the FAL constitutes substantial, if not actual, compliance with the statutory obligation to provide written objection”). The statutory automatic closure provisions are designed to “promote, encourage, and ensure prompt payment of compensation to an injured worker without the necessity of a formal administrative determination in cases not presenting a legitimate controversy.” *Dyrkopp v. Indus. Claim Appeals Off.,* 30 P.3d 821, 822 (Colo. App. 2001). Once a claim is closed by an FAL, issues resolved by the FAL are not subject to further litigation unless reopened under §8-43-303, C.R.S. *Leewaye v. Indus. Claim Appeals Off.,* 178 P.3d 1254 (Colo. App. 2007). The overall statutory scheme is designed to provide a method to determine the claimant’s medical condition,

afford the claimant an opportunity to contest a medical determination, close all undisputed issues and permit reopening on appropriate grounds. *See Peregoy v. Indus. Claim Appeals Off.,* 87 P.3d 261 (Colo. App. 2004).

5. By its plain language, the reopening statute applies to the reopening of "any award." §8-43-303(1). *City and County of Denver v. Indus. Claim Appeals Off.*, 2021 COA 146, ¶ 25. An "award" has been interpreted broadly under the Act to include "[a]n order, whether resulting from an admission, [an] agreement, or a contested hearing, which addresses benefits and which grants or denies a benefit." *Bolton v. Indus. Claim Appeals Off.*, 2019 COA 47, ¶ 23 (quoting *Burke v. Indus. Claim Appeals Off.*, 905 P.2d 1, 2 (Colo. App. 1994)); *see also Safeway, Inc. v. Indus. Claim Appeals Off.*, 968 P.2d 162, 164 (Colo. App. 1998) ("An order resulting from an admission which addresses the granting or denial of a particular benefit is an award which must be reopened if additional or different benefits are sought.").

6. Where limitations on post-MMI medical benefits are contained in a FAL, rather than an order, the limitations are binding, unless objected to by the claimant within the time provided by §8-43-203(b) (II), C.R.S. and §8-42-107.2, C.R.S. As noted in *Anderson v. SOS Staffing Services*, W.C. No. 4-543-730 (ICAO July 14, 2006), a claim may be closed by a "final award" resulting from an admission or order after a contested hearing. *See Burke v. Indus. Claim Appeals Off.*, 905 P2d 1 (Colo. App. 1994). Thus, unless an "award" of benefits expressly reserves other issues for future determination, the "award" closes the claim and requires the parties to satisfy the reopening requirements of §8-43-303 C.R.S. before litigation of any further issues. *Hanna v. Print Expediters*, Inc. 77P.2d 863 (Colo. 2003); see *Brown and Root, Inc. v. Indus. Claim Appeals Off.*, 833 P.2d 780, 784 (Colo. App 1991).

7. As found, the ALJ lacks jurisdiction to address Claimant's request for medical maintenance benefits because Respondents' October 30, 2020 FAL closed Claimant's claim and she has not filed a petition to reopen. Initially, although §8-42-107, C.R.S. places an affirmative duty upon the respondents to admit for future medical benefits in a FAL, the statute only applies when "there is no contrary medical opinion in the record." Here, the medical records reflect that Dr. Lindenbaum provided a contrary medical opinion to ATP Dr. Zinis regarding medical maintenance benefits. Specifically, Dr. Lindenbaum explained that treatment modalities including massage therapy, acupuncture and physical therapy were no longer appropriate for Claimant. He reasoned that, aside from Dr. Zinis' opinion that Claimant was improving with conservative care, the medical records lacked adequate objective documentation to support referrals for additional conservative treatment. Respondents' were thus not required to admit future medical benefits in the October 30, 2020 FAL pursuant to §8-42-107, C.R.S.

8. As found, the FAL specifically recounted Dr. Lindenbaum's medical maintenance recommendations. Notably, the FAL acknowledged that Dr. Zinis should follow Claimant's cervical spine complaints, but stated that Claimant did not need acupuncture, physical therapy or massage therapy except for "an occasional episode" during an exacerbation "where she would need up to 6-8 sessions combined per year of these treatments." Moreover, Claimant could visit Dr. Shogan twice in the ensuing year

for neurological monitoring. Based on Dr. Lindenbaum's DIME report, Respondents acted reasonably when they limited the admission of medical maintenance benefits. However, Claimant failed to object to the FAL within 30 days. The issue of medical maintenance benefits thus closed pursuant to statute and Claimant has not filed a petition to reopen the claim. Accordingly, the ALJ lacks jurisdiction to address Claimant's request for medical maintenance benefits.

Mileage Reimbursement

9. Section 8-42-101(1)(a), C.R.S. requires the respondents to pay for expenses that are incidental to obtaining reasonable and necessary medical treatment. Specifically, mileage expenses are compensable if "incidental" to obtaining medical treatment. *Country Squire Kennels v. Tarshsis*, 899 P.2d 362 (Colo. App. 1995); *Sigman Meat Co. v. Indus. Claim Appeals Off.*, 761 P.2d 265 (Colo. App. 1988). Similarly, Colorado Division of Workers' Compensation (DOWC) Rule of Procedure 16-10(G) specifies that "payers shall reimburse injured workers for mileage expenses as required by statute or provide written notice of the reason(s) for denying reimbursement within 30 days of receipt." Finally, DOWC Rule of Procedure 18-7(E) provides that "[t]he Payer shall reimburse the injured worker for reasonable and necessary mileage expenses for travel to and from medical appointments. The injured worker shall submit a request to the Payer showing the date(s) of travel and mileage, and explain any other reasonable and necessary travel expenses incurred or anticipated."

10. As found, Claimant has established by a preponderance of the evidence that she is entitled to reimbursement for mileage expenses for authorized visits to medical appointments during the period February 11, 2021 through June 23, 2021. Initially, in October of 2020 Claimant sought payment in the amount of $8,655.96 for travel mileage to and from her medical appointments. The dates for reimbursement extended from January 2, 2018 until July of 2020. Claimant acknowledged that she was reimbursed for the preceding travel expenses. However, Claimant explained that she has been denied additional mileage reimbursement for the period February 11, 2021 through June 23, 2021. On the Application for Hearing in this matter Respondents challenged the preceding reimbursement request because it was not reasonable.

11. As found, on June 23, 2021 Claimant submitted a mileage reimbursement request for a total amount of $1,194.40. The amount requested covered 2253.6 miles at the rate of $0.53 per mile. The mileage requests involved travel during the period February 11, 2021 through June 23, 2021. Claimant timely submitted the mileage reimbursement requests and verified in her testimony that the mileage was related to her attendance at appointments with her authorized treating providers. Nevertheless, Respondents contend that, because Claimant moved from Denver to Castle Rock during her medical treatment, her mileage expenses are no longer reasonable. Specifically, Claimant's round trip mileage requests increased from 19.4 to 46 miles for her visits to Concentra, 13.4 to 50.8 miles for her appointments with Dr. Zinis, 11 to 43.8 miles for her physical therapy sessions and 15.8 to 47.6 miles for her massage therapy visits.

12. As found, Claimant's change of residence required her to travel substantially further distances to obtain medical treatment. However, the record reflects that Claimant incurred reasonable and necessary mileage expenses for travel to and from her medical appointments during the period February 11, 2021 through June 23, 2021. Claimant credibly testified that the requests she has submitted are accurate and she attended each of the claimed appointments. She commented that she tries to schedule multiple appointments on the same day to minimize her mileage. Claimant remarked that she desires to continue treating with her providers to assure continuity of care. The record thus reveals that Claimant's mileage expenses were reasonable and incidental to obtaining necessary medical treatment. Claimant's request for mileage reimbursement for the period February 11, 2021 and June 23, 2021 is thus compensable. Accordingly, Respondents shall reimburse Claimant in the amount of $1,194.40 for mileage expenses incidental to obtaining medical treatment for the period February 11, 2021 through June 23, 2021.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. The ALJ lacks jurisdiction to address Claimant's request for medical maintenance benefits.

2. Respondents shall reimburse Claimant in the amount of $1,194.40 for mileage expenses incidental to obtaining medical treatment during the period February 11, 2021 through June 23, 2021.

3. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: December 7, 2021.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant has overcome the Division of Workers' Compensation Independent Medical Examination (DIME) physician's opinion by clear and convincing evidence.

II. If Claimant proves he has overcome the DIME's physician's opinion, whether Claimant has proven that he is entitled to further permanent partial impairment related to the mild traumatic brain injury (mTBI), cosmetic disfigurement and/or the nonreactive pupil in accordance with the *AMA Guides to the Evaluation to Permanent Impairment*, Third Edition, (*Revised).*

III. If Claimant proves he has overcome the DIME's physician's opinion, whether Claimant is entitled to medical benefits regarding the disputed mTBI and headaches (HAs) by preponderance of the evidence as reasonable, necessary and related to the admitted injury of September 1, 2017.

PROCEDURAL HISTORY

On May 28, 2020, Claimant filed an Objection to Final Admission of Liability dated May 6, 2020, and an Application for Hearing on the same date listing the issues of medical benefits, permanent partial disability benefits, non-Payment of treating physician, mileage reimbursement, interest at 8% per statute and overcoming the April 15, 2020 DIME opinion of Michael Striplin, M.D. On October 28, 2020 Claimant filed an Amended Application for Hearing adding issues of penalties. On March 11, 2021 the OAC issued an Order Granting the Unopposed Motion to Withdraw the Application for Hearing and Refile without prejudice. On April 14, 2021 Claimant filed a new Application for Hearing on the identical issues.

On July 20, 2021 Prehearing Administrative Law Judge David W. Gallivan issued a Prehearing Conference Order granting Claimant's motion for an extension of time to commence the hearing and Respondent's motion for a prehearing deposition of Dr. Carlos Cebrian.

On May 14, 2020 Respondents filed a Response to the April 14, 2020 Application for Hearing on issues that include causation, relatedness, reasonably necessary medical benefits, ripeness, and stated that Claimant must overcome the DIME by clear and convincing evidence preliminary to or in conjunction with issues endorsed for appeal. On November 18, 2020 Respondents filed a Response to Claimant's October 28, 2020 AFH and on April 28, 2021 Respondents filed a Response to Claimant's April 14, 2021 Application for Hearing on similar issues but added penalties and attorney fees as well as overpayment.

On October 4, 2021 Respondents provided notice that they had scheduled the post-hearing deposition of Dr. Carlos Cebrian to take place on October 7, 2021.

Claimant argued previously that Respondents' were not entitled to a Division Independent Medical Examination as Claimant was placed at maximum medical improvement by his authorized treating physician prior to the DIME taking place. This issue was previously addressed by ALJ Glen Goldman on September 30, 2020 in and Order Granting Respondents' Motion for Summary Judgement and will not be revisited here.

STIPULATIONS

The issue of payment of authorized treating physician, Dr. Spinossi, is withdraw by Claimant.

The issue of mileage is reserved by Claimant with the condition that, if further payment of mileage is to be paid on mileage already submitted to Insurer, Claimant waives the right to any interest due on payments that might be due from the date of hearing, September 14, 2021 and forward.

At the commencement of the continued hearing on October 18, 2021, the parties indicated that the issues of penalties and attorney fees were withdrawn with prejudice, including Exhibits B, C, G, H, I, and J. Respondents also conceded that there was no overpayment currently being asserted, only a lien for child support pursuant to statute.

FINDINGS OF FACT

Based on the evidence presented, the ALJ enters the following findings of fact:

A. Claimant's Testimony:

1. Claimant was born on April 21, 1961, and was 60 years old at the time of the hearing. He attended school in the Netherlands where he worked for his father's dairy. Claimant moved to the United States in 1988 and owned a dairy in California. Due to a debt his ex-wife owed and failed to pay her ex-father-in-law, Claimant failed to pay child support and the courts ordered a child support lien. Claimant has significantly reduced the lien and continues to pay for child support for a disabled middle child, despite reaching the age of majority.

2. Claimant stated that Employer runs a dairy company, producing approximately 300,000 lbs. of milk, as well as beef and compost. Claimant was a dairy farm worker for Employer, performing activities such as heard health and corral maintenance. Prior to the work injury, Claimant was employed by Employer for approximately two years. He obtained the job as he had a long history of experience. He would perform these duties early in the morning for a few hours and another few hours late in the afternoon or evenings. During the day, Claimant had a job as a real estate broker.

3. On September 1, 2017 Claimant was running a tractor with a hydraulic box scraper and lift to clean out the manure from the corral. A steel hose and metal fitting was connected from the tractor to the box in order to operate the hydraulic lift. It would allow the lift to be moved upward from the ground to move the manure from the corral into a pile. The hose was under pressure and broke. The hose held about 3700 PSI of pressure in order to work. When the hose broke, the hose whiplashed with extreme force into the cab of the tractor, striking Claimant in the head and right eye with the metal fitting at the end of the pressurized hose.

4. Claimant felt immediate excruciating pain, disorientation, dizziness, nausea, slurred speech, could not think effectively and was bleeding. Also his face and eye swelled up. A co-worker witnessed the event and immediately called the General Manager (GM) and owner of the dairy. Claimant advised the GM that he would wait to see how he was doing before he sought medical care. Initially Claimant was still out of it, and confused, thought that the swelling would go down and heal on its own. But he attempted to return to work and the light caused incredible eye pain, headaches and he could not think straight.

5. On the day of and the days following, Claimant continued to have blurred vision in the right eye, nausea, dizziness, disorientation, slurred speech, and severe headaches. He attempted to continue working but the light caused him to have excruciating pain and nausea, and he was unable to continue to work. He requested that the GM send him to a medical provider.

6. The GM took Claimant himself to Banner Occupational Health Clinic, at Northern Colorado Medical Center, for medical care on September 7, 2017, when the symptoms did not abate. Claimant stated that he had not experience any of these symptoms before the accident other than the occasional headache caused by a cold or flu, which did not interrupt his activities of daily living (ADLs) or his work.

7. Claimant was evaluated by James A. Hebard, M.D. Claimant reported to Dr. Hebard that since the accident he continued to experience fatigue, trouble sleeping, difficulty seeing, loss of vision, eye pain, blurred vision, eye trauma, inflamed eyes, dizziness, nose bleeds, and head and facial trauma, nausea, vomiting, difficulty walking, difficulty speaking, difficulty concentrating, headaches, and loss of memory.

8. Claimant testified that since the accident he has continued to experience pain in the right eye, blurred vision and vision loss in the right eye, problems with the left eye, dizziness, disorientation, problems with balance and bumping into things or people, depth perception, and light sensitivity. However, one of the worst problems are the continuing headaches. He also stated that he had loss of balance, he stumbles around, has inconsistent work performance, does not have a social life, nor recreational life, and cannot drive at night. He does engage in some exercises at home but not at a gym or outside because of the light sensitivity, stating that it was just not worth the pain it would cause.

9. Claimant testified that he has two distinct types of headaches. The first is a headache that begins above the right eye on the socket ridge and following to the side

of his head along his right temple. These headaches occur approximately four to five times a week and are primarily caused by light sensitivity, and vary in intensity from a four to a seven and a half on a visual analog scale (VAS) of zero to ten. The second is a pain that feels like a hot knife stabbing into the brain that goes from his forehead inward deep into his brain, to the back of his head. They generally cause him to have nausea and pain with the sensation of almost passing out. This will typically be pain of almost a ten, the worst pain possible. This occurs approximately three times in a four to five week period.

10. Claimant has been unable to return to his work as a real estate agent as this job requires him to utilize computers and drive clients to showings. Claimant is unable to stare at a computer screen as the screen's light will cause neurological feedback that causes severe headaches the same way the sun or bright lights will do. He also cannot drive clients around due to liability of being vision impaired. Claimant is forced to avoid exposure to bright lights and the outdoors. He no longer goes to parties or social gatherings due to being awkward in movement, bumping into people, and being off balance. Claimant used to be an avid hiker and liked to take long walks, which he no longer does. He is unable to return to exercise at a gym also due to the lighting. He does do some moderate exercise at home, depending on his status, as he has difficulty with balance and spatial awareness about his surroundings due to balance problems caused by the injury. Claimant denied having had any of those symptoms prior to the work accident of September 1, 2017. He also stated that he had no problems performing his job duties for either the Employer or in his work as a real estate agent prior to the injury.

11. Approximately one year ago (from the time of the hearing) and three years following the injury, Claimant returned to work for Employer in a limited capacity. He is unable to use the power equipment or machinery, like the tractor upon which he was injured. He is restricted to working in dimmer lighting situations, has inconsistent work performance, and difficulties with balance. He has a significant problem with depth perception. Claimant also has difficulties driving at nighttime. He is limited when he has severe headaches. He attempts to work a few hours every day, both in the morning and in the evening but no more than approximately four and a half hours each day. While he is working under restrictions, Claimant feels lucky to have survived his accident, fortunate that he has been able to return to some work and grateful to his employer of injury.

12. Claimant specifically recalls his evaluation with Dr. Striplin. Dr. Striplin's staff attempted to perform some testing but some of the equipment they were using was not working, so they were unable to complete the testing. Dr. Striplin looked at his right eye with a flashlight but did not perform any other specific testing. Claimant remembered that he answered Dr. Striplin's precise questions, but he was not asked if he had problems driving, just if he could drive. Claimant does not have a choice and must drive as he is divorced, and his children are adults living away. He has been divorced for over twenty years. Claimant was not invited to expand on his answers to Dr. Striplin and was not asked open ended questions. He was asked some generic question of whether he could perform activities of daily living but was not ask how his ADLs were limited by his sight and impairments related to his mild traumatic brain injury or headaches. He was not asked about the facts that limited his ability to perform his activities of daily living (ADLs) or hobbies. Claimant no longer enjoys the outdoors or socializing as these activities are affected by his vision problems and the headaches

caused by either the photophobia or mTBI. In fact, Claimant does not recollect being asked any questions by Dr. Striplin regarding the effect his headaches have on his life.

13. Claimant discussed his ongoing needs for medical care with both his authorized treating physicians (ATPs), Dr. Cathy Smith, Dr. Bradley Martin, and Dr. Micah Rothstein. He understood that he will require medications, both Gabapentin and steroid eye drops for the rest of his life, in order to continue functioning independently. He testified that he had undergone five surgeries to his right eye and that as a consequence of problems with his right eye, he now has problems with vision in his left eye, caused by sequelae related to his right eye blindness. Claimant's testimony is credible.

14. Claimant's right eye has a demonstrable difference in the eye pupil, which includes a pupil that does not respond to light. The left eye pupil retracted while the right eye pupil remained dilated and approximately twice the size of the left eye pupil when the light was turned on and Claimant approached the video screen. The pupil was oddly shaped and irregular, not round, almost completely obliterating the iris.[1]

B. Medical Records

15. On September 7, 2017 Dr. Hebard examined Claimant and documented that Claimant had a myriad of symptoms since the accident. Claimant reported experiencing fatigue, trouble sleeping, difficulty seeing, loss of vision, eye pain, blurred vision, eye trauma, inflamed eyes, dizziness, nose bleeds, and head and facial trauma, nausea, vomiting, difficulty walking, difficulty speaking, difficulty concentrating, headaches, loss of memory. Claimant reported the accident consistent with his hearing testimony.

16. On initial evaluation, Dr. Hebard stated that Claimant reported immediate swelling of his face, which closed his right eye shut and Claimant self-treated his injury with ice, flushing out the eye and over the counter analgesics. On exam his right infraorbital[2] area had a 1 cm healing laceration with local swelling and his periorbital[3] area was moderately sore and moderately tender to palpation; his right eye exam using loupes showed injected sclera and conjunctiva, and a cloudy cornea with possible cornea abrasions. He was taken off work; referred for a stat ophthalmology consult after which he would be triaged to the NCMC ER for evaluation to include a Head and Periorbital CT; and was to return to Dr. Hebard for follow up. Dr. Hebard diagnosed right periorbital contusion, blurred vision, and postconcussive symptoms.

17. William Benedict, M.D. of Eye Care Center in Longmont, performed a virectomy and lensectomy procedure of the right eye on September 7, 2017, the first of five right eye surgeries. On September 27, 2017 Dr. Benedict performed surgery consisting of peeling of preretinal membranes and silicone oil placement of the right eye.

[1] These observations were performed by the ALJ during the October 18, 2021 hearing.
[2] The structures below the orbit of the eye.
[3] The structures around the eye.

18. On September 26, 2017 Claimant followed up with Dr. Hebard who stated that a physical exam of the eye was not possible since Claimant's right eye was patched up following surgery, and Claimant was instructed to keep his head down and forward until his ophthalmology follow-up. Dr. Hebard diagnosed right periorbital contusion, blurred vision, postconcussive symptoms and status post right eye vitrectomy and lensectomy by Dr. Benedict.

19. Dr. Hebard reported on October 10, 2017 that Claimant continued to have right eye pain, continued light sensitivity and 3-4/10 headaches that are not as often but when they occur the pain can shoot through the middle of his head. Claimant reported that the bridge of his nose is not sore at rest but significantly tender with firm touching. On exam he was wearing dark glasses due to light sensitivity; his right eye was mildly injected, the pupil round but slightly larger than his left pupil, the cornea appeared clear, and Claimant reported his vision was very fuzzy.

20. Claimant was evaluated by Dr. Hebard again on October 24, 2017 reporting he felt better with reduced frequency of headaches but continued 8/10 pain intensity when they do occur and 4/10 pain after he takes the pain meds; he reported that the Ophthalmologist informed him he had optic nerve damage from the high glaucoma intraocular pressures caused by the trauma. Dr. Hebard noted that Claimant continued wearing dark glasses due to light sensitivity; his right eye was mildly injected, the pupil round but still larger than his left pupil, the cornea appeared clear, and he reported his vision was more fuzzy.

21. Claimant attended Dr. Henry Poon on December 19, 2017. He noted Claimant had persistently worsening headache that makes him unable to sleep. On neurologic exam Dr. Poon noted mild slurring of speech and Claimant was not fully oriented to time and event (vagueness), had difficulty with tandem walk with abnormal gait as he would fall to the side and his diagnosis remained the same including postconcussive syndrome. He reported that Claimant had made little progress, needed case management and mental health counseling as he was unable to work and could not manage his symptoms while at home.

22. Micah Rothstein, M.D., performed a transscleral cyclophotocoagulation of the right eye on December 26, 2017.

23. Dr. Cathy Smith at Banner Occupational Health Clinic took over Claimant's care on January 2, 2018. She reported that Claimant had right-sided facial and ocular trauma with traumatic glaucoma, now four months status post the injury. Claimant reported he continued with eye pain and headaches, which he reported were constant in nature. He completed laser surgery the prior week and reported that the pressure did decrease to 16 following the procedure. However, since the procedure, Claimant had increased tearing and light sensitivity, worse than before surgery. He had "burning" pain of the "eyeball," was wearing dark glasses and was asking to sit in a dark room. Dr. Smith diagnosed contusion of the right eyelid and periocular areas, visual disturbance, postconcussive syndrome, and stated that both an ENT and a neurology evaluation were pending.

24. On January 11, 2018 Dr. Micah Rothstein, the eye specialist, documented that following blunt trauma to Claimant's right eye, he was diagnosed with severe traumatic glaucoma and he had an immediate surgical procedure on September 1, 2017. Dr. Rothstein reported that Claimant continued to have tearing of his right eye two weeks after surgery, as well as severe headaches, pain and burning, with stable but poor vision.

25. On January 22, 2018, Dr. Benedict performed a vitrectomy and silicone removal of the right eye. On March 13, 2018, Dr. Rothstein performed a right eye intraocular lens placement surgery.

26. Claimant was evaluated by Dr. Smith on April 12, 2018 reporting he had undergone five right eye surgeries to date, the last one on March 13, 20218, stating a shunt was placed to control the pressure and a lens was implanted. Claimant reported being extremely light sensitive, had to use dark glasses even inside to control the light exposure, was having difficulty driving at night as the pain increased when the oncoming traffic light hit him. Dr. Smith found Claimant had no vision in the right eye, was having problems bumping into objects due to the loss of vision and depth perception. Claimant continued with light sensitivity and right-sided headaches, frontal scalp musculature spasms, irritation to the supraorbital nerve, and depth perception when walking and driving. Dr. Smith recommended he should probably not drive at night and if driving during the day, drive only short distances in light traffic and recommended use of a cane to help with depth perception.

27. Chester Roe, M.D. conducted an ophthalmology Independent Medical Examination (IME) at Respondents' request on September 24, 2018. He fully examined Claimant's binary vision and determined that Claimant did not have any loss of vision of he left eye after corrected vision assessment. He assessed that Claimant had complete vision impairment of the right eye, which provided at 25% for vision field impairment which converted to a 24% whole person impairment. He further provided a cosmetic right pupil abnormality impairment of 2% whole person impairment. Dr. Roe determined that the final rating for the right eye injury was at 26% whole person impairment of the visual system.

28. Dr. Roe stated that the right eye had an irregular pupil with glare symptoms and currently controlled glaucoma with topical medications. He assessed chronic macular edema that was being treated, but not eliminated, by topical steroid drops and periocular steroid injections. Dr. Roe noted that Claimant had variable pain and headaches around his right eye, exacerbated by bright light. He stated that left eye problems should be considered linked to the right eye injury due to left eye symptomatic ophthalmia inflammation[4] caused by the right eye injury.

29. Dr. Roe opined that Claimant's ophthalmologic care had been necessary and appropriate. Dr. Roe opined that Claimant would require ongoing maintenance care for his right eye for the rest of his life due to the work-related injury. Dr. Roe further opined that ophthalmic treatment for ongoing treatment for glaucoma, including topical eye drops and future changes of his topical medications, continuing periocular injections or other

[4] Sympathetic ophthalmia is a bilateral inflammation of the uvea, which includes the iris, and follows penetrating injury or surgery to one eye.

treatment for intraocular inflammation, retinal treatments as well as additional surgeries for glaucoma, laser treatments, may include right eye corneal transplantation, or surgery and possible enucleation if the right eye progressed to phthisis.[5] Dr. Roe also recommended yearly complete dilated bilateral eye exams, frequent retinal and glaucoma subspecialty follow-ups every one to two months with periodic ancillary testing, such as OCT[6] or ultrasound of the retina or optic nerve of the right eye.

30. Lastly, Dr. Roe recommended Claimant not drive professionally due to decreased right visual field and decreased stereo vision and depth perception, not be working at exposed heights or operating heavy machinery, using power tools or sharp tools for near work, use of safety lens prescription glasses at all walking times and recommended use of more specific eye protection, for specific on-the-job task or activities of daily living.

31. On September 27, 2018 Dr. Smith reported Claimant continued to have severe pain and headaches if exposed to bright light, with the "good eye" being more sensitive at times than his "bad eye." She stated that Claimant’s vision was unchanged in the right eye, his light sensitivity and depth perception difficulties continued to affect all his activities of daily living, was using the cane more to help with balance, and his right eye remained dilated. Dr. Smith advised that Claimant needed a driving evaluation and psychological care with Dr. Bruns.

32. Dr. Rothstein reported, on October 8, 2018, that Claimant was having problem with chronic migraines, head pain that he feels are caused by light, and he can no longer go outside. Claimant requested to know what could be done about this.

33. Dr. Smith responded to a questionnaire sent by Respondents on October 22, 2018 stating that Claimant was not at maximum medical improvement (MMI), needed care with Dr. Bruns, including for anxiety and depression due to the work related injury, further ophthalmology evaluations to improve vision as well as consideration for eye removal to decrease light sensitivity, headaches, and reduce pain.

34. Claimant returned to Dr. Smith on January 10, 2019 with right and left eyes unchanged, with hypersensitivity to bright fight bilaterally and headaches, peripheral vision and depth perception defects, which interfered with ADLs. Claimant continued to use dark glasses and a hat when outside, rated the pain at a 5/10 in intensity, while in a partially darkened room. He reported he recently had tried to force himself to spend more time in bright light and "try to get used to it," but it only increased headaches and incapacitated him for 24 hours. He reported inability to sleep and felt the loss of sleep and fatigue were contributing to his pain and dysfunction.

35. On February 11, 2019 Dr. Rothstein summarized Claimant’s ocular injury as a ruptured globe that developed into severe traumatic glaucoma, with a complex retinal detachment and severe traumatic aniridia[7], with a permanent shunt in the right eye.

[5] Denotes shrinkage or disorganization of the eye with functional loss.

[6] Optical Coherence Tomography.

[7] Traumatic aniridia caused the pupil to partly or fully cover the iris, the pupil frequently is abnormally large and may be oddly shaped.

Because of the trauma and severe traumatic aniridia, Claimant developed severe light sensitivity with absence of an iris in the right eye, which also affected his left eye sensitivity. Dr. Rothstein describes the sequelae of the trauma as having a "severely dilated pupil of the right eye with early-stage cataract on the left. He stated that the condition would require continuing medical care, chronic medication therapy, special prescription glasses and would need to see Claimant every four months. On exam the same day, Dr. Rothstein noted an irregular right pupil with no reaction with an abnormal afferent pupillary defect. The diagram of the pupils also showed an irregular pattern of the right pupil. Dr. Rothstein diagnosed severe stage traumatic glaucoma OD,[8] cystoid macular edema, history of retinal detachment, and sympathetic photophobia in the OS.[9]

36. Dr. Smith, now at UCHealth Occupational Medicine Clinic, evaluated Claimant on May 28, 2019, reporting that Claimant continued with blurred vision, photophobia and discharge as well as headaches, with a right pupil that remains dilated and nonreactive, and decreased peripheral vision on the right side. She continued to diagnose postconcussive syndrome and contusion of the right periocular region. On June 29, 2019 Dr. Smith referred Claimant to a neurologist to investigate possible medications to control his postconcussive headaches.

37. On July 23, 2019 Dr. Smith discussed that Claimant continued to use over the counter pain medications, which was affecting his GI problems, but Claimant reported that he needed to control the level of his headaches, which had increased. He had seen the neurologist, who suggested to Claimant he was experiencing migraines in light of the nausea, starting Claimant on Nortriptyline and Gabapentin. The headaches caused Claimant to feel "scatterbrained." On exam Dr. Smith noted that Claimant was squinting significantly with the right eye due to light exposure in his regular glasses, and had a positive Romberg test[10]. Claimant continued to have daily headaches with severe headaches significantly increased over the last 2 weeks. The headaches were generally right-sided over the frontal area and can extend to include severe pain on the left side. Dr. Smith observed that Claimant's headaches had a migraine component, and he would be more functional if his headaches were under better control.

38. On August 28, 2019 Dr. Bradley Martin, from the UCHealth Neurology Clinic, specializing in neurology, diagnosed Claimant with post traumatic headaches and traumatic brain injury. Claimant reported having headaches every day, explaining two different kinds of headaches. The first started behind the right eye and goes back past the right ear. Claimant described the second type of headaches as a sharp pain across the middle of his head. Triggers included sunlight and florescent lights. These episodes typically last for multiple hours and can last up to 1.5 days. Associated symptoms include photophobia and vomiting. To alleviate these symptoms, he tried anti-inflammatory pain medications (NSAIDs), aspirin (ASA), and acetaminophen. However, he reported hospitalization due to GI bleed and was advised to discontinue these medications. Dr. Martin prescribed both Nortriptyline and Gabapentin for post-traumatic headaches.

[8] OD is an abbreviation for "oculus dextrus," Latin for the "right eye."

[9] OS is an abbreviation for "oculus sinister," Latin for the "left eye."

[10] Measures sense of balance based on visual, inner ear and positional system during neurologic exam.

39. On October 15, 2019, Dr. Smith evaluated Claimant's cognitive sequelae immediately following his head injury, which seemed to improve as expected over time. However, when questioned more closely Claimant stated that for quite some time he had been having to "write myself more sticky notes than usual to help me remember things". He stated that he now has sticky notes "all over my house." He was unsure whether "this has been going on since the time of his accident or whether increased problems with short-term memory began when he started decreasing his use" of medications. At this point, Dr. Smith recommended Claimant undergo neuropsychological testing to evaluate cognitive sequalae related to his concussion.

40. Dr. Smith reevaluated and counseled Claimant on November 12, 2019 regarding multiple future care, including visual therapy with Dr. Spinossi, improvements Claimant was making with tracking and visual acuity and continuing consistent daily visual independent exercise program. She reviewed the neurology visit and recommendation for increasing Gabapentin to 300 mg three times per day to see if this would continue to improve his headaches but also his sleep. Dr. Smith also reviewed expectations for neuropsychological testing, advising that testing on two different days may be necessary because of the significant left eye fatigue.

41. On December 2, 2019 Dr. Martin reported that Claimant medications are helping his headaches overall, especially with regard to the intensity of the pain. He diagnosed both post-traumatic headaches and TBI, with an "Etiology likely related to TBI 2017."[11] Dr. Martin increased Claimant's Gabapentin dosage.

42. On January 28, 2020 Dr. Smith reported that there had been some changes since their last evaluation, including headaches that continue to be more intense with increased exposure to bright light, sunlight, and glare when driving, even when wearing dark glasses and wearing a brimmed hat, he gets "sick headaches" associated with nausea approximately 4 times per week. Pain levels are described as fluctuating. He had tried wearing a patch over his right eye but did not find it to be helpful.

43. On April 1, 2020 Dr. Smith placed Claimant at maximum medical improvement. She examined Claimant noting that Claimant had a permanently dilated right pupil that was unresponsive to light, inability to distinguish anything beyond light and dark in the right eye. She continued to diagnose contusion of the right periocular region, visual disturbance, and post-concussion syndrome.

44. Dr. Smith opined that Claimant had impairment due to the work-related injuries and assessed Claimant under the *AMA Guides to the Evaluation of Permanent Impairment*, Third Edition*, Revised (AMA Guides)*. She agreed with Dr. Roe's assessment of the ocular impairment of the right and left eyes, specifically the 26% whole person impairment of the visual system. In addition, Dr. Smith opined that impairment was required due to chronic sequelae related to mTBI injury, specifically postconcussive migraines and vertigo. She determined that these conditions were best evaluated under

[11] Miscited or mistranscribed in the Hearing Transcript, September 14, 2021, page 89, line 5, hereinafter p. 89:5, wherein it states "Ideology." However, the audio of the hearing and the medical report clearly states "Etiology."

Table 1, page 109 under Episodic Neurologic Disorders. Dr. Smith determined that postconcussive migraine headaches mildly interfered with activities of daily living and assigned a 17% whole person. She determined that continuing vertigo was under control as Claimant could perform most of his activities of daily living. Dr. Smith assigned a 10% whole person impairment for this. Per the AMA *Guides* the largest value had to be used to represent the impairment for both, and therefore, the 17% whole person was determined to be the impairment for episodic neurologic disorders. The 26% whole person impairment for eye trauma was combined with the 17% episodic disorders impairment, for a total impairment of 39% whole person.

45. Dr. Smith documented that she sent Claimant for a neuropsychological testing evaluation with Dr. Thwaites, who evaluated Claimant on March 6, 2020.[12] The records indicated that Claimant completed neuropsychological testing with Dr. Thwaites and that he reviewed the results with him a week later. Dr. Thwaites opined that current neuropsychological testing reflected a pattern of cognitive impairment he would not expect to see in the natural recovery following a concussion. He felt Claimant's significant visual spatial and constructural defects most likely were related to his monocular vision. Otherwise auditory verbal learning and memory scores were normal. Dr. Thwaites further opined that Claimant's "cognitive" profile reflected good effort, but was not reflective of residual impairment from a concussion. Dr. Smith indicated that since Dr. Thwaites did not feel neuropsychological testing indicated evidence of cognitive sequelae related to his head injury additional impairment for cognition was not indicated.

46. Dr. Smith opined Claimant would require at least yearly complete dilated eye exams, frequent retinal and glaucoma specialty follow-up every 2 to 6 months, periodic ancillary testing of the retina or optic nerve of the right eye. He would also require maintenance medications to include Gabapentin and lab work at least twice a year, and neurology follow-up every 3 to 6 months to monitor postconcussive migraines. She recommended Claimant have access to maintenance vision therapy up to 4 sessions per year, as well as optometry evaluations for yearly prescription transitional lenses and safety glasses. Dr. Smith agreed with Dr. Roe in regard to work restrictions due to decreased stereovision and depth perception.

47. Respondents requested a 24-Month Division Independent Medical Examination (DIME) pursuant to Section 8-42-107(8)(b)(II), C.R.S., which was performed by Dr. Michael Striplin on April 15, 2020.

48. Dr. Striplin stated that he was asked to address psychological problems, traumatic brain injury, the face and the visual system. He took a history that Claimant has no functional vision in the right eye, almost daily headaches, lasting from one to three days, which are triggered by bright light, and a problem with glare emanating from his left eye. He concurred with Dr. Smith's date of maximum medical improvement of April 1, 2020. Dr. Striplin assigned a 25% impairment for the visual field, which converts to a 24% whole person impairment of the visual system based on Table 6 of the *AMA Guides.*

[12] As neither party submitted a copy of Dr. Thwaites' neuropsychological report, but multiple experts refer to the report, summaries of the reports are being included in the order as reported by the experts.

He stated that additional cosmetic impairment for the irregular right pupil was not warranted, and that apportionment did not apply.

49. Dr. Striplin provided a rationale for his decision with regard to his assessment. He stated that Claimant denied any psychological sequelae related to the work injuries, including problems with activities of daily living or problems with driving. With regard to consideration of the traumatic head injury Dr. Striplin stated that since Claimant did not suffer from loss of consciousness, retrograde amnesia or antegrade amnesia, and the imaging studies were normal, as well as the neuropsychological evaluation performed by Dr. Thwaites, that Claimant did not warrant an impairment for a TBI. He further stated that no impairment was appropriate for the continuing headaches as they were subjective, and the temporal coincidence did not establish a cause and effect relationship between the headaches and the work related accident. He stated that there was no evidence of residual facial trauma "other than to the right eye" and provided no impairment for the face.

50. Dr. Striplin documented that Gregory A. Thwaites, Ph. D, sent a letter to Cathy Smith, M.D. indicating that a psychological evaluation was conducted. Dr. Striplin summarized, in pertinent part, as follows: Dr. Thwaites noted that the accident at work did not involve any loss of consciousness, no retrograde amnesia, and no posttraumatic amnesia. The patient did report some slowing of processing speed and some forgetfulness but that the patient had been experiencing forgetfulness for quite some time and that cognitive sequelae after the accident improved as expected over time. The patient reported a stable mood, and denied any symptoms of depression, anxiety, or PTSD but mentioned a referral to Dr. Bruns for a consultation. With regard to neurological testing, some impairments were noted which were not expected to occur as a result of a concussion but may be affected by problems with his eye, other medical conditions, or may be preexisting. He acknowledged the patient suffered a mild concussion related to the injury at work, that he required no cognitive treatment related to the accident, and that the patient; within a reasonable degree of medical probability, did not have residual cognitive symptoms related to the accident at work.

51. Dr. Striplin recommended maintenance medical care with regard to the right eye and stated that Claimant required no maintenance medical care for psychological problems, traumatic brain injury (including headaches), or his face, recommending that Claimant continue to follow-up through his personal physician for further evaluation and treatment if his headaches persisted or worsened.

52. Respondents filed a Final Admission of Liability consistent with Dr. Striplin's DIME report on May 6, 2020, admitting to maintenance medical care after MMI.

53. Carlos Cebrian, M.D performed a medical records review at Respondents' request on May 20, 2020, though he indicated that a prior medical record review was performed.[13] Dr. Cebrian stated that he reviewed new records but that he incorporated the prior review by reference. The report states that Dr. Cebrian was asked to comment

[13] Not submitted by either party into evidence, but part of Exhibit J, which was withdrawn by Respondents.

on Dr. Smith's recommendations for maintenance care. He diagnosed multiple issues as not related to the work injury, and only identified one work related diagnosis of the right ruptured globe with traumatic glaucoma. He opined that Claimant may have reached MMI as early March 31, 2019. He indicated that Claimant required maintenance medical care including annual eye exams, glasses replacements, quarterly follow-ups with his ophthalmologist and neurologist, continued gabapentin and eye drop medications, vision therapy, lab workups, and other treatment as recommended by his providers if his condition worsens. With regard to the gabapentin, Dr. Cebrian stated that Claimant's medical providers should attempt to wean Claimant from the medication for the postconcussive headaches. He did not provide an impairment rating report.

54. Dr. Cebrian documented that Claimant completed neuropsychological testing with Dr. Thwaites on March 6, 2020 and that Dr. Thwaites opined that current neuropsychological testing reflected a pattern of cognitive impairment he would not expect to see in natural recovery following a concussion. He felt Claimant's significant visual spatial and constructural defects most likely were related to his monocular vision. Otherwise, auditory verbal learning and memory scores were normal. Dr. Thwaites further opined that Claimant's cognitive profile reflected good effort but was not reflective of residual impairment from a concussion[14].

55. On August 4, 2021 Sander J.H. Orent, M.D. provided a record review and conducted a telephone interview of Claimant at Claimant's request. He is an expert in internal medicine, occupational medicine and a Level II physician. He took a history of the event consistent with the Claimant's testimony and documented that Claimant had severe periorbital pain, local pain, blurred vision, significant headaches, memory loss, confusion and fatigue. Dr. Orent provided a summary of the medical records reviewed. He was asked to comment on Dr. Striplin's DIME report and opinions. Dr. Orent opined that Dr. Striplin was substantially in error regarding the postconcussive headaches and the cosmetic defect of the pupil. He criticized Dr. Striplin's assessment that the headaches were subjective and could not be quantified by any objective measure. He stated that all headaches are subjective and cannot be measured but they can definitely be assessed for impairment according to the *AMA Guides*. He stated that Claimant continued with headaches and characterized them as postconcussive in nature, which clearly required a rating.

56. Dr. Orent documented that Claimant's headaches are quite severe, they occur on the right side, and he is intensely photophobic, with headaches occurring two to three times a week, depending on triggers. He described the impact of the headaches and noted that Claimant has to go to a dark room for up to two days, which is profoundly impacting Claimant. He is also limited in using a computer due to the lighting of the screen. Dr. Orent provided an additional 12% whole person impairment related to the injury under the Episodic Neurologic Disorders section of the *AMA Guides*. He related this to his assessment of the impact headaches have on Claimant's activities of daily living. He agreed with Dr. Roe's assessment that Claimant has 24% due to visual disturbance, the 2% for the cosmetic defect of the pupil, and combined them with the 12% for a 34% whole person impairment rating. Dr. Orent specifically stated that Dr. Striplin

[14] This summary of Dr. Thwaites' evaluation may be redacted from Dr. Smith's April 1, 2020 report.

was substantially in error based on both the intent and the clear direction of both the *Guides* and the Level II accreditation course.

57. Dr. Orent also had Dr. Thwaites' report of March 6, 2020. He stated that Dr. Thwaites felt that Claimant was moderately impaired in visual spatial task. This was due to his eye trauma. He had low average range of working memory and processing speed, mild impairment in visual naming, story recall was poor, other difficulties were noted and "taken together these scores suggest that intact auditory verbal learning and memory but significantly impairment visual memory that cannot be solely accounted for by his visual impairment alone." His impression was that the patient had a concussion, but this was a "very slight concussion" according to Dr. Thwaites. He stated that Claimant had a couple of weeks of altered consciousness. The testing was not impacted by any poor efforts or anything of that nature. He felt that the patient sustained a work-related minor concussion. He did not, however, discuss the postconcussive headaches in his report anywhere that Dr. Orent could perceive and Dr. Thwaites provided primarily a behavioral analysis.

C. Hearing Testimony of Dr. Cathy Smith

58. Dr. Smith is an expert in occupational medicine and is a Level II accredited physician. Dr. Smith testified that she has been Claimant's ATP since January 2018 to the present. When she took over Claimant's care, she reviewed the medical records of her predecessor, Dr. Hebard, to make her own assessment with regard to causation. She diagnosed contusion of the right eyelid and periocular areas, visual disturbance and postconcussive syndrome. To the day of the hearing, Dr. Smith stated that these diagnoses continue to be accurate and appropriate, which is supported by Claimant's ongoing problem list and symptoms.

59. Dr. Smith stated she is very familiar with the Medical Treatment Guidelines (MTG), regularly uses them in her routine practice with regard to injured workers. She also regularly uses the *AMA Guides*, as well as the Division Desk Aids[15]. She defined traumatic brain injury as an injury to the head or brain caused by externally inflicted trauma and opined that the history and medical records reflect that this is what happened to Claimant. She stated that she diagnosed postconcussive syndrome or concussion, which is defined under the MTG as a mild traumatic brin injury. Further, she stated that Claimant continues to exhibit signs and symptoms from the mTBI.

60. She testified that the MTG, specifically Rule 17, Exhibit 2A for Mild Traumatic Brain injury, does not require a finding on diagnostic testing, amnesia or loss of consciousness to diagnose mTBI. The MTG state that altered mental state within twenty-four to seventy-two hours following the injury are sufficient to document the mTBI.[16] Claimant exhibited fatigue, trouble sleeping, dizziness, and head and facial trauma, nausea, vomiting, difficulty walking, difficulty speaking, difficulty concentrating, headaches and loss of memory, all of which indicate an mTBI. Since then, Claimant has

[15] Division of Workers' Compensation Desk Aids are on multiple topics including Apportionment Spinal of Range of Motion (Desk Aid #10); impairment rating tips (DK #11); Scheduled Impairment Chart (DK #13); Apportionment Calculation Worksheet (DK #14).
[16] MTG, Rule 17, Exh. 2A, p. 10, Section C.1.a.

had a complex recovery, which is a risk factor when a patient is over 40 years old and sustained a soft tissue injury, such as to the eye as Claimant suffered.[17] Further, the symptoms were documented in multiple reports after the first two weeks as Claimant continued to complain of headaches, dizziness, nausea, photophobia, attention and memory problems, feeling foggy, and fatigue.[18]

61. Dr. Smith explained that Claimant has two separate and distinct types of headaches. One is caused by the right eye injury because he does not have a defense mechanism that most individuals have where the pupil constricts to protect the eye from excessive light being introduced. Claimant has a nonreactive pupil that is continuously dilated, and the light causes nerve pain, which in turn causes him headaches. The second is a "sick" headache associated with nausea, which is one of the diagnostic criteria for migraine headaches. At the beginning, Claimant had these headaches approximately twice a week, until after he was evaluated by neurology and now the frequency is approximately three times a month with the medications he is taking. She agreed with the quote from the MTG that "[I]n approximately 10-25% of patients, chronic symptoms requiring treatment are associated with mTBI… but functional changes occur beyond one year."[19]

62. Dr. Smith also discussed that she was not able to make active treatment recommendations for the mTBI until after his last eye surgery, and then there were delays in obtaining authorization for the psychological, neurological, vision therapy, and vestibular therapy, which were the active treatment Claimant required to achieve functional improvement before he could be placed at MMI. She stated that "Dr. Martin concurred that he was suffering from a mTBI injury, and that he did have post-traumatic headaches from that mTBI injury. And it was Dr. Martin who suggested treatment" for the post traumatic headaches with Nortriptyline and Gabapentin. And now Claimant required treatment to maintain that status as recommended by the MTG.[20]

63. Dr. Smith explained that Dr. Thwaites, as a psychologist, is not Level II accredited and only performed a neuropsychological evaluation that will test for Complex cerebral dysfunction related to TBI, not for traumatic brain injury itself. Under both the *AMA Guides* and the Level II accreditation course materials, Dr. Smith further clarified that postconcussive headaches are to be evaluated for impairment under the Episodic Neurologic Disorder Section, which does not state or require objective findings with regard to the headaches or any particular measurements.

64. When Dr. Smith evaluated Claimant's ADLs at the time she placed Claimant at MMI, she reviewed how his ADLs were being affected and determined that they were, therefore, requiring her to determine if a rating was appropriate. She specifically found that light sensitivity was limiting his ability to go outside in the sunlight, interfered with his driving, and being on a computer. She also assessed, when he had a migraine, he is severely limited and they require him to remain in a dark room, though both types of HAs

[17] MTG, Rule 17, Exh. 2A, p. 10, Section D.1.
[18] MTG, Rule 17, Exh. 2A, p. 10, Section D.2, 9/14/2021 Hrg. Tr., p. 80:3-22.
[19] MTG, Rule 17, Exh. 2A, p. 25, Sec. D.8.
[20] MTG, Rule 17, Exh. 2A, pp. 63-68, Sec. F.1.

have improved over time with the treatment provided by Dr. Spinossi, Dr. Bruns, Dr. Drennan, and Dr. Martin.

65. With regard to the rating, Dr. Smith agreed with Dr. Roe's visual impairment and cosmetic impairment. However, in recent re-review of the *AMA Guides*, Dr. Smith identified that the Claimant's nonreactive pupil was a functional problem, not only a cosmetic problem, as it does contribute to daily headaches since his pupil is not able to constrict when he is in bright light. She opined that a 10% for the nonreactive pupil was appropriate as a consequence of the frequent headaches cause by light exposure that disrupt his activities of daily living. She quoted from the Guides that "[T]o the extent that any ocular disturbance causes impairment not reflected in visual acuity, visual fields, or ocular motility with diplopia, the impairment *must* be evaluated by the physician *and* be added to the impairment of the visual system." [*Emphasis added*].[21] She combined the 24% for vision loss of the right eye, the mTBI neurological impairment caused by the post concussive headaches of 17%, the nonreactive pupil impairment of 10% with the 2% cosmetic impairment to reach a 44% whole person impairment rating.[22]

66. Dr. Smith stated that Dr. Striplin committed a critical error when he did not provide a review of particular systems in accordance with the Level II accredited curriculum requirements including the effect the Claimant's headaches were having on his activities of daily living. Both Dr. Striplin and Dr. Roe, failed to appreciate and assess the nonreactive pupil's functional impairment as the *AMA Guides* require by the use of the word "*must"* and therefore, their opinions are in error. Dr. Smith agreed with Dr. Orent that Dr. Striplin was substantially in error for his failure to rate both the cosmetic defect of the nonreactive pupil and the postconcussive headaches.[23]

D. Hearing Testimony of Dr. Michael R. Striplin

47. Dr. Striplin was accepted as an expert in occupational medicine and as a Level II accredited physician. He described the mechanism of the injury, which was consistent with Claimant's hearing testimony. He also described other history involving Claimant's ADLs and driving, which was inconsistent with Claimant's testimony as well as Dr. Smith's testimony, including that Claimant did not have problems driving or with ADLs. Dr. Striplin described the irregular pupil and the fact that the pupil was non-responsive, that Claimant wore dark glasses in his office and that upon examination, Claimant was sensitive to the light.

48. Dr. Striplin explained the rating and stated that the 25% for the visual system is a complete loss of vision in the right eye that is equivalent to 24% of the whole person. He stated that the headaches were problematic for him because he did not know if Claimant was having neurological headaches, specifically because he was not familiar with migraines that would last up to three days, or if the headaches were caused by pain related to the eye injury. In fact, he stated I don't know why Claimant had headaches and that the temporal relationship of the inception of the headaches was not sufficient to

[21] Hearing Transcript, September 14, 2021, pp. 99-100; AMA Guides p. 161, Claimant's Exh. 8, p. 194.
[22] Hearing Transcript, September 14, 2021, p. 101:7-14.
[23] Hearing Transcript, September 14, 2021, p. 104:21-25 & p. 1051-2.

establish causation. Dr. Striplin asserted that it was his discretion, as a DIME physician, whether to rate the subjective headaches or not, and he was not required to do so by the rules or the *AMA Guides*. He also stated that whether he assigned a cosmetic impairment for the pupil deformity was also within his discretion as a DIME and he understood that cosmetic impairments were reserved for only significantly disfiguring injuries like burns or amputations.

49. In addressing maintenance care, Dr. Striplin reiterated what he had previously stated in his report, that maintenance for the ophthalmological problems related to the right eye was appropriate but stated that any treatment related to the headaches was not appropriate because he did not know whether they were caused by the right eye damage or some other problem but he was completely unconvinced that Claimant was experiencing migraines from neurological problems, a concussion or from a mild traumatic injury. He also stated that he was not experienced in the use of Gabapentin for migraines and since, in his mind, Claimant was not experiencing migraines, the use of Gabapentin was not reasonable maintenance care.

50. Dr. Striplin stated that he was not an expert in either psychological issues or traumatic brain injuries, and he had advised the Division that he was not available to address those issues. He deferred to the ophthalmologist regarding further medical care for Claimant. He also stated that he deferred to Dr. Roe about assessment of permanent impairment of the right eye.[24]

51. Dr. Striplin opined that Claimant's headaches were totally subjective and cannot be quantified, despite the records that show that from the first date he was treated until the present and that he continued to have headaches. He disagreed with other providers that it was appropriate to rate the headaches under the episodic neurological disorders or whether they were traumatic in origin.[25] He agreed that there were neither medical records nor history of Claimant experiencing preexisting medical history of headaches or traumatic brain injury prior to the work-related injury.

52. When assessing whether Claimant had a traumatic brain injury, Dr. Striplin relied on Dr. Thwaites' psychological report and failed to ask Claimant what had happened to him immediately following the accident including the disorientation, feeling dazed, confused, in extreme pain, and having severe headaches. He also stated that he was unfamiliar with the Medical Treatment Guidelines with regard to Traumatic Brain injuries as it had been a while since he had reviewed them.[26] He was not aware of how often symptoms persisted following immediate recovery of a TBI or the percentages of individuals with TBI that continue with complex issues such as headaches.[27] Dr. Striplin did not complete the mental impairment worksheet in this matter.[28] He further conceded

[24] Hearing Transcript, September 14, 2021, p. 56:9-11.

[25] Hearing Transcript, September 14, 2021, p. 53:20-25; p. 54:-1-13.

[26] Transcript of Hearing, September 14, 2021, pp. 60-64.

[27] Medical Treatment Guidelines were revised as recently as 2018 and effective January 30, 2019, Exhibit 17, Rule 17, Exhibit 2A.

[28] Required by W.C.R.P.Rule 12-5(C).

that he had not looked at the MTG for traumatic brain injury in a while and was simply relying on Dr. Thwaites' psychological testing.

53. Dr. Striplin conceded that he was not an ophthalmologist or psychiatrist, he does not include in his inventory for DIME purposes an expertise in psychological issues or traumatic brain injury, and was limiting his practice not to include psychological or traumatic brain injury.

E. Deposition Testimony of Dr. Carlos Cebrain

67. Dr. Cebrian testified as an expert in occupational medicine and as a Level II accredited physician. Dr. Cebrian testified that Dr. Striplin[29] provided the 24% whole person impairment rating and did not commit any errors. Dr. Cebrian opined that Claimant did suffer from a mild traumatic brain injury as it was well documented. He stated that there was overlap in the symptoms that occurred since the mTBI that are difficult to assess. He stated that "there are mechanisms in place when determining whether an impairment rating should be assigned for additional problems such as a mTBI in addition to any other previous problems and that Claimant's ongoing symptoms four years after the injury cannot specifically be related to the mTBI. Dr. Cebrian quotes from the MTG, p. 10 that the guideline definitions apply to "[T]he initial severity of impairment and do not necessarily define or describe the degree of subsequent impairment or disability."[30]

68. Dr. Cebrian couched Dr. Striplin's report and testimony as not having a sequela of symptoms at the time he evaluated Claimant, not that he never had a mTBI.[31] Dr. Cebrian specifically stated the MTG specified "An individual with a mild traumatic brain injury would be somebody who has either a short loss of consciousness, post-injury confusion, anterograde or retrograde amnesia that occur with a head injury. And so utilizing that, you make the determination whether a patient met that kind of minimum threshold for a mild traumatic brain injury."[32]

69. Dr. Cebrian testified as follows:

> Now, if you separate outside the eye and you're just addressing headaches from a neurological basis, the way that we're instructed to evaluate those is related to page 109 under the brain injury component, and then specifically additional information for headaches is given in impairment rating tips for episodic neurological disorders.

[29] The Deposition transcript refers to "Dr. Strickland" but this ALJ simply considers this a transcription error and should read "Dr. Striplin." Depo page 5 line 10 (hereinafter p. 5:10). There is also an error where the deposition reads "Dr. Warren" instead of "Dr. Orent." Depo. p. 5:16.

[30] This reference is to the distinction that an initial diagnosis of mild versus moderate or severe TBI does not reflect the severity of the subsequent impairment or disability. This ALJ interprets this to mean that a patient originally assigned a diagnosis of mild traumatic brain injury may later be re-diagnosed with a moderate or severe TBI diagnosis, or vice versa.

[31] Dr. Cebrian Deposition Transcript, page 13, lines 2 through19, whereinafter Depo. p.13:2-19.

[32] Cebrian Depo. p. 7:1-7.

> And I think one of the key components for all the impairment ratings that have performed in this is that you have to avoid as an examiner having overlap in impairments that may be addressed in other systems. And in the impairment rating tips on page 2, under headaches, one of the things that is stressed is that the rater must be very careful not to rate the activities of daily living deficits in both impairment areas. And that means that there are other areas where there may be activities of daily living that lead to an impairment, and so you have to be certain as an examiner that what you're assigning an impairment for is specifically related to that specific problem and not overlapped from another medical condition.[33]

70. Dr. Cebrian also states that cosmetic defects impairment are appropriate if there is no other alteration of ocular function.[34]

F. Rebuttal Testimony of Dr. Cathy Smith

71. Dr. Smith testified that Dr. Striplin erred in his assessment of impairment in his Division IME report. In particular, she opined that there was a critical error when Dr. Striplin stated that he did not feel that there was a diagnosis of a mild traumatic brain injury because there was no loss of consciousness, amnesia, and that imaging studies were normal, as stated on page 7, under number 2 of his report.

72. She clarified that the Medical Treatment Guidelines for mild traumatic brain injury are clear on page 10 and 12. They state that to make a diagnosis for mild traumatic brain injury, you do not have to have any of these requirements. In particular, on page 10 it states that you have to have one of the following symptoms within 24 to 48 hours after the injury, and those symptoms include an altered mental state, or feelings of being dazed or disoriented, confused, or focal neurologic deficits. Dr. Smith stated that clearly, according to the extensive medical records, Claimant did have altered mental state where he was dazed, disoriented and confused following his injury and still evident up to six days later. Dr. Smith disputed Dr. Striplin's opinion on that, according to page 12 of the treatment guidelines, a patient must have CT exam findings or MRI findings to make a diagnosis of mild traumatic brain injury. She stated that, according to the MTG, abnormal imaging studies are only required for a moderate traumatic brain injury diagnosis. Dr. Smith disputed the DIME physician’s statement that the frequency of headaches and migraine headaches, was questionable as the medical records clearly shows otherwise. Claimant’s migraine headaches have been present since the very beginning and all through his medical record they have been documented by multiple treating physicians, including the neurology specialist who treated Claimant for the migraines.

73. Dr. Smith also opined that Dr. Striplin made a critical error when he stated that “where there appears to be a temporal relationship between headache and work injury on 9/1/17, this temporal relationship alone does not establish a medical probable cause and effect.” Dr. Smith stated, in pertinent part

> Again, the medical record does not substantiate this. Postconcussive migraines are well-documented throughout the history, there is no past history of headache, specifically

[33] Cebrian Depo. pp. 14:21-15:16.
[34] Cebrian Depo. pp. 21:3-22:2.

> migraine headaches. These types of headaches are very typical of what we see following head injury, especially mild traumatic brain injury, and clearly the medical record supports a greater than 50 percent probability that these migraine headaches are related to his traumatic brain injury.

74. Dr. Smith opined that Dr. Striplin's position exhibited a critical error that his reason to not rate the headaches was that headaches are totally subjective and cannot be quantified. She stated that all headaches are subjective, and the intent and the direction of the *AMA Guides* and the Level II accreditation course is to rate post-traumatic headaches using the Episodic Neurologic Disorders table under Chapter 4 for The Nervous System.

75. Dr. Smith agreed with Dr. Cebrian that Claimant clearly had a mild traumatic brain injury, which was diagnosed from the beginning and agreed that 75 to 90 percent of patients that suffer from mTBI fully recover as stated in the MTG, but those that do not may continue to report symptoms for several months or years. Dr. Smith emphasized that Claimant falls within the second category as his symptoms have persisted. Dr. Smith testified that the DIME physician had not even looked at the MTG for TBI when he determined his opinion, which is a critical requirement when determining diagnosis the severity of a TBI, which is a critical error.

76. Dr. Smith stated that both Dr. Cebrian and the DIME physician committed critical errors in failing to consider the MTG to determine diagnosis in order to assess whether there is an impairment or not, and appropriately apply the *AMA Guides*. Dr. Smith vehemently disagreed with Dr. Cebrian in regard to his statement that the ongoing headache symptoms Claimant continued to suffer from could not be related to the work injury. Dr. Smith opined that the MTG clearly state that 10 to 25 percent of patients with mTBI continue to have complications related to the mTBI for years. She clarified that complex headache problems, specifically postconcussive migraine headaches, are more likely associated with mTBI than moderate or severe brain injury cases. She stated that Claimant has been diagnosed with these headaches, he's received treatment for these headaches, and they aren't benign headaches. She stated that Claimant has responded to treatment, that the frequency of the migraine headaches have decreased, as expected, over time, but they have not resolved, which entitles Claimant to an impairment rating under the *AMA Guides*.

77. Dr. Smith also stated that the medical records documented that Clamant was not the only one to document the initial symptoms. The history was also from his supervisor and coworker that reported Claimant was confused, he had an altered state, he was disoriented, he had difficulty walking, and he had difficulty speaking as well as weakness and photophobia, several of the symptoms that are used to diagnose or that you find with mild traumatic brain injury/postconcussive headaches. Now, cognitive symptoms, disorientation, all of those kinds of things, those initial symptoms that he had, did decrease and eventually resolve, which is what you would expect with mild traumatic brain injuries. The one symptom that did not resolve was his postconcussive headaches, and this is a fairly typical history that a physician would receive from people when they have a documented mild traumatic brain injury. Dr. Smith opined that Claimant had, without a doubt, a mild traumatic brain injury and because the DIME physician failed to

diagnose the mTBI, he committed a critical error in his assessment of impairment of the mTBI.

78. Dr. Smith stated that when looking at impairment under the *AMA Guides*, you rate the sequelae of diagnosis, not the diagnosis itself, because, it is not the mTBI in and of itself that caused the impairment but the consequences that continue to affect the Claimant that causes the need to address impairment. However, the DIME physician committed a critical error in misapplying the MTG, and failing to provide the mTBI diagnosis and consequently, not addressing impairment of the sequelae of the mTBI, specifically the residual postconcussive migraine headaches that are well documented and diagnosed throughout the Claimant's records, including by the neurology specialist, since the accident to the time of the hearing.

79. Dr. Smith reaffirmed that Claimant did not have a psychological overlay, and that the eye specialists' notations that symptoms were out of proportion regarding the right eye condition failed to consider or document the mTBI symptoms that Claimant was experiencing or that there were physiological explanations for the symptoms Claimant was experiencing, specifically as documented by Dr. Roe with regard to the left eye sympathetic ophthalmia, which occurs after injury or surgery to the other eye.

80. Dr. Smith opined that the "sick"[35] headaches that cause Claimant nausea are the postconcussive migraine headaches. Though Claimant also suffers a second type of daily headaches, due to the nonreactive pupil that cause the pupil to allow in too much light, and in turn causes nerve pain and subsequent headaches.

81. Dr. Smith agreed with Dr. Cebrian that, pursuant to the *AMA Guides*, one should not overlap impairments. However, in this case, Claimant has two separate systems that cause him impairment. The first is the damage to the pupil, and has nothing to do with his vision impairment, but due to light sensitivity, which causes headaches that require Claimant to use dark glasses, sit in darkened rooms and this is a completely different and separate mechanism than the migraines headaches caused by the mTBI postconcussive syndrome, including nausea.

82. Dr. Smith quoted the *AMA Guides* specifically with regard to the "Introduction" under the "The Visual System" of Chapter 8, found at p.161, which states the visual field and the nonreactive pupil as well as the cosmetic defect should be considered and rated separately. Dr. Smith stated that the activities of daily living that are affected by Claimant's daily headaches are different than the activities of daily living that are affected by his migraine headaches. She opined that there is no double-dipping or overlapping impairments here as the nonreactive pupil and postconcussive headaches are two different problems. The first is a functional problem with the pupil that results in daily headaches, and the second is the mild traumatic brain injury postconcussive migraine headaches that also result in symptoms, such as nausea and severe headaches every week or two.

[35] Hearing Transcript for October 18, 2021 hearing at pp. 35:14 & 36:13 state "stick" headaches but the audio and this ALJ's hearing notes clearly state "sick' headaches.

83. Dr. Smith opined that the daily headaches should be rated under the visual system under the *AMA Guides*, p. 161[36] for the nonreactive pupil, which states there is an additional 5 to 10% impairment, and that would cover not only other problems that might result from the nonreactive pupil, but also the problems with the filtering of light, which causes the significant symptoms on a daily basis.

84. Dr. Smith stated that Dr. Striplin committed another critical error in not addressing the Claimant's paroxysmal positional vertigo problems caused from the traumatic brain injury, which are not addressed by the vision impairment.

85. Dr. Smith also agreed with Dr. Roe that Claimant would continue to require further maintenance care for the continuing visual problems but also stated that Claimant would continue to require medications and follow up for his ongoing postconcussive migraines. She also emphasized that, while Claimant is currently driving, it does not mean that he is safe to drive and still requires a driving test to assess whether there should be any limitations on his driving caused by the visual impairments.

86. Dr. Smith ultimately opined that the correct impairment rating for all of Claimant's September 1, 2017 work-related conditions is as follows: The final impairment included 24% whole person impairment for the visual system due to total loss of vision of the right eye, 2% whole person for the cosmetic defect for the pupil, 10% for the nonreactive pupil and 17% whole person for the episodic disorder caused by the postconcussive migraines related to the mTBI, which all combine to a 44% whole person impairment rating.

87. Lastly, Dr. Smith reaffirms that the DIME physician, Dr. Striplin, committed critical errors in failing to diagnose the mTBI and consider an impairment for the cosmetic pupil defect, the impairment for the nonreactive pupil and for the mTBI as he failed to consider the substantial documentation of the problems related to the significant injuries and sequelae caused by the work-related accident of September 1, 2017 to Claimant's face, eye and head.

G. Other Resources

88. The Workers' Compensation Rules of Procedure, Desk Aids promulgated by the Division, the Medical Treatment Guidelines, and the *AMA Guides* were resources quoted by both parties and bear quoting in order to analyze the experts' interpretations.

89. W.C.R.P. Rule 12-5, 7 CCR 1101-3, addresses permanent mental and behavioral disorders and state, in pertinent part:

> (A) Any physician determining permanent mental or behavioral disorder impairment shall:
>
> (1) Limit such rating to mental or behavioral disorder impairments not likely to remit despite medical treatment; and
>
> (2)Use the instructions contained in the AMA Guides giving specific attention to:

[36] Dr. Smith actually states page 160 in error, which is the blank page prior to The Visual System Chapter 8, 10/18/2021 Hrg. Tr. p. 39:20-25; p. 43:8-23; p. 44:2-6; p. 63:17-25; & p. 64:1-9

(a) Chapter 4, "Nervous System"; and

(b) Chapter 14, "Mental and Behavioral Disorders"; and

(3) Complete a full psychiatric assessment following the principles of the AMA Guides, including:

…

(C) The permanent impairment report shall include a written summary of the mental evaluation and the work sheet incorporated herein as part of this rule (Division form WC-M3-PSYCH). The impairment rating shall be established using the "category definition guidelines" set forth in this rule, and which shall supplement the related instructions in the AMA guides. When appropriate, the physician shall address apportionment.

93. The Division Desk Aid No. 11 (DK11 Rev 07/20) addresses the Impairment Rating Tips. While these are simply tips and not a requirement, they provide a guideline for DIME physicians to follow and state in pertinent pat:

General Principles.

1. Impairment Ratings Based on Objective Pathology: Impairment ratings are given when a specific diagnosis and objective pathology is identified. (Reference: C.R.S. §8-42-107(8)(c)). In cases with multiple symptoms, the clinician must determine whether separate diagnoses are established which warrant an impairment rating OR the impairment rating provided for a specific diagnosis incorporates the accompanying symptoms of the patient.

   …

2. Impairment Rating for Workers Who Have Undergone an Invasive Treatment Procedure: The rating physician should keep in mind the AMA Guides, 3rd Edition (rev.) definition for impairment: "The loss of, loss of use of, or derangement of any body part, system, or function." Given this definition, one may assume any patient who has undergone an invasive procedure that has permanently changed any body part has suffered a derangement. Therefore, the patient should be evaluated for an impairment by a Level II Accredited Physician. Although the rating provided may be zero percent, it is essential that the physician perform the necessary tests, as outlined in the AMA Guides, 3rd Edition (rev.) for the condition treated, in order to justify the zero percent rating.

   …

5. Worksheets: Make sure to attach all applicable worksheets to the narrative report and include this information to all legally concerned parties.

   …

10. Headaches: Headaches that qualify for a separate work-related impairment rating should be rated using the Episodic Neurological Disorders section in Table 1- Section B (Chapter 4, p. 109). It is important to remember that if the individual has a closed head injury the highest applicable rating from this table is the only rating used. If the headache rating is to be combined with another body part, the rater must be very careful not to rate the activities of daily living deficits in both impairment areas.

DIME Panel Physician Notes:

2. IME Physicians Must Perform Complete Assessments and Exams, including All Applicable Measurements: As a Division Independent Medical Examiner you are required to perform your own examination of the claimant and ensure that all required measurements are performed and documented on the appropriate worksheets. If another medical professional (such as a physical therapist) performs range of motion measurements or other specialized tests and assessments (such as an audiogram), it is the responsibility of the physician to ensure that the medical professional performs the assessments in accordance with the AMA Guides and other professional standards. After completing the evaluation, in rare occurrences, you may decide that another physician's impairment rating better reflects the condition being evaluated. Examples include instances where you find another physician's range of motion more physiologically credible than the measurements you have obtained or when another physician has more training in a particular area than you do, such as a psychiatrist. If you then decide to adopt another physician's rating, you should discuss in your report your own findings and clearly justify the reasons for using another physician's rating. If you do not provide such a discussion your report will be returned as incomplete.

7. Declaring Condition is Not Related to Injury: Division Independent Medical Examiners may declare a condition is not work-related. This may occur despite the fact a payer has accepted a body part or diagnosis as part of the claim, treatment has occurred, and MMI has been declared by the authorized provider. If this situation arises, an impairment rating must be provided in the report or as an addendum to the DIME report.
...

93. The MTG under W.C.R.P. Rule 17, Exhibit 2 for Traumatic Brain Injury specifically state, in pertinent part, as follows:

C. **Introduction to traumatic brain injury** (TBI)

C.1. Definitions of TBI:

Before a diagnosis of TBI is made, the physician should assess the level of trauma exposure to the individual using available objective evidence. According to the Institute of Medicine of the National Academies, TBI is an injury to the head or brain caused by externally inflicted trauma.The Department of Defense defines TBI as a "traumatically induced structural injury and/or physiological disruption of brain functions as a result of an external force." TBI may be caused by a blow to the head from an object or by striking an object, by acceleration or deceleration forces without impact, or by blast injury or penetration to the head that disrupts the normal function of the brain.

A diagnosis of TBI is based on acute injury parameters and should be determined by the criteria listed below. Severity of initial impairment following TBI is subdivided into two major categories, mild TBI (mTBI) and moderate/severe TBI (M/S TBI). These definitions apply to the initial severity of impairment and do not necessarily define or describe the degree of subsequent impairment or disability.

C.1.a Mild TBI (mTBI)

mTBI is a traumatically induced physiological disruption of brain function, as manifested by at least one of the following, documented within 24 to 72 hours of an injury:

> - any loss of consciousness
> - any loss of memory for events immediately before or after the injury
> - any alteration of mental status at the time of the injury (e.g., feeling dazed, disoriented, or confused)
>
> ….
>
> D.1 Prognosis and risk factors
>
> In general, 75–90% of people with mTBI fully recover in less than 90 days. Those who suffer an mTBI may continue to report symptoms for several months or years.
>
> A number of factors appear to increase the risk for symptom prolongation:
>
> - Glasgow Coma Scale score of less than 15 at 2 hours post-injury;
> - work risk factors, such as very demanding or stressful vocations or being employed in the current job for a short period oftime;
> - age above 40years;
> - injury complicated by the presence of intracranial lesions, current orprevious;
> - history of prior brain injury, cognitive impairment, learning disabilities, ordevelopmental delay;
> - associated orthopedic, soft tissue, or organ injuries;
> - pre-injury issues with general health or psychosocial well-being;
> - psychological factors such as depression, post-traumatic stress disorder, or anxiety (see evidence statement below);
> - pre-injury history of migraines or other recurrent headaches.
>
> CT or MRI findings that do not necessitate surgery nor result in significant initial neurologic findings on physical exam may still result in a complex recovery.

90. The *AMA Guides* also provides multiple provisions that are applicable in this matter. The first is under Chapter 4, The Nervous System. Section 4.1, which addresses the brain functions, pursuant to the Desk Tips suggests that headaches should be addressed under the Episodic Neurological Disorder table. This includes *AMA Guides* page 106 for Episodic Neurological Disorders and Table 1 on page 109. Section 4.1a for "The Brain," Chapter 4 of the *AMA Guides* also specifies as follows:

> More than one category of impairment may result from brain disorders. In such cases the various degrees of impairment from the several categories are not added or combined, but the largest value, or greatest percentage of the seven categories of impairment, is used to represent the impairment for all of the types.

91. Chapter 8, The Visual System, Section 8.0 states in pertinent part:

> To the extent that any ocular disturbance causes impairment not reflected in visual acuity, visual fields, or ocular motility with diplopia, the impairment ***must*** be evaluated by the physician ***and*** be added to the impairment of the visual system.
>
> ***One or more other*** ocular impairments, such as vitreous opacities, a ***nonreactive pupil***, and light scattering disturbances of the cornea or other media, ***may*** be calculated as an additional 5% to 10% impairment of the involved eye. Permanent deformities of the orbit,

> scars, and ***cosmetic defects that may not alter ocular function should be considered individually as an additional factor*** that can cause up to 10% impairment of the whole person. [*Emphasis added*.]

92. Section 8.5, Table 6 provides that total loss of vision in one eye provides a 24% whole person impairment rating.

96. Additionally, Section 8.6 addresses "Other Conditions," and states:

> Up to an additional 10% impairment may be combined with the impairment of the whole person caused by the visual system for such conditions as permanent deformities of the orbit, scars, and other cosmetic deformities that do not otherwise alter ocular function.

H. Credibility Analysis of the Findings of Fact

93. As found, Dr. Striplin's true opinion is that Claimant only has an impairment rating of the visual field. Dr. Striplin is not credible. Firstly, Dr. Striplin stated that impairment of the visual field provided by Dr. Roe of 25% accounts for all the impairments Claimant has for the right eye because if Claimant had lost the whole eye, he would receive the 25% for loss of vision in one eye. The critical error is that there would be other considerations, including clear deformity by loss of the eyeball, and potentially other impairments caused by the loss of the eye. Here, this ALJ finds Dr. Striplin not credible and Dr. Smith's analysis to be correct.

94. Ocular function is of the visual field only. In this case Claimant lost 100% of the visual field of the right eye pursuant to the *AMA Guides.* A 25% impairment of the visual field, which converts to a 24% whole person impairment of the visual system. This was assigned by all rating physicians, including Dr. Striplin and Dr. Cebrian.

95. A scar or deformity does not affect the visual field but may be considered for disfigurement pursuant to the *AMA Guides* under Sections 8.0 and 8.6. If, as interpreted by Dr. Striplin, Claimant was not entitled to this impairment because he had a visual field loss, then the paragraph under Sections 8.0 and 8.6 would be rendered meaningless and would never entitle a patient that has a visual impairment to a disfigurement or scar impairment. Under the analysis of *Gonzales and ICAO v. Advanced Component Systems*, 949 P.2d 569 (Colo. 1997), the Colorado Supreme Court found that a patient may have both an impairment of the function of the eye as well as a disfigurement or cosmetic defect. Therefore, Dr. Striplin's analysis and explanation is incorrect and not credible.

96. Dr. Smith credibly testified that an impairment rating of 2% for the cosmetic deformity for the irregular pupil was appropriate under the *AMA Guides*, and this was a rating also provided by both Dr. Roe and Dr. Orent. Claimant has a clearly visible malformed pupil, which is irregular in shape, not round, and is permanently dilated, covering the majority of the iris, as observed by this ALJ during the hearing. Dr. Striplin was clearly in error in interpreting the *AMA Guides* in this matter and is found not credible in regard to the cosmetic deformity impairment.

97. Secondly, Dr. Cebrian and Dr. Striplin both stated that Claimant did not have an impairment for the nonreactive pupil of the right eye because he had already been compensated for the total loss of vision in the right eye. While the main purpose of the eye is vision, there are other issues that must be addressed according to the *AMA Guides*. In this case there are symptoms and sequelae caused by the damage to the eye. Dr. Smith explained that the right eye no longer dilates. This causes introduction of light into the eye causing an effect of stimulating the nerve, which causes daily headaches, and is well documented by multiple providers, including Dr. Smith, Dr. Martin, Dr. Rothstein, Dr. Hebard, Dr. Poon and Dr. Orent. Even Dr. Cebrian and Dr. Striplin acknowledged that Claimant has continued to have ongoing headaches related to the permanently dilated right eye.

98. Dr. Cebrian justified his failure to address the nonreactive pupil impairment by stating that, if the eye had been enucleated, this problem would not exist. However, this is not what happened to Claimant. As found, Dr. Smith credibly explained that the eye is still part of Claimant's body and Claimant suffers the effect of the continual introduction of light that triggers a nerve response, which causes daily headaches and affects Claimant's activities of daily living, including inability to work on a computer or perform activities outside without protection of dark glasses and a hat. Under the *AMA Guides,* it is appropriate to consider an impairment if the symptoms impact the Claimant's activities of daily living. As found, Dr. Striplin was incorrect in not addressing an impairment for the nonreactive pupil and assessing whether claimant had an impairment caused by the nonreactive pupil affecting Claimant's activities of daily living. Claimant was credible that Dr. Striplin never asked how his nonreactive pupil was affecting him.

99. Dr. Cebrian and Dr. Striplin were of the opinion that Section 8.0, the Introduction of The Visual System's description meant that it was one or the other, an impairment of the visual field or the nonreactive pupil impairment. This ALJ finds that the *AMA Guides* state that to the extent that any ocular disturbance causes impairment not reflected in visual fields, the impairment "must" be evaluated by the physician "and" added to the impairment of the visual system. The *AMA Guides* goes on to state that "One or more other ocular impairments, such as … a nonreactive pupil, …, may be calculated as an additional 5% to 10% impairment of the involved eye." As found, Dr. Striplin was incorrect in the reading of the *AMA Guides* and the reference to "one or more" indicates that there can be multiple visual system impairments, including loss of vision field, a nonreactive pupil and/or a cosmetic defect, as testified by Dr. Smith, who is found credible in this matter.

100. The *AMA Guides* go on to state that "Permanent deformities of the orbit, scars, and cosmetic defects that *may* not alter ocular function should be considered individually as an additional factor…" [*Emphasis added*.] The word "may" is interpreted here as either does or does not. Which means that just because the nonreactive pupil may affect function, this does not mean that a separate disfigurement is inappropriate.

101. Dr. Cebrian quotes from the MTG, p. 10 that the guideline definitions apply to "[T]he initial severity of impairment and do not necessarily define or describe the degree of subsequent impairment or disability." This reference is to an initial diagnosis of mild versus moderate or severe TBI that does not reflect the severity of the subsequent

impairment or disability. This ALJ interprets this to mean that a patient originally assigned a diagnosis of mild traumatic brain injury may later be re-diagnosed with a moderate or severe TBI diagnosis, or vice versa, or neither. As found Dr. Cebrian is not credible or persuasive in this regard.

102. Dr. Striplin clearly stated that he did not reach a diagnosis of a mild traumatic brain injury and, therefore, did not have to go through the steps to make a determination whether Claimant had any ongoing symptoms that required impairment under the *AMA Guides*. Dr. Striplin failed to consider the mild traumatic brain injury which causes the postconcussive headaches. As found, it is clear from the medical records that Claimant suffered an mTBI. Claimant reported to Dr. Hebard on September 7, 2017 that he had symptoms of dizziness, nose bleeds, and head and facial trauma, nausea, vomiting, difficulty walking, difficulty speaking, difficulty concentrating, headaches, and loss of memory. Dr. Henry Poon on December 19, 2017 noted on neurologic exam a mild slurring of speech and Claimant was not fully oriented to time and event (vagueness), had difficulty with tandem walk with abnormal gait as he would fall to the side and his diagnosis included postconcussive syndrome. As found, Dr. Striplin was incorrect in failing to address the Claimant's diagnosis of mTBI and postconcussive syndrome. Dr. Striplin committed an error when concluding that Claimant did not have an mTBI and is not credible in his assessment of the Claimant's permanent impairment.

103. Dr. Striplin stated that he did not feel that there was a diagnosis of a mild traumatic brain injury because there was no loss of consciousness, amnesia, and that imaging studies were normal. This is not how this ALJ interpreted the causation analysis as provided by the MTG. Dr. Smith credibly testified that Dr. Striplin made a critical error because, to diagnose an mTBI there only needs to be a determination of any alteration of mental status at the time of the injury (e.g., feeling dazed, disoriented, or confused), which are documented in the records. Over three months after the accident medical providers were noticing Claimant continued with symptoms of mTBI. Claimant continued to have headaches that were "sick" headaches, causing nausea. Dr. Smith's opinion that these were migraine headaches caused by the sequelae of the mTBI and the postconcussive syndrome are credbile. Dr. Smith and other ATPs documented Claimant's ongoing headaches from the beginning of his injury to the date of maximum medical improvement. Dr. Smith also testified that she continued to treat Claimant following MMI and he continued with the same symptoms despite ongoing care, though the care Claimant had received did ameliorate the frequency of the migraine headaches. Dr. Striplin is incorrect in failing to consider the mTBI as related to the September 1, 2017 claim and failing to rate the impairment caused by the postconcussive headaches. As found, Claimant has shown that Dr. Striplin was incorrect on multiple levels, including failing to address the diagnosis of mTBI related to the work related injury, failing to properly rate Claimant's impairments and failing to appropriately review, consider and misapplying the MTG and the *AMA Guides*.

104. Dr. Striplin failed to comply with W.C.R.P. Rule 12-5(C), which requires a full evaluation and completion of the mental impairment work sheet. Further, Dr. Striplin failed to comply with the cautions of Desk Aid 11 which states that as "a Division Independent Medical Examiner you are required to perform your own examination of the claimant and ensure that all required measurements are performed and documented on

the appropriate worksheets." This creates an additional burden on a DIME physician and a higher standard of care. DK 11 goes on to state that a DIME Examiner "may declare a condition is not work-related." However, "[I]f this situation arises, an impairment rating must be provided in the report or as an addendum to the DIME report." However, Dr. Striplin simply makes a conclusory statement that Claimant has no ratable psychological, TBI or face conditions, without going through the steps as required by the heightened burden of a DIME physician. As found, Dr. Striplin is not credible.

105. As found, Dr. Smith is credible in her determination that Claimant has a mTBI that causes ongoing migraine headaches which affect Claimant's activities of daily living, including being confined to a dark room for one up to three days at a time, due to the intensity of the migraines. During these disruptions Claimant is unable to carry out his activities of daily living. Dr. Smith is persuasive that the Claimant has an impairment under the Episodic Neurological Disorder (END) Table 1 at p. 109 of the *AMA Guides*, which provides a 17% whole person impairment for the residual migraine headaches caused by the ongoing mTBI symptoms, as well as a 10% for the continuing vertigo, also under Table 1. However, the *AMA Guides* also state that only one impairment could be used under the END and the 17% was the larger amount.

106. As found, Claimant continues to have postconcussive migraine headaches as well as a nonreactive pupil causing headaches that continue to be treated by his authorized treating provider. Both of these types of headaches are proximately caused by the September 1, 2017 admitted work related injury and require ongoing care in order to maintain Claimant at maximum medical improvement. Dr. Smith is persuasive in this regard.

107. The *AMA Guides* also state under Chapter 8 that the physician must consider the effect other impairments have on a patient's vision system other than the loss of vision function itself, including a nonreactive pupil. In considering this, Dr. Smith provided an additional 10% impairment for the nonreactive pupil as it interferes with Claimant's ADLs. However, there is an overlap as Claimant continues to have headaches related to the nonreactive pupil and the migraine headaches that both result in disruptions in Claimant's activities of daily living. As found, the disruptions include loss of ability to perform activities outside in the sunlight, must wear dark glasses, including inside medical offices, uses both dark glasses and a hat when outside, is unable to do more than limited exercises in his home related to both the vertigo and too many lights in a gym, no longer engages in social activities like parties because of balance problems and lighting, is unable to engage in activities like hiking and is unable to perform computer work as Claimant cannot look at a screen for extended periods of time, cutting off his ability to work as a real estate agent. Because there are overlap in the activities of daily living caused by the mTBI sequelae and the ADLs caused by the nonreactive pupil, this ALJ finds that it is important, pursuant to the *AMA Guides,* that the headache conditions be address as one component and not be duplicative of Claimant's impairments. As found, the END impairment is the greatest rating that causes an effect on Claimant's activities of daily living, the 17% shall be combined with the 24% whole person due to the loss of vision in the right eye and the 2% for the cosmetic defect for a total combined rating of 39% whole person impairment assigned to the September 1, 2017 work related accident.

CONCLUSIONS OF LAW

A. Generally

The purpose of the “Workers’ Compensation Act of Colorado” is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. The facts in a Workers’ Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers’ Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ’s factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered “to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence.” See *Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness’s testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers’ compensation case is decided on its merits. C.R.S. § 8-43-201.

B. Overcoming the DIME Physician:

Here, Claimant argues that the DIME physician, Dr. Striplin, was incorrect in multiple opinions with regard to Claimant’s work related impairment ratings. Claimant must prove that the DIME physician’s determination of causation and impairment were incorrect by clear and convincing evidence. Section 8-42-107(8)(C), C.R.S. *Wilson v. Indus. Claim Appeals Office*, 81 P.3d 1117, 1118 (Colo. App. 2003); *In re Claim of Lopez*, 102721 COWC, 5-118-981 (Colorado Workers' Compensation Decisions, 2021). Clear and convincing evidence must be “unmistakable and free from serious or substantial doubt.” *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). The party challenging a DIME’s conclusions must demonstrate it is “highly probable” that the impairment rating is incorrect. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *Qual-*

Med, 961 P.2d 590 (Colo. App. 1998); *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).). A “mere difference of medical opinion” does not constitute clear and convincing evidence. *Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (March 18, 2016). Therefore, to overcome the DIME physician’s opinion, the evidence must establish that it is incorrect. *Leming v. Indus. Claim Appeals Office*, 62 P.3d 1015, 1019 (Colo. App. 2002).

The DIME physician must assess, as a matter of diagnosis, whether the various components of the claimant's medical condition are causally related to the industrial injury. See *Qual-Med, Inc. v. Industrial Claim Appeals Office*, *supra*. Consequently, when a party challenges the DIME physician’s impairment rating, the Colorado Court of Appeals has recognized that a DIME physician’s determination on causation is also entitled to presumptive weight. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998); *In re Claim of Singh*, 060421 COWC, 5-101-459-005 (Colorado Workers' Compensation Decisions, 2021). However, if the DIME physician offers ambiguous or conflicting opinions concerning his opinions, it is for the ALJ to resolve the ambiguity and determine the DIME physician's true opinion as a matter of fact. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, *supra*. Further, deviations from the *AMA Guides* do not mandate that the DIME physician’s impairment rating is incorrect. *In Re Gurrola,* W.C. No. 4-631-447 (ICAP, Nov. 13, 2006). Instead, the ALJ may consider a technical deviation from the *AMA Guides* in determining the weight to be accorded the DIME physician’s findings. *Id.* Whether the DIME physician properly applied the *AMA Guides* to determine an impairment rating is generally a question of fact for the ALJ. *In Re Goffinett,* W.C. No. 4-677-750 (ICAP, Apr. 16, 2008); *In re Claim of Pulliam*, 071221 COWC, 5-078-454-001 (Colorado Workers' Compensation Decisions, 2021).

A DIME physician's finding consists not only of the initial report, but also any subsequent opinions given by the physician. See *Andrade v. ICAO*, 121 P.3d 328 (Colo. App. 2005). Thus, the ALJ should consider all of the DIME physician's written and oral testimony. *Lambert & Sons, Inc. v. ICAO*, 984 P.2d 656, 659 (Colo. App. 1998); *In Re Dazzio,* W.C. No. 4-660-149 (ICAP, June 30, 2008); *Andrade v. Industrial Claim Appeals Office, supra*. Once the ALJ determines the DIME physician's true opinion, if supported by substantial evidence, then the party seeking to overcome that opinion bears the burden of proof by clear and convincing evidence to overcome that finding of the DIME physician’s true opinion. Section 8-42-107(8)(b), C.R.S.; see *Leprino Foods Co. v. ICAO*, *34 P.3d 475 (Colo. App. 2005), In re Claim of Licata*, W.C. No. 4-863-323-04, ICAO, (July 26, 2016) and *Magnetic Engineering, Inc. v*. ICAO, *supra*.

The Act requires DIME physician to comply with the *AMA Guides* in performing impairment rating evaluations. Sec. 8-42-101(3)(a)(I) & Sec. 8-42-101 (3.7), C.R.S.; *Gonzales v. Advanced Components,* 949 P.2d 569 (Colo. 1997). Further, pursuant to 8-42-101 (3.5)(II), C.R.S. the director promulgated rules establishing a system for the determination of medical treatment guidelines, utilization standards and medical impairment rating guidelines for impairment ratings based on the *AMA Guides.* In determining whether the physician’s rating is correct, the ALJ must consider whether the physician correctly applied the *AMA Guides* and other rating protocols. *Wilson v. Industrial Claim Appeals Office*, *supra*. The determination of whether the physician correctly applied the *AMA Guides* is a factual issue reserved for the ALJ. *McLane W., Inc.*

v. Indus. Claim Appeals Office, 996 P.2d 263 (Colo. App. 1999); *In re Claim of Pulliam*, *supra*. The question of whether the DIME physician's rating has been overcome is a question of fact for the ALJ to determine, including whether the physician correctly applied the *AMA Guides*. *Metro Moving and Storage Co. v. Gussert, supra*.

Where a physician has failed to follow established medical guidelines for rating a claimant's impairment in a DIME, the DIME's opinion has been successfully overcome by clear and convincing evidence. See, e.g., *Am. Comp. Ins. Co. v. McBride*, 107 P.3d 973, 981 (Colo. App. 2004) (DIME physician's deviation from medical standards in rating the claimant's injury constituted error sufficient to overcome the DIME); *Mosley v. Indus. Claim Appeals 11 Office*, 78 P.3d 1150, 1153 (Colo. App. 2003) (DIME physician's impairment rating overcome by clear and convincing evidence where DIME physician failed to rate a work related impairment). Similarly, when a DIME physician's opinion is contrary to the Act, it is grounds for overcoming the DIME because the DIME report is legally incorrect. See *In re Claim of Lopez*, *supra*. Lastly, where an ALJ finds a claimant's description of his present symptoms credible, this is sufficient to overcome the DIME physician's opinion. *In re Claim of Conger*, 100521 COWC, 4-981-806-001 (Colorado Workers' Compensation Decisions, 2021).

Dr. Smith credibly testified that Dr. Striplin erred in his assessment of Claimant's impairment. In particular, there were some critical errors when Dr. Striplin assessed his impairment in his Division IME report, specifically in that he failed to provide a diagnosis of a mild traumatic brain injury because there was no loss of consciousness, amnesia, and that imaging studies were normal, as stated on page 7, under number 2 of his report. Dr. Smith, Dr. Cebrian and Dr. Orent all credibly opined that Claimant clearly had a mild traumatic brain injury, which was diagnosed from the beginning, and while the majority of mTBI patients fully recover, as stated in the MTG, those that do not may continue to report symptoms for several months or years. Dr. Smith credibly opined that it was a critical error for the DIME physician to have failed to look at the MTG when he examined Claimant and provided his opinion, as it is a critical requirement when determining diagnosis and severity of a TBI. Claimant testified and the medical records exhaustively document Claimant's mTBI and postconcussive headaches. As found and concluded, Claimant falls within the second category as his symptoms have persisted and the mTBI should have been diagnosed and rated by the DIME physician. Dr. Striplin was incorrect in his findings. Dr. Smith and the multiple medical records by Dr. Martin, Dr. Hebard, Dr. Poon and Dr. Orent provide proof that is unmistakable and free from serious or substantial doubt. As found and concluded this is evidence that it is highly probable the DIME physician was incorrect, not merely a difference of medical opinion.

The MTG for mild traumatic brain injury are clear on page 10 and 12 that to make a diagnosis for mild traumatic brain injury, you do not have to have any of the requirements that Dr. Striplin stated. In particular, on page 10 it states that you have to have one of the symptoms listed within 24 to 48 hours after the injury, and includes altered mental state, which means dazed or disoriented, confused, or findings of focal neurologic deficits. As found and concluded, clearly the extensive medical records reveal Claimant had an altered mental state where he was dazed and disoriented and confused following his September 1, 2017 work related injury. That was immediately evident as testified by

Claimant, and was still evident six days later when he was evaluated by Dr. Hebard. It was still present when Claimant was evaluated by Dr. Poon on December 16, 2017, who found, on neurologic exam, mild slurring of speech, Claimant was not fully oriented to time and event (vagueness), had difficulty with tandem walk with abnormal gait as he would fall to the side, and diagnosed Claimant with postconcussive syndrome. Claimant has proven by clear and convincing evidence that Dr. Striplin was incorrect in the fact that he failed to review the MTG for purposes of determining a diagnosis. As found and concluded Dr. Striplin was incorrect in his assessment that the continuing mTBI was not related to the work related injury of September 17, 2017, including the postconcussive headaches that were caused by the mTBI. As found and concluded Dr. Striplin was clearly incorrect in not considering the diagnosis of mTBI for purposes of providing an impairment rating. In fact, he relied upon the psychologist's determination that Claimant did not have a cognitive psychological disorder to state that a rating under mTBI was inappropriate. Dr. Smith credibly testified that the psychologist's evaluation only assessed for psychological impairments and cognitive impairments, not neurological deficits. Dr. Striplin is also not credible when he stated that the frequency of headaches, migraine headaches, was questionable. Clearly the medical record shows otherwise. As found and concluded Claimant's migraine headaches have been present since the very beginning and all through his medical records. It's been documented by multiple treating physicians, including providers specializing in neurology who have treated him for the migraines. Dr. Smith's credible testimony that the postconcussive migraines were well-documented throughout the history, there was no past history of headache, specifically migraine headaches, that Claimant's headaches are very typical of what she would see following head injury, especially mild traumatic brain injury, and clearly the medical record supports in this case that the migraine headaches are related to Claimant's traumatic brain injury. This is clear and convincing evidence that the postconcussive headaches are proximately caused by the Claimant's September 1, 2017 traumatic injury to head. Dr. Striplin clearly committed an error in finding otherwise.

Dr. Smith credibly opined that Dr. Striplin's statements regarding headaches exhibited a critical error as his reason to not rate the headache was that headaches are subjective and cannot be quantified. Dr. Smith and Dr. Orent credibly opined that all headaches are subjective, and the intent and the direction of the *AMA guides* and the Level II accreditation course is to rate post-traumatic headaches using the episodic neurologic disorders table under Chapter 4 under the nervous system. This is supported by the Desk Aids as quoted above. Claimant has proven by clear and convincing evidence that the causally related trauma to the head caused the mTBI, which in turn proximately caused migraine headaches which disrupted Claimant's ADLs on almost a weekly basis as fully supported by the medical records, and is not a psychological condition, but a neurological diagnosis and condition.

Lastly, Dr. Striplin was clearly incorrect in his application and interpretation of the *AMA Guides* in reviewing Chapter 8, Section 8.0, regarding the nonreactive pupil and cosmetic disfigurement. The *AMA Guides* are clear in that, to the extent that any ocular disturbance causes impairment not reflected in the Claimant's visual field, the impairment *must* be evaluated by the physician *and* be added to the impairment of the visual system, as well as that o*ne or more other* ocular impairments, such as a *nonreactive pupil, may* be considered for additional impairment*.* Here, Claimant has shown by clear and convincing evidence that he has both. First, Claimant's nonreactive pupil, causes light to be introduced that produces a reaction of the nerve, causing severe headaches which daily interferes with his activities of daily living, including light sensitivity, not being able to work outdoors without significant protection or for extended time periods, or work with computer screens. The second is that Claimant has a clear disfigurement of the pupil, which is always dilated, irregular in shape and almost fully obliterates the iris by observation of this ALJ as well as documented in the medical records. While there is no requirement that the DIME physician rate the irregularity of the pupil as a disfigurement under the *AMA Guides*, Dr. Striplin made a clear error in that he failed to consider that the *AMA Guides* state that *cosmetic defects that may not alter ocular function should be considered individually as an additional factor.* This means that the disfigurement of the pupil should have been at least considered for an award but Dr. Striplin considered only extreme disfigurements as meriting an award for disfigurement. Claimant has additionally proven by clear and convincing evidence that Dr. Striplin committed an error in his interpretation of the *AMA Guides* as credibly testified by Dr. Smith.

C. Permanent partial disability benefits

Once the DIME's rating has been overcome in any respect, the ALJ is to calculate the claimant's impairment rating based upon the preponderance of the evidence. *Mosley v. Industrial Claim Appeals Office*, 78 P.3d 1151, 1153 (Colo. App. 2003) (once the DIME is overcome "the ALJ was free to consider the other medical evidence concerning claimant's permanent medical impairment"); *Paredes v. ABM Industries,* W.C. No. 4-862-312 (April 14, 2014*); DeLeon v. Whole Foods Market,* W.C. No 4-600-477 (November 16, 2006); *Garlets v. Memorial Hospital*, W.C. No. 4-336-566 (September 5, 2001). *Destination Maternity v. Burren*, 2020 CO 41, at ¶ 28, 463 P.3d 266, at 274 (Colo. 2020).

Dr. Smith credibly opined that both Dr. Cebrian and the DIME physician committed critical errors in failing to consider the mTBI MTG to determine diagnosis in order to assess whether there is an impairment or not, and that Dr. Striplin failed to appropriately apply the *AMA Guides* correctly. Dr. Smith credibly opined that Claimant falls in the 10 to 25 percent of patients with mTBI, as the MTG specify, he continues to have complications related to the mTBI and he has a complex headache problem, specifically postconcussive migraine headaches, associated with his mTBI injury.

Dr. Smith credibly opined that when looking at impairment under the *AMA Guides*, you rate the sequelae of diagnosis, not the diagnosis, because, it is not the mTBI in and of itself that causes the impairment, but the consequences that continue to affect the Claimant that causes the need to address impairment. As found and concluded by this ALJ, the DIME physician committed a critical error in misapplying the MTG and *AMA Guides.* Claimant has proven by a preponderance of the evidence that Claimant has impairments of the visual field, causing a 24% whole person impairment as agreed upon by all providers who considered Claimant for a rating. Dr. Smith also credibly testified, which was supported by Drs. Roe (Respondent IME) and Dr. Orent (Claimant IME) that Claimant has a cosmetic defect, which entitles him to a 2% whole person impairment in accordance with the *AMA Guides* pursuant to Sec. 8.0 and 8.6. These combine for a 26% whole person impairment of the visual system.

Next, Claimant has ongoing postconcussive migraine headaches due the mTBI, vertigo and a nonreactive pupil, all of which cause impairments to the Claimant's activities of daily living. Dr. Smith credibly testified that there were three different and distinct impairment ratings in this regard. She assessed that the paroxysmal positional vertigo could be rated both under The Ear, Nose, Throat and Related Structures section of the *AMA Guides* (Chapter 9, Sec. 9.1C) or under Chapter 4, under The Nervous System. She made a rational decision to rate it under the nervous system of the brain because then she could select whether the vertigo or the postconcussive headaches impairment would be included in the rating, as only one of them could be added to the final impairment rating. In this case she assessed that the vertigo caused a 10% whole person impairment. She assessed that the postconcussive migraine headaches caused a greater impact on Claimant's activities of daily living, and assessed a 17% whole person impairment. As the *AMA Guides*, under Sec. 4.1a states that only the largest of the impairment should be included in the impairment, Dr. Smith combined the 17% whole person impairment to the visual system's 26% whole person impairment to obtain a 39% whole person impairment. This is impairment rating is credible and persuasive. Claimant has proven by a preponderance of the evidence that the 39% whole person impairment rating is appropriate in this matter.

Claimant is asserting that the amount of impairment to be assigned for the nonreactive pupil condition should be added to the prior impairments. Dr. Smith testified that Claimant was entitled to an additional 10% whole person impairment due to the nonreactive pupil impairment, which caused impairments in daily living. However, while Claimant showed by clear and convincing evidence that Dr. Striplin failed to appropriately apply the *AMA Guides* in this regard, Claimant failed to show how the activities of daily living which were affected by the paroxysmal positional vertigo, migraine headaches and the nonreactive pupil were different. Claimant testified that headaches caused by infiltration of light were affecting his ability to use a computer, perform outdoor activities and engage in social activities but this is no different from the activities interrupted by the migraine headaches and the vertigo. Both Dr. Smith and Dr. Cebrian credibly testified that both the *AMA Guides* and the Level II accreditation course materials indicated that rating physicians needed to be cautious about duplicative impairment ratings and not overlapping the ratings affecting another medical condition. And while this ALJ agrees that Dr. Smith applied the *AMA Guides* correctly by considering the nonreactive pupil under Sec. 8.0 of Chapter 8, and the paroxysmal positional vertigo under Chapter 4, providing a rating for both of them, there is no clear guideline or detailed list of which activities of daily living are affected by each of the three impairments. Therefore, Claimant has failed to show by a preponderance of the evidence that Claimant is entitled to the additional impairment for the nonreactive pupil.

D. Reasonably necessary and related medical benefits.

The right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301, C.R.S. See *Popovich v. Irlando*, 811 P.2d 379 (Colo. 1991); *Seifried v. Industrial Commission*, 736 P.2d 1262 (Colo. App. 1986).

Section 8-42-101(1)(a), C.R.S., provides that Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *Snyder v. Industrial Claim Appeals Office*, *supra*; *Wal-Mart Stores, Inc. v. Industrial Claims Office,* 989 P.2d 251 (Colo. App. 1999). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002); *In re Claim of Foust*, I.C.A.O, WC, 5-113-596 (COWC October 21, 2020). Medical benefits may extend beyond MMI if a claimant requires treatment to relieve symptoms or prevent deterioration of their condition. *Grover* v. *Indus. Commission*, 759 P.2d 705 (Colo. 1988). If the claimant establishes the probability of a need for future treatment, he is entitled to a general award of medical benefits after MMI, subject to the respondents' right to dispute causation or reasonable necessity of any particular treatment. *Hanna v. Print Expediters, Inc*., 77 P.3d 863 (Colo. App. 2003). The claimant must prove entitlement to post-MMI medical benefits by a preponderance of the evidence. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997).

Claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities. See *Merriman v. Industrial Commission*, 120 Colo. 400, 210 P.2d 448 (1949); *Abeyta v. Wal-Mart Stores*, W.C. No. 4-669-654 (January 28, 2008). Expert medical opinion is not needed to prove causation where circumstantial evidence supports an inference of a causal relationship between the injury and the claimant's condition. *Savio House v. Dennis,* 665 P.2d 141 (Colo. App. 1983). Where conflicting expert opinion is presented, it is for the ALJ as fact finder to resolve the conflict. *Rockwell International v. Turnbull*, 802 P.2d 1182 (Colo. App. 1990). Further, when expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting all, part, or none of the testimony of a medical expert. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968); *Dow Chemical Co. v. Industrial Claim Appeals Office,* 843 P.2d 122 (Colo. App. 1992).

It is appropriate for an ALJ to consider the guidelines while weighing evidence, but the MTGs are not definitive. *Jones v. T.T.C. Illinois*, Inc., W.C. No. 4-503-150 (May 5, 2006); *aff'd Jones v. Industrial Claim Appeals Office* No. 06CA1053 (Colo. App. March 1, 2007) (not selected for publication); *Stamey v. C2 Utility Contractors et al*, W.C. No. 4-503-974 (August 21, 2008). See also Sec. 8-43-Concerning the issue presented, the MTG's indicate that "[t]here is some evidence that the ALJ may decide the weight to be assigned the provisions of the *Guidelines* upon consideration of the totality of the evidence. See *Cahill v. Patty Jewett Golf Course,* WC 4-729-518 (ICAO February 23, 2009); *Siminoe v. Worldwide Flight Services,* WC 4-535-290 (ICAO November 21, 2006).

Respondents admitted by Final Admission of Liability dated May 6, 2020 with a general award of medical benefits that are reasonably necessary and related to the claim after the maximum medical improvement determination. However, as of the date of the hearing, Respondents alleged that the medical care that Claimant is currently receiving from his ATP for the postconcussive headaches and nonreactive pupil impairment is no longer reasonable, necessary or related to the September 1, 2017 admitted injury. Here, given that Claimant has shown by clear and convincing evidence that the DIME physician’s causation analysis of the mTBI was incorrect and that the mTBI and its sequelae are proximally caused by the work related trauma of September 1, 2017, it must be determined whether the ongoing medical care for the headaches and migraines is reasonably necessary and related to the injury.

Claimant has had ongoing care by the neurology department at UCHealth, under Dr. Martin, including the follow up evaluations and prescriptions such as Gabapentin, which have reduced the degree and amount of the ongoing migraine headaches. Dr. Smith noted in her January 28, 2020 report that Claimant gets “sick headaches” associated with nausea approximately 4 times per week, yet at the time of MMI on April 1, 2020 and of the hearing Claimant’s migraines were reduced to only once every week or every other week. Dr. Smith credibly testified that Claimant requires the ongoing care for the mTBI and the frequent ongoing headaches. Claimant has shown by a preponderance of the evidence that the ongoing care for the postconcussive migraine headaches as well as headaches for the nonreactive pupil is reasonably necessary and related to the September 1, 2017 work trauma.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant has overcome Dr. Striplin’s opinion by clear and convincing evidence. Claimant’s postconcussive migraine headaches are related to the admitted and compensable workers’ compensation injuries caused by the traumatic brain injury of September 1, 2017.

2. Respondents shall pay Claimant the permanent impairment rating of 39% whole person related to the loss of the visual field, cosmetic deformity and all neurological disorders related to the September 1, 2017 admitted injury.

3. Respondents shall be entitled to assert any lien as specified by law.

4. Respondents shall pay for all reasonable, necessary and related medical treatment for Claimant’s headaches both due to the mild traumatic brain injury postconcussive syndrome and the nonreactive pupil as outlined and prescribed by the authorized treating physician, Cathy Smith, M.D.

5. Respondents shall pay Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts due, which were not paid when due.

6. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 7th day of December, 2021.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

Whether the claimant has demonstrated, by a preponderance of the evidence, that his claim should be reopened on the basis of fraud or mutual mistake.

In his July 20, 2021 Application for Hearing, the claimant also endorsed compensability, disfigurement, and permanent total disability (PTD) benefits. At hearing, the parties agreed to hold those additional issues in abeyance pending the resolution of the claimant's request to reopen his claim.

FINDINGS OF FACT

1. On July 5, 2014, the claimant was injured at work while employed with the employer. The respondents admitted liability for July 5, 2014 injury.

2. During his claim, the claimant attended a Division sponsored independent medical examination (DIME) with Dr. Shimon Blau. The body parts Dr. Blau was to address during the DIME process were the claimant's neck and bilateral shoulders. In his DIME report, Dr. Blau indicated that the claimant reached maximum medical improvement (MMI) on September 25, 2015. Dr. Blau assessed permanent impairment of 10 percent for the claimant's left upper extremity. Dr. Blau noted that the claimant was evaluated by three different orthopedic surgeons that agreed that surgery was not warranted. In addition, Dr. Blau opined that other pain symptoms the claimant had, including those in his neck, were not related to the claimant's work injury.

3. On March 21, 2016, the respondents filed an Amended Final Admission of Liability (FAL). In that FAL, the respondents relied upon Dr. Blau's report and admitted for the 10 percent impairment rating for the claimant's left upper extremity.

4. On April 8, 2016, the claimant filed an objection to the FAL. Thereafter, the parties agreed to a full and final settlement. The settlement was approved by the Director of the Division of Workers' Compensation on December 21, 2016.

5. Paragraph 4 of the Settlement Agreement provides: "[t]he parties stipulate and agree that this claim will never be reopened except on the grounds of fraud or mutual mistake of material fact."

6. Paragraph 6 of the Settlement Agreement provides:

> Claimant realizes that there may be unknown injuries, conditions, diseases or disabilities as a consequence of these alleged injuries or occupational diseases; including the possibility of a worsening of the conditions, In return for the money paid or other consideration provided in this settlement, Claimant rejects, waives and FOREVER gives up the right to make any kind

> of claim for workers' compensation benefits against Respondents for any such unknown injuries, conditions, diseases, or disabilities resulting from the injuries or occupational diseases, whether or not admitted, that are the subject of this settlement, The Claimant and Respondents agree that this settlement, when approved by the Division of Workers' Compensation or by an administrative law judge from the Office of Administrative Courts, ends FOREVER the Claimant's right to receive any further workers' compensation money and benefits even if the Claimant later feels that Claimant made a mistake in settling this matter or later regrets having settled.

7. On July 20, 2021, the claimant filed the Application of Hearing that has resulted in the present hearing.

8. The claimant asserts that prior to the July 5, 2014 injury, he was injured multiple times while working for the employer. The claimant also asserts that these prior injuries were to his neck, back, and legs. The claimant testified that the employer knew about these prior injuries.

9. The claimant also testified that prior to the settlement, Dr. Evans opined that in addition to his shoulder, the claimant’s neck was injured. The claimant asserts that his attorney knew of this opinion, but proceeded with the settlement without addressing it. Finally, the claimant asserts that his attorney forced him to enter into the settlement.

10. The ALJ has considered all evidence and testimony presented at hearing and finds that the claimant has failed to demonstrate that it is more likely than not that there was fraud or mutual mistake in his case. While the ALJ understands the claimant’s disagreement of the body parties included in his claim, the DIME physician, Dr. Blau, specifically addressed the issue of the claimant’s neck complaints. It was Dr. Blau’s opinion that the claimant’s neck symptoms were not related to the July 5, 2014 work injury. Any dispute regarding the opinions of the DIME physician was resolved when the parties entered into a full and final settlement. Furthermore, the ALJ is not persuaded that the claimant was forced or coerced into entering the settlement in this case. The ALJ finds no persuasive evidence of fraud or mutual mistake in this matter.

CONCLUSIONS OF LAW

1. The purpose of the Workers’ Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers’ Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers’ Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers’ Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

4. Section 8-43-303(1) provides that "any award" may be reopened within six years after the date of injury "on the ground of fraud, an overpayment, an error, mistake, or a change in condition." Reopening for "mistake" can be based on a mistake of law or fact. *Renz v. Larimer County School District Poudre R-1*, 924 P.2d 1177 (Colo. App. 1996). The ALJ has wide discretion to determine whether an error or mistake has occurred that justifies reopening the claim. *Berg v. Industrial Claim Appeals Office*, 128 P.3d 270 (Colo. App. 2005); *Travelers Ins. Co. v. Industrial Commission*, 646 P.2d 399 (Colo. 1981).

5. The doctrine of mutual mistake has three primary criteria. *England v. Propane*, 395 P.3d 766, 771 (Colo. 2017). First, the mistake must be mutual, meaning "both parties must share the same [factual] misconception." *Cary v. Chevron*, 867 P.2d 117, 118 (Colo.App. 1993). Second, the mistaken fact must be material, meaning that it is a fact that goes to "the very basis of the contract." In other words, the mistake of fact must relate to a material aspect of the contract such that, but for the mistake, the party seeking rescission would not have entered the contract. *England*, 395 P.3d at 771. A material fact is one which relates to a basic assumption on which the contract was made. It must have a material effect on the agreed upon exchange, and the mistake must not be one concerning which the party seeking relief bears the risk. *In re Claim of Matus*, WC 4-740-062-01 (ICAO, Mar. 20, 2018). Third, the mistaken fact must be a past or present existing one, as opposed to a fact that develops in the future. *England*, 395 P.3d at 771.

6. Where the evidence is subject to more than one interpretation, the existence of fraud is a factual determination for the ALJ. *In re Arczynski,* WC 4-156-147 (ICAO, Dec. 15, 2005).

7. Here, the claimant entered into a full and final settlement regarding his July 5, 2014 injury. Pursuant to Section 8-73-303, C.R.S., the only options available to the claimant to reopen his claim are fraud or mutual mistake. As found, the claimant has failed to demonstrate, by a preponderance of the evidence, that his claim should be reopened on the basis of fraud or mutual mistake. As noted above, the ALJ finds no persuasive evidence of fraud or mutual mistake in this matter.

ORDER

It is therefore ordered:

1. The claimant's request to reopen his claim is denied and dismissed.

2. All remaining endorsed issues are dismissed as moot.

Dated this 9th day of December 2021.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-113-514-002

ISSUES

1. Whether Respondents established by a preponderance of the evidence grounds to reopen Claimant's case and withdraw Respondents' December 9, 2020, Final Admission of Liability ("FAL") based on fraud.

2. Whether Respondents established by a preponderance of the evidence grounds for repayment of temporary total disability ("TTD") and temporary partial ("TPD") disability benefits and medical benefits Insurer paid to Claimant and third-parties after November 3, 2019, based upon Claimant's alleged fraudulent misrepresentations.

FINDINGS OF FACT

1. Claimant sustained an admitted injury on July 16, 2019, when she fell in the course of her employment with Employer. Bystanders reported to emergency medical personnel that Claimant struck the back of her head on the floor. It was also reported that after being helped to a chair, Claimant slumped and lost consciousness. Upon arrival, EMS personnel indicated Claimant responded easily to stimuli and woke easily. (Ex. Y).

2. Claimant was taken to the Swedish Medical Center emergency department, where she reported pain in her head, neck, back and left hip. No other complaints were noted. Imaging studies of Claimant's head, cervical spine, lumbosacral spine, left hip, and chest were performed. The ER Physician noted that Claimant's imaging studies did not show evidence of injury. (Ex. RR & JJ).

3. The following day, Claimant went to SCL Health and saw Nicole Hoffman, D.O. Claimant reported to Dr. Hoffman that she had fallen and struck her head rendering her unconscious for 6-7 minutes, and that landed so her left arm was beneath her. Claimant reported pain in her left lower back, radiating to the left leg, occipital headaches, bruising and on her arms, legs and left hip area back pain when she walked or stood, and tenderness in the neck and shoulder. Dr. Hoffman assigned work restrictions and scheduled Claimant to see Heip Ritzer, M.D., the following week. (Ex. FF). Thereafter, Dr. Ritzer was Claimant's authorized treating physician (ATP).

4. Claimant saw Dr. Ritzer on July 23, 2019, and reported dizziness, headache, neck pain, upper back numbness, lower back pain, left arm pain, including the shoulder, elbow, wrist. and hand, left hip pain, left knee pain, and left foot swelling. Claimant also complained of blurred vision. (Ex. FF).

5. From July 17, 2019 until July 23, 2019, Claimant was subject to Dr. Hoffman's modified work restrictions of no lifting over 10 pounds, no crawling, kneeling, squatting, or climbing. (Ex. FF, p. 204). On July 23, 2019, Dr. Ritzer modified Claimant's work

restrictions and indicated Claimant was unable to work. (Ex. FF, p. 214). The total work restriction remained in place until October 8, 2019, after which time Dr. Ritzer imposed work restrictions of including a ten-pound lifting, carrying, and pushing restriction, no reaching overhead, and no bending/twisting of the back. Additionally, Dr. Ritzer limited Claimant to 50% seated duty. (Ex. FF, p. 293). These restrictions remained in place until January 16, 2020, when Dr. Ritzer returned Claimant to full duty. (Ex. FF, p. 318 & 328).

6. Between August 1, 2019 and October 8, 2019, Claimant saw Dr. Ritzer six times. At these visits, Claimant reported various symptoms including dizziness and lightheadedness when standing, significant difficulty turning her head, headaches, neck pain, back pain, memory deficits, confusion, left shoulder pain, and left elbow pain. (Ex. FF).

7. Between August 12, 2019 and October 7, 2019, Claimant saw Sean Griggs, M.D., for left shoulder pain on referral from Dr. Ritzer. Dr. Griggs noted that Claimant had a left shoulder MRI that showed a labral injury and partial rotator cuff tear, which could be treated nonoperatively. Claimant also complained of right shoulder and neck pain, and left-hand numbness. At her October 7, 2018 visit, Claimant reported she was continuing to have pain in the paraspinal muscles and numbness and tingling in her left middle finger.

8. On August 20, 2019, Respondents filed a General Admission of Liability admitting for medical benefits and temporary total disability benefits beginning July 17, 2019, with an average weekly wage of $510.00.(Ex. J).

9. Between August 23, 2019 and October 28, 2019, Claimant saw Yusuke Wakeshima, M.D, at Mile High Sports and Rehabilitation Medicine, on referral from Dr. Ritzer. During this time, Claimant reported experiencing headaches, neck pain, upper back pain, bilateral shoulder pain, bilateral clavicular region pain, left rib pain and upper lumbar pain, all of which she attributed to her July 16, 2019 injury. Additionally, Claimant reported blurred vision, balance problems, and numbness in her left middle finger. At Claimant's October 28, 2019 visit, she reported he was continuing to experience pain in the left lower periscapular area and lower thoracic spine, and continued memory issues. Claimant reported to Dr. Wakeshima that she was no longer having issues with neck pain, lower back pain, clavicular pain, or numbness. (Ex. KK).

10. In October 2019, Claimant saw David Mirich, Ph.D., at Paths Center for a neuropsychological evaluation which took place over three days. Claimant reported headaches, insomnia, depression, anxiety, anger, confusion and forgetfulness, problems with thinking lack of concentration and fatigue. Dr. Mirich note that, based on Claimant's medical records, she appeared to be getting worse since her work accident.[1] Dr. Mirich diagnosed Claimant with a mild neurocognitive disorder due to traumatic brain injury, adjustment disorder with depression, and multiple physical problems. (Ex. SS).

[1] In his report, Dr. Mirich indicates that Claimant's condition is related to an "MVC" - typically an abbreviation for Motor Vehicle Collision. The context of the report, however, indicates that Dr. Mirich used the abbreviation to reference Claimant's July 16, 2019 work incident.

11. On November 3, 2019, Respondents conducted video surveillance of Claimant while she was at the 4G Family Laundry (hereinafter the "laundromat"). The surveillance was conducted by Coburn Investigative Agency and place over the course of 10 ½ hours. (Ex. NN). Respondents' exhibit NN includes three minutes of video from November 3, 2019, during which Claimant performed multiple tasks throughout the laundromat inconsistent with her then-existing work restrictions. Claimant climbed on top of washing machines, lifted a partially full laundry basket with her right arm extended above her head, wiped surfaces with a rag with both hands, removed laundry from a washer or dryer, mopped the floor, swept, and use her left arm above her head to hold a metal top panel of a washer or dryer. Claimant was able to perform these tasks without apparent difficulty. (Ex. NN). At hearing, Claimant testified that she is the person shown in the video.

12. On November 23 and 24, 2019, Respondents again conducted video surveillance on Claimant. The video from these dates shows Claimant again climbing on washing machines several times, bending, kneeling on the floor, lifting multiple full laundry baskets, mopping floors, and walking around the laundromat, all without apparent difficulty. (Ex. NN).

13. Respondents also conducted video surveillance of Claimant on February 21, 2020. The video from that date shows Claimant climbing on washing machines, carrying a large bag of trash with her right arm, and climbing and carrying a step-stool to access the top of washers or dryers, again, all without apparent difficulty. (Ex. NN).

14. Respondents also conducted video surveillance of Claimant on multiple other dates between November 3, 2019 and February 21, 2020. The video for these dates was not offered or admitted into evidence. The investigation report describes the videos as showing Claimant performing activities similar to those demonstrated on the admitted videos. (Ex. NN).

15. The activities Claimant performed at the laundromat, as demonstrated by the admitted surveillance videos, were inconsistent with the significant reports of pain, and functional limitations she described to her health care providers, and demonstrated that the work restrictions imposed by her health care providers were unnecessary.

16. After November 3, 2019, Claimant continued to see her health care providers, including Dr. Ritzer, Dr. Wakeshima, Dr. Griggs and Haley Burke, M.D. At visits with these providers, Claimant complained of numerous issues, including significant back pain, neck pain, shoulder pain, limitations of shoulder movement, numbness in her hands, and balance issues. Claimant's representations to these health care providers were inconsistent with the conduct and activities shown on surveillance videos.

17. On November 7, 2019, Claimant saw Dr. Ritzer, and an interpreter was used during the visit. Claimant reported worsening back pain at a level of 6/10. She also reported intermittent memory issues. Claimant reported she had returned to modified work duty. Dr. Ritzer noted Claimant was not complying with her restrictions "at work" and was standing most of the day. (The ALJ infers that Dr. Ritzer's reference to "at work" is a

reference to Claimant's employment with Employer, given that Claimant had not disclosed her work at the laundromat.)

18. On November 14, 2019, Claimant saw Dr. Griggs. Claimant complained of thoracic spine pain, pain in the neck and trapezius, ongoing numbness in her hand, and neck pain radiating to her arm. Claimant reported working at modified duty. Dr. Griggs noted Claimant had been referred for an EMG nerve conduction study due to complaints of ongoing numbness and tingling, and that the study was read as normal. Dr. Griggs' diagnosis was "left shoulder sprain with MRI findings inconsistent with her present complaints of neck and thoracic spine pain." He indicated he would not recommend surgical management of her shoulder. (Ex. AA).

19. John H[Redacted], a senior investigator for Insurer, testified that Claimant's claims adjuster, Zoraida J[Redacted], assigned him to investigate allegations that Claimant was working while collecting TTD payments from Insurer. On December 8, 2019, Mr. H[Redacted] visited the laundromat. Mr. H[Redacted] credibly testified that he observed Claimant for approximately 10-15 minutes and saw her climb on top of numerous machines, pull and push laundry baskets, walk around, check machines and do some of the same things observed on the November 3, 2019 surveillance video. Mr. H[Redacted] then spoke with Claimant. Claimant told Mr. H[Redacted] she worked at the laundromat, and that she could wash, dry and fold laundry for him at the price of $10 per level laundry basket, and $10 per item for larger items such as blankets. After Mr. H[Redacted] identified himself, Claimant indicated she was not paid for her work at the laundromat, and had only worked there one time. Mr. H[Redacted] provided Claimant with a "C-500 form," (in both Spanish and English) used by Insurer to confirm whether an injured worker had returned to work. Claimant signed the form and provided it to Mr. H[Redacted], who provided the form to Ms. J[Redacted].

20. Ms. J[Redacted] testified she became suspicious that Claimant was working when before November 3, 2019, because Claimant had informed Insurer she could not be scheduled for appointments on certain days, when Insurer knew Claimant was not working for Employer. As a result, Insurer began its investigation and determined Claimant was working at the laundromat. Ms. J[Redacted] also testified she had not received documentation or verbal confirmation from Claimant that Claimant earned money during the time Insurer paid temporary disability benefits. Ms. J[Redacted] testified that she did not believe Insurer could terminate Claimant's medical benefits or temporary disability benefits until obtaining an opinion regarding MMI and permanent impairment from an ATP or DIME physician, and could not file a final admission of liability until after Dr. Dillon's DIME report.

21. On December 9, 2019, Claimant saw Haley Burke, M.D., an interventional neurologist, on referral from Dr. Wakeshima. Dr. Burke's notes indicated that surveillance demonstrated that Claimant had a second job. Claimant denied having a second job to Dr. Burke. Dr. Burke noted that Claimant has "no neurologic necessity for work restrictions." Dr. Burke diagnosed Claimant with intercostal neuralgia and post-concussion syndrome. She recommended an intercostal nerve block. (Ex. KK).

22. On December 11, 2019, Claimant saw Dr. Wakeshima, who noted that video surveillance had shown Claimant performing activities outside her work restrictions, but that he had not reviewed the video. Claimant reported her symptoms had decreased in some respects, but also reported current pain levels of 6/10 for her left posterior rib, left neck, left upper back, and intermittent left arm numbness. She indicated her low back pain and right shoulder pain had resolved, and headaches had decreased. Claimant also claimed she did not work at the laundromat, but that she was "helping her son at that laundromat." She further reported she went to the laundromat to "sit and walk around." (Ex. KK).

23. On December 12, 2019, Claimant saw Dr. Ritzer. Claimant reported a pain level of 7/10 with pain in the mid back, left shoulder with paresthesias into the left hand. Dr. Ritzer noted she was unable to view Claimant's surveillance video, and would wait for Dr. Wakeshima's recommendations after he reviewed the video. Claimant again reported that she was helping her son at the laundromat. (Ex. FF).

24. Claimant saw Dr. Ritzer again on January 16, 2020, reporting constant pain in her left shoulder and left back, with numbness in her left hand, and headaches with light sensitivity. Dr. Ritzer opined that Claimant was at maximum medical improvement, and released Claimant to full wok duty without restrictions. (Ex. FF).

25. On December 16, 2019, Respondents filed a second General Admission of Liability, admitting for medical benefits, temporary total disability benefits from July 17, 2019 through November 7, 2019 in the amount of $3,192.00, and for temporary partial disability benefits beginning November 8, 2019, based on Claimant's release to modified duty. (Ex. J).

26. On December 17, 2019, David Orgel, M.D., a physician advisor for Insurer provided a report to Mr. J[Redacted]. Dr. Orgel reviewed videos of Claimant from November 2, 8, and 10, 2019, showing Claimant performing various tasks, as described above. Dr. Orgel indicated it was his understanding Claimant was working 12 hours per day, 4 days per week at the laundromat. Dr. Orgel stated: "It is clear that this case should be closed. She either has a factitious disorder and/or malingering. There is no evidence from the video to suggest any functional disturbance at all." He recommended that Claimant's designated provider (Dr. Ritzer) and Dr. Wakeshima "close her claim as well and not provide any additional treatment." (Ex. EE).

27. On December 24, 2019, Respondents filed a third General Admission of Liability, updating the temporary total disability payments made from July 17, 2019 through November 7, 2019 to $5,537.14, without revising Respondents' admission of TPD benefits. (Ex. J).

28. On January 14, 2020, Claimant saw Lupe Ledezma, Ph.D., for a psychological evaluation. Dr. Ledezma diagnosed Claimant with adjustment disorder with adjustment disorder with mixed anxiety and depressed mood, psychological factors affecting other medical conditions and mild neurocognitive disorder. Claimant saw Dr. Ledezma eleven times between January 14, 2020 and June 4, 2020. During these visits, in addition to

psychological issues, Claimant continued to report ongoing pain in her shoulder and back, without significant changes in pain levels or physical functioning. (Ex. QQ).

29. On January 15, 2020, Dr. Wakeshima saw Claimant and noted the video surveillance demonstrated Claimant performing increased activities and performing increased activities. He therefore placed her at maximum medical improvement for her neck, upper back and shoulder. He noted that based on the video, Claimant should be able to return to work without restrictions and no further treatment was indicated for her left shoulder. He indicated the video surveillance did not permit assessment of Claimant's mental and cognitive function and that he could not comment on whether Claimant was maximum medical improvement (MMI) with respect to her psychiatric/psychological condition. He indicated Claimant should continue treatment with Dr. Ledezma and also recommended additional maintenance care to include acupuncture. (Ex. EE).

30. On January 23, 2020, Respondents filed a fourth GAL, terminating Claimants temporary partial disability benefits based on Dr. Ritzer's release to full duty on January 16, 2020. Respondents asserted a right to $454.86 for overpayment. (Ex. J).

31. On January 28, 2020, Dr. Wakeshima indicated he disagreed with Dr. Orgel's assessment of factitious disorder or malingering. However, he agreed Claimant was at MMI from a physical perspective and opined that psychological MMI was yet to be determined. Dr. Wakeshima argued that although the surveillance video did demonstrate Claimant performing activities outside her work restrictions, he did not observe the Claimant using her left arm "fully overhead [or] demonstrating full flexion or abduction of the left shoulder." Dr. Wakeshima also indicated that based on the Claimant's left shoulder MRI and her self-report that Claimant had limitations in flexion and abduction of her shoulder, she would warrant an impairment rating." (Ex. KK). Dr. Wakeshima continued to see Claimant approximately monthly until December 16, 2020.

32. On February 12, 2020, Insurer sent Dr. Ledezma a copy of the surveillance video, who addressed the video surveillance in her note on February 26, 2020. Dr. Ledezma indicated the video did not affect her diagnosis of adjustment disorder with mixed anxiety and depressed mood, psychological factors affecting other medical conditions and mild neurocognitive disorder. (Ex. QQ).

33. Between February 20, 2020, and May 8, 2020, Claimant saw Stephen Moe, M.D., for psychiatric evaluation. Claimant reported she expected her treatment to terminate due to the video surveillance. Dr. Moe opined that Claimant had depressive symptoms sufficient to detract from her quality of life and impacting her function, and that she would benefit from medication. His impression was that Claimant suffered from adjustment disorder with depression and anxiety and may benefit from anti-depressant medication, and prescribed Cymbalta. On May 8, 2020, Dr. Moe placed Claimant at MMI from a psychiatric perspective, and indicated he would assign a 3% whole person mental impairment rating. (Ex. DD).

34. On March 13, 2020, Claimant underwent an independent medical examination with Jeffrey Raschbacher, M.D. Claimant reported that she was "always in pain" but that pain

was alleviated by a pain patch. Claimant also reported shoulder pain, neck pain, left sided back pain, and numbness in her left arm. As part of his IME, Dr. Raschbacher reviewed a one-hour surveillance video from November 3, 2019 and November 8, 2019. Based on his observation, he indicated Claimant was able to use her upper extremities normally and spontaneously, without apparent discomfort on the video. Based on his review of medical records, surveillance video, and examination of Claimant, Dr. Raschbacher opined that Claimant should not receive an impairment rating for her shoulder. He opined that it was not likely Claimant was accurately reporting her symptomatology, and that more likely there was no symptomatology present. He recommended case closure, and opined that Claimant was at MMI on July 16, 2019.

35. Respondents presented Dr. Raschbacher's testimony by deposition in lieu of live testimony. Dr. Raschbacher was admitted as an expert in occupational medicine. Dr. Raschbacher testified that there was no objective evidence that Claimant sustained an injury on July 16, 2019, and that Claimant's most accurate medical diagnosis was malingering. He also opined that Claimant did not require medical treatment because the purported need for treatment was based on subjective complaints, which he did not believe were truthful. (Ex. VV).

36. On July 7, 2020, the parties conducted a Samms conference with Dr. Griggs at which he reviewed video surveillance of Claimant. Dr. Griggs issued a report dated July 7, 2020 following the conference. In that report, he indicated that during each of his visits with Clamant, she showed significant guarding with any examination of the upper extremities and "would wince in pain [and] state that she had severe pain." He indicated Claimant complained she could not do normal activities during his examinations, and that she complained of pain using a computer to fill out paperwork. He stated Claimant's exams were not consistent with the shoulder pathology shown on her MRI.

37. Dr. Griggs opined that Claimant's presentation on the video surveillance was inconsistent with her presentation and symptoms described during his examinations. He noted that the videos demonstrated Claimant using her arm without any significant guarding or apprehension which was "completely inconsistent with her complaints." Dr. Griggs stated that the significant inconsistency between his examinations and Claimant's actions on the video "would lead me to be concerned that the diagnosis would be malingering." Based on his review of the video surveillance and his prior examinations of Claimant, Dr. Griggs opined that Claimant was at maximum medical improvement on November 3, 2019, that she had no permanent impairment, required no work restrictions and did not require maintenance care. (Ex. AA).

38. On August 5, 2020, Claimant saw Suzanne Kenneally, Psy.D., after being referred by Respondents' counsel for a neuropsychological assessment. The examination was conducted through an interpreter. Claimant now reported she did not lose consciousness following her July 16, 2019 injury. Claimant reported then-existing symptoms of left shoulder pain, neck pain, left leg pain, blurry vision, low back pain and ear issues. Claimant also reported cognitive symptoms including being confused in the emergency room following the incident and not recognizing her daughter. Dr. Kenneally noted that Claimant's performance on neuropsychological testing which included initially failing tests

and then improving on subsequent trials was consistent with depression rather than indicative of intentionally poor effort. (Ex. CC).

39. Dr. Kenneally found Claimant's psychological testing was valid and indicated a preoccupation with physical symptomatology and the translation of psychological distress into physical and psychological symptoms. She also noted that Claimant was at risk of poor recover due to erratic compliance with medical regimens. Neuropsychological testing demonstrated no permanent cognitive impairment from Claimant's work injury. Dr. Kenneally diagnosed Claimant with somatic symptoms disorder, generalized anxiety disorder, and sleep disorder. Dr. Kenneally opined that Claimant's then-current psychological stats was not attributable to the July 16, 2019 work injury, and appeared to be chronic based on personal, situational, and psychological factors. (Ex. CC).

40. Throughout Claimant's claim, Insurer assigned a nurse case manager to Claimant's claim. The nurse case manager, Teresa Kahler, RN, attended Claimant's medical visits with Claimant, and prepared detailed, monthly reports which she submitted to Insurer. Ms. Kahler's reports describe Claimant's interactions with her health care providers, including Claimant's reports of symptoms and limitations, and Ms. Kahler's observations of Claimant. In Ms. Kahler's November 15, 2019 report, she described how the Claimant's demeanor changed significantly during an appointment with Dr. Wakeshima on October 28, 2019. Ms. Kahler reported that "once in the exam room with [Dr. Wakeshima], [Claimant's] demeanor changed so that she breathed differently, as if in pain; sighing frequently, sitting on her right buttock only, stating that it hurts to sit on the left buttock (she appeared to be sitting on both sitting bones in the waiting room." (Ex. LL, p. 555).

41. On September 15, 2020, Claimant underwent a Division Independent Medical Examination (DIME) with Jade Dillon, M.D., which was to address Claimant's left shoulder and neuropsychological issues. On examination, Dr. Dillon noted that Claimant moved slowly, and appeared to be in pain with frequent grimacing and limitation of motion. Dr. Dillon opined that Claimant had complaints of severe left shoulder pain and left arm dysfunction without any significant underlying causative pathology. She noted that although Claimant had a labral tear on MRI, it was not necessarily the cause of her pain or dysfunction. She determined Claimant did not have a ratable shoulder condition or mental/psychological impairment. Dr. Dillon noted that although she did not review Claimant's video surveillance, reports of multiple providers made "it obvious that [Claimant] was using her upper extremities without evidence difficulty and certainly in a manner completely inconsistent with what she was reporting to medical providers." Based on her examination of review of records, Dr. Dillon placed Claimant at MMI effective November 3, 2019, without maintenance care or work restrictions. (Ex. F).

42. On November 3, 2020, Dr. Dillon performed a follow-up DIME examination, which included evaluation of cervical, thoracic and lumbar spine and traumatic brain injury, which were not addressed in the previous DIME examination. Dr. Dillon found that Claimant' symptoms were "well out of proportion" to the minimal objective finding, nonspecific complaints of memory and balance issues. She opined that there was no evidence that her symptoms were causally related to Claimant's work injury, and assigned

no permanent impairment. Dr. Dillon reiterated her MMI date of November 3, 2019. (Ex. H).

43. On December 9, 2020, Respondents filed a Final Admission of Liability admitting for medical benefits to date of $38,842.79, TTD of $5,294.29, denying liability for permanent partial disability benefits and post-MMI medical treatment, and asserting an overpayment of $2,629.71. In the FAL, Respondents noted that on November 11, 2020, DIME physician Dr. Dillon placed Claimant at MMI effective November 3, 2019, with no permanent impairment. (Ex. J).

44. On April 27, 2021, Respondents filed the AFH in the present matter.

45. After November 3, 2019, Claimant continued to receive medical treatment from multiple providers. During this time, Insurer paid for transportation and interpretation services in conjunction with Claimant's medical treatment. Ms. J[Redacted] testified Insurer paid $18,399.78 for Claimant's medical benefits after November 3, 2019. (Ex. X). Between July 17, 2019 and November 2, 2019, Insurer paid Claimant $5,294.29 in TTD benefits. After November 3, 2019, Insurer paid Claimant an additional $2,629.71 TTD and TPD benefits.

46. Claimant testified at hearing that she did perform services at the laundromat, and that Mr. H[Redacted] accurately testified as to their conversation on December 8, 2019. Claimant. Claimant testified that she had spoken with the owner of the laundromat and that he had told her how much to charge. At the same time, Claimant testified that she was working at the laundromat, but asserted that she did not collect any money for the work performed. Claimant's testimony that she did not receive money for working at the laundromat was not credible.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Withdrawal Of Admission For Fraud Or Overpayment

After an admission of liability has been filed, an insurer may not unilaterally withdraw its admission, but rather must continue to make payments consistent with admitted liability until the ALJ enters an order allowing revocation in full or in part. § 8-43-203(2)(d), C.R.S.; *H.L.J. Mgmt. v. Kim*, 804 P.2d 250 (Colo. App. 1990). Once a case has been closed, the issues resolved by a Final Admission of Liability are not subject to litigation unless they are reopened pursuant to § 8-43-203 (2)(d), C.R.S. *See also Berg v. Indus. Claim Appeals Office*, 128 P.3d 270, 272 (Colo. App. 2005); *Webster v. Czarnowski Display Serv., Inc*., W.C. No. 5-009-761-03 (ICAO, Feb. 4, 2019). Section 8-43-303(1) C.R.S., allows an ALJ to reopen any award within six years of the date of injury on a several grounds, including fraud and overpayment. *Heinicke v. Indus. Claim Appeals Office*, 197 P.3d 220 (Colo. App. 2008). The ALJ has authority to remedy either fraud or overpayment by requiring a claimant to repay benefits already received. *Cody v. ICAO,* 940 P.2d 1042 (Colo. App. 1996). In the case of medical benefits paid to third-parties, the ALJ possesses independent authority to remedy fraud even by ordering repayment by Claimant to Insurer for all medical benefits paid to third parties as a result of Claimant's fraudulent misrepresentations. *Stroman v. Southway Services, Inc.,* W.C. No. 4-36-989 (ICAO August 31, 1999).

The power to reopen is permissive, and is therefore committed to the ALJ's sound discretion. Further, the party seeking to reopen bears the burden of proof to establish grounds for reopening. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Barker v. Poudre School Dist.*, W.C. No. 4-750-735 (ICAO, Mar. 7, 2012).

Respondents, as the party seeking to withdraw their FAL and obtain repayment, bear the burden of proving the elements of fraud by a preponderance of the evidence. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The elements of fraud or material misrepresentation are well-established in Colorado law. The elements are: (1) A false representation of a material existing fact, or a representation as to a material fact with reckless disregard of its truth; or concealment of a material existing fact; (2) Knowledge on the part of one making the representation that it is false; (3) Ignorance on the part of the one to whom the representation is made, or the fact concealed, of the falsity of the representation or the existence of the fact; (4) Making of the representation or concealment of the fact with the intent that it be acted upon; (5) Action based on the representation or concealment resulting in damage. *Arczynski v. Club Mediterranee of Colorado, Inc.*, W.C. No. 4-156-147 (ICAO Dec. 15, 2005), *citing Morrison v. Goodspeed*, 68 P.2d 458, 462 (Colo. 1937). "Where the evidence is subject to more than one interpretation, the existence of fraud is a factual issue for resolution by the ALJ." *Arczynski, supra.*

Overpayment Of Temporary Disability Benefits

The ALJ finds that Respondents have established by a preponderance of the evidence that Claimant received an overpayment of temporary disability benefits in the amount of $2,629.71, paid between November 3, 2019 and January 20, 2020, and that Insurer is entitled to repayment. "Overpayment" means money received by a Claimant that exceed the amount that should have been paid, of which the Claimant was not entitled to receive. § 8-40-201 (15.5) C.R.S. Under § 8-42-105 (3), and 8-42-106 (2), C.R.S., temporary disability benefits terminate when a claimant reaches maximum medical improvement. In her October 5, 2020 report, the DIME physician, Dr. Dillon placed Claimant at maximum medical improvement effective November 3, 2019. Respondents had paid Claimant temporary disability benefits from November 3, 2019 through January 21, 2020, and terminated the benefits based on Dr. Ritzer's release to full duty on January 16, 2020. From November 3, 2019 to January 16, 2020, Respondents paid Claimant $2,629.71 in benefits. Because these benefits were paid after Claimant reached MMI when she was not entitled to receive temporary disability benefits, Respondents have established an overpayment, and Insurer is entitled to repayment of those benefits. Claimant is ordered to repay to Insurer for such benefits in the amount of $2,629.71.

Recovery Of Temporary Disability Benefits Paid Between July 17, 2019 and November 2, 2019

Respondents also seek repayment of temporary disability benefits paid between July 17, 2019 and November 2, 2019. During this period, Insurer paid claimant $5,294.29 in TTD benefits. Respondents contend Claimant fraudulently obtained such benefits by misrepresenting her employment status, or concealing from Respondents that she was working and earning income from working at the laundromat, and by fraudulently representing her ability to work.

Respondents have failed to establish by a preponderance of the evidence that Claimant fraudulently induced the payment of TTD benefits from July 17, 2019 to

November 2, 2019. No credible evidence was admitted indicating when or how often Claimant worked at the laundromat between July 17, 2019 and November 2, 2019, or the amount she earned during this time. The evidence established that Claimant informed Mr. H[Redacted] she charged $10 per load of laundry and $10 each for bulky items. Claimant's admitted average weekly wage was $510 per week, which would correspond to 51 load of laundry per week, or approximately 10 per day. Given that Claimant was filmed working at the laundromat on November 3, 2019, the ALJ finds it likely she worked at the laundromat at some point prior to November 3, 2019, and earned some income, prior to that date. Claimant's testimony that she was not paid for working at the laundromat is not credible. However, the evidence presented is insufficient to determine when Claimant worked prior to November 3, 2019, how often, and amounts earned during the relevant time period. Similarly, the evidence is insufficient to permit the ALJ to draw a reasonable inference as to the amounts earned or dates worked. Accordingly, Respondents have failed to establish by a preponderance of the evidence an entitlement to repayment for the period of July 17, 2019 to November 2, 2019.

Recovery Of Medical Benefits Paid After MMI

Respondents have failed to establish by a preponderance of the evidence that Claimant induced either Respondents' Final Admission of Liability or the payment of medical and other benefits by fraud. Respondents have established the first and second elements of Fraud, but have failed to establish the third element – ignorance on the part of the party to whom the representation was made. The evidence clearly establishes that Claimant made false representations of material fact or concealed material existing facts by materially misrepresenting her medical condition, symptoms, and functional abilities to Insurer and to Claimant's health care providers. The surveillance video demonstrates that Claimant was not experiencing the symptoms she reported to her medical providers. Claimant's ability to function was demonstrated by surveillance, and was markedly different than her presentation to providers and the representations made to providers regarding her condition. The ALJ finds that Claimant made these misrepresentations, or concealed her abilities knowingly.

However, neither Insurer nor Claimant's health care providers were ignorant of these facts after November 3, 2019. Insurer became aware that Claimant's reports of pain and limited functional ability were likely untrue by at least November 2019. Insurer conducted multiple days of surveillance beginning on November 3, 2019, during which Claimant was fully functional, in contrast to her representations to her providers. Insurer recognized that the video surveillance was inconsistent with Claimant's reports, and provided the surveillance to multiple health care providers beginning in December 2019. Respondents provided the video to Drs. Ritzer and Wakeshima in December 2019, and to Dr. Ledezma in February 2020, indicating that Insurer recognized the significance of the videos, and believed the evidence served as a basis for terminating or curtailing Claimant's medical benefits. Insurer conducted an internal review with Dr. Orgel who indicated Claimant's claim should be closed on December 17, 2019. In addition, Insurer assigned a nurse case manager to Claimant's claim, and received monthly reports which explain, in detail, Claimant's interactions with health care providers, ad her symptoms, behavior and demeanor both before and during provider visits. Thus, Insurer was, or should have been aware of what Claimant was reporting to her health care providers. Because Insurer was aware that Claimant's observed function on video surveillance was markedly inconsistent with Claimant's representations to her health care providers and Insurer's nurse case manager, the ALJ finds that Insurer was not ignorant that Claimant was either making material misrepresentations or concealing material facts.

Respondents contend, however, they could not close Claimant's claim or terminate benefits until a DIME was obtained. Respondents' position does not negate Insurer's knowledge. While it is accurate that Respondents could not unilaterally terminate Claimant's benefits or close her case, Respondents were not without recourse. The Act and WCRP permit Respondents to file with the Director motions for case closure and disputes regarding medical payment, and also authorize Respondents to file applications for hearing regarding any dispute or controversy under the Act. *See generally*, WRCP 7-1(A), 9-3 (A)(5) and (9), § 8-43-201, § 8-43-207(1) C.R.S. Thus, Respondents could have sought an order closing Claimant's case, or disputing her entitlement to medical benefits, Respondents elected not to avail themselves of those remedies. Instead, Insurer continued to pay benefits, and ultimately filed the December 9, 2020 Final Admission of Liability, with the knowledge that Claimant had materially misrepresented or concealed her condition since at least November 3, 2019.

Because Insurer was aware of Claimant's material misrepresentations and concealment, the ALJ concludes that, after November 3, 2019, Respondents' decision to pay benefits to and on behalf of Claimant were not induced by Claimant's misrepresentations and concealment. Because Respondents have failed to establish an essential element of fraud, Respondents have failed to establish grounds to withdraw its admission for medical benefits contained in the December 9, 2020 Final Admission of Liability.

Repayment Terms

In *Simpson v. Industrial Claim Appeals Office*, 219 P.3d 354 (Colo. App. 2009), *rev'd on other grounds*, *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d 777 (Colo. 2010), the Colorado Court of Appeals held that with regard to overpayments, the ALJ has discretion to fashion a remedy. Further, the ALJ has the authority to determine the terms of repayment and the ALJ's schedule for recoupment will not be disturbed absent an abuse of discretion. See *Louisiana Pacific Corp. v. Smith*, 881P.2d 456 (Colo. App. 1994). Claimant did not present credible evidence regarding her ability to repay. Because no credible evidence exists in the record from which the ALJ can determined whether any payment schedule is appropriate, the ALJ orders that Claimant shall repay Insurer $2,629.71 within 60 days of the date of this Order.

ORDER

It is therefore ordered that:

1. Respondents are entitled to recover temporary disability benefits after Claimant reached MMI. Claimant is ordered to

pay Respondents $2,629.71 within sixty days of the date of this order.

2. Respondents request to reopen and withdraw its Final Admission of Liability for fraud is denied and dismissed.

3. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 10, 2021

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

WORKERS' COMPENSATION NO. 4-929-166-005

ISSUES

The issues set for determination included:

- Did Claimant establish by a preponderance of the evidence that she is permanently and totally disabled ("PTD") as a result of her work injury.

PROCEDURAL HISTORY

After the first day of hearing there were multiple motions filed and several procedural orders were issued. As noted, *supra,* the hearing took place over several days and the record was closed after expert depositions were taken and the transcripts filed with the Court. The ALJ issued a Summary Order on August 3, 2021, which was mailed August 5, 2021. Claimant requested a full Order and Respondent submitted amended proposed Findings of Fact, Conclusions of Law and Order on August 24, 2021. This Order follows.

FINDINGS OF FACT

1. Claimant worked for Employer as a driver. At the time she was injured, Claimant drove the route from DIA to Boulder. Claimant testified this job required her to lift 50–65 pounds of luggage.

2. There was no evidence in the record Claimant suffered an injury to her low back before 2013, nor was there evidence that she required treatment for her low back before her work injury. Claimant testified she was able to perform all aspects of her job. She stated as a driver for Employer, she was required to lift up to 75 pounds. The record contained no evidence of work restrictions before 2013.

2. On September 9, 2013, Claimant injured her low back while working for Employer when she lifted some heavy luggage.

3. Claimant was evaluated by Lori Long, M.D. on September 9, 2013. On examination, she had tenderness to palpation to the paralumbar muscles on the right side of her back, with severe restriction of mobility, with minimal flexion and extension. Dr. Long's impression was lumbar strain, with lumbar radiculopathy symptoms. Dr. Long oversaw Claimant's treatment from 2013-2014.

4. On September 17, 2013, Claimant underwent an MRI of the lumbar spine, which was ordered by Dr. Long. The films were read by Wayne Miller, M.D. Dr. Miller's impression was: L4-5 and L5-S1 degenerative disc disease accompanied by bilateral facet arthropathy, with mild to moderate central canal narrowing. There was disc desiccation and broad-based posterior bulging of each of those discs, but no focal disc herniations or definite root impingements. No other disc disease was evident in the lumbar region and there were no fractures or other bony abnormalities.

5. Claimant initially received conservative treatment and that care was overseen by Dr. Long. Claimant was evaluated by Andrew Castro, M.D. on September 30, 2013 for low back pain.

6. Claimant was also treated by Leif Sorenson, M.D. starting on October 16, 2013. Dr. Sorenson treated Claimant's low back and leg pain, including prescribing pain medications. On April 14, 2014, Dr. Sorenson performed a lumbar interlaminar L5-S1 ESI, which gave her 80% lower extremity pain relief. Claimant took Dilaudid as needed. On April 28, 2014, Dr. Sorenson took over Claimant's pain management, including gabapentin, Flexeril, and Dilaudid. Dr. Sorenson continued to treat Claimant in 2014. Claimant received continuous work restrictions issued by her ATP-s in 2013-14.

7. On October 2, 2014, a Final Admission of Liability ("FAL") was filed on behalf of Respondent. The FAL admitted for the 19% whole person medical impairment rating issued by Dr. Long.

8. Sander Orent, M.D. at Arbor Occupational Medicine took over Claimant's medical treatment from Dr. Long on February 4, 2015. He evaluated her at least 22 times between February 4, 2015, and July 13, 2016. When Claimant was evaluated by Dr. Orent on February 4, 2015, she complained of bilateral sciatica with pain radiating down both legs. Dr. Orent opined that, while Claimant had been receiving maintenance care, her claim probably needed to be reopened.

9. On March 10, 2015, Claimant underwent a DOWC Independent Medical Examination ("DIME"), which was performed by Jade Dillon, M.D. At that time, Claimant complained of constant central low back pain, with minimal waxing and waning. Claimant said she experienced exacerbations with most activities and also with sitting, especially sitting in the car. Dr. Dillon's impression was that Claimant had not reached MMI and was now a candidate for surgery. She had a documented occupational injury, with perspective assistant low back pain and sciatica. Dr. Dillon provided a provisional rating and stated Claimant had no evidence of mental/psychological impairment.

10. On March 31, 2015, Claimant underwent a lumbar decompression, which was performed by Dr. Castro. Dr. Castro followed Claimant after the surgery. Claimant underwent rehabilitation following surgery and had continuous work restrictions after the surgery.

11. Dr. Orent also treated Claimant after the first surgery. On September 16, 2015, Dr. Orent placed Claimant at MMI, and provided a permanent medical impairment rating of 31% whole person, consisting of an 8% Table 53 II-C rating for 2-level rhizotomy and 23% whole person for loss of range of motion. Dr. Orent opined Claimant had permanent restrictions of maximum lifting of 15 lbs. and no crawling or climbing.

12. On September 16, 2015, Claimant underwent a follow-up DIME, which was performed by Dr. Dillon. Dr. Dillon concurred with Dr. Orent that Claimant reached MMI on September 16, 2015. On examination, there was no significant tenderness in the low back. Neurovascular function in the lower extremities was intact, with strength adequate and symmetric proximally and distally, normal muscle bulk and tone, normal sensation throughout, normal hair growth, color, temperature, and capillary refill. Dr. Dillon's impression was: low back injury, failure of conservative treatment and persistent symptoms subsequent to single level lumbar laminectomy and discectomy.

13. Dr. Dillon concluded Claimant suffered a permanent medical impairment pursuant to the AMA Guides to the Evaluation of Permanent Impairment ("AMA Guides"). She rated Claimant on specific disorders of the spine (Table 53) as follows: laminectomy/discectomy L4/5-5% W.P.; radio frequency ablation L4-2% WP; radio frequency ablation L3, L4-2% WP. For loss of range of motion ("ROM"), Dr. Dillon found Claimant had a 18% whole person impairment rating and her total rating was 25% W.P.

14. On December 10, 2015, Respondent filed a FAL, admitting for the 25% whole person medical impairment rating issued by Dr. Dillon. The FAL admitted for Grover medical benefits.

15. Claimant continued to experience low back pain and required treatment at the end of 2015. On December 23, 2015, Claimant returned to Dr. Orent complaining of pain in her lower back and into the legs. Dr. Orent prescribed Dilaudid and referred Claimant for an MRI with contrast. He took her off work, noting that he might need to rescind his previous MMI.

16. On January 4, 2016, Claimant saw Dr. Sorensen complaining of a new pain down the left leg and foot which had come on in the previous 1 ½ months. On exam, he found positive lumbar facet loading bilaterally, decreased sensation over the

bilateral legs and feet, spinal muscle spasm, decreased strength with right knee flexion and ankle dorsiflexion, and abnormal sensation. His diagnoses were myalgia and myositis, lumbar spondylosis (spinal osteoarthritis complication), chronic pain syndrome, lumbar degenerative disc disease, and lumbar radiculitis. Dr. Sorensen prescribed p.r.n. Dilaudid for her severe pain

17. Claimant also underwent an MRI on January 4, 2016, MRI. The MRI showed: L3-4 stable minimal diffuse disc bulging asymmetric to the left and mild bilateral facet arthropathy resulting in mild left neural foraminal narrowing. L4-5 diffuse disc bulging, small superimposed central disc protrusion and mild-moderate bilateral facet arthropathy resulting in mild-moderate bilateral neural foraminal narrowing including slight abutment of the bilateral exiting L4 nerve roots along with the traversing right L5 nerve root. L5-S1 stable diffuse disc bulging, small superimposed central disc extrusion and moderate bilateral facet arthropathy resulting in stable mild-moderate bilateral neural foraminal narrowing including stable slight abutment of the bilateral exiting L5 nerve roots, more pronounced on the right.

18. An issue arose concerning a positive drug screen in January 2016. Dr. Sorenson noted on January 14, 2016 that he would no longer prescribe opioids. Claimant testified that she had a made a mistake on New Year's Eve, but was not using other opioids or illicit drugs. Nonetheless, Dr. Sorensen performed bilateral L5-S1 transforaminal epidural steroid injections on January 20, 2016 to treat Claimant's low back and leg pain. Dr. Orent stated Claimant was unable to work.

19. Dr. Orent stated Claimant was not longer at MMI status in January 2016. On February 10, 2016, Dr. Orent found Claimant had positive straight leg raising (SLR) bilaterally and definite paraspinous tightness, especially just distal and proximal to the surgical site. He diagnosed a disc extrusion causing bilateral radiculopathy, with which Dr. Sorensen agreed. Both Drs. Orent and Sorensen referred her to Dr. Castro for a surgical consultation.

20. On May 3, 2016, Claimant underwent a spinal fusion at L4-5, which was performed by Dr. Castro. The post-surgery medical records reflected an improvement in Claimant's symptoms. When Claimant returned to Dr. Castro on November 9, 2016, he released Claimant to all activities and stated: "She may perform all of her normal activities without limitation from her surgery"

21. Claimant returned to Dr. Orent on June 15, 2016 and noted she was off pain medications, but took used a muscle relaxer at night. On July 13, 2016, Dr. Orent placed restrictions of no lifting and primarily seated work.

22. On August 10, 2016, Sara Kornely PA-C in Dr. Castro's office advised that Claimant's activities could be increased "as tolerated".

23. On November 9, 2016, Claimant saw Sara Kornely, complaining of an inability to remain in one position for more than 15 minutes at a time, after which she needed to move. If she was in one position too long, her back bothered her and she was limited in doing any activities. She needed to "change positions frequently and cannot tolerate any prolonged sitting, standing, or walking." Ms. Kornely wrote, "she may perform all of her normal activities without limitations from her surgery. She went on to state, "(W)e do not anticipate any need for further surgery or treatments except activities as tolerated and stretching".

24. David Orgel, M.D. evaluated Claimant on November 29, 2017, for an impairment rating for her work-related injury on September 9, 2013. Dr. Orgel noted Claimant's complaints as low back pain status post two surgeries, the first one-level lumbar decompression and the second a one-level lumbar fusion. placed Claimant at MMI. Dr. Orgel opined Claimant had a 28% whole person impairment rating, consisting of 10% from Table 53 2-E plus an additional 2% from Table 53 2-G for the second surgery, and 18% whole person for loss of range of motion. Dr. Orgel said Claimant did not require maintenance medical treatment.

25. On January 2, 2018, an Amended FAL was filed on behalf of Respondent. The FAL was based upon Dr. Orgel's November 29, 2017 report and admitted for the 28% W.P. rating. The FAL denied liability for maintenance medical benefits.

26. Claimant did not return to work at Employer after she reached MMI.

27. On April 4, 2018, Claimant underwent an independent medical examination with Wallace Larson, M.D., at the request of Respondent. She reported pain in the back, hips and legs, along with difficulty standing and walking. The pain was greater on the left rather than the right side, which goes to her feet. At that time, her medications included Dilaudid (4 mg. three times daily), Trazodone (six mg. every 3–4 hours), Ambien (10mg at night), Gabapentin (600 mg/ morning and afternoon) and Gabapentin 1200 mg. in the evening. Claimant also took Zoloft (150 mg. daily) and an inhaler for asthma.

28. On examination, Claimant subjectively reported severe tenderness to palpation of the skin and subcutaneous issues of the lumbar spine and down into both legs. Palpation of the lateral thigh and the right/side resulted in reports of pain extending down the legs. Straight leg raising was negative in the sitting position and was positive in the supine position at 20° on either side. Passive hip flexion to 40° and either right or

left side resulted in reports of severe low back pain. Claimant was noted to ambulate slowly and have a great deal of pain behavior.

29. Dr. Larson‘s diagnoses included: a history of low back pain, which was related to her occupational exposure. Claimant had symptoms out of proportion to any objective findings and had multiple non-physiologic findings. With regard to work restrictions, Dr. Larson stated it was not likely Claimant could return to repetitive lifting of luggage weighing up to 50 pounds. Considering her multiple issues of age, gender, deconditioned status, and history of two surgical procedures to her lumbar spine, Dr. Larson opined restrictions against repetitive bending or twisting was reasonable. A weight limit of lifting 30 pounds occasionally and 15 pounds frequently were also reasonable. These permanent restrictions were also confirmed by Dr. Larson in his deposition. Dr. Larson concluded Claimant did not require further active medical treatment.

30. Dr. Larson concluded Claimant sustained a permanent medical impairment in accordance with the AMA Guides. He said the impairment based on ROM should be seen as an upper limit of impairment rather than a definitive impairment rating. This was due to truncal obesity which limited ROM measurements. Claimant had a 10% impairment of the lumbar spine, plus an additional 2% for the second surgical procedure yielding 12% impairment for specific disorders. ROM impairment included 11%, which yielded a 22% impairment from the combined values chart.

31. On October 12, 2018, Claimant underwent an MRI of the lumbar spine. The films were read by Kimberly Wright, M.D., whose impression was: interval postsurgical changes following L4-L5 posterior fusion and discectomy, without evidence of complication; small left foraminal disc protrusions at L3-L4 and L4-L5, resulting in minimal left neural foraminal narrowing rain, without nerve root displacement. There was a small disc protrusion superimposed on a broad-based disc bulge at the lumbosacral junction, abutting the left S1 nerve root, without appreciable displacement, unchanged.

32. Claimant returned to Dr. Castro on October 17, 2018. Dr. Castro‘s assessment was: bilateral lumbar radiculopathy, which he described as back pain recent flare. Dr. Castro opined that a small far lateral disc herniation at L3-L4 could be causing her symptoms and he recommended a transforaminal epidural injection at L3-L4.

33. On November 12, 2018, at a follow-up evaluation, Ashish Narendra Chavda, M.D., a pain medicine specialist from Dr. Sorensen’s office, took Claimant’s medical history, performed a physical examination, and reviewed the medical chart in Dr. Sorensen’s record (Claimant had at least 30 visits with Sorensen). Claimant

reported that the May 3, 2016, L4-5 fusion surgery improved her overall back pain and bilateral leg numbness and tingling and pain. However, approximately two (2) months prior to this examination, due to no inciting event, she started having pain down the left buttock to the foot and big toe. Claimant complained of limitations in her ability to walk, perform routine daily activities, and sleep. She also complained of stress urinary incontinence.

34. Claimant is fifty (50) years old and her highest level of education is a G.E.D. Claimant had a commercial driver's license, but no longer has that license. The majority of Claimant's work experience was a driver. She drove a truck, as well as a school bus. Claimant testified she was not able to return to work after her 2013 work injury. She could not return to work for Employer because of the lifting required. The ALJ concluded Claimant's education, work experience and symptoms limited her access to the labor market.

35. Other than her experience as a driver, she has worked as hairdresser. Claimant testified she did not believe she would be able to stand for the long periods of time required by this job and the ALJ credited this testimony.

36. Claimant's current work restrictions (based upon the evaluation conducted by Dr. Larson) were: lifting 30 pounds occasionally and 15 pounds frequently. The ALJ concluded Claimant could not return to her former job with Employer due to her restrictions.

37. Donna Ferris conducted a vocational evaluation of Claimant at the request of Respondent and prepared a report, dated May 7, 2018. Her written report was admitted into evidence. When she met with Claimant, the latter reported leg pain and numbness. Claimant said she was unable to vacuum, do laundry or do any cooking. She now has a regular driver's license, as she gave up her commercial driver's license. She has difficulty driving and sitting in a car for greater than approximately 15 minutes.

38. Ms. Ferris conducted labor market research considering Claimant's vocational background and physical abilities. Ms. Ferris noted Claimant had transferable job skills which included driving and working with the public. Ms. Ferris identified numerous full and part-time driving positions not requiring a commercial driver's license for which Claimant had prior experience. There were also full and part-time light production positions that generally required a high school diploma or GED. These positions did not require prior experience and were available in the local labor market. Ms. Ferris opined that Claimant remained capable of earning wages despite her work related injury and subsequent medical care.

39. Claimant reviewed jobs within Ms. Ferris' vocational expert report. She testified she could not perform any of the jobs identified by Respondent's expert. More particularly, Claimant testified she could not do the following jobs and gave the following reasons why:

A. Denver Metro Statistics: Crewmember: she cannot stand for the eight hours required; she is not allowed to work with her pain medication;

B. Cashier: she cannot stand the eight hours required, no unscheduled breaks are allowed; she is not allowed to work with her pain medication;

C. Target: Guest Service Team Member, Cashier: she cannot stand the number of hours required without a break, she is not allowed to work with pain medication;

D. Boston Market: Cashier: she could not be on her feet for the entire shift, not allowed to work with pain medication;

E. Airport Parking: Cashier: unable to drive and be on her feet the entire shift, work or drive on pain medications;

F. The Parking Spot: Cashier: requires some driving which she cannot do legally because of her pain medications, no as-needed breaks, on feet for many hours, not allowed to work on her pain medications;

G. Assembler I: requires repetitive lifting of up to 25 pounds;

H. Production Associate Warehouse: on feet for too long, requires lifting up to 20 pounds;

I. Craft Tea Production Associate: standing on feet for long periods of time;

J. Food Prep Production: require standing eight hours at a time, no unscheduled breaks, no pain meds allowed;

K. Condor Snack Foods: Second Shift Packer: on feet for hours at a time, lifting boxes continually; no pain meds allowed;

L. Driver Easy Delivery: Thompson: drive more than seven hours, would not be able to be on pain medications, unable to lift;

M. Bicycle Courier/Delivery Driver/Customer Service: unable to drive long periods of time, unable to drive bicycle;

N. Uber Eats Part: Time Delivery Driver: driving all day, lifting more than 10 pounds, no medication allowed;

O. Door Dash Delivery Driver: continuous driving, in and out of the car, unable to drive on medications;

P. Denver Post Delivery Driver: in car for long periods of time, cannot load car with papers, lifting more than 10 lbs., unable to drive on medications;

Q. Homework Club Deliver Driver: does not have education to teach children, cannot drive for long periods, cannot pass physical exam, cannot drive on medications;

R. Shuttle Driver: cannot perform the physical requirements of lifting, sitting, standing, bending, stooping, kneeling, crouching; requires Class B in order to carry passengers, cannot drive on medications, cannot pass physical for Class B license;

S. Car Porter/Shuttle Driver: requires Class B in order to carry passengers, cannot drive on medications, cannot pass physical required for Class B license;

T. Manheim Denver Auction Driver: continuous driving without breaks, no meds allowed, cannot pass physical required for Class B license;

U. Fleet Valet Driver: cannot pass physical, no meds allowed;

V. Family Auto Collision Driver: cannot lift the required minimum 10 lbs., cannot drive long periods of time, will not allow days off as needed, cannot drive on meds;

W. Avis Budget Group Driver: cannot drive long periods, no meds allowed;

X. Hertz Transporter: cannot drive long periods, no meds allowed.

40. Claimant testified she would not be able to return to work as a hairdresser as it requires standing for long periods of time. Claimant stated she currently has constant hip and low back pain, for which she takes Dilaudid and Tizanidine. She

believed this limited her ability to work. The ALJ found Claimant's description of her pain to be credible.

41. Claimant is still able to drive, although she testified she experienced pain when sitting for long periods of time.

42. Donna Ferris testified as an expert in vocational rehabilitation at the April 28, 2020, hearing. Ms. Ferris was present during Claimant's testimony and reviewed the depositions of Drs. Orgel and Larson. In preparing for her testimony, Ms. Ferris prepared by focusing on Claimant's testimony related to labor market survey.

43. Ms. Ferris testified that when preparing an opinion regarding a workers' ability to earn wages she focuses on both the permanent work restrictions assigned by treating physicians, IME physicians, and DIME physicians and the workers' vocational background. Regarding Dr. Castro, Ms. Ferris testified that based on her review of the records he was a longstanding treating physician, performing multiple surgeries. Based on his opinion that Claimant could return to all normal activities, Ms. Ferris testified that Claimant maintained the ability to earn wages. Ms. Ferris observed that Dr. Orgel provided the same opinion.

44. Regarding Dr. Larson, Ms. Ferris testified that he assigned a 50-pound restriction related to the work injury, but 30-pound lift occasionally and 15 lift frequently based on Claimant's age and condition. When preparing her opinion, Ms. Ferris relied upon the more stringent restriction.

45. Ms. Ferris opined that Claimant's continued Dilaudid use was not a bar to employment for several reasons. First, multiple physicians had opined that continued use of Dilaudid was not reasonable, necessary, and related to the industrial injury. Second, with the exception of one, none of the jobs identified by Ms. Ferris required drug testing. Third, notwithstanding her use of Dilaudid, Claimant does operate her motor vehicle. The driving positions identified by Ms. Ferris did not require a CDL.

46. Ms. Ferris said Claimant's use of Dilaudid would not preclude such employment. Ms. Ferried identified driving positions with DoorDash, Uber Eats, and Grub Hub which comply with Dr. Larson's restrictions. Ms. Ferris identified positions as a shuttle driver and newspaper delivery. She located a position which involves simply moving cars within a parking lot. The ALJ credited Ms. Ferris' opinion that these positions were available in the Denver labor market.

47. Regarding non-driving positions, Ms. Ferris testified that Claimant misinterpreted a number of jobs during her testimony. For example, Claimant testified that the cashier positions at DIA would involve luggage handling; Ms. Ferris testified

these jobs did not involve lifting or driving. Additionally, Ms. Ferris testified that food production jobs were available as well, such as packing loose tea leaves into packages, a snack company, and a clerk position at Target. Ms. Ferris concluded by restating her opinion that Claimant maintains the ability to earn wages.

48. Claimant did not retain a vocational expert and did not offer expert testimony to specifically rebut Ms. Ferris's expert opinions. The ALJ credited Ms. Ferris' testimony that there were jobs in the Denver labor market within Claimant's restrictions. This included jobs within the sedentary work category. The ALJ concluded Claimant could be hired in one of these jobs, retain her employment and earn wages.

49. Claimant's testimony, while raising the question about whether she could do some of the specific jobs identified by Ms. Ferris, did not rebut the conclusion there were jobs in the labor market in which she could earn wages.

50. Claimant retained access to the labor market, although this was limited by her work injury. The ALJ found Claimant could earn wages.

51. Claimant did not prove she was permanently and totally disabled as a result of her work injury.

52. Testimony and evidence inconsistent with the above findings is either not credible and/or not persuasive.

CONCLUSIONS OF LAW

General

The purpose of the Workers' Compensation Act of Colorado (Act), § 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. § 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the Claimant nor in favor of the rights of Respondents. § 8-43-201(1), C.R.S.

A Workers' Compensation case is decided on its merits. § 8-43-201, C.R.S. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2005).

Permanent Total Disability

To prove her claim that she is permanently and totally disabled ("PTD"), Claimant shoulders the burden of proving by a preponderance of the evidence that she is unable to earn any wages in the same or other employment. Sections 8-40-201(16.5)(a) and 8-43-201, C.R.S. (2003). Claimant must also prove the industrial injury was a significant causative factor in the PTD claim by demonstrating a direct causal relationship between the injury and the PTD. *Joslins Dry Goods Co. v. Industrial Claim Appeals Office,* 21 P.3d 866 (Colo. App. 2001); *Wallace v. Current USA, Inc.* W.C. No. 4-886-464 (ICAO, Dec. 24, 2014).

The term "any wages" means more than zero wages. *Lobb v. Industrial Claim Appeals Office,* 948 P.2d 115 (Colo. App. 1997). In weighing whether Claimant is able to earn any wages, the ALJ may consider various human factors, including Claimant's physical condition, mental ability, age, employment history, education, and availability of work that Claimant could perform. *Weld County School Dist. Re-12 v. Bymer*, 955 P.2d 550 (Colo. 1998).

The ALJ may also consider Claimant's ability to handle pain and the perception of pain. *Darnall v. Weld County,* W.C. No. 4-164-380 (I.C.A.O. April 10, 1998). The critical test is whether employment exists that is reasonably available to Claimant under his or her particular circumstances. *Weld County School Dist. Re-12 v. Bymer*, *supra*. The question of whether Claimant proved inability to earn wages in the same or other employment presents a question of fact for resolution by the ALJ. *Best-Way Concrete Co. v. Baumgartner,* 908 P.2d 1194 (Colo. App. 1995).

Claimant asserted she was permanently and totally disabled as a result of the work injury because her residual pain and restrictions, as well as the narcotic medications she took prevented her from earning wages. She argued that her testimony and Exhibit 1 (her response to specific jobs identified by Ms. Ferris) supported for the claim the for PTD benefits. There was no evidence in the record that Claimant earned wages since her injury and the issue was whether she can currently obtain/retain employment and earn wages. Respondents relied upon the expert testimony of Ms. Ferris and the restrictions issued by treating physicians. Respondent averred there were open jobs in the Denver labor market and Claimant retained the ability to earn wages.

As a starting point, the ALJ found Claimant‘s work injury resulted in extensive medical treatment, including back surgeries. As determined in Findings of Fact 2-24, Claimant received extensive treatment from the date of injury in 2013 through 2018. Claimant did not return to work for Employer after she reached MMI. (Finding of Fact 26). The ALJ also found Claimant could not return to work for Employer because of the lifting required. (Finding of Fact 34). In addition, the ALJ found Claimant what is a credible witness when describing her low back and leg pain, as well as crediting her testimony that this limited her activities. (Finding of Fact 40).

The ALJ also considered various human factors when deciding whether Claimant could "earn wages". *Weld County School Dist. Re-12 v. Bymer*, *supra*, 955 P.2d 555-556. As found, Claimant obtained her GED, but had no education beyond that. (Finding of Fact 34). The majority of Claimant's work experience was as a driver. After the injury, she no longer had a commercial driver's license, which limited her ability to work as a driver. *Id.* However, there were driving jobs that Claimant could perform that did not require a commercial driver's license. (Finding of Fact 46).

Claimant had worked as a hairdresser, but subjectively reported that she did not believe she could stand for the long periods of time this job required. (Finding of Fact 34). The ALJ concluded that although the work injury limited Claimant‘s access to the labor market, she retained the ability to earn wages. (Finding of Fact 50). In this regard, the ALJ credited Ms. Ferris‘ testimony that there were jobs Claimant could perform in the labor market, even with restrictions. (Findings of Fact 46-47). The ALJ found Ms. Ferris to be credible when, in her expert opinion, she concluded Claimant could earn wages in several of these positions. *Id.* In addition, the ALJ found Ms. Ferris‘ expert testimony was not rebutted, although Claimant disputed some of her conclusions. The ALJ concluded Claimant could be hired in one of the jobs identified by Ms. Ferris, retain her employment and earn wages. (Finding of Fact 48).

Based upon a totality of the evidence, the ALJ determined Claimant could earn wages and was not entitled to receive permanent total disability benefits.

ORDER

IT IS HEREBY ORDERED:

1. Claimant's claim for permanent total disability benefits is denied and dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's Order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 10, 2021

Digital signature

Timothy L. Nemechek
Administrative Law Judge
Office of Administrative Courts

ISSUES

- Did Claimant overcome the DIME's determination regarding MMI by clear and convincing evidence?

- If Claimant overcame the DIME regarding MMI, did Claimant prove entitlement to a triple phase bone scan, QSART testing, and thermography by a preponderance of the evidence?

- If Claimant is at MMI, did she prove she suffered a whole person impairment to her left shoulder?

- The parties stipulated Respondents make take credit of $19,344 for PPD benefits previously paid against any additional PPD benefits awarded in this Order.

FINDINGS OF FACT

1. Claimant works in the housekeeping department at Employer's nursing home. She suffered a compensable injury on July 1, 2018, when she hit her left elbow on a wall-mounted fire extinguisher while mopping floors.

2. Claimant had previously injured her left elbow in June 2016 while working for Employer. In that incident, she hit her elbow on the inside of a dryer while removing clothes. She was diagnosed with traumatic olecranon bursitis and triceps tendinitis. She ultimately had surgery with Dr. Michael Morley on December 1, 2016 to remove the bursa sac in the left elbow.

3. Claimant had an IME with Dr. Dwight Caughfield on February 21, 2017. She was still symptomatic, with 7/10 "stabbing/burning" pain in the left elbow and forearm. She said the area swelled frequently with activity and turned purple approximately once or twice a month. The pain worsened "with any pressure or something rubbing over the forearm." She had forearm numbness in a posterior antebrachial cutaneous distribution, and a positive Tinel's over the bursectomy area. Dr. Caughfield diagnosed right posterior antebrachial cutaneous neuropathy, either from the initial injury or from the surgery. He recommended a trial of amitriptyline, with consideration of medications such as Neurontin, Lyrica, or Topamax if the amitriptyline was not helpful. He recommended physical therapy for desensitization and scar mobilization. If she did not improve with therapy, Dr. Caughfield recommended up to three nerve blocks. Dr. Caughfield recommended no work restrictions other than being careful to protect the elbow from further trauma. Dr. Caughfield issued an addendum report on March 1, 2017, to clarify that Claimant was not at MMI because "her neuropathic pain may improve with medical management."

4. Respondents' expert, Dr. Burris, testified at hearing that patients typically recover from a bursectomy relatively quickly and pain typically recedes within 1-2 months.

He would not expect 7/10 pain three months post-op for that procedure, which suggests an additional problem. This is consistent with Dr. Caughfield's diagnosis of "neuropathic pain."

5. Claimant did not pursue the treatment recommended by Dr. Caughfield. Instead, she settled her claim on a full and final basis in April 2017. She received no further treatment or evaluations relating to her elbow until after the July 1, 2018 work accident that is the subject of this claim.

6. Claimant testified her left elbow was "good" and she had no symptoms between the time she saw Dr. Caughfield and the July 1, 2018 work accident.

7. After the July 1, 2018 accident, Claimant underwent an MRI of the left elbow. The MRI showed a non-displaced olecranon fracture, ulnar neuritis, and a partial triceps tendon tear.

8. Claimant saw Dr. Kobayashi, an upper extremity surgeon, on October 25, 2018. X-rays showed the olecranon fracture had healed. Dr. Kobayashi diagnosed a high-grade partial triceps tendon rupture and left ulnar neuropathy/cubital tunnel syndrome. Dr. Kobayashi recommended a left triceps tendon repair and a left ulnar nerve transposition. He gave Claimant an elbow brace that limited elbow movement from 30° to 100°. She understood she was to wear the brace "at all times, except for at bedtime."

9. The surgery was denied based on an IME from Dr. Frederick Scherr, who agreed the surgery was reasonably necessary but was not causally related to the work accident. Dr. Scherr opined the accident was too minor to have caused a fracture or triceps tendon tear.

10. Dr. Miguel Castrejon performed an IME for Claimant and opined the olecranon fracture, ulnar neuritis, and triceps tendon tear were caused by the July 1, 2018 accident. He recommended Claimant proceed with surgery under the workers' compensation claim.

11. The parties proceeded to hearing before the undersigned ALJ on March 21, 2019. The ALJ found Claimant proved a compensable injury, and that the proposed surgery was reasonably necessary and causally related to the work accident. Respondents were ordered to cover the surgery in a final order dated May 1, 2019.

12. Claimant had worn the splint Dr. Kobayashi gave her for several months while the claim was under denial and in litigation. Although Dr. Kobayashi likely did not intend Claimant to remain splinted for such a prolonged period, she understood his instructions as wear the splint at all times unless she was sleeping. Claimant thereafter could not go back to Dr. Kobayashi because her claim has been denied. Having received no further instruction, she dutifully followed his last instructions to wear the brace. Because of prolonged immobilization related to the elbow injury, Claimant's injuries ultimately expanded to include the adhesive capsulitis of left shoulder.

13. Dr. Kobayashi performed a left ulnar nerve transposition and left triceps tendon repair on May 31, 2019.

14. Claimant remained significantly symptomatic after the surgery. On August 27, 2019, Dr. Kobayashi documented ongoing severe elbow pain and hypersensitivity despite postoperative therapy. Claimant was also having neck pain. Physical examination showed trigger points in the left trapezius. Claimant only tolerated gentle shoulder range of motion. Dr. Kobayashi noted, “Clinical findings demonstrate evidence of significant hypersensitivity adjacent to the surgical wound site. Continue to work on desensitization. We will start Neurontin, lidocaine patch, as well as Voltaren gel.”

15. On January 13, 2020, Dr. Kobayashi documented Claimant still had severe pain despite ongoing therapy. Claimant also reported neck pain. Examination showed trigger points over the trapezius and over the posterior aspect of the shoulder. Neck and shoulder range of motion were slightly limited, and elbow range of motion was substantially limited. Dr. Kobayashi noted significant hypersensitivity of the elbow and the forearm. He opined Claimant “has had a poor response to surgery. This was thoroughly discussed with the patient.” He thought Claimant’s clinical presentation was consistent with possible complex regional pain syndrome, so he referred her to Dr. Timothy Sandell for nerve conduction studies and a possible stellate ganglion block. He also recommended a cervical MRI.

16. Dr. Scherr performed a record-review IME for Respondents on January 22, 2020. Dr. Scherr opined a cervical MRI was not causally related to the July 1, 2018 work accident. He further opined Claimant did not meet the diagnostic criteria set forth in the Medical Treatment Guidelines (MTGs) for Complex Regional Pain Syndrome (CRPS) and therefore should not proceed with the nerve block or nerve conduction studies. He opined to the extent Claimant had symptoms suggestive of CRPS, the symptoms were not causally related to the July 1, 2018 accident.

17. Dr. Kobayashi reevaluated Claimant on March 28, 2020. He noted his request for evaluation of CRPS was denied. He stated:

> Clinical findings are very concerning for possible complex regional pain syndrome. The patient does meet the Budapest diagnostic criteria for complex regional pain syndrome. This was thoroughly discussed with the patient. Further workup to include imaging includes three-phase bone scan, thermography, as well as nerve conduction studies. I am also concerned about possible relationship to the cervical spine. Occasionally, nerve injuries can be related to complex regional pain syndrome (CRPS type 2).

18. Claimant’s primary authorized provider has been Doug Miller, FNP at Rocky Ford Family Health. Because he is not Level II accredited, Mr. Miller referred Claimant to Dr. Terrence Lakin to assess MMI and impairment.

19. Dr. Lakin evaluated Claimant on April 24, 2020. The accompanying pain diagram includes aching pain on the top and back of the left shoulder, extending to the

trapezius and upper scapula. Dr. Lakin documented significant range of motion deficits at the left elbow and left shoulder. Dr. Lakin observed left arm mottling in a reticular pattern from the mid upper arm down to her fingers, and the left arm was “markedly cooler” than the uninjured right arm. Claimant had little to no hair on either arm. There was no significant nail deformity. There was some sensitivity to light touch throughout the left arm but no hypersensitivity. She was hypersensitive to palpation around the left cubital tunnel and ulnar transposition area. Dr. Lakin “highly suspected” CRPS of the left upper extremity. He opined Claimant was not at MMI and recommended a shoulder MRI to evaluate adhesive capsulitis. He also recommended a formal CRPS evaluation by a specialist, to include thermogram, QSART, and nerve conduction testing. He thought she might also warrant sympathetic ganglion blocks. After the CRPS evaluation was completed, he wanted Claimant returned to Dr. Kobayashi to discuss surgical intervention for the shoulder and/or elbow. Despite concluding Claimant was not at MMI, Dr. Lakin provided an advisory impairment rating of 12% for the elbow, 21% for the shoulder, and 9% whole person for CRPS.

20. Dr. Scherr issued a supplemental report on June 1, 2020 based on a record review. He disagreed with the CRPS rating assigned by Dr. Lakin. He opined Claimant met only one of the four required vasomotor symptoms required by the MTGs. Dr. Scherr opined Claimant’s symptoms are better explained by her poor response to surgery instead of CRPS. He opined Claimant was at MMI.

21. Claimant saw Dr. Mallikarjuna Nallegowda, a pain management specialist, on July 16, 2020. She reported discoloration and pain in the left arm and lack of elbow motion. Examination showed mild tenderness and range of motion loss in the neck and left shoulder. The left upper extremity had a bluish discoloration, decreased temperature, muscle atrophy, forearm hair loss and allodynia. Dr. Nallegowda opined Claimant met the Budapest criteria for CRPS type I.

22. Claimant had a left shoulder MRI on August 5, 2020, which showed a full thickness rotator cuff tear, with no significant retraction or muscle atrophy.

23. Dr. Charles Wenzel performed a DIME on August 28, 2020. Dr. Wenzel concluded Claimant was not at MMI and needed additional workup and consideration for shoulder manipulation under anesthesia and/or possible surgical debridement of adhesions. Dr. Wenzel opined that if Claimant were found not to be a surgical candidate for her shoulder, then she would be at MMI as of August 28, 2020. Dr. Wenzel opined Claimant’s possible CRPS was pre-existing and not caused by the 2018 work injury. In support of this conclusion, he relied on Dr. Caughfield’s February 21, 2017 report that documented “symptoms similar to her current symptoms,” including burning pain around the elbow and forearm, frequent swelling, purple discoloration, and severe pain with light touch. Dr. Wenzel also noted the inconsistency of Claimant’s report to him that she was “100% pain free after the surgery in 2016” when compared to Dr. Caughfield’s evaluation.

24. Claimant returned to Dr. Lakin on November 12, 2020 to review the DIME report. Dr. Lakin noted Claimant faced a “clinical dilemma” regarding the need for treatment and the diagnosis of CRPS. He continued to believe Claimant has CRPS based

on his clinical findings. Dr. Nallegowda agreed with the diagnosis based on similar findings. Part of Claimant's dilemma is that she "has not had formal work up under Workers' Compensation department [of] labor guidelines for CRPS. For that, she would need nerve conduction studies, bone scan, and referral to Dr. [Schakaraschwili]. [She] would then need thermogram and QSART testing for formal diagnosis." Dr. Lakin thought Claimant's elbow and shoulder would benefit from surgical treatment, but she would need to get control of her CRPS before she could purse surgery. He also stated, "she might have a potential argument for CRPS exacerbation in the Workers' Compensation [injury]." Dr. Lakin commented Claimant had undergone cervical x-rays that showed DDD, which is "obviously" not related to the work injury.

25. Claimant saw Dr. Kobayashi on December 22, 2020. He noted he had not seen Claimant in nearly a year. At her last appointment, he was concerned about CRPS and tried to refer her to pain management. Claimant still had significant contracture of the left elbow and reported severe anterolateral shoulder pain. He reviewed the recent shoulder MRI that showed a full-thickness rotator cuff tear. Dr. Kobayashi recommended an updated MRI of the left elbow and an EMG study. He opined "given her significant poor response to surgery on her elbow we [would use] extreme caution when proceeding with further surgical intervention."

26. Dr. Katherine Leppard performed an EMG on February 8, 2021. It showed mild left ulnar neuropathy and mild left carpal tunnel. There was no electrodiagnostic evidence of cervical radiculopathy.

27. Also on February 8, 2021, Dr. Scherr issued an addendum records review report. He agreed with Dr. Wenzel that Claimant's possible diagnosis of CRPS was pre-existing and was not aggravated or accelerated by the July 1, 2018 work accident. He recommended any further evaluation of Claimant's "possible and pre-existing CRPS should be performed outside of the Workers' Compensation system."

28. Claimant met with Dr. Lakin on February 19, 2021. Dr. Lakin had spoken with Dr. Kobayashi by phone and "Dr. Kobayashi does not believe that she is any type of surgical candidate for shoulder [or] elbow. He believes with her element of pain and Budapest criteria for CRPS, that high likelihood she would have [a] poor outcome. [Claimant] reports that Dr. Kobayashi told her same." Because Claimant had been determined not to be a surgical candidate, Dr. Lakin opined she was at MMI and should return to the DIME.

29. Claimant saw Dr. Wenzel for a follow-up DIME on April 2, 2021. He determined she had reached MMI as of August 28, 2020 because Dr. Kobayashi had ruled out additional surgery. To the extent Claimant may qualify for the diagnosis of CRPS, Dr. Wenzel again opined the condition was pre-existing and not causally related to the 2018 work accident. Dr. Wenzel adopted the range of motion measurements previously obtained by Dr. Lakin. He assigned a 21% extremity rating for the shoulder and a 12% extremity rating for the elbow, for an overall combined upper extremity rating of 30%.

30. Insurer filed a Final Admission of Liability on May 6, 2021 admitting for 30% scheduled impairment for the left arm.

31. Dr. Castrejon performed an IME for Claimant on July 22, 2021. Claimant described ongoing pain in the left elbow and shoulder area. She also reported pain at the base of her neck extending to the left shoulder. Physical examination showed tenderness and trigger points along the trapezius, AC joint, and the anterior capsule. There was also tenderness and hypertonicity of the left cervical paraspinal muscles and rhomboids. Shoulder range of motion was significantly reduced and rotator cuff strength was 4-/5. Examination of the elbow showed mild swelling laterally, limited range of motion, and localized allodynia around the olecranon and triceps insertion. Dr. Castrejon appreciated no specific color or temperature asymmetries, or hair or nail changes. He noted a slight increased sweat response. He stated his examination was “borderline” for CRPS. He opined the rotator cuff tear shown on the recent MRI must have occurred “relatively recently” because there was no evidence of muscle atrophy or retraction. He thought Claimant would benefit from surgical intervention to her shoulder and possibly elbow but she needs additional testing first to definitively “rule in or out the diagnosis of CRPS.” If testing confirmed CRPS, surgery would not be appropriate. In that case, he would recommend treatment for the myofascial component of her condition including physical therapy, acupuncture, massage therapy, and trigger point injections. He opined, “improvement of her myofascial condition would contribute to improvement in both cervical, scapular, and shoulder range of motion.” Dr. Castrejon opined Claimant cannot be put at MMI until a “definitive diagnosis” is established regarding CRPS.

32. Dr. Castrejon issued a supplemental report dated September 18, 2021 after reviewing Dr. Wenzel’s follow-up DIME report. Dr. Castrejon agreed the symptoms and clinical findings documented in Dr. Caughfield’s February 2017 report were “suggestive” of CRPS. But he emphasized the lack of formal testing to rule in or out the diagnosis of CRPS. In Dr. Castrejon’s view, Claimant is being unfairly prevented from obtaining treatment for the shoulder and elbow because of a presumed diagnosis of CRPS, without the testing to determine whether she actually has the condition. He stated if CRPS were confirmed, he would agree with Dr. Wenzel’s determination of MMI.

33. Dr. John Burris performed an IME for Respondents on September 28, 2021. He determined that Claimant does not meet the clinical requirements for a diagnosis of CRPS under the MTGs. He opined that Claimant’s continued pain is more likely related to the “poor outcome from the left elbow surgery, prolonged immobilization, and disuse,” an opinion he maintained in his testimony. Dr. Burris agreed with Dr. Wenzel that Claimant is at MMI. He relied on Dr. Kobayashi’s statement that Claimant is not a candidate for additional treatment, regardless of whether or not the diagnosis of CRPS is ruled out. Dr. Burris opined that based on Claimant’s extreme pain response to her last surgery, she would be at risk for increased pain complaints and increased scar tissue if further surgery was performed. Thus it is reasonable for Dr. Kobayashi not to proceed with further surgical intervention. Dr. Burris testified there are no current surgical recommendations from any authorized provider that would warrant a reversal of MMI. Dr. Burris opined the functional impairment related to the shoulder injury is confined to Claimant’s arm, and therefore the shoulder rating should not be converted to whole person.

34. Dr. Castrejon testified at hearing consistent with his reports. He reiterated that Claimant's clinical presentation is "borderline" for CRPS, and she should have formal testing to determine objectively if she has CRPS or not. If the testing is negative, she should be referred back to Dr. Kobayashi and to a shoulder specialist.

35. Claimant failed to overcome the DIME's determination of MMI by clear and convincing evidence. Dr. Wenzel's causation determination regarding Claimant's potential CRPS is a plausible inference from Dr. Caughfield's February 2017 report. Dr. Wenzel's conclusions are supported by the opinions of Dr. Scherr and Dr. Burris. The finding of MMI is also supported by Dr. Kobayashi's determination Claimant is not a candidate for any additional surgery. Dr. Castrejon's contrary opinions do not rise to the level of clear and convincing evidence.

36. Dr. Wenzel's impairment rating includes a 21% upper extremity rating for the left shoulder. According to the *AMA Guides*, the 21% upper extremity rating converts to 13% whole person.

37. Dr. Castrejon persuasively testified Claimant's shoulder injury causes functional impairment extending beyond her arm. He cited his examination findings of tenderness around the shoulder, along the trapezius, and into the rhomboids and cervical musculature. He also appreciated hypertonicity and trigger points in those areas. Dr. Castrejon noted similar findings had been documented by other providers and had been treated in physical therapy. He opined these proximal symptoms are distinct from any symptoms related to Claimant's nonwork-related cervical spondylosis and potential facet pain. Specifically, Dr. Castrejon opined:

> [T]ypically, when you have facet joint pain, it expresses itself in a dermatomal distribution. But it's expressed by pain. In this particular case, this individual had muscular hypertonicity, trigger points, decrease in the scapular movement of the shoulder joint, which led me to . . . believe that the muscle attachments that – will be termed the shoulder girdle muscles, that run from the shoulder to the neck are being affected. And in my mind, this is secondary to the prolonged immobilization, hence the lack of adequate use of that limb that [ ] resulted in that adhesive nature.

38. Claimant proved she suffered functional impairment not listed on the schedule, independent of any limitations potentially related to cervical spondylosis or facet pain.

CONCLUSIONS OF LAW

A. Overcoming the DIME

A DIME's determination regarding MMI is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c). "Maximum Medical Improvement" (MMI) is defined as the point when any medically determinable physical or mental impairment because of the industrial injury has become stable and when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5), C.R.S. The party challenging the DIME's conclusions must show it is "highly probable" the determination of MMI is incorrect. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office*, 961 P.2d 590 (Colo. App. 1998). A party meets this burden if the evidence contradicting the DIME physician is "unmistakable and free from serious or substantial doubt." *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). A "mere difference of medical opinion" does not constitute clear and convincing evidence. *E.g., Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (March 18, 2016).

Claimant's challenge to MMI hinges on testing to determine whether she has CRPS. A need for additional diagnostic procedures can support a finding that a claimant is not at MMI if such procedures have a reasonable prospect of diagnosing the claimant's condition and suggesting further treatment. *E.g.*, *Watier-Yerkman v. Da Vita, Inc*., W.C. No. 4-882-517-02 (January 12, 2015); *Soto v. Corrections Corp. of America*, W.C. No. 4-813-582 (February 23, 2012). But there are two major problems with Claimant's argument in this context. First, Dr. Wenzel opined Claimant's possible CRPS is pre-existing and not causally related to the July 2018 work accident. Assessing causation is an "inherent" aspect of the DIME's determination of MMI and impairment. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1988). Therefore, the DIME's determination that a particular condition is or is not related to the industrial injury is binding unless overcome by clear and convincing evidence. *Id*. Claimant failed to overcome Dr. Wenzel's causation determination by clear and convincing evidence. Dr. Wenzel's conclusion is a plausible inference from Dr. Caughfield's February 2017 report. His conclusion is also supported by the opinions of Dr. Scherr and Dr. Burris. Dr. Castrejon's contrary opinions do not rise to the level of clear and convincing evidence. Likewise, Dr. Lakin's lukewarm supposition that Claimant "might" have a "potential" argument the work accident exacerbated pre-existing CRPS is insufficiently persuasive to overcome Dr. Wenzel's causation determination using an aggravation theory.

Second, Claimant failed to prove that CRPS testing is reasonably likely to produce additional treatment recommendations for Claimant's elbow or shoulder. Dr. Castrejon thinks Dr. Kobayashi will change his mind about surgery if CRPS is definitively ruled out. The ALJ does not share that interpretation of Dr. Kobayashi's position. Dr. Kobayashi did not decline further surgery merely because he thinks Claimant has CRPS. Rather, he cited the poor result from prior surgery and ongoing neuropathic pain *symptoms*. Those factors will remain salient regardless of whether they are shown to be from CRPS or another neuropathic pain process. In this regard, the specific diagnostic label assigned to her condition is immaterial.

No doubt, Claimant's medical situation is unfortunate. But the question of whether anything else can be done to improve her condition is an issue about which reasonable physicians can disagree. Dr. Wenzel initially afforded Claimant the opportunity to go back to Dr. Kobayashi and see if he had anything else to offer her. Dr. Kobayashi concluded additional surgery is unlikely to help Claimant and may make her worse. Dr. Wenzel reasonably accepted that decision and put Claimant at MMI. Although Dr. Castrejon makes a cogent argument for the path he would follow if Claimant were his patient, his opinions do not rise to the level of clear and convincing evidence. At most, Claimant has shown a “mere difference of medical opinion” regarding MMI, which is insufficient to overcome the DIME.

B. Specific medical benefits

Claimant’s request that Respondents be ordered to cover the CRPS testing is moot because that request was expressly contingent on a finding she was not at MMI.

C. Whole person impairment

When evaluating whether a claimant has sustained scheduled or whole person impairment, the ALJ must determine “the situs of the functional impairment.” This refers to the “part or parts of the body which have been impaired or disabled as a result of the industrial accident,” and is not necessarily the site of the injury itself. *Strauch v. PSL Swedish Healthcare System*, 917 P.2d 366, 368 (Colo. App. 1996). The schedule of disabilities refers to the loss of “an arm at the shoulder.” Section 8-42-107(2)(a). If the claimant has a functional impairment to part(s) of his body other than the “arm,” they have suffered a whole person impairment and must be compensated under § 8-42-107(8).

There is no requirement that functional impairment take any particular form, and “pain and discomfort which interferes with the claimant’s ability to use a portion of the body may be considered ‘impairment’ for purposes of assigning a whole person impairment rating.” *Martinez v. Albertson’s LLC*, W.C. No. 4-692-947 (June 30, 2008). Referred pain from the primary situs of the initial injury may establish proof of functional impairment to the whole person. *E.g., Latshaw v. Baker Hughes, Inc*., W.C. No. 4-842-705 (December 17, 2013); *Mader v. Popejoy Construction Co., Inc*., W.C. No. 4-198-489 (August 9, 1996). Although the opinions of physicians can be considered when determining this issue, the ALJ can also consider lay evidence such as the claimant’s testimony regarding pain and reduced function. *Olson v. Foley’s*, W.C. No. 4-326-898 (September 12, 2000).

Pain and limitation in the trapezius or scapular area can functionally impair an individual beyond the arm. *E.g. Steinhauser v. Azco, Inc.*, W.C. No. 4-808-991 (January 11, 2012) (pain and muscle spasm in scapular and trapezial musculature warranted whole person impairment); *Franks v. Gordon Sign Co.*, W.C. No. 4-180-076 (March 27, 1996) (supraspinatus attaches to the scapula, and is therefore properly considered part of the “torso,” rather than the “arm”); *Martinez v. Albertson’s LLC*, W.C. No. 4-692-947 (ICAO, June 30, 2008) (pain affecting the trapezius and difficulty sleeping on injured side supported ALJ’s finding of whole person impairment). Limitations on overhead reaching can also consitute functional impairment beyond the arm in appropriate cases. *E.g.*, *Brown v. City of Aurora*, W.C. No. 4-452-408 (October 9, 2002); *Heredia v. Marriott*, W.C. No. 4-508-205 (September 17, 2004). However, the mere presence of pain in a part of the body beyond the schedule does not automatically represent a functional impairment or require a whole person conversion. *Newton v. Broadcom, Inc*., W.C. No. 5-095-589-002 (July 8, 2021).

As found, Claimant proved she suffered functional impairment not listed on the schedule. The adhesive capsulitis affects Claimant's entire shoulder girdle region, and it not merely limited to her arm. Dr. Castrejon's analysis of the factors supporting whole person conversion is credible and persuasive.

Dr. Wenzel's impairment rating includes a 21% upper extremity rating for the left shoulder. Although his report does not specify the equivalent whole person rating, that information can be easily ascertained from the *AMA* Guides. According to Table 3, p. 16, a 21% upper extremity rating converts to 13% whole person. The ALJ disagrees with Respondents' argument that Claimant had to submit a copy of the *AMA Guides* rating conversion table at hearing to obtain an award of whole person PPD benefits. While that may have been the rule several years ago, the courts have appropriately abandoned that position. *E.g*., *Serena v. SSC Pueblo Belmont Op Co. LLC*, W.C. No. 4-922-344-01 (December 1, 2015). The *AMA Guides* have been the mandatory basis for impairment ratings in Colorado for over 30 years. They are well known to participants in the workers' compensation system, and not reasonably subject to dispute. Review of pertinent portions of the AMA Guides is "part of a judge's inherent duty and power to find and apply the law." *Id*. In that regard, a party is no more obligated to submit copies of the AMA Guides than they are portions of the Act, case law, rules of procedure, or any other authority routinely relied on in Workers' Compensation hearings.

ORDER

It is therefore ordered that:

1. Claimant's request to overcome the DIME regarding MMI is denied and dismissed.

2. Claimant's request for diagnostic testing for CRPS, including a triple phase bone scan, QSART testing, and thermography, is denied and dismissed.

3. Insurer shall pay Claimant PPD benefits based on the DIME's 13% whole person shoulder rating and 12% scheduled elbow rating. Insurer may take credit for $19,344 of PPD benefits previously paid to Claimant.

4. Insurer shall pay Claimant statutory interest of 8% per annum on all benefits not paid when due.

5. The issue of disfigurement is reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: December 10, 2021

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-150-066-003

ISSUE

1. Did the Claimant prove by a preponderance of the evidence that he sustained a compensable work-related injury?

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant is a 34 year-old male who worked part-time for Employer as a package handler. Employer hired Claimant on July 21, 2020. (Ex. D)

2. On August 20, 2020, Claimant was involved in an altercation with another employee while at work. Employer suspended Claimant pending an investigation. Based upon the investigation, Employer concluded that Claimant violated its Security, Acceptable Conduct, and Workplace Violence policies. Employer terminated Claimant. According to Claimant's employment records, the last day he worked was August 21, 2020, and he was terminated on August 25, 2020. (Ex. D).

3. On August 26, 2020, Claimant contacted Employer's human resources department. Claimant reported he had injured his back and needed to go to the hospital. Claimant did not provide a date of injury. Human resources advised Claimant that he was to notify his manager of all injuries.

4. Employer representative, Shanna R[Redacted], credibly testified that Claimant received training in reporting workers' compensation matters, safe lifting practices, and the consequences of workplace violence.

5. Claimant went to Concentra the afternoon of August 26, 2020, and Nate Adams, P.A., evaluated him. Claimant, who speaks French, reported through a professional interpreter that he injured himself two weeks prior, when he picked up a heavy package at work and felt a pain in his low back. This would place Claimant's injury at or about August 12, 2020.

6. At the hearing, Claimant testified that his injury occurred seven days prior to reporting the injury to human resources on August 26, 2020. This would place Claimant's injury at or about August 19, 2020.

7. Claimant testified that after he injured his back, he wanted to see if he could handle the pain. After seven days, however, the pain around his spine was bad and he felt he needed to go to the doctor so he contacted human resources. Claimant testified that human resources told him he needed to notify his manager of the injury.

8. Claimant never notified his manager, Kyle P[Redacted], of his injury. When Mr. P[Redacted] suspended Claimant and took his badge, Claimant never mentioned anything regarding an injury. (Ex. G).

9. At Claimant's initial Concentra appointment on August 26, 2020, he told Mr. Adams that two weeks prior he picked up a heavy package and felt a pain in his lower back. Claimant then told Mr. Adams that he was able to lift 300 pounds, and that if that weight was available, he would be happy to demonstrate that he could lift it. (Ex. C). The ALJ finds that this statement is inconsistent with Claimant allegedly suffering from back pain.

10. Mr. Adams diagnosed Claimant with a low back strain. He ordered physical therapy for Claimant and did not prescribe any medications. Claimant was able to return to modified duty with a temporary restriction of lifting up to 50 pounds frequently. (Ex. C).

11. Claimant returned to Concentra on August 31, 2020 for a follow-up appointment with Scott Richardson, M.D. Claimant reported experiencing brief pain in the midline area of his lower back. He rated his pain as one out of ten. Claimant had not yet started physical therapy. Dr. Richardson prescribed Naproxen and Acetaminophen, and instructed Claimant on using a heating pad, and a Hot/Cold compress. Claimant was given a work restriction of lifting up to 10 pounds constantly, 25 pounds frequently, and 40 pounds occasionally. Additionally, he could push/pull up to 20 pounds constantly, 50 pounds frequently, and 80 pounds occasionally. (Ex. C).

12. Dr. Richardson evaluated Claimant on September 8, 2020. Claimant reported having brief midline lower back pain. Claimant, on occasion, took his prescribed medications, and he was not using the heat or ice. Claimant reported that he was not working at Employer given his restrictions. (Ex. C.) Employer, however, terminated Claimant approximately two weeks prior, on August 25, 2020. (Ex. D).

13. Claimant returned for a follow-up appointment on September 22, 2020. Dr. Richardson noted that Claimant had no tenderness in his lumbosacral spine, and had full range of motion. Claimant reported that he was still not back to work for Employer, but was working at another job. Dr. Richardson released Claimant to full-duty work and maximum medical improvement (MMI) was anticipated for October 2, 2020. According to the medical records, Dr. Richardson noted that Claimant would need another recheck prior to discharge. Claimant did not return for a recheck appointment. (Ex. C)

14. From August 31, 2020 to October 6, 2020, Claimant attended seven physical therapy appointments and four massage therapy appointments. (Ex. C.).

15. On November 12, 2020, while working for a different employer, Claimant fell off a concrete door step while delivering a package. Claimant sustained a left knee tibial plateau fracture. In February 2021, Claimant was referred for chiropractic care for neck and back pain. While receiving chiropractic care, Claimant "noted a previous work related incident with neck pain while working for [Employer]. He notes this more recent incident aggravated this neck pain and also caused back pain." (Ex. E.).

16. At the request of Respondent, Claimant saw Kathy McCranie, M.D., for an Independent Medical Evaluation (IME) on April 1, 2021. Claimant told Dr. McCranie that his date of injury was August 25, 2020. (Ex. B). This is the same date of injury, August 25, 2020, that Claimant listed on his Application for Hearing. The last day Claimant worked for Employer, however, was August 21, 2020. (Ex. D).

17. Dr. McCranie credibly testified at the hearing that if Claimant sustained an injury while working for Employer, it was a back strain. She further testified that Claimant was at MMI as of early October 2020, and any injury had resolved with no impairments or restrictions. This testimony was consistent with Dr. McCranie's April 1, 2021, IME report. (Ex. B).

18. In July 2021, ATP, Lawrence Lesnak, D.O., performed a musculoskeletal and neurologic examination of Claimant that included an evaluation of his lumbar spine. Dr. Lesnak reviewed Claimant's cervical, thoracic and lumbar MRI scans, noting diffuse degenerative findings. He opined that "[t]here is absolutely no evidence of any injury or trauma-related pathology identified whatsoever on his cervical, thoracic, and lumbar spine MRIs." Dr. Lesnak recommended that Claimant begin physical therapy to focus on strength training and lower extremity strengthening. (Ex. E.).

19. Claimant's various statements with respect to his injury were inconsistent and unreliable. Claimant testified at the hearing that he was injured on or about August 19, 2020. He told Mr. Adams, when he first went to Concentra, he was injured on August 12 or 13, 2020. Claimant told Dr. McCranie he was injured on August 25, 2020 even though his last day of work for Employer was August 21, 2020. Claimant reported to his ATP that he was not working for Employer due to the work restrictions, when in fact, he had been terminated from his employment. Finally, Claimant did not report his alleged injury until after he had been suspended due to a workplace altercation. Because of these inconsistencies and inaccuracies, Claimant's testimony was not credible.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceedings is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v.*

Indus. Claim Appeals Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Indus. Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

The claimant is required to prove by a preponderance of the evidence that at the time of the injury both he and the employer were subject to the provisions of the Act, he was performing a service arising out of, and in the course of, his employment and the injury was proximately caused by the performance of such service. §§8-41-301(1)(a)-(c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

The ALJ concludes that Claimant failed to meet his burden of proof. He did not present credible evidence to prove he suffered a compensable injury while working for Employer. The ALJ considered the evidence Claimant presented regarding his injury. Claimant alleged he injured his back lifting a heavy package, sometime in August 2020. A review of Claimant's and Respondent's exhibits indicate that Claimant was diagnosed with a low back strain on August 26, 2020. He attended seven physical therapy and four massage therapy appointments, and was given modest work restrictions. Based upon the medical records, and Dr. McCranie's opinion, Claimant had an uneventful and expected response to the treatment he received. His anticipated date of MMI was October 2, 2020, but he never returned for his recheck appointment where he was expected to be discharged. Most recently, in July 2021, Dr. Lesnak, Claimant's current ATP, reviewed Claimant's cervical, thoracic and lumbar MRI scans and concluded that there was no evidence whatsoever of any injury.

As found, Claimant gave multiple dates for his date of injury. One reported date of injury, August 25, 2020, was several days after the last day Claimant worked for Employer. Claimant's testimony and evidence with respect to the date of his injury were inconsistent, and not credible. (Finding of Fact ¶ 18). Claimant received training with respect to timely reporting of work injuries, but Claimant failed to timely report his injury. *Id.* at ¶¶ 3-4. The first time Claimant reported the alleged work injury was after he received a disciplinary action resulting in his termination for cause. *Id*. at ¶¶ 2-3. Claimant's evidence regarding his injury was not credible, and he failed to meet his burden of proving compensability. The ALJ concludes that Claimant failed to present credible evidence to prove a compensable injury by a preponderance of the evidence.

In the Application for Hearing, Claimant endorsed, in addition to compensability, medical benefits, authorized provider, reasonably necessary, average weekly wage, and temporary total benefits from 8/26/20 to TBD. In light of the ALJ's finding that Claimant did not meet his burden of proving compensability, these additional issues are moot.

ORDER

It is therefore ordered that:

1. Claimant did not sustain a compensable work injury and his claim is dismissed.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 13, 2021

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that he suffered a compensable work injury, due to an electrocution, on September 21, 2020?

II. If Claimant suffered a compensable injury on said date, what medical benefits are reasonable, necessary, and related to his work injury?

STIPULATIONS

Respondents' Exhibits 2, A through K, were admitted without objection. They represent 13 prior Workers Compensation claims made by Claimant. However, Respondents concurred that they were not offered as evidence of propensity; rather, they are offered as evidence that current medical complaints by Claimant were also listed as similar medical complaints in the past. The ALJ accepted this stipulation.

Respondents also stated that from the alleged date of injury, Claimant's extensive medical bills (consisting largely of diagnostics, rather than actual treatment) were paid by Respondents, without admitting compensability. Only when the IME report from Dr. Brumworth was completed, did Respondents issue a Notice of Contest, and refuse further medical treatment. Hearing no credible evidence to the contrary, ALJ accepted this representation.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

Claimant's Prior Injuries and Claim History

1. Claimant has a lengthy and varied injury and Workers Compensation claim history stretching decades over several states. [The ALJ notes that such records were not received for the purpose of showing a propensity for being injured on the job, or filing claims thereafter; rather said records might provide insight into Claimant's prior reported symptoms and preexisting conditions].

2. On May 2, 2006, after six months of employment with SOS staffing as an install technician, Claimant reported a fall from a ladder in which he reported injury to his left ankle, low back and wrist. (CO Claim 4-685-594; Ex. 2D, Dr. Patton IME Ex. 3G, p. 320).

3. For the first time in available medical records, Claimant was diagnosed with severe degenerative disc disease at the L4-5 level. His *left ankle was diagnosed with swelling* and a corticated ossific density. (Ex. 3G, p. 321).

4. After his May 2, 2006, claim was closed, Claimant reported to Dr. Larry Welling, on November 10, 2006, with a report of *persistent right eye pain*. (Ex. 3G, p. 322-23).

5. In 2007, while working for Solitare Homes, Claimant suffered two injuries: one to his left upper extremity while using a power tool, and another trip and fall injury where he reported pain to his bilateral lower extremities**,** right ankle**,** right knee**,** neck and lower back. (NM Claim 08-51688, Ex. 2F; Ex. 3G 323-328).

6. While treating for his right wrist pain, Claimant was diagnosed with cervical radiculopathy extending from C6 in his neck to his left extremity. (Ex. 3G p. 324).

7. On April 1, 2008, while treating for his 2007 work injuries, Claimant reported new issues of left gluteal pain, neck pain and vertigo. He was diagnosed with adjustment disorder, vertigo, and cervical herniation with radiculopathy, along with strains to his right knee and ankle. (Ex. 3G p. 330).

8. Two weeks later on April 15, 2008, Claimant reported to San Juan Regional Medical Center reporting numbness to the entire right side of his bod**y** and dizziness for an hour every day after previously experiencing dizziness 80-90% of the time following his October 29, 2007, injury. (Ex. 3G. p. 330).

9. On April 23, 2008, Claimant's injury complaints expanded yet again, with complaints of radiating pain into the back of his legs with swelling in his arms. Given these complaints, Claimant was referred for a spinal surgical evaluation asap. (Ex. 3G p. 332).

10. Two days after being referred for an "asap" spinal surgical evaluation, Claimant began working at Building Specialties Store Inc. (Co WC No. 4-776617, Ex. 2E).

11. While working for Building Specialties, Claimant continued to treat for his 2007 New Mexico injuries, despite substantial restrictions including limits of 20 pounds lifting, 10 pounds repetitive lifting, and no pushing, pulling or repetitive use of his upper extremities as of July 31, 2008. (Ex. 3G p. 332-33).

12. On August 6, 2008, Claimant reported pain swallowing and sore left throat and was recommended for further evaluation for dysphagia. (Ex. 3G, p. 333-334).

13. While still on work restrictions for his 2007 New Mexico trip and fall claim, Claimant was working alone on a job for Building Specialties at the Durango Airport when he walked head first into a beam on November 6, 2008. As a result, Claimant was diagnosed with a cervical strain and concussion, at which time he reported blurry vision. (Ex. 3G p. 335-36).

14. Two months later, on December 5, 2008, Claimant's injury complaints expanded to include head, neck, shoulder and back pain with muscle spasm, which resulted in a diagnosis of head injury, nausea and dizziness. (Ex. 3G p. 335-36).

15. By December 12, 2008, Claimant was complaining of right sided facial spasms, and by December 19, 2008, Claimant complaints included back spasms. (Ex. 3G p. 337).

16. On December 23, 2008, Claimant was seen at Four Corners Neurosurgical Services where he reported constant pain 100% of the time which prevented him from working or doing recreational activities. Further, he reported pain across both shoulders, down the front and back of both arms, pain in his right leg and pain in both knees. He reported dizzy spells, severe headache, chronic heartburn, constipation, weight gain, excessive thirst, arthritis, bladder infections, frequent urination, tremors, loss of coordination, and nerve disorder/nerve troubles. (Ex. 3G, p. 337).

17. Claimant continued to treat for his open Workers Compensation injuries from New Mexico in 2007, and Colorado in 2008, and by April 3, 2009, he was still complaining of vertigo and spasms in his eyelids. (Ex. 3G, p. 343).

18. On April 6, 2009, Claimant underwent a lumbar MRI which demonstrated a significant herniated disc at L5-S1. (Ex. 3G p. 344).

19. More than a year after his 2008 injury, Claimant was complaining of hypersensitivity in both arms and mild weakness in both grips. (Ex. 3G, p. 345).

20. Claimant underwent his first spinal surgery on July 13, 2009, when he had a C5-6 fusion. (Ex. 3G, 348).

21. In early October 2009, Claimant returned to his surgeon for an unscheduled visit, now complaining of dizziness and lightheadedness that resulted in a fall. In following up with Dr. Ken Stradling, Claimant was complaining of difficulty swallowing and pain in the left side of his neck when swallowing. Claimant was again recommended for a swallowing study. (Ex. 3G, p. 357-58).

22. On October 14, 2009, Claimant reported to a physical therapist symptoms of left ear pain, bilateral eye fluttering, trouble thinking, trouble swallowing, loss of balance and dizziness. (Ex. 3G p. 358).

23. Given consistent complaints of vertigo, Claimant underwent a neurology consultation with Dr. Richard Breeden on October 29, 2009, at which time he was complaining of pain in both upper extremities with “arm pain that has been so severe it has prevented him from doing any kind of activity.” (Ex. 3G p. 359).

24. Despite reporting no pain or numbness immediately after his surgery, by his follow up with his surgeon, Dr. Jim Youssef, on December 2, 2009, Claimant was reporting problems in his left arm, vision problems, thinking problems, difficulty communicating, difficulty swallowing, weight loss and weight gain, loss of appetite, nausea and vomiting, coordination problems, and weakness. Prior to his December 2, 2009, follow up, Claimant reported pain of 9/10 on several occasions to his physical therapist as well. (Ex. 3G, p. 362).

25. As a result of his extremely varied complaints, Dr. Youssef stated, "I have told him he has to come to grips with the fact that *multiple studies have failed to evaluate or determine the etiology between all of his symptomatology and complaints."* (Ex. 3G, p. 363) (emphasis added).

26. Despite a release at MMI from his surgeon on February 2, 2010, Claimant reported 9/10 pain to his physical therapist as of February 24, 2010, with pain in his jaw, ear, neck and both shoulders. (Ex. 3G, p. 369-370).

27. On March 21, 2010, on his 50th physical therapy visit, he reported pain of 1-2 of 10, but reported pain of 10/10 the day prior with varied symptoms including neck pain, and shoulder-blade pain. (Ex. 3G p. 372).

28. On March 18, 2010, Claimant underwent a psychological examination with Dr. Ed Cotgageorge. At this time, Claimant reported several facts that were directly contradicted by, or absent from prior medical records including, loss of consciousness, light sensitivity, no hearing problems, sexual dysfunction, and taste and smell issues. (Ex. 3G, p. 375).

29. Dr. Cotgageorge concluded, "his current presentation is significant for over focusing on pain, and he perceives himself as extremely disabled. He also has a very low pain tolerance." He found that Claimant had substantial indicators of a poor outcome including *low levels of activity, high pain behaviors, and over reporting of symptoms*." (Ex. 3G, p. 376).

30. After further diagnostics, Claimant was ultimately released at MMI for his November 2008 injury. On August 2, 2010, received a rating report from Dr. Randal Jernigan which found, after apportionment for Claimant's 2007 (still ongoing) New Mexico claim, Claimant had a 29% whole person disability rating for spinal impairment and cognitive dysfunction. Dr. Jernigan noted that Claimant's neck injury allowed him to perform sedentary activity, but his emotional and thinking aspects were significant enough that Dr. Jernigan was not sure if Claimant could do significant amounts of work, concluding, "He certainly cannot do construction work." (Jernigan Rating Report Ex. 3E, p. 180).

31. On August 13, 2010, after Dr. Jernigan's rating report, Dr. Ken Stradling released Claimant with permanent 5 pound lifting restrictions, with 2-4 hour walking and standing restrictions, and no ladders. (Ex. 3G, p. 378).

32. Clamant settled his 2008 Colorado Workers Compensation claim on September 30, 2010, and promptly returned to construction work less than a week later, on October 5, 2010. (Ex. 2E; NM W.C. Claim 11-50087, Ex. 2 G.).

33. Just over one month after returning to construction as a garage door installer with EE Newcomer Enterprises, Claimant reported a back strain on November 29, 2010, while lifting a garage door. (Ex. 2G; Ex. 3G, p. 378).

34. On December 3, 2010, Claimant reported numbness and tingling into his fingertips and the tops of his feet, while reporting pain in his mid-thoracic area with the feeling like his skin is on fire in his hands, feet and upper arms. The evaluating medical professional noted that *Claimant's reports were not anatomically correlated.* (Ex. 3G, p. 379).

35. On December 14, 2010, Claimant saw Dr. Camille Rivera for his November 2010 lifting injury. She noted Claimant's expanded complaints of pain in the right mid and low back, as well as bilateral upper extremities, primarily in the joints, in his mid and low back, and bilateral lower extremities. Dr. Rivera also noted *5/5 Waddell's* signs, and full range of motion in the lumbar spine. (Ex. 3G, p. 379-380).

36. One month later, Claimant was treating with Chad Silseth D.C, who found Claimant reporting 8 to 9/10 pain and severely limited range of motion. (Ex. 3G, p. 382).

37. Claimant returned to Dr. Rivera on January 25, 2011, where she again found 5/5 Waddell's signs, and noted Claimant's lower back complaints were not in relation to the November 2010 lifting injury. Dr. Rivera found *Claimant's symptoms were expanded* with new complaints of urinary incontinence, and groin numbness and tingling. (Ex. 3G, p. 383).

38. On March 3, 2011, Claimant settled his 2007 New Mexico claim. (Ex. 2F).

39. Despite prior severe restrictions and ongoing pain complaints requiring monthly refills of Percocet, Claimant returned to work as a pipefitter with PESCO on February 20, 2012, where he promptly incurred his first of two Workers Compensation claims on April 5, 2012, upon striking the ring finger on his right hand with a hammer. (NM Clam 12-01330, Ex. 2H).

40. After treating briefly for the hammer strike, on May 4, 2012, Clamant reported that he hit his head against a pipe causing him to hyperextend his neck, resulting in pain complaints in his neck and upper back as of May 7, 2012. He also complained of a headache and pain radiating into both arms. (Dr. Stradling Reports, Ex. 3D, p. 185).

41. Claimant was referred for chiropractic care and as of May 14, 2012, Dr. Silseth stated, "One thing of notation is *my objective findings do not correlate with his subjective complaints* at this point." (Ex. 3D, p. 193) (emphasis added).

42. One day later, Claimant returned to Dr. Stradling at which time his complaints expanded to include worsening neck pain, intense mid back pain, numbness and tingling in his right leg, along with headaches and nausea. (Ex. 3D p. 200).

43. Given ongoing complaints, Claimant was referred to Spine Colorado where he was examined by Dr. Cyril Boachevsky. When describing the incident, Claimant stated, "He was moving around to look at some pipes when he suddenly hit his head against the pipe . . . he did not hit the ground because his co-workers caught him." Dr. Boachevsky noted Claimant presented with diffuse pain complaints, accompanied by

exaggerated pain behaviors, overreaction, and psychological factors. Claimant reported stabbing pain through his neck and arm pain on both sides. Given the reports of lower back pain, Dr. Boachevsky recommended a lumbar MRI. (Spine Colorado Report, Ex. 3B, p. 164).

44. On June 24, 2012, Claimant drove himself to the San Juan Regional Medical Center in Farmington, where he complained of neck and back pain, with 10/10 pain in his lower back and numbness in his right leg. (Ex. 3E, p. 258).

45. The following day, Claimant returned to Dr. Stradling who noted the curious addition of new symptoms when addressing Dr. Boachevsky's MRI referral stating, "I do not have any mention of lower back pain in his previous visits and I am not sure how this came to be." The following paragraph notes,

> The *patient seems to be continually adding new symptoms* to this complaint. The patient also mentions some shoulder pain, which again I cannot relate to as he described his injury. I think the patient is *exaggerating some of his symptoms* at this point of time, especially when he states he hurts from the top of his neck all the way down to his tailbone. I do believe there are some psychological factors as well…(Ex. 3D, p. 228) (emphasis added).

46. By July 17, 2012, Dr. Stradling's physician assistant Doug Shaffer, who had been treating Claimant with Dr. Stradling for many years, expressed concern. PA Shaffer noted, "*patient's symptom list seems to grow each time we talk.*" He went on to note, "Once again the patient's mechanism seems rather simple compared with the magnitude and multitude of symptoms this patient currently presents with." Concluding, "*I am concerned about possible malingering in this case … it is difficult to ascertain where the true symptoms are versus malingering issues.*" (Ex. 3D p. 245) (emphasis added).

47. By August of 2012, Claimant complained of chest pain that radiated into his throat. (Ex. 3D, p. 247).

48. As of November 2012, Claimant was complaining of blackouts which resulted in him crashing his truck into a ditch. (Ex. 3G, p. 398).

49. Given the allegations of blacking out, Claimant underwent an EEG, which returned normal results. (Ex. 3G, p. 400).

50. On January 13, 2013, Claimant returned to see Dr. Youssef, who noted Claimant had a, "10 year history of problems with his left ear, vision problems, thinking problems… coordination problems and weakness." Dr. Youssef diagnosed Claimant with, 1) C6-7 disk herniation, 2) L4-5 disk herniation, 3) disk degeneration at L4-5, 4) obesity, 5) history of diabetes, 6) history of multiple traumatic brain injuries with postconcussive symptomatology and postconcussive seizure disorder. Dr. Youssef recommended lumbar surgery to address the most pressing issues, noting that an extension of the prior cervical fusion would be a secondary recommendation. (Ex. 3B, p. 173-174).

51. Given Claimant's substantial claims history, his May 2012 New Mexico claim was contested, went through an IME, depositions, and was ultimately settled November 12, 2013. (Patton IME, Ex. 3G, NM 12-57245, Ex. 2i). (The actual settlement document, dated 11/21/2013, was tendered at the time of Respondent's Position Statement; while corroborative, the ALJ will not consider it, although the contents of the Patton IME have been admitted.)

52. Shortly thereafter, despite a pending recommendation for a cervical fusion extension and lumbar spine surgery, Claimant moved to Colorado Springs where he began employment with GWD Inc. d/b/a American Overhead Door as a commercial garage door technician. (Co WC No. 4-968-334, Ex. 2J).

53. Within months of beginning work for American Overhead Door, Claimant reported two successive Workers Compensation injuries on February 26, 2014, and April 22, 2014. (Ex. 2J; CO WC No. 4-948-380, Ex. 2K).

54. On February 26, 2014, Claimant asserted that he was pulling a large box from a truck when the box broke and he fell backwards on the ground. Claimant was evaluated a week later with reports of back pain. (Report of Dr. Henry Roth, Ex. 3K, p. 848).

55. Despite previous complaints of debilitating back pain noted in January of 2013, a pending recommendation for lumbar surgery, and a recent fall on his back, Claimant returned to work with American Overhead Door, when on April 22, 2014, he was ratcheting a garage door spring when the ratchet slipped out of his hands hitting his face. (E. 2K, Ex. 3K, p. 848).

56. As a result of the April 22, 2014, injury, Claimant reported neck pain and shocking sensations in his right arm. (Ex. 3K, p. 848).

57. In exploring the root of Claimant's bilateral upper extremity pain, he underwent an EMG on June 10, 2014, which found mild bi-lateral cubital tunnel and carpal tunnel syndrome, but no evidence of a right or left cervical radiculopathy. (Ex. 3K, p. 848).

58. Claimant underwent a psychological evaluation with Dr. David Hopkins on June 24, 2014, which echoed prior findings while noting that patients like Claimant with high levels of cognitive dysfunction and depression over-reported emotional symptoms and tend to respond catastrophically with small changes in symptoms. Dr. Hopkins diagnosed Claimant with concussive and post-concussive disorder, cognitive disorder, and pain disorder with psychological and physical factors. (mirroring diagnoses from prior claims), (Ex. 3K, p. 849).

59. By July 3, 2014, Claimant reported 10 of 10 pain with complaints including visual disturbances, *headaches*, confusion, *memory loss,* neck pain, *as well as numbness, tingling and weakness in his arms.* (Ex. 3K, p. 850).

60. Similar to his reports from 2010 with Dr. Cotgageorge, in August of 2014, Claimant reported reduced smell and taste. (Ex. 3K, p. 851).

61. By September of 2014, Dr. Michael Rauzzino performed a cervical fusion extension up to C4-5. (Ex. 3K, p. 851).

62. The September 2014 fusion extension appears to have done little to improve Claimant's condition, as he continued to report severe headaches, neck pain, and arm pain. (Ex. 3K, p. 851-852).

63. By January of 2015, Claimant's pain drawing had expanded indicating he was experiencing pain circumferentially in the upper torso, across his upper extremities, and from the waist down. (Ex. 3K, p. 853).

64. On February 12, 2012, Claimant underwent an IME with Dr. Albert Hattem, who found that Claimant's consistent lumbar complaints were not related to his employment, given Claimant's substantial pre-existing lower back problems documented from 2006 through 2014. (Ex. 3K, p. 853-54).

65. By March 22, 2015, Dr. Hopkins found that a neuropsychological evaluation was not warranted, given "too many intervening factors and complications." (Ex. 3K, p. 854).

66. After a revision surgery on his neck, Claimant underwent a Functional Capacity Evaluation which found again that he had permanent lifting restrictions of 5 pounds constantly, and up to 20 pounds infrequently. (Ex. 3K, p. 855-56)

67. After the FCE, Claimant was referred by his authorized treating physician for an impairment rating conducted by Dr. Henry Roth on October 29, 2015, who found:

> Mr. [Claimant] reports that pre-4/22/14 he was fully recovered from his prior conditions and was working full time without limitation or difficulty. *Mr. [Claimant] subjective report does not conform to the medical record reviewed*…
>
> It is not reasonable to anticipate that further medical attention will result in any sustained benefit in terms of comfort, function or impairment. His mental and cognitive status cannot be improved upon… His chronic pain syndrome cannot be improved upon. His behavioral aberrations are not new to the claim date of 4/22/14 …
>
> The prognosis for Mr. [Claimant] is very poor… As a result of Mr. [Claimant]' pre-existing, inherent behavioral health deficiencies, chronic inflammatory metabolic conditions, pre-existing ischemic cerebral disease, and hypersensitivity to bodily sensations, Mr. [Claimant] is not likely to ever feel well… He will continue to experience cervical, brachial, mid back, low back and extremity discomfort of waxing and waning intensity. (Ex. 3K, p. 860) (emphasis added).

68. After accounting for apportionment of two prior claims (2007 and 2008), Dr. Roth released Claimant at MMI with an additional 7% whole person rating, solely relating

to cervical surgeries, while noting that Claimants documented and ongoing pre-existing cognitive disorders, headaches, and low back pain. (Ex. 3K, 859-860).

69. After Dr. Roth's rating report, Claimant continued to treat with Dr. Rauzzino. By January 5, 2016, Claimant was reporting "worsening symptoms in his left arm," 7 of 10 pain in his "neck and down his arms bi-laterally," and "loosing strength in his hand grip." (Sky Ridge/Rauzzino Reports Ex. 3L, p. 867).

70. Three months later, in April of 2016, Claimant reported that his neck and arm symptoms were about 75% better, but that he was now complaining of a *"left swollen and painful ankle,"* which was about the same since surgery. Claimant also noted for the first time that he was complaining of a swollen left eye as a result of the revision surgery in September. (Ex. 3L, p. 869).

71. As a result of his left ankle complaints, on April 14, 2016, Claimant underwent an x-ray and ultrasound. The ultrasound was negative, while the x-rays showed arthritis of the ankle with small ossicles around the margin of the joint "probably due to an old avulsion injury," along with an osteophyte and narrowing of the interphalangeal joints. (Imaging, Ex. 3i, p. 469-471).

72. Two days after his left ankle imaging, on April 16, 2016, Dr. Rauzzino performed another surgery to extend Claimant's fusion to the C6-7 level (which was recommended by Dr. Youssef back in 2013). (Ex. 3L, p. 872-73).

73. By May 24, 2016, Claimant was reporting, "he is now doing worse with pain in his shoulders associated with numbness, tingling, and weakness. *He feels like his shoulders are coming out of their sockets."* He rated his pain as 8 of 10 with pain radiating into both arms to his hands. (Ex. 3L, p. 876) (emphasis added).

74. After Claimant had objected to Dr. Roth's rating, he was again released at MMI on September 26, 2016, and provided a 12% whole person rating. (Ex. 2K; Ex. 3L p. 878.)

75. Claimant settled his 2014 claims on November 28, 2016. (Ex. 2K).

76. The day after the settlement order issued on his 2014 claims, on November 29, 2016, Claimant returned to Dr. Rauzzino whose report states, "He continues to have sharp, stabbing aching throbbing pain in the back of his neck. It is constant and going 9/10. It goes all the way down his hands into his fingers bilaterally. He feels that he has had this for months and it is not getting any better." "He feels he cannot work due to this." Dr. Rauzzino referred Claimant for an EMG and for evaluation with a physiatrist. (Ex. 3L, p. 878-879).

77. Claimant testified at hearing that he did not receive any further treatment or evaluation for neck or bilateral arm pain between Dr. Rauzzino's report of November 29, 2016, and the alleged injury which forms the basis of this claim.

78. Sometime after November 29, 2016, Claimant underwent a lumbar fusion surgery. (PA Mychael Scott Letter, Cl. Ex. 6).

Current Claim

79. Despite claiming 9 of 10 pain for months preceding his release at MMI in November of 2016, indicating that he could not work due to the pain, (and admittedly receiving no treatment for claimed neck and arm pain), Claimant returned to work, when he began his employment with A1 Garage Door Specialists in August of 2020.

80. Ryan M[Redacted], the owner of Respondent Employer, testified at hearing that he specifically asked Claimant if he would be able to perform the functions of the job, which included heavy lifting and frequent use of ladders. Despite multiple physicians dating back decades stating that Claimant was restricted in lifting to 5 pounds consistently, with no use of ladders, Claimant did not indicate any physical restrictions limiting his ability to work.

81. After working as a garage door technician for six weeks, Claimant now alleges that he was injured on the job with Respondent Employer on September 21, 2020. (Online Claim Report, Cl. Ex. 2).

82. Claimant was assigned to install a new garage door and side mount opener at Lenz Electric, located at 3514 E. St. Vrain St, Unit A, Colorado Springs, Colorado. (Job Ticket, Ex. 4).

Jonathan G[Redacted] Testifies at Hearing

83. Claimant's co-worker, Jonathan G[Redacted], a current firefighter in the Colorado Springs area and a trained Emergency Medical Technician, testified at the hearing.

84. Mr. G[Redacted] testified that as a firefighter, he is trained in emergency medical response, and further that he was trained in combat casualty care as a firefighter in the national guard. Mr. G[Redacted] clarified that he was trained as an EMT prior to working at A1 Garage Door Specialists, but that his license had lapsed while in the military.

85. Mr. G[Redacted] noted that he had a conversation with Claimant on the date of the alleged injury in which Claimant stated to him that he had sought additional insurance coverage prior to his alleged accident. Mr. G[Redacted] found the discussion of insurance strange.

86. Claimant had requested assistance on the job, and Mr. G[Redacted] arrived at the jobsite after completing an earlier job. Mr. G[Redacted] noted that when he arrived, Claimant had not set up the worksite and hadn't unloaded anything.

87. Claimant stated to Mr. G[Redacted] that they were to remove the existing overhead opener. Mr. G[Redacted] then proceeded to set up a fiberglass step-ladder, with aluminum steps and rubber feet, to access the existing overhead garage door opener.

88. Upon climbing the ladder and removing the metal panel to access the electrical connections to the opener, Mr. G[Redacted] found that the opener was directly wired. Given his inexperience with direct wiring, he stated that he was uncomfortable disconnecting the existing overhead opener.

89. Mr. G[Redacted] testified that despite Claimant's stated ability to test the connection with a volt-o-meter, Claimant ascended the ladder without testing the existing motor's electrical connection.

90. Mr. G[Redacted] noted that he had not received any electrical shock when touching the metal opener, or when opening the access panel to the motor's electrical connections.

91. [The existing opener was a metal-encased garage door motor. The motor specifically states that it is a 1/3 horsepower motor operated by a 115 volt connection]. (Ex. 4).

92. After Mr. G[Redacted] came off the ladder, Claimant climbed the ladder to complete the disconnection of the overhead door. Claimant was wearing gloves, which he described as "Gorilla Gloves," which were noted to be cloth gloves that were rubberized from the fingers to the palms. Claimant was also wearing rubber-soled work boots at the time of the alleged accident. (See also Claimant's Prehearing Position Statement p. 3).

93. As Mr. G[Redacted] had his back turned to walk to get some water, he heard Claimant exclaim "Oh, fuck, I think I got electrocuted," which caused him to turn around, where he saw Claimant draped over the top of the ladder with his chest and abdomen parallel with the rungs of the ladder.

94. Mr. G[Redacted] testified that after Claimant stated he was 'electrocuted', he was still able to speak coherently, and was able to climb down the ladder. Mr. G[Redacted] noted, that as a trained EMT, Claimant was not exhibiting any signs of a traumatic high voltage electrocution. Although he did not take Claimant's vitals, Claimant did not lose consciousness and was able to clearly speak and walk.

95. Mr. G[Redacted] did not hear any popping, cracking or electrical discharge; did not see any arcing, lightening or smoke; and did not smell any acrid or metallic scent of electricity.

96. Mr. G[Redacted] also noted that Claimant's symptoms appeared to dramatically change as soon as an ambulance arrived.

Claimant Testifies at Hearing

97. Claimant offered photographs of the location of the alleged injury, [marked and admitted generally as C-1] and stated that they had been taken immediately ***prior*** to the occurrence, because his boss wanted him to take before-and-after photos of each job. [The ALJ notes that this claim was not corroborated by the owner of A1 Garage Door].

98. Claimant testified that he was required to stand on the absolute top rung of the ladder in order to access the overhead motor. Despite this allegation, Claimant testified that after this alleged electric shock, he found himself 'waking up', and draped (presumably at his midsection) over the top rung of the ladder.

99. Claimant asserted that while wearing rubberized gloves, before he had even finished unscrewing a single wire cap, he received a substantial electrical shock with lighting going off in front of his face. Claimant testified that he smelled burning hair and skin at that time. He theorized that the electricity went 'up his left ankle'.

100. Claimant estimated that he had worked for Employer for approximately six months. Claimant was then asked about a number of Facebook postings [marked generally as Respondent's Ex. 5, and none of which Claimant denied posting] depicting him narrating fishing trips in the weeks and months following his alleged injury. He was further asked about his postings regarding panning for gold in the mountains during this time frame, and operating a 'sluice box' he had purchased and set up at his home to separate the gold.

101. Claimant was evasive in his answers to these questions, each time minimizing the extent of his activities [despite none of his postings making any note of any limitations he allegedly suffered from]. Claimant claimed he was unable to even operate the 'sluice box' he had set up to separate the gold; rather, it was just set up 'to see how it worked'. The ALJ finds Claimant's explanations and rationalizations to be duplicitous.

102. Despite complaints on the date of injury limited to his right arm, and left ankle, Claimant now asserts that the alleged incident has caused issues including but not limited to, dementia, problems swallowing, low back pain, seizures, facial tremors, pulmonary hypertension, breathing problems, and cardiac problems.

Claimant is transported by Ambulance

103. Claimant insisted that he be transported by ambulance. After Claimant was transported, Mr. M[Redacted] and Mr. G[Redacted] both witnessed the electrical line being tested at standard residential socket level of 110-120 volts. They also noted that the breaker to which the overhead door was attached had not been tripped.

104. Mr. M[Redacted] testified that when he completed the disconnection of the overhead door, there were no wires exposed inside the electrical panel of the motor.

105. Claimant arrived by ambulance at Memorial Hospital in Colorado Springs where he was evaluated. While in triage, he complained of right arm pain at 10 out of 10, asserted that he was starting to get a migraine, and informed the triage nurse that he was shocked by an estimated *460 volts of electricity*. (UC Health Records, Ex. 3J, p. 503).

106. Despite Claimant's allegation of a '460 volt' shock, the triage nurse examined Claimant's skin, "thoroughly", *finding no sign of an exit wound or thermal burn*. (Ex.

3J, p. 496). Claimant reported, “He feels like his shoulder is dislocated.” (Ex. 3J, p. 497). Claimant reported that he believed he lost consciousness. *Id.*

107. Further, when reporting diffuse right arm pain up in the shoulder, Claimant denied any significant past medical history. *Id.*

108. Claimant was evaluated by Dr. Jason Murphy, who stated:

> Concern that patient is large voltage may have actually caused some significant internal damage that we cannot evaluate he could be at risk for compartment syndrome especially with how much pain he is having there is probably also a muscle spasm component. We had the patient evaluated by the trauma surgeon who will take him to their service overnight for evaluation and monitoring. *His EKG did not show any acute abnormalities on my interpretation. Id* at 502. (emphasis added).

109. Despite Claimant’s reports of a high voltage injury, Dr. Murphy noted, *“No significant external injury appreciated entire length of his right arm right shoulder and bilateral lower extremities or in the rest of his body. Heart exam is unremarkable.”* Given Claimant’s subjective pain complaints, and (highly exaggerated) allegations of a high voltage 460 volt electrocution, Claimant was nonetheless admitted for observation. *Id.* (emphasis added).

110. When subsequently interviewed by Dr. Brian Leininger in the Memorial Hospital emergency department, Claimant again repeated that he “touched a ‘live’ 460 V motor while up on a ladder,” and further stated that he briefly lost consciousness. Despite these allegations, Dr. Leininger found that *Claimant’s hand “does not have any cutaneous lesions indicative of surface burns.”* Though Claimant’s left ankle was swollen, imaging only revealed a “calcaneus deformity which appears *chronic* in nature.” *EKG was found to be normal* with no acute myocardial ischemia and no arrhythmias. *Id* at 554. (emphasis added).

111. After an overnight stay, and re-evaluation in the early morning of September 22, 2020, Claimant was discharged, noting sensory intact, good pulses, soft compartments, normal electrolytes, decreased CPK levels, and a normal initial EKG. Given these findings, the burn unit in Denver indicated that transfer was unnecessary. *Id* at 570.

112. Before being discharged, Claimant underwent a cognitive evaluation which found, mild cognitive deficits. At the time Claimant reported new onset of word finding difficulties and short term memory impairments. *Id.*

113. [Contrary to Claimant’s reports to the treating provider on September 22, 2020, Claimant had been diagnosed with substantial ongoing cognitive defects well before his alleged electrical injury].

Claimant is discharged from Hospital, then Returns

114. Eight days later, Claimant returned to the hospital, now complaining of right shoulder pain, headaches and dizziness. He denied neck pain and back pain. Claimant underwent a head and neck CT scan, which did not demonstrate significant or acute findings. (Ex. 3J, p. 738).

115. After this hospital discharge, Claimant saw both his primary care physician, and an Authorized Treating Physician (which Respondents approved, despite a pending Notice of Contest).

116. Claimant's November 6, 2020, report from his NP Coram at his primary care physician' s office states, "He has been following up with neurology for multiple issues with sensation, pain, and weakness… the *doctors 'think he may have MS,"* they have multiple concerns that appear to have developed *within the last year* including balance, memory, and general health." (Ex. 3M, p. 882) (emphasis added).

117. In accordance with Respondents approval of an ATP, Claimant reported to Dr. McNulty with Optum on November 19, 2020. At his initial telehealth appointment, Claimant reported that he was electrocuted by *240 volts*, and had experienced neuropathy in his right arm and left foot since the date of injury. Claimant was, [for the first-time] reporting, "3 days of *right eye pain* and blurry vision and visual disturbances."

118. Despite the appointment being a telehealth visit, Dr. McNulty concluded "visual abnormalities supposedly related to that electrocution, extensive degree of muscle and nerve damage in his right arm through is left leg which was the exit point." (Ex. 3N, p. 891). This conclusion appears solely based on Claimant's subjective reports and inaccurate recitation.

119. In addition to reporting new right eye pain on November 19, 2020, Claimant also reported new symptoms of dysphagia (problems swallowing). (Ex. 3N, p. 892).

Claimant Returns to the Emergency Room

120. On November 20, 2020, Claimant returned to the emergency room complaining of right eye pain and vision problems, worsening over the last 4 days. Despite any notation or allegation of such pain in records from the date of accident, Claimant reported that this symptom had been ongoing since "electrocution over a month ago." (Ex. 3J, 792).

121. On January 17, 2021, Claimant appeared for a follow up telehealth visit at which time Dr. McNulty again found, "He is experienced consistent headaches, dysphagia, neuropathic pain at the entry and exit points of his electrocution." (Ex. 3N, p. 894). Again, Dr. McNulty's findings are based solely on Claimant's subjective reports, as the

record indicates no physical exam was done, and he fails to cite hospital records indicating no evidence of an entry or exit wound.

IME with Dr. Brunworth

122. On February 4, 2021, Claimant underwent an Independent Medical Examination with Dr. Gretchen Brunworth. Dr. Brunworth performed a physical examination of the Claimant, and also had access to Claimant's available and disclosed medical history. Claimant's reported history to Dr. Brunworth included only two prior injuries (2009 and 2013) with a full recovery and no restrictions from both.

123. During the Claimant's *History,* as he related to Dr. Brunworth, Claimant stated:

> ….He grabbed onto a nut with his right hand and undid the cover. *His hand then got stuck to the cover.* He reports that he was being electrocuted. He could not move his hand. Fortunately, he fell over the ladder and did not fall off the ladder. *When he came to, he could not speak.* Eventually he was able to slowly climb down the ladder and ask for help…..*He could not think or speak….* He reports that he was on the trauma burn intensive care unit for three days….*He had a burn on his right foreman(sic) and wrist* in a lot of pain in his left foot. After treating in the ICU *it was recommended that he go to the Denver Health Burn Unit.* Unfortunately, he never went. He was ultimately discharged because he had no insurance. (Ex. O, p. 897) (emphasis added).

124. During Claimant's *Current Complaints*, he reported constant bilateral neck pain, as though his neck were *'fractured'* again. His muscles felt 'weak and broken', with burning, numbness and tingling in both arms. He reported 'pounding headaches', and 'it feels like his right eye is being pushed out', with occasional blurred vision. "On a pain scale of zero to 10 with zero being no pain and 10 being pains so severe *one would faint*, the patient reports that at its worst, his pain is a level of 10, at its best it is a 7, and *today it is a 10*. *Id* (emphasis added).

125. Under *Occupational History*, Dr. Brunworth noted: *"He has worked as a garage door specialist for 28 years.*" *Id* at 898.

126. In her *Assessment*, Dr. Brunworth concluded: "There are multiple inconsistencies between the patient's report and the records. There is no objective evidence that the patient sustained an electrocution injury significant enough to cause all his symptoms." *Id* at 913.

127. [At hearing, and in his reports to Dr. Brunworth, Claimant continued to assert that he had burn wounds on his right arm. As noted in Dr. Brunworth's report, this is inconsistent with medical records].

Dr. Brunworth Testifies at Hearing

128. Dr. Brunworth testified at hearing and was admitted as an expert with specialties in physical medicine and rehabilitation, over Claimant's repeated objections.

129. Dr. Brunworth testified that pursuant to her review of available medical records, and physical examination of Claimant, that there was no objective evidence that he sustained an injury attributable to an electrical event. Dr. Brunworth noted that all objective testing including physical examination, EKG, imaging and bloodwork was completed.

130. Dr. Brunworth testified that all of Claimant's symptoms of which he was currently complaining, were found throughout available medical records from his prior medical encounters. Dr. Brunworth concluded that Claimant did not suffer a compensable injury requiring care.

131. Over Respondents' objections, the ALJ entered a November 3, 2021, letter from PA Mychael Scott, which states: "*per Mr. [Claimant]'s report* he was completely asymptomatic prior to this electrocution injury." The letter then notes that an MRI found severe stenosis at the L3-4 level, for which a subsequent surgery was performed. (CL. Ex. 6).

132. In differentiating the stenosis finding, PA Scott notes that an EMG was performed which demonstrated evidence of a distal injury to the left sciatic nerve, then in quotes noted that such finding, "*could conceivably* be due to an electric injury." *Id.* (emphasis added).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

B. In accordance with *Section 8-43-215, C.R.S.,* this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. In deciding whether a party has met their burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensecki v. ICAO*, 183 P.3d 684 (Colo.App. *2008).* In short, the ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo.App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo.App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo.App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

D. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). The ALJ does adopt the findings and conclusions of Dr. Brunworth as being accurate. She made a thorough medical records review, took a (highly suspect, but accurately documented) medical history from Claimant, and drew an appropriate conclusion that there is no objective or reliable medical evidence to support Claimant's central claim that he suffered an electrocution injury.

E. The ALJ finds that Jonathan G[Redacted] testified both credibly and knowledgeably. Mr. G[Redacted] has no axe to grind with anyone. And by happenstance, he has a background in emergency medical response; thus was better equipped than the average individual to observe and evaluate a person purporting to be in distress. He also made accurate observations about Claimant's unusual statement before the alleged incident that he had taken out extra insurance, and that Claimant was indeed wearing rubber tipped gloves, rubber soled boots, and worked on a fiberglass ladder with rubber feet. Further, the ALJ finds him credible in recounting his own, non-dramatic, experience on the ladder, the lack of any signs of an electrical accident in the workplace, and the lack of apparent symptoms that Claimant was exhibiting-until the ambulance arrived. The ALJ also finds Mr. M[Redacted]'s testimony, brief though it was, to be credible and accurate in every respect.

F. As will be discussed in more detail, infra, Claimant has displayed a lengthy history of not merely extreme symptom magnification, but symptom fabrication. This pattern has carried into the instant case with equal mendacity. The ALJ finds nothing that Claimant has said to any of his numerous medical providers through the years to be reliable or truthful. Nothing that Claimant testified to this tribunal was truthful, reliable, or supportable by any extrinsic evidence. The most charitable interpretation of Claimant's gross exaggerations and outright fabrications is that he suffers from a severe somatoform disorder. The more likely explanation is that Claimant has found that Workers Compensation can be lucrative.

Compensability, Generally

F According to C.R.S. § 8-43-201, "a claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer, and a workers' compensation case shall be decided on its merits." *Also see Qual-Med, Inc. v. Indus. Claim Appeals Off.,* 961 P.2d 590, 592 (Colo. App. 1998) ("The Claimant has the burden of proving an entitlement to benefits by a preponderance of the evidence."); *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915, 918 (Colo. App. 1993) ("The burden is on the claimant to prove his entitlement to benefits by a preponderance of the evidence.").

G. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.,*104 P.3d 273, 275 (Colo. App. 2004).

H. For an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Off.,* 919 P.2d 207, 210, 210 (Colo. 1996); *Schepker v. Daewoo North*, W.C. No. 4-528-434 (ICAO April 22, 2003). An injury "arises out of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions as part of the employee's services to the employer. *See Schepker, supra.* "In the course of" employment refers to the time, place, and circumstances of the injury. *Id.* There is no presumption that an injury arises out of employment merely because an unexplained injury occurs during the course of employment. *Finn v. Indus. Comm'n,* 165 Colo. 106, 108-09, 4437 P.2d 542 (1968).

I, Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1)(c) C.R.S.*;* *Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for the determination by the ALJ. *Faulkner,* 12 P.3d at 846.

J. Colorado's Workers' Compensation Act creates a distinction between the terms "accident" and "injury". The term "accident" refers to an "unexpected, unusual, or undesigned occurrence." *See* §8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident. In other words, an "accident" is the cause and an "injury" is the result. *City of Boulder v. Payne,* 426 P.2 194 (1967). No benefits flow to the victim of an industrial accident unless the accident results in a compensable “injury.” A compensable injury is one which requires medical treatment or causes a disability.

K. It is the claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between her employment and her injuries. An ALJ might reasonably conclude the evidence is so conflicting and unreliable that the claimant has failed to meet the burden of proof with respect to causation. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186, 191 (Colo. App. 2002) (weight to be accorded evidence on question of causation is issue of fact for ALJ). *See also, In the Matter of the Claim of Tammy Manzanares, Claimant*, W. C. Nos. 4-517-883 and 4-614-430, 2005 WL 1031384 (Colo. Ind. Cl. App. Off. Apr. 25, 2005).

Was there an Electrical ‘Accident’ of any sort?

L. The only corroboration that Claimant *could have possibly* been shocked, however briefly, was that the opener he was going to take down was direct wired. However, Mr. G[Redacted] was not shocked when he took a look by opening the access panel. Nor was Mr. M[Redacted] when he looked after the fact. Mr. G[Redacted] heard nothing to indicate any sort of event occurred-other than Claimant’s ‘exclamation’. The breaker supporting this connection was not tripped. There were no exposed wires upon inspection. Clamant was wearing the proper protective equipment, standing on a fiberglass ladder with rubber feet. *The ALJ finds and concludes that no such electrical accident, however brief, occurred at all-regardless of the voltage.*

Did Claimant Suffer an ‘Injury’ from any Electrical Accident?

M. The ALJ finds that he did not. Even assuming, arguendo (which the ALJ emphatically does *not* in this instance) that Claimant suffered a momentary shock while grabbing one of the leads, it was plainly fed with a 115 volt connection-which is ordinary household current. Claimant is experienced in installing garage doors (although his claim to Dr. Brunworth of 28 years in the business is demonstrably false). He knew full well what he was working on. It was right in front of him. Yet, after the fact, he repeated his fabricated claim that he endured 460 volts. He had to make that number up, in order to support the symptoms he was claiming. [The ALJ notes that 115 multiplied by 4 comes out to the nice, round, fictitious number of 460]. He later lowered this claim to 240 volts to Dr. McNulty, which was still a knowing falsehood.

Did Claimant ‘Stage’ this entire event before the fact?

N. The ALJ concludes that it is entirely plausible that he did so, as opposed to just opportunistically making it all up as he went along. Claimant made the highly unusual statement to Mr. G[Redacted] *before the fact* about taking extra insurance. Claimant took photos of the alleged injury location *before the fact*, citing a reason unsupported by the record. Claimant waited until he had a ‘witness’ to this incident (who didn’t turn out so well for him at hearing) before ascending the ladder, then waited until Mr. G[Redacted]’s back was turned, before issuing his ‘exclamation’. He then conveniently ‘draped’ himself over the top rung of the ladder-instead of falling off, as one would expect an unconscious person to do. Falling of the ladder might have actually hurt. Given Claimant's experience, he knew to use a volt meter to test to see if the unit were still 'hot'. He did not do so. Before Mr. G[Redacted] arrived to assist, there is ample reason to believe Claimant himself could have made sure the unit was still 'hot' (with 115 only, as he well knew) before the arrival of his 'witness'. And, of course, his grossly exaggerated symptoms upon the arrival of the (insisted-upon) ambulance are suggestive of pre-planning.

Were any of Claimant's Alleged Symptoms Even Real?

O. Assuming, arguendo (which the ALJ emphatically does *not* in this case), that Claimant were sincere (due to some somatoform disorder) in his symptomatology, there is zero objective evidence in support thereof. In fact, the available objective evidence contradicts Claimant's claims. His EKG was normal. His bloodwork was normal. His physical exam was normal. While rarely oiccurring, range of motion deficits can be faked. Subjective complaints of pain, headaches, and visual disturbances can be faked-and they were in this case-repeatedly. Claimant was never ***treated*** for an electrical injury during his stay at Memorial. Instead, he underwent extensive *testing and evaluation,* which always came up zeros. When there was no actual *treatment* to offer him, he was appropriately discharged. Then, Claimant went back to the well again, with new 'symptoms', which numerous medical providers dutifully investigated, lest they be accused of malpractice.

P. Be it noted that to the extent *any* medical provider (such as Dr. McNulty, or PA Scott) stated *any potential* support at all for an electrical injury, said providers were relying *solely* upon Claimant's uncorroborated complaints to them. And, of course, being in the business of helping persons with their medical complaints, their preliminary reliance was not unreasonable. Physicians initially take things at face value, as they trust their patients will act in their own best interests in providing good medical histories. Then, they test and investigate. In this case, such testing and investigation was done, ad nauseam, by others. To the extent that any medical reports could be interpreted in favor of Claimant's claim, the ALJ finds that such interpretations are vastly outweighed by the credible and reliable evidence in contradiction thereof.

Q. Unencumbered by a conscience, Claimant milked the entire system, until the IME report put a stop to it. His constellation of reported complaints (which the ALJ finds were knowingly fabricated in this case) resemble, to a remarkable degree, symptoms he has complained of in the past- and for which sometimes he was handsomely rewarded by the Workers Compensation systems in at least two states. While outright Workers Compensation fraud is a comparatively rare occurrence, the ALJ finds this one to be precisely the case.

Medical Benefits

R. Claimant did not suffer a compensable injury. His claim for any medical benefits is denied and dismissed.

ORDER

It is therefore Ordered that:

1. Claimant did not suffer a compensable work injury. His claim for Workers Compensation benefits of any sort, including medical benefits, is denied and dismissed.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. *In addition, in order to best assure prompt processing of your Petition, it is **highly recommended** that you send a copy of your Petition to Review to the Colorado Springs OAC via email at oac-csp@state.co.us.*

DATED: December 13, 2021

s/ William G. Edie

Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

ISSUES

Has the respondent overcome, by clear and convincing evidence, the opinion of the Division sponsored independent medical examination (DIME) physician that the claimant's lumbar spine was injured as part of the admitted July 1, 2017 work injury, resulting in an impairment rating for the lumbar spine?

FINDINGS OF FACT

1. The claimant suffered an injury at work on July 1, 2017. The injury occurred when the claimant was attempting to push a bookshelf with her left leg and felt a pop in her left hip. During this claim, the claimant's authorized treating physician (ATP) has been Dr. Vanessa McClellan with Western Valley Family Practice.

2. The claimant underwent a magnetic resonance image (MRI) arthrogram of her left hip on August 1, 2017. The MRI showed an acetabular labral tear involving the superior and posterior acetabulum

3. On October 5, 2017, Dr. Peter Scheffel performed arthroscopic left hip surgery. The procedure included arthroscopic synovectomy, minimal labral debridement, and iliopsoas tenotomy.

4. The ALJ notes that throughout this time period, the claimant completed pain diagrams when seen by Dr. McClellan. The ALJ further notes that the notations/marks made on these pain diagrams are substantially consistent before and after the hip surgery.

5. On March 22, 2018, the claimant returned to Dr. Scheffel. At that time, the claimant reported ongoing left hip pain, with low back pain, and left foot numbness. Dr. Schedffel recommended an evaluation of the claimant's spine.

6. On April 12, 2018, the claimant was seen by Dr. McClellan. At that time, Dr. McClellan noted that it was Dr. Scheffel's opinion that the claimant's pain was coming from her back. Dr. McClellan also noted that she agreed with Dr. Scheffel's referral to Dr. Larry Tice. In that same medical record, it was noted that the claimant was eight weeks pregnant.

7. On April 23, 2018, the claimant was seen by Dr. Tice. At that time, Dr. Tice referenced the claimant's hip injury. In addition, he noted that the claimant's pain could be coming from the sacroiliac (SI) joint. As a result, he recommended an MRI of the claimant's pelvis. In that same medical record, it is noted that the claimant did not experience back pain with a prior pregnancy.

8. On June 13, 2018, the claimant attended an independent medical examination (IME) with Dr. Tashof Bernton. In connection with the IME, Dr. Bernton reviewed the claimant's medical records, obtained a history from the claimant, and performed a physical examination. In his IME report, Dr. Bernton noted that the claimant's mechanism of injury would be consistent with a labral tear. However, he also noted that during the arthroscopic procedure, the tear was deemed minimal. Dr. Berton recommended that the claimant undergo a repeat left hip MRI and a rheumatologic evaluation. With regard to the claimant's low back symptoms, Dr. Barton opined that these were related to the claimant's pregnancy. Therefore, he recommended that any treatment or evaluation of the claimant's SI joint and back symptoms should be pursued outside the workers' compensation claim.

9. On July 5, 2018, Dr. McClellan noted that the claimant's low back pain existed prior to the claimant's pregnancy. Dr. McClellan noted her disagreement with Dr. Bernton and stated that it is her opinion that the claimant's low back pain is not related to the claimant's pregnancy. Dr. McClellan reiterated her opinion in a September 4, 2018 medical record in which she stated "the low back pain was present long before [the claimant] became pregnant".

10. On June 19, 2018, the claimant was seen by Dr. Scheffel. At that time, the claimant reported that the pain in her groin and intraarticular hip joint had improved. However, she had increased pain along her trochanteric iliotibial band. Dr. Scheffel recommended evaluation of the claimant's SI joint, but no further treatment for her hip.

11. Following the birth of her child, on March 7, 2019, the claimant underwent the MRI previously recommended by Dr. Tice. The MRI showed degenerative disc disease at L5-S1 level with a disc bulge resulting in right lateral recess stenosis and mild right neural foraminal stenosis.

12. On January 22, 2019, the claimant attended a second IME with Dr. Bernton. At that time, Dr. Bernton noted that the claimant was experiencing "pain in the left SI [joint] with both piriformis and Patrick's testing."

13. On March 27, 2019, the claimant returned to Dr. McClellan. At that time, Dr. McClellan reviewed the recent MRI results and noted that these results did not correlate with the claimant's left low back symptoms. Dr. McClellan opined that the claimant's left hip was likely the source of the claimant's ongoing pain. As a result, she recommended a repeat MRI of the claimant's left hip.

14. On March 29, 2019, the claimant underwent the recommended left hip MRI. The MRI showed no evidence of a labral tear and no clear etiology of the claimant's left sided symptoms.

15. On May 6, 2019, the claimant returned to Dr. McClellan. On that date, Dr. McClellan noted that the claimant had ongoing left sided hip and low back pain. Dr. McClellan noted that the claimant "continues to struggle with this pain that happened right after the original injury."

16. On September 25, 2019, Dr. McClellan determined that the claimant had reached maximum medical improvement (MMI). At that time, Dr. McClellan noted that the claimant would need an impairment rating. In addition, Dr. McClellan recommended maintenance medical treatment of physical therapy and dry needling.

17. On October 23, 2019, the claimant was seen by Dr. Ellen Price for an impairment rating. On that date, Dr. Price noted that the claimant “started having back pain” after she became pregnant. Dr. Price assessed a 14 percent impairment rating for the claimant’s left hip. Dr. Price did not assess an impairment for the claimant’s back.

18. On March 24, 2020, the claimant attended a telehealth appointment with Dr. Price. On that date, Dr. Price noted that it was likely that the claimant’s low back complaints were work related. Dr. Price also noted that the claimant had undergone physical therapy and dry needling for her low back. Dr. Price determined that the claimant would return to her for range of motion measurements of the claimant’s low back to assess permanent impairment.

19. On April 7, 2020, the parties went to hearing before ALJ Keith Mottram on the issue of converting the scheduled left lower extremity impairment to a whole person impairment.

20. On April 8, 2020, the claimant returned to Dr. Price. At that time, Dr. Price assessed permanent impairment for the claimant’s lumbar spine of 10 percent. She then added this to the lower extremity rating, for a total whole person impairment rating of 15 percent.

21. On April 30, 2020, ALJ Mottram issued Findings of Fact, Conclusions of Law and Order[1] in which he found that conversion of the claimant’s left lower extremity to a whole person impairment was appropriate.

22. On May 8, 2020, the respondent filed a revised Final Admission of Liability (FAL) to reflect ALJ Mottram’s order regarding conversion of the scheduled left lower extremity impairment to a whole person impairment.

23. On September 8, 2020, the parties attended a hearing before ALJ Mottram on the issue of reopening this claim. At the outset of the hearing, the parties stipulated that if the claimant was successful in reopening her claim, the respondent would have the opportunity to request a Division sponsored independent medical examination (DIME).

24. At the September 8, 2020 hearing, the claimant testified that the October 25, 2017 surgery improved her hip joint pain, but that the pain across the back part of her body remained.

25. In an order dated October 19, 2020 (and issued October 20, 2020), ALJ Mottram granted the claimant’s petition to reopen the claim. In his order, ALJ Mottram

[1] A Corrected Order was issued by ALJ Mottram on May 13, 2020 to address clerical errors in the April 30, 2020 order. The substance of the order was unchanged regarding conversion.

found that Dr. Price made a mistake when she failed to include an impairment rating for the claimant’s lumbar spine on October 23, 2019.

26. Thereafter, the respondent filed a Petition to Review (PTR) and the matter proceeded to the Industrial Claim Appeals Office (ICAO). In a Final Order dated April 1, 2021, the ICAO dismissed the respondent’s PTR, without prejudice, for lack of a final order. The ICAO found that ALJ Mottram’s order only reopened the claimant’s case, and did not order any specific benefits. As a result, the ICAO determined that the order was not final and ICAO could not review it.

27. Subsequently, the respondent requested a DIME, and on June 4, 2021, the claimant attended a DIME with Dr. Thomas Moore. In connection with the DIME, Dr. Moore reviewed the claimant’s medical records, obtained a history from the claimant, and performed a physical examination. In his DIME report, Dr. Moore noted that the body parts involved in this claim are the claimant’s left hip and lumbar spine. Dr. Moore also noted the claimant’s report that she had ongoing left hip pain and pain in her left lower spine. In his report, Dr. Moore further noted that the claimant pointed to her SI joint when reporting her lower back symptoms. Dr. Moore identified the claimant’s diagnoses as left hip labral pathology, chronic hip pain, and chronic low back pain. Dr. Moore agreed that the claimant reached MMI on September 25, 2019.

28. Dr. Moore specifically noted:

> Although there was no identified specific injury to her lumbar spine from her on-the-job occurrence, Dr. Tice related her symptoms could be related to her lumbar spine and therefore ordered the MRI on 3/7/2019. If [the claimant’s] lumbar spine is included as part of her job related injury then the permanent impairment determined is related to her on-the-job injury.

29. Dr. Moore performed range of motion testing on the claimant’s left hip, and assessed a scheduled impairment of six percent. In addition, he assigned a five percent whole person impairment for the claimant’s lumbar spine for a specific disorder and a six percent whole person impairment for loss of lumbar spine range of motion. This resulted in a permanent impairment rating of 13 percent, whole person.

30. At the request of the respondent, Dr. Bernton reviewed additional records in the claimant’s case. This review included Dr. Moore’s DIME report. In his September 23, 2021 report, Dr. Bernton opined that Dr. Price’s assessment of an impairment rating for the claimant’s lumbar spine “was based on a factual error”. Specifically, it is Dr. Bernton’s opinion that Dr. Price did not independently review the claimant’s medical records to determine that her low back complaints existed since the beginning of the claim. Dr. Bernton further opined that Dr. Moore erred when he included the claimant’s lumbar spine in the impairment rating. Dr. Bernton noted that Dr. Moore used a conditional statement in the DIME report regarding the relatedness of the claimant’s lumbar spine to the work injury. Dr. Bernton stated that this statement fails to rise to the level of a reasonable medical probability.

31. Dr. Bernton's testimony was consistent with his written reports. Dr. Bernton testified that Dr. Moore erred when he included the claimant's low back as a related body part. Dr. Bernton further testified that the claimant developed back symptoms after she became pregnant. Therefore, it remains his opinion that the claimant's low back symptoms are not related to the work injury, but rather caused by her pregnancy.

32. The ALJ credits the medical records and finds that the claimant was experiencing low back pain from the time of her injury. Specifically, the ALJ credits the May 6, 2019 medical record in which Dr. McClellan noted that the claimant's left hip and low back pain "happened right after the original injury." The ALJ also specifically credits the pain diagrams completed by the claimant throughout this claim that consistently demonstrate the existence of both hip and low back symptoms. The ALJ further credits Dr. Moore's statement that if the claimant injured her low back in the work injury, then the permanent impairment to her low back is related to the work injury. The ALJ also finds that the claimant's low back was appropriately included in the impairment ratings assessed by Drs. Price and Moore. The ALJ further finds that the difference between the opinion of Dr. Bernton and that of Drs. Price and Moore is merely a difference of opinion. Based upon all of the foregoing findings, the ALJ finds that the respondent has failed to overcome the opinion of the DIME physician that the claimant's lumbar spine was injured as part of the admitted July 1, 2017 work injury, resulting in an impairment rating for the lumbar spine.

CONCLUSIONS OF LAW

1. The purpose of the Workers' Compensation Act of Colorado is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probable than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

2. The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and action; the motives of the witness; whether the testimony has been contradicted; and bias,

prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16.

4. Section 8-42-107(8)(b)(III) and (c), C.R.S. provides that the DIME physician's finding of MMI and permanent medical impairment is binding unless overcome by clear and convincing evidence. Clear and convincing evidence is highly probable and free from substantial doubt, and the party challenging the DIME physician's finding must produce evidence showing it is highly probable that the DIME physician is incorrect. *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995). A mere difference of opinion between physicians fails to constitute error. See *Gonzales v. Browning Ferris Industries of Colorado*, W.C. No. 4-350-356 (March 22, 2000). The ALJ may consider a variety of factors in determining whether a DIME physician erred in his opinions including whether the DIME appropriately utilized the Medical Treatment Guidelines and the AMA Guides in his opinions.

5. As found, the respondent has failed to overcome, by clear and convincing evidence, the opinion of the DIME physician that the claimant's lumbar spine was injured as part of the admitted July 1, 2017 work injury, resulting in an impairment rating for the lumbar spine. As found, the medical records and the opinions of Drs. Price and Moore are credible and persuasive.

ORDER

It is therefore ordered:

1. The respondent's request to overcome the opinion of the DIME physician is denied and dismissed.

2. All matters not determined here are reserved for future determination.

Dated this 14th day of December 2021.

Cassandra M. Sidanycz
Administrative Law Judge
Office of Administrative Courts

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. For statutory reference, see section 8-43-301(2), C.R.S. and OACRP 26. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms.

You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: **oac-ptr@state.co.us**. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts.

In addition, it is recommended that you send an additional copy of your Petition to Review to the Grand Junction OAC via email at oac-gjt@state.co.us.

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable right shoulder injury during the course and scope of his employment with Employer on June 5, 2020.

2. Whether Claimant has established by a preponderance of the evidence that the right shoulder surgery recommended and performed by Authorized Treating Physician (ATP) Adam Joseph Seidl, M.D. at the Steadman Hawkins Clinic on August 19, 2021 was reasonable, necessary and causally related to his June 5, 2020 injury.

3. Whether Claimant has proven by a preponderance of the evidence that he is entitled to receive Temporary Total Disability (TTD) benefits for the period August 19, 2021 until terminated by statute.

4. A determination of Claimant's Average Weekly Wage (AWW).

FINDINGS OF FACT

1. On February 24, 2020 Claimant began working for Employer as a firefighter. Prior to commencing work, Claimant underwent a physical examination and was cleared for full-duty employment. He had previously retired from the Denver Fire Department after 25 years of service.

2. In June 2020 Claimant was a recruit in the Academy for the [Redacted] (District). Lieutenant Brian D[Redacted] was a recruit training officer for the District. He testified that the Academy was open from February 2020 through early June 2020. There were two locations for the Academy. One was the Joint Services Facility (JSF) and the other was the Troy Jackson Training Center (TJTC). Claimant was assigned to the JSF.

3. Claimant testified that on June 5, 2020, as part of his training at the Academy, he was throwing 24-foot and 16-foot ladders for a vent, enter and search scenario. During the exercise he experienced pain in his right shoulder.

4. Claimant explained that he immediately reported the injury to Lieutenant D[Redacted]. He noted that Lieutenant D[Redacted] directed him to start treatment at Employer's Wellness Facility. However, Lieutenant D[Redacted] testified that Claimant never advised him of an on-the-job injury.

5. The record reveals that Claimant has a prior history of right shoulder symptoms. Claimant began receiving treatment for his right shoulder condition in May 2011. Specifically, on May 3, 2011 Claimant visited personal physician Heather A. Shull, M.D. at Kaiser Permanente for an examination. Claimant explained that he had injured

his right shoulder six months earlier while putting on a pack at work. Dr. Shull diagnosed Claimant with rotator cuff syndrome and administered an injection

6. On October 20, 2015 Claimant's underwent a right shoulder MRI. The MRI revealed a SLAP tear and a partial thickness rotator cuff tear.

7. On November 16, 2015 Claimant visited orthopedic surgeon David Gerhardt for an examination. Following the assessment, Dr. Gerhardt documented that he had a long discussion with Claimant regarding potential treatment options. He noted that surgical intervention was an option and specified that the surgery would "include biceps tenotomy with an open subpectoral biceps tenodesis and possible superior labrum anterior, posterior repair versus debridement and associated rotator cuff debridement versus repair." However, Claimant was "not particularly symptomatic and has declined injections." Dr. Gerhardt remarked that Claimant would continue to function as tolerated and follow up on an as-needed basis.

8. Subsequent to the June 5, 2020 incident, Claimant emailed Employer's Wellness Director Trae Tashiro on June 16, 2020. He requested an appointment but was uncertain about how to obtain one. Claimant specifically sought treatment for his right shoulder and right hip. Mr. Tashiro testified that he was uncertain whether Claimant's e-mail suggested he had suffered a work injury.

9. On June 16, 2020 Claimant received an e-mail from Employer's athletic trainer Brian Crouser. Mr. Crouser noted that Mr. Tashiro had forwarded Claimant's e-mail and was available "to assist you with scheduling a time to evaluate your shoulder/hip."

10. On July 7, 2020 Claimant commenced treatment at Employer's Wellness facility. The medical provider maintained a record of treatment on a document titled "Injury Record [Employer] Injury Stats." The record provided that Claimant's right shoulder was improving but he was still experiencing weakness. Claimant continued to undergo physical therapy at Employer's Wellness facility through March 4, 2021.

11. On November 25, 2020 Claimant visited Employer's designated surgeon Authorized Treating Physician (ATP) Adam Joseph Seidl, M.D. Dr. Seidl recorded that Claimant had been "dealing with right shoulder pain for the past couple years it has really increased over the past 6 months." Claimant denied a specific traumatic event, but complained of pain and weakness. After performing a physical examination and reviewing diagnostic studies, Dr. Seidl determined that, because conservative treatment modalities had failed, he would proceed with an MRI of Claimant's right shoulder.

12. On December 4, 2020 Claimant underwent a right shoulder MRI. The imaging revealed several findings including moderate to severe tendinosis of the supraspinatus tendon with large partial tear at the footprint as well as a SLAP-type labral tear.

13. On December 11, 2020 Claimant returned to Dr. Seidl for an examination. Dr. Seidl recounted that Claimant suffered from “a high-grade partial thickness bursal sided tear of the rotator cuff.” After discussing treatment options, Dr. Seidl determined that Claimant would require surgery for the rotator cuff tear.

14. On December 18, 2020 Claimant sent an e-mail to Wellness Manager for the District Chris Macklin. He specifically stated that “[i]n mid-May, during Academy, I started having significant weakness in my right shoulder during overhead press movement.”

15. In a January 11, 2021 e-mail to Claimant Mr. Macklin responded that he was unable to locate a First Report of Injury from May 2020 referencing the injury that Claimant described in his December 18, 2020 e-mail. Claimant responded in a January 11, 2021 e-mail that he would like to proceed with a Workers’ Compensation claim. He noted that, because he was not aware of an injury until he underwent the MRI, he sought to use the MRI date as the date of his work injury.

16. On January 26, 2021 Lisa C[Redacted], who works with Employer on processing Workers’ Compensation injuries, e-mailed Claimant inquiring “what is the injury date listed on the first Report of Injury form that was submitted to your shoulder injury.” Claimant responded:

> I’m not sure one has been created yet. I reported the injury during the academy to Lt. D[Redacted] and Coach Yoon. Coach Yoon coordinated with wellness to modify my workouts and provide rehab work. Following the academy I met with Wellness weekly and had a home program. While I had significant improvement over the following six months, I was still not improving in two specific ranges of motion. I then had an MRI done through Dr. Siedl and he discovered two tears that will need surgical repair.

In subsequent e-mail exchanges with Ms. C[Redacted] on January 26, 2020 Claimant initially reported that he injured his right shoulder “throwing ladders” at the Academy on April 24, 2021 but later corrected the date to June 5, 2021.

17. On February 6, 2021 Lieutenant Jeff M[Redacted] completed a First Report of Injury. The Report reflected that Claimant had informed Lieutenant D[Redacted] on June 5, 2020 he “was carrying and throwing the 24 ft and 16ft ladders for a vent, enter, search scenario by himself when he felt a pain in his right shoulder followed by a persistent dull ache.”

18. Lieutenant D[Redacted] testified that Claimant never reported any kind of injury on June 5, 2020. He explained that, if a recruit suffers an injury while performing tasks through the Academy, protocol requires him to immediately complete a First Report of Injury and provide a designated provider list. Furthermore, Lieutenant D[Redacted] remarked that, on or about February 6, 2021, Lieutenant M[Redacted] did not contact him to discuss whether Claimant had reported the injury on June 5, 2020. He remarked that

it was not until sometime during the summer of 2021 that someone approached him inquiring about whether Claimant had reported a shoulder injury on June 5, 2020.

19. After the First Report of Injury was filed, Employer provided Claimant with a designated provider form. Claimant selected Stephanie Chu, SMFR Wellness at 9195 East Mineral Avenue, Centennial, Colorado 80112.

20. On March 10, 2021 Claimant visited Dr. Chu for an examination. Dr. Chu noted that Claimant continued to work with Wellness and rehabilitation but obtained minimal pain relief. She recommended an injection during the following week and an evaluation of Claimant's response. Dr. Chu was awaiting surgical recommendations and the timing of the procedure.

21. On May 25, 2021 Claimant underwent an independent medical examination with Nicholas K. Olsen, D.O. Claimant explained that on June 5, 2020 he injured his right shoulder while he was "throwing ladders at the Academy." He commented that "throwing ladders" consists of taking ladders from a simulated fire truck, carrying them to the side of a building and putting them up. Claimant specifically experienced pain while setting up a 28 foot extension ladder during the drill. He remarked that his right shoulder symptoms improved through strength and conditioning exercises at physical therapy.

22. Dr. Olsen reviewed Claimant's medical records and performed a physical examination. He diagnosed Claimant with: (1) chronic right shoulder tendonosis; and (2) a chronic SLAP tear that was first diagnosed during a 2011 MRI. Dr. Olsen concluded that, while raising a ladder overhead could cause a rotator cuff tear, Claimant had symptoms "great enough to warrant a possible surgical intervention in 2015." He reasoned that many of the findings on Claimant's 2020 MRI had dated back to the initial 2011 MRI.

23. On August 19, 2021 Claimant underwent right shoulder surgery with ATP Dr. Seidl and has not returned to work. He remains on temporary work restrictions and is currently receiving unemployment benefits in the amount of $700.00 per week. Claimant remarked that at the time of the June 5, 2020 incident he was earning an Average Weekly Wage (AWW) of $1,695.22. An AWW of $1,695.22 constitutes a fait approximation of Claimant's wage loss and diminished earning capacity.

24. On October 13, 2021 Dr. Seidl drafted a letter stating that Claimant's right shoulder rotator cuff tear was unrelated to his prior SLAP tear. He specified that there were no degenerative changes to his joint cartilage surface at the time of his recent arthroscopy.

25. Dr. Olsen testified at the hearing in this matter. He maintained that Claimant's right shoulder symptoms were not causally related to the June 5, 2020 industrial incident. Dr. Olsen remarked that the December 4, 2020 MRI demonstrated a large partial tear in the rotator cuff as well as a SLAP tear. The MRI did not show any evidence of an acute rotator cuff tear. He detailed the following:

> There is a partial tear in 2015, and there is a partial tear in 2020. If there was an acute tear, you would expect that the partial tear was converted to a complete tear, and it clearly has not converted to a complete tear as of December 4, 2020.

26. Dr. Olsen compared the 2015 MRI with the 2020 MRI and noted that the 2020 MRI did not show any evidence of a tear. Rather, Claimant had a partial rotator cuff tear in the 2015 MRI, and he continued to have a partial rotator cuff tear in the 2020 MRI. Dr. Olsen testified that, if Claimant had suffered some injury in 2020, then it is very likely that the 2015 partial tear would have become a complete tear. Dr. Olsen remarked that the 2020 MRI findings most likely represented nothing more than the natural progression of Claimant's right shoulder problems over the years. The 2020 MRI findings could easily have occurred in the absence of trauma. Dr. Olsen summarized that it is more probable than not that the 2020 MRI findings constitute the natural progression of Claimant's underlying right shoulder condition.

27. Dr. Olsen acknowledged that Claimant's August 19, 2021 right shoulder surgery was reasonable and necessary but disagreed that the procedure was causally related to the June 5, 2020 work incident. Dr. Olsen reasoned that the surgery was not causally related to the June 5, 2020 incident based on Claimant's medical records from May 3, 2011 that referenced shoulder pain and November 16, 2015 that mentioned shoulder pain and the possible necessity of surgery. Nevertheless, Dr. Olsen agreed that, at no time prior to Claimant's right shoulder surgery on August 19, 2021, had he been placed on temporary work restrictions. Moreover, Dr. Olsen recognized that there were no medical records referencing Claimant's right shoulder between May 3, 2011 and November 16, 2015 as well as from November 16, 2015 until July 7, 2020. Finally, Dr. Olsen acknowledged that Claimant's activity of raising a ladder overhead on June 5, 2020 could certainly have caused a rotator cuff injury. However, he maintained that, because shoulder surgery was recommended in 2015, the need for surgery in 2021 constituted a natural progression of Claimant's pre-existing condition.

28. Claimant has demonstrated that it is more probably true than not that he suffered a compensable right shoulder injury during the course and scope of his employment with Employer on June 5, 2020. Initially, Claimant explained that, as part of his training at the District's Academy on June 5, 2020, he was throwing 24-foot and 16-foot ladders for a vent, enter and search scenario. During the exercise he experienced pain in his right shoulder. Notably, he had not experienced pain in his right shoulder since 2015 and had been cleared for duty prior to commencing work for Employer in February 2020. Subsequent to the June 5, 2020 incident, Claimant emailed Employer's Wellness Director on June 16, 2020. He specifically sought treatment for his right shoulder and right hip.

29. Despite conflicts in the testimony regarding Claimant's reporting of a work injury, he began physical therapy at Employer's Wellness facility on July 7, 2020. The

records titled “Injury Records [Employer] Injury stats from July 7, 2020 through March 4, 2021,” contradict the testimony of Lieutenant D[Redacted] that Claimant had not reported an injury. The title of the documents as “Injury Record,” consistent references to the right shoulder and a lengthy period of physical therapy to bring Claimant to his baseline condition, reveal that Claimant was receiving treatment for the June 5, 2020 work accident. Moreover, although the records reflect that Claimant has suffered from a pre-existing right shoulder condition since 2011, the June 5, 2020 incident caused the need for medical care and eventual surgery with Dr. Seidl on August 19, 2021. Accordingly, Claimant’s work activities on June 5, 2020 aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. Thus, Claimant suffered a compensable right shoulder injury during the course and scope of his employment with Employer on June 5, 2020.

30. Claimant has established that it is more probably true than not that the right shoulder surgery performed by ATP Dr. Seidl at the Steadman Hawkins Clinic on August 19, 2021 was reasonable, necessary and causally related to his June 5, 2020 injury. Initially, Claimant’s right shoulder MRI on December 4, 2020 revealed several findings including moderate to severe tendinosis of the supraspinatus tendon with a large partial tear at the footprint as well as a SLAP-type labral tear. Claimant had previously undergone a right shoulder MRI on October 20, 2015 that revealed a SLAP tear and a partial thickness rotator cuff tear. After conservative treatment modalities failed, Claimant underwent right shoulder surgery with ATP Dr. Seidl on August 19, 2021.

31. Dr. Olsen maintained that Claimant’s right shoulder symptoms were not causally related to the June 5, 2020 industrial incident. He compared the 2015 MRI with the 2020 MRI and noted that the 2020 MRI did not show any evidence of a tear. Rather, Claimant had a partial rotator cuff tear in the 2015 MRI and he continued to have a partial rotator cuff tear in the 2020 MRI. Dr. Olsen testified that, if Claimant had suffered some injury in 2020, then it is very likely that the 2015 partial tear would have become a complete tear. He remarked that the 2020 MRI findings most likely represented nothing more than the natural progression of Claimant’s right shoulder problems over the years. The 2020 MRI findings could easily have occurred in the absence of trauma. Dr. Olsen summarized that it is more probable than not that the 2020 MRI findings constitute the natural progression of Claimant’s underlying right shoulder condition.

32. Despite Dr. Olsen’s opinion, the record reveals that Claimant’s previous SLAP tear did not cause the need for surgery on August 19, 2021. Instead, Claimant suffered an aggravation of his pre-existing right shoulder condition on June 5, 2020. Dr. Seidl persuasively determined that the need for surgery was unrelated to the pre-existing SLAP tear. He specifically noted that there were no degenerative changes to his joint cartilage surface at the time of his recent arthroscopy. Furthermore, Dr. Olsen acknowledged that Claimant’s August 19, 2021 right shoulder surgery was reasonable and necessary but disagreed that the procedure was causally related to the June 5, 2020 work incident. He also agreed that at no time prior to Claimant’s right shoulder surgery on August 19, 2021 had Claimant been placed on temporary work restrictions. Moreover, Dr. Olsen recognized that there were no medical records referencing Claimant’s right

shoulder between May 3, 2011 and November 16, 2015 as well as from November 16, 2015 until July 7, 2020. Therefore, based on the medical records and persuasive opinion of ATP Dr. Seidl, Claimant's work activities on June 5, 2021 aggravated or accelerated his pre-existing right shoulder condition. Accordingly, Claimant's August 19, 2021 right shoulder surgery was reasonable, necessary and causally related to his June 5, 2021 work incident.

33. Claimant has proven that it is more probably true than not that he is entitled to receive TTD benefits for the period August 19, 2021 until terminated by statute. On August 19, 2021 Claimant underwent surgery with ATP Seidl and has not returned to work. He remains on temporary work restrictions and is currently receiving unemployment benefits in the amount of $700.00 per week. Claimant has suffered an impairment of earning capacity based on his inability to resume his prior work. He has thus proven that his June 5, 2020 industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. Accordingly, Claimant shall receive TTD benefits for the period August 19, 2021 until terminated by statute subject to Employer's right to an offset for unemployment benefits.

CONCLUSIONS OF LAW

1. The purpose of the "Workers' Compensation Act of Colorado" (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge's factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

Compensability

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967). *Soto-Carrion v. C & T Plumbing, Inc.,* W.C. No. 4-650-711 (ICAO, Feb. 15, 2007); *David Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a pre-existing condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. The provision of medical care based on a claimant's report of symptoms does not establish an injury but only demonstrates that the claimant claimed an injury. *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020). Moreover, a referral for medical care may be made so that the respondent would not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id.* Because a physician provides diagnostic testing, treatment, and work restrictions based on a claimant's reported symptoms does not mandate that the claimant suffered a compensable injury. *Fay v. East Penn manufacturing Co., Inc.*, W.C. No. 5-108-430-001 (ICAO, Apr. 24, 2020); *see Snyder v. Indus. Claim Appeals Off.*, 942 P.2d 1337, 1339 (Colo. App. 1997) ("right to workers' compensation benefits, including medical payments, arises only when an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment"). While scientific evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory

supporting compensability when making a determination. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020).

8. As found, Claimant has demonstrated by a preponderance of the evidence that he suffered a compensable right shoulder injury during the course and scope of his employment with Employer on June 5, 2020. Initially, Claimant explained that, as part of his training at the District's Academy on June 5, 2020, he was throwing 24-foot and 16-foot ladders for a vent, enter and search scenario. During the exercise he experienced pain in his right shoulder. Notably, he had not experienced pain in his right shoulder since 2015 and had been cleared for duty prior to commencing work for Employer in February 2020. Subsequent to the June 5, 2020 incident, Claimant emailed Employer's Wellness Director on June 16, 2020. He specifically sought treatment for his right shoulder and right hip.

9. As found, despite conflicts in the testimony regarding Claimant's reporting of a work injury, he began physical therapy at Employer's Wellness facility on July 7, 2020. The records titled "Injury Records [Employer] Injury stats from July 7, 2020 through March 4, 2021," contradict the testimony of Lieutenant D[Redacted] that Claimant had not reported an injury. The title of the documents as "Injury Record," consistent references to the right shoulder and a lengthy period of physical therapy to bring Claimant to his baseline condition, reveal that Claimant was receiving treatment for the June 5, 2020 work accident. Moreover, although the records reflect that Claimant has suffered from a pre-existing right shoulder condition since 2011, the June 5, 2020 incident caused the need for medical care and eventual surgery with Dr. Seidl on August 19, 2021. Accordingly, Claimant's work activities on June 5, 2020 aggravated, accelerated or combined with his pre-existing condition to produce a need for medical treatment. Thus, Claimant suffered a compensable right shoulder injury during the course and scope of his employment with Employer on June 5, 2020.

Medical Benefits

10. Respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of an industrial injury. §8-42101(1)(a), C.R.S.; *Colorado Comp. Ins. Auth. v. Nofio*, 886 P.2d 714, 716 (Colo. 1994). A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). The question of whether a particular disability is the result of the natural progression of a pre-existing condition, or the subsequent aggravation or acceleration of that condition, is itself a question of fact. *University Park Care Center v. Indus. Claim Appeals Off.*, 43 P.3d 637 (Colo. App. 2001). Finally, the determination of whether a particular treatment modality is reasonable and necessary to treat an industrial injury is a factual determination for the ALJ. *In re Parker*, W.C. No. 4-517-537 (ICAO, May 31, 2006); *In re Frazier,* W.C. No. 3-920-202 (ICAO, Nov. 13, 2000).

11. Section 8-41-301(1)(c), C.R.S. requires that an injury be "proximately caused by an injury or occupational disease arising out of and in the course of the employee's employment." Thus, the claimant is required to prove a direct causal relationship between the injury and the disability and need for treatment. However, the industrial injury need not be the sole cause of the disability if the injury is a significant, direct, and consequential factor in the disability. *See Subsequent Injury Fund v. Indus. Claim Appeals Off.,* 131 P.3d 1224 (Colo. App. 2006); *Joslins Dry Goods Co. v. Indus. Claim Appeals Off.,* 21 P.3d 866 (Colo. App. 2001).

12. As found, Claimant has established by a preponderance of the evidence that the right shoulder surgery performed by ATP Dr. Seidl at the Steadman Hawkins Clinic on August 19, 2021 was reasonable, necessary and causally related to his June 5, 2020 injury. Initially, Claimant's right shoulder MRI on December 4, 2020 revealed several findings including moderate to severe tendinosis of the supraspinatus tendon with a large partial tear at the footprint as well as a SLAP-type labral tear. Claimant had previously undergone a right shoulder MRI on October 20, 2015 that revealed a SLAP tear and a partial thickness rotator cuff tear. After conservative treatment modalities failed, Claimant underwent right shoulder surgery with ATP Dr. Seidl on August 19, 2021.

13. As found, Dr. Olsen maintained that Claimant's right shoulder symptoms were not causally related to the June 5, 2020 industrial incident. He compared the 2015 MRI with the 2020 MRI and noted that the 2020 MRI did not show any evidence of a tear. Rather, Claimant had a partial rotator cuff tear in the 2015 MRI and he continued to have a partial rotator cuff tear in the 2020 MRI. Dr. Olsen testified that, if Claimant had suffered some injury in 2020, then it is very likely that the 2015 partial tear would have become a complete tear. He remarked that the 2020 MRI findings most likely represented nothing more than the natural progression of Claimant's right shoulder problems over the years. The 2020 MRI findings could easily have occurred in the absence of trauma. Dr. Olsen summarized that it is more probable than not that the 2020 MRI findings constitute the natural progression of Claimant's underlying right shoulder condition.

14. As found, despite Dr. Olsen's opinion, the record reveals that Claimant's previous SLAP tear did not cause the need for surgery on August 19, 2021. Instead, Claimant suffered an aggravation of his pre-existing right shoulder condition on June 5, 2020. Dr. Seidl persuasively determined that the need for surgery was unrelated to the pre-existing SLAP tear. He specifically noted that there were no degenerative changes to his joint cartilage surface at the time of his recent arthroscopy. Furthermore, Dr. Olsen acknowledged that Claimant's August 19, 2021 right shoulder surgery was reasonable and necessary but disagreed that the procedure was causally related to the June 5, 2020 work incident. He also agreed that at no time prior to Claimant's right shoulder surgery on August 19, 2021 had Claimant been placed on temporary work restrictions. Moreover, Dr. Olsen recognized that there were no medical records referencing Claimant's right shoulder between May 3, 2011 and November 16, 2015 as well as from November 16, 2015 until July 7, 2020. Therefore, based on the medical records and persuasive opinion of ATP Dr. Seidl, Claimant's work activities on June 5, 2021 aggravated or accelerated his pre-existing right shoulder condition. Accordingly, Claimant's August 19, 2021 right

shoulder surgery was reasonable, necessary and causally related to his June 5, 2021 work incident.

Temporary Total Disability Benefits

15. To prove entitlement to Temporary Total Disability (TTD) benefits a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability, and the disability resulted in an actual wage loss. *See* §8-42-105, C.R.S.; *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Indus. Claim Appeals Off.,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (*citing Ricks v. Indus. Claim Appeals Off.*, P.2d 1118 (Colo. App. 1991)). Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

16. As found, Claimant has proven by a preponderance of the evidence that he is entitled to receive TTD benefits for the period August 19, 2021 until terminated by statute. On August 19, 2021 Claimant underwent surgery with ATP Seidl and has not returned to work. He remains on temporary work restrictions and is currently receiving unemployment benefits in the amount of $700.00 per week. Claimant has suffered an impairment of earning capacity based on his inability to resume his prior work. He has thus proven that his June 5, 2020 industrial injury caused a disability lasting more than three work shifts, he left work as a result of the disability and the disability resulted in an actual wage loss. Accordingly, Claimant shall receive TTD benefits for the period August 19, 2021 until terminated by statute subject to Employer's right to an offset for unemployment benefits.

Average Weekly Wage

17. Section 8-42-102(2), C.R.S. requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. The Judge must calculate the money rate at which services are paid to the claimant under the contract of hire in force at the time of

injury. *Pizza Hut v. ICAO,* 18 P.3d 867, 869 (Colo. App. 2001). However, §8-42-102(3), C.R.S. authorizes a judge to exercise discretionary authority to calculate an AWW in another manner if the prescribed method will not fairly calculate the AWW based on the particular circumstances. *Campbell v. IBM Corp.,* 867 P.2d 77, 82 (Colo. App. 1993). Specifically, §8-42-102(3), C.R.S. grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine the claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993); *see In re Broomfield,* W.C. No. 4-651-471 (ICAO, Mar. 5, 2007). The overall objective in calculating the AWW is to arrive at a fair approximation of the claimant's wage loss and diminished earning capacity. *Campbell,* 867 P.2d at 82. Where the claimant's earnings increase periodically after the date of injury the ALJ may elect to apply §8-42-102(3), C.R.S. and determine whether fairness requires the AWW to be calculated based upon the claimant's earnings during a given period of disability instead of the earnings on the date of the injury. *Id.*

18. As found, Claimant credibly remarked that at the time of the June 5, 2020 incident he was earning an AWW of $1,695.22. An AWW of $1,695.22 constitutes a fait approximation of Claimant's wage loss and diminished earning capacity.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. On June 5, 2020 Claimant suffered a compensable right shoulder injury during the course and scope of his employment with Employer.

2. The surgery performed by ATP Seidl on August 19, 2021 to repair Claimant's rotator cuff was reasonable, necessary and causally related to his June 5, 2020 injury.

3. Claimant shall receive TTD benefits for the period August 19, 2021 until terminated by statute subject to Employer's right to an offset for unemployment benefits.

4. Claimant earned an AWW of $1,695.22.

5. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For* *further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at https://oac.colorado.gov/resources/oac-forms*.

DATED: December 17, 2021.

DIGITAL SIGNATURE:

Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Has Claimant shown, by a preponderance of the evidence, that he suffered a compensable injury to his left knee on November 11, 2020?

II. If compensable, are Respondents liable for Claimant's medical treatment for the injury to his left knee?

III. If compensable, has Claimant shown that the treatment rendered to date for his left knee is reasonable, necessary, and causally related to his work injury, thus entitling him for reimbursement for said medical expenses?

IV. If compensable, who will be designated as Claimant's ATP?

V. Has Claimant shown, by a preponderance of the evidence, that he is entitled to Temporary Total Disability payments?

STIPULATIONS

At the outset of the hearing, the parties stipulated to an Average Weekly Wage of $945.98. The ALJ accepted this stipulation.

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

Claimant's Hearing Testimony

1. Claimant is a 45-year-old employee of Affordable Plumbing & Heat, Inc. in Colorado Springs, Colorado. Claimant has been employed as a plumber for Employer since May 2020.

2. Claimant testified that he served in a similar capacity while in the US Navy from 2002 to 2007. Part of his job duties includes cleaning out sewer lines. He described the device he used for Employer as a 'snake' or an 'auger', weighing about 200-250 pounds altogether. His job duties included pulling this device, as well as other equipment, on and off the [service] van 'all day long', and also involved a lot of crouching and kneeling.

3. Claimant described his mechanism of injury at hearing:

A ….I was in the basement [of the customer]. I had accessed the main sewer line, cast iron…going out to the street. Removed the clean-out cap,

> starting snaking the line. Got all the way out, started pulling my cable back, when it became hung on something. You know, when you're in that situation, you use the machine to kind of run it in reverse, push out, push back…Nothing I was doing was working. I started yanking on it, pulling on it...you're wrestling with an anaconda at this point. [I] Started pulling on it.
>
> And at one point I was in a kneeling position and went to stand, and I yanked on it, and I felt this pop in my knee, and it felt like somebody literally stabbed me on the inside of my knee. (Transcript, pp. 16-17).

4. Claimant stated that he was using 'fairly extreme force' when trying to extract the cable, but it did not come out "until a couple of other guys actually came to help me." *Id* at 17.

5. Claimant stated that he contacted Employer's HR department that day and was referred for medical treatment. (Claimant earlier remembered seeing Frankie V[Redacted] earlier that morning, who had noticed that Claimant appeared sort of 'stiff', due to the cold weather, and that Frankie had made some joke to the effect of "hey, old man, how you doing?" (Transcript, p. 33). Claimant then told Frankie "I'm good.") *Id.*

6. Claimant was asked how long before November 11, 2020, that he had experienced symptoms in his knees. He responded that for a couple years he has had pain in both knees. He also stated that both of his knees were stiff on the morning of the alleged injury.

7. Claimant testified that a couple weeks passed by since the injury, and that his knee was not doing any better. An MRI was ordered on December 1, 2020 by Claimant's ATP, Dr. Peterson. The MRI was denied, because Respondents filed a Notice of Contest on November 24, 2020. (*see* Ex. F). Since the MRI was not authorized by Workers' Compensation, Claimant retained Dr. Peterson as his PCP, who in turn referred him to orthopedist Michael Simpson, MD.

8. Dr. Simpson referred Claimant to undergo an MRI of his left knee. The MRI was performed on January 13, 2021. Arthroscopic surgery was then recommended. The surgery was performed on March 16, 2021.

9. Claimant testified that he missed approximately two and a half months of work following the surgery. He was not able to resume full duties immediately; instead, "for the first week or two…they had me on not-as-strenuous jobs. I wasn't going down in crawl spaces. I wasn't…lifting machinery." (Transcript, pp. 22-23).

10. Instead, Claimant stated that he was involved in training younger guys, watching them. "I think they wanted to make sure that I was okay. That went on for the first couple of weeks and then I slowly eased back into it [his former position]".

(Transcript, p. 23).

11. At hearing, Claimant stated that this knee “ironically, it was kind of achy this morning…honestly…I ache and hurt a lot” *Id.* The knee “clicks and pops every now and then.” *Id.* “But…it’s functioning. I can do my job.” *Id.*

Claimant’s Initial Course of Treatment with Concentra

12. On November 11, 2020, Claimant presented to Concentra for an evaluation for left knee pain. (Ex. 5, p. 16). PA-C Tianna Voros noted: “Christopher was snaking a line and twisted *his knee* slightly outwards *when he felt severe sharp pain* in his medial knee. The pain is now aching but it was 7/10 and very sharp. *He is limping.* He took 800mg Motrin this morning before the injury because his knee was feeling a little stiff this morning when he woke up. He normally has some aching *in both knees* when the weather is cold.” *Id*. (emphasis added).

13. Under the physical exam, she noted: “There is tenderness in the pes anserine bursa, over the *medial* joint line and diffusely over the *medial* knee, but *not* over the lateral tibial plateau and not in the medial tibial plateau. *Id* at 17 (emphasis added). Limited range of motion in all planes with pain. *Id.* There were no significant X-ray findings. *Id.* Initial assessment was knee strain. *Id.*

14. Claimant returned to PA-C Voros on November 16, 2020, who now noted: “The pain is much less but he has noticed a sharp *painful* clicking *when he extends his knee.”* *Id* at 21 (emphasis added). Claimant was placed on work restrictions of sitting 85% of the time, no squatting, no kneeling. *Id* at 23.

15. Claimant next saw Daniel Peterson, MD at Concentra on November 24, 2020, who noted that Claimant had already been to physical therapy 5 times, but feels pain at the medial joint line. “Feels something moving under his finger at the medial proximal tibia. Has painful popping but no locking. No prior major left knee injuries were noted. *Id* at 24. Dr. Peterson noted: *exam and MOI suggestive of medial meniscus injury* was well as pes anserine bursa. If not progress in PT will get MRI. *Id* at 25 (emphasis added).

16. On December 11, 2020, Claimant again saw PA-C Voros, whose report that there had been a physician referral by Dr. Peterson for a left knee MRI on December 1, 2020 to r/o [rule out] meniscal tear. *Id* at 28. Claimant’s symptoms remained essentially unchanged.

Notice of Contest is Lodged / Claimant Seeks Care Privately

17. On December 22, 2020, Claimant returned to PA-C Voros, who noted that Clamant reported that his knee had gotten worse over the past few weeks. Claimant

recounted to her that the MRI had been denied because the adjuster had called him that someone had seen him limping earlier in the day prior to the injury, so they believed his injury was actually pre-existing. *Id* at 32. Under her *assessment,* she noted that Claimant "still needs MRI". *Id* at 34.

18. The MRI (after denial by Insurer) was performed on January 13, 2021 (which is noted to be over two months after the injury). The *IMPRESSIONS* were:

1. *Complex tear medial meniscus* with mild overlying bursitis and adjacent bony *edema.*
2. Mild chondromalacia of the patellofemoral compartment.
3. Small knee joint *effusion.* (Ex. 6, p. 38) (emphasis added).

19. Orthopedist Michael Simpson, MD saw Claimant on January 14, 2021, wherein he noted: Chris has symptomatic medial meniscus tear. I reviewed his MRI…In all likelihood, at some point, he is going to require meniscal surgery. Either partial meniscectomy or meniscal repair. (Ex. 7, pp. 45-46).

20. Dr. Simpson next noted on February 3, 2021 that, while Claimant was doing better after a steroidal injection, "We discussed treatment options…I think the most rapid return to function for him would actually be a partial medial meniscectomy. At 44 with a *rather extensive horizontal cleavage tear*, I think predictability of meniscal repair is uncertain and may only result in more prolonged recovery with the possibility of requiring additional revision surgery in the future. *Id* at 56. (emphasis added).

21. Dr. Simpson performed this surgery on March 16, 2021. The surgical notes indicated:

> …the medial tibial plateau was spared. The patient had a very tight medial compartment. There was a complex tear of the posterior horn of the medial meniscus *with a flap component interposed in the joint. This was resected.* At this point, the *degenerative* posterior horn of the medical meniscus was resected back to a stable rim…The repair was not felt to be indicated given the *degenerative* nature of the tear and also the tightness of the joint. (Ex. C, p. 36) (emphasis added).

22. Claimant's post-operative visit on March 17, 2021 was uneventful, although pain was noted, he was noted to have full range of motion. He was to start PT right away. (Ex. C. p. 44).

23. The final report in evidence is dated April 14, 2021, with PA-C Kimberly Shenuk with Centura Orthopedics. (Ex. C, p. 51). Claimant at that time expressed his concern to her that despite the pain, he was concerned that he would have to be able to kneel and squat to keep his job and maintain his health insurance. It was noted that he did now have full range of motion. *Id.*

Two of Claimant's Co-Workers Sign Statements

24. Frankie V[Redacted], one of Claimant's coworkers, signed a typewritten statement (Ex. E, p. 77), undated, stating the *Date of Injury Reported: 11/11/2020 @ 12:45 p.m.* In its entirely, it reads:

> Incident Report: Arrived at 4951 Webb Dr. Wallace Strickle. Upon arrival I saw that *Chris was holding his knee* when I was trying to help remove cable from the main line. When I was talking to him *he got a jolt of pain and could not put pressure on his knee.* He stated he had tweaked it *at this job* and was hurting him.
>
> That same morning I saw Chris limping into the plumbers meeting. After the meeting I asked what was up and he said he had tweaked his knee and it was bothering him. I stated that sucked and to let me know if he needed anything to let me know. I never asked more questions and went about my day. (emphasis added).

25. Bill B[Redacted], Claimant's manager, also signed an undated, typewritten statement (Ex. E, p. 78) addressed *To Whom It May Concern*, reading, in its entirety:

> I witnessed Chris this morning limping when he came into the shop for the meeting. I didn't get a chance to ask what happened.

IME by Dr. Steinmetz

26. Dr. Marc Steinmetz performed an IME of Claimant on August 5, 2021. (Ex. A). Dr. Steinmetz opined that Claimant's left knee problems are a result of his "progressive pre-existing ongoing non-work-related degenerative problems in his left knee." *Id* at 6. Multiple factors went into his reasoning, such as Claimant was taking ibuprofen for bilateral knee pains, including the date of the alleged injury. Claimant was limping the morning of the alleged injury, and the preoperative MRI showed 'completely pre-existing' degenerative arthritic changes in the meniscal surface, joint surface, bony articulation, and cartilage areas. *Id*. at 5.

27. Dr. Steinmetz further opined that no acute traumatic problems from kneeling or twisting are noted in the MRI. The act of *temporarily kneeling* is not aggravating of pre-existing osteoarthritis in the knee per the Colorado Level 2 Guidelines. *Id*.

28. Finally, Dr. Steinmetz opined that the degenerative nature of the meniscal findings both in the MRI and the operation notes, are not consistent with any acute tear from a twisting injury. *Id*. In support, the operative note from March 16, 2021, stated, "The degenerative posterior horn of the medial meniscus was resected back to a stable rim…The repair was not felt to be indicated given the degenerative nature of the tear and also the tightness in the joint. A repair would not have been technically possible." (*see* Ex. C, p. 19).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the “Workers’ Compensation Act of Colorado” (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

B. In accordance with *Section 8-43-215, C.R.S.,* this decision contains Specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. See *Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. In deciding whether a party has met their burden of proof, the ALJ is empowered “to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence.” *See Bodensecki v. ICAO*, 183 P.3d 684 (Colo.App. *2008).* In short, the ALJ determines the credibility of the witnesses. *Arenas v. ICAO,* 8 P.3d 558 (Colo.App. 2000). The weight and credibility to be assigned evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo.App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo.App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness’s testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

D. In this instance, the ALJ finds that Claimant effectively reported his injury in real-time to his co-worker, was referred to Concentra, then accurately described his symptoms to his treatment providers all along the way, in a sincere effort to get better. Further, the ALJ finds that Claimant testified credibly, and in a forthright manner at hearing. While neither of the co-workers who signed the written statements were available for cross-examination and clarification, the ALJ finds that their statements are not materially inconsistent with Claimant's hearing testimony.

E. Lastly, it is noted that while Dr. Steinmetz did not testify, the ALJ finds that he rendered his IME opinion in good faith, based upon the evidence available to him at the time. However, as will be noted, *infra*, the ALJ does not find his ultimate conclusions to be sufficiently persuasive.

Compensability, Generally

F According to C.R.S. § 8-43-201, "a claimant in a workers' compensation claim shall have the burden of proving entitlement to benefits by a preponderance of the evidence; the facts in a workers' compensation case shall not be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer, and a workers' compensation case shall be decided on its merits." *Also see Qual-Med, Inc. v. Indus. Claim Appeals Off.,* 961 P.2d 590, 592 (Colo. App. 1998) ("The Claimant has the burden of proving an entitlement to benefits by a preponderance of the evidence."); *Lerner v. Wal-Mart Stores, Inc.,* 865 P.2d 915, 918 (Colo. App. 1993) ("The burden is on the claimant to prove his entitlement to benefits by a preponderance of the evidence.").

G. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark,* 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.,*104 P.3d 273, 275 (Colo. App. 2004).

H. For an injury to be compensable under the Workers' Compensation Act, it must "arise out of" and "occur within the course and scope" of the employment. *Price v. Indus. Claim Appeals Off.,* 919 P.2d 207, 210, 210 (Colo. 1996); *Schepker v. Daewoo North*, W.C. No. 4-528-434 (ICAO April 22, 2003). An injury "arises out of" employment when the origins of the injury are sufficiently related to the conditions and circumstances under which the employee usually performs his or her job functions as part of the employee's services to the employer. *See Schepker, supra.* "In the course of" employment refers to the time, place, and circumstances of the injury. *Id.* There is no presumption that an injury arises out of employment merely because an unexplained injury occurs during the course of employment. *Finn v. Indus. Comm'n,* 165 Colo. 106, 108-09, 4437 P.2d 542 (1968).

I, Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any benefits are awarded. § 8-41-301 (1)(c) C.R.S.*; Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000). The question of causation is generally one of fact for the determination by the ALJ. *Faulkner,* 12 P.3d at 846.

J. Colorado's Workers' Compensation Act creates a distinction between the terms "accident" and "injury". The term "accident" refers to an "unexpected, unusual, or undesigned occurrence." *See* §8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident. In other words, an "accident" is the cause and an “injury” is the result. *City of Boulder v. Payne,* 426 P.2 194 (1967). No benefits flow to the victim of an industrial accident unless the accident results in a compensable “injury.” A compensable injury is one which requires medical treatment or causes a disability.

K. It is the claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between her employment and her injuries. An ALJ might reasonably conclude the evidence is so conflicting and unreliable that the claimant has failed to meet the burden of proof with respect to causation. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186, 191 (Colo. App. 2002) (weight to be accorded evidence on question of causation is issue of fact for ALJ). *See also, In the Matter of the Claim of Tammy Manzanares, Claimant*, W. C. Nos. 4-517-883 and 4-614-430, 2005 WL 1031384 (Colo. Ind. Cl. App. Off. Apr. 25, 2005).

Preexisting Condition, Generally

L. The mere fact that a Claimant suffers from a pre-existing condition does not disqualify a claim for compensation or medical benefits if the work-related activities aggravated, accelerated, or combined with the preexisting condition to produce disability or a need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a preexisting condition, and the claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities and not the underlying preexisting condition. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949). The claimant must prove by a preponderance of the evidence that his symptoms were proximately caused by an industrial aggravation of a preexisting condition rather than simply the natural progression of the condition. *Melendez v. Weld County School District #6*, W.C. No. 4-775-869 (ICAO, October 2, 2009).

Did Claimant Have a Preexisting, Degenerative Meniscus?

M. The ALJ finds that sufficient evidence exists to show that Claimant suffered from some degree of degenerative condition in his knees prior to the work incident. Claimant testified consistent with this finding. While this is not a claim for an occupational disease, it is likely at least some of the degenerative conditions were wrought by performing similar work in the Navy, followed by about 13 more years performing this type of occasionally arduous work. The operative report from Dr. Simpson appears to confirm that his meniscal defects had at least some degenerative component, which predated this work incident. The written statements from Claimant’s co-workers are also consistent with Claimant having difficulty with his knees hours before the ‘snaking’ incident.

Did the ‘Snaking’ Incident Cause Claimant’s Preexisting Degenerative Condition to Become Symptomatic, Requiring Medical Treatment?

N. What is significant is that prior to Claimant’s ‘snaking’ incident, he had issues in *both knees*-neither of which had ever required medical treatment. On the very same date of the incident, he told PA-C Voros that “he normally has some aching in *both knees* when the weather is cold.” – which it apparently was that day. This explains the observations of his co-workers that morning, and before he could even begin to somehow concoct an after-the-fact explanation (which Respondents do not allege) for his earlier limping. But now Claimant, with record support, complained-in real time-of a severe, sharp pain in the left medial compartment. He had never sought medical attention prior to this.

O. Claimant had never before reported a painful *clicking* upon extension of this knee. While MRIs are an essential diagnostic tool (which the ALJ finds was prematurely denied by the adjuster, based upon insufficient information), there is nothing quite like actually having a look inside. And Dr. Simpson found a *flap component* *interposed in the joint**-which had to be* *resected**,* along with some other parts of the meniscus which could not be repaired. The ALJ finds that, at a minimum, this 'snaking' incident aggravated Claimant's partially degenerated meniscus, by loosening this flap, and interposing it into the joint. Pain was the inevitable symptom, which could not be alleviated without this surgery. This finding is entirely consistent with the statement of Mr. V[Redacted], which (while lacking in much detail) noted that Claimant was merely l*imping* in the morning, but right after the incident, *got a jolt of pain,* and could not put pressure on his knee. Never before in the record had Claimant reported such pain; he previously just experienced sore knees on occasion.

P. The ALJ makes the following observations about the IME report. While the co-worker's statements were no doubt sincere, the adjuster jumped the gun in denying care based upon them. By denying the MRI-which was ordered by the very ATP supplied by Respondents-the forensic value to determine acute vs. chronic was diminished. This should not disadvantage Claimant, but it did. All Dr. Steinmetz had to look at was an MRI taken over two months post injury. Even then, there was a small amount of both *edema* and *effusion*—both at least consistent with an earlier traumatic event. While Dr. Steinmetz noted [consistent with Level 2 Guidelines] that the mere act of temporarily kneeling would not aggravate preexisting arthritis, this was not the mechanism of injury recounted by Claimant. On the same date of injury, Claimant told PA-C Voros that he *twisted his knee slightly outwards.* This is entirely consistent with stressing the medial meniscus. At hearing, Claimant not only described arising from a kneeling position; he also yanked on the cable, and felt a pop and immediate pain.

Q. A healthy knee likely would have withstood the forces applied to Claimant's knee on the date of this incident. And given the delicate state of Claimant's knees, maybe something like this was inevitable. Maybe he would have twisted his knee playing with his dogs, or hiking, or working in the yard. But he didn't. He twisted his left knee, just the wrong way, *while on the job*, struggling with a stuck cable. His knee became immediately symptomatic. It required immediate medical treatment, which the ALJ finds was initially provided, then wrongfully withheld by the Insurer. This in turn caused unnecessary delays in getting needed medical treatment. Claimant has shown, by a preponderance of the evidence, that this is a compensable injury.

Medical Benefits, Generally

R. A claimant is entitled to medical benefits that are reasonably necessary to cure or relieve the effects of the industrial injury. *See* § 8-42-101(1), C.R.S. 2003; *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office, supra*. Similarly, the question of whether medical treatment is reasonable and necessary to cure or relieve the effects of an industrial injury is one of fact. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003).

Medical Benefits, as Applied

S. Since this is a compensable injury, Claimant is entitled to a general award of medical benefits to cure him from the effects thereof. The ALJ finds, by a preponderance of the evidence, that the MRI and surgery, as performed by Dr. Simpson, was reasonable, necessary, and causally related to Claimant's work injury. Respondents are responsible for reimbursing Claimant and/or Concentra and/or Dr. Simpson for all treatment rendered on his behalf, limited to compensation in accordance with the Fee Schedule.

Authorized Treating Providers/Right of Selection

T. Section 8-43-404(5)(a), C.R.S. permits an employer or insurer to select the treating physician in the first instance. *Yeck v. Indus. Claim Appeals Office*, 996 P.2d 228 (Colo. App. 1999). However, the Colorado Workers' Compensation Act requires that respondents must provide injured workers with a list of at least four designated treatment providers. §8-43-404(5)(a)(I)(A), C.R.S. Section 8-43-404(5)(a)(I)(A), C.R.S. states that, if the employer or insurer fails to provide an injured worker with a list of at least four physicians or corporate medical providers, "the employee shall have the right to select a physician." W.C.R.P. Rule 8-2 further clarifies that once an employer is on notice that an on-the-job injury has occurred, "the employer shall provide the injured worker with a written list of designated providers." W.C.R.P. Rule 8-2(E) additionally provides that the remedy for failure to comply with the preceding requirement is that "the injured worker may select an authorized treating physician of the worker's choosing." An employer is deemed notified of an injury when it has "some knowledge of the accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Bunch v. industrial Claim Appeals Office,* 148 P.3d 381, 383 (Colo. App. 2006).

U. Respondents (apparently) initially supplied Claimant with appropriate options for an ATP. Claimant timely chose Concentra, and was assigned Dr. Peterson, who the ALJ finds provided appropriate and timely recommendations for Claimant's care. Then, however, Insurer effectively told Claimant he was on his own. Fortunately, Claimant had the means to seek the care he needed through Employer's health insurance. The ALJ has already found that such care was reasonable, necessary, and related to Claimant's work injury. Respondents have now forfeited further control over who will provide any further treatment for this knee injury. Hopefully, this surgery already performed will be the last needed treatment, but the ALJ now finds that Dr. Simpson- or his designee-will now remain Claimant's ATP until this case is concluded.

Temporary Total Disability

V. To prove entitlement to Temporary Total Disability (TTD) benefits, a claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *See* Sections 8-42-(1)(g), 8-42-105(4); *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a) requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. The term "disability" connotes two elements: (1) medical incapacity evidenced by loss or restriction of bodily function; and (2) impairment of wage earning capacity as demonstrated by claimant's inability to resume his or her prior work. *Culver v. Ace Electric*, 971 P.2d 641, 649 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)).

W. Because there is no requirement that a claimant must produce evidence of medical restrictions, a claimant's testimony alone is sufficient to demonstrate a disability. *Lymburn v. Symbios Logic,* 952 P.2d 831, 833 (Colo. App. 1997). TTD benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. §8-42-105(3)(a)-(d), C.R.S.

X. In this case, while Claimant (lacking an ATP until this Order) has not been placed at MMI, the ALJ finds his testimony persuasive that he was unable to return to work for approximately *two and a half months*, whereupon he was returned to light duty for a 'couple of weeks', then returned to full duty. There is no evidence that his pay was diminished during this light duty, although it is likely he did not earn commission until returned to the field full-time. However, Claimant supplied no exhibits or testimony in support. Respondents' supplied *Employer's Records suggest* some ongoing, but greatly diminished, pay through 12/4/2020 (then the records end). However, there is no explanation or testimony on this issue; rather, Respondents essentially rely on their compensability argument. The ALJ will not impute any income to Claimant during this period without more substantial evidence. The ALJ finds, therefore, that Claimant has shown that he is entitled to TTD payments for *two and a half months* from the date of injury, at the AWW rate previously stipulated by the parties.

ORDER

It is therefore Ordered that:

1. Claimant suffered a compensable injury to his left knee. Claimant is entitled to a general award of medical benefits to cure him of the effects of this work injury.

2. All treatment rendered to date for Claimant's knee injury is reasonable, necessary, and causally related to the work injury. Respondents are responsible for reimbursement for all such medical expenses rendered to date, in accordance with the Fee Schedule.

3. Dr. Simpson, or his designee, shall remain Claimant's ATP.

4. Clamant is entitled to two and a half months of TTD payments.

5. Claimant's Average Weekly Wage is $945.98.

6. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

7. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. *In addition, it is recommended that you send a copy of your Petition to Review to the Colorado Springs OAC via email at oac-csp@state.co.us.*

DATED: December 17, 2021

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

STIPULATION

Prior to the presentation of evidence, the parties stipulated to an average weekly wage of $1,653.14. The stipulation was approved.

REMAINING ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that she is entitled to temporary total disability (TTD) benefits from December 14, 2018, to December 27, 2018.

II. Whether Claimant established, by a preponderance of the evidence, that she is entitled to temporary partial disability (TPD) benefits between January 3, 2020, and January 18, 2021.

III. Whether Claimant established, by the preponderance of the evidence, that she is entitled to a disfigurement award and if so, the amount of that disfigurement benefit.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant works as a Systems Engineer for Employer. On August 29, 2018, she was testing some computer terminals when she sustained an admitted injury to her right ankle. According to Claimant, she was walking between two terminal stations when she "stepped wrong on [a] cable cover" inverting her right ankle. Claimant's injury occurred while she was on assignment in San Diego, California.

2. As a result of her injury, Claimant has been evaluated and treated by a variety of healthcare providers, including John Seddon, M.D., Melissa Strike, D.O., Martin Verhey, M.D., Walter Larimore, M.D., Scott Primack, D.O. and David Reinhard, M.D. She has also received a substantial amount of physical therapy (PT) treatment through Action Potential.

3. Claimant's right ankle injury failed to respond to rest and conservative care. Consequently, on December 14, 2018, she was taken to the operating room (OR) by Dr. Seddon who performed a right ankle arthroscopic debridement and mircofracture surgery along with a lateral ligament stabilization with internal brace augmentation procedure.

4. Claimant returned to Dr. Seddon for a follow-up appointment on December 26, 2018. During this encounter, Claimant reported that she had been shopping two days prior to her scheduled appointment when someone pushing a shopping cart struck her on

the lateral aspect of the right leg. Claimant reported increased pain in the lateral portion of the right lower leg and ankle that gradually improved with time. (Claimant's Exhibit 2, p. 13). Claimant also reported that she was elevating her leg "as much as possible" and had been compliant with her non-weight bearing status.

5. During her December 26, 2018 appointment, Claimant's sutures were removed and she was placed in a cam boot. Claimant was instructed to continue her non-weight bearing status for the next two weeks followed by an increase in weight bearing as tolerated while wearing her cam boot. Post-operative physical therapy was to start at the end of the two-week non-weight bearing period. Dr. Seddon imposed no other restrictions, indicating instead that he would reevaluate Claimant with weight bearing x-rays in four weeks. (Claimant's Exhibit 2, p. 13).

6. Claimant's testified that her job requires her to sit, stand, walk, stoop, bend, climb ladders and crawl under computer terminals. She testified to an average of 2-3 hours of walking per day. A copy of Claimant's job description containing a list of the physical demands necessary required of the position indicates that during an eight-hour day, a system engineer is expected to sit 6 hours, stand one hour and walk one hour. Moreover, occasional bending/stooping, squatting/crouch, crawling, climbing, kneeling twisting, pushing/pulling and reaching above shoulder height is required as part of the position. (Respondents' Exhibit B, p. 14).

7. Claimant continued to have right ankle pain and instability following her December 14, 2018 surgery and post-operative physical therapy. Consequently, Dr. Seddon returned her to the OR on January 3, 2020, where she underwent surgery to the right ankle consisting of a repeat debridement and a revision of her lateral ligamentous stabilization with peroneus longus and peroneus brevis debridement and tenosynovectomy. (Claimant's Exhibit 4, p. 28). In the case of her peroneus brevis, Dr. Seddon performed an excision of low-lying muscle belly. (Id.). Claimant was placed in a short leg case and assigned weight-bearing restrictions (non-weight bearing) throughout the right lower extremity.

8. Claimant presented to Dr. Seddon in follow-up on January 21, 2020. During this encounter, she reported compliance with her non-weight bearing status. She also reported that she was elevating her right leg as much as possible. Dr. Seddon removed her surgical sutures without incident. Claimant was once again placed in a cam boot and instructed to "slowly" progress her weight bearing over the next 2 weeks as tolerated. (Claimant's Exhibit 6, p. 42).

9. During a follow-up visit on February 18, 2020, Claimant reported that she was weight bearing as tolerated while in her cam boot. She reported symptoms consistent with complex regional pain syndrome (CRPS) along the distal aspect of her medial toes. Thus, she was referred to a pain management physician for further discussion of treatment options related to CRPS. She was also advised that she could transition out of her cam boot and was fitted with a lace up ankle brace. PT was to continue. (Claimant's Exhibit 6, pp. 43-44). Claimant also reported that she was going

to Australia later in the week prompting Dr. Seddon to advise her to wear compression socks during the long flight and to continue with her daily exercises while there. (*Id*. at p. 44).

10. Claimant was evaluated for her CRPS like symptoms on February 18, 2020, by Dr. Melissa Strike. During this examination, Claimant reported intermittent discoloration of the first and second toes of the right foot and stabbing pain in the right ankle since her January 3, 2020 surgery. Dr. Strike noted that while Claimant's EMG was normal, she was experiencing persistent pain that was accompanied by skin changes. Accordingly, she referred Claimant to Dr. Martin Verhey for additional evaluation. (Claimant's Exhibit 9, p. 164).

11. Claimant was evaluated by Dr. Verhey on February 19, 2020. Dr. Verhey noted that Claimant had "ischemic" looking changes on her toes and other symptoms very consistent with CRPS. He recommended a series of sympathetic lumbar blocks. Claimant's first block would be cancelled because of the Covid-19 pandemic. (Claimant's Exhibit 10, p. 173).

12. Claimant returned to Dr. Strike for follow-up on April 6, 2020. She reported that she did travel to Australia at the end of February 2020. According to Dr. Strike's April 6, 2020 report, Claimant described engaging in a "great deal of hiking" while in Australia. Claimant added that at the end of a long day of activity, she would experience severe swelling of the right ankle. Finally, she described persistent discoloration of the right toes for which she was hoping to get an injection by Dr. Verhey. (Claimant's Exhibit 9, p. 167).

13. Claimant returned to Dr. Seddon on April 8, 2020. During this appointment, she reported that she had completed her post-operative PT, had discontinued the use of her lace up ankle brace. She also reported persistent "minimal" pain with everyday ambulation. (Claimant's Exhibit 7). Nonetheless, Claimant had increased pain with rotational type movements of the ankle and with prolonged periods of ambulation or "being on her feet." (Id. at p. 45). Dr. Seddon concluded by indicating that Claimant was doing "fairly well." He expected that she would "continue to improve as she performs her home exercises and increases her activity level." (*Id*. at p. 46). He did not have any "specific" restrictions for Claimant.

14. Dr. Verhey administered a series of lumbar sympathetic blocks to treat Claimant's suspected CRPS on May 28, 2020, August 25, 2020 and September 15, 2020 with mixed results. (See generally, Claimant's Exhibit 10). Dr. Seddon also administered a cortisone injection into the right ankle on June 22, 2020. (Claimant's Exhibit 6, p 48).

15. During a September 22, 2020 follow-up with Dr. Seddon, Claimant reported persistent right ankle pain, which was affecting her activities of daily living. (Claimant's Exhibit 6, pp. 52-53). While discussion was had regarding the potential for a second cortisone injection, Claimant declined the shot opting instead for additional PT. (*Id*. at p. 53).

16. As noted, Claimant has undergone an extensive amount of PT. Review of the available records supports a finding that Claimant has been referred to PT on multiple occasions and has attended numerous PT sessions over several months. (See generally, Claimant's Exhibit 8). Indeed, between January 24, 2020 and April 14, 2020, Claimant attended 69 separate PT appointments. (Claimant's Exhibit 8, pp. 112-146).

17. Claimant was evaluated by Dr. Walter Larimore on September 30, 2020 for a transfer of care and establishment of an authorized treating provider (ATP) as part of her workers' compensation claim. (Claimant's Exhibit 11). While Claimant reported persistent right ankle pain, Dr. Larimore did not observe any gait alteration, i.e. antalgia. He also noted that prior to her visit, Claimant had returned to work "full duty." After obtaining a history and reviewing the available medical records, Dr. Larimore discussed the case with his partner, Dr. Elizabeth Bisgaard. (*Id*. at p. 215). Following that consultation it was decided that Dr. Larimore's office did not have the resources to "provide delayed recovery care" for Claimant as her ATP. No work restrictions were provided.

18. Claimant presented to the emergency department (ED) at Grandview Hospital at 5:36 p.m. on October 14, 2020, seeking an evaluation related to an elevated blood pressure reading of 138/94. (Claimant's Exhibit 7, p. 88). She was evaluated by Dr. Eric Wu at 6:37 pm. (*Id*. at p. 91). During this encounter, Claimant was advised that her hypertension "may" be related to her use of Cymbalta, or alternatively to an increase in her thyroid medication. According to Claimant's testimony, she left work around lunchtime on this date. Careful review of the available records fails to convince the ALJ that there has been a definitive statement concerning the causal connection between Claimant's hypertension and her work related ankle injury.

19. Claimant was referred to Dr. Scott Primack as an ATP to determine whether she had reached maximum medical improvement (MMI) after Dr. Larimore declined to assume treatment. She would see Dr. Primack several times. The initial evaluation with Dr. Primack occurred on November 16, 2020, for what is described in the record as "ongoing right ankle discomfort." (Claimant's Exhibit 12). After taking a history and completing a physical examination, Dr. Primack opined that Claimant's symptoms were out of proportion to her examination. He was hesitant to recommend additional surgery. Rather, he recommended that Claimant undergo an autonomic test battery to include a thermogram and sonographic analysis in an effort to help delineate whether her persistent ankle pain represented a case of CRPS or was mechanical in nature. (*Id*. at p. 225). Dr. Primack referred Claimant to Dr. David Reinhard for the autonomic testing.

20. Dr. Reinhard completed the requested testing battery on December 14, 2020. (Claimant's Exhibit 13). The results of Claimant's autonomic battery and stress thermography were negative for CRPS. (*Id*. at pp. 252-272). With two negative test results, Claimant did not meet the Colorado Division of Workers' Compensation criteria for confirmed CRPS, leading Dr. Reinhard to conclude that Claimant's persistent pain was most likely mechanical in nature. (*Id*. at p. 252).

21. Claimant was reevaluated by Dr. Primack on January 18, 2021. At the conclusion of this appointment, Dr. Primack placed Claimant at MMI with 10% lower extremity impairment. (Claimant's Exhibit 12, p. 244). He did not assign work restrictions.

Claimant's Testimony

22. Claimant testified that following her December 14, 2018 and January 3, 2020 surgeries she was non-weight bearing for six weeks. She testified that she missed time from work following her surgeries because she was restricted and because she needed to attend medical appointments related to her right ankle injury or the complications caused thereby. She also testified that when she was able to work she could not perform the full range of duties associated with her position as a systems engineer.

23. Claimant testified that she compiled a list of all dates and time she was unable to work due to her ankle injury. (Claimant's Exhibit 15). While Claimant began tracking her lost time from work on August 31, 2018[1], she testified that she was not seeking TTD benefits for the period extending August 31, 2018 through December 13, 2018. Rather, Claimant asserts entitlement to TTD benefits beginning December 14, 2018 and ending December 27, 2018. Consequently, this order does not address Claimant's entitlement to temporary disability benefits prior to December 14, 2018.

24. Claimant's Exhibit 15 reveals that she did not work December 14, 2018. This is supported by medical records, which establish that Claimant underwent surgery on this date. The spreadsheet also reflects that she did not work December 17, 2018. She worked remotely for 6.5 hours on December 18, 2018, but did not work at all the next day, December 19, 2018. Claimant again worked remotely from home for 4 hours on December 20, 2018. According to her lost time log, Claimant did not work any hours between December 21 and December 31, 2018. Nevertheless, at the outset of the hearing Claimant's counsel indicated that Claimant was only seeking TTD benefits through December 27, 2018 and Claimant reiterated this during her hearing testimony.

25. Although Claimant's log supports a finding that she missed 61.5 hours of work between December 14, 2018 and December 27, 2018, she testified that she received her full wages because she used personal time off (PTO) and "comp time" to make up for her lost work hours. According to Claimant, PTO is earned on a weekly basis and can be cashed in, up to a certain amount, at the end of the year. Claimant went on to testify that comp time was given to her in lieu of overtime. For example, if Claimant worked 42 hours, she would get 2 hours of comp. time. The comp time policy as explained by Claimant is corroborated by Employers "Time Keeping Procedures." (Respondents' Exhibit B, p. 12).

26. Claimant returned to work on January 2, 2019. She testified that she was able to get a ride to/from work and that her co-workers would assist her in completion of

[1] According to Claimant's compilation of lost time, she missed 265 hours from work between in 2018 as a consequence of her injury. (Claimant's Exhibit 15, p. 313).

duties she was unable to perform at work. Nonetheless, Claimant testified that she continued to miss time from work due to attendance at medical appointments to obtain treatment for her right ankle.

27. Claimant's lost time log supports a finding that she missed 333.5 hours of time from work in 2019, because of the ongoing symptoms associated with her right ankle injury or to attend various medical appointments related to treatment directed to her right ankle injury, including physical therapy. Nonetheless, the evidence presented, including Claimant's Application for Hearing (Respondents' Exhibit A), the statements of counsel and her testimony persuades the ALJ that Claimant is not seeking temporary disability benefits for the period beginning December 28, 2018 and ending January 2, 2020. Accordingly, this order does not address Claimant's entitlement to temporary disability benefits for this time period.

28. Claimant testified that following her January 3, 2020 surgery, she was again restricted to a non-weight bearing status for six to eight weeks. She testified that she was instructed to remain out of work for two weeks following her surgery. Although Claimant testified that she was excused from work for two weeks after surgery, she admitted that she did not follow this advice. Instead, she testified that she returned to work January 6, 2020.

29. Claimant's lost time log (Exhibit 15) reflects that she did not work January 3, 2020. The reason for not working is listed as "Ankle Surgery." As found, Dr. Seddon's records support a finding that he performed right ankle surgery on January 3, 2020. Accordingly, the ALJ finds that Claimant's lost time log consistent with and supported by the available medical records for this date.

30. Claimant's lost time log also reflects that she returned to work "Half Days" on January 6-7, 2020. Claimant returned to full work, i.e. eight-hour days on January 8, 2020. Nonetheless, she testified and the medical records support that she continued to experience lost time due to her need to attend medical appointments related to her right ankle injury. The lost time log compiled by Claimant supports a finding that between January 3, 2020 and May 28, 2020, she lost 114.5 hours of work time due to the persistent symptoms associated with her right ankle injury or because her had to attend a medical appointment related to her right ankle condition.[2] There are no entries on the lost time log after May 28, 2020. (Claimant's Exhibit 15, p. 313). While there are no entries reflected on the lost time spreadsheet after May 28, 2020, the wage records admitted into evidence demonstrate that Claimant regularly used PTO and/or "Workcomp Leave" after this date to make up hours she lost attending medical appointments related to her right ankle injury. (Claimant's Exhibit 14).

31. Based upon the totality of the evidence presented, the ALJ is sufficiently persuaded that the majority of Claimant's spreadsheet entries are accurate and that much of the lost time reflected on the spreadsheet was compensated using PTO, comp time,

[2] See Claimant's Exhibit 15, p. 323 consisting of a compilation of dates Claimant attended medical appointments for her right ankle injury.

or Workcomp Leave. While the ALJ is convinced that the majority of the lost time referenced on Claimant's spreadsheet is probably related to her inability to work due to symptoms associated with her right ankle injury or her attendance at medical appointments, several entries to the spreadsheet raise concerns for the ALJ.

32. As noted, the medical records support a finding that Claimant traveled to Australia at the end of February 2020. The record evidence substantiates that Claimant saw Dr. Seddon on February 18, 2020, after which appointment Dr. Seddon documented that Claimant would be traveling to Australia "later" in the week. Claimant then saw Dr. Strike on February 18, 2020, who referred her to Dr. Verhey for additional evaluation. As found, Claimant was seen by Dr. Verhey on February 19, 2020. The lost time spreadsheet contains entries for February 18-19, 2020 consistent with these visits. Moreover, Claimant's physical therapy records demonstrate that she attended a PT appointment on February 19, 2020 during which she reported that she was "leaving for work for three weeks and [would] return to PT after." (Claimant's Exhibit 8, p. 131). Following this physical therapy session, there is a gap in Claimant's treatment until March 9, 2020 when she returned to physical therapy reporting that her ankle "swelled a lot while hiking." (Claimant's Exhibit 8, p. 133). The lost time spreadsheet supports a finding that Claimant is not claiming any lost time to attend medical appointments between February 20, 2020 and March 9, 2020, which the ALJ finds consistent with the hiatus in treatment during this same period. Consequently, the ALJ finds it reasonable to infer that Claimant was probably out of the country and in Australia for this period. While Claimant testified that she would "go out to teach for two weeks at a time" and the February 19, 2020, physical therapy record reflects that she was leaving for work for three weeks, the evidence presented strongly supports that Claimant's increased ankle symptoms and swelling were due to substantial amounts of hiking while in Australia. While it is possible that Claimant traveled to Australia for business, she did not testify as such nor did she indicate that hiking was part of her work duties while in Australia if she had. As presented, the evidence fails to persuade the ALJ that the time Claimant purports to have lost from work on February 24, 2020, March 2, 2020 or March 3, 2020, per the lost time spreadsheet was actually time lost from work.

33. The ALJ also finds Claimant's assertion that she lost time from work on October 14, 2020 unpersuasive. While it is possible that Claimant's trip to the ED on October 14, 2020 for high blood pressure was related to medications used to treat the effects of her work injury, the report associated with this visit indicates that it is equally likely that the visit was necessitated by a change in the dosage of her non-work related thyroid medication. The ALJ finds Claimant's testimony concerning the relatedness of this visit to her right ankle injury speculative and unconvincing. Accordingly, the ALJ is not persuaded that the lost time associated with Claimant's October 14, 2020 ED treatment is related to her right ankle injury.

34. Finally, the evidence presented fails to convince the ALJ that Claimant's use of 80 hours of PTO time from December 21, 2020 to January 3, 2021 is related to her work injury. There are no medical records to substantiate the use of this time nor did Claimant record or otherwise testify that the effects of her injury precluded her from

working during this period. Based upon the payroll record associated with this pay period, the ALJ finds that Claimant probably cashed in or used 80 hours of PTO time and that the use of this time was unrelated to her right ankle injury.

35. Claimant is seeking a disfigurement award for the scarring related to her right ankle injury and subsequent surgeries. As noted, Claimant attended the hearing via video conference during which the ALJ visually inspected the disfigurement associated with her August 29, 2018 right ankle injury. The ALJ finds that as a result of her admitted right ankle injury, Claimant has an approximately 4 inch long by ⅛ - ¼-inch wide surgical scar located on the lateral aspect of the right ankle. This scar is slightly raised and lightly pigmented. However, the skin adjacent to this scar appears discolored (mottled) making the disfigurement associated with this scar appear much more conspicuous. In addition to the aforementioned scar, Claimant has two small, lightly pigmented, ¼ inch in diameter, semi-circular arthroscopic scars located on the right ankle. There is mild swelling of the right ankle compared to the left, especially around the lateral malleolus. In addition to the above described scarring and swelling, Claimant ambulates with a slight but perceptive limp favoring the right leg.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the ALJ draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo.App. 2000).

C. Assessing the weight, credibility and sufficiency of evidence in a Workers' Compensation proceeding is the exclusive domain of the ALJ. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo.App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002).

Claimant's Entitlement to Temporary Disability Benefits

D. To prove entitlement to temporary total disability (TTD) benefits, Claimant must prove that the industrial injury caused a disability lasting more than three work shifts; that she left work as a result of the disability, and the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). The term disability connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by Claimant's inability to resume her prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of the earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions, which impair the Claimant's ability effectively, and properly to perform her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998); *Jefferson County Schools v. Headrick*, 734 P.2d 659 (Colo. App. 1986). A claimant is not required to prove both components to establish entitlement to disability benefits under the Workers' Compensation Act. *Montoya v. Industrial Claim Appeals Office*, 488 P.3d 314 (Colo. App. 2018). Rather, it is sufficient if Claimant proves that he/she sustained a loss of wages as a result of her industrial injury to be entitled to temporary disability benefits. (*Id.*)

E. Temporary total disability (TTD) benefits are designed to compensate an injured worker for wage loss while the employee is recovering from his/her work-related injury. *Pace Membership Warehouse, Div. of K-Mart Corp. v. Axelson*, 938 P.2d 504 (Colo. 1997); *Eastman Kodak Co. v. Industrial Commission of State of Colorado*, 725 P.2d 107 (Colo. App. 1986). In the case of TTD, the injured employee "shall receive sixty-six and two-thirds percent of [his/her] average weekly wage so long as the disability is total, not to exceed a maximum of ninety-one percent of the state average weekly wage per week." C.R.S. § 8-42-105(1). As noted above, the claimant in a workers' compensation claim bears the burden of establishing three conditions before qualifying for TTD benefits: (1) that the industrial injury caused the disability; (2) that claimant left work because of the injury; and (3) the disability is total and last more than three working days. *City of Colorado Springs v. ICAO*, 954 P.2d 637 (Colo. App. 1997).

F. In this case, the ALJ credits Claimant's testimony to conclude that she was medically incapacitated and unable to perform the full range of her regular employment following her December 14, 2018 right ankle surgery.[3] Here, the evidence presented supports a finding that Dr. Seddon restricted Claimant's weight bearing status and imposed a further restriction of having to elevate her right leg post surgery causing her to lose time and therefore, wages from work. Based upon the evidence presented, including Claimant's testimony, it is reasonable to infer that she was unable to work as effectively or as efficiently as she had prior to her admitted right ankle injury. Consequently, the ALJ is convinced that Claimant has proven that she is "disabled" within the meaning of section 8-42-105, C.R.S. See *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999); *Hendricks v. Keebler Company*, W.C. No. 4-373-392 (ICAO, June 11, 1999). While the ALJ is persuaded that Claimant's work-related right ankle injury caused a disability and that she left work because of this injury, a question remains as to whether her disability was "total" for the entire period of requested TTD extending from December 14, 2018 through December 27, 2018.

G. It is undisputed that Claimant returned to work on Tuesday, December 18, 2018, albeit in a modified capacity for 6.5 hours from home. While she was unable to work December 19, 2018, Claimant again worked remotely for 4 hours on December 20, 2018. Per C.R.S. § 8-42-105(3)(b), TTD benefits shall continue until "[t]he employee returns to regular or modified employment." Accordingly, the ALJ concludes that Claimant's lost time from work on December 18, 2018 and December 20, 2018 is appropriately characterized as temporary partial disability. Conversely, Claimant's December 14, 20218, December 17, 2018, December 19, 2018 and December 21, 2018 – December 27, 2018 lost time could be considered total. However, because Claimant had returned to work, the ALJ concludes that the hours Claimant lost from work between December 18, 2018 and December 27, 2018 is also best characterized as temporary partial disability in this case. Because the period of total disability did not last longer than two weeks from the day Claimant left work as a consequence of her work related injury, she is not entitled to recovery from the day she left work. C.R.S. § 8-42-103(1)(b). Based upon the evidence presented, the ALJ is persuaded that after excluding the first three regular working days, i.e. 24 hours, Claimant is entitled to payment of 37.5 hours of temporary disability benefits for her lost work time between December 18, 2020 and December 27, 2020 (61.5 hours of lost time – 24 hours (when accounting for the first three regular work shifts) = 35.7 hours of temporary partial disability).[4]

H. In the case of temporary partial disability (TPD), an injured employee "shall receive sixty-six and two-thirds percent of the difference between the employee's average weekly wage at the time of the injury and the employee's average weekly wage during the continuance of the temporary partial disability, not to exceed a maximum of ninety-

[3] A medical opinion is not a prerequisite to establishing entitlement to temporary disability benefits. To the contrary, a claimant's testimony, if credited, is sufficient to prove causation and the inability to work. Lymburn v. Symbios Logic, 952 P.2d 831 (Colo. App. 1997),

[4] Based upon the evidence presented, the ALJ finds Respondents suggestion that Claimant is not entitled to TTD for December 24, 2018, because she went shopping unpersuasive. To the contrary, the ALJ is convinced that Claimant's shopping probably occurred after working hours and that she was unable to work as reflected on the lost time spreadsheet. (Claimant's Exhibit 15, p. 308).

one percent of the state average weekly wage per week. Temporary partial disability shall be paid at least once every two weeks." C.R.S. 8-42-106 (1).

I. As noted above, Claimant specifically asserts entitlement to TPD benefits between January 3, 2020 and January 18, 2021 for time she lost from work due to ongoing symptoms associated with her right ankle injury or because of attendance at medical appointments to cure and relieve her of the effects of her right ankle injury. As found, the ALJ credits Claimant's testimony and the majority of the lost time spreadsheet to conclude that she lost time from work to attend medical appointments or simply because she could not work on occasion due to the ongoing symptoms associated with her work related right ankle injury. Respondents contend that "[t]here is no explanation as to why [Claimant] is entitled to a year of TPD benefits following the January 2020 surgery when she had similar treatment and recommendations following the 2018 surgery." The ALJ disagrees as the medical records demonstrate that Claimant lost time either, because of ongoing symptoms related to her work injury or because she had to attend medical appointments to cure and relieve her of these symptoms. Moreover, the ALJ is persuaded that Claimant used PTO, comp time or work comp leave to make up for those lost hours from her wages.

J. C.R.S. § 8-42-124 (4) provides that if the employer pays less than the benefits to which the injured worker is entitled or charges the Claimant with earned vacation or sick leave, the Claimant is still entitled to receive temporary disability benefits. Vacation and sick pay "are benefits earned by virtue of past services rendered," and such earned benefits may not be impaired by the employees work related injury. *Public Service Co. V. Johnson*, 789 P.2d 487, 488 (Colo. App. 1990). It follows that PTO and comp time are similarly earned benefits. In this case, Respondents paid no temporary disability benefits in spite of Claimant's entitlement to such benefits. Rather, Claimant used her PTO and comp time in order to ensure she received full wages while disabled.

K. In keeping with the holding announced in *Public Service Co. of Colorado v. Johnson*, 789 P.2d, 487 (Colo. App. 1990) the ALJ concludes that Claimant is entitled to receive TTD and TPD for the above referenced periods of time. As noted in the *Public Service Co.* decision, such payment does not constitute double compensation because vacation, sick and other similar benefits, i.e. "comp time" are earned by past services unrelated to the occupational injury. The Court concluded that the legislative determination of § 8-42-124(4) "reflects a legislative determination that an injured employee should not be required to sacrifice earned benefits in order to obtain statutorily mandated workmen's compensation benefits." *Public Service Co., supra.* Thus, just as the employer in *Public Service Co.* was required to pay both the claimant's sick and vacation time and full TTD, Respondent-Employer in the instant case is obligated to pay Claimant for the required PTO, comp time and work comp leave she depleted from these accounts in addition to TTD/TPD.

Claimant's Entitlement to Disfigurement Benefits

L. In *Arkin v. Industrial Commission*, 145 Colo. 463, 358 P.2d 879 (1961), the Court held that the term “disfigurement” as used in the statute, contemplates that there be an “observable impairment of the natural person.” As found at Finding of Fact, ¶ 32 above, Claimant has suffered a “disfigurement”, i.e. surgical scarring and mild swelling about the right ankle in addition to a slight limp, which the ALJ concludes, constitutes an observable alteration in Claimant’s gait pattern and the natural appearance of skin covering the right knee. Accordingly, the ALJ concludes that Claimant has suffered a visible disfigurement entitling her to additional benefits pursuant to Section 8-42-108 (1), C.R.S.

ORDER

It is therefore ordered that:

1. Claimant has proven that she is entitled to a period of temporary disability benefits. Respondent-Insurer shall pay Claimant temporary disability benefits for her lost time from work for the following dates:[5]

- Beginning December 18, 2018 for 1.5 hours and all subsequent lost time thereafter, as documented in Exhibit 15, through December 27, 2018.

- Beginning January 3, 2020 and running through February 19, 2020, for lost time caused by persistent symptoms precluding Claimant’s ability to work or for lost time related to her attendance at medical appointments as documented in Exhibit 15.

- Claimant’s request for lost time claimed in association with a January 11, 2020 appointment to the ED at Grandview Hospital is expressly denied as the ALJ takes administrative notice that January 11, 2020 was a Saturday and Claimant failed to prove that she lost time from work for this appointment nor did she claim it in Exhibit 15.

- Beginning March 9, 2020 and running through May 28, 2020, for lost time caused by persistent symptoms precluding Claimant’s ability to work or for lost time related to her attendance at medical appointments as documented in Claimant’s Exhibit 15.

- Beginning May 29, 2020 and running through October 13, 2020, for lost time in association with Claimant’s attendance at medical appointments as documented in Claimant’s Exhibit 15, p. 323.

[5] During hearing, Claimant clarified that he was simply asking the ALJ to determine Claimant’s entitlement to temporary disability benefits for the requested periods rather than the specific amount of TT and TPD benefits, noting further that the parties expected to work out the exact amount of time and value of any temporary disability benefits awarded.

- Claimant’s request for payment of temporary disability benefits in association with lost time for a claimed date of medical service on October 14, 2020 is denied as dismissed as Claimant failed to prove the requisite causal connection between her industrial injury and the need for treatment on this date.

- Beginning October 15, 2020 and running through December 20, 2020, for lost time associated with Claimant’s attendance at medical appointments on November 4, 9, 11, 16, 17, 20, 23, 25, and December 7 and 14, 2020, as documented in Claimant’s Exhibit 15, p. 323.

- Claimant’s request for payment of temporary disability benefits in association with lost time between December 21, 2020 and January 3, 2021, is denied and dismissed as Claimant failed to carry her burden of proof to establish that her use of PTO time for this period was related to her work related right ankle injury.

- Beginning January 4, 2021 and January 18, 2021, for time associated with attending medical appointments on January 13, 2021, January 15, 2021 and January 18, 2021 as documented in Claimant’s Exhibit 15, p. 323.

2. Claimant’s AWW for purposes of her employment with Respondent-Employer is determined to be $1,653.14 per the approved stipulation of the parties.

3. Insurer shall pay Claimant $2,250.00 for the above-described disfigurement. Insurer shall be given credit for any amount previously paid for disfigurement in connection with this claim.

4. The insurer shall pay interest to claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein, and not closed by operation of law, are reserved for future determination.

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 20, 2021

/s/ Richard M. Lamphere

Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
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OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-089-884-004

ISSUES

I. What is Claimant's impairment rating for his right knee?

II. What is Claimant's impairment rating for his left ankle?

III. Whether the TENS unit supplies are reasonable, necessary, and related medical treatment.

IV. Whether Claimant must reimburse Respondent for the cancellation fee for the Respondent requested independent medical examination with Dr. O'Brien on July 15, 2021, that did not occur.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. Claimant sustained an admitted right knee injury while working for Respondent on October 11, 2018.
2. An MRI of Claimant's right knee, obtained on October 12, 2018, indicated a high-grade partial thickness tear in the proximal patellar tendon, MCL sprain, chondromalacia, and moderate joint effusion. Claimant was referred for surgery.
3. A second MRI, obtained on April 4, 2019, indicated patella tendinopathy, and a stable superficial chondral fissure of the patellar ridge with preservation of the remaining patellofemoral articular cartilage.
4. A third MRI, obtained on August 12, 2019, indicated chronic degenerative changes in the patella.
5. On September 10, 2019, Claimant underwent right knee surgery. The operation was performed by Justin Newman, M.D, and included diagnostic arthroscopy, chondroplasty of the patella and medial femoral condyle, medial meniscus repair with bone site techniques, and medial patella femoral ligament reconstruction with allograft. The postoperative diagnoses included:
   - Right knee lateral patellar instability.
   - Grade III chondromalacia of the medial patellar facet over an area of 8/10 mm with diffuse grade II chondromalacia over the medial and lateral patella facets.
   - Diffuse grade II chondromalacia with delaminated cartilage in the medial femoral condyle.
   - Medial meniscal tear.

6. Claimant then underwent post-operative rehabilitation. As part of his treatment, Claimant was prescribed a TENS unit. Claimant used the unit and it provided relief to his right knee.

7. During his recovery from surgery, Claimant used crutches to ambulate. In late October or early November 2019, one of Claimant's crutches slipped while he was using it and he suffered a left ankle injury.

8. MRI of the left ankle was obtained on January 16, 2020, which revealed an ankle sprain and tear of the peroneus brevis. Claimant was referred for left ankle surgery.

9. Respondent admitted liability for Claimant's left ankle injury.

10. On September 18, 2020, Claimant underwent left ankle surgery. The surgery was performed by Scott Resig, M.D., and included arthroscopy, debridement, modified Brostrom procedure, peroneus brevis repair, and peroneal tenosynovectomy.

11. Claimant then underwent post-operative rehabilitation. As part of his treatment, Claimant continued to use the prescribed TENS unit for pain relief, and it provided pain relief for his left ankle and right knee.

12. In January 2021, Claimant's authorized treating physician, Edwin Baca, M.D., requested replacement electrodes and batteries for the TENS unit.

13. On January 28, 2021, Mahdy Flores, M.D., reviewed the request for TENS unit supplies. Dr. Flores, M.D., concluded that the request for TENS unit supplies should not be approved. As part of his review, Dr. Flores did not discuss with Claimant whether the TENS unit was providing pain relief. The primary basis for Dr. Flores' recommendation to deny authorization of the TENS unit supplies was that the medical records did not document objective improvement or decrease in pain as shown by a visual analog scale (VAS) with specific use of Claimant's TENS unit. However, despite Dr. Flore's finding that there was a lack of evidence in the medical records that Claimant was getting pain relief from the TENS unit, Claimant credibly testified at hearing that he gets pain relief from the TENS unit.

14. On April 16, 2021, Claimant was referred to Scott Primack, D.O., for a comprehensive consultation / impairment rating for his right knee and left ankle injury. Dr. Primack obtained a history, reviewed Claimant's medical records, and performed a physical examination. He concluded Claimant reached MMI as of April 16, 2021. During his examination of Claimant's lower extremities Dr. Primack noted evidence of "a brown discoloration, which could be from pooling of fluid at the lower extremities bilaterally." Based on his evaluation of Claimant, Dr. Primack's diagnoses of Claimant's work-related conditions for his right knee included:

    (a) Ligament tearing and meniscal fraying,

    (b) Post meniscectomy,

    (c) Ongoing achiness.

    (d) Residual loss of motion.

    As to his left ankle, Dr. Primack's diagnoses include:

(a) Post ankle surgery.

(b) Residual pulling/swelling secondary to his postoperative treatment course.

(c) Residual pain

(d) Residual laxity and stiffness.

15. Dr. Primack provided Claimant an impairment rating for his knee and ankle injury. Dr. Primack assigned an 18% scheduled impairment rating to Claimant's right knee, and a 17% scheduled impairment rating to his left ankle. The 18% impairment assigned to Claimant's right knee was based on 4% range of motion ("ROM") loss per Table 39 and 15% for specific disorders per Table 40 for having a meniscal tear and undergoing surgery – which he classified as a meniscectomy. The 17% impairment assigned to Claimant's left ankle was based on 11% ROM loss per Table 37 and 6% ROM loss per Table 38.

16. Dr. Primack also concluded that Claimant required maintenance medical treatment due to his work injury. At the time of his evaluation, he concluded Claimant required Jobst stockings due to the bilateral swelling – which might also reduce Claimant's pain. He also stated that the Jobst stockings should be custom fitted to Claimant. He said the Jobst stockings should be:

> [F]itted to him. This will require high pressures distally with less pressures proximally, so he will have a lesser propensity of pulling/swelling.

17. On April 21, 2021, Claimant was assessed by Dr. Baca – who treated Claimant during his claim. Dr. Baca agreed Claimant had reached MMI. He also agreed Claimant sustained permanent impairment. Dr. Baca did not, however, recommend any maintenance medical treatment.

18. Respondent objected to Dr. Primack's impairment ratings and filed an Application for Hearing regarding permanent partial disability benefits. Claimant also filed an application for hearing and endorsed the issue of medical benefits. The applications were consolidated to be heard at one hearing.

19. On April 27, 2021, Dr. O'Brien performed a records review IME. He disagreed with the prescription for ongoing use of a TENS unit. According to Dr. O'Brien, there is a lack of scientific evidence to support the use of a TENS unit to support healing. (But Claimant is requesting the TENS unit for pain relief, not "healing.") Dr. O'Brien also stated that there was also no Level I or II accredited scientific treatise that supported the use of a TENS unit as an effective modality following surgery. But the Medical Treatment Guidelines state that a TENS unit is effective treatment for pain relief. As set forth by Dr. Hughes - A TENS unit is specifically outlined in the Colorado Division of Worker's Compensation Lower Extremity Injury Medical Treatment Guidelines. The Lower Extremity Medical Treatment Guidelines specifically provide that:

> Transcutaneous Electrical Nerve Stimulation (TENS): is a generally accepted treatment. TENS should include at least one instructional session for proper application and use. Indications include muscle spasm, atrophy, and decreased

> circulation and pain control. Minimal TENS unit parameters should include pulse rate, pulse width and amplitude modulation. Consistent, measurable functional improvement must be documented prior to the purchase of a home unit.
>
> - Time to Produce Effect: Immediate.
> - Frequency: Variable.
> - Optimum Duration: 3 sessions.
> - Maximum Duration: 3 sessions. If beneficial, provide with home unit or purchase if effective. Due to variations in costs and in models, prior authorization for home units is required.

Colorado Lower Extremity Medical Treatment Guidelines, p. 185.

Thus, based on Dr. Hughes' opinion, the language set forth in the Guidelines, and the fact that Claimant is using the TENS unit for pain relief - and not "healing" - the ALJ does not find Dr. O'Brien's opinions about the TENS unit to be persuasive.

20. On July 15, 2021, Claimant was scheduled to undergo an independent medical examination (IME) with Timothy O'Brien, M.D., at the request of Respondent's counsel. Before Claimant attended the IME, he was not advised that his wife, or anyone else, would not be allowed to attend the IME with him. Claimant and his wife, Shana P[Redacted] , presented at Dr. O'Brien's office on time, prepared to be seen. Claimant filled out to the intake paperwork including the consent form required by the Division of Workers' Compensation (DOWC). Claimant submitted the paperwork to Dr. O'Brien's office before the appointment. But the examination did not occur. Claimant requested that his wife attend the appointment with him, as she had done with several prior appointments with other providers. But Dr. O'Brien refused. Dr. O'Brien informed Claimant he would not evaluate him if Claimant wanted his wife to attend the appointment. Thus, Dr. O'Brien would not perform the IME with Claimant's wife present. As result of not letting his wife attend the IME, Claimant left without undergoing the evaluation. Claimant did not, however, violate an order compelling him to attend the IME. Claimant did not attend the IME because he wanted to have his wife attend with him – like she had done at prior appointments with other providers – and Dr. O'Brien would not accommodate Claimant's request.

21. Despite the IME not proceeding, the Respondent was charged $898.00 – a cancellation fee - for the IME that did not take place. The fee consisted of $374.00 for file review, $374 for the scheduled IME time, and $150.00 for a facility fee.

22. Ms. P[Redacted] credibly testified she and Claimant made multiple requests for Dr. O'Brien to allow her to attend the appointment with Claimant so the appointment could move forward on July 15, 2021, but yet Dr. O'Brien refused their requests.

23. Ms. Christi Gleason testified via deposition. Ms. Gleason credibly testified that she is the person working the front desk of Dr. O'Brien's office when Claimant and his wife arrived for the July 15, 2021, IME. She testified that Dr. O'Brien would not allow Ms. P[Redacted] to attend the IME because it is his office policy to have the injured worker attend the IME alone. She also testified, that in the past, Dr. O'Brien has allowed a

chaperone to attend an IME when the injured worker was a minor. That said, he did not adjust his office policy for Claimant. She also testified that after Claimant was advised that his wife could not attend the IME, Claimant left and was not evaluated by Dr. O'Brien.

24. On July 21, 2021, Claimant underwent an IME with John Hughes, M.D., at the request of Claimant's counsel. Dr. Hughes obtained a detailed history from Claimant, reviewed his medical records, and performed a physical examination. Dr. Hughes detailed each surgical procedure Claimant underwent for his right knee. The procedures consisted of:

    - Chondroplasty of the patella and medial femoral condyle.
    - Medial meniscus repair.
    - Medial patellofemoral ligament reconstruction with allograft.

25. Dr. Hughes did the same thing for Claimant's left ankle surgery. He noted that Claimant underwent the following procedures:

    - Modified Brostrom procedure with peroneus brevis repair.
    - Peroneal tenosynovectomy.
    - Extensive debridement of the left ankle.

26. Dr. Hughes assessment included the following:

    - Work-related fall with complex right knee injuries sustained October 11, 2018.
    - Traumatic grade 3 chondromalacia of the right medial patellar facet along with lateral patellar instability with residual patellofemoral arthritis, post arthroscopic chondroplasty of the patella and medial femoral condyle done September 10, 2019.
    - Traumatic medial meniscus tear, post medial meniscus repair done September 10, 2019.
    - Right medial patellofemoral ligament tear, post reconstruction done September 10, 2019.
    - Left ankle sprain/strain sustained as a result of a fall, with a peroneus brevis tear and instability of the left ankle.
    - Left ankle arthritis, post open modified Brostrom procedure, peroneus brevis repair, peroneal tenosynovectomy, and extensive debridement done September 18, 2020.
    - Bilateral lower extremity venous insufficiency secondary to bilateral traumatic injuries and surgeries.

27. Dr. Hughes concluded that in addition to Claimant's range of motion deficit to his right knee, Claimant is also entitled to additional impairment for the meniscal injury and for the swelling of both of his lower extremities. As a result, Dr. Hughes concluded

Claimant has a 33% scheduled impairment to his right knee and a 24% scheduled impairment to his left ankle. The 33% impairment assigned to Claimant's right knee was based on 12% ROM loss per Table 39, 15% for specific disorders per Table 40, and 10% for vascular impairment. Dr. Hughes specified that the impairment per Table 40 was 5% for the meniscal tear and surgery, and 10% for chondral injuries that equate to arthritis. The 24% impairment to Claimant's left ankle was based on 9% ROM loss per Table 37, 7% ROM loss per Table 38, and 10% for vascular impairment.

28. Dr. Hughes' impairment rating is consistent with the AMA Guides. For example, along with providing Claimant an impairment rating for his decrease in range of motion of his right knee, Dr. Hughes also provided Claimant a 5% scheduled impairment for the meniscal tear and surgery as well as an additional 10% scheduled impairment for the chondral injuries which he equated to arthritis. A review of Table 40 of the AMA Guides indicates that a "torn meniscus, meniscectomy, or partial meniscectomy" results in a 0-10% impairment. And Dr. Hughes applied the Guides and provided Claimant a 5% impairment for his torn meniscus. Second, Table 40 also provides that arthritis due to any cause, including trauma or chondromalacia can be provided a 0-20% rating. And, Dr. Hughes, provided Claimant 10% impairment for the chondral injury – arthritis – involving Claimant's knee. Third, Table 52 of the AMA Guides provides for a 10-35% impairment for intermittent claudication on walking at least 100 yards at an average pace or for persistent edema of a moderate degree, incompletely controlled by elastic supports. Dr. Hughes concluded that the pain and swelling in Claimant's legs is due to vascular impairments caused by Claimant's injuries and subsequent surgeries. This conclusion is consistent with Dr. Primack, who also concluded Claimant's edema bilateral edema was work related and recommended Jobst stockings. As a result, Dr. Hughes used Table 52 and provided Claimant a 10% rating for claudication and/or persistent edema for each lower extremity.

29. The ALJ finds Dr. Hughes' calculation of Claimant's impairment rating to be credible and persuasive because it is consistent with Claimant's complaints, consistent with the underlying medical records, and consistent with a reasonable interpretation and application of the AMA Guides.

30. On August 10, 2021, a prehearing was held. The prehearing was held to address Respondent's motion to compel Claimant to undergo an IME with Dr. O'Brien without his wife present and their motion to endorse reimbursement for Claimant missing Dr. O'Brien's IME. The motions were granted. Claimant was therefore compelled to attend the IME with Dr. O'Brien on September 10, 2021, and further ordered that his wife could not attend and witness the IME. Moreover, the issue for reimbursement for the cost associated with Claimant's refusal to attend the IME without his wife was added as an issue to be heard at hearing.

31. On September 10, 2021, and pursuant to the order to compel, Claimant attended the IME with Dr. O'Brien without his wife.

32. On September 24, 2021, Dr. O'Brien issued a report. As stated in his report, Dr. O'Brien obtained a history, reviewed Claimant's medical records, and performed a physical examination. Based on his physical examination, he noted Claimant had bilateral pitting edema in the distal two-thirds of his legs. He also noted hemosiderin

staining of both legs. He did not, however, provide a rating for Claimant's edema – swelling - as did Dr. Hughes. Nor did he explain why he did not provide a rating for the swelling. Dr. O'Brien also measured Claimant's range of motion regarding his right knee and left ankle. He did not, however, provide any worksheets setting forth his range of motion measurements. Based on his assessment, he concluded that under the AMA Guides, Claimant has a 2% impairment to his right knee and 12% impairment to his left ankle. As for Claimant's right knee, he did not provide any impairment for Claimant's meniscal injury which required surgery. According to Dr. O'Brien, it was his opinion that the AMA Guides does not provide a mandatory disability rating for a meniscal tear and repair – which Claimant had. He also noted that while Claimant underwent surgery, the surgery "does not constitute a disabling surgical intervention but rather a health restoring surgical intervention." Thus, in his opinion, he did not think that Claimant should be provided an impairment rating just because the meniscal repair was performed. He also supported his decision to not provide Claimant a rating for his torn meniscus and surgical repair because he concluded that Claimant had an excellent surgical outcome. Dr. O'Brien's conclusion that Claimant had "an excellent surgical outcome" is not supported by the history Claimant provided Dr. O'Brien. For example, Claimant told Dr. O'Brien that he still has symptoms in his right knee. These symptoms included 1-9/10 pain, locking, and occasional catching. Thus, there mere fact that Dr. O'Brien concludes that Claimant had an excellent surgical outcome is not supported by Claimant's ongoing complaints. The ALJ therefore does not find Dr. O'Brien's conclusion that Claimant had an excellent result from the knee surgery to be credible or persuasive.

33. Dr. O'Brien also testified in this matter. His testimony largely reflected the opinions expressed in his report. Dr. O'Brien testified that a meniscectomy is the removal of meniscal tissue. He also testified that Claimant did have meniscal tissue removed as part of his right knee surgery, but that he did not have enough tissue removed to qualify as a meniscectomy that would justify impairment per Table 40 of the AMA Guides. Dr. O'Brien tried to make sense of his contradictory testimony by stating that while Claimant did have meniscal tissue removed as part of his surgery, he did not have enough meniscal tissue removed to qualify as a meniscectomy. The ALJ does not, however, find his rationale to be credible or persuasive.

34. Dr. O'Brien further concluded that Claimant did not warrant any impairment per Table 40 for the meniscal tear or chondral injuries as opined to by Dr. Hughes. Dr. O'Brien also testified that Claimant does suffer from swelling in his lower extremities, but he does not believe Claimant should receive claim related impairment ratings for this condition.

35. Overall, the ALJ does not find Dr. O'Brien's opinions to be credible or persuasive.

36. Claimant testified that he continues to have issues with his right knee and left ankle from his work injury. He testified that both his lower extremities become swollen after he is on his feet for an hour to an hour-and-a-half. That his right lower extremity began to swell after his right knee surgery, and that his left lower extremity began to swell after his left ankle surgery. He also testified that he never had issues with his lower extremities swelling prior to undergoing the surgeries to his right knee and left ankle. Claimant testified that he continues to treat his work injuries. Since being placed at

MMI he has received a specialized knee brace for his ongoing right knee issues, and specially fitted Jobst stockings for the swelling in his lower extremities. Claimant also testified that the TENS unit relieves his knee and ankle pain.

37. Claimant's testimony is consistent with the findings set forth by Drs. Primack and Hughes. As a result, the ALJ find Claimant's testimony to be credible and persuasive.

38. The ALJ finds that Claimant continues to have pain involving his knee and ankle and continues to have swelling involving his lower extremities that was caused by his work injuries.

39. The ALJ also finds that the TENS unit relieves Claimant from the effects of his work injury by reducing his knee and ankle pain.

Ultimate Findings

40. Claimant's impairment rating of his right knee is 33% scheduled as set forth by Dr. Hughes.

41. Claimant's impairment rating of his left ankle is 24% scheduled as set forth by Dr. Hughes.

42. The TENS unit supplies are reasonably necessary to relieve Claimant from the effects of his work injury. As a result, the electrodes and batteries are found to be reasonable, necessary, and claim related treatment.

43. Claimant did not violate an order compelling his attendance at the IME with Dr. O'Brien because there was not an order compelling Claimant to attend the July 15, 2021, IME. Nor did Claimant commit a discovery violation when the July 15, 2021, IME did not occur because the failed appointment resulted from a reasonable disagreement about Dr. O'Brien's office policies and Claimant's desire to have his wife present during the IME.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or

every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. What is Claimant's impairment rating for his right knee?

II. What is Claimant's impairment rating for his left ankle?

Typically, when an injured worker is placed at MMI and assigned permanent impairment by the authorized treating physician the process to challenge the impairment rating is to file for a Division Independent Medical Examination ("DIME"). However, the Act does not afford an absolute right to a DIME as a prerequisite to hearing in cases that clearly involve only scheduled injuries. *See Delaney v. Indus. Claim Appeals Off*., 30 P.3d 691, 693 (Colo. App. 2000). Where the impairment is subject to scheduled awards in § 8-42-107(2) the clear and convincing burden of proof does not apply and the usual preponderance burden of proof applies for the claimant to prove entitlement to benefits, which is a factual issue to be determined by an ALJ. *See Burciaga v. AMB Janitorial Services, Inc*., W.C. No. 4-777-882 (Colo. Ind. Cl. App. Off. Nov. 5, 2010).

This is because scheduled and non-scheduled impairments are treated differently under the Act for purposes of determining permanent disability benefits. In particular, the procedures of § 8-42-107(8)(c), which states that a DIME finding as to permanent impairment can be overcome only by clear and convincing evidence and that such finding is a prerequisite to a hearing on permanent impairment, have been recognized as applying only to non-scheduled impairments. *See Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo.App.1998).

As found, per Dr. Hughes, Claimant's right lower extremity impairment is 33% scheduled, and his left lower extremity impairment is 24% scheduled.

As for the right lower extremity, Dr. Primack, Dr. Hughes, and Dr. O'Brien all found Claimant suffers ROM loss in his right knee. Claimant's right knee condition remains symptomatic and has worsened to the point he was fitted for a specialized knee brace after being placed at MMI on April 16, 2021. The main dispute about the impairment to Claimant's right knee is whether he should be assigned additional impairment for specific disorders per Table 40. Both Dr. Primack and Dr. Hughes believe that Claimant should.

In assigning his impairment to Claimant's right knee, Dr. Primack made a clerical error in his impairment rating. Dr. Primack assigned a 15% impairment per Table 40 Disorder 2 (i.e., meniscal tear and/or meniscectomy). However, Table 40 Disorder 2 specifies that when there is only one meniscal tear and/or meniscectomy, like Claimant had, the additional impairment rating should only be up to 10%. Despite this clerical error, Dr. Hughes credibly explained that Claimant should still be assigned the 15% impairment per Table 40 because Claimant (1) suffered a meniscal tear and/or underwent a meniscectomy that warrants an additional 5% impairment per Table 40 Disorder 2, and (2) suffered a chondral injury that is tantamount to arthritis which warrants a 10% impairment per Table 40 Disorder 5.

Dr. Hughes' opinions on the application of Table 40 are credible because they are supported by the MRIs and surgical report. The MRIs indicate injury to Claimant's patella joint and tendon. The operative report indicates injury to Claimant's meniscus that required surgical repair, and injury to patella cartilage that required Chondroplasty of the patella and medial femoral condyle. These findings are consistent with the additional impairment available under Table 40 Disorder 2 and 5.

The only provider that does not believe Claimant should be awarded the additional impairment for specific disorders per Table 40 is Dr. O'Brien. Dr. O'Brien opined the meniscal injury and surgery are not debilitating enough to warrant the additional impairment despite acknowledging Claimant has ROM loss and continued symptomology in the right knee. Dr. O'Brien testified that Claimant should not be awarded impairment per Table 40 Disorder 2 for undergoing a meniscectomy because Claimant underwent a meniscal repair, not meniscectomy. Dr. O'Brien testified that a meniscectomy is the removal of meniscal tissue. He added that Claimant did have some meniscal tissue removed as part of his surgery. Dr. O'Brien then tried to make sense of his contradictory testimony by stating that while Claimant did have meniscal tissue removed as part of his surgery, he did not have enough meniscal tissue removed to qualify as a meniscectomy. Dr. O'Brien's testimony is simply not credible.

Dr. O'Brien acknowledged Claimant's meniscus was torn, but opined Table 40 does not apply to Claimant because he had a meniscal repair rather than a removal and therefore Claimant should be provided a 0% as set forth in Table 40. Dr. O'Brien's opinions about application of Table 40 to the facts here are not found to be credible or persuasive.

Dr. Hughes' ROM findings regarding Claimant's right knee appear to be more consistent with Claimant's current and permanent ROM loss. When Dr. Primack conducted his ROM testing in April 2021, Claimant was still treating. Since then, Claimant's treatment, such as physical therapy, has stopped and it reasonable to conclude that his range of motion has decreased. Thus, the discrepancy between Dr. Primack's ROM testing in April 2021 and Dr. Hughes' in July 2021, makes sense because Claimant's right knee condition now requires a specialized knee brace while in April 2021 he did not.

As for Claimant’s left ankle impairment, Dr. Primack, Dr. Hughes, and Dr. Primack all agree Claimant suffers ROM loss. The disagreement is to what degree. The ROM findings by Dr. Primack and Dr. Hughes are very similar with Dr. Primack’s being 11% per Table 37 and 6% per Table 38, and Dr. Hughes’s being 9% per Table 37 and 7% per Table 38. The outlier in regard to the ROM findings to the left ankle is Dr. O’Brien. His findings are essentially half that of Dr. Primack and Dr. Hughes. Dr. O’Brien’s findings simply are not credible, nor did he submit impairment worksheets showing his findings like both Dr. Primack and Dr. Hughes did. The major difference between Dr. Primack and Dr. Hughes’ left ankle ratings concern the vascular impairment assigned by Dr. Hughes.

Dr. Hughes credibly opined Claimant suffers a vascular injury to his lower extremities as a result of his injuries and surgeries. Claimant credibly testified that the swelling in his right lower extremity began after his right knee surgery, and the swelling in his left lower extremity began after his left ankle surgery. At the time of MMI, on April 16, 2021, Dr. Primack recommended Claimant be fitted for Jobst stockings to address the swelling in his lower extremities. The swelling persists to this day, and Dr. Hughes’ decision to provide a rating under the AMA Guides is a reasonable interpretation and application of the AMA Guides for this ongoing claim related condition.

As a result, the ALJ finds and concludes that Claimant has established by a preponderance of the evidence that he suffered a 33% scheduled impairment of his right knee and a 24% impairment of his left ankle.

III. Whether the TENS unit supplies are reasonable, necessary, and related medical treatment.

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether Claimant proved treatment is reasonable and necessary is one of fact for the ALJ*. Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

As found, the electrodes and batteries are reasonable and necessary medical care that is related to Claimant’s admitted work injury. The TENS unit was prescribed to Claimant by his authorized treating physician as claim related treatment. Claimant credibly testified that he used the TENS unit and it provided pain relief. Dr. Hughes credibly stated that the TENS unit is recommended care under the Colorado Division of Worker's Compensation Lower Extremity Injury Medical Treatment Guidelines. Further, that since the TENS unit is being provided for home use, all of the attendant supplies should be considered reasonable, necessary, and related to Claimant’s work-related injury. In sum, the TENS unit was authorized, claim related treatment. Claimant used the TENS unit throughout his course of treatment per his provider recommendation to relieve his pain. The ALJ did not find the opinions of Drs. Flores and O’Brien persuasive on this issue. Thus, Claimant has established by a preponderance of the evidence that the TENS unit supplies – the electrodes and batteries - are found to be reasonable, necessary, and claim related treatment to relieve Claimant from the effects of his work injury.

IV. Whether Claimant must reimburse Respondent for the cancellation fee for the Respondent requested independent medical examination with Dr. O'Brien on July 15, 2021, that did not occur.

Section 8-43-404(1)(a) states that: "If in case of injury the right to compensation under articles 40 to 47 of this title exists in favor of an employee, upon the written request of the employee's employer or the insurer carrying such risk, the employee shall from time to time submit to examination by a physician or surgeon or to a vocational evaluation, which shall be provided and paid for by the employer or insurer, and the employee shall likewise submit to examination from time to time by any regular physician selected and paid for by the division." The IME guidelines are also outlined in WCRP 8-8. However, neither 8-43-404(1)(a) or Rule 8-8 require a Claimant to pay for cancellation fees associated with a missed or cancelled IME. *See Newton v. Broadcom*, W.C. No. 5-095-589-002 (Colo. Ind. Cl. App. Off. July 8, 2021).

Instead, Rule 8-8 mandates that the employer or insurer shall ensure the IME physician is provided with written notice that describes the requirements relating to recording the exam. It also requires the IME physician to provide both parties with a written medical report of the exam.

This issue has been addressed twice by the ICAO Panel, in *In re* Claim of Fahler, W.C. No. 5-111-049 (Aug. 17, 2020) and *Newton, supra. Fahler, supra* held as follows:

> Here, we agree with the ALJ that § 8-43-404(1)(b)(II), C.R.S. does not require the claimant to reimburse the respondents for the $917.50 cancellation fee associated with a missed IME appointment. To interpret § 8-43-404(1)(b)(II), C.R.S. as the respondents are proposing, would require us to read words into the statute. However, we are precluded from reading nonexistent provisions into the Act. *Archuletta v. Industrial Claim Appeals Office*, 381 P.3d 374, 377 (Colo. App. 2016). The clear intent of § 8-43-404(1)(b)(II), C.R.S. is to allow the employer or insurer to recover the advanced expenses made specifically to the claimant for his or her lodging, travel, and hotel costs associated with attending an IME, when the claimant misses such IME.

As found, Claimant is not responsible to pay the cancellation fee stemming from the July 15, 2021, IME that was scheduled but did not occur. As stated above, there is nothing in the Act or WCRP that requires Claimant to reimburse Respondent for the costs of the missed IME.

Nor is there any discovery violation per Colorado Rules of Civil Procedure Rule 37. Similar to the situation in *Newton, supra*, the July 15, 2021 IME did not occur because of Dr. O'Brien's policy which conflicted with Claimant's desire to have his wife attend the IME with him. Respondent provided Claimant with the required notice before the IME. Nothing in those documents stated Claimant must attend the IME alone. Furthermore, Respondent did not provide Claimant with Dr. O'Brien's office policy that nobody is allowed to attend the appointment with the injured worker. Claimant cannot know Dr. O'Brien's office policy about who can attend the IME when Respondent did not communicate Dr. O'Brien's policy to Claimant before Claimant sat in his lobby with his wife.

Additionally, who can and cannot attend an IME with an injured worker is not addressed by the Act or the WCRP. The closest thing to addressing this issue is § 8-43-404(2)(a), which states: "The employee shall be entitled to have a physician, provided and paid for by the employee, present at any such examination. If an employee is examined by a chiropractor at the request of the employer, the employee shall be entitled to have a chiropractor provided and paid for by the employee present at any such examination." However, this section addresses a situation in which an injured worker elects to have a medical professional attend the IME with him or her. It is not an exhaustive list of who can and cannot attend an IME. Further, it cannot be an interpreted as an exhaustive list because it does not address the issue of when a minor is injured at work and is subject to an IME. If this were an exhaustive list of who can and cannot attend an IME, it would be interpreted such that an injured worker who is a minor, possibly 15 or 16 years old, could not, by law, have his or her parent attend the IME. That is not the intent of § 8-43-404(2)(a). Thus, it must be interpreted as addressing the narrow issue of allowing a medical professional to attend the IME with the injured worker at the injured worker's expense, not an exhaustive list of who can and cannot attend the IME. Thus, as found, there is no discovery violation that subjects Claimant to the repayment of the cancellation fee.

Moreover, Section 8-43-207(1)(p) provides that an ALJ can only impose sanctions if a party violates an order. Section 8-43-207(1)(p) provides that an ALJ may:

> Impose the sanctions provided in the Colorado rules of civil procedure, except for civil contempt pursuant to rule 107 thereof, for willful failure to comply with any order of an administrative law judge issued pursuant to articles 40 to 47 of this title.

There is no order compelling Claimant to attend the July 15, 2021, IME with Dr. O'Brien. Therefore, based on Section 8-43-207(1)(p), an ALJ lacks the authority to impose a monetary sanction for Claimant's failure to complete the IME with Dr. O'Brien since Claimant did not violate an order.

As a result, Respondents have failed to establish that Claimant should be ordered to pay the cancellation fee.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's impairment to his right lower extremity is 33% scheduled.
2. Claimant's impairment to his left lower extremity is 24% scheduled.

3. The TENS unit electrodes and batteries are reasonable, necessary, and claim related treatment. Therefore, Respondent shall pay for the TENS unit supplies.

4. Claimant is not responsible for the cancellation fee stemming from the IME that was scheduled for, but did not occur, on July 15, 2021.

5. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 21, 2021.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

I. Whether Claimant proved by a preponderance of the evidence that he sustained compensable injuries on March 9, 2021 arising out of and in the course of his employment with Employer.

II. Whether Claimant proved by a preponderance of the evidence that he is entitled to authorized medical benefits that are reasonably necessary and related to the March 9, 2021 accident.

III. If Claimant proved he is entitled to medical benefits, whether Claimant is entitled to reimbursement for medical benefits Claimant paid directly to the providers.

IV. What is Claimant's average weekly wage.

PROCEDURAL ISSUES

Claimant filed a Contested Motion for Expedited Hearing on September 3, 2021 with supporting documentation that included a letter from the Division instructing that Claimant may file for an expedited hearing on whether the employer should be held liable for Claimant's injuries. The Division's July 12, 20221 letter also advised Claimant that he would be required to attend a hearing, be awarded benefits, and file an Application to the Colorado Uninsured Employer Fund to qualify for CUE Fund Benefits.

This ALJ issued an order granting the motion on September 21, 2021. Counsel for Claimant indicated that the CorVel Representative for the Colorado Uninsured Employer Fund declined to participate in the hearing after being provided the pleadings in the matter.

Claimant filed an Application for Expedited Hearing on July 27, 2021 and an Application for Hearing on August 18, 2021 on issues that include compensability, medical benefits, average weekly wage and temporary disability benefits.

Employer failed to file any responsive pleadings in this matter and failed to appear at the hearing. This ALJ confirmed the Notice of Hearing was sent to Employer at the same address as the tax records that were sent to Claimant for 2020. Therefore, Employer is presumed to have received the pleadings in this matter and had notice of the hearing.

Claimant acknowledged, at the beginning of the hearing, that he had only missed three days of work and withdrew the issues of temporary total and partial disability benefits.

FINDINGS OF FACT

Based on the evidence provided at hearing the ALJ finds as follows:

1. Claimant was 37 years old at the time of the hearing. Claimant has worked for Employer, located in La Salle, Colorado, for approximately the last 2 years. He was employed to perform heard processing, which involves processing cows into corrals.

2. On March 9, 2021 he was processing cows in a corral, when one of the cows separated from the heard and had to be processed again. The cow became angry and charged Claimant. Claimant was standing close to the fence when this occurred. He jumped up on to one of the rungs of the fence. The fence was approximately four and a half to five feet tall. The cow charged the fence, where Claimant had jumped up. The cow crashed into the fencing and the impact caused Clamant to slip and be thrown to the other side of the fence, where he landed on the left side of his body. Claimant injured his left arm and wrist as well as his left knee and foot from the impact with the ground. Claimant had significant visible bruising of his left arm. He testified that his arm immediately swelled up and was red and numb. Coworkers had to help him take off his boot and help him up.

3. Several of his female coworkers saw the incident and Claimant requested that one of them call their employer so that he may report the accident. Claimant also contacted his wife to come for him, to take him to the emergency room. Mr. [Redacted], Claimant's supervisor, arrived at the accident cite and Claimant advised him that he needed to seek medical attention. Claimant's supervisor advised Claimant that he would contact the insurance company to let them know Claimant was injured and would provide him the insurance information. The supervisor agreed Claimant could seek care at the emergency room. Claimant's wife took him to the closest emergency room at UCHealth Hospital.

4. Claimant was attended by Jerold D. Goehring, P.A.-C at the emergency room at UCHealth Hospital on March 9, 2021. Mr. Goehring ordered an X-Ray of Claimant's left elbow, provided a sling for the left arm as well as medication, and temporary restrictions directing Claimant not to use his left arm until released by the workers' compensation provider. Claimant testified he was directed to the Clinic close to the hospital, by the hospital staff.

5. Claimant advised his supervisor that he had been seen at the emergency room, that they took an x-ray and that they were requesting insurance information. Again, Claimant was advised that his supervisor would call the insurance company, but Claimant did not know if that ever happened.

6. Claimant was next evaluated by Eric A. Hofmann, PA-C on March 25, 2021, who works under Oscar Sanders, M.D. Mr. Hofmann diagnosed a contusion of the left elbow, stating that the strain of the left knee had resolved. Mr. Hofmann prescribed continuing use of the left elbow sling, topical ice and Naproxen. He provided work restrictions of 15 lbs. maximum lifting and provided a follow up visit of April 8, 2021.

7. Claimant credibly testified he was seen several more times and was prescribed physical therapy for his arm, but he was unable to attend the appointment as the clinic contacted him, advising that his employer had not provided the correct insurance information. The clinic advised Claimant that he could rescheduled when he was able to "fix" the problem with the insurance and obtain a claim number.

8. Claimant was unable to continue with care as he could not afford to pay out of pocket for the medical expenses to cover his work related medical care. Claimant stated that he continued to require medical care with regard to his arm and requested that medical care be approved so that he may return for care at the clinic.

9. Claimant received multiple billing statements from UCHealth for the ER treatment and the treatment at the Clinic, as well as from Advanced Medical Imaging Consultants. The providers were demanding payment as Employer had failed to provide current insurance information.

10. Division sent a letter to Employer on June 10, 2021 providing Employer with a copy of the claim for compensation, advising that employers are required to have workers' compensation insurance. It requested that Employer provide Division with the information regarding Employers' insurer. It also advised that it was Employer's obligation to file a Notice of Contest or an Admission of Liability within 20 days of the letter.

11. Claimant advised that Employer had been unresponsive to his requests to pay the medical expenses in this matter. Claimant negotiated a payment plan with the providers that had seen him to date and started making payments for the outstanding bills.

12. Claimant testified that the provider advised that the employer was unresponsive, documenting the conversations with the provider by sending text messages to the employer of the employers' failure to respond to the providers.

13. Claimant provided multiple check stubs of payments by Employer. However, none of the check stubs were consecutive, containing only two checks between January 2021 and the date of the injury on March 9, 2021. Therefore, the tax information for 2020 was used to calculate the Claimant's average weekly wage. In 2020 Claimant earned a total of $37,563.26, which represents an average weekly wage of $722.37. Claimant has proven by a preponderance of the evidence that his average weekly wage is $722.37.

14. Claimant has proven by a preponderance of the evidence that he suffered a compensable injury on March 9, 2021 arising out of and in the course and scope of his employment as a heard processor with Employer.

15. Claimant has proven by a preponderance of the evidence that Employer had notice of the injury and that he failed to provide insurance information as requested by both Claimant and the medical provider. As found, Employer was uninsured at the time of the compensable injury.

16. Claimant has proven by a preponderance of the evidence that the treatment at UCHealth Hospital, by Dr. Sanders, Mr. Goehring, Mr. Hoffmann and Advanced Medical Imaging Consultants was reasonably necessary medical treatment for the compensable injury.

17. Claimant has proven by a preponderance of the evidence that the ongoing care recommended, including physical therapy, is reasonably necessary to cure and relieve Claimant from the effects of his injury of March 9, 2021.

18. Claimant has proven by a preponderance of the evidence that he has paid multiple bills to the emergency and the medical providers. The billing statements show that there were either payments by Claimant or adjustments/discounts by the providers, as well as an agreement for Claimant to pay up to $50.00 per month until the total bills were paid. Receipts of payments were not provided.

CONCLUSIONS OF LAW

Based on these findings of fact, the Judge draws the following conclusions of law:

A. General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S.. The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the claimant's rights nor in favor of the rights of the respondents; and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S..

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office (ICAO)*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2018). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Compensability

A compensable injury is one that arises out of and occurs within the course and scope of employment. § 8-41-301(1)(b), C.R.S. An injury occurs in the course of employment when it was sustained within the appropriate time, place, and circumstances of an employee's job function. *Wild West Radio v. Indus. Claim Apps. Office*, 905 P.2d 6 (Colo. App. 1995). An injury arises out of employment when there is a sufficient causal connection between the employment and the injury. *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). Where the claimant's entitlement to benefits is disputed, the claimant has the burden to prove, by a preponderance of the evidence, a causal relationship between the work injury and the condition for which benefits are sought. *Snyder v. Indus. Claim Apps. Office*, 942 P.2d 1337 (Colo. App. 1997).

An "accident" is defined under the Act as an "unforeseen event occurring without the will or design of the person whose mere act causes it; an unexpected, unusual or undersigned occurrence." Section 8-40-201(1), C.R.S. In contrast, an "injury" refers to the physical trauma caused by the accident and includes disability. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *see also*, §8-40-201(2). Consequently, a "compensable" injury is one which requires medical treatment or causes disability. *Id*.; *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO Sept. 24, 2004). No benefits are payable unless the accident results in a compensable "injury." § 8-41-301, C.R.S.

As found, the medical records, the claimant's testimony, and the opinions of Dr. Sanders and PA-Cs Hofmann and Goehring are credible and persuasive. Also as found, Claimant has demonstrated by a preponderance of the evidence that he suffered injuries to his left upper extremity and left knee arising out of and in the course and scope of his employment with Employer on March 9, 2021 and that the injuries are proximately caused by the March 9, 2021 accident.

C. Medical Benefits

Respondents are liable for authorized medical treatment reasonably necessary to cure and relieve an employee from the effects of a work-related injury. Section 8-42-101, C.R.S.; *Sims v. Industrial Claim Appeals Office*, 797 P.2d 777 (Colo. App. 1990). Nevertheless, the right to workers' compensation benefits, including medical benefits, arises only when an injured employee establishes by a preponderance of the evidence that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment. § 8-41-301(1)(c), C.R.S.; *Faulkner v. Indus. Claim*

Apps. Office, 12 P.3d 844, 846 (Colo. App. 2000). Claimant must establish the causal connection with reasonable probability but need not establish it with reasonable medical certainty. *Ringsby Truck Lines, Inc. v. Indus. Comm'n*, 491 P.2d 106 (Colo. App. 1971); *Indus. Comm'n v. Royal Indemnity Co.,* 236 P.2d 2993. A causal connection may be established by circumstantial evidence and expert medical testimony is not necessarily required. *Indus. Comm'n v. Jones*, 688 P.2d 1116 (Colo. 1984); *Indus. Comm'n v. Royal Indemnity Co., supra*, 236 P.2d at 295-296. All results flowing proximately and naturally from an industrial injury are compensable. *See Standard Metals Corp. v. Ball,* 172 Colo. 510, 474 P.2d 622 (1970). Respondents are liable for emergency treatment without regard to the right of selection or prior authorization. *Sims v. Industrial Claim Appeals Office*, supra. Once the employer has exercised its right of selection, the claimant may not unilaterally change physicians without prior approval from the respondents or an ALJ. Such permission may be express or implied, and a physician becomes authorized if the "employer has expressly or impliedly conveyed to the employee the impression" that he has permission to treat with the physician. *Greager v. Industrial Commission*, 701 P.2d 168 (Colo. App. 1985).

Respondents have the right to make the initial selection of medical provider. As found in this case, Respondents agreed that Claimant should be taken to the emergency room. UCHealth Hospital in Greeley was the closest provider. There was no evidence to indicate that Respondents exercised their right to select a provider in this matter. Therefore, the ALJ finds, Claimant proved by a preponderance of the evidence, that Claimant's authorized treating provider is Dr. Oscar Sanders and the PA-Cs in his clinic.

Claimant has further proven by a preponderance of the evidence that he is entitled to all reasonable and necessary medical treatment for this work injury. As found, Claimant has proven by a preponderance of the evidence that the treatment Claimant received from Dr. Sanders and PA-Cs Hofmann and Goehring of UCHealth was reasonable medical treatment necessary to cure and relieve claimant from the effects of the work injury. As found, Claimant has proven by a preponderance of the evidence that the physical therapy recommended by his authorized treating providers is reasonable medical treatment related to Claimant's left upper extremity injury.

D. Reimbursement of Medical Benefits

Section 8-42-101(6)(a) states in pertinent part as follows:

> If an employer receives notice of injury and the employer … after notice of the injury, fails to furnish reasonable and necessary medical treatment to the injured worker for a claim that is admitted or found to be compensable, the employer or carrier shall reimburse the claimant …that pays for related medical treatment, for the costs of reasonable and necessary treatment that was provided.

Additionally, W.C.R.P. Rule 16-10(H) states:

> An injured worker shall never be required to directly pay for admitted or ordered medical benefits covered under the Workers' Compensation Act. In the event the injured worker has directly paid for medical treatment that is then admitted or

> ordered under the Workers' Compensation Act, the payer shall reimburse the injured worker for the amounts actually paid for authorized treatment within 30 days of receipt of the bill.

Claimant has proven by a preponderance of the evidence that Claimant has paid for reasonably necessary medical benefits that are related to the March 9, 2021. While the billing statements do show both adjustments and credits, it is not clear what Claimant actually paid out of pocket, though Claimant credibly testified that he had made multiple payments toward the total bill to UCHealth Hospital. Therefore, Respondents must reimburse Claimant, pursuant to statute and rule, for compensable medical treatment he paid directly from his own pocket within 30 days of Claimant submitting to Employer both the billing statements and the receipts of payment.

E. Average Weekly Wage

Section 8-42-105(1), C.R.S., provides that a claimant's TTD rate is sixty-six and two-thirds percent of his average weekly wage (AWW). Section 8-42-102(2), C.R.S., requires the ALJ to base the claimant's AWW on his or her earnings at the time of injury. But under certain circumstances the ALJ may determine the claimant's AWW from earnings received on a date other than the date of injury. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo. App. 1993). Specifically, Sec. 8-42-102(3), C.R.S., grants the ALJ discretionary authority to alter the statutory formula if for any reason it will not fairly determine Claimant's AWW. *Coates, Reid & Waldron v. Vigil*, 856 P.2d 850 (Colo. 1993). The overall objective in calculating the AWW is to arrive at a fair approximation of Claimant's wage loss and diminished earning capacity. *Campbell v. IBM Corp., supra.*

Based on a totality of the evidence presented at hearing, and the unique facts of this case, the ALJ finds and concludes Claimant has established by a preponderance of the evidence that his AWW is $722.37 under Sec. 8-42-102(3), C.R.S. The ALJ finds and concludes that the AWW of $722.37 is a fair approximation of Claimant's wage loss and diminished earning capacity because of his March 9, 2021 work injury. As a result, Claimant's TTD rate is $481.58. However, in this matter, Claimant conceded that he had only missed three days from work, so is not entitled to any TTD or TPD benefits at this time.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant's claim for workers' compensation benefits in W.C. No. 5-174-113, for date of injury of March 9, 2021 is compensable.

2. Employer shall cover all reasonably necessary treatment from authorized providers to cure or relieve the effects of Claimant's compensable injury, including but not limited to the charges from UCHealth Hospital, Dr. Sanders and the PA-Cs at Dr. Sanders' clinic, and Advanced Medical Imaging.

3. Respondent shall reimburse Claimant for any payments made to UCHealth Hospital, UCHealth Clinic, Dr. Sanders, Mr. Hoffman, Mr. Goehring, and Advanced Medical Imaging physician bills within 30 days of Claimant tendering to Employer the bills and receipts of the payments made by Claimant to his providers.

4. Claimant's average weekly wage is $722.37 and Claimant's TTD rate is $481.58.

5. Respondent shall pay interest at the rate of 8% on all amounts due pursuant to Sec. 8-43-410(2), C.R.S. (2021).

6. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. **In addition, it is recommended that you send a copy of your Petition to Review to the Denver OAC via email at oac-dvr@state.co.us.**

DATED this 21st day of December, 2021.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-122-646-001

ISSUES

I. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable injury on October 15, 2019, and is entitled to reasonable, necessary, and related medical treatment.

II. Whether Claimant has established by a preponderance of the evidence that he is entitled to Temporary Total Disability (TTD) benefits for the period November 1, 2019, through December 17, 2019.

STIPULATIONS

- The parties stipulated to an average weekly wage of $809.64 with the corresponding TTD rate of $539.76.
- The parties also stipulated that if the Claim is found to be compensable, Dr. Warncke is an authorized provider.

FINDINGS OF FACT

Based on the evidence presented at hearing, the Judge enters the following specific findings of fact:

1. Employer is an auto broker. Claimant works for Employer as a shop helper. Claimant's duties include changing tires on automobiles and trucks.

2. On October 15, 2019, Claimant was working for Employer. At the direction of Employer, Claimant installed four different sets of "after-market" tires and wheels, each tire and wheel weighing 65 to 80 pounds, on a Chevy Tahoe that had been modified with a 7.5-inch lift kit. The first three sets did not fit correctly. On a test drive, the tires rubbed the bumper, fender lining or brake calipers or had inadequate turning radius. (Tr.: p. 12, l. 10 – p. 13, l. 10)

3. The tires were pre-mounted on the wheels and were very heavy, weighing 65 to 80 pounds. The vehicle was on floor jacks about 8 to 12 inches from the floor. Claimant had to install them in a crouching position and use his muscles in his back, legs and knees to put each tire on the Chevy Tahoe. (Tr.: p. 13, 1. 11; p. 14, ll. 4 – 25; p. 22, ll. 3 – 9; p. 22, l. 17 – p. 25, l. 7)

4. As Claimant was lifting the last wheel and tire of the fourth set, halfway through his lift he felt a very sharp, searing, excruciating pain in his right groin. He dropped the tire and fell forward onto his knees and placed his hands on his testicles trying to catch his breath. Claimant thought he had torn his groin. He managed to stand up, using the vehicle as a support, and reported his injury to his Employer right away. He described what he had been doing and told him he thought he had torn his right groin. Claimant remained at

work, did some sweeping, and tried to vacuum a car but could not bend over. He did, however, finish his workday. (Tr.: p. 12, l. 7 through p. 15, l. 4) (Tr.: p. 25, ll. 8 – 22) (Tr.: p. 27, l. 15 – 21)

5. When Claimant woke up the next day, his right testicle was swollen and painful. Claimant went to work and again reported his condition to Employer, who instructed Claimant to take it easy. Claimant did some light cleaning that day. On the third day after his injury when he woke, his right testicle was swollen "approaching the size of a papaya." Claimant tried to walk it off, soaked in hot water and Epsom salts, took Tylenol but nothing worked. He went to work and showed Employer the size of his testicle through his clothing and Employer instructed Claimant to go to see his doctor. Employer recommended Claimant see Dr. Warncke, his urologist. (Tr.: p. 15, l. 6 – p. 16, l. 2) (Tr.: p. 27, l. 15 – 21)

6. On October 30, 2019, Claimant presented to Dr. Warncke. At this appointment, the medical records note that Claimant stated:

> [A]bout two months ago he was lifting a heavy tire and felt a pop in his right groin. The next day he had right scrotal swelling. He has been having right testicle pain since that time. He has intermittent right testicular swelling. He tries ice.

(Ex. 3, p. 86)

7. Based on Claimant's presentation, Dr. Warnke diagnosed Claimant with a right sided hydrocele in Claimant's right testicle and ordered an ultrasound to confirm the diagnosis. Dr. Warncke also concluded that if the ultrasound confirmed a hydrocele, that surgery, in the form of a hydrocelectomy, would be recommended. (Ex. 3, p. 85)

8. On cross-examination, Claimant was asked whether he had related to Dr. Warncke an onset of pain from lifting a heavy tire two months before the October 30, 2019, visit. Claimant testified that after his worker's comp claim was denied, he reviewed the medical records and had brought to Dr. Warncke's attention that his entry that his injury had occurred two months before the visit was incorrect as he had reported the injury occurred two weeks before the visit. The doctor had agreed to correct it, but Claimant did not have a copy of the corrected record. (Tr.: p. 29, ll. 2 – 19) (Claimant's Exhibit 6, p. 80, 86)

9. On November 1, 2019, Claimant was taken to UC Health Greeley Hospital by ambulance from work for severe right testicular and inguinal pain. The record first states that the injury had been present for "several weeks" but at discharge the History documents his pain "over the past two weeks." (Claimant's Exhibit 4, pp. 93 – 94, 107) On cross-examination, Claimant was asked what he was doing at work before he was transported by ambulance to the ER. He testified that he always got there early to open the shop. He turned on the air, the lights and moved the vehicles. He tried to get up on an F-150 that was lifted and as he raised his right leg, his pain was unbelievable, and he felt like throwing up. His employer arrived at work and instructed him to go sit down but the pain did not allow him to sit. He testified he went to his toolbox to get some Tylenol and the next thing he remembered he was talking to emergency personnel who had been called by his Employer. He denied having experienced a new injury. (Tr.: p. 30, l. 20 – p. 32, l. 24) (Claimant's Exhibit 4, pp. 93 - 102)

10. On November 4, 2019, Claimant returned to Dr. Warncke who recommended surgery as the most effective option for his condition and Claimant agreed. Asked whether the surgery was an elective procedure, Claimant said he did not have any choice. His scrotum was so enlarged he could not even put on a pair of jeans. Claimant credibly testified that Dr. Warncke asked Claimant if he could stay home from work and Claimant told him that his Employer had told him to stay home from work. (Tr.: p. 17, l. 20 – p. 18, l. 19) Consistent with Claimant's testimony that Dr. Warncke told him to stay home from work is Dr. Warncke's statement in his November 4, 2019, medical report that he prescribed oxycodone, rest, Tylenol and Ibuprofen. (Claimant's Exhibit 3, p. 74). As a result of his hydrocele, and being unable to perform his job duties, Claimant stayed home from work and did not return to work until after having surgery for his hydrocele.

11. On November 7, 2019, Mr. C[Redacted], Claimant's employer, completed an Employer's First Report of Injury. In the Employer's First Report of Injury, Mr. C[Redacted] confirmed that Claimant had a lifting injury to his groin on October 15, 2019, and that Claimant reported his injury the same day.

12. On November 19, 2019, Claimant underwent surgery for his hydrocele. After his surgery, his pain subsided. He had a good result. But there was the normal after surgery discomfort. Claimant was instructed to walk 20 minutes per hour. It took about three or four weeks for him to be able to walk without discomfort and after two to three months, by February or March of 2020, his right testicle returned to normal size. Claimant returned to work light duty on December 17, 2019, and as of the date of the hearing, remained employed by Employer. On cross-examination, Claimant was asked what problems he was still experiencing, Claimant testified that when he moves something really heavy, he feels a twinge in his testicle. (Tr.: p. 18, l. 20 – p. 19, l. 23) (Tr.: p. 39, l. 11 – 14)

13. Based on his injury, and the subsequent surgery, Claimant could not perform his regular job duties and could not work, and did not work, from November 2, 2019, through December 16, 2019. Claimant did, however, return to work performing light duty on December 17, 2019.

14. Claimant testified that because his workers' compensation claim was denied, he sought the opinion of Dr. Dru, whom he considered an expert in hydroceles, to get a second opinion about the cause of his hydrocele and need for medical treatment. Claimant testified that Dr. Dru concluded that his injury, the enlargement of the hydrocele, was a "no brainer" and that it was caused by trauma from lifting. On cross-examination, counsel pointed out that Claimant's appointment with Dr. Dru had been a tele-health visit. On re-direct examination, Claimant testified that he had seen Dr. Dru twice—first by tele-health and second by office examination. Claimant also testified that while the tire did not cause any direct trauma to his testicle, Dr. Dru described the lifting that had precipitated the enlargement as trauma. (Tr.: p. 19, l. 24 – p. 20, l. 22)(Tr.: p. 40, ll. 12 – 16)(Tr.: p. 43, l. 11 – p. 44, l. 11)

15. Claimant testified that in addition to the bills from Dr. Warncke, he has bills from UC Health Greeley Hospital emergency room, the ambulance and UC Health Greeley Hospital for surgery and services related to the surgery such as the anesthesiologist. He also testified that such bills remain unpaid. (Tr.: p. 21, ll. 2 – 17)

16. Employer Curtis C[Redacted] testified that he is the owner of Advantage Auto, and that Claimant was his employee on October 15, 2019, his date of injury, and had been employed with him for about 13 months. Mr. C[Redacted] also testified that Claimant never missed a day of work and that Claimant had never reported any groin pain before the October 15, 2019, injury. Consistent with Claimant's testimony and the Employer's First Report of Injury, Mr. C[Redacted] testified that Claimant reported his injury to him. Even though he had not witnessed the injury, he had no reason to doubt Claimant's report of injury. Employer testified that after the incident, Claimant had to wear baggy sweatpants and he could tell Claimant's testicle was very the swollen. (Tr.: p. 46, l. 10 - p. 47, l. 5) (Tr.: p. 47, l. 24 – p. 48, l. 11)

IME Report by F. Mark Paz, M.D.

17. Dr. Paz conducted an IME for Respondents on October 7, 2021, and issued a report. Dr. Paz concluded that it was not medically probable that Claimant's right testicular hydrocele is causally related to Claimant's October 15, 2019, lifting incident. His opinion was based on:

a) Hydroceles do not develop as a result of exposure to traumatic injuries.

b) Symptomatology of hydroceles is unrelated to increased intra-abdominal pressures.

c) There are no extraneous causes for the development of a hydrocele.

d) Claimant's surgery was elective.

e) Dr. Dru in his medical records did not opine that it was medically probable that Claimant's hydrocele and need for treatment was causally related to the October 15, 2019, lifting incident.

(Respondents' Exhibit Y, pp. 108-109)

Medical Records of Christopher Dru, M.D.

18. On April 2, 2020, Claimant consulted Dr. Dru, a urologist, through a Covid telehealth visit for an opinion on causation between his hydrocele surgery and his lifting accident because his workers' compensation claim had been denied. Claimant informed Dr. Dru that he did not believe his surgeon, Dr. Warncke, considered his condition work related. From the clinical history Dr. Dru's initial impression was that Claimant had experienced a reactive right hydrocele secondary to a traumatic event at work, as Claimant had not experienced scrotal swelling before the incident. Reactive hydroceles can occur from trauma and other inciting events. Dr. Dru questioned Dr. Warncke's designation of Claimant's surgery as elective since Claimant was experiencing extreme pain, nausea, and vomiting. Dr. Dru requested Claimant provide him with all his medical records and planned to consult with Dr. Warncke. (Claimant's Exhibit 2, p. 54 – 57)

19. On October 21, 2020, Claimant followed up with Dr. Dru with an in-person office visit. Dr. Dru noted that Claimant's medical records, which predated the October 15, 2019 incident, documented a small hydrocele in May 2016. In his professional opinion a small hydrocele is 1- 4 centimeters. There were no documented physical exams between May 2016 and October 2019. After the accident there was a November 2019 pre-operative

exam which showed a large hydrocele, 6 x 10 centimeters. Dr. Dru noted that Claimant "seems very genuine in how he tells his story" and concluded that it "was entirely possible that the trauma caused enlargement of the hydrocele and pain requiring surgery." (Claimant's Exhibit 2, p. 50 – 53)

Deposition Testimony of Christopher Dru, M.D.

20. By deposition, Dr. Dru, a urologist, was asked whether Dr. Paz was correct in his report which stated that hydroceles do not develop as an exposure to traumatic injuries. Dr. Dru testified that hydroceles are quite common as a result of testicular trauma, and sometimes even with abdominal trauma. He testified that a reactive fluid will form around the testicle to cushion it and protect it from further trauma. These hydroceles are called reactive hydroceles. (Claimant's Exhibit 1, p. 4, l. 1 - p. 5, l. 6)

21. Dr. Dru was then asked to comment on the opinion by Dr. Paz that a hydrocele is unrelated to increased intra-abdominal pressure. Dr. Dru replied that increased intra-abdominal pressure can cause hydroceles. He also testified that a lot of times a hydrocele is formed by increased pressure. A patient can have what is called a patent processus which is essentially a tube that goes from the abdomen into the scrotum. When one does heavy lifting, he is using his core muscles, which increases abdominal pressure, and that can increase testicular pressure. Doctors usually ask patients to avoid heavy lifting because it can make pain worse or a hydrocele worse. (Claimant's Exhibit 1: p, 5, l. 13 – p. 6, l. 15) Asked whether Dr. Paz was correct in stating that there were no extraneous causes for the development of a hydrocele, Dr. Dru answered that hydroceles absolutely can develop through extraneous causes, such as lifting. Based on personal observations in his practice, extraneous causes such as high intensity exercise, a hit to one's scrotum on a pipe or bar or falling, can absolutely exacerbate a hydrocele and go from a point of being asymptomatic to a point where surgery is needed to address the symptoms. He also testified that to a medical probability, heavy lifting can accelerate, exacerbate, or aggravate a hydrocele. (Claimant's Exhibit 1: p. 6, l. 16 – p. 9, l. 3)

22. Dr. Dru was asked to address anything else on the report by Dr. Paz. Dr. Dru pointed out that the record reference to Claimant's hydrocelectomy surgery being elective did not mean that surgery was cosmetic as the word elective is usually interpreted. A symptomatic hydrocele is not treated with emergency surgery but will be treated with pain control, anti-inflammatory medications, followed by surgery within a week. He also testified that any reference to elective surgery should not lessen the severity of the condition. (Claimant's Exhibit 1, p. 11, l. 22 - p. 12, l. 22)

23. Dr. Dru was asked on cross-examination how much weight does one have to lift to aggravate or exacerbate a hydrocele, Dr. Dru stated there was no definitive weight. He testified that people could engage in very light activity and have a fairly large hydrocele. Others can lift a couple of hundred pounds and have an exacerbation or aggravation. The more important factor, however, is how the pressure is transmitted down into the scrotum. Asked to describe how lifting transmits pressure to the scrotum, Dr. Dru explained the pelvis has a whole structure of muscles called the pelvic floor. He also explained that abdominal pressure transmits through the pelvic floor directly to the spermatic cord that goes to the testicles. The transmission is called a strain, which can cause inflammation,

and the inflammation can cause fluid accumulation in the testicles. (Claimant's Exhibit 1, p. 17, l. 20 – p. 18, l. 19)

24. Asked to comment on the statement by Dr. Paz that in his reports Dr. Dru did not opine that it was "medically probable that Claimant's hydrocele and need for treatment was causally related to the October 15, 2019 lifting incident," Dr. Dru stated his notes made at the time stated that is was very possible that the incident had enlarged the hydrocele to a point it required surgery. His testimony at the deposition about causation to a medical probability did not represent a change of his opinion which was that more than likely the incident at work caused a worsening of the hydrocele and the likelihood was very high. He also testified he had consulted with Dr. Warncke as part of his evaluation to get his impression about causation, and Dr. Warncke informed Dr. Dru that it was certainly possible that Claimant's condition was due to the October 15, 2019, lifting incident. (Claimant's Exhibit 1, p. 9, l. 23 – p. 11, l. 21)

25. Dr. Dru was cross-examined on the use of the term "possible" by Dr. Warncke regarding causation. Dr. Dru said that based on Dr. Warncke's tone, Dr. Warncke felt similarly as he: "I would say more definitive than possible… My gut and my professional instinct tells me that it is the cause because I see so much of this." Asked whether based on his medical experience and knowledge of the case, he would rate his causation opinion to a medical probability greater than 50%, Dr. Dru said yes. More importantly, Dr. Dru considered himself an expert in hydroceles and the year before his deposition, he treated about 50 patients in his office for hydroceles. Asked how many of the 50 hydrocele patients he had seen the last year were caused or exacerbated by lifting, Dr. Dru replied "maybe 10%, and that's a true guess." (Claimant's Exhibit 1, p. 21, l. 22 – p. 22, l. 16)

Hearing Testimony of F. Mark Paz, M.D.

26. Dr. Paz testified that it was not medically probable that the lifting on or about October 15, 2019, caused or aggravated the hydrocele in Claimant's right testicle. (Tr.: p. 53, ll. 11 – 15) Dr. Paz had opined in his IME that a.) hydroceles do not develop as a result of traumatic injuries and b.) their symptomatology is unrelated to the intra-abdominal pressures. At the hearing, he abandoned these two positions. Dr. Paz testified that hydroceles can be exacerbated or aggravated by traumatic injuries. (Tr.: p. 63. l. 21 – p. 64, l. 2) He also admitted that intra-abdominal pressure can be communicated to the testicles but denied that this had occurred when Claimant's lifting accident happened. He reasoned that Claimant's processus vaginalis was closed absent any surgery note that the processus vaginalis had been open and repaired through surgery. Dr. Paz assumed that Claimant' s hydrocele was non-communicating. Dr. Paz testified that intra-abdominal pressure can be transmitted only through an open processus vaginalis into the testicles. He also testified that since Claimant's processus vaginalis was closed, no transfer of intra-abdominal pressure from lifting could have occurred during Claimant's lifting accident. Contrary to his IME report where he stated that hydroceles are unrelated to an increase in intra-abdominal pressure, at hearing Dr. Paz testified that he agreed that intra-abdominal pressure could be transferred to a communicating hydrocele through an open port or patent processus vaginalis. (Tr.: p. 60, ll. 8 – 22)(Tr.: p. 66, ll. 12 – 18)(Tr.: p. 68, ll. 9 – 19)(Tr.: p. 71, ll. 13 – 16) On cross-examination, Dr. Paz testified he had probably evaluated two or three hydroceles in the past year. Asked if he had treated any of them,

he replied “Well, they're, they're not going to be work-related, so I've not treated them, per se.” (Tr.: p. 76, l. 18 – p. 77, l. 5) Asked whether he agreed with Dr. Warncke’s opinion that Claimant should refrain from lifting over 10 pounds as lifting something too heavy too soon in the post-operative course could re-accumulate the hydrocele, Dr. Paz answered “Not necessarily… I don’t recall ever seeing Postoperative Instructions that do not include no heavy lifting with the abdomen or a knee, regardless of body part…It’s his call what the restrictions are.” Even though Dr. Warncke’s restrictions had specifically warned that lifting over 10 pounds could re-accumulate the hydrocele, Dr. Paz insisted that Dr. Warncke’s restriction against heavy lifting was so Claimant would not tear his sutures. (Claimant’s Exhibit 3, p. 58)(Tr.: p. 78, ll. 11 - 25)(Tr.: p. 79, ll. 5 - 12)(Tr.: p. 81, ll. 10 – 20)

Credibility of Claimant

27. The ALJ finds Claimant’s testimony to be credible and persuasive. The Claimant’s testimony is consistent with the majority of the underlying medical records regarding the onset of his symptoms and the cause of his symptoms. His testimony was also consistent with the information in the Employer’s First Report of Injury as well as Mr. C[Redacted]’s testimony about the timing of his injury, his symptoms, and when he reported his injury. While Dr. Warncke’s records document Claimant’s symptoms started two months earlier, Claimant credibly testified that he told Dr. Warncke that the onset of his symptoms occurred two weeks earlier and Dr. Warncke made a mistake.

Persuasiveness of Drs. Dru, Warncke and Paz

28. Dr. Dru’s testimony is found to be credible and persuasive for many reasons. First, Dr. Dru is a urologist and an expert in hydroceles. For example, he testified that he treated about 50 hydroceles in the past year, 10% of which had been aggravated or exacerbated by heavy lifting. Second, his opinion that the lifting incident aggravated or exacerbated Claimant’s small preexisting hydrocele is consistent with the onset of Claimant’s symptoms, which occurred right after lifting the tire and feeling pain in his groin. Third, Dr. Dru’s opinion is consistent with the majority of the underlying medical records – and Claimant’s testimony - regarding the onset of Claimant’s symptoms and the cause of such. Fourth, his opinion is consistent with Dr. Warncke’s opinion, as described to Dr. Dru by Dr. Warncke. Fifth, his opinion that lifting can cause a hydrocele is consistent with Dr. Warncke restricting Claimant from lifting over 10 pounds as that activity could re-accumulate the hydrocele.

29. On the other hand, Dr. Paz’ opinion that Claimant’s hydrocele and need for treatment was not caused by lifting a very heavy tire and wheel is not found to be credible for many reasons. First, Dr. Paz initially opined by report following an independent examination and review of all the records that it was not medically probable that the right testicular hydrocele was causally related to Claimant’s October 15, 2019, lifting accident as “hydroceles do not develop as a result of exposure to traumatic injuries,” “symptomatology of hydroceles is unrelated to increased intra-abdominal pressures,” “there are no extraneous causes for the development of a hydrocele.” That said, at hearing Dr. Paz disavowed these opinions, agreeing with Dr. Dru that hydroceles can develop or be exacerbated as a result of exposure to traumatic injuries and therefore

external causes. He also retracted his opinion that hydroceles cannot be aggravated or exacerbated by intra-abdominal pressure, agreeing with Dr. Dru's opinion that intra-abdominal pressure caused by lifting can transmit to a hydrocele. However, he disagreed with Dr. Dru's opinion that intra-abdominal pressure can be transmitted directly from the pelvic floor into a man's scrotum absent an open processus vaginalis. Based on the lack of a surgical note that Dr. Warncke had closed the processus vaginalis, Dr. Paz assumed Claimant's processus vaginalis was closed and the intra-abdominal pressure exerted on October 15, 2019, when he lifted, could not have transferred to his scrotum, and aggravated or exacerbated his hydrocele. Asked whether he agreed with Dr. Warncke's warning to Claimant that lifting over 10 pounds after surgery could re-accumulate the hydrocele, Dr. Paz replied that post-surgery lifting restrictions are meant to protect sutures.

30. In addition, Dr. Paz testified on direct examination that he both treated and evaluated patients with hydroceles. (Tr.: p. 51, ll. 7-9) On cross-examination, however, Dr. Paz admitted he had only evaluated two or three hydroceles in the past 12 months. Dr. Paz did not specify whether his "two or three" evaluations included Claimant. Retracting his testimony on direct, he admitted the number of hydrocele patients he had treated in the past 12 months was "none" as hydroceles are "not work related," "per se." On the other hand, Dr. Dru testified all urologists were experts in hydroceles. Out of the hydroceles he treated in the past 12 months, 5 to 15 had been surgical cases and of the 50 patients he had treated about 10% were hydroceles that had probably been aggravated or exacerbated by heavy lifting.

31. The medical opinions of Dr. Dru and Dr. Warncke as related by Dr. Dru and reflected by Dr. Warncke's post-surgery lifting of no lifting more than 10 pounds as lifting could re-accumulate Claimant's hydrocele, are more persuasive than the opinions of Dr. Paz. The Court finds that Claimant's exertion when lifting the last of 16 wheels and tires to place on the vehicle caused his symptomatology including his onset of pain and subsequent enlargement of his right hydrocele requiring surgery and resulting disability.

Ultimate Findings of Fact

32. Claimant has established that it is more probably true than not that he suffered a compensable injury on October 15, 2019, during the course and scope of his employment with Employer while lifting a heavy tire and wheel. While Dr. Warncke's records dated Claimant's incident "two months ago" while lifting a heavy tire, the November 1, 2019, Emergency Room records recorded that the injury had been present for "several weeks" but the discharge record from the emergency room documents symptoms "over the past two weeks. (Claimant's Exhibit 4, pp. 93 - 94) Plus, Claimant credibly testified his symptoms started on October 15, 2019, when lifting the 16th wheel and tire. He also credibly testified that he requested Dr. Warncke to correct the record regarding the onset of his symptoms. Moreover, Claimant's Employer corroborates a lack of symptoms before October 15, 2019, and Claimant reporting his injury on October 15, 2019. Except for Dr. Warncke's records, the evidentiary record consistently reveals Claimant's symptoms began on October 15, 2019, as related by Claimant.

33. Due to his injury, Claimant developed severe swelling of his testicles and severe pain. The swelling and pain caused the need for medical treatment. As a result, Claimant

treated with Dr. Warncke and ultimately underwent surgery. The ALJ finds the treatment Claimant has received due to his hydrocele – up through the date of the hearing - to be reasonable and necessary.

34. After his injury, Claimant continued to work. However, on November 1, 2019, while at work, Claimant developed significant pain – due to his hydrocele – and was taken to the hospital via ambulance. As a result of his hydrocele, Claimant could not work and perform his regular job duties after November 1, 2019. Claimant could not perform his regular job duties and work until December 17, 2019, when he returned to performing modified duty at work after having surgery. Claimant is therefore entitled to temporary total disability benefits from November 2, 2019, through December 16, 2019.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Judge draws the following conclusions of law:

General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), C.R.S. §§ 8-40-101, et seq., is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. C.R.S. § 8-40-102(1). Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. C.R.S. § 8-43-201. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on its merits. C.R.S. § 8-43-201.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. ICAO*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." *See Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions, the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936);

CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

I. Whether Claimant has established by a preponderance of the evidence that he suffered a compensable injury on October 15, 2019, and is entitled to reasonable, necessary and related medical treatment.

Compensability

Claimant was required to prove by a preponderance of the evidence that at the time of the injury he was performing service arising out of and in the course of the employment, and that the injury or occupational disease was proximately caused by the performance of such service. Section 8-41-301(1)(b) & (c), C.R.S. The question of whether the claimant met the burden of proof is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office,* 12 P.3d 844 (Colo. App. 2000).

Claimant was required to prove by a preponderance of the evidence that the conditions for which he seeks medical treatment were proximately caused by an injury arising out of and in the course of the employment. Section 8-41-301(1)(c), C.R.S. The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp*., 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease or infirmity to produce a disability or need for medical treatment. *Duncan v. Industrial Claim Appeals Office*, 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or that the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1995); *Breeds v. North Suburban Medical Center*, WC 4-727-439 (ICAO August 10, 2010); *Cotts v. Exempla, Inc*., WC 4-606-563 (ICAO August 18, 2005). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

As found, on October 15, 2019, Claimant was working for Employer changing 15 tires and wheels weighing 65 to 80 pounds. He was in a crouched position lifting the wheel and tire to place on the vehicle that had been lifted about 12 inches from the floor. When lifting the 16th tire and wheel, he felt excruciating pain in his right groin and felt a pop as if he had torn something. He dropped the wheel and tire and reported his symptoms to Employer. He completed his shift but could not bend and continued in pain. The next day, his testicle was swollen, and the swelling and pain continued. Ultimately, the hydrocele and his right testicle swelled up to the size of a papaya. Claimant was diagnosed with an enlarged hydrocele that required medical treatment which included surgery. Claimant did have a preexisting hydrocele in his right testicle which was identified during his 2016 prostate surgery. However, his hydrocele had been asymptomatic since 2016 and did not become enlarged and painful until he lifted the tire on October 15, 2019. As found, the persuasive medical opinion of Dr. Dru support that Claimant's work activities for Employer on October 15, 2019, permanently aggravated his preexisting hydrocele, and resulted in it becoming larger and painful. As a result, the ALJ finds and concludes that Claimant established by a preponderance of the evidence that he suffered a compensable injury on October 15, 2019, in the form of an enlarged hydrocele which was also painful.

Medical Benefits

Respondents are liable to provide medical treatment that is reasonable and necessary to cure and relieve the effects of the industrial injury. Section 8-42-101(1)(a), C.R.S. The question of whether the claimant proved treatment is reasonable and necessary is one of fact for the ALJ. *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

As found, on October 15, 2019, Claimant lifted a very heavy tire and wheel which aggravated Claimant's preexisting hydrocele. As found, the aggravation of his preexisting hydrocele caused his testicle to swell up to the size of a papaya. The aggravation and swelling also resulted in significant pain. As further found, the swelling and pain associated with the lifting accident caused the need for Claimant to seek medical treatment with Dr. Warncke. The swelling and pain also caused the need for Claimant to be taken by ambulance to the emergency room on November 1, 2019. Thereafter, Claimant required surgery to drain the enlarged hydrocele. As further found, the medical treatment Claimant has received up through the day of the hearing is reasonably necessary and related to the work accident.

As a result, the ALJ finds and concludes that Claimant established by a preponderance of the evidence that his work injury caused the need for medical treatment. Claimant is therefore entitled to reasonable and necessary medical treatment to treat his hydrocele – which includes the treatment Claimant has received up through the date of the hearing.

II. Whether Claimant has established by a preponderance of the evidence that he is entitled to Temporary Total Disability (TTD) benefits for the period November 1, 2019, through December 17, 2019.

To prove entitlement to TTD benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *Anderson v. Longmont Toyota,* 102 P.3d 323 (Colo. 2004); *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995); *City of Colorado Springs v. Industrial Claim Appeals Office,* 954 P.2d 637 (Colo. App. 1997). Section 8-42-103(1)(a), C.R.S., requires the claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595 (Colo. App. 1998). TTD benefits ordinarily continue until one of the occurrences listed in § 8-42-105(3), C.R.S.; *City of Colorado Springs v. Industrial Claim Appeals Office, supra*.

The existence of disability presents a question of fact for the ALJ. There is no requirement that the claimant produce evidence of medical restrictions imposed by an ATP, or by any other physician. Rather, lay evidence alone may be sufficient to establish disability. *Lymburn v. Symbios Logic,* 952 P.2d 831 (Colo. App. 1997).

As found, the pain from Claimant's enlarged hydrocele became so severe on November 1, 2019, Employer called an ambulance for Claimant. Moreover, Claimant credibly testified that on November 4, 2014, Dr. Warncke asked Claimant if he could stay home from work and Claimant told him that his Employer had already told him to stay home from work. Based on the record as a whole, the ALJ finds Claimant could not perform his regular job duties after November 1, 2019. As further found, due to his injury, Claimant could not return to work after November 1, 2019, until after his surgery. After his surgery, Claimant could not and did not return to work until December 17, 2019, when he returned to modified duty. Thus, it was found that Claimant was disabled and restricted from discharging his usual and customary employment with Employer from November 2, 2019, through December 16, 2019.

As a result, the ALJ finds and concludes that Claimant established by a preponderance of the evidence that the October 15, 2019, industrial injury caused a disability lasting more than three work shifts, Claimant left work as a result of the disability, and the disability resulted in an actual wage loss. Claimant suffered a complete inability to work and perform his regular employment from November 2, 2019, through December 16, 2019. Thereafter, on December 17, 2019, Claimant could return to modified duty.

As a result, the ALJ finds and concludes that Claimant established by a preponderance of the evidence that he is entitled to TTD from November 2, 2019, through December 16, 2019.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant suffered a compensable injury on October 15, 2019.

2. Dr. Warncke is an authorized provider.

3. Respondents shall pay for Claimant's reasonable and necessary medical treatment to cure and relieve him from the effects of his October 15, 2019, work injury which aggravated his preexisting and asymptomatic hydrocele. This includes the treatment with Dr. Warncke, the ambulance and emergency room visit, and his surgery.

4. Claimant’s average weekly wage is $809.64 with the corresponding TTD rate of $539.76.

5. Respondents shall pay Claimant temporary total disability benefits from November 2, 2019, through December 16, 2019, at a temporary total disability rate of $539,76.

6. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

7. Issues not expressly decided herein are reserved to the parties for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 21, 2021.

/s/ Glen Goldman

Glen B. Goldman
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant prove by a preponderance of the evidence a right knee revision arthroplasty performed by Dr. Jepson was causally related to the admitted August 5, 2020 work accident?

- Did Claimant prove by a preponderance of the evidence she suffered a 23% scheduled lower extremity impairment? Specifically, did Dr. Sparr correctly assign a 20% extremity rating Table 40 for Claimant's revision total knee arthroplasty?[1]

- If Claimant proved an impairment related to her work injury, did Respondent prove the rating should be apportioned because her prior nonwork-related TKA was "independently disabling" before the work accident?

- Disfigurement.

- The parties agreed to reserve issues relating to mileage reimbursement and Claimant's out-of-pocket surgical costs pending resolution of the causation question regarding the revision TKA.

FINDINGS OF FACT

1. Claimant works as a Deputy Sheriff in Employer's jail. The job is physically demanding, including extensive walking and altercations with inmates. She suffered an admitted right knee injury on August 5, 2020 while escorting a belligerent inmate in the jail. The inmate tripped Claimant, causing her to fall on her right knee. Claimant felt immediate pain in the knee but finished her shift. Later than evening, she felt the knee "shift" when she took a step. Claimant credibly testified she had never experienced that sensation in her knee before. The knee pain persisted and she requested treatment.

2. Claimant has an extensive pre-injury history of right knee problems and surgeries, culminating in a total knee arthroplasty (TKA) performed by Dr. Eric Jepson on March 13, 2017.

3. Claimant did well after the March 2017 TKA. However, she continued to experience intermittent knee pain, primarily with activity. Claimant returned to full-duty work as a Deputy Sheriff in approximately July 2017, including subduing and restraining inmates.

[1] Although Respondent stated at hearing and in its post-hearing brief that it has the burden to prove Dr. Sparr incorrectly assigned the 20% rating, the burden of proof regarding scheduled impairment is properly placed on Claimant.

4. Claimant followed up with Dr. Jepson's PA-C, Robert Peterson, on December 22, 2017. She reported, "over the last 5 or 6 weeks increased pain and swelling mostly while she is weight bearing." Examination showed a "very small" effusion, and mild laxity with varus and valgus stress and anterior drawer test. X-rays showed good alignment of the prosthesis with no indication of loosening or changes from previous x-rays. Mr. Peterson changed Claimant's anti-inflammatory medication and ordered blood work to rule out an infection. If the blood work came back negative, he planned to offer Claimant a cortisone injection. The blood work ultimately showed no infection but there is no indication Claimant pursued the injection.

5. Claimant sought no further evaluation or treatment regarding her right knee until December 12, 2018, when she saw a different PA-C in Dr. Jepson's office, Ryan O'Neal. She described increasing right anterior knee pain over the last 6 months. She had no posterior knee pain but described a "fullness" in the posterior knee and occasional pain in the right calf. Mr. O'Neal noted Claimant "is still able to play racquetball with his knee pain, which she frequently does." Examination of the knee was unremarkable with no pain to palpation, no swelling or effusion, pain-free range of motion, normal strength, and no evidence of instability. Knee x-rays showed the hardware remained in place with good joint alignment and no indication of acute abnormalities. Mr. O'Neal ordered an ultrasound to evaluate a possible DVT. He also ordered blood work and a bone scan of the knee.

6. The ultrasound was negative for DVT and the blood work showed no infection. The bone scan was completed on December 28, 2018. There was mild increased uptake involving the tibia but no definitive evidence of any infection or hardware loosening. The radiologist noted the increased uptake was "not unexpected given recent surgery."

7. There are no further medical records documenting any issue related to Claimant's right knee until August 6, 2020, after the work accident that is the subject of this claim.

8. Claimant was seen at the UCHealth emergency department on October 6, 2019 for "right leg swelling and pain" for several days. The pain was localized to the right calf. Examination of the right leg showed diffuse mild edema and diffuse tenderness but there was no indication of any issue specifically related to the knee. The bony prominences of the right tibia and fibula were "nontender." An ultrasound was negative for DVT. Claimant was diagnosed with nonspecific "myalgia" and elevated blood pressure. There is no persuasive evidence Claimant's symptoms were related to her right knee.

9. Claimant was very active before the August 2020 work accident. Besides performing her job as a deputy sheriff, she worked out three to five days per week, played racquetball, and hiked regularly.

10. Claimant credibly testified she appreciated no "instability" in her right knee between her recovery from the 2017 TKA and the August 2020 work accident.

11. Employer referred Claimant to CCOM for authorized treatment. She saw Valerie Joyce, FNP at her initial appointment on August 6, 2020. The physical examination showed mild effusion and ecchymosis. Knee x-rays showed no evidence of fracture.

12. Claimant saw Dr. Centi at CCOM on August 26, 2020. She reported ongoing pain, laxity, grinding, and stated the knee "feels unstable." Dr. Centi ordered an MRI.

13. The MRI was performed on August 27, 2020. It showed the knee joint effusion, extensive artifact from prior TKA, and potential osteolysis or other cystic process in the distal femur, surrounding the central peg of the prosthesis.

14. Dr. Centi referred Claimant to Dr. Jepson for evaluation of her knee. Claimant saw PA-C Peterson on October 9, 2020. She explained she fell "directly on her knee," and "since that fall she has had increased pain and instability in her knee." On examination, Mr. Peterson noted mild flexion instability with varus and valgus stress, and mild tenderness to palpation. Exam was otherwise unremarkable. X-rays in the office showed the prosthesis was well aligned with no sign of loosening, fracture, or dislocation. Mr. Peterson ordered a triple phase bone scan and blood work "to make sure she has no loosening or infection."

15. The bone scan was completed on November 10, 2020. It showed abnormal increased uptake surrounding the right TKA, which the radiologist stated was "concerning for loosening or infection."

16. Claimant followed up with Dr. Jepson on November 17, 2020 to review the bone scan. Her knee remained painful and "does not feel stable." Dr. Jepson indicated the bone scan was positive for a loose prosthesis but she also had some elevated lab results suggesting possible infection. Dr. Jepson aspirated the knee so the fluid could be definitively checked for signs of infection. The test results ultimately confirmed there was no infection in the knee.

17. Dr. Jepson submitted a preauthorization request for a right revision TKA on December 9, 2020.

18. Dr. James Lindberg performed a Rule 16 review for Respondent on December 15, 2020. Dr. Lindberg concluded Claimant probably had "a deep infection with loosening of the prosthesis which was symptomatic well before the slip and fall." He noted she had been worked up in the past for a possible infection, which "appears to have progressed from that date on." He thought the August 5 work accident was "incidental" and merely led to discovery of the unrelated infection or loose prosthesis. He recommended the revision TKA be denied as not work-related.

19. Dr. Jepson performed the revision TKA on December 30, 2020. The procedure was billed to Claimant's health insurance because it had been denied by Respondent.

20. Claimant followed up with Dr. Centi on January 6, 2021. She still had moderate pain but her knee felt stable.

21. On January 13, 2021, Respondent's counsel sent Dr. Centi a copy of Dr. Lindberg's Rule 16 report. Dr. Centi responded, "per IME, there is no work-related condition." He opined Claimant was at MMI with no impairment and no restrictions.

22. Claimant's care was transferred to Dr. Michael Sparr. She saw Dr. Sparr's physician assistant, Kelsey Walls, on April 20, 2021. Claimant reported her knee was about 75% improved since the revision TKA but she was still having pain and stiffness with bending the knee, squatting, exercising, and sitting "too long." Ms. Walls recommended physical therapy, continued home exercises, and follow up with Dr. Jepson.

23. Dr. Jepson administered a steroid injection to the right knee on May 13, 2021. The injection was helpful.

24. Claimant saw Dr. Sparr for an impairment evaluation on May 25, 2021. Dr. Sparr determined Claimant was at MMI and ready to return to full duty. Dr. Sparr opined, "The patient qualifies for a Table 40 diagnosis. She had a total knee arthroplasty which results in a 20% lower extremity impairment." This was combined with 4% for range of motion loss, for an overall combined lower extremity rating of 23%. Dr. Sparr referenced the Division's Impairment Rating Tips regarding apportionment of prior impairment. He concluded apportionment was not indicated because the prior knee condition was "not independently disabling at the time of the current work injury."

25. Dr. Jepson issued a report dated July 2, 2021 addressing causation of the revision TKA. Dr. Jepson noted Claimant "recovered uneventfully" from the March 2017 TKA and "did very well." She had periodic exacerbations of knee pain, but this was "not unexpected in light of her young age, increased activity level, and the extensive history." He opined the December 28, 2018 bone scan showed "no evidence of loosening," although "it did reveal some increased diffuse uptake which would be expected in a total knee replacement within 2 years of surgery." Claimant was very active after the initial TKA, including playing sports and going on long hikes. She was "doing very well" until the work accident in which she landed directly on her knee. She returned to his clinic after the work injury "secondary to her significant increased pain which was not resolving since the fall." After ruling out an underlying infection, he recommended a "revision arthroplasty" to address aseptic loosening. Dr. Jepson disagreed with Dr. Lindberg that the prior studies, including the 2018 bone scan, showed or suggested loosening before the work accident. He concluded, "The fall she sustained on August 5, 2020 contributed to the loosening of this total knee arthroplasty. There is no evidence in the records to suggest that she had loosening of the implant prior to this fall."

26. Dr. Lindberg issued a supplemental report on September 21, 2021. He opined the uptake on Claimant's bone scan films was evidence of aseptic loosening. Dr. Lindberg noted Claimant was seen on December 22, 2017 with reports of increasing knee pain and swelling over the past five to six weeks. He opined this was probably the first

sign of loosening. She continued to complain of knee pain on December 12, 2018, one and one-half years post total knee arthroplasty. She was worked up for infection, and a bone scan showed moderate uptake involving the patella. There was increased uptake involving the tibia, but not at a level to diagnose loosening or infection. Dr. Lindberg further opined, "It is clear to me that she had aseptic loosening that was secondary to her increased body weight and not secondary to the fall. Her complaints of knee pain preceded the incident at work, and I do not believe this is compensable." He opined a fall on the knee with no fracture is unlikely to cause loosening of the tibial component, as most of the impact would have been on the patella and not on the tibial component. He also disagreed with Dr. Sparr's rating and stated "merely doing a revision does not entitle her to another 20% for a total knee arthroplasty."

27. Dr. Sparr authored a lengthy narrative report on October 18, 2021 analyzing causation of the revision TKA. He agreed with Dr. Jepson's assessment outlined in his July 2, 2021 report. He disagreed with Dr. Lindberg's supposition that Claimant's flare-up in December 2017 was "probably" the first sign of loosening or infection. He pointed out that Claimant worked as a deputy sheriff, which required frequent restraining of inmates. She was also active in athletics including racquetball and working out with a "heavy bag." He thought the episode of pain and swelling in December 2017 was "in no way indicative of" loosening or infection. He opined, "If this was in fact the first sign of either . . . she would've had progressive pain, but this was not the case as she was not seen again until December 12, 2018, a full year after Dr. Lindberg's theoretical first sign of loosening or infection. In fact, when I saw the patient in June 2018 for treatment of a neck injury, her review of systems revealed no joint stiffness or swelling." Dr. Sparr was more persuaded by the radiologist's and Dr. Jepson's interpretation of the pre-injury imaging than Dr. Lindberg's assessment. He emphasized that Claimant had no complaints of instability between her first and second arthroplasties, whereas "after she fell on her knee, which causes loosening of the prosthetic, there are multiple notes indicating a complaint of instability." He disagreed with Dr. Lindberg that Claimant's fall could not cause loosening of the prosthesis. He also disagreed with Dr. Lindberg's opinion that if the loosening were due to trauma, it would have been visible on x-ray and not required a bone scan. In Dr. Sparr's opinion, "loosening is often due to trauma and often not visible on an x-ray. This is why the bone scan is so often utilized to diagnose loosening."

28. Dr. Sparr testified via deposition on October 22, 2021. Regarding impairment, he explained he provided 20% under Table 40 for the August 5, 2020 revision total knee arthroplasty, combined with range of motion loss for an overall lower extremity rating of 23%. He testified apportionment of the rating was not appropriate because "the previous arthroplasty was not independently disabling. She was working full duties as a deputy sheriff and working out. And . . . it wasn't work-related so it couldn't be apportioned out."

29. Dr. Lindberg testified at hearing consistent with his reports. He reiterated his opinion the prosthesis probably began loosening around December 2017. He opined patients with knee replacements are generally asymptomatic, so the fact she had intermittent pain meant something was probably wrong with the hardware. He disagreed with the radiologists' interpretation of the December 2018 bone scan. He opined it takes

a “major trauma” to cause gross loosening of the bone scan and he has never seen a prosthesis loosen without a fracture. He reiterated his belief Claimant’s fall could not have caused traumatic loosening. He agreed the revision TKA was reasonably necessary but was unrelated to the work accident.

30. Dr. Lindberg testified Dr. Sparr should not have given the 20% lower extremity rating for the arthroplasty because the *AMA Guides* do not allow for a specific diagnosis rating for a revision total knee arthroplasty. Additionally, Dr. Lindberg opined Claimant’s condition was independently disabling at the time of the injury. He noted Claimant had episodes of pain in 2017 and 2018, “so she was not at full function” before the work accident. He conceded there is no evidence Claimant’s knee impaired her ability to perform her job before the work accident. He also testified, “she was still doing her exercises and sports but she was having pain doing it, so she was disabled to some extent.”

31. Dr. Jepson and Dr. Sparr’s opinions regarding causation of the revision TKA are credible and more persuasive than the contrary opinions offered by Dr. Lindberg’s opinions.

32. Dr. Sparr’s opinions regarding Claimant’s impairment rating and apportionment are credible and more persuasive than Dr. Lindberg’s opinions.

33. Claimant was a credible witness.

34. Claimant proved the December 30, 2020 revision TKA performed by Dr. Jepson was reasonably necessary and causally related to the admitted work accident.

35. Claimant proved she suffered a 23% lower extremity impairment because of her admitted work accident.

36. Respondent failed to prove Claimant’s rating should be apportioned.

37. Claimant demonstrated visible disfigurement at hearing consisting of an 8.25-inch long by 3/8 to 0.25-inch wide discolored, irregular, partially raised, partially indented surgical scar on the right knee from her revision TKA. Claimant testified the incision for the revision TKA was “on” the scar from the first TKA and Dr. Jepson “tried to follow the same line.” When asked how she would compare the current scar to the scarring she had before the work accident, Claimant testified, “I think the top is a little bit wider but the rest of it is about the same.” Although difficulty to quantify precisely, it appears the current scarring is slightly worse than before the revision TKA. The ALJ finds Claimant should be awarded $500 for disfigurement related to the August 5, 2020 work accident.

CONCLUSIONS OF LAW

A. Causation of the revision TKA

The respondents are liable for medical treatment that is reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101(1)(a); *Snyder v. Industrial Claim Appeals Office*, 942 P .2d 1337 (Colo. App. 1997); *Country Squire Kennels v. Tarshis*, 899 P. 2d 362 (Colo. App. 1995). Even if the respondents admit liability, they retain the right to dispute the relatedness of any particular treatment, and the mere occurrence of a compensable injury does not compel the ALJ to find that all subsequent medical treatment was caused by the industrial injury. *Snyder v. City of Aurora*, 942 P.2d 1337 (Colo. App. 1997); *McIntyre v. KI, LLC*, W.C. No. 4-805-040 (ICAO, Jul. 2, 2010). Where the respondents dispute the claimant's entitlement to medical benefits, the claimant must prove that an injury directly and proximately caused the condition for which benefits are sought. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999); *Snyder v. Industrial Claim Appeals Office*, 942 P.2d 1337 (Colo. App. 1997)*.* The claimant must also prove that the requested treatment is reasonably necessary, if disputed. Section 8-42-101(1)(a). The claimant must prove entitlement to medical benefits by a preponderance of the evidence.

The existence of a preexisting condition does not disqualify a claim for medical benefits where an industrial injury aggravates, accelerates, or combines with a preexisting condition to produce the need for treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). But the mere fact a claimant experiences symptoms after an incident at work does not necessarily mean the employment aggravated or accelerated the preexisting condition. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005). The ALJ must determine if the need for treatment was the proximate result of an industrial aggravation or is merely the direct and natural consequence of the pre-existing condition. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Carlson v. Joslins Dry Goods Company*, W.C. No. 4-177-843 (March 31, 2000).

As found, Claimant proved the revision TKA was causally related to the admitted work accident. The analyses and conclusions of Dr. Sparr and Dr. Jepson are credible and more persuasive than the contrary opinions offered by Dr. Lindberg. Claimant did well after the first TKA and quickly returned to her physically demanding job without limitation or difficulty. She also regularly participated in fitness training, sports, and outdoor activities such as hiking. Although Claimant had episodic knee pain, it was relatively minor and required no regular treatment. As Dr. Jepson explained, periodic knee pain was "expected" given her extensive history culminating in a TKA. Despite her rigorous work and fitness routines, Claimant had sought no treatment related to the right knee for over 19 months before the work accident. And there is no persuasive reason to expect she would have sought treatment in August 2020 but for the fall at work. Dr. Sparr and Dr. Jepson agree the mechanism of injury was sufficient to cause Claimant's knee prosthesis to loosen and become symptomatic. Claimant fell directly on her right knee and developed immediate pain. Shortly thereafter the knee felt unstable, which had not been a problem before the work accident.

Even if Dr. Lindberg were correct that the prostheses were loose before the work accident, the knee was minimally symptomatic and caused no notable impact on Claimant's functional capacity. By contrast, she became much more symptomatic immediately after the fall, which continued until she had the revision TKA. The argument that a fall directly on her right knee was merely coincidental is not persuasive. The work accident either caused Claimant's TKA prostheses to become loose, or aggravated and accelerated a pre-existing loosening, or some combination thereof. As a result, the need for the revision TKA was "more likely than not" work-related.

B. Impairment rating for "knee replacement arthroplasty"

Permanent impairment ratings must be "based on" the *AMA Guides to the Evaluation of Permanent Impairment* (3d ed. rev. 1991) ("AMA Guides"). Section 8-42-101(3.7). Whether a rating physician correctly applied the *AMA Guides* is a question of fact for the ALJ. *Metro Moving and Storage v. Gussert*, 914 P.2d 411 (Colo. App. 1995). Where, as here, the claimant suffers a purely scheduled impairment, the claimant must prove entitlement to a rating by a preponderance of the evidence. *Delaney v. Industrial Claim Appeals Office*, 30 P.3d 691 (Colo. App. 2000).

Table 40 of the *AMA Guides* provides a 20% lower extremity rating for "knee replacement arthroplasty." As evidenced by the differing opinions advanced by the physicians in this case, that language is reasonably susceptible of more than one interpretation. Dr. Sparr interprets it to include a "revision total knee arthroplasty." Dr. Lindberg believes it only applies to a first TKA, with no rating for any subsequent procedure. The *AMA Guides* provide no specific instructions for how to rate a revision TKA. Nor is the issue addressed in the Level II curriculum or the Rating Tips. Absent definitive guidance regarding the "correct" way to interpret Table 40, the rating physician enjoys a zone of discretion to determine what, if any, rating applies "based on the *AMA Guides*." *Fisher v. Industrial Claim Appeals Office*, 484 P.3d 816, (Colo. App. 2021) ("the revised third edition is the starting point, not the exclusive font, of impairment rating methodology. By employing 'based on,' instead of using a more limiting word such as 'only,' the legislature made clear that doctors should have some leeway and discretion when determining a patient's final impairment rating.").

Dr. Sparr's rating is "based on" a reasonable interpretation of the *AMA Guides*. As noted, above Table 40 does not differentiate between an "arthroplasty" and a "revision arthroplasty." It simply provides a 20% rating for a "knee replacement arthroplasty." The Lower Extremity MTGs define a total knee arthroplasty as "prosthetic replacement of the articulating surfaces of the knee joint." From a strictly linguistic perspective, that definition can describe a revision TKA, notwithstanding that the "articulating surfaces" in Claimant's knee before the work accident were prosthetic instead of organic. This is also consistent with the terminology used by multiple physicians in this case, including Dr. Dr. Jepson, Dr. Lindberg, and Dr. Sparr, who have described the procedure as a "revision *total knee arthroplasty*." Accordingly, the revision procedure Claimant underwent is a form of "knee replacement arthroplasty."

It is possible the authors of the *AMA Guides* intended to preclude a diagnosis-based rating for a revision TKA, as Dr. Lindberg argues. But it is at least equally likely they saw no need to explicitly discuss revision procedures because a revision is encompassed in the broader term “arthroplasty.” The ALJ is not persuaded that Dr. Lindberg’s interpretation of Table 40 is “right” and Dr. Sparr is “wrong.” Dr. Sparr's rating reflects a reasonable application of the *AMA Guides* to the injury-related impairment suffered by his patient. In that regard, Dr. Sparr’s rating is “based on” the AMA Guides as required by the Act.

The ICAO recently addressed a similar scenario, but from a slightly different angle. *Pulliam v. FedEx Ground Package System, Inc*., W.C. No. 5-078-454-001 (July 12, 2021). The claimant in *Pulliam* had undergone a nonwork-related TKA, from which he recovered well. He subsequently reinjured the knee at work and underwent a revision TKA to treat aseptic loosening caused by the work accident. The claimant eventually underwent a DIME, who assigned a rating based solely on range of motion. The DIME physician did not assign a rating under Table 40 or discuss its applicability. As in Claimant’s case, two experienced Level II physicians had differing interpretations of whether Table 40 applied. The claimant’s IME opined the DIME erred by failing to provide a Table 40 rating for the revision TKA. Conversely, the respondents’ IME opined no specific disorder rating applied because Table 40 does not apply to “revision” TKAs. The ALJ found the respondents’ IME to be more persuasive and denied the request for an additional 20% lower extremity rating. The ICAO affirmed the ALJ’s decision based on the substantial evidence rule. The claimant argued on appeal he was absolutely entitled to a Table 40 rating for the revision TKA. The Panel disagreed that a 20% rating was mandatory under Table 40 for a revision procedure. However, the Panel did not rule that Table 40 definitively precludes a rating for a revision TKA. Had that been the Panel’s interpretation, there would have been no need to resort to the substantial evidence rule. The upshot of *Pulliam* is that the proper rating is a matter of fact for the ALJ’s determination. Accordingly, the ICAO’s ruling in *Pulliam* is not inconsistent with this ALJ’s determination in Claimant’s case.

Dr. Sparr’s analysis of Claimant’s impairment is more persuasive than Dr. Lindberg’s analysis. Claimant proved she suffered a 20% impairment under Table 40 because of her work injury. Combined with the range of motion loss, her overall lower extremity rating is 23%.

C. Apportionment

Once the physician determines a claimant has a work-related permanent impairment, the question of how to account for any pre-existing impairment is answered § 8-42-104(5) (the “apportionment statute”). The current iteration of the apportionment statute reflects a policy determination by the General Assembly that a previous nonwork-related impairment can only be deducted from a claimant's rating if it was “independently disabling” before the work accident. Section 8-42-104(5)(b). Apportionment under § 8-42-104(5) is an affirmative defense which the respondents must prove. *Hansford v. South Metro Fire Rescue District*, W.C. No. 4-693-447 (December 20, 2007).

The phrase “independently disabling in the apportionment statute invokes the analysis set forth in *Askew v. Industrial Claim Appeals Office*, 927 P.2d 1333 (Colo. 1996). *Askew* held that “medical impairment” is not synonymous with “disability.” Impairment is “an alteration of an individual’s health status that is assessed by medical means,” whereas disability pertains to “an individual’s capacity to meet personal, social, or occupational demands.”

As found, Respondents failed to prove Claimant’s impairment rating should be apportioned. Although Claimant’s knee was episodically symptomatic before the work accident, it did not limit her ability to perform a strenuous job or engage in other physical activities on a regular basis. Dr. Sparr’s analysis regarding the lack of prior “disability” is persuasive. Dr. Lindberg essentially equates pre-injury pain with “some extent” of disability. That is not the proper standard under the apportionment statute. Moreover, the last documented episode of symptoms was over 19 months before the accident. Thus, even if we accepted Dr. Lindberg’s premise that symptoms equate to disability, there is no persuasive evidence the condition was disabling “at the time of the subsequent injury” as required by § 8-42-104(5)(b).

D. Disfigurement

Section 8-42-108(1) provides for additional compensation if a claimant is “seriously, permanently disfigured about the head, face, or parts of the body normally exposed to public view.” As found, Claimant suffered visible disfigurement to her right knee because of the work accident. Accounting for the pre-existing scarring based on Claimant’s credible testimony, the ALJ concludes Claimant should be awarded $500 for disfigurement.

ORDER

It is therefore ordered that:

1. Respondent shall cover the December 20, 2020 revision total knee arthroplasty performed by Dr. Jepson.

2. Respondent shall pay Claimant PPD benefits based on Dr. Sparr’s 23% scheduled lower extremity rating.

3. Respondent shall pay Claimant statutory interest of 8% per annum on all compensation benefits not paid when due.

4. Respondent’s request to apportion Claimant’s impairment rating is denied and dismissed.

5. Respondent shall pay Claimant $500 for disfigurement. Respondent may take credit for any disfigurement benefits previously paid in connection with this claim.

6. Issues relating to medical mileage reimbursement, and payment for the revision TKA, including reimbursement of Claimant’s out of pocket expenses, are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ’s order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: December 21, 2021

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-146-480-002

ISSUES

1. Whether Respondents proved by a preponderance of the evidence that Claimant experienced an intervening event on August 18, 2020, that was sufficient to sever Respondent's liability stemming from an admitted injury of March 24, 2020.

2. Whether Respondents established by clear and convincing evidence that the Division IME (DIME) physician's opinions regarding maximum medical improvement (MMI) and impairment rating were incorrect.

3. If applicable, the amount of Claimant's Average Weekly Wage (AWW).

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ makes the following findings of fact:

1. Claimant is a 32 year-old male who suffered an admitted work injury to his lower back on March 24, 2020, while working for Employer. Claimant tripped while lifting a heavy case of food (approximately 45 pounds). He felt a sudden onset of midline back pain radiating to the right side of his lower back. (Ex. 3 and Ex. D).

2. Claimant went to UC Health Urgent Care on April 3, 2020, and was evaluated by Sarah Thompson, PA-C. Claimant explained that he had persistent pain in his lower back, and it was worse when he was laying down and trying to sleep. Ms. Thompson advised Claimant to take Naprosyn and Tizanidine as needed, but she did not feel he needed an MRI or physical therapy. Ms. Thompson told Claimant to follow up with a workers' compensation clinic. (Ex. 3 and Ex. D).

3. The first appointment Claimant could secure at Concentra, due to the COVID-19 pandemic, was on July 22, 2020 with Pete Michael, PA-C. Claimant complained of pain in the middle of his lower back. He rated the pain as five out of ten at rest, but movement and bending could increase the pain to ten out of ten. Mr. Michael diagnosed Claimant with a lower back strain. He ordered physical therapy (three times a week, for two weeks), and Claimant was to start Ibuprofen and Lidocaine patches. Claimant was restricted to modified duty. He could not lift more than 10 pounds, and could not push or pull more than 25 pounds. (Ex. E).

4. On July 28, 2020, Claimant returned for a follow-up appointment and was evaluated by Valerie Skvarca, P.A. Claimant reported occasionally having lower back pain, but generally, it was improving. His pain did not radiate, but he felt it when he bent over. Claimant was attending physical therapy and showing functional improvement. (Ex. E).

5. Claimant's follow-up appointment on August 7, 2020 was with Mr. Michael. Claimant had completed his physical therapy and reported that it helped a lot. He still, however, had pain with heaving lifting and bending forward. According to the medical records, the anticipated date of MMI was August 15, 2020. (Ex. E).

6. On August 19, 2020, Amy Pate, M.D. rechecked Claimant's back. Claimant reported some improvement since his last visit, but he told Dr. Pate he experienced pain with heaving lifting (40 pounds) the prior day. According to the medical records, Claimant "reinjured himself" leading to the increased pain. The same medical records, however, state that Claimant had an "exacerbation" of his injury due to lifting heavy. (Ex. E).

7. Dr. Pate ordered physical therapy (three times a week for two weeks) for Claimant. She also renewed his Metaxalone and Lidocaine patch prescriptions, and prescribed him Naproxen. She restricted Claimant to modified duty at work where he could occasionally lift up to 15 pounds, and occasionally push/pull 30 pounds. His anticipated date of MMI was September 30, 2020. (Ex. E).

8. On August 28, 2020, Ms. Skvarca noted that Claimant was close to being able to do the physical requirements of his job. She revised his work restrictions, noting he could work at least eight hours a day, could lift up to 25 pounds frequently, and push/pull 30 pounds frequently. His anticipated date of MMI was September 5, 2020. (Ex. E).

9. On September 8, 2020, Ms. Skvarca released Claimant to full duty work with no restrictions as he was doing much better and only had slight pain. (Ex. E).

10. The ALJ concludes that the incident on August 18, 2020 exacerbated Claimant's admitted back injury. The temporary exacerbation was not an intervening event that broke the chain of causation. The evidence shows that Claimant's back symptoms improved within a short period of time with limited intervention.

11. Claimant credibly testified he returned to Concentra in early October 2020 after an onset of increased back pain from lifting heavy boxes, and he was referred for chiropractic care. (Tr. 27:15-25).

12. There are no Concentra records in evidence between September 8, 2020 and October 9, 2020 that reflect the appointment in early October 2020 that Claimant testified about. The chiropractic records, however, indicate that in October 2020 Ms. Skvarca referred Claimant to Richard Mobus, D.C., for six chiropractic sessions. Claimant received chiropractic care from October 9, 2020 to November 3, 2020. Over this period of time, Claimant's pain level decreased from six out of ten, to three out of ten. (Ex. G)

13. Claimant saw Ms. Skvarca on October 30, 2020. He reported his pain was still moderate, but better than his previous appointment a few weeks prior. Claimant had completed physical therapy and had one more chiropractic appointment. (Ex. E).

14. The ALJ finds that Claimant credibly testified he had another temporary exacerbation of his March 24, 2020 injury on or before October 9, 2020 from lifting heavy boxes.

15. Steve Danahey, M.D., evaluated Claimant on December 18, 2020. He opined that Claimant could return to full-duty work with no restrictions, that Claimant reached MMI as of December 18, 2020, and that Claimant had no permanent impairment. (Ex. E).

16. Claimant requested a DIME on the issues of MMI, permanent impairment and apportionment for his March 24, 2020 injury. (Ex. 1) Joseph Morreale, M.D., was selected as the DIME physician. Respondents sent Dr. Morreale a copy of Claimant's medical records, including records related to the August 18, 2020 incident. (Ex. 2).

17. Dr. Morreale examined Claimant on April 29, 2021. In the DIME report, Dr. Morreale disagreed with the December 18, 2020 MMI date. Dr. Morreale opined that Claimant reached MMI on September 24, 2020, approximately six months after his injury. He assigned a 15% range of motion impairment and gave Claimant a 5% table 53 rating for a 19% whole person impairment rating. Dr. Morreale noted in his DIME report that Claimant still had some back pain and may need physical therapy. (Ex. 1 and Ex. H).

18. Dr. Morreale's DIME report is brief and general. He states, however, that Claimant's "records reveal excellent recovery from physical therapy and chiropractic care with non-painful range of motion of his lumbar spine." (Ex. H). Dr. Morreale does not address Claimant's August 18, 2020 incident.

19. In light of the DIME report, Respondents requested an IME from Mark C. Winslow, D.O. Dr. Winslow did not testify at the hearing, but his report was admitted into evidence.

20. In his IME report, Dr. Winslow disagreed with Dr. Morreale's MMI date. Dr. Winslow opined that Claimant had a significant change in the course of his treatment and his ongoing symptoms due to the August 18, 2020 incident. Dr. Winslow agreed with ATP, Dr. Danahery, and opined that Claimant reached MMI on December 18, 2020. Dr. Winslow alleged that Dr. Morreale "did not review the medical records or note the significant changes in Claimant's profile with the August 18, 2020 injury." (Ex. I).

21. Dr. Winslow did not challenge Dr. Morreale's permanent impairment rating of 19%, and opined that his "[i]mpairment rating is appropriate in terms of its analysis of the data, but by definition is premature". (Ex. I).

22. Based upon the fact that Dr. Morreale was provided all of Claimant's medical records, the ALJ infers that Dr. Morreale reviewed and relied upon all of the medical records in reaching his opinions regarding Claimant's MMI date and impairment rating.

23. Dr. Winslow also opined that "[f]ollowing the incident on August 18 . . . chiropractic was initiated and added to the patient's care." Claimant, however, did not begin chiropractic care until October 9, 2020, following a second temporary exacerbation. (Ex. G.)

24. The ALJ finds that Respondents did not overcome Dr. Morreale's opinions on MMI and impairment by clear and convincing evidence.

25. The ALJ finds that Claimant's August 18, 2020 injury represents a temporary exacerbation of his March 24, 2020 injury and this did not break the chain of causation

26. This ALJ finds Claimant reached MMI on September 24, 2020, and has a 19% whole person impairment rating.

27. Claimant credibly testified that when he was injured, he concurrently worked at Chili's approximately 28 hours a week, for $17.00 an hour. (Tr. 22:19-22). Claimant worked under the name of [Claimant]. Claimant did not have a social security number, so he used his friend's name and social security number for his employment at Chili's. (*Id.* at 23:2-16). The ALJ finds that the wage records for [Claimant] reflect wages earned by Claimant. (Ex. 6).

28. Claimant's wages while working for Employer for 83 days, from January 1, 2020 through March 24, 2020, total $7,118.84. The 83 days equate to 11.86 weeks (83 divided by 7). Claimant's AWW at Employer is $600.24 ($7,118.84 divided by 11.86 weeks). Claimant's wages at Chili's, while working as [Claimant], from January 2, 2020 to March27, 2020, total $4,893.26. The 85 days of work equate to 12.14 weeks (85 divided by 7). Claimant's AWW at Chili's, under the name of [Claimant], is $403.07 ($4,893.26 divided by 12.14 weeks). The ALJ finds Claimant's concurrent AWW is $1,003.31 ($600.24 plus $403.07).

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, § 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceedings is the exclusive domain of the ALJ. *Univ. Park Care Ctr. v. Indus. Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insur. Co. v. Cline*, 57 P.2d 1205 (Colo. 1936);

Bodensieck v. Indus. Claim Appeals Office, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colo. Springs Motors, Ltd. v. Indus. Comm'n*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Eng'g, Inc. v. Indus. Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Intervening Cause

Under section 8-42-101(1)(a), C.R.S., respondents are liable for authorized medical treatment that is reasonable and necessary to cure or relieve the effects of the industrial injury. *See Owens v. Indus. Claim Appeals Office*, 49 P.3d 1187, 1188 (Colo. App. 2002) (citing *Standard Metals Corp. v. Ball*, 474 P.2d 622 (Colo. 1970)). All results flowing proximately and naturally from an industrial injury are compensable. *Id*. No compensability exists, however, when a later accident, injury, or disease occurs as the direct result of an independent intervening cause. *Owens,* 49 P.3d 1187; *Post Printing & Publishing Co. v. Erickson*, 30 P.2d 327 (Colo. 1934); *Merrill v. Pulte Mortgage Corporation,* WC 4-635-705-02, (ICAO, May 10, 2013). The respondents are only liable for the "direct and natural" consequences of the work related injury. *Reynal v. Home Depot USA, Inc.*, WC 4-585-674-05 (ICAO, Dec. 10, 2012). An intervening injury may sever the causal connection between the injury and the claimant's temporary disability if the claimant's disability is triggered by the intervening injury. *See Standard Metals*, 474 P.2d 622. If the need for treatment results from an intervening injury or disease unrelated to the industrial injury, then treatment of the subsequent condition is not compensable. This is a question of fact for resolution by the ALJ. *Owens,* 49 P.3d at 1188-89.

Claimant suffered an admitted injury to his back on March 24, 2020. Claimant was improving and close to MMI when he reinjured his back on August 18, 2020. (Findings of Fact ¶¶ 5 and 6). The medical records classify this event as Claimant reinjuring himself, and also as an exacerbation of his admitted injury. *Id.* at ¶ 6. The injury was due to the resumption of heavy lifting. *Id.* Claimant's condition, however, improved quickly with limited interventions. *Id.* at ¶ 10. Based upon the totality of the evidence, the ALJ concludes that Claimant suffered a temporary exacerbation of his back injury. Respondents failed to prove by a preponderance of the evidence that this was an intervening event that broke the chain of causation.

DIME Physician's MMI and Impairment Findings

A DIME physician's opinions concerning MMI and whole person impairment carry presumptive weight and may be overcome by clear and convincing evidence. § 8-42-107

(8)(b)(III), C.R.S. The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Eng'g,* 5 P.3d 385. "Clear and convincing evidence" is evidence that demonstrates that it is "highly probable" the DIME physician's rating is incorrect. *Qual-Med, Inc. v. Indus. Claim Appeals Office*, 961 P.2d 590, 592 (Colo. App. 1998); *Lafont v. WellBridge D/B/A Colorado Athletic Club* WC 4-914-378-02 (ICAO, June 25, 2015). In other words, to overcome a DIME physician's opinion, "there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be unmistakable and free from serious or substantial doubt." *Adams v. Sealy, Inc*., WC 4-476-254 (ICAP, Oct. 4, 2001). The mere difference of medical opinion does not constitute clear and convincing evidence to overcome the opinion of the DIME physician. *Javalera v. Monte Vista Head Start, Inc*., WC's 4-532-166 & 4-523-097 (ICAO, July 19, 2004). Rather, it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Licata v. Wholly Cannoli Café* WC 4-863-323-04 (ICAO, July 26, 2016). When a DIME physician issues conflicting or ambiguous opinions concerning MMI, the ALJ may resolve the inconsistency as a matter of fact to determine the DIME physician's true opinion. *MGM Supply Co. v. Indus. Claim Appeals Office,* 62 P.3d 1001 (Colo. App. 2002); *Licata v. Wholly Cannoli Café* WC 4-863-323-04 (ICAO, July 26, 2016).

As a matter of diagnosis, the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Indus. Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003); *Sharpton v. Prospect Airport Services,* W.C. No. 4-941-721-03 (ICAO, Nov. 29, 2016). Consequently, a DIME physician's finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Indus. Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Indus. Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998); *Watier-Yerkman v. Da Vita, Inc.*, W.C. No. 4-882-517-02 (ICAO Jan. 12, 2015).

The DIME physician, Dr. Morreale, determined that Claimant reached MMI on September 24, 2020. (Findings of Fact ¶ 17)[1]. Dr. Winslow opined that Claimant was not at MMI until December 18, 2020, because Claimant had a significant change in the course of his treatment and symptoms that Dr. Morreale did not consider. (*Id.* at ¶ 20). There is no evidence, however, that Dr. Morreale's opinion regarding Claimant's date of MMI is incorrect. Dr. Morreale's DIME report does not specifically mention Claimant's presentation on August 18, 2020, and he does not reference this event as an exacerbation of the previous injury, or a new injury. (*Id.* at ¶ 18). The fact that this information it is not specifically addressed in Dr. Morreale's report is not persuasive. Respondents provided Dr. Morreale with a copy of Claimant's medical records, including the records from August 18, 2020. (*Id.* at ¶ 16). The ALJ infers that Dr. Morreale considered this information in rendering his opinions. (*Id.* at ¶ 22). Respondents have not met their burden of proof as they have not presented clear and convincing evidence to overcome the DIME.

[1] Dr. Winslow agreed with Dr. Morreale's impairment rating, so the impairment rating is not at issue. (Findings of Fact ¶ 19).

ORDER

It is therefore ordered that:

1. Respondents failed to prove by a preponderance of the evidence that Claimant experienced an intervening event on August 18, 2020, that severed Respondents' liability related to the admitted March 24, 2020 injury.

2. Respondents failed to prove by clear and convincing evidence that the DIME physician's finding of MMI is incorrect.

3. Respondents failed to prove by clear and convincing evidence that the DIME physician's impairment rating is incorrect.

4. Claimant's concurrent average weekly wage is $1,003.31.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 21, 2021

Victoria E. Lovato
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-122-636-002

ISSUES

1. Whether Claimant established by a preponderance the right to select her authorized physician.

FINDINGS OF FACT

1. Claimant sustained an admitted injury on August 21, 2019, arising out of the course of her employment with Employer.

2. Claimant initially sought medical treatment with authorized treating physician (ATP) Kathryn Bird, D.O., at Concentra Medical Centers on August 21, 2019. (Ex. 2).

3. Claimant underwent various treatments, including chiropractic and physical therapy, and attended regular visits with Dr. Bird. On November 18, 2019, Dr. Bird placed Claimant at maximum medical improvement (MMI), with no permanent impairment, work restrictions or recommendations for medical maintenance treatment. (Ex. 2 & F).

4. On August 27, 2020, Claimant underwent a Division Independent Medical Examination (DIME), with Martin Kalevik, M.D. Dr. Kalevik determined Claimant was not at MMI and recommended additional treatment, including EMG/nerve conduction studies, a right hip MRI, and a follow up orthopedic evaluation depending on the results of the imaging studies. Dr. Kalevik also endorsed additional possible or potential treatment, including a physiatry evaluation, SI injection, nerve block and repeat MRI. (Ex. 1).

5. Respondents filed an application for hearing to overcome Dr. Kalevik's DIME opinions. After a hearing, ALJ Peter Cannici issued Findings of Fact, Conclusions of Law, and Order (on June 2, 2021) finding that Respondents failed to overcome the DIME opinion, and that Claimant was not at MMI. (Ex. 2).

6. At hearing in the present matter, Claimant testified that between June and July 2021, she attempted to schedule an appointment with Dr. Bird by calling her office three or four times. Claimant testified that Dr. Bird's receptionist stated that Claimant's was closed two years earlier and refused to schedule an appointment. Other than these phone calls, Claimant made no other direct efforts to schedule an appointment with Dr. Bird. Claimant testified that she did not provide Dr. Bird with a copy of Dr. Kalevik's DIME report.

7. On July 1, 2021, Claimant's counsel's office emailed Respondents' counsel stating "Pursuant to Judge Cannici's June 2, 2021 Order in the aforementioned claim,

[Claimant] is not yet at MMI for the August 21, 2019 injury. At your earliest convenience, please have the adjuster schedule her for a follow-up appointment to resume her care." (Ex. 3).

8. Subsequently, Claimant attended a demand appointment with Dr. Bird on September 7, 2021. At that appointment, Dr. Bird performed a physical examination of Claimant, and opined that Claimant was "at functional goal, not at end of healing." Dr. Bird dispensed acetaminophen 325 mg tablets and referred Claimant for physical therapy, opining that physical therapy "is medically necessary to address objective impairment/functional loss and to expedite return to full activity." Dr. Bird also indicated that if Claimant did not improve, she would consider referrals for acupuncture and to Dr. Kawasaki "for other treatment options." (Dr. Kawasaki is a physiatrist). Claimant was also instructed to keep follow up appointments, and a follow-up appointment was indicated in "about 2 days." (Ex. F). Claimant testified that Dr. Bird did not state to her that she would consider referrals for acupuncture and to Dr. Kawasaki.

9. Claimant did not return to Dr. Bird after September 7, 2021, and did not attend physical therapy as recommended by Dr. Bird. Instead, Claimant elected to treat with physicians at New West Physicians. Claimant testified that she did not treat with Dr. Bird because Dr. Bird would not follow through with the treatment recommended by Dr. Kalevik, although Claimant was not aware of the specific treatment Dr. Kalevik recommended.

10. Claimant testified that she saw physicians at New West Physicians, who ordered an MRI of her hip, but had not yet ordered the additional treatment Dr. Kalevik recommended. Claimant testified that she attended an appointment at New West on September 7, 2021. No records of Claimant's treatment at New West Physician were offered or admitted into evidence. Claimant testified that she did not know if her physicians at New West Physicians are Level II-accredited or treat workers' compensation patients.

11. Claimant indicated she would like to treat with Kimberly Winter, M.D. and Daffney Glotzbach, PA-C at New West Physician, and that she had treated with those providers.

12. Claimant asserts that Dr. Bird refused to treat her for non-medical reasons, and did not know if Insurer was notified of the alleged failure to treat for non-medical reasons.

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See*

§ 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

Change of Physician for Failure to Treat for Non-Medical Reasons

Section 8-43-404(5)(a), C.R.S. permits the employer or insurer to select the treating physician in the first instance. Once the respondents have exercised their right to select the treating physician, the claimant may not change the physician without the insurer's permission or "upon the proper showing to the division." §8-43-404(5)(a), C.R.S.; *In Re Tovar,* W.C. No. 4-597-412 (ICAO, July 24, 2008). Because §8-43-404(5)(a), C.R.S. does not define "proper showing" the ALJ has discretionary authority to determine whether the circumstances warrant a change of physician. *Jones v. T.T.C. Illinois, Inc.,* W.C. No. 4-503-150 (ICAO, May 5, 2006). The ALJ's decision regarding a change of physician should consider the claimant's need for reasonable and necessary medical treatment while protecting the respondent's interest in being apprised of the course of treatment for which it may ultimately be liable. *Id.* An ALJ is not required to approve a change of physician for a claimant's personal reasons including "mere dissatisfaction." *In Re Mark*, W.C. No. 4-570-904 (ICAO, June 19, 2006). Because the statute does not contain a specific definition of a “proper showing,” the ALJ has broad discretionary authority to determine whether the circumstances justify a change of physician. *Loza v. Ken’s Welding,* WC 4-712-246 (ICAO January 7, 2009); *Pedro Gutierrez Lopez v. Scott Contractors*, W.C. No. 4-872-923-01, (ICAO Nov. 19, 2014).

Claimant asserts that Dr. Bird refused to treat her for non-medical reasons, and that she is therefore entitled to select a new authorized treating physician. Section 8-43-404 (10)(a), C.R.S., provides that where an ATP refuses to provide medical treatment to an injured employee for non-medical reasons, the ATP must provide notice of the refusal to the injured employee and the insurer within three business days by certified mail. The notice must explain, among other things, the reasons for the refusal. Section 8-43-404 (10(b), also provides that if either the ATP or the injured worker notifies the insurer by certified mail that an ATP has refused to provide medical treatment for non-medical reasons and there is no other ATP willing to provide medical treatment, then insurer must designate a new ATP within 15 days. If the insurer fails to designate a new ATP, the right of selection passes to the injured employee.

Claimant has failed to establish by a preponderance of the evidence grounds for selecting a new ATP or that Dr. Bird refused to treat Claimant for non-medical reasons. As found, Dr. Bird originally discharged Claimant at MMI in November 2019. When Claimant contacted Dr. Bird’s office in June or July 2021 to schedule an appointment, Dr. Bird’s office was under the impression that Claimant’s claim had been closed, as evidenced by Claimant’s testimony. No evidence was presented to indicate any other reason for Dr. Bird’s initial refusal to schedule an appointment. No credible evidence was presented that Dr. Bird was aware of the DIME physician’s opinion that Claimant was not at MMI, or ALJ Cannici’s Order finding Claimant not at MMI. Moreover, Dr. Bird saw Claimant in September 2021, recommended additional treatment, and indicated in her record that further treatment may be indicated depending on how Claimant responded to physical therapy.

That Dr. Bird did not implement Dr. Kalevik’s treatment recommendations is not grounds for changing physicians and does not indicate that Dr. Bird refused to treat Claimant for non-medical reasons. "The insurer's right to select the treating physician contemplates the insurer will appoint a physician willing to treat the claimant based on the physician's independent medical judgment." *Scoggins v. Air Serv.*, W.C. No. 4-642-757 (ICAO March 31, 2006). "The question of whether an ATP has exercised independent medical judgment, or is basing a refusal to treat on non-medical considerations, is one of fact for determination by the ALJ." *In re Claim of Ayala*, W.C. No. 4-579-880 (ICAO July 22, 2004). As found, Dr. Bird did not refuse to treat Claimant and referred Claimant for physical therapy. Dr. Bird, as Claimant’s authorized treating physician was not obligated to implement Dr. Kalevik’s treatment recommendations. An ATP cannot be ordered to perform or refer a claimant for treatment recommended by a physician who is not authorized to treat. *In re Claim of Estrada-Perez*, W.C. No. 5-047-415-002 (ICAO March 25, 2021). Under WCRP Rule 11-2(G), a DIME physician is not authorized to treat a Claimant and his or her recommendations for future medical treatment carry no presumptive weight. *In re Claim of Holcombe*, W.C. No. 4-824-259-05 (ICAO March 24, 2017). Given Dr. Bird's referral for physical therapy and her willingness to consider other forms of treatment based on Claimant's response to physical therapy, the ALJ concludes that Dr. Bird's treatment recommendations were based on her exercise of independent medical judgment and that she did not refuse to recommend or refer Claimant for the treatment recommended by Dr. Kalevik for non-medical reasons. Accordingly, Claimant has failed to establish grounds for changing authorized treating physicians.

ORDER

It is therefore ordered that:

1. Claimant's request to change authorized treating physicians is denied.

2. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 22, 2021

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-132-097-003

ISSUE

Whether Claimant has established by a preponderance of the evidence that she is entitled to recover penalties pursuant to §8-43-304(1), C.R.S. based on Respondents' failure to pay a lump sum settlement award within 15 calendar days pursuant to §8-43-204(7), C.R.S.

FINDINGS OF FACT

1. On February 24, 2020 Claimant suffered injuries during the course and scope of her employment with Employer. On April 7, 2021 Claimant and Respondents executed a final settlement agreement in Workers' Compensation claim number 5-132-097 for $14,900. Respondents received the settlement order on the same day.

2. Insurer's adjuster Haley P[Redacted] testified regarding the timeline and her actions to issue the settlement check. Ms. P[Redacted] remarked that she received notice from Respondents' counsel regarding the approved settlement documents and the need to issue the settlement check by April 22, 2021. She noted that she was aware that §8-43-204(7), C.R.S. requires that, once a settlement document is received by the insurance company, it is required to pay the claimant or the claimant's attorney the settlement proceeds within 15 calendar days. Ms. P[Redacted] commented that she investigated whether there were any liens in the matter before issuing the settlement check.

3. Ms. P[Redacted] explained that she issued the initial settlement check on April 13, 2021 and the treasury department at her office mailed the check on April 14, 2021. Respondents' internal payment log and documents confirm the settlement check was issued on April 13, 2021 and mailed on April 14, 2021 through USPS. The check thus had sufficient time to arrive at Claimant's attorney's office on or before April 22, 2021. Respondents informed Claimant's attorney the settlement check had been issued.

4. On April 22, 2021 Claimant's attorney notified Respondents that it was the 15th day following the settlement. She requested the check to be sent through overnight mail to her law firm. Respondents' counsel replied by e-mail that the adjuster had issued and mailed the check the previous week and Claimant's counsel would receive it shortly. However, Claimant did not receive the settlement check in the days that followed.

5. On April 28, 2021 Claimant's counsel sent an e-mail to Respondents' counsel stating that the settlement check was six days late. She noted that, in the past when she had alerted other respondents that a settlement check was late, the adjusters typically cancelled the first check and sent a second check through overnight mail to stay in compliance with the 15 day time period specified in §8-43-204(7), C.R.S. Claimant's counsel further advised Respondents that they were in a penalty situation and requested they "overnight a new check to our office immediately."

6. On April 29, 2021 Ms. P[Redacted] became aware for the first time that the settlement proceeds had not been received by Claimant's counsel. Ms. P[Redacted] noted in the claims file that she received an e-mail from Respondents' counsel earlier in the day stating that Claimant's counsel had not received the settlement check. She was asked "to cancel, reissue and overnight to [opposing counsel]." When she learns a settlement check has not been received, Ms. P[Redacted]'s procedure is to immediately cancel the check, reissue it and send it overnight "because it's being delayed." On April 29, 2021 Ms. P[Redacted] thus placed a stop payment on the settlement check. She requested a new check to be issued on Friday April 30, 2021. Ms. P[Redacted] testified that, if she issues a check after 10:00 a.m. on a Friday, the treasury department of her office prints the check on Monday. It then takes a day or two to overnight the document.

7. On May 3, 2021 Claimant's counsel again e-mailed Respondents' counsel stating that the settlement proceeds had not been received. She asked for a "tracking update." On the following day Respondents' counsel stated that the check was scheduled for delivery on May 5, 2021. Claimant's counsel subsequently received the settlement check on May 6, 2021. The FedEx envelope in which the settlement check was shipped reflected the ship date was "05May21." The check was scheduled for priority overnight delivery on "THU - 06 May 10:30A."

8. Claimant testified that she expected the check to be delivered roughly two weeks after the settlement documents were signed by the judge on April 7, 2021. She was relying on receiving the check within 15 days because she had bills to pay and intended to use some of the funds to replace an 18-year-old car that was failing. However, between April 22, 2021 and the time the check was received on May 6, 2021, a major failure occurred to the car. Claimant thus sold the vehicle for less money than she would have received if she had been able to sell it at the time the settlement check should have arrived.

9. Claimant testified that she sold four properties in Leadville, CO between December 2020 and January 2021. She confirmed each of the properties sold for approximately $160,000-$165,000. Claimant noted that she received a total of $650,000 from property sales. However, Claimant remarked that the proceeds were not liquid and thus unavailable at the time she anticipated receiving the settlement proceeds.

10. On June 8, 2021 Claimant filed an Application for Hearing on the issue of penalties for Respondents' violation of §8-43-204(7), C.R.S. because the settlement proceeds were due by April 22, 2021 but not received until May 6, 2021. Claimant specifically sought penalties of $1,000 per day for each day the check was late based on §8-43-304(1), C.R.S.

11. Claimant has failed to establish that it is more probably true than not that she is entitled to recover penalties pursuant to §8-43-304(1), C.R.S. based on Respondents' failure to pay a lump sum settlement award within 15 calendar days pursuant to §8-43-204(7), C.R.S. Initially, §8-43-204(7), C.R.S. specifies that "any lump sum payable as a full or partial settlement shall be paid to the claimant or the claimant's attorney within fifteen calendar days after the date the executed settlement order is

received by the carrier." Here, because Insurer received the fully executed settlement order on April 7, 2021, the settlement check was due no later than April 22, 2021. It is undisputed that the settlement proceeds were not received by Claimant's attorney until May 6, 2021. Therefore, because neither Claimant nor her attorney received the settlement check within 15 days, Respondents violated §8-43-204(7), C.R.S.

12. However, Respondents' violation of §8-43-204(7), C.R.S. was not objectively unreasonable. Respondents' actions were predicated on a rational argument based in law or fact. Initially, it was reasonable to assume the settlement check would be delivered to Claimant's attorney between April 14-22 2021. Ms. P[Redacted] explained that she issued the initial settlement check on April 13, 2021 and the treasury department at her office mailed the check through USPS on April 14, 2021. Insurer's internal payment logs and documents confirm the initial check was issued on April 13, 2021 and sent on April 14, 2021. There was thus sufficient time for the check to arrive at Claimant's attorney's office on or before April 22, 2021. However, on April 22, 2021 Claimant's attorney notified Respondents that it was the 15th day following the settlement and she had not received the check. Respondents' counsel replied by e-mail that the adjuster had issued and mailed the check the previous week and she anticipated Claimant's counsel would receive it shortly. However, Claimant did not receive the settlement check in the days that followed.

13. On April 28, 2021 Claimant's counsel sent an e-mail to Respondents' counsel stating that the settlement check was six days late. She further alerted Respondents that they were in a penalty situation and requested they "overnight a new check to our office immediately." On April 29, 2021 Ms. P[Redacted] noted in the claims file that she received an e-mail from Respondents' counsel earlier in the day that Claimant's counsel had not received the settlement check. She thus placed a stop payment on the settlement check and requested a new check to be issued on Friday April 30, 2021. Ms. P[Redacted] testified that, if she issues a check after 10:00 a.m. on a Friday, the treasury department of her office prints the check on Monday. It then takes a day or two to overnight the document. Claimant's attorney ultimately received and cashed the replacement check on May 6, 2021. The lost check and subsequent process of reissuing the replacement check resulted in a total delay of 14 days. The preceding chronology reflects that Respondents took reasonable actions when issuing the original check and in providing Claimant with a replacement check upon notice the first check was apparently lost in the mail.

14. Finally, even if Insurer's actions were objectively unreasonable, a violation of §8-43-304(1), C.R.S. may be cured within 20 days after an application for hearing has been filed. If a violation is cured, no penalties may be imposed in the absence of "clear and convincing evidence" that the violator "knew or reasonably should have known" of the violation. On June 8, 2021 Claimant filed an Application for Hearing on the issue of penalties for Respondents' violation of §8-43-204(7), C.R.S. Specifically, the settlement proceeds were due by April 22, 2021 but not received until May 6, 2021. As the preceding chronology reflects, Respondents corrected any error by providing Claimant with a replacement check when it became aware that the initial check was apparently lost in the mail. Respondents cured any violation by promptly canceling the April 13, 2021 check

and reissuing a replacement check. Claimant received the replacement check on May 6, 2021 or more than a month before filing the Application for Hearing. Respondents thus cured any violation well before the 20 day limit specified in §8-43-304(4), C.R.S. Accordingly, Claimant’s request for penalties pursuant to §8-43-304(1), C.R.S. based on Respondents’ failure to pay a lump sum settlement award within 15 calendar days pursuant to §8-43-204(7), C.R.S. is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge’s factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. Indus. Claim Appeals Off.,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. A party may be penalized under §8-43-304(1), C.R.S. for up to $1,000 day for any failure, neglect or refusal to obey any lawful order of the director or panel. *Jiminez v. Industrial Claim Appeals Office*, 107 P.3d 965 (Colo. App. 2003). The party seeking penalties bears the burden of proving that a person failed to take an action that a reasonable party would have taken. *City of County of Denver v. Indus. Claim Appeals Off.*, 58 P.3d 1162, 1164-65 (Colo. App. 2002). Once the prima facie showing of unreasonableness has been made, the burden of persuasion shifts to the party who committed the alleged penalty to show that the conduct was reasonable under the circumstances. *See e.g. Pioneers Hosp. of Rio Blanco County v. Indus. Claim Appeals Off.*, 114 P.3d 97 (Colo. App. 2005); *Postlewait v. Midwest Barricade*, 905 P.2d 21, 23 (Colo. App. 1995).

5. Section 8-43-204, C.R.S. governs the settlement of Workers' Compensation claims. Section 8-43-204(7), C.R.S. specifically addresses the timely payment of lump sum settlement awards. The statute provides that "[a]ny lump sum payable as a full or partial settlement shall be paid to the claimant or the claimant's attorney within fifteen calendar days after the date the executed settlement order is received by the carrier or the noninsured or self-insured employer. §8-43-204(7), C.R.S.

6. The imposition of penalties under §8-43-304(1), C.R.S. requires a two-step analysis. *See In re Hailemichael,* W.C. No. 4-382-985 (ICAO, Nov. 17, 2004). The ALJ must first determine whether the disputed conduct violated a provision of the Act or rule. *Allison v. Indus. Claim Appeals Off.,* 916 P.2d 623, 624 (Colo. App. 1995). If a violation has occurred, penalties may only be imposed if the ALJ concludes that the violation was objectively unreasonable. *Colorado Compensation Insurance Authority v. Indus. Claim Appeals Off.,* 907 P.2d 676, 678-79 (Colo. App. 1995). The reasonableness of an insurer's actions depends upon whether the action was predicated on a "rational argument based in law or fact." *In re Lamutt,* W.C. No. 4-282-825 (ICAO, Nov. 6, 1998).

7. Even if an insurer's actions are objectively unreasonable, a violation of §8-43-304(1), C.R.S. may be cured within 20 days after an application for hearing is filed. If a violation is cured, no penalties may be imposed in the absence of "clear and convincing evidence" that the violator "knew or reasonably should have known" of the violation. §8-43-304(4), C.R.S. "Clear and convincing evidence" exceeds the preponderance standard and is evidence that "makes a proposition highly probable and free from serious doubt." *In re Barnes,* W.C. No. 4-632-352 (ICAO, Oct. 30, 2006). Whether a respondent's actions were objectively unreasonable and whether it knew or should have known of a violation are questions of fact for the ALJ. *In re Lamutt,* W.C. No. 4-282-825 (ICAO, Nov. 6, 1998).

8. As found, Claimant has failed to establish by a preponderance of the evidence that she is entitled to recover penalties pursuant to §8-43-304(1), C.R.S. based on Respondents' failure to pay a lump sum settlement award within 15 calendar days pursuant to §8-43-204(7), C.R.S. Initially, §8-43-204(7), C.R.S. specifies that "any lump sum payable as a full or partial settlement shall be paid to the claimant or the claimant's attorney within fifteen calendar days after the date the executed settlement order is received by the carrier." Here, because Insurer received the fully executed settlement order on April 7, 2021, the settlement check was due no later than April 22, 2021. It is undisputed that the settlement proceeds were not received by Claimant's attorney until May 6, 2021. Therefore, because neither Claimant nor her attorney received the settlement check within 15 days, Respondents violated §8-43-204(7), C.R.S.

9. As found, however, Respondents' violation of §8-43-204(7), C.R.S. was not objectively unreasonable. Respondents' actions were predicated on a rational argument based in law or fact. Initially, it was reasonable to assume the settlement check would be delivered to Claimant's attorney between April 14-22 2021. Ms. P[Redacted] explained that she issued the initial settlement check on April 13, 2021 and the treasury department at her office mailed the check through USPS on April 14, 2021. Insurer's internal payment logs and documents confirm the initial check was issued on April 13, 2021 and sent on

April 14, 2021. There was thus sufficient time for the check to arrive at Claimant's attorney's office on or before April 22, 2021. However, on April 22, 2021 Claimant's attorney notified Respondents that it was the 15th day following the settlement and she had not received the check. Respondents' counsel replied by e-mail that the adjuster had issued and mailed the check the previous week and she anticipated Claimant's counsel would receive it shortly. However, Claimant did not receive the settlement check in the days that followed.

10. As found, on April 28, 2021 Claimant's counsel sent an e-mail to Respondents' counsel stating that the settlement check was six days late. She further alerted Respondents that they were in a penalty situation and requested they "overnight a new check to our office immediately." On April 29, 2021 Ms. P[Redacted] noted in the claims file that she received an e-mail from Respondents' counsel earlier in the day that Claimant's counsel had not received the settlement check. She thus placed a stop payment on the settlement check and requested a new check to be issued on Friday April 30, 2021. Ms. P[Redacted] testified that, if she issues a check after 10:00 a.m. on a Friday, the treasury department of her office prints the check on Monday. It then takes a day or two to overnight the document. Claimant's attorney ultimately received and cashed the replacement check on May 6, 2021. The lost check and subsequent process of reissuing the replacement check resulted in a total delay of 14 days. The preceding chronology reflects that Respondents took reasonable actions when issuing the original check and in providing Claimant with a replacement check upon notice the first check was apparently lost in the mail.

11. As found, finally, even if Insurer's actions were objectively unreasonable, a violation of §8-43-304(1), C.R.S. may be cured within 20 days after an application for hearing has been filed. If a violation is cured, no penalties may be imposed in the absence of "clear and convincing evidence" that the violator "knew or reasonably should have known" of the violation. On June 8, 2021 Claimant filed an Application for Hearing on the issue of penalties for Respondents' violation of §8-43-204(7), C.R.S. Specifically, the settlement proceeds were due by April 22, 2021 but not received until May 6, 2021. As the preceding chronology reflects, Respondents corrected any error by providing Claimant with a replacement check when it became aware that the initial check was apparently lost in the mail. Respondents cured any violation by promptly canceling the April 13, 2021 check and reissuing a replacement check. Claimant received the replacement check on May 6, 2021 or more than a month before filing the Application for Hearing. Respondents thus cured any violation well before the 20 day limit specified in §8-43-304(4), C.R.S. Accordingly, Claimant's request for penalties pursuant to §8-43-304(1), C.R.S. based on Respondents' failure to pay a lump sum settlement award within 15 calendar days pursuant to §8-43-204(7), C.R.S. is denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

1. Claimant's request for penalties pursuant to §8-43-304(1), C.R.S. based on Respondents' failure to pay a lump sum settlement award within 15 calendar days pursuant to §8-43-204(7), C.R.S. is denied and dismissed.

2. Any issues not resolved in this order are reserved for future determination.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at http://www.colorado.gov/dpa/oac/forms-WC.htm.*

DATED: December 22, 2021.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NOS. 5-111-600-003 & 5-154-619-003

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that she was injured in the course and scope of her employment while working for Employer on June 22, 2019, the subject of W.C. No. 5-111-600-003 and/or September 12, 2020, the subject of W.C. No. 5-154-619-003..

II. Whether Claimant has proven by a preponderance of the evidence that she is entitled to medical benefits that are reasonably necessary and related to the injuries or occupational diseases, if found compensable.

PROCEDURAL HISTORY

Claimant filed an Application for Hearing on November 6, 2020 on issues that included compensability, medical benefits that are authorized, reasonably necessary and related to the injury, change of physician, termination of benefits as well as temporary total and temporary partial disability benefits for the alleged claim of June 22, 2019, W.C. No. 5-111-600. A second application was filed on the same issues on December 10, 2020. Respondents filed a Response to Application for Hearing on January 8, 2021on the same issues, but adding causation, relatedness, apportionment, offsets, overpayment, termination for cause or responsible for termination. Claimant filed a third Application for Hearing on April 21, 2021 on the same issues and Respondents filed a responsive pleading on May 21, 2021 listing the same issues.

On December 15, 2020 Claimant filed an Application for Hearing with regard to the alleged claim of September 12, 2020, for W.C. No. 5-154-619. This application listed similar issues as for the prior claim but added penalties for failure to admit or deny within the statutory period. Respondents filed a Response to Application for Hearing on January 14, 2021 also listing similar issues as the prior claim filing. A second application was filed on April 21, 2021 and a response on May 21, 2021.

The parties indicated that the claims were consolidated for hearing purposes.

STIPULATIONS

The parties stipulated to reserve the issues of temporary total disability, temporary partial disability and penalties.

The parties also agreed that Claimant had requested a change of physician to Dr. Roberta Anderson Oeser, which Respondents granted.

FINDINGS OF FACT

Based on the evidence presented, the ALJ makes the following findings of fact:

Claimant's testimony

1. Claimant was 54 years old at the time of the hearing. Claimant worked in the mail room for Employer, a newsprint company, for approximately 26 years. She always worked for Employer in the same department but performed multiple jobs within the department. At the time of the hearing, she was not working. When she initially started working for Employer, Claimant worked on a press job line at night, stacking the newspapers, in bundles, onto pallets from the assembly line, and depending on the orders, the pallet would hold up to sixty or seventy bundles, of up to 120 newspapers per bundle, on a pallet.

2. In more recent years, Claimant would work the entire shift as a dolly/lift worker or at the insert machine operator. Claimant would use a dolly, also called a "forklift," which was battery operated. The dolly had forks that would lift pallets or skids full of newspapers, or preprint materials, magazines and advertisements that were inserted into the newspapers. In order for the dolly to move forward, Claimant would twist the handle, like the handle of a motorcycle. To go forward she would twist it forward with her right hand, and if going backward, she twisted the handle backward. When moving sideways, Claimant had to move the handlebar from side to side. It was difficult to maneuver, because the handle was very stiff or hard and Claimant would have a difficult time maneuvering the dolly in order to operate it, frequently using her whole body force. This caused pain in her arms and her shoulders due to the force and torqueing required.

3. With the left hand Claimant held on to the dolly, in order not to fall off the dolly, to keep herself steady. The dolly had wheels that did not always move easily. When the handle would get stuck, Claimant would have to push and pull forcefully, including having to use both hands and arms to make the dolly to go forward, exerting full body force. Claimant generally would be standing on the dolly, while operating it to move the pallets from the press line to the insert machine, all the time pushing the alarm button to let others know that she was moving.

4. The spaces between the insert machines were very small and it was hard to manage to move the dolly close to the insert machine. As an example, the dolly in the photo at Exhibit 19, p. 137, was moving an extra-large pallet made of wood. The inserts on the pallet were advertisements that were to be inserted into the newspapers that were called mains (the newspapers) and had sections.

5. The lifts were even harder to move than the dolly. The lifts were used to raise the full pallets of materials to the level of the insert machine heads. Claimant would have an extremely hard time because they were difficult to line up the lifts to get the lift's forks into the pallets. Claimant would push and pull the lifts to accommodate the pallets. They were hard to maneuver, because on the front they have two wheels but on the back they only had one. There was also a lot of debris from the paper and plastic materials around the work areas, which would wrap around the wheels and the wheels would get stuck. Claimant had to use force to move the lifts and sometimes would have to get the plastic off the wheels with a pocketknife. The videos showed that the bar of the lift was

above Claimant’s chest height while she was pushing the empty lift was, Claimant was leaning forward with her body to move the lift.

6. Claimant had to position the lifts in very constricted, tight areas beside the insert machine, and the pallets were very hard to place, with the lifts, in the small areas. Claimant would have to apply a lot of body force to push the lifts, and pull them manually until they lined up. Claimant stated that, during the time she hurt her arms and shoulders, she would change a pallet every ten to fifteen minutes, then would operate the insert machine until the pallets were empty of materials, starting the process all over again. This was constant throughout her shift. The lifts did have a battery to make the pallets go up to the level of the insert machine.

7. There were multiple lifts that had to be maneuvered because there were up to 48 insert machine heads that needed to be provided with paper products. Each head required a different lift. Each lift was different and there were some that were easier to manage than others. It really depended on what was being run during the time that Claimant would work. Claimant stated that there were approximately six to eight or more lifts per machine that had to be placed at each head of the machine to make sure each of the inserts were inserted into the mains (newspaper sections). The lift would typically jump when they were not loaded with a full pallet, and Claimant had to control the lift’s movement with brute force, with her hands and arms. The lift had a plate to push or pull to operate while standing on the floor, behind the lift.

8. Claimant would also work the insert machine position for other workers when they were on vacation or required a break. The insert machine had multiple heads that required different pallets loaded with the mains and the different preprint advertisements to insert in the newspapers, including the advertisements, or whatever was being run, which were approximately 13,000 to 14,000 newspapers per hour. The newspaper bundles were taken off the pallets, then loaded to the insert machines. She would take half a bundle with the left hand, place it on the jogger then move the bundle to the right hand to place it on the insert machine with her right hand extended.

9. Claimant would move the pallets manually once the pallets were empty of materials that had been loaded to the insert machine. She would stack the pallets in another area up to eight or nine high, by the type of pallet, plastic upon plastic, wood upon wood. The plastic pallets were heavy, but the wooden ones were even heavier. She had to pick them up by hand, because the space was too small to be able to use the dolly. They were not moved with the lift, because moving the lift was too heavy and hard. She would be responsible for moving the pallets, depending on the orders that were made, because each newspaper required different inserts, depending on the area they were to be sent to. She had to keep track of the orders and change the pallets as necessary. Then Claimant would bring in the next full pallet with the dolly to the insert machine, where she would use the lift to bring the full pallet next to the insert machine. Any leftovers on the pallets that were not used, depending on the order, would go to the warehouse. At the end of the shift, she would use the dolly to take away the stacks of the empty pallets

to make sure that her area was clean, including the cardboard, unused or damaged product, debris and plastic.

10. The process was to take the pallet from the palletizer/press line area and take the bundled mains (bundles of 45-50 lbs. each) to the insert machine, where the magazines or preprints were to be inserted into the mains. The bundled mains and the insert preprints would be loaded onto the hoppers of at least three different heads. Claimant would take the newspapers or the preprinted advertisements or magazines, by pulling them from the pallet from the left side, twisting towards the right to stack them onto the hopper so they could be fed into the head of the insert machine. All the while Claimant would take about half of a bundle, maneuvering the stack on to the jogger that vibrated, to make sure that the paper was arranged and smooth. But the jogger table and insert machine were higher than waist level for her, so her upper arm had to be up higher and at an uncomfortable and awkward level, putting pressure on her shoulders to do a lot of the work. The work was fast paced and constant. The process was continuous because if the machine stopped, there were problems on the line and the insert machine would not work properly.

11. The job was hard and intensive. She would normally start work at 5:30 a.m. five days a week when she was working mornings, but it varied. Sometimes she would work mornings, sometimes she would work afternoons. And when they worked overtime, she would work six days a week. She would know what time they would start but did not know what time they would stop. They had two breaks and a lunch break.

12. Claimant never recalled having any down time, because she was always sent to clean up the areas, throw away the trash, or organize the metal carts for single capping, or take away the cardboard from the palletizers. There was always something that they would have her doing. She would also do the stack down, when the palletizer was not functioning.

13. Claimant estimated that an empty pallet weighed approximately 40 lbs., depending on the pallet, medium, large or extra-large.

14. On June 22, 2019 Claimant was working for Employer as a dolly/lift operator and on the insert machine, both, when Claimant initially started having symptoms in her bilateral upper extremities while working the dolly, the lift and insert machine. She reported to the Union Chairman that she was having pain in both arms and shoulders. Her Employer would give her pain medication and she would continue working. Eventually Claimant advised the Union Chairman she needed medical attention and he advised her to report the injury formally with her supervisor.

15. By the end of June the pain was so severe that she reported the June 22, 2019 injury to her supervisor and asked for medical care. She had tendon pain in her arms, they were swollen and felt hard, especially when she used her arms pushing and pulling the machinery, then would perform the insert job. She had difficulty using her arms to lift things, and drive. Her right shoulder was a little lower than the left, less injured,

shoulder. Claimant reported bilateral arm and shoulder problems. She was sent to Dr. Miller as he was the only doctor that would see her without an appointment. Claimant stated that Dr. Miller evaluated her, told her she had tendonitis, sent her for therapy, and provided her with restrictions, which Employer was unable to accommodate. She stated that the therapy Dr. Miller provided was only for the arms, not the shoulders.

16. Claimant recalled that a job site evaluation was performed on August 8, 2019 and Claimant felt much pressured by the individual that did the evaluation. She was advised that she had to do the evaluation despite having symptoms in her arms or restriction, as Dr. Miller had requested the evaluation.

17. Claimant was not happy with the care provided by Dr. Miller because he first provided a diagnosis, and provided restrictions. Then Dr. Miller advised that she did not have any work related problems. Claimant conveyed she believed Dr. Miller had called her a liar, mistreated her and spoke to her in a bad way, telling her to call her own insurance.

18. Claimant took a letter from her Kaiser physician to her Employer with her restrictions. The floor supervisor, treated her poorly in front of all her coworkers. He refused to take the paper from her doctor, a specialist that restricted her from employment for approximately eight weeks. Claimant also saw a different specialist at Kaiser, who also limited her work. Following the treatment at Kaiser, Claimant was able to continue working without restrictions for over a year despite some continuing symptoms. Claimant was off work for a period of time from approximately July through September 2019. Claimant was not paid for the time off.

19. In September 2020 Claimant was assigned to working the press job. The press job required Claimant to lift the bundles of newspapers off the conveyor, which was low, and stack them on the pallets, when the palletizers were broken. There were two palletizers. The two palletizers were frequently broken and they were probably not working one quarter of the time.

20. The conveyor was by the place where they stack the newspapers that come from the pressroom. The stacker was a machine that stacks the newspapers, then ties the stack of completed newspapers into bundles. Then the bundles come out of the stacker to the conveyor belt. The conveyor belt takes the bundles to the palletizes. A person does not generally move the newspapers from the conveyor to the palletizer. The palletizer stacks the bundles onto the pallets and gets the pallets ready with plastic for shipping, to where they have to go. There were approximately twelve bundles flat onto a pallet that were stacked five or six bundles high. There was a smaller conveyor belt that took the pallets to the palletizer. The quantity on each pallet depended on each order of newspapers. The bundles generally held from 80 to 120 copies of completed newspapers, which were run through the press on Saturdays. The bundles would weigh between 45 to 50 lbs.

21. When the palletizers would break or were not functioning, the conveyor belt stopped, and Claimant had to pull the newspaper bundles off the conveyor and place the bundles onto the pallets by hand.

22. Claimant injured herself on September 12, 2020. She had already been working on the insert machine that day, and doing the dolly and lift work as well for a few hours, when she was sent to the press job. On that day, the palletizer was broken, and Claimant was working on the one line of the newspapers that carried two different extra magazines and it was very heavy and awkward to move the bundles. These bundles consisted of up to twelve newspapers only because they were so large. When she was working transferring the bundles in the press job, the pain in her arms and right shoulder were aggravated by the work.

23. Claimant reached a point of no longer being able to continue working on September 26, 2020. She had to stack the heavy bundles onto the pallets by hand and the bundles were large and awkward for her to handle. Claimant stated that all of her jobs are repetitive in nature, requiring full body force, awkward positions and twisting.

24. On September 26, 2020 the pain was in the arms and the right shoulder was so intense that Claimant reported her September 12, 2020 injury to her supervisor. Claimant was crying as she could not perform the work as the pain was so severe. Claimant asked for medical care but was told that she had to wait until the following Monday to be attended by Dr. Ogden. Dr. Ogden did not really help her.

25. Claimant last worked September 26, 2020. Employer discontinued her health insurance, so she no longer had any way to obtain care for her injuries, and no one paid her for her lost time from work. She had no way to pay for health care insurance at this time. She stated that there was no light duty work available.

26. Lastly, the equipment in the mail room was not properly maintained and she had to work despite the poorly operating machines. The lifts, did not have the right type of wheels or they were not fully charged, causing the worker to have to push and pull them with their whole body force. They would have low pressure of the wheels and had product wrapped around the wheels that Claimant had to clean out herself despite multiple reports to her employer that the lifts were not operating properly.

27. Since September of 2020, her pain complaints have changed a little. The swelling was reduced, but still continued with some symptoms. She was advised by her doctor that she has something wrong. She feels a pain deep in her right shoulder, especially when she raises the right arm even to shoulder level. Her doctor advised that her injuries are due to both the heavy and repetitive nature of her work. But because she has not been working and has no insurance or the ability to get insurance, she has been unable to get the therapy she needs to get better but requested further help.

28. The pain that she felt at the time of the hearing was better than before but she continued to have some pain. It had gotten better because she had not been working,

not been lifting heavy bundles of newspapers, driving the stiff to operate dolly, pushing and pulling the lifts, or loading the insert machines. She was avoiding doing anything that would aggravate her bilateral upper extremities as she was unable to afford medical care.

Testimony of Claimant's Coworker, Mr. M.

29. Claimant's coworker, Mr. M., testified during the hearing and did so consistent with Claimant, but with more detailed descriptions of the multiple jobs. He testified that he had worked for Employer in the mail room for approximately 36 years. He was familiar with Claimant, as he worked with Claimant for the time she had worked there, over 25 years. He worked for Employer around the time she was injured but may not have been there on the date she claimed the injury as he did not particularly recall the specific date. He did know she had problems with both arms and had made claims.

30. He was very familiar with the requirements of each of the jobs or positions in the mail room, as he had performed each and every one of them during his time working for Employer. Now that there were less workers, workers performed multiple jobs throughout the day. So a dolly worker would also do the insert machine work.

31. When the newspapers were transported from the pressroom, they were either sent to the insert machines for the inserts or they were stacked in bundles to be loaded onto a pallet to be moved directly to the loading areas for the trucks. Not all newspapers had inserts. For those newspapers that had inserts, the newspapers had to be transported to the insert machine.

32. When working press, the worker would not generally be working with the insert machines. The pressroom sent the newspapers on a conveyor that went to a stacker, then went to a tying machine, then proceeded to a palletizer. If everything was working well, then the process ran on its own, almost automatically. If the palletizers were broken, then the worker needed to stack the bundles of newspapers on the skids by hand. The bundles were heavy, and awkward to handle. The company did not always have palletizers. They were brought into the company approximately 10 years ago. Before that they had to stack the newspapers on the skids by hand to transport them to the insert machine. The worker had to stacking them down from the line, then picking them up, and arrange them on the pallet.

33. Mr. M. stated that the dolly position, required the worker to insert the dolly forks into the skids, and move the dolly and full pallet to the insert machine. The dolly was a hand jack, with two forks, and the worker could stand on it, and had a handle that can move to steer the jack. When working on dolly, the worker would maneuver the dolly with the right hand, and pick up the skids that are full of products, like ads or preprints, which were to be inserted into the newspapers. The skids were parked near the insert machines. The dolly was hardest on the shoulders, and if you hit the crack in the concrete, or hit water or oil, or chunk of wood from a broken skid on the floor, that could jerk the machine, pulling on the shoulder. There was some vibration while operating a dolly.

34. Once the worker used the dolly to bring the pallets full of materials close up to the insert machine, they would pull the dolly out and then tug, pull and push the lift to put the lift forks into the skid, which were sometimes difficult to line up. And if it did not hit the skid just right, the body takes a beating, throwing the body weight into it to move the lift into place. It really depended on the lift. The lifts were always used when performing the dolly job. Some of the lifts were old and not well maintained, so they were very difficult to maneuver. The machines had no preventative maintenance. For the last several years, the Company had been working on a skeleton crew. Nothing was lubed, including the wheels of the dolly or the lifts. They did not get worked upon until they would break down.

35. When doing the dolly job, the product was moved into such a small place between the insert machines, that was extremely difficult, that was why the worker had to push, pull and jog the lifts into place. They were tight fits for the lift to maneuver. The lifts have two legs and the two forks, to maneuver between the machines. The worker had to use his arms and shoulders, pulling and tugging and jerking, just to move the pallet an inch so that they would line up the pallet next to the insert machine.

36. He stated that the worker needed to unwrap or cut off the plastic wrapping from the product materials on the skid or pallet, stripping the product down, including cutting the straps that kept the materials on the skid. With regard to the advertising materials, because the product was frequently slippery, the plastic was sometimes only stripped down as far as needed to handle the product so that the materials did not slip off the skid. The lift itself was battery operated so that the lift would raise the pallet of materials to the level of the insert machine.

37. The job of insert machine operator required the worker to take the product off the skid in bundles and feed it into the insert machine head. The skid was on the left of the worker. The worker would take a stack of product with one hand, the materials were fanned out, then would be place on the jogging machine, to jog the cut or stack of materials, then lift the bundle of materials from the jogging machine and placed the materials into the insert machine head. The jogger was a table that vibrated to get the stack of product as smooth as possible. The jogger was tough on the arms because of the vibration that was constant, to smooth out the product while working on the insert machine. Then, with one hand holding the bundle of product, and the other hand controlling or supporting the materials to where it was placed into the insert machine or the hopper. He also stated that the height of the jogger, hopper and insert machine required him to load the insert machine at waist height but that Claimant was much shorter and would be required to use her shoulders much more. From there, the machine would take the product, page by page, to insert into the newspapers.

38. In order to accomplish this, the worker had to have their hand twisted into a downward position, which was very awkward. Mr. M demonstrated that he had his hand in a supinating position with the wrist fully extended backward while twisting or abducting the wrist. He explained that the materials were held in that position in order to feed them into the machine. The hopper was a table that held multiple materials that would feed

directly into the head of the insert machine and would allow the worker to feed a lot more product to the insert machine. When working on the insert machine, feeding the hopper, the paper or the product was always moved by hand. Generally, the workers used both hands, though it depended on the worker. The workers that had large hands would be able to accomplish the transfer of the insert machine product with one hand, but probably not Claimant.

39. After the pallet was empty of preprinted materials or product, then the worker had to move the lift out, take the pallet manually off the lift forks, move it to another area. The worker stacked the pallets one on top of the other. Once stalked, ther worker would take the dolly or a forklift to move the pallet stack. The dolly would bring in a new full pallet of product or advertisements towards the insert machine, place the pallet down close to the insert machine and the lift, insert the forks, then push, jog and pull the lift, until it was placed next to the insert machine to start all over again. The lift was so that the worker could bring the product to the level of the machine as the pallet was emptied of material, to save the worker from bending over constantly.

40. The height of the insert machine was approximately about four and a half feet tall. The hands get abused because of all the lifting in awkward positions, pulling the product from the skid, putting it on the jogger, then extending the arms with the product to feed the insert machine. It takes hours to do the job, sometimes all day. People have gotten injured because they do it for hours at a time for years.

41. Mr. M. stated that he weighed multiple items, including the lift, the full skids and the different types of pallets the day before the hearing. The lift was approximately 1200 lbs. and when you included the skid and the materials of approximately 1400 lbs., it was, literally, over a ton of weight that had to be moved into position so it would line up to the insert machine head or the hopper. Most of the kids weigh approximately 35 lbs., though wood skids could weight upwards of 100 lbs. or more when wet but that was rare. The skids were of various sizes.

42. Employer had no light duty in the mail room that he knew of because everyone had to perform the job they were assigned. Down time was very rare. The supervisors would find some things to do when the workers had finished their particular jobs, such loading the bailer. The worker would have to pick up bundles, while standing on stacks of skids, to throw the bundles into the bailer. They also had a job on a “bulk out” line. Some organizations or advertisers did not like their products inserted into the newspapers by the machine. Those products were counted, bundled up by weight and tied up, then sent out as a bulk or bundle. The worker had to pick the advertising materials in stalks, weigh them up, and then stack them all together. The stacks would weigh approximately 25 lbs.

43. There were also times when the workers would have over 300 hours of overtime a year but that was not as common these days, but there would still have occasional mandatory overtime.

44. The company used to run approximately 700,000 newspapers a day. Now they run approximately 130,000 per day due to the circulation loss. So now the workers do a wide variety of jobs and are not assigned to just one job.

Pleadings, Medical Records and Employment Records

45. An Employers' First Report of Injury (FROI) dated July 2, 2019 stated that Claimant reported a work injury caused by an occupational exposure to repetitive motion on June 22, 2019, injuring her right shoulder and elbow.

46. Claimant was first evaluated by Dr. Matt Miller on July 3, 2019 for complaints of arm and shoulder pain. Dr. Miller noted that the elbow pain was the most concerning and that Claimant also had pain in the right shoulder and trapezius region as well as the neck. He noted that Claimant was moving a lot of product in the mail room. Upon exam, he noted tenderness in the neck, paracervical and trapezius muscles. He noted good motor strength in the right shoulder though a positive impingement test, tenderness at the lateral epicondyle and medial epicondyle, and a negative Tinel's. On neurological exam, he found decreased sensation in the entire right hand. He assessed bilateral medial epicondylitis but stated that causation was unclear. Dr. Miller provided work restrictions of lifting, pushing, and pulling up to ten (10) pounds, ordered physical therapy at Genex Services, chiropractic treatment with Dr. Justin Houck, lab work, and requested a work site evaluation to assess risk factors.

47. Claimant was seen at Houck Chiropractic from July 8, 2019 through July 29, 2019 for bilateral upper extremity complaints.

48. Dr. Miller reevaluated Claimant on July 18, 2019 and continued the same diagnosis. Examination showed diffuse tenderness to palpation of both extremities from the shoulder to the wrist. He discontinued therapy but continued the restrictions pending the work site evaluation (WSE).

49. Ms. Kelly Harris, a nurse case manager and ergonomic evaluator from the third party administrator for Insurer performed a Worksite Job Evaluation (WSE) on August 8, 2019. She reported that Claimant stated she had a gradual onset of bilateral shoulder, elbow and hand/wrist pain which progressed over the month of June to the point she reported a workers' compensation claim. Ms. Harris concluded that Claimant did not have any primary or secondary risk factors as required by the Medical Treatment Guidelines under W.C.R.P. Rule 17, Exhibit 5, pp. 20-22. The WSE only minimally describes the position of dolly worker/lift operator (less than one half page of the less than 3 page report), stating Claimant would only cover at the insert machine for breaks. It does not describe the motions, measurements, Claimant's statue or requirements. It denotes observation that Claimant would steer the dolly by using her body to lean into the steering handle and that she had to pull and push the lift into place, that the hydraulic lift was to raise the pallets to the level of the insert machine.

50. On August 13, 2019, following work site evaluation, Dr. Miller continued to diagnose epicondylitis and shoulder pain of unspecified etiology. He expected Claimant

to have some improvement while off work for 6 weeks. However, Claimant reported that the WSE worsened her condition. Dr. Miller stated that he saw a video of the machines that she operated and did not think they would cause an overuse injury. Dr. Miller released Claimant at maximum medical improvement, without impairment or restrictions, stating that if she needed work restrictions she should go to her personal care provider and that it was more an issue of fitness for duty than work related complaints. Claimant left upset from the appointment.

51. Respondents filed a Notice of Contest on August 14, 2019.

52. Claimant proceeded with care at Kaiser Permanente under Dr. Terri Richardson, on August 20, 2019, who diagnosed bilateral epicondylitis and right shoulder joint pain. Claimant reported that she felt disrespected by the workers' compensation physician. Claimant advised that she lifted a lot at product. Dr. Richardson ordered x-rays and referred Claimant to orthopedics.

53. On September 4, 2019 she was evaluated by Dr. Kimberly Chhor for the bilateral elbow strain. She reported doing manual labor lifting, pushing, and pulling pallets for Employer for "several years." Examination of the bilateral elbows demonstrated skin was intact, had mild swelling over bilateral medial and lateral condyles, pain with range of motion, tenderness over bilateral medial and lateral condyles. Pain was worsened with elbow and wrist range of motion, but grossly neurovascularly intact. She advised Claimant that therapy may take several months before she would show improvement. Dr. Chhor diagnosed tendinitis and injected the bilateral elbows with cortisone, due to tendinitis, and provided work restrictions of no lifting, pushing, or pulling for 2 weeks.

54. Claimant also saw Dr. Rupert Galvez on September 4, 2019 for an orthopedic evaluation of the right shoulder. X-rays showed mild acromioclavicular osteoarthritis and a preserved subacromial space. Claimant was diagnosed with rotator cuff syndrome with associated tendinopathy, provided a cortisone injection and work restrictions. He stated that if Claimant still continued with significant symptoms he would proceed with an MRI of the right shoulder to evaluate for rotator cuff tear.

55. Claimant had a telemedicine appointment with Dr. Galvez on March 19, 2020. Claimant reported that the injection really did seem to help. She reported she was having difficulty with ranges of motion above shoulder height, resistance, lifting even doing activities of daily living, felt that there was swelling around the shoulder, and was frustrated as she had difficulty working because of her ongoing shoulder and elbow pain. He assessed right rotator cuff syndrome, differential diagnoses included degenerative partial rotator cuff tear, impingement, myofascial pain syndrome, overuse from repetitive motions at work. Dr. Galvez ordered an MRI at that time and stated that Claimant may require surgical consultation depending on the MRI findings.

56. Claimant also had a telemedicine appointment on April 8, 2020 with Dr. Chhor to request further injections for her bilateral elbow tendinitis, but could not proceed due to loss of insurance. Dr. Chhor provided her with time off work through June 3, 2020. She stated that after the prior injections effects wore off Claimant had persistent pain and

stated she had difficulty working. Dr. Chhor provided work restrictions of 8 weeks of no lifting, pushing or pulling greater than 5 lbs. in hopes that Employer could offer her light duty work. Dr. Chhor encouraged her to work on exercises prescribed by therapy, take anti-inflammatory for pain control, and stated that when she was able to obtain medical insurance with Kaiser again she should call to make an appointment for repeat evaluation and possible steroid injection.

57. On June 23, 2020 Claimant contacted Nurse Brooks at Kaiser requesting a referral to Denver Health as she was no longer an insured member of Kaiser, which was denied.

58. A second FROI was filed with Division on September 28, 2020, which stated that Claimant made a report of injury while loading preprints into the hopper on the insert machine while lifting. The FROI identified strain and swelling of both shoulders and stated it was a specific injury.

59. Claimant was evaluated on September 28, 2020 by Dr. Paul Ogden, when she reported that she had bilateral shoulder and elbow pain that was constant, sharp and burning, aggravated by work. He noted that the current exacerbation started as of September 12, 2020. Exam showed Claimant limited range of motion of the shoulders and elbows. Claimant had tenderness over the anterior shoulder, positive Speed's test, and diffuse tender points over the bilateral elbows and forearms with a presentation consistent with bilateral tendinitis as well as shoulder strain. Though he stated that causality was uncertain, Dr. Ogden also noted that the Claimant's presentation was consistent with bicipital tendinitis as well as shoulder strain and elbow and forearm strain from the patient's mechanism of work. He stated that the objective findings were consistent with a history and/or work related mechanism of injury/illness. He provided work restrictions of pushing, pulling, carrying and lifting up to 15 lbs. with both arms; and no above shoulder level work.

60. On October 15, 2021 Claimant returned to Dr. Ogden's clinic, and was seen by Jocelyn Cavender, PA, who provided Celebrex and ordered home exercises for the shoulder, neck and elbow. She continued work restrictions and stated that she should do no above the shoulder work. She requested prior medical records but had not yet received them. The diagnosis did not change from what Dr. Ogden had provided.

61. On October 26, 2020 Claimant again returned to Dr. Ogden with continued symptomatic bilateral upper extremity and posterior shoulder symptoms. Claimant described her pain as sharp, achy, throbbing but improved with meds. She was not working at that point due to the restrictions. On exam he found no swelling of the extremities but tenderness of bilateral lateral epicondyle areas. He stated that if the claim was accepted, then they would start physical therapy and psychological treatment, but in the meantime she was to continue light duty activities, which continued throughout November and December, pending a causation determination as Dr. Ogden had not received all past medical records.

62. Claimant filed a Workers' Claim for Compensation on November 24, 2020 stating that both palletizers were down and Claimant had to "stackdown" bundles, injuring her right upper arm, left lower arm and bilateral elbows on September 12, 2020.

63. On December 3, 2020 Claimant attended Dr. Ogden virtually. Claimant reported that the majority of her pain was in her elbows but she continues to have range of motion issues in her shoulders and could not raise her arms above her head. Dr. Ogden noted Claimant "states that she typically pushes, pulls and carries items, typically working at waist level or higher." Dr. Ogden had received the WSE which advised that there were neither primary nor secondary risk factors for cumulative trauma disorder but agreed to confirm it with the employer. Dr. Ogden documented that he had spoken with human resources and confirmed that there had been no change in the job description since it was prepared and that the WSE was accurate. This ALJ found little confirmation that the HR person was personally aware of the actual job requirements nor evidence that Dr. Ogden discussed in detail or confirmed with Claimant if the WSE was an accurate description of all the jobs she performed or was performing on September 12, 2020.

64. On December 21, 2020 Dr. Ogden advised Claimant that it was unlikely that her diffuse symptomology was work related given her 2019 WSE and the fact that the prior claim had been denied. He advised that, if the insurance company accepted the claim, that he would be happy to provide her with care.

65. Respondents filed a Notice of Contest on January 18, 2021.

66. On January 26, 2021 Claimant was evaluated by Dr. Roberta Anderson Oeser of Premier Spine and Pain Institute. Dr. Anderson stated that Claimant presented with complaints of bilateral shoulder pain and bilateral elbow and forearm pain. On exam, Claimant's right shoulder revealed tenderness over the acromioclavicular joint, subacromial space and biceps tendon insertion site, had restricted range of motion most notably with forward flexion, abduction and internal rotation, and a positive impingement with maneuvers. Claimant had a positive Speeds test and Yergason's test on the right. She had tenderness to palpation over the medial and lateral epicondyles. Resisted wrist extension with the forearm supination caused her pain over the right lateral epicondyle. She had resisted wrist flexion with forearm pronation because of pain over the right medial epicondyle. Evaluation of the left shoulder revealed tenderness over the biceps tendon insertion site and acromioclavicular joint. Left shoulder range of motion was mildly restricted with forward flexion and abduction. Speeds test and Yergason's test were mildly positive on the left. She had tenderness over the medial and lateral epicondyles. Resisted wrist extension with forearm supination caused her pain over the lateral epicondyles and forearm extensor mass.

67. After an extensive discussion with the patient regarding her job duties, it was Dr. Anderson Oeser's opinion that Claimant's current symptoms were related to the repetitive nature of her job in addition to vibration from the machines. Dr. Anderson Oeser specifically diagnosed Claimant with strains of the bilateral forearms, strains of the bilateral shoulders, tendinitis of the bilateral shoulders and depression related to the work injuries.

68. Dr. Anderson recommended Claimant proceed with a course of physical therapy to address the bilateral shoulder strains, occipital tendinitis and impingement and occupational therapy for the bilateral elbow and forearms strains. She explained to Claimant the need for her to engage in an active stretching and range of motion program several times per day. She and Claimant reviewed her program in-depth.

69. Claimant was also reporting depressive type symptoms related to her chronic pain. Dr. Anderson recommended that Claimant be seen by Dr. Ledezma for psychological evaluation and treatment to address her chronic pain issues and any underlying depression and anxiety associated with her work injury.

70. A referral was written for her to see Dr. Ledezma and for PT and OT. She further recommended medications but advised Claimant not to take NSAIDs due to GI issues. She provided work restrictions of 15 lbs., no pushing or pulling greater than 20 lbs. and avoid any repetitive or frequent lifting, pushing, pulling or carrying.

71. Claimant had a telemedicine visit with Dr. Anderson Oeser on March 15, 2021 reporting that the topical medications helped control her symptoms, though she had swelling at the elbows and forearm regions. She continued to diagnose strain of the right arm, bicipital tendonitis of the bilateral shoulders and mixed anxiety and depression, and kept her on work restrictions. Dr. Anderson Oeser is found credible.

72. On March 3, 2021 Claimant was evaluated by Dr. Ledezma for the psychological problems including depression and anxiety. Dr. Ledezma took a lengthy history that included that the injections provided by Drs. Galvez and Dr. Chhor did result in improvement in range of motion in her elbows and right shoulder and the benefit, lasted for several months. When the pain returned, Dr. Galvez referred her for an MRI of her shoulders and elbows. However, in March 2020, her hours were cut at work and she lost her insurance coverage. She was unable to have the MRI. Yet, she continued performing the same duties at work.

73. Dr. Ledezma reported that on September 12, 2020, Claimant was, assigned to lift bundles of newspapers to move to pallets. At that point, she was unable to move her arms any longer. On September 26, 2020 she was assigned to load bundles of print paper on a conveyor belt. She again experienced debilitating pain and another accident report was filed. She was referred to Dr. Ogden's office, who stated that she likely had problems with her tendons. Work restrictions were provided as well as medication she was unable to tolerate. Her employers were unable to accommodate her restrictions and took her off work oin September 2020. In January 2021, her care was transferred to Dr. Anderson-Oeser. Following an analysis of Claimant’s complaints she diagnosed adjustment disorder with mixed anxiety and depression, and recommended psychotherapy and antidepressant medication.

Deposition Testimony of Dr. Matt Miller

74. Dr. Miller testified as an expert in occupational medicine. He testified consistent with his medical reports submitted into evidence. He stated that he based his

decision that Claimant’s June 22, 2019 work related claim was not a work related occupational disease based on Claimant’s multiple complaints that were diffuse as well as the WSE issued by Ms. Harris, a representative of the third party administrator. He stated that he knew Ms. Harris from multiple other cases as she was a nurse case manager that was frequently with patients in his office. He stated that he relied on the employer’s statement that the WSE described the Claimant’s job accurately. Dr. Miller stated that he knew Claimant’s job was repetitive in nature but did not get the detailed specifics of the job from Claimant.

75. Dr. Miller also stated that he agreed with Dr. Ogden’s assessment regarding Claimant’s complaints and that they were similar to his findings but that Dr. Ogden had noted that Claimant complained of tingling in both forearms, swelling in the elbows, woke up at night with pain and had decreased range of motion. He also testified that Dr. Ogden reported that the injury of September 12, 2020 started with a specific instance of loading paper, which is different from the report of injury for the 2019 claim. He stated that since Claimant’s symptoms tend to be diffuse, that she may have a systemic condition or an underlying somatization tendency, which is a psychological underlay causing symptoms that are not one hundred percent physical, though real symptoms.

76. Dr. Miller stated that his first diagnosis included possible epicondylitis, which is an inflammation of the tendons at the elbow. He stated that epicondylitis could be caused by a cumulative trauma or an acute injury. He stated that it is also called tennis elbow. It can be caused by a combination of applied force and extension of the arms. He was unable to make an assessment of how long the condition could last as it was variable. He stated that some patients healed in a few weeks while others had a chronic problem.

77. Dr. Miller also stated that Claimant described a very heavy repetitive job, including lifting, moving of a lot or a high volume of product, and had a very physical job, which included driving machinery. He stated that he took a limited description of the job from Claimant and he did not know what kinds of movements she actually performed, as he depended on the WSE to provide that information. He could not recall whether Claimant told him if it was using the machines or the repetitive motion to put the paper in the machines that was the cause of her injury.

Medical Treatment Guidelines

78. W.C.R.P. Rule 17, Exhibit 5, Section D (3) Cumulative Trauma Conditions, effective March 2, 2017 states, in pertinent part, as follows:

> The steps in a medical causation assessment for cumulative trauma conditions are:
>
> **Step 1:** Make a specific and supportable diagnosis. Remember that cumulative trauma, repetitive strain and repetitive motion are not diagnoses. Examples of appropriate diagnoses include: specific tendinopathies, strains, sprains, and mono-neuropathies. Refer to Section F Specific Musculoskeletal Disorders and Section G Specific Peripheral Nerve Disorders for the specific findings of common cumulative trauma conditions. Less common cumulative trauma conditions not listed specifically in these Guidelines are still subject to medical causation assessment.

Step 2: Determine whether the disorder is known to be or is plausibly associated with work. The identification of work-related risk factors is largely based on comparison of the patient's work tasks with risk factors (as described in Section D.3.a Foundations for Evidence of Occupational Relationships and Section D.3.b Using Risk Factors to Determine Causation).

Step 3: Interview the patient to find out whether risk factors are present in sufficient degree and duration to cause or aggravate the condition. Consider any recent change in the frequency or intensity of occupational or non-occupational tasks. In some cases, a formal job site evaluation may be necessary to quantify the actual ergonomic risks. Refer to Section E.6.c Job Site Evaluations.

Step 4: Complete the required match between the risk factors identified in Section D.3.d Risk Factors Definitions Table and the established diagnosis using the system described in Section D.3.b. Remember that preexisting conditions may be aggravated by, or contribute to, exposures lower than those listed on the table. Those preexisting conditions must be determined by the authorized treating physician based on physiologic plausibility.

Step 5: Determine whether a temporal association exists between the workplace risk factors and the onset or aggravation of symptoms.

Step 6: Identify non-occupational diagnoses, such as rheumatoid arthritis, obesity, diabetes, as well as avocational activities, such as golf and tennis. This information can affect the medical causation assessment. It may be applicable when exposure levels are low and the case does not meet evidence-based criteria.

79. Sec. D(3)(a) states that "The clinician is responsible for documenting specific information regarding the force, posture, repetition, and other risk …. Job title alone is not sufficient to determine the risk factors. A job site evaluation is usually necessary."

80. Sec. D(3)(b) states as follows:

The physician should perform the following:

Step 1. Determine the diagnosis.
Using the history, physical examination and supporting studies, a medical diagnosis must be established. Refer to Section F Specific Musculoskeletal Diagnosis and Section G Specific Peripheral Nerve Diagnosis. Less common cumulative trauma conditions not listed specifically in these Guidelines are still subject to medical causation assessment.

Step 2. Clearly define the job duties of the worker.
Do not rely solely on the employer's description of job duties. The worker's description of how they actually perform the duties is extremely important. Job site evaluations are always appropriate, but they are sometimes unnecessary when the physician can identify the job duty that appears to be causing the symptoms and provide a method for ergonomically correcting the activity. Job site evaluations performed to identify risk factors should always include appropriate ergonomic alterations. It may not be possible to recommend ergonomic alterations in industrial settings where the employer is incapable

Analysis of the Facts

81. Claimant and Mr. M credibly testified that the job of insert machine operator required constant reaching for materials, frequently half a bundle of product from the left, brought to the jogger table that vibrates to arrange the product then the product is loaded to the hopper or the head of the insert machine. They credibly testified that this required twisting motions from left to right. Mr. M. credibly stated that the jogger is a table that vibrates in order to align the paper products in order to smooth them out so that they could feed the products correctly and is very hard on the upper extremities. They both credibly testified that the movements of the arms and wrists were awkward, required twisting and reaching, Mr. M. credibly stated that he was of a height that would require him to load the insert machine at waist height but that Claimant was much shorter and would be required to use her shoulders much more. He also testified that when handling product to feed to the head or the hopper, the worker needed to hold the materials with the wrist extended in a pronated posture on a continual basis and then place them on the vibrating table and handle them by holding the opposite hand, all while twisting.

82. Both Claimant and Mr. M. also testified that the use of the lift was very difficult as it would have to be pushed, pulled and jogged into position. The lift was over a ton when loaded with the skid of the products. Mr. M. credibly testified that the job was hard because workers had to use their whole bodies to move either the lift or the dolly because they were poorly maintained and did not run well. Mr. M. confirmed that he worked for the company for approximately 36 years and knew every job required of workers in the mail room and had performed each of the jobs himself during his time working for Employer. Both Claimant and her co-worker were credible.

83. The WSE completed by Ms. Harris does not define each of the types of work that Claimant performed, including that Claimant was sometimes assigned to the job as an insert material worker for a full shift or that she would perform the job of press worker, loading the completed newspaper bundles when the palletizer was not working. Neither did Ms. Harris document the force or pressure or weight in terms of lbs. required to twist the handles of the dolly or the lift plate, or how much was required of the worker to use their body to manhandle the equipment to get it placed in certain positions. Ms. Harris’ report is not credible.

84. Neither Dr. Miller nor Dr. Ogden followed the Medical Treatment Guidelines in assessing analyzing the causation of Claimant’s injuries or the risk factors in this matter or apply the steps required here. While Dr. Miller ordered a work site evaluation, he did not independently confirm or obtain specifics of the job requirements from Claimant in order to assess specifically the activities and the extent of the activities Claimant performed. Neither are credible.

85. Further, in reviewing the records, and following the care received from both Drs. Galvez and Chhor, they stated that it was their opinions that Claimant’s strain and tendinitis were related to the repetitive motion, work environment and working conditions. They both provided care in the form of injections on September 4, 2019. Their records documented that the injections, in fact, assisted Claimant with the symptoms of the

bilateral elbows and shoulders, contrary to Dr. Ogden's assessment. This is documented specifically by Dr. Galvez on March 19, 2020 and Dr. Chhor on April 8, 2020, when Claimant requested further injections but was unable to proceed as she had lost her insurance. This is also supported by the fact that Claimant returned to work in September of 2019 and continued to work for Employer through September 2020 when she was provided a job lifting heavy bundles on the press line and sustained further strain of her upper extremities, aggravating her prior work related occupational disease. This is also supported by the history taken by Dr. Ledezma.

86. Dr. Anderson Oeser provided an in-depth evaluation and assessment that is more credible than the contrary opinions of Drs. Miller and Ogden. Dr. Anderson Oeser is found to be credible.

CONCLUSIONS OF LAW

Based on these findings of fact, the Judge draws the following conclusions of law:

A. General Provisions

The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, *et seq*., C.R.S. is to assure the quick and efficient delivery of benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. Section 8-43-201, C.R.S. The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the claimant's rights nor in favor of the rights of the respondents; and a workers' compensation claim shall be decided on its merits. Section 8-43-201, C.R.S.

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the analysis of the findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office (ICAO)*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensieck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App. 2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008). The credibility attributed to expert medical opinion on the issue of causation is within the ALJ's province as fact-finder. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2018). A workers' compensation case is decided on its merits. Sec. 8-43-201, C.R.S.

B. Burden of Proof

The injured worker has the burden of proof, by a preponderance of the evidence, of establishing entitlement to benefits. Sections. 8-43-201 and 8-43-210, C.R.S. *See City of Boulder v. Streeb,* 706 P. 2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office,* 12 P. 3d 844 (Colo. App. 2000); *Lutz v. Indus. Claim Appeals Office,* 24 P.3d 29 (Colo. App. 2000; *Kieckhafer v. Indus. Claim Appeals Office*, 284 P.3d 202, 205 (Colo. App. 2012). A "preponderance of the evidence" is that quantum of evidence that makes a fact, or facts, more reasonably probable, or improbable, than not. *Page v. Clark,* 197 Colo. 306, 592 P. 2d 792 (1979; *People v. M.A.,* 104 P. 3d 273 (Colo. App. 2004). "Preponderance" means "the existence of a contested fact is more probable than its nonexistence." *Indus. Claim Appeals Office v. Jones*, 688 P.2d 1116 (Colo. 1984).

C. Compensability

A compensable industrial accident is one that results in an injury requiring medical treatment or causing disability. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. Section 8-41-301(1)(b), C.R.S. (2020); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course" of employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its "origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee's service to the employer." *Popovich v. Irlando*, 811 P.2d 379, 383 (Colo. 1991); *Horodyskyj v. Karania*n, 32 P.3d 470, 475 (Colo. 2001).

There is no presumption that injuries which occur in the course of a worker's employment arise out of the employment. *Finn v. Industrial Commission*, 165 Colo. 106, 437 P.2d 542 (1968). Rather, it is the claimant's burden to prove by a preponderance of the evidence that there is a direct causal relationship between the employment and the injuries. Section 8-43-201, C.R.S.; *Ramsdell v, Horn*, 781 P.2d 150 (Colo. App. 1989). The determination of whether there is a sufficient nexus or causal relationship between a Claimant's employment and the injury is one of fact and one that the ALJ must determine based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del*

Valle, 934 P.2d 861 (Colo. App. 1996). When a claimant experiences symptoms while at work, it is for the ALJ to determine whether a subsequent need for medical treatment was caused by an industrial aggravation of the pre-existing condition or by the natural progression of the pre-existing condition. *H & H Warehouse v. Vicory, supra.* A preexisting condition or susceptibility to injury does not disqualify a claim if the work related injury aggravates, accelerates, or combines with the preexisting condition to produce a need for medical treatment. *Duncan v. Industrial Claim Appeals Office,* 107 P.3d 999, 1001 (Colo. App. 2004).

The Act imposes additional requirements for liability of an occupational disease beyond the "arising out of" and "course and scope" requirements. A compensable occupational disease must meet each element of the four-part test mandated by § 8-40-201(14), C.R.S. which defines an occupational disease as:

> [A] disease which results directly from the employment or the conditions under which work was performed, which can be seen to have followed as a natural incident of the work and as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment.

The equal exposure element effectuates the "peculiar risk" test and requires that the injurious hazards associated with the employment be more prevalent in the workplace than in everyday life or other occupations. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993). The claimant "must be exposed by his or her employment to the risk causing the disease in a measurably greater degree and in a substantially different manner than are persons in employment generally." *Id.* at 824. The hazard of employment need not be the sole cause of the disease, but must cause, intensify, or aggravate the condition "to some reasonable degree." *Id*. The mere fact an employee experiences symptoms while working does not compel an inference the work caused the condition. *Scully v. Hooters of Colorado Springs*, W.C. No. 4-745-712 (ICAO, October 27, 2008). There is no presumption that a condition which manifests at work arose out of the employment. Rather, the Claimant must prove a direct causal relationship between the employment and the injury. Section 8-43-201; *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989). The question of whether a claimant has proven that a particular disease was caused by a work-related hazard is one of fact for determination by the ALJ. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office,* 989 P.2d 251 (Colo. App. 1999). The determination of whether there is a sufficient causal relationship between the claimant's employment and the injury or disease is also one of fact, which the ALJ must determine based on the totality of the circumstances. *Delta Drywall v. Industrial Claim Appeals Office*, 868 P.2d 1155 (Colo. App. 1993).

The Division has adopted *Medical Treatment Guidelines* (MTG) to advance the statutory mandate to assure quick and efficient delivery of medical benefits to injured workers at a reasonable cost to employers. W.C.R.P. 17, 7 Code Colo. Regs. 1101-3. The Division's Guidelines were established by the Director pursuant to an express grant of statutory authority. See § 8-42-101(3.5)(a)(II), C.R.S. Exhibit 5 of Rule 17 specifically addresses Cumulative Trauma Conditions (CTD MTG), and was most recently updated in December 2016 (effective March 2, 2017). Pursuant to Sec. 8-42-101(3)(b) and W.C.R.P. 17-2(A), medical providers must use the MTG when furnishing medical treatment. In *Hall v. Industrial Claim Appeals Office*, 74 P.3d 459 (Colo. App. 2003) the court noted that the Guidelines are to be used by health care practitioners when furnishing medical aid under the Workers' Compensation Act. See Section 8-42-101(3)(b), C.R.S. The ALJ may consider the MTG as an evidentiary tool but is not bound by the MTG when making determination of causation or when determining if requested medical treatment is reasonably necessary or injury related. Sec.8-43-201(3); *Logiudice v. Siemans Westinghouse*, W.C. No. 4-665-873 (January 25, 2011).

The Guidelines are regarded as accepted professional standards for care under the Workers' Compensation Act. *Rook v. Industrial Claim Appeals Office,* 111 P.3d 549 (Colo. App. 2005). However, the compensable nature of the claimant's industrial injury or disease is not controlled by the application of the Guidelines. In determining the compensability of a claim, an ALJ is not bound by any medical opinion, even if it is unrefuted. *Indus. Commission v. Riley*, 165 Colo. 586, 591, 441 P.2d 3, 5 (1968*); Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). Rather, the determination of the compensable nature of an alleged occupational disease remains controlled by the Workers' Compensation Act and by relevant case law. The claimant sustains an occupational disease when the injury is the incident of the work, or a result of exposure occasioned by the nature of the work and does not come from a hazard to which the worker would have been equally exposed outside of the employment.

While it is appropriate to consider the Guidelines on the question of diagnosis and cause of the claimant's condition, even assuming there might have been some deviation from the Guidelines here, it does not compel the fact finder to disregard the opinion of that medical expert on the issue of the causal connection between a work-related injury and a particular medical condition. See *Eldi v. Montgomery Ward*, W. C. No. 3-757-021 (October 30, 1998); *Jones v. T.T.C. Illinois, Inc.,* W.C. No. 4-503-150 (May 5, 2006).

a. June 22, 2019 Occupational Disease Claim, W.C. No. 5-111—600

Here, the ALJ credited Dr. Chhor and Dr. Galvez with regard to the work-related occupational disease exposure and resolved the conflicts in the evidence in favor of Claimant with regard to the June 22, 2019 claim under W.C. No. 5-111-600. As found, Claimant proved she suffered a compensable occupational disease consisting of soft tissue strains and tendinitis affecting her bilateral upper extremities.

In fact, the CTD MTG explicitly recognizes “strains” and “tendinopathies” as “examples of appropriate diagnoses.” See W.C.R.P. Rule 17, Exhibit 5, Sec. (D)(3). The injury resulted directly from Claimant’s work activities and not from any hazard to which Claimant was exposed outside her job, as Claimant testified that she did not perform strenuous activities outside of her work. Claimant credibly testified that she would use both significant force as well as awkward movements to perform her various jobs.

The WSE was not credible as it failed to accurately document the types of movements Claimant performed while working her jobs as a dolly/lift operator, the job of insert machine worker or the press job. Claimant testified that the force and movement required to operate the dolly was significant and hard. Ms. Harris' Job Evaluation Report failed to document the angle or degree of the movement required to maneuver the handles of the machines. She failed to document what angle Claimant was required to supinate and pronate her wrist while loading a hopper or the head of the insert machine. She failed to document the movement and angles required to pick up the bundles of newspapers or inserts from the skid, the twisting of the arm when arranging the bundles on the "jogger" which vibrated, or the twisting of the arm when loading the insert machine head. Another critical failure is that she did not document the height of the machine and how that would affect Claimant's posture or repetitive activities. Ms. Harris and her Job Evaluation are found not to be credible.

As found, Claimant's co-worker credibly testified that the job of dolly/lift was very hard. He credibly stated that the dolly required forceful movement of the handles forward and backward, side to side, and jogging of the body when driving, affecting the shoulders. He credibly testified that using the, often poorly maintained, lifts required heavy pushing, pulling and jogging of the lifts into place and that these machines would involve upward of a ton of weight. The co-worker credibly stated that it often involved use of full body force to get them to work and move them where they needed to be placed.

As found, Respondents' reliance on the CTD MTG causation algorithm in this case is misplaced because Claimant's credible diagnosis is as provided by Dr. Chhor and Dr. Galvez of tendinitis and strains. The CTD MTG causation tables under W.C.R.P. Rule 17, Exhibit 5, Sec. D(3)(e) does not account for these diagnosis. Accordingly, the causation tables are not particularly helpful in determining the cause of Claimant's soft-tissue upper extremity strains.[1] The MTG CTD causation matrix provides a quick reference to available empirical data regarding the listed CTDs. It does not definitively limit the universe of potentially work-related conditions. The ALJ knows of no authority to support Dr. Miller's opinion that the Claimant's conditions are not work related or that only those diagnoses listed in the CTD causation tables are eligible for coverage in a workers' compensation claim. The ALJ is not persuaded the Division intended to foreclose compensation for non-listed medical conditions if Claimant otherwise satisfies the statutory requirements for a compensable occupational disease. Indeed, such a rule would be contrary to the Act and void. *Reyes v. JBS USA LLC,* W.C. No. 4-968-907-04 (December 4, 2017) (notwithstanding the MTGs, "determination of the compensable nature of an injury remains controlled by the Workers' Compensation Act and by relevant case law").

[1] Section D(3)(a) of the CTD MTG concedes, "there are few studies which address less common musculoskeletal diagnoses" other than those listed in the causation tables to characterize application of the tables to unlisted diagnoses as "evidence-based."

Multiple factors persuade the ALJ that Claimant's upper extremity strains and tendinitis were caused by her work. The symptoms began at work and were associated with specific work-related activities such as working with equipment that was not well maintained and hard to maneuver; pushing, pulling and jogging lifts, which weighed over a ton, that had to be positioned into place beside specific machinery in very limited spaces; lifting bundles of materials from one side to a jogging table that vibrated and then extending the hand backward, while holding the materials in a stack, and torqueing the hand backward and to the side to place the materials into the insert machine head/hopper on a repetitive basis, as well as operating a dolly that also had problems with stuck wheels and hard handles, in addition to the working stations not being easy work at Claimant's level. These are all activities that were repetitive in nature, required a large amount of force, twisting, awkward positioning, and caused Claimant's strains and tendinitis. Claimant's symptoms were worse while she was working, but somewhat better when she was away from work. The persistent and worsening symptoms interfered with her ability to perform specific job-related tasks, prompting her to report the injury and request treatment. None of the experts provided persuasive evidence of any other potentially injurious activity, pathology, or potentially causal risk factors besides Claimant's work that caused the strains and tendinitis. Claimant testified that she did not engage in other work and avoided any strenuous activities at home, and specifically denied any outside activities of an aggravating nature. Nor is there persuasive evidence she was at least equally exposed to the injurious activities outside of work.

Claimant has proven by a preponderance of the evidence that there was a causal link between the work activities, which she performed for over 25 years, and the diagnoses provided by Dr. Chhor and Dr. Galvez. Claimant had little care from Dr. Miller other than three therapy visits. She received several months' worth of some relief from the injections provided by Drs. Chhor and Galvez and was able to return to work in September 2019 for over a year before injuring herself in a specific incident and causing further disability and inability to continue performing the heavy work her employer required. Claimant has proven by a preponderance of the evidence that the tendinitis and strains of the shoulders and elbows are as a direct and proximate consequence of her work related exposure, with an onset date of June 22, 2019, that followed as a natural incident of the work she performed for Employer. It is also concluded that the exposure can be closely traced to her employment as the proximate cause and which Claimant was not otherwise exposed outside of her working environment. Claimant has proven by a preponderance of the evidence that, on June 22, 2019, she suffered an occupational disease that is compensable.

b. September 12, 2020 Injury, W.C. No. 5-154-619

It is specifically found that Claimant injured her bilateral shoulders and bilateral elbows as well as caused significant depression as a consequence of the specific injury of September 12, 2020 caused by the lifting of heavy bundles of newspapers onto a pallet and stacking them up to six bundles high. Claimant and the co-worker testified that lifting the bundles was hard work. Claimant was credible in describing that the work was so difficult that she aggravated her bilateral shoulders and elbow preexisting conditions by lifting the heavy bundles. Claimant has proven by a preponderance of the evidence that she sustained an aggravation of her preexisting occupational disease within the course and scope of her employment while working for Employer on this day. There is a direct causal relationship between Claimant’s employment and the injury. The aggravation was a specific event that had its origin in Claimant’s work-related functions and is sufficiently related to be considered part of Claimant’s service to Employer.

Also as found, in January 2021 Dr. Anderson Oeser found on exam, that Claimant’s right shoulder revealed tenderness over the acromioclavicular joint, subacromial space and biceps tendon insertion site, had restricted range of motion most notably with forward flexion, abduction and internal rotation, and a positive impingement with maneuvers. Claimant had a positive Speeds test and Yergason's test on the right. She had tenderness to palpation over the medial and lateral epicondyles. Resisted wrist extension with the forearm supination caused her pain over the right lateral epicondyle. She had resisted wrist flexion with forearm pronation because of pain over the right medial epicondyle. Evaluation of the left shoulder revealed tenderness over the biceps tendon insertion site and acromioclavicular joint. Claimant’s left shoulder range of motion was mildly restricted with forward flexion and abduction. Speeds test and Yergason's test were also positive on the left. She had tenderness over the medial and lateral epicondyles and resisted wrist extension with forearm supination caused Claimant pain over the lateral epicondyles and forearm extensor mass. These findings are persuasive in this matter and support Dr. Anderson Oeser diagnoses of soft-tissue strains as well as tendinitis and depression are legitimate diagnoses as evidenced by their corresponding ICD-10 codes (shown in her January 26, 2021 report). Dr. Anderson Oeser obtained a detailed description of Claimant’s job and concluded that the injuries were work related. This ALJ finds all of this evidence credible and persuasive in concluding that Claimant suffered a specific incident on September 12, 2020 causing the shoulder and elbow strains and tendinitis as well as the depression caused by the ongoing, untreated chronic pain.

As found, based on the totality of the evidence, Claimant suffered from a specific injury on September 12, 2020 when she was lifting heavy bundles of newspapers and stacking them on a pallet while performing her assigned press job duties. As found, Claimant and Mr. M. are credible in this matter. Claimant did not receive the care to cure or relieve her of the symptoms of the injuries from Dr. Ogden and continued to have symptoms despite the limited care she received under Drs. Anderson Oeser and Ledezma. Claimant has proven by a preponderance of the evidence that she suffered a specific incident on September 12, 2020 and this is a distinct aggravation caused by the work she was performing on September 12, 2020 lifting the heavy bundles of newspapers onto pallets in the press room. This is a separate injury from the occupational disease of the June 22, 2019 claim, which aggravated her preexisting condition. This ALJ concludes that Claimant has proven by a preponderance of the evidence that the bilateral strains and tendinitis of Claimant’s bilateral shoulders and bilateral elbows was aggravated by the work Claimant was performing on September 12, 2020 and the claim is compensable.

D. Medical benefits

Employer is liable to provide such medical treatment “as may reasonably be needed at the time of the injury or occupational disease and thereafter during the disability to cure and relieve the employee of the effects of the injury.” Section 8-42-101(1)(a), C.R.S. (2021); *Colorado Compensation Insurance Authority v. Nofio,* 886 P.2d 714 (Colo. 1994); *Snyder v. Industrial Claim Appeals Office,* 942 P.2d 1337 (Colo. App. 1997). The question of whether the need for treatment is causally related to an industrial injury is one of fact. *Walmart Stores, Inc. v. Industrial Claims Office*, 989 P.2d 251 (Colo.App.1999); *Kroupa v. Industrial Claim Appeals Office*, *supra*. Where the relatedness, reasonableness, or necessity of medical treatment is disputed, Claimant has the burden to prove that the disputed treatment is causally related to the injury, and reasonably necessary to cure or relieve the effects of the injury. *Ciesiolka v. Allright Colorado, Inc*., W.C. No. 4-117-758 (ICAO April 7, 2003). The determination of whether a particular treatment is reasonable and necessary to treat the industrial injury is a question of fact for the ALJ. See generally *Stamey v. C2 Utility Contractors, Inc., et. al.,* W.C.No. 4-503-974 , ICAO (August 21, 2008); *Parker v. Iowa Tanklines, Inc.,* W.C. No. 4-517-537 (May 31, 2006); *Chacon v. J.W. Gibson Well Service Company*, W. C. No. 4-445-060 (February 22, 2002). Compensable medical treatment includes evaluations or diagnostic procedures to investigate the existence, nature, or extent of an industrial injury, or suggest a course of treatment. *Garcia v. Express Personnel*, W.C. No. 4-587-458 (August 24, 2000); *Walker v. Life Care Centers of America*, W.C. No. 4-953-561-02 (March 30, 2017); *Jacobson v. American Industrial Service/Steiner Corp*., W.C. No. 4-487-349 (April 24, 2007).

a. Regarding the June 22, 2019 Occupational Disease

As found, Claimant received limited medical care that was reasonably needed to cure and relieve the occupational disease from Dr. Matt Miller from July 3, 2019 through August 13, 2019, when Dr. Miller placed Claimant at MMI. Dr. Miller referred Claimant to her personal care providers for any further care. Claimant then proceeded to obtain care from her personal care providers from August 20, 2019 through April 8, 2020, including Dr. Richardson, Dr. Chhor and Dr. Galvez at Kaiser Permanente. Claimant had follow up visits, and injections for her elbows and her right shoulder strains and tendinitis. Claimant lost her health care insurance and was unable to continue to obtain the care that both Dr. Chhor and Dr. Galvez were recommending including further injections or the MRI of the right shoulder. This care and treatment was reasonable and necessary for Claimant’s occupational disease and allowed Claimant to continue working through September, 2020.

However, absent a completed DIME, the ALJ may not hear or decide any issue that constitutes an actual or constructive challenge to MMI. *Story v. Industrial Claim Appeals Office, supra.* The ICAO has repeatedly held that “after MMI [is] declared, the ALJ lack[s] jurisdiction to award or deny medical benefits to cure and relieve the claimant’s condition.” *McCormick v. Exempla Healthcare,* W.C. No. 4-594-683 (January 27, 2006); see also *Eby v. Wal-Mart Stores Inc.,* W.C. No. 4-350-176 (February 14, 2001) (“once an authorized treating physician places the claimant at MMI, and ALJ lacks jurisdiction to award additional medical benefits for the purpose of curing the industrial injury and assisting a claimant to reach MMI unless the claimant undergoes a DIME."); *Anderson-Capranelli v. RepublicIndustries, Inc*., W.C. No. 4-416-649 (November 25, 2002); *Cass v. Mesa County Valley School District,* W.C. No. 4-69-69 (August 26, 2005) ("[i]f an ATP places the claimant at MMI, an ALJ lacks jurisdiction to award additional medical benefits to improve the claimant's condition unless a DIME has been conducted on the issue of MMI."). Therefore, because Claimant was placed at MMI by Dr. Miller on August 13, 2019, this ALJ has no jurisdiction to order Respondents to pay for the authorized care that Drs. Chhor and Galvez provided Claimant after the date of MMI.

Although a DIME is not a jurisdictional prerequisite to a hearing on a request for post-MMI medical treatment, Claimant has not characterized the care previously recommended by Drs. Chhor and Galvez, who are authorized providers, as a *Grover*-type benefit. At least the injections may be intended to improve Claimant's condition, rather than merely relieve the effects of the occupation disease and prevent deterioration. The ALJ concludes that awarding the treatment requested by Claimant would constitute a constructive challenge to MMI in circumvention of the DIME process pursuant to *Story v. Industrial Claim Appeals Office, supra*. While this situation is a little different because Claimant is unable to seek a DIME at this time, as the Claimant's right to a DIME is only triggered by the filing of a Final Admission of Liability by Respondents pursuant to Sec. 8-42-107.2,(2)(a)(I)(A), C.R.S., and Respondents have denied this claim, but this does not change the jurisdictional requirement. Lastly, Claimant failed to request that the issue of maintenance care after MMI be addressed at this hearing. Therefore, medical benefits after the August 13, 2019 finding of MMI by Dr. Miller are denied at this time, but reserved for future determination, following completion of the DIME process.

b. Regarding the September 12, 2020 specific injury.

This case is a little different than the June 22, 2019 occupational disease claim. In the September 12, 2020 claim, Dr. Ogden stated that he would continue to provide care, if authorized. The parties then agreed to have Dr. Anderson Oeser as the authorized treating physician. As found, the evaluations and treatment Claimant received from Dr. Anderson Oeser, including the referral to Dr. Ledezma, was reasonably necessary to cure and relieve the effects of her injuries of the September 12, 2020 work related injury. Also as found, the treatment Dr. Anderson Oeser continued to recommend, including the occupational and physical therapy and medications are reasonably necessary to cure and relieve Claimant from the effects of the September 12, 2020 work related injury. When Claimant was authorized to change provider to Dr. Anderson Oeser, the care that she recommended was not authorized either. Claimant has been unable to obtain the care that she requires in order to appropriately address her work-related conditions caused by the compensable work related injury. Claimant has proven by a preponderance of the evidence that the treatment recommended by Dr. Anderson Oeser for the Claimant's specific injuries were causally related to the September 12, 2020 work related injury and reasonably necessary and related to the injury in order to cure and relieve Claimant of the effects of the injury.

ORDER

IT IS THEREFORE ORDERED THAT:

1. Claimant's occupational disease claim of June 22, 2019 is compensable.

2. Respondents shall pay for all treatment from authorized providers reasonably needed to cure and relieve the effects of Claimant's June 22, 2019 work related occupational disease, including the care Claimant received from Dr. Matt Miller, Genex Services and Justin Houck D.C. through the date of MMI of August 13, 2019. Any medical care received from authorized medical providers, Dr. Richardson, Dr. Chhor and Dr. Galvez, after this date is specifically reserved for future determination pending a DIME evaluation.

3. Claimant's specific incident claim of September 12, 2020 is compensable.

4. Respondents shall pay for the reasonably necessary medical care recommended by authorized treating providers, Dr. Paul Ogden and Dr. Roberta Anderson Oeser for the aggravations of the preexisting strains and tendinitis of Claimant's bilateral shoulders and elbow injuries as well as psychological care recommended by Dr. Anderson and Dr. Ledezma to cure and relieve Claimant of the chronic pain caused by the ongoing work related injuries.

5. All issues not decided herein are reserved for future determination.

If you are dissatisfied with the Judge' s order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 23rd day of December, 2021.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant prove he suffered compensable injury to his right knee on May 21, 2021?

- If Claimant proved a compensable injury, is Claimant entitled to reimbursement for a knee brace prescribed by his ATP?

FINDINGS OF FACT

1. Claimant works for Employer as a warehouse worker and parts specialist. The job requires extensive walking and carrying items around the warehouse. Claimant alleges claiming an injury from an incident that occurred at work on May 21, 2021. He was climbing a mobile step ladder carrying a filter weighing approximately ten pounds, when he felt a painful pop in his right knee. The section of the warehouse floor where the ladder was located was slightly uneven, which caused the ladder to "wiggle a bit" as he placed his weight on the step. Despite the slight "wiggle," Claimant's knee did not twist. Claimant cried out in pain. A nearby co-worker came to help and found Claimant in apparent distress after the incident. Claimant reported the injury and completed an illness report the same day. He completed a nurse triage call on May 21, 2021 and was referred to urgent care.

2. Claimant was seen at Concentra Medical Centers by Jennifer Livingston, NP on May 21, 2021. His chief complaint was recorded as "injured right knee while climbing ladder." Claimant explained that he was climbing a ladder when his right knee gave out and he heard a pop. He had difficulty bearing weight once he got to the ground. Claimant thought his knee would get better and continued working for about an hour until the pain became too great and he reported the incident to his supervisor. Claimant described burning pain in the lower lateral aspect of his knee and down his leg. Ms. Livingston observed ecchymosis and swelling around the knee. Range of motion was limited in all planes. Ms. Livingston diagnosed a "right knee injury." She prescribed a knee brace, diclofenac solution, ibuprofen, and referred Claimant to physical therapy. She gave Claimant work restrictions including elevating and icing the right knee for 20 minutes every 2 hours and must be up and walking for five minutes every hour. She opined the objective findings were consistent with the history and a work-related mechanism of injury.

3. Claimant paid for the prescribed knee brace from his own funds.

4. Claimant followed up with Ms. Livingston on May 26, 2021. His pain was no better and that he was still having difficulty bearing weight on the knee. His initial PT appointment scheduled for later in the day. Ms. Livingston made no changes to the prior treatment plan or restrictions.

5. Claimant’s next appointment was on June 2, 2021. He reported no improvement and being unable to participate in PT due to pain. Ms. Livingston requested an MRI.

6. A right knee MRI was performed on June 11, 2021. It showed an ACL strain, reactive edema along the inferolateral patella with patellar tendinitis, and a mild patellar retinaculum strain. There was no fracture, no loose bodies, no osteochondral lesions, no degenerative arthritis, and no meniscal tears.

7. Claimant started seeing Dr. J. Douglas Bradley at Concentra on June 16, 2021. Claimant’s knee was still symptomatic but was “not hurting as much.” The pain and swelling were exacerbated by stairs and walking. On examination, Dr. Bradley noted tenderness in the undersurface of the patella and the medial patellar retinaculum. Dr. Bradley diagnosed “recurrent subluxation of right patella,” although it is not clear how he came to that diagnosis because there are no corresponding documentation of subluxation. Dr. Bradley liberalized Claimant’s work restrictions to 30 pounds lifting and 80 pounds pushing and pulling. Dr. Bradley opined the objective findings were consistent with the history and a work-related mechanism of injury.

8. On July 7, 2021, Dr. Bradley documented that PT was helping but Claimant’s right knee was “buckling” without the brace. He referred Claimant to Dr. David Walden for an orthopedic evaluation.

9. Claimant saw Dr. Walden on July 12, 2021. Claimant explained he was carrying a filter up a ladder and felt a painful pop in his knee. Dr. Walden noted Claimant’s right knee was asymptomatic before the incident at work, “but since then he experienced pain and swelling in the knee.” He further noted Claimant had never experienced any similar problems with his knee in the past. Dr. Walden opined Claimant’s mechanism of injury “is not completely understood, he was climbing up on a ladder with minimal additional weight and a pop was experienced in the knee. He is not certain whether or not there was any twisting involved.” Dr. Walden diagnosed right knee patellofemoral syndrome, and “possible patellofemoral subluxation (?).” Dr. Walden concluded, “the patient’s mechanism of injury is certainly not classic for patellofemoral subluxation, but he continues to experience pain in the knee and his exam is consistent with ongoing patellofemoral symptoms. He denies any prior history of similar episodes and has not had any similar episodes on the opposite knee.” Dr. Walden did not recommend any surgery. Instead, he recommended Claimant continue therapy and return in two weeks for consideration of a steroid injection.

10. Dr. L. Barton Goldman performed an IME at Respondents’ request in August 2021. Claimant reported that his right foot was mostly flat on the upper step to which he was shifting his bodyweight without any obvious anterior translation or twisting. Claimant reported that his right knee gave out and he heard a pop. Claimant found it difficult to bear weight when descending the ladder and reported the incident approximately one hour later. Claimant acknowledged to Dr. Goldman that the alleged mechanism of injury was relatively minor and wondered if walking approximately 6-12 miles per day at work predisposed him to injury. Claimant denied any prior problems with

the knee. Dr. Goldman reviewed photographs of the stepladder and noted it has a 60° incline, which he believed would make patellar subluxation less likely than ascending stairs with a less steep angle. Dr. Goldman diagnosed patellofemoral dysfunction with infrapatellar tendinitis, ACL strain, and reports of recurrent subluxation. He thought Claimant's ongoing symptoms were primarily due to the patellofemoral dysfunction. He believed Claimant to be "sincere and well-meaning," and "doing his best to recollect accurately his history." Nevertheless, he opined the described mechanism of injury "did not make sense for the diagnoses established in the case." He opined an injury was medically "possible" but did not think it was medically "probable." He agreed Claimant needed additional treatment and work restrictions, but not on a work-related basis.

11. Dr. Goldman testified at hearing consistent with his report. He testified Claimant's history suggests dislocation, but examinations have not shown it. Dr. Goldman opined injuries such as this occur most commonly when going downhill, because the bone externally rotates causing the femur to go in the opposite direction with a quick flexion of the knee which pulls the kneecap out to the side. Dr. Goldman opined that such an injury going upstairs or uphill is possible but is not medically probable. He testified Claimant did not mentioned the stairs "wobbling" at the IME but acknowledged he did not specifically ask about that either. In any event, he thought slight movement of the staircase would make the injury "about 5% more plausible" but still not medically probable because there would still need to be some sort of twisting movement. He opined the knee condition for which Claimant has been treated probably occurred within a month or so of the reported date of injury. He described Claimant as "forthright" and did not believe he has falsified the incident. He opined Claimant's knee may have been "predisposed" to injury, but "not to the degree of what we're seeing here."

12. The ALJ credits the causation opinions of Dr. Bradley and Ms. Livingston over the contrary opinions of Dr. Goldman.

13. Claimant proved he suffered a compensable injury to his right knee on May 21, 2021. Claimant's description of the accident is credible and unrebutted by any persuasive evidence. A coworker observed and assisted Claimant immediately after the accident. Dr. Goldman opined Claimant is forthright and sincere and did not falsify the injury. Claimant's knee was asymptomatic before the work accident despite a performing a job that required extensive standing and walking. Ms. Livingston's examination on the date of injury showed objective abnormalities consistent with an acute event. The MRI revealed no pre-existing degenerative pathology or other condition that would have coincidentally precipitated the onset of symptoms at work. There is no persuasive evidence of any alternate injurious event or other causal factor. The preponderance of persuasive evidence shows Claimant's symptoms and need for treatment were precipitated by the distinctly work-related act of climbing a ladder to put parts away.

14. Claimant was prescribed a knee brace by authorized provider. The knee brace was reasonably necessary treatment for the compensable knee injury.

CONCLUSIONS OF LAW

A. Compensability

To receive compensation or medical benefits, a claimant must prove he is a covered employee who suffered an injury arising out of and in the course of employment. Section 8-41-301(1); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000); *Pacesetter Corp. v. Collett*, *33 P.3d 1230* (Colo. App. 2001). The "course of employment" requirement is satisfied if the injury occurred within the time and place limits of the employment relationship and during an activity that had some connection with the employee's job-related functions. *Wild West Radio, Inc. v. Industrial Claim Appeals Office*, 905 P.2d 6 (Colo. App. 1995). An injury "arises out of" employment when it has its origin in an employee's work-related functions and is sufficiently related to those functions to be considered part of the employment. *City of Brighton v. Rodriguez*, 318 P.3d 496 (Colo. 2014). The claimant must prove an injury directly and proximately caused the condition for which he seek benefits. *Wal-Mart Stores, Inc. v. Industrial Claim Appeals Office*, 989 P.2d 251 (Colo. App. 1999). The mere fact that a claimant experiences symptoms during or after an activity at work does not necessarily mean they suffered a compensable injury. *Finn v. Industrial Commission*, 437 P.2d 542 (Colo. 1968); *Cotts v. Exempla*, W.C. No. 4-606-563 (August 18, 2005); *Miles v. City and County of Denver*, W.C. No. 4-961-742-01 (July 10, 2015). Claimant must prove entitlement to benefits by a preponderance of the evidence. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979).

As found, Claimant proved he suffered a compensable injury to his right knee on May 21, 2021. Claimant's description of the accident is credible and unrebutted by any persuasive contrary evidence. Although the accident was unwitnessed, a coworker came to his aid immediately and observed Claimant in distress. The ALJ expects Respondents would have presented testimony from the coworker if Claimant's account were inaccurate. Claimant had no problems with his knee before the work accident despite a performing a job that required extensive standing and walking. Claimant's knee became symptomatic for the first time when he stepped up on the ladder and has remained continuously symptomatic ever since. Dr. Goldman opined Claimant is forthright and sincere and did not falsify the injury. Ms. Livingston observed objective abnormalities (ecchymosis and swelling) on examination shortly after the accident, consistent with an acute event. The MRI revealed no pre-existing degenerative pathology or other condition that would have coincidentally precipitated the onset of symptoms at work. There is no persuasive evidence of any alternate injurious event or other causal factor. Given that confluence of factors, most persuasive conclusion is that the activity Claimant was performing when his knee popped and became painful was the proximate cause of his symptoms.

Claimant's case is analogous to the situation in *Reinhard v. Pikes Peak Broadcasting Co*., W.C. No. 4-114-050 (May 20, 1993). The claimant in *Reinhard* was walking down a flight of stairs to a room where his next job assignment was posted. As he turned the corner at the bottom of the stairs, he felt a pop in his back. The injury was deemed compensable because it had its origin in the distinctly work-related activity of descending the stairs. The ICAO noted the mere fact that "the claimant's injury could have occurred from similar activities outside the scope of employment did not compel the ALJ to conclude that the claimant's injury was not compensable."

As in *Reinhard*, *supra*, Claimant's symptoms and need for treatment were precipitated by the distinctly work-related act of climbing a ladder to put parts on the shelf. Claimant proved he suffered a compensable injury arising out or and in the course of his employment.

B. Medical benefits

The respondents are liable for authorized medical treatment reasonably necessary to cure and relieve the effects of an industrial injury. Section 8-42-101. Claimant was prescribed a knee brace by an authorized provider that he had to purchase at his own expense. Claimant is entitled to reimbursement for his out-of-pocket cost for treatment related to the compensable injury. Section 8-42-101(6)(a).

ORDER

It is therefore ordered that:

1. Claimant's claim for a right knee injury on May 21, 2021 is compensable.

2. Insurer shall reimburse Claimant for the knee brace he purchased.

3. All issues not decided herein are reserved for future determination.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ's order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: December 23, 2021

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts

ISSUES

I. Have Respondents, by clear and convincing evidence, overcome the DIME opinion of Dr. Hall that Claimant is not at Maximum Medical Improvement?

II. If the DIME opinion is not overcome, was the labral hip surgery performed by Dr. Doner (and without prior authorization) reasonable, necessary, and related to Claimant's work injury, thus subject to reimbursement by Respondents?

III. If the DIME is overcome, are Respondents entitled to reimbursement for TTD overpayments?

FINDINGS OF FACT

Based upon the evidence received at Hearing, the ALJ makes the following Findings of Fact:

Background / Procedural Posture

1. Claimant was injured on August 12, 2019, when he and a co-worker were installing a sound door that weighed 350-450 pounds. They tilted the top of the door towards Claimant, who grabbed the top of the door and lowered it down to waist level. Claimant's co-worker picked up his end of the door and Claimant, by all accounts, experienced symptoms which resulted in the claim being admitted for injuries to his lumbar spine.

2. Respondents filed a revised Final Admission of Liability on April 12, 2021, admitting for the spine injuries, but not for ongoing issues with Claimant's hip. (Ex. Y). Claimant timely objected (Ex. Z), and requested a DIME exam, which was completed, after revisions, on June 8, 2021 (Ex. 15). The DIME report found Claimant not to be at MMI, opining that Claimant's hip pathology was work-related. Respondents do not concur, and have challenged the DIME findings. Claimant has now had surgery, outside the Workers Compensation system, to his right hip, and seeks compensation.

Chronology of Claimant's Treatment

3. Claimant saw Michael Dallenbach, M.D. at *Emergicare* the same day. Claimant reported that he had a door at chest height to lower it down and place on a dolly when "he felt a popping and a tearing at the same time." The pain radiated "from the back to the right buttocks" and "down to the whole leg and ankle." There was no mention of hip pain or any mention of a twisting mechanism of injury at his initial visit. (Ex. C, p. 28) Claimant's "Detailed Injury History" indicated that his injured body part was his "lower back" as did his intake form. *Id* at 33, 37.

4. Claimant's pain diagram from that date indicated, via 'O's, that he had 'pins and needles' in his right buttock area including the side. It also noted 'O's in his right thigh and, 'aching', (via 'X's) in the back side of his right buttock, thigh, and calf down to his ankle. (Resp. Ex. C, pg. 34). There were also three 'O's on the frontal diagram in the hip area or groin area. Pain was listed at 8/10. *Id.* 'Stabbing' pain was to be depicted by an *'X' within an 'O'*, but no such markings appear on this initial diagram.

5. Dr. Dallenbach examined claimant's lumbar spine and noted abnormal lumbosacral findings. (Ex. C, p. 29) He did not examine Claimant's right hip. His initial *Impression* was that Claimant had a strain of the lower back. Id at 30. Separate injections were administered to both Claimant's *right and left* Gluteus Maximus at this visit. Id at 29-30.

6. On August 14, 2019, Claimant reported to Dr. Dallenbach that he had ongoing low back pain radiating down his right leg and into the foot and severe pain in his right buttock. Dr. Dallenbach's *review of systems* noted "Injury/pain to back, Injury/pain to hip, Injury/pain to leg, Injury/pain to knee". (Ex. C, p. 41). There are no notes indicating that Dr. Dallenbach examined or tested Claimant's right hip. However, injections into Claimant's *right and left* Gluteus Maximus were also performed that day. *Id* at 42-43.

7. Claimant's questionnaire from August 14, 2019, noted his current pain was in his "*right* lower butt cheek down the leg." Pain was now self-reported at 10/10. There are whole body pain charts, with a frontal and rear view. (Ex. C, pg. 46). As best as can be discerned, the rear view depicts pain down the entire right leg from waist to ankle, with an apparent mixture of 'X's and 'O's, but with the 'O's more towards the buttock area. It appears that there is considerable overlap with some of the 'X's and 'O's, perhaps indicating 'stabbing' pain in that area.

8. On this same page, the ALJ notes that Claimant actually has marked the frontal view as exclusively affecting his *left* side. Due to Claimant's reported 10/10 pain, the ALJ attributes this mismarking as confusion on the part of Claimant, and that he intended to report his frontal pain to his *right* side. Once again, there is a mixture of 'X's and 'O's, with 'O's weighted towards his upper leg/wait area. The lower leg is exclusively 'X's. However, at the groin area, there are (while rather sloppily performed) markings indicative of overlapping of 'X's and 'O's, best interpreted as 'stabbing' pain in the groin and quad region. *Id* at 46.

9. Claimant saw Erik Ritch, M.D., on August 16, 2019 and reported "severe *right* sided low back pain radiating down the back of his right leg to the ankle." Pain attain at 10/10. There was no specific mention of right hip pain, and his hip was not tested. (Ex. C, p. 52) The follow-up visit questionnaire noted that his pain was in his "right back side." The pain diagram (this time correctly R/L oriented by Claimant, but sloppily executed) appears to show 'stabbing' pain in Claimant's right buttocks, down the back side of his right leg into his ankle and 'pins and needles' on the front side of claimant's right leg, including the hip and groin area. *Id* at 54.

10. Claimant saw Dr. Dallenbach on August 21, 2019. The hip was not

examined. (Ex. C, pp. 58-59) The pain diagram (now at 8/10, and correctly R/L oriented) appears to show stabbing pain in the right buttock and pins and needles and stabbing pain in the right calf and ankle as well as pins and needles in his right groin area. Less emphasis on the thigh was marked at this visit. *Id* at 61. There was a reference at this visit to referral to a surgeon for the lumbar symptoms; none for hip issues. *Id.*

11. Claimant saw Dr. Dallenbach on August 26, 2019 and reported ongoing pain radiating from his back to his ankle. Claimant's hip was not examined. (Ex. C, pp. 64-65) Claimant's pain diagram (R/L oriented) did not materially differ from that of 8/21/2019. *Id* at 67. Pain was 8/10, but listed as worsening, with no relief from the prescribed medications. *Id.*

12. On August 28, 2019, Claimant reported to Dr. Dallenbach that he had lower back pain radiating to his buttocks, calf and ankle. Claimant's hip was not examined. (Ex. C, pp. 68-69) Claimant's pain diagram, again, generally resembled the previous one. *Id* at 70. Pain this date was reported at 6/10. *Id.*

13. Claimant returned to Dr. Dallenbach on September 4, 2019. He now reported that he had low back pain radiating to the side into the buttock, lower leg, and calf. (Ex. C, pp. 72-74). Claimant was now complaining of the delays in getting in to see a surgeon, due to constant pain. Claimant's pain diagram appeared to show that he had pins and needles in his low back, right buttock, right thigh, right and left groin, right calf and right ankle. (Ex. C, p. 76). Pain at 8/10. Despite all focus being on Claimant's *right* sided complaints, the medical noted indicate that Claimant actually received two separate injections into his *left* Gluteus that day. Id at 74.

14. Claimant saw Dr. Dallenbach September 11, 2019 and reported persistent back and leg pain. (Ex. C, pp. 82-83) The pain diagram (7/10 pain now reported, R/L oriented) was more detailed, noted an apparent mixture of "X's, and 'O's, sometimes overlapping, in the right buttock, thigh, calf and ankle-*and groin area*. *Id* at 85.

15. Claimant presented to neurosurgeon Sana Bhatti, M.D., on September 16, 2019. He reported that he hurt his back lifting a 400 pound door. He stated that he felt a pop in the low back on the right side, with immediate pain down his right leg to the calf. His pain level was a 7/10. There was no mention of any popping in the right hip or any hip pain. At this visit, Claimant did not report a twisting mechanism of injury. (Ex. D, p. 201). Dr. Bhatti examined claimant's low back, but no examination was done to the right hip. Dr. Bhatti recommended a right L4-5 discectomy with L4-5 fusion. Id at 202.

16. Claimant saw Dwight Leggett, M.D. of *Accelerated Recovery Specialists,* on September 19, 2019. He reported that he was moving a 400 pound door to put it on a cart when he had a "sudden onset of pain in the low back region, which was associated with a 'pop' on the right side." He reported immediate pain down the right leg, primarily in the lateral aspect of the right thigh and calf. There was no mention of a popping or pain in the right hip or a twisting mechanism of injury. (Ex. F, p. 328) Claimant reported that his pain started in the right low back region, went to his buttock, right leg, thigh and foot but not his right hip. (Resp. Ex. F, pg. 329-30). Focus was clearly on the apparent L4/L5

disc herniation, and how to address that. However, under his listed *Impressions*, Dr. Leggett noted:

> 1. It has been several weeks since his accident, and he continues to have significant back pain was well as right leg pain. On exam, there are areas of mechanical irritation, including facet mediated pain, sacroiliitis, myofascial tightness, and *trochanteric bursitis**….**Highest* pain generation seems to be associated with a radiculopathy traveling into the right lower extremities.
>
> 2. Review of the MRI indicates a fairly recent herniation at the L4-L5 level. While this encroaches upon nerves, it did not appear to actually compress any nerve roots. However, there is clearly reproducible radicular symptoms on exam. *….He feels he has some* *soreness in the hip**,* but this is again likely compensatory in nature. *Id* at 331 (emphasis added).

17. On October 1, 2019, Claimant reported to Dr. Dallenbach that he had low back pain that radiated to his right leg. (Ex. C, pp. 87-88) Claimant's pain diagram (now at 4/10) appears to indicate that Claimant had pins and needles in his right groin, thigh, calf and ankle as well as stabbing pain in the right buttock. *Id* at 90.

18. Claimant returned to Dr. Bhatti on October 17, 2019. He reported low back pain that radiated down the posterior aspect of the right leg with numbness and paresthesias, but no hip pain was noted. His pain level was 7/10. (Ex. D, p. 204). At this visit, it was agreed that a L4/L5 discectomy and fusion should proceed. *Id.*

19. On November 25, 2019, Claimant returned to Dr. Dallenbach, and reported ongoing pain that radiated from his lumbar spine into his buttocks and pain in his neck and left arm. There is no mention of right hip pain and his hip was not examined, although his left upper extremity was examined. Claimant weighed 285 pounds with a BMI of 42.086. (Ex. C, pp. 97-98) Claimant's pain diagram was left blank on the frontal view, but the rear view now noted 'O's across both buttocks and down the lateral aspect of the right leg. *Id* at 103.

20. Claimant saw Michael Sparr, M.D. (also with *Accelerated Recovery Specialists*), on December 3, 2019. Claimant was now reporting *left upper extremity* numbness and tingling. He reported that a 400-pound door was falling towards him. He was unable to secure the door and "tried to throw it." He had "immediate onset of central back pain." There was no mention of hip pain. He complained of low back pain and left hand numbness and tingling. Dr. Sparr examined claimant's cervical spine but did not examine Claimant's hip. There was now an abnormal electrodiagnostic study of his left upper extremity, suggestive of possible C7 radiculopathy or carpal tunnel syndrome. (Ex. F, pp. 342-344)

21. On December 9, 2019, Dr. Dallenbach examined Claimant's lumbar and cervical spine. There was no mention of right hip pain and his hip was not examined. Claimant's pain diagram now noted numbness and tingling in his neck, shoulder, arm and hand on the left side as well as pins and needles in both sides of his low back and buttocks

and his right groin, thigh, calf and ankle. (Ex. C, pp. 107-108, 110)

22. Claimant saw Scott Stanley, M.D., of *Centura Orthopedics* (apparently at Respondents' request) on December 18, 2019. He reported diffuse lower back pain that radiated into both buttocks, right posterolateral hip and lower extremity. There was no mention of specific right hip pain other than that his back pain radiated down the side of his hip. His pain level was 6/10. (Ex. H, p. 353) Claimant's pain diagram noted that he had pain, aching, and pins and needles bilaterally in his low back and buttocks and pins and needles on the side of his right thigh into his ankle. There were no markings in his right groin or hip area. *Id* at 363. Dr. Stanley examined claimant but did not test his right hip. *Id* at 356-57. Dr. Stanley appears to have concurred with Dr. Bhatti's overall surgical assessment. *Id.*

23. On December 23, 2019, Dr. Dallenbach evaluated Claimant, but did not note right hip pain, and did not examine claimant's hip. Claimant weighed 293 pounds with a BMI of 42.04. (Ex. C, pp. 112-13) Claimant's pain diagram noted pins and needles in the left side of his head, shoulder, left and right groin, left thigh, calf and ankle as well as numbness in his left forearm and hand. It also noted stabbing pain in the left and right side of his low back and buttocks as well as his right calf and ankle. *Id* at 115.

24. On January 6, 2020, Claimant saw Rachel Langley, D.O. (also with *Emergicare*), who noted abnormal flexion, extension, and rotation of the lumbar spine on exam. There was no mention of right hip pain and the hip was not examined or tested. No pain diagram is noted for this visit. (Ex. C, pp. 117-18)

25. Claimant saw Dr. Dallenbach (now noted to be on *Concentra* letterhead) on January 14, 2020. He reported bilateral lower back pain that radiated to his buttocks, thighs and bilateral calves. There was no mention of right hip pain. (Ex. C, pg. 121). Dr. Dallenbach examined Claimant's lumbar spine but he did not examine his right hip. (Ex. C, pg. 121-22). [It is noted that once Dr. Dallenbach's apparent affiliation began with *Concentra*, there are verbal pain descriptions noted by the patient, but no longer pain diagrams offered].

26. On February 3, 2020, Dr. Bhatti noted that Claimant had low back pain with radiation down the right leg. There was no mention of right hip pain. Dr. Bhatti examined claimant's low back but did not examine claimant's right hip. However, it is readily apparent that pages from Dr. Bhatti's report were not submitted into evidence. The significance of the contents of said excised pages cannot be inferred. (*see* Ex. D, generally)

27. On February 10, 2020, Dr. Bhatti performed his recommended L4-5 right foraminal decompression and fusion. (Ex. D, p. 216)

28. On his February 20, 2020 post-surgical follow-up, Claimant reported to Dr. Bhatti that his low back pain which had radiated to the posterior aspect of the right leg had resolved. He no longer had paresthesias, and his numbness had improved. (Ex. D, p. 236)

29. Claimant saw Lisa Baron, M.D., (with *Concentra*) on March 10, 2020. He reported that he no longer had pain in his right lower extremity but did have some aching in the left buttock. There was no mention of pain in the right hip. His pain level was 5/10. (Ex. C, pg. 132) Dr. Baron did not test or examine his right hip. *Id.*

30. Claimant saw Shelby Johnson, PA, on March 24, 2020, and reported improvement in his right sided pain but continued with neck and arm pain with a pain level of 4/10. There was no mention of hip pain and it was not examined. (Ex. C, p. 136)

31. On April 2, 2020, Claimant reported to Dr. Bhatti that his low back pain that radiated to his right leg had resolved. He no longer had paresthesia, and his numbness had improved. There was no mention of right hip pain. (Ex. D, p. 240).

32. Claimant saw Dr. Dallenbach on April 9, 2020, and reported that his pain was more focused on the left side of his back and leg as well as his left upper extremity. His pain level was a 4/10 in the lumbar spine. There was no mention of right hip pain and his hip was not examined. (Ex. C, p. 139)

33. Claimant saw Tianna Voros, PA-C (with *Concentra*), on April 23, 2020. He reported that he was "handed a 450 lb door from another person and his *trunk* twisted under the weight of the door which caused his back injury." He also claimed that he injured his cervical and lumbar spine at that time. Claimant reported that his low back pain level was better at a 4/10 but he had more pain on the left side of his back. There was no mention of right hip pain and his hip was not examined. (Ex. C, pg. 142)

34. On May 7, 2020, Claimant saw Daniel Peterson, M.D. (also with *Concentra*), and reported "Patient feels like his pain is getting *worse in his hips* and neck pain and headaches are everyday." (Ex. C, p. 145) The report noted hip and buttocks area weakness, leg weakness, numbness and tingling. *Id* at 146.

35. On May 18, 2020, Claimant saw Dr. Bhatti, and reported difficulty ambulating, secondary to his back pain. There was no specific mention of right hip pain. (Ex. D, pg. 246).

36. Claimant again saw Dr. Bhatti on June 1, 2020. He reported neck pain and left arm pain, as well low back pain. There was no mention of right hip pain and his hip was not examined. (Ex. D, pp. 258, 260). Dr. Bhatti recommended an anterior cervical discectomy and decompression at C6-7 with fusion. *Id* at 261.

37. Claimant saw Anthony Stanulonis, M.D. (with *Concentra*), on June 8, 2020, and reported that his low back pain was a 5-6/10. He complained of bilateral low back pain that radiated into his buttocks, right greater than left and no lower extremity radicular symptoms. There was no specific mention of right hip pain, and his hip was not examined. (Ex. C, pg. 149, 151)

38. On July 6, 2020, Claimant saw Dr. Bhatti, and reported that his posterior right leg pain was much better, as was his numbness and paresthesias. He was having increased posterior back pain and neck pain but no reported hip pain. (Ex. D, p. 270)

39. Claimant saw Dr. Stanulonis on July 8, 2020, and reported low back and buttock pain as well as pain in *both* hips and numbness down his right leg with a pain level of 6/10. Dr. Stanulonis did not examine claimant's hips. (Ex. C, pp. 154, 156-57)

40. On August 12, 2020, Claimant reported to Dr. Stanulonis low back pain with radiation to the right thigh and calf as well as neck and left arm pain. There was no mention of right hip pain and his hip was not examined. (Ex. C, pp. 164, 166).

41. Apparently, in an IME report, Michael Rauzzino, M.D., (Ex. C, p. 169) determined that there was no temporal relationship between the onset of claimant's cervical symptoms and his work injury. In any event, Claimant withdrew his Application for Hearing based upon that original assertion. (Ex. T, U).

42. Claimant underwent a Functional Capacity Evaluation (FCE) on November 16, 2020, and reported that he was "lifting a 450 pound door with a partner and felt a pop in the low back with pain shooting down his right leg." Claimant reported that the pain was in his lower back going down the right lower extremity. Claimant reported his pain level was a 3/10. (Resp. Ex. J, pg. 369). The FCE tested claimant's flexion, extension, abduction, adduction, internal rotation and external rotation on his bilateral hips. Claimant's range of motion on all tests were 'within normal limits' for both hips, although there was a slight deficiency in strength in his right hip for internal and external rotation. (Ex. J, p. 379)

43. On December 11, 2020, Claimant reported to Dr. Stanulonis back pain which radiated to his right thigh and calf, with a pain level of 4-6/10. Dr. Stanulonis placed claimant at MMI. Dr. Stanulonis assigned Claimant a 28% whole person impairment rating which consisted of a 10% impairment rating per Table 53, IIE, and a 20% impairment rating for loss of range of motion. (Ex. C, pp. 188, 195-96).

44. Concentra then referred Claimant to *The Peak Physical Medicine*. (Ex. K, p. 404). Claimant then saw Timothy Sandell, M.D., on December 15, 2020, and reported that he was lifting a heavy door when he "felt a popping sensation in the low back." His pain radiated down the side of the right thigh with some numbness in the right buttock. His pain level was a 6/10. *Id* at 406. Dr. Sandell examined his low back and right lower extremity, noting some discomfort in the right leg with manual motor testing. *Id* at 408.

45. Claimant returned to Dr. Bhatti on December 21, 2020. He reported increased low back pain, with radiation down his right buttock, to his right hip and right posterior thigh. His pain level was 6/10. (Ex. D, pp. 276, 279). Dr. Bhatti noted on examination that Claimant had significant pain to abduction and external rotation of the right hip, and referred claimant for a lumbar spine and right hip MRI. *Id* at 278-279.

46. A right hip MRI was completed on January 7, 2021. The *Impressions* were as noted:

1. Coxa Magna within the right hip. There is shortening of the right femoral

neck. Decreased acetabular coverage and developmental hip dysplasia is suspected. *No marrow edema* within the right hip.
2. Normal-appearing articular cartilage and there is *no joint effusion.*
3. Thin smooth tear within the anterior labrum 2:00 position.
4. Diffuse increased signal within a normal-volume superior labrum which could reflect partial ossification/mineralization of the superior labrum. Radiographic correlation would be helpful. There is chondral undercutting of the superior labrum versus a partial-thickness labral base tear.
5. *Normal-appearing left hip* on the large field-of-view coronal STIR sequence. (Ex. 13, p. 352) (emphasis added).

47. A lumbar spine MRI was also completed on January 7, 2021. The MRI showed an instrumented fusion and canal and neural foraminal decompression at L4-5 with improved narrowing. There was moderate to severe right and moderate left neural foraminal narrowing at L3-4 which had progressed. (Ex. 13, p. 353).

48. Claimant saw Dr. Bhatti on January 14, 2021, and reported low back pain with radiation down to his right buttock, hip and thigh. His pain level was 6/10. (Ex. D, pp. 282, 285) Dr. Bhatti noted that Claimant had significant pain to abduction and external rotation of the right hip. *Id* at 284. He noted that Claimant's right hip MRI showed significant arthritic changes. He felt that this was the cause of claimant's symptoms and referred him for an orthopedic evaluation.

Claimant is Referred to Dr. Doner

49. Claimant saw orthopedist Jeffrey Doner, M.D., on April 6, 2021. He reported that he was "lifting a very heavy door and then felt a sharp pain in his right hip." (Ex. M, p. 460). Dr. Doner noted that Claimant had a positive labral impingement sign and positive Faber exam. He also noted that Claimant could not flex his hip past 30 degrees, and that he had pain with flexion, adduction and internal rotation.

50. Dr. Doner reviewed Claimant's MRI, and noted that he had a right hip acetabular tear, coxa magna and cam deformity of his right hip. He noted that Claimant had shortening of the femoral neck and decreased acetabular coverage with a center edge angle of 24 degrees. Dr. Doner recommended right hip arthroscopy with labral repair, femoroplasty and capsular closure. He felt that claimant's hip pain was causally related to his work injury because he did not have any hip pain prior to the incident. *Id* at 460.

IME by Dr. Erickson

51. Claimant saw Jon Erickson, M.D., on April 18, 2021, for an IME. Claimant

reported that he was lowering a 400 pound door onto a dolly when he felt a pop and tearing sensation in his lower back and had pain that radiated down the right leg. Claimant did not report any popping or pain in his hip, nor did he mention a twisting mechanism of injury. (Ex. N, p. 474). Claimant was positive for 4/5 Waddell signs on examination.

52. Dr. Erickson noted the right hip MRI showed an obvious deformity in the proximal femur, with coxa magna deformity and a coxa breva (a shortened femoral head). There was a large cam lesion at the femoral head/neck offset and the acetabulum was very shallow with a center edge angle of 25 degrees. Dr. Erickson noted that this was "a classic example of developmental dysplasia of the acetabulum." He noted that there was significant tearing of the labrum, extending from the anterior to the lateral labrum. (Ex. N, pp. 492-93).

53. Dr. Erickson indicated that because of "the lateralization of the femoral head, there is significant increase in pressure on the lateral acetabulum. This causes widening and thickening of the labrum and evidence of ossification, all of which are present in this case. It has been well established [in the medical literature] that there is a substantial increase in the risk of labral damage and tears with DDH and coxa magna."

54. Dr. Erickson noted that Claimant did not complain of hip pain immediately after his work injury. (Ex. N, p. 493). He indicated that during his extensive career as a hip arthroscopist, he found that hip injuries cause substantial pain and this was not consistent Claimant's lack of pain complaints. He noted that on examination, Claimant's hip pain was posterior, which was not common, nor was sustaining a labral tear without a twisting mechanism of injury. (Ex. N, p. 494) Dr. Erickson was not convinced that Claimant's right hip was severely symptomatic.

55. Dr. Erickson actually recommended a periacetabular osteotomy (PAO) to manage the DDH, and then a femoral head osteoplasty, coupled then with a labral repair. Dr. Erickson opined that Claimant's hip condition and symptomatology was not related to his August 12, 2019 work injury, because the labral tear was most likely related to his developmental abnormalities. Further, Claimant's mechanism of injury was very weak for causing a labral tear and his clinical presentation was not consistent with the injury. *Id* at 494.

The DIME Report by Dr. Hall

56. On May 6, 2021, Timothy Hall, M.D., performed the DIME exam and issued his report. Claimant reported that he was lifting a door that weighed 300-400 pounds which came to his side as his co-worker was lifting the other end. He noted a popping and pulling in his low back and twisted to put the door on a dolly. He reported having low back and leg pain and reported groin pain early on as well. (Ex. 15, p. 386). Claimant reported that he had pretty much constant pain in his back that ran down the right side through his buttock, around his lateral hip and thigh area, into the groin and down the leg into the knee. He stated that since his surgery with Dr. Bhatti he had not had as severe of leg pain. *Id* at 372. "His pain is worse when stair climbing, walking, standing, and prolonged sitting. When he sits, he does not end completely at the waist and keeps his

right leg out in front of him. He uses a cane most of the time…..He has a lift at home to help with the stairs". *Id.*

57. On examination, Claimant exhibits pain behaviors; he could get in and out of chairs 'well enough,' but getting off and on the exam table was 'difficult.' "Psoas is very tender and tight bilaterally. Hip range of motion is noted in the worksheet. In particular, he lacks pretty much any hip rotation. Maneuver of stressing the hip joint is extremely uncomfortable for him…..His gait is quite abnormal. He keeps his knee straight during ambulation." *Id.*

58. Dr. Hall's *Clinical Diagnosis* was (1). L4-5 disc herniation status post fusion at L4-5 and (2) hip pathology/symptomatology potentially related to labral tears. *Id.* Dr. Hall agreed that claimant was at MMI for his low back on December 11, 2020. *Id* at 373.

59. However, regarding the hip, Dr. Hall stated:

> Regarding the hip, there is evidence early on of groin pain on the right. He reports his groin pain not to have responded to the surgery through Dr. Sethi (sic). He does have symptomology and physical findings consistent with hip pathology. *It is my opinion this is related and requires treatment*. I cannot tell you what is the best treatment for this hip situation. It will likely come to surgery, but just what surgery would obviously be up to the surgeon and the patient. *Id* at 373. (emphasis added).

60. Under his *Rationale*, Dr. Hall stated:

> *Regarding the left hip situation as discussed above reviewing the early pain diagrams, it is clear that the groin area, right thigh, and anterior aspect of the leg are marked within a short time frame of the date of injury.* The groin pain and thigh pain did not respond to treatment of the lumbar radiculopathy….This points toward a potential additional pain generator involving the right hip and there is pathology on imaging. *It is therefore my opinion* within a reasonable degree of medical probability that *the right hip situation relates to the compensable injury.* Id at 73. (emphasis added).

61. Dr. Hall assigned provisional impairment ratings. He assigned Claimant a 26% whole person rating for his lumbar spine, which consisted of an 18% for loss of range of motion and a 10% rating under Table 53. For the right hip, he assigned an 11% whole person rating. The two ratings combined equaled a 34% whole person impairment rating. [Respondents' expert, Dr. Erickson felt that Dr. Hall's 26% impairment rating for the lumbar spine was appropriate].

Claimant receives Hip Surgery by Dr. Doner, without prior Authorization

62. Dr. Doner performed his recommended surgery on May 28, 2021. At this time, he noted that Claimant had painful mechanical locking and catching of his right hip.

(Ex. M, p. 464) {Dr. Doner acknowledged during his deposition that this “locking and catching” in Claimant’s right hip was never reported prior to this date].

63. By June 10, 2021, Claimant reported to Dr. Doner that his symptoms were improving. (Ex. M, p. 468).

Ongoing Treatment for the Admitted Lumbar Issues

64. Claimant saw Dr. Sandell on September 13, 2021, and reported increased low back pain after sitting for a long period of time at a volleyball game. He reported a burning pain across his low back and bilateral leg pain, radiating into the right thigh and a pain level of 10/10. (Ex. K, p. 436). Dr. Sandell referred claimant for lumbar and right hip MRIs. *Id* at 442.

65. The October 6, 2021, lumbar MRI showed stable post-operative changes. There was no recurrent disc disease or spinal stenosis at L4-5. (Ex. K, p. 452).

66. Claimant saw Jamie Case, PA, on October 8, 2021, and complained of low back pain that traveled up the lumbar spine and down the through the buttocks wrapping around the hips to the tops of both thighs. His pain level was 8/10. (Ex. K, p. 450).

67. The October 18, 2021, right hip MRI showed a worsening labral tear now with a complex component superiorly and anterosuperiorly, and a re-demonstrated coxa vara morphology. (Ex. EE, p. 743). Dr. Erickson testified that the recurrent and worsened labral tear was related to claimant’s uncorrected pre-existing abnormalities and obesity.

Supplemental IME Report by Dr. Erickson

68. Dr. Erickson issued an addendum report on October 18, 2021. He disagreed with Dr. Hall’s opinion that Claimant’s right hip complaints were related to his work injury. Dr. Erickson noted that upon careful review of the medical records there was no conclusive evidence of a credible complaint of hip pain prior to Dr. Bhatti’s evaluation on December 21, 2020, when Dr. Bhatti suggested that Claimant’s continued back pain could be caused by his hip. There were no specific complaints, and the pain diagrams were not diagnostic. He also noted that there were was no evidence of anyone doing an evaluation of Claimant’s right hip prior to Dr. Bhatti’s examination. This was not consistent with repeated complaints of right hip pain as alleged by Claimant.

69. Dr. Erickson noted an injury to the hip joint causes substantial pain, and pain was not present in this case. Dr. Erickson again stated that Claimant’s pre-existing conditions place his labrum at a risk for tearing as seen on the MRI. However, there was no evidence whatsoever that the labral tear occurred on August 12, 2019; rather it could have occurred at any time. (Ex. N, p. 499).

Deposition of Dr. Doner

70. Dr. Doner’s deposition was taken on October 5, 2021. He has been board certified in orthopedic surgery since 2015. He is not Level II accredited. His focus is on

arthroscopic surgery of the hip, knee, and shoulder. Claimant was initially referred to him by Dr. Bhatti, once Dr. Bhatti began to suspect that some of Claimant's complaints might be due to hip issues. At the initial examination, Claimant showed signs of labral damage on the FABER test, with severe restrictions of flexion range of motion.

71. Dr. Doner noted that the same nerve (L4/L5) that innervates the back can also innervate the hip. As a result, sometimes patients who initially see a back specialist are then referred to a hip specialist, and vice versa. After weighing the options, he felt that the arthroscopic hip repair he performed on Claimant was the best option, and hopefully will not require a hip replacement in the future.

72. Dr. Doner had reviewed the medical records from Emergicare, Dr. Bhatti, Dr. Erickson's IME, and the DIME report. Dr. Doner opined that the symptoms as relayed by Claimant were consistent with the hip injury Claimant suffered. In his practice, perhaps 20 to 30% of his patients who suffer a hip injury actually point to the buttocks area behind the hip, instead of the groin immediately to the hip joint. In reviewing the DIME report, he agreed with Dr. Hall's causation analysis, noting, in essence, that Claimant reported no symptoms before the work injury, then reported symptoms afterwards, which in turn were improved by the hip surgery. He disagreed with the initial assessment of Dr. Bhatti that Claimant's hip issues were arthritic in nature [and thus agreeing with the DIME report], since the surgery did not reveal significant arthritic changes; the arthroscopic repair would hopefully be sufficient.

73. When asked to address Dr. Erickson's position that Claimant's symptoms were due to his coxa magna abnormality (and not the work incident), Dr. Doner noted:

> A …I do agree that he has coxa magna…that was not caused by the injury. That is basically the way the hip formed when the was younger.
>
> And he also had some hip dysplasia, which is a lack of acetabular coverage. But if you look at the patient, and you talk to him, you know he told you that prior to this, you know, date, he had no pain basically coming from his hip. So *he could have been walking around with a coxa magna and his hip dysplasia his whole life, but have no symptoms.*
>
> He then had an injury he reported at work, where he believes that was what…caused that. And ever since then, he's had pain in the hip. So that's why, in my mind, attribute that to the work injury, not to having this underlying …basically anatomical abnormality, which I do agree, he does have that. (Depo, pp. 36-37) (emphasis added).

74. Dr. Doner was then asked if developmental dysplasia and coxa magna increased the chance of a labral tear, he responded:

> A In my mind it does……if you have a coxa magna, which is an abnormality of the bone. You have some hip dysplasia which abuts acetubular coverage, putting more pressure on the labrum. And then you have an injury. *I think you're more likely to…sustain such as the labral tear.*

> Whereas maybe someone, like myself, that has no bone abnormalities…dysplasia or coxa magna…my hip might not have torn. *So I think you have a lower threshold to actually get injured when you have this type of abnormality.* (Depo, pp. 37-38) (emphasis added).

75. Dr. Doner did not agree with Dr. Erickson's opinion that some sort of twisting mechanism would be required to result in a torn labrum. He mentioned, as examples, auto accidents, and tackling injuries injuring hip labrums with no known twisting involved; the shear force was sufficient. In this case, however, he understood that Claimant did in fact engage in some twisting while 'disengaging' with the heavy door. Dr. Doner agreed that excessive weight in someone with these abnormalities could increase the likelihood of damage to the hip joint as well.

Dr. Erickson Testifies at Hearing

76. Dr. Erickson testified that in his extensive clinical experience, a torn labrum causes a great deal of pain immediately when the injury occurs. Any range of motion would cause a great deal of pain. He testified that pins and needles are not a symptom of a torn labrum, but are associated with a neurogenic condition. Therefore, they do not support a finding that claimant tore his labrum on August 12, 2019.

77. Dr. Erickson noted that in his deposition testimony, Dr. Doner had noted that on the pain diagram from August 12, 2019, Claimant drew circles on his buttocks and right hip area, indicating that he had pain in those areas. However, these circles indicate pins and needles, not pain. Dr. Doner again failed to note that the hip and groin areas were marked as having pins and needles and not pain on the October 1, 2019 pain diagram. Almost all of the pain diagrams indicated only a feeling of pins and needles in the hip and groin area. Dr. Erickson testified that Claimant's pain diagrams were not diagnostic for a hip labral tear, but were consistent with a lumbar disc herniation with radiculopathy. He testified that if Claimant had suffered an acute labral tear he "would expect that the pain diagrams would be decidedly different than what they are." However, on cross-examination, Dr. Erickson partially backed off of this position, when shown specific pain diagrams, including from early in Claimant's treatment (*see*, generally Hearing Transcript at pp. 73-77).

78. Dr. Erickson testified that a labrum would likely not tear over time in a normal hip, unless there was some sort of pathology in the hip joint, like degenerative arthritis or other abnormalities. He opined that Claimant's substantial pre-existing abnormalities in his hip joint, along with his body weight, would greatly increase the chances that he would develop a labral tear from normal daily activities. Dr. Erickson testified an activity like baseball [as noted by Claimant in his testimony] could lead to, or cause, a degenerative labral tear in someone with Claimant's similar abnormalities. He noted that a degenerative labral tear could occur from normal daily activities, but the more athletic the activities are, the more likely it is you are going to have a degenerative tear. The body mechanics involved in playing baseball creates more force on a labrum and requires twisting of the hips.

79. Dr. Erickson testified that the majority of hip labral tears involved some kind of a “significant weight-bearing twist to the hip joint.” He noted that Claimant’s injury involved an “axial load, which with the waist in a bent position would put a great deal of strain on the lower back. But [he didn’t] think it would put a great deal of stress on the hip joint.”

80. Dr. Erickson testified that physicians, especially in the Workers’ Compensation field, are trained to take detailed histories and reports of injuries from injured workers, because they are critical to the cases. He testified that in his past experiences with Dr. Dallenbach, he has found him to be very thorough and complete in his examinations. Dr. Erickson opined that if a symptom or report of injury is not included in the initial medical report, then it was most likely not reported to the physician. The fact that there was no mention of immediate pain to Claimant’s hip or a twisting mechanism of injury in Dr. Dallenbach’s initial report indicated to him that there was no hip injury at the time of his accident. Dr. Erickson also noted that Claimant did not begin complaining of specific problems with his hip until after he was evaluated by Dr. Bhatti on December 21, 2020. The first time claimant reported a sharp pain in his hip was when he was first seen by Dr. Doner.

81. Dr. Erickson noted that Claimant was seen by at least 15 different medical providers from August 12, 2019, to December 21, 2020. Claimant claimed that he reported right hip pain to all of these providers but they all failed to note that he specifically reported right hip pain.

82. Dr. Erickson testified that if a patient reported immediate pain or a pop or tearing sensation in the hip joint at the time of an injury, a careful examination would be made of the hip joint. Range of motion would be tested for possible pain with external rotation and flexion. Tests like the FABER, the FADER, and the FAI impingement test would be performed to determine whether there is a labral tear or femoroacetabular impingement. Imaging studies would also be requested. The fact that Dr. Dallenbach did not perform any of these tests indicated to him that there were no complaints of hip pain. The first time anybody did an actual hip examination was when Dr. Bhatti was trying to find another possible source of Claimant’s pain. This led Dr. Erickson to believe that Claimant never complained of significant pain in his hip such that a physician took notice and did an examination.

83. Dr. Erickson testified that he could not definitively say the tear was pre-existing or if it happened after the work injury. But he could definitively say, without any serious doubt, that based on the medical records and his expertise the medical evidence did not support a finding that claimant suffered an acute labral tear on August 12, 2019.

84. Regarding the surgery performed by Dr. Doner, the following exchange occurred:

> Q Now, did you agree with the procedures that Dr. Doner performed, the surgical procedures?

> A I think that they were indicated based on the pathology of the MRI.
>
> Q Is there any additional procedures that should have been performed, in your opinion.
>
> A In my opinion, there was. [whereupon he would have recommended a hip angle realignment procedure prior to the labral repair, in order to assure better long-term results]. (Hearing transcript, pp. 61-62).

Claimant Testifies at Hearing

85. On August 12, 2019, Claimant was a lock specialist for *Colorado Lock and Safe.* Claimant's duties included installing frames and soundproof doors weighing up to 450 pounds in classified containers. Claimant testified that installation of these doors involved a lot of twisting, lifting, kneeling, and upper body strength. Claimant clarified that lifting these doors involved the use of the hips and legs, and that installation can take between 4-5 hours. Claimant had installed over a hundred of these doors prior to his work injury.

86. Claimant testified that he was moving a soundproof door with a coworker ("Jeb") on August 12, 2019, when he was injured. Claimant stated he grabbed the door at the top and it was tilted towards him. As he was walking backwards, he jerked it down to the hip and his coworker picked up the other end to transfer the weight. Claimant stated that when the weight shifted towards his coworker, he felt a tearing sensation. He continued:

> So I had a rock dolly between Jeb and I on the right. So we twisted towards the right to try to make it to the rock dolly so we didn't damage the expensive door. And when I was doing the twisting, the popping—I had that pop, and then I dropped the door and it fell on the ground. And I was in excruciating pain from that day on. (Transcript, pp.108-109).

87. Claimant testified that he experienced both a popping and tearing sensation from this motion within seconds of each other. Claimant testified that when he twisted to the right to move the door onto the dolly that he twisted with his hips and his upper body. Claimant stated that he experienced pain in his lower back, down his right leg, and his groin, which he described as being both a stabbing pain along with pins and needles. Claimant rated his pain in his right hip at the time at a 9/10.

88. Claimant testified he sought medical treatment immediately and that he reported pain in his right buttocks, groin, lower back, and right hip. Claimant testified he was referred to physical therapy and dry needling, which did not help. Claimant stated he had a L4-5 discectomy with Dr. Bhatti that helped with pain shooting down his leg but that he continued to have pain in his back and butt. Claimant had no significant change with pain in his right hip, groin, or right buttocks area after the back surgery.

89. Claimant stated he is currently experiencing pain across his low back, right buttocks, and groin. He also described limited range of motion in his right hip which is constant, and which has gotten worse over time. He described difficulty with activities of daily living, including bending over to tie his shoes, putting on socks, and getting out of bed. Claimant testified that prior to this work injury he was able to hike and play softball without pain but that he is no longer able to do these activities. Claimant also described pain in his hip and groin while rotating during sleep that resulted in a popping sensation.

90. Claimant reviewed his pain diagram from August 28th, 2019, and stated that he marked an ‘X” within a “’O” in the right groin and right buttocks. Claimant stated he also marked an “X” within a “O” in his groin and buttocks in his September 11, 2019 pain diagram. Claimant stated that he consistently reported pain in his hip to his providers. Claimant later clarified that when he stated he reported hip pain consistently to his providers that this also included reports of pain to his groin, thigh, and buttocks.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the ALJ draws the following Conclusions of Law:

Generally

A. The purpose of the Workers’ Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. §8-40-102(1), C.R.S. In general, the claimant has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not, *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979). The facts in a workers’ compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. §8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing weight, credibility and sufficiency of evidence in a workers’ compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002).

In this instance, the ALJ finds that while Claimant has not been a model of consistency throughout his diagnosis and treatment, he still did so in good faith, while in obvious distress as times. While taking a little more care, for example, in filling out the pain charts would have served him better, he likely rushed through the 'formalities' just to get on with things. And while sometimes he mentioned a 'twisting' mechanism, and sometimes he didn't, the ALJ notes that often such responses are context driven, depending upon the perceived level of detail desired by the listener. Be it noted that this entire episode, from start to finish, likely lasted *at most* a few seconds, and yielded sudden and unexpected results. It is simply asking too much to demand precise recall from a layperson whether he twisted his hips vs. his torso while searing pain surges through his back and leg, while trying to save an expensive door. Further, the ALJ finds that Claimant testified to the best of his abilities at hearing.

D. The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55, P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441, P.2d 21 (Colo. 1968). The ALJ finds that each expert has rendered their opinions-both in writing and in testimony- to the best of their ability, based upon the information they were provided. The real issue here is one of *persuasiveness.*

E. Further, courts are to be "mindful that the Workmen's Compensation Act is to be liberally construed to effectuate its humanitarian purpose of assisting injured workers." *James v. Irrigation Motor and Pump Co.*, 503 P.2d 1025 (Colo. 1972).

Overcoming the DIME Opinion on MMI, Generally

F. The party seeking to overcome the DIME physician's finding regarding MMI bears the burden of proof by clear and convincing evidence. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office, supra*; *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590, 592 (Colo. App. 1998); *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186, 189-190 (Colo. App. 2002); *Sholund v. John Elway Dodge Arapahoe,* W.C. No. 4-522-173 (ICAO October 22, 2004); *Kreps v. United Airlines,* W.C. Nos. 4-565-545 and 4-618-577 (ICAO January 13, 2005). The MMI determination requires the DIME physician to assess, as a matter of diagnosis, whether the various components of a claimant’s medical condition are casually related to the injury. *Martinez v. ICAO*, No. 06CA2673 (Colo. App. July 26, 2007). “Clear and convincing evidence” is evidence that demonstrates that it is “highly probable” the DIME physician's opinion concerning MMI is incorrect. *Metro Moving and Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995) In other words, to overcome a DIME physician's opinion regarding the cause of a particular component of a claimant’s overall medical impairment, MMI or the degree of whole person impairment, “there must be evidence establishing that the DIME physician's determination is incorrect and this evidence must be “unmistakable and free from serious or substantial doubt.” *Adams v. Sealy, Inc*., W.C. No. 4-476-254 (ICAP, Oct. 4, 2001).

G. This enhanced burden of proof reflects an underlying assumption that the physician selected by an independent and unbiased tribunal will provide a more reliable medical opinion. *Qual-Med v. Industrial Claim Appears Office, supra.* Where the evidence is subject to conflicting inferences a mere difference of opinion between qualified medical experts does not necessarily rise to the level of clear and convincing evidence. Rather it is the province of the ALJ to assess the weight to be assigned conflicting medical opinions on the issue of MMI. *Oates v. Vortex Industries,* WC 4-712-812 (ICAO November 21, 2008).

H. As a matter of diagnosis the assessment of permanent medical impairment inherently requires the DIME physician to identify and evaluate all losses that result from the injury. *Mosley v. Industrial Claim Appeals Office,* 78 P.3d 1150 (Colo. App. 2003). Consequently, a DIME physician’s finding that a causal relationship does or does not exist between an injury and a particular impairment must be overcome by clear and convincing evidence. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals Office,* 961 P.2d 590 (Colo. App. 1998). The rating physician’s determination concerning the cause or causes of impairment should include an assessment of data collected during a clinical evaluation and the mere existence of impairment does not create a presumption of contribution by a factor with which the impairment is often associated. *Wackenhut Corp. v. Industrial Claim Appeals Office,* 17 P.3d 202 (Colo. App. 2000).

I. However, the mere fact that a Claimant suffers from a pre-existing condition does not disqualify a claim for compensation or medical benefits if the work-related activities aggravated, accelerated, or combined with the pre-existing condition to produce disability or a need for medical treatment. *H & H Warehouse v. Vicory*, 805 P.2d 1167 (Colo. App. 1990). Pain is a typical symptom from the aggravation of a pre-existing condition, and the claimant is entitled to medical benefits for treatment of pain, so long as the pain is proximately caused by the employment-related activities and not the underlying pre-existing condition. *Merriman v. Industrial Commission*, 210 P.2d 448 (Colo. 1949). Moreover, an otherwise compensable injury does not cease to arise out of a worker's employment simply because it is partially attributable to the worker's pre-existing condition. *See Subsequent Injury Fund v. Thompson*, 793 P.2d 576, 579 (Colo. 1990); *Seifried v. Industrial Comm'n*, 736 P.2d 1262, 1263 (Colo. App, 1986) (“[I]f a disability were [ninety-five percent] attributable to a pre-existing, but stable, condition and [five-percent] attributable to an occupational injury, the resulting disability is still compensable if the injury has caused the dormant condition to become disabling.")

J. Generally, the Claimant must prove by a preponderance of the evidence that his symptoms were proximately caused by an industrial aggravation of a pre-existing condition rather than simply the natural progression of the condition. *Melendez v. Weld County School District #6*, W.C. No. 4-775-869 (ICAO, October 2, 2009). However, in this instance, the DIME physician has concluded that Claimant's current symptoms were proximately caused by the work injury, rather than an inevitable, natural progression of his hip condition. Respondents must now overcome the DIME in this regard.

Overcoming the DIME on MMI, as Applied

K. In this instance, Dr. Erickson has provided a number of opinions, which dispute the conclusions drawn by Dr. Hall. He opines that the proposed hip surgery was not necessitated by Claimant's work injury. He opines that Claimant's pain complaints were not consistent with the mechanism of injury. He was initially insistent that Claimant never complained of stabbing hip pain until being examined by Dr. Bhatti long after the work incident. However, (and to his credit) he at least partially walked back that assertion during cross examination when shown the relevant pain charts. In the final analysis, while it is likely true that Claimant-to his own detriment-hurried through the process of filling out the pain charts, it is also likely that Dr. Erickson hurried through the process of analyzing these same charts. It's hard to overcome a DIME when you don't play mistake-free ball yourself. The ALJ further notes that five weeks post-injury, Dr. Leggett noted that Claimant reported soreness in his hip, and areas of mechanical irritation, including trochanteric bursitis. Emphasis at that time, however, was on the L4/L5 manifestations.

While he is not Level II accredited, Dr. Doner makes a convincing case for the nexus between the work incident and Claimant's hip complaints. He is an active practitioner, and is actively treating Claimant. Perhaps surprisingly, a sizeable minority (25-30%) of his hip patients point to pain in the buttocks instead of the hip. [Although the ALJ notes in this case that Claimant actually did mark his stabbing hip even early on-while understandably more focused on his lumbar-mediated neuropathic pain]. Both he and Dr. Erickson agree that Claimant's preexisting coxa magna and hip dysplasia made Claimant more susceptible to a hip injury under these circumstances. However, (despite not even knowing what Level II means) Dr. Doner made a better analysis than Dr. Erickson on the proximate cause issue. Claimant brought his own preexisting abnormalities, and his BMI, to work with him, and subjected his hip to stresses which a more 'normal' hip might well have withstood. And he became symptomatic, said symptoms requiring treatment.

In the final analysis, Dr. Erickson's opinions, however sincere they might be, are exactly that – his medical opinions. Respondents have presented insufficient evidence that Dr. Hall *erred* in some critical fashion; instead, it is more of "that's not the way I think he should have done it." It is duly noted that Dr. Hall spend little time emphasizing Claimant's preexisting abnormalities himself, but Dr. Doner concurred with the DIME findings, and provided greater context to them. And the ALJ is not persuaded that Dr.

Doner's opinion is biased towards Claimant, with an eye towards getting paid-any more than Dr. Erickson would appreciate being labeled a 'hired gun.' The ALJ finds that the mere difference in medical opinion as expressed by Respondents' expert does not rise to the level of overcoming the DIME opinion. Claimant was not yet at MMI at the time of the issuance of the DIME report, and will not achieve it until he recovers from the surgical intervention.

Medical Benefits, Generally

L. Once a Claimant has established the compensable nature of his work injury, he is entitled to a general award of medical benefits and Respondents are liable to provide all reasonable and necessary and related medical care to cure and relieve the effects of the work injury. Section 8-42-101, C.R.S.; *Grover v. Industrial Commission, 759 P. 2d 705 (Colo. App. 1990).* However, a Claimant is only entitled to such benefits as long as the industrial injury is the proximate cause of his need for medical treatment. *Merriman v. indus. Comm'n, 210 P.2d 448 (Colo. 1949);Standard Metals Corp. v. Ball, 172 Colo. 510, 474 P. 2d 622 (1970); §8-41-301(1)©, C.R.S.* Ongoing benefits may be denied if the current and ongoing need for medical treatment or disability is not proximately caused by an injury arising out of and in the course of the employment. *Snyder v. City of Aurora, 942 P. 2D 1337 (Colo. App. 1997).* The mere occurrence of a compensable injury does not require an ALJ to find that all subsequent medical treatment and physical disability was caused by the industrial injury. To the contrary, the range of compensable consequences of an industrial injury is limited to those which flow proximately and naturally from the injury. *Standard Metals Corp. v. ball, supra*.

Medical Benefits, as Applied

M. It is duly noted that even Dr. Erickson felt that the arthroscopic labral repair performed by Dr. Doner was "indicated', based upon the pathology. The ALJ concurs, and finds such procedure was *reasonable and necessary* to cure Claimant of his hip complaints. Dr. Erickson believes that Dr. Doner should have gone even further, and addressed Claimant's complaints in a two-step process, by first addressing the underlying hip angle abnormalities. Otherwise, the labral repair might be subject to a revision, due to the ongoing stress upon the joint due to Claimant's suboptimal hip angles. Hopefully it will not come to that, but time will tell. As it is, there is no medical opinion contraindicating the *reasonableness and necessity* of the labral repair already performed. And the relatedness of Claimant's hip condition to his work injury has now been established via the DIME process. In an abundance of caution, the ALJ finds that the *relatedness* of the torn hip labrum to the work injury has also been shown by Claimant by a preponderance of the evidence. It is therefore ordered that Respondents shall reimburse Claimant (limited, of course, by the Fee Schedule) for all expenses in diagnosing and treating his torn hip labrum, including, but not limited to, the surgery already provided by Dr. Doner.

Overpayment of TTD Benefits

N. Pursuant to §8-40-201(15.5), C.R.S., "overpayment" means money received by a claimant that exceed the amount that should have been paid or which the claimant was not entitled to receive. For an overpayment to result, it is not necessary that the overpayment exist at the time the claimant received the disability benefits. *Simpson v. Indus. Claim Appeals Off.*, 2I9 P.3d 354, 359 (Colo. App. 2009), *rev'd in part on other grounds*: *Benchmark/Elite, Inc. v. Simpson*, 232 P.3d777 (Colo.2010); *see also Grandestaff v. United Airlines*, W.C. No. 4-717-644 (Dec. 12, 2013). The Court in *Grandstaff* expressly cited *Simpson v. Industrial Claim Appeals Office*, *supra*, to hold that payment of TTD benefits under an admission of liability did not bar a party from seeking to recover the TTD benefits as an overpayment. *See also Mattorano v. United Airlines*, W.C. No. 4-861-379 (July 25, 2013).

O. However, in this case, the ALJ has found that Claimant is not yet at MMI, due to his ongoing treatment and recovery for his work-related hip injury. Claimant is thus entitled to TTD payments until they are otherwise terminated by operation of law. Ipso facto, there is no overpayment owed as of the date of this Order.

ORDER

It is therefore Ordered that:

1. The DIME opinion of Dr. Hall has not been overcome. Claimant is not yet at Maximum Medical Improvement.

2. The labral hip repair performed by Dr. Doner was reasonable, necessary, and related to Claimant's work injury. Respondents shall reimburse the appropriate parties for all costs in connection therewith, subject to Fee Schedule limitations.

3. Respondents' claim for overpayment of TTD payments is denied and dismissed.

4. Respondents shall pay interest to Claimant at the rate of 8% per annum on all amounts of compensation not paid when due.

5. All matters not determined herein are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm. *In addition, in order to best assure prompt processing of your Petition, it is* ***highly recommended*** *that you send a copy of your Petition to Review to the Colorado Springs OAC via email at oac-csp@state.co.us.*

DATED: December 28, 2021

/s/ William G. Edie

William G. Edie
Administrative Law Judge
Office of Administrative Courts
2864 South Circle Drive, Suite 810
Colorado Springs, Colorado 80906

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC 5-163-922-001 & WC 5-166-299-001
(Consolidated)

ISSUES

WC. 5-163-922-001

1. Whether Claimant established by a preponderance of the evidence that he sustained a compensable injury to his left wrist arising out of the course of his employment with Employer on May 18, 2015.

2. Whether Claimant established by a preponderance of the evidence an entitlement to medical benefits related to a May 18, 2015 work injury.

3. Whether Claimant established an entitlement to temporary total disability benefits related to a May 18, 2015 work injury.

4. Claimant's average weekly wage.

5. Authorized treating provider.

6. Whether Respondents established by a preponderance of the evidence that Claimant's claim is barred by application of the statute of limitations.

7. Whether Respondents established by a preponderance of the evidence that Claimant should be penalized up to one day's temporary disability benefits for late reporting.

WC. 5-166-299-001

1. Whether Claimant established by a preponderance of the evidence that he sustained a compensable injury to is right upper extremity arising out of the course of his employment with Employer on December 9, 2020.

2. Whether Claimant established by a preponderance of the evidence an entitlement to medical benefits related to a December 9, 2020 work injury.

3. Whether Claimant established an entitlement to temporary total disability benefits related to a December 9, 2020 work injury.

4. Claimant's average weekly wage.

5. Authorized treating provider.

FINDINGS OF FACT

1. Claimant has been employed by Employer in its bakery since 2004. From 2004 to May 2010, Claimant worked as an oven operator. From May 2004 to April 2020, Claimant worked as a "wrap operator." After April 5, 2020, Claimant worked as a "scaler."

2. In the wrap operator position, Claimant placed bread inside baskets and then pushed the baskets along a conveyor belt and the baskets would move down the conveyor belt on rollers on a continual basis. Claimant testified the bread baskets weighted approximately twenty-five pounds, and that his movements were primarily with his left hand. Claimant worked five to seven days per week, and eight hours per day as a wrapper, although he often worked overtime.

3. In the "scaler" position, Claimant's duties included primarily using a hand-held scoop to scoop various ingredients from bins to a scale, using both his left and right hands. Depending on the ingredient, the loaded scoop could weigh up to five pounds. Claimant used the scoop repetitively and frequently over the course of a workday. Claimant testified that when working in the scaler position, he was not constantly using the same exact motion for scooping ingredients and that the various ingredient containers were of different heights and in various locations in his work area. Again, Claimant performed this position five to seven days per week, eight hours per day, and often worked overtime.

WC 5-163-922-001 – Procedural History

4. On February 10, 2021, Claimant reported to Employer that he had sustained an injury to his left wrist from his work as a wrap operator and a scaler. Claimant also reported experiencing the same symptoms in his right wrist at that time. (Ex. 1).

5. Also on February 10, 2021, Claimant's manager, Brittany S[Redacted], completed a Management Report of Associate Injury or Illness in which she indicated Claimant reported his private physician indicated Claimant required surgery. Claimant also reported that his wrist had been bothering him over the previous 2-4 years. (Ex. O). Employer provided Claimant a list of eight designated providers on February 10, 2021, as required by § 8-43-404 ((5)(a)(I)(A), C.R.S. (Ex. P).

6. Claimant testified that he first noted pain in his left wrist sometime in 2015, and that he went to his doctor with left wrist symptoms at that time. Claimant testified that his pain would come and go, and that he did not know what caused the pain. Claimant testified that he came to believe his left wrist symptoms were work-related sometime in 2020, after he moved to the scaler position. Claimant testified he did not report his left wrist pain until 2021 because he then realized that it would not go away and was continuous.

7. On February 12, 2021, Employer filed a First Report of Injury, for Claimant's alleged left wrist injury, indicating a date of injury of May 18, 2015, and that the alleged mechanism of injury was "repetitive motion." (Ex. 1). Respondents filed a Notice of

Contest on February 26, 2021, indicating Claimant' injury required further investigation. (Ex. B).

8. On June 10, 2021, Claimant filed an Application for Hearing in WC 5-166-922-001, endorsing issues of compensability, medical benefits, authorized provider, reasonably necessary, average weekly wage, and temporary disability benefits beginning May 18, 2015. Claimant's stated date of injury was May 18, 2015. (Ex. C).

WC. 5-163-922-001 – Medical History (Left wrist)

9. Claimant's first documented report of left wrist symptoms was on or about March 18, 2016, when Claimant saw his primary care physician, Haftu Gebrehiwot, M.D., at the Romanat Clinic. Claimant reported pain and swelling in his left wrist for two weeks. Claimant reported his pain at 9/10 and aggravated with movement. He reported he was unable to work, and he would like to obtain sick leave. Claimant denied any trauma or fall. On examination, Dr. Gebrehiwot found the left wrist warm to the touch, tender and swollen, with limited range of motion. He wrote a note to excuse Claimant from work for the period of March 18, 2016 to March 25, 2016. Dr. Gebrehiwot ordered x-rays of Claimant's left wrist. (Ex. Y & Ex. 5).

10. X-rays of Claimant's left wrist were performed at Health Images on March 25, 2016. The x-rays of Claimant's left wrist showed a widened scapholunate joint, suggesting ligamentous instability and a potential ligamentous tear. (Ex. Y, p. 104, Ex. 5, p. 49).

11. Claimant's next three documented visits with Dr. Gebrehiwot were on May 12, 2016, March 7, 2017, and March 25, 2017. At these visits Claimant reported various symptoms such as headaches and a cough. Dr. Gebrehiwot's medical records from these dates do not document that Claimant reported any wrist or upper extremity symptoms. (Ex. 5).

12. On May 24, 2018, Claimant saw Nader Shourbaji, M.D., at the UC Health hand surgery clinic for left wrist pain. Claimant reported an acute onset of pain ten days earlier that prompted a trip to the emergency room. (No records of an emergency room visit were offered or admitted into evidence). Claimant reported his wrist pain did not interfere with most of his activities, but bothered him with wrist extension and when he used it a lot. Left wrist x-rays showed SL (i.e., scapholunate joint) widening with radioscaphoid OA (i.e., osteoarthritis). Dr. Shourbaji diagnosed Claimant with arthritis, likely related to SLAC wrist, and discussed treatment options including injections and possible surgery in the future. Claimant indicated he did not wish to pursue treatment and would follow up as his symptoms warranted. Claimant testified that Dr. Shourbaji did not relate Claimant's wrist pain to his work. (Ex. 5, p. 58 – 60, Ex. Z).

13. On August 26, 2018[1], Claimant saw Dr. Gebrehiwot, M.D. for lower back pain. No wrist or upper extremity issues were documented. (Ex. Y, p. 100-101, Ex. 5, p. 40-41).

[1] The date of signature on the medical record is difficult to read, but appears to be either August 26, 2018, or August 26, 2016.

14. On or about July 20 2020[2], Claimant returned to Dr. Gebrehiwot, for complaints of bilateral wrist and hand pain with swelling for approximately three months. On examination, Dr. Gebrehiwot noted that Claimant's left medial wrist was tender and slightly swollen, with no limitation of range of motion. Claimant's right wrist and fingers were mildly tender with palpation. Dr. Gebrehiwot diagnosed Claimant with pain in both wrists and joint pain in both hands, and wrote a note to excuse Claimant from work from July 20, 2020 through July 25, 2020. Dr. Gebrehiwot did not state any opinion regarding the cause of Claimant's symptoms. (Ex. 5, p. 61-62).

15. On February 11, 2021, Claimant saw Brian Beatty, D.O., at Rocky Mountain Medical Group (RMMG). RMMG was listed on the designated provider list provided to Claimant the previous day. Claimant reported pain in his left wrist and a date of injury of May 8, 2015. Claimant reported he had been developing left wrist pain that was initially intermittent, but that he had worsened. Claimant reported that he had x-rays in 2015 which were negative and that he had been seen at University Hospital approximately two years earlier. Claimant also reported developing some right-hand pain as well. Dr. Beatty recommended that Claimant see Craig Davis, M.D., for an orthopedic consult. Dr. Beatty did not impose any work restrictions. Dr. Beatty's February 11, 2021 report does not contain any analysis of the cause of Claimant's condition. (Ex. 5, p. 72-74)

16. On March 3, 2021, Claimant saw Dr. Beatty for his left wrist, and reported no change in his symptoms. Dr. Beatty reviewed Claimant's medical records and noted that Claimant had previously been diagnosed with a SLAC 1 lesion involving his wrist. He diagnosed Claimant with an unspecified sprain of the left wrist and indicated that Claimant was released to perform full work duties. (Ex. 5, p. 76-77).

17. On March 10, 2021, Claimant saw Dr. Davis for left wrist symptoms. Claimant reported developing gradually worsening symptoms over the left wrist for the previous few years. On examination, Dr. Davis noted swelling and tenderness over the dorsal radial aspect of the wrist, and diagnosed Claimant with a scapholunate advanced collapse (SLAC) of the left wrist. Dr. Davis also opined that Claimant had posttraumatic arthritis of the left wrist, "clearly aggravated by his work activities," and that Claimant's job activities significantly aggravated the arthritis resulting in the need for surgery. Dr. Davis discussed treatment options to include steroid injections and surgery. Dr. Davis did not conduct a causation analysis and, apparently, formed his causation opinion based on information provided by Claimant. (Ex. 5, p. 78-82).

18. On March 17, 2021, Claimant saw Dr. Beatty for his left wrist. Dr. Beatty did not impose any work restrictions. (Ex. 5, p. 83-85). Dr. Beatty repeated Dr. Davis' opinion that Claimant's work activities aggravated post-traumatic arthritis, but offered no independent opinion regarding the cause of Claimant's symptoms and condition. (Ex. 5, p. 83-84).

[2] The date of signature on the medical record is July 26, 2020. However, the ALJ infers that the visit took place on or about July 20, 2020 based on Dr. Gebrehiwot's assignment of a work release beginning July 20, 2020.

WC 5-166-299-001 – Procedural History

19. On March 2, 2021, Claimant reported to Employer that his physician had referred Claimant to physical therapy for right shoulder, elbow, and forearm issues. He also reported that on March 2, 2021, he felt pain in his right hand from the shoulder to the tip of his fingers, including his shoulder, elbow, forearm, wrist, and palm of hand, "[a]ll because of overusing or scooping ingredients." (Ex. R & S).

20. Employer appropriately provided Claimant with a list of eight designated providers on March 2, 2021, as required by § 8-43-404 ((5)(a)(I)(A), C.R.S. (Ex. T).

21. On March 5, 2021, Employer filed a First Report of Injury with the division, for Claimant's right upper extremity. The stated date of injury was December 9, 2020. (Ex. E).

22. On March 23, 2021, Respondents filed a Notice of Contest with respect to Claimant's right upper extremity claims. (Ex. F).

23. On August 27, 2021, Claimant filed an Application for Hearing in WC 5-166-299-001, endorsing issues of compensability, medical benefits, authorized provider, reasonably necessary, average weekly wage, and temporary disability benefits beginning December 9, 2020. Claimant's stated date of injury was December 20, 2020. (Ex. G).

24. On September 14, 2021, WC 5-163-922-001 and 5-166-299-001, were consolidated for hearing. (Ex. I).

WC 5-166-299-001 – Medical History

25. On May 8, 2015, Claimant saw Dr. Gebrehiwot, at the Romanat Clinic, reporting right wrist pain and swelling after picking up and moving heavy objects the previous day. Claimant reported sharp pain in the wrist aggravated by movement. Dr. Gebrehiwot diagnosed Claimant with wrist pain and ordered an x-ray of the right wrist joint and hand. (Ex. 5).

26. Claimant testified he reported his right arm pain to his personal physician on December 9, 2020, and was referred to physical therapy. No record of Claimant's December 9, 2020 visit was offered into evidence. Claimant testified he did not receive any treatment for his right wrist between October 2012 and December 2020. Claimant's testimony in this regard is inconsistent with his medical records, as Claimant was evaluated for his right wrist on May 8, 2015, and for bilateral wrist pain on or about July 20, 2020.

27. From December 12, 2020 through December 28, 2020, Claimant attended three physical therapy appointments at Quality Health Physical Therapy for diagnoses of pain in right shoulder, medial epicondylitis in the right elbow and pain in the right wrist flexor. The physical therapy records indicate Claimant was referred by Dr. Gebrehiwot and the date of onset was stated as November 16, 2020. (Ex. 5, p. 63-71).

28. On March 2, 2021, Claimant saw Amanda Cava, M.D., at Concentra for evaluation of his right upper extremity symptoms. Concentra Medical Clinic was included on the designated provider list provided to Claimant on March 2, 2021. Other than a WC 164 form, no record of Dr. Cava's examination was offered into evidence. Dr. Cava noted a diagnosis of a strain of the right hand, elbow, and forearm, internal impingement of the right shoulder and a repetitive motion injury, and referred Claimant for occupational therapy and a job site analysis referral. Dr. Cava indicated claimant would be anticipated to be at maximum medical improvement in 4-6 weeks. (Ex. BB, p. 121). The WC 164 form does not include documentation of Claimant's reported medical history, subjective symptoms, objective findings, an examination, testing or causation analysis.

29. On March 6, 2021, Claimant saw Valeri M. Skvarca, PA-C, at the Concentra Medical Clinic for evaluation of right arm symptoms. The only record of Claimant's evaluation by Ms. Skvarca is a "Work Activity Status Report," indicating Claimant was able to return to work full time on March 6, 2021, and that he was anticipated to be at MMI in two weeks. (Ex. BB, p. 122). The March 5, 2021 record does not include documentation of Claimant's reported medical history, subjective symptoms, objective findings, an examination, testing or a causation analysis.

30. On March 15, 2021, Claimant saw Dr. Cava, for his right arm, hand, and shoulder. Dr. Cava's examination and findings were not included in the record. According to the Work Activity Status Report she prepared, Claimant was able to return to work without restrictions, other than no overtime. (Ex. BB, p. 123). The March 15, 2021 record does not include documentation of Claimant's reported medical history, subjective symptoms, objective findings, an examination, testing or a causation analysis.

31. On March 29, 2021, Claimant saw Dr. Cava, who released Claimant from care for his right upper extremity issues, and found Claimant had reached maximum medical improvement (MMI) on March 29, 2021. Claimant was released with no work restrictions. The only admitted record of Claimant's visit on March 29, 2021 is a Work Activity Status Report. (Ex. BB, p. 124). The March 29, 2021 record does not include documentation of Claimant's reported medical history, subjective symptoms, objective findings, an examination, testing or a causation analysis.

EXPERT WITNESSES

32. Sara Nowotny, M.A., is a vocational consultant and was admitted as an expert in vocational evaluation and rehabilitation. Respondents presented Ms. Nowotny's testimony through deposition in lieu of live testimony. Ms. Nowotny performed two job site evaluations and prepared a job demands analyses for both the wrapper and scaler positions. On July 19, 2021, Ms. Nowotny observed Claimant performing his duties in the scaler position for three hours, and prepared a job demands analysis based on her observations. Based on her observations, Ms. Nowotny determined that Claimant engaged in lifting of 0-50 pounds frequently over the course of a workday. However, she also concluded that the risk factors for cumulative trauma conditions contained in the Colorado Medical Treatment Guidelines, Rule 17, Exhibit 5, were not present. (Ex. M).

33. Also on July 19, 2021, Ms. Nowotny observed a different employee performing the duties of a wrap operator for one hour. Ms. Nowotny testified that the employee she observed was pulling trays onto a conveyor and then pushing loaves of bread into the trays, and sliding the trays onto the conveyor. Her description of the duties observed was consistent with Claimant's description of the duties performed as a wrap operator. Based on her observations, Ms. Nowotny prepared a job demands analysis for the position. Ms. Nowotny indicated that the position required frequent lifting of 11-25 pounds, and occasional lifting of 26-50 pounds. She also determined that simple and firm grasping were performed infrequently. Ms. Nowotny opined that neither the primary nor secondary risk factors for cumulative trauma conditions of the wrist or shoulder identified in the Colorado Medical Treatment Guidelines were present. (Ex. L).

34. Jonathan Sollender, M.D., was admitted as an expert in orthopedics and hand surgery. Respondents submitted Dr. Sollender's deposition in lieu of live testimony. Dr. Sollender conducted an Independent Medical Examination of Claimant on July 5, 2021. (Ex. X.) As part of his evaluation, Dr. Sollender met with Claimant, physically examined Claimant, reviewed all available medical records, and reviewed two Job Demands Analysis reports prepared by Sara Nowotny.

35. Dr. Sollender performed a causation analysis as described in WCRP Rule 15, Exhibit 5 of the Colorado Medical Treatment Guidelines for both Claimant's left wrist and right upper extremity conditions. Based on his analysis, including a thorough review of Ms. Nowotny's job demands analysis for both the wrapper and scaler positions, Dr. Sollender opined that neither Claimant's left wrist symptoms nor his right hand or wrist extremity symptoms caused by Claimant's employment with Employer. Sollender's analysis was thorough and credible. Dr. Sollender offered no opinion on the cause of Claimant's reported shoulder symptoms. (Ex. X).

CONCLUSIONS OF LAW

Generally

The purpose of the Workers' Compensation Act of Colorado, §§ 8-40-101, et seq., C.R.S. is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. Claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979). The facts in a workers' compensation case must be interpreted neutrally; neither in favor of the rights of the claimant, nor in favor of the rights of respondents; and a workers' compensation claim shall be decided on the merits. § 8-43-201, C.R.S.

Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of the administrative law judge. *University Park Care Center v. Industrial Claim Appeals* Office, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. *Id*. at 641. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission*, 441 P.2d 21 (Colo. 1968).

The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

COMPENSABILITY

To establish a compensable injury an employee must prove by a preponderance of the evidence that his injury arose out of the course and scope of employment with his employer. §8-41-301(1)(b), C.R.S. (2006); *see City of Boulder v. Streeb*, 706 P.2d 786, 791 (Colo. 1985). An injury occurs "in the course of" employment when a claimant demonstrates that the injury occurred within the time and place limits of his employment and during an activity that had some connection with his work-related functions. *Triad Painting Co. v. Blair*, 812 P.2d 638, 641 (Colo. 1991). The "arising out of" requirement is narrower and requires the claimant to demonstrate that the injury has its “origin in an employee's work-related functions and is sufficiently related thereto to be considered part of the employee’s service to the employer.” *Popovich v. Irlando,* 811 P.2d 379, 383 (Colo. 1991). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *Mailand v. PSC Indus. Outsourcing LP*, WC 4-898-391-01, (ICAO Aug. 25, 2014).

The claimant must prove a causal nexus between the claimed disability and the work-related injury. *Singleton v. Kenya Corp.,* 961 P.2d 571 (Colo. App. 1998). A pre-existing disease or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates, or combines with the pre-existing disease to produce a disability or need for medical treatment. *Duncan v. Indus. Claim Appeals Office,* 107 P.3d 999 (Colo. App. 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167 (Colo. App. 1990); *Enriquez v. Americold d/b/a Atlas Logistics*, WC 4-960-513-01, (ICAO Oct. 2, 2015).

A compensable aggravation can take the form of a worsened preexisting condition, a trigger of symptoms from a dormant condition, an acceleration of the natural course of the preexisting condition or a combination with the condition to produce disability. The compensability of an aggravation turns on whether work activities worsened the preexisting condition or demonstrate the natural progression of the preexisting condition. *Bryant v. Mesa County Valley School Dist. #51*, WC 5-102-109-001 (ICAO Mar. 18, 2020).

However, the mere occurrence of symptoms at work does not require the ALJ to conclude that the duties of employment caused the symptoms, or the employment aggravated or accelerated any pre-existing condition. Rather, the occurrence of symptoms at work may represent the result of or natural progression of a pre-existing condition that is unrelated to the employment. *See F.R. Orr Constr. v. Rinta,* 717 P.2d 965 (Colo. App. 1995); *Atsepoyi v. Kohl's Dept. Stores*, WC 5-020-962-01, (ICAO Oct. 30, 2017). The question of whether the claimant met the burden of proof to establish the requisite causal connection is one of fact for determination by the ALJ. *City of Boulder v. Streeb*, 706 P.2d 786 (Colo. 1985); *Faulkner v. Indus. Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000).

WC 5-163-922-001

Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury or occupational disease to his left wrist arising out of the course of his employment with Employer. As found, Claimant was diagnosed with a scapholunate advanced collapse (SLAC) of the left wrist. Claimant contends this condition manifested while he was working as a wrap operator in 2015, but he did not report it until 2021 because it did not become a continuous issue until 2021. Of Claimant's treating providers, only Dr. Davis opined that Claimant's condition was work-related. However, Dr. Davis' opinion is cursory, and does not demonstrate that he conducted any analysis of the cause of Claimant's condition. Moreover Dr. Davis did not credibly explain how Claimant's position as a wrap operator, or the repetitive physical movements involved in that position could cause a SLAC of the left wrist, osteoarthritis, or how his work aggravated his condition. Claimant did not offer credible, persuasive evidence that his left wrist condition is causally related to his employment with Employer. The ALJ finds credible Dr. Sollender's opinion that Claimant's left wrist condition is not work-related. Claimant has failed to meet his burden of proof of establishing a compensable injury, occupational disease, or aggravation of an existing condition.

Because Claimant has failed to establish a compensable injury, the remainder of Claimant's claims and Respondents' defenses related to the alleged May 18, 2015 injury are moot.

WC 5-166-299-001

Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable injury or occupational disease to his right upper extremity arising out of the course of his employment with Employer. The evidence presented was insufficient to establish that Claimant's reported right upper extremity symptoms are related to his work activities. Although Claimant saw Dr. Gebrehiwot on December 9, 2020, no record from Dr. Gebrehiwot from this visit was offered into evidence. While the physical therapy records from Quality PT do indicate a referral by Dr. Gebrehiwot, and stated diagnoses of right shoulder pain, and medial epicondylitis of the right elbow, no substantive evidence was offered to explain the basis for Dr. Gebrehiwot's diagnoses or whether he made any determination of causation.

After reporting his condition in March, 2021, Claimant saw Dr. Cava and Ms. Skvarca from March 2, 2021 to March 29, 2021. The only records admitted into evidence from these providers were three "Work Activity Status Reports" and a WC 164 form. These records state diagnoses of strains of the right elbow, forearm and hand, internal impingement of the right shoulder, and cumulative trauma from repetitive impact. Dr. Cava also indicated that objective findings were consistent with "history and/or work-related mechanism of injury/illness." However, the admitted records from Dr. Cava or Ms. Skvarca do not show the history Claimant provided, his subjective complaints, the providers' objective findings, testing or results of examinations performed. Consequently, the record does not contain credible evidence supporting Dr. Cava's diagnoses or causation opinion. The ALJ finds credible Dr. Sollender's opinion that Claimant's right wrist symptoms are not work related. Claimant offered no persuasive evidence demonstrating that his remaining symptoms are work-related.

Because Claimant has failed to establish a compensable injury, the remainder of Claimant's claims and Respondents' defenses related to the alleged May 18, 2015 injury are moot.

ORDER

It is therefore ordered that:

1. Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable work-related injury or onset of an occupational disease on or about May 18, 2015, as alleged in WC 5-163-922-001. Claimant's claim is denied and dismissed.

2. Claimant has failed to establish by a preponderance of the evidence that he sustained a compensable work-related injury or onset of an occupational disease on or about December 9, 2020, as alleged in WC 5-166-299-001. Claimant's claim is denied and dismissed.

3. All other issues are moot.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference,

see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: December 27, 2021

Steven R. Kabler
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, Colorado, 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. 5-171-125-001

ISSUES

I. Whether Claimant established, by a preponderance of the evidence, that he sustained a compensable injury to his left knee on April 2, 2020.

II. If Claimant demonstrated that he sustained a compensable injury, whether Respondent established, by a preponderance of the evidence, that Claimant's need for additional treatment, including surgery directed to the left knee is related to a subsequent intervening event.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant is employed as a police officer for [Employer Redacted].

2. He is a member of the SWAT team whose duties are primarily to apprehend violent suspects. His job entails engaging in a substantial amount of physical activity, including running at full speed (sprinting), lifting and jumping.

3. On April 2, 2020, two SWAT teams were in pursuit of a suspected offender. As they moved in to apprehend the suspect, he fled on foot prompting Claimant to exit his vehicle and pursue him on foot. During the chase, Claimant slipped on some loose gravel, buckling his left knee. Claimant testified that he felt a popping sensation followed by immediate pain and swelling in the left knee joint.

4. Claimant testified that he has never had any prior injuries/issues with either of his knees before to the pain he felt from the above-described episode.

5. Claimant testified that he reported the injury to his supervisor, Sergeant Troy B[Redacted] immediately. Because the alleged injury occurred on the last day of his workweek[1], Claimant testified that he elected to go home and wait to see if things improved over the weekend. According to Claimant, he spent the weekend resting and icing his left knee without much improvement. Indeed, despite these efforts, Claimant testified that he had significant discomfort and the knee remained stiff and tight.

6. In addition to the aforementioned self-care, Claimant testified that he did some internet-based research into his symptoms after which he formed a belief that he had strained his lateral collateral ligament (LCL). Based upon his research, Claimant

[1] Claimant works four 10-hour shifts, Monday through Thursday and the accident occurred on Thursday afternoon around 4:00 p.m. (Claimant's Exhibit 1, p. 2).

testified that he believed that it would simply take time for his knee heal so he did not seek the assistance of any health care providers.

7. Claimant retuned to work as scheduled on April 6, 2020 and continued to work full-duty in the ensuing months following the April 2, 2020 incident. He testified that within two to three weeks following the incident, his pain as better. Nonetheless, he reported a “vague feeling of instability.” (Resp. Ex. M, p. 57). Claimant continued to work and perform his regular job duties sometimes with assistance and at other times without because he thought it was improving.

8. By late July/early August, Claimant felt his knee had improved enough that he could attempt to play softball. Claimant testified: “[At that point,] I felt really good in my normal day-to-day movement. It really didn’t bother me unless I was trying to push it through running or trying to do some range of motion-type [activities].” However, Claimant experienced an increase in his left knee pain while he was playing in the outfield and a ball was hit to him. As he attempted to run the ball down, Claimant experienced an immediate onset of increased pain in the same area he had following the April 2, 2020 incident. Claimant testified that after resting the knee once more, his pain went back to the baseline level that he had been dealing with before playing softball.

9. Claimant testified that in the months following this softball incident, he “felt really good doing the normal activities of [his] day-to-day” and that his knee “didn’t bother [him] at all.” It was only while pushing himself while working out that he noticed discomfort in his knee.

10. As a member of the SWAT Team, Claimant testified that he stays physically fit. He participates in intense workouts and lists weightlifting, running, and mountain biking as his hobbies. (Resp. Ex. P, p. 71). He has described previously being able to squat more than 400 pounds of weight. (Resp. Ex. A, p. 7). He testified: “Outside of work, I work out probably five to seven days a week in some way, shape, or form. I’m very active. I lift weights, I do sprints, I ride a mountain bike . . . . I’m very active outside of work.” He testified that SWAT Team members are permitted to work out during work hours as long as there is not an episode that needs their attention.

11. Similar to the increased discomfort he experienced while playing softball, Claimant had an episode of intense pain while working out in January 2021. According to Claimant, he was performing deadlifts when he felt increased pain on the outside of his left knee. Claimant testified that because his self-directed treatment regimen had not ameliorated his symptoms completely and because he had again experienced increased pain with his workout, he decided to seek medical attention.

12. Claimant scheduled an appointment with Dr. Huang at the Colorado Springs Orthopedic Group for February 5, 2021; however, he was evaluated by Dr. Huang’s physician assistant (PA-C) Ryan O’Neal on this date. In conjunction with this appointment, Claimant completed paperwork that expressly indicates that his left knee injury was not work related. (Resp. Ex. M, p. 60). Claimant’s “patient History” form

indicates that his left knee pain started on March 2, 2020. (Id.). He indicated further that the left knee had "buckled" two times in the past year while running and that he had pain and at times a grinding sensation with "explosive" movements. (Id.).

13. PA-C O'Neal's February 5, 2021 record indicates that Claimant presented to the office with a complaint of "increasing left lateral knee pain over the last 10 months." (Resp. Ex. M, p. 57). Claimant reported that he had injured the knee while "running when he twisted it . . . awkwardly." (Id.). He described that he had "2-3 weeks of fairly significant left lateral knee pain and swelling . . . but did not see anyone." (Id.). Claimant further described that his left knee pain improved slowly but he continued to have a persistent feeling of instability which became manifest while working out in the gym when his left knee "buckled" on him. (Id.). Claimant explained that he had an immediate onset of left lateral knee pain that had persisted since the buckling incident in the gym. (Id.). He also described a persistent sensation of his knee wanting to "give out" on him but denied any "locking" of the knee. (Id.). Physical examination revealed a positive McMurray's with a Lachman's test and pain with palpation to the lateral aspect of the left knee raising concern for internal derangement. (Id. at p. 58). PA-C O'Neal ordered a MRI of the left knee. (Id. at p. 59).

14. An MRI was performed on February 17, 2021. The MRI revealed an undersurface oblique tear of the posterior horn of the medial meniscus near the posterior junction and a large chondral defect/irregularity of the lateral trochlea that measured 2.3 cm in length and 6 mm in width. There were also full thickness chondral changes and likely morphologic defects with extensive underlying cystic changes of the lateral trochlea along with a partial thickness chondral fissuring/small chondral flaps of the medial patellar facet and median patellar ridge. Finally, there was focal subcortical edema of the mid ridge suggesting a full thickness fissure in this area of the knee. (Resp. Ex. N, p. 63).

15. Claimant returned to Dr. Huang on February 19, 2021. Dr. Huang reiterated the following history:

> Kyle Vanderlinden is a 35 year old male police officer seen for ongoing left knee pain. He reports one year of symptoms starting when he was at work and running around the car to the left side and his knee "buckled." He was able to continue to walk and ambulate and over time, he though his symptoms would improve but unfortunately continues to clean (sic) of mild swelling and pain with high load activities including sprinting and jumping. After resting and modifying his activities and using Ibuprofen, he did have some improvement of the symptoms but approximately 3 months later, he was at a softball game and his knee gave way again. This has resulted in increased pain. His pain is described as sharp, dull and aching and heat predominate. [He] has pain over the lateral aspect of his knee with only occasional pain medially. (Resp. Ex. O, p. 65).

16. Dr. Huang performed a physical examination of Claimant's knees and reviewed the MRI findings with Claimant. Dr. Huang provided the following impressions: "Left knee medial meniscus tear posterior horn, osteochondral defect lateral trochlea/lateral femoral condyle." (Resp. Ex. O, p. 66). Treatment options included continued rest, activity modification, anti-inflammatory medication, injection therapy, bracing and physical therapy. (Id.). Surgical options included "arthroscopic partial meniscetomy medially and evaluation of the chondral defect laterally which would include possible mircofracture/chondroplasty, debridment of loose fragmentation." (Id.).

17. After seeing Dr. Huang, Claimant spoke to his supervisor and elected to file a claim arising out of the April 2, 2020, incident. Nonetheless, it was not until February 24, 2021 that an accident report detailing the April 2, 2020 incident was submitted to Respondent by Claimant's supervisor, Sgt. Troy B[Redacted]. (Clmt's Ex. 11, pp. 65-67). Claimant would not file a Workers' Claim for Compensation form asserting a date of injury of April 2, 2020 until June 6, 2021. (Clmt's. Ex 1). Regardless, Respondent-Employer appears to have had notice of the asserted claim as the same was denied by Notice of Contest filed by Respondent on May 6, 2021. (Clmt's. Ex 2). Claimant then filed an Application for Hearing on June 17, 2021. (Clmt's Ex. 3).

18. After electing to file a claim, Claimant was referred to Respondent-Employer's Occupational Health Clinic where he was evaluated by PA-C Paula Homberger on March 1, 2021. (Resp. Ex. P, pp. 68-72). PA-C Homberger's report from this date of visit notes that Claimant's knee "has continued to bother him [and] be symptomatic with explosive movements. He is fine with daily use. He denies any other injury. He reports having seen an orthopedic surgeon for evaluation [and] having an MRI. He reports seeing him because he wasn't sure this injury would be covered since he waited too long. He reports that Dr. Huang recommends surgery on the lateral aspect of the knee, reportedly an area of cartilage loss. He also reports a meniscus tear." (Resp. Ex. P, p. 68). PA-C Homberger reviewed with Claimant her recommendation for conservative treatment, including physical therapy and possible injections, and discussed with Claimant "that it sounds like the procedure Dr. Huang is recommending is not related to an acute finding, but more of a chronic finding." (*Id*.). Claimant would ultimately be referred to Dr. Michael Simpson for an orthopedic consultation. (Resp. Ex. R, p. 77).

19. Claimant was evaluated by Dr. Simpson on April 21, 2021. At the time of his evaluation, Dr. Simpson did not have either the MRI images or Dr. Huang's report available for review. (Resp. Ex. S, pp. 78, 80). Dr. Simpson indicated that Claimant's situation was "complicated" but thought that the treatment recommendation of Dr. Huang was "propria for the pathology described in his current symptomatology" but that due to the passage of time it was impossible to indicate "beyond medical probability" that the April 2, 2020 incident was responsible for the changes seen on Claimant's MRI.

20. Claimant returned for follow-up at Respondent's Occupational Health Clinic on May 4, 2021 where he was evaluated by Dr. Nicolas Kurz. Following his examination, Dr. Kurz, opined: "Based in (sic) the totality of the info provided, it is my professional medical opinion, and to a greater than 51% medical probability, that the remote

mechanism reported did not cause the findings on the MRI, [Claimant] was fully functional and able to work FDs, participate in weight lifting [and] sports, and is not causally work related. He is advised to follow up [with] his PCP privately, outside of the WC system for this non work related issue." (Resp. Ex. T, p. 88).

21. Respondent sought the opinions of Dr. Annu Ramaswamy. Accordingly, Dr. Ramaswamy completed an independent medical examination (IME) of Claimant on September 21, 2021. As part of his IME, Dr. Ramaswamy obtained a thorough history concerning Claimant's alleged injury. He also completed a medical records review and a physical examination. Following his evaluation, Dr. Ramaswamy opined:

> I would have to opine that I am not able to indicate (in medical probable fashion) that [Claimant's] current knee condition relates to the 04-20-2020 work incident. As [Claimant's] other providers have mentioned, given that [he] did not seek medical attention until 2021, there are no documented physical examinations of the knee (in close proximity to the 04-20-2020 incident). Therefore, it is impossible to indicate in medical probable fashion (greater than 51% probability) that [Claimant's] current left knee pathology relates to the 04-20-2020 incident.

22. Dr. Ramaswamy testified that his inability to causally relate the pathology in Claimant's left knee to the April 2, 2020 incident was due to the fact that (1) no physical examination was performed on Claimant's knee within a timely fashion following the April 2, 2020 incident and (2) the Claimant presented differently than someone who had suffered an acute meniscal tear or cartilage loss. Dr. Ramaswamy explained that because an examination was not performed for many months after the April 2, 2020 incident, he was "at a loss as to what the [Claimant's] diagnosis was at that time." Accordingly, he could not "say that the [Claimant's] medial meniscus tear or the loss of that cartilage . . . relates to that April 2, 2020 injury . . . ."

23. Dr. Ramaswamy testified further that it was not medically probable that Claimant would have presented in the fashion he did after the April 2, 2020 incident if the changes revealed on MRI were causally related to acute trauma.

24. Regarding the medical probability that Claimant's left knee conditions were related to the April 2, 2020 incident, Dr. Ramaswamy testified that he agreed with Dr. Simpson's statement that the injury Claimant purports to have suffered on April 2, 2020 would have been symptomatic and prompted treatment at that time. According to Dr. Ramaswamy, "[w]hen you have acute trauma to the meniscus or both areas (the cartilage and meniscus), you get all this fluid, you get tremendous inflammation, range of motion loss, trouble weight-bearing – that would've been the typical presentation for these issues from an acute event . . ." In contrast, Claimant "presented in April of 2020 with a couple of weeks of discomfort, got better . . . [and] was still working. . . ." Simply put, Claimant's presentation following the April 2, 2020 incident did not match what would have happened physiologically had Claimant's meniscus tear and chondral defect occurred acutely as

part of a traumatic event. Consequently, Dr. Ramaswamy was unable to relate Claimant's left knee condition to the April 2, 2020 incident, suggesting instead that the pathology seen on MRI was degenerative in nature.

25. As presented, the evidence persuades the ALJ that Claimant has failed to carry his burden to establish that he sustained a compensable left knee injury arising out the above-described April 2, 2020 incident. While the ALJ commends Claimant's devotion to his position and otherwise finds that he has been a consistent historian regarding the condition of his left knee and the April 2, 2020 incident, there is a dearth of forensic evidence to support a finding that the pathology in Claimant's left knee is causally related to an acute traumatic event occurring on April 2, 2020.

26. Based upon the evidence presented, the ALJ credits the opinions of Dr. Ramaswamy to find that Claimant has failed to establish the requisite causal connection between his left knee Dr. Ramaswamy noted in his examination that the claimant was extremely physically fit and such provides a plausible inference as to why the claimant did not present for medical treatment before he did. That coupled with his original research indicating that it may take considerable time for his injury to heal indicates to the ALJ that the delay in seeking any medical attention was reasonable given the fact that additionally he was not missing time from work.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Judge draws the following conclusions of law:

Generally

A. The purpose of the Workers' Compensation Act of Colorado (Act), Sections 8-40-101, C.R.S. 2007, *et seq*., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. Section 8-40-102(1), C.R.S. The facts in a workers' compensation case must be interpreted neutrally, neither in favor of the rights of the claimant nor in favor of the rights of the respondents. Section 8-43-201, C.R.S.

B. In accordance with §8-43-215 C.R.S., this decision contains specific Findings of Fact, Conclusions of Law and an Order. In rendering this decision, the ALJ has made credibility determinations, drawn plausible inferences from the record, and resolved essential conflicts in the evidence. *See Davison v. Industrial Claim Appeals Office*, 84 P.3d 1023 (Colo. 2004). This decision does not specifically address every item contained in the record; instead, incredible or implausible testimony or unpersuasive arguable inferences have been implicitly rejected. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

C. Assessing the weight, credibility and sufficiency of evidence in Workers' Compensation proceeding is the exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43, P.3d 637 (Colo.App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence presented. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo.App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo.App. 2002). The same principles concerning credibility determinations that apply to lay witnesses apply to expert witnesses as well. *See Burnham v. Grant,* 24 Colo. App. 131, 134 P. 254 (1913); *see also Heinicke v. ICAO*, 197 P.3d 220 (Colo.App. 2008). When considered in its totality, the ALJ concludes that the evidence in this case supports a reasonable inference/conclusion that Claimant suffers from both a torn meniscus and chondral defect in the left knee. While Claimant probably requires treatment for these conditions, the evidence presented, including the medical opinions of Dr. Simpson and Dr. Ramaswamy persuade the ALJ that Claimant's need for such treatment is unrelated to the April 2, 2020 incident occurring at work. Based upon the evidence presented, the ALJ concludes that Dr. Ramaswamy's opinions concerning the cause of Claimant's left knee pathology and the need for surgery are credible and more persuasive than Claimant's assertions to the contrary.

Compensability

D. A "compensable injury" is one that requires medical treatment or causes disability. *Romero v. Industrial Commission*, 632 P.2d 1052 (Colo. App. 1981); *Aragon v. CHIMR, et al.*, W.C. No. 4-543-782 (ICAO, Sept. 24, 2004); *H & H Warehouse v. Vicory,* 805 P.2d 1167, 1169 (Colo. App. 1990). No benefits flow to the victim of an industrial accident unless the accident results in a compensable "injury." *Romero*, supra; § 8-41-301, C.R.S. To sustain his burden of proof concerning compensability, Claimant must establish that the condition for which he seeks benefits was proximately caused by an "injury" arising out of and in the course of employment*. Loofbourrow v. Industrial Claim Appeals Office*, 321 P.3d 548 (Colo. App. 2011), *aff'd Harman-Bergstedt, Inc. v. Loofbourrow*, 320 P.3d 327 (Colo. 2014); *Section 8-41-301(I)(b), C.R.S.*

E. The phrases "arising out of" and "in the course of" are not synonymous and a claimant must meet both requirements for the injury to be compensable. *Younger v. City and* County of Denver, 810 P.2d 647, 649 (Colo. 1991); *In re Question Submitted by U.S. Court of Appeals,* 759 P.2d 17, 20 (Colo. 1988). The latter requirement refers to the time, place, and circumstances under which a work-related injury occurs. *Popovich v. Irlando,* 811 P.2d 379, 381 (Colo. 1991). An injury occurs in the course and scope of employment when it takes place within the time and place limits of the employment relationship and during an activity connected with the employee's job-related functions. *In re Question Submitted by U.S. Court of Appeals, supra; Deterts v. Times Publ'g Co.,* 38 Colo. App. 48, 51, 552 P.2d 1033, 1036 (1976). The "arising out of" test is one of causation. It requires that the injury have its origins in an employee's work related functions, and be sufficiently related thereto so as to be considered part of the employee's service to the employer. *Horodyskyj v. Karanian*, 32 P.3d 470, 475 (Colo. 2001). Based upon the evidence presented, the ALJ finds ample evidence to conclude that Claimant's alleged left knee injuries may have occurred in the course of his employment while pursuing a felon on foot. Nonetheless, the question remains as to whether Claimant's left knee injuries, i.e. his torn meniscus and chondral defect arose out of his employment. As found, the ALJ is not persuaded that this pathology is casually related to the events of April 2, 2020 while Claimant was chasing the aforementioned suspect.

F. The determination of whether there is a sufficient "nexus" or causal relationship between Claimant's employment and the injury is one of fact, which the ALJ must determine, based on the totality of the circumstances. *In Re Question Submitted by the United States Court of Appeals,* 759 P.2d 17 (Colo. 1988); *Moorhead Machinery & Boiler Co. v. Del Valle,* 934 P.2d 861 (Colo. App. 1996). The fact that Claimant may have experienced an onset of pain while performing job duties does not mean that he sustained a work-related injury or occupational disease. An incident, which merely elicits pain symptoms without a causal connection to the industrial activities, does not compel a finding that the claim is compensable. *F.R. Orr Construction v. Rinta*, 717 P.2d 965 (Colo. App. 1985); *Parra v. Ideal Concrete,* W.C. No. 3-963-659 and 4-179-455 (April 8, 1988)*; Barba v. RE1J School District,* W.C. No. 3-038-941 (June 28, 1991); *Hoffman v. Climax Molybdenum Company,* W.C. No. 3-850-024 (December 14, 1989). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (October 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between a claimant's work and his symptoms does not mean there is a causal connection between a claimant's injury and his/her work. Further, there is no presumption that an employee found injured on the employer's premises is presumably injured from something arising out of her work. *See Finn v. Industrial Commission,* 437 P.2d 542, 544 (Colo. 1968). As presented, the evidence does not support that Claimant sustained a work related injury to his left knee.

G. Rather, the evidence presented supports a conclusion that Claimant's alleged injury on April 2, 2020 did not require medical treatment or cause him to lose time from work. Moreover, he participated in sports and intense workouts following the events of April 2, 2020. This included participating in softball games, which he continued to participate in even after he tweaked his left knee during a game. Finally, the persuasive medical evidence supports a conclusion that the type of injury Claimant alleges to have occurred on April 2, 2020, if acute, would probably have necessitated medical treatment at or near the time of injury. Indeed, Dr. Simpson emphasized that an injury of the kind Claimant described would have been "pretty symptomatic at the time and would have led to him seeking care at that point." Similarly, Dr. Ramaswamy testified that "[t]he presentation of someone with an acute event to a meniscus or cartilage loss would have presented differently than [Claimant] did after April 2, 2020 incident. . . ." Per Dr. Ramaswamy, Claimant's presentation following the April 2, 2020 incident did not match the physiologic response one would have had if the pathology visualized on MRI were caused by an acute traumatic event leading him to conclude that Claimant's torn meniscus and cartilage loss were probably degenerative in nature. (Hearing Trans. p.

51, ll. 8-25 and p. 52, ll. 1-13). Based on the evidence presented, the ALJ concludes that Claimant has failed to prove, by a preponderance of the evidence, that there is a causal connection between his employment and the resulting condition for which medical treatment benefits are sought. §8-43-201, C.R.S.; *Ramsdell v. Horn*, 781 P.2d 150 (Colo. App. 1989); *Faulkner v. Industrial Claim Appeals Office*, 12 P.3d 844 (Colo. App. 2000). Because Claimant has failed to prove by a preponderance of the evidence that he suffered a compensable "injury" as defined by the aforementioned legal opinions, his claim for medical benefits must be denied and dismissed.[2]

ORDER

It is therefore ordered that:

1. Claimant's claim for benefits is hereby denied and dismissed.

DATED: December 29, 2021

/s/ Richard M. Lamphere
Richard M. Lamphere
Administrative Law Judge
Office of Administrative Courts
2864 S. Circle Drive, Suite 810
Colorado Springs, CO 80906

NOTE: If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. You may file your Petition to Review electronically by emailing the Petition to Review to the following email address: oac-ptr@state.co.us. If the Petition to Review is emailed to the aforementioned email address, the Petition to Review is deemed filed in Denver pursuant to OACRP 26(A) and Section 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it does not need to be mailed to the Denver Office of Administrative Courts. For statutory reference, see Section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at http://www.colorado.gov/dpa/oac/forms-WC.htm.

[2] Because Claimant failed to establish that he suffered a compensable left knee injury, this order does not address Respondent's additional contentions that an intervening event severed the causal connection between Claimant's April 2, 2020 injury and his need for treatment.

ISSUES

1. Whether Claimant has demonstrated by a preponderance of the evidence that she suffered compensable cardiac injuries during the course and scope of her employment by receiving the COVID-19 vaccination as a condition of her continued employment with Employer.

2. Whether Claimant has established by a preponderance of the evidence that she is entitled to receive reasonable, necessary and causally related medical benefits for her industrial injuries.

FINDINGS OF FACT

1. Claimant is a 48 year old female who worked for Employer as a Physical Therapist. She explained that in mid-March 2020 she tested positive for COVID-19 after working with a patient in a nursing home. Claimant noted the acute COVID-19 symptoms lasted for about 10 days. She had never previously suffered any cardiac or respiratory issues.

2. Employer subsequently required Claimant to obtain the COVID-19 vaccination as a condition of continued employment. On December 29, 2020 Claimant received the first Pfizer COVID-19 vaccination. She commented that, immediately after the vaccine, she did not develop any problems. However, about 13 days later, she noticed symptoms that included mild shortness of breath and chest discomfort.

3. On January 10, 2021 Claimant visited the Sky Ridge Medical Center Emergency Department because she had developed left scapular pain, neck pain, chest tightness and numbness in the left jaw. She reported that she suffered COVID-19 in March 2020 and had almost returned to baseline but was still experiencing some chest tightness with exertion. A chest x-ray did not reveal radiographic evidence for acute cardiopulmonary disease. EKG testing was also normal.

4. On January 19, 2021 Claimant received the second Pfizer COVID-19 vaccine. In the waiting room she developed the acute onset of chest pain and all of her prior symptoms significantly worsened.

5. Claimant testified that she was physically active and had no history of cardiac symptoms prior to her second Pfizer COVID-19 vaccine. Her activities included running, climbing and swimming.

6. On January 22, 2021 Claimant visited FNP-C Lisa Lumley at personal medical provider Aurora Internal Medicine Clinic. Claimant's emergency room visit had occurred 13 days after receiving her first COVID-19 vaccination. FNP-C Lumley noted that, after Claimant's second COVID-19 vaccination, she suffered recurrent chest pain

that subsided after approximately one hour. Claimant did not report any shortness of breath, dizziness, nausea, weakness or diaphoresis. She had experienced heart palpitations and felt flushed. Claimant further reported that her exercise tolerance had decreased after having COVID-19. FNP-C Lumley assessed Claimant with chest pain, decreased exercise tolerance, history of COVID-19, and shortened PR interval.

7. On February 22, 2021 Claimant underwent an echocardiogram. The results were within normal limits.

8. On February 25, 2021 Claimant visited cardiologist Barry Smith, M.D. at South Denver Cardiology Associates. Claimant reported a five week history of palpitations, diminished exercise tolerance due to fatigue and shortness of breath. Her episodes were essentially exercise related. She denied associated chest pain. Claimant had no peripheral edema, claudication, or neurologic symptoms. A CT angiogram at the emergency room showed no evidence of carotid vascular disease. Claimant's echocardiogram "revealed no structural heart disease and most likely her palpitations [were] benign." Dr. Smith concluded that, from a cardiac standpoint, Claimant was stable "with activity-related limitations due to new palpitations which sound like ectopic beats." He ordered a Holter monitor to evaluate Claimant's heart condition.

9. On March 8, 2021 Claimant underwent a Holter monitor evaluation. The cardiac testing was within normal limits.

10. On March 22, 2021 Claimant returned to the Emergency Department at Sky Ridge Medical Center because of significant dizziness, she noted a two month intermittent history of chest pain, dyspnea, and palpitations. All diagnostic scans at the emergency room were within normal limits.

11. On May 26, 2021 Claimant visited Robert Maulitz, M.D. at National Jewish Health for a consultation for post-COVID-19 infection symptoms. Claimant reported she had suffered COVID-19 in March 2020 "with subsequent hypoxemia, worse at altitude, as well as breathing difficulty on exertion." She also noted chest pain, palpitations and activity intolerance following her Pfizer COVID-19 vaccine in January 2021. Claimant experienced decreased oxygen levels at higher altitude. She remarked that her symptoms had "somewhat improved" since she had started taking ibuprofen 2400-2800 mg daily. Claimant's physical examination was normal and her oxygen saturation was 96 percent. Dr. Maulitz reviewed Claimant's diagnostic testing results. He assessed Claimant with shortness of breath, chest tightness, hypoxemia and tachycardia. Dr. Maulitz noted that Claimant should try albuterol two puffs every four hours as needed "especially 15-30 minutes before exercise." He recommended "overnight oximetry to ensure adequate saturation on room air at night."

12. On August 3, 2021 Claimant returned to Dr. Maulitz for an evaluation. She reported that her shortness of breath and chest tightness had improved. Claimant's vital signs and physical examination were normal. Dr. Maulitz noted that a February 2021 echocardiogram and a March 2021 Holter monitor test were normal. He assessed Claimant with shortness of breath, chest tightness, pericarditis and hypoxemia. Dr. Maulitz concluded that Claimant's symptoms were "likely related to some combination of

lung disease and Pericarditis related to vaccine." He specifically noted that pericarditis was "presumed, due to financial vaccination." Dr. Maulitz commented that Claimant should continue to use albuterol and supplement her oxygen with activity as needed.

13. On August 3, 2021 Claimant underwent pulmonary function testing at National Jewish Health. The testing revealed increased diffusing capacity and overinflation that suggested subclinical asthma.

14. The record includes a document entitled *Clinical Considerations: Myocarditis and Pericarditis after Receipt of rnRNA COVID-19 Vaccines Among Adolescents and Young Adults* that was last reviewed on August 23, 2021. The article defines "myocarditis" as "inflammation of the heart muscle" and "pericarditis" as "inflammation of the lining outside the heart." In both conditions, the body's immune system causes inflammation in response to an infection or some other trigger. Symptoms can include chest pain, shortness of breath or palpitations. Cases have occurred primarily in male adolescents and young adults 16 years of age and older.

15. On September 25, 2021 Claimant underwent an independent medical examination with Annu Ramaswamy, M.D. He reviewed Claimant's medical records and performed a physical examination. Claimant noted symptoms of chest pain, shortness of breath, palpitations, lightheadedness, dizziness and poor exercise tolerance. She related her symptoms to receiving the Pfizer COVID-19 vaccine. Dr. Ramaswamy recounted that Claimant had visited the emergency room on two occasions. She had undergone several EKG tests, two Holter monitor tests, an echocardiogram and pulmonary function tests. Dr. Ramaswamy remarked that Claimant's differential diagnoses included pericardial effusion and a pulmonary condition.

16. Dr. Ramaswamy explained that Claimant's medical records did not meet the diagnostic criteria for pericarditis. He noted that, although various tests can be normal in the setting of pericarditis, specific criteria have been established to diagnose the condition. Dr. Ramaswamy specified that *the 2015 European Society of Cardiology Guidelines on Pericardial Diseases* recommended that at least two of the following diagnostic criteria must exist to diagnose pericarditis: (1) typical chest pain (sharp and pleuritic, improved by sitting up and leaning forward); (2) evidence of a pericardial friction rub; (3) EKG changes suggestive of pericarditis and (4) new or worsening pericardial effusion. He recounted that the medical records revealed Claimant presented with chest pain and repeatedly stated that lying flat caused more pain. None of the healthcare providers noted the presence of a pericardial friction rub on examination. Furthermore, physicians did not determine that Claimant's EKG findings were consistent with acute pericarditis. Dr. Ramaswamy also remarked that the low voltage appearance on Claimant's initial EKG likely was a normal variant. Finally, an echocardiogram did not document evidence for a pericardial effusion. Dr. Ramaswamy thus concluded that Claimant only met the single criteria of chest pain under the preceding guidelines.

17. Dr. Ramaswamy explained that the Pfizer COVID-19 vaccine has caused rare instances of pericarditis in various individuals. He specified that, in an article entitled *Israel Examines Heart Inflammation Cases after Pfizer Shot*, 1 out of 100,000 individuals developed pericarditis/myocarditis after receiving the Pfizer vaccine. Notably, incidence

rates were higher for men 18-30 years of age. Dr. Ramaswamy commented that the preceding data correlated with the Centers for Disease Control and Prevention (CDC) data. Thus, even if Claimant suffered from pericarditis/myocarditis, she did not likely develop the condition as a result of receiving the Pfizer-COVID-19 vaccine.

18. The record includes an Article entitled *Safety of the BNT162b2 mRNA COVID-19 Vaccine in a Nationwide Setting* (*Safety of the COVID-19 Vaccine)* that was published on August 25, 2021 in the New England Journal of Medicine at NEJM.org. The authors of the article used data from the largest health care organization in Israel to evaluate the COVID-19 vaccine for potential adverse reactions. The study measured adverse effects up to 42 days after vaccination. In evaluating the frequency of myocarditis, 938,812 individuals were studied. Twenty-one participants in the vaccinated group and six individuals in the control group developed the condition within 42 days. Specifically, the 95% confidence interval reflected values between 1 and 5 excess events per 100,000 persons. Among the 21 persons with myocarditis in the vaccinated group, the median age was 25 years (quartile range of 20-34) and 90.9% were male. The authors of *Safety of the Covid-19 Vaccine* concluded that the risk of myocarditis increased by a factor of three after vaccination and translated to approximately three excess events per 100,000 individuals.

19. The article *Safety of the COVID-19 Vaccine* also evaluated the frequency of pericarditis, A total of 936,197 individuals were studied. Twenty-seven individuals in the vaccinated group and twenty-one individuals in the control group developed the condition within 42 days.

20. Importantly, *Safety of the COVID-19 Vaccine* also noted that the COVID-19 infection substantially increased the risk of many different adverse events. Specifically, the COVID-19 infection increased the likelihood of developing myocarditis from 3.95 to 25.12 for a risk difference of 11 events for 100,000 persons. Similarly, the COVID-19 infection increased the likelihood of developing pericarditis from 2.22 to 23.58 for a risk difference of 10.9 events per 100,000 persons.

21. Claimant has failed to demonstrate that it is more probably true than not that she suffered compensable cardiac injuries during the course and scope of her employment by receiving the COVID-19 vaccine as a condition of her continued employment with Employer. Initially, in mid-March 2020 Claimant tested positive for COVID-19 after working with a patient in a nursing home. Claimant noted the acute COVID-19 symptoms lasted for about 10 days. However, the record reveals that she continued to experience lingering symptoms. Employer subsequently required Claimant to obtain the COVID-19 vaccination as a condition of continued employment. On December 29, 2020 Claimant received the first Pfizer COVID-19 vaccination. About 13 days later, she noticed symptoms that included mild shortness of breath and chest discomfort. On January 19, 2021 Claimant received the second Pfizer COVID-19 vaccine. In the waiting room she developed the acute onset of chest pain and all of her prior symptoms significantly worsened.

22. Claimant asserts that, as a result of receiving the Pfizer COVID-19 vaccination as a condition of her continued employment, she developed cardiac problems

including myocarditis or “inflammation of the heart muscle” or pericarditis or “inflammation of the lining outside the heart.” However, a review of the medical records, scientific studies and persuasive opinion of Dr. Ramaswamy reflects that any of Claimant’s cardiac symptoms were not causally related to receiving the Pfizer COVID-19 vaccination. The record does not establish that Claimant suffered myocarditis/ pericarditis and the scientific studies reveal that it is speculative to attribute any of Claimant’s symptoms to the vaccination.

23. Subsequent to receiving the Pfizer COVID-19 vaccinations Claimant underwent several EKG tests, two Holter monitor tests, an echocardiogram and pulmonary function tests. Dr. Ramaswamy persuasively explained that Claimant’s medical records did not meet the diagnostic criteria for pericarditis. He specified that at least two of the following diagnostic criteria must exist to diagnose pericarditis: (1) typical chest pain (sharp and pleuritic, improved by sitting up and leaning forward); (2) evidence of a pericardial friction rub; (3) EKG changes suggestive of pericarditis and (4) new or worsening pericardial effusion. Dr. Ramaswamy recounted that the medical records revealed Claimant presented with chest pain and repeatedly stated that lying flat caused more pain. None of the healthcare providers noted the presence of a pericardial friction rub on examination. Furthermore, physicians did not determine that Claimant’s EKG findings were consistent with acute pericarditis. Finally, an echocardiogram did not document evidence for a pericardial effusion. Dr. Ramaswamy thus concluded that, because Claimant only met the single criteria of chest pain under the preceding guidelines, she did not suffer from pericarditis.

24. In contrast, on August 3, 2021 Dr. Maulitz assessed Claimant with shortness of breath, chest tightness, pericarditis and hypoxemia. Dr. Maulitz concluded that Claimant’s symptoms were “likely related to some combination of lung disease and Pericarditis related to vaccine.” He specifically noted that pericarditis was “presumed, due to financial vaccination.” However, Dr. Maulitz neither provided details of his pericarditis diagnosis nor outlined criteria for assessing the condition. Moreover, the medical records do not support a diagnosis of pericarditis but merely demonstrate Claimant’s subjective complaints of diminished exercise capacity, shortness of breath and palpitations. The objective diagnostic testing in the record reflects that results were largely within normal limits.

25. More importantly, assuming Claimant suffers from myocarditis, pericarditis or some other cardiac condition, it is speculative to associate the development of the disorder to Claimant’s Pfizer COVID-19 vaccination. Numerous scientific studies in the record reveal that, although it is possible to develop myocarditis/pericarditis after the COVID-19 vaccination, it is extremely unlikely. Dr. Ramaswamy specified that, in an article entitled, *Israel Examines Heart Inflammation Cases after Pfizer Shot*, 1 out of 100,000 individuals developed pericarditis/myocarditis after receiving the Pfizer vaccine. Notably, incidence rates were higher for men 18-30 years of age. Similarly, the article entitled *Safety of the COVID-19 Vaccine* specified that, from a group of 938,812 participants, twenty-one individuals in the vaccinated group and six individuals in the control group developed myocarditis within 42 days. Specifically, the 95% confidence interval reflected values between 1 and 5 excess events per 100,000 persons. Among the 21 persons with myocarditis in the vaccinated group, the median age was 25 years

(quartile range of 20-34) and 90.9% were male. The authors of *Safety of the Covid-19 Vaccine* concluded that the risk of myocarditis increased by a factor of three after vaccination and translated to approximately three excess events per 100,000 individuals. The article also evaluated the frequency of pericarditis, A total of 936,197 individuals were studied. Twenty-seven participants in the vaccinated group and twenty-one individuals in the control group developed the condition within 42 days.

26. The article *Safety of the COVID-19 Vaccine* also noted that the COVID-19 infection substantially increased the risk of many different adverse events. Specifically, the COVID-19 infection increased the likelihood of developing myocarditis from 3.95 to 25.12 for a risk difference of 11 events for 100,000 persons. Similarly, the COVID-19 infection increased the likelihood of developing pericarditis from 2.22 to 23.58 for a risk difference of 10.9 events per 100,000 persons. Accordingly, individuals are much more likely to develop myocarditis and pericarditis from the COVID-19 infection than from the vaccination. Based on the study, because Claimant suffered COVID-19 with lingering symptoms before receiving the Pfizer COVID-19 vaccination, it is more likely that any cardiac condition would be related to her prior infection as opposed to the vaccine.

27. Although Claimant explained that she developed cardiac symptoms including chest pain, shortness of breath, heart palpitations and reduced exercise tolerance subsequent to her Employer-mandated COVID-19 vaccination, it is speculative to attribute her symptoms to the Pfizer COVID-19 vaccination. Specifically, temporal proximity is insufficient to create a causal relationship. Claimant’s objective diagnostic testing revealed largely normal results and the medical record does not establish a diagnosis for myocarditis/pericarditis. Moreover, the medical literature in the record reveals a tenuous connection between the COVID-19 vaccination and the development of myocarditis/pericarditis. It is thus unlikely that Claimant’s cardiac symptoms are related to her COVID-19 vaccination. Accordingly, Claimant’s claim is denied and dismissed.

CONCLUSIONS OF LAW

1. The purpose of the “Workers’ Compensation Act of Colorado” (Act) is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. §8-40-102(1), C.R.S. A claimant in a Workers' Compensation claim has the burden of proving entitlement to benefits by a preponderance of the evidence. §8-42-101, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 197 Colo. 306, 592 P.2d 792 (1979); *People v. M.A.*, 104 P.3d 273, 275 (Colo. App. 2004). The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. §8-43-201, C.R.S. A Workers' Compensation case is decided on its merits. §8-43-201, C.R.S.

2. The Judge’s factual findings concern only evidence that is dispositive of the issues involved; the Judge has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *See Magnetic Engineering, Inc. v. ICAO,* 5 P.3d 385, 389 (Colo. App. 2000).

3. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. *See Prudential Insurance Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007).

4. For a claim to be compensable under the Act, a claimant has the burden of proving that he suffered a disability that was proximately caused by an injury arising out of and within the course and scope of employment. §8-41-301(1)(c) C.R.S.; *In re Swanson,* W.C. No. 4-589-645 (ICAO, Sept. 13, 2006). Proof of causation is a threshold requirement that an injured employee must establish by a preponderance of the evidence before any compensation is awarded. *Faulkner v. Indus. Claim Appeals Off.,* 12 P.3d 844, 846 (Colo. App. 2000); *Singleton v. Kenya Corp.,* 961 P.2d 571, 574 (Colo. App. 1998). The question of causation is generally one of fact for determination by the Judge. *Faulkner,* 12 P.3d at 846.

5. A pre-existing condition or susceptibility to injury does not disqualify a claim if the employment aggravates, accelerates or combines with the pre-existing condition to produce a need for medical treatment. *Duncan v. Indus. Claim Appeals Off.,* 107 P.3d 999, 1001 (Colo. App. 2004). A compensable injury is one that causes disability or the need for medical treatment. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967); *Mailand v. PSC Industrial Outsourcing LP*, W.C. No. 4-898-391-01, (ICAO, Aug. 25, 2014).

6. The mere fact a claimant experiences symptoms while performing work does not require the inference that there has been an aggravation or acceleration of a pre-existing condition. *See Cotts v. Exempla, Inc.,* W.C. No. 4-606-563 (ICAO, Aug. 18, 2005). Rather, the symptoms could represent the "logical and recurrent consequence" of the pre-existing condition. *See F.R. Orr Construction v. Rinta,* 717 P.2d 965 (Colo. App. 1985); *Chasteen v. King Soopers, Inc.*, W.C. No. 4-445-608 (ICAO, Apr. 10, 2008). As explained in *Scully v. Hooters of Colorado Springs,* W.C. No. 4-745-712 (ICAO, Oct. 27, 2008), simply because a claimant's symptoms arise after the performance of a job function does not necessarily create a causal relationship based on temporal proximity. The panel in *Scully* noted that "correlation is not causation," and merely because a coincidental correlation exists between the claimant's work and his symptoms does not mean there is a causal connection between the claimant's injury and work activities.

7. The provision of medical care based on a claimant's report of symptoms does not establish an injury but only demonstrates that the claimant claimed an injury. *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020). Moreover, a referral for medical care may be made so that the respondent would not forfeit its right to select the medical providers if the claim is later deemed compensable. *Id.* Because a physician provides diagnostic testing, treatment, and work restrictions based on a claimant's reported symptoms does not mandate that the claimant suffered a compensable injury. *Fay v. East Penn manufacturing Co., Inc.*, W.C. No. 5-108-430-001 (ICAO, Apr. 24, 2020); *see Snyder v. Indus. Claim Appeals Off.*, 942 P.2d 1337, 1339 (Colo. App. 1997) ("right to workers' compensation benefits, including medical payments, arises only when

an injured employee initially establishes, by a preponderance of the evidence, that the need for medical treatment was proximately caused by an injury arising out of and in the course of the employment"). While scientific evidence is not dispositive of compensability, the ALJ may consider and rely on medical opinions regarding the lack of a scientific theory supporting compensability when making a determination. *Savio House v. Dennis*, 665 P.2d 141 (Colo. App. 1983); *Washburn v. City Market*, W.C. No. 5-109-470 (ICAO, June 3, 2020).

8. As found, Claimant has failed to demonstrate by a preponderance of the evidence that she suffered compensable cardiac injuries during the course and scope of her employment by receiving the COVID-19 vaccine as a condition of her continued employment with Employer. Initially, in mid-March 2020 Claimant tested positive for COVID-19 after working with a patient in a nursing home. Claimant noted the acute COVID-19 symptoms lasted for about 10 days. However, the record reveals that she continued to experience lingering symptoms. Employer subsequently required Claimant to obtain the COVID-19 vaccination as a condition of continued employment. On December 29, 2020 Claimant received the first Pfizer COVID-19 vaccination. About 13 days later, she noticed symptoms that included mild shortness of breath and chest discomfort. On January 19, 2021 Claimant received the second Pfizer COVID-19 vaccine. In the waiting room she developed the acute onset of chest pain and all of her prior symptoms significantly worsened.

9. As found, Claimant asserts that, as a result of receiving the Pfizer COVID-19 vaccination as a condition of her continued employment, she developed cardiac problems including myocarditis or "inflammation of the heart muscle" or pericarditis or "inflammation of the lining outside the heart." However, a review of the medical records, scientific studies and persuasive opinion of Dr. Ramaswamy reflects that any of Claimant's cardiac symptoms were not causally related to receiving the Pfizer COVID-19 vaccination. The record does not establish that Claimant suffered myocarditis/ pericarditis and the scientific studies reveal that it is speculative to attribute any of Claimant's symptoms to the vaccination.

10. As found, subsequent to receiving the Pfizer COVID-19 vaccinations Claimant underwent several EKG tests, two Holter monitor tests, an echocardiogram and pulmonary function tests. Dr. Ramaswamy persuasively explained that Claimant's medical records did not meet the diagnostic criteria for pericarditis. He specified that at least two of the following diagnostic criteria must exist to diagnose pericarditis: (1) typical chest pain (sharp and pleuritic, improved by sitting up and leaning forward); (2) evidence of a pericardial friction rub; (3) EKG changes suggestive of pericarditis and (4) new or worsening pericardial effusion. Dr. Ramaswamy recounted that the medical records revealed Claimant presented with chest pain and repeatedly stated that lying flat caused more pain. None of the healthcare providers noted the presence of a pericardial friction rub on examination. Furthermore, physicians did not determine that Claimant's EKG findings were consistent with acute pericarditis. Finally, an echocardiogram did not document evidence for a pericardial effusion. Dr. Ramaswamy thus concluded that, because Claimant only met the single criteria of chest pain under the preceding guidelines, she did not suffer from pericarditis.

11. As found, in contrast, on August 3, 2021 Dr. Maulitz assessed Claimant with shortness of breath, chest tightness, pericarditis and hypoxemia. Dr. Maulitz concluded that Claimant's symptoms were "likely related to some combination of lung disease and Pericarditis related to vaccine." He specifically noted that pericarditis was "presumed, due to financial vaccination." However, Dr. Maulitz neither provided details of his pericarditis diagnosis nor outlined criteria for assessing the condition. Moreover, the medical records do not support a diagnosis of pericarditis but merely demonstrate Claimant's subjective complaints of diminished exercise capacity, shortness of breath and palpitations. The objective diagnostic testing in the record reflects that results were largely within normal limits.

12. As found, more importantly, assuming Claimant suffers from myocarditis, pericarditis or some other cardiac condition, it is speculative to associate the development of the disorder to Claimant's Pfizer COVID-19 vaccination. Numerous scientific studies in the record reveal that, although it is possible to develop myocarditis/pericarditis after the COVID-19 vaccination, it is extremely unlikely. Dr. Ramaswamy specified that, in an article entitled, *Israel Examines Heart Inflammation Cases after Pfizer Shot*, 1 out of 100,000 individuals developed pericarditis/myocarditis after receiving the Pfizer vaccine. Notably, incidence rates were higher for men 18-30 years of age. Similarly, the article entitled *Safety of the COVID-19 Vaccine* specified that, from a group of 938,812 participants, twenty-one individuals in the vaccinated group and six individuals in the control group developed myocarditis within 42 days. Specifically, the 95% confidence interval reflected values between 1 and 5 excess events per 100,000 persons. Among the 21 persons with myocarditis in the vaccinated group, the median age was 25 years (quartile range of 20-34) and 90.9% were male. The authors of *Safety of the Covid-19 Vaccine* concluded that the risk of myocarditis increased by a factor of three after vaccination and translated to approximately three excess events per 100,000 individuals. The article also evaluated the frequency of pericarditis, A total of 936,197 individuals were studied. Twenty-seven participants in the vaccinated group and twenty-one individuals in the control group developed the condition within 42 days.

13. As found, the article *Safety of the COVID-19 Vaccine* also noted that the COVID-19 infection substantially increased the risk of many different adverse events. Specifically, the COVID-19 infection increased the likelihood of developing myocarditis from 3.95 to 25.12 for a risk difference of 11 events for 100,000 persons. Similarly, the COVID-19 infection increased the likelihood of developing pericarditis from 2.22 to 23.58 for a risk difference of 10.9 events per 100,000 persons. Accordingly, individuals are much more likely to develop myocarditis and pericarditis from the COVID-19 infection than from the vaccination. Based on the study, because Claimant suffered COVID-19 with lingering symptoms before receiving the Pfizer COVID-19 vaccination, it is more likely that any cardiac condition would be related to her prior infection as opposed to the vaccine.

14. As found, although Claimant explained that she developed cardiac symptoms including chest pain, shortness of breath, heart palpitations and reduced exercise tolerance subsequent to her Employer-mandated COVID-19 vaccination, it is speculative to attribute her symptoms to the Pfizer COVID-19 vaccination. Specifically, temporal proximity is insufficient to create a causal relationship. Claimant's objective

diagnostic testing revealed largely normal results and the medical record does not establish a diagnosis for myocarditis/pericarditis. Moreover, the medical literature in the record reveals a tenuous connection between the COVID-19 vaccination and the development of myocarditis/pericarditis. It is thus unlikely that Claimant's cardiac symptoms are related to her COVID-19 vaccination. Accordingly, Claimant's claim is denied and dismissed.

ORDER

Based upon the preceding findings of fact and conclusions of law, the Judge enters the following order:

Claimant's claim for Workers' Compensation benefits is denied and dismissed.

If you are a party dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, Colorado, 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. *For statutory reference, see section 8-43-301(2), C.R.S. (as amended, SB09-070). For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a form for a petition to review at https://oac.colorado.gov/resources/oac-forms*.

DATED: December 30, 2021.

DIGITAL SIGNATURE:
Peter J. Cannici

Peter J. Cannici
Administrative Law Judge
Office of Administrative Courts
1525 Sherman Street, 4th Floor
Denver, CO 80203

OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NO. WC No. 5-169-499-001

ISSUES

I. Whether Claimant has proven by a preponderance of the evidence that Claimant is entitled to temporary total disability benefits from April 11, 2021 and ongoing until terminated by law.

II. Whether Respondents have proven by a preponderance of the evidence that Claimant is responsible for the wage loss.

PROCEDURAL HISTORY

Respondents filed a General Admission of Liability on May 18, 2021 for medical benefits only, denying loss of wages as they alleged modified duty was available.

Claimant filed an Application for Hearing on June 11, 2021, through prior counsel, on issues that included compensability, medical benefits, authorized medical provider, change of physician, right of selection of authorized treating provider, temporary disability benefits and average weekly wage.

Respondents filed a Response to Application for Hearing on August 9, 2021 on additional issues of responsibility for wage loss, waiver of selection of treating provider or change of physician.

STIPULATION

The parties stipulated to an average weekly wage at hearing of $680.00.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ enters the following findings of fact:

1. Claimant was 61 years old at the time of the hearing. Claimant worked as a kitchen helper performing a variety of duties for Employer, including washing dishes, washing the floor mats and floors for the cooks, taking out trash, which required Claimant to lift the heavy bags of trash onto a cart, up to six or seven bags at a time, and roll them to the basement. Claimant reported to the therapist he would lift and carry up to 50 lbs. Claimant would be standing the majority of the time, with the exception of breaks.

2. The employment records showed an Application for Employment dated April 6, 2021, though the records were only electronic and not signed by Claimant. Claimant testified that he obtained the job through a phone conversation with the supervisor, or account manager, who advised Claimant that they would be providing him with a copy of the documents that were being completed, which he never received. After

he applied by phone, he received a call from the supervisor stating that they had checked his background and that he had been approved for employment. He was instructed when and where to show for work by phone. He was later provided with an envelope with only a bank card in it, he was instructed to activate the card and then he would be able to withdraw his wages. The Employer's Earning Statement shows 7.5 hours of work for the week of March 26, 2021 through April 1, 2021. It is to be inferred that Claimant's 7.5 hours of work actually happened on either April 1 or before this date, and it is inferred that the completed documents were finalized after Claimant had begun to work for Employer. The next Earnings Statement covers April 2, 2021 through April 8, 2021 for 39 hours worked. No records were provided for the actual date of injury. Claimant stated that he only ever spoke with his supervisor by phone or text and never met her in person.

3. On April 10, 2021 at approximately 11:30 p.m., Claimant was walking in the kitchen service area when he slipped and fell onto his knees, catching himself before falling all the way to the ground, cutting his hand on broken glass.

4. Claimant went to an emergency clinic on April 11, 2021 at Advanced Urgent Care, and was attended by Physician Assistant Briana Vieta. Claimant reported injuries to his bilateral knees, hand and low back that occurred on April 10, 2021. They conducted a physical exam, took x-rays, provided medications and recommended therapy of ice and heat. Ms. Vieta also provided work restrictions of lifting, carrying, pushing and pulling of 10 lbs. maximum, with walking, standing and sitting up to 50% of the time per day, as well as seated breaks as needed. Claimant testified that he was advised that he had no broken bones.

5. Claimant was seen at Concentra by Amanda Cava, M.D. on April 13, 2021 Claimant's chief complaints were his bilateral knees, bilateral elbows, hips and left hand laceration, as well as soreness and limited movements. He reported low back pain in the central low back spreading across the low back. Claimant informed Dr. Cava that he slipped on the wet floor while carrying kitchen supplies. She documented that Claimant had an initial evaluation at Advanced Urgent Care in Westminster, where he had x-rays, was given medications (cyclobenzaprine, steroid dose pack, and Tylenol). Dr. Cava noted that Claimant had joint pain, muscle pain, back pain, limping and night pain, as well as tingling and numbness on neurological review of systems. On exam, Dr. Cava noted Claimant had a healing abrasion on the thenar/palm side of the left hand, tenderness of the anterior patella of the knees, right greater than left, including loss of range of motion and pain with motion, as well as tenderness of the right ankle. She also noted tenderness across the L5-S1 area. Claimant demonstrated an antalgic gait.

6. Dr. Cava assessed lumbar strain, contusion of the bilateral knees, and a right ankle sprain. Dr. Cava's plan was to request the services of an interpreter, refer Claimant to physical therapy, direct Claimant to continue to take the medications he was prescribed by Advanced Urgent Care, request the records from Advanced Urgent Care, and, review and update work restrictions. She stated that Claimant's injuries were consistent with history and/or work-related mechanism of injury and should return to work with restrictions as of April 13, 2021. Restrictions were the similar to those provided by Advanced Urgent Care of lifting, pushing and pulling up to 10 lbs. maximum, but added

that Claimant was not to crawl, kneel squat or climb and was to alternate positions between sitting, standing and walking as needed.

7. Claimant attended physical therapy on April 14, 2021. Claimant reported that pain was aggravated by sitting and attempting to stand and laying down, but improved with walking. Claimant reported back pain most of the time, as well as knee and shoulder pain. He also reported pain going down from the low back into the lower leg. Ms. Jessica McAlee noted that Claimant did not report any prior injuries or previous physical therapy and stated Claimant was a good candidate for therapy intervention. Claimant continued physical therapy through at least June 7, 2021.

8. On April 17, 2021 Claimant retuned to Concentra and was evaluated by PA Tanya Manning. She noted that Claimant had not been working as no light duty work was available. Ms. Manning noted that Claimant's symptoms had improved slightly with physical therapy, but continued with joint pain, muscle pain, back pain, limping and night pain. She stated that Claimant was not exhibiting any out of proportion pain, parasthesia or range of motion. Claimant was still reporting pain on palpation of the paraspinal muscles of the lumbar spine and found bilateral muscle spasms. Diagnosis and restrictions remained the same as provided by Dr. Cava previously. Claimant continued with physical therapy and positive changes were noted.

9. Claimant testified that he spoke with his supervisor by phone and was advised that Employer had no work within his restrictions.

10. Claimant returned to see Dr. Cava on April 29, 2021 who reported that Claimant was improving with therapy and medications, though had not been working as no light duty was available. She performed a full examination, noting that Claimant continued to have tenderness in the ATFL[1] and the medial malleolus of the right ankle, swelling of the patella of the left knee, mild tenderness of the bilateral knees, pelvic obliquity with left higher than the right, tenderness in the left paraspinals at the L5-S1 level, left sacroiliac joint pain, with left sided muscle spasms of the lumbar spine and limited painful range of motion. Dr. Cava referred Claimant for chiropractic treatment. She changed restrictions to 20 lbs. lifting, pushing and pulling, with standing, and walking up to 6 hours a day, though restricted repetitive bending, twisting and lifting.

11. Claimant testified that he contacted his supervisor by phone approximately two weeks after his work injury and asked whether he would be paid for his time off. Claimant stated that his supervisor advised he would not be paid and that he had committed an error in contacting an attorney. Claimant stated that he did not hear from her at any time thereafter.

12. Claimant was evaluated and treated by Dr. Richard Mobus for chiropractic care on May 3, 2021. He noted Claimant stated he had no functional impairment prior to the work injury. He described aching, heavy, shooting, burning and dull pain with numbness in the bilateral lower extremities. Claimant was treated with manipulation of

[1] Anterior talofibular ligament

the lumbar spine and lower thoracic spine, was provided neuromuscular reeducation and therapeutic exercises. Treatment with Dr. Mobus continued for multiple sessions through at least May 13, 2021.

13. Dr. Cava reevaluated Claimant on May 17, 2021 and provided restrictions of limited bending and no kneeling or squatting. No medical notes were in the exhibits other than the work status report.

14. On June 10, 2021 Dr. Cava reexamined Claimant, finding he continued with constant pain in the low back, especially the left side, worse with bending, lifting and walking, including weakness in the right leg that gives out when walking. Dr. Cava ordered an MRI of the lumbar spine and referred Claimant to a physiatrist. Dr. Cava altered Claimant's restrictions to 30 lbs. lifting, carrying, pushing and pulling with limited bending repetitively, no kneeling, squatting or climbing as well as limited stair or ladder climbing and occasional sitting breaks as needed.

15. The June 17, 2021 MRI, read by Dr. Louis Golden, showed degenerative changes. At the L3-L4 Claimant had a 4 mm broad-based disc protrusion and bilateral facet arthropathy and moderate bilateral foraminal narrowing. At the L4-L5 level, Claimant showed a 3 mm broad-based disc protrusion and bilateral facet arthropathy that resulted in moderate to severe bilateral foraminal narrowing and exiting the L4 nerve roots were contacted in the foramina. At the L5-S1 level, there was no disc herniation, but showed facet arthropathy and central canal narrowing, with lateral recess narrowing, or foraminal narrowing. Also the circumferential epidural fat tapered the thecal sac.

16. John Aschberger, M.D. evaluated Claimant on June 24, 2021. He noted Claimant was referred by Dr. Cava for evaluation regarding low back pain and potentially radiating symptomatology. Claimant reported pain and irritation at the lumbosacral back. Claimant also indicated he had pain in the medial knee and right ankle. On exam, his position change was guarded and slow. Claimant had intermittent steppage type gait for the right lower extremity, reflexes were 1+ at the patellar and absent at the Achilles tendons, a negative seated straight leg raise, though supine straight leg raise revealed hamstring tightness with restriction on the right at 60 to 70 degrees and left 70 degrees. Claimant had difficulty with heel walking and toe walking, however, with standing, the spine was midline, with no significant areas of localized tenderness, lumbosacral flexion was 80 to 90 degrees and extension restricted at 10 to 20 degrees with increased pain and irritation, and facet loading right worse than left. There was no significant aggravation with anterior pelvic compression. Dr. Aschberger stated that there were multiple levels of degenerative disk disease noted on the June 17, 2021 MRI, with disk protrusions at the L3-L5 and facet arthropathy noted bilaterally at L3 through S1. At L4-5 there was moderate to severe foraminal narrowing and some contact at the L4 nerve roots. However, Dr. Aschberger found that the examination was not very remarkable for localized irritation, but given the radiating symptoms, he ordered electrodiagnostic testing, especially since Dr. Cava did note issues of weakness at her last evaluation, predominantly for toe and heel walking that prompted ordering the MRI scan. He advised that light work duties appeared to be reasonable.

17. On July 1, 2021 Dr. Cava continued the same restrictions of 30 lbs. lifting, carrying, pushing and pulling with limited bending repetitively, no kneeling, squatting or climbing as well as limited stair or ladder climbing and occasional sitting breaks as needed. She continued to state that Claimant's injuries were consistent with history and/or work-related mechanism of injury.

18. Claimant stated that he had never met his supervisor in person, but had always communicated either by phone or by text. He further testified that he never received a call or contact from employer, or his supervisor, to offer him modified duty work. He had spoken with his supervisor after the accident and was advised that there was no work for him. He again called approximately two weeks after his injury, and his supervisor advised him that Employer would not be paying him for his lost time. He never received a call or a text message regarding an offer of employment and did not receive the letter Respondents indicated had been mailed to him. He later was provided a copy of the letter and credibly testified that the address was an old one where he had lived two years prior. He clarified that he had given his supervisor his correct address when he applied for the job over the phone, but that she had also requested a copy of his drivers' license that still had his old address on it, which he had not updated.

19. Claimant credibly testified that he had never been involved in a motor vehicle accident and that the person listed on the ISO report was not him. He also stated he had never lived at the address shown on the ISO report, though he thought his elderly friend, now diseased, had lived at that address.

20. Claimant stated that he had not had any injuries or restrictions until after the accident of April 10, 2021 while working for Employer. Claimant credibly testified that the last time he communicated with the supervisor about working was when she advised him that there was no job available within his restrictions. Claimant credibly testified that he had looked at his phone's history and confirmed he had not received any calls or texts from the supervisor or the HR manager.

21. The HR services specialist stated that by April 17, 2021 Employer had located a modified duty job. She attempted to call Claimant on various dates but was unable to reach Claimant. She testified that she had confirmed with the supervisor that Claimant had not returned to work and that she believed that the supervisor had attempted to contact Claimant regarding returning to work, without success. The HR specialist also stated that she had sent Claimant a letter saying that there was modified work available. The letter was sent to Claimant's old address as that was the address in the employment records. She also stated that she and the supervisor had exchanged multiple texts about their attempts to communicate with Claimant but that she had only preserved the text that indicated that Claimant had not yet returned to work, dated April 27, 2021.

22. The HR specialist also testified that they did not initially have work for Claimant within his restrictions, confirming Claimant's conversation with his supervisor. She stated that she did not keep records of the modified job that had been available or the requirements of the job. Neither did she document the communications with the

supervisors, other than the one text message, or the attempted communications with Claimant. She confirmed that she failed to communicate with Claimant's authorized treating provider, Dr. Cava, regarding whether the job that was available was appropriate for Claimant and within his restrictions. She stated that the letter sent to Claimant did not identify the job that was available, the rate of pay or the date and time Claimant was to start the modified job.

23. As found, Claimant is credible in his testimony. Especially persuasive is the fact that Claimant applied for employment with Employer over the phone, not online. He is credible in his testimony that he was never provided a copy of the application in order to correct or sign the application. He credibly testified that he was advised by his supervisor that they had no work and that the supervisor never contacted him, after the initial conversation regarding the lack of continued employment, with an offer of modified employment. It is found that Claimant has shown by a preponderance of the evidence that he is entitled to temporary disability benefits as he was provided work restrictions by his treating providers as of April 11, 2021 and he is not at maximum medical improvement, or been released to full duty work.

24. Respondents failed to show by a preponderance of the evidence that Claimant was, in fact offered modified work. Claimant credibly testified that he received no communication offering modified work, including the letter sent to his old address, from which he had moved two years prior to the injury.

CONCLUSIONS OF LAW

A. Generally

The purpose of the "Workers' Compensation Act of Colorado" is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of any litigation. Section 8-40-102(1), C.R.S. The facts in a Workers' Compensation case are not interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. Section 8-43-201, *supra*. A Workers' Compensation case is decided on its merits. Section 8-43-201, *supra*.

The ALJ's factual findings concern only evidence that is dispositive of the issues involved. The ALJ has not addressed every piece of evidence that might lead to a conflicting conclusion and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office*, 5 P.3d 385 (Colo. App. 2000).

In deciding whether a party has met the burden of proof, the ALJ is empowered "to resolve conflicts in the evidence, make credibility determinations, determine the weight to be accorded to expert testimony, and draw plausible inferences from the evidence." See *Bodensleck v. ICAO*, 183 P.3d 684 (Colo. App. 2008). The ALJ determines the credibility of the witnesses. *Arenas v. ICAO*, 8 P.3d 558 (Colo. App.

2000). The weight and credibility assigned to evidence is a matter within the discretion of the ALJ. *Cordova v. ICAO*, 55 P.3d 186 (Colo. App. 2002). The same principles for credibility determinations that apply to lay witnesses apply to expert witnesses as well. See *Burnham v. Grant*, 24 Colo. App. 131, 134 P. 254 (1913); see also *Heinicke v. ICAO*, 197 P.3d 220 (Colo. App. 2008).

The fact finder should consider, among other things, the consistency, or inconsistency of the witness's testimony and actions, the reasonableness, or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness, whether the testimony has been contradicted, and bias, prejudice, or interest. See *Prudential Ins. Co. v. Cline*, 98 Colo. 275, 57 P.2d 1205 (1936); CJI, Civil 3:16 (2007). A workers' compensation case is decided on its merits. C.R.S. § 8-43-201.

B. Temporary total disability benefits and termination of benefits

To prove entitlement to temporary total disability (TTD) benefits, claimant must prove that the industrial injury caused a disability lasting more than three work shifts, that he left work as a result of the disability, and that the disability resulted in an actual wage loss. *PDM Molding, Inc. v. Stanberg*, 898 P.2d 542 (Colo. 1995). Section 8-42-103(1)(a), *supra*, requires claimant to establish a causal connection between a work-related injury and a subsequent wage loss in order to obtain TTD benefits. *PDM Molding, Inc. v. Stanberg, supra*. The term disability, connotes two elements: (1) Medical incapacity evidenced by loss or restriction of bodily function; and (2) Impairment of wage earning capacity as demonstrated by claimant's inability to resume his prior work. *Culver v. Ace Electric*, 971 P.2d 641 (Colo. 1999). There is no statutory requirement that claimant establish physical disability through a medical opinion of an attending physician; claimant's testimony alone may be sufficient to establish a temporary disability. *Lymburn v. Symbios Logic*, 952 P.2d 831 (Colo. App. 1997). The impairment of earning capacity element of disability may be evidenced by a complete inability to work, or by restrictions which impair the claimant's ability effectively and properly to perform his or her regular employment. *Ortiz v. Charles J. Murphy & Co.*, 964 P.2d 595, 597 (Colo. App. 1998) (citing *Ricks v. Industrial Claim Appeals Office*, P.2d 1118 (Colo. App. 1991)).

Temporary total disability benefits shall continue until the first occurrence of any of the following: (1) the employee reaches MMI; (2) the employee returns to regular or modified employment; (3) the attending physician gives the employee a written release to return to regular employment; or (4) the attending physician gives the employee a written release to return to modified employment, the employment is offered in writing and the employee fails to begin the employment. Section 8-42-105(3)(a)-(d), C.R.S. Further, W.C.R.P. Rule 6-1(A) controls termination of temporary disability benefits and states in pertinent part as follows:

> (A) In all claims based upon an injury or disease occurring on or after July 1, 1991, an insurer may terminate temporary disability benefits without a hearing by filing an admission of liability form with:
>
> ….
>
> (4) A copy of a written offer delivered to the claimant with a signed certificate of service, containing both an offer of modified employment, setting forth duties, wages and hours and a statement from an authorized treating physician that the employment offered is within the claimant's physical restrictions.
>
> (a) A written offer of modified duty may only be used to terminate benefits pursuant to this subsection if:
>
> i) A copy of the written inquiry to the treating physician is provided to the claimant by the insurer or employer at the time the authorized treating physician is asked to provide a statement on the claimant's capacity to perform the offered modified duty; and
>
> ii) The claimant is provided a period of 3 business days from the date of receipt of the offer to return to work in response to the offer of modified duty.

Here, as found, Claimant was clearly placed on work restrictions on April 11, 2021 by the Advanced Urgent Care provider, Ms. Vieta, of lifting, carrying, pushing and pulling of 10 lbs. maximum, with walking, standing and sitting up to 50% of the time per day and seated breaks as needed. These restrictions were mirrored and added to by Dr. Cava on April 13, 2021 to include no crawling, kneeling, squatting or climbing and was to alternate positions between sitting, standing and walking as needed. Claimant credibly testified that he contacted his supervisor and she advised that there was no work within his job restrictions. This was confirmed by the HR specialist, who stated that there was no work for Claimant until after April 17, 2021 when she reached out to the supervisors to contact Claimant. There was no confirmation that Claimant, was in fact, contacted. Claimant credibly testified that he did not receive any communications from Employer or the supervisors regarding work other than the calls he made to his immediate supervisor, the first of which she denied that there was any work, the second when she failed to respond. Therefore, Claimant is entitled to temporary disability benefits beginning April 11, 2021.

As found, Dr. Cava did not change Claimant’s restrictions until April 29, 2021 when she increased them to 20 lbs. lifting, pushing and pulling, with standing, and walking up to 6 hours a day, and no repetitive bending, twisting and lifting. Again, as found, Dr. Cava subsequently changed Claimant’s restrictions on June 10, 2021 to 30 lbs. lifting, carrying, pushing and pulling with limited bending repetitively, no kneeling, squatting or climbing as well as limited stair or ladder climbing and occasional sitting breaks as needed. Claimant credibly testified that his physician advised he could contact his supervisor to find out if there was a job for him, but he never received a response from his supervisor when his restrictions were raised to 30 lbs. His supervisor did not testify in this matter. And the HR specialist was never able to reach Claimant, for whatever reason, and sent a letter on May 23, 2021 that did not comply with the requirements of terminating temporary total disability benefits pursuant to the statute and rules. Claimant has established by a preponderance of the evidence an entitlement to temporary total disability benefits beginning April 11, 2021 and continuing until terminated by law.

Temporary total disability benefits calculated for the period of April 11, 2021 through the date of the hearing of November 16, 2021, (220 days or 31 weeks and 3 days), results in a past due payment of $14,247.51. This does not include any TTD due and owing from November 17, 2021 until terminated by law, until Claimant is provided with a proper offer of employment, is release to return to regular work or is placed at maximum medical improvement. Interest from April 11, 2021 through the date of this order on December 30, 2021, calculates to $600.05 with a daily interest rate after December 30, 2021 of $3.23. This interest does not calculate any interest due and owing on benefits beginning November 17, 2021, if Claimant has not been sent an offer of employment in accordance with the rules, has been released to full duty work and/or been placed at MMI by an authorized treating physician.

Respondents argue that, because there was no General Admission of Liability filed admitting for temporary disability benefits from April 11, 2021 forward, they need not have complied with the statutory and rule provisions of terminating temporary disability benefits. However, failure to file a GAL is not sufficient to fail to comply with the rules. As found, clearly, Employer agreed that there was no work initially for Claimant. Both Claimant and the HR specialist testified to this fact. Even if work was available at or around April 17, 2021, this constituted greater that three days of lost time from work pursuant to Sec. 8-42-105(1), C.R.S. and Claimant was entitled to temporary disability benefits. Therefore, the rule and statutory termination provisions applied in this matter. Respondents were required to make an offer of employment. An offer of employment required certain elements that have not been accomplished, including a letter that was vetted through the ATP, had a beginning date and time to show up for work and a rate of pay. While Employer's intensions were clear in that they wanted to reach Claimant, Claimant was credible in stating that the letter sent on May 23, 2021 to his old address did not reach him and that when he applied for employment over the phone, he provided his supervisor with his current address. While Claimant may have been lackadaisical in failing to correct his driver's license's address, so was Employer in failing to provide Claimant a copy of the phone call completed application for employment so that Claimant could correct any errors in his current address. Employer also agreed that they did not make a record of any contacts by phone with Claimant other than the text message from the supervisor acknowledging that Claimant had not returned to work. And Claimant was credible in stating that he did not receive any calls or texts from Employer on his phone. Respondents have failed to show by a preponderance of the evidence that temporary disability benefits should be terminated in this claim, at least through the date of hearing. Neither party indicated at the time of hearing or in their position statements that Claimant had been placed at MMI at this time.

ORDER

IT IS THEREFORE ORDERED:

1. Claimant's correct date of injury is April 10, 2021.

2. Respondents shall pay temporary total disability benefits at the rate of $453.33 per week from April 11, 2021 to the date of the hearing and until terminated by law.

3. Respondents shall pay Claimant statutory interest at the rate of eight percent (8%) per annum on all amounts due and not paid when due.

4. All matters not determined here are reserved for future determination.

If you are dissatisfied with the ALJ's order, you may file a Petition to Review the order with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the ALJ; and (2) That you mailed it to the above address for the **Denver Office of Administrative Courts**. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED this 30th day of December, 2021.

Digital Signature

By: Elsa Martinez Tenreiro
Administrative Law Judge
1525 Sherman Street, 4th Floor
Denver, CO 80203

ISSUES

- Did Claimant overcome the DIME's determination of MMI by clear and convincing evidence?

- Is Claimant entitled to reinstatement of TTD benefits effective November 19, 2020?

FINDINGS OF FACT

1. Claimant works for Employer as a flight attendant. She suffered admitted injuries on August 29, 2018 while riding a shuttle bus to the employee parking area after her shift. Claimant had boarded the bus and was in the process of taking her seat when the bus braked unexpectedly, causing her to fall into the rear stairwell. Claimant hit her left shoulder on the stairwell and her low back on the stairs. Her head also "whipped" backward as she fell.

2. Claimant felt immediate severe pain in her low back and tingling in her legs. She also felt lesser pain in her neck, left shoulder, and left arm.

3. Claimant retrieved her vehicle and drove home. When she got home, she rested briefly and then went to urgent care.

4. Claimant was seen at the Complete Care Emergency Department on the evening of August 29. She reported sharp, aching pain in her left low back. Examination showed tenderness and muscle spasm in the left lumbar paraspinal muscles, and limited range of motion. The provider noted a contusion on Claimant's left lower back. Lumbar x-rays showed multilevel degenerative changes but no fracture. Claimant was diagnosed with low back pain and osteoarthritis. She was given a Toradol injection and muscle relaxers and instructed to follow up with a workers' compensation provider. Claimant testified she was also having severe left arm pain. However, the urgent care records make no mention of any left arm or shoulder issues.

5. Employer referred Claimant to Concentra for authorized treatment. She saw PA-C Kenneth Ginsburg at her initial appointment on September 4, 2018. Claimant's primary complaint was severe low back pain, but she also reported pain in the left side of her neck and left upper arm. Examination of the left shoulder showed full range of motion and normal strength. Hawkins, empty can, and painful arc tests were negative. The left upper arm and left trapezius were tender to palpation. Palpation of the cervical muscles showed tenderness and muscle spasm on the left. Mr. Ginsburg diagnosed a lumbosacral strain, SI joint strain, neck strain, and a left shoulder strain. He prescribed NSAIDs and muscle relaxers and referred Claimant to physical therapy.

6. At the initial PT evaluation, the therapist noted low back pain “along with neck tension and L shoulder pain.”

7. Claimant’s symptoms were similar at her next appointment with Mr. Ginsburg on September 7, 2018.

8. On September 10, 2018, the physical therapist documented Claimant’s left lateral upper arm “had been hurting a lot lately when she tries to raise her arm up. She says that her neck feels a little stiff as well.”

9. On September 14, 2018, the therapist noted Claimant’s “neck is doing much better but her back pain seems to persist.”

10. Claimant followed up with Mr. Ginsburg on September 21, 2018. He documented, “all symptoms have resolved except for her low back pain.” Examination of the left shoulder showed no tenderness, full range of motion, normal strength, and no signs of impingement. Mr. Ginsburg referred Claimant to Dr. Randy Knoche, a chiropractor, for treatment of her ongoing low back pain.

11. Claimant started seeing Dr. Knoche on September 27, 2018. He documented, “she has had some physical therapy which included some symptoms in her neck and upper back. These have essentially resolved, and she is left with left-sided lower back pain and sacroiliac joint pain.” Claimant saw Dr. Knoche for a few weeks, with no mention of any left shoulder issues.

12. Claimant started seeing Dr. Daniel Peterson at Concentra on October 4, 2018. His initial report contains no reference to any ongoing left shoulder issues. The left shoulder strain was removed from her list of active diagnoses. He referred Claimant to Dr. Timothy Sandell for SI or facet injections.

13. Dr. Sandell evaluated Claimant on December 11, 2018. Claimant told Dr. Sandell “physical therapy helped her neck and shoulder symptoms, but her back pain persisted.” She reported constant 6-10/10 low back and hip pain and some numbness in the left leg. There was no indication of any ongoing left shoulder issues. Dr. Sandell ultimately treated Claimant for almost 3 years, and his records contain no mention of any ongoing left shoulder symptoms or problems.

14. On December 17, 2018, Claimant told Mr. Ginsburg the chiropractic treatment helped her neck pain, but she still significant low back pain. An examination of the left shoulder was entirely normal.

15. Dr. Peterson’s January 17, 2019 report documented 4/10 left-sided neck pain with numbness and tingling going up her neck and around her left ear. Claimant stated, “this had gotten better but now has this odd tingling and numbness from her L trap up into the L side of neck, L ear, and L side of head.” Claimant made no mention of any left shoulder symptoms. Dr. Peterson documented tenderness and muscle spasm in the left trapezius and left cervical paraspinal muscles, but he found no abnormalities on

examination of the left shoulder. Dr. Peterson referred Claimant to massage therapy for her neck.

16. Claimant started massage therapy on January 29, 2019. Her "main complaints" were "left side of neck and head, tingling lower back." The pain diagram notes bilateral trapezial and scapular pain but no specific left shoulder pain. The massage therapy records document "objective findings" in the trapezius and paraspinal muscles from the neck to low back but nothing regarding the shoulder.

17. Claimant followed up with Mr. Ginsburg on February 18, 2019. The massage therapy was "very helpful" but she was still having intermittent left neck pain with numbness radiating to the left side of her head. There is no indication of any left shoulder issues.

18. On March 18, 2019, Dr. Peterson issued a report on Claimant's behalf regarding SI joint injections that Insurer had denied based on a Rule 16 peer review. Dr. Peterson was concerned Claimant's treatment was being delayed unnecessarily and feared this might lead to a chronic pain condition. This report (and later reports) includes some pointed comments directed to the claims adjuster. Although the disputed treatment was unrelated to the shoulder, Dr. Peterson's willingness to advocate for Claimant belies the argument he would ignore or dismiss shoulder complaints had they been brought to his attention.

19. Claimant reinitiated treatment with Dr. Knoche in August 2019. His reports contain no reference to any left shoulder problems.

20. Dr. David Elfenbein, an orthopedic surgeon, performed an IME at Respondents' request on September 13, 2019. Claimant told Dr. Elfenbein, "The physical therapy helped her shoulder. Her neck and arm pain resolved. The low back continued." Claimant reported "0/10" shoulder pain and stated, "it is fine." She was still having some minor neck pain. Examination of the left shoulder showed no subacromial tenderness and no evidence of atrophy. There was tenderness around the AC joint and the biceps tendon. Supraspinatus strength was 4+/5 with pain. Hawkins sign was positive, but Neer test and cross arm tests were negative. Shoulder range of motion was mildly reduced. Dr. Elfenbein opined there was "no shoulder pathology present on the left." He diagnosed a mild cervical strain superimposed on pre-existing degenerative spondylosis. He opined Claimant was at MMI and provided impairment ratings for her low back and neck. He provided no shoulder rating, because he saw "no evidence of a shoulder injury. 100% of her impairment would be pre-existing and 0% from the work injury."

21. Claimant was evaluated by Dr. Kerry Latch, a pain management specialist, on October 11, 2019. Claimant stated her neck pain had improved since the accident but still got his highest 4/10 on occasion. She stated the neck pain radiated into the posterior left shoulder and made it difficult to move the left shoulder. Her low back remained her biggest complaint. On examination, the left shoulder was very tender at the subacromial-subdeltoid bursa in the lateral edge of the left scapula. She had pain and signs of impingement with abduction at 140°. Dr. Latch's diagnoses included "left shoulder pain,

persistent and resistant to conservative treatment since date of work-related injury, rule out internal derangement." He made several treatment recommendations for her low back, but none related to the shoulder.

22. Claimant underwent a Functional Capacity Evaluation (FCE) on February 6, 2020. When describing her then-current symptoms, Claimant made no mention of her left shoulder. Claimant demonstrated the ability to perform medium level work, although she could not satisfy all the demands of her job related to frequent carrying. The therapist recommended a work conditioning program focused on her low back and neck but recommended nothing related to the shoulder.

23. Claimant completed a repeat FCE on October 6, 2020. She again demonstrated the ability to work at the medium level. The report contains no mention of the left shoulder, and no limitations were attributed to any shoulder condition.

24. Dr. Peterson put Claimant at MMI on November 19, 2020. His final diagnosis was lumbar strain/contusion, with degenerative disc disease. Dr. Peterson assigned a 7% whole person impairment under Table 53 of the *AMA Guides*. He did not assign any range of motion impairment because the measurements were invalid.

25. Claimant attended a DIME with Dr. Timothy Hall on April 27, 2021. Dr. Hall noted Claimant "still" had "considerable symptoms" in her left shoulder. She described difficulty with arm movement, particularly abduction and internal rotation. Examination showed limited range of motion, pain with AC joint compression, mild laxity, and tenderness with palpation of the bicipital tendon. Dr. Hall also indicated impingement maneuvers were "concerning for possible impingement issues." He saw no indication of any labral dysfunction. Dr. Hall opined the left shoulder symptoms were related to the work accident but had been "overlooked" during her course of care. Dr. Hall stated, "I did discuss with the patient that I thought she needed more treatment with respect to her shoulder, but she would rather not do that through the work comp system, so I will be putting her at MMI." Dr. Hall assigned a 12% whole person rating for the lumbar spine and an 8% upper extremity rating for the left shoulder.

26. Claimant returned to Dr. Peterson on September 13, 2021. She said she initially did not want treatment for the left shoulder under her claim but had been advised to pursue it by her counsel. Dr. Peterson agreed left shoulder pain was documented in her early treatment with Mr. Ginsburg but "she never mentioned it to me." He also pointed out her shoulder range of motion was measured as normal at the FCE. Claimant also reported that the left shoulder symptoms increased in September of 2020. Nevertheless, he referred Claimant for an MRI because insurer had already agreed to cover it.

27. A left shoulder MRI was completed on September 27, 2021. It showed: (1) rotator cuff tendinosis with no high-grade partial or full-thickness rotator cuff tear, (2) mild/moderate glenohumeral joint osteoarthritis, chondromalacia, and osteophytes, (3) a degenerative tear of the posterior labrum, (4) a tear and detachment of the superior labrum, and (5) mild AC joint arthrosis.

28. Dr. Mark Failinger conducted an IME for Respondents and testified at hearing. Dr. Failinger opined Claimant suffered a mild strain or sprain to her left shoulder, but it resolved quickly, as documented by Mr. Ginsburg and Dr. Knoche. Thereafter, any left upper quadrant complaints were probably related to the left trapezius and cervical myofascial strains rather than the shoulder. He opined the shoulder examination findings documented by Mr. Ginsburg in September 2018 were consistent with a shoulder strain but not a labral tear or rotator cuff injury. He did not think the mechanism of injury was forceful enough to cause a labral tear. Dr. Failinger opined the pathology shown on the MRI was probably degenerative in nature and is common among individuals in Claimant's age group. He thought it improbable that Claimant's treating providers would ignore repeated reports of left shoulder symptoms for more than two years. Dr. Failinger discussed Claimant's case with Dr. Peterson who confirmed Claimant did not mention any left shoulder issues after he took over as primary ATP. Dr. Failinger concluded the work injury neither caused nor aggravated any pathology in Claimant's shoulder.

29. Dr. Anjmun Sharma performed an IME for Claimant and testified via deposition. He opined Claimant injured her shoulder in the work accident and her current symptoms are related to that initial injury. Dr. Sharma opined Claimant is not at MMI because the left shoulder needs further evaluation and treatment. He noted Dr. Hall had only placed Claimant at MMI because she did not want to seek further care within the workers' compensation system. He believes Claimant should have an orthopedic evaluation to determine if she needs additional treatment or surgery before putting her at MMI for the left shoulder. He believes the injury described by Claimant was sufficient to injure her left shoulder. He further testified individuals with a rotator cuff tears frequently have referred symptoms in adjacent areas, such as the trapezius and scapula. He opined Claimant's cervical pain is probably caused by the shoulder injury.

30. Dr. Failinger's opinions are credible and more persuasive than the contrary opinions offered by Dr. Sharma.

31. Claimant failed to overcome the DIME's determination of MMI by clear and convincing evidence.

CONCLUSIONS OF LAW

A. MMI

A DIME's determination regarding MMI is binding unless overcome by clear and convincing evidence. Section 8-42-107(8)(b) and (c). "Maximum Medical Improvement" (MMI) is defined as the point when any medically determinable physical or mental impairment because of the industrial injury has become stable and when no further treatment is reasonably expected to improve the condition. Section 8-40-201(11.5). The assessment of MMI "inherently" includes a determination what conditions, if any, are causally related to the work accident. *Egan v. Industrial Claim Appeals Office*, 971 P.2d 664 (Colo. App. 1998). The party challenging the DIME's conclusions must show it is "highly probable" the determination of MMI is incorrect. *Cordova v. Industrial Claim Appeals Office*, 55 P.3d 186 (Colo. App. 2002); *Qual-Med, Inc. v. Industrial Claim Appeals*

Office, 961 P.2d 590 (Colo. App. 1998). A party meets this burden if the evidence contradicting the DIME physician is “unmistakable and free from serious or substantial doubt.” *Leming v. Industrial Claim Appeals Office*, 62 P.3d 1015 (Colo. App. 2002). A “mere difference of medical opinion” does not constitute clear and convincing evidence. *E.g., Gutierrez v. Startek USA, Inc*., W.C. No. 4-842-550-01 (March 18, 2016).

As found, Claimant failed to overcome the determination of MMI by clear and convincing evidence. Specifically, Claimant did not prove additional evaluation or treatment for the left shoulder is causally related to the admitted work accident. Dr. Failinger’s analysis and conclusions are credible and persuasive. Claimant probably suffered a mild left shoulder strain, which multiple providers documented as “resolved” shortly after the work accident. The subsequent references to trapezial and cervical pain and spasm were probably related to a cervical strain, rather than a shoulder condition. There are no additional specific references to left shoulder problems until Dr. Kerry’s evaluation in October 2019. But just a month before, Claimant had told Dr. Elfenbein her shoulder pain had “resolved” and the shoulder was “fine.” Additionally, Claimant recently told Dr. Peterson that her shoulder worsened in September 2020, more than two years after the work accident. Although Claimant may require some treatment for the left shoulder, the persuasive evidence fails to show that any such treatment is causally related to the August 29, 2018 accident.

B. TTD

TTD benefits were initially terminated on November 18, 2020 based on the finding of MMI. Section 8-42-105(3)(a). Because Claimant failed to overcome the DIME regarding MMI, there is no basis for reinstatement of TTD benefits.

ORDER

It is therefore ordered that:

1. Claimant’s request to set aside the determination of MMI is denied and dismissed.

2. Claimant’s request for TTD benefits commencing November 19, 2020 is denied and dismissed.

If you are dissatisfied with this order, you may file a Petition to Review with the **Denver Office of Administrative Courts**, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on the certificate of mailing or service; otherwise, the ALJ's order will be final. You may file the Petition to Review by mail by sending it to the above address for the **Denver Office of Administrative Courts** within twenty (20) days after mailing or service of the ALJ’s order. In the alternative, you may file your Petition to Review electronically by email to the following email address: oac-ptr@state.co.us. If the Petition to Review is timely served via email, it is deemed filed in Denver pursuant to OACRP 26(A) and § 8-43-301, C.R.S. If the Petition to Review is filed by email to the proper email address, it need not also be mailed to the Denver Office of Administrative Courts. For statutory reference, see § 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 26, OACRP. You may access a petition to review form at: https://oac.colorado.gov/resources/oac-forms

DATED: December 30, 2021

s/Patrick C.H. Spencer II
Patrick C.H. Spencer II
Administrative Law Judge
Office of Administrative Courts